COMPANIES (AMENDMENT) ACT, 1995

No. 7 **of 1995**

ARRANGEMENT OF SECTIONS

An Act to amend the Companies Act

Date of Assent : 13.04.95.

Date of Commencement: 21.04.95.

ENACTED by the Parliament of Botswana.

1. This Act may be cited as the Companies (Amendment) Act, 1995. **Short title**

2. Section 5 of the Companies Act (hereinafter referred to as "the Act") is amended by substituting, therefor, the following new section — **Amendment of section 5 of Cap. 42:01**

"Registrar and Deputy Registrar of Companies

5. (1) There shall be a Registrar of Companies (referred to in this Act as "the Registrar") who shall be a public officer, and who shall, subject to the control of the Minister, be responsible for the administration of this Act and who shall perform such functions and exercise such powers as may be conferred on him by this Act or any other enactment.

(2) The Registrar shall be appointed in accordance with the provisions of the Public Service Act.

(3) There shall also be a Deputy Registrar of Companies who shall be a public officer and who shall, likewise, be appointed in accordance with the provisions of the Public Service Act, and who shall have the power to do any act or thing which may be lawfully done under this Act or any other enactment by the Registrar."

Insertion of section 5A in the Act

3. The Act is amended by inserting, immediately after section 5 thereof, the following new section —

"Powers and functions of Registrar

5A. Without derogating from the generality of the provisions of section 5, the Registrar shall have the following powers and functions, namely to —

(*a*) take charge of, and be responsible for the safe custody of, all documents lodged with him under this Act;

(*b*) examine and register all returns and other documents lodged with him;

(*c*) register any alteration in the share capital of a company provided that such alteration is in accordance with the provisions of this Act;

(*d*) register amendments to the memorandum and articles of association of any company provided that such amendments are in accordance with the provisions of this Act;

(*e*) register the changes in the name of any company provided that such changes are in accordance with the provisions of this Act;

(*f*) register all transfer of shares in respect of any company registered in Botswana; and

(*g*) exercise any other powers which the Minister may, by regulations, prescribe."

Insertion of section 5B in the Act

4. The Act is amended by inserting, immediately after section 5A thereof, the following new section —

"Seal of office

5B. (1) The Registrar shall have a seal of office which shall be affixed to every memorandum and articles of association and certificate of incorporation lodged with or registered by him, and to any copy of a document issued by him in lieu of the original document.

(2) The seal of the Registrar and the impression thereof shall be judicially noticed in evidence."

Amendment of section 8 of the Act

5. Section 8 of the Act is amended by substituting, for subsection (1) (*a*) thereof, the following new subsection —

"8. (1) In the case of a company limited —

(*a*) by shares, the memorandum shall be in the English language and shall specify —

(i) the name of the company and, unless a licence has been granted under section 22, with the word "Limited" as the last word in its name, and if the company is a private company, with the word "(Proprietary)" inserted before the word "Limited",

(ii) the full name, sex, age, nationality, address and occupation of each individual who is a beneficial shareholder of the company,

(iii) where the beneficial shareholder is a company, the name of that company, the place of registration of that company, the registration number of that company, and the full name, sex, age, nationality and occupation of the principal representative of that company resident in Botswana,

(iv) the objects of the company,

(v) that the liability of the members is limited,

(vi) the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount;".

Amendment of section 66 of the Act

6. Section 66 of the Act is amended by substituting, therefor, the following new section —

"Special resolution for reduction of share capital

66. (1) Subject to the provisions of this section, a company may, by special resolution, if so authorized by its articles, reduce its share capital and, in particular, without prejudice to the generality of this power, may —

(*a*) extinguish or reduce the liability on any of its shares in respect of share capital not paid-up;

(*b*) with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(*c*) with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) Where a company wishes to reduce its share capital, it shall deliver, to the Registrar, a special resolution for reducing share capital, accompanied by a certificate certifying either that the company has no creditors, or that all creditors of the company have consented, in writing, to such reduction.

(3) The Registrar shall, within 14 days of the reso-lution being delivered to him, publish, at the company's expense, a notice of such resolution and of such certification in two separate issues of the Gazette.

(4) Where a notice of a resolution for reducing share capital has been published in accordance with subsection (3), any person being a creditor of the company who wishes to object to the reduction of the company's share capital shall, within 14 days of the last publication of the notice, give notice, in writing, of his objection thereto, and the grounds thereof to both the Registrar and the company.

(5) Where any creditor of the company makes an objection to such reduction, the Registrar shall not register the resolution save in compliance with an order of the court to so register it.

(6) Where the Registrar receives no objections to the reduction of a company's share capital, he shall, within 21 days of the publication of the notice, register the resolution."

Insertion of section 79A in the Act

7. The Act is amended by inserting, immediately after section 79 thereof, the following new section —

"Return in respect of sale, etc, of shares

79A. (1) Every private company registered in Botswana shall, within 21 days of the sale, transfer or disposal of any of its shares, file, with the Registrar, a return in the form contained in the Fifth Schedule specifying —

(*a*) the full name, sex, age, nationality, address and occupation of the person to whom the shares are being so sold, transferred, or disposed of;

(*b*) the number of shares being so sold, transferred or disposed of;

(*c*) the price of such shares; and

(*d*) the date of the sale, transfer or disposal of such shares.

(2) Where the person to whom the shares are sold, transferred or disposed of is not the beneficial shareholder of those shares, the return referred to in subsection (1) shall specify —

(a) the full name, sex, age, nationality, address and occupation of the beneficial shareholder;
(b) the number of shares allotted to him;
(c) the date on which the shares were so allotted to him; and
(d) the value of the shares.

(3) Every company which files a return in accordance with subsection (1) shall pay, to the Registrar, such filing fee as may be prescribed.

(4) Any company which fails to comply with the provisions of this section commits an offence and shall be liable to the penalty specified in section 309."

Amendment of section 95 of the Act

8. Section 95 of the Act is amended —

(a) by substituting, for subsection (7) thereof, the following new subsection —

"(7) The Registrar may from time to time require a company to transmit to him a list of the persons who have ceased to be members of that company since the date of the last return or, if no return has been made, since the date of the incorporation of the company."; and

(b) by inserting, immediately after subsection (7) thereof, the following new subsections —

"(7A) There shall be annexed to the annual return filed with the Registrar in terms of subsection (1), a declaration of beneficial shareholders in the form contained in the Fifth Schedule specifying —

(a) the full name, sex, age, nationality, address and occupation of each individual who is a beneficial shareholder of the company; and
(b) where the beneficial shareholder is a company, the name of that company, and the full name, sex, age, nationality, and occupation of the principal representative of that company resident in Botswana.

(7B) The Registrar shall have the power to require such additional information as he may consider necessary to determine —

(a) the ownership of any company registered or sought to be registered in Botswana; or
(b) the identity of the ultimate beneficiaries of any shares of the company."

Amendment of section 97 of the Act

9. Section 97 of the Act is amended —

(a) in subsections (2), (3) and (5) thereof, by substituting, for the word "Minister" which appears therein, the word "Registrar"; and
(b) by inserting, immediately after subsection (2) thereof, the following new subsection —

"(2A) A company which makes application to the Registrar in terms of subsection (2) shall pay, to the Registrar, such penalty fee as may be prescribed from time to time by the Minister."

Amendment of section 111 of the Act

10. Section 111 of the Act is amended by substituting, therefor, the following new section —

"Keeping of books of account

111. (1) Every company shall cause to be kept in the English language, proper books of account with respect to —

(*a*) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;

(*b*) all sales and purchases of goods by the company; and

(*c*) the assets and liabilities of the company.

(2) For the purposes of subsection (1), proper books of account shall not be deemed to be kept with respect to the matters referred to in that subsection if there are not kept such books as are necessary to give a true and fair view of the state of the company's affairs and to explain its transactions.

(3) The books of account shall be kept at the registered office of the company and shall at all times be open to inspection by the directors.

(4) If any director of a company fails to take all reasonable steps necessary to secure compliance by the company with the requirements of this section, or has by his own wilful act been the cause of any default by the company thereunder, he shall, in respect of each default, and subject to the provisions of section 119, be guilty of an offence and liable to a fine not exceeding P3 000,00."

"Statement of source and application of funds

11. The Act is amended by inserting, immediately after section 112 thereof, the following new section —

Insertion of section 112A in the Act

112A. (1) There shall be annexed to every balance sheet and every profit and loss account laid before a company in general meeting as required in terms of section 112, a statement setting out the source of, and the uses to which, the funds of the company will be applied.

(2) The statement shall comply with the requirements of the Sixth Schedule."

Amendment of section 121 of the Act

12. Section 121 of the Act is amended —

(*a*) by substituting, for subsection (8) thereof, the following new subsection —

"(8) Notwithstanding anything to the contrary contained in this section, a private company shall not be required to appoint an auditor if —

(*a*) the number of shareholders in such company does not exceed 10;

(*b*) the equity investment in the company does not exceed P50 000.00; and

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

(*b*) by inserting, immediately after subsection (8) thereof, the following new subsection —

"(9) Every company which is required to appoint an auditor under the provisions of this Act shall appoint one who is resident in Botswana."

13. The Act is amended by inserting, immediately after section 121 thereof, the following new section — Insertion of section 121A in the Act

"Notice of appointment to Registrar

121A. Every company which is required to appoint an auditor under this Act shall, in writing, within 14 days of appointing such auditor, give notice of that appointment to the Registrar."

14. Section 139 of the Act is amended by substituting, therefor, the following new section — Amendment of section 139 of the Act

"Directors and secretary to be resident

139. (1) Every company not being a private company shall have at least two directors, one of whom shall be resident in Botswana, and every private company shall have at least one director who shall be resident in Botswana.

(2) Every company shall have a secretary who shall also be resident in Botswana.

(3) The sole director of a company shall not also be secretary, nor shall any company have as secretary to the company a corporation the sole director of which is a sole director of the company.

(4) Every subscriber to a memorandum of association of a private company shall, until other directors are appointed, be deemed to be a director of the company and be liable for all the duties and obligations of a director.

(5) Any provision requiring or authorizing a thing to be done by or to a director and the secretary shall not be satisfied by its being done by or to the same person acting both as director and as or in place of the secretary."

15. (1) Section 182 of the Act is amended by substituting, therefor, the following new section — Amendment of section 182 of the Act

"Report by Master

182. (1) Where the court has made a winding-up order the Master may, if he has reasonable cause to believe —

(*a*) that an offence has been, may be or is being committed by any person in the promotion, formation, management or conduct of the business of the company being wound-up; or

(*b*) that the company has not caused, to be kept, any books of account as required by section 111;

make a report, in writing, to the Attorney-General.

(2) The Attorney General shall, upon receipt of the report of the Master made under subsection (1), take such action as he may deem appropriate."

Insertion of section 243A in the Act

16. The Act isamended by inserting, immediately after section 243 thereof, the following new section —

"Master to see liquidator's report

243A. The liquidator shall, as soon as practicable, but not later than three months after the date of his appointment, submit to the Master, a copy ofthe report which he is required to make in terms of section 243."

Amendment of section 276 of the Act

17. Section 276 of the Act is amended —

(*a*) by substituting, for subsection (1) thereof, the following new subsection —

"(1) Where the Registrar has reasonable cause to believe that a company is not carrying on business or is not in operation, he shall send to the company by registered post a letter —

(*a*) inquiring whether it is carrying on business or is in operation; and

(*b*) demanding such information as he may deem necessary to prove that the company is carrying on business or is in operation"; and

(*b*) by inserting, immediately after subsection (8) thereof, the following new subsections —

"(9) Notwithstanding the provisions of subsection (1), a registered company which is no longer carrying on business or is no longer in operation may, for the purposes of ensuring that no other company is registered by a name, title, description or style which is identical or similar to that by which it is registered under this Act, make application to the Registrar to retain its name on the register, and shall pay, to the Registrar, the annual fee prescribed in the Third Table of the Seventh Schedule for such retention.

(10) The Registrar shall retain, or cause to be retained, on the register, the name of any company which makes application to him under subsection (9) and pays, to him, the requisite fee therefor."

Amendment of section 309 of the Act

18. Section 309 of the Act is amended by inserting, immediately after the words "55(2)", the words "79(1), 79(2),".

Amendment of Fifth Schedule to the Act

19. The Fifth Schedule is amended —

(*a*) by inserting, immediately after the word "sections" which appears immediately after the heading thereof, the word "75A,"; and

(*b*) by inserting, immediately after the forms which appear therein, the following new forms —

"THE COMPANIES ACT (Chapter 42:01)

RETURN OF TRANSFER OF SHARES of the....................................... Company Limited

A. Information relating to transferee who is to be the beneficial holder of the shares transferred

1. Name...

   Surname..

   First name (s)...

2. Sex F/M

3. Age.................

4. Nationality...

5. Postal Address...

6. Occupation...

7. Number of shares transferred..

8. Mode of transfer (i.e. whether by sale, assignment,etc).......................

9. Price of shares transferred...

10. Date of transfer...

B. Information relating to the person who is the beneficial holder of the shares transferred

1. Name...

   Surname..

   First name(s)...

2. Sex F/M

3. Nationality...

4. Postal Address...

5. Occupation...

6. Number of shares allotted..

7. Date of allotment of shares...

8. Value of shares allotted..

....
Secretary Director

DECLARATION OF BENEFICIAL SHAREHOLDERS OF THE

....Company Limited made on

the....................day of...19.......

A. Particulars of beneficial shareholder not being a corporate shareholder

1. Name..

Surname..

First name(s)..

2. Sex F/M

3. Age........................

4. Nationality..

5. Occupation..

6. Postal Address..

B. Particulars of corporate beneficial shareholder

1. Name of company..

2. Particulars relating to principal representative of the company in Botswana

(*a*) Surname..

First name(s)..

(*b*) Sex F/M

(*c*) Age........................

(*d*) Nationality..

(*e*) Occupation..

....

Secretary *Director"*

20. The Sixth Schedule to the Act is amended — Amendment of Sixth Schedule to the Act

(*a*) by inserting, immediately after paragraph 11 thereof, the following new paragraph —

"11A. The statement of source and application of funds to be annexed to the balance sheet in terms of section 112A shall disclose the following —

A. SOURCE FROM WHICH THE FUNDS OF A COMPANY MAY BE DERIVED :

(*a*) the gross income of the company;
(*b*) the disposal of fixed and current assets;
(*c*) the proceeds of shares issued;
(*d*) the proceeds of loans raised;
(*e*) the proceeds of debentures raised; and
(*f*) repayments received on loans and advances made.

B. PURPOSES TO WHICH THE FUNDS OF THE COMPANY MAY BE APPLIED

(*a*) the meeting of any loss the company might make;
(*b*) the acquisition of fixed and other assets;
(*c*) the redemption of any loans;
(*d*) the redemption of any debentures;
(*e*) the payment of taxes due and payable by the company;
(*f*) the payment of dividends; and
(*g*) any increase in the net working capital being current assets less current liabilities; and

(*b*) by inserting, immediately after paragraph 12 thereof, the following new paragraph —

"12A. The statement of source and application of funds to be annexed to the profit and loss account in terms of section 112A shall disclose the information specified in paragraph 11A of this Schedule."

21. The Seventh Schedule to the Act is amended in the Third Table thereof by inserting, immediately after paragraph (5) thereof, the following new paragraph — Amendment of Seventh Schedule to the Act

"(6) For retaining the name of a company on the register for purposes of protecting its name under section 276 276...........50,00."

PASSED by the National Assembly this 6th day of April, 1995.

C.T. MOMPEI,
Deputy Clerk of the National Assembly.