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GENERAL NOTICES • ALGEMENE KENNISGEWINGS

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION**GENERAL NOTICE 1965 OF 2023****NOTICE TO INTRODUCE THE COMPANIES FIRST AMENDMENT BILL, 2023 AND THE COMPANIES SECOND AMENDMENT BILL, 2023 TO PARLIAMENT**

The Minister of Trade, Industry and Competition intends introducing the Companies FIRST Amendment Bill, 2023 and the Companies Second Amendment Bill, 2023 in Parliament in August 2023, in terms of Rule 276(1)(b)(c) of the Rules of the National Assembly. Explanatory Summaries of the Bills are hereby published:

(A) COMPANIES FIRST AMENDMENT BILL, 2023.

The following explanatory summary of the Bill is hereby published:

1. BACKGROUND

- 1.1 The Department of Trade, Industry and Competition (**the dtic**) and its predecessor department has undertaken a review of the Companies Act, No. 71 of 2008 as amended. The work involved extensive discussions by the Specialist Committee on Company Law (SCCL) and detailed discussions on the content of a draft Bill by organised business and labour at the National Economic Development and Labour Council (Nedlac). Based on these discussions, a Bill was tabled in Cabinet on 14 September 2021, with a request for Cabinet concurrence that the Bill be released for public comment.
- 1.2 On 1 October 2021 the Director General of **the dtic** published an invitation (the "**invitation**") to the public to comment on the Draft Companies Amendment Bill (the "**Bill**"). This invitation was accompanied by a copy of the Bill and a Background Note and Explanatory memorandum explaining the philosophical pillars of the proposed amendments. The changes to the current revised Bill are outlined below in point 3.

- 1.2 Following the publication of the invitation, a number of comments was received. Those comments were carefully considered by the senior executives of the Department of Trade, Industry and Competition together with the assistance of the Specialist Committee on Company Law.
- 1.3 The Companies Amendment Bill addresses the following key pillars:
- 1.3.1 first, the ease of doing business and cutting unnecessary red tape. In this regard it is important that company law should, among other factors, be clear, user friendly, consistent with well-established principles and not be over burdensome on the conduct of business. This is important not only for the attraction of investors but also for the efficient and effective conduct of the domestic economy and for the creation of jobs. In addition, changes were made that are essentially purely administrative issues, enhancement of regulatory efficiency and tidying up of drafting deficiencies.
- 1.3.2 second, the achievement of equity as between directors and senior management on the one hand, and shareholders and workers on the other hand as well as addressing public concerns regarding high levels of inequalities in society. Certain of the proposed amendments are designed to achieve better disclosure of senior executive remuneration and the reasonableness of the remuneration. The provisions relating to transparency on the pay gap and the reasonableness of remuneration provide an objective benchmark which will assist the public dialogue on this topic. The fairly extensive amendments to the provision relating to the social and ethics committee are designed to deal with several of the policy areas.
- 1.3.3 third, providing greater disclosure of the ultimate owner of shares in a business; as part of the broader efforts to combat corruption and money-laundering.
- 2 It is also necessary to note, as is referred to hereunder, that at the end of last year the General Laws Amendment Act No 22 of 2022 (the “**General Laws Amendment Act**”) was passed pursuant to Cabinet’s actions to address greylisting. In terms of the General Laws Amendment Act a number of amendments were effected to the Companies Act No 71 of 2008, as amended, (the “**Companies Act**”) and to numerous other statutes. Those amendments related to beneficial interests in shares and the concept of “true owner”. The

effect of these amendments is that some of the provisions in the original draft Bill have effectively been achieved and are no longer necessary in the Bill. In addition, attention is drawn to the fact that on 24 May 2023 the Minister of Trade, Industry and Competition published regulations pursuant to the aforementioned amendments that were made to the Companies Act in terms of the General Laws Amendment Act. These regulations largely reinforce the new provisions in the Companies Act relating to beneficial interests in shares. Regulation 30(9) and (10) provide access to the public to the annual returns filed with the Commission that now include a copy of the securities register as required in terms of section 50 of the Companies Act.

(B) COMPANIES SECOND AMENDMENT BILL, 2023.

The following explanatory summary of the Second Amendment Bill is hereby published:

1. BACKGROUND

1.1 The Zondo Commission of Enquiry into State Capture (“**Zondo Commission**”) made a recommendation to amend the Companies Act, 2008 (Act No. 71 of 2008) (the “**Companies Act**”), to extend the time bar which is contained in sections 162(2) and 162(3) of the Companies Act.

1.2 Section 162 of the Companies Act makes provision for an application to a Court for an order declaring a person delinquent or under probation.

1.3 Section 162(2) of the Companies Act provides as follows –

“162 (2) A company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may apply to a court for an order declaring a person delinquent or under probation if –

(a) the person is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and

- (b) any of the circumstances contemplated in –**
 - (i) subsection (5) (a) to (c) apply, in the case of an application for a declaration of delinquency; or**
 - (ii) subsections (7)(a) and (8) apply, in the case of an application for probation.”**

1.4 Section 162(3) of the Companies Act provides as follows –

“162 (3) The Commission or the Panel may apply to a court for an order declaring a person delinquent or under probation if –

- (a) the person is a director of a company or, within the 24 months immediately preceding the application, was a director of a company; and**
- (b) any of the circumstances contemplated in –**
 - (i) subsection 5 apply, in the case of an application for a declaration of delinquency; or**
 - (ii) subsections (7) and (8) apply, in the case of an application for probation.”**

1.5 As appears from the above in both section 162(2) and 162(3) an application in terms of those sections may be brought if the person concerned is a director of that company, or within the 24 months immediately preceding the application, was a director of that company.

1.6 The Zondo Commission made a recommendation in respect of two specific companies and certain persons connected with those companies that section 162 of the Companies Act be amended so as to ensure that the application for a declaration of delinquency may be brought even after the two years on good cause shown.

1.7 Whilst the aforesaid recommendations of the Zondo Commission were limited to specific cases, it is considered to be in the public interest that any amendments to the Companies Act to extend the time bar set out in sections 162(2) and 162(3) should be of wider application and should apply generally.

- 1.8 Following research undertaken it appears that a number of jurisdictions have different time bars in respect of applications for declarations of delinquency. It appears from such research that the corresponding provisions in New Zealand's Companies Act have the longest time bar, being five years.
- 1.9 It is appreciated that the time bar in applications for declarations of delinquency must be balanced and fair to both plaintiff and defendant, having regard to the implications of lapse of time, reduced memories, and inability to find relevant records.
- 1.10 Having regard to all of the foregoing it was considered that the period of five years is appropriate.
- 1.11 There is, however, a further dimension, namely that in certain circumstances even the time bar of five years may be insufficient and that the Courts should be empowered on good cause shown to extend that time period in a specific case. Furthermore, when good cause is shown to the Courts to extend the time bar, such power of the Court should include the right to extend the time period even in respect of any of the circumstances mentioned in section 162 of the Companies Act which may have occurred in the period before the extension. In exercising its powers in this regard the Court will take into account the interests of justice and fairness.
- 1.12 The proposed legislation should be expressed to be retrospective. Thus, the legislation should state that the court on good cause shown may extend the time bar even though the conduct in question was committed during the period before the extension.
- 1.13. Although not the subject of any recommendation of the Zondo Commission, it appears on reflection that the time bar in section 77(7) of the Companies Act also requires amendment. Section 77 deals with the liability of directors and prescribed officers for breaching their fiduciary duties and duties of care, skill and diligence as well as certain statutory duties.
- 1.14. Section 77(7) reads as follows –

“77 (7) Proceedings to recover any loss, damages or costs for which a person is or may be held liable in terms of this section may not be commenced more than three years after the act or omission that give rise to that liability.”

- 1.15. Whilst the period of three years in section 77 of the Companies Act conforms with international best practice, it is considered appropriate that the Court should also be empowered, on good cause shown, to extend the time bar of three years, on the basis that such extended period may also cover acts or omissions that occurred during the period before the extension.

Copies of the draft Bill can be obtained from Ms Reeva Welman - Chief Director: Regulatory Policy and Legislation, 77 Meintjies Street, the dtic Campus, Block B, 1st Floor, Sunnyside, Pretoria, Tel: 012 394 5575, Email: rwelman@thedtic.gov.za.

Copies are also available on the Department of Trade, Industry and Competition's website, www.thedtic.gov.za .

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