CHAPTER 42:01
COMPANIES

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An Act to update and consolidate the law relating to Companies.

[*Date of Commencement: 3rd July, 2007*]

[**Editorial Note–** The word "Office of the Registrar" substituted by the word "Companies and Business Names Office" and the word "Registrar of Companies" substituted by the word "Registrar of Companies and Business Names" wherever they appear in the Act by section 2 of Act 12 of 2012.]

PART I
Preliminary (ss 1-18)

1. Short title

This Act may be cited as the Companies Act.

2. Interpretation

(1) In this Act, unless the context otherwise requires—

"accounting records" means the accounting records referred to in section 189;

"accounting period" means, in relation to a company or another body corporate, the period in respect of which the financial statements of the company or other body corporate are made up, whether that period is a year or not;

"annual meeting" means the meeting of a company required to be held by section 105;

"annual report" means the report required to be made by section 212;

"annual return" means the return required to be made by section 217 and includes any document attached to or intended to be read with the return;

"arrangement" includes a re-organisation 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 these methods;

"articles"—

(*a*) means the articles of association of an existing company; and

(*b*) includes, so far as they apply to the company, the provisions contained in Table A or Table C of the First Schedule to the repealed Act;

"balance sheet date" has the meaning assigned to it in section 210;

"**banking company**" means a bank licensed under the Banking Act (Cap. 46:04);

"**beneficial owner**" has the meaning assigned to it under the Financial Intelligence Act;

[7 of 2022, s. 2(a) w.e.f. 25 February 2022.]

"**benefits**" in relation to a director—

(*a*) includes a fee, percentage or other payment, and the money value of any consideration, allowance or perquisite, given directly or indirectly, to him in relation to the management or direction of the affairs of the company or of a related company, whether as a director or otherwise; but

(*b*) does not include an amount given in payment or reimbursement of out-of-pocket expenses incurred for the benefit of the company;

"**Board**" and "**board of directors**" have the meanings assigned to them in section 126;

"**book**" includes any account, deed, writing or document, and any other record of information however compiled, recorded or stored;

"**borrowing company**" means a company that is or will be under a liability to repay any money received or to be received by it in response to an invitation to the public to subscribe for or purchase debentures;

"**branch register**" means—

(*a*) in relation to a company, a branch register of members referred to in section 84; and

(*b*) in relation to an external company, a branch register of shareholders required to be kept under Part XXIV;

"**carrying on business**" for the purposes of Part XXIV has the meaning given in section 344;

"**certified**" means—

(*a*) in relation to a copy or extract of a document, certified in the prescribed manner to be a true copy or extract of the document; and

(*b*) in relation to a translation of a document, certified in the prescribed manner to be a correct translation of the document into the English language;

"**charge**" means—

(*a*) a mortgage or a mortgage bond;

(*b*) a deed of hypothecation;

(*c*) a notarial bond;

(*d*) a deposit of a share or debenture certificate made by way of charge;

(*e*) a pledge of shares or debentures;

(*f*) a pledge or cession over motor vehicles or plant and equipment;

(*g*) a cession of book debts;

(*h*) a charge on a ship or aircraft; and

(*i*) an agreement to give a charge;

"class" in relation to a class of shares for the purposes of section 104 means a class of shares having attached to them the same rights, privileges, limitations and conditions;

"close company" means a company which is registered as a close company in accordance with Part XIX;

"Collateral Registry" means the Collateral Registry established under the Movable Property (Security Interests) Act;

[7 of 2022, s. 2(c) w.e.f. On Notice.]

"company" means a company formed and registered under Part II or registered under Part XXIV or an existing company;

"company limited by guarantee" means a company formed on the principle of having the liability of its members limited by the constitution to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound-up;

"company limited by shares" means a company formed on the principle of having the liability of its shareholders limited, by the constitution, to any amount unpaid on the shares respectively held by the shareholders;

"competent authority" has the meaning assigned to it under the Financial Intelligence Act and includes a foreign comparable body;

[7 of 2022, s. 2(c) w.e.f. 25 February 2022.]

"constitution" means a document referred to in section 40;

"contributory" means a person liable to contribute to the assets of a company in the event of its being wound-up, and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are deemed to be contributories, includes any person alleged to be a contributory under section 366;

"corporation"—

(*a*) means a body corporate, including an external company or a foreign company or a partnership formed or existing in Botswana or elsewhere, but

(*b*) does not include—

(i) a statutory corporation,

(ii) a corporation sole,

(iii) a registered co-operative society,

(iv) a trade union, or

(v) a registered association;

"court" means the High Court of Botswana and in relation to any offence against this Act, includes a Magistrate's Court having jurisdiction in respect of that offence;

"creditors' voluntary winding-up" has the meaning assigned to it by section 409(3);

"**date of incorporation**" means the date of registration of a company;

"**debenture**" means—

(*a*) a written acknowledgment of indebtedness issued by a company in respect of a loan made or to be made to it or to any other person or money deposited or to be deposited with the company or any other person or the existing indebtedness of the company or any other person whether constituting a charge on any of the assets of the company or not;

(*b*) includes—

(i) debenture stock,

(ii) convertible debenture,

(iii) a bond or an obligation,

(iv) loan stock,

(v) an unsecured note, or

(vi) any other instrument executed, authenticated, issued or created in consideration of such a loan or existing indebtedness; and

(*c*) does not include—

(i) a bill of exchange,

(ii) a promissory note,

(iii) a letter of credit,

(iv) an acknowledgment of indebtedness issued in the ordinary course of business for goods or services supplied,

(v) a policy of insurance, or

(vi) a deposit certificate, pass book or other similar document issued in connection with a deposit or current account at a banking company;

"**debenture trust deed**"—

(*a*) means a deed executed by a company and a trustee for debenture holders in relation to the issue of debentures; and

(*b*) includes a supplemental document, resolution or scheme of arrangement modifying the terms of the deed and a deed substituted therefor;

"**debenture stock**" means—

(*a*) a debenture by which a company or a trustee for debenture holders' acknowledges that the holder of the stock is entitled to participate in the debt owing by the company under a debenture trust deed; and

(*b*) includes loan stock;

"**declared company**" has the meaning assigned to it in section 282;

"**director**" has the meaning set out in section 126;

"**distribution**" in relation to a distribution by a company to a shareholder, means—

(*a*) the direct or indirect transfer of money or property, other than the company's own shares, to or for the benefit of the shareholder; or

(*b*) the incurring of a debt to or for the benefit of the shareholder, in relation to shares held by that shareholder, and whether by means of a purchase of property, the redemption or other acquisition of shares, a distribution of indebtedness, or by some other means, but shall not include a distribution of assets to shareholders upon a winding-up;

"**dividend**" has the meaning set out in section 60;

"**document**" means a document in any form, and includes—

(*a*) any writing on any material;

(*b*) information recorded or stored by means of a tape-recorder, computer, or other device, and material subsequently derived from information so recorded or stored;

(*c*) a book, graph, or drawing;

(*d*) a photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of equipment) of being reproduced;

"**dormant company**" ...;

[22 of 2018, s. 2(b) w.e.f. 3 June 2019.]

"**entitled person**", in relation to a company, means a—

(*a*) shareholder;

(*b*) person upon whom the constitution confers any of the rights and powers of a shareholder; and

(*c*) beneficial owner;

[7 of 2022, s. 2(b) w.e.f. 25 February 2022.]

"**employee**" means a person who has entered into a contract of employment for the hire of his labour;

"**executive director**" means a director who is involved in the day-to-day management of the company;

"**executor**" means a person who is appointed by the Master of the High Court to administer the estate of a deceased person;

"**exempt private company**" has the meaning assigned to it in subsection (3) of this section;

"**existing company**" means a body corporate registered or deemed to be registered under Part II of this Act or under the repealed Act;

"**expert**" means a person holding himself out to be such whose professional or technical training gives authority to a statement made by him;

"**external company**" means a body corporate, other than a corporation sole, which is registered or incorporated outside Botswana and that is required to be registered under Part XXIV;

"**external country**" means any state, dominion, country, colony or territory other than Botswana;

"**external register**" means the register of bodies corporate that are incorporated outside Botswana kept pursuant to Part XXIV;

"**financial statements**" has the meaning assigned to it in section 211(1);

"**financial year**" means, in relation to any body corporate, the period in respect of which any profit and loss account of the body corporate laid before it in general meeting is made up, whether that period is a year or not;

"**firm**" means the association formed by persons who enter into a partnership not registered under this Act or the repealed Act;

"**foreign company**" means a body of persons formed outside Botswana which—

(*a*) is a body corporate in its place of incorporation; or

(*b*) under the law of its place of formation may sue and be sued, or hold property in the name of an officer of the body duly appointed for that purpose;

"**functional currency**" with reference to a company means the currency of the country in which the company operates;

"**group financial statements**" has the meaning set out in section 211(3);

"**group of companies**" or "**group**" has the meaning set out in section 207;

"**holding company**" has the meaning assigned to it section 6(2);

"**inspector**" means a qualified person in terms of section 281 who is appointed to carry out an investigation under Part XXI;

"**insurance company**" means a company registered as an insurer under the Insurance Industry Act (Cap. 46:01);

"**interested**", in relation to a director, has the meaning set out in section 134;

"**interests register**" means the register kept under sections 135 and 186(1)(*c*);

"**International Financial Reporting Standards**"—

(*a*) means the International Financial Reporting Standards issued by the International Accounting Standards Board; and

(*b*) includes—

(i) the interpretations of the International Reporting Standards issued by the International Financial Reporting Interpretation Committee;

(ii) International Accounting Standards still in force according to the International Accounting Standards Board; and

(iii) any other entity to which the responsibility for setting accounting standards has been assigned by the International Accounting Standards Board;

"**International Standards on Auditing**" means the International Standards on Auditing issued by the

International Federation of Accountants;

"investment company with variable capital" means an investment company with variable capital which is licensed under the Collective Investment Undertakings Act (Cap. 56:09);

"Judicial Manager" means a person appointed in terms of section 472;

"legal practitioner" means a person who is enrolled as a legal practitioner under the Legal Practitioners Act (Cap. 61:01);

"limited company" means a company limited by shares or by guarantee;

"liquidator" means the person appointed under Part XXVI as liquidator of a company and includes any co-liquidators or provisional liquidators so appointed and also includes the Master acting as the liquidator;

"listed company" means a company the shares or a class of shares of which have been admitted to quotation on the official list of a stock exchange;

"major transaction" has the meaning assigned to it in section 128(2);

"manager" means the principal executive of a company, whether or not that person is a director;

"Master" means the Master of the High Court of Botswana or any person acting in that capacity;

"member" means, in the case of a company limited by shares, a shareholder within the meaning of section 90 and in the case of a close company means a person who is designated as a member in the application for registration as a close company or who becomes a member on being admitted as a member, and in the case of a company limited by guarantee, means a person whose name is entered in or who is entitled to have his name entered in the register of members;

"members voluntary winding-up" has the meaning assigned to it by section 409(2);

"memorandum" means the memorandum of association of an existing company;

"nominator" means a person who issues instructions to a nominee to act on their behalf in a certain capacity, and includes a shadow director and silent partner;

[7 of 2022, s. 2(c) w.e.f. 25 February 2022.]

"nominee" means a person who, in exercising a right in relation to a share, debenture or other property, is entitled to exercise that right only in accordance with instructions given by some other person either directly or through the agency of one or more persons, and a person is the nominee of another person where he is entitled to exercise such a right only in accordance with instructions given by that other person;

"non-executive director" means a director who has no involvement in the day-to-day management of the company;

"offer" includes an invitation to make an offer;

"officer", in relation to a company means a director, a secretary or manager;

"one person company" means a private company in which the only shareholder is also the sole director of the company, and for the avoidance of doubt, a company of which the only shareholder is a corporation controlled by the person who is the sole director of the company is not a one person company;

"ordinary resolution" has the meaning assigned to it in section 95(2);

"**parent company**" means a company that has one or more subsidiaries;

"**partnership**" means any partnership not registered as a company under this Act or the repealed Act;

"**person concerned**" in relation to a company, includes—

(*a*) a person who is or has been employed by a corporation as a director, banker, auditor, attorney-at-law, notary or otherwise;

(*b*) a person who, or in relation to whom there are reasonable grounds for suspecting that he—

(i) has in his possession any property of the corporation,

(ii) is indebted to the corporation, or

(iii) is able to give information concerning the promotion, formation, management, dealing, affairs or property of the corporation;

"**pre-emptive rights**" means the rights conferred on shareholders under section 52;

"**private company**" is a company which is incorporated as a private company or is registered as a private company having the characteristics referred to in Part XVIII;

"**records**" means the documents required to be kept by a company under section 186(1);

"**redeemable**" has the meaning assigned to it in section 72;

"**register**" or "**register of companies**" means the register required to be kept under section 11(1)(*a*);

"**register of external companies**" means the register required to be kept under section 11(1)(*b*);

"**registered**" means registered under this Act or the repealed Act;

"**registered co-operative society**" has the meaning assigned to it in the Co-operative Societies Act (Cap. 42:04);

"**registered office**" has the meaning assigned to it in section 182;

"**Registrar**" means the Registrar of Companies and Business Names appointed under section 25(1)(*a*) of the Companies and Intellectual Property Authority Act;

[12 of 2012, s. 3.]

"**related company**" has the meaning assigned to it in section 6(7);

"**related corporation**" has the meaning assigned to it in section 6(7);

"**relative**", in relation to any person, means—

(*a*) any parent, spouse, child, brother or sister of that person;

(*b*) any parent, child, brother or sister of a spouse of that person; or

(*c*) a nominee or trustee for any of those persons;

"**relevant interest**" has the meaning assigned to it in section 141;

"**repealed Act**" means the Companies Act repealed under section 526;

"**resolution *in lieu* of meeting**" means a resolution signed by all members or shareholders in accordance with section 107;

"**secure electronic**" signature means an electronic signature that results from the use of an electronic documents system;

"**secured creditor**", in relation to a company, means a person entitled to a charge on or over property owned by that company;

"**securities**" has the meaning assigned to it in the Botswana Stock Exchange Act (Cap. 56:08);

"**security interest**" has the meaning assigned to it under the Movable Property (Security Interests) Act;

[7 of 2022, s. 2(c) w.e.f. On Notice.]

"**share**" means a share in the share capital of a company;

"**shareholder**" has the meaning assigned to it in section 90;

"**share register**" means the share register required to be kept under section 83;

"**signed**" means subscribed by a person under his hand with his signature, and includes that person's secure electronic signature;

"**solvency test**" has the meaning assigned to it in section 4;

"**special meeting**" means a meeting called in accordance with section 106;

"**special resolution**" means a resolution approved by a majority of 75 per cent or, if a higher majority is required by the constitution, that higher majority, of the votes of those shareholders entitled to vote and voting on a question;

"**spouse**", in relation to a person, means a person to whom that person is married;

"**stated capital**" has the meaning assigned to it in section 5;

"**statutory corporation**" means a body corporate established under an Act of Parliament;

"**subsidiary**" has the meaning assigned to it in section 6;

"**Stock Exchange**" means a stock exchange established under the Botswana Stock Exchange Act (Cap. 56:08) or any other stock exchange outside Botswana which is regulated by the laws of the jurisdiction in which it is situated and is recognised by the Minister for the purposes of this Act;

"**stock market**" means such primary and secondary or other stock market as may be established under the Botswana Stock Exchange Act (Cap. 56:08) or may be established by any other Stock Exchange recognised by the Minister for the purposes of this Act;

"**surplus assets**" means the assets of a company remaining after the payment of creditors' claims and available for distribution in accordance with section 455 prior to its removal from the register of companies;

"**trade union**" has the same meaning as in the Trade Unions and Employers Organisations Act (Cap. 48:01);

"**trustee for debenture holders**" means a person designated as such in a debenture trust deed;

"**unable to pay its debts**", in relation to a company, has the meaning assigned to it in section 368 and, in

relation to an unregistered association, has the meaning assigned to it by section 484(4)(*b*);

"unanimous resolution" means a resolution which has the assent of every shareholder entitled to vote on the matter which is the subject of the resolution and either—

(*a*) given by voting at a meeting to which notice to propose the resolution has been duly given and of which the minutes of the meeting duly record that the resolution was carried unanimously; or

(*b*) where the resolution is signed by every shareholder or his agent duly appointed in writing signed by him, and such resolution may consist of one or more documents in similar form (including letters, telegrams, cables, facsimiles, telex messages, electronic mail or similar forms of communication) in each case signed by the shareholder concerned or his agent on his behalf duly authorised in writing signed by him;

"unregistered association" has the meaning assigned to it in section 483;

"virtually wholly owned subsidiary" has the meaning given by section 6(6);

"wholly owned subsidiary" has the meaning assigned to it in section 6(5);

"winding-up resolution" means a resolution passed for the winding-up of a company;

"winding-up order" means any order whereby a company is placed under liquidation or provisional liquidation when such order for provisional liquidation has not been set aside;

"working day" means a day of the week other than Saturday, Sunday or a public holiday;

"writing" includes—

(*a*) the recording of words in a permanent or legible form; and

(*b*) the display of words by any form of electronic or other means of communication in a manner that enables the words to be readily stored in a permanent form and with or without the aid of any equipment to be retrieved and read;

"year" means a calendar year.

(2) A reference in this Act to an address means—

(*a*) in relation to an individual, the full address of the place where that person usually lives;

(*b*) in relation to a company its registered office;

(*c*) in relation to any other body corporate, its registered office or, if it does not have a registered office, its principal place of business.

(3) A company shall be an "exempt private company" where it is a private company which, in respect of its last preceding financial year, satisfied all of the following criteria—

(*a*) the total assets of the company are less than such amounts as may be prescribed in Regulations made under this Act;

(*b*) the annual turnover of the company is less than such amounts as may be prescribed in Regulations made under this Act; and

(*c*) none of the shareholders in such company is a company.

(4) A private company which is not an exempt private company is a non-exempt private company.

(5) In determining the "total assets" of the company for the purposes of subsection (3), regard shall be had to the total assets of the company as shown in the most recent financial statements of the company prepared on the basis of generally accepted accounting principles.

(6) In the application of subsections (3), (4) and (5) to any period which is a financial year of a company but not in fact a year, the maximum figure for turnover in subsection (3)(ii) shall be proportionately adjusted.

(7) A private company which is incorporated after the commencement of this Act shall qualify as an exempt private company in respect of its first financial year if it satisfies all the relevant qualifying criteria in respect of that year.

3. Public notice

Where, pursuant to this Act, a public notice is required to be given of any matter affecting a company, that notice shall be given by publishing notice of the matter in—

(*a*) the *Gazette*;

(*b*) a newspaper with wide circulation in Botswana; or

(*c*) any other medium in Botswana, as the Registrar may consider necessary.

[22 of 2018, s. 3 w.e.f. 3 June 2019.]

4. Meaning of "solvency test"

(1) 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 the company's assets is greater than the sum of—

(i) the value of its liabilities, and

(ii) the company's stated capital.

(2) In determining for the purposes of this Act (other than sections 224 and 225 which relate to amalgamations) whether the value of a company's assets is greater than the value of its liabilities, the Board may take into account—

(*a*) in the case of a public company or a non-exempt private company, the most recent financial statements of the company prepared in accordance with International Accounting Standards;

(*b*) in the case of an exempt private company, the most recent financial statements prepared on the basis of generally accepted accounting principles that are applicable to private or close companies; and

(*c*) a valuation of assets or estimates of liabilities that are reasonable in the circumstances.

(3) Without limiting sections 224 and 225, in determining, for the purposes of those sections whether the value of the amalgamated company's assets will be greater than the sum of the value of its liabilities and its stated capital, the directors of each amalgamating company—

(*a*) shall have regard to—

(i) financial statements that are prepared in accordance with International Accounting Standards or generally accepted accounting principles that are prepared as if the amalgamation had become effective,

and

(ii) all other circumstances that the directors know or ought to know would affect, or may affect, the value of the amalgamated company's assets and the value of its liabilities;

(*b*) may rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances.

5. Stated capital

(1) Subject to section 59, stated capital in relation to a company means the total of all amounts received by the company or due and payable to the company—

(*a*) in respect of the issue of the shares; and

(*b*) in respect of calls on the shares.

(2) Where a share is issued for consideration other than cash, the Board shall, in accordance with section 53, determine the cash value of that consideration for the purposes of subsection (1).

(3) Where a share has attached to it an obligation other than an obligation to pay calls, and that obligation is performed by the shareholder—

(*a*) the Board shall determine the cash value, if any, of that performance; and

(*b*) the cash value of that performance shall be deemed to be a call which has been paid on the share for the purposes of subsection (1).

(4) A company shall not reduce its stated capital except in the manner provided by this Act.

6. Meaning of "holding company" and "subsidiary"

(1) In this section and in sections 7 and 8, the expression "company" includes a corporation.

(2) For the purposes of this Act, a company is a subsidiary of another company if—

(*a*) that other company—

(i) controls the composition of the Board of the company,

(ii) is in a position to exercise, or control the exercise of, more than one-half the maximum number of votes that can be exercised at a meeting of the company,

(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 a subsidiary of another company.

(3) For the purposes of this Act, a company is another company's holding company if that other company is its subsidiary.

(4) For the purposes of this Act—

(*a*) a company is the "ultimate holding company" of another company if—

(i) the other company is a subsidiary of the first mentioned company, and

(ii) the first mentioned company is not itself a subsidiary of any company;

(*b*) "the ultimate holding company in Botswana", in relation to a company incorporated in Botswana, means a holding company which is not a subsidiary of a company incorporated in Botswana.

(5) A company shall be deemed to be the wholly owned subsidiary of another corporation if the members of the company do not include any person apart from—

(*a*) that other corporation;

(*b*) a nominee of that other corporation;

(*c*) a subsidiary of that other corporation being a subsidiary the members of which do not include any person apart from that other corporation or a nominee of that other corporation; or

(*d*) a nominee of such a subsidiary.

(6) A company shall be deemed to be the virtually wholly owned subsidiary of another corporation (known as "the parent") if the parent owns 90 per cent or more of the voting power in that company.

(7) Where a body corporate is—

(*a*) a holding company of another body corporate;

(*b*) a subsidiary of another body corporate; or

(*c*) a subsidiary of a holding company of another body corporate, the first mentioned body and the other body are related to each other and are "related corporations", and "related company" has a corresponding meaning where the body in question is a company.

(8) For the purposes of subsection (7), a company within the meaning of section 2 of the repealed Act is related to another company if, were it a company within the meaning of subsection (1), it would be related to that other company.

7. Definition of "control"

For the purposes of section 6, without limiting the circumstances in which the composition of a company's Board is to be taken to be controlled by another company, the composition of the Board is to be taken to be so controlled if the other company, by exercising a power exercisable (whether with or without the consent or concurrence of any other person) by it, can appoint or remove all the directors of the company, or such number of directors as together hold a majority of the voting rights at meetings of the Board of the company, and for this purpose, the other company is to be taken as having power to make such an appointment if—

(*a*) a person cannot be appointed as a director of the company without the exercise by the other company of such a power in the person's favour; or

(*b*) a person's appointment as a director of the company follows necessarily from the person being a director or other officer of the other company.

8. Certain matters to be disregarded

In determining whether a company is a subsidiary of another company—

(*a*) shares held or a power exercisable by that other company only as a trustee are not to be treated as held or exercisable by it;

(*b*) subject to paragraphs (*c*) and (*d*) of this section, shares held or a power exercisable—

(i) by a person as a nominee for that other company, except where that other company is concerned only as a trustee, or

(ii) by, or by a nominee for, a subsidiary of that other company, not being a subsidiary which is concerned only as a trustee-are to be treated as held or exercisable by that other company;

(*c*) shares held or a power exercisable by a person under the provisions of debentures of the company or of a debenture trust deed shall be disregarded; and

(*d*) shares held or a power exercisable by, or by a nominee for, that other company or its subsidiary (not being held or exercisable in the manner described in paragraph (*c*) of this section) are not to be treated as held or exercisable by that other company if—

(i) the ordinary business of that other company or its subsidiary, as the case may be, includes the lending of money, and

(ii) the shares are held or the power is exercisable by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

9. Act binds the State

This Act binds the State.

10. ...

[12 of 2012, s. 4.]

11. Registers

(1) The Registrar shall ensure the maintenance of a register of—

(*a*) companies registered or deemed to be registered under this Act;

(*b*) external companies registered or deemed to be registered under Part XXIV; and

(*c*) ...

[22 of 2018, s. 4(a) w.e.f. 3 June 2019.]

(*d*) beneficial owner information of companies registered or deemed to be registered under this Act for a period of seven years.

[7 of 2022, s. 3(a) w.e.f. 25 February 2022.]

(1A) The Registrar may request in writing, from any person, any information as the Registrar considers necessary to enable him to carry out the maintenance of the register.

[22 of 2018, s. 4(b) w.e.f. 3 June 2019.]

(1B) A request for information under subsection (1A) shall—

(*a*) specify the nature and type of information sought by the Registrar in sufficient detail as shall enable the person to identify and provide the information; and

(*b*) specify the format and period within which the required information is to be submitted.

[22 of 2018, s. 4(b) w.e.f. 3 June 2019.]

(1C) Upon receipt of a request for information, the person to whom the request is made shall, at the Registrar's option as set out in the request and within the time specified in the request, give the Registrar the information so requested or provide a copy of such information.

[22 of 2018, s. 4(b) w.e.f. 3 June 2019.]

(2) The register of companies and the register of external companies may be kept in such manner as the Registrar considers appropriate including, either wholly or partly, by means of a device or facility—

(*a*) that records or stores information electronically or by other means; and

(*b*) that permits the information so recorded or stored to be publicly available and readily inspected or reproduced in usable form.

[7 of 2022, s. 3(b) w.e.f. 25 February 2022.]

(3) The Minister may make regulations for the purposes of this section—

(*a*) authorising the destruction of any documents which have been recorded or stored electronically or by other means;

(*b*) providing that any document stored and reproduced electronically or by other means by the Registrar shall for all purposes be treated as if it were the original document, notwithstanding any law to the contrary;

(*c*) otherwise giving full effect to, and ensuring the efficient operation of, any device or facility of the kind referred to in subsection (2).

12. Registration of documents

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

(*a*) subject to subsection (2), register the document in the register of companies or the register of external companies, as the case may be; and

(*b*) give written advice of the registration to the person from whom the document was received.

(2) If a document received by the Registrar for registration under this Act—

(*a*) is not in the prescribed form, if any;

(*b*) does not comply with this Act or regulations made under this Act;

(*c*) is not printed or typewritten;

(*d*) where the register of companies or the register of external companies is kept wholly or partly by means of a device or facility referred to in section 11(2), the document is not received by the Registrar in a form that enables particulars to be entered directly by electronic or other means in the device or facility;

(*e*) has not been properly completed;

(*f*) contains matter contrary to law;

(*g*) contains any error, alteration or erasure; or

(*h*) contains material that is not clearly legible, the Registrar may refuse to register the document.

(3) Where the Registrar refuses to register the document under subsection (2) he shall request either—

(*a*) that the document be appropriately amended or completed and submitted for registration again; or

(*b*) that a fresh document be submitted in its place.

(4) For the purposes of this Act, a document is registered when—

(*a*) the document itself is constituted part of the register of companies or the register of external companies; or

(*b*) particulars of the document are entered in any device or facility referred to in section 11(2).

(5) Neither registration nor refusal of registration of a document, by the Registrar, affects or creates a presumption as to, the validity or invalidity of the document or the correctness or otherwise of the information contained in it.

13. Inspection and evidence of registers

(1) A person may inspect—

(*a*) any document that constitutes part of the register of companies or the register of external companies;

(*b*) particulars of any registered document that have been entered on any device or facility referred to in section 11(2); or

(*c*) any registered document particulars of which have been entered on any device or facility referred to in section 11(2).

[22 of 2018, s. 5(a) w.e.f. 3 June 2019.]

(2) A person may require the Registrar to give or certify—

[22 of 2018, s. 5(b) w.e.f. 3 June 2019.]

(*a*) a certificate of incorporation of a company;

(*b*) a copy of, or extract from, a document that constitutes part of the register of companies or the register of external companies;

(*c*) particulars of any registered document that have been entered in any device or facility referred to in section 11(2); or

(*d*) a copy of, or extract from, a registered document particulars of which have been entered in any such device or facility.

(3) Nothing in subsections (1) and (2) shall apply to—

(*a*) any report by an inspector appointed under Part XXI, unless the Registrar directs otherwise;

(*b*) a report filed by a liquidator or judicial manager of a company unless the person applying to inspect the document or requiring a copy or extract of it is a shareholder or creditor of that company;

(4) A process to compel the production of—

(*a*) a registered document kept by the Registrar; or

(*b*) evidence of the entry of particulars of a registered document in any device or facility referred to in section 11(2), shall not issue from the court without the leave of the court and, a statement shall be attached stating that it is issued with the leave of the court.

(5) A copy of, or extract from, a registered document—

(*a*) that constitutes part of the register of companies or the register of external companies; or

(*b*) particulars of which have been entered in any device or facility referred to in section 11(2),

certified to be a true copy or extract by the Registrar is admissible in evidence in legal proceedings to the same extent as the original document.

(6) An extract certified by the Registrar as containing particulars of a registered document that have been entered in any device or facility referred to in section 11(2) is, in the absence of proof to the contrary, conclusive evidence of the entry of those particulars.

14. Registrar's powers of inspection

(1) For the purpose of ascertaining whether a company or an officer is complying with this Act or any subsidiary enactment made under this Act, the Registrar may, on giving 72 hours written notice to the company, call for the production of or inspect any book required to be kept by the company.

(2) A person shall not obstruct or hinder the Registrar or a person authorised by the Registrar while exercising a power conferred by subsection (1).

(3) Any person who fails to comply with subsection (1) shall be guilty of an offence and liable to the penalty set out in section 492(2).

(4) In this section "Company" includes an external company.

15. Appeals from Registrar's decisions

(1) A person who is aggrieved by an act or decision of the Registrar under this Act may appeal to the court within 15 working days after the date of notification of the act or decision, or within such further time as the court may allow.

(2) On hearing the appeal, the court may approve the Registrar's act or decision or may give such directions or make such determination in the matter as the court considers appropriate.

16. Enforcement of duty on companies to make return to Registrar

(1) Where a person makes default in complying with a requirement of this Act relating to the filing of a document or the giving of a notice and still fails to make good the default within 14 days from the service on the person of a notice requiring it to be done, the court may, on the application of the Registrar or the Master or, if the person making default is a company on the application of a member or creditor, make an order

directing the person, or if the person making default is a corporation, the corporation or any officer, to make good the default within such time as may be specified in the order.

(2) Any order under subsection (1) may provide that all costs of, and incidental to, the application and the order thereon shall be borne by the company or by any officers of the company responsible for the default.

(3) Nothing in this section shall be taken to prejudice the operation of any enactment imposing penalties on a company or its officers in respect of any such default.

17. Lost documents

(1) Where a constitution or any other document relating to a company required to be filed has been lost or destroyed, the company may apply to the Registrar for leave to file a copy of the document.

(2) On receipt of an application under subsection (1), the Registrar may direct that a notice in that behalf shall be given to such person and in such manner as the Registrar considers appropriate.

(3) The Registrar may, on being satisfied—

(*a*) that the original document has been lost or destroyed,

(*b*) of the date of the filing of the original document, and

(*c*) that the copy of the document produced to him is a correct copy, certify on that copy that the Registrar is so satisfied and direct that the copy be filed in the same manner as the original document.

(4) The copy shall, on being filed, from such date as is mentioned in the certificate as the date of the filing of the original, have the same force and effect as the original.

18. Extension of time

Where a person is required by this Act to do any act within a specified time, he may be granted an extension of time within which the act is required to be done by the—

(*a*) Registrar, for a period not exceeding 60 days; and

(*b*) court, upon expiry of the 60 days extension under paragraph (*a*), in accordance with section 518(4) on good cause being shown.

PART II
Incorporation - Essential Requirements (ss 19-24)

19. Essential requirements and types of company

(1) A company shall have—

(*a*) a name;

(*b*) one or more shares in the case of a company limited by shares;

(*c*) one or more members in the case of a close company or a company limited by guarantee;

(*d*) one or more directors in the case of a private company and two or more directors in the case of a public company; and

(*e*) a secretary in the case of all companies other than a close company and an accounting officer in the case of a close company.

(2) A company shall be—

(*a*) a company limited by shares;

(*b*) a close company; or

(*c*) a company limited by guarantee.

(3) Every company limited by shares or by guarantee shall be either a private company or a public company.

(4) Every company limited by shares or by guarantee shall be a public company unless it is stated in its application for incorporation or its constitution that it is a private company.

20. Right to apply for registration

Any person may, either alone or together with another person, apply for the registration of a company under this Act.

21. Application for registration

(1) An application for the registration of a company under this Act shall be made to the Registrar, and shall be—

(*a*) in the prescribed form;

(*b*) signed by each applicant;

(*c*) accompanied, in the case of a company other than a close company, by a document in the prescribed form signed by every person named as a director or secretary, containing his consent to be a director or secretary and a certificate that he is not disqualified from being appointed or holding office as a director or secretary of a company and providing the identity number of the director; and

(*d*) accompanied by—

(i) in the case of a company having a share capital, a document in the prescribed form, signed by every person named as a shareholder or by an agent of the shareholder authorised, in writing, containing the person's consent to be a shareholder and to taking the number of shares specified in the document,

[22 of 2018, s. 6(a)(i) w.e.f. 1 February 2019.]

(ii) in the case of a close company, a document in the prescribed form signed by every person named as a member, containing that person's consent to being a member and stating the particulars required by section 248(4),

(iii) in the case of a company limited by guarantee, a document signed by each person named as a member or by an agent of the member authorised in writing, containing that person's consent to be a member, or

[22 of 2018, s. 6(a)(ii) w.e.f. 1 February 2019.]

(iv) if the document has been signed by an agent, the instrument authorising the agent to sign it; and

(*e*) ...

[22 of 2018, s. 6(b) w.e.f. 1 February 2019.]

(*f*) accompanied by a document certified by at least one applicant as the company's constitution, if the proposed company is to have a constitution apart from the Act.

(2) Without limiting the provisions of subsection (1), the application shall state—

(*a*) the full name and address of each applicant;

(*b*) the full name and residential address of every director and of the secretary of the proposed company;

(*c*) the full name and residential address of every shareholder or member of the proposed company, and in the case of a company limited by shares, the number of shares to be issued to every shareholder and the amount to be paid or other consideration to be provided by that shareholder for the issue of those same shares, including—

(i) the full name and residential address of every beneficial owner of the proposed company, including the amount to be paid or other consideration to be provided by the beneficial owner,

(ii) where a company is identified as the beneficial owner, information of the natural persons who own, hold shares and control that company, their full names, residential addresses and categories and the number of shares they hold or their interests in that company expressed as a percentage,

(iii) where a natural person identified as the beneficial owner, the position to be held by the person if the person is in a managerial position, and

(iv) where some of the shares are to be held by a foreign company, the identification of natural persons who own, hold shares and control the foreign company, their full names, residential addresses and categories and the number of shares they hold or their interests in the foreign company expressed as a percentage;

[7 of 2022, s. 4 w.e.f. 25 February 2022.]

(*d*) whether the company is a private company;

(*e*) whether a company is a close company;

(*f*) the registered office of the proposed company; and

(*g*) the physical address of the principal place of business or other activity of the proposed company.

(2A) ...

[16 *of 2019, s. 3.*]

(3) ...

[22 of 2018, s. 6(b) w.e.f. 1 February 2019.]

(4) ...

[22 of 2018, s. 6(b) w.e.f. 1 February 2019.]

(5) ...

[22 of 2018, s. 6(b) w.e.f. 1 February 2019.]

22. Registration

(1) On receipt of a properly completed application for registration of a company, the Registrar shall—

(*a*) enter the particulars of the company in the register;

(*b*) assign a unique number to the company as its company number; and

(*c*) issue a certificate of incorporation in the prescribed form.

[22 of 2014, s. 2.]

(2) Notwithstanding the provisions of subsection (1), the Registrar may refuse to register a company if, in his opinion, it is in the public interest to do so.

[22 of 2014, s. 2.]

(3) The Registrar shall, after entering the particulars of the company in the register under subsection (1), verify the beneficial owner information submitted in terms of section 21 using—

(*a*) information held by financial institutions and other competent authorities;

(*b*) where disclosure requirements ensure transparency of beneficial owners, information on listed companies; or

(*c*) any other documents as the Registrar may determine.

[7 of 2022, s. 5 w.e.f. 25 February 2022.]

22A. Delegation of powers by the Registrar

Registrar may, in writing, delegate to any officer at or above the level of Principal Commercial Officer in the office of the Registrar of Companies and Business Names, the power to sign and issue certificates of incorporation.

[26 of 2008, s. 2; 12 of 2012 s. 2(b).]

23. Certificate of incorporation

A certificate of incorporation of a company issued under section 22 is conclusive evidence that—

(*a*) all the requirements of this Act as to registration have been complied with; and

(*b*) on and from the date of incorporation stated in the certificate, the company is incorporated under this Act.

24. Separate legal personality

A company incorporated under this Act shall be a body corporate with the name by which it is registered from time to time and shall continue in existence until it is removed from the register of companies.

PART III
Capacity, Powers, and Validity of Actions (ss 25-28)

25. Capacity and powers

(1) Subject to this Act, any other enactment, and the general law, a company has, both within and outside Botswana—

(*a*) full capacity to carry on or undertake any business or activity, do any act which it may by law do, or enter into any transaction; and

(*b*) for the purposes of paragraph (*a*), full rights, powers and privileges.

(2) The constitution of a company may contain a provision relating to the capacity, rights, powers, or privileges of the company if the provision restricts the capacity of the company or those rights, powers and privileges.

26. Validity of actions

(1) If the constitution of a company sets out the objects of a company, there is deemed to be a restriction in the constitution on carrying on any business or activity that is not within those objects, unless the constitution expressly provides otherwise.

(2) If the constitution of a company provides for any restriction on the business or activities in which the company may engage—

(*a*) the capacity and powers of the company shall not be affected by that restriction; and

(*b*) no act of the company and no contract or other obligation entered into by the company and no transfer of property to or by the company is invalid by reason only that it was done in contravention of that restriction.

(3) Subsection (2) does not limit—

(*a*) section 165, relating to interdicts to restrain conduct by a company that would contravene its constitution;

(*b*) section 166 relating to derivative actions by directors and shareholders;

(*c*) section 170 relating to actions by shareholders of a company against the directors; or

(*d*) section 172 relating to actions by shareholders to require the directors of a company to take action under the constitution or this Act.

27. Dealings between company and other persons

(1) A company or a guarantor of an obligation of a company may not assert against a person dealing with the company or with a person who has acquired property, rights, or interests from the company that—

(*a*) this Act (in so far as it provides for matters of company meetings and internal procedure) or the constitution of the company has not been complied with; or

(*b*) a person named as a director or secretary of the company in the most recent notice received by the Registrar under section 155—

(i) is not a director or secretary of a company,

(ii) has not been duly appointed, or

(iii) does not have authority to exercise a power which a director or secretary of a company carrying on business of the kind carried on by the company customarily has authority to exercise;

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

(i) has not been duly appointed, or

(ii) does not have authority to exercise a power which a director, secretary, employee, or agent of a company carrying on business of the kind carried on by the company customarily has authority to exercise;

(*d*) a person held out by the company as a director, secretary, employee, or agent of the company with authority to exercise a power which a director, secretary, employee, or agent of a company carrying on business of the kind carried on by the company does not customarily have authority to exercise, does not have authority to exercise that power; or

(*e*) a document issued on behalf of a company by a director, secretary, employee, or agent of the company with actual or usual authority to issue the document is not valid or not genuine, unless the person has, or ought to have, by virtue of his position with or relationship to the company, knowledge of the matters referred to in any of paragraphs (*a*), (*b*), (*c*), (*d*), or (*e*), as the case may be, of this subsection and in that case subsection (3) applies.

(2) Subsection (1) of this section applies even though a person of the kind referred to in paragraphs (*b*) to (*e*) of that subsection acts fraudulently or forges a document that appears to have been signed on behalf of the company, unless the person dealing with the company or with a person who has acquired property, rights, or interests from the company has actual knowledge of the fraud or forgery.

(3) Where the person dealing with the company has, by virtue of his position with or relationship with the company, knowledge of any of the matters referred to in paragraphs (*a*), (*b*), (*c*), (*d*), or (*e*) of subsection (1), the company shall not be precluded from asserting against that person that the state of the particular matter of which that person has knowledge in fact accords with the knowledge of that person.

(4) A person is a person who is "dealing with the company" for the purposes of this section if that person is a party to any transaction or other act to which the company is a party.

(5) Notwithstanding the provisions of this section, a director who is resident in Botswana, the secretary of the company and, in the case of a close company, an accounting officer shall—

(*a*) be accountable to any competent authority for providing all basic information and beneficial owner information of the company, including facilitating access to such information;

(*b*) provide, on request from a competent authority, the information in paragraph (*a*) within three days of such request being made; and

(*c*) cooperate with the competent authority and effectively provide all assistance that the competent authority may reasonably require.

[7 of 2022, s. 6 w.e.f. 25 February 2022.]

28. No constructive notice

No person shall be deemed to have notice or knowledge of the contents of the constitution of, or any other document relating to, a company by reason only of the fact that the constitution or document has been registered by the Registrar; or it is available for inspection at an office of the company.

PART IV
Company Names (ss 29-36)

29. Name to be reserved

The Registrar shall not register a company under a name or register a change of the name of a company unless the name has been reserved.

30. Name of company if liability of shareholders limited and if a private company

(1) Unless a licence has been granted under section 31, the registered name of a company other than a close company, shall end with the word "Limited".

(2) If the company is a private company, the word "Proprietary" shall be added before the word "Limited".

(3) If the company is a close company the designation CC in capital letters shall be added to the name of the close company.

31. Power to dispense with "Limited"

(1) Where it is proved to the satisfaction of the Minister that an association about to be formed as a company is to be formed as a limited company for promoting commerce, art, science, religion, charity or any other useful object, and intends to apply its profits or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the Minister may direct that the association be registered as a company, without the addition of the word "Limited" to its name, and the association may be registered accordingly.

(2) A direction under this section may be granted on such conditions (including the maximum area of land the company may hold) as the Minister considers appropriate, and those conditions shall be binding on the association, and shall, if the Minister so directs, be inserted in the constitution.

(3) The association shall, on registration, enjoy all the privileges of limited companies, and be subject to all their obligations, except those of using the word "Limited" as any part of its name, and of publishing its name, and of sending lists of members and directors and managers to the Registrar.

(4) A direction under this section may at any time be revoked by the Minister, and upon revocation the Registrar shall enter the word "Limited" at the end of the name of the association in the register, and the association shall cease to enjoy the exemptions and privileges granted by this section.

(5) No direction under this section may be revoked unless the Minister has given to the association notice in writing of his intention and has afforded the association an opportunity of being heard in opposition to the revocation.

(6) Where, as a result of a direction given under subsection (1), the constitution includes a provision that the constitution shall not be altered except with the consent of the Minister, the company may not, by special resolution alter any provision of the constitution.

(7) Where a direction under this section is revoked, the constitution may be altered by special resolution so as to remove any provision in, or to the effect that, the constitution may be altered only with the consent of the Minister.

(8) A private company which has been the subject of a direction under this section need not include the word "Proprietary" in its name.

31A. Delegation of power to dispense with "Limited"

(1) The Minister may, in writing, delegate any of his powers under section 31 to the Registrar.

[22 of 2018, s. 7 w.e.f. 3 June 2019.]

(2) Notwithstanding any delegation under subsection (1), the Minister may—

(*a*) exercise any powers delegated by him and may from time to time cancel or vary such delegation; and

(*b*) vary or set aside any decision made by Registrar in the exercise of such delegated powers.

[22 of 2018, s. 7 w.e.f. 3 June 2019.]

(3) A power delegated under this section may, where the instrument of delegation so provides, be further delegated.

[22 of 2018, s. 7 w.e.f. 3 June 2019.]

32. Application for reservation of name

(1) The Registrar shall, on written application by the applicant, reserve a name pending registration of a company or a change of name of an existing company; and such reservation shall be for a period of 30 days or such longer period not exceeding 60 days as the Registrar may, for special reasons, allow.

(2) An application for the reservation of the name of a company shall be made to the Registrar in the prescribed form.

(3) The Registrar may not reserve a name and no company may be registered by a name—

(*a*) the use of which would contravene the Banking Act (Cap. 46:01) or any other enactment;

(*b*) that is identical or almost identical to, the name of a registered company or a registered external company or a statutory corporation, or to a name registered under the Registration of Business Names Act (Cap. 42:04), unless the registered company, the registered external company or the business is in liquidation or insolvency and signifies its consent to the registration in such manner as the Registrar may require;

(*c*) that is identical or almost identical to a name that the Registrar has already reserved under this Act or the repealed Act and that is still available for registration; or

(*d*) that, in the opinion of the Registrar, is calculated to mislead the public or cause offence to a person or any class of persons or is suggestive of blasphemy or indecency.

(4) The Registrar shall, within 10 working days of the date the application was received, advise the applicant by notice in writing—

(*a*) whether or not he has reserved the name; and

(*b*) If the name has been reserved, that unless the reservation is sooner revoked by the Registrar, the name is available for registration of a company with that name or on a change of name, for the period of time stated in the notice.

33. Name of company

Except with the Minister's written consent, no company, including an external company, shall be registered under a name which includes—

(*a*) the word "Authority", "Commonwealth", "co-operative", "Government", "National", "President", "Presidential", "Regional" or "State",

(*b*) the combined words "United Nations"; or

(*c*) any other word which, in the Registrar's opinion suggests, or is likely to suggest, that it enjoys the patronage of the Government or of a statutory corporation, or of the Government of any other State or of a department of any such Government or of the General Assembly of the United Nations.

34. Change of name

(1) An application to change the name of a company shall—

(*a*) be in the prescribed form;

(*b*) ...

[22 of 2018, s. 8(a)(i) w.e.f. 3 June 2019.]

(*c*) subject to the constitution of the company, be made by a director of the company or any other person authorised by the board of the company.

[22 of 2018, s. 8(a)(ii) w.e.f. 3 June 2019.]

(2) Subject to its constitution, an application to change the name of a company is not an amendment of the constitution of the company for the purposes of this Act.

(3) The Registrar shall not enter a change of name in the register until 14 days after the Registrar has issued a public notice of the application to change the name of the company.

[22 of 2018, s. 8(b) w.e.f. 3 June 2019.]

(4) At the expiry of the 14 days after publication of the *Gazette* under subsection (3), the Registrar shall—

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

(*b*) issue a certificate of incorporation for the company recording the change of name of the company.

(5) A change of name of a company—

(*a*) takes effect from the date of the certificate issued under subsection (4); and

(*b*) does not affect the rights or obligations of the company, or legal proceedings by or against the company, and legal proceedings that might have been continued or commenced against the company under its former name may be continued or commenced against it under its new name.

35. Direction to change name

(1) If the Registrar believes on reasonable grounds that the name under which a company is registered should not have been reserved, he may serve written notice on the company to change its name by a date specified in the notice, being a date not less than 20 working days after the date on which the notice is served.

(2) If the company does not change its name within the period specified in the notice, the Registrar may enter, on the register of companies, a new name for the company selected by the Registrar, being a name under which the company may be registered under this Part.

(3) If the Registrar registers a new name under subsection (2)—

(*a*) he shall issue a certificate of incorporation for the company recording the new name of the company, and section 34(4) of this Act shall apply in relation to the registration of the new name as if the name of the company had been changed under that section;

(*b*) he shall, within 14 days of the date of entry of the new name in the register, publicise the new name of the company by notice in the *Gazette*; and

(*c*) the company shall pay to the Registrar the costs of the advertisement published under paragraph (*b*).

36. Use of Company name

(1) A company shall ensure that its name is clearly stated in—

(*a*) every written communication sent by, or on behalf of, itself; and

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

(2) Where—

(*a*) a document that evidences or creates a legal obligation of a company is issued or signed by or on behalf of the company; and

(*b*) the name of the company is incorrectly stated in the document, every person who issued or signed the document is liable to the same extent as the company if the company fails to discharge the obligation.

(3) Liability under subsection (2) shall not be applicable where—

(*a*) the person who issued or signed the document 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*) the court is satisfied that it would not be just and equitable for the person who issued or signed the document to be so liable.

(4) For the purposes of subsections (1), (2) and (3) and of section 177, relating to the manner in which a company may enter into contracts and other obligations, a company may use a generally recognised abbreviation of a word or words in its name if it is not misleading to do so and in particular may use the abbreviation "Ltd" and "Pty" for the words "Limited" and "Proprietary".

(5) If, within the period of 12 months immediately preceding the giving by a company of any public notice, the name of the company was changed, the company shall ensure that the notice states—

(*a*) that the name of the company was changed in that period; and

(*b*) the former name or names of the company.

(6) If a company fails to comply with subsection (1) or subsection (4)—

(*a*) the company shall be guilty of an offence and liable to the penalty set out in section 492(1); and

(*b*) every director of the company shall be guilty of an offence and liable to the penalty set out in section 493(1).

PART V

Company Constitution (ss 37-44)

37. Requirement for company to have constitution

(1) A company, including a close company, shall have a constitution.

[7 of 2022, s. 7 w.e.f. 25 February 2022.]

(2) A company which, prior to the commencement of this section, was not required to have a constitution, shall submit, to the Registrar, a constitution in the manner prescribed in the First Schedule within one year from the date of commencement of this section.

[7 of 2022, s. 7 w.e.f. 25 February 2022.]

(3) If a company fails to submit a constitution within the period prescribed in subsection (1), the Registrar shall in accordance with section 252 deregister the company.

[7 of 2022, s. 7 w.e.f. 25 February 2022.]

(4) The Registrar may, subject to section 343, restore a company under subsection (3) upon—

(*a*) submission of a constitution in terms of subsection (2) notwithstanding that the one year period has lapsed; and

(*b*) payment, by the company that is restored, of a penalty of P2500 or such fee as may be prescribed from time to time.

[7 of 2022, s. 7 w.e.f. 25 February 2022.]

38. Effect of Act on constitution

(1) A company, the Board, each director and each shareholder of the company shall have the rights, powers, duties, and obligations set out in this Act except to the extent that they are negated or modified, in accordance with this Act, by the constitution of the company.

[7 of 2022, s. 8 w.e.f. 25 February 2022.]

(2) Notwithstanding subsection (1), the members of a close company shall have the rights, powers, duties and obligations set out in Part XIX except to the extent that they are negated or modified, in accordance with that Part, by the constitution of the company.

[7 of 2022, s. 8 w.e.f. 25 February 2022.]

39. ...

[7 of 2022, s. 9 w.e.f. 25 February 2022.]

40. Form of constitution

The constitution of a company is—

[7 of 2022, s. 10(a) w.e.f. 25 February 2022.]

(*a*) in the case of a company registered under Part II, a document certified by the applicant for registration of the company as the company's constitution;

(*b*) ...;

[7 of 2022, s. 10(b) w.e.f. 25 February 2022.]

(*c*) in the case of a company registered under the repealed Act, the memorandum and articles of association as originally registered or as altered in accordance with the repealed Act, including so far as they apply to the company the regulations contained in Table A, Table B, Table C or Table D in the First Schedule to the repealed Act:

Provided that any statement of objects in the memorandum shall, from the commencement of this Act, have the effect stated in section 25;

(*d*) a document that is adopted by the company as its constitution under section 43;

(*e*) a document described in section 44 of this Act; or

(*f*) a document described in any of the preceding paragraphs of this section as altered by the company under section 43 or varied by the court under section 175.

41. Contents of constitution

Subject to section 25(2), the constitution of a company may contain—

(*a*) matters contemplated by this Act for inclusion in the constitution of a company;

(*b*) powers that regulate and bind the company, the names of natural persons having control over the company and those in senior management positions in terms of section 21; and

(*c*) such other matters as the company wishes to include in its constitution.

[7 of 2022, s. 11 w.e.f. 25 February 2022.]

42. Effect of constitution

(1) The constitution of a company has no effect to the extent that it contravenes, or is inconsistent with, this Act.

(2) Subject to this Act, the constitution of a company is binding as between—

(*a*) the company, each director and each shareholder; and

[7 of 2022, s. 12 w.e.f. 25 February 2022.]

(*b*) shareholders, in accordance with its terms.

43. Adoption, alteration and revocation of constitution

(1) The shareholders of a company may, by special resolution, adopt a constitution for the company.

[7 of 2022, s. 13 w.e.f. 25 February 2022.]

(2) Subject to subsection (3), and without limiting section 104 (which relates to variation of shareholders' rights) and section 174 (which relates to the right of a shareholder to apply to the court for relief in cases of prejudice), but subject to section 31(6) (which relates to a direction made by the Minister under section 31) and to section 64 (which relates to the reduction of shareholders' liability), the shareholders of a company may, by special resolution, alter or revoke the constitution of the company.

(3) An existing company which has, as its constitution pursuant to section 40(*c*), a memorandum of association and articles of association, shall not alter any of the provisions in its existing memorandum of association or articles of association unless it replaces its memorandum of association and its articles of association by a single document into which it consolidates its constitution.

(4) Within 10 working days of the adoption of a constitution by a company, or the alteration or revocation of the constitution of a company, as the case may be, the Board shall ensure that a notice in the prescribed form of the adoption of the constitution or of the alteration or revocation of the constitution is delivered to the Registrar for registration.

(5) If the Board of a company fails to comply with subsection (4) of this section, every director of the company commits an offence and is liable, on conviction, to the penalty set out in section 493(1).

(6) A company to which subsection (3) would otherwise apply may apply to the Registrar for dispensation from the requirement in subsection (3) that the memorandum and articles of association be replaced at that time by a constitution into which it consolidates its existing memorandum and articles, and where the Registrar considers that the requirement may impose undue hardship on the company, the Registrar may grant a dispensation to the company from the application of subsection (3) on such conditions as the Registrar considers appropriate. The conditions imposed by the Registrar may include a condition that the company register such a constitution within such period of time as the Registrar may stipulate.

(7) Notwithstanding the provisions of section 522 and the Eleventh Schedule, the Registrar shall not, during a period of three years from the commencement of this Act, require the payment of any fee which would otherwise be payable on the presentation by a company, registered under the repealed Act, for registration of a constitution which replaces its memorandum and articles.

44. New form of constitution

(1) A company may, from time to time, deliver, to the Registrar, a single document that incorporates the provisions of a document referred to in any of the paragraphs of section 40, together with all amendments to it.

(2) The Registrar may, if he considers that by reason of the number of amendments to a company's constitution it would be desirable for the constitution to be contained in a single document, by notice in writing, require a company to deliver to him a single document that incorporates the provisions of a document referred to in any of the paragraphs of section 40 together with the amendments to it.

(3) Within 20 working days of receipt by a company of a notice under subsection (2), the Board shall ensure that the document required by that subsection is received by the Registrar for registration.

(4) The Board shall ensure that a document delivered to the Registrar under this section is accompanied by a certificate signed by a person authorised by the Board that the document complies with subsection (1) or subsection (2), as the case may be, of this section.

(5) As soon as the Registrar receives a document certified in accordance with subsection (4), he shall register the document.

(6) If the Board of a company fails to comply with subsection (3) or subsection (4), every director of the company shall be guilty of an offence and liable to the penalty set out in section 493(1).

PART VI
Shares (ss 45-79)

45. Legal nature and rights and powers attaching to shares

(1) A share in a company is movable property and is transferable in accordance with section 48.

(2) Subject to subsection (3), a share in a company confers on the holder—

(*a*) the right to one vote on a poll at a meeting of the company on any resolution;

(*b*) the right to an equal share in dividends authorised by the Board;

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

(3) Subject to section 60, the rights specified in subsection (2) may be negated, altered, or added to by the constitution of the company or in accordance with the terms on which the share is issued under section or section 50, as the case may be.

46. Types of shares

(1) Subject to the constitution of the company, different classes of shares may be issued in a company.

(2) Without limiting subsection (1), shares in a company may—

(*a*) be redeemable within the meaning of section 72;

(*b*) confer preferential or limited rights to distributions of capital or income;

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

(*d*) not confer voting rights.

47. No par value shares

(1) All shares created or issued after the commencement of this Act shall be shares of no par value.

(2) All shares issued prior to the commencement of this Act shall be deemed to be converted into shares of no par value but such conversion shall not affect the rights and liabilities attached to such shares and in particular, but without prejudice to the generality of this provision, such conversion shall not affect—

(*a*) any unpaid liability on such shares; or

(*b*) the rights of the holders thereof in respect of dividends, voting or repayment on winding-up or a reduction of capital.

(3) Subsection (2) shall apply notwithstanding any statement in a share certificate relating to the shares that describes the shares by reference to a par value.

(4) On the commencement of this Act, the stated capital of a company which has issued shares prior to the commencement of this Act shall be the whole of the company's called up issued share capital and its share premium account.

(5) Notwithstanding the provisions of subsection (1), the Registrar may, in exceptional circumstances where he is satisfied that a company registered under this Act is a wholly owned subsidiary of a company registered outside Botswana and that for the purposes of the company's reporting obligations outside Botswana it is necessary for the company to be formed with shares carrying a par value, the Registrar may grant a dispensation from the provisions of subsection (1) and permit the issue of a class or classes of par value shares, on such terms and conditions as he may consider appropriate:

Provided that all the ordinary shares or all the preference shares shall consist of either one or the other, and any premiums received on any issue of shares shall be transferred into an account called a share premium account to which, together with the company's nominal issued share capital, the provisions of section 59 relating to reduction of capital shall apply.

(6) Shares of par value issued under subsection (5) may, with the approval of the Registrar where the functional currency of the company is a foreign currency, be designated in that foreign currency, but shall otherwise be designated in the currency of Botswana.

48. Transferability of shares

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

(2) A share is transferred by entry in the share register in accordance with section 81.

(3) Subject to section 82, the executor of a deceased shareholder may transfer a share even though the executor is not a shareholder at the time of transfer.

(3A) A company that transfers a share in the company shall, in such form as may be prescribed and within 20 days from the date the transfer is made, notify the Registrar of the transfer.

[22 of 2018, s. 10(a) w.e.f. 3 June 2019.]

(3B) Where a company fails to comply with subsection (3A)—

(*a*) the company shall be guilty of an offence and liable to a penalty set out in section 492(1); and

(*b*) every director of the company shall be guilty of an offence and liable to a fine set out in section 492(2).

[22 of 2018, s. 10(b) w.e.f. 3 June 2019.]

49. Issue of shares on registration and amalgamation

(1) Upon the registration of the company under section 22, the company shall issue, to any person or persons named in the application for registration as a shareholder or shareholders, the number of shares specified in the application as being the number of shares to be issued to that person or those persons.

(2) Upon the issue of a certificate of amalgamation under section 227, the amalgamated company shall issue to any person entitled to a share or shares under the amalgamation proposal, the share or shares to which that person is entitled.

50. Issue of other shares

(1) Subject to this Act and the constitution of the company, the Board of a company may issue shares at any time, to any person, and in any number it considers appropriate:

Provided that—

(i) no shares may be issued to bearer or an unidentified shareholder; and

(ii) where the constitution of the company contains a provision authorising the company to issue shares to the bearer or an unidentified shareholder, the company shall immediately amend its

constitution to remove such provision and deliver a copy of the amended constitution to the Registrar within a month from the date of commencement of this section.

[7 of 2022, s. 14 w.e.f. 25 February 2022.]

(2) If the shares confer rights other than those set out in section 45(2), or impose any obligation on the holder, the Board shall, subject to—

(*a*) the prior approval of an ordinary resolution of shareholders (unless the constitution otherwise provides); and

(*b*) the requirements of section 104 (dealing with a variation of class rights), approve terms of issue which set out the rights and obligations attached to the shares.

(3) The terms of issue approved by the Board under subsection (2)—

(*a*) shall be consistent with the constitution of the company, and to the extent that they are not so consistent are invalid and of no effect; and

(*b*) are deemed to form part of the constitution and may be amended in accordance with section 43 subject to the requirements of section 104, providing for the variation of class rights.

(4) Within 10 working days of the issue of shares under this section, the company shall—

(*a*) give notice to the Registrar, in the prescribed form, of the number of shares issued;

[22 of 2018, s. 11 w.e.f. 3 June 2019.]

(*b*) deliver to the Registrar a copy of any terms of issue approved under subsection (2); and

(*c*) deliver to the Registrar together with the notice under paragraph (*a*) and the copy of any terms of issue under paragraph (*b*), a declaration made by any of the persons referred to in section 21(3) that the provisions of the Act in relation to the issue of shares have been complied with.

(5) If a company fails to comply with subsection (4)—

(*a*) the company shall be guilty of an offence and liable to the penalty set out in section 492(1); and

(*b*) every officer of the company who is in default shall be guilty of an offence and liable to the penalty set out in section 493(1).

51. Alteration in number of shares

(1) A company may by ordinary resolution—

(*a*) subdivide its shares into shares of a smaller amount if the proportion between the amount paid, and the amount, if any, unpaid on each reduced share remains the same as it was in the case of the share from which the reduced share is derived; or

(*b*) consolidate and divide all of its shares into shares of a larger amount than its existing shares.

(2) Where shares are consolidated, the amount paid and any unpaid liability thereon, any fixed sum by way of dividend or repayment to which such shares are entitled, shall also be consolidated.

(3) Where a company has altered its share capital in a manner specified in subsection (1), it shall, within 10 working days, file a notice to that effect with the Registrar.

(4) A notice under subsection (3) shall include particulars with respect to the classes of shares affected.

52. Pre-emptive rights to new issues

(1) Subject to the constitution, where a company issues shares which rank equally with or prior to existing shares as to voting or distribution rights, those shares shall be offered to the holders of existing shares in a manner which would, if the offer were accepted, maintain the relative voting and distribution rights of those shareholders.

(2) An offer under subsection (1) shall remain open for acceptance for a reasonable time.

53. Consideration for issue of shares

(1) Before it issues any shares the Board shall—

(*a*) determine the amount of the consideration for which the shares shall be issued; and

(*b*) resolve that in its opinion the consideration is fair and reasonable to the company and to all existing shareholders.

(2) The consideration for which a share is issued may take any form and may be cash, promissory notes, contracts for future services, real or personal property, or other securities of the company and may be issued in part for cash and in part by way of some other form of consideration.

54. Shares not paid for in cash

(1) Shares shall be deemed not to have been paid for in cash except to the extent that the company has actually received cash in payment of the shares at the time of or subsequently to the agreement to issue the shares.

(2) Before shares are credited as fully or partly paid up other than for cash, the Board shall—

(*a*) determine the reasonable present cash value of the consideration; and

(*b*) resolve that, in its opinion, the present cash value of the consideration is—

(i) fair and reasonable to the company and to all existing shareholders, and

(ii) not less than the amount to be credited in respect of the shares.

(3) The directors who vote in favour of a resolution under subsection (2) shall sign a certificate—

(*a*) describing the consideration in sufficient detail to identify it; and

(*b*) stating—

(i) the present cash value of the consideration and the basis for assessing it,

(ii) that the present cash value of the consideration is fair and reasonable to the company and to all existing shareholders; and

(iii) that the present cash value of the consideration is not less than the amount to be credited in respect of the shares.

(4) The Board shall deliver a copy of a certificate that complies with subsection (3) to the Registrar for registration within 10 working days after it is given, and where the shares are issued to an officer or employee

of the company or to any relative of such persons or to a corporation which is a related party of such persons, the certificate shall be entered in the Interests Register.

(5) For the purposes of this section, shares that are or are to be credited as paid up, whether wholly or partly, as part of an arrangement that involves the transfer of property or the provision of services and an exchange of cash or cheques or other negotiable instruments, whether simultaneously or not, shall be treated as paid up other than in cash to the value of the property or services.

(6) A director who fails to comply with subsection (3) of this section shall be guilty of an offence and liable to the penalty set out in section 492(1).

(7) Nothing in this section applies to the issue of shares in a company on—

(*a*) the conversion of any convertible securities; or

(*b*) the exercise of any option to acquire shares in the company.

(8) If the Board of a company fails to comply with subsection (4), every officer of the company shall be guilty of an offence and liable to the penalty set out in section 492(1).

55. Calls on shares

(1) Where a call is made on a share or any other obligation attached to a share is performed by the shareholder, the company shall, within 10 working days of the call being made, give notice, in the prescribed form, to the Registrar of the amount of the stated capital of the company following the making of the call.

[22 of 2018, s. 12 w.e.f. 3 June 2019.]

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

(*a*) the company shall be guilty of an offence and liable to the penalty set out in section 492(1); and

(*b*) every director of the company who is in default shall be guilty of an offence and liable to the penalty set out in section 493(1).

56. Consent to issue of shares

The issue by a company of a share that—

(*a*) increases the liability of a person to the company; or

(*b*) imposes a new liability on a person to the company, is void if that person or an agent of that person authorised in writing does not consent in writing to becoming the holder of the share before it is issued.

57. Time of issue of shares

A share is issued when the name of the holder is entered on the share register.

58. Board may authorise distributions to shareholders

(1) Before a distribution is made by a company to any shareholder, that distribution—

(*a*) shall be authorised by the Board under subsection (2); and

(*b*) shall, unless the constitution provides otherwise, be approved by the shareholders by ordinary resolution.

(2) The Board of a company may authorise a distribution at such time and of such amount as it considers appropriate, if it is satisfied that the company will, immediately after the distribution is made, satisfy the solvency test.

(3) The directors who vote in favour of a distribution shall sign a certificate stating that, in their opinion, the company will, immediately after the distribution, satisfy the solvency test.

(4) If after a distribution is authorised and before it is made, the Board ceases to be satisfied that the company will, immediately after the distribution is made, satisfy the solvency test, any distribution made by the company is deemed not to have been authorised.

(5) In applying the solvency test for the purpose of this section and section 63, "debts" includes fixed preferential returns on shares ranking ahead of those in respect of which a distribution is made, except where that fixed preferential return is expressed in the constitution as being subject to the power of the Board to authorise distributions.

(6) A director who fails to comply with subsection (3) of this section shall be guilty of an offence and liable to the penalty set out in section 493(2).

59. Reduction of stated capital

(1) Subject to subsection (3), a company may by special resolution reduce its stated capital to such amount as it considers appropriate.

(2) Public notice of a proposed reduction of a company's stated capital shall be given not less than 30 days before the resolution to reduce stated capital is passed.

(3) Where a company has agreed in writing with a creditor of the company that it will not reduce its stated capital below a specified amount without the prior consent of the creditor, or unless specified conditions are satisfied at the time of the reduction, a resolution to reduce stated capital passed in breach of any such agreement is invalid and of no effect.

(4) A company shall not take any action to extinguish or reduce a liability in respect of an amount unpaid on a share or to reduce its stated capital for any purpose other than the purpose of declaring that its stated capital is reduced by an amount that is not represented by the value of its assets if there are reasonable grounds for believing that—

(*a*) the company is, or after the taking of such action, would be unable to pay its debts as they become due; or

(*b*) after the taking of such action the value of the company's assets would be less than the value of its liabilities.

(5) Where a share is redeemed at the option of the shareholder under section 74 or on a fixed date under section 75, or the company purchases a share under section 100 and the Board is satisfied that as a consequence of the redemption or purchase, the company would but for this subsection fail to satisfy the solvency test, the Board shall resolve that the stated capital of the company shall be reduced by the amount by which the company would so fail to satisfy the solvency test and the resolution of the Board shall have effect notwithstanding subsections (1) to (3).

(6) ...

[22 of 2018, s. 13(a) w.e.f. 3 June 2019.]

(7) If a company fails to comply with subsection (2)—

[22 of 2018, s. 13(b) w.e.f. 3 June 2019.]

(*a*) the company shall be guilty of an offence and liable to the penalty set out in section 492(2); and

(*b*) every officer of the company who is in default shall be guilty of an offence and liable to the penalty set out in section 493(2).

60. Dividends

(1) A dividend is a distribution other than a distribution to which sections 66 and 76 apply.

(2) The Board shall not authorise a dividend—

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

(*b*) of a greater amount in respect of some shares in a class than other shares in that class except where—

(i) the amount of the dividend is reduced in proportion to any liability attached to the shares under the constitution, or

(ii) a shareholder has agreed in writing to receive no dividend, or a lesser dividend than would otherwise be payable.

61. Shares *in lieu* of dividends

Subject to the constitution of the company, the Board may issue shares to any shareholders who have agreed to accept the issue of shares, wholly or partly, *in lieu* of a proposed dividend or proposed future dividends if—

(*a*) the right to receive shares, wholly or partly, *in lieu* of the proposed dividend or proposed future dividends has been offered to all shareholders of the same class on the same terms;

(*b*) in the event that all shareholders elect to receive the shares *in lieu* of the proposed dividend, the relative voting or distribution rights in relation to the shares would be maintained;

(*c*) the shareholders to whom the right is offered are afforded a reasonable opportunity of accepting it;

(*d*) the shares issued to each shareholder are issued on the same terms and subject to the same rights as the shares issued to all shareholders in that class who agree to receive the shares; and

(*e*) the provisions of section 50 are complied with by the Board.

62. Shareholder discounts

(1) The Board may resolve that the company offer shareholders discounts in respect of some or all of the goods sold or services provided by the company.

(2) The Board may approve a discount scheme under subsection (1) only if it has previously resolved that the proposed discounts are—

(*a*) fair and reasonable to the company and to all shareholders; and

(*b*) to be available to all shareholders or all shareholders of the same class on the same terms.

(3) A discount scheme may not be approved or continued by the Board unless it is satisfied on reasonable grounds that the company satisfies the solvency test.

(4) Subject to subsection (5), a discount accepted by a shareholder under a discount scheme approved under this section is not a distribution for the purposes of this Act.

(5) Where—

(*a*) a discount is accepted by a shareholder under a scheme approved or continued by the Board; and

(*b*) at the time the scheme was approved or the discount was offered, the Board ceased to be satisfied on reasonable grounds that the company would satisfy the solvency test, the provisions of section 63 shall apply in relation to the discount with such modifications as may be necessary as if the discount were a distribution that is deemed not to have been authorised.

63. Recovery of distributions

(1) A distribution made to a shareholder at a time when the company did not, immediately after the distribution, satisfy the solvency test may be recovered by the company from the shareholder unless—

(*a*) the shareholder received the distribution in good faith and without knowledge of the company's failure to satisfy the solvency test;

(*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 repayment in full or at all.

(2) If, in relation to a distribution made to shareholders—

(*a*) the procedure set out in section 58 has not been followed; or

(*b*) reasonable grounds for believing that the company would satisfy the solvency test in accordance with section 58, section 74 or section 75, as the case may be, did not exist at the time the certificate was signed, a director who—

(i) failed to take reasonable steps to ensure the procedure was followed, or

(ii) signed the certificate, as the case may be, is personally liable to the company to repay to the company so much of the distribution as is not able to be recovered from shareholders.

(3) If, by virtue of section 58(4) a distribution is deemed not to have been authorised, a director who—

(*a*) ceased after authorisation but before the making of the distribution to be satisfied on reasonable grounds for believing that the company would satisfy the solvency test immediately after the distribution is made; and

(*b*) failed to take reasonable steps to prevent the distribution being made, is personally liable to the company to repay to the company so much of the distribution as is not able to be recovered from shareholders.

(4) If, by virtue of section 62(5), a distribution is deemed not to have been authorised, a director who failed to take reasonable steps to prevent the distribution being made is personally liable to the company to repay to

the company so much of the distribution as is not able to be recovered from shareholders.

(5) If, in an action brought against a director or shareholder under this section, the court is satisfied that the company could, by making a distribution of a lesser amount, have satisfied the solvency test, the court may—

(*a*) permit the shareholder to retain; or

(*b*) relieve the director from liability in respect of,

an amount equal to the value of any distribution that could properly have been made.

64. Reduction of shareholders liability

(1) If a company proposes to alter its constitution, or redeem shares under section 73 in a manner which would cancel or reduce the liability of a shareholder to the company in relation to a share held prior to that alteration, or redemption, the proposed cancellation or reduction of liability is to be treated—

(*a*) for the purposes of section 58 as if it were a distribution; and

(*b*) for the purposes of section 60(2) as if it were a dividend.

(2) If a company has altered its constitution, or redeemed shares under section 73 in a manner which cancels or reduces the liability of a shareholder to the company in relation to a share held prior to that alteration, or redemption, that cancellation or reduction of liability is to be treated for the purposes of section 63 as a distribution of the amount by which that liability was reduced.

(3) If the liability of a shareholder of an amalgamating company, to that company in relation to a share held before the amalgamation is—

(*a*) greater than the liability of that shareholder to the amalgamated company in relation to a share or shares into which that share is converted; or

(*b*) cancelled by the cancellation of that share in the amalgamation, the reduction of liability effected by the amalgamation is to be treated, for the purposes of section 63(1) and (3), as a distribution by the amalgamated company to that shareholder, whether or not that shareholder becomes a shareholder of the amalgamated company of the amount by which that liability was reduced.

(4) Where a company acquires shares issued by it, the provisions of section 67 shall govern the way in which the distribution to shareholders is to be treated.

65. Company may acquire or redeem its own shares

(1) A company shall not purchase or otherwise acquire any of its own shares except—

(*a*) under section 66;

(*b*) under sections 98 to 103;

(*c*) with the approval of a unanimous resolution;

(*d*) if the company is a private company, with the unanimous agreement of all shareholders under section 247; or

(*e*) in accordance with an order made by the court under this Act.

(2) A company shall not redeem a share which is a redeemable share except in accordance with sections 72 to 75.

(3) Within seven days following the acquisition or redemption of shares by the company, the company shall give notice to the Registrar of the number and class of shares acquired or redeemed.

(4) Where shares are acquired by a company pursuant to subsection (1) or redeemed pursuant to subsection (2), the stated capital of the class of shares so acquired or redeemed shall be decreased by an amount derived by multiplying the number of shares of that class so acquired with the amount arrived at so as to take into account the extent to which the company's stated capital is reduced by the company's acquisition or redemption of its own shares.

(5) A company shall not make any payment in whatever form to acquire or redeem any share issued by the company where there are reasonable grounds for believing that the company is or would after the payment, be unable to satisfy the solvency test.

(6) Shares in the capital of a company may not be acquired or redeemed if, as a result of such acquisition or redemption, there would no longer be any shares on issue other than convertible or redeemable shares.

(7) If a company fails to comply with subsection (3) or (4)—

(*a*) the company shall be guilty of an offence and liable, in the case of subsection (3), to the penalty set out in section 492(1) and in the case of subsection (4) to the penalty set out in section 492(3); and

(*b*) every officer of the company who is in default shall be guilty of an offence and liable, in the case of subsection (3), to the penalty set out in section 493(1) and in the case of subsection (4) to the penalty set out in section 493(2).

66. Purchase of own shares

(1) A company may with the approval of the Board and of an ordinary resolution of shareholders purchase or otherwise acquire its own shares:

Provided that the shares are fully paid up and its constitution does not forbid it from doing so.

(2) The approval pursuant to subsection (1) may be a general approval or a specific approval for a particular acquisition.

(3) If the approval under subsection (1) is a general approval, it shall be valid only until the next annual meeting or it may be revoked or varied by ordinary resolution by any general meeting of the company at any time prior to such annual meeting.

(4) Subject to subsection (10), before a company enters into any arrangement to purchase its own shares, the Board shall resolve that it is not aware of any information that has not been disclosed to shareholders which is material to an assessment of the value of the shares, and as a result of which the terms on which the shares are being acquired or the consideration to be provided for the shares are unfair to shareholders whose shares are to be acquired.

(5) Save as provided under subsections (10) and (11), a company that proposes to acquire shares that are issued by it shall deliver or mail a copy of the written offer or circular to each shareholder on record as at the date of the offer, in such manner as may be provided in the constitution of the company for sending any notice of meeting to shareholders—

(*a*) stating the number of its issued shares which the company proposes to acquire;

(*b*) specifying the terms and reasons for the offer; and

(*c*) providing the disclosure required by subsection (12).

[22 of 2018, s. 14(a) w.e.f. 3 June 2019.]

(6) The provisions of sections 313 to 315 shall apply so far as they reasonably extend to all documents issued in terms of subsection (5).

(7) Where in response to any offer to acquire shares, the shareholders propose to dispose of a greater number of shares than the company offered to acquire, the company shall acquire from all shareholders who offered to sell, *pro rata* as nearly as possible disregarding fractions:

Provided that this section shall not apply to the acquisition of shares in terms of transactions effected on a stock exchange within Botswana or to acquisition of shares by an investment company with variable capital.

(8) A company that acquires shares issued by it shall, in such form as may be prescribed and within 30 days from the date the shares are acquired, notify the Registrar of the date and number of shares that it has acquired.

[22 of 2018, s. 14(b) w.e.f. 3 June 2019.]

(9) A stock exchange within Botswana may, in addition to any requirements contained in this Act, determine further requirements with which a company whose shares are listed on such exchange shall comply prior to such company acquiring its own shares.

(10) Subsections (4), (5) and (8) shall not apply to an investment company with variable capital which is licensed under the Collective Investment Undertakings Act (Cap. 56:09).

(11) Subsection (5) shall not apply to—

(*a*) an offer which is made to all shareholders to acquire a proportion of their shares which, would if accepted, leave unaffected relative voting and distribution rights, and affords a reasonable opportunity to shareholders to accept the offer;

(*b*) an offer to which all shareholders have consented in writing;

(*c*) an offer made pursuant to a unanimous shareholder agreement under section 247;

(*d*) an offer made pursuant to an approval by unanimous resolution; or

(*e*) where the purchase or acquisition is made on a stock exchange in accordance with the rules of the stock exchange.

(12) The disclosure required for the purposes of subsection (5) is a document that sets out—

(*a*) the nature and terms of the offer, and if made to specified shareholders only, names of those shareholders;

(*b*) the nature and extent of any relevant interest of any director of the company in any shares the subject of the offer; and

(*c*) the text of the resolution required by subsection (4), together with such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed acquisition.

67. Liability of directors and shareholders where solvency test not satisfied

(1) The directors of a company, who, contrary to the provisions of section 65(5), are party to allowing the company to acquire any share issued by it, shall be jointly and severally liable to restore to the company any amount so paid and not otherwise recovered by the company, subject to any relief granted by the court under section 517.

(2) A director who is liable under subsection (1) may apply to the court for an order directing any shareholder or former shareholder to pay, to the company, any money that was paid to such shareholder contrary to section 65(5).

(3) Where the acquisition by the company, of shares issued by it, is in contravention of the provisions of section 66(5), any creditor who was a creditor at the time of acquisition or any shareholder may apply to the court for an order and the company may, if it thinks it equitable to do so—

(*a*) order a shareholder or former shareholder to pay to the company any money or return any consideration that was paid or provided by the company to acquire the shares;

(*b*) order the company to issue an equivalent number of shares to the shareholder or former shareholder;

(*c*) make such order as it considers appropriate.

(4) A proceeding to enforce a liability imposed by this section shall be brought within three years after the date of completion of the acquisition.

(5) Nothing contained in this section shall limit or diminish any liability which any person may incur under this Act or any other law, or the common law.

(6) For the purposes of this section "director of a company" includes a director of a holding company of such company.

68. Cancellation of shares repurchased

(1) Subject to sections 69 and 70, shares that are acquired by a company pursuant to section 66 or section 100 are deemed cancelled immediately on acquisition.

(2) Shares are acquired for the purposes of subsection (1) on the date on which the company would, apart from this section, become entitled to exercise the rights attached to the shares.

(3) On the cancellation of a share under this section, the rights and privileges attached to that share expire; but the share may be reissued in accordance with this Part.

69. Company may hold its own shares

(1) Shares acquired by a company pursuant to section 66 or section 98 shall not be deemed cancelled under section 68(1) if—

(*a*) the constitution of the company expressly permits the company to hold its own shares;

(*b*) the Board of the company resolves that the shares concerned shall not be cancelled on acquisition; and

(*c*) the number of shares acquired, when aggregated with shares of the same class held by the company pursuant to this section at the time of the acquisition, does not exceed five per cent of the shares of

that class previously issued by the company, excluding shares previously deemed to be cancelled under section 68(1).

(2) Shares acquired by a company pursuant to section 66 or section 98 that, pursuant to this section, are not deemed cancelled shall be held by the company in itself.

(3) A share that a company holds in itself under subsection (2) may be cancelled by the Board of the company resolving that the share is cancelled; and the share shall be deemed to be cancelled on the making of such a resolution.

(4) The rights and obligations attaching to a share that a company holds in itself pursuant to subsection (2) shall not be exercised by or against a company while it holds the share.

(5) Without limiting subsection (4), while a company holds a share in itself pursuant to this section, the company shall not—

(*a*) exercise any voting rights attaching to the share; or

(*b*) make or receive any distribution authorised or payable in respect of the share.

70. Reissue of shares company holds in itself

(1) Subject to subsection (2), section 53 shall apply to the transfer of a share held by a company in itself as if the transfer were the issue of the share under section 50.

(2) Subject to subsection (1), the transfer of a share by a company in itself shall not be subject to any provisions in this Act or the company's constitution relating to the issue of shares, except to the extent the company's constitution expressly applies those provisions.

(3) A company shall not grant an option to acquire a share it holds in itself or enter into any obligations to transfer such a share where the company has received notice in writing of a takeover scheme or, in the case of a listed company where the stock exchange makes a public notification to the share-market that a takeover offer for more than 20 per cent of the company's shares is to be made.

71. Enforceability of contract to repurchase shares

(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 the company would, after performance of the contract fail to satisfy the solvency test.

(2) The company has the burden of proving that performance of the contract would result in the company being unable to satisfy the solvency test.

(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 to be paid as soon as the company is lawfully able to do so or, prior to the removal of the company from the register of companies, to be ranked subordinate to the rights of creditors but in priority to the other shareholders.

72. Meaning of "redeemable"

For the purpose of this Act, unless the constitution of the company forbids the issue of redeemable shares, a share is redeemable—

(*a*) if the terms of the issue of the share, or where those terms of issue are contained in the constitution, the constitution makes provision for the redemption of the share—

(i) at the option of the company,

(ii) at the option of the holder of the share, or

(iii) on a date specified in the terms of the issue of the share or the constitution if the terms of issue are contained in the constitution; or

(*b*) for a consideration that is—

(i) specified,

(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.

73. Redemption at option of company

A redemption of a share at the option of the company is—

(*a*) an acquisition by the company of the share for the purposes of section 66(4) and (5); and

(*b*) a distribution for the purposes of section 57.

74. Redemption at option of shareholder

(1) Subject to this section, if a share is redeemable at the option of the holder of the share, and the holder gives proper notice to the company requiring the company to redeem the share—

(*a*) the company shall redeem the share on the date specified in the notice, or if no date is specified, on the date of receipt of the notice;

(*b*) the share is deemed to be cancelled on the date of redemption; and

(*c*) from the date of redemption the former shareholder ranks as an unsecured creditor of the company for the sum payable on redemption.

(2) A redemption under this section—

(*a*) is not a distribution for the purposes of section 58 and 60; and

(*b*) is deemed to be a distribution for the purposes of subsections (1) and (5) of section 63 of this Act.

75. Redemption on fixed date

(1) Subject to this section, if a share is redeemable on a specified date—

(*a*) the company shall redeem the share on that date;

(*b*) the share is deemed to be cancelled on that date; and

(*c*) from that date the former shareholder ranks as an unsecured creditor of the company for the sum payable on redemption.

(2) A redemption under this section—

(*a*) is not a distribution for the purposes of sections 58 and 60; and

(*b*) is deemed to be a distribution for the purposes of subsections (1) and (3) of section 63.

76. Restrictions on giving financial assistance

(1) A company shall not give financial assistance directly or indirectly to any person for the purpose of or in connection with the acquisition of its own shares, other than in accordance with this section.

(2) A company may give financial assistance for the purpose of, or in connection with, the acquisition of its own shares if the Board has previously resolved that—

(*a*) giving the assistance is in the interests of the company;

(*b*) the terms and conditions on which the assistance is given are fair and reasonable to the company and to any shareholders not receiving that assistance; and

(*c*) immediately after giving the assistance, the company will satisfy the solvency test.

(3) If the amount of any financial assistance approved under subsection (2) together with the amount of any other financial assistance given by the company which is still outstanding exceeds 10 per cent of the company's stated capital, the company shall not give the assistance unless it first obtains from its auditor or, if it does not have an auditor, from a person qualified to act as its auditor, a certificate that—

(*a*) the person has inquired into the state of affairs of the company; and

(*b*) the person is not aware of anything to indicate that the opinion of the Board as to the matters in paragraph (*b*) of subsection (2) is unreasonable in all the circumstances.

(4) The amount of any financial assistance under this section is not a distribution for the purposes of section 58.

(5) For the purposes of this section, the term "financial assistance" includes giving a loan or guarantee, or the provision of security.

77. Transactions not prohibited by section 76

Section 76 shall not apply to—

(*a*) a distribution to a shareholder approved under section 58;

(*b*) the issue of shares by the company;

(*c*) a repurchase or redemption of shares by the company;

(*d*) anything done under a compromise under Part XV or a compromise or arrangement approved under Part XVI;

(*e*) a situation where the ordinary business of a company includes the lending of money by the company in the ordinary course of business.

78. Subsidiary may not hold shares in holding company

(1) Subject to this section, a subsidiary shall not hold shares in its holding company, and, subject to subsection (6), a transfer of shares in a holding company to its subsidiary shall be void and of no effect.

(2) Subject to subsection (6), an issue of shares by a holding company to its subsidiary shall be void and of no effect.

(3) Where a company that holds shares in another company becomes a subsidiary of that other company—

(*a*) the company may, notwithstanding subsection (1), continue to hold those shares; but

(*b*) the exercise of any voting rights attaching to those shares shall be of no effect.

(4) Nothing in this section prevents a subsidiary holding shares in its holding company in its capacity as a personal representative or a trustee unless the holding company or another subsidiary 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 applies to a nominee for a subsidiary in the same way as it applies to the subsidiary.

(6) Notwithstanding the provisions of this section, a subsidiary company may, in accordance with sections 69 to 70 with any necessary adjustments, acquire shares in its holding company to a maximum of 10 per cent in the aggregate of the number of issued shares of the holding company:

Provided that this subsection shall not apply to the acquisition of shares by a holding company in its subsidiary.

79. Statement of rights to be given to shareholders

(1) Every company shall issue to a shareholder, on request, a statement that sets out—

(*a*) the class of shares held by the shareholder, the total number of shares of that class issued by the company, and the number of shares of that class held by the shareholder;

(*b*) the rights, privileges, conditions, and limitations, including restrictions on transfer, attaching to the shares held by the shareholder; and

(*c*) the relationship of the shares held by the shareholder to other classes of shares.

(2) The company is not obliged to provide a shareholder with a statement if—

(*a*) a statement has been provided within the previous six months;

(*b*) the shareholder has not acquired or disposed of shares since the previous statement was provided;

(*c*) the rights attached to shares of the company have not been altered since the previous statement was provided; and

(*d*) there are no special circumstances which would make it unreasonable for the company to refuse the request.

(3) The statement is not evidence of title to the shares or of any of the matters set out in it.

(4) The statement shall state in a prominent place that it is not evidence of title to the shares or of the matters set out in it.

(5) If a company fails to comply with subsection (1)—

(*a*) the company shall be guilty of an offence and liable to the penalty set out in section 492(1); and

(*b*) every director of the company shall be guilty of an offence and liable to the penalties set out in section 493(1).

PART VII
Title Transfers, Share Register and Certificates (ss 80-89)

80. Lien on shares

(1) Subject to subsection (2) a company shall, unless the constitution provides otherwise, be entitled to a lien, in priority to any other claim, over every partly paid issued share, and over any dividend payable on the share, for all money due by the holder of that share to the company by way of money called or payable at a fixed time in respect of the unpaid amount owing in respect of that share.

(2) A company, other than a listed company, may, if expressly so provided in its constitution, be entitled to a lien, in priority to any other claim over all shares including fully paid up shares and over any dividend payable on those shares, for all money due by the holder of those shares to the company whether in relation to the shares or otherwise.

(3) A company may, in such manner as the directors consider appropriate, sell any share over which the company has a lien:

Provided that no sale shall be made unless—

(*a*) a sum in respect of which the lien exists is presently payable; and

(*b*) until the expiry of 14 days after a written notice, stating and demanding payment of such part of the amount in respect of which the privilege or lien exists as is presently payable, has been given to the registered holder for the time of the share, or the person entitled to the share by reason of the death or bankruptcy of the registered holder.

(4) The directors may, to give effect to any sale under subsection (2), authorise a person to transfer the shares sold to the purchaser of the shares, who shall be registered as the holder of the share comprised in any such transfer, and shall not be bound to see to the application of the purchase money, nor shall the title of the purchaser to the share be affected by any irregularity or invalidity in the proceedings relating to the sale.

(5) The proceeds of the sale shall be received by the company and applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and any residue shall, subject to a like lien for sums not presently payable as existed upon the share before the sale, be paid to the person entitled to the share at the date of the sale.

(6) The directors may, unless the constitution provides otherwise, decline to register the transfer of a share on which the company has a lien.

81. Transfer of shares

(1) Subject to the constitution of the company and any other written law, shares in a company may be transferred by the entry of the name of the transferee on the share register in accordance with this section.

(2) For the purpose of transferring shares, a transfer form signed by the present holder of the shares or by his personal representative shall be given to—

(*a*) the company; or

(*b*) an agent of the company who maintains the share register under section 83(4).

(3) The form of transfer shall be signed by the transferee if registration has the effect of imposing on the transferee as holder of the shares a liability to the company.

(4) On receipt of a form of transfer in accordance with subsection (2) and (3), the company shall forthwith enter or cause to be entered the name of the transferee on the share register as holder of the shares, unless—

(*a*) the Act or the constitution expressly permits the Board to refuse or delay registration for the reasons stated;

(*b*) the Board resolves within one month of receipt of the transfer to refuse or delay the registration of the transfer, and the resolution sets out in full the reasons for doing so; and

(*c*) notice of the resolution, including those reasons, is sent to the transferor and to the transferee within five days of the resolution being passed by the Board.

(4A) A company that transfers a share in the company shall, in such form as may be prescribed and within 20 days from the date the transfer is made, notify the Registrar of the transfer.

[22 of 2018, s. 15 w.e.f. 3 June 2019.]

(5) Subject to the constitution of a company, the Board may refuse or delay the registration of a transfer of shares under subsection (4) where the holder of the shares has failed to pay to the company an amount due in respect of those shares, whether by way of consideration for the issue of the shares or in respect of sums payable by the holder of the shares in accordance with the constitution.

(6) Subsections (2) to (5) shall not apply to securities traded on a stock market of a Stock Exchange under a scheme for the electronic transfer of shares approved and publicly notified by a Stock Exchange.

(7) Where a company fails to comply with subsection (4)—

(*a*) the company shall be guilty of an offence and liable to the penalty set out in section 491(1); and

(*b*) every director of the company shall be guilty of an offence and liable to the penalty set out in section 492(1).

82. Transfer of shares by operation of law

(1) Shares in a company may pass by operation of law notwithstanding the constitution of the company.

(2) A transfer of the share or other interest of a deceased shareholder of a company made by his executor shall, although the executor is not himself a shareholder, be as valid as if he had been a member at the date of the transfer, subject to the Capital Transfer Act (Cap. 53:02) and any law relating to the administration of the estate of a deceased person.

83. Company to maintain share register

(1) A company having a share capital shall maintain a share register that records the shares issued by the company, and in the case of a public company the register shall state—

(*a*) whether, under the constitution of the company or the terms of issue of the shares, there are any restrictions or limitations on the transfer of shares; and

(*b*) where any document that contains the restrictions or limitations may be inspected.

(2) The share register shall state, with respect to each class of shares—

(*a*) the names, alphabetically arranged, and the latest known address of each person who is, or has within the last seven years been, a shareholder;

(*b*) the number of shares of that class held by each shareholder within the last seven years; and

(*c*) the date of any—

(i) issue of shares to,

(ii) repurchase or redemption of shares from, or

(iii) transfer of shares by or to, each shareholder within the last seven years, and in relation to the transfer, the name of the person to or from whom the shares were transferred.

(3) In the case of a company which does not have a share capital, including a close company, the register required to be kept by this section may be called a register of members and shall state—

(*a*) the names and addresses of the members;

(*b*) the date at which each person was entered in the register as a member; and

(*c*) the date at which any person ceased to be a member, and the references in this Act to a share register shall be read as referring to this register of members.

(4) An agent may maintain the share register of the company provided that the agent is a person, firm or corporation which is qualified to be the secretary of a public company in accordance with section 162.

(5) Every company having more than 50 shareholders shall, unless the share register is in such a form as to constitute in itself an index, keep an index of the names of the shareholders of the company and shall, within 10 days from the day on which any alteration is made in the share register, make any necessary alteration in the index.

(6) The index shall enable the account of each shareholder in the register to be found.

(7) If a company fails to comply with subsection (1), (2) or (4)—

(*a*) the company shall be guilty of an offence and liable to the penalty set out in section 492(1); and

(*b*) every director of the company shall be guilty of an offence and liable to the penalty set out in section 493(1).

(8) The register required to be kept by this section may be kept in electronic form provided that the information kept on the register is available to persons entitled to inspect the register.

84. Place of share register

(1) The share register may, if expressly permitted by the constitution, be divided into two or more registers kept in different places.

(2) The principal register shall be kept—

(*a*) in Botswana;

(*b*) at the registered office of the company; and

(*c*) at the office of the secretary of the company.

[7 of 2022, s. 15(a) w.e.f. 25 February 2022.]

(3) If a share register is divided into two or more registers kept in different places—

(*a*) notice of the place where each register and beneficial owner information is kept shall be delivered to the Registrar for registration within 10 working days after the share register is divided or any place where a register or beneficial owner information is kept is altered;

(*b*) a copy of every register and beneficial owner information shall be kept at the same place as the principal register; and

(*c*) if an entry is made or beneficial owner information is entered in a register other than the principal register, a corresponding entry shall be made within 10 working days in the copy of that register kept with the principal register.

[7 of 2022, s. 15(b) w.e.f. 25 February 2022.]

(4) In this section "principal register", in relation to a company—

(*a*) means—

(i) if the share register is not divided into two or more registers, the share register, or

(ii) if the share register is divided into two or more registers, the register described as the principal register in the last notice sent to the Registrar and every other register shall be a “branch register”; and

(*b*) includes beneficial owner information.

[7 of 2022, s. 15(c) w.e.f. 25 February 2022.]

(5) If a company fails to comply with subsections (2) and (3)—

(*a*) the company shall be guilty of an offence and liable to the penalty set out in section 492(1); and

(*b*) every director of the company shall be guilty of an offence and liable to the penalty set out in section 493(1).

85. Share register as evidence of legal title

(1) Subject to section 87, the entry of the name of a person in the share register as holder of a share is *prima facie* evidence that legal title to the share vests in that person.

(2) A company may 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.

86. Secretary's duty to supervise share register

(1) It is the duty of the secretary to take reasonable steps to ensure that the share register is properly kept and that share transfers are promptly entered on it in accordance with section 83.

(2) A secretary who fails to comply with subsection (1) shall be guilty of an offence and liable to the penalty set out in section 492(1).

87. Power of court to rectify share register

(1) If the name of person is wrongly entered in, or omitted from, the share register of a company, the person aggrieved, or a shareholder, may apply to the court for—

(*a*) rectification of the share register;

(*b*) compensation for loss sustained; or

(*c*) both rectification and compensation.

(2) On an application under this section the court may order—

(*a*) rectification of the register;

(*b*) payment of compensation by the company or a director of the company for any loss sustained; or

(*c*) rectification and payment of compensation.

(3) On an application under this section, the court may decide—

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

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

88. Trusts not to be entered

No notice of a trust, whether express, implied, or constructive, may be entered on the share register or be received by the Registrar, except where the beneficial owner is a trust.

[7 of 2022, s. 16 w.e.f. 25 February 2022.]

89. Share certificate

(1) Subject to subsection (2), a public company shall, within 20 working days after the issue, or registration of a transfer, of shares in the company, as the case may be, send a share certificate to every holder of those shares stating—

(*a*) the name of the company;

(*b*) the class of shares held by that person; and

(*c*) the number of shares held by that person.

(2) Nothing in subsection (1) applies in relation to shares which can be transferred under a system for electronic trading approved by a Stock Exchange in Botswana pursuant to a scheme which does not require a share certificate for the transfer of shares.

(3) A shareholder in a company, not being a company to which subsection (1) or subsection (2) applies, may apply to the company for a certificate relating to some or all of the shareholder's shares in the company.

(4) On receipt of an application for a share certificate under subsection (3), the company shall within 20 working days after receiving the application—

(*a*) if the application relates to some but not all of the shares, separate the shares shown in the register as owned by the applicant into separate parcels, one parcel being the shares to which the share certificate relates, and the other parcel being any remaining shares; and

(*b*) in all cases send to the shareholder a certificate stating—

(i) the name of the company,

(ii) the class of shares held by the shareholder, and

(iii) the number of shares held by the shareholder to which the certificate relates.

(5) Notwithstanding section 81, where a share certificate has been issued, a transfer of the shares to which it relates shall not be registered by the company unless the form of transfer required by that section is accompanied by the share certificate relating to the share, or by evidence as to its loss or destruction and, if required, an indemnity in a form required by the Board.

(6) Subject to subsection (1), where shares to which a share certificate relates are to be transferred, and the share certificate is sent to the company to enable the registration of the transfer, the share certificate shall be cancelled and no further share certificate issued except at the request of the transferee.

(7) If a company fails to comply with subsection (1) or subsection (4)—

(*a*) the company shall be guilty of an offence and liable to the penalty set out in section 492(1); and

(*b*) every director of the company shall be guilty of an offence and liable to the penalty set out in section 493(1).

PART VIII
Shareholders and their Rights and Obligations (ss 90-110)

90. Meaning of "shareholder"

In this Act, the term "shareholder", in relation to a company, means—

(*a*) in the case of a company having a share capital—

(i) a person whose name is entered in the share register as the holder for the time being of one or more shares in the company,

(ii) until the person's name is entered in the share register, a person named as a shareholder in an application for the registration of a company at the time of registration of the company, or

(iii) until the person's name is entered in the share register, a person who is entitled to have that person's name entered in the share register under a registered amalgamation proposal as a shareholder in an amalgamated company;

(*b*) in the case of a close company or a company limited by guarantee—

(i) a person, or

(ii) until the person's name is entered in the register of members, a person named as a member in an application for the registration of the company at the time of registration of the company; and

(*c*) in the case of a company limited by guarantee, until the person's name is entered in the register of members, a person who is entitled to have that person's name entered in the share register under a registered amalgamation proposal as a member in an amalgamated company.

91. Liability of shareholders

(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 or member to the company is limited to—

(*a*) in the case of a company limited by shares any amount unpaid on a share held by the shareholder;

(*b*) in the case of a company limited by guarantee any amount which the member has undertaken to contribute to the company in the event of its being wound-up;

(*c*) in the case of a close company any amount which the member has contributed to the company or undertaken or agreed to contribute to the company under section 250;

(*d*) any liability expressly provided for in the constitution of the company;

(*e*) any liability under sections 130, 158 and 160;

(*f*) any liability to repay a distribution received by the shareholder or member to the extent that the distribution is recoverable under section 63; or

(*g*) any liability under section 92.

(3) Nothing in this section affects the liability of a shareholder or member to a company under a contract, including a contract for the issue of shares, or for any delict, or breach of a fiduciary duty, or other actionable wrong committed by the shareholder.

92. Liability for calls and forfeiture of shares

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

(2) Where—

(*a*) all or part of the consideration payable in respect of the issue of a share remains unsatisfied; and

(*b*) the person to whom the share was issued no longer holds that share, liability in respect of that unsatisfied consideration does not attach to subsequent holders of the share, but remains the liability of the person to whom the share was issued, or of any other person who assumed that liability at the time of issue.

(3) The calls on shares, in respect of any amount unpaid on the shares by the shareholders, and the forfeiture of shares, where any person fails to pay on any call or any instalment of a call for which such person is liable at the time appointed for payment, shall be made in accordance with the provisions of the Seventh Schedule.

93. Shareholders not required to acquire shares by alteration to constitution

Notwithstanding anything in the constitution of the company, a shareholder is not bound by an alteration of the constitution of a company that—

(*a*) requires the shareholder to acquire or hold more shares in the company than the number held on the date the alteration is made; or

(*b*) increases the liability of the shareholder to the company, unless the shareholder agrees in writing to be bound by the alteration either before, on, or after it is made.

94. Exercise of powers reserved to shareholders

(1) Subject to section 247, powers reserved to the shareholders of a company by this Act may be exercised only—

(*a*) at a meeting of shareholders pursuant to section 105 or section 106; or

(*b*) by a resolution *in lieu* of a meeting pursuant to section 107.

(2) Powers reserved to the shareholders of a company by the constitution of the company may be exercised —

(*a*) subject to the constitution, at a meeting of shareholders pursuant to section 105 or section 106;

(*b*) by a resolution *in lieu* of a meeting pursuant to section 107; or

(*c*) in the case of a private company or a close company by a unanimous agreement under section 247.

95. Exercise of powers by ordinary resolution

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

(2) An ordinary resolution is a resolution that is approved by a simple majority of the votes of those shareholders entitled to vote and voting on the question.

96. Powers exercised by special resolution

(1) Notwithstanding the constitution of a company, when shareholders exercise a power to—

(*a*) adopt a constitution or alter or revoke the company's constitution;

(*b*) approve a major transaction;

(*c*) approve an amalgamation of the company under section 224; or

(*d*) wind-up the company, the power shall be exercised by special resolution.

(2) A special resolution pursuant to paragraph (*a*), (*b*) or (*c*) of subsection (1) can be rescinded only by a special resolution.

(3) A special resolution pursuant to paragraph (*d*) of subsection (1) cannot be rescinded in any circumstances.

(4) At any meeting at which a special resolution is submitted, a declaration of the chairman that the resolution is carried, shall unless a poll is demanded, be conclusive evidence of that fact without proof of the number or proportion of the votes recorded in favour or against the resolution.

97. Management review by shareholders

(1) Notwithstanding anything in this Act or the constitution of the company, the chairman of a meeting of shareholders of a company shall allow a reasonable opportunity for shareholders at the meeting to question, discuss, or comment on the management of the company.

(2) Notwithstanding anything in this Act or the constitution of the company, a meeting of shareholders may pass a resolution under this section which makes recommendations to the Board on matters affecting the management of the company.

(3) Unless carried as a special resolution or unless the constitution so provides, any recommendation under subsection (2) shall not be binding on the Board.

98. Shareholder may require company to purchase shares

Where—

(*a*) a shareholder is entitled to vote on the exercise of one or more of the powers set out in—

(i) section 96(1)(*a*), and the proposed alteration imposes or removes a restriction on the business or activities in which the company may engage, or

(ii) section 96(1)(*b*) or (*c*);

(*b*) the shareholders resolved, pursuant to section 96, to exercise the power;

(*c*) the shareholder cast all the votes attached to shares registered in the shareholder's name and having the same beneficial owner against the exercise of the power; or

(*d*) the resolution to exercise the power was passed under section 107, the shareholder did not sign the resolution, that shareholder is entitled to require the company to purchase those shares in accordance with section 99.

99. Notice requiring purchase

(1) A shareholder of a company who is entitled to require the company to purchase shares by virtue of section 98 may—

(*a*) within 10 working days of the passing of the resolution at a meeting of shareholders; or

(*b*) where the resolution was passed under section 107, before the expiration of 10 working days after the date on which notice of the passing of the resolution is given to the shareholder, give a written notice to the company requiring the company to purchase those shares.

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

(*a*) agree to the purchase of the shares by the company;

(*b*) arrange for some other person to agree to purchase the shares;

(*c*) apply to the court for an order under section 102 or section 103; or

(*d*) arrange, before taking the action concerned, for the resolution to be rescinded in accordance with section 96 or decide in the appropriate manner not to take the action concerned, as the case may be.

(3) The Board shall, within the 20 working days give written notice to the shareholder of the Board's decision under this subsection.

100. Purchase by company

(1) Where the Board agrees under section 99(2)(*a*) to the purchase of the shares by the company, it shall, on giving notice under that subsection or within five working days thereafter—

(*a*) nominate a fair and reasonable price for the shares to be acquired; and

(*b*) give notice of the price to the holder of those shares.

(2) A shareholder who considers that the price nominated by the Board is not fair or reasonable, shall forthwith give notice of objection to the company.

(3) If, within 10 working days of giving notice to a shareholder under subsection (1), no objection to the price has been received by the company, the company shall, on such date as the company and the shareholder agree or, in the absence of agreement, as soon as practicable, purchase all the shares at the nominated price.

(4) If, within 10 working days of giving notice to a shareholder under subsection (1), an objection to the price has been received by the company, the company shall—

(*a*) refer the question of what is a fair and reasonable price to arbitration and nominate a suitably qualified and independent arbitrator;

(*b*) give notice to the shareholder of the reference to arbitration and the name and particulars of the arbitrator; and

(*c*) within five working days, pay a provisional price in respect of each share equal to the price nominated by the Board.

(5) A reference to arbitration under this section is deemed to be a submission to arbitration.

(6) The arbitrator shall expeditiously determine a fair and reasonable price for the shares on the day prior to the date on which the vote of the shareholders authorising the action was taken or the date on which written consent of the shareholders without a meeting was obtained excluding any appreciation or depreciation directly or indirectly induced by the action, and that price shall be binding on the company and the shareholder for all purposes.

(7) In the case of shares which are listed on a Stock Exchange or traded on a stock market, the arbitrator shall determine the price for the shares as being the price at which such shares are traded on the Stock Exchange or stock market as at the close of business on the day prior to the date on which the vote of shareholders authorising the action was taken or the date on which written consent of shareholders without a meeting was obtained, excluding any appreciation or depreciation directly or indirectly induced by the action, and that value shall be binding on the company and the shareholder for all purposes.

(8) The arbitrator may—

(*a*) award interest on any balance payable or excess to be repaid under subsection (7) of this section at such rate as he considers appropriate having regard to whether the provisional price paid or the reference to arbitration, as the case may be, was reasonable;

(*b*) provide for interest to be paid to or by the shareholder whose shares are to be purchased; and

(*c*) award costs to the shareholder where the arbitrator considers this to be just.

(9) If—

(*a*) the company fails to refer a question to arbitration in accordance with subsection (4); or

(*b*) the arbitrator to whom the matter is referred by the company is not independent of the company, or is not suitably qualified to conduct the arbitration the shareholder who has given a notice of objection under subsection (2) may apply to the court to appoint an arbitrator, and the court may appoint such person as it considers appropriate to act as arbitrator for the purposes of this section.

(10) A purchase of shares by a company under this section—

(*a*) is deemed not to be a distribution for the purposes of section 58;

(*b*) is deemed to be a distribution for the purposes of section 63(1) and (3).

101. Purchase of shares by third party

(1) Section 100 applies to the purchase of shares by a person with whom the company has entered into an arrangement for purchase in accordance with section 99(2)(*b*) subject to such modifications as may be necessary, and, in particular, as if references in that section to the Board and the company were references to that person.

(2) Every holder of shares that are to be purchased in accordance with the arrangement is indemnified by the company in respect of loss suffered by reason of the failure by the person who has agreed to purchase the shares to purchase them at the price nominated or fixed by arbitration, as the case may be.

102. Court may grant exemption

(1) A company to which a notice has been given under section 99 may apply to the court for an order exempting it from the obligation to purchase the shares to which the notice relates on the grounds that—

(*a*) the purchase would be disproportionately damaging to the company; or

(*b*) the company cannot reasonably be required to finance the purchase; or

(*c*) it would not be just and equitable to require the company to purchase the shares.

(2) On an application under this section, the court may make an order exempting the company from the obligation to purchase the shares, and may make any other order it considers appropriate, including an order—

(*a*) setting aside a resolution of the shareholders;

(*b*) directing the company to take, or refrain from taking, any action specified in the order;

(*c*) requiring the company to pay compensation to the shareholders affected; or

(*d*) that the company be put into liquidation.

(3) The court shall not make an order under subsection (2) on either of the grounds set out in paragraph (*a*) or paragraph (*b*) of subsection (1) unless it is satisfied that the company has made reasonable efforts to arrange for another person to purchase the shares in accordance with section 99(2)(*b*).

103. Court may grant exemption if company is insolvent

(1) If—

(*a*) a notice is given to a company under section 99;

(*b*) the Board has resolved that the purchase by the company of the shares to which the notice relates would result in it failing to satisfy the solvency test; and

(*c*) the company has, having made reasonable efforts to do so, been unable to arrange for the shares to be purchased by another person in accordance with section 99(2)(*b*), the company shall apply to the court for an order exempting it from the obligation to purchase the shares.

(2) The court may, on an application under subsection (1), if it is satisfied that the purchase of the shares would result in the company failing to satisfy the solvency test, and the company has made reasonable efforts to arrange for the shares to be purchased by another person in accordance with section 99(2)(*b*), make—

(*a*) an order exempting the company from the obligation to purchase the shares;

(*b*) an order suspending the obligation to purchase the shares; or

(*c*) such other order as it considers appropriate, including any order referred to in section 102(2).

(3) For the purposes of this section, the stated capital of a company shall not be taken into account in determining whether the company will, after the purchase, fail to satisfy the solvency test provided that if a company has entered into an agreement with a creditor pursuant to section 59(3) the stated capital shall be taken into account to the extent required by that agreement unless the creditor's prior consent is obtained.

104. Variation of class rights

(1) Where the share capital of a company is divided into different classes of shares, a company may not take action which varies the rights attached to a class of shares unless that variation is approved by a special resolution or with the consent in writing of the holders of 75 per cent of the shares of that class.

(2) Where the variation of rights attached to a class of shares is approved under subsection (1) and the company becomes entitled to take the action concerned, the holder of a share of that class, who did not consent to or cast any votes in favour of the resolution for the variation, may apply to the court for an order under section 174, or may require the company to purchase those shares in accordance with sections 98 to 103.

(3) The expression "variation" in this section includes abrogation and the expression "varied" shall be construed accordingly.

(4) A resolution which would have the effect of diminishing the proportion of the total votes exercisable at a general meeting of the company by the holders of the existing shares of a class or of reducing the proportion of the dividends or distributions payable at any time to the holders of the existing shares of a class, shall be deemed to be a variation of the rights of the class.

(5) The company shall within one month from the date of the consent or resolution referred to in subsection (1) file with the Registrar in the prescribed form the particulars of such consent or resolution, and if default is made in complying with this provision, the company, and every director and officer thereof who knowingly is a party to the default, shall be guilty of an offence and shall be liable on conviction to the penalty set out in section 492(1).

105. Annual meeting of shareholders

(1) Subject to subsection (2) the Board of a company shall call an annual meeting of shareholders to be held —

(*a*) once in each calendar year;

(*b*) not later than six months after the balance sheet date of the company; and

(*c*) not later than 15 months after the previous annual meeting.

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

(3) The company shall hold the meeting on the date on which it is called to be held.

(4) The business to be transacted at an annual meeting shall, unless already dealt with by the company, include—

(*a*) the consideration and approval of the financial statements;

(*b*) the receiving of any auditor's report;

(*c*) the consideration of the annual report;

(*d*) the appointment of any directors whose appointment on an annual or rotational basis is required by the constitution of the company;

(*e*) the appointment of any auditor pursuant to section 195, where relevant; and

(*f*) an opportunity for shareholders to question, discuss or comment on the management of the company in accordance with section 97(1).

106. Special meetings of shareholders

(1) A special meeting of shareholders entitled to vote on an issue may be called at any time by—

(*a*) the Board; or

(*b*) a person who is authorised by the constitution to call the meeting.

(2) A special meeting shall be called by the Board on the written request of shareholders holding shares carrying together not less than 10 per cent of the voting rights entitled to be exercised on the issue.

107. Resolution *in lieu* of meeting

(1) A company need not hold any particular meeting if all members entitled to attend that meeting agree thereto in writing and in that event a unanimous resolution shall be deemed to be a resolution passed at that meeting on the date on which the last signature to that resolution is affixed.

(2) A special meeting shall be called by the Board on the written request of shareholders holding shares carrying together not less than 60 per cent of the voting rights entitled to be exercised on the issue.

[6 of 2011, s. 3.]

(3) A resolution may be signed under subsection (1) without any prior notice being given to shareholders.

108. Court may call meeting of shareholders

(1) If the court is satisfied that—

(*a*) it is impracticable to call or conduct a meeting of shareholders in the manner prescribed by this Act or the constitution; or

(*b*) it is in the interests of a company that a meeting of shareholders be held, the court may order a meeting of shareholders to be held or conducted in such manner as the court directs.

(2) Application to the court may be made by a director, or a shareholder, or a creditor of the company.

(3) The court may make the order on such terms as to the costs of conducting the meeting and as to security for those costs as the court considers appropriate, and the court may give such directions as it considers appropriate including the direction that the legal personal representative of any deceased member may exercise all or any of the powers that the deceased member could have exercised if he or she were present at the meeting.

109. Proceedings at meetings

(1) Subject to subsection (2) the provisions of the Second Schedule govern proceedings at meetings of shareholders of a company.

(2) The constitution of the company may make provision for any of the matters that the Second Schedule states may be subject to the constitution of the company.

110. Shareholders entitled to receive distributions, attend meetings and exercise rights

(1) Shareholders may be entitled to—

(*a*) receive distributions;

(*b*) exercise pre-emptive rights to acquire shares in accordance with section 52; or

(*c*) exercise any other right or receive any other benefit under this Act or the constitution.

(2) The shareholders entitled under subsection (1) are—

(*a*) if the Board fixes a date for the purpose, those shareholders whose names are registered in the share register on that date;

(*b*) if the Board does not fix a date for the purpose, those shareholders whose names are registered in the share register on the day on which the Board passes the resolution concerned.

(3) A date shall not be fixed under subsection (2) that precedes by more than 20 working days the date on which the proposed action will be taken.

(4) The shareholders who are entitled to receive notice of a meeting of shareholders are—

(*a*) if the Board fixes a date for the purpose, those shareholders whose names are registered in the share register on that date;

(*b*) if the Board does not fix a date for the purpose, those shareholders whose names are registered in the share register at the close of business on the day immediately preceding the day on which the notice is given.

(5) A date shall not be fixed under subsection (3) that precedes by more than 30 working days or less than 10 working days the date on which the meeting is to be held.

PART IX
Debentures and Registration of Charges (ss 111-125)

111. Creation and issue of debentures

A company may create and issue secured or unsecured debentures.

112. Security for debentures

(1) The binding of movable property as security for any debenture or debentures may be effected by—

(*a*) a deed of pledge and the delivery of the movable property concerned to one or more debenture-holders or to a trustee for debenture-holders; or

(*b*) a notarial bond, collateral notarial bond or notarial surety bond executed in favour of one or more debenture-holders or of a trustee for debenture-holders; or

(*c*) the pledging of incorporeal rights by means of cession of such rights, whether present or future, in due and proper form.

(2) The binding as aforesaid of immovable property may be effected by a mortgage bond, collateral mortgage bond or surety bond executed in favour of one or more debenture-holders or of a trustee for debenture-holders.

(3) A wholly owned subsidiary shall be deemed to have and always to have had the power to mortgage any of its property as collateral security for the issue of debentures by its holding company.

113. Bonds to be registered in deed registry; copies of documents to be annexed to bonds and deeds of pledge

(1) Any mortgage bond or notarial bond in pursuance of the provisions of section 112 and subsequent transactions relating thereto shall, subject to the laws governing the registration of mortgage bonds and notarial bonds, be registered in the Deeds Registry.

(2) If any such bond is in favour of one or more debenture-holders, a certified copy of the debenture concerned shall be annexed to the said bond.

(3) If any such bond is in favour of a trustee for debenture-holders, certified copies of the debenture concerned and of the trust deed by which the trustee is appointed and in which the trustee's rights and duties are defined, shall be annexed to the bond.

(4) Certified copies of the debenture concerned and of any such trust deed, if any, shall be annexed to any deed of pledge where the debentures are secured by a pledge of movable property.

114. Debenture may be registered

If any debenture is executed before a notary public, it may, subject to the provisions of section 121(1), be registered in the Deeds Registry in like manner as if it were a notarial bond.

115. Trustee for debenture holders

(1) If a company issues or agrees to issue debentures of the same class to more than 10 persons, or to any one or more persons with a view to the debentures or any of them being offered for sale to more than 10 persons, the company shall before issuing any of the debentures—

(*a*) sign under its seal a debenture trust deed; and

(*b*) procure the signature to the deed by a person qualified to act as a trustee for debenture holders.

(2) For the purposes of this section, debentures shall not be deemed to be of the same class if—

(*a*) they do not rank equally for repayment when any security created by the debenture is enforced or the company is wound-up; or

(*b*) different rights attach to them in respect of—

(i) the rate of, or dates for, payment of interest,

(ii) the dates when, or the instalments by which, the principal of the debentures will be repaid, unless the difference is solely that the class of debentures will be repaid during a stated period of time and particular debentures will be selected by the company for repayment at different dates during that period by drawings, ballot or otherwise,

(iii) any right to subscribe for or convert the debentures into shares or other debentures of the company or any other company or corporation, or

(iv) the powers of the debenture holders to realise any security.

(3) No debenture trust deed shall cover more than one class of debentures.

(4) The Fifth Schedule to the Act shall apply to the following—

(*a*) the qualification, appointment and removal of a trustee for debenture holders;

(*b*) the naming of a successor to a trustee for debenture holders;

(*c*) the matters to be set out in the trust deed;

(*d*) the powers of the trustee for debenture holders;

(*e*) the right of the trustee for debenture holders to obtain information from the borrowing company;

(*f*) meetings of debenture holders;

(*g*) the duties of the trustee for debenture holders;

(*h*) repayment of loans or deposits where the purpose stated in a prospectus issued in relation to debentures, is not achieved; and

(*i*) release of the trustee for debenture holders.

116. Issue of debentures at different dates and ranking of preference

In any bond or deed of pledge executed in favour of a trustee for debenture-holders generally, provision may be made that the debentures thereby secured or to be secured may be issued from time to time and at different dates, as the company may determine, but all such debentures, whenever issued, shall rank in preference concurrently with one another as from the date on which the pledge was constituted or the bond was registered.

117. Rights of debenture holders

(1) Every holder of a debenture secured by a pledge or a bond executed in favour of a trustee for debenture-holders generally shall, unless it is otherwise provided by the deed of pledge, bond or trust deed and copy of the debenture annexed thereto, be entitled to enforce his rights under such debenture as soon as it has been issued to him in the same manner as if he were himself the pledgee or the holder of such bond.

(2) No notice of the cession of any such debenture shall be necessary in order to confer upon any cessionary thereof the rights of the cedent.

118. Power to reissue redeemed debenture in certain cases

(1) Where a company has redeemed any debentures previously issued, not being debentures convertible into shares of the company, it shall, unless its constitution or the conditions of issue of such debentures expressly otherwise provide or the debentures have been redeemed in pursuance of any obligation on the part of the company to redeem them, (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his successors in title) have and be deemed at all times to have had power to keep the debentures alive for the purpose of re-issue, and, where a company has purported to exercise such a power, it shall have and be deemed at all times to have had power to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such a re-issue the person entitled to the debentures shall have and shall be deemed at all times to have had the same rights and priorities as if the debentures had not previously been issued.

(2) Where with the object of keeping debentures alive for the purpose of re-issue, they have been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(3) Where a company had deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4) Nothing in this section shall prejudice any power reserved to a company by its debentures or the securities therefor, to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished.

119. Debenture to be described as secured or unsecured

No debenture, debenture certificate or prospectus relating to debentures shall be issued by a company unless the term "debenture" or such other term denoting a debenture used therein is qualified by the word "secured" or "unsecured", as the case may be.

120. Form of debentures or debenture certificates

(1) No debenture or debenture certificate shall be issued by a company unless the conditions of the debenture concerned are stated on the debenture or on the debenture certificate.

(2) Any debenture or debenture certificate shall be signed by one director of the company and an officer of the company duly authorised thereto by the directors and shall, in the case where the debenture concerned is not a bearer debenture and in the case of a debenture certificate, specify the debentures, other than bearer debentures, of that company held by the person named therein.

(3) Any signature referred to in subsection (2) may be affixed to a debenture or debenture certificate by autographic or mechanical means.

(4) Any debenture or debenture certificate issued in terms of this section shall be *prima facie* evidence of the title thereto of the person named therein or, in the case of a bearer debenture, of the bearer thereof.

121. Register of pledges, cessions and bonds and Register of debenture holders

(1) Every company shall keep at its registered office a register of charges and enter therein all charges affecting property of the company, giving in each case a short description of the property charged and the

names and addresses of the persons in whose favour any charge or to whom any pledge has been delivered.

(2) Every company shall keep at its registered office a register of debenture-holders showing the number of debentures issued and outstanding and whether or not they are payable to bearer and specifying the names and addresses of the holders, other than bearers, thereof.

(3) The provisions of section 83 relating to the share register shall apply *mutatis mutandis* to the registers required to be kept by this section.

122. Special powers of court

A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

123. Perpetual debentures

Notwithstanding any other law, a condition contained in a debenture or in an agency deed for securing a debenture, whether the debenture or agency deed is issued or made before or after the commencement of this Act, shall not be invalid by reason that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period however long.

124. Debentures to bearer

(1) Subject to subsection (2) no company shall issue debentures to bearer.

(2) The Minister may grant approval to a public company to issue debentures to bearer on such terms and conditions as the Minister may require.

125. Filing of particulars of charges

(1) Every company shall, within 28 days of the creation by the company of any charge or of making any issue of debentures charged on or affecting any property of the company, file with the Registrar a statement of the particulars specified in subsection (3) or (4) in the form prescribed in the Regulations made under this Act.

(2) Where—

(*a*) a company acquires any property which is subject to a charge referred to in subsection (1), particulars of which would, if it had been created by the company after the acquisition of the property, have been required to be filed;

(*b*) a registered external company has, before registration, created a charge subject to subsection (1), particulars of which would if it had been created by the company while it was registered, have been required to be filed; or

(*c*) a registered external company has before registration acquired property which is subject to a charge subject to subsection (1) particulars of which would, if it had been created by the company after the acquisition and while it was registered, have been required to be filed, the company shall, within 28 days after the date on which the acquisition is completed or the date of the registration of the company in Botswana, as the case may be, cause a statement of the particulars specified in the form prescribed in Regulations made under this Act.

(3) Subject to subsection (4), the particulars required to be given in the statement are—

(*a*) if the charge is a charge created by the company, the date of its creation, and if the charge was a charge existing on property acquired by the company, the date of the acquisition of the property;

(*b*) the amount secured by the charge;

(*c*) a description sufficient to identify the property charged;

(*d*) the rate of interest payable on the charge, and if applicable the way in which any variable rate of interest is to be calculated;

(*e*) the name of the person entitled to the charge; and

(*f*) any prohibition or restriction contained in the instrument creating the charge, or in any agency deed, on the power of the company to create any other charge or issue debentures ranking in priority to or equally with the charge or debentures in respect of which the application is made.

(4) Where the holders of a series of debentures are entitled to the benefit of a charge the particulars required to be given in the statement are—

(*a*) the total amount secured by the whole series;

(*b*) the dates of the resolution authorising the issue of the series and the date of the agency deed or other instrument by which the security is created or defined;

(*c*) the name of the trustee for debenture holders; and

(*d*) the particulars required to be given by paragraphs (*c*) and (*e*) of subsection (3).

(5) Where a charge (including an issue of debentures), particulars of which are required to be lodged under subsection (1)—

(*a*) is transferred by the charge-holder or trustee for debenture holders;

(*b*) is modified in a material respect; or

(*c*) has its priority altered in relation to any other charge or issue of debentures, the company or in the case of transfer, the transferee, shall lodge particulars, of the name and description of the transferee and of any material modification to the terms of the charge and of any alteration in priority, such particulars to be lodged within 28 days after the making of such transfer or modification or alteration of priority.

(6) Where, in relation to a charge the particulars of which are required to be lodged under subsection (1)—

(*a*) the debt for which the charge was given has been paid or satisfied in whole or in part; or

(*b*) the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking of the company concerned, the company shall lodge a certificate of satisfaction in whole or in part, or of the fact that the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking, as the case may be.

(7) The certificate shall be supported by evidence sufficient to satisfy the Registrar of the payment, satisfaction, release or cessation referred to in subsection (6).

PART X
Directors and Secretaries - their Powers and Duties (ss 126-163)

126. Meaning of "director" and "Board"

(1) In this Act, "director", in relation to a company, includes—

(*a*) a person occupying the position of director or alternate director of the company by whatever name called; and

(*b*) for the purposes of sections 130 to 136, 140 to 144 and 158—

(i) a person in accordance with whose directions or instructions a person referred to in paragraph (*a*) of this subsection may be required or is accustomed to act,

(ii) a person in accordance with whose directions or instructions the Board of the company may be required or is accustomed to act, and

(iii) a person who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the constitution of the company, would fall to be exercised by the Board; and

(*c*) for the purposes of sections 140 to 144 a person to whom a power or duty of the Board has been directly delegated by the Board with the person's consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the Board.

(2) Paragraphs (*b*) and (*c*) of subsection (1) do not include a person to the extent that the person acts only in a professional capacity.

(3) In this Act, the terms "Board" and "Board of directors", in relation to a company, mean—

(*a*) directors of the company who number not less than the required *quorum* acting together as a Board of directors; or

(*b*) if the company has only one director, that director.

127. Management of company

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

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

(3) Subsections (1) and (2) are subject to any modifications, exceptions, or limitations contained in this Act or in the company's constitution.

128. Major transactions

(1) A company shall not enter into a major transaction or make a substantial gift unless the transaction is—

(*a*) approved by special resolution; or

(*b*) contingent on approval by special resolution.

(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 the value 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;

"substantial gift" in relation to a company means making voluntary contributions to any charitable or other fund, other than a pension fund for the benefit of employees of the company or a related corporation, of any amounts which, in any financial year, will in the aggregate exceed P100,000, or two per cent of the net profits of the company for the last preceding financial year, whichever is the lesser.

(3) Nothing in the definition of the term "major transaction" in subsection (2)(*c*) applies by reason only of the company giving, or entering into an agreement to give, a charge secured over 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) No lender or other person dealing with a company shall be concerned to see or inquire whether the conditions of this section have been fulfilled and no debt incurred or contract entered into with the company by a person dealing with it shall be invalid or ineffectual, except in the case of actual notice to that person, at the time when the debt was incurred or the contract was entered into, that the company was acting in breach of this section.

129. Delegation of powers

(1) Subject to any restrictions in the constitution of the company, the Board of a company may delegate to a committee of directors, a director or employee of the company, or any other person, any one or more of its powers other than its powers under any of the sections of this Act set out in the Third Schedule.

(2) A Board that delegates a power under subsection (1) is responsible for the exercise of the power by the delegate as if the power had been exercised by the Board, unless the Board—

(*a*) believed on reasonable grounds at all times before the exercise of the power that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution; and

(*b*) has monitored, by means of reasonable methods properly used, the exercise of the power by the delegate.

130. Duty of directors to act in good faith and in best interest of company

(1) Subject to this section it shall be the duty of the directors of a company—

(*a*) to exercise their powers in accordance with this Act and with the limits and subject to the conditions and restrictions established by the company's constitution;

(*b*) to obtain the authorisation of a general meeting before doing any act or entering into any transaction for which the authorisation or consent of a general meeting is required by this Act or by the company's constitution;

(*c*) to exercise their powers honestly in good faith in the best interests of the company and for the respective purposes for which such powers are explicitly or impliedly conferred;

(*d*) to exercise the degree of care, diligence and skill required by section 158;

(*e*) not to agree to the company incurring any 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;

(*f*) to account to the company for any monetary gain, or the value of any other gain or advantage, obtained by them in connection with the exercise of their powers, or by reason of their position as directors of the company, except remuneration, pensions provisions and compensation for loss of office in respect of their directorships of any company which are dealt with in accordance with section 159;

(*g*) not to make use of or disclose any confidential information received by them on behalf of the company as directors otherwise than as permitted and in accordance with section 140;

(*h*) not to compete with the company or become a director or officer of a competing company, unless it is approved by the company under section 133;

(*i*) if directors are interested in a transaction to which the company is a party to disclose such interest pursuant to sections 134 and 135;

(*j*) not to use any assets of the company for any illegal purpose or a purpose in breach of paragraphs (*a*) and (*c*), and not to do, or knowingly allow to be done, anything by which the company's assets may be damaged or lost (otherwise than in the ordinary course of carrying on its business);

(*k*) to transfer forthwith to the company all cash or assets acquired on its behalf (whether before or after its incorporation) or as the result of employing its cash or assets, and until such transfer is effected to hold such cash or assets on behalf of the company and to use it only for the purposes of the company;

(*l*) to attend meetings of the directors of the company with reasonable regularity, unless prevented from so doing by illness or other reasonable excuse;

(*m*) to keep proper accounting records in accordance with sections 189 and 190.

(2) A director of a company that is a wholly-owned subsidiary may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company, act in a manner which the director believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.

(3) A director of a company that is a subsidiary (but not a wholly owned subsidiary) may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company and with the prior agreement of the shareholders (other than its holding company), act in a manner which the director believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.

(4) A director of a company incorporated to carry out a joint venture between the shareholders may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, if expressly permitted to do so by the constitution of the company, act in a manner which the director believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company.

(5) Subject to subsection (6) the duties imposed by this section shall be owed to the company, and not to the shareholders, debenture holders or creditors of the company.

(6) An application may be made to the court by any shareholder or in the case of a breach of paragraphs (*a*), (*b*), (*j*), (*k*) and (*m*) of subsection (1) by any debenture holder for a declaration that any act or transaction, or proposed act or transaction, by the directors or any director or former director involves a breach of any of their

said duties, and an interdict to restrain the directors or any director or former director from doing any such proposed act or entering into any such proposed transaction; and

(7) An action for damages for breach of the said duties may be brought in the name of the company by a member under section 166.

131. Exercise of powers in relation to employees

(1) Nothing in section 130 shall limit the power of a director to make provision, for the benefit of employees of the company, in connection with the company ceasing to carry on the whole or part of its business.

(2) In this section—

"employees" includes former employees and the dependants of employees or former employees; but does not include an employee or former employee who is or was a director of the company; and

"company" includes a subsidiary of a company.

132. Use of information and advice

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

(*a*) an employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;

(*b*) a professional adviser or expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence;

(*c*) any other director or committee of directors upon which the director did not serve in relation to matters within the director's or committee's designated authority.

(2) Subsection (1) applies to a director only if the director—

(*a*) acts in good faith;

(*b*) makes proper inquiry where the need for inquiry is indicated by the circumstances; and

(*c*) has no knowledge that such reliance is unwarranted.

133. Approval of the company

(1) The approval of the company for the purposes of section 130(1)(*h*) and of section 140(1)(*d*) shall require that after full disclosure of all material facts, including the nature and extent of any interest of the director, the transaction has been specifically authorised by either—

(*a*) a form of resolution which has been circulated to all the members and is signed by three-fourths of all members entitled to attend and vote at a general meeting; or

(*b*) an ordinary resolution of the company passed at a general meeting at which neither the director concerned, nor the holder of any share in which he is beneficially interested, or held by any nominee or relative of the director either directly or indirectly, has voted as member on such resolution, or if such person has voted such vote or votes are not counted.

(2) Subject to subsection (3) the approval of the company in accordance with subsection (1) may be given either before or after the occurrence of the transaction to which it relates.

(3) A resolution approving a transaction or transactions or series of related transactions which has or have already taken place shall not be effective for purposes of subsection (1) unless it was signed or passed not later than 15 months after the date when the transaction or the first of the series of transactions took place.

134. Meaning of "interested"

(1) Subject to subsection (2), for the purposes of this Act, a director of a company or beneficial owner is interested in a transaction to which the company is a party if, and only if, the director—

[7 of 2022, s. 18(*a*) w.e.f. 25 February 2022.]

(*a*) is a party to, or will or may derive a material financial benefit from, the transaction;

(*b*) has a material financial interest in another party to the transaction;

(*c*) is a director, beneficial owner, officer, or trustee of another party to, or person who will or may derive a material financial benefit from, the transaction, not being a party or person that is—

[7 of 2022, s. 18(*b*) w.e.f. 25 February 2022.]

(i) the company's holding company being a holding company of which the company is a wholly-owned subsidiary, or

(ii) a wholly-owned subsidiary of the company, or

(iii) a wholly-owned subsidiary of a holding company of which the company is also a wholly-owned subsidiary;

(*d*) is the parent, child, or spouse of another party to, or person who will or may derive a material financial benefit from, the transaction; or

(*e*) is otherwise directly or indirectly materially interested in the transaction.

(2) For the purposes of this Act, a director or beneficial owner of a company is not interested in a transaction to which the company is a party if the transaction comprises only the giving by the company of security to a third party which has no connection with the director or beneficial owner, at the request of the third party, in respect of a debt or obligation of the company for which the director, beneficial owner or another person has personally assumed responsibility in whole or in part under a guarantee, indemnity, or by the deposit of a security.

[7 of 2022, s. 18(*c*) w.e.f. 25 February 2022.]

135. Disclosure of interest

(1) A director of a company shall, forthwith after becoming aware of the fact that he or she is interested in a transaction or proposed transaction with the company, cause to be entered in the interests register (if it is required to keep one), and, if the company has more than one director, disclose to the Board of the company and enter in the minutes of directors meetings—

(*a*) if the monetary value of the director's interest is able to be quantified, the nature and monetary value of that interest; or

(*b*) if the monetary value of the director's interest cannot be quantified, the nature and extent of that interest.

(2) A director of a company is not required to comply with subsection (1) if—

(*a*) the transaction or proposed transaction is between the director and the company; and

(*b*) the transaction or proposed transaction is or is to be entered into in the ordinary course of the company's business and on usual terms and conditions.

(3) For the purposes of subsection (1), a general notice entered in the interests register or disclosed to the Board to the effect that a director is a shareholder, director, officer or trustee of another named company or other person and is to be regarded as interested in any transaction which may, after the date of the entry or disclosure, be entered into with that company or person, is a sufficient disclosure of interest in relation to that transaction.

(4) A failure by a director to comply with subsection (1) does not affect the validity of a transaction entered into by the company or the director.

(5) Every director who fails to comply with subsection (1) shall be guilty of an offence and liable to the penalty set out in section 492(2).

136. Avoidance of transactions

(1) A transaction entered into by the company in which a director of the company is interested may be avoided by the company at any time before the expiration of six months after the transaction is disclosed to all the shareholders (whether by means of the company's annual report or otherwise).

(2) A transaction cannot be avoided if the company receives fair value under it.

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

(4) If a transaction is entered into by the company in the ordinary course of its business and on usual terms and conditions, the company is presumed to receive fair value under the transaction.

(5) For the purposes of this section—

(*a*) a person seeking to uphold a transaction and who knew or ought to have known of the director's interest at the time 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 avoided on the ground of the director's interest in accordance with this section or the company's constitution.

137. Effect on third parties

The avoidance of a transaction under section 136 does not affect the title or interest of a person in or to property which that person has acquired if the property was acquired—

(*a*) from a person other than the company;

(*b*) for valuable consideration; and

(*c*) without knowledge of the circumstances of the transaction under which the person referred to in paragraph (*a*) of this section acquired the property from the company.

138. Application of sections 135 and 136 in certain cases

Nothing in section 135 and section 136 applies in relation to—

(*a*) remuneration or any other benefit given to a director in accordance with section 157; or

(*b*) an indemnity given or insurance provided in accordance with section 159.

139. Interested director may vote

Subject to the constitution of the company, a director of a company who is interested in a transaction entered into, or to be entered into, by the company, may—

(*a*) vote on a matter relating to the transaction;

(*b*) attend a meeting of directors at which a matter relating to the transaction arises and be included among the directors present at the meeting for the purpose of a *quorum*;

(*c*) sign a document relating to the transaction on behalf of the company; and

(*d*) do any other thing in his capacity as a director in relation to the transaction, as if the director were not interested in the transaction.

140. Use of company information

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

(*a*) for the purposes of the company;

(*b*) as required by law;

(*c*) in accordance with subsection (2); or

(*d*) in any other circumstances authorised by the constitution, or approved by the company under section 133.

(2) A director of a company may, if authorised by the Board under subsection (3), and if particulars of the authorisation are entered in the interests register, if the company has or is required to keep an interests register (or is otherwise disclosed to the Board and entered in the minutes of directors meetings) disclose information to—

(*a*) a person whose interests the director represents; or

(*b*) a person in accordance with whose directions or instructions the director may be required or is accustomed to act in relation to the director's powers and duties and, if the director discloses the information, the name of the person to whom it is disclosed shall be entered in the interests register or in the minutes of a directors meetings which ever is applicable, and a director if so authorised and on entering the particulars of the authorisation in the interests register or minutes of directors meetings, may otherwise disclose, make use of, or act on the information.

(3) The Board may authorise a director to disclose, make use of, or act on information if it is satisfied that to do so will not be likely to, prejudice the company.

141. Meaning of "relevant interest"

(1) For the purposes of section 143, a director of a company has a relevant interest in a share issued by the company (whether or not the director is registered in the share register as the holder of it) if the director—

(*a*) is a beneficial owner of the share;

(*b*) has the power to exercise any right to vote attached to the share;

(*c*) has the power to control the exercise of any right to vote attached to the share;

(*d*) has the power to acquire or dispose of the share; or

(*e*) has the power to control the acquisition or disposition of the share by another person; or

(*f*) under, or by virtue of, any trust, agreement, arrangement or understanding relating to the share (whether or not that person is a party to it)—

(i) may at any time have the power to exercise any right to vote attached to the share,

(ii) may at any time have the power to control the exercise of any right to vote attached to the share,

(iii) may at any time have the power to acquire or dispose of, the share, or

(iv) may at any time have the power to control the acquisition or disposition of the share by another person.

(2) Where a person would, if that person were a director of the company, have a relevant interest in a share by virtue of subsection (1) and—

(*a*) that person or its directors are accustomed or under an obligation, whether legally enforceable or not, to act in accordance with the directions, instructions, or wishes of a director of the company in relation to —

(i) the exercise of the right to vote attached to the share,

(ii) the control of the exercise of any right to vote attached to the share,

(iii) the acquisition or disposition of the share, or

(iv) the exercise of the power to control the acquisition or disposition of the share by another person;

(*b*) a director of the company has the power to exercise the right to vote attached to 20 per cent or more of the shares of that person;

(*c*) a director of the company has the power to control the exercise of the right to vote attached to 20 per cent or more of the shares of that person;

(*d*) a director of the company has the power to acquire or dispose of 20 per cent or more of the shares of that person; or

(*e*) a director of the company has the power to control the acquisition or disposition of 20 per cent or more of the shares of that person, that director has a relevant interest in the share.

(3) A person who has, or may have, a power referred to in any of paragraphs (*b*) to (*f*) of subsection (1), has a relevant interest in a share regardless of whether the power—

(*a*) is expressed or implied;

(*b*) is direct or indirect;

(*c*) is legally enforceable or not;

(*d*) is related to a particular share or not;

(*e*) is subject to restraint or restriction or is capable of being made subject to restraint or restriction;

(*f*) is exercisable presently or in the future;

(*g*) is exercisable only on the fulfilment of a condition;

(*h*) is exercisable alone or jointly with another person or persons.

(4) A power referred to in subsection (1) exercisable jointly with another person or persons is deemed to be exercisable by either or any of those persons.

(5) A reference to a power includes a reference to a power that arises from, or is capable of being exercised as the result of, a breach of any trust, agreement, arrangement, or understanding, or any of them, whether or not it is legally enforceable.

142. Relevant interests to be disregarded in certain cases

(1) For the purposes of section 143, no account shall be taken of a relevant interest of a person in a share if —

(*a*) the ordinary business of the person who has the relevant interest consists of, or includes, the lending of money or the provision of financial services, or both, and that person has the relevant interest only as security given for the purposes of a transaction entered into in the ordinary course of the business of that person;

(*b*) that person has the relevant interest by reason only of acting for another person to acquire or dispose of that share on behalf of the other person in the ordinary course of business of a sharebroker and that person is a member of a stock exchange;

(*c*) that person has the relevant interest solely by reason of being appointed as a proxy to vote at a particular meeting of members, or of a class of members, of the company and the instrument of that person's appointment is produced before the start of the meeting in accordance with clause 6(4) of the Second Schedule or by a time specified in the company's constitution, as the case may be;

(*d*) that person—

(i) is a trustee corporation or a nominee company, and

(ii) has the relevant interest by reason only of acting for another person in the ordinary course of business of that trustee corporation or nominee company; or

(*e*) the person has the relevant interest by reason only that the person is a bare trustee of a trust to which the share is subject.

(2) For the purposes of subsection (1)(*e*), a trustee may be a bare trustee notwithstanding that he is entitled as a trustee to be remunerated out of the income or property of the trust.

143. Disclosure of share dealing by directors

(1) A person who—

(*a*) is a director of a public company on the commencement of this Act; or

(*b*) becomes a director of a public company, and who has a relevant interest in any shares issued by the company shall forthwith, disclose to the Board the number and class of shares in which the relevant interest is held and the nature of the relevant interest, and ensure that the particulars disclosed to the Board are entered in the interests register.

(2) A director of a public company who acquires or disposes of a relevant interest in shares issued by the company shall, forthwith after the acquisition or disposition,—

(*a*) disclose to the Board—

(i) the number and class of shares in which the relevant interest has been acquired or the number and class of shares in which the relevant interest was disposed of, as the case may be,

(ii) the nature of the relevant interest,

(iii) the consideration paid or received, and

(iv) the date of the acquisition or disposition; and

(*b*) ensure that the particulars disclosed to the Board under paragraph (*a*) of this subsection are entered in the interests register.

144. Restrictions on share dealing by directors

(1) If a director of a company has information in that person's capacity as a director or employee of the company or a related company, being information that would not otherwise be available to the director, but which is information material to an assessment of the value of shares or other securities issued by the company or a related company, the director may acquire or dispose of those shares or securities if—

(*a*) in the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the shares or securities; or

(*b*) in the case of a disposition, the consideration received for the disposition is not more than the fair value of the shares or securities.

(2) For the purposes of subsection (1), the fair value of shares or securities is to be determined on the basis of all information known to the director or publicly available at the time.

(3) Subsection (1) does not apply in relation to a share or security that is acquired or disposed of by a director only as a nominee for the company or a related company.

(4) Where a director acquires shares or securities in contravention of subsection (1)(*a*), the director is liable to the person from whom the shares or securities were acquired for the amount by which the fair value of the

shares or securities exceeds the amount paid by the director.

(5) Where a director disposes of shares or securities in contravention of subsection (1)(*b*), the director is liable to the person to whom the shares or securities were disposed of for the amount by which the consideration received by the director exceeds the fair value of the shares or securities.

(6) Nothing in this section applies in relation to a company to which section 324 applies.

145. Number of directors

A company shall have at least—

(*a*) two directors, if it is a public company;

(*b*) one director, if it is a private company other than a close company; or

(*c*) one director, if it is a foreign company or a company limited by guarantee, ordinarily resident in Botswana.

[22 of 2018, s. 16 w.e.f. 3 June 2019.]

146. Qualifications of directors

(1) A natural person who is not disqualified by subsection (2) of this section 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*) except with the leave of the court a person whose estate is sequestrated as insolvent or who is an un-rehabilitated insolvent whether in Botswana or elsewhere;

(*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 sections 500 and 501;

(*d*) except with the leave of the court a person who has been at any time convicted (whether in Botswana or elsewhere) of theft, fraud, forgery or uttering a forged document, or perjury and has been sentenced therefore to serve a term of imprisonment without the option of a fine or to a fine exceeding P5,000;

(*e*) except with the leave of the court a person who has been removed by a competent court from an office of trust on account of misconduct;

(*f*) a person who has been adjudged to be of unsound mind; and

(*g*) in relation to any particular company, a person who does not comply with any qualifications for directors contained in the constitution of that company.

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

147. Director's consent required

A person shall not be appointed a director of a company unless that person has consented in writing to be a director and certified that he or she is not disqualified from being appointed or holding office as a director of a

company.

148. Appointment of first and subsequent directors

(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 otherwise provides, be appointed by ordinary resolution.

149. Court may appoint directors

(1) If—

(*a*) there are no directors of a company, or the number of directors is less than the *quorum* required for a meeting of the Board; and

(*b*) it is not possible or practicable to appoint directors in accordance with the company's constitution—

a shareholder or creditor of the company may apply to the court to appoint one or more persons as directors of the company, and the court may make an appointment if it considers that it is in the interests of the company to do so.

(2) An appointment may be made on such terms and conditions as the court considers appropriate.

150. Appointment of directors to be voted on individually

(1) Subject to the constitution of a company, the shareholders of that company may vote on a resolution to appoint a director of the company only if—

(*a*) the resolution is for the appointment of one director; or

(*b*) the resolution is a single resolution for the appointment of 2 or more persons as directors of the company and a separate resolution that it be so voted on has first been passed without a vote being cast against it.

(2) A resolution moved in contravention of subsection (1) is void even though the moving of it was not objected to at the time.

(3) Subsection (2) does not limit the operation of section 154.

(4) No provision for the automatic re-appointment of retiring directors in default of another appointment applies on the passing of a resolution in contravention of subsection (1).

(5) Nothing in this section prevents the election of 2 or more directors by ballot or poll.

151. Removal of directors

(1) Notwithstanding anything in its constitution or in any agreement between it and a director, a director of a public company may be removed from office by an ordinary resolution passed at a meeting called for the purpose or for purposes that include the removal of a director.

(2) Subject to the constitution of a company, a director of a private company may be removed from office by special resolution passed at a meeting called for the purpose or for purposes that include the removal of the

director.

(3) The notice of meeting shall state that the purpose or a purpose of the meeting is the removal of the director.

152. Director ceasing to hold office

(1) Subject to section 153, the office of director of a company shall be vacated if the person holding that office—

(*a*) resigns in accordance with subsection (2);

(*b*) is removed from office in accordance with this Act or the constitution of the company;

(*c*) becomes disqualified from being a director pursuant to section 146;

(*d*) dies; or

(*e*) otherwise vacates office in accordance with the constitution of the company.

(2) A director of a company may resign office by signing a written notice of resignation and delivering it to the address for service of the company and such notice is effective when it is received at that address or at a later time specified in the notice.

(3) Notwithstanding the vacation of office, a person who held office as a director remains liable under the provisions of this Act that impose liabilities on directors in relation to acts and omissions and decisions made while that person was a director.

153. Resignation of last remaining director

(1) Notwithstanding section 152(1), where a company has only one director, that director may not resign office until that director has called a meeting of shareholders to receive notice of the resignation, and to appoint one or more new directors.

(2) A notice of resignation given by the sole director of a company shall not take effect, notwithstanding its terms, until the date of the meeting of shareholders called in accordance with subsection (1).

154. Validity of director's acts

The acts of a person as a director are valid even though—

(*a*) the person's appointment was defective; or

(*b*) the person is not qualified for appointment.

155. Notice of change of directors and secretary

(1) The Board of a company shall ensure that notice in the prescribed form of—

(*a*) a change in the directors or the secretary of a company; or

(*b*) a change in the name or the residential address or other particulars of a director or secretary of a company, is delivered to the Registrar for registration.

(2) A notice under subsection (1) shall—

(*a*) specify the date of the change;

(*b*) include the full name and residential address of every person who is a director or secretary of the company from the date of the notice;

(*c*) in the case of the appointment of a new director or secretary, have attached the form of consent and certificate required pursuant to section 147; and

(*d*) be delivered to the Registrar within 20 working days of—

(i) the change occurring, in the case of the appointment or resignation of a director or secretary, or

(ii) the company first becoming aware of the change, in the case of the death of a director or secretary or a change in the name or residential address of a director or secretary.

(3) If the Board of a company fails to comply with this section, every director and the secretary of the company shall be guilty of an offence and liable to the penalty set out in section 492(2).

156. Proceedings of board

Subject to the constitution of a company, the provisions set out in the Fourth Schedule govern the proceedings of the Board of a company.

157. Remuneration, loans and other benefits

(1) Subject to subsections (5) to (9), unless otherwise provided by the constitution—

(*a*) the company by ordinary resolution shall approve the remuneration of the directors and any benefits payable to the directors including any compensation for loss of employment of a director or former director;

(*b*) the Board may determine the terms of any service contract with a managing director or other executive director; and

(*c*) the directors may be paid all travelling, hotel and other expenses properly incurred by them in attending any Board meetings of the company or in connection with the business of the company.

(2) Subject to subsections (3) and (4), the constitution may provide that the Board, instead of the general meeting of a company, may approve—

(*a*) the payment of remuneration or the provision of other benefits to a director; or

(*b*) the payment by a company to a director or former director of compensation for loss of office, if the Board considers it is fair to the company.

(3) In any case coming under subsection (2) the Board shall ensure that forthwith after authorising the making of the payment or the provision of the benefit as the case may be, particulars of the payment or benefit are entered in the interests register if the company has one, and in the minutes of directors' meetings.

(4) Where a payment is made or other benefit provided to which subsection (2) applies shareholders who consider that the payment was not fair to the company and who hold between them not less than 10 per cent of the company's voting share capital may within one month of the date on which the existence of the payment was first made known to the shareholders (whether through the annual report, production of the interests register to a shareholders' meeting or otherwise) require the directors to call a general meeting to approve the payment by way of ordinary resolution and to the extent to which the payment is not approved by ordinary resolution, it shall constitute a debt payable by the director to the company.

(5) Subject to subsection (6) and section 247 a company shall not—

(*a*) make a loan to a director of the company; or

(*b*) enter into any guarantee or provide any security in connection with a loan made by any person to a director of the company.

(6) Subsection (5) shall not prevent a company from—

(*a*) making a loan to a related company, or entering into a guarantee or providing security in connection with a loan made by any person to a related company;

(*b*) making a loan to a director who is engaged in the salaried employment of the company or its holding company, in accordance with a scheme for the making of loans to employees of the company which is approved by the general meeting of the company in so far as its application to directors is concerned;

(*c*) making a loan in respect of a director who holds salaried employment under the company or in a holding company or subsidiary of the company;

(*d*) providing a director with funds to meet expenditure incurred or to be incurred by him for the purpose of the company or for the purpose of enabling him to perform his duties as an officer of the company; or

(*e*) making a loan in the ordinary course of the business of lending money, where that business is carried on by the company.

(7) Where a loan is made in contravention of subsection (5) the loan shall be voidable at the option of the company and the loan shall be immediately repayable upon being avoided by the company, notwithstanding the terms of any agreement relating to the loan.

(8) Where a transaction other than a loan to a director is entered into by a company in contravention of subsection (5)—

(*a*) the director shall be liable to indemnify the company for any loss or damage resulting from the transaction; and

(*b*) the transaction shall be voidable at the option of the company unless—

(i) the company has been indemnified under paragraph (*a*) for any loss or damage suffered by it, or

(ii) any rights acquired by a person other than the director in good faith and for value, without actual notice of the circumstances giving rise to the breach of this section, would be affected by its avoidance.

(9) If a company fails to comply with subsection (5)—

(*a*) the company shall be guilty of an offence and liable to the penalty set out in section 492(2); and

(*b*) every director of the company who authorises or permits the company to enter into the relevant transaction shall be guilty of an offence and liable to the penalty set out in section 493(2).

158. Standard of care and civil liability of officers

(1) Every officer of a company shall exercise—

(*a*) the powers and discharge the duties of his office honestly, in good faith and in the best interests of the company; and

(*b*) the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) Where a director of a public company also holds office as an executive the director shall exercise that degree of care, diligence and skill which a reasonably prudent and competent executive in that position would exercise.

(3) Without limiting any liability of a director under section 130, where an officer commits a breach of duties under this Part—

(*a*) the officer and every person who knowingly participated in the breach shall be liable to compensate the company for any loss it suffers as a result of the breach;

(*b*) the officer shall be liable to account to the company for any profit made by the officer as a result of such breach; and

(*c*) any contract or other transaction entered into between the officer and the company in breach of those duties may be rescinded by the company.

159. Indemnity and insurance

(1) Except as provided in this section, a company shall not indemnify, or directly or indirectly effect insurance for, an officer or employee of the company or a related company in respect of—

(*a*) liability for any act or omission in his capacity as an officer or employee; or

(*b*) costs incurred by that officer or employee in defending or settling any claim or proceeding relating to any such liability.

(2) An indemnity given in breach of this section is void.

(3) A company may, unless its constitution provides otherwise, indemnify an officer or employee of the company or a related company for any costs incurred by him in any proceedings—

(*a*) that relate to liability for any act or omission in his capacity as an officer or employee; and

(*b*) in which judgment is given in his favour, or in which he is acquitted, or which is discontinued or in which he is granted relief under section 517, or where proceedings are threatened and such threatened action is abandoned or not pursued.

(4) A company, unless its constitution provides otherwise, may indemnify an officer or employee of the company or a related company in respect of—

(*a*) liability to any person other than the company or a related company for any act or omission in his capacity as an officer or employee; or

(*b*) costs incurred by that officer or employee in defending or settling any claim or proceeding relating to any such liability, not being criminal liability or liability for conduct involving a reckless disregard of the interests of the company or a liability under section 160 or liability in respect of a breach, in the case of an officer, of the duty specified in section 130(1)(*c*).

(5) A company, unless its constitution provides otherwise, and with the prior approval of the Board, may effect insurance for an officer or employee of the company or a related company in respect of—

(*a*) liability, not being criminal liability, for any act or omission in his capacity as an officer or employee;

(*b*) costs incurred by that officer or employee in defending or settling any claim or proceeding relating to any such liability; or

(*c*) costs incurred by that officer or employee in defending any criminal proceedings—

(i) that have been brought against the officer or employee in relation to any act or omission in that person's capacity as an officer or employee, and

(ii) in which that person is acquitted.

(6) The Board of a company shall ensure that particulars of any indemnity given to, or insurance effected for, any officer or employee of the company or a related company are forthwith entered in the interests register, if the company has one, or otherwise in the minutes of the directors' meeting.

(7) Where insurance is effected for an officer or employee of a company or a related company and the provisions of either subsection (5) or subsection (6) have not been complied with, the officer or employee is personally liable to the company for the cost of effecting the insurance except to the extent that the officer or employee proves that it was fair to the company at the time the insurance was effected.

(8) In this section—

"effect insurance" includes pay, whether directly or indirectly, the costs of the insurance;

"employee" includes a former employee;

"indemnify" includes relieve or excuse from liability, whether before or after the liability arises; and "indemnity" has a corresponding meaning; and

"officer" includes a former officer.

160. Duty of directors on insolvency

A director of a company who is knowingly party to the contracting of a debt by the company and had, at the time the debt was contracted, no reasonable or probable expectation, that the company would be able to pay the debt, shall, on the application of the liquidator or of the creditor concerned in the winding-up of the company, be liable for the whole or any part of any loss suffered by the creditor to whom the debt was incurred.

161. Secretary

(1) Every company other than a close company shall have one or more secretaries each of whom shall, subject to subsection (6), be a natural person who has reached the age of majority and who shall ordinarily be resident in Botswana.

(2) No person shall be appointed as a secretary of a company unless that person has—

(*a*) in the prescribed form consented to be a secretary; and

(*b*) the qualifications prescribed in section 162.

(3) A person named as a secretary of the company in an application for incorporation or in an amalgamation proposal shall hold office as a secretary from the date of the incorporation of the company or the date the amalgamation proposal is effective, as the case may be, until that person ceases to hold office in accordance with this Act or the constitution of the company.

(4) Unless the constitution of the company otherwise provides, the Board may appoint or remove a secretary of the company.

(5) The office of the secretary shall not be left vacant for more than three months at any time.

(6) A firm or corporation may be appointed as secretary provided that—

(*a*) at least one member of the firm or one director of the corporation is ordinarily resident in Botswana and accepts responsibility for the work of the firm or corporation as secretary;

(*b*) the member of the firm or director of the corporation who accepts responsibility for the work of the firm or corporation as secretary under paragraph (*a*) is qualified to act as a secretary under section 162; and

(*c*) the names and business addresses of all partners or directors of the firm or corporation for the time being shall be provided on the request of the Registrar or any person dealing with the company.

162. Qualifications of Company Secretary

(1) The following persons shall not be qualified to be appointed and shall not act as secretary of a company —

(*a*) a body corporate, except in accordance with section 161(6);

(*b*) an undischarged bankrupt;

(*c*) a person who is the sole director of the company; or

(*d*) an auditor of the company.

(2) Subject to subsection (3), it shall be the duty of the directors of a company to take all reasonable steps to ensure that the secretary of the company is a person who appears to them to have the requisite knowledge and experience to discharge the functions of secretary of the company and such qualifications, if any, as may be prescribed under subsection (3) and by Regulations made under the Act.

(3) The secretary of a public company and non-exempt private company shall be—

(*a*) either a qualified auditor, a member of the Botswana Institute of Chartered Accountants, a member of the Southern African Institute of Chartered Secretaries and Administrators, or a legal practitioner; or

[22 of 2018, s. 17(a) w.e.f. 3 June 2019.]

(*b*) a member of a professional association of company secretaries approved by the Minister under subsection (2).

(4) The Minister may, for the purposes of subsection (3)(*b*), approve an association of company secretaries which shall consist of persons qualified under subsection (3)(*a*) and notify such approval by publication in the *Gazette*.

[22 of 2018, s. 17(b) w.e.f. 3 June 2019.]

163. Duties of Company Secretary

For the purposes of this section, the duties of a company secretary are—

(*a*) to be responsible to the Board of the company for the preparation of all returns required to be filed with the Registrar of Companies and Business Names including those under—

(i) section 34 for the change of name,

(ii) sections 43(4) and 175 for the alteration of the constitution,

(iii) section 50 for the issue of shares,

(iv) section 125 for registration of particulars of charges,

(v) section 53(2) for the certificate regarding shares issued for consideration other than cash,

(vi) section 55 for the notice of call and of increase in stated capital,

(vii) section 155 for the notice of change of directors and secretary,

(viii) section 184(2) for the notice of change of registered office,

(ix) section 209 for the registration of financial statement, and

(x) section 217 for the annual return;

(*b*) to be responsible to the Board of the company for issuing all notices of meeting and responding to all enquiries in relation to notices of meetings;

(*c*) attending meetings of directors and general meetings of shareholders and keeping minutes of those meetings and together with the Chairman of Directors, signing the minutes as a true and correct record;

(*d*) to be responsible to the Board of directors for maintaining the register of shareholders, debenture holders, directors and secretaries, substantial shareholders and charges;

(*e*) ensuring, together with the directors, that the company keeps accounting records pursuant to sections 205 to 208 and that annual financial statements are prepared and presented at the Annual Meeting; and

(*f*) to be responsible to the Board of directors for maintaining an adequate system of record keeping in relation to the correspondence, affairs and activities of the company.

PART XI
Enforcement (ss 164-176)

164. Interpretation

In this Part, unless the context otherwise requires, the terms—

"entitled person", "former shareholder", and "shareholder" include a reference to the executor or other personal representative of an entitled person, former shareholder, or shareholder and a person to whom shares of any of those persons have passed by operation of law.

165. Interdict

(1) The court may, on an application under this section, make an order restraining a company that, or a director of a company who, proposes to engage in conduct that would contravene the constitution of the company or this Act, from engaging in that conduct.

(2) An application may be made by—

(*a*) the company;

(*b*) a director or shareholder of the company; or

(*c*) an entitled person.

(3) If the court makes an order under subsection (1) it may also grant such consequential relief as it considers appropriate.

(4) An order may not be made under this section in relation to conduct or a course of conduct that has been completed.

(5) The court may, at any time before the final determination of an application under subsection (1), make, as an interim order, any order that it is empowered to make under that subsection.

166. Derivative actions

(1) Subject to subsection (3), the court may, on the application of a shareholder or other entitled person or director of a company, grant leave to that shareholder, entitled person or director to—

(*a*) bring proceedings in the name and on behalf of the company or any subsidiary; or

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

(2) Without limiting subsection (1), in determining whether to grant leave under that subsection, the court shall have regard to—

(*a*) the likelihood of the proceedings succeeding;

(*b*) the costs of the proceedings in relation to the relief likely to be obtained;

(*c*) any action already taken by the company or subsidiary to obtain relief; or

(*d*) the interests of the company or subsidiary in the proceedings being commenced, continued, defended, or discontinued, as the case may be.

(3) Leave to bring proceedings or intervene in proceedings may be granted under subsection (1), only if the court is satisfied that either—

(*a*) the company or related company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or

(*b*) it is in the interests of the company or subsidiary that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole.

(4) Notice of the application shall be served on the company or subsidiary.

(5) The company or related company—

(*a*) may appear and be heard; and

(*b*) shall inform the court, whether or not it intends to bring, continue, defend, or discontinue the proceedings, as the case may be.

(6) Except as provided in this section, a shareholder or other entitled person or director of a company is not entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company or subsidiary.

167. Costs of derivative action to be met by company

(1) The court shall, on the application of the shareholder or other entitled person or director to whom leave was granted under section 166 to bring or intervene in the proceedings, order that the whole or part of the reasonable costs of bringing or intervening in the proceedings, including any costs relating to any settlement, compromise, or discontinuance approved under section 166, shall be met by the company unless the court considers that it would be unjust or inequitable for the company to bear those costs.

(2) A shareholder or other entitled person or director may bring an application for costs under this section at the same time as an application is brought under section 166 to bring or intervene in the proceedings, and the court may make an order on that application at the same time as the court grants leave under section 166.

168. Powers of court where leave granted

The court may, at any time, make any order it considers appropriate in relation to proceedings brought by a shareholder or other entitled person or a director or in which a shareholder or other entitled person or director intervenes, as the case may be, with leave of the court under section 166, and without limiting the generality of this section may—

(*a*) make an order authorising the shareholder or any other person to control the conduct of the proceedings;

(*b*) give directions for the conduct of the proceedings;

(*c*) make an order requiring the company or the directors to provide information or assistance in relation to the proceedings; or

(*d*) make an order directing that any amount ordered to be paid by a defendant in the proceedings shall be paid, in whole or part, to former and present shareholders or other entitled person of the company or subsidiary instead of to the company or the related company.

169. Compromise, settlement, or withdrawal of derivative action

No proceedings brought by a shareholder or other entitled person or a director or in which a shareholder or a director intervenes, as the case may be, with leave of the court under section 166, may be settled or compromised or discontinued without the approval of the court.

170. Actions by shareholders against directors

(1) A shareholder or former shareholder may bring an action against a director for breach of a duty owed to him as a shareholder.

(2) An action may not be brought under subsection (1) to recover any loss in the form of a reduction in the value of shares in the company or a failure of the shares to increase in value by reason only of a loss suffered, or a gain forgone, by the company.

(3) Without limiting subsection (1), the duties of directors set out in—

(*a*) section 135, which relates to the duty to disclose interests; and

(*b*) section 143, which relates to the duty to disclose share dealings—

are duties owed to shareholders.

(4) Without limiting subsection (1) the duties of directors set out in—

(*a*) section 130(1)(*c*), (*f*), (*h*), (*j*), (*k*) and (*m*), which relates to the duty of directors—

(i) to act in good faith and in the best interests of the company,

(ii) not to compete with the company, and

(iii) to properly use and account for assets;

(*b*) section 160, which relates to the duty of directors on insolvency;

(*c*) section 130(1)(*e*), which relates to the duty not to agree to a company incurring certain obligations;

(*d*) section 158, which relates to a director's duty of care;

(*e*) section 140, which relates to the use of company information; and

(*f*) section 189 and 190, which relate to keeping proper accounting records, are duties owed to the company and not to shareholders.

171. Actions by shareholders against company

A shareholder of a company may bring an action against the company for breach of a duty owed by the company to him as a shareholder.

172. Actions by shareholder to require company to act

Notwithstanding section 171, the court may, on the application of a shareholder of a company, if it is satisfied that it is just and equitable to do so, make an order requiring the company or its Board or a director of the company to take any action that is required to be taken by the constitution of the company or this Act and, on making the order, the court may grant such other consequential relief as it considers appropriate.

173. Representative actions

Where a shareholder of a company brings proceedings against the company or a director, and other shareholders have the same or substantially the same interest in relation to the subject-matter of the proceedings, the court may appoint that shareholder to represent all or some of the shareholders having the same or substantially the same interest, and may, for that purpose, make such order as it considers appropriate including, without limiting the generality of this section, an order—

(*a*) as to the control and conduct of the proceedings;

(*b*) as to the costs of the proceedings; or

(*c*) directing the distribution of any amount ordered to be paid by a defendant in the proceedings among the shareholders represented.

174. Prejudiced shareholders

(1) A shareholder or former shareholder of a company, or any other entitled person, who considers that the affairs of a 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 prejudicial to that person in that capacity or in any other capacity, may apply to the court for an order under this section.

(2) If, on an application under this section, the court considers that it is just and equitable to do so, it may make such order as it considers appropriate including, without limiting the generality of this subsection, an order—

(*a*) requiring the company or any other person to acquire the shareholder'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*) putting the company into liquidation; or

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

(3) No order may be made against the company or any other person under subsection (2) of this section unless the company or that person is a party to the proceedings in which the application is made.

175. Alteration to constitution

(1) Notwithstanding anything in this Act, but subject to the order, where the court makes an order under section 174 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 made by an order under section 174 has the same effect as if it had been made by the shareholders of the company pursuant to section 43 and the provisions of this Act shall apply to the constitution as altered or added to.

(3) Within 10 working days of the making of an order under section 43 altering or adding to the constitution of a company, the Board of the company shall ensure that a copy of the order and the constitution as altered or added to is delivered to the Registrar for registration.

(4) If the Board of a company fails to comply with subsection (3), every director of the company shall be guilty of an offence and liable to the penalty set out in section 492(1) of this Act.

176. Ratification of certain actions of directors

(1) The purported exercise by a director or the Board of a company of a power vested in the shareholders or any other person may be ratified or approved by those shareholders or that person in the same manner in which the power may be exercised.

(2) The purported exercise of a power that is ratified under subsection (1) is deemed to be, and always to have been, a proper and valid exercise of that power.

(3) The ratification or approval under this section of the purported exercise of a power by a director or the Board does not prevent the court from exercising a power which might, apart from the ratification or approval, be exercised in relation to the action of the director or the Board.

PART XII
Administration of Companies (ss 177-188)

177. Method of contracting

(1) An obligation which, if entered into by a natural person, would, by law, be required to be in writing and signed by that person and notarially executed, may be entered into on behalf of the company in writing signed under the name of the company by—

(*a*) two or more directors of the company;

(*b*) if there is only one director, by that director whose signature shall be witnessed;

(*c*) if the constitution of the company so provides, a director, or other person or class of persons whose signature or signatures shall be witnessed; or

(*d*) one or more attorneys appointed by the company in accordance with section 178, and may in the same manner be varied or discharged.

(2) An obligation which, if entered into by individual persons, is, by law, required to be in writing, may be entered into on behalf of the company in writing by a person acting under the company's express or implied authority and may in the same manner be varied or discharged.

(3) An obligation which, if entered into by individual persons, is not, by law, required to be in writing, may be entered into on the behalf of the company in writing or orally by a person acting under the company's express or implied authority and may in the same manner be varied or discharged.

(4) Nothing in subsection (1) limits or prevents a company entering into a contract or other enforceable obligation in writing under a common seal, if it has one.

(5) Subsection (1) applies to a contract or other obligation

(*a*) whether or not that contract or obligation was entered into in Botswana; and

(*b*) whether or not the law governing the contract or obligation is the law of Botswana.

(6) All contracts made in accordance with this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto.

178. Attorneys

(1) Subject to its constitution, a company may, by an instrument in writing executed in accordance with section 177(1), appoint a person as its attorney either generally or in relation to a specified matter.

(2) An act of the attorney in accordance with the instrument binds the company.

(3) The law relating to powers of attorney shall apply, with the necessary modifications, in relation to a power of attorney executed by a company to the same extent as if the company was a natural person and as if the commencement of the liquidation or, if there is no liquidation, the removal from the register, of the company was the death of a person.

179. Pre-incorporation contracts may be ratified

Any contract made in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly registered as if it had been duly formed, incorporated and registered at the time when the contract was made if the contract or a certified copy thereof is delivered to the Registrar simultaneously with the application for incorporation in terms of section 21.

180. Warranties implied in pre-incorporation contracts

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

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

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

(2) The amount of damages recoverable in an action for breach of a warranty implied by subsection (1) of this section is the same as the amount of damages that would be recoverable in an action against the company for damages for breach by the company of the unperformed obligations under the contract if the contract had been ratified by the company.

(3) If, after its incorporation, a company enters into a contract in the same terms as, or in substitution for, a pre-incorporation contract (not being a contract ratified by the company under section 179), the liability of a person under subsection (1) of this section (including any liability under an order made by the court for the payment of damages) is discharged.

181. Failure to ratify

(1) A party to a pre-incorporation contract that has not been ratified by the company after its incorporation may apply to the court for an order—

(*a*) directing the company to return property, whether real or personal, acquired under the contract to that party;

(*b*) for any other relief in favour of that party relating to that property; or

(*c*) validating the contract whether in whole or in part.

(2) The court may, if it considers it just and equitable to do so, make any order or grant any relief it considers appropriate and may do so whether or not an order has been made under section 180(2).

182. Registered office

(1) A company shall always have a registered office in Botswana to which all communications and notices may be addressed and which shall constitute the address for service of legal proceedings on the company.

(2) Subject to section 184, the registered office of a company at a particular time is the place that is described as its registered office in the register of companies at that time.

183. Description of registered office

(1) The description of the registered office shall state the address of the registered office.

(2) Where the registered office is at the offices of any firm of a chartered accountant, attorney at law, or any other person, such description shall state-

(*a*) that the registered office of the company is at the offices of that firm or person; and

(*b*) particulars of the location in any building of those offices.

184. Change of registered office

(1) Subject to the company's constitution and to subsection (3), the Board of a company may change the registered office of the company at any time.

(2) Notice in the prescribed form of such change shall be given to the Registrar for registration within 21 days of the change.

(3) The change in the registered office takes effect on a date stated in the notice not being a date that is earlier than five working days after the notice is registered.

185. Requirement to change registered office

(1) Subject to this section, a company shall change its registered office if it is required to do so by the Registrar.

(2) The Registrar may require a company to change its registered office by notice in writing delivered or sent to the company at its registered office.

(3) The notice shall—

(*a*) state that the company is required to change its registered office by a date stated in the notice, not being a date that is earlier than 20 working days after the date of the notice;

(*b*) state the reasons for requiring the change;

(*c*) state that the company has the right to appeal to the court under section 15;

(*d*) be dated and signed by the Registrar.

(4) A copy of the notice shall also be sent to each director of the company.

(5) The Company shall change its registered office—

(*a*) by the date stated in the notice; or

(*b*) if it appeals to the court and the appeal is dismissed, within five working days after the decision of the court.

(6) If a company fails to comply with this section, every director of the company shall be guilty of an offence and liable to the penalty set out in section 492(1).

186. Company records

(1) Subject to subsection (3) and to sections 84 and 190, a company shall keep the following documents at its registered office or at such place within Botswana as is notified to the Registrar under subsection (4)—

(*a*) the constitution of the company;

(*b*) minutes of all meetings and resolutions of shareholders within the last seven years;

(*c*) the interests register if the company keeps or is required to keep one;

(*d*) minutes of all meetings and resolutions of directors and directors' committees within the last 10 years;

(*e*) certificates given by directors under this Act within the last seven years;

(*f*) the full names and addresses of the current directors and secretary;

(*g*) copies of all written communications to all beneficial owners, shareholders or all holders of the same class of shares during the last seven years, including—

(i) full names and residential addresses of natural persons identified as beneficial owners under section 21(2)(*c*) supporting documents, and

(ii) annual reports made under section 212;

[7 of 2022, s. 19(a) w.e.f. 25 February 2022.]

(*h*) copies of all financial statements and group financial statements required to be completed by section 205 to 208 for the last seven completed accounting periods of the company;

(*i*) the accounting records required by section 190 for the current accounting period and for the last seven completed accounting periods of the company;

(*j*) the share register required to be kept under section 83;

(*k*) the register of charges required to be kept under section 121(1);

(*l*) the register of debentures required to be kept under section 121(2); and

(*m*) the copies of instruments creating or evidencing charges required to be registered under section 125.

(2) The references in paragraphs (*b*), (*d*), (*e*) and (*g*) of subsection (1) to seven years and the references in paragraphs (*h*) and (*i*) of that subsection to seven completed accounting periods include such lesser periods as the Registrar may approve by notice in writing to the company:

Provided that records for a dissolved company, including beneficial owner information of the dissolved company shall be kept for 20 years or such period as may be prescribed under the Financial Intelligence Act.

[7 of 2022, s. 19(*b*) w.e.f. 25 February 2022.]

(3) Any of the records referred to in subsection (1) may be kept at a place in Botswana other than the registered office of the company only with the prior approval in writing of the Registrar provided that the accounting records may be kept at another place within Botswana provided the company complies with section 190(2).

(4) The Registrar shall record the place approved for the keeping of records under subsection (3) and that record shall be available for inspection under section 13.

(5) If a company fails to comply with subsection (1)—

(*a*) the company shall be guilty of an offence and liable to the penalty set out in section 492(2);

(*b*) every director of the company shall be guilty of an offence and liable to the penalty set out in section 493(2).

187. Form of records

(1) The records of a company required to be kept by section 186 shall be kept—

(*a*) subject to subsection (3) in the English language;

(*b*) in written form; or

(*c*) in a form or in a manner that allows the documents and information that comprise the records to be easily accessible and convertible into written form.

(2) The Board shall ensure that adequate measures exist to—

(*a*) prevent the records being falsified; and

(*b*) detect any falsification of them.

(3) A close company may keep the records referred to in section 186(1)(*b*), (*d*) and (*g*) in the English or Setswana languages.

(4) If the Board fails to comply with subsection (2) of this section, every director shall be guilty of an offence and liable to the penalty set out in section 493(2).

188. Inspection of records by directors

(1) Subject to subsection (2), every director of a company is entitled, on giving reasonable notice, to inspect the records of the company—

(*a*) in written form; and

(*b*) without charge; and

(*c*) at a reasonable time specified by the director.

(2) The court may, on application by the company, if it is satisfied that—

(*a*) it would not be in the company's interests for a director to inspect the records; or

(*b*) the proposed inspection is for a purpose that is not properly connected with the director's duties,

(*c*) direct that the records need not be made available for inspection or limit the inspection of them in any manner it considers appropriate.

PART XIII
Accounting Records, Audit and Disclosure by Companies (ss 189-221)

189. Accounting records to be kept

(1) The Board of a company shall cause accounting records to be kept that—

(*a*) correctly record and explain the transactions of the company;

(*b*) shall at any time enable the financial position of the company to be determined with reasonable accuracy;

(*c*) shall enable the directors to prepare financial statements that comply with this Act; and

(*d*) shall enable the financial statements of the company 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 it relates;

(*b*) a record of the assets and liabilities of the company;

(*c*) if the company's business involves dealing in goods—

(i) a record of goods bought and sold, except goods sold for cash in the ordinary course of carrying on a retail business, that identifies both the goods and buyers and sellers and relevant invoices, and

(ii) a record of stock held at the end of the financial year together with records of any stocktakings during the year; and

(*d*) if the company's business involves providing services, a record of services provided and relevant invoices.

(3) The accounting records shall be kept in the English language.

(4) If the Board of a company fails to comply with the requirements of this section, every director of the company shall be guilty of an offence and liable to the penalty set out in section 493(2) of this Act.

190. Place accounting records to be kept

(1) A company shall keep its accounting records at the registered office of the company or subject to subsection (2) at such other place in Botswana as the Board shall determine.

(2) Notice of any change in the place where the accounting records are kept, shall be submitted to the Registrar within 21 days after such change.

(3) If a company fails to comply with subsection (1) or (2)—

(*a*) the company shall be guilty of an offence and liable to the penalty set out in section 492(2);

(*b*) every director of the company shall be guilty of an offence and liable to the penalty set out in section 493(2).

191. Appointment of auditors

(1) Subject to this section, every public company and every non-exempt private company shall, at each annual meeting, appoint an auditor to-

(*a*) hold office from the conclusion of the meeting until the conclusion of the next annual meeting; and

(*b*) audit the financial statements of the company and, if the company is required to complete group financial statements, those group financial statements, for the accounting period next after the meeting.

(1A) A public company and a non-exempt private company shall, where it appoints an auditor under subsection (1) and within 20 days from the date the appointment is made, deliver to the Registrar, in such form as may be prescribed, a notice of the appointment of the auditor.

[22 of 2018, s. 18 w.e.f. 3 June 2019.]

(2) The Board of a company may fill any casual vacancy in the office of auditor, but while the vacancy remains, the surviving or continuing auditor, if any, may continue to act as auditor.

(3) If in the case of a company which is required to appoint an auditor—

(*a*) at an annual meeting of a company no auditor is appointed or re-appointed; or

(*b*) a casual vacancy in the office of auditor is not filled within one month of the vacancy occurring, the Registrar may appoint an auditor.

(4) A company shall, within five working days of the power becoming exercisable, give written notice to the Registrar of the fact that the Registrar is entitled to appoint an auditor under subsection (3) of this section.

(5) If a company fails to comply with subsection (4), the company and every director of the company shall be guilty of an offence and liable to the penalties set out in section 493(2).

[26 of 2008, s. 3.]

192. Auditors' fees and expenses

The fees and expenses of an auditor of a company shall be fixed-

(*a*) if the auditor is appointed at a meeting of the company, by the company at the meeting or in such manner as the company determines at the meeting;

(*b*) if the auditor is appointed by the directors, by the directors; or

(*c*) if the auditor is appointed by the Registrar, by the Registrar and paid by the company.

193. Appointment of partnership as auditor

(1) A partnership may be appointed by the firm name to be the auditor of a company if—

(*a*) at least one member of the firm is ordinarily resident in Botswana;

(*b*) at least one of the members of the firm including the member who is ordinarily resident in Botswana, are persons who are qualified for appointment under section 194;

(*c*) no member of the firm is indebted in an amount exceeding P5,000 to the company or a related corporation unless the debt is in the ordinary course of business;

(*d*) no member of the firm is—

(i) an officer or employee of the company, or

(ii) a partner, or in the employment, of a director or employee of the company or a related corporation; and

(*e*) except in the case of an exempt private company no officer of the company receives any remuneration from the firm or acts as a consultant to it on accounting or auditing matters.

(2) The appointment of a partnership by the firm name to be the auditor of a company is deemed, notwithstanding subsection (1) to be the appointment of all the persons who are partners in the firm from time to time whether ordinarily resident in Botswana or not at the date of the appointment.

(3) Where a partnership that includes persons who are not qualified to be appointed as auditors of a company is appointed as auditor of a company, the persons who are not qualified to be appointed as auditors shall not act as auditors of the company.

(4) Where a firm has been appointed as auditor of a company, and the members constituting the firm change by reason of the death, retirement, or withdrawal of a member or by reason of the admission of a new member, the firm as newly constituted shall, if it is not disqualified from acting as auditor of the company by virtue of subsection (1), be deemed to be appointed under this section as auditor of the company and that appointment shall be taken to be an appointment of all persons who are members of the firm as newly constituted.

194. Qualifications of auditors

(1) A person shall not be qualified to be appointed as an auditor of a company unless that person is a member of the Institute of Accountants of Botswana who is qualified under the rules of that Institute to conduct an audit and holds a valid practising certificate issued by the Institute.

(2) None of the following persons may be appointed or act as auditor of a company—

(*a*) a director or employee of the company;

(*b*) a person who is a partner, or in the employment, of a director or employee of the company;

(*c*) a liquidator or a person who is a receiver in respect of the property of the company;

(*d*) a body corporate except as permitted by section 193;

(*e*) a person who is a director or employee of a body corporate which is an officer of the company;

(*f*) a person who by himself, or his partner, or his employee, regularly performs the duties of secretary or accounting officer or bookkeeper to the company;

(*g*) a person who is not ordinarily resident in Botswana; or

(*h*) a person who is indebted in an amount exceeding P5,000 to the company, or to a related company unless the debt is in the ordinary course of business.

195. Automatic re-appointment

(1) An auditor of a company, other than an auditor appointed under section 196, is automatically re-appointed at an annual meeting of the company unless—

(*a*) the auditor is then not qualified for appointment;

(*b*) the company passes a resolution at the meeting appointing another person to replace him as auditor;

(*c*) an exempt private company passes a resolution under section 206 that no auditor be appointed; or

(*d*) the auditor has given notice to the company that he does not wish to be re-appointed.

(2) An auditor is not automatically re-appointed if the person who is to replace him dies, or is, or becomes incapable of, or disqualified from, appointment.

196. Appointment of first auditor

(1) The first auditor of a company may be appointed by the directors of the company before the first annual meeting, and, if so appointed, holds office until the conclusion of that meeting.

(2) If the directors do not appoint an auditor under subsection (1), the company shall appoint the first auditor at the first annual meeting of the company.

197. Replacement of auditor

(1) A company shall not appoint a new auditor in the place of an auditor who is qualified for re-appointment, unless—

(*a*) at least 20 working days' written notice of a proposal to do so has been given to the auditor; and

(*b*) the auditor has been given a reasonable opportunity to make representations to the shareholders on the appointment of another person either in writing or by the auditor or his representative speaking at a shareholders' meeting (whichever the auditor may choose).

(2) An auditor is entitled to be paid by the company reasonable fees and expenses for making the representations to shareholders.

(3) Where, on the application of the company or any other person who claims to be aggrieved by the auditor's representation being sent out or being read out at the meeting of shareholders, the court is satisfied that the rights conferred by subsection (1) are being abused to secure needless publicity of defamatory matter, the court may order—

(*a*) that the auditor's representation shall not be sent out or shall not be read at the meeting of shareholders;

(*b*) the costs of the application to the court to be paid in whole or in part by the auditor.

198. Auditor not seeking re-appointment

(1) If an auditor gives the Board of a company written notice that seeking re-appointment the auditor does not wish to be re-appointed, the Board shall, if requested to do so by that auditor—

(*a*) distribute to all shareholders and to the Registrar, at the expense of the company, a written statement of the auditor's reasons for his wish not to be re-appointed; or

(*b*) permit the auditor or his representative to explain at a shareholders' meeting the reasons for his wish not to be re-appointed.

(2) An auditor may resign prior to the annual meeting by giving notice to the company calling on the Board to call a special meeting of the company to receive the auditor's notice of resignation.

(3) Where a notice is given by an auditor under subsection (2), the auditor may, at the time of giving his notice to the Board, request the Board to distribute a written statement providing him or his representative with the opportunity to give an explanation on the same terms as are set out in subsection (1).

(4) Where a written statement is provided by the auditor under subsection (3) the provisions of section 202(3) shall apply to that statement and explanation.

(5) Where a notice of resignation is given by an auditor under this section, the appointment of the auditor shall terminate at that meeting and the business of the meeting shall include the appointment of a new auditor to the company.

(6) An auditor is entitled to be paid by the company reasonable fees and expenses for making the representations to shareholders.

199. Auditor to avoid conflict of interest

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

200. Auditor's report

(1) The auditor of a company shall make a report in accordance with the International Standards on Auditing to the shareholders on the financial statements which have been audited.

(2) The auditor's report shall state whether, in the auditor's opinion, the financial statements and any group financial statements, give a true and fair view of the financial position of the company as at the balance sheet date and of the results of its operations and its cash flows for the financial year then ended and comply with International Financial Reporting Standards, and, if they do not, the respects in which they fail to do so.

201. Access to information

(1) The Board of a company shall ensure that an auditor of a company has access at all times to the accounting records and other documents of the company.

(2) An auditor of a company is entitled to require from a director or employee of the company such information and explanations as he thinks necessary for the performance of his duties as auditor.

(3) If the Board of a company fails to comply with subsection (1), every director shall be guilty of an offence and liable to the penalty set out in section 492(3).

(4) A director or employee who fails to comply with subsection (2) shall be guilty of an offence and liable to the penalty set out in section 493(2).

(5) It is a defence to a charge under subsection (4) if the employee proves that—

(*a*) the employee did not have the information required in his possession or under his control; or

(*b*) by reason of the position occupied by the employee or the duties assigned to the employee, he was unable to give the explanations required, as the case may be.

202. Auditor's attendance at shareholders' meeting

(1) The Board of a company shall ensure that an auditor of the company—

(*a*) is permitted to attend a meeting of shareholders of the company;

(*b*) receives the notices and communications that a shareholder is entitled to receive relating to a meeting of shareholders; and

(*c*) may be heard at a meeting of shareholders which he attends on any part of the business of the meeting which concerns him as auditor.

(2) If the Board of a company fails to comply with subsection (1), every director of the company shall be guilty of an offence and liable to the penalty set out in section 493(2).

203. Company to provide auditors report to trustee for debenture holders

The auditor of a borrowing company shall, within seven days after furnishing the company with any financial statements or any report certificate or other document which the auditor is required by this Act or by the debenture trust deed to give to the company, send a copy by post to every trustee for debenture holders.

204. Duties of auditor on becoming aware of irregularity

(1) Where, in the performance of the auditor's duties as auditor of a company, the auditor becomes aware of —

(*a*) any material irregularity in the conduct of the company's financial affairs; or

(*b*) any matter which, in his opinion, is otherwise relevant to the exercise of the powers and duties imposed by this Act or by any debenture trust deed, on any trustee for debenture holders, the auditor shall, within seven days after becoming aware of the matter, send a report in writing of such matter to the Board of the company and a copy to the trustee.

(2) The auditor of a borrowing company shall, at the request of the trustee for debenture holders, furnish the trustee with such further information relating to the borrowing company as are within the auditor's knowledge and which, in the auditor's opinion, are relevant to the exercise of the powers or duties conferred or imposed on the trustee by this Act or by the trust deed.

(3) Where a report is given under subsection (1) and the matter on which the auditor has reported has not within 30 days either been remedied or reported by the Board, or in the case of a listed company to the stock exchange, or in the case of any other company to the shareholders of the company, the auditor shall forthwith provide a written report to the stock exchange or to the Registrar as the case may be.

(4) No right of action against the auditor shall be available to any person by reason only of the auditor having in good faith provided a report pursuant to subsections (1), (2) and (3).

(5) The Registrar, on receipt of the report, may require the directors to forthwith call a meeting of shareholders to be held within seven days or within such further period as the Registrar may direct, to discuss the report.

205. Obligation to prepare financial statements

(1) The Board of every company shall ensure that, within five months after the balance sheet date of the company, in the case of a public company, and within seven months after balance sheet date in the case of any other company, financial statements that comply with sections 206 to 208 are—

(*a*) completed in relation to the company and that balance sheet date; and

(*b*) dated and signed on behalf of the Board by two directors of the company, or, if the company has only one director, by that director.

(2) The Registrar may, if he considers it appropriate to do so, extend the period of five or seven months specified in subsection (1) to a period not exceeding eight or 10 months respectively.

(3) If the Board fails to comply with subsection (1), every director of the company who is in default shall be guilty of an offence and liable to the penalty set out in section 493(1).

206. Contents and form of financial statements

(1) The financial statements of a company shall give a true and fair view of—

(*a*) the state of affairs of the company as at the balance sheet date;

(*b*) the profit and loss or income and expenditure, as the case may be, of the company for the accounting period ending on that balance sheet date; and

(*c*) the other matters to which the financial statements relate.

(2) Without limiting subsection (1), in the case of public companies and non-exempt private companies the financial statements shall—

(*a*) be prepared in accordance with and comply with the International Financial Reporting Standards;

(*b*) comply with any regulations made under this Act which prescribe the form and content of financial statements for public and non-exempt private companies;

(*c*) comply with any requirement which applies to the company's financial statements under any other Act.

(3) Without limiting subsection (1) the financial statements of an exempt private company shall be prepared on the basis of generally accepted accounting principles which are appropriate for an exempt private company and shall comply with any regulations made under this Act which prescribe the form and content of financial statements for exempt private companies.

(4) If, in complying with the standards or regulations referred to in subsections (2) and (3), the financial statements do not give a true and fair view of the matters to which they relate, the directors shall add such information and explanations as will give a true and fair view of those matters.

207. Obligation to prepare group financial statements

(1) Subject to subsection (2), the Board of a company that has, on the balance sheet date of the company, one or more subsidiaries, shall in addition to complying with section 205, ensure that, within five months in the case of a public company, and within seven months in the case of any other company, after that balance sheet date, group financial statements that comply with section 208 are—

(*a*) completed in relation to that group and that balance sheet date; and

(*b*) dated and signed on behalf of the directors by two directors of the company, or, if the company has only one director, by that director.

(2) Group financial statements are not required in relation to a company and a balance sheet date if the company is at that balance sheet date the wholly owned subsidiary of any company incorporated in Botswana.

(3) Group financial statements are not required in relation to a company and a balance sheet date if the company is at the balance sheet date a virtually owned subsidiary of any company incorporated in Botswana and the parent obtains the approval of the owners of the minority interest.

(4) In the case of a public or non-exempt private company, group accounts need not deal with a subsidiary of the company in circumstances where this would not be required by the International Financial Reporting Standards.

(5) In the case of companies other than those coming under subsection (4) group accounts need not deal with a subsidiary of the company if the company's directors are of the opinion and the Registrar agrees that—

(*a*) it is impracticable, or would be of no real value to members of the company to do so in view of the insignificant amount involved, or would involve expense or delay out of proportion to the value to the members of the company; and

(*b*) the result would be misleading or harmful to the business of the company or any of its subsidiaries.

(6) The companies required by this section to prepare group financial statements are referred to for this purpose as a "group of companies" or "group".

(7) If the Board fails to comply with subsection (1), every director of the company who is in default shall be guilty of an offence and liable to the penalty set out in section 493(2).

208. Contents and form of group financial statement

(1) The financial statements of a group shall give a true and fair view of—

(*a*) the state of affairs of the company and its subsidiaries as at the balance sheet date; and

(*b*) the profit and loss or income and expenditure, as the case may be, of the company and its subsidiaries for the accounting period ending on that balance sheet date.

(2) Without limiting subsection (1), in the case of public companies and non-exempt private companies the financial statements of a group shall—

(*a*) be prepared in accordance with and comply with International Financial Reporting Standards;

(*b*) comply with any regulations made under this Act which prescribe the form and content of group financial statements of public companies and non-exempt private companies; and

(*c*) comply with any requirements which apply to the group financial statements of public companies and non-exempt private companies under any other Act.

(3) Without limiting subsection (1), the financial statements of the group in the case of an exempt private company shall comply with any regulations made under this Act which prescribe the form and content of group financial statements of exempt private companies.

(4) Where a subsidiary became a subsidiary of a company during the accounting period to which the group financial statements relate, the consolidated profit and loss statement or the consolidated income and expenditure statement for the group, shall relate to the profit or loss of the subsidiary for each part of that accounting period during which it was a subsidiary, and not to any other part of that accounting period.

(5) Subject to subsection (4), where the balance sheet date of a subsidiary of a company is not the same as that of the company, the group financial statements shall—

(*a*) if the balance sheet date of the subsidiary does not precede that of the company by more than three months, incorporate the financial statements of the subsidiary for the accounting period ending on that date, or incorporate interim financial statements of the subsidiary completed in respect of a period that is the same as the accounting period of the company; or

(*b*) in any other case, incorporate interim financial statements of the subsidiary completed in respect of a period that is the same as the accounting period of the company.

(6) Subject to subsection (4), group financial statements shall incorporate the financial statements of every subsidiary of the company.

(7) If, in complying with the standards or regulations referred to in subsections (2) and (3) the financial statements do not give a true and fair view of the matters to which they relate the directors shall add such information and explanations as will give a true and fair view of those matters.

209. Registration of financial statement

(1) Every company to which this section applies shall ensure that, statements within 20 working days after the financial statements of the company and any group financial statements are required to be signed, copies of those statements together with a copy of the auditor's report on those statements are delivered to the Registrar for registration.

(2) The copies delivered to the Registrar under this section shall be certified to be correct copies by two directors of the company, or, where the company has only one director, by that director.

(3) This section applies to every—

(*a*) public company;

(*b*) other company in which a public company holds more than 25 per cent of its share capital; and

(*c*) company which is required by any other enactment to deliver its financial statements to the Registrar for registration.

210. Meaning of "balance sheet date"

(1) In this Act, the term "balance sheet date", in relation to a company, means the close of the 30th day of June or of such other date as the Board of the company has adopted as the company's balance sheet date and notified to the Registrar under subsection (7).

(2) Subject to subsections (3) and (4), a company shall have a balance sheet date in each calendar year.

(3) A company need not have a balance sheet date in the calendar year in which it is incorporated if its first balance sheet date is in the following calendar year and is not later than 18 months after the date of its formation or incorporation.

(4) If a company changes its balance sheet date, it need not have a balance sheet date in a calendar year if—

(*a*) the period between any two balance sheet dates does not exceed 15 months; and

(*b*) the Registrar approves the change of balance sheet date before it is made.

(5) The Registrar may approve a change of balance sheet date for the purposes of subsection (4) with or without conditions.

(6) If a company adopts a balance sheet date other than the 30th day of June, or changes its balance sheet date, it shall, in the prescribed form, lodge with the Registrar, the balance sheet date of the company and the adoption or change of the balance sheet date shall have effect on the date on which the notice is lodged.

(7) The Board of a company shall ensure that, unless in the Board's opinion there are good reasons against it, the balance sheet date of each subsidiary of the company is the same as the balance sheet date of the company.

(8) If the balance sheet date of a subsidiary of a company is not the same as that of the company, the balance sheet date of the subsidiary for the purposes of any particular group financial statements shall be that preceding the balance sheet date of the company.

211. Meaning of "financial statements" and "group financial statements"

(1) In this Act, the term "financial statements", in relation to a company and a balance sheet date, means—

(*a*) a balance sheet for the company as at the balance sheet date; and

(*b*) an income statement which shall—

(i) in the case of a company trading for profit, be a profit and loss statement for the company in relation to the accounting period ending at the balance sheet date; and

(ii) in the case of a company not trading for profit, be an income and expenditure statement for the company in relation to the accounting period ending at the balance sheet date; together with any notes or documents giving information relating to the balance sheet or statement including a statement of accounting policies.

(2) In the case of companies which are required to comply with International Financial Reporting Standards the financial statements shall also include—

(*a*) a statement of changes in equity between its last two balance sheet dates;

(*b*) a cash flow statement; and

(*c*) any other statement which may from time to time be required by International Financial Reporting Standards.

(3) In this Act, the term "group financial statements", in relation to a group and a balance sheet date, means —

(*a*) a consolidated balance sheet for the group as at that balance sheet date; and

(*b*) a consolidated income statement as described in subsection (2), together with any notes or documents giving information relating to the balance sheet or statement including a statement of accounting policies.

(4) In the case of companies which are required to comply with International Financial Reporting Standards the group financial statements shall also include—

(*a*) a consolidated statement of changes in equity between the last two balance sheet dates;

(*b*) a consolidated cash flow statement; and

(*c*) any other statement which may from time to time be required by International Financial Reporting Standards.

212. Obligation to prepare annual report

(1) The Board of every company shall, in the case of a public company within five months and in the case of any other company within seven months after the balance sheet date of the company, prepare an annual report on the affairs of the company during the accounting period ending on that date.

(2) If the Board of a company fails to comply with subsection (1), every director of the company shall be guilty of an offence and liable to the penalty set out in section 493(1) of this Act.

(3) This section does not apply to a one person company.

(4) The shareholders of a private company may resolve by unanimous resolution that this section and sections 213 to 220 shall not apply to the company, and from the date of that resolution the Board shall not be required to comply with these sections, provided that if any shareholder during the period of three months after balance sheet date in any year requests the Board in writing that it comply with these sections the Board

shall comply with these sections in relation to the annual report next due and in relation to any subsequent year until any further unanimous resolution is passed under this section.

213. Sending of annual report to shareholders

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

(2) The Board of a company is not required to send an annual report to a shareholder if—

(*a*) the shareholder has given notice in writing to the company waiving the right to be sent a copy of that annual report or copies of annual reports of the company generally;

(*b*) the shareholder has not revoked that notice; and

(*c*) a copy of the report is available for inspection by the shareholder in the manner prescribed by section 219.

(3) A public company shall deliver a copy of its annual report to the Registrar for registration at the same time as delivering its financial statements for registration under section 209.

(4) If the Board of a company fails to comply with subsection (1) and subsection (3), every director of the company shall be guilty of an offence and liable to the penalty set out in section 493(1).

214. Sending of financial statements to shareholders who elect not to receive annual report

(1) The Board of a company shall cause to be sent to every shareholder of the company referred to in section 213(2), not less than 20 working days before the annual meeting of shareholders—

(*a*) financial statements for the most recently completed accounting period completed and signed in accordance with section 205 and any group financial statements for the most recently completed accounting period completed and signed in accordance with section 207; and

(*b*) any auditor's report on those financial statements and any group financial statements.

(2) If the Board of a company fails to comply with subsection (1) of this section, every director of the company shall be guilty of an offence and liable to the penalty set out in section 493(2).

215. Contents of annual report

(1) Every annual report for a company shall be in writing and be dated and, subject to subsection (3), shall—

(*a*) describe, so far as the Board believes is material for the shareholders to have an appreciation of the state of the company's affairs and will not be harmful to the business of the company or of any of its subsidiaries, any change during the accounting period in—

(i) the nature of the business of the company or any of its subsidiaries, or

(ii) the classes of business in which the company has an interest, whether as a shareholder of another company or otherwise;

(*b*) include financial statements for the accounting period completed and signed in accordance with section 205 and any group financial statements for the accounting period completed and signed in accordance with section 207;

(*c*) where an auditor's report is required under Part XIII in relation to the financial statements or group financial statements, as the case may be, included in the report, include that auditor's report;

(*d*) describe any change in accounting policies made during the accounting period;

(*e*) state particulars of entries in the interests register made during the accounting period;

(*f*) state, in respect of each director or former director of the company, the total of the remuneration and the value of other benefits received by that director or former director during the accounting period;

(*g*) state the total amount of donations made by the company and any subsidiary during the accounting period;

(*h*) state the names of the persons holding office as directors of the company as at the end of the accounting period and the names of any persons who ceased to hold office as directors of the company during the accounting period;

(*i*) state the amounts payable by the company to the person or firm holding office as auditor of the company as audit fees and, as a separate item, fees payable by the company for other services provided by that person or firm; and

(*j*) be signed on behalf of the Board by two directors of the company or, if the company has only one director, by that director.

(2) A company that is required to include group financial statements in its annual report shall include, in relation to its subsidiaries, the information specified in paragraphs (*d*) to (*j*) of subsection (1).

(3) The annual report of a company need not comply with any of paragraphs (*a*) and (*d*) to (i) of subsection (1) if all shareholders agree that the report need not do so, and such agreement is noted in the annual report.

216. Failure to disclose

Subject to the constitution of a company, the failure to send an annual report, notice, or other document to a shareholder in accordance with this Act does not affect the validity of proceedings at a meeting of the shareholders of the company if the failure to do so was accidental.

217. Annual return

(1) A company shall, in such form as may be prescribed, at least once in every year, deliver an annual return to the Registrar.

[22 of 2018, s. 19 w.e.f. 3 June 2019.]

(2) Notwithstanding subsection (1), a company may not deliver an annual return in the same year of its incorporation.

[22 of 2018, s. 19 w.e.f. 3 June 2019.]

(3) A company shall, in terms of this section, deliver its first annual return to the Registrar in the following year, on the month of its registration and such month shall be deemed to be the month in which the annual return of the company becomes due to be delivered to the Registrar, for the succeeding years.

[22 of 2018, s. 19 w.e.f. 3 June 2019.]

(4) Notwithstanding subsection (3), a company incorporated in—

(*a*) January of a particular year, shall deliver its annual return in February of the succeeding year; and

(*b*) December of a particular year, shall deliver its annual return in November of the succeeding year.

[22 of 2018, s. 19 w.e.f. 3 June 2019.]

(5) A director or secretary of a company who fails to comply with the provisions of subsection (1), commits an offence and is liable to the penalty set out in section 493(2) of this Act.

[22 of 2018, s. 19 w.e.f. 3 June 2019.]

(6) A company which fails to comply with the provisions of subsections (1) and (3), shall immediately be removed from the register.

[22 of 2018, s. 19 w.e.f. 3 June 2019.]

218. Public inspection of company records

(1) A company shall keep the following records available for records inspection in the manner prescribed in section 220 by a person who serves written notice of intention to inspect on the company—

(*a*) the certificate of incorporation or registration of the company;

(*b*) the constitution of the company, if it has one;

(*c*) the share register;

(*d*) the full names and residential addresses of the directors and beneficial owners;

[7 of 2022, s. 20 w.e.f. 25 February 2022.]

(*e*) the registered office and address for service of the company;

(*f*) the register of charges;

(*g*) copies of the instruments creating or evidencing charges which are required to be registered under section 125; and

(*h*) in the case of a public company the register of substantial shareholders.

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

(*a*) the company commits an offence and is liable on conviction to the penalty set out in section 492(1); and

(*b*) every director of the company shall be guilty of an offence and liable to the penalty set out in section 493(1).

219. Inspection of company records by shareholders

(1) In addition to the records available for public inspection, a company shall keep the following records available for inspection in the manner prescribed in section 220 by a shareholder of the company, or by a person authorised in writing by a shareholder for the purpose, who serves written notice of intention to inspect on the company—

(*a*) minutes of all meetings and resolutions of shareholders;

(*b*) copies of written communications to all shareholders or to all holders of a class of shares during the preceding 10 years, including annual reports, financial statements, and group financial statements;

(*c*) certificates given by directors under this Act; and

(*d*) the interests register of the company, if it has one.

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

(*a*) the company shall be guilty of an offence and liable to the penalty set out in section 492(2); and

(*b*) every director of a company shall be guilty of an offence and liable to the penalty set out in section 493(2).

220. Manner of inspection

(1) Documents which may be inspected under section 218 or section 219 shall be available for inspection at the place at which the company's records are required to be kept during normal working hours of each working day during the inspection period.

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

221. Copies of documents

(1) A person may require a copy of, or extract from, a document which is available for inspection by that person under section 218 or section 219 to be sent to him—

(*a*) within five working days after he or she has made a request in writing for the copy or extract; and

(*b*) if that person has paid a reasonable copying and administration fee prescribed by the company.

(2) If a company fails to provide a copy of, or extract from, a document in accordance with a request under subsection (1)—

(*a*) the company shall be guilty of an offence and liable to the penalty set out in section 492(1); and

(*b*) every director of the company shall be guilty of an offence and liable to the penalty set out in section 493(2).

PART XIV
Amalgamations (ss 222-230)

222. Amalgamations

Two or more companies may amalgamate, and continue as one company, which may be one of the amalgamating companies, or may be a new company.

223. Amalgamation proposal

(1) An amalgamation proposal shall set out the terms of the amalgamation, and in particular—

(*a*) the name of the amalgamated company, if it is the same as the name of one of the amalgamating companies;

(*b*) the registered office of the amalgamated company;

(*c*) the full name or names and residential address or addresses of the director or directors and the secretary of the amalgamated company;

(*d*) the address for service of the amalgamated company;

(*e*) the share structure of the amalgamated company, specifying—

(i) the number of shares of the company, and

(ii) the rights, privileges, limitations, and conditions attached to each share of the company, if different from those set out in section 45;

(*f*) the manner in which the shares of each amalgamating company are to be converted into shares of the amalgamated company;

(*g*) if shares of an amalgamating company are not to be converted into shares of the amalgamated company, the consideration that the holders of those shares are to receive instead of shares of the amalgamated company;

(*h*) any payment to be made to a shareholder or director of an amalgamating company, other than a payment of the kind described in paragraph (*g*);

(*i*) details of any arrangement necessary to complete the amalgamation and to provide for the subsequent management and operation of the amalgamated company; and

(*j*) a copy of the proposed constitution of the amalgamated company.

(2) An amalgamation proposal may specify the date on which the amalgamation is intended to become effective.

(3) If shares of one of the amalgamating companies are held by or on behalf of another of the amalgamating companies, the amalgamation proposal—

(*a*) shall provide for the cancellation of those shares without payment or the provision of other consideration when the amalgamation becomes effective; and

(*b*) shall not provide for the conversion of those shares into shares of the amalgamated company.

224. Approval of amalgamation proposal

(1) The Board of each amalgamating company shall resolve that—

(*a*) in its opinion the amalgamation is in the best interest of the company; and

(*b*) it is satisfied on reasonable grounds that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test.

(2) The directors who vote in favour of a resolution required by subsection (1) shall sign a certificate stating that, in their opinion, the conditions set out in that subsection are satisfied, and the grounds for that opinion.

(3) The Board of each amalgamating company shall send to each shareholder of the company, not less than 20 working days before the amalgamation is proposed to take effect—

(*a*) a copy of the amalgamation proposal;

(*b*) copies of the certificates given by the directors of each Board;

(*c*) a summary of the principal provisions of the constitution of the amalgamated company, if it has one;

(*d*) a statement that a copy of the constitution of the amalgamated company will be supplied to any shareholder who requests it;

(*e*) a statement setting out the rights of shareholders;

(*f*) a statement of any material interests of the directors in the amalgamation proposal, whether in that capacity or otherwise; and

(*g*) such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed amalgamation.

(4) The Board of each amalgamating company shall, not less than 20 working days before the amalgamation is proposed to take effect—

(*a*) send a copy of the amalgamation proposal to every secured creditor of the company; and

(*b*) give public notice of the proposed amalgamation, including a statement that—

(i) copies of the amalgamation proposal are available for inspection by any shareholder or creditor of an amalgamating company or any person to whom an amalgamating company is under an obligation at the registered offices of the amalgamating companies and at such other places as may be specified during normal business hours, and

(ii) a shareholder or creditor of an amalgamating company or any person to whom an amalgamating company is under an obligation is entitled to be supplied free of charge with a copy of the amalgamation proposal upon request to an amalgamating company.

(5) The amalgamation proposal shall be approved—

(*a*) by the shareholders of each amalgamating company, in accordance with section 96; and

(*b*) if a provision in the amalgamation proposal would, if contained in an amendment to an amalgamating company's constitution or otherwise proposed in relation to that company, require the approval of an interest group, by a special resolution of that interest group.

(6) A director who fails to comply with any of subsections (2), (3) and (4) shall be guilty of an offence and liable to the penalty set out in section 493(1).

225. Short form amalgamation

(1) A company and one or more other companies that is or that are directly or indirectly wholly owned by it may amalgamate and continue as one company (being the company first referred to) without complying with sections 223 and 224 if—

(*a*) the amalgamation is approved by a resolution of the Board of each amalgamating company; and

(*b*) each resolution provides that—

(i) the shares of each amalgamating company, other than the amalgamated company, will be

cancelled without payment or other consideration,

(ii) the constitution of the amalgamated company, if it has one, will be the same as the constitution of the company first referred to, if it has one, and

(iii) the Board is satisfied on reasonable grounds that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test.

(2) Two or more companies, each of which is directly or indirectly wholly owned by the same company, may amalgamate and continue as one company without complying with section 223 or section 224 if—

(*a*) the amalgamation is approved by a resolution of the Board of each amalgamating company; and

(*b*) each resolution provides that—

(i) the shares of all but one of the amalgamating companies will be cancelled without payment or other consideration,

(ii) the constitution of the amalgamated company, if it has one, will be the same as the constitution of the amalgamating company whose shares are not cancelled, if it has one, and

(iii) the Board is satisfied on reasonable grounds that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test.

(3) The Board of each amalgamating company shall, not less than 20 working days before the amalgamation is proposed to take effect, give written notice of the proposed amalgamation to every secured creditor of the company.

(4) The resolutions approving an amalgamation under this section, taken together, shall be deemed to constitute an amalgamation proposal that has been approved.

(5) The directors who vote in favour of a resolution required by subsection (1) or (2), as the case may be, shall sign a certificate stating that, in their opinion, the conditions set out in subsection (1) or (2) are satisfied, and the grounds for that opinion.

(6) A director who fails to comply with subsections (3) and (5) shall be guilty of an offence and liable to the penalty set out in section 493(1).

226. Registration of amalgamation proposal

For the purpose of effecting an amalgamation the following documents shall be delivered to the Registrar for registration—

(*a*) the approved amalgamation proposal;

(*b*) any certificates required under section 224(2) or section 225(5);

(*c*) a certificate signed by the Board of each amalgamating company stating that the amalgamation has been approved in accordance with this Act and the constitution of the company, if it has one;

(*d*) if the amalgamated company is a new company or the amalgamation proposal provides for a change of the name of the amalgamated company, a copy of the notice reserving the name of the company;

(*e*) a certificate signed by the Board, or proposed Board, of the amalgamated company stating that, where the proportion of the claims of creditors of the amalgamated company in relation to the value of the assets of the company is greater than the proportion of the claims of creditors of an amalgamating company

in relation to the value of the assets of that amalgamating company, no creditor will be prejudiced by that fact; and

(*f*) a document in the prescribed form signed by each of the persons named in the amalgamation proposal as a director or secretary of the amalgamated company consenting to act as a director or secretary of the company as the case may be.

227. Certificate of amalgamation

(1) Forthwith after receipt of the documents required under section 226, the Registrar shall—

(*a*) if the amalgamated company is the same as one of the amalgamating companies, issue a certificate of amalgamation; or

(*b*) if the amalgamated company is a new company—

(i) enter particulars of the company on the Register, and

(ii) issue a certificate of amalgamation together with a certificate of incorporation.

(2) If an amalgamation proposal specifies a date on which the amalgamation is intended to become effective, and that date is the same as, or later than, the date on which the Registrar receives the documents, the certificate of amalgamation, and any certificate of incorporation shall be expressed to have effect on the date specified in the amalgamation proposal.

228. Effect of certificate of amalgamation

On the date shown in a certificate of amalgamation—

(*a*) the amalgamation is effective, if it is the same as a name of one of the amalgamating companies, the amalgamated company has the name specified in the amalgamation proposal;

(*b*) the Registrar shall remove the amalgamating companies, other than the amalgamated company, from the Register;

(*c*) the property, rights, powers, and privileges of each of the amalgamating companies continues to be the property, rights, powers and privileges of the amalgamated company;

(*d*) the amalgamated company continues to be liable for all the liabilities and obligations of each of the amalgamating companies;

(*e*) proceedings pending by, or against, an amalgamating company may be continued by, or against, the amalgamated company;

(*f*) a conviction, ruling, order, or judgment in favour of, or against, an amalgamating company may be enforced by, or against, the amalgamated company; and

(*g*) any provisions of the amalgamation proposal that provide for the conversion of shares or rights of shareholders in the amalgamating companies have effect according to their tenor.

229. Registers

(1) Where an amalgamation becomes effective, no Registrar, including the Registrar of Deeds or other person charged with the keeping of any books or registers shall be obliged, solely by reason of the amalgamation becoming effective, to change the name of an amalgamating company to that of an amalgamated company in those books or registers or in any documents.

(2) The presentation to any Registrar or other person of any instrument (whether or not comprising an instrument of transfer) by the amalgamated company—

(*a*) executed or purporting to be executed by the amalgamated company;

(*b*) relating to any property held immediately before the amalgamation by an amalgamating company; and

(*c*) stating that property has become the property of the amalgamated company by virtue of this Part and producing the relevant certificate of amalgamation issued under section 227, shall, in the absence of evidence to the contrary, be sufficient evidence that the property has become the property of the amalgamated company.

(3) Without limiting subsection (1) or subsection (2), where any security issued by any person or any rights or interests in property of any person become, by virtue of this Part, the property of an amalgamated company, that person, on presentation of a certificate signed on behalf of the Board of the amalgamated company, stating that that security or any such rights or interests have, by virtue of this Part, become the property of the amalgamated company, shall, notwithstanding any other enactment or rule of law or the provisions of any instrument, register the amalgamated company as the holder of that security or as the person entitled to such rights or interests, as the case may be.

230. Powers of court in other cases

(1) If the court is satisfied that giving effect to an amalgamation proposal would prejudice a shareholder or creditor of an amalgamating company or a person to whom an amalgamating company is under an obligation, it may, on the application, made at any time before the date on which the amalgamation becomes effective, by that person, make any order it considers appropriate in relation to the proposal, and may, without limiting the generality of this subsection, make an order—

(*a*) directing that effect shall not be given to the proposal;

(*b*) modifying the proposal in such manner as may be specified in the order; or

(*c*) directing the company or its Board to reconsider the proposal or any part of it.

(2) An order may be made under subsection (1) on such conditions as the court considers appropriate.

PART XV
Compromises with Creditors (ss 231-238)

231. Interpretation

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;

(*b*) varying the rights of its creditors or the terms of a debt; or

(*c*) relating to an alteration of a company's constitution that affects the likelihood of the company being able to pay a debt;

"creditor" includes—

(*a*) a person who, in a liquidation, would be entitled to claim that a debt is owing to that person by the company; and

(*b*) a secured creditor;

"proponent" means a person referred to in section 232 who proposes a compromise in accordance with this Part.

232. Compromise proposal

(1) Any of the following persons may propose a compromise under this Part if that person has reason to believe that a company is or will be unable to pay its debts within the meaning of section 368—

(*a*) the Board of directors of the company;

(*b*) a liquidator of the company; or

(*c*) 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)(*c*), the court may make an order directing the company to supply to the creditor or shareholder, within such time as may be specified, a list of the names and addresses of the company's creditors showing the amounts owed to each of them or such other information as may be specified to enable the creditor or shareholder to propose a compromise.

233. Notice of proposed compromise

(1) The proponent shall compile, in relation to each class of creditors of the company, a list of creditors known to the proponent who would be affected by the proposed compromise, setting out—

(*a*) the amount owing or estimated to be owing to each of them; and

(*b*) the number of votes which each of them is entitled to cast on a resolution approving the compromise.

(2) The proponent shall give to each known creditor, the company, any receiver or liquidator, and deliver to the Registrar for registration—

(*a*) notice of a meeting of creditors, or any two or more classes of creditors, for the purpose of voting on the resolution; and

(*b*) a statement—

(i) containing the name and address of the proponent and the capacity in which the proponent is acting,

(ii) containing the address and telephone number to which inquiries may be directed during normal business hours,

(iii) setting out the terms of the proposed compromise and the reasons for it; and why it is considered to be reasonably in the interests of the company and its creditors and to have business efficacy,

(iv) setting out the reasonably foreseeable consequences for creditors of the company of the compromise being approved,

(v) setting out the extent of any interest of a director in the proposed compromise,

(vi) explaining that the proposed compromise and any amendment to it proposed at a meeting of creditors or any classes of creditors will be binding on all creditors, or on all creditors of that class, if approved in accordance with section 234,

(vii) containing details of any procedure proposed as part of the proposed compromise for varying the compromise following its approval, and

(viii) setting out the nature of the business to be transacted at the meeting in sufficient detail to enable a creditor to make a reasoned judgement in relation to it and providing the text of any resolution to be submitted to the meeting; and

(*c*) a copy of the list or lists of creditors referred to in subsection (1).

234. Approval and effect of compromise

(1) A compromise, including any amendment proposed at the meeting, is approved by creditors, or a class of creditors, if, at a meeting of creditors or that class of creditors the compromise, including any amendment, is adopted in accordance with subsection (3)(*b*).

(2) Subject to subsection (3), the meeting of creditors shall be conducted in accordance with the Companies Winding-Up Rules including rule 33(1) in so far as they are reasonably applicable.

(3) At any meeting of creditors held for the purposes of this section—

(*a*) where in the case of a company in the course of winding-up the liquidator or any nominee of the liquidator is present the liquidator or his nominee shall be the chairman of the meeting and in any other case the proponent of the compromise or his nominee shall be the chairman of the meeting but if neither the proponent or any nominee of the proponent is present, the creditors participating shall choose one of their number to act as chairman of the meeting:

Provided that the chairman shall not have a casting vote;

(*b*) a resolution is adopted if a majority in number representing 75 per cent in value of the creditors or class of creditors voting in person or by proxy vote in favour of the resolution.

(4) A compromise, including any amendment, approved by creditors or a class of creditors of a company in accordance with this Part is binding on the company and on—

(*a*) all creditors; or

(*b*) if there is more than one class of creditors, on all creditors of that class to whom notice of a meeting of that class was given under section 233.

(5) If a resolution proposing a compromise, including any amendment, is put to the vote of more than one class of creditors, it is to be presumed, unless the contrary is expressly stated in the resolution, that the approval of the compromise, including any amendment, by each class is conditional on the approval of the compromise, including any amendment, by every other class voting on the resolution.

(6) The proponent shall give written notice of the result of the voting to each known creditor, the company, any receiver or liquidator, and the Registrar.

235. Variation of compromise

(1) A compromise approved under section 234 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 of the compromise in accordance with this Part which, for that purpose, shall apply with such modifications as may be necessary as if any proposed variation were a proposed compromise.

(2) The provisions of this Part shall apply to any compromise that is varied in accordance with this section.

236. Powers of court

(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 of this Act, or waive or vary any such requirement, if satisfied that it would be just to do so; or

(*b*) order that, during a period specified in the order, beginning not earlier than the date on which notice was given of the proposed compromise and ending not later than 10 working days after the date on which notice was given of the result of the voting on it—

(i) proceedings in relation to a debt owing by the company be stayed, or

(ii) a creditor refrain from taking any other measure to enforce payment of a debt owing by the company.

(2) Nothing in subsection (1)(*b*) affects the right of a secured creditor during that period but, subject to subsection (3), not thereafter, to take possession of, realise, or otherwise deal with, property of the company over which that creditor has a charge.

(3) If the court is satisfied, on the application of a creditor of a company who was entitled to vote on a compromise that—

(*a*) insufficient notice of the meeting or of the matter required to be notified under section 233 was given to that creditor;

(*b*) there was some other material irregularity in obtaining approval of the compromise; or

(*c*) in the case of a creditor who voted against the compromise, the compromise is unfairly prejudicial to that creditor, or to the class of creditors to which that creditor belongs, the court may order that the creditor is not bound by the compromise or make such other order as it considers appropriate.

(4) An application under subsection (3) shall be made not later than 10 working days after the date on which notice of the result of the voting was given to the creditor.

237. Effect of compromise in liquidation of company

(1) Where a compromise is approved under section 234 the court may, on the application of—

(*a*) the company; or

(*b*) with the leave of the court, any creditor or shareholder of the company—

make such order as the court considers appropriate 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 of the company.

(2) Where a compromise is approved under section 234 and the company is subsequently put into liquidation, the court may, on the application of—

(*a*) the liquidator; or

(*b*) with the leave of the court, any creditor or shareholder of the company—

make such order as the court considers appropriate with respect to the extent, if any, to which the compromise will continue in effect and be binding on the liquidator of the company.

238. Costs of compromise

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;

(*b*) if incurred by a liquidator, are a cost of the liquidation; or

(*c*) if incurred by any other person, are a debt due to that person by the company and, if the company is put into liquidation, are payable in the order of priority required in the liquidation.

PART XVI

Approval of Arrangements, Amalgamations and Compromises by court (ss 239-243)

239. Interpretation

In this Part, unless the context otherwise requires—

"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" means—

(*a*) a company within the meaning of section 2; or

(*b*) an external company that is registered on the register of external companies.

"creditor" includes—

(*a*) a person who, in a liquidation, would be entitled to claim that a debt is owing to that person by the company; and

(*b*) a secured creditor.

240. Approval of arrangements, amalgamation and compromises

(1) Notwithstanding the provisions of this Act or the constitution of a company, the court may, on the application of a company or, with the leave of the court, any shareholder or creditor of a company, order that an arrangement or amalgamation or compromise shall be binding on the company and on such other persons or classes of persons as the court may specify and any such order may be made on such terms and conditions as the court considers appropriate.

(2) Before making an order under subsection (1), the court may, on the application of the company or any shareholder or creditor or other person who appears to the court to be interested, or of its own motion, make any one or more of the following orders—

(*a*) an order that notice of the application, together with such information relating to it as the court considers appropriate, be given in such form and in such manner and to such persons or classes of persons

as the court may specify;

(*b*) an order directing the holding of a meeting or meetings of shareholders or any class of shareholders or creditors or any class of creditors of a company to consider and, if thought fit, to approve, the proposed arrangement or amalgamation or compromise in such manner as the court may specify and, for that purpose, may determine the shareholders or creditors that constitute a class of shareholders or creditors of a company;

(*c*) an order requiring that a report on the proposed arrangement or amalgamation or compromise be prepared for the court by a person specified by the court and, if the court considers appropriate, be supplied to the shareholders or any class of shareholders or creditors or any class of creditors of a company or to any other person who appears to the court to be interested;

(*d*) an order as to the payment of the costs incurred in the preparation of any such report; or

(*e*) an order specifying the persons who shall be entitled to appear and be heard on the application to approve the arrangement or amalgamation or compromise.

(3) An order made under this section has effect on and from the date specified in the order.

(4) Within 10 working days of an order being made by the court, the Board of the company shall ensure that a copy of the order is delivered to the Registrar for registration.

(5) If the Board of a company fails to comply with subsection (4), every director of the company shall be guilty of an offence and liable to the penalty set out in section 492(1).

241. Court may make additional orders

(1) Without limiting section 240, the court may, for the purpose of giving effect to any arrangement or amalgamation or compromise approved under that section, either by the order approving the arrangement or amalgamation or compromise, or by any subsequent order, provide for, and prescribe terms and conditions relating to—

(*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 continuation of legal proceedings;

(*d*) the liquidation of any company;

(*e*) the provisions to be made for persons who voted against the arrangement or amalgamation or compromise at any meeting called in accordance with any order made under subsection (2)(*b*) of that section or who appeared before the court in opposition to the application to approve the arrangement or amalgamation or compromise; and

(*f*) such other matters that are necessary or desirable to give effect to the arrangement or amalgamation or compromise.

(2) Within 10 working days of an order being made by the court, the Board of the company shall ensure that a copy of the order is delivered to the Registrar for registration.

(3) If the Board of a company fails to comply with subsection (2), every director of the company shall be guilty of an offence and liable to the penalty set out in section 492(1).

242. Court may approve amalgamation or compromise

The court may—

(*a*) approve an amalgamation under section 240 even though the amalgamation could be effected under Part XIII; or

(*b*) approve a compromise under section 240 even though the compromise could be approved under Part XIV.

243. Application of section 237

The provisions of section 237 shall apply with such modifications as may be necessary in relation to any compromise approved under section 240.

PART XVII
Companies Limited by Guarantee (s 244)

244. Provisions which apply to a company limited by guarantee

(1) The following provisions shall not apply to a company limited by guarantee without a share capital—

(*a*) Part VI providing for shares;

(*b*) sections 98 to 103 providing for minority buy out rights and interest groups;

(*c*) sections 141 to 144 providing for the disclosure of directors' interests in shares;

(*d*) section 83(2)(*b*) and (*c*) and sections 84(1) and (3) providing in relation to share register; and

(*e*) Part XIV providing for amalgamations.

(2) The provisions of this Act other than those referred to in subsection (1) shall apply to a company limited by guarantee without a share capital with all necessary modifications, as if—

(*a*) the company were a company limited by shares;

(*b*) references to shareholders were references to members; and

(*c*) references to the share register were references to the register of members.

PART XVIII
Private Companies (ss 245-247)

245. Limitations and privileges of a private company

A private company—

(*a*) shall not have more than 25 shareholders provided that where two or more of its shareholders hold one or more shares jointly they shall be deemed to be one shareholder and provided further that, in computing the number of 25, no account shall be taken of persons who are in the employment of the company, and who, having been formerly in the employment of the company were while in that employment and have continued, after the determination of that employment, to be members of the company;

(*b*) shall not make any offer to the public to subscribe for its shares or debentures;

(*c*) may provide in its constitution that the right to transfer its shares is restricted;

(*d*) may dispense with the holding of shareholders meetings if resolutions which would otherwise require the holding of a meeting are passed by means of a resolution *in lieu* of meeting under section 107;

(*e*) unless its constitution otherwise requires may remove a director from office by special resolution under section 151(2);

(*f*) in the case of an exempt private company is pursuant to section 191 not required to appoint an auditor;

(*g*) in the case of an exempt private company is pursuant to section 206 not required to prepare and present its accounts in accordance with the International Financial Reporting Standards;

(*h*) in the case of an exempt private company is not required to appoint as secretary a person who is qualified under section 162(3);

(*i*) may dispense with the provision of an annual report by unanimous resolution under section 212;

(*j*) may by unanimous resolution under section 246 dispense with the keeping of an interests register; and

(*k*) may by unanimous agreement among the shareholders dispense with the observance of any of the matters referred to in section 247.

246. Private companies need not keep interests register

(1) Subject to subsection (3), a private company may by unanimous resolution of its shareholders dispense with the need to keep an interests register and while such a resolution is in force no provision of this Act which requires any matter to be entered in the interests register shall apply to a private company.

(2) A unanimous resolution under subsection (1) shall cease to have effect if any shareholder gives notice in writing to the company that the shareholder requires the company to keep an interests register.

(3) This section shall not apply to close companies and section 264 shall apply to such companies.

247. Unanimous agreement by shareholders

(1) Where all the shareholders of a private company and to the extent to which the matters referred to in this section apply to it, the members of a close company agree to or concur in any action which has been taken or is to be taken by the company—

(*a*) the taking of that action is deemed to be validly authorised by the company, notwithstanding any provision in the constitution of the company; and

(*b*) the provisions of this Act referred to in the Eighth Schedule shall not apply in relation to that action.

(2) Without limiting the matters which may be agreed to or concurred in under subsection (1), that subsection shall apply where all the shareholders of a private company including, where relevant, a close company agree to or concur in—

(*a*) the issue of shares by the company;

(*b*) the making of a distribution by the company;

(*c*) the repurchase or redemption of shares in the company;

(*d*) the giving of financial assistance by a company for the purpose of, or in connection with, the purchase of shares in the company;

(*e*) the payment of remuneration to a director (or member in the case of a close company) or the making of a loan to a director (or member) or the conferral of any other benefit on a director (or member); or

(*f*) the making of a contract between an interested director (or member in the case of a close company) and the company.

(3) Where—

(*a*) a distribution is made by a company under this section; and

(*b*) as a consequence of the making of the distribution, the company fails to satisfy the solvency test, the distribution is deemed not to have been validly made.

(4) A distribution to a shareholder which is deemed not to have been validly made may be recovered by the company from the shareholder unless—

(*a*) the shareholder received the distribution in good faith and without knowledge of the company's failure to satisfy the solvency test;

(*b*) the shareholder has altered his position in reliance on the validity of the distribution; and

(*c*) it would be unfair to require repayment in full or at all.

(5) If reasonable grounds did not exist for believing that the company would satisfy the solvency test after the making of a distribution which is deemed not to have been validly made, each shareholder who agreed to or concurred in the making of the distribution is personally liable to the company to repay to the company so much of the distribution as is not able to be recovered from the shareholders to whom the distribution was made.

(6) If, in an action brought against a shareholder under subsection (4) or (5), the court is satisfied that the company could, by making a distribution of a lesser amount, have satisfied the solvency test, the court may—

(*a*) permit the shareholder to retain; or

(*b*) relieve the shareholder from liability in respect of,

an amount equal to the value of any distribution that could properly have been made.

(7) The references in subsections (4), (5) and (6) to a shareholder shall in the case of a close company be read as referring to a member.

PART XIX
Close Companies (ss 248-276)

248. Formation of close company

(1) Anyone or more persons, but not exceeding five, who qualify for membership of a close company in terms of this Act, may form a close company by making application under subsection (3)(*a*).

(2) Any private company having not more than five shareholders, in this Part called "members", who qualify under section 249 for membership of a close company, may apply to the Registrar for the private company to be converted into a close company by making application under section 278.

(3) The application under subsection (1) for registration as a close company shall be made by application for registration under section 21 signed by all of the applicants.

(4) The application shall state, in addition to the matters referred to in section 21—

(*a*) the size, expressed as a percentage, of each member's interest in the company; and

(*b*) the name and address of the person or firm which has consented in writing to be appointed as accounting officer of the close company pursuant to section 273.

[22 of 2018, s. 20 w.e.f. 3 June 2019.]

(5) The application shall provide for the designation "CC" to be added to the name of the close company.

(6) The Registrar on being satisfied that the company is entitled to be registered as a close company shall enter the company on the register of close companies and the company shall thereupon be a close company under this Act.

(7) In this Part, unless the context otherwise requires—

"property" includes corporeal or incorporeal property;

249. Qualification for membership of and nature of business of a close company

(1) Subject to subsection (2) only individuals may be members of a close company and no corporate body or trustee in that capacity shall directly or indirectly (whether through the instrumentality of a nominee or otherwise) hold a member's interest in a close company.

(2) In the case of a member who becomes insolvent, deceased or mentally disordered or is otherwise incapable or incompetent to manage his affairs that member's interest may be held by the trustee, administrator, executor or curator or other legal personal representative of the member.

(3) A close company may not be established for or carry on the business of banking, or insurance but may otherwise be formed for and carry on any lawful business.

(4) The provisions of this Act, with the exception of the Ninth Schedule, shall apply *mutatis mutandis* to a close company, and references to shareholders shall be read as referring to members and references to directors or to the board read as referring to members collectively.

[26 of 2008, s. 5.]

250. Contributions by members

(1) Every person who is to become a member of a close company upon its registration, shall make to the company an initial contribution of money, property, or services rendered in connection with and for the purposes of the formation and incorporation of the company.

[22 of 2018, s. 21 w.e.f. 3 June 2019.]

(2) The amount or value of the members' contributions, or of the contribution of any one or more members, may from time to time by agreement among all the members—

(*a*) be increased by additional contributions of money or property to the close company by existing members or, in terms of section 255(1)(*b*), by a person becoming a member of a registered corporation; or

(*b*) be reduced, provided that a reduction by way of a repayment to any member shall comply with the provisions of sections 258 and 259.

[22 of 2018, s. 21 w.e.f. 3 June 2019.]

(3) Money or property referred to in subsection (2)(*a*) shall, in order to vest ownership thereof in the close company, be paid, delivered or transferred, as the case may be, to the company within a period of 90 days—

(*a*) after the date of registration of the company; or

(*b*) after the date of the registration of any notice of additional contribution referred to in section 261.

[22 of 2018, s. 21 w.e.f. 3 June 2019.]

(4) An undertaking by a member to make an initial or an additional contribution to a corporation shall be enforceable by the close company in legal proceedings.

[22 of 2018, s. 21 w.e.f. 3 June 2019.]

251. Postal address and registered office

(1) Every close company shall have in Botswana a postal address and an office to which, subject to subsection (2), all communications and notices to the company may be addressed.

(2) Any—

(*a*) notice, order, communication or other document which is in terms of this Act required or permitted to be served upon any company or member thereof, shall be deemed to have been served if it has been delivered at the registered office, or has been sent by certified or registered post to the registered office or postal address, of the company; and

(*b*) process which is required to be served upon any corporation or member thereof shall, subject to applicable provisions in respect of such service in any law, be served by so delivering or sending it.

252. Deregistration of close companies

(1) The Registrar shall, subject to the provisions of this section, deregister a close company—

(*a*) if the company has ceased to carry on business or is not in operation;

(*b*) if the company has been put into liquidation and—

(i) no liquidator is acting, or

(ii) the notice referred to in section 427 has not been given to the Registrar within six months after the liquidation of the company is completed;

(*c*) if a request, in such form as may be prescribed, is sent or delivered to the Registrar that the company be deregistered on any of the grounds specified in subsection (2) by—

(i) a member authorised to make the request by a special resolution of members entitled to vote and voting on the question,

(ii) a member or any other person, if the constitution of the company so requires or permits, or

(iii) the Master;

(*d*) if a liquidator notifies the Master in terms of section 426(3) that no *quorum* was present at a meeting called to confirm the account; or

(*e*) if the company has failed to comply with the requirements of this Act.

[22 of 2018, s. 22 w.e.f. 3 June 2019.]

(2) A request to deregister a company under subsection (1)(*c*) shall be—

(*a*) made on the grounds that the company—

(i) has ceased to carry on business, has discharged in full its liabilities to all its known creditors, and has distributed its surplus assets in accordance with its constitution and this Act, or

(ii) after paying its debts in full or in part has no surplus assets, and no creditor has applied to the court on grounds under section 369 for an order putting the company into liquidation; and

(*b*) accompanied by a written notice from the Commissioner of Taxes stating that the Commissioner has no objection to the company being deregistered.

[22 of 2018, s. 22 w.e.f. 3 June 2019.]

(3) The Registrar shall deregister a company under subsection (1)(*a*), if—

(*a*) the Registrar has complied with section 332;

(*b*) the company has not satisfied the Registrar that it is carrying on business or that reasons exist for the company not to continue in existence; and

(*c*) the Registrar—

(i) is satisfied that no person has objected to the deregistration of the company under section 334, or

(ii) has received an objection to the deregistration and has complied with section 335.

[22 of 2018, s. 22 w.e.f. 3 June 2019.]

(4) Where the Registrar decides to deregister a company under subsection (1)(*b*), (*c*), (*d*) or (*e*), the Registrar shall give notice to the company under section 332 of this Act and shall deregister the company upon satisfying himself that—

(*a*) no person has objected to the deregistration under section 334; and

(*b*) where an objection to the deregistration has been received that the provisions of section 335 have been complied with:

Provided that deregistration of a company under subsection (1)(*e*) on the grounds in section 217(6), shall not require such notice.

[22 of 2018, s. 22 w.e.f. 3 June 2019.]

(5) Subject to the provisions of this section, the deregistration of a close company shall not affect any liability of a member of the company to the company or to any other person, and such liability may be enforced

as if the company were not deregistered.

[22 of 2018, s. 22 w.e.f. 3 June 2019.]

(6) If a company is deregistered while having outstanding liabilities, the persons who are members of such company at the time of deregistration shall be jointly and severally liable for such liabilities.

[22 of 2018, s. 22 w.e.f. 3 June 2019.]

(7) The Registrar may, on application made by an interested party in such form as may be prescribed, restore a company deregistered in terms of this section, where the interested party proves to the satisfaction of the Registrar that—

(*a*) the company was at the time of its deregistration carrying on business and was in operation; or

(*b*) it is otherwise just that the registration of the company be restored.

[22 of 2018, s. 22 w.e.f. 3 June 2019.]

253. Nature of member's interest

(1) The interest of any member in a close company shall be a single interest expressed as a percentage and shall be moveable property which shall be transferable in the manner provided by this Act.

(2) Two or more persons shall not be joint holders of the same member's interest in a close company.

254. Representation of members

(1) A minor who is a member of a close company, other than a minor over the age of 18 years whose guardian has lodged with the company a written consent to the minor's participation in the company, shall be represented in the close company by his guardian.

(2) A married woman, whether subject to the marital power of her husband or not, shall require no representation or assistance to act as a member of a close company.

(3) A member subject to any other legal disability shall be represented in the close company by his duly appointed or authorised legal representative referred to in subsection (2) of section 249.

255. Acquisition of member's interest by new member

(1) A person becoming a member of a close company shall acquire his member's interest required for membership—

(*a*) from one or more of the existing members or his or their deceased or insolvent estates; and

(*b*) pursuant to a contribution made by such person to the close company, in which case the percentage of his member's interest is determined by agreement between him and the existing members, and the percentages of the interests of the existing members in the close company shall be reduced in accordance with the provisions of section 258.

(2) The contribution referred to in subsection (1)(*b*) may consist of an amount of money, or of any property of a value agreed upon by the person concerned and the existing members.

256. Disposal of interest of insolvent member

(1) Notwithstanding any provision to the contrary in the constitution or other agreement between members, a trustee of the insolvent estate of a member of a close company may, in the discharge of his duties, sell that member's interest—

(*a*) to the close company if there are one or more members other than the insolvent member;

(*b*) to the members of the close company other than the insolvent member, in proportion to their member's interests or as they may otherwise agree upon; or

(*c*) subject to the provisions of subsection (2), to any other person who qualifies for membership of a close company in terms of section 249.

(2) If the close company concerned has one or more members other than the insolvent, the following provisions shall apply to a sale in terms of subsection (1)(*c*) of the insolvent member's interest—

(*a*) the trustee shall deliver to the close company a written statement giving particulars of the name and address of the proposed purchaser, the purchase price and the time and manner of payment thereof;

(*b*) for a period of 28 days after the receipt by the close company of the written statement the close company or the members, in such proportions as they may agree upon, shall have the right, exercisable by written notice to the trustee, to be substituted as purchasers of the whole, and not a part only, of the insolvent member's interest at the price and on the terms set out in the trustee's written statement; and

(*c*) if the insolvent member's interest is not purchased in terms of paragraph (*b*), the sale referred to in the trustee's written statement shall become effective and be implemented.

(3) The provisions of this section shall apply *mutatis mutandis* to any attachment and sale in execution of a member's interest in a close company.

257. Disposal of interest of deceased member

Subject to any other arrangement in the constitution an executor of the estate of a member of a close company who is deceased shall, in the performance of his duties—

(*a*) cause the deceased member's interest in the close company to be transferred to a person who qualifies for membership of a close company in terms of section 249 and is entitled thereto as legatee or heir or under a redistribution agreement, if the remaining member or members of the close company (if any) consent to the transfer of the member's interest to such person; or

(*b*) if any consent referred to in paragraph (*a*) is not given within 28 days after it was requested by the executor, sell the deceased member's interest—

(i) to the close company, if there is any other member or members than the deceased member,

(ii) to any other remaining member or members of the close company in proportion to the interests of those members in the close company or as they may otherwise agree upon, or

(iii) to any other person who qualifies for membership of a close company in terms of section 249, in which case the provisions of subsection (2) of section 256 shall *mutatis mutandis* apply in respect of any such sale.

258. Maintenance of aggregate of members' interest

The aggregate of the members' interests in a close company expressed as a percentage shall at all times be one hundred per cent, and for that purpose—

(*a*) any transfer of the whole, or a portion, of a member's interest shall be effected by the cancellation or the reduction, as the case may be, of the interest of the member concerned and the allocation in the name of the transferee, if not already a member, of a member's interest of the percentage concerned, or the addition to the interest of an existing member of the percentage concerned;

(*b*) when a person becomes a member of a close company pursuant to a contribution made by him to the company, the percentage of his member's interest shall be agreed upon by him or her and the existing members, and the percentages of the interests of the existing members shall be reduced proportionally or as they may otherwise agree; and

(*c*) any member's interest acquired by the close company shall be added to the respective interests of the other members in proportion to their existing interests or as they may otherwise agree.

259. Payment by close company for members' interest acquired

(1) Payment by a close company in respect of its acquisition of a member's interest in the company shall be made only—

(*a*) with the previously obtained written consent of every member of the company, other than the member whose interest is acquired, for the specific payment;

(*b*) if, after such payment is made, the company's assets, fairly valued, exceed all its liabilities;

(*c*) if the company is able to pay its debts as they become due in the ordinary course of its business; and

(*d*) if such payment will in the particular circumstances not in fact render the company unable to pay its debts as they become due in the ordinary course of its business.

(2) For the purposes of subsection (1) "payment" shall include the delivery or transfer of any property.

260. Financial assistance by close company in respect of acquisition of members' interest

A close company may give financial assistance (whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise) for the purpose of, or in connection with, any acquisition of a member's interest in that company by any person, only—

(*a*) with the previously obtained written consent of every member of the company for the specific assistance;

(*b*) if, after such assistance is given, the company's assets, fairly valued, exceed all its liabilities;

(*c*) if the company is able to pay its debts as they become due in the ordinary course of its business; and

(*d*) if such assistance will in the particular circumstances not in fact render the company unable to pay its debts as they become due in the ordinary course of its business.

261. Registration of changes

(1) Whenever any change has been made or has occurred in any of the following particulars the members of a close company shall within 30 days give notice in writing containing particulars of the change to the Registrar—

(*a*) the constitution;

(*b*) the registered office;

(*c*) the names and addresses of each member;

(*d*) the name and address of any person who becomes a member and of the size expressed as a percentage of that person's interest as a member;

(*e*) the name of any person ceasing to be a member;

(*f*) the name and address of the accounting officer;

(*g*) the name of the close company;

(*h*) the financial year;

(*i*) the making of any additional contribution to the close company by a member or the reduction in any contribution; and

(*j*) the change in the percentage of a member's interest in the close company.

(2) If the members of a close company fail to comply with any of the requirements of subsection (1) each member shall be guilty of an offence and liable to the penalty set out in section 492(1).

262. Management

(1) A close company shall—

(*a*) have no directors or a board and Part X, other than section 160, shall not apply to a close company; and

(*b*) convert to a private company under section 279 should it desire to have directors.

(2) The management of a close company shall be vested in its members which, unless otherwise provided in its constitution, shall be in proportion to the percentage of their respective interests in the close company, as adjusted from time to time to properly reflect any additional contributions or reduction of interest by the members.

(3) The members of a close company may delegate the management of the company to a manager or managers who shall be appointed by unanimous agreement of the members on the terms and conditions provided for in that agreement or in accordance with such procedure and on such terms and conditions as is provided in the constitution.

(4) Subject to subsection (5), every member of a close company shall, in relation to a person who is dealing with the company and is not a member, be an agent of the company.

(5) A close company shall be bound by any act of a member or manager of the close company, whether or not such act is performed for the carrying out of the business of the company, unless the member or manager so acting has in fact no authority to act for the company in the particular matter and the person with whom the member or manager dealt, has or ought reasonably to have, knowledge of the fact that the member or manager has no such authority.

263. Meetings

A close company may make the decisions and take any steps which are required by this Act to be made by ordinary or special resolution in any of the following ways—

(*a*) by an ordinary or special resolution at a meeting of members called and conducted in the way required by the Act or the constitution of the company;

(*b*) by a resolution *in lieu* of meeting; or

(*c*) in relation to any matters which can be entered into or done by way of unanimous agreement under section 247 then by way of such unanimous agreement.

264. Fiduciary position of members

(1) Each member of a close company stands in a fiduciary relationship towards the company and his fellow members.

(2) Without prejudice to the generality of subsection (1) of this section—

(*a*) every member of a close company is bound to render to every other member full information on all things affecting the company;

(*b*) every member of a close company shall account to the company for any benefit derived by him without the consent of the other members from any transaction concerning the company or from any use by him of the company's property, name or business connection; and

(*c*) if a member of a close company, without the consent of the other members, directly or indirectly carries on any business of the same nature as, and competing with, that of the company, he shall account for and pay over to the company all profits made by him in that business.

(2) A close company need not keep an Interests Register.

265. Payments by close company to members

(1) Any payment by a close company to any member by reason only of his membership, may be made only—

(*a*) if, after such payment is made, the company's assets, fairly valued, exceed all its liabilities;

(*b*) if the company is able to pay its debts as they become due in the ordinary course of its business; and

(*c*) if such payment will in the particular circumstances not in fact render the company unable to pay its debts as they become due in the ordinary course of its business.

(2) A member shall be liable to a close company for any payment received contrary to any provision of subsection (1).

(3) For the purposes of this section—

(*a*) without prejudice to the generality of the expression "payment by a close company to any member by reason only of his membership", that expression—

(i) shall include a distribution, or a repayment of any contribution, or part thereof, to a member, but

(ii) shall exclude any payment to a member in his capacity as a creditor of the relevant close company and, in particular, a payment as remuneration for services rendered as an employee or officer of the company, a repayment of a loan or of interest thereon or a payment of rental; and

(*b*) "payment" shall include the delivery or transfer of any property.

266. Prohibition of loans and furnishing of security to members and others by close company

(1) A close company shall not, directly or indirectly, make a loan—

(*a*) to any of its members;

(*b*) to any other company in which one or more of its members together hold more than a 50 per cent interest; or

(*c*) to any other company (except a close company) controlled by one or more members of the close company,

and shall not provide any security to any person in connection with any obligation of any such member, or other close company, or other company.

(2) The provisions of subsection (1) shall not apply in respect of the making of any particular loan or the provision of any particular security with the express previously obtained consent in writing of all the members of a close company.

(3) Any member of a close company who authorises or permits or is a party to the making of any loan or the provision of any security contrary to any provision of this section—

(*a*) shall be liable to indemnify the close company and any other person who had no actual knowledge of the contravention against any loss directly resulting from the invalidity of such loan or security; and

(*b*) shall be guilty of an offence and shall be liable on conviction to the penalty set out in section 492(2).

(4) A company shall be treated for the purposes of subsection (1)(*c*) as being controlled by one or more members of a close company if the same factors are present as would result in a company being controlled by another company under section 7.

(5) In this section the term—

(*a*) "loan" includes—

(i) a loan of any property, and

(ii) any credit extended by a close company where the debt concerned is not payable or is not being paid in accordance with normal business practice in respect of the payment of debts of the same kind; and

(*b*) "security" includes a guarantee.

267. Liability of members for negligence

(1) A member of a close company shall be liable to the company for loss caused by his failure in the carrying out of the business of the company to act with the degree of care and skill that may reasonably be expected from a person of his knowledge and experience.

(2) Liability referred to in subsection (1) shall not be incurred if the relevant conduct was preceded or followed by the written approval of all the members where such members had or have knowledge of all the material facts.

268. Rules applying to internal relations in the absence of contrary agreement

The following rules shall apply to the relations between members of a close company insofar as this Act or the constitution in respect of the close company does not provide otherwise—

(*a*) every member shall be entitled to participate in the carrying on of the business of the company;

(*b*) subject to the provision of section 262 and of paragraph (*d*), members shall have the right to participate in the management of the business of the company and in regard to the power to represent the company in the carrying on of its business:

Provided that the consent in writing of a member holding a member's interest of at least 75 per cent, or of members holding together at least that percentage of the member's interests, in the company, shall be required for—

(i) a change in the principal business carried on by the company,

(ii) a disposal of the whole, or substantially the whole, undertaking of the company,

(iii) a disposal of all, or the greater portion of, the assets of the company, and

(iv) any acquisition or disposal of immovable property by the company;

(*c*) differences between members as to matters connected with a close company's business shall be decided by majority vote at a meeting of members of the company;

(*d*) at any meeting of members of a close company each member shall have the number of votes that corresponds with the percentage of his interest in the close company;

(*e*) all the members are entitled to share in the capital and profits of the close company in proportion to their respective interests in the company;

(*f*) a close company shall indemnify every member in respect of expenditure incurred or to be incurred by him—

(i) in the ordinary and proper conduct of the business of the company, and

(ii) in regard to anything done or to be done for the preservation of the business or property of the company; and

(*g*) distributions by a close company to its members by reason only of their membership in terms of section 265 shall be of such amounts and be effected at such times as the members may from time to time agree upon, and such payments shall be made to members in proportion to their respective interests in the company.

269. Disqualification of persons regarding management of close company

(1) Notwithstanding any other provision of this Act or the constitution of a close company, the following persons shall be disqualified from taking part in the management of a close company—

(*a*) any person under legal disability, except—

(i) ...

[11 of 2008, s. 7.]

(ii) a minor who has attained at least the age of 18 years and whose guardian has lodged with the company a written consent to the minor's participation in the management of the business of the company;

(*b*) save under authority of a court—

(i) an un-rehabilitated insolvent,

(ii) any person removed from an office of trust on account of misconduct, and

(iii) any person who has at any time been convicted of theft, fraud, forgery or uttering a forged document, perjury, or any offence involving dishonesty or in connection with the formation or management of a company, and has been sentenced in relation to such conviction to imprisonment for at least six months without the option of a fine; and

(*c*) any person who is subject to any order of a court under this Act or the repealed Act disqualifying him from being a director of a company.

(2) Any person disqualified under the provisions of subsection (1)(*b*) or (*c*) who directly or indirectly takes part in or is concerned with the management of any close company, shall be guilty of an offence and shall be liable on conviction to the penalty set out in section 492(2).

270. Accounting records

(1) A close company shall keep in the English language such accounting records as are necessary fairly to present the state of affairs and business of the company, and to explain the transactions and financial position of the business of the company, including—

(*a*) records showing its assets and liabilities, members' contributions, undrawn profits, revaluations of fixed assets and amounts of loans to and from members;

(*b*) a register of fixed assets showing in respect thereof the respective dates of any acquisition and the cost thereof, depreciation (if any), and where any assets have been revalued, the date of the revaluation and the revalued amount thereof, the respective dates of any disposals and the consideration received in respect thereof:

Provided that in the case of a close company which has been converted from a private company, the existing fixed asset register of the company shall be deemed to be such a register in respect of the close company, and such particulars therein shall be deemed to apply in respect of it;

(*c*) records containing entries from day-to-day of all cash received and paid out, in sufficient detail to enable the nature of the transactions and, except in the case of cash sales, the names of the parties to the transactions to be identified;

(*d*) records of all goods purchased and sold on credit, and services received and rendered on credit, in sufficient detail to enable the nature of those goods or services and the parties to the transactions to be identified;

(*e*) statements of the annual stocktaking, and records to enable the value of stock at the end of the financial year to be determined; and

(*f*) vouchers supporting entries in the accounting records.

(2) The accounting records relating to—

(*a*) contributions by members;

(*b*) loans to and from members; and

(*c*) payments to members, shall contain sufficient detail of individual transactions to enable the nature and purpose thereof to be clearly identified.

(3) The accounting records referred to in subsection (1) shall be kept in such a manner as to provide adequate precautions against falsification and to facilitate the discovery of any falsification.

(4) The accounting records shall be kept at the place or places of business or at the registered office of the close company and shall, wherever kept, be open at all reasonable times for inspection by any member.

(5) Any close company which fails to comply with any provision of any of the preceding subsections of this section, and every member thereof who is a party to such failure or who fails to take all reasonable steps to secure compliance by the company with any such provision, shall be guilty of an offence and liable to the penalty set out in section 492(2).

(6) In any proceedings against any member of a close company in respect of an offence consisting of a failure to take reasonable steps to secure compliance by a close company with any provision referred to in subsection (5), it shall be a defence if it is proved that—

(*a*) the accused had reasonable grounds for believing and did believe that a competent and reliable person was charged with the duty of seeing that any such provision was complied with;

(*b*) such person was in a position to discharge that duty; and

(*c*) that the accused had no reason to believe that such person had in any way failed to discharge that duty.

271. Financial year of close company

(1) A close company shall—

(*a*) determine a date on which, in each year, its financial year will end; and

(*b*) cause the financial year of the company to be its annual accounting period.

(2) The date referred to in subsection (1)(*a*) may, subject to the provisions of section 261, be changed by the company to any other date:

Provided that the close company may not change the date referred to in subsection (1)(*a*) more than once in any financial year.

(3) Subject to any increase or reduction of the duration of a financial year by reason of the provisions of subsection (4), the duration of each financial year of a close company shall be 12 months ending on the date or other date referred to in subsection (1)(*a*) or (2).

(4) Notwithstanding the provisions of subsection (3)—

(*a*) the first financial year of a close company shall commence on the date of its registration and shall end on the date referred to in subsection (1)(*a*) occurring not less than three nor more than 15 months after the date of registration:

Provided that the first financial year of any close company which has converted from an existing private company in terms of section 248 shall end on the date on which the financial year of the private

company would have ended had it not been so converted; and

(*b*) in the case of a close company which has in terms of subsection (2) changed the date referred to in subsection (1)(*a*), the financial year shall commence at the end of the previous financial year and shall end on the date as changed occurring not less than three nor more than 18 months after the end of that previous financial year.

272. Annual financial statements

(1) The members of a close company shall within five months after the end of every financial year of the company cause annual financial statements in respect of that financial year to be made out in the English language.

(2) The annual financial statements of a close company—

(*a*) shall consist of—

(i) a balance sheet and any notes thereon, and

(ii) an income statement or any similar financial statement where such form is appropriate, and any notes thereon;

(*b*) shall be in conformity with generally accepted accounting principles, appropriate to the business of the company, fairly present the state of affairs of the company as at the end of the financial year concerned, and the results of its operations for that year;

(*c*) shall disclose separately the aggregate amounts, as at the end of the financial year, of contributions by members, undrawn profits, revaluations of fixed assets and amounts of loans to or from members, and the movements in these amounts during the year;

(*d*) shall be in agreement with the accounting records, which shall be summarised in such a form that—

(i) compliance with the provisions of this subsection is made possible, and

(ii) an accounting officer is enabled to report to the company in terms of section 276(1) without it being necessary to refer to any subsidiary accounting records and vouchers supporting the entries in the accounting records:

Provided that nothing contained in this paragraph shall be construed as preventing an accounting officer, if he deems it necessary, from inspecting such subsidiary accounting records and vouchers; and

(*e*) shall contain the report of the accounting officer referred to in section 276.

(3) The annual financial statements shall be approved and signed by or on behalf of a member holding a member's interest of at least 51 per cent, or members together holding members' interests of at least 51 per cent, in the company.

(4) A close company which in respect of its last preceding financial year satisfies the criteria referred to in the definition of "exempt private company" in section 2(4) shall comply with the obligations of an exempt private company in relation to its financial statements and the provisions relating to auditors in all respects as if it were a non-exempt private company and sections 2(4) and 190 to 211 shall apply to such a close company.

(5) Any member of a close company who fails to take all reasonable steps to comply or to secure compliance with any provision of this section, shall be guilty of an offence and liable on conviction to the penalty set out in section 492(2).

(6) In any proceedings against any member of a close company under subsection (5) the defence referred to in section 270(6) shall be available to him.

273. Appointment of accounting officers

(1) Subject to subsection (7) every close company shall appoint an accounting officer in accordance with the provisions of this Part.

(2) The appointment of an accounting officer of a close company shall take effect on the date of registration of the close company or on any date thereafter:

[22 of 2018, s. 23 w.e.f. 3 June 2019.]

Provided that a close company shall, in the prescribed form and within 20 days from the date the appointment is made, notify the Registrar of such appointment.

[22 of 2018, s. 23 w.e.f. 3 June 2019.]

(3) If a vacancy occurs in the office of an accounting officer, whether as a result of a removal, resignation or otherwise, the close company shall within 28 days appoint another accounting officer and comply with the provisions of this Part.

(4) A close company shall inform its accounting officer in writing of his removal from office.

(5) An accounting officer shall on resignation or removal from office forthwith inform every member of the close company thereof in writing, and shall send a copy of the letter to the last known address of the registered office of the close company and shall in addition forthwith by certified post inform the Registrar—

(*a*) that he has resigned or been removed from office;

(*b*) of the date of his resignation or removal from office;

(*c*) of the date up to which he performed his duties; and

(*d*) whether, at the time of the resignation or removal from office of the accounting officer, that officer was aware of any matters in the financial affairs of the close company which are in contravention of the provisions of this Act, and where that accounting officer was aware of any such matter shall submit the full particulars thereof in writing to the Registrar.

(6) If an accounting officer who has been removed from office is of the opinion that he was removed for improper reasons, he shall forthwith by certified post inform the Registrar thereof, and shall send a copy of the letter to every member.

(7) Where a close company is receiving accounting advice and assistance, which includes an equivalent service to that required of an accounting officer under section 276, through a programme for small business administered or approved by the Ministry responsible for trade and industry the Registrar shall be given notice by the Director or officer from the Ministry responsible for providing the programme of the fact that such assistance is being given and until further notice is given by such Director or officer to the Registrar that this advice and assistance has been withdrawn the close company need not appoint an accounting officer under this section:

Provided that the provisions of this section shall not apply from after the expiry of the third financial year of a close company following its incorporation.

274. Qualifications of accounting officers

(1) Subject to section 273(7), no person shall be appointed as or hold the office of an accounting officer of a close company, unless that person is a member of the Botswana Institute of Accountants and is ordinarily resident in Botswana.

(2) A member or employee of a close company, or a firm whose partner or employee is a member or employee of a close company, shall not qualify for appointment as an accounting officer of such company unless all the members consent in writing to such appointment.

(3) A firm or corporation may be appointed as an accounting officer of a close company, provided that—

(*a*) at least one member of the firm or director of the corporation is ordinarily resident in Botswana; and

(*b*) the members of the firm or directors of the corporation who accept responsibility for the work of the firm or corporation as accounting officer are qualified to act as accounting officer under subsection (1).

275. Right of access and remuneration of accounting officers

(1) An accounting officer of a close company shall at all times have a right of access to the accounting records and all the books and documents of the close company, and to require from members such information and explanations as he considers necessary for the performance of his duties as an accounting officer.

(2) The remuneration of an accounting officer shall be determined by agreement with the close company.

276. Duties of accounting officers

(1) The accounting officer of a close company shall, not later than three months after completion of the annual financial statements—

(*a*) subject to the provisions of section 272, determine whether the annual financial statements are in agreement with the accounting records of the close company;

(*b*) review the appropriateness of the accounting policies represented to the accounting officer as having been applied in the preparation of the annual financial statements; and

(*c*) report in respect of paragraphs (*a*) and (*b*) to the members.

(2) An accounting officer of a close company may be engaged by the company to keep the company's books and financial records and prepare its financial statements.

(3) If during the performances of his duties an accounting officer becomes aware of any contravention of a provision of this Act, he shall describe the nature of such contravention in his report.

(4) Where an accounting officer is a member or employee of the close company, or is a firm of which a partner or employee is a member or employee of the close company, or if the accounting officer has himself assisted in or had responsibility for keeping the company's books and financial records or preparing its financial statements, his report shall state that fact.

(5) If an accounting officer of a close company—

(*a*) at any time knows, or has reason to believe, that the close company is not carrying on business or is not in operation and has no intention of resuming operations in the foreseeable future; or

(*b*) during the performance of his duties finds—

(i) that any change, during a relevant financial year, in respect of any particulars mentioned in the constitution (or in the absence of a constitution are required by this Act) has not been registered,

(ii) that the annual financial statements indicate that as at the end of the financial year concerned the close company's liabilities exceed its assets, or

(iii) that the annual financial statements incorrectly indicate that as at the end of the financial year concerned the assets of the close company exceed its liabilities, or has reason to believe that such an incorrect indication is given,

he shall forthwith report in writing accordingly to the Registrar.

(6) If an accounting officer of a close company has in accordance with subparagraph (ii) or (iii) of paragraph (*b*) of subsection (5) reported to the Registrar that—

(*a*) the annual financial statements of the close company concerned indicate that as at the end of the financial year concerned the company's liabilities exceed its assets;

(*b*) the annual financial statements incorrectly indicate that as at the end of the financial year concerned the assets of the company exceed its liabilities;

(*c*) he has reason to believe that such an incorrect indication is given, and he finds that any subsequent financial statements of the company concerned indicate that the situation—

(i) has changed, or

(ii) has been rectified and that the assets concerned then exceed the liabilities or that they no longer incorrectly indicate that the assets exceed the liabilities; or

(*d*) he no longer has reason to believe that such an incorrect indication is given, as the case may be, he may report to the Registrar accordingly.

PART XX
Alteration in Nature of Companies (ss 277-280)

277. Conversion of company limited by shares to company limited by guarantee

(1) A company limited by shares may be converted to a company limited by guarantee without a share capital where—

(*a*) there is no unpaid liability on any of its shares;

(*b*) all its members agree in writing to the conversion and to the surrender to the company for cancellation of all the shares held by them immediately before the conversion; and

(*c*) a new constitution appropriate to a company limited by guarantee is lodged.

(2) Where—

(*a*) a copy of the new constitution and of the special resolution adopting the constitution; and

(*b*) a declaration by a director and the secretary of the company stating that the requirements of subsection (1) have been complied with, are filed, the Registrar shall, subject to the other provisions of this Act, issue a certificate of the conversion.

(3) The conversion of a company under this section shall—

(*a*) take effect on the issue of the certificate;

(*b*) operate so that all shares are deemed to have been validly surrendered and cancelled notwithstanding anything in Part VI;

(*c*) have effect so that every member who has not agreed to contribute to the assets of the company in the event of its being wound-up shall cease to be a member; and

(*d*) not affect any right or obligation of the company except as otherwise provided in this section or render defective any proceedings by or against the company.

(4) A company limited by guarantee shall, forthwith after its conversion from a company limited by shares, give notice in writing of the conversion to all creditors of the company at the time of conversion, and to all other parties to contracts or legal proceedings in which the company was involved at the time of the conversion.

[22 of 2018, s. 24 w.e.f. 3 June 2019.]

278. Conversion of company into close company

(1) Any private company having five or fewer members all of private whom qualify for membership of a close company in terms of section 249 may be converted into a close company, provided that every member of the company becomes a member of the close company.

(2) In respect of a conversion referred to in subsection (1) there shall be filed with the Registrar an application for conversion accompanied by any new constitution which may be filed by the company.

(3) The application for a conversion under subsection (2) shall state—

(*a*) the size, expressed as a percentage, of each member's interest in the close company; and

(*b*) the name and address of the person appointed to be the accounting officer of the close company.

[22 of 2018, s. 25(a) w.e.f. 3 June 2019.]

(4) Where the provisions of subsections (2) and (3) have been complied with, the Registrar shall, if he is satisfied that the company concerned has complied materially with the requirements of this Act, register the company as a close company and—

(*a*) issue to the company a new certificate of incorporation confirming the conversion;

(*b*) cancel the previous certificate of incorporation; and

(*c*) give public notice of the conversion.

[22 of 2018, s. 25(b) w.e.f. 3 June 2019.]

(5) The close company shall forthwith after its conversion from a private company, give notice in writing of the conversion to all creditors of the company at the time of conversion, and to all other parties to contracts or

legal proceedings in which the private company was involved at the time of the conversion.

(6) ...

[22 of 2018, s. 25(c) w.e.f. 3 June 2019.]

(7) The conversion of a company under this section shall—

(*a*) take effect on the issue of the certificate; and

(*b*) not affect the identity of the company or any right or obligation of the company or render defective any legal proceedings by or against the company.

279. Conversion of close company into a private company

(1) A close company may be converted into a private company limited by shares if—

(*a*) all the members agree, in writing, to convert the company into a private company; and

(*b*) each member agrees, in writing, to take up a specified number of shares.

[22 of 2018, s. 26(a) w.e.f. 3 June 2019.]

(2) In respect of a conversion referred to in subsection (1) there shall be filed with the Registrar an application for conversion accompanied by any new constitution which may be filed by the company.

(3) The application for conversion shall state—

(*a*) ...

[22 of 2018, s. 26(b) w.e.f. 3 June 2019.]

(*b*) the number of shares issued to each shareholder; and

(*c*) the full names and residential addresses of each director and the secretary and their written consents to acting as such.

(4) Where the provisions of subsections (2) and (3) have been complied with—

(*a*) the Registrar shall, if he is satisfied that the company concerned has complied materially with the requirements of this Act, register the company as a close company and—

(i) issue to the company a new certificate of incorporation confirming the conversion,

(ii) cancel the previous certificate of incorporation, and

(iii) give public notice of the conversion; and

(*b*) the company shall, forthwith after its conversion from a close company, give notice in writing of the conversion to all creditors of the company at the time of conversion, and to all other parties to contracts or legal proceedings in which the company was involved at the time of the conversion.

[22 of 2018, s. 26(c) w.e.f. 3 June 2019.]

(5) ...

[22 of 2018, s. 26(d) w.e.f. 3 June 2019.]

(6) The conversion of a company under this section shall—

(*a*) take effect on the issue of the certificate; and

(*b*) not affect the identity of the company or any right or obligation of the company or render defective any proceedings by or against the company.

280. Conversion of public and private companies

(1) A public company that has not for the time being more than 25 members may convert to a private company by filing with the Registrar—

(*a*) a copy of a special resolution passed to that effect; and

(*b*) a declaration by a director or secretary of the company stating the full names, addresses and descriptions of all the members, and the number of shares held by each of them respectively.

(2) A private company may, subject to its constitution, convert to a public company by filing with the Registrar a copy of a special resolution passed to that effect.

(3) ...

[22 of 2018, s. 27(a) w.e.f. 3 June 2019.]

(4) Where a company has complied with the provisions of subsections (1) and (2)—

(*a*) the Registrar shall—

(i) issue to the company a new certificate of incorporation in the prescribed form, confirming the conversion,

(ii) cancel the previous certificate of incorporation, and

(iii) give public notice of the conversion; and

(*b*) the company shall, forthwith after its conversion from a private company or public company as the case may be, give notice in writing of the conversion to all creditors of the company at the time of conversion, and to all other parties to contracts or legal proceedings in which the company was involved at the time of the conversion.

[22 of 2018, s. 27(b) w.e.f. 3 June 2019.]

(5) The conversion of a company under this section shall—

(*a*) take effect on the issue of the certificate; and

(*b*) not affect the identity of the company or any right or obligation of the company or render defective any legal proceedings by or against the company.

PART XXI
Investigations (ss 281-294)

281. Qualifications of Inspectors

An inspector designated or appointed under this Part shall be either a qualified auditor of at least seven years experience or a person who holds or has held judicial office.

282. Declared companies and their inspection

(1) Where the Minister is satisfied that—

(*a*) for the protection of the public, the shareholders or creditors of a company, it is desirable that the affairs of the company should be investigated;

(*b*) it is in the public interest that the affairs of a company should be investigated; or

(*c*) in the case of a foreign company, the appropriate authority of another country had made request to the Minister that a designation be made under this section in respect of the company, the Minister may, by notice published in the *Gazette*, designate the company or foreign company to be a declared company.

(2) The Registrar shall require an inspector to investigate the affairs of every declared company and to make a report on his investigation in such form and manner as the Registrar shall direct.

(3) The expenses of and incidental to an investigation of a declared company shall, subject to subsection (4), be paid out of public funds.

(4) Where the Minister is of the opinion that the whole or any part of the expenses of and incidental to the investigation should be paid or refunded—

(*a*) by the company; or

(*b*) by the person or authority who requested the designation of a declared company, the Minister may direct that the expenses be so paid or refunded.

(5) Where a direction is made for the payment of the whole or part of the expenses by a company and the company is in liquidation or subsequently goes into liquidation the expenses shall, for the purposes of section 459, be part of the costs and expenses of the winding-up.

283. Investigation of other companies

(1) The Registrar may—

(*a*) in the case of a company having a share capital, on the application of—

(i) not less than 50 shareholders,

(ii) shareholders holding not less than one-tenth of the issued shares; or

(iii) debenture holders holding not less than one-fifth in nominal value of the issued debentures; or

(*b*) in the case of a company limited by guarantee, on the application of not less than one-fifth in number of the persons on the share register,

and where the company by special resolution or the court by order declares that the affairs of the company should be investigated, require an inspector to investigate the affairs of a company or such aspects of the affairs of a company as are specified in the instrument of appointment and in the case of a debenture trust deed, the conduct of the trustee for debenture holders, and to make a report on his investigation in such form and manner as the Registrar shall direct.

(2) An application under this section shall be supported by such evidence as the Registrar requires as to the reasons for the application and the motives of the applicants in requiring the investigation, and the Registrar

may, before appointing an inspector, require the applicants to give security in such amount as he considers appropriate for payment of the costs of the investigation.

284. Inspector's Reports

(1) An inspector who makes an investigation under section 282 or 283 may, and if so directed by the Registrar shall, make interim reports to the Registrar.

(2) Subject to section 287(3), a copy of the inspector's final report shall be forwarded to the Registrar and to the registered office of the company, and a further copy shall, at the request of the authority who requested the designation for the declared company under section 282(1)(*c*) or an applicant under section 283, be delivered to the authority or the applicant.

(3) The Registrar may, if the Registrar is of the opinion that it is necessary in the public interest so to do, cause the report to be published.

(4) Where from a report of an inspector it appears to the Registrar that proceedings ought in the public interest to be brought by a company dealt with by the report—

(*a*) for the recovery of damages in respect of any fraud, misfeasance or other misconduct—

(i) in connection with the promotion or formation of that company, or

(ii) the management of its affairs; or

(*b*) for the recovery of any property of the company which has been misapplied or wrongly retained,

he may bring proceedings for that purpose in the name of the company, and the Registrar may, unless the company is already being wound-up by the court, bring a petition under section 370 for winding-up by the court.

(5) Where, from a report of an inspector, it appears that any qualified auditor has been guilty of misconduct or has conducted an audit in a manner which renders him in the opinion of the inspector unfit to be a qualified auditor, the Registrar shall refer that matter to the body which is charged with the responsibility for the conduct of auditors in Botswana for it to consider the taking of disciplinary action against such auditor, and if there is no such body for the time being in Botswana then the Minister shall inquire into the conduct of that person and if he is satisfied that such person is unfit to continue to discharge the function of an auditor under this Act the Minister shall declare by notice in the *Gazette* that the person is no longer qualified to be an auditor under this Act and on publication of the notice he shall cease to be qualified to be an auditor under this Act.

(6) Where, from a report of an inspector, it appears to the Minister or the Registrar that in the case of any public company or non-exempt private company—

(*a*) an agreement for the use of—

(i) a holding company or subsidiary company or companies,

(ii) shares with restricted voting rights or special rights, or

(iii) any voting trust or arrangement, has been entered into by any member or members in order to confer or maintain control in that member or those members; and

(*b*) the control referred to in paragraph (*a*) unfairly discriminates against or is unfairly prejudicial to other members of the company, the Minister or the Registrar may apply to the court under section 174 for an order under that section.

285. Investigation at company's request and investigation of related corporation

(1) A company other than a declared company may, by ordinary resolution, appoint an inspector to investigate its affairs.

(2) On the conclusion of the investigation the inspector shall report his opinion in such manner and to such persons as the company in general meeting directs.

(3) Where an inspector thinks it necessary for the purposes of the investigation of the affairs of a company to investigate the affairs of a related corporation he may, with the Registrar's written consent, investigate the affairs of that corporation.

286. Investigation of financial or other control of corporation

(1) The Registrar may, where he is of the opinion that there is reasonable ground to do so and shall, unless he is of the opinion that the request is vexatious or unreasonable, at the request of a like number of applicants as is specified in section 283(1), for the purpose of determining the true persons who are or have been financially interested in the success or failure, real or apparent, of a company or able to control or materially influence its policy, require an inspector to investigate—

(*a*) the membership of a company and any related corporation;

(*b*) any other matter relating to the company or related corporation; and

(*c*) to make a report on his investigation in such form and manner as the Registrar may direct.

(2) Subject to subsection (1), the powers of an inspector making an investigation under this section shall extend to the investigation of any circumstances which suggest the existence of an arrangement or understanding which, though not legally binding, is or was observed or likely to be observed in practice and which is relevant to the purposes of his investigation.

(3) Where the Registrar is of the opinion that there is good reason for not divulging the contents of the report or of any part thereof, the Registrar shall not be bound to furnish the company or any other person with a copy of a report by an inspector making an investigation under this section.

287. Procedure and powers of inspector

(1) Every person concerned shall, if required to do so, produce to an inspector every book in that person's custody, control or possession and give to the inspector all assistance in connection with the investigation which the person is reasonably able to give.

(2) An inspector may by written notice require any person concerned to appear for examination on oath in relation to the business of a corporation and the notice may require the production of every book in the custody, control or possession of the person concerned.

(3) Where an inspector requires the production of a book in the custody, control or possession of a person concerned, he—

(*a*) may take possession of the book;

(*b*) may retain the book for such time as he considers necessary for the purpose of the investigation; and

(*c*) shall, where the book is in his possession, permit the corporation to have access, at all reasonable times, to the book.

(4) An inspector, on giving 72 hours notice to the corporation concerned, may exercise the same powers of inspection as are conferred on the Registrar under section 14.

(5) No person concerned shall refuse to answer a question which is relevant or material to the investigation on the ground that the person's answer might tend to incriminate the person.

(6) Where the person concerned claims that the answer to a question might incriminate the person and, but for this subsection, he or she would have been entitled to refuse to answer the question, the answer to the question shall not be used in any subsequent criminal proceedings, except in the case of a charge against that person for making a false statement in answer to that question.

(7) An inspector may cause notes of any examination under this Part to be recorded and reduced to writing and to be read to or by and signed by the person examined and the notes may, subject to subsection (5)(*b*), thereafter be used in evidence in any legal proceedings against that person.

288. Costs of investigations

(1) Subject to subsection (4) the expenses of and incidental to an investigation by an inspector under sections 283 and 285 including the costs of any proceedings brought by the Registrar in the name of the company, shall be paid by the company investigated or if the Registrar so directs, by the applicant or in part by the company and in part by the applicant.

(2) Where a company fails to pay the whole or any part of the sum which it is liable to pay under subsection (1), the applicant shall make good the deficiency up to the amount by which the security given by him under this part exceeds any amount which he has been directed to pay under subsection (1).

(3) Any balance of the expenses not paid either by the company or the applicant shall, following reasonable steps to recover the same, be paid out of public funds.

(4) Any person who is convicted on a prosecution instituted by the Attorney-General as a result of the investigation may be directed by the court to pay by way of reimbursement to public funds, the applicant, or the company as the case may be, the said expenses either in whole or in part.

289. Report of inspector admissible in evidence

A copy of the report of an inspector certified as a true copy by the Registrar shall be admissible in any legal proceedings as evidence of the opinion of the inspector and of the facts on which his opinion is based in relation to any matter contained in the report.

290. Suspension of proceedings in relation to declared company

Where an inspector has been required to investigate a declared company, no proceeding shall, until the expiry of one month after the inspector has presented his final report, be commenced or proceeded with in any court except with the Registrar's consent—

(*a*) by the company on or in respect of any contract, bill of exchange or promissory note; or

(*b*) by the holder or any other person in respect of any bill of exchange or promissory note made, drawn or accepted by or issued, transferred negotiated or endorsed by or to the company unless the holder or other person—

(i) at the time of the negotiation, transfer, issue endorsement or delivery gave adequate pecuniary consideration, and

(ii) was not at the time of the negotiation, transfer, issue, endorsement or delivery or at any time within three years before that time a shareholder, officer, person concerned or employee or the wife or husband of a member, officer, person concerned or employee.

291. Power to require information as to person interested in shares or debentures

(1) Subject to subsection (2), where the Registrar is of opinion that there is reasonable ground to investigate the ownership of any shares or debentures of any company and any related corporation including a banking company, but that it is unnecessary to require an inspector to make an investigation for that purpose, the Registrar may require any person whom the Registrar has reasonable ground to believe—

(*a*) to be or to have been interested in the shares or debentures; or

(*b*) to act or to have acted in relation to the shares or debentures as the agent of someone interested therein,

to give to the Registrar any information which the person has or can reasonably be expected to obtain as to the present and past interests in those shares or debentures and the names and addresses of the persons interested and of any persons who act or have acted on their behalf in relation to the shares or debentures.

(2) Nothing in subsection (1) shall, subject to the Banking Act (Cap. 46:04), require a banking company to disclose to the Registrar any information as to the affairs of a customer other than a company of which it is the banker.

292. Power to impose restrictions on shares or debentures

(1) Where in connection with an investigation under section 286 or a request under section 291, it appears to the Registrar that there is difficulty in finding out the relevant facts about any shares, whether issued or to be issued, and that the difficulty is due wholly or mainly to the unwillingness of a person concerned to assist the investigation or the inquiry, the Registrar may, by notice published in the *Gazette* direct that—

(*a*) any transfer of those shares or any exercise of the right to acquire or dispose of those shares or in the case of unissued shares any transfer of the right to be issued therewith and any issue thereof, shall be void;

(*b*) no voting rights shall be exercisable in respect of those shares;

(*c*) no further shares shall be issued in right of those shares or in pursuance of any offer, including any rights offer within the meaning of section 295(1) made to the holder of those shares; or

(*d*) except in a liquidation, no payment shall be made of any sum due from the corporation on those shares whether in respect of capital or otherwise.

(2) Where the Registrar directs that shares shall cease to be subject to the restrictions specified in subsection (1) and the notice is expressed to be made with a view to permitting a transfer of those shares, the Registrar may direct that subsection (1)(*c*) and (*d*) shall continue to apply in relation to those shares, either in whole or in part, so far as those paragraphs relate to a right acquired or an offer made before the transfer.

(3) This section shall apply in relation to debentures as it applies in relation to shares.

293. Inspectors appointed in other countries

Where—

(*a*) under a corresponding law of another country an inspector has been appointed to investigate the affairs of a corporation; and

(*b*) the Registrar is of the opinion that, in connection with that investigation, it is expedient that an investigation be made in Botswana,

the Registrar may by notice published in the *Gazette* direct that the inspector so appointed shall have the same powers and duties in Botswana in relation to the investigation as if the corporation was a declared company.

294. Saving for attorneys and bankers

Nothing in this Act shall require disclosure to the Minister or Registrar or to an inspector appointed under this Part—

(*a*) by an attorney of any privileged communication made to him in that capacity, except as respects the name and address of his client; or

(*b*) by a company's bankers as such of any information as to the affairs of any of their customers other than the company.

PART XXII
Public Offering of Securities and Prospectus (ss 295-329)

295. Definitions

(1) In this Part, unless the context otherwise requires—

"**company**" includes an external company;

"**letter of allocation**" means any document conferring a right to subscribe for securities in terms of a rights offer;

"**offer**" means an offer made in any way, including by provisional allotment or allocation, for the subscription for or sale of any securities and includes an invitation to subscribe for or purchase any securities;

"**offer to the public**" and any reference to offering securities to the public mean any offer to the public and include an offer of securities to any section of the public, whether selected as shareholders or debenture-holders or employees of the company concerned or as clients of the person issuing the prospectus concerned or in any other manner;

"**promoter**" in relation to civil and criminal liability in respect of an untrue statement in a prospectus, means a person who was a party to the preparation of the prospectus or of the portion thereof containing the untrue statement but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company or preparing the said prospectus;

"**rights offer**" means an offer for subscription with a right to renounce in favour of other persons, to those shareholders or debenture holders of a company who are not excluded from such offer under subsection (2), for any securities of that company or any other company, where a stock exchange within Botswana or a stock exchange recognised by the Minister on the recommendation of the committee of the Botswana Stock Exchange for the purposes of this definition by notice in the *Gazette*, has granted or has agreed to grant a listing for the shares which are the subject of the offer;

"**securities**" means any shares or debentures or any right or option in respect of any shares or debentures but does not include any securities issued by an investment company or a Collective Investment Undertaking

which are regulated by the Collective Investment Undertakings Act (Cap. 56:09);

"**untrue statement**" in relation to a prospectus or portion thereof, includes—

(*a*) a statement which is misleading in the form and context in which it is included therein and a statement shall be deemed to be included in a prospectus if it is contained in any report or memorandum which appears on the face of the prospectus or which is by reference incorporated therein or is attached to or accompanies the prospectus on registration; and

(*b*) an omission from a prospectus of any matter, whether such matter is required to be included therein by this Act or not, where such an omission is calculated to mislead, and such prospectus shall be deemed in respect of such omission to be a prospectus in which an untrue statement is included.

(2) Notwithstanding anything contained in the constitution of a company, the company may, with the written approval of the Registrar and subject to such conditions as he may determine, exclude any category of shareholders or debenture holders of the company not resident within Botswana from any rights offer.

(3) An application for a written approval referred to in subsection (2) shall be accompanied by the prescribed fee.

296. Restrictions as to offers to the public

(1) No person shall offer any securities to the public otherwise than in accordance with the provisions of this Act.

(2) No person shall offer to the public any securities of any company or body corporate which is not a company or external company within the meaning of this Act or which is not or which has not been exempted from the provisions of this subsection by the Registrar by notice in the *Gazette*.

(3) Any person who contravenes the provisions of subsection (2) and, if such person is a company, any director or officer of such company who knowingly is a party to the contravention shall be guilty of an offence and liable to the penalty set out in section 492(3)

297. Offers not being offers to the public

An offer of shares or debentures in relation to an offer for the subscription for or sale of any shares or debentures, shall not be construed as an offer to the public—

[6 of 2011, s. 4.]

(*a*) if the offer is made to—

(i) a bank registered or provisionally registered in terms of the Banking Act (Cap. 46:04),

(ii) an insurer registered or provisionally registered in terms of the Insurance Industry Act (Cap. 46:01),

(iii) a pension fund manager or administrator registered under the Pension Funds Act (Cap. 27:01), or

(iv) any other company which carries on the business of portfolio funds management and is approved for the purposes of this section by the committee of the Botswana Stock Exchange which is acting as principal, and also to a wholly owned subsidiary of such bank, or insurer or other company when it acts as agent in the capacity of authorised portfolio manager for a pension fund approved by the Minister responsible for finance and development planning, or for a Collective Investment Undertaking licensed under the Collective

Investment Undertakings Act, managed by the said wholly owned subsidiary which is a management company in terms of the Collective Investment Undertakings Act (Cap. 56:09);

(*b*) if the offer for subscription is of such a nature that the total acquisition cost of the shares or debentures for a single offeree acting as principal is at least P100,000 or such higher amount as the Minister may, by notice in the *Gazette*, determine in order to counter the effect of inflation;

(*c*) if it is a single once-off offer for subscription and the offer is accepted by not more than 20 persons acting as principals:

Provided that—

(i) the aggregate subscription price (including any premium) of the shares or debentures so issued does not exceed P100,000 or such higher amount as the Minister may, by notice in the *Gazette*, determine in order to counter the effect of inflation,

(ii) the issue of the shares or debentures shall be finalised within six months from the date the offer was first made,

(iii) the offer shall be in writing,

(iv) particulars of the offer shall be lodged in the prescribed manner with the Registrar for registration prior to the offer being made, and

(v) the offer shall not be accompanied by or made by means of an advertisement and no selling expenses shall be incurred in connection with the offer;

(*d*) if it is a non-renounceable offer for the subscription of shares or debentures and the offer is made only to existing shareholders or debenture holders of that company;

(*e*) if it is a rights offer; or

(*f*) if the offer is made to any director or officer of the company, or any close relative of such director or officer:

Provided that the original offer shall for purposes of this Part be an offer to the public if the offer is renounceable in favour of a person who is not a director or officer of the company or close relative of such director or officer.

298. Offer or subscription to public without a prospectus prohibited

(1) No person shall make any offer to the public for the subscription for shares unless it is accompanied by a prospectus complying with the requirements of this Act and registered with the Registrar, and no person shall issue such a prospectus which has not been so registered.

(2) Any person who contravenes any provision of subsection (1) and, if such person is a company, any director or officer of such company who knowingly is a party to the contravention, shall be guilty of an offence, and is liable on conviction to the penalty set out in section 492(3).

299. Approval by stock exchange a requirement for letters of allocation

(1) No person shall issue, distribute or deliver or cause to be issued, distributed or delivered a letter of allocation unless it is accompanied by such documents as are required and have been approved by the stock exchange concerned.

(2) Any person who contravenes any provision of subsection (1) and, if such person is a company, any director or officer of such company who knowingly is a party to the contravention, shall be guilty of an offence and is liable on conviction to the penalty set out in section 492(3).

300. Offer for sale to the public without prospectus prohibited

(1) No person shall make any offer to the public for the sale of any securities—

(*a*) which have been, or have been agreed to be, allotted by the company concerned with a view to all or any of them being offered to the public; or

(*b*) in respect of which it has been made known in any way at or about the time of, and in connection with, such offer, that the company concerned has applied or intends to apply for their listing by a stock exchange in Botswana or elsewhere, unless such offer is accompanied by a prospectus complying with the requirements of this Act and registered with the Registrar, and no person shall issue such a prospectus which has not been so registered.

(2) For the purposes of subsection (1)(*a*) it shall, unless the contrary is proved, be evidence that an allotment of, or an agreement to allot, shares was made with a view of the shares being offered for sale to the public if it is shown that an offer for sale to the public in respect of such shares or any of them was made within 18 months after the allotment or the agreement to allot.

(3) Any person who contravenes any provision of subsection (1) and, if such person is a company, any director or officer of such company who knowingly is a party to the contravention, shall be guilty of an offence, and is liable on conviction to the penalty set out in section 492(3).

301. Rights offers

(1) A company desiring to issue a letter of allocation shall deliver to the Registrar for registration a copy thereof together with the prescribed fee and a copy of every document referred to in section 299 and every such copy shall be certified, by not less than two directors of the company, as a true copy of the original approved by the stock exchange concerned.

(2) Every copy mentioned in subsection (1) shall be accompanied by a copy of any contract referred to in the letter of allocation and, if such contract is not in the English language, by translation of the contract into English.

(3) As soon as the Registrar has registered the documents referred to in subsection (1), he shall give notice of the registration to the company concerned or the person who lodged them with him on behalf of the company.

(4) Every letter of allocation which is issued shall—

(*a*) state on the face of it that a copy of the letter of allocation together with copies of all other documents referred to in subsections (1) and (2) have been registered as required by this section; and

(*b*) be accompanied by a copy of every document lodged therewith in terms of subsection (1):

Provided that the provisions of this paragraph shall not apply to any letter of allocation issued in connection with a renunciation of part of the rights to subscribe in terms of the rights offer.

(5) The provisions of sections 304(2) and (3), 306(1) and (4), 307(1), (4) and (5), 311, 313, 314, 315, and 316 shall apply *mutatis mutandis* to the rights offer and all documents issued in connection therewith.

(6) Any person who contravenes any provision of this section, and if such person is a company, any director and officer of such company who knowingly is a party to such contravention, shall be guilty of an offence and liable on conviction to the penalty set out in section 492(2).

302. Application form for shares to be attached to prospectus

(1) No person shall issue, distribute or deliver or cause to be issued, distributed or delivered, any form of application in respect of shares of a company, unless the form—

(*a*) is attached to a prospectus a copy of which has been registered with the Registrar; and

(*b*) bears on the face of it the date of registration of the prospectus:

Provided that this subsection shall not apply if it is shown that the form of application was issued either—

(i) in connection with a *bona fide* invitation to enter into an underwriting agreement with respect to the shares, or

(ii) in relation to shares which were not offered to the public.

(2) If any person contravenes subsection (1)(*a*) or (*b*), he shall be guilty of an offence, and is liable on conviction to the penalty set out in section 492(2).

303. Matters to be stated in prospectus

(1) Every prospectus issued in terms of this Act—

(*a*) shall be in the English language and contain a fair presentation of the state of affairs of the company, the securities of which are being offered and shall state at least the matters specified in, and set out the reports referred to in, Part I and Part II of the Tenth Schedule; and

(*b*) may state instead of the matters referred to in paragraph (*a*), at least the matters specified in Part III of the Tenth Schedule, where the intended offer relates to securities which are or are to be in all respects uniform with existing securities previously issued and a stock exchange within Botswana has not in respect of such first-mentioned securities granted or agreed to grant a listing, and such offer is made only to existing shareholders or debenture holders of any company with the right to renounce in favour of other persons.

(2) The information referred to in subsection (1) shall be set out in print or type and shall not be less conspicuous than that in which the additional matter of the prospectus is printed or typed, shall be set out in separate paragraphs under the headings provided in the Tenth Schedule and in accordance with the instructions contained in Part IV of that Schedule.

(3) Every prospectus in respect of an offer for the sale of shares under section 300(1)(*a*) shall state, in addition to the matters specified in subsection (1)—

(*a*) the net amount of the consideration received or to be received by the company in respect of the shares to which the offer relates; and

(*b*) the place and time at which a contract under which the said shares have been or are to be allotted to the issuer of the prospectus may be inspected.

(4) Every prospectus issued shall state on the face of it that a copy thereof has been registered as required by this Act and shall specify or refer to statements including therein specifying any documents required by section 304 to be endorsed on or attached to or to accompany a prospectus when lodged for registration.

(5) Any person who knowingly is a party to the issue of a prospectus in contravention of any provision of this section, shall be guilty of an offence and shall be liable on conviction to the penalty set out in section 492(2).

304. Consent of person named as director or expert

(1) No person shall be named as a director or proposed director of a company in any prospectus relating to shares of that company unless, at any time prior to the registration of such prospectus—

(*a*) his written consent, in the prescribed form, to act as such director has been lodged with the company; and

(*b*) the notice referred to in section 155 providing the relevant particulars in regard to such person, has been delivered to the Registrar.

(2) No prospectus which includes any statement or reference to any statement purporting to be made by an expert, shall be registered by the Registrar unless—

(*a*) the expert has given, and has not before delivering of a copy of the prospectus for registration to the Registrar, withdrawn his written consent to the issue thereof with the statement or reference included in the form and context in which it is included;

(*b*) a statement that the expert has given and has not so withdrawn his consent appears in the prospectus; and

(*c*) such written consent is endorsed on or attached to the copy of the prospectus delivered for registration to the Registrar.

(3) The Registrar shall not register any prospectus which names any person as an auditor, attorney, banker or broker of a company unless it is accompanied by the consent in writing of the person so named to act in the capacity stated and to his name being stated in the prospectus.

305. Contracts and translations thereof to be attached to prospectus

(1) No prospectus shall be registered unless there is attached to it a copy of any material contract required by the Tenth Schedule to be stated in the prospectus or, in the case of such a contract not reduced to writing, a memorandum giving full particulars thereof.

(2) There shall be attached to any such contract as is mentioned in subsection (1)—

(*a*) if it is in a foreign language, a certified translation thereof into English; or

(*b*) if it is partly in a foreign language, a copy thereof embodying such a certified translation of so much thereof as is in a foreign language.

306. Where the issue is underwritten

(1) No prospectus containing a statement to the effect that the whole of any portion of the issue of the securities offered to the public, has been or is being underwritten shall be registered until there is delivered to the Registrar a copy of the underwriting contract and a sworn declaration by the person named as underwriter or, if such person is a company, by each of two directors of such company, or if the company only has one director, by that director, that to the best of the deponents knowledge and belief the underwriter is and will be in a position to carry out his obligations even if no securities are applied for.

(2) If an offer of securities is made in respect of which no prospectus is required by this Act, the copy of the contract and sworn declaration referred to in subsection (1) shall be delivered to the Registrar not later than

the date of the proposed offer of securities.

(3) If default is made in complying with the provisions of subsection (2), the company, and any person (including a body corporate) and every director or officer of the said company (or body corporate) who knowingly is a party to the contravention, shall be guilty of an offence, and is liable on conviction to the penalty set out in section 491(1).

(4) In the event of any underwriter being unable, when duly called upon, to carry out his obligations under the underwriting contract, any person who has in connection with that contract made a sworn declaration as required by subsection (1) shall, unless he proves that when he made the declaration he believed and had reasonable grounds for believing that the underwriter was or would be able to carry out his obligations, be guilty of an offence, and is liable on conviction to the penalty set out in section 492(3).

307. Signing, date and date of issue, of prospectus

(1) A prospectus in respect of an offer for the subscription of securities of a company shall be signed by every person named therein as a director of the company or by his agent authorised by him in writing to sign on his behalf.

(2) A prospectus in respect of any other offer of securities shall be signed by every person making such offer or by his agent authorised by him in writing to sign on his behalf or if the person making the offer is a company or firm, by two directors of such company, or if such company has only one director, by that director, or by not less than one-half of the partners in such firm or by an agent authorised by any such director or partner in writing to sign on his behalf.

(3) Where a prospectus has been signed by or on the behalf of directors of a company or partners in a firm as provided in subsections (1) and (2), every director of such company or partner in such firm shall be deemed to have authorised the issue of such prospectus notwithstanding that he has not signed it, unless he proves that it was issued without his knowledge, authority or consent.

(4) Every signature to a prospectus shall be dated and the latest of such dates shall be deemed to be the date of the prospectus.

(5) The date of registration of any prospectus in the Register of Companies shall, unless the contrary is proved, be taken as the date of the issue of prospectus.

308. Registration of prospectus

(1) No prospectus shall be registered by the Registrar unless the requirements of this Part have been complied with an dislodged with the Registrar for registration, together with such documents as are prescribed in this Part, within 14 days of the date of such prospectus.

(2) As soon as the Registrar has registered the prospectus he shall send notice of the registration to the person lodging the same or to the company.

309. Time limit for issue of prospectus

(1) No prospectus shall be issued more than three months after the date of the registration thereof, and if a prospectus is so issued, it shall be deemed to be a prospectus which has not been registered.

(2) Any person who knowingly is a party to the issue of a prospectus in contravention of subsection (1), shall be guilty of an offence and is liable on conviction to the penalty set out in section 492(2).

310. Advertising as to prospectus

(1) Every newspaper or other advertisement whatsoever offering or calling attention to an offer or intended offer of securities of a company to the public shall be deemed to be a prospectus issued by the person responsible for publishing or disseminating the advertisement (and all enactments and rules of law as to the contents of prospectuses and as to the liability in respect of statement in and omissions from prospectuses or otherwise relating to prospectuses shall apply and have effect accordingly), unless it contains no more information than the following—

(*a*) the number and description of the securities concerned;

(*b*) the name and date of registration of the company;

(*c*) the general nature of the main business or proposed main business actually carried on or to be carried on by the company;

(*d*) the names and addresses of the directors;

(*e*) the places at and times during which copies of the prospectuses may be obtained;

(*f*) where all the shares which are the subject of an offer are intended to be offered only to the shareholders of a company or debenture holders, as the case may be, with or without the right to renounce in favour of other persons—

(i) the issue price of such securities,

(ii) the ratio in which such securities will be offered to the shareholders or debenture holders entitled to accept the offer, and

(iii) the last day on which shareholders or debenture holders shall register as such in order to be entitled to receive the offer; and

(*g*) the last day for subscribing.

(2) No statement that, or to the effect that, the said advertisement is not a prospectus shall prevent the operation of this section.

311. Waiver of requirements of the Part void

Any condition requiring any applicant for shares to waive compliance with any requirements of this Part or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void.

312. Variation of contract mentioned in prospectus

No company shall within one year after the date of registration of a prospectus vary or agree to the variation of the terms of a contract referred to in such prospectus unless the variation in specific terms is authorised or ratified by a general meeting of shareholders of the company of which notice has been given on a date not earlier than six months after the date of registration of the prospectus.

313. Liability for untrue statements in prospectus

(1) Where securities are offered to the public for subscription in pursuance of a prospectus, every person—

(*a*) who is, at the time of issue of the prospectus, a director of the company;

(*b*) who becomes a director at any time between the issue of the prospectus and the holding of the

first annual general meeting of the company at which directors are elected or appointed;

(*c*) who with his authority is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time;

(*d*) who is a promoter of the company; or

(*e*) who has authorised the issue of the prospectus,

shall be liable to pay compensation to all persons who have acquired any shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof or issued therewith, or by reference incorporated therein.

(2) Where securities are offered to the public for sale in pursuance of a prospectus, every person—

(*a*) who has made the said offer;

(*b*) who under section 307(3) is deemed to have authorised the issue of such prospectus; or

(*c*) who is in relation to the company the securities of which are so offered, is any of the persons referred to in subsection (1),

shall be liable to pay compensation to all persons who have acquired any securities on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof or issued therewith, or by reference incorporated therein.

(3) The liability provided for in subsection (1) or (2) shall not attach to any person if it is proved—

(*a*) with respect to every such untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares or the acceptance of the offer, as the case may be, believed that the statement was true;

(*b*) with respect to every such untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from the report or valuation of an expert, that it fairly represented the statement or was a correct and fair copy of or extract from the report or valuation and that the defendant had reasonable ground to believe and did up to the time of the issue of the prospectus believe that the person making the statement was competent to make it, and that the said person had given the consent required by this Act to the issue of the prospectus of the making of the offer and had not withdrawn that consent before lodgment of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment thereunder or before the acceptance of the offer; and

(*c*) with respect to every such untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document; or

(*d*) that having consented to become a director of the company, he withdrew his consent before the issue of the prospectus and that it was issued without his authority or consent;

(*e*) that the prospectus was issued without his knowledge or consent and that on becoming aware of its issue, he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or

(*f*) that after the issue of the prospectus and before allotment or acceptance thereunder he, on becoming aware of any untrue statement therein, withdrew his consent hereto and gave reasonable public

notice of the withdrawal and of the reason therefor.

(4) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus and has not authorised or consented to the issue thereof, the directors of the company (except any without whose knowledge or consent the prospectus was issued) and any other person who issued it or authorised the issue thereof, shall be liable to indemnify the person named as aforesaid, against all damages, costs and expenses for which he may be liable by reason of his name having been so stated in the prospectus or in defending himself against any action or legal proceedings brought against him in respect thereof.

(5) Every person who by reason of his being a director or having been named as a director, or having agreed to become a director, or of his having authorised the issue of the prospectus or of his having become a director between the issue of the prospectus and holding of the first general meeting of the company at which directors are elected or appointed, has satisfied any liability to make payment under this section, may recover a contribution, as in cases of contract, from any other person, who, if sued separately, would have been liable to make the same payment, unless the person who has satisfied such liability was, and that other person was not, guilty of fraudulent misrepresentation.

314. Liability of experts and others

(1) Where the consent of any person required under section 304(2) and (3) and such person has given that consent—

(*a*) he shall not, by reason of having given such consent, be liable as a person who has authorised the issue of the prospectus either—

(i) under section 313(1) or (2) to compensate persons subscribing or purchasing on the faith of the prospectus, except in respect of any untrue statement purporting to be made by him as an expert, or

(ii) under section 313(4) to indemnify any person against liability under the said section 313(1) or (2); but

(*b*) he shall, in respect of any untrue statement purporting to be made by him as an expert, be liable under the said section 313(1) or (2), unless one of the following things (which shall in his case be *in lieu* of the grounds of defence available to others by virtue of section 313(3)), is proved, namely—

(i) that having given his consent as aforesaid he withdrew it in writing before lodgement of a copy of the prospectus for registration,

(ii) that after lodgement of a copy of the prospectus for registration and before allotment thereunder to, or before acceptance thereunder by, the person complaining, he, on becoming aware of the untrue statement, withdrew his consent in writing and gave reasonable public notice of the withdrawal and of the reason therefor; or

(iii) that he was competent to make the statement and that he had reasonable ground to believe and did up to the time of the allotment of the shares or the acceptance of the offer, as the case may be, believe that the statement was true.

(2) Where under section 304(2) and (3) the consent of any person is required to the issue of a prospectus, and he either has not given that consent or has withdrawn it before the issue of the prospectus, he shall be entitled to indemnity under section 313 as if he had without his consent been named in the prospectus as a director of the company.

315. Offences in respect of untrue statements in prospectus

(1) Where a prospectus contains a statement which is untrue, every person referred to in section 313(1) or (2) shall, subject to the provisions of subsections (3) and (4) of this section, be guilty of an offence and shall be liable on conviction to the penalty set out in section 492(4).

(2) Where there is published with or as part of a prospectus a report of any expert or an extract from such report and such report or extract contains a statement which is untrue, the expert shall, provided he has given his consent to the inclusion of such statement in the prospectus in the form and context in which it appears, and subject to the provisions of subsections (3) and (4), be guilty of an offence, and is liable on conviction to the penalty set out in section 492(4).

(3) In any prosecution under this section it shall be a defence if it is proved either that the untrue statement was immaterial or—

(*a*) with respect to every such untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that the person charged had, after reasonable investigation, reasonable ground to believe and did up to the time of the allotment of the shares or acceptance of the offer (as the case may be) believe that the statement was true, and that there was no omission to state any material fact necessary to make the statement as set out not misleading;

(*b*) with respect to every untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that the person charged had reasonable ground to believe and did believe that the person making the report or valuation was competent to make it; and

(*c*) with respect to every such untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document.

(4) In any prosecution under this section of any person it shall be a defence if it is proved—

(*a*) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent;

(*b*) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or

(*c*) that after the issue of the prospectus and before allotment or acceptance thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto and gave reasonable public notice of the withdrawal, and of his reason therefor.

316. No diminution of liability under any other law or the common law

Nothing in this Part shall limit or diminish any liability which any person may incur under this Act apart from this Part, or under any other law, or under the common law.

317. Time limit as to allotment or acceptance

(1) No company shall allot any shares offered to the public for subscription and no offeror shall accept any offer to purchase any shares offered for sale to the public unless the application concerned is received by the company or the offeror, as the case may be, before the expiration of a period of four months after the date of registration of the prospectus.

(2) Any director or officer of a company or any offeror of, if the offeror is a company, any director or officer of that company who knowingly contravenes or permits the contravention of subsection (1) with respect to allotment or acceptance of an offer, shall be guilty of an offence, and is liable on conviction to the penalty set out in section 493(2).

318. No allotment unless minimum subscription received

(1) No shares shall be allotted on any application made in pursuance of a prospectus for subscription unless the amount stated in that prospectus as the minimum amount which in the opinion of the directors of the company concerned has to be raised by the issue of share capital in order to provide for the matters specified in paragraph 21 of the Tenth Schedule has been subscribed and the amount so stated has been paid to and received by the company.

(2) For the purposes of subsection (1)—

(*a*) an amount stated in any cheque received by the company shall not be deemed to have been paid to and received by it until the amount of the cheque has been unconditionally credited to its account with its banker; and

(*b*) any amount paid to and received by the company shall be reduced by the amount of any money, bill, promissory note or cheque which it has at any time delivered to the payer otherwise than in discharge of a debt *bona fide* due to him by the company.

(3) The amount so stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as "the minimum subscription".

(4) The amount paid on application shall be set apart by the directors as separate fund in a separate account with a banking institution registered under the Banking Act (Cap. 46:04), and shall not be available for the purposes the company or for the satisfaction of its debts until the minimum subscription has been made up.

(5) If the requirements prescribed in subsection (1) have not been complied with on the expiration of 60 days after the issue of the prospectus, moneys received from applicants for shares shall forthwith be repaid to them without interest, and, if any such money is not so repaid within a period of 80 days after the issue of the prospectus, the directors and officers of the company shall be jointly and severally liable to repay that money with interest at the rate of six per cent per annum reckoned from the expiration of the said period of 80 days.

(6) It shall be a defence to any claim under subsection (5), or any charge to prove that the default which is the subject of the claim or charge, was not due to any misconduct or negligence on the part of the defendant or the accused.

(7) Any director or officer of the company who knowingly contravenes or permits the contravention of any provision of this section, shall, in addition to other liability incurred under subsection (5)(*a*), be guilty of an offence, and be liable on conviction to the penalty set out in section 492(3).

319. No allotment or acceptance if application form not attached to prospectus

(1) No company shall allot any shares offered to the public for subscription and no offeror shall accept any offer to purchase any shares offered for sale to the public unless the subscription or offer has been made on an application form which has been attached to or accompanied by a prospectus as required by section 302 or unless it is shown that the applicant, at the time of his application, was in fact in possession of a copy of the prospectus or was aware of its contents.

(2) Any director or officer of a company or any offeror (or if the offeror is a company, any director or officer of that company) who knowingly contravenes or permits the contravention of subsection (1), shall be guilty of an offence and shall on conviction be liable to the penalty set out in section 492(2).

320. Voidable allotment where section 317, 318 or 319 contravened

(1) An allotment made by a company to an applicant, or the acceptance of an offer made by an applicant, in contravention of any provision of sections 317, 318 or 319 shall be voidable at the instance of the applicant concerned within 30 days after the date of allotment or acceptance, and not later, and the right to treat as voidable such allotment shall apply notwithstanding that the company concerned may be in the course of being wound-up.

(2) When an allotment or an acceptance is declared void under subsection (1), every director and every officer of the company concerned or the offeror, and if the offeror is a company, every director and every officer thereof, shall be liable to compensate the company concerned and the applicant for any loss, damages or costs which such company or the applicant may have sustained or incurred thereby:

Provided that no proceedings to recover any such loss, damages or costs shall be commenced after the expiration of two years from the date of the relevant allotment or acceptance.

321. Minimum interval before allotment or acceptance

(1) No allotment of shares or acceptance of an offer in respect of shares of a company shall be made in pursuance of a prospectus, and no proceedings shall be taken on applications made in pursuance of a prospectus, until the beginning of the third day after that on which the prospectus is first issued or such later time (if any) as may be specified in the prospectus.

(2) For the purposes of subsection (1), the reference therein to the day on which the prospectus is first issued shall be construed as a reference to the day on which it is first issued as a newspaper advertisement, or, if it is not issued as a newspaper advertisement before the third day after that on which it is first issued in any other manner, as a reference to the day on which it is first issued in such other manner.

(3) The validity of an allotment or acceptance shall not be affected by any contravention of the provisions of subsection (1), but, in the event of any such contravention, the company concerned, and every director and every officer of the company and the offeror, and, if the offeror is a company, every director and every officer thereof who knowingly is a party to the contravention, shall be guilty of an offence, and is liable on conviction to the penalty set out in section 492(3).

(4) An application for shares of a company which is made in pursuance of a prospectus shall not be revocable before the expiration of the third day after the time of the opening of the subscription lists or offer or the giving before the expiration of the said third day, of a public notice under section 304 having the effect of excluding or limiting the liability under that section of the person giving such notice.

(5) In reckoning any number of days for the purposes of this section, Saturdays, Sundays and public holidays shall not be taken into account.

(6) The "beginning of the third day" or the "later time" referred to in subsection (1) is in this Part referred to as "the time of the opening of the subscription lists or offers".

322. Conditional allotment if prospectus states shares to be listed by stock exchange

(1) No prospectus containing a statement to the effect that application has been or will be made for permission for the shares offered thereby to be dealt in on a stock exchange shall be issued unless an application has been made in accordance with the requirements of the stock exchange concerned on or

before the date of issue of such prospectus and it names the particular stock exchange to which such application has been made.

(2) Any allotment of shares in pursuance of a prospectus referred to in subsection (1) shall be subject to the condition that the application for permission for the said shares to be dealt in on the stock exchange concerned, is granted or that an appeal against a refusal of such application, is upheld.

(3) Any money received in respect of applications for shares in pursuance of a prospectus referred to in subsection (1) shall be set apart by the directors of the company as a separate fund in a separate account with a banking institution registered under the Banking Act (Cap. 46:04), and shall not be available for the purposes of the company or for the satisfaction of its debts so long as the company may in terms of subsection (4) become liable for the repayment thereof, and if any issue of shares in pursuance of such a prospectus is oversubscribed, the directors of the company shall forthwith repay the amounts oversubscribed to the applicants.

(4) Where the application for permission to deal in the shares on a stock exchange has been refused and no appeal has been noted or when an appeal against the refusal of an application has been dismissed or an appeal against the granting of an application has been upheld, the company shall forthwith repay all moneys received in respect of applications made in pursuance of the prospectus together with any interest earned thereon, if any.

(5) If any money required to be repaid under subsection (3) and subsection (4) is not repaid within 14 days after the company becomes liable to repay it, the directors and officers of the company, together with the company, shall be jointly and severally liable to repay that money with interest at the rate of 10 per cent per annum from the expiration of the fourteenth day.

(6) If any provision of subsection (1), (3) or (4) is contravened or not complied with—

(*a*) the company, and every director or officer thereof who knowingly is a party to such contravention or non-compliance, shall be guilty of an offence; and

(*b*) it shall be a defence to any claim or charge under subsection (4) to prove that the default which is the subject of the claim of the contravention or non-compliance was not due to misconduct or negligence on the part of the defendant or the accused.

(7) The provisions of this section shall—

(*a*) in relation to any shares agreed to be taken by a person underwriting an offer of the shares by a prospectus, have effect as if he had applied therefor in pursuance of the prospectus;

(*b*) in the case of a prospectus offering shares for sale, be construed, except in so far as the context otherwise indicates—

(i) as if any reference therein to the allotment of shares were a reference to the acceptance of the offer in respect thereof,

(ii) subject to the provisions of subparagraph (iii), as if any reference therein to a company by which a prospectus has been issued, or a director or officer thereof, were a reference to the person by whom the shares have been offered, and

(iii) where the person by whom the shares have been offered is a company, as if the reference therein to a director or officer of a company by which a prospectus has been issued, were a reference to a director or officer of the company by which the shares have been offered for sale.

(8) In reckoning any number of days for the purpose of this section, Saturdays, Sundays and public holidays shall not be taken into account.

323. Compulsory acquisition of minority in affected transaction

(1) In this section, unless the context otherwise indicates—

"acquisition", in relation to securities of any company, means the acquisition of securities in such company by any means whatsoever, including purchase or subscription;

"acting in concert" means, subject to subsection (2), acting in pursuance of an agreement, arrangement or understanding (whether formal or informal) between two or more persons pursuant to which they or any of them co-operate for the purposes of entering into or proposing an affected transaction;

"affected transaction" means any transaction (including a transaction which forms part of a series of transactions) or scheme, whatever form it may take, which, taking into account any securities held before such transaction or scheme, has or would have the effect in the event of any offers to acquire securities of a company being accepted of the transfer of all the securities included in a class of securities being transferred to the offeror;

"offeree company" means any company the securities or part of the securities of which is or is to be the subject of any affected transaction or proposed affected transaction;

"offeror" means any person or two persons acting in concert who propose any affected transaction.

(2) If an offer for the acquisition of securities under an affected transaction involving the transfer of securities or any class of securities of a company to an offeror, has within four months after the date of the making of such offer been accepted by the holders of not less than nine-tenths of the securities of any class of securities whose transfer is involved (other than securities already held at the date of the issue of the offer by, or by a nominee for, the offeror or its subsidiary), the offeror may at any time within two months after the date of such acceptance give notice in the prescribed manner to any holder of such securities who has not accepted the said offer, that he or it desires to acquire his or its securities, and where such notice is given, the offeror shall be entitled and bound to acquire those securities on the terms on which under the affected transaction the securities of the holders who have accepted the offer, were or are to be transferred to the offeror, unless on an application made by such holder within six weeks from the date on which the notice was given, the court—

(*a*) orders that the offeror shall not be so entitled and bound; or

(*b*) imposes conditions of acquisition different from those of the offer.

(3) If the said offer has not been accepted to the extent necessary for entitling the offeror to give notice under subsection (2), the court may, on application by the offeror, issue an order authorising him to give notice under that subsection if the court is satisfied that—

(*a*) the offeror has after reasonable enquiry been unable to trace one or more of the persons holding securities to which the offer relates;

(*b*) the securities whose transfer is involved, by virtue of acceptances of the offer, together with the securities held by the person or persons referred to in paragraph (*a*), amount to not less than the minimum specified in subsection (2); and

(*c*) the consideration offered is fair and reasonable, but the court shall not issue an order under this subsection unless it considers that it is just and equitable to do so having regard, in particular, to the number

of holders of securities who have been traced but who have not accepted the offer.

(4) Where a notice has been given by the offeror under subsection (2) and the court, on an application made by a holder of the securities who has not accepted the offer, has not ordered as contemplated in subsection (2), the offeror shall, on the expiration of six weeks from the date on which the notice was given, or, if an application to the court by such holder is then pending, after the application has been disposed of, transmit a copy of the notice to the offeree company, together with an instrument of transfer executed on behalf of such holder by any person appointed by the offeror, and pay or transfer to the offeree company the amount or other consideration representing the price payable by the offeror for the securities which by virtue of this section he or it is entitled to acquire, and the offeree company shall thereupon register the offeror as the holder of those securities:

Provided that an instrument of transfer shall not be required for any security for which a share warrant is for the time outstanding.

(5) Where, in pursuance of an affected transaction referred to in subsection (2), securities of an offeree company were or are to be transferred to a person and those securities, together with any other securities of the said offeree company held by, or by a nominee for, the offeree or its subsidiary at the date of the acceptance of the offer in question comprise or include nine-tenths of the securities in the offeree company or of any class of those securities, then—

(*a*) the offeror shall within a month from the date of such acceptance (unless he or it has already complied with this requirement under subsection (2)) give notice of that fact in the prescribed manner to the holders of the remaining securities or of the remaining securities of that class, as the case may be, who have not accepted the offer under the affected transaction in question; and

(*b*) any such holder may within three months from the giving of the notice to him require the offeror to acquire the securities in question, and where the holder gives notice under paragraph (*b*) in relation to any securities, the offeror shall be entitled and bound to acquire the conditions on which under the affected transaction the securities of the holders who have accepted the offer were or are to be transferred to him or it, or on such other conditions as may be agreed upon or as the court on the application of either the offeror or the holder may think fit to order.

(6) Any sum, and any dividend or other sum accruing from any other consideration, received by the offeree company under this section shall be paid into a separate bank account with a banking institution registered under the Banking Act (Cap. 46:04), and any such sums, dividend or any other consideration so received shall be held in trust by the offeree company for the person entitled to the securities in respect of which the said sums, dividend or other consideration was received.

(7) In this section any reference to a "holder of securities who has not accepted the offer" includes any holder who has failed or refused to transfer his securities to the offeror in accordance with the affected transaction.

324. Prohibition of insider trading

(1) Any person who, whether directly or indirectly, knowingly deals in a security on the basis of unpublished price sensitive information in respect of that security, shall commit an offence if such person knows that such information has been obtained—

(*a*) by virtue of a relationship of trust or any other contractual relationship, whether or not the person concerned is a party to that relationship; or

(*b*) through espionage, theft, bribery, fraud, misrepresentation or any other wrongful method, irrespective of the nature thereof,

and such person shall on conviction be liable to the penalty set out in section 492(3).

(2) For the purposes of this section—

(*a*) "unpublished price-sensitive information", in respect of a security, means information which—

(i) relates to matters in respect of the internal affairs of a company or its operations, assets, earning power or involvement as offeror or offeree company in an affected transaction or proposed affected transaction,

(ii) is not generally available to the reasonable investor in the relevant markets for that security, and

(iii) would reasonably be expected to affect materially the price of such security if it were generally available;

(*b*) "generally available" means available in the sense that such steps have been taken, and such time has elapsed, that it can reasonably be expected that such information as referred to in paragraph (*a*) is or should be known to such investor as referred to in subparagraph (ii) of paragraph (*a*).

(3) If in criminal proceedings at which an accused is charged with an offence under subsection (1), it is proved that—

(*a*) the accused was in possession of unpublished price-sensitive information in respect of the security in question at the time of the alleged commission of the offence; or

(*b*) unpublished price-sensitive information was obtained in the manner contemplated in subsection (1)(*a*) or (*b*),

he or it shall be deemed, unless the contrary is proved, in the case of paragraph (*a*), to have knowingly dealt in that security on the basis of such information, or, in the case of paragraph (*b*), to have known that such information was so obtained.

(4) Where an advantage is gained from a dealing in securities in contravention of the provisions of this section, any person who gained that advantage shall, whether or not any person has been prosecuted for or convicted of an offence in respect of the contravention, be liable—

(*a*) to any other person for the amount of any loss incurred by that other person by reason of the gaining of that advantage;

(*b*) to the company that issued or made available those securities, for any profit that accrued by him or loss avoided by him by reason of the gaining of that advantage; and

(*c*) any amount which the court considers to be an appropriate pecuniary penalty provided that the amount of the pecuniary penalty shall not exceed—

(i) the consideration for the securities, or

(ii) three times the amount of the gain made or loss avoided by the person in buying or selling the securities, whichever is the greater.

(5) Where a loss or profit referred to in subsection (4) is incurred by means of an advantage gained from a dealing in securities, the amount of the loss or profit shall be the difference between—

(*a*) the price at which the dealing was effected; and

(*b*) the price that, in the opinion of the court before which it is sought to recover the amount of the loss or profit, would have been the market price of the securities at the time of the dealing if the specific information used to gain that advantage had been generally known at that time.

(6) The company may bring an action in the name of and for the benefit of a person for recovery of a loss or profit referred to in subsection (4).

(7) An action to recover a loss or profit referred to in subsection (4) may not be brought after the expiry of the period of—

(*a*) two years next succeeding the dealing in securities to which the action relates; or

(*b*) six months next succeeding the discovery of the relevant fact by the person who suffered the loss or seeks the profit, whichever first occurs.

(8) Nothing in subsection (7) affects any other liability that a person may incur under any other law.

(9) The provisions of this section shall not apply to dealings in the members' interest in a private company or a close company.

(10) Subject to subsection (5), the Minister may, by notice in the *Gazette* exempt any class of persons from the provisions of this section on such conditions and to such extent as he may deem fit, and may at any time in like manner revoke or amend any such exemption.

325. Fraudulent inducement to invest

(1) Every person who, by any fraudulent means, induces or attempts to induce another person to enter into or offer to enter into—

(*a*) an agreement for, or with a view to, acquiring, disposing of, subscribing for or underwriting securities; or

(*b*) an agreement for the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities,

shall be guilty of an offence and liable to the penalty set out in section 492(4).

(2) For the purposes of subsection (1), "fraudulent means" shall include—

(*a*) any statement, promise or forecast which the person knows to be misleading, false or deceptive;

(*b*) any dishonest concealment of material facts; or

(*c*) any reckless making of any statement, promise or forecast which is misleading, false or deceptive.

326. False statements and transactions

Every person who knowingly or recklessly—

(*a*) gives a fictitious price to securities by means of false rumours;

(*b*) obtains admission to listing on a stock exchange by means of a false statement; or

(*c*) makes any fictitious dealings in securities which are listed on any stock exchange, shall be guilty of an offence and liable to the penalty set out in section 492(4).

327. Misleading documents

Every person who—

(*a*) distributes or causes to be distributed any documents which, to his knowledge contain—

(i) an invitation to enter into an agreement of the kind referred to in section 325, or

(ii) information calculated to lead directly or indirectly to the entry into an agreement of the kind referred to in section 325 by the recipient of the information; or

(*b*) has in his possession for the purpose of distribution any documents which, to his knowledge, are such documents as are specified in paragraph (*a*),

shall be guilty of an offence and liable to the penalty set out in section 492(4).

328. Stock market manipulation

(1) A person shall not, with the fraudulent intent to induce other persons to purchase or subscribe for securities of a body corporate or of a related corporation effect, take part in, be concerned in or carry out, either directly or indirectly, two or more transactions in securities of the body corporate, being transactions that have, or are likely to have, the effect of abnormally or artificially raising the price of securities which are being traded through a stock exchange.

(2) A person shall not, with the fraudulent intent to induce other persons to sell securities of a body corporate or of a related corporation, effect, take part in or be concerned in or carry out, either directly or indirectly, two or more transactions in securities of the body corporate, being transactions that have or are likely to have, the effect of abnormally or artificially lowering the price of securities of a body corporate the securities of which are being traded through a stock exchange.

(3) A person shall not, with the fraudulent intent to induce other persons to sell, purchase or subscribe for securities of a body corporate or of a related corporation, effect, take part in, be concerned in or carry out, either directly or indirectly, two or more transactions in securities of a body corporate, being transactions that have, or are likely to have the effect of abnormally or artificially maintaining the price of securities of the body corporate which securities are being traded through a stock exchange.

(4) A reference in this section to a transaction, in relation to securities of a body corporate, includes a reference to the making of an offer to sell or purchase such securities of the body corporate; and a reference to the making of an invitation, however expressed, expressly or impliedly invites a person to offer to sell or purchased securities of the body corporate.

(5) Every person who acts in contravention of this section shall commit an offence and shall, on conviction be liable to the penalty set out in section 492(4).

329. Disclosure of beneficial interest in securities

(1) In this section, unless the context otherwise requires—

"beneficial interest" in relation to a security, means—

(*a*) the right or entitlement to receive any dividend or interest payable in respect of that security; or

(*b*) the right to exercise or cause to be exercised, in the ordinary course, any or all of the voting, conversion, redemption or other rights attaching to such security, but does not include any interest held by a person in a Collective Investment undertaking under the Collective Investment Undertakings Act (Cap. 56:09);

"Exchange" means the Botswana Stock Exchange established under the Botswana Stock Exchange Act (Cap. 56:08);

"issuer" means a public company which has issued securities to the public which are listed;

"substantial shareholder" means a person who holds beneficial interests equal to or in excess of five per cent of the total number of securities of that class issued by the issuer.

(2) A person is deemed to have a beneficial interest in a security if—

(*a*) the spouse of the person married in community of property or the minor children of that person have a beneficial interest in such security;

(*b*) that person acts in terms of an agreement with another person holding a beneficial interest and the agreement is in respect of the co-operation between them for the acquisition, disposal or any other matter relating to a beneficial interest in such security;

(*c*) it is the holding company of a company that has a beneficial interest in such security;

(*d*) a body corporate or trust has a beneficial interest in such security and—

(i) the body corporate or its directors or the trustees are accustomed to act in accordance with the directions or instructions of that person, or

(ii) that person is entitled to exercise or control the exercise of the majority of the voting rights at general meetings of the body corporate or trust; or

(*e*) the security is held by another person on that person's behalf by virtue of the official office of that other person.

(3) Where securities of an issuer are registered in the name of a person, and that person ("the registered shareholder") is not the holder of the beneficial interest in all of the securities held by the registered shareholder, the registered shareholder shall, at the end of every three month period after 30th June, 2001, disclose to the issuer the identity of each person on whose behalf the registered shareholder holds securities and the number and class of securities issued by that issuer held on behalf of each such person.

(4) The information required in terms of subsection (3) shall be furnished in writing within seven days of the end of the three month period referred to in that subsection.

(5) Where a registered shareholder who has made disclosure under subsections (3) and (4) ceases to be a holder of such securities or there is a change in the nature and extent of the beneficial interest the registered shareholder shall forthwith give notice of that fact and in the case of any change in the particulars of that change to the issuer.

(6) An issuer may by notice in writing require a person who is a registered shareholder of, or whom the issuer knows or has reasonable cause to believe to have a beneficial interest in, securities issued by that issuer, to confirm or deny whether or not such person holds a beneficial interest in such securities, and if the

security is held for another person, the person to whom the request is made shall disclose to the issuer the identity of the person on whose behalf that security is held:

Provided that the registered shareholder may levy such fee for the furnishing of information requested as may be prescribed by the Committee of the Botswana Stock Exchange from time to time.

(7) A notice under subsection (6) may, in addition, require the addressee to give particulars of the extent of the beneficial interest held during the three years preceding the date of the notice.

(8) The information required in terms of subsections (6) and (7) shall be furnished within a reasonable time specified in the notice, but not later than 14 days from the date of receipt of the notice.

(9) All issuers of securities shall establish and maintain a register of substantial shareholders in terms of this section and shall—

(*a*) publish in their annual financial statements a list of the persons who are substantial shareholders together with the extent of the beneficial interests held by those persons;

(*b*) enter in such register the following particulars—

(i) the name and address of the substantial shareholder,

(ii) the number, class and nominal value of the share in which the substantial shareholder has an interest,

(iii) the name of the holder of the share if the substantial shareholder is not the holder,

(iv) the nature of the substantial shareholder's interest and its duration if it is limited in duration,

(v) the date of the acquisition of the interest by the substantial shareholder,

(vi) the date of the disposal of the interest by the substantial shareholder or of any change in the nature of the interest held by him; and

(*c*) open such register to inspection in accordance with section 220.

(10) Every person in respect of whom an entry is required to be made in the register of substantial shareholders, by reason of the fact that the person holds beneficial interests equal to or in excess of five per cent of the total number of securities of that class issued by the issuer, shall within 14 days after that person becomes a substantial shareholder, or after any other matter which requires an entry occurs or arises, give to the issuer and to the Exchange written notice of the fact together with a statement of the particulars specified in subsection (9).

(11) Where a substantial shareholder who has made disclosure under subsection (10) ceases to be a substantial shareholder, or there is a change in the nature and extent of his beneficial interest that person shall forthwith give notice of that fact and in the case of any change in the particulars of that change to the issuer and to the Exchange.

(12) A person who fails to comply with any provision of this section or to make a disclosure as required by this section or who makes a false disclosure shall be guilty of an offence and shall be liable on conviction to the penalty set out in section 492(3).

329A. Disclosure by nominee shareholder or director

(1) A nominee shareholder or director shall disclose the identity of their nominator to the Director for inclusion in the register.

[7 of 2022, s. 21 w.e.f. 25 February 2022.]

(2) Where the nominator under subsection (1) changes, the nominee shareholder or director shall, within 10 working days, file a notice to that effect with the Registrar.

[7 of 2022, s. 21 w.e.f. 25 February 2022.]

(3) The nominee shareholder or director shall, upon request by a competent authority, make information identifying their nominator available to the competent authority.

[7 of 2022, s. 21 w.e.f. 25 February 2022.]

(4) A nominee shareholder or director who fails to comply with this section shall be guilty of an offence and liable to the penalty set out in section 493(2).

[7 of 2022, s. 21 w.e.f. 25 February 2022.]

PART XXIII
Removal from the Register (ss 330-343)

330. Removal from the register

A company is removed from the register of companies when an entry is made in the register at the direction of the Registrar recording that the company is removed from the register.

331. Grounds for removal from register

(1) Subject to this section, the Registrar shall remove a company from the register of companies if—

(*a*) the company is an amalgamating company, other than an amalgamated company, on the day on which the Registrar issues a certificate of amalgamation under section 228; or

(*b*) the Registrar is satisfied that—

(i) the company has ceased to carry on business, and

(ii) there is no other reason for the company to continue in existence; or

(*c*) the company has been put into liquidation, and—

(i) no liquidator is acting, or

(ii) the notice referred to in section 427 has not been given to the Registrar within six months after the liquidation of the company is completed; or

(*d*) there is sent or delivered to the Registrar a request in the prescribed form made by—

(i) a shareholder authorised to make the request by a special resolution of shareholders entitled to vote and voting on the question,

(ii) the board of directors or a request by any other person, if the constitution of the company so requires or permits, or

(iii) the Master,

that the company be removed from the register of companies on either of the grounds specified in subsection (2); or

(*e*) a liquidator sends or delivers to the Master the notice referred to in section 426(3) that no *quorum* was present at any meeting to confirm the final account;

(*f*) the company has failed to comply with the requirements of this Act.

[22 of 2018, s. 28 w.e.f. 3 June 2019.]

(2) A request that a company be removed from the register under subsection (1)(*d*) may be made on the grounds—

(*a*) that the company has ceased to carry on business, has discharged in full its liabilities to all its known creditors, and has distributed its surplus assets in accordance with its constitution and this Act; or

(*b*) that the company after paying its debts in full or in part has no surplus assets, and no creditor has applied to the court under section 369 for an order putting the company into liquidation.

(3) A request that a company be removed from the register under subsection (1)(*d*) shall be accompanied by a written notice from the Commissioner of Taxes stating that the Commissioner has no objection to the company being removed from the register.

(4) The Registrar shall remove a company from the register under subsection (1)(*b*) only if—

(*a*) the Registrar has complied with section 332; and

(*b*) the company has not satisfied the Registrar that it is carrying on business or that reason exists for the company to continue in existence; and

(*c*) the Registrar—

(i) is satisfied that no person has objected to the removal under section 334, or

(ii) if an objection to the removal has been received, has complied with section 335.

(5) The Registrar shall remove a company from the register under paragraphs (*c*), (*d*), or (*e*) of subsection (1) only if—

(*a*) the Registrar is satisfied that notice has been given in accordance with section 332; and

(*b*) the Registrar—

(i) is satisfied that no person has objected to the removal under section 334, or

(ii) has complied with section 335, where an objection to the removal has been received.

332. Notice of intention to remove where company has ceased to carry on business

(1) Before a company can be removed from the register of companies under section 331(1)(*b*), the Registrar shall give—

(*a*) notice to the company in accordance with subsection (2);

(*b*) notice of the matters set out in subsection (3) to any person who is entitled to a charge registered under section 125; and

(*c*) public notice of the matters set out in subsection (3).

(2) The notice to be given under subsection (1)(*a*) shall state—

(*a*) the section under, and the grounds on which, it is intended to remove the company from the register; and

(*b*) that, unless—

(i) by the date specified in the notice, which shall not be less than 20 working days after the date of the notice, the company satisfies the Registrar by notice in writing that it is still carrying on business or there is other reason for it to continue in existence, or

(ii) the Registrar does not in accordance with section 335, proceed to remove the company from the register, the company will be removed from the register.

(3) The notice to be given under paragraphs (*b*) and (*c*) of subsection (1) of this section shall specify—

(*a*) the name of the company and its registered office;

(*b*) the section under, and the grounds on which, it is intended to remove the company from the register; and

(*c*) the date by which an objection to the removal under section 334 shall be delivered to the Registrar, which shall not be less than 20 working days after the date of the notice.

333. Notice of intention to remove in other cases

(1) If a company is to be removed from the register under section 331(1)(*c*), the Registrar shall give notice in the *Gazette* of the matters set out in subsection (4).

(2) If a company is to be removed from the register under section 331(1)(*d*) or (*e*), the applicant, or liquidator, as the case may be, shall, by notice published in a newspaper of general circulation, make known the matters set out in subsection (4).

(3) If a company is to be removed from the register under section 331(1)(*c*), the Registrar, or, if it is to be removed from the register under section 331(1)(*d*) of this Act, the applicant, as the case may be, shall also give notice of the matters set out in subsection (4) to—

(*a*) the company; and

(*b*) a person who is entitled to a charge registered under section 125.

(4) The notice to be given under this section shall specify—

(*a*) the name of the company and its registered office; and

(*b*) the section under, and the grounds on which, it is intended to remove the company from the register; and

(*c*) the date by which an objection to the removal under section 334 shall be delivered to the Registrar, which shall not be less than 20 working days after the date of notice.

(5) If a company is to be removed from the register under section 217(6), the Registrar may remove such company from the register without giving any notice and subsection (4) shall not apply.

[22 of 2018, s. 29 w.e.f. 3 June 2019.]

334. Objection to removal from register

(1) Where a notice is given of an intention to remove a company from the register, any person may deliver to the Registrar, no later than the date specified in the notice, an objection to the removal on any one or more of the following grounds—

(*a*) that the company is still carrying on business or there is other reason for it to continue in existence;

(*b*) that the company is party to legal proceedings;

(*c*) that the company is in liquidation;

(*d*) that the person is a creditor, or shareholder, or a person who has an undischarged claim against the company;

(*e*) that the person believes that there exists, and intends to pursue, a right of action on behalf of the company under Part XI; or

(*f*) that, for any other reason, it would not be just and equitable to remove the company from the register.

(2) For the purposes of subsection (1)(*d*)—

(*a*) a claim by a creditor against a company is not an undischarged claim if—

(i) the claim has been paid in full,

(ii) the claim has been paid in part under a compromise entered into under Part XV or by being otherwise compounded to the reasonable satisfaction of the creditor,

(iii) the claim has been paid in full or in part by a liquidator in the course of a completed liquidation, or

(iv) a liquidator has notified the creditor that the assets of the company are not sufficient to enable any payment to be made to the creditor; and

(*b*) a claim by a shareholder or any other person against a company is not an undischarged claim if —

(i) payment has been made to the shareholder or that person in accordance with a right under the company's constitution or this Act to receive or share in the company's surplus assets, or

(ii) a liquidator has notified the shareholder or that person that the company has no surplus assets.

335. Duties of Registrar if objection received

(1) If an objection to the removal of a company from the register is made on a ground specified in section 334(1)(*a*), (*b*), or (*c*), he shall not proceed with the removal unless the Registrar is satisfied that—

(*a*) the objection has been withdrawn;

(*b*) any facts on which the objection is based are not, or are no longer, correct; or

(*c*) the objection is frivolous or vexatious.

(2) If an objection to the removal of a company from the register is made on a ground specified in section 334(1)(*d*), (*e*), or (*f*), the Registrar shall give notice to the person objecting that, unless notice of an application to the court by that person for an order—

(*a*) under section 371 that the company be put into liquidation; or

(*b*) under section 336, that, on any ground specified in section 334, the company not be removed from the register, is served on the Registrar not later than 20 working days after the date of the notice, the Registrar intends to proceed with the removal.

(3) If—

(*a*) notice of such an application to the court is not served on the Registrar; or

(*b*) the application is withdrawn; or

(*c*) on the hearing of such an application, the court refuses to grant either an order putting the company into liquidation or an order that the company not be removed from the register, the Registrar shall proceed with the removal.

(4) Every person who makes such an application shall give the Registrar notice in writing of the decision of the court within five working days of the decision being given.

(5) The Registrar shall send—

(*a*) a copy of an objection under section 334;

(*b*) a copy of a notice given by or served on the Registrar under this section; and

(*c*) if the company is removed from the register, notice of the removal, to a person who sent or delivered to the Registrar a request that the company be removed from the register under section 331(1)(*d*) or, while acting as liquidator, sent or delivered to the Registrar the documents referred to in section 331(1)(*e*).

336. Powers of Court

(1) A person who gives notice objecting to the removal of a company from the register of companies on a ground specified in section 334(1)(*d*), (*e*), or (*f*) may apply to the court for an order that the company not be removed from the register on any ground set out in that subsection.

(2) On an application for an order under subsection (1), the court may, if it is satisfied that the company should not be removed from the register on any of these grounds, make an order that the company is not removed from the register.

337. Property of company removed from the register

(1) Property that, immediately before the removal of a company from the register of companies, had not been distributed or disclaimed, vests in the Consolidated Fund with effect from the removal of the company from the register.

(2) For the purposes of this section, property of the former company includes leasehold property and all other rights vested in or held on behalf of or on trust for the former company, but does not include property held by the former company on trust for any other person.

(3) The Registrar shall, forthwith on becoming aware of the vesting of the property, inform the office of the Minister responsible for finance and development planning and give public notice of the vesting, setting out the name of the former company and particulars of the property.

(4) Where property is vested in the Consolidated Fund under this section, a person who would have been entitled to receive all or part of the property, or payment from the proceeds of its realisation, if it had been in the hands of the company immediately before the removal of the company from the register of companies, or any other person claiming through that person may apply to the court for an order—

(*a*) vesting all or part of the property in that person; or

(*b*) for payment to that person from out of the Consolidated Fund of compensation of an amount not greater than the value of the property.

(5) On an application made under subsection (4), the court may—

(*a*) decide any question concerning the value of the property, the entitlement of any applicant to the property or to compensation, and the apportionment of the property or compensation among two or more applicants;

(*b*) order that the hearing of two or more applications be consolidated;

(*c*) order that an application be treated as an application on behalf of all persons, or all members of a class of persons, with an interest in the property; or

(*d*) make an ancillary order.

(6) Compensation ordered to be paid under subsection (4) shall be paid out of the Consolidated Fund without further appropriation than this section.

338. Disclaimer of property by the State

(1) The Minister responsible for finance and development planning may, by notice in writing, disclaim the State's title to property vesting in the Consolidated Fund under section 337 if the property is onerous property.

(2) The Minister responsible for finance and development planning shall forthwith give notice in the *Gazette* of the disclaimer.

(3) Property that is disclaimed under this section shall be deemed not to have vested in the Consolidated Fund under section 337.

(4) Subject to any order of the court, the Minister responsible for finance and development planning is not entitled to disclaim property unless—

(*a*) the property is disclaimed within 12 months after the vesting of the property in the Consolidated Fund first comes to the notice of the office of the Minister; or

(*b*) if any person gives notice in writing to the Minister requiring the Minister to elect, before the close of such date as is stated in the notice, not being a date that is less than 60 working days after the date on which the notice is received by the Minister, whether to disclaim the property, the property is disclaimed before the close of that date, whichever occurs first.

(5) A statement in a notice disclaiming property under this section that the vesting of the property in the Consolidated Fund first came to the notice of the Minister on a specified date shall, in the absence of proof to the contrary, be evidence of the fact stated.

339. Liability of directors, shareholders and others to continue

The removal of a company from the register of companies does not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register and that liability continues and may be enforced as if the company had not been removed from the register.

340. Liquidation of company removed from register of companies

(1) Notwithstanding the fact that a company has been removed from the register of companies, the Master may appoint a liquidator under section 381 as if the company continued in existence.

(2) If a liquidator is appointed under subsection (1)—

(*a*) Part XXVI applies to the liquidation with such modifications as may be necessary; and

(*b*) the provisions of section 343(3) shall apply, with such modifications as may be necessary, to property of the company that is vested in the Consolidated Fund under section 337 as if the company has been restored to the register of companies.

341. Registrar may restore company to register of companies

(1) Subject to this section, the Registrar shall, on the application of a person referred to in subsection (2), and may, on his own motion, restore a company that has been removed from the register of companies to the register if the Registrar is satisfied that, at the time the company was removed from the register—

(*a*) the company was still carrying on business or other reason existed for the company to continue in existence;

(*b*) the company was a party to legal proceedings; or

(*c*) the company was in receivership, or liquidation, or both.

(2) Any person who, at the time the company was removed from the register, was—

(*a*) a shareholder or director of the company;

(*b*) a creditor of the company;

(*c*) a liquidator of the company; or

(*d*) the Master, may make an application under subsection (1).

(3) The Registrar shall, prior to restoring a company to the register, publish a public notice setting out—

(*a*) the name of the company;

(*b*) the name and address of the applicant;

(*c*) the section under, and the grounds on which, the application is made or the Registrar proposes to act, as the case may be; and

(*d*) the date by which an objection to restoring the company to the register shall be delivered to the Registrar, not being less than 20 working days after the date of notice.

[22 of 2018, s. 30 w.e.f. 3 June 2019.]

(4) The Registrar shall not restore a company to the register if the Registrar receives an objection to the restoration within the period stated in the notice.

(5) Before the Registrar restores a company to the register under this section, the Registrar may require any of the provisions of this Act or any regulations made under this Act, being provisions with which the company had failed to comply before it was removed from the register, to be complied with.

(6) The court may, on the application of the Registrar or the applicant, give such directions or make such orders as may be necessary or desirable for the purpose of placing a company that is restored to the register under this section and any other persons as nearly as possible in the same position as if the company had not been removed from the register.

(7) Nothing in this section limits or affects section 342.

342. Court may restore company to register of companies

(1) The court may, on the application of a person referred to in subsection (2), order that a company that has been removed from the register of companies be restored to the register if it is satisfied that—

(*a*) at the time the company was removed from the register—

(i) the company was still carrying on business or other reason existed for the company to continue in existence, or

(ii) the company was a party to legal proceedings,

(iii) the company was in liquidation,

(iv) the applicant was a creditor, or a shareholder, or a person who had an undischarged claim against the company, or

(v) the applicant believed that a right of action existed, or intended to pursue a right of action, on behalf of the company under Part XI; or

(*b*) for any other reason it is just and equitable to restore the company to the register.

(2) The following persons may make an application under subsection (1)—

(*a*) any person who, at the time the company was removed from the register—

(i) was a shareholder or director of the company,

(ii) was a creditor of the company,

(iii) was a party to any legal proceedings against the company,

(iv) had an undischarged claim against the company, or

(v) was the liquidator, or a receiver of the property of, the company;

(*b*) the Registrar;

(*c*) the Master; or

(*d*) with the leave of the court, any other person.

(3) Before the court makes an order restoring a company to the register under this section, it may require any provisions of this Act or any regulations made under this Act, being provisions with which the company had failed to comply before it was removed from the register, to be complied with.

(4) The court may give such directions or make such orders as may be necessary or desirable for the purpose of placing the company and any other persons as nearly as possible in the same position as if the company had not been removed from the register.

343. Restoration to register

(1) A company is restored to the register of companies when a notice signed by the Registrar stating that the company is restored to the register is published in the *Gazette* by the Registrar.

(2) A company that is restored to the register shall be deemed to have continued in existence as if it had not been removed from the register.

(3) Subject to this section, property of a company that is, at the time the company is restored to the register, vested in the Consolidated Fund pursuant to section 337, shall, on the restoration of the company to the register, vest in the company as if the company had not been removed from the register.

(4) Nothing in subsection (3) applies to any property vested in the Consolidated Fund pursuant to section 337 if the Court has made an order for the payment of compensation to any person pursuant to section 337(4)(*b*) in respect of that property.

(5) Nothing in subsection (3) applies to land or any estate or interest in land that has vested in the Consolidated Fund pursuant to section 337 if transmission to the State of the land or interest in land has been registered under any statute providing for the registration of such land or interest.

(6) Where transmission to the State of land or any interest in land that has vested in the Consolidated Fund pursuant to section 337 has been registered, the court may, on the application of the company, make an order —

(*a*) for the transfer of the land or interest to the company; or

(*b*) for the payment from out of the Consolidated Fund to the company of compensation—

(i) of an amount not greater than the value of the land or interest as at the date of registration of the transmission, or

(ii) if the land or interest has been sold or contracted to be sold, of an amount equal to the net amount received or receivable from the sale.

(7) On an application under subsection (6), the court may decide any question concerning the value of the land or the estate or interest.

(8) Compensation ordered to be paid under subsection (6) shall be paid out of the Consolidated Fund without further appropriation than this section.

PART XXIV
External Companies (ss 344-354)

344. Application of this Part and meaning of "carrying on business"

(1) This part applies to an external company only if it has a place of business or is carrying on business in Botswana.

(2) For the purposes of this Part—

(*a*) a reference to an external company carrying on business in Botswana includes a reference to the external company—

(i) establishing or using a share transfer office or a share registration office in Botswana; or

(ii) administering, managing, or dealing with property in Botswana as an agent, or personal representative, or trustee, and whether through its employees or an agent or in any other manner;

(*b*) an external company does not carry on business in Botswana merely because in Botswana it—

(i) is or becomes a party to a legal proceeding or settles a legal proceeding or claim or dispute, or

(ii) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs,

(iii) maintains a bank account,

(iv) effects a sale of property through an independent contractor,

(v) solicits or procures an order for delivery in Botswana or elsewhere that becomes a binding contract only if the order is accepted outside Botswana,

(vi) creates evidence of a debt or creates a charge on property,

(vii) secures or collects any of its debts or enforces its rights in relation to securities relating to those debts,

(viii) conducts an isolated transaction that is completed within a period of 31 days, not being one of a number of similar transactions repeated from time to time, or

(ix) invests its funds or holds property.

345. Registration of external companies

(1) Every external company shall, within one month after it establishes a place of business or commences to carry on business in Botswana, lodge with the Registrar—

(*a*) a duly authenticated copy of the certificate of its incorporation or registration in its place of incorporation or origin or a document of similar effect;

(*b*) a duly authenticated copy of its constitution, charter, statute or memorandum and articles or other instrument constituting or defining its constitution;

(*c*) a list of the external company's—

(i) directors containing similar particulars with respect to directors as are by this Act required to be contained in the register of the directors, managers and secretaries of the company,

(ii) shareholders and the number of shares issued to each shareholder, and

(iii) beneficial owners and address of each beneficial owner;

[22 of 2018, s. 31(a) w.e.f. 1 February 2019.]

(*d*) where the list includes directors resident in Botswana who are members of the local board of directors of the company, a memorandum duly executed by or on behalf of the external company stating the powers of the local directors;

(*e*) the name and address of a person resident in Botswana, not including an external company, who is appointed by the external company to—

(i) have responsibility for the management of the business of the external company in Botswana,

(ii) accept on its behalf service of process and any notices required to be served on the company, and

(iii) be answerable for all such acts, matters and things as are required to be done by the company under this Act referred to in this Part as the "authorised agent";

(*f*) notice of the situation of its registered office in Botswana and, unless the office is open and accessible to the public during ordinary business hours on each working day, the days and hours during which it is open and accessible to the public.

(2) Where an external company has complied with subsection (1), the Registrar shall, subject to section 12(2), register the company under this Part and shall issue a certificate in the prescribed form.

(2A) Where a company fails to comply with subsection (1)—

(*a*) the company shall be guilty of an offence and liable to a penalty set out in section 492(4); and

(*b*) every director of the company shall be guilty of an offence and liable to a fine set out in section 492(2).

[22 of 2018, s. 31(b) w.e.f. 1 February 2019.]

346. Registered office and authorised

(1) An external company shall have a registered office in Botswana to which all communications and notices may be addressed and which shall be open and accessible to the public for not less than four hours on every working day.

(2) An authorised agent shall, until he ceases to be such in accordance with subsection (4) continue to be the authorised agent of the company.

(3) An external company or its authorised agent may lodge with the Registrar a written notice stating that the authorised agent has ceased to be the authorised agent or will cease to be the authorised agent on a date specified in the notice.

(4) The authorised agent in respect of whom the notice has been lodged shall cease to be an authorised agent—

(*a*) on the expiry of a period of 21 days after the date of lodging of the notice or on the date of the appointment of another authorised agent the memorandum of whose appointment has been lodged in accordance with subsection (5), whichever is earlier; or

(*b*) if the notice states a date on which he is to so cease and the date is later than the expiry of that period, on that date.

(5) Where an authorised agent ceases to be an authorised agent and the company is then without an authorised agent in Botswana, within 21 days after the authorised agent ceased to be one, the company shall appoint an authorised agent.

347. Return of alteration

(1) An external company shall, within one month, lodge with the Registrar the particulars of the change or alteration, where a change or alteration is made in—

(*a*) the constitution, charter, statutes, memorandum or articles or other instrument lodged;

(*b*) the directors;

(*c*) shares or shareholders;

(*d*) the authorised agents or the address of an authorised agent;

(*e*) the situation of the registered office in Botswana or of the days or hours during which it is open and accessible to the public;

(*f*) the address of the registered office and its place of incorporation or origin;

(*g*) the name of the company; or

(*h*) the powers of any directors resident in Botswana who are members of the local board of directors.

[22 of 2018, s. 32(a) w.e.f. 3 June 2019.]

(2) Where an order is made by a court under any law in force in the country in which an external company is incorporated which corresponds with orders made under Parts XIV, XV and XVI, the company shall, within one month, lodge with the Registrar a copy of the order.

(2A) Where a company fails to comply with subsections (1) and (2)—

(*a*) the company shall be guilty of an offence and liable to a penalty set out in section 492(1); and

(*b*) every director of the company shall be guilty of an offence and liable to a fine set out in section 492(2).

[22 of 2018, s. 32(b) w.e.f. 3 June 2019.]

348. Registrar's certificate and validity of transactions

(1) On the registration of an external company under this Part or the lodging with the Registrar of particulars of the change or alteration in a matter referred to in section 347(*c*) or (*f*) the Registrar shall issue a certificate to that effect.

(2) A failure by an external company to comply with this Part does not affect the validity or the enforceability of any transaction entered into by the external company.

349. Financial statements

Every external company, other than a private company, shall in every year make out a balance sheet and profit and loss account and, if the external company is a holding company, group accounts, in such form, and containing such particulars and including such documents as under the provisions of this Act it would, had it

been a company within the meaning of this Act, have been required to make out and lay before the company in general meeting, and lodge a copy of such balance sheet, profit and loss account and group accounts, if any, with the Registrar; and if such balance sheet and other documents are in a foreign language there shall be annexed a certified translation thereof.

350. Publication of name by company

(1) An external company shall—

(*a*) conspicuously exhibit outside its registered office and every place of business established by it in Botswana, its name and the place where it is formed or incorporated;

(*b*) cause its name and the place where it is formed or incorporated to be stated in legible characters in all—

(i) business letters, notices and other official publications of the company,

(ii) bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and

(iii) delivery notes, invoices, receipts letters of credit and prospectuses of the company;

(*c*) where the liability of its members is limited, unless the last word of its name is the word "Limited" or the abbreviation "Ltd." cause notice of the fact—

(i) to be stated in legible characters in every prospectus issued by it and in all other forms of publication referred to in paragraph (*b*); and

(ii) except in the case of a banking company, to be exhibited outside its registered office and every place of business established by it in Botswana.

(2) Where the name of an external company is indicated on the outside of its registered office or any place of business established by it in Botswana or on any of the documents referred to in subsection (3) in characters or in any other way than by the use of romanised letters, the name of the company shall also be exhibited outside such office or place of business or stated on such document in romanised letters not smaller than any of the characters so exhibited or stated on the relevant office, place of business or document.

351. Service of notices

Any document required to be served on an external company shall be deemed to have been served—

(*a*) if addressed to the external company and left at or sent by post to its registered office in Botswana;

(*b*) if addressed to an authorised agent and left at or sent by post to his registered address; or

(*c*) in the case of an external company which has ceased to maintain a place of business in Botswana, if addressed to the external company and left at or sent by registered post to its registered office in the place of its incorporation.

352. Cessation of business in Botswana

(1) Where an external company ceases to have a place of business or to carry on business in Botswana, it shall within seven days lodge with the Registrar a notice to that effect, and as from the day on which the notice is lodged its obligation to lodge any document other than a document that ought to have been lodged shall

cease, and the Registrar shall on the expiry of three months after the lodging of the notice remove the name of the company from the register.

(2) Where an external company goes into liquidation or is dissolved in its place of incorporation or origin—

(*a*) every person who immediately before the commencement of the liquidation proceedings was an authorised agent shall within one month after the commencement of the liquidation or the dissolution lodge or cause to be lodged with the Registrar a notice to that effect and, where a liquidator is appointed, notice of the appointment; and

(*b*) the liquidator shall, until a liquidator for Botswana is appointed by the court, have powers and functions of a liquidator for Botswana.

(3) A liquidator of an external company appointed for Botswana by the court or a person exercising the powers and functions of such a liquidator shall—

(*a*) before any distribution of the external company's assets is made, by advertisement in a newspaper circulating generally in each country where the overseas company had been carrying on business before the liquidation and where no liquidator has been appointed for that place, invite all creditors to make their claims against the foreign company within a reasonable time before the distribution;

(*b*) not, subject to subsection (7), without leave of the court, pay out any creditor to the exclusion of any other creditor;

(*c*) unless the court otherwise directs, only recover and realise the assets of the overseas company in Botswana and shall, subject to paragraph (*b*) and to subsection (7), pay the net amount so recovered and realised to the liquidator of that overseas company for the place where it was formed or incorporated after paying any debts and satisfying any liabilities incurred in Botswana by the external company.

(4) Where an overseas company has been wound-up so far as its assets in Botswana are concerned and there is no liquidator for the place of its incorporation or origin, the liquidator may apply to the court for directions as to the disposal of the net amount recovered under subsection (3).

(5) On receipt of a notice from an authorised agent that the company has been dissolved the Registrar shall remove the name of the company from the register:

Provided that records, including beneficial owner information of the company shall be kept for 20 years or such period as may be prescribed under the Financial Intelligence Act.

[7 of 2022, s. 22 w.e.f. 25 February 2022.]

(6) Where the Registrar has reasonable cause to believe that an external company has ceased to carry on business or to have a place of business in Botswana, Part XXIII shall, with such adaptations and modification as may be necessary, apply to an external company as they apply to a company.

(7) Part XIII shall, with such adaptations and modifications as may be necessary, apply to an external company.

353. Exemption in respect of transfer duty

(1) Notwithstanding anything contained in any law an external company may satisfy the court that—

(*a*) it carries on its principal business within Botswana;

(*b*) the company is about to be or is being wound-up voluntarily in its country of incorporation for the purpose of transferring the whole of its business and property wherever situate to a company which will be or has been registered under this Act (hereinafter referred to as "the new company") for the purpose of acquiring such business and property;

(*c*) the sole consideration for such transfer is the issue to the members of the external company of shares in the new company in proportion to their shareholdings in the external company; and

(*d*) no shares in the new company will be available for issue to any persons other than the members of the external company.

(2) Where the court has been satisfied in terms of subsection (1) it may, subject to the certificate of the Registrar that—

(*a*) the external company is being wound-up voluntarily for the said purpose;

(*b*) a company has been registered under this Act for the said purpose; and

(*c*) the members of the external company have had issued to them the shares in the new company to which they are entitled,

order that no transfer duty shall be payable in respect of the transfer of immovable property from the external company to the company so registered.

354. Power of external company to hold land in Botswana

Except as may be expressly provided in any other written law, an external company to which section 345 applies and which has lodged with the Registrar the documents and particulars therein mentioned shall have the same power to own immovable property in Botswana as if it were a company incorporated in Botswana.

PART XXV

Transfer of Registration and Registration of Statutory Corporations as Companies (ss 355-363)

355. Registration and continuation of foreign company and statutory corporation

(1) A foreign company incorporated under the laws of any country other than Botswana, may where it is so authorised by the laws of that country apply to the Registrar to be registered and continued in Botswana as if it had been incorporated in Botswana under this Act.

(2) An application under subsection (1) shall be supported by—

(*a*) a certified copy of the certificate of incorporation or other similar document that evidences its incorporation;

(*b*) a copy of the resolution authorising the continuation of the company in Botswana;

(*c*) a statement whether the company applies to be registered as a company limited by shares or by guarantee and whether as a public company or a private company;

(*d*) a certified copy of the documents defining its constitution;

(*e*) a statement of the charges on the company's assets;

(*f*) evidence acceptable to the Registrar that the company is not prevented from being registered as a company under this Act by either section 356 or section 357;

(*g*) the documents and information that are required to register a company under Part II; and

(*h*) any other documents and information the Registrar may require.

(3) The Registrar may direct that a document that has been delivered to the Registrar or registered under Part XXIV need not accompany the application.

(4) A statutory corporation may, where it is authorised by an Act of Parliament, apply to the Registrar to be registered and continued as if it had been incorporated under this Act.

(5) An application under subsection (4) shall be supported by—

(*a*) a copy of the law under which the statutory corporation was established;

(*b*) a copy of the law authorising the continuation of the statutory corporation under this Act;

(*c*) a statement whether the statutory corporation applies to be registered as a company limited by shares or by guarantee and whether as a public company or a private company;

(*d*) a certified copy of the documents defining its constitution;

(*e*) a statement of the charges on the statutory corporation's assets;

(*f*) the documents and information that are required to register a company under Part II; and

(*g*) any other documents or information the Registrar may require.

(5A) A building society registered under the Building Societies Act may apply to the Registrar to be registered and continued as if it had been incorporated under this Act.

[22 of 2014, s. 4.]

(6A) An application under subsection (5A) shall be supported by—

(*a*) a copy of the certificate of registration of the building society;

(*b*) a copy of the rules of the building society;

(*c*) a statement whether the company applies to be registered as a company limited by shares or by guarantee, and whether as a public company or a private company;

(*d*) a statement of the charges on the building society's assets;

(*e*) the documents and information that are required to register a company under Part II; and

(*f*) any other documents and information the Registrar may require.

[22 of 2014, s. 4.]

(7A) Where a building society which is registered under the Building Societies Act is registered under this Act, the Registrar shall notify the Registrar of Building Societies, in writing, of such registration.

[22 of 2014, s. 4.]

356. Foreign companies shall be authorised to register

A foreign company shall not be registered as a company under this Act unless—

(*a*) the company is authorised to transfer its incorporation under the law of the country in which it is incorporated;

(*b*) the company had complied with the requirements of that law in relation to the transfer of its incorporation; and

(*c*) if that law does not require its shareholders or members, or a specified proportion of them, to consent to the transfer of its incorporation, the transfer has been consented to by not less than 75 per cent of its shareholders or members entitled to vote and voting in person or by proxy at a meeting of which not less than 21 days notice had been given specifying the intention to transfer the company's incorporation.

357. Foreign companies that cannot be registered

(1) A foreign company shall not be registered as and continue as a company under this Act if—

(*a*) the company is in the process of winding-up or liquidation;

(*b*) a receiver or a manager has been appointed, whether by a court or not, in relation to the property of the company; or

(*c*) there is any scheme or order in force in relation to the company whereby the rights of creditors are suspended or restricted.

(2) A foreign company shall not be registered as a company under this Act unless the foreign company would, immediately after becoming registered under this Act, satisfy the solvency test.

358. Registration

(1) As soon as the Registrar receives a properly completed application from a foreign company, a statutory corporation or a building society for registration as a company under this Act, and in the case of a foreign company, is satisfied that the type of company named in the application in accordance with paragraph (*c*) of section 355(2) is an appropriate type of company for continuation of the company in Botswana, and in the case of a statutory corporation or a building society, is satisfied that the type of company named in the application in accordance with paragraph (*c*) of section 355(5) is an appropriate company for registration and continuation of the statutory company or building society, the Registrar shall—

(*a*) enter on the register of companies the particulars of the company required under section 21; and

(*b*) issue a certificate of registration in the prescribed form.

[22 of 2014, s. 5.]

(2) A certificate of registration of a company issued under this section is conclusive evidence that—

(*a*) all the requirements of this Act as to registration have been complied with; and

(*b*) on and from the date of registration stated in the certificate, the company is registered under this Act.

359. Effect of registration

(1) The registration of a foreign company, a statutory corporation or a building society under this Act does not—

(*a*) create a new legal entity;

(*b*) prejudice or affect the identity of the body corporate or building society constituted by the company or its continuity as a legal entity;

(*c*) affect the property, rights or obligations of the company or building society; or

(*d*) affect proceedings by or against the company or building society.

[22 of 2014, s. 6.]

(2) Proceedings that could have been commenced or continued by or against the foreign company, statutory corporation or building society before registration under this Act may be commenced or continued by or against the company after registration.

[22 of 2014, s. 6.]

(3) Upon registration of a foreign company, a statutory corporation or a building society under this Act, all the provisions of this Act shall apply to that company, statutory corporation or building society as if it were a company registered under this Act as a company limited by shares or by guarantee and as a public company or private company, as the case may be.

[22 of 2014, s. 6.]

360. Companies may transfer incorporation

(1) Subject to this Part, a company may be removed from the register of companies in connection with becoming incorporated under the law in force, or in any part of, another country.

(2) An application by a company for removal from the register of companies in connection with becoming incorporated under the law in force in, or in any part of, another country shall be in the prescribed form and shall be accompanied by—

(*a*) evidence acceptable to the Registrar that subsection (3) and section 361 have been complied with;

(*b*) evidence acceptable to the Registrar that the removal of the company from the register is not prevented by section 362;

(*c*) written notice from the Commissioner of Taxes that the Commissioner has no objection to the company being removed from the register;

(*d*) evidence acceptable to the Registrar that the company is incorporated under the law; and

(*e*) any other documents or information the Registrar may require.

(3) A company shall not apply to be removed from the register of companies under section 363 unless the making of the application has been approved by a special resolution.

361. Company to give public notice

A company shall not apply to be removed from the register of companies under section 331(1)(*d*) unless—

(*a*) the company gives public notice—

(i) stating that it intends, after the date specified in the notice, which shall not be less than 20 working days after the date of the notice, to apply under section 360 for the company to be removed from the

register in connection with the company becoming incorporated under the law in force in, or in any part of, another country, and

(ii) specifying the country or part of the country under the law of which it is proposed that the company will be incorporated; and

(*b*) the application is made after that date.

362. Companies that cannot transfer incorporation

(1) A company shall not be removed from the register of companies under section 363 if—

(*a*) the company is in liquidation or an application has been made to the court under section 370 to put the company into liquidation;

(*b*) the company has entered into a compromise with creditors or a class of creditors under Part XIV or a compromise has been proposed under that Part in relation to that company; or

(*c*) a compromise has been approved by the court under Part XV in relation to the company or an application has been made to the court to approve a compromise under that Part.

(2) A company shall not be removed from the register under section 363 unless the company would, immediately before it is removed from the register, satisfy the solvency test.

363. Removal from register

(1) As soon as the Registrar receives a properly completed application under section 360(2) to remove a company from the register, the Registrar shall remove the company from the register.

(2) A company is removed from the register when a notice signed by the Registrar stating that the company is removed from the register is registered under this Act.

(3) The removal of a company from the register of companies under this section does not—

(*a*) prejudice or affect the identity of the body corporate that was constituted under this Act or its continuity as a legal person;

(*b*) affect the property, rights, or obligations of that body corporate; or

(*c*) affect proceedings by or against that body corporate.

(4) Proceedings that could have been commenced or continued by or against a company before the company was removed from the register under this section may be commenced or continued by or against the body corporate that continues in existence after the removal of the company from the register.

PART XXVI
Winding-up and Judicial Management (ss 364-482)

364. Modes of winding-up

(1) The winding-up of a company may be either—

(*a*) by the court; or

(*b*) voluntary.

(2) Unless the contrary appears, the provisions of this Act with respect to winding-up apply to the winding-up of a company by either of those modes.

365. Jurisdiction of Master

For the purposes of the winding-up or judicial management of companies the Master shall have the jurisdiction conferred on him by this Part.

366. Liability as contributories of present and past members

In the event of a company being wound-up, every present and past shareholder shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding-up, and for the adjustment of the rights of the contributories among themselves, subject to the following qualifications—

(*a*) in the case of a company limited by shares no contribution shall be required from any shareholder exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member;

(*b*) in the case of a company limited by guarantee no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound-up;

(*c*) a past shareholder or member shall not be liable to contribute if he has ceased to be a shareholder or member for a period exceeding one year before the commencement of the winding-up;

(*d*) a past shareholder or member shall not be liable to contribute unless at the commencement of the winding-up there is unsatisfied debt or liability of the company contracted before he ceased to be a shareholder or member;

(*e*) a past member shall not be liable to contribute unless it appears to the court that the present members are unable to satisfy the contributions required to be made by them in pursuance of this Act;

(*f*) a past member shall not be liable to contribute in respect of any debt or liability of the company other than a debt or liability contracted before he ceased to be a member and unsatisfied at the commencement of the winding-up, or in respect of the costs, charges and expenses of the winding-up, except in so far as these have been occasioned by the necessity of recovering a contribution from him under this section;

(*g*) a past shareholder or member shall not be liable to contribute in respect of the adjustment of the rights of the contributories among themselves;

(*h*) notwithstanding anything in this section to the contrary, no transfer of shares improperly issued as fully or partly paid up shall relieve the transferor of any liability which he would have had to contribute in respect of the amount improperly credited as paid on the shares had he not transferred them; but in so far as the present shareholder or member is liable to contribute in respect of the amount improperly credited, such liability shall be a joint and several liability of such transferor and the present shareholder or member;

(*i*) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract, whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract; and

(*j*) a sum due to any shareholder or member of a company, in his character of a shareholder or member, by way of dividends, profits or otherwise, shall not be deemed to be a debt of the company, payable to

that shareholder or member in a case of competition between himself and any other creditor not a shareholder or member of the company; but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories amongst themselves.

367. Nature of liability of contributory

(1) The liability of a contributory shall constitute a debt accruing due from him at the time when this liability commenced, but payable at the times when calls are made for enforcing the liability.

(2) If a contributory dies before or after he has been placed on the list of contributories then either

(*a*) his executor shall, as such, be placed on the list of contributories in his stead and be liable accordingly; or

(*b*) if his estate has passed into the hands of his heirs or legatees they shall be liable for his contribution to such extent and in such proportions as they would, by law, respectively be liable for debts of the estate payable but not provided for at the time of distribution of the estate, and shall be placed on the list of contributories accordingly.

(2) If a contributory becomes insolvent or assigns his estate under the law relating to insolvent estates, either before or after he has been placed on the list of contributories, then—

(*a*) his trustee in insolvency or his assignee, as the case may be, shall represent him for all the purposes of the winding-up, and shall be a contributory accordingly; and

(*b*) there may be proved against the estate of the insolvent or of the debtor who has assigned his estate the estimated value of his liability to future calls, as well as calls already made.

368. When a company deemed unable to pay its debts

A company shall be deemed to be unable to pay its debts—

(*a*) if a creditor, by cession or otherwise, to whom the company is indebted in a sum exceeding P1,000 then due, has served on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office, and if the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

(*b*) if the execution or other process issued, on a judgment, decree or order of any competent court in favour of a creditor, against the company is returned by the sheriff or messenger with the endorsement that no assets could be found to satisfy the debt or that the assets found were insufficient to do so; or

(*c*) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

369. Circumstances in which company may be wound-up by court

A company may be wound-up by the court—

(*a*) if the company has by special resolution resolved that the company be wound-up by the court;

(*b*) if the company is unable to pay its debts;

(*c*) the company or the board has persistently or seriously failed to comply with this Act;

(*d*) the company does not comply with section 19(1);

(*e*) in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding-up its affairs; or

(*f*) if the court is of the opinion that it is just and equitable that the company should be wound-up.

370. Petition for winding-up a company

(1) An application to the court for the winding-up of a company shall be by petition presented, subject to the provisions of this section, by—

(*a*) the company;

(*b*) any creditor or creditors (including any contingent or prospective creditor or creditors);

(*c*) any shareholder or shareholders;

(*d*) all or any of those parties together or separately; or

(*e*) in a case falling within section 284(4), the Registrar accompanied by the Minister, by a certificate of the Master or administrative officer that due security has been found for payment of all fees and charges necessary for the prosecution of all proceedings until the appointment of a liquidator.

(2) Notwithstanding the provisions of subsection (1)—

(*a*) a shareholder shall not be entitled to present a petition for winding-up a company unless—

(i) the application is on grounds (*a*), (*c*), (*d*) or (*f*) of section 369, or

(ii) the shares, or some of them, either were originally allotted to him or have been held by him and registered in his name for at least six months during the 18 months before the commencement of the winding-up, or have devolved upon him through the death of a former holder;

(*b*) the court shall not grant a petition for winding-up a company by a contingent or prospective creditor until a *prima facie* case for winding-up has been established to the satisfaction of the court; and

(*c*) a creditor shall not be entitled to present a petition for winding-up a company unless such petition when presented is accompanied by the sum of P500 (hereinafter called "the petition fee").

(3) An application to the court for the winding-up of a company may be made by the Registrar on the grounds referred to in paragraphs (*c*) and (*d*) of section 369.

(4) Where a company is being wound-up voluntarily, a petition may be presented by the Master, or by any other person authorised in that behalf under the other provisions of this section:

Provided the court shall not make a winding-up order on the petition unless it is satisfied that the voluntary winding-up cannot be continued with due regard to the interests of the creditors or contributories.

(5) Notwithstanding any other provisions of this Act, the petition fee paid in accordance with paragraph (*c*) of subsection (2) shall be dealt with as follows—

(*a*) if the petition is refused, the petition fee shall be refunded by the Master to the petitioner after deduction of any costs which may be awarded under section 371(1);

(*b*) if the petition is granted and the assets of the company are insufficient to pay the costs of the winding-up, the petition fee, or such portion thereof as shall be necessary, shall be used to pay the costs of the

winding-up and the balance, if any, shall be refunded by the Master to the petitioner; or

(*c*) if the petition is granted and there are sufficient assets to pay the costs of the winding-up, the petition fee shall be refunded by the Master to the petitioner:

Provided that, if a petition is granted and the Master, having made due enquiry, has reasonable cause to believe that there are sufficient funds to pay the costs of the winding-up, he may, on due application having been made to him, refund to the petitioner the petition fee notwithstanding the fact that the winding-up has not been completed.

371. Powers of court on hearing petitions

(1) On hearing the petition the court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order or any other order that it deems just, but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where the petition is presented by shareholders of the company on the ground that it is just and equitable that the company should be wound-up, the court if it is of the opinion—

(*a*) that the petitioners are entitled to relief either by winding-up the company or by some other means; or

(*b*) that in the absence of any other remedy it would be just and equitable that the company should be wound-up, shall make a winding-up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound-up instead of pursuing that other remedy.

372. Court may stay or restrain proceedings against company

At any time after the presentation of a petition for winding-up and before a winding-up order has been made, the company or any creditor or shareholder may—

(*a*) where any action or proceeding by or against the company is pending in any court of law in Botswana, apply to such court for a stay of proceedings therein; and

(*b*) where any other action or proceeding is being or about to be instituted against the company, apply to the court to which the petition for winding-up has been presented for an order restraining further proceedings in the action or proceeding,

and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it considers appropriate.

373. Commencement of winding-up by court

(1) Where before the presentation of a petition for the winding-up of a company by the court a resolution has been passed by the company for voluntary winding-up, the winding-up of the company shall be deemed to have commenced at the time of the passing of the resolution.

(2) In any other case, the winding-up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding-up.

374. Court may adopt proceedings of voluntary winding-up

Where a company is being wound-up voluntarily and an order is made for its winding-up by the court, the court may, if it considers appropriate, by the same or any subsequent order, confirm all or any of the proceedings in the voluntary winding-up.

375. Effect of winding-up order

An order for winding-up a company shall operate in favour of all the creditors and of all the shareholders of the company as if the petition had been presented by all creditors and shareholders jointly.

376. Action stayed and avoidance of certain attachments, executions, dispositions etc.

In a winding-up by the court—

(*a*) no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose;

(*b*) any attachment or execution put in force against the assets of the company after the commencement of the winding-up shall be void; and

(*c*) every disposition of the property (including rights of action) of the company, and every transfer of shares or alteration in the status of its shareholders made after the commencement of the winding-up, shall, unless the court otherwise orders, be void.

377. Transmission of winding-up order to certain officers

(1) The Registrar of the court shall forthwith transmit a copy of every provisional and final winding-up order, and of every order amending or setting aside the same to the Registrar, to the Master and to every sheriff of the High Court of Botswana who, to the knowledge of the Registrar, has property of the company under attachment, and—

(*a*) in respect of any immovable property or any interest in minerals within Botswana which appears to be an asset of the company, to the Registrar of Deeds; and

(*b*) to the messenger of every magistrate's court by the order whereof it appears that property of the company is under attachment:

Provided that when the assets of the company are under P2,000 in value, and the court so orders, the movable assets may remain in the custody of such person as the court may order upon such terms as to security as the court may direct, and in that case it shall not be necessary to transmit a copy of any order to the Sheriff or any messenger.

(2) Upon receipt by the Registrar of Deeds of a winding-up order he shall enter a caveat against the transfer of any immovable property or the cancellation or cession of any bond or the transfer of any interest whatsoever in minerals registered in the name of or belonging to the company.

(3) Every such public officer concerned shall register every copy of an order transmitted to him and note thereon the day and hour when it is received.

(4) Upon receipt of a copy of any winding-up order, the Master shall give notice thereof in the *Gazette*.

378. Statement of company's affairs to Master

(1) Where the court has made a winding-up order, there shall be made and submitted to the Master a statement in duplicate as to the affairs of the company in the prescribed form, if any, showing as at the date of the winding-up order or such other convenient date as the Master shall allow, the particulars of its assets,

debts and liabilities, the names, addresses and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as the Master may require; and the Master shall transmit the duplicate of such statement to the liquidator on his appointment.

(2) The statement shall be submitted and verified by affidavit by one or more persons who are at the relevant date directors and by the person who is at that date the secretary of the company, or by such of the persons hereinafter in this subsection mentioned as the Master may require to submit and verify the statement that is to say, persons—

(*a*) who are or have been officers of the company;

(*b*) who have taken part in the formation of the company at any time within one year before the relevant date;

(*c*) who are in the employment of the company, or have been in the employment of the company within the said year, and are in the opinion of the Master capable of giving the information required; or

(*d*) who are or have been within the said year officers of or in the employment of a company which is, or within the said year was, an officer of the company to which the statement relates.

(3) The statement shall be submitted within 14 days from the date of the order, or within such extended time as the Master or the court may for special reasons allow.

(4) Any person making or concurring in making the statement and affidavit required by this section shall be allowed, and shall be paid out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the Master may consider reasonable.

(5) If any person, without reasonable excuse, makes default in complying with the requirements of this section, he shall be guilty of an offence and liable to a fine not exceeding P100 for every day during which the offence continues and where the default continues after the making by the court of such an order the court may direct the person to make payment to the company towards satisfaction of the debts and liabilities of the company such sum as the court may consider to be just not exceeding the total amount of such debts and liabilities.

(6) Any person shall be entitled by himself or by his agent at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom.

379. Report by Master

Where the court has made a winding-up order the Master may, if he considers appropriate, make a report to the court, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company or its creditors since the formation thereof and any other matters which in his opinion it is desirable to bring to the notice of the court.

380. Application of sections

The provisions contained in sections 381 to 404 inclusive shall apply in relation to the winding-up of a company by the court.

381. Custody of property and appointment of liquidator

(1) For the purpose of conducting the proceedings in a winding-up by the court the Master shall, subject to the provisions of sections 382 and 445, appoint a liquidator or liquidators.

(2) On a winding-up order being made or thereafter when, for whatever cause, there is no person acting as liquidator of the company—

(*a*) all the property of the company shall be deemed to be in the custody or control of the Master until a liquidator or provisional liquidator is appointed and is capable of acting as such; and

(*b*) subject to the provisions of section 445 the Master may appoint any fit person or shall appoint any person whom the court has directed to be appointed as a provisional liquidator of the company to hold office until the appointment of a liquidator, and may, or shall, as so ordered by the court, restrict his powers by the terms of his letter of appointment.

(3) When a vacancy occurs in the office of liquidator the Master shall fill the vacancy by making an appointment under the provisions of sections 382 and 445.

382. Meetings of creditors and contributories

(1) When a final winding-up order has been made by the court, the Master shall summon separate meetings —

(*a*) of the creditors of the company for the proof of claims against the company and for the purpose of determining the person or persons whose names shall be submitted for appointment as liquidator or liquidators; and

(*b*) of the contributories of the company for the purpose of determining the person or persons whose names shall be submitted for appointment as liquidator or liquidators.

(2) Where in regard to the said appointment there is no difference between the determinations of the meetings of the creditors and contributories, or where there is a determination of the meeting of the creditors only or of the meeting of the contributories only, the Master may make any appointment required to give effect to any such determination.

(3) Where there is a difference between the determinations of the meeting of the creditors and the contributories the Master shall call a joint meeting of the creditors and contributories with a view to reaching an agreement and, if no agreement is reached the Master shall make such appointment as he may think fit.

(4) Any such appointment shall be subject to an appeal within 14 days to a Judge in chambers, made by the creditors or contributories or both.

(5) On any such appeal a judge may make such order thereon and as to costs as he may think fit.

(6) Meetings of creditors and contributories shall, unless otherwise in this Act specially provided, be convened and held in the manner prescribed in the rules framed under section 523.

383. Proof of claims

(1) All claims against a company being wound-up by the court shall be proved at a meeting of creditors called and held as nearly as possible in the manner provided by the law relating to insolvent estates for the proof of claims against an insolvent estate and subject to the provisions of section 460.

(2) The Master, on the application of the liquidator, may fix a time or times within which creditors of the company are to prove their claims or to be excluded from the benefit of any distribution under any account

lodged with the Master before those debts are proved.

384. Powers of liquidator

(1) The liquidator, in a winding-up by the court, shall have the following powers—

(*a*) to execute in the name and on behalf of the company all deeds, receipts and other documents, and for that purpose to use the company's seal if it has one;

(*b*) to prove a claim in the estate of any contributory or debtor and receive payment in full or a dividend in respect thereof;

(*c*) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company, but so as not, except with the leave of the court or the authority mentioned in subsection (4) or for the purpose of carrying on the business of the company in terms of subsection 4(*e*), to impose any additional liability upon the company;

(*d*) to summon any general meeting of the company or the creditors or contributories of the company for the purpose of obtaining its or their authority or sanction; and

(*e*) subject to the provisions of subsections (3), (4) and (5), to take such measures for the protection and better administration of the affairs and property of the company as the trustee of an insolvent estate may take in the ordinary course of his duties and without the authority of a resolution of creditors.

(2) At any time before a general meeting contemplated in subsection (1)(*d*) is convened for the first time the liquidator shall, if satisfied that any movable or immovable property of the company ought forthwith to be sold, recommend to the Master in writing accordingly stating his reasons.

(3) The Master on receiving the recommendation made under subsection (2) may thereupon authorise the sale of such property or any part of it on such conditions and in such manner as he may determine:

Provided that if such property or any part of it is subject to a preferential right, the Master shall not authorise the sale of such property or part of it unless the person entitled to such preferential right has given his consent to in writing.

(4) The liquidator shall have power, with the leave of the court, or with the authority of a resolution of creditors and contributories duly passed at a joint meeting—

(*a*) to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature, and subject to the provisions of any law relating to criminal procedure any criminal proceeding:

Provided that immediately upon the appointment of a liquidator or a provisional liquidator, the Master may authorise upon such terms as he considers appropriate legal proceedings for the recovery of any outstanding accounts, the collection of which appears to him to be urgent;

(*b*) to agree to any offer of composition made to the company by any debtor or contributory, and take any reasonable part of the debt in discharge of the whole or give reasonable time, regard being had to the provisions of section 450;

(*c*) to compromise or admit any claim or demand against the company, including an unliquidated claim;

(*d*) to submit to the determination of arbitrators any dispute concerning the company or any claim or demand by or upon the company;

(*e*) to carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up thereof:

Provided that, if necessary, the liquidator may carry on or discontinue the same before he has obtained the leave of the court or the authority aforesaid, but it shall not then be competent for him as between himself and the creditors or contributories to charge the winding-up with the cost of any goods purchased by him unless the same have been necessary for the immediate purpose of carrying on the business and there are funds available for payment of the same after providing for the cost of winding-up or unless the court otherwise orders;

(*f*) in the case of a company unable to pay its debts, to elect to adopt or to abandon any contract entered into by the company before the commencement of the winding-up to buy or receive in exchange any immovable property, transfer of which has not been effected in favour of the company:

Provided that—

(i) if the liquidator does not make his election within six weeks after being required in writing to do so, the person entitled under the contract may apply by motion to the court for cancellation of the contract and delivery of possession of the immovable property and the court may make such order as it considers appropriate, and

(ii) nothing contained in this paragraph shall affect any concurrent claim against the company for damages for non-fulfilment of the contract;

(*g*) to terminate any lease entered into by the company as lessee by notice in writing to the lessor, subject however to the following terms and conditions—

(i) nothing contained in this paragraph shall affect any claim by the lessor against the company for damages he may have sustained by reason of the non-performance of the terms of the lease,

(ii) if the liquidator does not within three months of his appointment notify the lessor that he is prepared to continue the lease on behalf of the company, he shall be deemed to have terminated the lease at the end of such three months,

(iii) the rent due under any lease so terminated from the date of the commencement of the winding-up to the termination of the lease by the liquidator shall be included in the costs of administration,

(iv) the fact that a lease has been terminated by the liquidator shall deprive him of any right to compensation for improvements made during the period of the lease;

(*h*) to sell, by public auction or otherwise, deliver or transfer the movable and immovable property of the company; and

(*i*) to perform any act or exercise any power for which he is not expressly required by this Act to obtain the leave of the court.

(5) The liquidator shall have power, with the leave of the court, to raise money on the security of the assets of the company or to do any other thing which the court may consider necessary for winding-up the affairs of the company and distributing its assets.

(6) The Master may restrict the powers of a provisional liquidator.

(7) The liquidator may, with the authority of a resolution of creditors and contributories, duly passed at a joint meeting of creditors and contributories, do any act or exercise any power for which he is not by this Act

expressly required to obtain the leave of the court.

385. Exercise of liquidator's powers

(1) The liquidator of a company which is being wound-up by the court shall, in the administration of the assets of the company, take into account any directions that may be given by resolution of the creditors or resolution of the contributories at any general meeting.

(2) In regard to any matter which has been submitted by the liquidator for the directions of creditors and contributories in general meeting, but as to which no directions have been given or as to which there is a difference between the directions of creditors and contributories, the liquidator may apply to the Master for directions and the Master shall decide the matter and may make such order therein as he shall think fit.

(3) Where the Master has declined to give directions on an application to him under subsection (2), or in relation to any other matter arising in the winding-up the liquidator may apply to the court for directions.

(4) Any person aggrieved by any act or decision of the liquidator may apply to the court after notice of motion to the liquidator and the court may make such order as it considers appropriate.

386. Control by Master over liquidator

(1) The Master shall take cognizance of the conduct of liquidators of companies which are being wound-up by the court, and if a liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by statute, rules, or otherwise with respect to the performance of his duties, or if any complaint is made to the Master by any creditor or contributory in regard thereto, the Master shall inquire into the matter and take such action thereon as he may think expedient.

(2) The Master may at any time require any liquidator of a company which is being wound-up by the court to answer any enquiry in relation to any winding-up in which such liquidator is engaged, and may, if he considers appropriate, examine such liquidator or any other person on oath concerning the winding-up.

(3) The Master may also direct an investigation to be made of the books and vouchers of the liquidator.

(4) Any expenses incurred by the Master in carrying out any provision of this section shall be part of the costs of the winding-up, but the court may order the liquidator to pay such expenses to the company *de bonis propiis*.

387. Bank account

(1) Immediately after his appointment the liquidator of a company which is being wound-up by the court shall open an account in the name of the company in liquidation, with a bank within Botswana and shall deposit therein to the credit of the company from time to time all moneys received by him on its behalf.

(2) All cheques or orders which may be drawn upon the account shall contain the name of the payee and the cause of payment and shall be drawn to order and signed by the liquidator or by his agent.

(3) Immediately after opening the account the liquidator shall give the Master written particulars of the bank and the branch of the bank with which the account has been opened, and he shall not, without the written permission of the Master, transfer the account from that branch.

(4) The Master and any surety for the liquidator or any person authorised by such surety shall have the same right to information in regard to the account as the liquidator himself possesses and may examine all vouchers in relation thereto whether in the hands of the bank or of the liquidator.

(5) If any liquidator, without lawful excuse, retains any sum of money belonging to the company exceeding P500 or knowingly permits his co-liquidator to retain such a sum of money longer than the earliest day after its receipt on which it was reasonable for him or his co-liquidator to pay the money into the bank or uses or knowingly permits his co-liquidator to use any assets of the company except for the benefit thereof he shall, in addition to any other penalty to which he may be liable, be liable to pay to the company an amount not exceeding double the sum so retained or double the value of the assets so used.

(6) The amount which the liquidator is so liable to pay may be recovered by action in any competent court at the instance of his co-liquidator, the Master or any creditor or contributory.

388. Release of liquidator

(1) When the liquidator of a company which is being wound-up by the court has realised all the assets of the company and has distributed a final dividend, if any, to the creditors, and adjusted the rights of the contributories among themselves, and made a final return, if any, to the contributories, he may apply to the Master for his release, and upon such liquidator giving by advertisement in the *Gazette* not less than three weeks prior notice of his application, the Master shall take into consideration any objection to the release of the liquidator lodged by any creditor, contributory, or other person interested and upon consideration of the objections, if any, the Master may either grant or withhold the release.

(2) The release of the liquidator by the Master shall discharge the liquidator from all liability in respect of any act done or default made by him in the administration of the affairs of the company, or otherwise in relation to his conduct as liquidator, but any such release may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.

(3) Where the liquidator has not previously resigned or been removed, his release shall operate as a removal of him from his office.

389. Remuneration of liquidator

(1) In a winding-up by the court every liquidator shall be entitled to a reasonable remuneration for his services, on the basis agreed as between the liquidator and the creditors and contributories at the first meeting of creditors and contributories, or to such fee as the Minister may, by statutory instrument, prescribe, which fee shall be taxed by the Master:

Provided that the Master may for good cause reduce or increase his remuneration:

Provided further that the Master may disallow his remuneration either wholly or in part on account of any failure or delay in the discharge of his duties.

(2) No person who employs or is a fellow-employee of or is in the ordinary employment of the liquidator shall be entitled to receive any remuneration out of the assets of the company for services rendered in the winding-up, and no liquidator shall be entitled either by himself or by his partner to receive out of the assets of the company any remuneration for his services except the remuneration to which under this Act he is entitled.

390. Court may stay or set aside winding-up

The court may at any time after the making of an order for winding-up, on the application of the liquidator or of any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings on such terms and conditions as the court deems fit.

391. Settlement of lists of contributories

(1) As soon as may be after making a winding-up order, the court shall settle a list of contributories with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act:

Provided that, where it appears to the court that it will not be necessary to make calls on or adjust the rights of contributories, the court may dispense with the settlement of a list of contributories.

(2) In settling the list of contributories, the court shall distinguish between persons who are contributories directly and persons who are contributories as being representatives of or liable for the debts of others.

392. Requiring delivery of property

The court may at any time after making a winding-up order require any contributory for the time being settled on the list of contributories, and any trustee, banker, agent or officer of the company, to pay, deliver, convey, surrender or transfer forthwith, or within such time as the court directs, to the liquidator any money, property or books and papers in his hands to which the company is *prima facie* entitled.

393. Ordering payment of debt by contributory

(1) The court may, at any time, after making a winding-up order, make an order on any contributory settled on the list of contributories to pay, in a manner directed by the order, any money due from him, or from the estate of the person whom he represents, to the company, exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

(2) When all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

394. Making calls and ordering payment

(1) The court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories settled on the list of the contributories to the extent of their liability, for payment of any money which the court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding-up, and for the adjustment of the rights of the contributories among themselves.

(2) In making a call, the court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

395. Ordering payment into bank

(1) The court may order any contributory, purchaser or other person from whom money is due to the company to pay the amount due into a bank, to be named by the court, to the account of the liquidator instead of to the liquidator, and such order may be enforced in the same manner as if it had directed payment to the liquidator.

(2) All moneys and securities paid or delivered into a bank as aforesaid in the event of a winding-up by the court shall be subject in all respects to the orders of the court.

396. Order on contributory conclusive evidence

(1) An order made by the court on a contributory shall, subject to any right of appeal, be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due.

(2) All other pertinent matters stated in such order shall be taken *prima facie* as truly stated as against all

persons and in all proceedings whatsoever.

397. Court to adjust rights of contributories

The court shall adjust the rights of the contributories among themselves, and apportion any surplus among the persons entitled thereto.

398. Inspection of books by creditors and contributories

(1) The court may, at any time after making a winding-up order, make such order for inspection of the books and papers of the company by creditors and contributories as the court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories accordingly but not further or otherwise.

(2) Nothing in this section shall be taken to exclude or restrict any statutory rights of a government department or of a person acting under the authority of a government department.

399. Dissolution of company

(1) When the affairs of a company have been completely wound-up, the court shall upon the application of the Master make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

(2) A copy of the order shall forthwith be transmitted by the Registrar of the court—

(*a*) to the Registrar, who shall make a minute in his books of the dissolution of the company and shall publish notice thereof in the *Gazette*; and

(*b*) to the Master.

(3) An application made by the Master under this section may be by way of a report submitted to the court through the Registrar thereof.

(4) Notwithstanding any dissolution in terms of this section, in the event of any property thereafter becoming available which would have accrued to the company if not dissolved, the Master shall give instructions for the realisation thereof and for the distribution of the proceeds, less the cost of realisation and distribution, to such persons as would have been entitled thereto in the winding-up; and the same shall apply to any moneys becoming so available.

400. Summoning persons suspected of having property of company

(1) The court may, after it has made a winding-up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs, or property of the company.

(2) The court may examine him on oath, either orally or by written interrogatories, and may reduce his answers to writing and require him to sign them.

(3) The court may require him to produce any books and papers in his custody or power relating to the company; but where he claims any lien on books or papers produced by him, the production shall be without prejudice to such lien, and the court shall have jurisdiction in the winding-up to determine all questions relating to that lien.

(4) If any person so summoned, after being tendered a reasonable sum for his expenses, fails to come before the court at the time appointed without reasonable excuse, made known to the court at the time of its sitting and allowed by it, the court may cause him to be apprehended, and brought before the court for examination.

401. Ordering public examination of promoters, directors, etc

(1) When an order has been made for winding-up a company by the court, and the Master has made a report under this Act showing that in his opinion a fraud has been committed by any person in the promotion or formation of the company, or by a director or officer of the company, in relation to the company or any creditor thereof since its formation, the court may direct that any person who has taken part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the court on a day appointed by the court for that purpose, and be publicly examined as to the promotion or formation, or the conduct of the business of the company, or as to his conduct and dealings as director or officer thereof.

(2) The Master may take part in the examination, and for that purpose may employ an attorney with counsel.

(3) The liquidator, and any creditor or contributory, may also take part in the examination, either personally or by attorney with counsel.

(4) The persons examined shall be examined on oath or affirmation and shall answer all such questions as the court may put or allow to be put to him notwithstanding that any answer may tend to incriminate him.

(5) The testimony of the person examined will not be admissible as evidence in criminal proceedings against that person except on a charge of perjury in relation to that testimony.

(6) A person ordered to be examined under this section shall, before his examination, be furnished at his request with a copy of the Master's report, and may at his own cost employ an attorney with counsel, who shall be at liberty to put to him such questions as the court may deem just for the purpose of enabling him to explain or qualify any answers given by him:

Provided that if he is, in the opinion of the court, exculpated from any charges made or suggested against him, the court may allow him such costs as in its discretion it may think fit.

(7) Notes of the examination shall be taken down in writing, and shall be read over to or by and signed by the person examined, and may thereafter, subject only to subsection (5), be used in evidence against him, and shall be open to the inspection of any creditor or contributory at all reasonable times.

402. Arrest of absconding contributory

The court, at any time before or after making a winding-up order, on proof that there is reason to believe that a contributory or officer is about to leave Botswana or otherwise to abscond, or to remove or conceal any property for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, may cause the contributory or officer to be arrested, and his books and papers and property to be seized, and him and them to be safely kept until such time as the court may order.

403. Powers to be cumulative

Any powers conferred on the court by this Act shall be deemed to be in addition to and not restricting any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums.

404. Appeal from any order

An appeal from any order or decision made or given for or in the winding-up of a company by the court under this Act shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the court in cases within its ordinary jurisdiction.

405. Circumstances in which company may be wound-up voluntarily

A company may be wound-up voluntarily—

(*a*) when the period, if any, fixed for the duration of the company by the constitution expires, or the event, if any, occurs on the occurrence of which the constitution provides that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound-up voluntarily; or

(*b*) if the company resolves by special resolution that the company be wound-up voluntarily.

406. Notice of resolution for voluntary winding-up

(1) When a company has passed a resolution for voluntary winding-up, it shall, within 14 days after the passing thereof—

(*a*) give notice of the resolution by advertisement in the *Gazette*;

(*b*) give written notice of the resolution to the Master, to the Registrar and, if any immovable property or interest in minerals within Botswana appears to be an asset of the company, to the Registrar of Deeds.

(2) If default is made by a company in complying with the requirements of this section, the company and every officer of the company who is in default, shall be guilty of an offence and liable to a fine not exceeding P100 for every day during which the offence continues and for the purposes of this subsection the liquidator of the company shall be deemed to be an officer of the company.

407. Commencement of voluntary winding-up

A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution for voluntary winding-up.

408. Effect of voluntary winding-up on business and status of company

When a company is wound-up voluntarily the company shall, from the commencement of the winding-up, cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof:

Provided that—

(*a*) the corporate state and corporate powers of the company shall, notwithstanding anything in its constitution, continue until it is dissolved; and

(*b*) records, including beneficial owner information of the company shall be kept for 20 years or such period as may be prescribed under the Financial Intelligence Act.

[7 of 2022, s. 23 w.e.f. 25 February 2022.]

409. Provision and effect of security

(1) If it is proposed to wind-up a company voluntarily, the directors of the company may, prior to the date of the notices of the meeting at which the resolution for the winding-up of the company is to be proposed, furnish security to the satisfaction of the Master for the payment of the debts of the company within a period not

exceeding 12 months from the commencement of the winding-up, and may recover from the company any costs reasonably incurred by them in furnishing such security:

Provided that the Master may dispense with such security if the majority of the directors of the company furnish him with a sworn statement supported by certificate from the auditors of the company that the company has no liabilities.

(2) Where in the case of a voluntary winding-up security has been provided or is dispensed with in accordance with subsection (1) the winding-up is referred to in the following sections of this Part as a "members" voluntary winding-up.

(3) A voluntary winding-up in any case in which security has neither been provided nor been dispensed with in accordance with subsection (1) is referred to in the following sections of this Part as a "creditors" voluntary winding-up.

410. Application of sections

The provisions contained in sections 411 to 413 inclusive, shall apply in relation to a members' voluntary winding-up.

411. Appointment, powers and remuneration of liquidator

(1) The company in general meeting shall, subject to the provisions of section 445, appoint one or more liquidators for the purpose of winding-up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them.

(2) If the company fails so to fix the remuneration, the provisions of section 389 shall apply.

(3) On the appointment of a liquidator in terms of this section all the powers of the directors shall cease except so far as the liquidator or the company in general meeting sanctions their continuance.

(4) The liquidator may, without the sanction of the court, exercise all the powers given by section 384 to the liquidator in a winding-up by the court, subject to such directions as may be given by the company in general meeting.

412. Power to fill vacancy in office of liquidator

(1) If a vacancy occurs by death, resignation or otherwise in the office of the liquidator appointed by the company, the company in general meeting may, subject to the provisions of section 411, fill the vacancy.

(2) For the purpose of appointing a liquidator under subsection (1), a general meeting may be convened by any contributory or by the continuing liquidator or liquidators, if any.

(3) The meeting shall be held in the manner prescribed by the constitution or in such manner as may, on application by any contributory or by the continuing liquidator or liquidators, be determined by the court.

413. Liquidator may accept shares, etc as consideration for sale of property of company

(1) Where in the case of a voluntary winding-up it is proposed to transfer the whole or part of the business or property of the company to another company (called "the transferee company"), whether registered under this Act or not, the liquidator of the transferor company may, with the sanction of a special resolution of the company—

(*a*) receive in consideration for the transfer or sale, shares, policies or other like interests in the transferee company, for distribution among the shareholders of the transferor company; or

(*b*) enter into other arrangements whereby the shareholders of the transferor company may instead of or in addition to receiving cash, shares, policies or other like interests, participate in the profits of or receive any other benefit from the transferee company.

(2) Any sale or arrangement made in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company, who did not vote in favour of the special resolution, expresses his dissent therefrom in writing addressed to the liquidator and left at the registered office of the company within seven days after passing of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration under the provisions of Arbitration Act (Cap. 06:01).

(4) If the liquidator elects to purchase the member's interest, the purchase price shall be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for voluntary winding-up or for appointing liquidators, but if an order is made within a year for winding-up the company by the court, the special resolution shall not be valid unless sanctioned by the court.

414. Application of sections 415 to 417

The provisions contained in sections 415 to 417, inclusive, shall apply in relation to a creditors' voluntary winding-up.

415. Meeting of creditors and appointment of liquidator

(1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for voluntary winding-up is to be proposed, and shall cause the notices of the said meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the said meeting of the company.

(2) The company shall cause not less than seven days' notice of the meeting of the creditors to be advertised once in the *Gazette* and once at least in a newspaper circulating in the district where the registered office or principal place of business of the company is situate.

(3) The directors of the company shall—

(*a*) cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting of creditors to be held as aforesaid; and

(*b*) appoint one of their number to preside at the said meeting, and it shall be his duty to do so.

(4) If the meeting of the company, at which the resolution for voluntary winding-up is to be proposed, is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors held in pursuance of subsection (1) shall have effect as if it had been passed immediately after the passing of the resolution for winding-up the company.

(5) If default is made—

(*a*) by the company in complying with subsection (1) or (2); or

(*b*) by any director of the company in complying with subsection (3), the company or director, as the case may be, shall be guilty of an offence and liable on conviction to the penalty set out in section 492(2).

(6) The creditors and the company at their respective meetings mentioned in this section may nominate a person to be liquidator subject to the provisions of section 445 for the purpose of winding-up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, subject to the provisions of section 445 as aforesaid:

Provided that in the case of different persons being nominated any director, shareholder or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the court for an order directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors, and the court may thereupon make such order as it considers appropriate.

(7) If a vacancy occurs by death, resignation or otherwise in the office of liquidator nominated by the creditors at a meeting at which a resolution for voluntary winding-up of the company is passed, the vacancy shall be filled in the same manner as is provided in subsection (6).

(8) The provisions of section 389 shall apply to every liquidator nominated at a meeting referred to in subsection (7).

416. Powers of liquidator

(1) All the powers of the directors shall cease except so far as the liquidator or the creditors of the company sanction their continuance.

(2) The liquidator may, without the sanction of the court and without requiring the authority of the contributories, exercise all powers given by section 384 to the liquidator in a winding-up by the court, subject to such directions as may be given by the creditors.

417. Application of section 413

The provisions of section 413 shall apply in the case of a creditors' voluntary winding-up as in the case of a members' voluntary winding-up with the modification that the powers of the liquidator under the said section shall not be exercised except with the consent of three-fourths in number and according to the value of their claims, of the creditors present or represented at a meeting called by the liquidator for that purpose and of which at least 14 days' notice has been given or with the sanction of the court.

418. Application of sections 419 to 428

The provisions contained in sections 419 to 428, inclusive, shall apply in relation to both modes of voluntary winding-up.

419. Consequences of voluntary winding-up

The following consequences shall ensue on the voluntary winding-up of a company—

(*a*) property to be distributed amongst the shareholders according to their rights and interests in the company;

(*b*) the list of the contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories;

(*c*) when several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by any number not less than two; and

(*d*) if from any cause whatever there is no liquidator acting, the Master may, on the application of a contributory, or creditor, and subject to the provisions of section 445, appoint a provisional liquidator.

420. Avoidance of transfer after commencement of winding-up

In a voluntary winding-up, every transfer of shares, except a transfer made to or with the sanction of the liquidator, and every alteration in the status of the members of the company, made after the commencement of the winding-up, shall be void.

421. Notice by liquidator of his appointment

(1) Every person appointed liquidator, whether alone or jointly with any other person or persons, in a voluntary winding-up shall, within seven days after his appointment, lodge with the Master a notice of his appointment in the prescribed form.

(2) If the person appointed liquidator fails to comply with the requirements of this section he shall be guilty of an offence and liable to a fine not exceeding P50 for every day during which the offence continues.

422. Proof of claims

(1) In a voluntary winding-up, all claims against the company shall be proved to the satisfaction of the liquidator, by affidavit, as nearly as may be in the form and containing the particulars prescribed by rules made under section 523.

(2) If the claim is rejected by the liquidator, the claimant may apply to the court by motion to set aside the rejection.

(3) The liquidator may with the approval of the Master fix a time or times within which creditors of the company are to prove their claims or to be excluded from any distribution under any account lodged with the Master before those claims are proved.

423. Arrangement when binding on company and creditors

(1) Any arrangement entered into between a company about to be, or being, wound-up voluntarily and its creditors shall, subject to any right of review under this section, be binding on the company if sanctioned by a special resolution, and on the creditors if acceded to by three-fourths in value of the creditors present or represented at a meeting duly called by the liquidator for that purpose.

(2) Any creditor or contributory may, within 28 days from the completion of the arrangement, bring it under review by the court, and the court may thereupon, as it considers appropriate, amend, vary, set aside or confirm the arrangement.

424. Meetings of creditors and contributories

In a voluntary winding-up, meetings of creditors and contributories shall, unless otherwise in the Act specially provided, be convened and held in the manner prescribed by rules made under section 520.

425. Power to apply to court

(1) Where a company is being wound-up voluntarily, the liquidator or any contributory or creditor of the company may apply to the court to determine any question arising in the winding-up, or to exercise as respects

the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound-up by the court.

(2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the court considers appropriate, or may make such other order on the application as the court considers appropriate.

426. Duty of liquidator to call meetings of company and creditors

(1) Where a company is being wound-up voluntarily, the liquidator may summon general meetings of the company for the purpose of obtaining the sanction of the company by special resolution or for any other purposes he may think fit.

(2) In the event of the winding-up continuing for more than six months, the liquidator shall summon a general meeting of the company and a meeting of creditors each to be held within 30 days after the expiration of the first six months from the commencement of the winding-up and within 30 days after the expiration of each succeeding period of six months and shall lay before the meeting for its confirmation an account of his acts and dealings and of the progress of the winding-up during the preceding period of six months.

(3) A copy of the account referred to in subsection (2) as confirmed by the meeting shall be sent forthwith by the liquidator to the Master and if there is no *quorum* at the meeting called to confirm the account the liquidator shall notify the Master of that fact.

(4) If the liquidator fails to comply with subsection (2), he shall be guilty of an offence and liable to a fine not exceeding P50 for every day during which the offence continues.

427. Notice to Registrar of confirmation of final account

Immediately after the confirmation of the final account the Master shall give notice thereof in writing to the Registrar, who shall forthwith register it, and on the expiration of three months from the registration of the notice the company shall be deemed to be dissolved but without prejudice to the duties of the liquidator or the powers of the Master under sections 455 and 456:

Provided that—

(*a*) the court may, on the application of the liquidator or any other person who appears to the court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the court considers appropriate; and

(*b*) notwithstanding any dissolution as aforesaid, in the event of any property thereafter becoming available the Master shall give instructions for the realisation thereof and the distribution of the proceeds, less the cost of realisation and distribution, to such persons as would have been entitled thereto in the winding-up; and the same shall apply to any moneys becoming so available.

428. Saving of rights of creditors and contributories

The voluntary winding-up of a company shall not bar the right of any creditor or contributory, at any time before its dissolution, to have it wound-up by the court:

Provided that in the case of an application by a contributory, the court must be satisfied that the rights of that contributory will be prejudiced by a voluntary winding-up.

429. Application of sections 430 to 441

The provisions contained in sections 430 to 441 inclusive shall apply in relation to a company being wound-up and unable to pay its debts.

430. Summoning directors and others to attend meetings of creditors

(1) In every winding-up of a company unable to pay its debts, all the directors of the company, including, if the Master so directs, in writing, any person who has been a director within a period of six months preceding the date on which the winding-up commenced, shall attend the first and second meetings of creditors and every adjourned first and second such meetings.

(2) The directors shall also attend any subsequent meeting of creditors if required to do so by written notice from the liquidator.

(3) The Master or other officer in the public service who is to preside or presides at any meeting of creditors may summon any person, who is known or, on reasonable grounds, believed to be in possession of any property which belongs or belonged to the company or to be indebted to the company or any person who in the opinion of the Master or such other officer may be able to give any material information concerning the company or its affairs, whether before or after the commencement of the winding-up, to appear at such meeting or adjourned meeting for the purpose of being interrogated under section 431.

(4) The Master or such other officer may also summon any person, who is known or, upon reasonable grounds, believed to have in his possession, custody or under his control any book or document containing any such information as is mentioned in subsection (3), to produce that book or document or an extract therefrom at any such meeting of creditors.

(5) Any person summoned by the Master or other officer in terms of subsection (3) or (4) who fails without valid excuse—

(*a*) to attend any meeting to which he has been so summoned; or

(*b*) to produce any book or document or extract from any book or document in his possession, custody or control, shall be guilty of contempt of court and liable to a fine not exceeding P1,000 or to imprisonment for a term not exceeding 12 months or to both.

431. Examination of directors and others at meeting of creditors

(1) At any meeting of creditors of a company being wound-up and unable to pay its debts, the Master or other officer in the public service presiding thereat may call and administer the oath to any director and any other person present at the meeting, who was or might have been summoned in terms of section 430(3), and the Master, such other officer, the liquidator and any creditor, who has proved a claim against the company or the agent of any of them, may interrogate a person so called and sworn concerning all matters relating to the company or its business or affairs, whether before or after the commencement of the winding-up, and concerning any property belonging to the company:

Provided that the presiding officer shall disallow any question which is irrelevant and may disallow any question which would prolong the interrogation unnecessarily.

(2) In connection with the production of any book or document in compliance with a summons issued under section 430(4) or at an interrogation of a person under subsection (1) of this section, the law relating to privilege as applicable to a witness summoned to produce a book or document or giving evidence in a court of law shall apply:

Provided that a banker at whose bank the company in question keeps or at any time kept an account, shall

be obliged to produce, if summoned to do so under section 430(4) any—

(*a*) cheque, promissory note or bill of exchange in his possession which was drawn or accepted by the company within one year before the commencement of the winding-up, or if any cheque, promissory note or bill of exchange drawn is not available, then any record of the payment, date of payment and amount of that cheque, promissory note or bill of exchange which may be available to him, or a copy of such a record; and

(*b*) other information, if called upon to provide it, available to him in connection with such cheque, promissory note or bill of exchange or the account of the company.

(3) The presiding officer shall reduce to writing or cause to be reduced to writing the statement of any person giving evidence under this section.

(4) Any evidence given under this section shall be admissible in any civil proceedings instituted against the person who gave evidence.

(5) Any person called upon to give evidence under this section may be represented at his interrogation by an accountant or by an attorney with or without counsel.

(6) Any person summoned to attend a meeting of creditors for the purpose of being interrogated under this section (other than the directors or other officers of the company) shall be entitled to such witness fees, to be paid out of the funds of the company, as he would be entitled to if he were a witness in any civil proceedings in a magistrate's court.

(7) If any director or other officer of the company is called upon to attend any meeting of creditors, he shall, if the Master so approves and subject to a right of appeal to the court, be entitled to an allowance out of the funds of the company to defray his necessary expenses in connection with such attendance.

(8) Any person interrogated under the provisions of this section who refuses, on any ground other than that the answer may tend to incriminate him, to answer any question (except any question which the presiding officer may see fit to disallow) put to him, shall be guilty of contempt of court.

(9) A person is not excused from answering a question in the course of being examined under the provisions of this section on the ground that the answer may incriminate or tend to incriminate that person.

(10) The testimony of a person examined under this section is not admissible as evidence in criminal proceedings against that person except on a charge of perjury in relation to that testimony.

432. Application of certain provisions of the law on insolvency

In the case of every winding-up of a company unable to pay its debts a secured creditor and the liquidator shall have the same right respectively to take over such creditor's security as a secured creditor as a trustee would have under the law relating to insolvent estates.

433. Refusal to supply essential services prohibited

(1) For the purposes of this section, an "essential service" means—

(*a*) the retail supply of electricity;

(*b*) the supply of water; or

(*c*) telecommunications services.

(2) For the purposes of this section, "telecommunications services" means the conveyance from one device to another by a line, radio frequency, or other medium, of a sign, signal, impulse, writing, image, sound, instruction, information or intelligence of any nature, whether or not for the information of a person using the device.

(3) Notwithstanding the provisions of any other Act or contract, a supplier of an essential service may—

(*a*) refuse to supply the service to a liquidator, or to a company in liquidation, by reason of the company's default in paying charges due for the service in relation to a period before the commencement of the liquidation;

(*b*) make it a condition of the supply of the service to a liquidator, or to a company in liquidation, that payment be made of outstanding charges due for the service in relation to a period before the commencement of the liquidation; or

(*c*) make it a condition of the supply of the service to a company in liquidation that the liquidator personally guarantees payment of the charges that would be incurred for the supply of the service.

(4) The charges incurred by a liquidator for the supply of an essential service are a cost in the winding-up for the purposes of section 460.

434. Voidable and undue preferences

(1) Every disposition of its property which, if made by an individual, could for any reason be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound-up and unable to pay its debts and the provisions of the law relating to insolvent estates shall subject to sections 435 and 436 *mutatis mutandis* apply to any such disposition.

(2) For the purposes of this section the event which shall be deemed to correspond with the sequestration order in the case of an individual shall be—

(*a*) in the case of a winding-up by the court, the presentation of the petition, unless that winding-up has superseded a voluntary winding-up, or the passing of a special resolution to wind-up the company when it shall be the registration in terms of section 406 of the passing of the resolution to wind-up the company;

(*b*) in the case of a voluntary winding-up, the registration in terms of section 406 of the passing of the resolution to wind-up;

(*c*) in the case of a winding-up of any company unable to pay its debts in the event of the cancelling of a judicial management order, the presentation of the application to the court in terms of section 477.

(3) Any cession or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

435. Procedure for setting aside voidable transactions and charges

(1) A liquidator who wishes to have a transaction including a charge set aside under section 434 shall—

(*a*) file in the court a notice to that effect specifying the transaction or charge to be set aside and, in the case of a transaction, the property or value which the liquidator wishes to recover and also the effect of subsections (2), (3) and (4); and

(*b*) serve a copy of the notice on the other party to the transaction or the grantee of the charge and on every other person from whom the liquidator wishes to recover.

(2) A person—

(*a*) who would be affected by the setting aside of the transaction or charge specified in the notice; and

(*b*) who considers that the transaction or charge should not be set aside,

may apply to the court for an order that the transaction or charge not be set aside.

(3) Unless a person on whom the notice was served has applied to the court under subsection (2) the transaction or charge is set aside one month after the date of service of the notice.

(4) If one or more persons have applied to the court under subsection (2) the transaction or charge is set aside on the day on which the last application is finally determined unless the court orders otherwise.

436. Other orders

If a transaction or charge is set aside under section 434 the court may make one or more of the following orders—

(1) an order requiring a person to pay to the liquidator in respect of benefits received by that person as a result of the transaction or charge such sums as fairly represent those benefits;

(2) an order requiring property transferred as part of the transaction to be restored to the company;

(3) an order requiring property to be vested in the company where such property represents either the proceeds of sale of property or of money which has been paid and transferred where such property or money is in the hands of the person against whom the transaction or charge is set aside;

(4) an order releasing in whole or in part a charge given by the company;

(5) an order requiring security to be given for the discharge of an order made under this clause;

(6) an order specifying the extent to which a person affected by the setting aside of a transaction or by an order made under this clause is entitled to claim as a creditor in the liquidation.

437. Additional provisions relating to setting aside transactions and charges

(1) The setting aside of a transaction or an order made under section 436 does not affect the title or interest of a person in property which that person has acquired—

(*a*) from a person other than the company;

(*b*) for valuable consideration; and

(*c*) without knowledge of the circumstances under which the property was acquired from the company.

(2) The setting aside of a charge or an order made under section 436 does not affect the title or interest of a person in property which that person has acquired—

(*a*) as the result of the exercise of a power of sale by the grantee of the charge;

(*b*) for valuable consideration; and

(*c*) without knowledge of the circumstances relating to the giving of the charge.

(3) Recovery by the liquidator of property or its equivalent value whether under section 436 or any other section of this Act or under any other enactment or law may be denied wholly or in part if—

(*a*) the person from whom recovery is sought received the property in good faith and has altered his position in the reasonably held belief that the transfer to that person was validly made and would not be set aside; and

(*b*) in the opinion of the court it is inequitable to order recovery or recovery in full.

438. Transactions at undervalue

(1) Where—

(*a*) a transaction was entered into by a company within the specified period referred to in subsection (3);

(*b*) the value of the consideration or benefit received by the company was less than the value of the consideration provided by the company or the company received no consideration or benefit;

(*c*) when the transaction was entered into the company—

(i) was unable to pay its due debts,

(ii) was engaged or about to engage in business for which its financial resources were unreasonably small, or

(iii) incurred an obligation knowing that the company would not be able to perform the obligation when required to do so; and

(*d*) when the transaction was entered into the other party to the transaction knew or ought to have known of the matter referred to in subparagraph (i) or subparagraph (ii) or subparagraph (iii) as the case may be of paragraph (*c*) of this section,

the liquidator may recover from any other party to the transaction any amount by which the value of the consideration or benefit provided by the company exceeded the value of the consideration or benefit received by the company.

(2) Where—

(*a*) a transaction was entered into by a company within the specified period;

(*b*) the value of the consideration or benefit received by the company was less than the value of the consideration provided by the company or the company received no consideration or benefit;

(*c*) the company became unable to pay its due debts as a result of the transaction; and

(*d*) when the transaction was entered into the other party to the transaction knew or ought to have known that the company would become unable to pay its due debts as a result of the transaction,

the liquidator may recover from any other party to the transaction any amount by which the value of the consideration or benefit provided by the company exceeded the value of the consideration or benefit received by the company.

(3) For the purposes of this section—

(*a*) "transaction" includes the giving of a guarantee by a company;

(*b*) "specified period" means—

(i) the period of a year before the commencement of the winding-up, and

(ii) in the case of a company that was put into winding-up by the court the period of a year before the making of the application to the court together with the period commencing on the date of the making of that application and ending on the date on which the order of the court was made.

439. Transactions for inadequate or excessive consideration with directors and certain other persons

(1) Where within the specified periods referred to in subsection (4) a company has acquired a business or property from the services of—

(*a*) a person who was at the time of the acquisition a director of the company or a nominee or relative of or a trustee for or a trustee for a relative of a director of the company;

(*b*) a person or a relative of a person who at the time of the acquisition had control of the company;

(*c*) another company that was at the time of the acquisition controlled by a director of the company or a nominee or relative of or a trustee for or a trustee for a relative of a director of the company; or

(*d*) another company that was at the time of the acquisition a related company,

the liquidator or Master (as the case may be) may recover from the person, relatives, company or related company as the case may be by any amount by which the value of the consideration given for the acquisition of the business, property or services exceeded the value of the business, property or services at the time of the acquisition.

(2) Where within the specified period referred to in subsection (4) a company has disposed of a business or property or provided services or issued shares to—

(*a*) a person who was at the time of the disposition or issue a director of the company or a nominee or relative of or a trustee for or a trustee for a relative of a director of the company;

(*b*) a person or a relative of a person who at the time of the disposition, provision or issue had control of the company;

(*c*) another company that was at the time of the disposition, provision or issue controlled by a director of the company or a nominee or relative of or a trustee for or a trustee for a relative of a director of the company; or

(*d*) another company that at the time of the disposition provision or issue was a related company,

the liquidator or Master (as the case may be) may recover from the person, relative company or related company as the case may be any amount by which the value of the business property or services or the value of the shares at the time of the disposition provision or issue exceeded the value of any consideration received by the company.

(3) For the purposes of this section the value of a business or property includes the value of any goodwill attaching to the business or property.

(4) For the purposes of subsections (1) and (2) of this section, "specified period" means—

(*a*) the period of three years before the commencement of the winding-up; and

(*b*) in the case of a company that was put into winding-up by the court the period of three years before the making of the application to the court together with the period commencing on the date of the making of the application and ending on the date on which the order of the court was made.

440. Court may set aside certain securities and charges

(1) Subject to subsection (2) if a company that is in liquidation is unable to meet all its debts the court, on the application of the liquidator or Master, as the case may be, may order that a security or charge or part of it created by the company over any of its property or undertaking in favour of—

(*a*) a person who was at the time the security or charge was created a director of the company or a nominee or relative of or a trustee for or a trustee for a relative of a director of the company;

(*b*) a person or a relative of a person who at the time when the security or charge was created had control of the company;

(*c*) another company that was when the security or charge was created controlled by a director of the company or a nominee or relative of or a trustee for or a trustee for a relative of a director of the company; or

(*d*) another company that at the time when the security or charge was created was a related company,

shall so far as any security on the property or undertaking is conferred be set aside as against the liquidator of the company or the Master (as the case may be) if the court considers that having regard to the circumstances in which the security or charge was created the conduct of the person, relative company or related company, as the case may be, in relation to the affairs of the company and any other relevant circumstances, it is just and equitable to make the order.

(2) Subsection (1) does not apply to a security or charge that has been transferred by the person in whose favour it was originally created and has been purchased by another person (whether or not from the first mentioned person) if—

(*a*) at the time of the purchase the purchaser was not a person specified in any of paragraphs (*a*) to (*d*) of that subsection; and

(*b*) the purchase was made in good faith and for valuable consideration.

(3) The court may make such other orders as it thinks proper for the purpose of giving effect to an order under this clause.

441. Liability if proper accounting records not kept

(1) Subject to subsection (2), if a company that is in liquidation and is unable to pay all its debts has failed to comply with sections 189 or 271 of this Act, relating to the keeping of accounting records and the court considers that—

(*a*) the failure to comply has contributed to the company's inability to pay all its debts or has resulted in substantial uncertainty as to the assets and liabilities of the company or has substantially impeded the orderly liquidation; or

(*b*) for any other reason it is proper to make a declaration under this clause,

the court on the application of the liquidator or Master (as the case may be) may if it thinks it proper to do so declare that any one or more of the directors and former directors of the company is or are personally

responsible without limitation of liability for all or any part of the debts and other liabilities of the company as the court may direct.

(2) The court shall not make a declaration under subsection (1) 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 paragraph (*a*) of that subsection; or

(*b*) had reasonable grounds to believe and did believe that a competent and reliable person was charged with the duty of seeing that the provision was complied with and was in a position to discharge that duty.

(3) The court may give any direction it considers appropriate for the purpose of 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.

442. Application of sections 443 to 469

The provisions contained in sections 443 to 469 inclusive shall apply in relation to every company being wound-up by whatever mode.

443. Persons disqualified for appointment as liquidator

(1) Each of the following persons shall be disqualified from being elected or appointed as liquidator of a company that is being wound-up—

(*a*) an insolvent;

(*b*) a minor;

(*c*) any other person under legal disability;

(*d*) a body corporate;

(*e*) a person declared under section 444(2) to be incapacitated for appointment as liquidator while such incapacity lasts;

(*f*) a person who is the subject of an order under this Act disqualifying him as a director of any company;

(*g*) a person who has, by reason of misconduct, been removed by the court from an office of trust;

(*h*) any person who, in order to obtain, or in return for the vote of any creditor or contributory, or in order to exercise any influence upon his election as liquidator of the company, has—

(i) procured or allowed the wrongful insertion or omission of the name of any person in or from any list or schedule required by this Act;

(ii) procured or allowed the wrongful or inaccurate statement of the claim of any creditor or contributory;

(iii) directly or indirectly given or agreed to give any person any consideration;

(iv) offered or agreed with any person to abstain from investigating any transactions of or relating to the company or of any of its officers; or

(v) been guilty of or allowed the splitting of claims in such manner as to increase the number or value of votes of the person whose claim has been so split;

(*i*) a person who has at any time been convicted (whether in Botswana or elsewhere) of theft, fraud, forgery or uttering a forged document or of perjury and has been sentenced therefor to serve a term of imprisonment without the option of a fine or to a fine exceeding P1,000; or

(*j*) any person who resides outside Botswana:

Provided that, notwithstanding paragraph (*j*), any person resident outside Botswana may be elected or appointed as liquidator who—

(i) is an attorney entitled under the Legal Practitioners Act (Cap. 61:01), to practise as such in the courts of Botswana;

(ii) is a qualified accountant having a place of business in Botswana; or

(iii) is a person who the Master has, in writing, certified to be a fit and proper person to be so appointed,

if such person is not disqualified for election or appointment on any other ground; and immediately after his election or appointment chooses for the purpose of the winding-up of the company a *domicilium citandi et executandi* within Botswana, and publishes a notice of such in the next available issue of the *Gazette*.

(2) Any person who in order to obtain or in return for the vote of any creditor or contributory or in order to exercise any influence upon his election as a liquidator of a company does any of the acts mentioned in subsection (1)(*h*) shall be guilty of an offence and liable on conviction to the penalty set out in section 492(3).

(3) Any person who procures or tries to procure the appointment as liquidator of any person, knowing that such person is disqualified for such appointment under the terms of subsection (1) shall be guilty of an offence and liable on conviction to the penalty set out in section 492(2).

(4) For the purposes of this section "qualified accountant" means an accountant holding such qualifications as the Minister may, by order published in the *Gazette*, prescribe.

444. Power of court to declare person disqualified from being liquidator or to remove a liquidator

(1) The court, on the application of the Master or any person having an interest in the winding-up—

(*a*) may declare that any person proposed or appointed as liquidator is disqualified under the provisions of section 443 from holding the office and, if he has been appointed, may remove him therefrom; or

(*b*) may remove any liquidator from his office upon any of the following grounds—

(i) ill-health or any other factor tending to interfere with the performance of his duties as liquidator;

(ii) that he has accepted or offered or agreed to accept or has solicited from any auctioneer, agent or other person employed on behalf of the company any share of the commission or remuneration or of any other benefit whatever accruing to such auctioneer, agent or other person;

(iii) misconduct, including any failure to satisfy a lawful demand of the Master or of a commissioner appointed by the court;

(iv) failure to perform any of the duties imposed on him by this Act; or

(v) any other good cause.

(2) The court may, in respect of any person removed by it—

(*a*) under the provisions of subsection (1)(*a*) as a person disqualified for reasons set out in section 443; or

(*b*) under the provisions of subsection (1)(*b*)(ii), (iii) or (iv), declare such person to be incapable of being appointed a liquidator under this Act during his lifetime or any other period.

(3) The Master shall give notice in the *Gazette* of the removal of any liquidator from his office in terms of this section.

445. Liquidator to give security, and to choose a *domicilium* within Botswana

(1) In every winding-up of a company, each liquidator, including a co-liquidator or a provisional liquidator—

(*a*) shall furnish security to the satisfaction of the Master for the due performance of his duties as such;

(*b*) shall choose some *domicilium citandi et executandi* within Botswana;

(*c*) shall not be capable of acting as liquidator, co-liquidator or provisional liquidator, as the case may be until he has complied with the conditions set out in paragraphs (*a*) and (*b*); and

(*d*) if these conditions are not complied with within a time to be fixed by the Master he shall be deemed to have resigned his office:

Provided that no such security will be required in the case of a members' voluntary winding-up if the company so resolves.

(2) The cost of giving the aforesaid security, provided it is furnished in the prescribed form, if any, by a fidelity company or an association approved by the Master, shall be a cost in the winding-up.

(3) When a liquidator has, in the course of winding-up a company, accounted to the Master to his satisfaction for any property belonging to the company the Master may consent to a reduction of the security mentioned in subsection (1) if he is satisfied that the reduced security will suffice to indemnify the company, its creditors and contributories against any maladministration by the liquidator of the remaining property belonging to the company.

446. Co-liquidator

(1) The Master may, whenever he deems it desirable, appoint a co-liquidator to act jointly with any other liquidator.

(2) When two or more liquidators have been appointed they shall act jointly in performing their functions as liquidators and each of them shall be jointly and severally liable for every act performed by them jointly.

(3) Whenever two or more liquidators disagree on any matter relating to the company of which they are liquidators, one or more of them may refer the matter to the Master who may thereupon determine the

question in issue or give directions as to the procedure to be followed for the determination of the matter.

447. Title and acts of liquidators

(1) A liquidator shall be described by the style of the liquidator of the particular company in respect of which he is appointed and not by his individual name.

(2) The liquidator shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable.

(3) Every liquidator shall give the Master such information and such access to the facilities for inspecting the books and documents of the company and generally such aid as may be requisite for enabling that officer to perform his duties under this Act.

(4) The acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.

448. General meetings to hear liquidator's report

The liquidator shall, as soon as practicable, and, unless with the consent of the Master, not later than three months after the date of his appointment, submit to general meetings of creditors and contributories a report —

(*a*) as to the amount of capital issued, subscribed and paid up and the estimated amount of assets and liabilities;

(*b*) if the company has failed, as to the causes of the failure;

(*c*) whether in his opinion further enquiry is desirable as to any matter relating to the promotion, formation or failure of the company or the conduct of its business;

(*d*) whether the company has kept the books and accounts required by sections 189 or 271 and, if not, in what respects such requirement has not been complied with;

(*e*) as to the progress and prospects of the liquidation; and

(*f*) as to any other matter which he may think fit or in regard to which he may desire the directions of the creditors or the contributories.

449. Books to be kept by liquidator and inspection thereof

(1) From the beginning of his appointment and during the whole period of his office the liquidator shall punctually keep proper books and records of all transactions of the liquidation.

(2) The Master may at any time in writing order the liquidator to produce the said books or records for inspection.

(3) Any creditor or contributor may, at all reasonable times, personally or by his agent, but subject to the control of the Master, inspect such books or records.

450. Liquidator to lodge with Master accounts in winding-up

(1) Every liquidator shall, unless he receives an extension of time as hereinafter provided, frame and lay before the Master, not later than six months after his appointment, an account of his receipts and payments and a plan of distribution, or, if there is a liability among creditors to contribute towards the cost in the winding-up, a plan of contribution apportioning their liability.

(2) If the account is not the final account, the liquidator shall from time to time, and as the Master may direct, but at least once in every six months (unless he receives an extension of time), frame and lay before the Master a further account and plan of distribution.

(3) The account shall be in the prescribed form, shall be made in duplicate, shall be fully supported by vouchers, including the liquidator's bank statement or a certified extract from his bank account, and shall be verified by an affidavit in the prescribed form.

(4) Where the office of the Master and the registered office of the company are not situated in the same district the liquidator shall forward a duplicate of the account to the District Commissioner of the district in which the registered office of the company is situated, for the purpose of section 452.

451. Application to court to compel liquidator to lodge accounts

(1) The Master, at any time when he considers that the liquidator has funds in hand that ought to be distributed, and the Master or any person interested in the company when a full and true account has not been lodged within the periods prescribed for the lodging of such an account, may apply to the court for an order compelling the liquidator to lodge his account:

Provided that—

(*a*) the Master or that other person shall, not later than 14 days before making the application, require the defaulting liquidator by notice in writing to lodge his account in accordance with this Act;

(*b*) any liquidator receiving such notice shall lay before the Master in writing his reasons for not having lodged his account and the grounds upon which he claims an extension of time within which to do so, and thereupon the Master may grant to the liquidator such extension of time as in the circumstances he may think necessary;

(*c*) if the prescribed period for lodging an account has expired or if it will expire within the time for which an extension is sought, unless the liquidator has previously given, by advertisement in the *Gazette*, not less than 14 days' notice of his intention to apply for an extension; and

(*d*) any liquidator who fails to satisfy the Master that he ought to receive an extension of time may, after notice to the Master and to the person referred to in proviso (*a*) of this subsection, apply by motion to the court for an order granting to him an extension of time within which to lodge his account.

(2) Upon an application by the Master under subsection (1), the court, although it may be of opinion that the reasons laid before the Master by the liquidator were such as would have justified the Master in granting an extension of time to lodge an account, shall order the liquidator to pay the costs of the Master if, before making his application, the Master allowed the liquidator sufficient time for an application to the court for an extension of the period for lodging his account.

452. Inspection of accounts

(1) Every liquidator's account shall lie open for inspection by creditors, contributories or other persons interested, for a period of not less than 14 days in the following manner—

(*a*) if the office of the Master and registered office of the company are situated in the same magisterial district, then at the office of the Master; or

(*b*) otherwise, at the office of the Master and at the office of the District Commissioner of the district in which the registered office of the company is situated.

(2) The liquidator shall give due notice thereof by advertisement in the *Gazette* and shall state in that notice the period during which and the place or places at which the accounts will lie open for inspection, and shall post or deliver a similar notice to every creditor who has proved a claim against the company.

(3) The Master or the District Commissioner shall cause to be affixed in a public place in or about his office a list of all such accounts as have been lodged in his office and the respective dates on which they will be transmitted to the Master and upon the expiry of the period of inspection so advertised, he shall endorse on each account his certificate that the account has been open in his office for inspection in terms of this section and shall transmit the account to the Master.

453. Objections to account by interested parties

(1) Any person interested in the winding-up of the company may, at any time before the confirmation of an account, lay before the Master in writing any objection, with the reasons therefor, to the account.

(2) If the Master is of opinion that any such objection ought to be sustained, he shall direct the liquidator to amend the account or may give such other directions as he may think fit.

(3) Notwithstanding that an objection to the account has not been lodged, if the Master is of opinion that any improper charge has been made against the assets or that the account is in any respect incorrect, he may direct the liquidator to amend the account or may give such other directions as he may think fit.

(4) The liquidator or any person aggrieved by any such direction of the Master under this section, or by the refusal of the Master to sustain an objection lodged thereunder, may apply by motion to the court within 14 days after the date of the Master's direction, after notice to the liquidator, for an order to set aside the Master's decision, and the court may confirm the account or make such other order as it considers appropriate.

(5) When any such direction affects the interests of a person who has not lodged an objection with the Master, the account so amended shall again lie open for inspection in the manner and with the notice herein before prescribed, unless the person affected as aforesaid consents in writing to the immediate confirmation of the account.

454. Confirmation of account

When an account has been open to inspection as herein before prescribed and—

(*a*) no objection has been lodged;

(*b*) an objection has been lodged and the account has been amended in accordance with the direction of the Master, and has again been open for inspection if necessary, as prescribed in section 453(5), and no application has been made to the court within the prescribed time to set aside the Master's decision; or

(*c*) an objection has been lodged, but withdrawn or not sustained, and the objector has not applied to the court within the time prescribed in section 453, the Master shall confirm the account, and his confirmation shall have the effect of a final sentence, except as against such persons as may be permitted by the court to re-open the account before any dividend has been paid thereunder.

455. Distribution of estate

(1) Immediately after the confirmation of any account the liquidator shall proceed to distribute the assets in accordance therewith or to collect from the creditors liable to contribute thereunder the amounts for which they may be liable respectively.

(2) The liquidator shall give notice of the confirmation of the account in the *Gazette*, stating that a dividend is in course of payment, or, that a contribution is in course of collection and that every creditor liable to contribute is required to pay to the liquidator the amount for which he is so liable, and the address at which the payment of the contribution is to be made, as the case may be.

456. Liquidator to lodge receipts for dividends or pay dividends to Guardian's Fund

(1) The liquidator shall without delay lodge with the Master the receipts for dividends.

(2) If the dividend remains unpaid for a period of three months after the confirmation of the account, the liquidator shall immediately pay it into the Guardian's Fund for account of the creditor or contributory.

(3) If the liquidator, at the expiry of the said period of three months, has failed to furnish the Master with a proper receipt for any dividend which has not been paid as aforesaid, his failure shall be *prima facie* evidence that such dividend has been received and has not lawfully been disposed of by him, and the Master may institute proceedings against the liquidator to answer for his default.

(4) The court may order the liquidator to pay such dividend, and in addition, by way of penalty, such sum, not exceeding the amount of the dividend which has been unduly detained, as it may think fit and such penalty shall be paid into the general revenues of Botswana.

(5) If a liquidator delays payment of any dividend, any creditor or contributory entitled thereto may, after notice to the liquidator, apply to the court for an order compelling the liquidator to pay that dividend.

457. Leave of absence or resignation of liquidator

(1) At the request of any liquidator the Master may grant him leave of absence or may relieve him of his office, in either case upon such conditions as the Master may think fit to impose and subject to his giving such notice thereto as the Master may direct.

(2) Every liquidator who is granted leave of absence or who is relieved of his office by the Master shall give notice thereof in the *Gazette*.

458. Voting at meetings of creditors and contributories

(1) In every winding-up of a company every creditor shall be entitled to vote at any meeting of creditors of the company as soon as his claim has been proved:

Provided that—

(*a*) he may not vote in respect of a claim that is dependent upon the fulfilment of a condition until he proves that the condition has been fulfilled, or in an application by the creditor to the court, the court otherwise orders; and

(*b*) he may not vote in respect of any claim acquired by him by cession or purchase from any person after—

(i) the passing of the resolution to wind-up the company in the case of a voluntary winding-up or of a voluntary winding-up that is superseded by a winding-up by the court, or

(ii) the filing of the petition for winding-up by the company in the case of any other winding-up by the court.

(2) The vote of a creditor shall be reckoned according to the value of his claim.

(3) Any creditor holding any security, other than a general notarial bond, shall put a value on his security when proving his claim and, except in the election of a liquidator and upon any question affecting his security, his vote shall be reckoned according to the value of the balance, if any, of his claim remaining after deduction therefrom of the said value of his security.

(4) At every meeting of contributories in the winding-up of a company the votes of each contributory shall be those to which he is entitled according to the articles of the company in force at the commencement of the winding-up.

459. Books of company to be evidence

Where a company is being wound-up, all books and papers of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters therein recorded.

460. Application of assets and costs of winding-up

(1) In every winding-up of a company the assets shall be applied in payment of the costs, charges and expenses incurred in the winding-up and of the claims of creditors as nearly as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvent estates, and the provisions of the said law relating to contributions by creditors shall apply.

(2) All costs and charges incurred, and all advances made by the Master on account of the company shall, subject to the order of the court, be costs in the winding-up.

461. Payment of money deposited with Master and disposal of books and papers

(1) Any person claiming to be entitled to any money paid to the Master by a liquidator under the provisions of this Act may apply to the Master for payment of the same, and the Master may, on a certificate by the liquidator or on other sufficient evidence that the person claiming is entitled thereto, pay to that person the sum due.

(2) When any company has been wound up and is about to be dissolved, the books, papers and records of the company and of the liquidators shall, unless the court otherwise directs, be delivered to the Master; and such books, papers and records shall not be destroyed for a period of five years from the date of dissolution of the company:

Provided that such books, papers and records, including beneficial owner information of the company shall be kept for 20 years or such period as may be prescribed under the Financial Intelligence Act.

[7 of 2022, s. 24 w.e.f. 25 February 2022.]

462. Insolvency (Assetless Companies) Fund

(1) The Registrar shall establish, maintain and administer a fund to be called the Insolvency (Assetless Companies) Fund, in this section called "the Fund".

(2) The Registrar may invest money forming part of the Fund in the manner in which money in the Public Account may be invested.

(3) The Fund shall consist of—

(*a*) all contributions paid under subsection (5);

(*b*) all interest received from the investment of moneys forming part of the Fund; and

(*c*) any other money lawfully paid into the Fund.

(4) There shall be paid out of the Fund—

(*a*) the expenses of maintaining and administering the Fund; and

(*b*) the amounts advanced from the Fund under subsection (6).

(5) A company that lodges an annual return shall pay to the Registrar, at the time of lodging the return, such fee by way of contribution to the Fund as is prescribed.

(6) Where a company in liquidation does not have unencumbered assets immediately available to the liquidator of a value greater than P10,000 or other prescribed amount (an "assetless company"), the Registrar may make one or more advances from the Fund under this section, if it is satisfied that it would be in the interests of the company's creditors or shareholders, or both, for the liquidator to—

(*a*) make inquiries concerning the business, property, affairs or entitlements of the company; or

(*b*) bring, continue or defend proceedings relating to the business, property or affairs of the company,

for the purpose of recovering, retaining or realising the company's assets.

(7) Advances from the Fund under this section shall be of such amount as the Registrar determines, having regard to the proposals of the liquidator for the conduct of the proceedings or the inquiry, and may be made in relation to any one or more stages of the proceedings or the inquiry, and on such terms and conditions as the Registrar considers appropriate.

(8) Advances from the Fund may include an amount to meet any costs awarded against the liquidator.

(9) Where an advance has been authorised by the Registrar under subsection (6), the Registrar has, in the liquidation of the company concerned, a claim to be repaid the amount of that advance.

(10) The Registrar's claim under subsection (9) shall be treated as an expense properly incurred by the liquidator under section 460.

463. Meetings to ascertain wishes of creditors and contributories

(1) The court may, as to all matters relating to a winding-up, take into account the proved wishes of the creditors or contributories.

(2) The court may, if it considers appropriate, for the purpose of ascertaining those wishes, order meetings of the creditors and contributories to be called, held and conducted in such manner as it directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to it.

464. Power of court to declare dissolution of company void

When a company has been dissolved, the court may, at any time within two years of the date of the dissolution, on an application by the liquidator of the company, or by any other person who appears to the court to be interested, make an order, upon such terms as the court considers appropriate, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

465. Review by court

(1) Any person aggrieved by any decision, ruling, order, appointment or taxation of the Master under this Act may bring the same under review by the court, and to that end may apply to the court by motion after due notice has been given to the Master and to any person whose interests are affected:

Provided that where the general body of creditors or contributories is affected notice to the liquidator shall be notice to them.

(2) Any person aggrieved by any decision, ruling or order of the officer presiding at any meeting of creditors or contributories may bring the same under review by the court in the same manner *mutatis mutandis* as is prescribed in subsection (1).

(3) Any person aggrieved by any decision of a liquidator affecting that person may bring the same under review by the court in the same manner *mutatis mutandis* as is prescribed in subsection (1).

(4) Nothing in this section shall authorise the court to re-open any duly confirmed account or plan of distribution or of contribution otherwise than as is provided in section 454.

466. Special commissioners for taking evidence

(1) All persons empowered to hold magistrates' courts and such other persons as the court may appoint shall be commissioners for the purpose of taking evidence or holding any inquiry under this Act in cases where a company is wound-up in any part of Botswana, and the court may refer the whole or any part of the examination of any witnesses or of any inquiry under this Act to any person hereby appointed commissioner, although he is out of the jurisdiction of the court.

(2) The Master, the liquidator and any creditor or contributory may be represented at such inquiry by an attorney with or without counsel.

(3) Every commissioner within Botswana shall, in addition to any powers which he might lawfully exercise as magistrate, have in the matter so referred to him the same powers of summoning and examining witnesses, of requiring the production or delivery of documents, of punishing defaulting or recalcitrant witnesses, and of allowing costs and expenses to witnesses, as the court which made the winding-up order.

(4) The examination so taken shall be returned or reported to the court in such manner as the court directs.

467. Orders to be sent to Master and Registrar

Whenever under this Act any order is made by the court in connection with the winding-up, judicial management or dissolution of a company, a copy of such order certified by the Registrar of the court shall be transmitted by him to the Master and the Registrar.

468. Pooling of assets of related companies

(1) On the application of the liquidator, or a creditor or shareholder, the court, if satisfied that it is just and equitable to do so, may order that—

(*a*) a company that is, or has been, related to the company in liquidation shall pay to the liquidator the whole or part of any or all of the claims made in the liquidation; or

(*b*) where two 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 so orders and subject to such terms and conditions as the court may impose.

(2) The court may make such other order or give such directions to facilitate giving effect to an order under

subsection (1) of this section as it considers appropriate.

469. Guidelines for orders

(1) In deciding whether it is just and equitable to make an order under section 468(1)(*a*) the court shall have regard to the following matters—

(*a*) the extent to which the related company took part in the management of the company in liquidation;

(*b*) the conduct of the related company towards the creditors of the company in liquidation;

(*c*) the extent to which the circumstances that gave rise to the liquidation of the company are attributable to the actions of the related company; and

(*d*) such other matters as the court considers appropriate.

(2) In deciding whether it is just and equitable to make an order under section 468(1)(*b*), the court shall have regard to the following matters—

(*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*) such other matters as the court considers appropriate.

(3) The fact that creditors of a company in liquidation relied on the fact that another company is, or was, related to it is not a ground for making an order under section 468.

470. Application of certain provisions in winding-up to judicial management

In every case in which a company is placed under judicial management the provisions of sections 379, 381(2) and (3), 382, 398, 400, 401, 443, 444, 445, 446, 458 and 467 and where the court so orders, sections 430, 431, 432 and 466 or any of the said sections shall apply in a judicial management as they apply in a winding-up by the court or in a winding-up of a company which is unable to pay its debts, any reference to the liquidator being taken as a reference to the judicial manager and any reference to a winding-up order as a reference to a judicial management order and any reference to a contributory as a reference to a member of the company.

471. Placing company under judicial management

(1) Whenever application is made to the court for the liquidation of any company on the ground that such company is unable to pay its debts, or that, by reason of its mismanagement or of its probable inability to meet its obligations or become a successful concern or for some other cause, it is just and equitable that the company should be wound-up, and the court, upon consideration of the facts, is of the opinion that, notwithstanding any present inability of the company to meet its obligations, or the existence of any other fact or circumstance alleged in the application, there is a reasonable probability that if the company be placed under judicial management as provided in this section it will be enabled to meet such obligations and to remove the occasion for liquidation or dissolution, and that it is otherwise just and equitable that the grant of

an order of liquidation should be postponed, the court may, instead of granting a liquidation order, grant an order (hereinafter called "a judicial management order") in terms of this section, to be of force either for a period stated in the order or for an indefinite period.

(2) A judicial management order may also be granted by the court in respect of any company on the application of any member or creditor, if it appears to the court that, by reason of mismanagement or any other cause, it is desirable that the company should be placed under judicial management.

(3) On the presentation of a petition for the granting of a judicial management order, the provisions of section 372 shall apply in the same manner as if such petition were a petition for a winding-up.

(4) Before granting a judicial management order in terms of this section the court may refer the case to the Master for a report on any circumstances which appear to him to justify the court in withholding a judicial management order or postponing consideration of the making of such an order.

(5) For the purposes of the said report the Master, or any other person appointed by him for the purpose, may require the production of any books and documents of the company and any information regarding the affairs of the company from any person who is or was an officer of the company or who has presented the petition or made an affidavit in the proceedings.

(6) Any person, who is in control of books or documents or in possession of information required by the Master and refuses, on demand, to produce such books or documents or give such information, shall be guilty of an offence and liable on conviction to the penalty set out in section 492(1).

(7) Before granting an order placing a company under judicial management, the court may, in terms of section 28(2), declare that the affairs of the company ought to be investigated by an inspector appointed by the Registrar.

(8) A copy of any report made under this section shall be furnished to the company and to the applicant for a judicial management order.

(9) The court may make any order it considers just for the payment of the costs of any investigation or inspection made under this section, including the costs of the report.

472. Judicial management order

(1) A judicial management order shall contain—

(*a*) directions that the company named therein shall, subject to the supervision of the court, be under the management of a judicial manager appointed in terms of section 382, but subject to the provisions of sections 381(2) and (3), and that any person vested with the management of the company's affairs shall from the date of the making of the order be divested thereof;

(*b*) directions that the judicial manager shall upon the date mentioned and upon completion of a bond of security in accordance with the provisions of section 445 proceed forthwith to take over the management of the company, and shall as soon as practicable and unless with the consent of the Master not later than one month and in any case not later than three months after the date of his assumption of management, and at intervals of three months thereafter, submit to a meeting of the company, to a meeting of the creditors of the company and to the Master, a report showing the assets and liabilities of the company, its debts and obligations, as verified by the auditors of the company, and all such other information as may be necessary to enable the Master and the members and the creditors to become fully acquainted with the company's position;

(*c*) directions as to the rate of remuneration of the judicial manager; and

(*d*) such other directions as the court may deem fit, as to the management of the company, or any matter incidental thereto, including power to the judicial manager to raise money on debentures or otherwise without the authority of members but subject to the rights of creditors,

and may direct that while the judicial management order is in force all actions and the execution of all writs, summonses, and other processes against the company be stayed and be not proceeded with without leave of the court first obtained.

(2) The court may at any time and in any manner vary the terms of the order.

473. Position of company's auditor in judicial management

(1) Notwithstanding the making of a judicial management order in respect of any company and for so long as the order is in force the provisions of this Act relating to the appointment and re-appointment of auditors and the rights and duties of auditors shall continue to apply as if any reference in the said provisions to the directors of the company were a reference to the judicial manager.

(2) The auditor of the company shall not be eligible for appointment as provisional manager or judicial manager.

474. Duties of judicial manager

It shall be the duty of a judicial manager, subject to the provisions of this Act, and to the provisions of the constitution of the company except where such last-mentioned provisions may be in conflict with any direction in the judicial management order or with any rules framed under section 523 and applicable under section 382(5)—

(*a*) so soon after his appointment as may be to recover and reduce into possession all the assets of the company, movable and immovable, and to undertake the management of the company;

(*b*) to conduct such management, subject to the order of the court in such manner as he may deem most economic and most conducive to the interests of the members and creditors;

(*c*) to comply with any direction of the court made in the judicial management order or any variation thereof;

(*d*) within 14 days of his appointment to transmit to the Registrar in duplicate a copy of the Master's letter of appointment;

(*e*) to transmit to the Registrar once in each calendar year during which the company is under judicial management a return containing all such information as is required in an annual return furnished under section 217 and complying *mutatis mutandis* with the provisions of that section:

Provided that this paragraph shall not apply to any calendar year in which the judicial management was ordered if in that calendar year returns have been furnished in respect of the company in terms of section 217.

(*f*) to keep such books of account and to prepare a balance sheet and profit and loss account in all respects as would have been the duty of the directors if the company had not been placed under judicial management;

(*g*) to convene, during the period the company is under judicial management, the annual general meeting of members and to furnish to the persons entitled thereto a report containing such information as is required by this Act in the report of directors together with all duly audited accounts of the company in such

form and manner as would have been required from the directors if the company had not been placed under judicial management; and

(*h*) if at any time he is of opinion that the continuance of the judicial management will not enable the company to meet its obligations and remove the occasion for judicial management or liquidation, to apply to the court, after not less than 14 days' notice, by registered post to all members and creditors, for the cancellation of the order under section 477 and the issue of a winding-up order.

475. Voidable and undue preferences in case of judicial management

(1) Every disposition of its property which, if made by an individual, could for any reason be set aside in the event of his insolvency, may, if made by a company, be set aside by the court at the suit of the judicial manager in the event of the company being placed under judicial management and its being unable to pay its debts, and the provisions of the law relating to insolvent estates shall *mutatis mutandis* be applied to any such disposition.

(2) For the purposes of this section the event which shall be deemed to correspond with the sequestration order in the case of an individual shall be—

(*a*) if the judicial management order was granted under section 471(1), the presentation of the petition for the liquidation of the company; or

(*b*) if the judicial management order was granted under section 471(2), the granting of that order.

476. Application of assets during judicial management

(1) A judicial manager shall not without the leave of the court sell, or otherwise dispose of, any of the company's assets, except in the ordinary course of the company's business.

(2) The creditors of the company whose claims arose before the date of the judicial management order may at a meeting convened by the judicial manager for the purposes of this subsection resolve that all liabilities incurred or to be incurred by the judicial manager in the conduct of the company's business shall be paid on preference to all other liabilities exclusive of the costs of the judicial management and thereupon all claims based upon such first-mentioned liabilities shall have preference in the order in which they were incurred over all unsecured claims against the company except claims arising out of the costs of the judicial management.

(3) Subject to the provisions of subsection (3) the costs of the judicial management and the claims of creditors of the company shall be paid *mutatis mutandis* in accordance with the law relating to insolvent estates, as if those costs were costs of the sequestration of an estate and those claims were claims against an insolvent estate.

(4) The law relating to insolvent estates shall, subject to section 458, apply *mutatis mutandis* in connection with the convening of a meeting of creditors mentioned in subsection (3) and the conduct of that meeting as if such meeting were a meeting of creditors of an insolvent estate.

477. Cancellation of judicial management order

(1) If at any time, on the application of the judicial manager or of any person interested, it appears to the court that the purpose of the judicial management order has been fulfilled, or that for any reason it is undesirable that such order should remain in force, the court may cancel such order and thereupon the judicial manager shall be divested of such management.

(2) In cancelling the said order the court shall give such directions as may be necessary for the resumption of the management and control of the company by the directors thereof; and such directions may include

directions for the summoning of a general meeting of members for the election of directors.

478. Power of court to assess damages against delinquent promoters, directors etc

(1) Where in the course of winding-up or judicial management of a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present officer, liquidator or judicial manager of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misconduct or breach of trust in relation to the company, the court may, on the application of the Master or of the liquidator or judicial manager or of any creditor or contributory, enquire into the conduct of the promoter, officer, liquidator or judicial manager, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retention, misconduct or breach of trust as the court may think just.

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

479. Penalty for failure by directors and others to attend meetings

Any person who is or has been a director of a company unable to pay its debts, who absents himself without valid excuse from attending a meeting of the creditors in a winding-up or judicial management of the company after having been required in writing to attend by the Master, liquidator or judicial manager shall be guilty of an offence and liable to a fine not exceeding P2,000 or to imprisonment for a term not exceeding six months or to both.

480. Offences consequent upon a winding-up or judicial management

(1) Where a company is being or has been wound-up or is or has been under judicial management and is a company unable to pay its debts, every person shall be guilty of an offence and liable to imprisonment for a term not exceeding three years who, at any time within the six months immediately preceding the commencement of the winding-up or of the judicial management of the company and while being an officer of the company, does any of the following acts, unless he satisfies the court, in each case, that he had no intention to defraud, namely, every person who—

(*a*) conceals, destroys, mutilates or falsifies or is privy to the concealment, destruction, mutilation or falsification, of any book or document relating to the property or affairs of the company, or makes or is privy to the making of any false entry in any such book or document;

(*b*) conceals any part of the property of the company to the value of P100 or upwards which ought by law to be divided amongst the creditors of the company; or

(*c*) causes or permits any property of the company, which it has obtained on credit and has not paid for, to be pledged, mortgaged or disposed of otherwise than in the ordinary course of the company's business.

(2) Every person shall be guilty of an offence and liable to imprisonment for a term not exceeding three years who, while being an officer of a company and with intent to defraud the creditors of the company in the event of its being wound-up or being placed under judicial management and being a company unable to pay its debts—

(*a*) does any specified in subsection (1);

(*b*) removes or disposes of any part of the property of the company to the value of P100 or upwards;

(*c*) is party with or is privy to the removal or disappearance of any books or documents relating to the property or affairs of the company.

(3) Where a company is being or has been wound-up or is or has been under judicial management and is a company unable to pay its debts, every person shall be guilty of an offence and liable to imprisonment for a term not exceeding three years who within the 12 months immediately preceding the commencement of the winding-up or of the judicial management of the company and while being an officer of the company, acts as follows, unless he satisfies the court that he had no intention to defraud, namely, every such person who when making any statement either verbally or in writing in regard to the business or affairs of the company, and for the information of its creditors or of any person who became its creditor on the faith of such a statement—

(*a*) conceals any liability, present or future, certain or contingent, which the company may then have contracted;

(*b*) mentions, as if it were an asset of the company, any right or property which, at the time, is not an asset; or

(*c*) in any way conceals or disguises, or attempts to conceal or disguise, any loss which the company has sustained, or gives any incorrect account thereof,

unless he satisfies the court that he had no intention to defraud; and for the purposes of this subsection an auditor of the company shall be deemed to be an officer of the company.

(4) Every person shall be guilty of an offence and liable to imprisonment for a term not exceeding one year who, being an officer of a company—

(*a*) causes or knowingly permits an undue preference as defined by the Insolvency Act (Cap. 42:02) to be given by the company; or

(*b*) causes or knowingly permits any debt or debts to the aggregate amount of P1,000 or upwards to be contracted by the company without any reasonable expectation that the company will be able to discharge the same and the company thereafter, being still a debtor for the said debt or debts, is wound-up or placed under judicial management and is a company unable to pay its debts.

(5) Every person shall be guilty of an offence and liable to imprisonment for a term not exceeding two years who, while being a director, secretary or manager of a company and at any time during the winding-up or judicial management of the company—

(*a*) knowing or suspecting that a false debt has been or is about to be proved against the company, fails for a period of seven days to inform the Master, or the liquidator or the judicial manager thereof in writing;

(*b*) fails to disclose to the liquidator or judicial manager to the best of his knowledge all the property of the company of any kind, and the manner in which, the person to whom, the consideration for which, and the time when, any part thereof was disposed of unless he satisfies the court that he had some lawful excuse for such failure;

(*c*) fails to deliver to the Master or liquidator or judicial manager as any one of them may direct, all books, documents, papers and writings in his custody or under his control relating to the property or affairs of the company, unless he satisfies the court that he had some lawful excuse for such failure; or

(*d*) prevents the production or delivery to the Master or liquidator or judicial manager of any books, documents or papers relating to the property or affairs of the company.

(6) Every person who, while being a director, manager or secretary of a company, and at any time during the winding-up or judicial management of the company, grants, promises or offers any investigation of the affairs of the company or the prosecution, on a criminal charge, of any officer of the company or of any person with whom the company may have had business relations shall be guilty of an offence and liable to imprisonment for a term not exceeding one year.

(7) Where a company is being or has been wound-up or is or has been under judicial management and is a company unable to pay its debts, every person shall be guilty of an offence and liable to imprisonment for a term not exceeding six months who, while being a director, manager or secretary of the company, and being under examination at a meeting by the presiding officer, the liquidator, judicial manager, or any creditor or contributory or their respective agents, fails to account for or to disclose what has become of any of the property of the company which is proved to have been in his possession or, to his knowledge, in the possession of the company so recently before the commencement of the winding-up or of the judicial management that in the ordinary course he ought to be able to account for same.

(8) For the purposes of subsections (1)(*a*) and (2)(*a*), an auditor of a company shall be deemed to be an officer of the company.

(9) For the purposes of subsections (5), (6) and (7), a person who is a director, a manager or secretary of a company at the commencement of the winding-up or judicial management thereof shall be deemed to be a director, manager or secretary during the winding-up or judicial management thereof notwithstanding that his duties may have ceased or that he is no longer gainfully employed by the company or by its liquidator or judicial manager on its behalf.

481. Responsibility of directors and other persons for fraudulent conduct of business

(1) If in the course of a winding-up or the judicial management of a company or otherwise it appears that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the Master, or the liquidator or judicial manager or any creditor of or contributory to the company, may, if it thinks proper to do so, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

(2) Where the court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or in any company or person on his behalf, or in any person claiming as assignee from or through the person liable or any company or person acting on his behalf and may from time to time make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection.

(3) For the purposes of subsection (2) the expression "assignee" includes any person to whom, or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge or interest therein was created, issued or transferred but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(4) Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence and liable on conviction to the penalty set out in section 492(3).

(5) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made.

482. Prosecution of delinquent directors and others

If it appears in the course of the winding-up or judicial management of a company that any past or present officer or member of the company has been guilty of an offence for which he is criminally responsible under this Act or in relation to the company or the creditors of the company under some other law, the liquidator or judicial manager shall cause all the facts known to him which appear to constitute the offence to be laid before the Attorney-General.

PART XXVII
Winding-up of Unregistered Associations (ss 483-488)

483. Unregistered association defined

An unregistered association shall mean any syndicate, association or partnership having a place of business in Botswana which consists of more than seven members and is not a company or an external company.

484. Winding-up of unregistered association

(1) An unregistered association may, subject to the provisions of this Part, be wound-up under this Act, and all the provisions of Part XXVI (except the provisions of section 470 to 477 inclusive) and of the winding-up rules made under section 523 shall mutates mutandis apply to such an association, and to its directors, officers or members with the exceptions and additions as contained in subsections (2) to (6).

(2) The head office or principal place of business in Botswana shall for all the purposes of the winding-up be deemed to be the registered office of the association.

(3) An unregistered association shall be wound-up under this Act voluntarily.

(4) The circumstances in which an unregistered association may be wound-up are as follows—

(*a*) if the association is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs;

(*b*) if the association is unable to pay its debts; or

(*c*) if the court is of opinion that it is just and equitable that the association should be wound-up.

(5) An unregistered association shall, for the purposes of this Act, be deemed to be unable to pay its debts if —

(*a*) a creditor to whom the association is indebted in a sum exceeding P1,000 then due, has served on the association a demand requiring the association to pay the sum so due, by leaving it at the association's principal place of business, or by delivering it to the secretary or director, manager or other principal officer of the association, or by serving it in such other manner as the court may allow, and if the association has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the satisfaction of the creditor;

(*b*) in respect of any action or other proceeding instituted against any member of the association for any debt or demand due, or claimed to be due, from the association or from him in his capacity as a member thereof, notice in writing of the institution of such action or proceeding has been served on the association by leaving such notice at its principal place of business, or by delivering it to the secretary, or a director, manager or other principal officer of the association, or by serving the same in such other manner as the court may

allow and if the association has for 10 days thereafter neglected to pay, secure or compound for the debt or demand, or to procure a stay of the action or proceeding, or to indemnify the defendant member to his reasonable satisfaction against the action or proceeding, and against all costs, damages and expenses incurred or to be incurred by him by reason of or in defending the same at the instance of the association;

(*c*) execution or other process issued on a judgment decree or order obtained in any court in favour of a creditor against the association, or any member thereof as such, or any person authorised to be sued as nominal defendant on behalf of the association, is returned unsatisfied by the sheriff or messenger with the endorsement that no asset could be found to satisfy the debt or that the assets found were insufficient to do so; or

(*d*) it is proved to the satisfaction of the court that the association is unable to pay its debts; and in determining whether an association is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the association;

(6) A member of an unregistered association being wound-up under this section shall be deemed to be an officer of the association for the purposes of sections 478 to 482 inclusive.

485. Contributories

(1) In the event of an unregistered association being wound-up, every person shall be deemed to be a contributory who is liable to pay or contribute to the payment of—

(*a*) any debt or liability of the association;

(*b*) any sum for the adjustment of the rights of the members amongst themselves; or

(*c*) the costs and expenses of winding-up the association,

and every contributory shall be liable to contribute to the assets of the association all sums due by him in respect of such liability as aforesaid.

(2) In the event of the death or insolvency of any contributory or the assignment of his estate under the Insolvency Act (Cap. 42:02), then section 367 shall, *mutatis mutandis*, apply.

486. Power of court to stay or restrain proceedings

(1) The provisions of section 372 with respect to staying and restraining actions and proceedings against a company at any time after the presentation of a petition for winding-up and before the making of a winding-up order shall, in the case of an unregistered association, where the application to stay or restrain is by a creditor, extend to actions and proceedings against any contributory of the association.

(2) Where an order has been made for winding-up an unregistered association, no action or proceeding shall be proceeded with or commenced against any contributory of the association in respect of any debt of the association, except by leave of the court, and subject to such terms as the court may impose.

487. Directions as to property in certain cases

If an unregistered association has no power to sue and be sued in a common name, or if for any reason it appears expedient, the court may by the winding-up order, or by any subsequent order, direct that all or any part of the property belonging to the association, or to trustees on its behalf, is to vest in the liquidator by his official name, and thereupon the property or the part thereof specified in the order shall vest accordingly; and the liquidator may, after giving such indemnity, if any, as the court may direct, bring or defend in his official

name any action or other legal proceedings relating to that property or necessary to be brought or defended for the purpose of effectually winding-up the association and recovering its property.

488. Provisions of this Part cumulative

The provisions of this Part with respect to unregistered associations shall be deemed to be in addition to and not in restriction of any provisions contained in this Act with respect to winding-up companies by the court, and the court or liquidator may exercise any powers or do any act in the case of unregistered associations which might be exercised or done by it or him in winding-up companies registered under this Act but an unregistered association shall not, except in the event of its being wound-up, be deemed to be a company under this Act, and then only to the extent provided by this Part.

PART XXVIII
Dormant Companies (ss 489-491)

[Part XXVIII (ss 489 to 491) repealed by 22 of 2018, s. 33 w.e.f. 3 June 2019.]

489.—491. [Repealed.]

PART XXIX
Offences and Penalties (ss 492-507)

492. Penalty for failure to comply with Act

(1) A person convicted of an offence against any of the provisions of this Act which state that on conviction the person shall be liable to the penalty set out in this subsection, shall be liable to a fine not exceeding P50,000.

[16 of 2019, s. 4(a).]

(2) A person convicted of an offence against any of the provisions of this Act which state that on conviction the person shall be liable to the penalty set out in this subsection, shall be liable to a fine not exceeding P100,000.

[16 of 2019, s. 4(b).]

(3) A person convicted of an offence against any of the provisions of this Act which state that on conviction the person shall be liable to the penalty set out in this subsection, shall be liable to a fine not exceeding P200,000 or to imprisonment for a term not exceeding five years.

[16 of 2019, s. 4(c).]

(4) A person convicted of an offence against any of the provisions of this Act which state that on conviction the person shall be liable to the penalty set out in this subsection, shall be liable to imprisonment for a term not exceeding 10 years or to a fine not exceeding P400,000.

[16 of 2019, s. 4(d).]

(5) The Registrar may—

(*a*) impose an administrative penalty not exceeding P500 000, where—

(i) a person fails to notify the Registrar of a change in basic information of a registered company including beneficial owner, nominee shareholder or nominator information or other notification as may be provided for in this Act,

(ii) a person falsifies basic information of a company including beneficial owner, nominee shareholder or nominator information,

(iii) a person fails to provide basic information of a company including beneficial owner, nominee shareholding and nominator information, or

(iv) the director who is resident in Botswana or the company secretary fails, upon request by a competent authority, including failure to submit audited financial statements for non-exempt companies or failure to adhere to any other reporting requirements in accordance with this Act;

(*b*) impose an administrative penalty not exceeding P250 000 where a director, secretary or an auditor of a company who has knowledge or who suspects another company of a suspicious conduct fails to report such suspicion to the relevant authority; or

(*c*) deregister a company, where the company, its directors, shareholders or auditor fails to pay administrative penalties within a prescribed period as directed by the Registrar:

Provided that—

(i) the directors, shareholders or auditor of the company shall be prohibited from registering any other company under this Act, and

(ii) the Registrar may, subject to section 341, restore the company to the register upon payment of the outstanding administrative fee and a restoration fee of P5 000.

[7 of 2022, s. 25 w.e.f. 25 February 2022.]

493. Penalties in cases of failure by board or company to comply with Act

(1) A director or secretary of a company who is convicted of an offence against any of the provisions of this Act which state that on conviction the person shall be liable to the penalty set out in this subsection, shall be liable to a fine not exceeding P50,000.

[22 of 2018, s. 34 w.e.f. 3 June 2019, 16 of 2019, s. 5(a).]

(2) A director or secretary of a company who is convicted of an offence against any of the provisions of this Act shall be guilty of an offence and liable to a fine not exceeding P100,000.

[22 of 2018, s. 34 w.e.f. 3 June 2019, 16 of 2019, s. 5(b).]

(3) Section 332(1) of the Criminal Procedure and Evidence Act (Cap. 08:02), providing for the criminal liability of certain officers of a company charged with an offence, shall not apply to criminal proceedings under any of the provisions of this Act.

494. Additional powers of enforcement

(1) Where any company is in default in filing, delivering or sending any return, account or other document required to be filed, delivered or sent to the Registrar under this Act, or is in any other respect in breach of any of the provisions of this Act, and where the Minister can satisfy the High Court that the provisions for enforcement contained in this Act (otherwise than as provided in this section) are impracticable of enforcement by reason of the fact that no officer of the company is resident in Botswana or for any other sufficient reason, the court may, on the application of the Minister, appoint a receiver to assume control of the company's assets located or situated in Botswana with full power to conduct the affairs of the said company in Botswana as if he were a judicial manager of a company under judicial management.

(2) The said receivership may be discharged by the court, on application made by—

(*a*) the receiver; or

(*b*) the company, when the court is satisfied that all of the following conditions are met, namely—

(i) there has been full compliance with all the provisions of this Act, including the filing, delivery or sending of all returns, accounts and documents required to be so filed, delivered or sent,

(ii) the payment by the company of all expenses and costs of the said receivership, including any remuneration due to or paid to the receiver and including any costs incurred by the Minister in obtaining the appointment of the receiver or in the discharge of the receivership, and

(iii) the payment by the company of such sum by way of penalty as the court may consider appropriate in the circumstances:

Provided that no such penalty shall be in excess of the fine or fines which might be imposed by the court on conviction of the company, or any of its directors or officers individually, in accordance with the provisions of this Act, in respect of the default or defaults in question.

495. Defences

(1) It is a defence to a director charged with an offence in relation to a duty imposed on the board of a company if the director proves that—

(*a*) the board took all reasonable and proper steps to ensure that the requirements of this Act would be complied with; or

(*b*) the director took all reasonable and proper steps to ensure that the board complied with the requirements of this Act; or

(*c*) in the circumstances the director could not reasonably have been expected to take steps to ensure that the board complied with the requirements of this Act.

(2) It is a defence to a director charged with an offence in relation to a duty imposed on the company if the director proves that—

(*a*) the company took all reasonable and proper steps to ensure that the requirements of this Act would be complied with;

(*b*) the director took all reasonable steps to ensure that the company complied with the requirements of this Act; or

(*c*) in the circumstances the director could not reasonably have been expected to take steps to ensure that the company complied with the requirements of this Act.

496. False statement

(1) Every person who, with respect to a document required by or for the purposes of this Act—

(*a*) makes, or authorises the making of, a statement in it that is false or misleading in a material particular knowing it to be false or misleading; or

(*b*) omits, or authorises the omission from it, any matter knowing that the omission makes the document false or misleading in a material particular,

shall be guilty of an offence, and liable to the penalties set out in section 492(3).

(2) Every director or employee of a company who makes or furnishes, or authorises or permits making or furnishing of, a statement or report that relates to the affairs of the company and that is false or misleading in a material particular, to—

(*a*) a director, employee, auditor, shareholder, debenture holder, or trustee for debenture holders of the company;

(*b*) a liquidator, or liquidation committee of property of the company;

(*c*) if the company is a subsidiary, a director, employee, or auditor of its holding company; or

(*d*) a stock exchange or and an officer of a stock exchange knowing it to be false or misleading,

shall be guilty of an offence, and liable to the penalties set out in section 492(3).

(3) For the purposes of this section, a person who voted in favour of the making of a statement at a meeting is deemed to have authorised the making of the statement.

(4) If any person, on examination on oath authorised under this Act, or in any affidavit or deposition in or about any matter arising under this Act, wilfully and corruptly gives false evidence he shall be guilty of an offence and liable to the penalties prescribed by law for perjury.

497. Fraudulent use or destruction of property

Every director, employee, or shareholder of a company who—

(*a*) fraudulently takes or applies property of the company for his own use or benefit or for a use or purpose other than the use or purpose of the company; or

(*b*) fraudulently conceals or destroys property of the company,

shall be guilty of an offence and liable to the penalties set out in section 492(4).

498. Falsification of records

(1) Every director, employee or shareholder of a company who, with 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 party to the making of, false entry in any register, accounting records, book, paper, or other document belonging or relating to the company,

shall be guilty of an offence, and liable to the penalties set out in section 492(4) of this Act.

(2) Every person who, in relation to a mechanical, electronic, or other device used in connection with the keeping or preparation of any register, accounting 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 records, index, book, paper, or other document, destroys, removes, or falsifies matter recorded or stored in the device, or fails or omits to record or store any matter in the device, shall be guilty of an offence and liable to the penalties set out in section 492(4).

499. Carrying on business fraudulently

Every person who is knowingly a party to a company carrying on business with intent to defraud creditors of the company or other persons or for a fraudulent purpose in circumstances not coming under section 481 shall be guilty of an offence and liable to the penalties set out in section 492(4).

500. Persons prohibited from managing companies

(1) Where—

(*a*) a person has been convicted on indictment of any offence in connection with the promotion, formation, or management of a company;

(*b*) a person has been convicted of an offence under any of sections 496 to 499 or of any crime involving dishonesty punishable on conviction by imprisonment for three months or more;

(*c*) a person has been convicted under section 324 as an insider trading; or

(*d*) a person who has been convicted under any of sections 325, 326, 327 or 328,

that person shall not, during the period of five years after the conviction or the judgment, be a director or promoter of, or in any way, whether directly or indirectly, be concerned or take part in the management of a company, unless that person first obtains the leave of the court which may be given on such terms and conditions as the court considers appropriate.

(2) A person intending to apply for the leave of the court under this section shall give to the Registrar not less than 10 days' notice of that person's intention to apply.

(3) The Registrar, and such other persons as the court considers appropriate, may attend and be heard at the hearing of any application under this section.

(4) A person who acts in contravention of this section, or of any order made under this section, shall be guilty of an offence and liable to the penalty set out in section 492(3).

(5) In this section, the term "company" includes a foreign or external company that carries on business in Botswana.

501. Court may disqualify directors

(1) Where—

(*a*) a person has, while a director of a company and whether convicted or not in circumstances not coming under section 50—

(i) persistently failed to comply with this Act, the repealed Act, or the Botswana Stock Exchange Act (Cap. 56:08), or where the company has failed to so comply, persistently failed to take all reasonable steps to obtain such compliance,

(ii) been guilty of fraud in relation to the company or of a breach of duty to the company or a shareholder, or

(iii) acted in a reckless or incompetent manner in the performance of his duties as director;

(*b*) a person who while a director of a company was wholly or substantially responsible for the company—

(i) being wound-up because of its inability to pay its debts as and when they become due,

(ii) ceasing to carry on business because of its inability to pay its debts as and when they become due, or

(iii) entering into a scheme of compromise or arrangement with its creditors; or

(*c*) a person who has been convicted of an offence in connection with the promotion, formation or management of a company under the Collective Investment Undertakings Act (Cap. 56:09),

the court may make an order that the person shall not, without the leave of the court, be a director or promoter of, or in any way, whether directly or indirectly, be concerned or take part in the management of a company for such period not exceeding five years as may be specified in the order.

(2) Where within the period of seven years before the making of an application under this section a person was director of two or more companies to which subparagraphs (i), (ii) or (iii) of subsection (1)(*b*) apply, the court may make an order that the person may not be a director or promoter of or in any way directly or indirectly be concerned in the management of a company for such period not exceeding five years as may be specified in the order unless that person satisfies the court—

(*a*) that he was not wholly or substantially responsible for the insolvency of those companies; or

(*b*) it would not be just or equitable for the power to be exercised.

(3) A person intending to apply for an order under this section shall give not less than 10 days' notice of that intention to the person against whom the order is sought, and on the hearing of the application the last-mentioned person may appear and give evidence or call witnesses.

(4) An application for an order under this section may be made by the Registrar, the Master, or by the liquidator of the company, or by a person who is, or has been, a shareholder or creditor of the company; and on the hearing of—

(*a*) an application for an order under this section by the Registrar or the Master or the liquidator; or

(*b*) an application for leave under this section by a person against whom an order has been made on the application of the Registrar, the Master, or the liquidator,

the Registrar, Master, or liquidator shall appear and call the attention of the court to any matters which seem to him to be relevant, and may give evidence or call witnesses.

(5) An order may be made under this section even though the person concerned may be criminally liable in respect of the matters on the ground of which the order is to be made.

(6) The Registrar of the court shall, as soon as practicable after the making of an order under this section, give notice to the Registrar that the order has been made and the Registrar shall give notice in the *Gazette* of the name of the person against whom the order is made.

(7) Every person who acts in contravention of an order under this section shall be guilty of an offence and liable to the penalties set out in section 492(4) of this Act.

(8) In this section, "company" includes an external company.

502. Liability for contravening sections 500 and 501

A person who acts as a director of a company in contravention of section 500 of this Act or an order made under section 501 of this Act is personally liable to—

(*a*) a liquidator of the company for every unpaid debt incurred by the company; and

(*b*) a creditor of the company for a debt to that creditor incurred by the company, while that person was so acting.

503. Improper use of "Limited"

Any person who, not being incorporated with limited liability, whether alone or with other persons, carries on business under a name or title of which "Limited" or a contraction or imitation of that word is the last word, shall be guilty of an offence and liable to the penalty set out in section 492(2).

504. Failure to keep accounts

(1) Where on an investigation under Part XXI or where a company is wound-up, it is shown that proper books of account were not kept by the company throughout the period of two years immediately preceding the commencement of the investigation or winding-up or the period between registration of the company and commencement of the investigation or winding-up, whichever is less, every officer who is in default shall, unless he acted honestly and shows that in the circumstances in which the business of the company was carried on the default was excusable, shall be guilty of an offence and liable to the penalty set out in section 492(2).

(2) For the purpose of this section, proper books of account shall be deemed not to have been kept in the case of any company—

(*a*) where there have not been such books of account as are necessary to exhibit and explain the transactions and financial position of the trade or business of the company, including books containing entries from day-to-day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, statements of the annual stock takings and except in the case of goods sold by way of ordinary retail trade, of all goods sold and purchased, showing the goods and the buyers and sellers thereof in sufficient detail to enable those goods and those buyers and sellers to be identified; or

(*b*) where such books for accounts have not been kept in such manner as to enable them to be conveniently and properly audited, whether or not the company has appointed an auditor.

505. Other offences

Every person who—

(*a*) issues or makes use of a document or certificate kept or given under this Act which does not comply with this Act;

(*b*) fails to do any act within the time within which it is required by this Act to be done;

(*c*) fails to comply with a request, direction or order issued under this Act by a court, by the Registrar or by any other person;

(*d*) makes use of any name or title which he is not under the Act authorised to use;

(*e*) divulges or makes use of any information obtained under this Act which he is not otherwise authorised to disclose;

(*f*) uses the seal of a company (if it has one) or issues any letter, bill or document relating to a company otherwise than in accordance with this Act; or

(*g*) in the exercise of any powers or functions conferred upon him by this Act or by any subsidiary enactment made under this Act, fails to act in accordance with the instrument which confers the function or power, shall be guilty of an offence and be liable to the penalty set out in section 492(2).

506. Reports of offences and production and inspection of books

(1) Where the court, the Master, the Registrar or a liquidator is of the opinion that an offence against the Act has been committed by any persons, it shall forthwith refer the matter to the Attorney-General.

(2) If on application made to the court by the Registrar or a police officer of or above the rank of Assistant Superintendent, there is shown to be reasonable cause to believe that any person has, while a director or other officer of a company, committed an offence in connection with the management of the company's affairs and that evidence of the commission of the offence is to be found in any books or papers of or under the control of the company, the court may make an order—

(*a*) authorising any person named therein to inspect the said books or papers or any of them for the purposes of investigating and obtaining evidence of the offence; or

(*b*) requiring the secretary of the company or such other officer thereof as may be named in order to produce the said books or papers or any of them to a person named in the order at a place so named by a special date.

(2) An auditor of a company shall for the purposes of this section be deemed to be an officer of the company.

507. Inducement to be appointed liquidator

Any person who gives or agrees or offers to give to any member or creditor of a company any valuable consideration with a view to securing his own appointment or nomination, or to securing or preventing the appointment or nomination of some person other than himself as the company's liquidator shall be guilty of an offence.

PART XXX
Miscellaneous (ss 508-528)

508. Service of documents on companies in legal proceedings

(1) A document in any legal proceedings may be served on a company as follows—

(*a*) by delivery to a person named as a director of the company on the register of companies;

(*b*) by delivery to an employee of the company at the company's head office or principal place of business;

(*c*) by leaving it at the company's registered office or address for service;

(*d*) by serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings; or

(*e*) in accordance with an agreement made with the company.

(2) The methods of service specified in subsection (1) are, notwithstanding any other law, the only methods by which a document in legal proceedings may be served on a company in Botswana.

509. Service of other documents on companies

A document, other than a document in any legal proceedings, may be served on a company as follows—

(*a*) by any of the methods set out in paragraph (*a*), (*b*), (*c*) or (*e*) of subsection (1) of section 508;

(*b*) by posting it to the company's registered office or address for service or delivering it to a post office box which the company is using at the time; or

(*c*) by sending it by facsimile machine to a telephone number used for the transmission of documents by facsimile at the company's registered office or address for service or its head office or principal place of business.

510. Service of documents on external companies in legal proceedings

(1) A document in any legal proceedings may be served on an external company in Botswana as follows—

(*a*) by delivery to a person named in the register of external companies as a director of the external company and who is resident in Botswana;

(*b*) by delivery to a person named in the register of external companies as being authorised to accept service in Botswana of documents on behalf of the external company;

(*c*) by delivery to an employee of the overseas company at the external company's place of business in Botswana or, if the external company has more than one place of business in Botswana at the external company's principal place of business in Botswana;

(*d*) by serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings; or

(*e*) in accordance with an agreement made with the external company.

(2) The methods of service specified in subsection (1) are, notwithstanding any other law, the only methods by which a document in legal proceedings under this Act may be served on an external company in Botswana.

511. Service of other documents on external companies

A document other than a document in any legal proceedings, may be served on an external company as follows—

(*a*) by any of the methods set out in paragraph (*a*), (*b*), (*c*) or (*e*) of subsection (1) of section 510;

(*b*) by posting it to the address of the external company's principal place of business in Botswana or delivering it to a post office box which the external company is then using at the time; or

(*c*) by sending it by facsimile machine to a telephone number used for the transmission of documents by facsimile at the principal place of business in Botswana of the external company.

512. Service of documents on shareholders and creditors

(1) A notice, statement, report, accounts, or other document to be sent to a shareholder or creditor who is a natural person may be—

(*a*) delivered to that person;

(*b*) posted to that person's address or delivered to a post office box which that person is using at the time; or

(*c*) sent by facsimile machine to a telephone number used by that person for the transmission of documents by facsimile.

(2) A notice, statement, report, accounts or other document to be sent to a shareholder or creditor that is a company or is an external company may be sent by any of the methods of serving documents referred to in section 510 or section 511 as the case may be.

(3) A notice, statement, report, accounts, or other document to be sent to a creditor that is a body corporate, not being a company or an external company, may be—

(*a*) delivered to a person who is a principal officer of the body corporate;

(*b*) delivered to an employee of the body corporate at the principal office or principal place of business of the body corporate;

(*c*) delivered in such manner as the court directs;

(*d*) delivered in accordance with an agreement made with the body corporate including in the case of shareholders the constitution;

(*e*) posted to the address of the principal office of the body corporate or delivered to a box at a document exchange which the body corporate is using at the time; or

(*f*) sent by facsimile machine to a telephone number used for the transmission of documents by facsimile at the principal place of business of the body corporate.

(4) Where a liquidator sends documents—

(*a*) to the last known address of a shareholder or creditor who is a natural person; or

(*b*) to the address for service of a shareholder or creditor that is a company,

and the documents are returned unclaimed three consecutive times, the liquidator need not send further documents to the shareholder or creditor until the shareholder or creditor gives notice to the company of its new address.

513. Additional provisions relating to service

(1) Subject to subsection (2), for the purposes of section 512—

(*a*) if a document is to be served by delivery to a natural person, service shall be made—

(i) by handing the document to the person, or

(ii) if the person refuses to accept the document, by bringing it to the attention of, and leaving it in a place accessible to, the person;

(*b*) a document posted or delivered to a post office box is deemed to be received five working days, or any shorter period as the court may determine in a particular case, after it is posted or delivered;

(*c*) a document sent by facsimile machine is deemed to have been received on the working day following the day on which it was sent;

(*d*) in proving service of a document by post or by delivery to a post office box it is sufficient to prove that—

(i) the document was properly addressed,

(ii) all postal or delivery charges were paid, and

(iii) the document was posted;

(*e*) in proving service of a document by facsimile machine, it is sufficient to prove that the document was properly transmitted by facsimile to the person concerned.

(2) A document is not to be deemed to have been served or sent or delivered to a person if the person proves that, through no fault on the person's part, the document was not received within the time specified.

514. Directors' certificates

A requirement imposed by any provision of this Act that directors of a company sign a certificate is complied with if the directors who are required to sign the certificate—

(*a*) sign the same certificate; or

(*b*) sign separate certificates in the same terms.

515. Prohibition of large partnerships

(1) No company, association, syndicate or partnership consisting of more than 20 persons shall be formed in Botswana for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association, syndicate or partnership, or by the individual members thereof, unless it is registered as a company under this Act or is formed in pursuance of some other law.

(2) Subsection (1) shall not apply to the formation of any association, syndicate or partnership for carrying on any organised professions which are designated by the Minister by notice in the *Gazette*, or for carrying on any combination of such professions.

516. Exemption for liability of acts or omissions of Government officers

No act or omission whatever of the Registrar or of any officer, clerk or other person in the employment of the Government, having duties to perform under this Act, shall render the Government or the Registrar or any such officer, clerk or person liable in respect of any loss or damage sustained by any person in consequence of any such act or omission unless such act or omission was *mala fide* or was due to want of reasonable care or diligence.

517. Power to grant relief

(1) Where in any proceedings before any court for negligence, default or breach of duty against a person to whom this section applies it appears to the court that the person is or may be liable in respect thereof, but that that person has acted honestly and reasonably and that, having regard to all circumstances of the case including those connected with the person's appointment, the person ought fairly to be excused for the

negligence, default or breach, the court may relieve that person either wholly or partly from liability on such terms as the court considers appropriate.

(2) Where a person to whom this section applies has reason to apprehend that any claim will or might be made against the person in respect of any negligence, default, or breach of duty that person may apply to the court for relief, and the court shall have the same power to relieve the person under this section as it would have had if it has been a court before which proceedings against that person for negligence, default, or breach of duty had been brought.

(3) The section shall apply to—

(*a*) an officer;

(*b*) a person employed by a company as auditor;

(*c*) an expert;

(*d*) a liquidator;

(*e*) a trustee for debenture holders; and

(*f*) directors, managers and other officers of an external company.

518. Irregularities in proceedings

(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court.

(2) The Court may if it considers appropriate make an order declaring that such proceeding is valid notwithstanding any such defect, irregularity or deficiency.

(3) Notwithstanding subsections (1) and (2) or any other provision of this Act, where such defect, irregularity or deficiency, including an omission, error or the absence of a *quorum* at any meeting of the company or of the directors, has occurred in the management of administration of a company whereby a provision of this Act has been contravened, or whereby there has been default of a procedural or technical kind in the observance of the constitution or whereby any proceedings at or in connection with any meeting of the company or of the directors of any assembly purporting to be such a meeting have been rendered ineffective, including the failure to make or lodge with the Registrar any declaration of solvency, the Court—

(*a*) may, either of its own motion or on the application of any interested person, make such order as it considers appropriate to rectify or cause to be rectified or to nullify or modify or cause to be modified the consequences in law of any such defect, irregularity, deficiency, omission or error, or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such defect, irregularity, deficiency omission or error;

(*b*) shall before making any such order satisfy itself that such an order would not do injustice to the company or to any member or creditor;

(*c*) where any such order is made, may give such ancillary or consequential directions as it considers appropriate; and

(*d*) may determine what notice or summons is to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how it should be given or served and whether it should be advertised in any newspaper.

(5) The Court may, whether a company is in the process of being wound-up or not, on good cause being shown, enlarge or abridge any time for doing any act or taking any proceeding allowed or limited by this Act or any subsidiary enactment made under this Act on such terms as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited.

519. Translations of instruments

(1) Where under this Act a corporation is required to lodge with the Registrar any instrument, certificate, contract, statement or document or a certified copy thereof and if the same is not written in the English language the corporation shall lodge at the same time with the Registrar a certified translation in the English language.

(2) Where under this Act a corporation is required to make available for public inspection any instrument, certificate, contract, statement or document and the same is not written in the English language, the corporation shall keep at its registered office in Botswana a certified translation in the English language.

(3) Subject to section 187(3), where in the case of any company any account, minute book or other record of a corporation required by this Act to be kept is not kept in the English language, the directors shall cause—

(*a*) a true translation in the English language of such account, minute book or record to be made at intervals of not more than seven days; and

(*b*) the translation to be kept with the original account, minute book or record for as long as the original account, minute book or record is required by this Act to be kept.

520. Costs in actions by limited companies

Where a company or an external company is a plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company or the external company or the liquidator or judicial manager of the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security for those costs, and may stay all proceedings until the security is given.

521. Arbitration

(1) A company may, by writing under the hands of two directors agree to refer and may refer, to arbitration, in accordance with the general law relating to arbitration, any existing or future dispute between itself and any other company or person.

(2) Every company which is party to an arbitration may delegate to the arbitrator power to settle any term or to determine any matter capable of being lawfully settled or determined by the company itself or by its directors or other governing body.

522. Fees

(1) There shall be paid to the Registrar, in respect of such matters as the Minister may, by statutory instrument, specify, such fee as the Minister may prescribe in that statutory instrument.

(2) Where a time limit is prescribed under any provision of this Act for the lodging of any document with the Registrar, a penalty fee shall be payable to the Registrar at such rate as the Minister may, by statutory instrument, prescribe, on any document lodged after the expiration of the prescribed time limit in addition to payment of the fee prescribed under subsection (1).

(3) The Registrar may accept the payment of a penalty fee as purging the offence committed under section 505(*b*) of failing to do an act within the time which it is required by this Act to be done, but, in the case of a repeated offence or of excessive delay, he may report the matter to the Attorney-General under section 506.

523. Rules of procedure

(1) The Chief Justice may make rules concerning the procedure to be followed with respect to any matter in connection with the winding-up of companies, external companies or unregistered associations and generally as to all matters in which the court is empowered under this Act to exercise jurisdiction, and all matters which are required by this Act to be prescribed by rules.

(2) Every rule aforesaid shall be published in the *Gazette* and thereupon shall take effect and have the force of law.

524. Amendment of Schedules

The Minister may, by regulations published in the *Gazette*, amend or replace the provisions of any of the Schedules.

525. Fees paid to company

(1) Where under this Act a fee is payable to a company for inspecting or obtaining a copy of, any book or document, the company may by resolution provide that a lesser fee shall be paid.

(2) The maximum fee payable for the inspection or obtaining of copies of any book or document shall be such fee as the Minister may, by statutory instrument, prescribe.

525A. Deregistration of a company

The Registrar may deregister a company if, in his opinion, it is in the public interest to do so.

[22 of 2014, s. 7.]

526. Repeal of Cap. 42:01

The Companies Act is hereby repealed.

527. Transitional provisions

(1) Any person appointed under the repealed Act and holding office at the commencement of this Act, shall remain in office as if he had been appointed under this Act.

(2) Any act made, executed, issued or passed under the repealed Act and in force and operative at the commencement of this Act, shall have effect as if made, executed, issued or passed under this Act.

(3) Subject to the provisions of this section, the memorandum of association and articles of association of an existing company in force and operative at the commencement of this Act and the provisions of Table A in the First Schedule to the repealed Act, if adopted as all or part of the articles of a company at the commencement of this Act, shall subject to sections 38 and 43 have effect as if made or adopted under this Act.

(4) Where a company formed prior to the commencement of this Act has pursuant to its memorandum or articles or are solution of the general meeting authorised the directors of the company to issue shares (its "authorised capital") and some part of the authorised capital remains unissued, the directors shall have authority to issue shares under section 50 on the terms and conditions and up to the limit expressed in the

memorandum, articles or resolution, without requiring the authority of a further ordinary resolution of the general meeting.

(5) Any register, fund and account kept under any provisions of the repealed Act shall be deemed to be part of the register, fund and account kept under the corresponding provision of this Act.

(6) Subject to the other provisions of this Act, a company registered under the repealed Act shall be deemed to be registered under this Act and this Act shall extend and apply to the company accordingly and any reference in this Act, express or implied, to the date of registration of such a company shall be construed as a reference to the date upon which the company was registered under the repealed Act.

(7) The provisions of this Act with respect to winding-up, shall not apply to any company of which the winding-up has commenced before the commencement of this Act, but every such company shall be wound-up in the same manner and with the same incidents as if this Act had not been passed and for the purposes of the winding-up the Act under which the winding-up commenced and any rules made thereunder shall be deemed to remain in full force.

(8) The Companies Winding-Up Rules made under the repealed Act shall continue in force and apply to companies wound-up under this Act as if these rules were made under this Act.

(8A) Subject to the other provisions of this Act, a company which has outstanding annual returns on or before 3rd July, 2007, shall file all such outstanding annual returns within 12 months commencing on 1st February, 2009, upon the payment of a filing fee of P300 for every outstanding annual return.

[26 of 2008, s. 7.]

528. Regulations

(1) The Minister may make regulations for the better carrying out of the purposes and provisions of this Act, or to give force or effect to its provisions.

(2) Without prejudice to the generality of the powers conferred in subsection (1) regulations may—

(*a*) prescribe forms and procedures for the purposes of this Act;

(*b*) prescribe requirements with which documents delivered for registration comply;

(*c*) provide for the regulation of take over offers made for the shares of a public company;

(*d*) regulate the conduct of liquidations;

(*e*) provide for such other matters as are contemplated by or necessary for giving effect to the transitional provisions of the Act; and

(*f*) prescribe anything required to be prescribed under this Act.

[22 of 2018, s. 35 w.e.f. 3 June 2019.]

FIRST SCHEDULE

(*section 40(b)*)

CONSTITUTION OF A PRIVATE COMPANY LIMITED BY SHARES

1. *Interpretation*

In this constitution "Act" means the Companies Act.

2. ***Issue of new shares***

New shares shall be issued in accordance with section 50 with the preemptive rights provided for in section 52.

3. ***Transfer of shares***

(1) *Freedom to Transfer is Qualified*: Every change in the ownership of shares in the capital of the company shall be subject to the following limitations and restrictions.

(2) *Pre-emptive Provisions*: No share in the capital of the company shall be sold transferred by any shareholder unless and until the rights of preemption hereinafter conferred have been exhausted.

(3) *Transfer Notice and Fair Price*: It shall be required that—

(*a*) every shareholder including the personal representative of a deceased shareholder or the trustee of the property of an insolvent shareholder who desires to sell or transfer any share or shares shall give notice in writing to the board of such desire;

(*b*) if such notice includes several shares it shall not operate as if it were a separate notice in respect of each such share, and the proposing transferor shall be under no obligation to sell or transfer some only of the shares specified in such notice;

(*c*) such notice shall be irrevocable and shall be deemed to appoint the board the proposing transferor's agent to sell such shares in one or more lots to any shareholder or shareholders of the company (including the directors or any of them) at a price to be agreed upon between the party giving such notice and the board or, failing agreement between them within 28 days of the board receiving such notice, at a fair price to be determined on the application of either party by a person to be nominated by the President for the time being of the Law Society of Botswana;

(*d*) such person, referred to in subparagraph (*b*), when nominated, and in certifying the sum which in that person's opinion is the fair price for the share, shall be considered to be acting as an expert and not as an arbitrator.

(4) *Offer to Shareholders and Consequent Sale*: The following conditions shall apply—

(*a*) upon the price for such shares being agreed on or determined, as the case may be, the board shall immediately give notice to each of the shareholders (other than the person wanting to sell or transfer such shares) stating the—

(*b*) number and price of such shares and inviting each of the shareholders to whom the notice is given to state in writing within 21 days after the date of the notice whether such shareholder is willing to purchase any; and

(*c*) maximum number of such shares, where such shareholder is willing to purchase any;

(*d*) at the expiration of 21 days from the date of the notice the board shall—

(i) apportion such shares amongst the shareholders (if more than one) who have expressed a desire to purchase the same; and

(ii) as far as may be *pro rata* according to the number of shares already held by the shareholders respectively, or if there is only one such shareholder, the whole of such shares shall be sold to

that shareholder:

Provided that no shareholder shall be obliged to take more than the maximum number of shares stated in that shareholder's response to such notice;

(*e*) upon such apportionment being made or such one shareholder notifying such shareholder's willingness to purchase, as the case may be, the party desiring to sell or transfer such share or shares shall be bound, upon payment of the said price, to transfer such share or shares to the respective shareholder or shareholders who have or has agreed to purchase the same and, in default thereof, the board may receive and give a good discharge for the purchase money on behalf of the party desiring to sell and enter the name of the purchasers or purchaser in the share register as holder or holders of such share or shares so sold.

(5) *Shares on Offer not Taken up by Shareholders*: In the event of all such shares not being sold under the preceding clause within 60 days of the board receiving notice, the party desiring to sell or transfer shall be at liberty within a further period of 30 days to sell the shares not so sold, but not a portion only, to persons who are not shareholders, provided however, that such party shall not sell them for a price less than the price at which the same have been offered for sale to the shareholders under this clause, but every such sale shall nevertheless be subject to the provisions of clause 4.

(6) *Family Transactions*: Any share—

(*a*) may be transferred by a shareholder to, or to trustees for, any husband or wife or child or grandchild or son-in-law or daughter-in-law of that shareholder, and any share of a deceased shareholder may be transferred by his or her executors or administrators to any husband or grandchild or son-in-law or daughter-in-law of the deceased shareholder; and

(*b*) held by trustees under any such trust as aforesaid may be transferred to any beneficiary, referred to in paragraph (*a*), of such trust, and shares standing in the name of the trustee of the will of any deceased shareholder or trustees under any such trust may be transferred upon any change of trustees for the time being of such will or trust, and the restrictions contained in the preceding subclauses 3(2) to 3(5) inclusive shall not apply to any transfer authorised by this clause but every such transfer shall nevertheless be subject to the provisions of clause 4.

4. ***Refusal to register transfers***

Directors' Right to refuse registration: Subject to compliance with the provisions of section 81, the board may refuse or delay the registration of any transfer of any share to any person whether an existing shareholder or not —

(*a*) if so required by law;

(*b*) if registration would impose on the transferee a liability to the Company and the transferee has not signed the transfer;

(*c*) if a holder of any such share has failed to pay on due date any amount payable thereon either in terms of the issue thereof or in accordance with the constitution (including any call made thereon);

(*d*) if the transferee is a minor or a person of unsound mind;

(*e*) if the transfer is in respect of more than one class of shares;

(*f*) if the transfer is not accompanied by such proof as the board reasonably requires of the right of the transferor to make the transfer;

(*g*) if the pre-emptive provisions contained in Clause 3 have not been complied with; or

(*h*) if the board acting in good faith decides in its sole discretion that registration of the Transfer would not be in the best interests of the company and/or any of its shareholders.

5. ***Purchase or other acquisition of own shares***

(1) *Authority to Acquire Own Shares*: for the purposes of section 65 of the Act, the company is expressly authorised to purchase or otherwise acquire shares issued by it.

(2) *Authority to hold own shares*: Subject to any restrictions or conditions imposed by law the company is expressly authorised to hold shares acquired by it pursuant to section 66 or section 100 of the Act.

6. ***Calls on shares and forfeiture of shares***

Calls on shares and forfeiture of shares shall be conducted in accordance with the Seventh Schedule of the Act.

7. ***Shareholders meetings***

Shareholders meetings shall be conducted in accordance with the Second Schedule of the Act.

8. ***Directors***

(1) The directors of the company shall be such person or persons as may be appointed from time to time by ordinary resolution, or by notice to the company signed by the holder or holders for the time being of the majority of ordinary shares in the capital of the company but so that the total number of directors shall not at any time exceed the number fixed pursuant to subclause (2) or by ordinary resolution pursuant to subclause (3).

(2) The first directors and the number of directors shall be determined in writing by the subscribers to the application for incorporation.

(3) The company may by ordinary resolution increase or reduce the number of directors.

(4) The directors may appoint any person to be a director to fill a casual vacancy or as an addition to the existing directors but the total number of directors shall not at any time exceed the number fixed in accordance with subclause (2) or by ordinary resolution pursuant to subclause (3).

(5) Any director appointed under subclause (4) shall hold office only until the next following annual meeting and shall then retire but is eligible for election at that meeting.

(6) A director shall hold office until removed by special resolution pursuant to section 151(2) of the Act or ceasing to hold office pursuant to section 152 of the Act.

9. ***Remuneration of directors***

The remuneration of directors shall be determined in accordance with section 157.

10. ***Proceedings of directors***

The directors meetings and the proceedings of directors shall be conducted in accordance with the Fourth Schedule.

11. ***Managing Director***

(1) The directors may appoint one or more of their body to the office of managing director for such period and on such terms as they think fit and subject to the terms of any agreement entered into in any particular case may revoke that appointment.

(2) If for any reason a managing director ceases to be a director his appointment shall automatically determine.

(3) A managing director shall, subject to the terms of any agreement entered into in any particular case, receive such remuneration whether by way of salary, commission or participation in profits as the directors may determine.

(4) The directors may entrust to and confer upon the managing director any of the powers exercisable by them with such restrictions as they may think fit, and either generally or to the exclusion of their own powers subject always to section 129 of the Act, and the directors may revoke, alter, or vary, all or any of these powers.

12. ***Dividends***

(1) Subject to the rights of persons, if any, entitled to shares with special rights as to dividend, all dividends shall be declared and paid according to the amounts paid or credited as paid on the shares in respect of which the dividend is paid, but no amount paid or credited as paid on a share in advance of calls shall be treated for the purposes of this article as paid on the share.

(2) All dividends shall be authorised by the board pursuant to section 58 of the Act with the approval of an ordinary resolution of shareholders, provided that the board may make payment of an interim dividend where this appears to be justified by the profits of the company and provided the solvency test is satisfied in accordance with section 58.

(3) All dividends shall be apportioned and paid proportionately to the amounts paid or credited as paid on the shares during any portion or portions of the period in respect of which the dividend is paid, but if any share is issued on terms providing that it shall rank for dividend as from a particular date, that share shall rank for dividend accordingly.

(4) The directors may deduct from any dividend payable to any member all sums of money, if any, presently payable by him to the company on account of calls or otherwise in relation to the shares of the company.

(5) No dividend shall bear interest against the company.

(6) Any dividend, interest, or other money payable in cash in respect of shares may be paid by cheque or postal or money order sent through the post directed to the registered address of the holder, or in the case of joint holders, to the registered address of that one of the joint holders who is first named on the members' register or to such person and to such address as the holder or joint holders may in writing direct.

(7) Every such cheque or postal or money order shall be made payable to the order of the person to whom it is sent.

(8) Any one of the 2 or more joint holders may give effectual receipts for any dividends, bonuses, or other money payable in respect of the shares held by them as joint holders.

13. ***Winding-up***

(1) Subject to the terms of issue of any shares in the company and to subclause (*b*), upon the winding-up of the company, the assets, if any, remaining after payment of the debts and liabilities of the company and the costs of winding-up ("the surplus assets"), shall be distributed among the shareholders in proportion to their shareholding provided, however, that the holders of shares not fully paid up shall only receive a proportionate

share of their entitlement being an amount paid to the company in satisfaction of the liability of the shareholder to the company in respect of the shares either under the constitution of the company or pursuant to the terms of issue of the shares.

(2) Where the company is wound-up, the liquidator may, with the sanction of a special resolution of the company, divide in kind amongst the members the assets of the company, whether they consist of property of the same kind or not, and may for the purpose set such value as he deems fair upon any property to be divided and may determine how the division is to be carried out as between the shareholders or different classes of shareholders.

14. ***One person companies and companies in which all shareholders are directors***

If at any time the company, for a continuous period exceeding six months is a one person company, or is a company in which all shareholders also hold office as director, then, for so long as such circumstance continues, the following provisions shall apply—

(*a*) new shares may be issued by unanimous resolution signed by the shareholder or shareholders having such rights and on such terms and conditions as may be set out in the resolution;

(*b*) a copy of the resolution shall be registered with the Registrar of Companies and Business Names;

(*c*) separate meetings of shareholders and directors need not be held provided all matters required by the Act to be dealt with by a general meeting of shareholders or a meeting of directors are dealt with by way of a unanimous resolution.

SECOND SCHEDULE

(*section 109*)

PROCEEDINGS AT MEETINGS OF SHAREHOLDERS

1. ***Chairperson***

(1) If the directors have elected a chairperson of the board, and the chairperson of the board is present at a meeting of shareholders, he or she shall chair the meeting.

(2) If no chairperson of the board has been elected or if, at any meeting of shareholders, the chairperson of the board is not present within 15 minutes of the time appointed for the commencement of the meeting, the directors present shall elect one of their number to be chairperson of the meeting. If no director is willing to act as chairperson, or if no director is present within 15 minutes of the time appointed for holding the meeting, the shareholders present may choose one of their number to be chairperson of the meeting.

2. ***Notice of meetings***

(1) Written notice of the time and place of a meeting of shareholders shall be sent to every shareholder entitled to receive notice of the meeting and to every director, any secretary and any auditor of the company not less than 10 working days before the meeting.

(2) The notice shall state—

(*a*) the nature of the business to be transacted at the meeting in sufficient detail to enable a shareholder to form a reasoned judgment in relation to it; and

(*b*) the text of any special resolution to be submitted to the meeting.

(3) An irregularity in a notice of a meeting is waived if all the shareholders entitled to attend and vote at the meeting attend the meeting without protest as to the irregularity, or if all such shareholders agree to the waiver.

(4) The accidental omission to give notice of a meeting to, or the failure to receive notice of a meeting by, a shareholder does not invalidate the proceedings at that meeting. The chairperson may, and if directed by the meeting shall, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting of shareholders is adjourned for 30 days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

NOTE: Subclauses 1 to 3 apply notwithstanding any contrary provision in any constitution adopted by the company.

3. ***Methods of holding meetings***

A meeting of shareholders may be held either by—

(*a*) a number of shareholders, who constitute a *quorum*, being assembled together at the place, date, and time appointed for the meeting; or

(*b*) means of audio, or audio and visual, communication by which all shareholders participating and constituting a *quorum*, can simultaneously hear each other throughout the meeting.

NOTE: Paragraph (*a*) applies notwithstanding any contrary provision in any constitution adopted by the company.

4. ***Quorum***

(1) Subject to subclause (3) of this clause, no business may be transacted at a meeting of shareholders if a *quorum* is not present.

(2) A *quorum* for a meeting of shareholders is present if shareholders or their proxies are present or have cast postal votes who are between them able to exercise a majority of the votes to be cast on the business to be transacted by the meeting.

(3) If a *quorum* is not present within 30 minutes after the time appointed for the meeting—

(*a*) in the case of a meeting called under section 106(*b*) of the Act, the meeting is dissolved;

(*b*) in the case of any other meeting the meeting is adjourned to the same day in the following week at the same time and place, or to such other date, time, and place as the directors may appoint; and

(*c*) if, at the adjourned meeting, a *quorum* is not present within 30 minutes after the time appointed for the meeting, the shareholders or their proxies present are a *quorum*.

NOTE: Subclauses 1, 3(*a*) and (*b*) apply notwithstanding any contrary provision in any constitution adopted by the company.

5. ***Voting***

(1) In the case of a meeting of shareholders held under clause 3(*a*) of this Schedule, unless a poll is demanded, voting at the meeting shall be by whichever of the following methods is determined by the chairperson of the meeting—

(*a*) voting by voice; or

(*b*) voting by show of hands.

(2) In the case of a meeting of shareholders held under clause 3(*b*) of this Schedule, unless a poll is demanded, voting at meeting shall be by the shareholders signifying individually their assent or dissent by voice.

(3) A declaration by the chairperson of the meeting that a resolution is carried by the requisite majority is conclusive evidence of that fact unless a poll is demanded in accordance with subclause (4) of this clause.

(4) At a meeting of shareholders a poll may be demanded by—

(*a*) not less than five shareholders having the right to vote at the meeting;

(*b*) a shareholder or shareholders representing not less than 10 per cent of the total voting rights of all shareholders having the right to vote at the meeting;

(*c*) a shareholder or shareholders holding shares in the company that confer a right to vote at the meeting and on which the aggregate amount paid up is not less than 10 per cent of the total amount paid up on all shares that confer that right; or

(*d*) the chairperson of the meeting.

(5) A poll may be demanded either before or after the vote is taken on a resolution.

(6) If a poll is taken, votes shall be counted according to the votes attached to the shares of each shareholder present in person or by proxy and voting.

(7) The chairperson of a shareholders' meeting is not entitled to a casting vote.

(8) For the purposes of this clause, the instrument appointing a proxy to vote at a meeting of a company confers authority to demand or join in demanding a poll and a demand by a person as proxy for a shareholder has the same effect as a demand by the shareholder.

(9) Subject to any rights or restrictions for the time being attached to any class of shares, every shareholder present in person or by proxy and voting by voice or by show of hands and every shareholder voting by postal vote (where this permitted) shall have one vote.

(10) The demand for a poll may be withdrawn.

(11) Except as provided in subclause 12, if a poll is duly demanded it shall be taken in such manner as the chairperson directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

(12) A poll demanded on the election of a chairperson or on a question of adjournment shall be taken immediately. A poll demanded on any other question shall be taken at such time and place as the meeting directs, and any business other than that on which a poll has been demanded may be proceeded with pending the taking of the poll.

NOTE: The subclauses of this clause, other than subclauses 7 and 9 to 12, apply notwithstanding any contrary provision in any constitution adopted by the company.

6. ***Proxies***

(1) A shareholder may exercise the right to vote either by being present in person or by proxy.

(2) A proxy for a shareholder is entitled to attend and be heard at a meeting of shareholders as if the proxy were the shareholder.

(3) A proxy shall be appointed by notice in writing signed by the shareholder and the notice shall state whether the appointment is for a particular meeting or a specified term.

(4) No proxy is effective in relation to a meeting unless a copy of the notice of appointment is produced before the start of the meeting. Any power of attorney or other authority under which the proxy is signed or a notarially certified copy shall also be produced.

(5) A proxy form shall be sent with each notice calling a meeting of the company.

(6) The instrument appointing a proxy shall be in writing under the hand of the appointer or of his agent duly authorised in writing or in the case of a corporation under the hand of an officer or of an agent duly authorised.

(7) The instrument appointing a proxy shall be in the following form—

I/we.....of..... being shareholders of the above named company hereby appoint .....
Or failing him/her.....of .....
As my/our proxy to vote for me/us at the meeting of the company to be held on..... and at any adjournment of the meeting.
Signed this.....day of..... 200.....

NOTE: The constitution of a company may provide that a proxy is not effective unless it is produced by a specified time before the start of a meeting if the time specified is not earlier than 24 hours before the start of the meeting. Otherwise the provisions of this clause (apart from the form of proxy given in subclause (4)) apply notwithstanding any contrary provision in any constitution adopted by the company.

7. ***Postal votes***

(1) A shareholder may exercise the right to vote at a meeting by casting a postal vote in accordance with the provisions of this clause.

(2) The notice of a meeting at which shareholders are entitled to cast a postal vote shall state the name of the person authorised by the board to receive and count postal votes at that meeting.

(3) If no person has been authorised to receive and count postal votes at a meeting, or if no person is named as being so authorised in the notice of the meeting, every director is deemed to be so authorised.

(4) A shareholder may cast a postal vote on all or any of the matters to be voted on at the meeting by sending a notice of the manner in which his or her shares are to be voted to a person authorised to receive and

count postal votes at that meeting. The notice shall reach that person not less than 48 hours before the start of the meeting.

(5) It is the duty of a person authorised to receive and count postal votes at a meeting—

(*a*) to collect together all postal votes received by him or her or by the company; and

(*b*) in relation to each resolution to be voted on at the meeting, to count—

(i) the number of shareholders voting in favour of the resolution and the number of votes cast by each shareholder in favour of the resolution; and

(ii) the number of shareholders voting against the resolution, and the number of votes cast by each shareholder against the resolution; and

(*c*) to sign a certificate that he or she has carried out the duties set out in paragraphs (*a*) and (*b*) of this subclause and which sets out the results of the counts required by paragraph (*b*) of this subclause; and

(*d*) to ensure that the certificate required by paragraph (*c*) of this subclause is presented to the chairperson of the meeting.

(6) If a vote is taken at a meeting on a resolution on which postal votes have been cast, the chairperson of the meeting shall—

(*a*) on a vote by show of hands, count each shareholder who has submitted a postal vote for or against the resolution;

(*b*) on a poll, count the votes cast by each shareholder who has submitted a postal vote for or against the resolution.

(7) The chairperson of a meeting shall call for a poll on a resolution on which he or she holds sufficient postal votes that he or she believes that if a poll is taken the result may differ from that obtained on a show of hands.

(8) The chairperson of a meeting shall ensure that a certificate of postal votes held him or her is annexed to the minutes of the meeting.

8. ***Minutes***

(1) The board shall ensure that minutes are kept of all proceedings at meetings of shareholders.

(2) Minutes which have been signed correct by the chairperson of the meeting are *prima facie* evidence of the proceedings.

NOTE: This clause applies notwithstanding any contrary provision in any constitution adopted by the company.

9. ***Shareholder proposals***

(1) A shareholder may give written notice to the board of a matter the shareholder proposes to raise for discussion or resolution at the next meeting of shareholders at which the shareholder is entitled to vote.

(2) If the notice is received by the board not less than 20 working days before the last day on which notice of the relevant meeting of shareholders is required to be given by the board, the board shall, at the expense of the company, give notice of the shareholder proposal and the text of any proposed resolution to all shareholders entitled to receive notice of the meeting.

(3) If the notice is received by the board not less than five working days and not more than 20 working days before the last day on which notice of the relevant meeting of shareholders is required to be given by the board, the board shall, at the expense of the shareholder, give notice of the shareholder proposal and the text of any proposed resolution to all shareholders entitled to receive notice of the meeting.

(4) If the notice is received by the board less than five working days before the last day on which notice of the relevant meeting of shareholders is required to be given by the board, the board may, if practicable, and at the expense of the shareholder, give notice of the shareholder proposal and the text of any proposed resolution to all shareholders entitled to receive notice of the meeting.

(5) If the directors intend that shareholders may vote on the proposal by proxy or by postal vote, they shall give the proposing shareholder the right to include in or with the notice given by the board a statement of not more than 1000 words prepared by the proposing shareholder in support of the proposal, together with the name and address of the proposing shareholder.

(6) The board is not required to include in or with the notice given by the board a statement prepared by a shareholder which the directors consider to be defamatory, frivolous, or vexatious.

(7) Where the costs of giving notice of the shareholder proposal and the text of any proposed resolution are required to be met by the proposing shareholder, the proposing shareholder shall, on giving notice to the board, deposit with the company or tender to the company a sum sufficient to meet those costs.

NOTE: This clause applies notwithstanding any contrary provision in any constitution adopted by the company.

10. ***Corporations may act by representative***

A body corporate which is a shareholder may appoint a representative to attend a meeting of shareholders on its behalf in the same manner as that in which it could appoint a proxy.

NOTE: This clause applies notwithstanding any contrary provision in any constitution adopted by the company.

11. ***Votes of joint holders***

Where two or more persons are registered as the holder of a share, the vote of the person named first in the share register and voting on a matter shall be accepted to the exclusion of the votes of the other joint holders.

NOTE: This clause applies notwithstanding any other provision in any constitution adopted by the company.

12. ***Loss of voting right if calls unpaid***

If a sum due to a company in respect of a share has not been paid, that share may not be voted at a shareholder's meeting other than a meeting of an interest group.

13. ***Other proceedings***

Except as provided in this Schedule, a meeting of shareholders may regulate its own procedure.

THIRD SCHEDULE

(*section 129(1)*)

SECTIONS OF THIS ACT THAT CONFER POWERS ON DIRECTORS THAT CANNOT BE DELEGATED

1. Section 50 (which relates to the issue of shares);

2. Sections 53 and 54 (which relates to the consideration for the issue of shares);

3. Section 58 (which relates to distributions);

4. Section 61 (which relates to the issue of shares *in lieu* of dividends);

5. Section 62 (which relates to shareholder discounts);

6. Section 66 (which relates to offers to acquire shares);

7. Section 73 (which relates to the redemption of shares at the option of a company);

8. Section 76 (which relates to the provision of financial assistance);

9. Section 184 (which relates to a change of registered office);

10. Section 224 (which relates to the manner of approving an amalgamation proposal); and

11. Section 225 (which relates to short form amalgamations).

FOURTH SCHEDULE

(*section 156*)

PROCEEDINGS OF THE BOARD OF A COMPANY

1. *Chairperson*

(1) The directors may elect one of their number as chairperson of the board and determine the period for which he is to hold office.

(2) If no chairperson is elected, or if at a meeting of the board the chairperson is not present within five minutes after the time appointed for the commencement of the meeting, the directors present may choose one of their number to be chairperson of the meeting.

2. *Notice of Meeting*

(1) A director or, if requested by a director to do so, an employee of the company, may convene a meeting of the board by giving notice in accordance with this clause.

(2) Not less than two days' notice of a meeting of the board must be sent by any means of communication to every director who is in Botswana, and the notice must include the date, time, and place of the meeting and the matters to be discussed.

(3) An irregularity in the notice of a meeting is waived if all directors entitled to receive notice of the meeting attend the meeting without protest as to the irregularity or if all directors entitled to receive notice of the meeting agree to the waiver.

3. *Methods of holding meetings*

A meeting of the board may be held either—

(*a*) by a number of the directors who constitute a *quorum*, being assembled together at the place, date, and time appointed for the meeting; or

(*b*) by means of audio, or audio and visual, communication by which all directors participating and constituting a *quorum* can simultaneously hear each other throughout the meeting.

4. ***Quorum***

(1) A *quorum* for a meeting of the board shall be fixed by the board and if not so fixed shall be a majority of the directors.

(2) No business may be transacted at a meeting of directors if a *quorum* is not present.

5. ***Voting***

(1) Every director has one vote.

(2) The chairperson does not have a casting vote.

(3) A resolution of the board is passed if it is agreed to by all directors present without dissent or if a majority of the votes cast on it are in favour of it.

(4) A director present at a meeting of the board is presumed to have agreed to, and to have voted in favour of, a resolution of the board unless he expressly dissents from or votes against the resolution at the meeting.

6. ***Minutes***

The board must ensure that minutes are kept of all proceedings at meetings of the board.

7. ***Resolution in writing***

(1) A resolution in writing, signed or assented to by all directors then entitled to receive notice of a board meeting, is as valid and effective as if it had been passed at a meeting of the board duly convened and held.

(2) Any such resolution may consist of several documents (including facsimile or other similar means of communication) in like form each signed or assented to by one or more directors.

(3) A copy of any such resolution must be entered in the minute book of board proceedings.

8. ***Other proceedings***

Except as provided in this Schedule, the board may regulate its own procedure.

FIFTH SCHEDULE

(*section 115(4)*)

PROVISIONS RELATING TO TRUSTEE FOR DEBENTURE HOLDERS AND TRUST DEED

1. ***Qualification to act as trustee for debenture holders***

(1) Subject to subclause (2) and (3), no person shall be qualified to act as a trustee for debenture holders unless that person is—

(*a*) a legal practitioner;

(*b*) a banking company;

(*c*) an insurance company;

(*d*) a qualified auditor;

(*e*) an investment trust company, finance or other corporation or person approved in writing by the Minister for the purpose of section 115, either generally or in respect of a particular issue.

(2) A person shall not be qualified for appointment as a trustee for debenture holders if he is—

(*a*) a director, officer, or employee of the company which issues debentures covered by the deed; or

(*b*) a substantial shareholder of the company.

(3) A trustee for debenture holders shall be disqualified from acting as such and shall vacate office if he—

(*a*) ceases to be qualified under subclause (1) or disqualified under subclause (2);

(*b*) is adjudged bankrupt or, in the case of a body corporate, goes into liquidation or makes an arrangement or composition with its creditors;

(*c*) becomes of unsound mind; or

(*d*) is convicted of an offence involving fraud or dishonesty.

(4) Where the trustee for debenture holders is a person other than a body corporate, a successor to him shall be named in the trust deed.

(5) Where the successor dies or becomes disqualified during the term of office of the trustee, a meeting of debenture holders shall be convened by the trustee within 28 days to appoint another person as successor.

(6) On the disqualification of the trustee under subclause (3) or on his death or resignation the successor shall immediately and without special appointment assume office, and shall within 28 days of assuming office convene a meeting of debenture holders to name his successor in accordance with subclause (5).

(7) Where the trustee for debenture holders is a body corporate it shall not without the consent of the court be discharged or retire from office until another trustee has been appointed to and taken office in accordance with the trust deed.

2. *Trust deed*

(1) A company may, as security for a debenture, but subject to any other laws create over any of its assets or property a charge, of whatever nature, in favour of the trustee for debenture holders.

(2) Every trust deed shall state—

(*a*) the maximum sum which the company may raise by issuing debenture of the same class;

(*b*) the maximum discount which may be allowed on the issue or reissue of the debentures, and the maximum premium at which the debentures may be made redeemable;

(*c*) where debenture stock is to be issued under the deed, that—

(i) the company is indebted to the trustee for debenture holders' for the amounts from time to time payable in respect of the debentures; and

(ii) except for his own remuneration and indemnity against expenses incurred by him, the trustee for debenture holders holds on behalf of the debenture holders any amount from time to time issued under the deed and remaining outstanding in accordance with their respective rights;

(*d*) the nature of any assets over which any charge is created by the deed in favour of the trustee for debenture holders for the benefit of the debenture holders equally, and except where such a charge is a floating charge, the identity of the assets subject to it;

(*e*) the nature of any assets over which any charge has been or will be created in favour of any person other than the trustee for debenture holders for the benefit of the debenture holders equally, and except where such a charge is a floating charge, the identity of the assets subject to it;

(*f*) whether the company has created or will have power to create a charge for the benefit of some, but not all, of the holders of debentures issued under the deed;

(*g*) any prohibition or restriction on the power of the company to issue debentures or to create charges on any of its assets ranking in priority to, or equally with, the debentures issued under the deed;

(*h*) whether the company will have power to—

(i) acquire debentures issued under the deed before the date for their redemption;

(ii) re-issue such debentures;

(*i*) the date on which the principal of the debentures issued under the deed will be repaid and, unless the whole principal is to be repaid to all the debenture holders at the same time, the manner in which repayment will be effected;

(*j*) the date on which interest on the debentures issued under the deed will be paid and the manner in which payment will be made;

(*k*) in the case of convertible debentures, the date and terms on which the debentures may be converted into shares and the amounts which will be credited as paid up on such shares, and the date and terms on which the debenture holders may exercise any right to subscribe for shares in place of the debentures held by them;

(*l*) the circumstances in which the debenture holders will be entitled to realise any charge vested in the trustee for debenture holders or any other person for their benefit;

(*m*) the circumstances in which the trustee for debenture holders may appoint a receiver or manager and the power and duties of the receiver or manager;

(*n*) the powers of the company and the trustee for debenture holders to call meetings of the debenture holders, and the rights of debenture holders to require the company or the trustee for debenture holders to call such meetings;

(*o*) whether the rights of debenture holders may be altered or abrogated and if so, the conditions which must be fulfilled and the procedure which must be followed to effect such an alteration or abrogation;

(*p*) the amount or rate of remuneration to be paid by the company to the trustee for debenture holders and the period for which it will be paid, and whether it will be paid in priority to the principal, interest and costs in respect of debentures issued under the deed.

3. ***Powers of trustee for debenture holders***

(1) On the execution of a debenture trust deed the debenture debt shall, where the deed so provides, vest as it is created in the trustee for debenture holders and thereupon he shall—

(*a*) have power to act in his own name on behalf of the debenture holders;

(*b*) be entitled to represent them in all matters affecting the debentures and their rights and obligations under the deed; and

(*c*) notwithstanding the generality of the foregoing powers, be able to—

(i) take title in his own name to any property charged by the borrowing company under the deed;

(ii) notwithstanding any other law be registered on behalf of the debenture holders in any register of movable or immovable property, the entry in the register to be made in his own name followed by the words "as the trustee for debenture holders under a trust deed dated the ....."

(iii) hold any document of title, certificate or other security conferring or evidencing the title or interest of the borrowing company in or otherwise relating to the property charged by the deed;

(iv) take or defend legal proceedings in his own name on behalf of the debenture holders in relation to any matter connected with the protection of their interest in the assets of the borrowing company and their rights and obligations under the deed;

(v) enter into any contract, compromise or arrangement in his own name on behalf of the debenture holders;

(vi) represent the debenture holders, in person or by proxy, at a meeting of the borrowing company, or of creditors of the borrowing company or at any other meeting which the debenture holders have a right to attend;

(vii) take any enforcement action under the deed in the name of and on behalf of the debenture holders.

(2) Every company shall at the request of a debenture holder and on payment of the fee prescribed in the Twelfth Schedule forward to him a copy of the trust deed relating to or securing any issue of debentures held by him.

4. ***Right of trustee for debenture holders to obtain information***

(1) A trustee for debenture holders shall be entitled to receive all notices of and other communications relating to any general meeting of the borrowing company which a shareholder is entitled to receive.

(2) A borrowing company shall on the written request of the trustee for debenture holders—

(*a*) make available for his inspection any book of the company;

(*b*) provide him with such information as he requires with respect to any matter relating to such book.

5. ***Meetings on request***

(1) A borrowing company shall, on the written request of the trustee for debenture holders or on that of persons holding not less than one-tenth in nominal value of the issued debentures to which the trust deed relates, summon a meeting of the holders of those debentures for the purpose of—

(*a*) considering the accounts and balance sheet of the company for its last preceding financial year; and

(*b*) giving directions to the trustee for debenture holders in relation to the exercise of his powers.

(2) Every meeting under subclause (1) shall be summoned by sending a notice by post, specifying the time and place of the meeting, to every holder of the debentures at his last known address not later than14 days before the date of the proposed meeting.

(3) The meeting shall be held under the chairmanship of a person nominated by the trustee for debenture holders, or such other person as may be appointed in that behalf by the debenture holders present at the meeting.

6. ***Duties of trustee for debenture holders***

(1) Every trustee for debenture holders shall—

(*a*) exercise reasonable diligence to ascertain whether or not the borrowing company has committed a breach of the terms of the trust deed;

(*b*) except where he is satisfied that the breach will not materially prejudice any security conferred by the deed or the interests of the debenture holders, do all such things as he is empowered to do to cause the borrowing company to remedy a breach of those terms of conditions;

(*c*) exercise reasonable diligence to ascertain whether or not the assets of the borrowing company that are or may be available, whether by way of security or otherwise, are sufficient or likely to be sufficient to discharge the amounts of the debentures as they become due;

(*d*) hold for the benefit of the debenture holders, and account to them for, any money or property coming into his hands by way of payment of principal or interest under the trust deed or on a realisation of the security conferred by the deed.

(2) Where, after due inquiry, a trustee for debenture holders is of the opinion that the assets of the company are insufficient or likely to be insufficient to discharge the amounts of the debentures as they become due, he may, having regard to—

(*a*) any other powers or remedies available to him for the protection of the interests of the debenture holders;

(*b*) the availability, by way of security or otherwise, of any assets of any corporation that has guaranteed or agreed to guarantee the repayment of the amounts of the debentures;

(*c*) the possible effects on the borrowing company's affairs of any application to the court under this subclause; and

(*d*) all other relevant circumstances, apply to the court for an order under subclause (3).

(3) On an application for an order under this clause the court may, after giving the borrowing company an opportunity of being heard, and having regard to the rights of all creditors of the borrowing company, give such directions as it thinks fit to protect the interests of the debenture holders, the members of the borrowing company, or the public, whether by way of—

(*a*) staying any proceedings by or against the borrowing company;

(*b*) restraining the payment by it of any money to any holders of debentures or to any class of such holders; or

(*c*) appointing a receiver of such of its property as constitutes the security for the debentures, or otherwise.

7. *Repayment of loans and deposits*

(1) Where, in a prospectus issued in connection with an invitation to subscribe for or to purchase debentures, there is a statement as to any particular purpose or project for which the moneys received by the company in response to the invitation are to be applied, the company shall report to the trustee for debenture holders as to the progress that has been made towards achieving the purpose or completing the project.

(2) Where it appears to the trustee for debenture holders that the purpose or project referred to in the prospectus has not been achieved or completed within the time stated in the prospectus or, where no time is stated, within a reasonable time, he may and shall, if in his opinion it is necessary for the protection of the interests of the debenture holders give written notice to the company requiring it to repay the money received and, subject to subclause (3) within one month, lodge a copy of the notice.

(3) The trustee for debenture holders shall not give the notice under subclause (2) if he is satisfied that—

(*a*) the purpose or project has been substantially achieved or completed;

(*b*) the interests of the debenture holders have not been materially prejudiced by the failure to achieve or complete the purpose or project within the time stated in the prospectus or within a reasonable time; or

(*c*) the failure to achieve or complete the purpose or project was due to circumstances beyond the control of the company that could not reasonably have been foreseen at the time the prospectus was issued.

(4) On receipt by the company of a notice referred to in subclause (2), the company shall be liable to repay any money owing as the result of a loan or deposit made in response to the invitation unless—

(*a*) before the money was accepted, the company had given written notice to the person from whom the money was received specifying the purpose or project for which the money would in fact be used and the money was accepted by the company accordingly; or

(*b*) the company by written notice given to the debenture holders—

(i) has specified the purpose or project for which the money would in fact be applied by the company; and

(ii) has offered to repay the money to the debenture holders and they have not within 14 days after the receipt of the notice, or such longer time as it specified in the notice, demanded in writing from the company repayment of the money.

(5) Where the company has given written notice under subclause (4), specifying the purpose or project for which the money will in fact be applied by the company, this clause shall apply and have effect as if the purpose or project so specified in the notice was the particular purpose or project specified in the prospectus as the purpose or project for which the money was to be applied.

8. *Release of trustee from obligations*

(1) Subject to subclause (2) and (3) a provision in a trust deed or in a contract with debenture holders secured by a trust deed, shall be void in so far as it would have the effect of exempting the trustee for debenture holders from, or indemnifying him against, liability for exercising reasonable diligence and care in the carrying out of his duties under the deed or observing any of the provisions of clauses 6 and 7.

(2) Subclause (1) shall not invalidate a provision enabling release to be given—

(*a*) with the concurrence of a majority of not less than three-fourths in nominal value of the debenture holders present and voting in person or, where proxies are permitted, by proxy at a meeting summoned for the purpose; and

(*b*) with respect to specific acts or omissions or on the trustee for debenture holders ceasing to act.

(3) A trustee for debenture holders may rely on a certificate or report given or statement made by any person who is a legal practitioner for or auditor or officer of the borrowing company, if he has reasonable ground for believing that the person was competent to give the certificate or report or to make the statement.

SIXTH SCHEDULE

(*section 217(5)*)

1. Form of Annual Return of a Company Limited by Shares
Annual Return of the ....Company Limited, made up to the date of the Annual Meeting.
Date of Meeting ..... or Resolution *in lieu* of meeting under section 107(2) of the Act.
1. The physical and postal address of the registered office of the Company:
.....
2. The physical and postal address of the Company:
.....
3. The address at which the register of shareholders or members is kept (if not kept at the registered office)
.....
4. The address at which the financial records are kept (if not kept at the registered office)
.....
5. The company is - [tick correct box]
(i) a public company

(ii) a non-exempt private company	
(iii) an exempt private company	

2. Summary of Share Capital and Debentures	
Share Capital	
(*a*) Total number of shares issued by the Company:	.....
(*b*) Total amount paid up on shares	P.....
Total amount called but unpaid	P.....
Amount received on any shares forfeited	P.....
Stated Capital	P.....

(3) Classes of shares	Number	Class
	.....	.....
	.....	.....
	.....	.....
	.....	.....

(4) Number of shares of each class issued subject to payment wholly in cash	....	..... shares ..... shares
	....	..... shares

		..... shares
(5) Number of shares of each class issued as fully paid up for a consideration other than cash	..... shares ..... shares ..... shares ..... shares	..... shares ..... shares ..... shares ..... shares
(6) The nature of the consideration given for such shares.	.....	.....
(7) Number of shares of each class issued as partly paid up for a consideration other than cash and extent to which such share is so paid up	.... shares issued as paid up to extent of P..... per share	
	.... shares issued as paid up to extent of P..... per share	
	.... shares issued as paid up to extent of P..... per share	
	.... shares issued as paid up to extent of P..... per share	
(8) The nature of the consideration given for such shares	....	

(9) Amount called up on shares of each class	
P.....per share on .....shares P.....per share on .....shares P.....per share on .....shares	

(10) Total number of shares of each class forfeited	
....shares..... .....shares..... .....shares	

(11) Total amount paid, if any, on shares forfeited	P.....
(12) The total number of shares purchased or otherwise acquired by the company	P.....
(13) The total number of shares redeemed by the company	P.....
(14) The total number of shares held as Treasury shares	P.....
(15) Total amount of the sums, if any, allowed by way of discount in respect of any debentures since the date of the last return	P.....
(16) Total amount of indebtedness of the company in respect of all charges which are required to be registered with the Registrar.	P.....

3. Particulars of Directors, Auditors and Secretaries
Names and Addresses of the Directors, Auditors, Secretaries and Share Transfer Secretaries on the .....day of.....

Names	**Directors** **Addresses**	Other Directorships
Names	**Auditors**	Addresses
Names	**Secretary**	Addresses
Names	**Share Transfer Secretary**	Addresses

4. Other matters (to be stated on a separate page)

(1) If the company is a party to a listing agreement with a stock exchange, state the names and addresses of, and the number of shares held by—

(i) the persons holding the 10 largest numbers of shares; or

(ii) if there is more than one class of shares, the persons holding the 10 largest numbers of shares in each class.

(2) Subject to subparagraph (2), unless the following particulars are included in the balance sheet or in a note on or a statement annexed to the balance sheet, which is required to be filed with this annual return particulars of—

(i) the names, countries of incorporation and nature of the businesses and subsidiaries of the company and of all corporations in which the company is entitled by itself or a nominee to exercise more than 25 per cent of the votes exercisable at a general meeting of the company; and

(ii) where the company is a subsidiary of another company or corporation, the name of the company or corporation regarded by the directors as the ultimate holding company of the first mentioned company, and if it is known to them the country in which it is incorporated.

Note: The information required by this paragraph need not be given if the Registrar so directs and for this purpose the Registrar shall have regard to whether the disclosure would be harmful to the business of the company or of that of other companies and this harm outweighs any benefit to the public in requiring this disclosure.

5. List of Shareholders

Shareholder register number (if any)	***Name and Address***	***Number of Shares held***

6. List of shares transferred since date of incorporation/last annual returnFIND*

Date of Transfer	Name of Transferring Shareholder	Name of Transferee	Number of shares transferred

7. Copy of last Audited Financial Statements and Annual Report of the Company (where required to be filed in terms of section 209 of the Act.)

Note: This return must include a copy, certified both by a Director and by the Secretary of the Company to be a true copy, of the financial statements laid before the company in general meeting during the period to which the summary relates, and, in addition, a copy, certified as aforesaid, of the report of the auditors on the financial statements and a copy of the Annual Report of the directors where required to be filed in terms of section 212.

8. Certificates to be given by a Private Company

(1) We certify—

(i) that the Company has not since the date of incorporation of the Company/ the last Annual ReturnFIND** issued any invitation to the public to subscribe for any shares or debentures of the Company;

(ii) the number of shareholders or members of the company is .....

.....
Director

.....
Secretary

(2) Should the number of shareholders or members of the Company exceed 25, the following certificate is required:—

We certify that the excess of members of the Company above 25 consists wholly of persons who are in the employment of the Company and/or of persons who, having been formerly in the employment of the Company, were while in such employment, and have continued after the determination of such employment to be, shareholders or members of the Company.

.....
Director

.....
Secretary

(3) In case of a private company which has passed an unanimous resolution under section 246 that no interests register need be kept by the company, state the date of the resolution
.....

We certify that no shareholder has, at the date of the annual return, given notice in writing to the company requiring it to keep an interests register.

.....
Director

.....
Secretary

* >Strike out whichever is not applicable.>
** >Delete whichever is inappropriate.>

SEVENTH SCHEDULE

(*section 92(3)*)

CALLS ON SHARES AND FORFEITURE OF SHARES

1. Calls on Shares

(1) *Board May Make Calls*: The board may from time to time make such calls as it thinks fit upon the shareholders in respect of any amount unpaid on their shares and not by the conditions of issue made payable at a fixed time or times, and each shareholder shall, subject to receiving at least 14 days' written notice specifying the time or times and place of payment, pay to the company at the time or times and place so specified the amount called. A call may be revoked or postponed as the board may determine.

(2) *Timing of Calls*. A call may be made payable at such times and in such amount as the board may determine.

(3) *Liability of Joint Holders*: The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

(4) *Interest*: If an amount called in respect of a share is not paid before or on the time appointed for payment thereof, the person from whom the amount is due shall pay interest on that amount from the time appointed for payment thereof to the time of actual payment at such rate not exceeding 10 per cent per annum as the board may determine, but the board shall be at liberty to waive payment of that interest wholly or in part.

(5) *Instalments*: Any amount which by the terms of issue of a share becomes payable on issue or at any fixed time shall for all purposes be deemed to be a call duly made and payable at the time at which by the terms of issue the same becomes payable and, in case of non-payment, all the relevant provisions of this constitution relating to payment of interest and expenses, forfeiture or otherwise shall apply as if the amount had become payable by virtue of a call duly made and notified.

(6) *Differentiation as to Amounts*: The board may, on the issue of shares, differentiate between the holders as to the amount of calls to be paid and the times of payment.

2. Forfeiture of Shares

(1) *Notice of Default*: If any person fails to pay any call or any instalment of a call for which such person is liable at the time appointed for payment, the board may at any time thereafter serve notice on such person requiring payment of the amount unpaid together with any interest which may have accrued.

(2) *Final Payment Date*: The notice shall name a further day (not earlier than the expiration of 14 days from the date of service of the notice) on or before which the payment required by the notice is to be made, and shall state that, in the event of non payment on or before the time appointed, the shares in respect of which the amount was owing will be liable to be forfeited.

(3) *Forfeiture*: If the requirements of any such notice are not complied with, any share in respect of which the notice has been given may be forfeited, at any time before the required payment has been made, by resolution of the board to that effect. Such forfeiture shall include all dividends and bonuses declared in respect of the forfeited share and not actually paid before the forfeiture.

(4) *Sale of Forfeited Shares*: A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the board in its sole discretion thinks fit and, at any time before a sale or disposition, the forfeiture may be cancelled on such terms as the board thinks fit. If any forfeited share shall be sold within 12 months of the date of forfeiture, the residue, if any, of the proceeds of sale after payment of all costs and expenses of such sale or any attempted sale and all amounts owing in respect of the forfeited share and interest thereon shall be paid to the person whose share has been forfeited.

(5) *Cessation of Shareholding*: A person whose share has been forfeited shall cease to be a shareholder in respect of the forfeited share, but shall, nevertheless, remain liable to pay to the company all amounts which, at the time of forfeiture, were payable by such person to the company in respect of the share, but liability shall cease if and when the company receives payment in full of all such amounts.

(6) *Evidence of Forfeiture*: A statutory declaration in writing declaring that the declarant is a director of the company and that a share in the company has been duly forfeited on a date stated in the declaration shall be conclusive evidence of such facts as against all persons claiming to be entitled to the share.

(7) *Validity of Sale*: The company may receive the consideration, if any, given for forfeited share on any sale or disposition thereof and may execute a transfer of the share in favour of the person to whom the share is sold or disposed of, and such person shall then be registered as the holder of the share and shall not be bound to see to the application of the purchase money, if any, nor shall such person's title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

EIGHTH SCHEDULE

(*section 247(1)(b)*)

PROVISIONS OF ACT NOT APPLYING TO A PRIVATE COMPANY ACTING UNDER UNANIMOUS AGREEMENT

Issue of shares under section 50.

Authorisation of a dividend under sections 58 to 60.

The approval of a discount scheme under section 62.

The procedure for purchasing or acquiring shares under section 66.

The procedure for issuing redeemable shares under sections 73, 74(1) and 75(1).

The procedure for providing financial assistance for the purchase of shares under section 76.

The approval of remuneration of directors under section 157.

NINTH SCHEDULE

[26 of 2008, s. 8.]

(*section 249(4)*)

PROVISIONS OF THE ACT WHICH DO NOT APPLY TO CLOSE COMPANIES

(*a*) Parts VI, VII and VIII - shares, title to shares, transfers and share register, and shareholder's rights and obligations.

(*b*) Part X - directors and secretaries other than section 160 which shall apply to close companies with the reference to a director being read as a reference to a member.

(*c*) Part XIII - accounting records and disclosure except that sections 191 to 211 shall apply to every close company which is a non-exempt close company as provided by section 272(4), and sections 190 and 218 to 221 which shall apply to all close companies.

(*d*) Sections 212 to 216 - annual reports.

(*e*) Part XIV - amalgamations.

(*f*) Part XVII - companies limited by guarantee.

(*g*) Part XVIII - private companies.

(*h*) Part XXIV - external companies.

(*i*) Part XXV - transfer of registration and registration of statutory corporations as companies.

(*j*) Sections 366 to 368, 391, 393, 394, 395 to 397 - liabilities of contributories but sections 398, 401, 425, 428, 458, 459, 463 and 465 shall apply as if a member of a close company were a contributory.

(*k*) Part XXVII - winding-up of unregistered associations.

TENTH SCHEDULE

(*section 303(1)(a)*)

MATTERS TO BE STATED IN PROSPECTUS IN ADDITION TO THOSE REQUIRED IN THE ACT

Interpretation

For the purposes of this Schedule, unless the context otherwise indicates—

(*a*) in respect of any property hired or proposed to be hired by the company, this Schedule shall have effect as if the expression "vendor" included the lessor and the expression "purchase money" included the consideration for the lease;

(*b*) "mining company" means, without limiting the generality thereof, any company which carries on or proposes to carry on mining, development or prospecting for or exploitation of any mineral resources, or which acquires or proposes to acquire any mineral rights thereto or options thereon;

(*c*) "property" includes movable and immovable property and, without limiting the generality thereof, shares in any other body corporate but does not include any property if its purchase price is not material;

(*d*) "the Act" means the Companies Act;

(*e*) "vendor" includes any person who, directly or indirectly, sells or otherwise disposes of any property to the company.

Part I
Particulars of Company

1. **Name, address and incorporation to be provided as follows—**

(*a*) the name and address of the registered office and of the transfer office, the date of incorporation of the company and, if an external company, the country in which it is incorporated and the date of registration in Botswana; and

(*b*) if the company is a subsidiary, the name and address of the registered office of its holding company, or of any body corporate which, had it been registered under the Act, would have been its holding company.

2. Information on Directors and management shall be provided as follows—

(*a*) the names, occupations and addresses of the directors and proposed directors of the company (specifying the chairman and managing director, if any,) and their nationalities, if not Botswana;

(*b*) the term of office for which any director has been or is to be appointed, the manner in and terms on which any proposed director will be appointed and particulars of any right held by any person relating to the appointment of any director;

(*c*) particulars of any remuneration or proposed remuneration of the directors or proposed directors in their capacity as directors, managing directors or in any other capacity, whether determined by the articles or not, by the company and any subsidiary;

(*d*) if the business of the company or its subsidiary or any part thereof is managed or is proposed to be managed by a third party under a contract, the name and address (or the address of its registered office, if a company) of such third party and a description of the business so managed or to be managed; and

(*e*) the borrowing powers of the company and its subsidiary exercisable by the directors and the manner in which such borrowing powers may be varied.

3. Auditor

The name and address of the auditor of the company.

4. Attorney, banker, stockbroker, trustee and underwriter

The names and addresses of the attorney, banker, stockbroker, trustee, if any, and underwriter, if any.

5. Secretary

The name, address and professional qualifications, if any, of the secretary of the company.

6. History, state of affairs and prospects of company—

(1) The general history of the company and its subsidiary stating, *Inter alia*

(*a*) the length of time during which the business of the company and of any subsidiary has been carried on;

(*b*) brief particulars of any alteration of capital during the past three years;

(*c*) a summary of any offers of shares of the company to the public for subscription or sale during the preceding three years, the prices at which such shares were offered, the number of shares allotted in pursuance thereof and whether issued to all shareholders in proportion to their shareholdings and, if not, to whom issued, the reasons why the shares were not so issued and the basis of allotment;

(*d*) the date of conversion into a public company.

(2) A general description of the business carried on or to be carried on by the company and its subsidiary and, where the company or its subsidiary carries on or proposes to carry on, two or more businesses which are

material having regard to the profits or losses, assets employed or to be employed or any other factor, information as to the relative importance of each such business.

(3) The situation, area and tenure (including in the case of leasehold property the rental and unexpired term of the lease) of the principal immovable property held or occupied by the company and its subsidiary.

(4) Details of any change in the business of the company, if material, during the past five years.

(5) A general description giving a fair presentation of the state of affairs of the company and its subsidiary, including—

(*a*) the name, date and place of incorporation and the issued or stated capital of its subsidiary, together with details of the shares held by the holding company, and the main business of its subsidiary and the date on which it became a subsidiary; and

(*b*) if material, a statement as to the estimated commitments of the company and its subsidiary for the purchase and erection of buildings, plant and machinery, the estimated date of completion and the commencement of the operational use thereof.

(6) For the company and each subsidiary, in respect of each of the preceding five years, particulars of—

(*a*) the profits or losses before and after tax;

(*b*) the dividends paid;

(*c*) the dividends paid in pula per share; and

(*d*) the dividend cover for each year, or where the company is a holding company, the same information *mutatis mutandis* for the company in consolidated form.

(7) If any part of the proceeds of the issue of shares is to be applied, directly or indirectly to the acquisition by the company or its subsidiary of the shares of any other company or body corporate, in consequence of which that company or that body corporate will become a subsidiary of the company, in respect of each of the preceding five years, the same particulars relating to such company or body corporate as are required *mutatis mutandis* by subparagraph (6) and a general history of such company or body corporate, as required by subparagraphs (1) and (2).

(8) If any part of the proceeds of the issue of shares is to be applied, directly or indirectly, to the acquisition by the company or its subsidiary of a business undertaking in respect of each of the preceding five years, particulars relating to such business undertaking of—

(*a*) the profits before and after tax;

(*b*) its general history.

(9) The opinion of the directors, stating the grounds therefor, as to the prospects of the business of the company and of its subsidiary and of any subsidiary or business undertaking to be acquired.

7. Purpose of the offer

A statement of the purpose of the offer giving reasons why it is considered necessary for the company to raise the capital offered, and if the capital offered is more than the amount of the minimum subscription referred to in paragraph 21, the reasons for the difference between the capital offered and the said minimum subscription.

8. Share capital of the company

Particulars of the share capital—

(*a*) if consisting of shares of par value, the authorised and issued share capital, share premium and share capital held in reserve, the number and classes of shares and their nominal value;

(*b*) if consisting of shares of no par value, the stated capital, the number of shares issued and held in reserve and the classes of shares;

(*c*) a description of the respective preferential conversion and exchange rights, rights to dividends, profits or capital of each class, including redemption rights and rights on liquidation or distribution of capital assets;

(*d*) the number of founders' and management or deferred shares, if any, and the special rights attaching thereto.

9. Loans

(1) Details of material loans, including debentures, to the company and to its subsidiary at the date of the prospectus, stating—

(*a*) whether such loans are secured or unsecured;

(*b*) the names of the lenders if not debenture holders;

(*c*) the amount, terms and conditions of repayment;

(*d*) the rates of interest on each loan; and

(*e*) details of the security, if any.

(2) Details of material loans by the company or by its subsidiary, other than in the ordinary course of business, at the date of the prospectus, stating—

(*a*) the date of the loan;

(*b*) the person to whom made;

(*c*) the rate of interest;

(*d*) if the interest is in arrears, the last date on which it was paid and the extent of the arrears;

(*e*) the period of the loan;

(*f*) the security held;

(*g*) the value of such security and the method of valuation;

(*h*) if the loan is unsecured, the reasons therefor; and

(*i*) if the loan was made to another company, the names and addresses of the directors of such company.

10. Options or preferential rights in respect of shares

The substance of any contract or arrangement or proposed contract or arrangement, whereby any option or preferential right of any kind was or is proposed to be given to any person to subscribe for any shares of the company or its subsidiary, giving the number and description of any such shares, including, in regard to the option or right, particulars of—

(*a*) the period during which it is exercisable;

(*b*) the price to be paid for shares subscribed for under it;

(*c*) the consideration given or to be given for it; the names and addresses of the persons to whom it was given, other than to existing share holders as such or to employees under a *bona fide* staff option scheme;

(*d*) if given to existing shareholders as such, material particulars thereof; and

(*e*) any other material fact or circumstance concerning the granting of such option or right.

Subscribing for shares shall, for the purpose of this paragraph, include acquiring them from a person to whom they were allotted or were agreed to be allotted with a view to his offering them for sale.

11. Shares issued or to be issued otherwise than for cash

The number of shares which within the preceding two years were issued, or were agreed to be issued, by the company or its subsidiary, to any person, otherwise than for cash, and the consideration for which those shares were issued or were agreed to be issued, and the value of the property, if any, acquired or to be acquired.

12. Property acquired or to be acquired

(1) Particulars of any immovable property or other property of the nature of fixed assets purchased or acquired by the company or its subsidiary or proposed to be purchased or acquired, the purchase price of which is to be defrayed in whole or in part out of the proceeds of the issue, or is to be or was within the preceding two years paid in whole or in part in securities of the company or its subsidiary, or out of the funds of the company or its subsidiary, whether in cash or shares, or the purchase or acquisition of which has not been completed at the date of the prospectus, and the nature of the title or interest therein acquired or to be acquired by the company or its subsidiary.

(2) Details of the consideration given, or to be given, for the acquisition of any such property, specifying the value payable for goodwill, if any.

(3) The names and addresses of the vendors and the consideration received or to be received by each.

(4) Brief particulars of any transaction relating to the property completed within the preceding two years in which any vendor of the property to the company or its subsidiary or any person who is or was at the time of the transaction a promoter or a director or proposed director of the company had any interest, direct or indirect:

Provided that where the vendors or any of them are a partnership, the members of the partnership shall not be treated as separate vendors.

(5) Particulars of the price at which any such property which is immovable property or an option over immovable property was purchased or sold within three years prior to the date of the prospectus where any promoter or director had any interest, directly or indirectly, in such transaction or where any promoter or director was a member of a partnership, syndicate or other association of persons which had such an interest, with the dates of any such purchases and sales and the names of any such promoter or director, and the

nature and extent of his interest; for the purposes of this subparagraph, shares of a company, the major asset of which is immovable property, shall be deemed to be immovable property.

13. Amounts paid or payable to promoters

The amount paid within the preceding two years or proposed to be paid to any promoter, with his name and address, or to any partnership, syndicate or other association of which he is or was a member, and the consideration for such payment, and any other benefit given to such promoter, partnership, syndicate or other association within the said period or proposed to be given, and the consideration for the giving of such benefit.

14. Commissions paid or payable in respect of underwriting

(1) The amount, if any, or the nature and extent of any consideration, paid within the preceding two years, or payable as commission to any person (including commission so paid or payable to any sub-underwriter who is a promoter or director or officer of the company) for—

(*a*) subscribing or agreeing to subscribe;

(*b*) procuring or agreeing to procure subscriptions, for any shares of the company.

(2) The name, occupation and address of each such person referred to in subparagraph (1), particulars of the amounts underwritten or sub-underwritten by each and the rate of the commission payable for such underwriting or sub-underwriting contract with such person.

(3) Where such person referred to in subparagraph (1) is a company, the names of the directors of such company and the nature and extent of any interest, direct or indirect, in such company of any promoter, director or officer of the company in respect of which the prospectus is issued.

15. Preliminary expenses and issue expenses

The amount or estimated amount of preliminary expenses, if incurred within two years of the date of the prospectus, and the persons by whom any of those expenses were paid or are payable, and the amount or estimated amount of the expenses of the issue and the persons by whom any of those expenses were paid or are payable.

16. Material contracts

(1) The dates and the nature of, and the parties to, every material contract entered into by the company or its subsidiary, not being a contract entered into the ordinary course of the business carried on or proposed to be carried on by the company or its subsidiary or a contract entered into more than two years before the date of the prospectus, and a reasonable time and place at which any such contract or a copy thereof may be inspected.

(2) A brief summary of existing contracts or proposed contracts, either written or oral, relating to the directors' and managerial remuneration, royalties, and secretarial and technical fees payable by the company and its subsidiary.

17. Interest of directors and promoters

(1) Full particulars of the nature and extent of any material interest, direct or indirect, of every director or promoter in the promotion of the company and in any property proposed to be acquired by the company out of the proceeds of the issue, and where the interest of such director or promoter consists in being a member of a partnership, company, syndicate or other association of persons, the nature and extent of the interest of such

partnership, company, syndicate or other association, and the nature and extent of such director's or promoter's interest in the partnership, company, syndicate or other association.

(2) Full particulars of the nature and extent of any material interest, direct or indirect, of every director or promoter in the property acquired or proposed to be acquired by the company or its subsidiary during the three years preceding the date of the prospectus.

(3) A statement of all sums paid or agreed to be paid within the three years preceding the date of the prospectus to any director or to any company in which he is beneficially interested or of which he is a director, or to any partnership, syndicate or other association of which he is a member, in cash or shares or otherwise, by any person either to induce him to become or to qualify him as a director, or otherwise for services rendered by him or by the company, partnership, syndicate or other association in connection with the promotion or formation of the company.

18. Particulars of the offer

(1) Particulars of the shares offered, including—

(*a*) the class of shares;

(*b*) the nominal value of the shares, if applicable;

(*c*) the number of shares offered;

(*d*) the issue price; and

(*e*) other conditions of the offer.

(2) Particulars of the debentures offered, including—

(*a*) the class of debentures;

(*b*) the conditions of the debentures;

(*c*) if the debentures are secured, particulars of the security, specifying the property comprising the security and the nature of the title to the property; and

(*d*) other conditions of the offer.

19. Time and date of the opening and of the closing of the offer.

The time and date of the opening and of the closing of the subscription lists or of the offer.

20. Issue price

(1) The amount payable by way of premium, if any, on each share which is to be issued or was issued in the five years preceding the date of the prospectus, stating the dates of issue, the reasons for any such premium, and, where some shares were or are to be issued at a premium and other shares at par or at a lower premium, also the reasons for the differentiation, and how any such premium was or is to be dealt with.

(2) Where no par value shares are to be issued or were issued within five years preceding the date of the prospectus, the dates of issue, the price at which they are to be or were issued, and the reasons for any differentiation.

21. Minimum subscription

(1) The minimum amount which, in the opinion of the directors, must be raised by the issue of the shares in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums required to be provided, in respect of each of the following matters—

(*a*) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;

(*b*) any preliminary expenses payable by the company and any commission payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares of the company;

(*c*) the repayment of any moneys borrowed by the company and its subsidiary in respect of any of the foregoing matters;

(*d*) working capital, stating the specific purposes for which it is to be used and the estimated amount required for each such purpose; and

(*e*) any other expenditure, stating the nature and purposes thereof and the estimated amount in each case.

(2) The amounts to be provided in respect of the matters aforesaid otherwise than out of the proceeds of the issue, and the sources from which those amounts are to be provided.

22. Statement as to adequacy of capital

A statement that in the opinion of the directors the issued capital of the company (including the amount to be raised in pursuance of this offer) is adequate for the purposes of the business of the company and of its subsidiary, and if they are of the opinion that it is inadequate, the extent of the inadequacy and the manner in which and the sources from which the company and its subsidiary are or are to be financed.

23. Statement as to listing on stock exchange

A statement as to whether or not an application has been made under section 323 of the Act for a listing of the shares offered and the name of the Stock Exchange.

24. Requirements for prospectus of mining company

(1) A report by an expert containing information appropriate to the subject matter of the prospectus and including, if applicable—

(*a*) a statement describing briefly the geological characteristics of the occurrence;

(*b*) details of previous operations and production relevant to the workability and payability of the proposed mining operations;

(*c*) survey, drilling and borehole results;

(*d*) ore reserves;

(*e*) an interpretation of the information available with reference to the viability of the project.

(2) Material information not otherwise required by this Schedule relating to the mineral rights, or any other right to mine, mining title, including any Government mining lease, and immovable property available for the mine, including, if applicable—

(*a*) whether the aforesaid is owned by the company, or in process of transfer or is under option or lease;

(*b*) the name of the farm on and district in which each is situated;

(*c*) the area of each;

(*d*) the aggregate price or other consideration for which they were or are to be acquired;

(*e*) relevant details of any option as aforesaid.

(3) A statement by the directors of the plans for reaching the production stage or for increasing output including information regarding—

(*a*) shaft sinking and development;

(*b*) capital expenditure for each material stage of development.

Part II
Reports to be set out

25. Report by auditor of company

(1) A report by the auditor of the company with respect to—

(*a*) profits or losses and assets and liabilities, in accordance with subparagraph (2) or (3) of this paragraph, as the case requires; and

(*b*) the rates of the dividends, if any, paid by the company in respect of each class of shares of the company in respect of each of the five financial years immediately preceding the issue of the prospectus, giving particulars of each such class of shares on which such dividends were paid and particulars of the cases in which no dividends were paid in respect of any class of shares in respect of any of those years, and, if no annual financial statements were made out in respect of any part of the period of five years ending on a date three months before the issue of the prospectus, a statement of that fact.

(2) If the company has no subsidiary, the report shall—

(*a*) in regard to profits or losses, deal with the profits or losses of the company in respect of each of the five financial years immediately preceding the issue of the prospectus; and

(*b*) in regard to assets and liabilities, deal with the assets and liabilities of the company at the last date to which the annual financial statements of the company were made out.

(3) If the company has a subsidiary, the report shall—

(*a*) in regard to profits or losses, deal separately with the company's profits or losses as provided by subparagraph (2), and in addition, deal—

(i) as a whole with the combined profits or losses of all subsidiaries, as far as they concern members of the company;

(ii) individually with the profits or losses of each subsidiary, so far as they concern members of the company; or

(iii) as a whole with the consolidated profits or losses of the company and (so far as concerns members of the company) of all subsidiaries;

(*b*) in regard to assets and liabilities, deal separately with the company's assets and liabilities as provided by subparagraph (2) and, in addition, deal—

(i) as a whole with the combined assets and liabilities of all subsidiaries, indicating the interests therein of members other than the company;

(ii) individually with the assets and liabilities of each subsidiary, indicating the interests therein of members other than the company; or;

(iii) as a whole with the consolidated assets and liabilities of the company and all subsidiaries, indicating the interests therein of members other than the company;

(*c*) if a subsidiary incurred losses, state the amounts of such losses and the manner in which provision was made therefor.

(4) The auditor shall satisfy himself, as far as reasonably practicable, that, save as stated in his report—

(*a*) the debtors and creditors do not include any accounts other than trade accounts;

(*b*) the provisions for doubtful debts are adequate;

(*c*) adequate provision has been made for obsolete, damaged or defective goods, and for supplies purchased at prices in excess of current market prices;

(*d*) inter-company profits in the group have been eliminated;

(*e*) there have been no material changes in the assets and liabilities of the company and of any subsidiary since the date of the last annual financial statements.

26. Report by auditor where business undertaking to be acquired

If the proceeds, or any part of the proceeds, of the issue of the shares or any other funds are to be applied directly or indirectly in the purchase of any business undertaking, a report made by an auditor (who shall be named in the prospectus) upon—

(*a*) the profits or losses of the business undertaking in respect of each of the five financial years preceding the date of the prospectus; and

(*b*) the assets and liabilities of the business undertaking at the last date to which the financial statements of the business undertaking were made out.

27. Report by auditor where body corporate will become a subsidiary

(1) If the proceeds or any part of the proceeds of the issue of the shares are to be applied, directly or indirectly, in any manner resulting in the acquisition by the company or its subsidiary of shares of any other body corporate by reason of which or of anything to be done in consequence thereof or in connection therewith, that body corporate will become a subsidiary of the company, a report made by an auditor (who shall be named in the prospectus) upon—

(*a*) the profits or losses of the other body corporate in respect of each of the five financial years preceding the date of the prospectus; and

(*b*) the assets and liabilities of the other body corporates at the last date to which the annual financial statements of the body corporate were made out.

(2) The said report shall—

(*a*) indicate how the profits or losses of the other body corporate dealt with by the report would, in respect of the shares to be acquired, have concerned members of the company and what allowance would have fallen to be made, in respect of assets and liabilities so dealt with, for holders of other shares, if the company had at all material times held the shares to be acquired; and

(*b*) where the other body corporate has a subsidiary, or, had it been a company in terms of the Act, would have had a subsidiary, deal with the profits or losses and the assets and liabilities of the body corporate and its subsidiary and such other body corporate as would have been its subsidiary if it had been a company in terms of the Act, in the manner provided by paragraph 25(3) in relation to the company and its subsidiary.

28. Auditor not qualified to make reports

Any report by an auditor required by this Schedule shall not be made by any auditor who is a director, officer or employee or a partner of or in the employment of a director, officer or employee of the company or of the company's subsidiary or holding company or of any other subsidiary of the holding company.

29. Qualification in respect of references to period of five years

If in the case of a company which has been carrying on business, or of a business undertaking which has been carried on, for less than five years, the annual financial statements of the company or business undertaking have only been made out in respect of four years, three years, two years, or one year, this Part of this Schedule shall have effect as if references to four years, three years, two years or one year, as the case may be, were substituted for references to five years.

30. Adjustment of figures in reports

Any report required by this Part of this Schedule shall either indicate by way of note any adjustments as regards the figures of any profits or losses or assets and liabilities dealt with by the report which appear to the persons making the report necessary or shall make these adjustments and indicate that adjustments have been made.

31. Report by directors as to material changes

A report by the directors of the company setting out any material change in the assets or liabilities of the company or any subsidiary which may have taken place between the last date to which the annual financial statements of the company or any subsidiary, as the case may be, were made out, and the date of the prospectus.

Part III

Matters which must be stated in a Prospectus under Section 303(1)(*b*) of the Act

32. Name, address and incorporation

The name and address of the registered office and of the transfer office, and, if an external company, or a body corporate incorporated outside Botswana, the country in which it is incorporated.

33. Description of business

If there has been a material change in the nature of the activities of the company since the issue of its last financial statements, then a general description of the business carried on by the company and any subsidiary.

34. Directors

The names of the directors of the company.

35. Secretary

The name, address and professional qualifications, if any, of the secretary of the company.

36. Purpose of the offer

A statement of the purpose of the offer, giving reasons why it is considered necessary for the company to raise the capital offered. If it is the intention to acquire a business undertaking or property, a brief history of such business undertaking or property must be given, including—

(*a*) particulars of any such business undertaking or property purchased or acquired or proposed to be purchased or acquired by the company or its subsidiary, the purchase price of which is to be defrayed in whole or in part out of the proceeds of the issue;

(*b*) the amount, if any, paid or payable as purchase money in cash or shares, for any such business undertaking or property as aforesaid, specifying the amount, if any, payable for goodwill;

(*c*) the name and address of any vendor;

(*d*) the amount payable in cash or shares to any vendor and, where there is more than one vendor or the company is a sub-purchaser, the amount so payable to each vendor.

37. Share capital of the company

Particulars of the share capital—

(*a*) if consisting of shares of par value, the authorised and issued share capital, share premium and share capital held in reserve, the number and classes of shares and their nominal value;

(*b*) if consisting of shares of no par value, the stated capital, the number of shares issued and held in reserve and classes of shares;

(*c*) a description of the respective preferential conversion and exchange rights, rights to dividends, profits or capital of each class, including redemption rights and rights on liquidation or distribution of capital assets;

(*d*) the number of founders' and management or deferred shares, if any, and any special rights attaching thereto.

38. Previous issues of debentures

Where debentures are offered—

(*a*) the aggregate amount raised before the date of the offer by the issue of debentures which have not been redeemed;

(*b*) particulars of debentures issued during the preceding period of two years, specifying the classes of debentures, whether secured or unsecured and, if secured, the property comprising the security;

(*c*) any material outstanding loans.

39. Options or preferential rights in respect of shares

The substance of any contract or arrangement or proposed contract or arrangement, whereby any option or preferential right of any kind was or is proposed to be given to any person to subscribe for any shares of the company or its subsidiary, giving the number and description of any such shares, including, in regard to the option or right, particulars of—

(*a*) the period during which it is exercisable;

(*b*) the price to be paid for shares subscribed for under it;

(*c*) the consideration given or to be given for it;

(*d*) the names and addresses of the persons to whom it was given, other than existing shareholders as such or to employees under a *bona fide* staff option scheme;

(*e*) if given to existing shareholders as such, material particulars thereof; and

(*f*) any other material fact or circumstance concerning the granting of such option or right.

40. Material contracts

The dates and nature of, and the parties to, every material contract entered into by the company or its subsidiary, not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company or its subsidiary or a contract entered into more than two years before the date of the prospectus, and a reasonable time and place at which any such contract or a copy thereof may be inspected.

41. Interest of directors

(1) Full particulars of the nature and extent of any material interest, direct or indirect, of every director in any property proposed to be acquired by the company or its subsidiary out of the proceeds of the issue, and, where the interest of such director consists in being a member of a partnership, company, syndicate or other association of persons, the nature and extent of the interest of such partnership, company, syndicate or other association, and the nature and extent of such director's interest in the partnership, company, syndicate or other association.

(2) Full particulars of the nature and extent of any material interest, direct or indirect, of every director in the property acquired or proposed to be acquired by the company or its subsidiary during the three years preceding the date of the prospectus.

(3) A statement of all sums paid or agreed to be paid within the three years preceding the date of the prospectus to any director or to any company in which he is beneficially interested or of which he is a director, or to any partnership, syndicate or other association of which he is a member, in cash or shares or otherwise, by any person either to induce him to become or to qualify him as a director, or otherwise for services rendered by him or by the company, partnership, syndicate or other association in connection with the promotion or formation of the company.

42. Commissions paid or payable in respect of underwriting

(1) In respect of the issue, the amount, or the nature and extent of any consideration, paid or payable as commission to any person (including a sub under writer who is a director or officer of the company) for—

(*a*) subscribing or agreeing to subscribe; or

(*b*) procuring or agreeing to procure subscriptions, for any shares of the company which are being

issued in terms of the prospectus.

(2) The name, occupation and address of each such person referred to in subparagraph (1), particulars of the amounts which each has underwritten and the rate of the commission payable for such underwriting to such person.

(3) Where such a person referred to in subparagraph (1) is a company, the names of the directors of such company and the nature and extent of any interest, direct or indirect, in such company of any director or other officer of the company in respect of which the prospectus is issued.

43. Particulars of the offer

(1) Particulars of the shares offered, including—

(*a*) the class of shares;

(*b*) the nominal value of the shares, if applicable;

(*c*) the number of shares offered;

(*d*) the issue price; and

(*e*) other conditions of the offer.

(2) Particulars of debentures offered, including—

(*a*) the class of debentures;

(*b*) the conditions of the debentures;

(*c*) if the debentures are secured, particulars of the security, specifying the property comprising the security and the nature of the title of the property; and

(*d*) other conditions of the offer.

44. Time and date of the opening and of the closing of the offer

The time and date of the opening and of the closing of the subscription lists of the offer.

45. Statement where an offer is not underwritten

In the event of the offer not being underwritten, a statement by the directors of the manner in which, and the sources from which, any shortfall in the amount proposed to be raised by means of the offer is to be financed.

46. Report by directors as to material changes

A report by the directors of the company setting out any material change in the state of the affairs of the company or its subsidiary which may have taken place between the last date to which the interim reports or the annual financial statements were made out and the date of the prospectus.

47. Report by auditor where business undertaking is to be acquired

If the proceeds, or any part of the proceeds, of the issue of the shares are to be applied, directly or indirectly, in the purchase of any business undertaking, a report made by an auditor (who shall be named in the prospectus) upon—

(*a*) the profits or losses of the business undertaking in respect of each or the five financial years preceding the date of the prospectus; and

(*b*) the assets and liabilities of the business undertaking at the last date to which the financial statements of the business undertaking were made out.

48. Report by auditor where body corporate will become a subsidiary

(1) If the proceeds or any part of the proceeds of the issue of the shares are to be applied, directly or indirectly, in any manner resulting in the acquisition by the company or its subsidiary of shares of any other body corporate by reason of which or of anything to be done in consequence thereof or in connection therewith, that body corporate will become a subsidiary of the company, a report made by an auditor (who shall be named in the prospectus) upon—

(*a*) the profits or losses of the other body corporate in respect of each of the five financial years preceding the date of the prospectus; and

(*b*) the assets and liabilities of the other body corporate at the last date to which the annual financial statements of the body corporate were made out.

(2) The said report shall—

(*a*) indicate how the profits or losses of the other body corporate dealt with by the report would, in respect of the shares to be acquired, have concerned members of the company and what allowance would have fallen to be made, in respect of assets and liabilities so dealt with, for holders of other shares, if the company had at all material times held the shares to be acquired; and

(*b*) where the other body corporate has a subsidiary or, had it been a company in terms of the Act, would have had a subsidiary, deal with the profits or losses and the assets and liabilities of the body corporate and its subsidiary and such other body corporate as would have been its subsidiary if it had been a company in terms of the Act, in the manner provided by paragraph 25(3) in relation to the company and its subsidiary.

Part IV
Directions as to the form of a Prospectus

49.The information required to be stated in a prospectus shall be set out in print or type and shall not be less conspicuous than that in which any additional matter is printed or typed and shall be set out in separate paragraphs under the headings included in this Schedule.

50. A prospectus shall deal with each of the applicable paragraphs of this Schedule under its prescribed heading but not necessarily in the same order, and shall in each case by means of a number in brackets, or otherwise, refer to the number of the paragraph of this Schedule. In the last paragraph of the prospectus under the heading- "Paragraphs of the Tenth Schedule which are not applicable"- the numbers of the paragraphs of this Schedule which are not applicable shall be stated.

51. As far as possible the general matter of a prospectus shall be presented in narrative form and statistical matter in tabular form.