M e m o r a n d u m

Bowman Gilfillan Attorneys

To: The Franchise Association of South Africa
From: Bowman Gilfillan Inc., Rudolph du Plessis
Date: 9 October 2009
Re: Brief Overview of the Companies Act, 2008

INTRODUCTION

1. You have asked us to prepare a note highlighting the significant changes to existing South African company law that the Companies Act, 71 of 2008 ("the new Act" or "the Act") will introduce. While the new Act has been promulgated, it will only come into operation on a date fixed by the President by proclamation in the *Government Gazette*, which date may not be earlier than one year following the date on which the President assented to the Act. The date on which the new Act will come into operation has not been fixed by the President, but in light of the fact that it was assented to on 9 April 2009, the new Act will not come into operation before April 2010.

2. The new Act replaces the existing Companies Act, 61 of 1973 ("the existing Act") in full, subject to certain transitional arrangements remaining in force. In some respects, the new Act retains much of that which worked in the existing Act but also contains new provisions and concepts that many have welcomed as positive advances that bring South African company law in line with the best practices internationally. Notably, the new Act –

- uses modern language and introducing simpler administrative and other procedures
- promotes corporate governance, transparency and accountability
- simplifies the procedure of incorporating companies, holding meetings etc.
- introduces flexibility in the design of companies
- introduces a new share capital regime
- amends the takeover provisions and introduces amalgamations or mergers
- introduces a new business rescue regime
- provides for the further protection of minority shareholders

3. While the new Act leaves the common law also largely intact, it does codify and significantly expand upon the common law duties and liabilities of directors and other officers of a company.

GENERAL

Interpretation

4. The new Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7 of the Act. Some of the relevant purposes are to:

4.1 continue to provide for the creation and use of companies in a manner that enhances the economic welfare of South Africa as a partner within the global economy;

4.2 create optimum conditions for the aggregation of capital for productive purposes and for the investment of that capital in enterprises and the spreading of economic risk;

4.3 promote investment in the South African markets.

Anti-avoidance

5. The new Act contains a general anti-avoidance provision. Subsection 6(1) provides that the court, on application by the Commission or Panel may declare an agreement, transaction, arrangement, resolution or provision of a company's MOI[1] or rules[2]:

5.1 to be primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an unalterable provision of the Act; and

5.2 void to the extent that it defeats or reduces the effect of a prohibition or requirement established by or in terms of an unalterable provision of the Act.

Plain language

6. Subsection 6(4) of the new Act provides that the producer of a prospectus must publish, produce or provide that prospectus:

[1] See paragraph 24 below.
[2] See paragraph 25 below.

6.1 in the prescribed form; or

6.2 in plain language if no form has been prescribed.

7. For the purposes of the new Act, the prospectus is in plain language if it is reasonable to conclude that a person of the class of persons for whom the prospectus is intended, with average literacy skills and minimal experience in dealing with company law matters, could be expected to understand the content, significance and import of the prospectus without undue effort.

Substantial compliance

8. The new Act provides that an unaltered electronically or mechanically generated reproduction of any document, other than a share certificate, may be substituted for the original for any purpose for which the original could be used in terms of the Act.

9. The new Act provides that it is sufficient if a person required to prepare or complete a document record statement or notice prescribed by the Act if it is completed in a form that satisfies all of the substantive requirements of the prescribed form.

10. The new Act also provides that any deviation from the design or content of the prescribed form does not invalidate the action taken by the person preparing or completing that document unless the deviation negatively and materially affects the substance of the document or it would reasonably mislead a person reading the document.

11. Most documents, records or statements which are required to be retained may be retained in an electronic original and may be published electronically provided that a notice of the availability of the document is delivered to each of the intended recipients.

Decriminalisation

12. The memorandum on the objects of the new Act states that the Act 'decriminalizes' company law. There are however a few remaining offences, including publishing of untrue or misleading information.

13. A person is guilty of an offence if the person is a party to the preparation or publication of a

prospectus or a written statement that contained an "untrue statement" as defined in section 95 of the Act. Section 214(2) of the new Act provides that a person is a party to the preparation of a prospectus if the prospectus includes or is based on words or numbers devised, prepared or recommended by that person, and that person knew or ought reasonably to have known that its inclusion would be false or misleading. The penalty is a fine or imprisonment for a period of not more than ten years, or both.

CLASSIFICATION OF COMPANIES

14. The new Act creates a broad distinction between profit companies and non-profit companies. There are further sub-classifications of profit companies, namely private, public, personal liability and state-owned companies.

Profit companies

15. The confusing definitions of widely held companies and limited interest companies used in earlier drafts of the Companies Bill and currently in force in terms of the Corporate Laws Amendment Act, 2006 have been removed.

16. A private company is a profit company:

16.1 that is not a state-owned company or a personal liability company (the effective equivalent of the so-called 'section 53(b)' company established under the existing Act); and

16.2 whose MOI:

16.2.1 prohibits it from offering any of its securities to the public; and

16.2.2 restricts the transferability of its securities.

Although the requirements set out in 16.2 also apply under the existing Act, there is no longer a requirement the new Act that private companies have no more than fifty members.

17. A public company is any company that is not a private company (in that its MOI does not satisfy the requirements set out in paragraph 16.2 above), a state-owned company or a

personal liability company. The new Act does not require that a public company have a minimum of seven members.

Non-profit companies

18. A non-profit company is a company incorporated in terms of section 21 of the existing Act.

19. As is the case under the existing Act, such companies must have a public interest object or an object relating to cultural or social activities, or communal or group interests and may not distribute its income and assets to its members (if any) or directors. Any distributions made by a non-profit company of its income or assets must be made to either advance its main object in terms of its MOI, or used to carry on any business, trade or undertaking consistent with or ancillary to its stated objects.

20. A non-profit company must have a minimum of 3 directors and 3 incorporators, who may not necessarily be the shareholders of the non-profit company.

21. Although non-profit companies may not convert to a profit company, or amalgamate or merge with a profit company, the new Act makes provision for a non-profit company to use its income or assets to acquire and hold securities issued by a profit company.

External companies and foreign companies

22. The new Act retains the concept of the external company under the existing Act, including the requirements and procedures for registration. The new Act does introduce the concept of a foreign company, being a company incorporated outside South Africa irrespective of whether it carries on business or any other activities in the Republic. Certain provisions of the new Act relating to the offer of securities to the South African public apply to such companies.

Close corporations

23. The new Act amends or repeals substantially the whole of the Close Corporations Act, 1984. In terms of the revised version of this Act, no new close corporations may be registered and existing close corporations may voluntarily undergo a conversion to a company in terms of a prescribed procedure.

MEMORANDUM OF INCORPORATION ("MOI")

24. Under the new Act, the MOI is effectively a consolidation of a company's memorandum and articles of association under the existing Act. Upon the commencement of the new Act, the memorandum and articles of association of an existing company will constitute its MOI. For a period of two years after the commencement of the new Act, and except to the extent that the new Act provides otherwise, the MOI (i.e. existing memorandum and articles of association) of a company will prevail in the event of a conflict between the provisions of the MOI and the provisions of the new Act. During this 'transitional period', a company may amend its MOI and/or change its registered name in order to conform to the requirements of the new Act without incurring the usual prescribed fees associated with such changes.

25. Except to the extent that a company's MOI provides otherwise, the board of the company may make any necessary or incidental rules relating to the governance of the company in respect of matters that are not addressed in the new Act or the MOI by publishing a copy of those rules in any manner prescribed and by filing a copy of those rules with the Commission[3].

26. Apart from the transitional period mentioned in paragraph 24 above, a company's MOI may not deviate from the 'unalterable provisions' of the new Act. A company may however, in its MOI, alter the effect of any of the 'alterable provisions' of the new Act to suit its particular needs. Having said this, any rules made by the board as well as any provision contained in a shareholders' agreement that is inconsistent with a company's MOI or the new Act (including the alterable provisions) is void to the extent of its inconsistency.

GENERAL MEETINGS

27. The new Act allows shareholders to act other than at a meeting. A resolution that could be voted on at a shareholders' meeting may instead be submitted for consideration to shareholders entitled to exercise voting rights in relation to that resolution and voted on in writing by shareholders entitled to exercise voting rights in relation to the resolution. Resolutions can be passed by written consent of shareholders, as long as such consent is given by at least the minimum number of shares that would have been required to adopt

[3] The Companies and Intellectual Property Commission. The Commission will perform the functions currently performed by the Companies and Intellectual Property Registration Office as well as certain additional functions.

the resolution:

27.1 if it had been voted upon; and

27.2 all of the holders of shares entitled to vote on the matter had been present at the meeting.

FINANCIAL REPORTING

General

28. As under the existing Act, prescribed financial reporting standards differ from company to company depending on its classification. Under the new Act, public companies and state-owned companies bear significantly more onerous financial reporting obligations compared to other profit companies (private companies and personal liability companies) and non-profit companies, notably, these companies are required to appoint a company secretary (who need not be a natural person) and an audit committee (whose members satisfy certain independence and qualification criteria).

29. The new Act also empowers the Minister, after consulting the Financial Reporting Standards Council, to make regulations prescribing financial reporting standards. These regulations must promote sound and consistent accounting practices, be consistent with IFRS and may establish different standards applicable to profit and non-profit companies and different categories of profit companies.

Accounting records

30. A company must keep accurate and complete accounting records in one of the official languages of the Republic –

30.1 as are necessary to enable the company to satisfy its obligations in terms of the Act or any other law with respect to the preparation of financial statements; and

30.2 including any prescribed accounting records, which must be kept in the prescribed manner and form.

Financial statements

31. If a company provides any financial statements, including any annual financial statements, to any person for any reason, those statements must –

31.1 satisfy the financial reporting standards as to form and content, if any such standards are prescribed;

31.2 present fairly the state of affairs and business of the company, and explain the transactions and financial position of the business of the company;

31.3 show the company's assets, liabilities and equity, as well as its income and expenses, and any other prescribed information.

Annual financial statements

32. Each year, a company must prepare annual financial statements within six months after the end of its financial year, or such shorter period as may be appropriate to provide the required notice of an annual general meeting.

33. The annual financial statements of a *public company* must be audited. In the case of any other company, such statements must be audited if required by regulation issued by the Minister. Such regulations could require the audit of a private company if it is desirable in the public interest, having regard to certain factors. In all other cases, the financial statements may be audited voluntarily at the option of the company. However if a company's financial statements are not audited, they must, subject to certain exceptions, be independently reviewed.

34. The annual financial statements of a company must –

34.1 where applicable, include an auditor's report;

34.2 include a report by the directors with respect to the state of affairs, the business and profit or loss of the company, or of the group of companies, if the company is part of a group, including –

34.2.1 any matter material for the shareholders to appreciate the company's state of affairs; and

34.2.2 any prescribed information;

34.3 be approved by the board and signed by an authorised director; and

34.4 be presented to the first shareholders meeting after the statements have been approved by the board.

35. The annual financial statements of each company that is required in terms of the Act to have its annual financial statements audited, must include particulars showing –

35.1 the remuneration and benefits received by each director, or individual holding any prescribed office in the company;

35.2 the amount of –

35.2.1 any pensions paid by the company to or receivable by current or past directors or individuals who hold or have held any prescribed office in the company;

35.2.2 any amount paid or payable by the company to a pension scheme with respect to current or past directors or individuals who hold or have held any prescribed office in the company;

35.3 the amount of any compensation paid in respect of loss of office to current or past directors or individuals who hold or have held any prescribed office in the company;

35.4 the number and class of any securities issued to a director;

35.5 details of service contracts of current directors.

Access to financial statements

36. A person who holds or has a beneficial interest in any securities issued by a company –

36.1 has an express statutory right to inspect and copy the information contained in the records of the company –

36.1.1 such as the records of its directors, copies of all documents presented at an annual general meeting, annual financial statements for 7 years after the date on which each such particular statements were issued, notice and minutes of shareholder meetings and copies of written communications sent generally by the company to all shareholders;

36.1.2 securities register and register of company's secretary and auditors;

36.2 has a right to any other information to the extent granted by the MOI.

Financial year of a company

37. A company must have a financial year, ending on a date set out in the company's Notice of Incorporation. The financial year of the company is its annual accounting period.

38. The board of a company may change its financial year end at any time, by filing a notice of that change, but –

38.1 it may not do so more than once during any financial year;

38.2 the newly established financial year end must be later than the date on which the notice is filed; and

38.3 the date as changed may not result in a financial year ending more than 15 months after the end of the preceding financial year.

GENERAL COMPANY RECORDS

Forms and standards

39. Any documents, accounts, books, writing, records or other information that a company is required to keep in terms of this Act or any other public regulation must be kept –

39.1 in written form, or other form or manner that allows that information to be converted into written form within a reasonable time; and

39.2 for a period of seven years, or any longer period of time specified in any other applicable public regulation.

40. Every company must maintain, *inter alia*, –

40.1 a record of its directors;

40.2 copies of all –

40.2.1 reports presented at an annual general meeting;

40.2.2 annual financial statements;

40.3 accounting records for the current financial year and for the previous seven completed financial years of the company;

40.4 notice and minutes of all shareholders meetings.

Location and access

41. The company records referred to above must be accessible at or from the company's registered office or another location within the Republic.

42. Aside from a shareholder's rights of access set out in paragraph 36 above, and as is the case under the existing Act, a company's register of members and register of directors must, during business hours and for reasonable periods, be open to inspection by any member of the public upon payment of the prescribed fee.

STANDARDS OF DIRECTORS CONDUCT

43. Section 76 of the new Act prescribes certain standards of conduct which apply to a "director" (which includes an alternative director, a prescribed officer[4], or a person who is a member of a board committee, or a member of the audit committee of a company, irrespective of whether the person is also a member of the company's board).

44. The section does not exclude the common law; therefore, the common law duties of directors that are not expressly amended by this section or those that are not in conflict with the section will still apply.

45. A director of a company (when acting in the capacity of director) must exercise the powers and perform the functions of a director:

45.1 in good faith *and* for a proper purpose;

45.2 in the best interests of the company; and

45.3 with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director, and having the general knowledge, skill and experience of that director.

46. A director will have satisfied the obligations of acting in the best interests of the company and with the required care and skill if:

46.1 he has taken reasonable diligent steps to become informed about the matter; and

46.2 he either had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or he complied with the requirements of section 75 in respect of any interest contemplated in the immediately preceding point; and

[4] The Minister may make regulations designating any specific function or functions within a company to constitute a prescribed office for the purposes of the Act.

46.3 he made a decision, or supported the decision of a committee or the board, with regard to that matter, and had a rational basis for believing, and did believe, that the decision was in the best interests of the company.

47. A director is entitled to rely on:

47.1 the performance by any of the persons referred to in section 76(5)[5]; or to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and

47.2 any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in section 76(5).

CAPITALISATION AND THE SOLVENCY AND LIQUIDITY TEST

48. As noted in the introduction above, the new Act introduces a shift from the par value capital maintenance regime under the existing Act to one based on solvency and liquidity.

49. Under the new Act shares will no longer have a par value and the distinction between the par value and the share premium will fall away.

50. The new Act introduces new powers in regard to equity financing and grants the directors of companies new powers in this regard. These include the right of the board to increase or decrease the number of authorised shares of any class, to reclassify any authorised but unissued shares, to classify shares that are authorised but are unclassified and unissued and to determine the preferences, rights, limitations or other terms of shares which have been authorised but not issued.

51. Section 4 of the new Act replaces the test set out in section 38 of the existing Act (see table of comparison below).

[5] Such persons are: one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided; or legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters within the particular person's professional or expert competence (or as to which the particular person merits confidence); or committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.

52. A company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time:

52.1 the assets of the company (if the company is a member of a group of companies, the aggregate assets of the company), as fairly valued, equal or exceed the liabilities of the company (if the company is a member of a group of companies, the aggregate liabilities of the company), as fairly valued; and

52.2 it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the date on which the test is considered.

53. The board or any other person applying the solvency and liquidity test to a company:

53.1 must consider a fair valuation of the company's assets and liabilities, including any reasonably foreseeable contingent assets and liabilities irrespective of whether or not as a result of the proposed transaction or otherwise; and

53.2 may consider any other valuation of the company's assets or liabilities that is reasonable in the circumstances.

54. It should be noted that the solvency and liquidity test is a subjective test in that the board must be satisfied that the company is actually solvent and that it appears that it will be liquid. If the company becomes insolvent or illiquid after the board has been satisfied of the company's solvency and liquidity, this will not affect the transaction or the liability of the directors.

55. The table below shows a comparison between the solvency and liquidity test as applied under the current Companies Act (for purposes of section 38 of the current Act) and the new Act:

Section 38 of the existing Act	Section 4 of the new Act
The company's board is satisfied that subsequent to the transaction … and subsequent to providing the assistance, and for the duration of the transaction.	A company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time.
The directors must account for any contingent liabilities which may arise to the company, including any contingent liability which may result from giving the assistance.	Must consider a fair valuation of the company's assets and liabilities including any reasonably foreseeable contingent assets and liabilities irrespective of whether or not arising as a result of the proposed transaction or otherwise.
Any company which contravenes the provisions of this section and every director or officer of such company shall be guilty of an offence, including a person who at the time of the alleged contravention was a director of the company.	No criminal sanction.

DISTRIBUTIONS

56. A company is not allowed to make distributions unless board of the company, by resolution, has acknowledged that it has applied the solvency and liquidity test and reasonably concluded that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution.

57. A distribution is defined as follows:

57.1 transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one or more holders of any of the shares of that company or of another company within the same group of companies, whether in the form of –

57.1.1 dividends (in cash or in kind); or

57.1.2 a payment in cash instead of capitalisation shares; or

57.1.3 a consideration for the acquisition by the company of any of its shares (or by any company within the same group of companies, of any shares of a company within that group of companies)[6]; or

57.1.4 a debt or other obligation incurred by a company for the benefit of one or more holders of any of the shares of that company (or of another company within the same group of companies); or

57.1.5 forgiveness or waiver by a company of a debt or other obligation owed to the company by one or more holders of any of the shares of that company (or of another company within the same group of companies).

58. A company may only make a distribution if:

58.1 the distribution is pursuant to an existing legal obligation of the company, or a court order; or the distribution is authorised by the company's board by resolution;

58.2 it reasonably appears that the company will satisfy the solvency and liquidity test immediately after the distribution; and

58.3 the board resolution acknowledges that the board has applied the solvency and liquidity test and reasonably concluded that the company will satisfy that test immediately after completing the proposed distribution.

FUNDAMENTAL TRANSACTIONS

59. Chapter 5 of the new Act regulates business dealings classified as fundamental transactions and takeovers. Fundamental transactions can be described as particular actions or transactions performed by a company for which there are specific requirements. The types of transactions which qualify as fundamental transactions are:

59.1 proposals to dispose of substantially all assets or undertakings of the company;

59.2 amalgamations or mergers; and

59.3 schemes of arrangements.

60. For the purposes of this note, we will only discuss the provisions relating to the disposal of substantially all assets or undertakings of the company, and amalgamations or mergers.

Disposals

61. Section 112 of the new Act prohibits a company from disposing of all or the greater part of its assets or undertaking unless the disposal has been approved by a special resolution of the shareholders and the company has satisfies all the requirements set out in section 115 of the new Act.[7]

62. The notice to be sent to all shareholders must not only be delivered within the prescribed time and in the prescribed manner, but it must include a written summary of the precise terms of the transaction.

63. However, not all transactions which result in the disposal of a company's assets are governed by section 112, read with section 115. Section 112 read with section 115 will not apply if the proposed disposal constitutes a transaction:

63.1 that is pursuant to or contemplated in that is pursuant to or contemplated in an adopted business rescue plan; or

63.2 between a wholly-owned subsidiary and its holding company; or

63.3 between or among two or more wholly-owned subsidiaries of the same holding company; or a wholly-owned subsidiary of a holding company, on the one hand, and its holding company and one or more wholly-owned subsidiaries of that holding company, on the other hand.

Amalgamations and mergers

64. Section 113 read with section 116 of the new Act governs the provisions relating to amalgamations and mergers separate from schemes of arrangements.

65. Section 1 defines an "amalgamation or merger" as "a transaction, or series of transactions,

[6] Or otherwise in respect of any of the shares of that company or of another company within the same group of companies, subject to section 164(19)

pursuant to an agreement between two or more companies, resulting in –

65.1 the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies"; or

65.2 the survival of at least one of the amalgamating or merging companies with or without the formation of one or more new companies, and the vesting in the surviving companies or companies, together with such new companies, of all of the assets and liabilities that were held by the amalgamating or merging companies immediately before the implementation of the agreement".

66. Two or more companies, including holding companies or subsidiaries, may amalgamate or merge if, upon implementation thereof, each amalgamated or merged company will satisfy the solvency and liquidity test.

67. Companies proposing to amalgamate or merge must enter into a written agreement setting out the terms and means of effecting the amalgamation or merger, which including –

67.1 the proposed Memorandum of any company to be formed;

67.2 the manner in which the securities of each amalgamating or merging company will be converted into securities of any proposed amalgamated or merged company, or exchanged for other property; and

67.3 details of the proposed allocation of the assets and liabilities of the amalgamating or merging companies among the companies to be formed or continuing to exist when it has been implemented.

68. The board of each such company must consider whether each proposed amalgamated or merged company will satisfy the solvency and liquidity test upon implementation of the agreement. If the board "reasonably believes" that each such company will satisfy this test, it may submit the agreement to shareholders of that company for consideration in accordance with section 115.

[7] Section 115 sets out the procedures that must be followed to obtain the necessary approval for all three fundamental transactions.

69. After a resolution approving the amalgamation or merger has been adopted by each company and the requirements of section 115 have been satisfied, each company must give notice of the amalgamation or merger to every known creditor of that company.

70. Subject to any provision of the merger agreement (or any other agreement), when a merger or amalgamation agreement has been implemented, each newly amalgamated, or surviving merged company is liable for all the obligations of every amalgamating or merging company. Consequently, a merger or amalgamation does not affect any civil, criminal or administrative action or proceeding pending by or against an amalgamating or merging company. Any such proceeding may continue by or against any amalgamated or merged company.

71. If, as a consequence of an amalgamation or merger, any property that is registered in terms of any public regulation is to be transferred from an amalgamating or merging company to an amalgamated or merged company:

71.1 a copy of the amalgamation or merger agreement, together with a copy of the filed notice of amalgamation or merger, constitutes sufficient evidence for the keeper of the relevant property registry to effect a transfer of the registration of that property; and

71.2 no transfer fee or tax is payable with respect to the transfer of the property or the registration of the property, except to the extent expressly otherwise provided in any public regulation.

Appraisal Right

72. The new Act provides an appraisal right. These provisions have been inserted to protect minority shareholders. They involve a new procedure for passing resolutions as well as a new remedy for minority shareholders which apply in limited circumstances only, namely where a meeting of shareholders is called at which a resolution is to be proposed to:

72.1 amend the Memorandum of Incorporation in any manner materially adverse to the rights or interests of any shareholder;

72.2 enter into the following transactions:

- a transaction for the disposal of all or the greater part of the assets or undertaking of a company;
- an amalgamation or merger;
- a scheme of arrangement.

73. A company may not take any steps to implement a disposal of all or substantially all of its assets, a merger, an amalgamation or a scheme of arrangement unless it has been approved:

73.1 by a special resolution of its shareholders;

73.2 adopted at a meeting called for that purpose, at which the holders of at least 25% of the shares entitled to be voted were present.

74. Even if the resolution was adopted, the company may not implement that resolution without the approval of a court if:

74.1 the holders of at least 15% of the shares that were voted on that resolution voted against its adoption and any person who voted against the resolution requires the company to seek court approval;

74.2 the court, on an application by any shareholder who voted against adoption of the resolution, grants that shareholder leave to apply to the court for a review of the transaction.

75. In both such instances, the court may set aside the resolution only if:

75.1 the resolution is manifestly unfair to any class of shareholders;

75.2 there was a material procedural irregularity.

76. Relief may only be sought if the person notified the company of its intention to oppose the resolution and the person was present and voted against the special resolution.

77. If the company adopts the resolution, it must send a notice to that effect to each shareholder who filed an objection. Such shareholder may then, within 20 business days after receipt thereof, demand in writing that the company pay him/her the fair value of his/her shares if (and only if) he/she satisfies requirements.

78. Dissenting shareholders have no further rights in respect of those shares, other than to be paid their fair value.

79. The company must then send to such shareholder a written offer to pay to him/her an amount considered by the directors to be the fair value of the relevant shares as at the date on which the resolution was adopted, accompanied by a statement showing how that value was determined. Such offer must remain open for 30 business days after it is made.

80. If the shareholder considers the offer to be inadequate, such shareholder may apply to Court to determine a fair value in respect of the shares concerned.

81. Shares surrendered in exercise of appraisal rights become part of the company's authorised but unissued shares of that class.

BUSINESS RESCUE

82. The business rescue provisions of the new Act have been the source of much scrutiny. Business rescue is an alternative to winding up and replaces the concept of judicial management under the existing Act. However, in keeping with international trends, the new business rescue approach is not restricted only to nursing a company back to a solvent trading status. It is also regarded as a system to temporarily protect the a company against the claims of creditors so that the company can thereafter, if necessary, be sold for maximum value as a going concern in order to give creditors a better dividend or return than they would have received under liquidation.

83. Business rescue can be invoked by –

83.1 A resolution of the board if it has reasonable grounds to believe that the company is "financially distressed" *and* "there appears to be a reasonable prospect of rescuing the company". With regard to the invoking of the business rescue provisions by resolution of the board –

83.1.1 No prior notice is given to employees, shareholders or creditors, nor is an application to court required. If a creditor or interested party is unhappy with the registration of a resolution for business rescue, such party must apply to the High Court to set it aside and, regrettably, incur the substantial legal costs.

83.1.2 If the board has reasonable grounds to believe that the company is financially distressed but *does not* pass a resolution for business rescue, it must deliver a written notice to all affected persons setting out that the company is financially distressed and the reasons why the board did not pursue a resolution for business rescue. Currently there is no obligation on a company's board or shareholders to place a failing company into liquidation or judicial management, or even to advise suppliers or creditors. The only indirect pressure to take steps is the threat of personal liability for reckless trading.

83.2 An affected person (shareholder, creditor, employee or trade union) may apply to the High Court on notice to the company, and other affected persons who must satisfy court that the company is financially distressed or the company has failed to pay over any amount in terms of employee related matters, or it is just and equitable to do so for "financial reasons".

83.3 The court may of its own volition, in hearing an application for liquidation or any other proceeding, grant an order for business rescue.

84. The effective date of business rescue is the registration of lodgement of resolution for business rescue; the issue of the papers if an affected person applies to the High Court for business rescue; or the date the court makes an order if during other proceedings. From the effective date, a moratorium is applicable on all claims, including secured claims or claims "in relation to property lawfully in the possession of the company".

85. Within a week after resolving to commence business rescue proceedings, the board (and not the shareholders, the creditors or a court) must appoint a person, called a "practitioner", to "oversee the company" during business rescue proceedings. The board nevertheless remains in office and continues to exercise its functions, subject to the overriding authority

of the practitioner. This obviously duplicates costs like directors' remuneration and supervisor's fees in a company trying to trim expenses. During business rescue, employees remain on the same terms and conditions. If employees are to be retrenched, the ordinary rules under the Labour Relations Act, 1995, will apply.

86. Section 136 (2) of the new Act provides that the practitioner may "cancel or suspend entirely, partially or conditionally *any* provision of an agreement to which the company is a party at the commencement of the business rescue period other than an agreement of employment". Unhappy counter-parties to contacts where the supervisor has exercised the power to cancel or suspend contractual provisions, are obliged to apply to the High Court to dispute the exercise of those rights. If the cancellation or suspension is upheld, the counter-party is left with an unsecured claim for damages only.

87. Post-business rescue financiers are given preference over ordinary "secured and unsecured" creditors but not over employees and practitioner's costs. This preference to post-business rescue financiers survives a subsequent liquidation if business rescue fails.

88. A 'business plan' lies at the heart of the business rescue process. A business plan must, within specified time periods, be prepared in a prescribed format by the practitioner in consultation with creditors and affected persons. The plan must contain "all the informational reasonably required" to enable affected persons to decide whether or not to accept or reject the plan. After the practitioner has completed the plan, it must be approved by creditors, including employees, whose aggregate claims against the company comprise 75% of the aggregate value of all amounts owed by the company to all its creditors, at least 50% of which must be amounts owed to "independent creditors", being creditors who are not related to the company or any of its directors. It thus excludes shareholders' loans. If the business plan is not approved, the company then goes out of business rescue or is put into liquidation.