

## CHAPTER 24:11

# PRIVATE BUSINESS CORPORATIONS ACT

*Act 15/1993, 22/2001 (s. 4)*

## ARRANGEMENT OF SECTIONS

### PART I

#### PRELIMINARY

#### *Section*

1. Short title.
2. Interpretation.
3. Registrar and office for registration of private business corporations.

### PART II

#### INCORPORATION OF PRIVATE BUSINESS CORPORATIONS AND MATTERS INCIDENTAL THERETO

4. Formation.
5. Incorporation statement.
6. Signing of incorporation statement.
7. Registration of incorporation statement.
8. Incorporation of private business corporation and capacity and powers thereof.
9. Limitation of liability of members of private business corporation.
10. Registration of amended incorporation statement.
11. Incorporation statement to be kept at registered office.
12. Effect of limitation of objects of private business corporation.
13. No constructive notice of incorporation statement or other public documents.
14. Prohibition of undesirable name.
15. Change of name.
16. Display of name by private business corporation.
17. Publication of members' names.
18. Postal address and registered office.
19. Pre-incorporation contracts.
20. Conversion of company into private business corporation.
21. Cancellation of registration of private business corporation upon conversion into company.

### PART III

#### MEMBERS

22. Number of members.
23. Requirements for membership.
24. Commencement and termination of membership.
25. Members' contributions.
26. Members' duty to act in good faith.
27. Cessation of membership by order of court.

### PART IV

#### MEMBERS' INTERESTS

28. Nature of member's interest.
29. Certificate of member's interest.
30. Acquisition of member's interest by new member.
31. Disposal of interest of insolvent member.
32. Disposal of interest of deceased member.
33. Other disposals of members' interests.
34. Maintenance of total of members' interests.
35. Acquisition by private business corporation of members' interests.
36. Financial assistance by private business corporation for acquisition of members' interests.

## PART V

### MANAGEMENT AND ADMINISTRATION

37. Power of members to bind private business corporation.
38. By-laws.
39. Variable rules for management.
40. Meetings of members.
41. Protection against unfair prejudice.
42. Restriction on payments to members.
43. Fraudulent or reckless conduct of business.

## PART VI

### ACCOUNTING

44. Accounting records.
45. Financial year.
46. Annual financial statements.
47. Examination of financial statements and report thereon.
48. Duties of accounting officer.
49. Accounting officer's right of access to books, etc., and to convene meetings.
50. Termination of accounting officer's mandate.

## PART VII

### WINDING UP AND JUDICIAL MANAGEMENT

51. Voluntary winding up.
52. Winding up by court.
53. When private business corporation deemed unable to pay its debts.
54. Liquidator.
55. Compositions.
56. Application of Cap. 24:03.
57. Additional provisions relating to winding up.

## PART VII

### GENERAL

58. Inspection and copies of documents in Registrar's office and production of documents in evidence.
59. Provision as to fees.
60. Transmission of copies of court orders to Registrar and Master.
61. [Repealed].
62. Regulations.

## SCHEDULE

Construction of References in Companies Act that are Applicable to this Act.

**AN ACT to provide for the constitution, incorporation, registration, management, administration and winding up of private business corporations; and to provide for matters connected with or incidental to the foregoing.**

[Date of commencement : 5th July, 1997]

## PART I

### PRELIMINARY

#### 1 Short title

This Act may be cited as the Private Business Corporations Act [*Chapter 24:11*].

#### 2 Interpretation

(1) In this Act—

“accounting officer”, in relation to the accounting records and financial statements of a private business corporation, means a person referred to in subsection (1) or (2) of section *forty-seven*;

“by-laws” means the by-laws of a private business corporation adopted or altered in terms of section *thirty-eight*;

“Companies Act” means the Companies Act [*Chapter 24:03*];  
“company” means a company incorporated under the Companies Act;  
“court”, in relation to any matter referred to in subsection (2), means a court with jurisdiction in the matter in terms of that subsection;  
“incorporation statement” means the incorporation statement of a private business corporation registered in terms of section *seven* or *ten*;  
“Master” means the Master of the High Court;  
“interest”, in relation to a member, means the member’s percentage interest in a private business corporation as stated in its incorporation statement;  
“Minister” means the Minister of Justice, Legal and Parliamentary Affairs or any other Minister to whom the President may, from time to time, assign the administration of this Act;  
“private business corporation” means a private business corporation incorporated under Part II;  
“Registrar” means the Chief Registrar of Companies or a registrar of companies appointed in terms of the Companies Act.

(2) For the purposes of this Act the courts with jurisdiction in respect of any matter arising out of this Act in relation to a private business corporation, including the winding up of such a corporation, shall be—

- (a) the High Court; or
- (b) the magistrates court within whose area of jurisdiction the registered office or main place of business of the private business corporation is situated:

Provided that—

- (i) in respect of any matter which is beyond the jurisdiction of the magistrates court by virtue of any provision of the Magistrates Court Act [*Chapter 7:10*], other than a provision limiting territorial jurisdiction, the court with jurisdiction shall be the High Court;
- (ii) if any proceedings relating to a private business corporation which could have been brought before a magistrates court are brought before the High Court, section 53 of the High Court Act [*Chapter 7:06*] shall apply in relation to such matter.

### **3 Registrar and office for registration of private business corporations**

For the registration of private business corporations under this Act the Companies Registration Offices established by section 5 of the Companies Act shall be employed and that section shall apply, *mutatis mutandis*, to private business corporations.

## **PART II**

### **INCORPORATION OF PRIVATE BUSINESS CORPORATIONS AND MATTERS INCIDENTAL THERETO**

#### **4 Formation**

Any one or more persons, not exceeding twenty, who qualify for membership of a private business corporation in terms of section *twenty-three* may, by subscribing their names to an incorporation statement and otherwise complying with the requirements of this Act in respect of registration, form a private business corporation.

#### **5 Incorporation statement**

(1) The incorporation statement shall be in the prescribed form and shall state—

- (a) the name of the private business corporation with “Private Business Corporation” as the last words of the name or the abbreviation “PBC”, in capital letters, at the end of the name; and
- (b) the postal address of the private business corporation for the purposes of section *eighteen*; and
- (c) the physical address, not being a post office box or private bag number, of the registered office of the private business corporation for the purposes of section *eighteen*; and
- (d) the full name of each member and his national identity number or, if he has no such number, the number of any other official identity document he may possess and his date of birth; and
- (e) the percentage of each member’s interest in the private business corporation, taking the total of members’ interests as one hundred *per centum*; and
- (f) the amount of each member’s contribution to the assets of the private business corporation, stating the extent to which each contribution is in cash or in property or in services rendered towards the formation or registration of the private business corporation, and stating the fair value of any contribution that is not in cash; and
- (g) the name and postal address of an accounting officer to whom the members of the private business corporation intend to submit their financial statements in terms of section *forty-seven*; and
- (h) the date of the end of the financial year of the private business corporation.

(2) Subject to section *twelve*, the incorporation statement may state the objects of the private business corporation.

## **6 Signing of incorporation statement**

- (1) An incorporation statement shall be signed by—
  - (a) every person who is to become a member of the private business corporation upon its incorporation; and
  - (b) a person who is qualified to become the accounting officer of the private business corporation upon its incorporation.
- (2) The effect of each member's signature on an incorporation statement shall be to acknowledge the correctness of each item in the incorporation statement and the fairness of any valuation included therein in terms of paragraph (f) of section *five*, and the effect of the signature of the person referred to in paragraph (b) of subsection (1) shall be to indicate that he has no cause to believe that such valuation is unfair.

## **7 Registration of incorporation statement**

- (1) An incorporation statement, together with a duplicate original or a copy in the prescribed form, or, if it is to be registered in Bulawayo, two duplicate originals or copies in the prescribed form, shall be delivered to the Registrar.
- (2) The Registrar shall, upon payment of the prescribed fee, register any incorporation statement delivered to him in terms of subsection (1) if it is in accordance with this Act.
- (3) On registering the incorporation statement of a private business corporation the Registrar shall—
  - (a) assign a registered number to the private business corporation; and
  - (b) endorse on each copy of the incorporation statement a certificate that the private business corporation is incorporated; and
  - (c) return one copy of the incorporation statement, endorsed in terms of paragraph (b), to the private business corporation.
- (4) An incorporation statement bearing the certificate of incorporation referred to in subsection (3) or a copy thereof issued in terms of subsection (5) shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with and that the private business corporation is duly incorporated under this Act.
- (5) The Registrar may, on application being made to him and on payment of the prescribed fee, if any, issue a certified copy of any incorporation statement registered with him, bearing the certificate of incorporation referred to in subsection (3).

## **8 Incorporation of private business corporation and capacity and powers thereof**

- (1) The incorporation of a private business corporation shall date from the completion by the Registrar of its certificate of incorporation, from which date it shall be a body corporate by the name contained in its incorporation statement, capable of exercising all the functions of a body corporate, and having perpetual succession, until it is struck off the register or dissolved in terms of Part VII.
- (2) A private business corporation shall have the capacity and powers of a natural person of full legal capacity in so far as a body corporate is capable of having such capacity and exercising such powers.

## **9 Limitation of liability of members of private business corporation**

Subject to this Act, the members of a private business corporation shall not, solely by reason of their membership, be liable for the debts or obligations of the private business corporation.

## **10 Registration of amended incorporation statement**

- (1) Subject to the proviso to subsection (1) of section *twenty-three*, if any change takes place in any of the matters stated in an incorporation statement in accordance with paragraph (d), (e) or (f) of subsection (1) of section *five*, the private business corporation shall within twenty-eight days deliver to the Registrar—
  - (a) an amended incorporation statement complying in every respect with subsection (1) of section *five* and incorporating the change that has taken place, signed in accordance with section *six* by every existing and new member, together with the duplicate original or originals or copy or copies required by section *seven*; and
  - (b) the private business corporation's copy of its original incorporation statement and any previous amended incorporation statement.
- (2) The Registrar shall, upon payment of the prescribed fee, register any amended incorporation statement delivered to him in terms of subsection (1) if it is in accordance with the provisions of this Act.
- (3) On registering an amended incorporation statement the Registrar shall—
  - (a) endorse on each copy the date of registration; and
  - (b) endorse on each copy of the private business corporation's original incorporation statement and any previous amended incorporation statement the date of registration of the new amendment; and
  - (c) return to the private business corporation one copy of the new amended incorporation statement and its own copy of its original incorporation statement and any previous amended incorporation statement so endorsed.

(4) If any change takes place in any of the matters stated in an incorporation statement in terms of paragraph (a), (b), (c), (g) or (h) of subsection (1) of section *five*, the private business corporation and the Registrar shall proceed in terms of subsections (1), (2) and (3), but the change shall not take effect until registration of the amended incorporation statement or any later date specified therein.

(5) If a private business corporation makes default in complying with subsection (1) or (4), the Registrar may, on his own motion or on application by a member or creditor, serve on the members individually by registered post a direction that they rectify the default within twenty-eight days.

(6) If the members of a private business corporation fail to comply with any direction given in terms of subsection (5), the Registrar may, by further written notice served on the members individually by registered post, impose on them, or any of them, liability jointly and severally with the private business corporation for every debt of the private business corporation incurred from the date on which the direction referred to in subsection (5) was sent until the default is rectified.

(7) On application by any member or members the court may relieve the members or any of them from any liability imposed under subsection (6).

### **11 Incorporation statement to be kept at registered office**

(1) Every private business corporation shall keep at its registered office the original or a certified copy of its incorporation statement endorsed with its certificate of incorporation and with the dates of any amendments, together with any amended incorporation statements endorsed with their date of registration and with the dates of any amendments.

(2) Every member shall be entitled to one free copy of each document referred to in subsection (1).

(3) Any person shall be entitled to inspect any document referred to in subsection (1) at any reasonable time during business hours and, on payment of the reasonable costs thereof, to obtain a copy of any such document.

### **12 Effect of limitation of objects of private business corporation**

(1) The members of a private business corporation may agree to specify the objects of the private business corporation and to limit the activities of the private business corporation to such objects, but no such specification or limitation shall invalidate any transaction which exceeds any such objects and which was made by the private business corporation or entered into by the private business corporation with any other person, notwithstanding that the other person was aware of the specification or limitation and notwithstanding that the specification or limitation was recorded in the incorporation statement or by the by-laws of the private business corporation or in any other document whatsoever.

(2) Where the members of a private business corporation have agreed to limit its activities to specified objects, then, without derogation from any other remedies that may be available—

(a) the court may, on application made prior to the event by a member of the private business corporation, issue an interdict restraining the private business corporation from entering into or completing any transaction that exceeds its objects;

(b) where the private business corporation has entered into any completed transaction that exceeds its objects and has resulted in loss to the private business corporation, the court may, on application made by a member of the private business corporation, order any other member who entered into or took part in the transaction to compensate the private business corporation for the loss:

Provided that where in respect of any such claim for compensation it appears that the member against whom the claim is made acted honestly and reasonably and, having regard to all the circumstances of the case, it would be just and fair to do so, the court may decline to award compensation against him or may make an award for part only of the compensation or may make such other order or award as the court may think fit.

### **13 No constructive notice of incorporation statement or other public documents**

The fact that a private business corporation's incorporation statement or any other document has been registered in terms of this Act or is available or required to be available for inspection in terms of this Act, shall not, of itself, be construed as giving any person notice or knowledge of its contents.

### **14 Prohibition of undesirable name**

(1) The Registrar may refuse to register a private business corporation with a name which—

(a) is identical to that under which another private business corporation or a company is already registered under this Act or the Companies Act, as the case may be, or which is so similar to any such name as to be likely to deceive; or

(b) is likely to mislead the public; or

(c) is blasphemous or indecent or likely to cause offence to any person or class of persons; or

(d) suggests patronage of the Government or some other authority or organisation unless the consent thereof has been obtained; or

(e) is undesirable for any other reason.

(2) The Registrar may upon application and payment of such fees as may be prescribed reserve, for a period not exceeding two months, a name for a private business corporation pending its registration or change of name.

(3) The Registrar, after affording a private business corporation an opportunity of making representations to him in the matter, may order it to change its name, within a period specified by him, being not less than six weeks from the date of the order, if he considers that the private business corporation should not have been registered with that name for any reason mentioned in paragraph (a), (b), (c), (d) or (e) of subsection (1):

Provided that the Registrar shall not make any such order if a period of more than twelve months has elapsed since the registration.

(4) If a private business corporation fails to comply with an order made in terms of subsection (3), the Registrar may apply to court for its winding up.

(5) Any person who is aggrieved by an order made in terms of subsection (3) may appeal to a judge of the High Court, who may make such order as he thinks fit.

(6) A court, on application by an interested person, shall have the same powers as the Registrar to make an order in terms of subsection (3), but shall not be limited in the exercise of its powers by the period of twelve months referred to in the proviso to that subsection.

(7) If a private business corporation fails to comply with an order referred to in subsection (6), any interested party may apply to court for its winding up.

## **15 Change of name**

(1) A private business corporation that wishes to change its name shall first obtain the written approval of the Registrar.

(2) If the Registrar grants written approval for a private business corporation to change its name, the private business corporation shall publish in the *Gazette* and in a daily newspaper circulating in the district in which the registered office of the private business corporation is situated an advertisement stating the change of name, and shall then apply for an appropriate amendment of its incorporation statement in terms of section *ten*.

(3) Where the name of a private business corporation is changed in terms of this section and section *ten*, the Registrar shall enter the new name in the register in place of the former name.

(4) Upon the application in writing of a private business corporation that has changed its name in terms of this section and on production of the amended incorporation statement endorsed in terms of section *ten*, a Registrar of Deeds or mining commissioner, or other officer responsible for the registration of deeds or mining titles, shall make such alterations in his registers and on any title deeds and other documents evidencing title as may be necessary as a result of the changed name:

Provided that nothing in this subsection shall exempt the private business corporation from paying any fees prescribed under the Deeds Registries Act [*Chapter 20:05*] or the Mines and Minerals Act [*Chapter 21:05*] in respect of such alterations.

(5) The change of the name of a private business corporation shall not affect any right or obligation of the private business corporation, or render defective any legal proceedings by or against the private business corporation, and any legal proceedings that might have been continued or commenced by or against it under its former name may be continued or commenced under its new name.

## **16 Display of name by private business corporation**

(1) Every private business corporation—

(a) shall continuously display its name on the outside of every office or place in which its business is carried on, in a conspicuous position, and in letters easily legible; and

(b) shall have its name engraved in legible characters on its seal, if any; and

(c) shall have its name mentioned in legible characters in all business letters, notices and other official publications of the private business corporation, and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the private business corporation, and in all delivery notes, invoices, receipts and letters of credit of the private business corporation.

(2) If default is made in complying with paragraph (a) of subsection (1), every member of the private business corporation shall be guilty of an offence and liable to a fine not exceeding level three or to imprisonment for a period not exceeding one month or to both such fine and such imprisonment.

[Subsection as amended by section 4 of Act No. 22 of 2001]

Provided that it shall be a defence for a member charged that under that paragraph to prove on a balance of probabilities he had reasonable grounds for believing that a competent and reliable person was charged with the duty of ensuring compliance with that paragraph and that such person was in a position to discharge that duty and that he had no reason to believe that such person had in any way failed to discharge that duty.

(3) If default is made in complying with paragraph (b) or (c) of subsection (1), any person acting on behalf of the private business corporation who uses or permits the use of any seal or document so as to constitute such a

default shall be personally liable for any debt incurred by the private business corporation as a result of such use, unless the debt is duly discharged by the private business corporation.

### **17 Publication of members' names**

(1) In this section—

“business letter” includes any quotation or order form, but does not include—

- (a) any invoice, statement, delivery note, packing note or similar document; or
- (b) any letter written on behalf of the private business corporation as a client by any professional person or partnership.

(2) Every private business corporation shall, in all business letters which it sends or issues to any person and on or in which the private business corporation's name appears, state in legible characters with respect to every member his present forenames, or the initials thereof, and present surname.

(3) If default is made in complying with subsection (2), any person acting on behalf of the private business corporation who sends or issues or permits the sending or issuing of any business letter so as to constitute such a default shall be personally liable for any debt incurred by the private business corporation as a result of the letter, unless the debt is duly discharged by the private business corporation.

(4) A private business corporation may, in complying with this section, describe any or all of its members as directors:

Provided that the fact that some but not all of the members are so described shall not of itself be taken as notice to any person dealing with the private business corporation that any member not so described has no authority or restricted authority to act on behalf of the private business corporation.

### **18 Postal address and registered office**

Every private business corporation shall have in Zimbabwe a postal address and a registered office, particulars of which shall be recorded in its incorporation statement and amended when necessary.

### **19 Pre-incorporation contracts**

Any contract made in writing by a person professing to act as agent or trustee for a private business corporation not yet formed, incorporated or registered shall be capable of being ratified and adopted by or otherwise made binding upon and enforceable by the private business corporation 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 ratification or adoption is in writing signed by all the members of the private business corporation within the time specified in the contract or, if no time is specified, within a reasonable time.

### **20 Conversion of company into private business corporation**

(1) Any company having not more than twenty members, all of whom qualify for membership of a private business corporation in terms of section *twenty-three*, may apply for conversion to a private business corporation in terms of this section.

(2) A company referred to in subsection (1) shall publish a notice in the *Gazette* and in a newspaper circulating in the district in which its registered office is situated stating that—

- (a) an application is intended to be made, on a date to be specified in the notice, to the Registrar for the conversion of the company to a private business corporation; and
- (b) the application may be inspected at the office of the Registrar; and
- (c) any interested person who wishes to oppose the application may do so by lodging his objections and his name and address, in writing, with the Registrar within the ten days next following the date on which the application will be made.

(3) Where a company has given notice in terms of subsection (2), it shall lodge with the Registrar, not later than the date specified in the notice—

- (a) an application for conversion in the prescribed form signed by all the members of the company and containing a statement that upon conversion the assets of the private business corporation, fairly valued, will exceed its liabilities and that upon conversion it will be able to pay its debts as they become due in the ordinary course of its business; and
- (b) an incorporation statement which complies with section *five* but in which the members' contributions to the private business corporation are shown as an aggregate amount, which amount shall not be greater than the excess of the fair value of the assets to be acquired by the private business corporation over the liabilities to be assumed by the private business corporation:

Provided that—

- (i) the private business corporation may treat any portion of such excess not reflected as members' contributions as amounts which may be distributed to its members;
- (ii) the members' interests in the private business corporation shall be in the same proportions to each other as their relative shareholdings in the company.

(4) An incorporation statement referred to in paragraph (b) of subsection (3) shall reflect every member of the company as a member of the private business corporation on its incorporation, and shall be signed accordingly by every such member and by an accounting officer in terms of section *six*.

(5) Upon the expiry of the period of ten days next following the date specified in terms of paragraph (a) of subsection (2), the Registrar shall, if he is satisfied that subsections (2) and (3) have been complied with by the company, consider the application and any objections thereto that may have been lodged and may grant or refuse the application:

Provided that, if any objections have been lodged, the Registrar shall give the objector or objectors and the company an opportunity of being heard in the matter.

(6) The Registrar shall notify the company and any objector of his decision on the application for conversion and the company or any objector may, within ten days of the notification of the decision, appeal against it to the High Court, which may confirm, reverse or vary the decision of the Registrar or give such other direction in the matter as it thinks fit.

(7) Where an application for conversion has been granted in terms of this section, the Registrar shall proceed in terms of subsections (2) and (3) of section *seven* and shall include in the certificate of incorporation of the private business corporation a statement that the private business corporation has been converted from a company, referring to its previous name and registered number.

(8) When he has registered a private business corporation which previously existed as a company, the Registrar shall ensure that the company's registration under the Companies Act has been cancelled.

(9) Upon registration of a private business corporation which previously existed as a company, the private business corporation shall forthwith give notice of its conversion in writing to all the creditors of the company at the time of conversion and to all other parties to contracts or legal proceedings in which the company was concerned at the time of conversion.

(10) On the registration of a private business corporation which previously existed as a company, all the assets, rights, obligations and liabilities of the company concerned shall vest in the private business corporation and any legal proceedings instituted by or against the company or other things done or commenced by or against the company shall be deemed to have been instituted, done or commenced, as the case may be, by or against the private business corporation.

(11) The conversion of a company to a private business corporation shall not affect—

- (a) any liability of a director or officer of the company to the company on the ground of breach of trust or negligence, or to any other person pursuant to any provision of the Companies Act; and
- (b) any liability of the company, or of any other person, as surety;

and the juristic person of the company shall continue to exist in the form of the private business corporation to which it has been converted.

(12) Upon the production by a private business corporation, which previously existed as a company, of its certificate of incorporation to any registrar or other officer charged with the custody of any register or record in terms of any law, such registrar or officer shall, free of charge, make all such alterations in his registers or records as may be necessary as a result of the conversion of the company to a private business corporation, and no transfer or stamp duty shall be payable in respect thereof.

## **21 Cancellation of registration of private business corporation upon conversion into company**

If a private business corporation is converted into a company in terms of the Companies Act, the Registrar shall, upon its registration as a company, cancel its registration as a private business corporation under this Act.

### **PART III**

#### **MEMBERS**

## **22 Number of members**

(1) A private business corporation shall have a minimum of one member and a maximum of twenty members.

(2) A private business corporation shall not cease to exist solely on account of its having no members or more than twenty members:

Provided that—

- (i) any person who knowingly causes a private business corporation to incur a debt whilst it has no members shall be liable, jointly and severally with the private business corporation, for the debt;
- (ii) if a private business corporation has or purports to have more than twenty members, every member and purported member shall be liable, jointly and severally with the private business corporation, for every debt incurred by the private business corporation whilst the number of its members and purported members exceeds twenty.

## 23 Requirements for membership

(1) Subject to this section, only individual natural persons acting in their own right may be members of a private business corporation, and no partnership, association or body corporate or other legal person shall be a member, whether directly or through a nominee:

Provided that, if a member dies or becomes insolvent, mentally disordered or subject to any other legal disability, his estate may, without it being necessary to amend the incorporation statement, become a member in his place, and he or his estate shall be represented for all purposes of membership by his executor, trustee, curator or other legal representative, whether or not such representative is a partnership, association or body corporate or other legal person.

(2) Subject to this section, a minor may be a member of a private business corporation:

Provided that he shall be represented or assisted by his guardian in the exercise of his rights and duties as a member.

(3) The following persons shall be disqualified from being members of a private business corporation—

(a) except with the leave of a court, any unrehabilitated insolvent;

(b) except with the leave of a court, any person who within the preceding seven years has been convicted, in Zimbabwe or elsewhere, of theft, fraud, forgery or uttering a forged document or perjury, and has been sentenced therefor to imprisonment without the option of a fine or to a fine exceeding level five;

[Paragraph as amended by section 4 of Act No. 22 of 2001]

(c) any person who is the subject of any order under the Companies Act disqualifying him as a director;

(d) except with the leave of a court, any person removed by a competent court from any office of trust on account of misconduct.

(4) Any person, partnership, association or body corporate or other legal person who or which, as the case may be, purports to become a member of a private business corporation in contravention of subsection (1) or (3) shall, notwithstanding the invalidity of his or its purported membership, be liable jointly and severally with the private business corporation for every debt of the private business corporation incurred while such purported membership continues.

(5) Any member of a private business corporation who becomes disqualified from being a member shall forthwith take steps to dispose of his interest in the private business corporation and to terminate his membership thereof.

(6) Any person who, without reasonable excuse the proof whereof lies on him, contravenes subsection (5) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[Subsection as amended by section 4 of Act No. 22 of 2001]

## 24 Commencement and termination of membership

(1) A member's membership of a private business corporation shall commence on the registration of the incorporation statement or amended incorporation statement in which his name and signature as a member first appear.

(2) Unless previously terminated by an order of court made under section *twenty-seven*, a member's membership shall terminate on the registration of an amended incorporation statement in which his name and signature as a member first do not appear.

## 25 Members' contributions

(1) Each person who is to become a member of a private business corporation upon its incorporation shall, with the agreement of every other such person, make a contribution to the private business corporation's assets in the form of cash or property or services rendered towards its formation or registration, or in a combination of those forms.

(2) Any person becoming a member of an existing private business corporation may, with the agreement of all existing members, make a contribution to the private business corporation's assets similar to that referred to in subsection (1).

(3) Any member's contribution may, with the agreement of all members, be increased or reduced:

Provided that a reduction involving a reduction of the private business corporation's assets shall be subject to section *forty-two*.

(4) A private business corporation shall record and secure the registration of any new member's contribution and any increase or reduction in an existing member's contribution by the procedure laid down in subsection (1) of section *ten*.

(5) All money payable or property transferable by any member to the private business corporation as a member's contribution shall be a debt due by him to the private business corporation.

## 26 Members' duty to act in good faith

(1) Every member of a private business corporation shall observe the utmost good faith towards it and its members in any transaction with it or on its behalf.

(2) A member shall act at all times in what he believes to be the best interests of the private business corporation as a whole so as to preserve its assets, further its business and promote the purposes for which it was formed, and with the degree of care and skill that may reasonably be expected from a person of his knowledge and experience.

(3) In considering what are the best interests of the private business corporation as a whole a member may have regard to the interests of the employees as well as the members.

(4) A member of a private business corporation shall not exceed the powers conferred upon him by this Act and the private business corporation, nor exercise such powers for a purpose other than that for which they were given.

(5) Without the consent of the other members given with knowledge of all the material facts, a member of a private business corporation shall not place himself in a position where his own interests conflict with those of the private business corporation, and in particular—

- (a) he shall not use for his own advantage any money or property of the private business corporation or any confidential information or special knowledge obtained by him in his capacity as a member;
- (b) he shall not be interested directly or indirectly, otherwise than as a minority shareholder or debentureholder in a company, in any business which competes with that of the private business corporation;
- (c) he shall not be personally interested, directly or indirectly, in any contract or other transaction entered into by the private business corporation

(6) No provision, whether contained in a private business corporation's by-laws or otherwise, shall relieve a member from the duty to act in accordance with subsections (1), (2) and (3) or relieve him from any liability incurred as a result of any breach of such duty.

(7) A member of a private business corporation who commits a breach of any of the duties imposed on him by this section shall be liable—

- (a) to compensate the private business corporation for any loss suffered by the private business corporation as a result of his breach of duty; and
- (b) to transfer to the private business corporation any profit made by him in breach of his duty;

and the private business corporation may rescind any contract entered into between the private business corporation and the member acting in breach of his duty.

## **27 Cessation of membership by order of court**

(1) On application by a private business corporation or by any member or members, a court may order that any member shall cease to be a member of the private business corporation in any of the following cases—

- (a) where the member is shown to the satisfaction of the court to have become permanently of unsound mind;
- (b) where the member is shown to the satisfaction of the court to have become in any other way permanently incapable of performing his duties as a member;
- (c) where the member has been guilty of such conduct as, in the opinion of the court, regard being had to the nature of the private business corporation's undertaking, is calculated prejudicially to affect the carrying on of the undertaking;
- (d) where the member has wilfully or persistently committed a breach of the private business corporation's by-laws, or has otherwise so conducted himself in matters relating to the private business corporation's undertaking that it is not reasonably practicable for the other member or members to carry on the undertaking in association with him;
- (e) whenever circumstances have arisen which, in the opinion of the court, render it just and equitable that the member should cease to be a member of the private business corporation.

(2) Application to a court on either or both of the grounds specified in paragraphs (c) and (d) of subsection (1) shall not be made by the member whose conduct is alleged to justify the making of an order that he shall cease to be a member.

(3) The court making an order in terms of subsection (1) may make such consequential orders as appear to it necessary to effect a just settlement between the person it has ordered to cease being a member, the other members and the private business corporation concerned.

## **PART IV**

### **MEMBERS' INTERESTS**

## **28 Nature of member's interest**

(1) Each member's interest in a private business corporation shall be expressed as a percentage, taking the total of members' interests as one hundred *per centum*, and shall be transferable by the method specified by section ten.

(2) Each member's interest in a private business corporation shall entitle him, on the winding up or dissolution of the private business corporation, to a corresponding percentage of the assets of the private business corporation that are then distributable to members.

(3) Each member's interest in a private business corporation shall be held by that member alone, and shall not be capable of joint ownership.

### **29 Certificate of member's interest**

(1) Each member shall be entitled to a certificate showing the percentage of his interest in the private business corporation, signed by every member.

(2) Whenever the percentage of a member's interest in a private business corporation changes he shall forthwith surrender to the private business corporation for cancellation any certificate previously issued to him and he shall be entitled to a new certificate reflecting his current interest

(3) If a member makes use of a certificate, at a time when he knows it does not reflect his current interest in a private business corporation, to obtain any benefits or advantage for himself or the private business corporation, he shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[Subsection as amended by section 4 of Act No. 22 of 2001]

### **30 Acquisition of member's interest by new member**

Subject to the by-laws of the private business corporation concerned, a new member may acquire his member's interest in an existing private business corporation either—

- (a) subject to section *thirty-three*, from one or more existing members or their estates; or
- (b) by making a contribution to the assets of the private business corporation in accordance with subsection (2) of section *twenty-five*, in which case the percentage of his interest shall be agreed between him and the existing members.

### **31 Disposal of interest of insolvent member**

(1) On the insolvency of the sole member of a private business corporation his trustee in insolvency shall, in the exercise of his functions as trustee, have unrestricted power to sell his member's interest.

(2) On the insolvency of a member of a private business corporation having two or more members his trustee in insolvency shall, in the exercise of his functions as trustee, have power to sell the member's interest—

- (a) to the private business corporation, subject to section *thirty-five*; or
- (b) to any or all of the other members *pro rata* or in such proportions as they and the trustee may agree; or
- (c) after giving a right of pre-emption on twenty-eight days' written notice to the private business corporation and the other members, to any person qualified under section *twenty-three* to be a member.

(3) The members of a private business corporation shall be obliged to accept as a new member a person who has acquired an insolvent member's interest in accordance with paragraph (c) of subsection (2).

(4) No by-laws or agreement to which the private business corporation or any member is a party shall affect the powers conferred on a trustee in insolvency by this section

### **32 Disposal of interest of deceased member**

(1) The executor of the estate of a deceased member of a private business corporation shall give effect to any by-law of the private business corporation which makes provision for the sale or disposal of the member's interest on his death, and any such by-law shall override any provision to the contrary in the deceased member's will or the law of intestate succession.

(2) If there is no provision to the contrary in the by-laws of the private business corporation concerned, on the death of the sole member of a private business corporation his executor shall have unrestricted power, in the exercise of his functions as executor, to sell or dispose of the member's interest.

(3) If there is no provision to the contrary in the by-laws of the private business corporation concerned, on the death of a member of a private business corporation having two or more members, his executor shall have power, in the exercise of his functions as executor, to sell or dispose of the member's interest—

- (a) to the private business corporation, subject to section *thirty-five*; or
- (b) to all or any of the remaining members *pro rata* or in such proportions as they and the executor may agree; or
- (c) after giving a right of pre-emption on twenty-eight days' written notice to the private business corporation and the other members, to any person qualified under section *twenty-three* to be a member.

(4) The members of a private business corporation shall be obliged to accept as a new member any person who has acquired a deceased member's interest in accordance with paragraph (c) of subsection (3).

### **33 Other disposals of members' interests**

Subject to sections *twenty-seven*, *thirty-one* and *thirty-two*, a private business corporation's by-laws may restrict the right to dispose of members' interests, but in the absence of such restriction all disposals of members' interests shall require the consent of every member.

### **34 Maintenance of total of members' interests**

To maintain the total members' interests at one hundred *per centum*, in conformity with paragraph (e) of section *five* and subsection (1) of section *twenty-eight*—

- (a) when a person becomes a new member of an existing private business corporation by making a contribution to its assets in accordance with subsection (2) of section *twenty-five*, the interests of all existing members shall be reduced in proportion to their existing percentages, so that the total of those reductions equals the percentage of the interest acquired by the new member in accordance with paragraph (b) of section *thirty*; and
- (b) when a private business corporation acquires any member's interest it shall be distributed between the remaining members' interests in proportion to their existing percentages.

### **35 Acquisition by private business corporation of members' interests**

(1) Subject to section *twenty-two*, a private business corporation may—

- (a) accept the surrender of any member's interest for no consideration; or
- (b) with the consent of all members, acquire any member's interest in exchange for payment or the delivery of property if, immediately after such payment or delivery, the private business corporation's assets, fairly valued, will exceed its liabilities and it will be able to pay its debts as they become due in the ordinary course of its business.

(2) If a private business corporation makes a payment or delivers property in contravention of paragraph (b) of subsection (1) the purported acquisition shall be void and every member, including the member to whom the payment or delivery was made, shall be liable, jointly and severally with the private business corporation, for every debt of the private business corporation incurred before payment or delivery was made, unless he can prove that he had no knowledge of the payment or delivery or took all reasonable steps to prevent it.

### **36 Financial assistance by private business corporation for acquisition of members' interests**

(1) A private business corporation may, with the consent of all its members, give financial assistance for the acquisition of a member's interest in the private business corporation if, immediately after such assistance is given, the private business corporation's assets, excluding any claim or security resulting from the giving of assistance, fairly valued, will exceed its liabilities and it will be able to pay its debts as they become due in the ordinary course of its business:

Provided that, where the lending of money is a part of the ordinary business of a private business corporation, nothing in this subsection shall be taken to prohibit the lending of money by the private business corporation in the ordinary course of its business.

(2) If a private business corporation gives financial assistance for the acquisition of a member's interest in the private business corporation in contravention of subsection (1), the purported giving of the assistance and acquisition of the interest shall be void and every member, including both parties to the purported acquisition, shall be liable, jointly and severally with the private business corporation, for every debt of the private business corporation incurred before the assistance was given, unless he can prove that he had no knowledge of the giving of the assistance or took all reasonable steps to prevent it.

## **PART V**

### **MANAGEMENT AND ADMINISTRATION**

### **37 Power of members to bind private business corporation**

(1) Subject to this section, every member who is not a minor shall be an agent of the private business corporation for the purpose of the business of the private business corporation

(2) The acts of every member shall bind the private business corporation if—

- (a) such acts were authorized, expressly or impliedly, by the private business corporation or were subsequently ratified by it; or
- (b) such acts were done for carrying on, in the usual way, business of the kind carried on by the private business corporation, unless the member so acting has in fact no authority to act for the private business corporation in the particular matter and the person with whom he is dealing knew or ought reasonably to have known that he had no authority.

(3) Where any act of a member is for a purpose apparently not connected with the private business corporation's ordinary business, the private business corporation shall not be bound unless it authorized him to do the act or subsequently ratified the act.

(4) If a private business corporation's by-laws or any agreement place any restriction on the authority of any member to bind the private business corporation, no act done in contravention of the restriction shall bind the private business corporation to any person who knew or ought reasonably to have known of the restriction.

(5) The fact that some but not all of the members of a private business corporation are described as directors or executive members shall not of itself be taken as notice, for the purposes of paragraph (b) of subsection (2) or

subsection (4), that any member not so described has no authority or restricted authority to act on behalf of the private business corporation.

### **38 By-laws**

(1) A private business corporation may at any time adopt by-laws regulating the management of its affairs.

(2) By-laws shall—

(a) be divided into paragraphs numbered consecutively; and

(b) be signed by every member at the time of their adoption, and shall be kept at the registered office of the private business corporation.

(3) A private business corporation may at a meeting, by the affirmative votes of members whose combined interests total at least seventy-five *per centum*, alter or add to its by-laws, and any alteration or addition so made in the by-laws shall be as valid as if originally contained therein and be subject to alteration by the same method.

(4) Subject to this Act, by-laws shall, when signed by every member at the time of their adoption, bind the private business corporation and the members thereof, including persons becoming members after the time of adoption, to the same extent as if they had been signed by each member and contained undertakings on the part of each member to observe all the by-laws.

(5) All moneys payable by any member to the private business corporation under the by-laws shall be a debt due by him to the private business corporation.

(6) Every member of a private business corporation shall be entitled to one free copy of the private business corporation's by-laws and of any alteration or addition thereto.

### **39 Variable rules for management**

Unless otherwise provided in this Act or in the by-laws of the private business corporation concerned or in any agreement between members or between the private business corporation concerned and its members—

(a) every member may take part in the management of the affairs of the private business corporation;

(b) no member shall be entitled to remuneration for taking part in the management of the affairs of the private business corporation;

(c) every member shall be entitled to an indemnity from the private business corporation for payments made and personal liabilities incurred by him—

(i) in the ordinary and proper conduct of the affairs of the private business corporation; and

(ii) in or about anything necessarily done for the preservation of the undertaking or property of the private business corporation;

(d) any difference arising between members in connection with the affairs of the private business corporation shall be decided by majority vote.

### **40 Meetings of members**

(1) Members of a private business corporation shall not be obliged to hold any meetings except as provided in this Act and the by-laws of the private business corporation.

(2) Any member of a private business corporation may at any time convene a meeting by giving all members reasonable notice, not necessarily in writing, of the time and place and purpose of the meeting:

Provided that the time and place of the meeting shall be reasonably convenient for the attendance of members.

(3) Unless otherwise provided in the by-laws, at any meeting of members of a private business corporation—

(a) to constitute a quorum, there shall be present in person or by proxy, not necessarily in writing, members whose interests exceed fifty *per centum* of the total members' interests;

(b) the chairman of the meeting shall be the member elected as chairman of the private business corporation or, if no member has been so elected or he is not present, the meeting shall elect its own chairman;

(c) the chairman shall not have a casting vote;

(d) each member shall have a vote corresponding with the percentage of his interest.

(4) Every private business corporation shall cause minutes of all proceedings of meetings of its members to be entered in a book kept for that purpose, and any such minutes, if purporting to be signed by the chairman of the meeting or of the next succeeding meeting, shall be evidence of the proceedings and evidence that the meeting was properly convened and conducted.

(5) Unless otherwise provided in the by-laws of a private business corporation, a resolution in writing signed by all the members for the time being entitled to receive notice of and to attend and vote at meetings of members shall, with effect from the date of the last signature, which date shall be recorded on the signed document, be as valid and effective as if it had been passed at a meeting of members duly convened and held in terms of this section.

### **41 Protection against unfair prejudice**

(1) A member may apply to a court for an order under this section on the ground that the private business corporation's affairs are being or have been conducted in a manner which is unfairly prejudicial to—

(a) his interests; or  
(b) his interests and the interests of one or more of the other members;  
or on the ground that any actual or proposed act or omission of the private business corporation, including an act or omission on its behalf, is or would be so prejudicial.

(2) Subsection (1) shall apply to a person who is not a member but is representing or assisting a member or his estate in accordance with subsection (1) or (2) of section *twenty-three*, and references in this section to a member or members shall be construed accordingly.

(3) If the court is satisfied that an application under this section is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(4) Without prejudice to the generality of subsection (3), the court's order may—

- (a) regulate the conduct of the private business corporation's affairs in the future;
- (b) require the private business corporation to refrain from doing or continuing an act complained of by the applicant or to do an act which the applicant has complained it has omitted to do;
- (c) authorize civil proceedings to be brought or defended in the name and on behalf of the private business corporation by such person or persons and on such terms as the court may direct;
- (d) provide for the purchase of the interests of any members of the private business corporation by other members or by the private business corporation itself.

(5) If an order under this section requires the private business corporation not to make any, or any specified, alteration in its incorporation statement or by-laws, the private business corporation shall not then have power without leave of the court to make any such alteration in breach of that requirement.

(6) Any alteration in a private business corporation's incorporation statement or by-laws made by virtue of an order under this section shall be of the same effect as if duly made by agreement of all the members, and the provisions of this Act shall apply to the incorporation statement and by-laws as so altered accordingly.

#### **42 Restriction on payments to members**

(1) A private business corporation shall not directly or indirectly pay any dividend, make any distribution, repay any contribution, make any other payment or transfer any property to any member by reason only of his membership unless, immediately after the payment or transfer, the private business corporation's assets, fairly valued, will exceed its liabilities and it will be able to pay its debts as they become due in the ordinary course of its business

(2) A member shall repay any money and return any property he has received from the private business corporation in contravention of subsection (1), and until he does so he shall be liable, jointly and severally with the private business corporation, for all its debts.

(3) Nothing in this section shall apply to the discharge by a private business corporation in good faith of—

- (a) an obligation towards a member arising out of contract or enrichment and resulting from the private business corporation—
  - (i) employing the member as an officer or employee; or
  - (ii) buying or hiring property from the member or borrowing money from him or otherwise contracting with him;in the ordinary course of its business; or
- (b) a statutory obligation towards a member; or
- (c) a delictual obligation towards a member.

#### **43 Fraudulent or reckless conduct of business**

(1) If at any time it appears to a court that any business of a private business corporation was or is being carried on—

- (a) recklessly; or
- (b) with gross negligence; or
- (c) with intent to defraud any person or for any fraudulent purpose;

the court may, on the application of the Master or a creditor, member, judicial manager or liquidator of the private business corporation, declare that any person who was knowingly a party to the carrying on of business in such manner or in such circumstances shall be personally liable for all or any of such debts and other liabilities of the private business corporation as the court may specify, and the court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing the liability.

(2) Any person who is knowingly a party to the carrying on of business in the manner or in the circumstances specified in subsection (1) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[Subsection as amended by section 4 of Act No. 22 of 2001]

## PART VI

### ACCOUNTING

#### 44 Accounting records

(1) Every private business corporation shall cause accounting records to be kept in accordance with this section.

(2) The accounting records shall be such as are necessary fairly to present the state of affairs and business of the private business corporation and to explain the transactions and financial position of the private business corporation, including—

- (a) records showing its assets and liabilities, members' contributions, undrawn profits, revaluations of fixed assets and amounts of loans to and from members; and
- (b) 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; and
- (c) 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; and
- (d) statements of the annual stock-taking, and records to enable the value of stock at the end of the financial year to be determined; and
- (e) vouchers supporting entries in the accounting records.

(3) The accounting records relating to—

- (a) contributions by members; and
- (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.

(4) 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.

(5) The accounting records referred to in subsection (1) shall be kept at the place or places of business or at the registered office of the private business corporation concerned and, wherever kept, shall be open at all reasonable times for inspection by any member.

(6) Every private business corporation shall preserve its accounting records for six years from the end of the financial year to which they relate.

(7) If any member of a private business corporation fails to take all reasonable steps to secure compliance by the private business corporation with the requirements of this section, or has by his own wilful act been the cause of default by the private business corporation in complying with any of those requirements, he shall, in respect of each default, be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[Subsection as amended by section 4 of Act No. 22 of 2001]

Provided that it shall be a defence for him to prove on a balance of probabilities that he believed on reasonable grounds that a competent and reliable person was charged with the duty of seeing that the requirements of this section were complied with and that such person was in a position to discharge that duty and that he had no reason to believe that such person had in any way failed to discharge that duty.

#### 45 Financial year

(1) The date of the end of the financial year of a private business corporation shall be fixed in accordance with paragraph (h) of subsection (1) of section *five* and may be changed in accordance with section *ten*:

Provided that the change from an old to a new financial year shall be effected by fixing a period of not less than six months and not more than eighteen months as the private business corporation's financial year on the occasion of the change.

(2) For convenience of accounting, a private business corporation may take as the end of its financial year any date not more than fourteen days before or after the date fixed in accordance with subsection (1).

#### 46 Annual financial statements

(1) The members of a private business corporation shall, within nine months after the end of every financial year of the private business corporation, cause financial statements in respect of that financial year to be made out.

(2) The financial statements of a private business corporation—

- (a) shall consist of—
  - (i) a balance sheet and any notes thereon where applicable; and
  - (ii) an income statement, or any similar financial statement where appropriate, and any notes thereon where applicable;

and

- (b) shall, in conformity with generally accepted accounting practice appropriate to the business of the private business corporation, fairly present the state of affairs of the private business corporation as at the end of the financial year concerned, and the results of its operations for that year; and
- (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 and from members, and the changes in those amounts during the year; and
- (d) shall be in agreement with the accounting records, which shall be summarised in such a form that—
  - (i) compliance with this subsection is made possible; and
  - (ii) an accounting officer is enabled to report to the corporation in terms of paragraph (c) of subsection (1) of section *forty-eight* without having 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 considers it necessary, from inspecting such subsidiary accounting records and vouchers;  
and

- (e) shall contain the report of an accounting officer referred to in paragraph (c) of subsection (1) of section *forty-eight*.

(3) The annual financial statements of a private business corporation shall be approved and signed by or on behalf of one or more members who have an aggregate of more than fifty *per centum* of all the members' interests.

(4) If any member of a private business corporation fails to take all reasonable steps to secure compliance by the private business corporation and its members with the requirements of this section or has by his own wilful act been the cause of any default by the private business corporation or its members in complying with any of those requirements, he shall, in respect of each default, be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[Subsection as amended by section 4 of Act No. 22 of 2001]

Provided that it shall be a defence for him to prove on a balance of probabilities that he believed on reasonable grounds that a competent and reliable person was charged with the duty of seeing that the requirements of this section were complied with and that such person was in a position to discharge that duty and that he had no reason to believe that such person had in any way failed to discharge that duty.

#### **47 Examination of financial statements and report thereon**

(1) Not later than three months after completion of its annual financial statements in terms of section *forty-six*, a private business corporation shall submit them to an accounting officer, who shall be a person who is either—

- (a) a member, entitled to practise as such, of a profession approved by the Minister in accordance with regulations made under section *sixty-two*; or
- (b) a person licensed by the Minister in accordance with regulations made under section *sixty-two*;

for examination, review and report in terms of section *forty-eight*.

(2) A private business corporation may submit its financial statements to one of its own members for examination, review and report if the member is qualified under subsection (1) to be an accounting officer and the private business corporation has at least one other member

(3) If any member of a private business corporation fails to take all reasonable steps to ensure that the private business corporation complies with the requirements of this section or has by his own wilful act been the cause of any default of the private business corporation in complying with any of those requirements, he shall, in respect of each default, be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[Subsection as amended by section 4 of Act No. 22 of 2001]

Provided that it shall be a defence for him to prove on a balance of probabilities that he believed on reasonable grounds that a competent and reliable person was charged with the duty of seeing that the requirements of this section were complied with and that such person was in a position to discharge that duty and that he had no reason to believe that such person had in any way failed to discharge that duty.

#### **48 Duties of accounting officer.**

(1) An accounting officer to whom the annual financial statements of a private business corporation have been submitted in terms of section *forty-seven* shall without delay—

- (a) determine whether the annual financial statements are in agreement with the accounting records of the private business corporation as provided in paragraph (d) of subsection (2) of section *forty-six*; and
- (b) review the appropriateness of the accounting policies applied in the preparation of the annual financial statements; and
- (c) report in respect of paragraphs (a) and (b) to the private business corporation.

(2) If in the performance of his duties the accounting officer of a private business corporation becomes aware of any contravention of this Act, he shall describe the nature of such contravention in his report made in terms of paragraph (c) of subsection (1).

(3) If an accounting officer is—

- (a) a member or employee of the private business corporation; or
- (b) a partner of a member or employee of the private business corporation; or
- (c) a member of a partnership or firm which employs a member or employee of the private business corporation;

he shall state that fact in his report made in terms of paragraph (c) of subsection (1).

(4) If an accounting officer of a private business corporation—

- (a) at any time knows, or has reason to believe, that the private business corporation is not carrying on business or is not in operation and has no intention of resuming operations in the foreseeable future; or
- (b) in the performance of his duties finds—
  - (i) that any change in respect of any particulars mentioned in the private business corporation's incorporation statement has not been registered; or
  - (ii) that the financial statements prepared in terms of section *forty-six* indicate that, as at the end of the financial year concerned, the private business corporation's liabilities exceeded its assets; or
  - (iii) that the financial statements prepared in terms of section *forty-six* incorrectly indicate that, as at the end to the financial year concerned, the assets of the private business corporation exceeded its liabilities, or if he has reason to believe that such an incorrect indication is given;

he shall forthwith report his findings to the Registrar:

Provided that, if the accounting officer subsequently finds that any matter or situation reported on in terms of this section has been changed, altered or rectified, he may report thereon to the Registrar.

(5) Any report submitted to the Registrar in terms of subsection (4), including any subsequent report submitted in terms of the proviso thereto, shall be open for inspection at his office in terms of section *fifty-eight*.

#### **49 Accounting officer's right of access to books, etc., and to convene meetings**

An accounting officer to whom the annual statements of a private business corporation have been submitted in terms of section *forty-seven* shall—

- (a) have a right of access at all times to the books, accounts, vouchers and securities of the private business corporation; and
- (b) be entitled to require from the members and any manager and employee of the private business corporation such information and explanations as he thinks necessary for the performance of his duties; and
- (c) have the same right as is conferred on members of the private business corporation by subsection (2) of section *forty* to convene a meeting of members; and
- (d) be entitled to be heard at any meeting of members of the private business corporation on any matter which concerns him as the accounting officer.

#### **50 Termination of accounting officer's mandate**

(1) If for any reason a private business corporation terminates the mandate of an accounting officer before he has been able to carry out his duties in terms of section *forty-eight*, the accounting officer shall forthwith report the fact of termination, in writing, to the Registrar.

(2) If an accounting officer has reason to believe that the termination of his mandate results from the commission by the private business corporation or any member of any fraud or financial or other irregularity in the conduct of the private business corporation's affairs, he shall append to his report under subsection (1) a concise statement of the fraud or irregularity.

(3) No action or other proceedings shall lie against an accounting officer in respect of any statement made in terms of subsection (2) unless it is false and malicious.

### **PART VII**

#### **WINDING UP AND JUDICIAL MANAGEMENT**

#### **51 Voluntary winding up**

(1) A private business corporation may be wound up voluntarily if all its members resolve, at a meeting called to consider the matter, that it should be so wound up and if they all sign a resolution in the prescribed form that it should be voluntarily wound up.

(2) A copy of the written resolution referred to in subsection (1) shall, within twenty-eight days of the passing of the resolution, be lodged with the Registrar for registration by him.

(3) If the Registrar is satisfied that subsections (1) and (2) have been complied with he shall register the resolution, which shall take effect from the date of such registration.

## 52 Winding up by court

A private business corporation may be wound up by order of a court if—

- (a) members having more than one-half of the total number of votes of members have resolved, at a meeting called to consider the matter, that it should be so wound up and such members have signed a resolution in the prescribed form that it should be so wound up; or
- (b) the private business corporation has not commenced its business within a year of its registration or has suspended its business for a whole year; or
- (c) the private business corporation is unable to pay its debts; or
- (d) the private business corporation has failed to comply with an order in terms of section *fourteen* to change its name; or
- (e) it appears to the court that it is just and equitable that the private business corporation should be wound up.

## 53 When private business corporation deemed unable to pay its debts

(1) For the purposes of paragraph (c) of section *fifty-two*, a private business corporation shall be deemed to be unable to pay its debts if—

- (a) a creditor, by cession or otherwise, who has a debt of not less than two hundred dollars which is due by the private business corporation has delivered to the private business corporation, at its registered office, a demand that it pay the debt, and the private business corporation has for twenty-one days thereafter neglected to pay the debt or to secure it or make some other arrangement for its payment or settlement to the reasonable satisfaction of the creditor; or
- (b) any writ of execution issued by a court in favour of a creditor against the private business corporation is returned by the sheriff or messenger with the endorsement that he has found insufficient property to satisfy the writ; or
- (c) it is proved to the satisfaction of the court that the private business corporation is unable to pay its debts.

(2) For the purpose of paragraph (c) of subsection (1), in determining whether a private business corporation is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the private business corporation.

## 54 Liquidator

(1) The Master shall appoint a suitable person as liquidator of a private business corporation which is being wound up—

- (a) in the case of a voluntary winding up, as soon as practicable after the resolution to wind up has been registered in terms of section *fifty-one*;
- (b) in the case of a winding up by the court, as soon as practicable after the winding-up order has been made.

(2) In appointing a liquidator the Master shall have due regard to any nomination of a person as liquidator made by the members or the creditors of the private business corporation concerned

(3) In the event of a vacancy occurring in the office of a liquidator the Master may, subject to subsection (2), make an appointment to fill the vacancy.

(4) Any person who is aggrieved by any appointment of a liquidator made by the Master may appeal against his decision to the High Court, which may confirm the decision of the Master or appoint some other suitable person instead.

## 55 Compositions

(1) A private business corporation which is unable to pay its debts and which is being wound up may, in accordance with the Insolvency Act [*Chapter 6:04*], submit to the liquidator a written offer to settle its debts, which written offer shall be signed by members holding more than fifty *per centum* of the total members' interests. Where a written offer of settlement has been submitted in terms of subsection (1), the Insolvency Act [*Chapter 6:04*] shall apply, *mutatis mutandis*, in all respects as if the offer has been submitted thereunder.

(3) For the avoidance of doubt, the application of certain provisions of the Insolvency Act [*Chapter 6:04*] by virtue of subsections (1) and (2) shall not derogate from the application of other provisions of that Act pursuant to any other law.

## 56 Application of Cap. 24:03

(1) In respect of any matter not specifically provided for in this Part, the provisions of sections 199 to 320 of the Companies Act relating to winding up, judicial management and the removal of defunct companies from the Register shall apply, *mutatis mutandis*, in relation to private business corporations.

(2) For the purposes of subsection (1)—

- (a) any reference in sections 199 to 320 of the Companies Act to an expression specified in the first column of the Schedule shall be construed as a reference to the expression specified opposite thereto in the second column;

- (b) a private business corporation shall be deemed to have passed a special resolution if the resolution is passed by a majority of not less than three-quarters of all the persons voting in person or by proxy at a meeting of members of the private business corporation and if the resolution is delivered to the Registrar for registration within twenty-eight days after it was passed:

Provided that, on registration, the resolution shall have effect from the day on which it was passed.

### **57 Additional provisions relating to winding up**

(1) In addition to the provisions of the Companies Act applied by section *fifty-six*, this section shall apply to every winding up of a private business corporation unable to pay its debts.

(2) Any direct or indirect payment or transfer of property by a private business corporation to a member made within two years before the commencement of the winding up of the private business corporation shall be presumed, unless the member proves the contrary on a balance of probabilities, to have been made in contravention of section *forty-two*.

(3) Notwithstanding the Companies Act and the Insolvency Act [*Chapter 6:04*], any debt owed by a private business corporation to a member, whether or not it is secured, shall not be payable unless all the claims of creditors who are not members have been paid in full.

## **PART VIII**

### **GENERAL**

### **58 Inspection and copies of documents in Registrar's office and production of documents in evidence**

(1) In this section—

“document” includes any sheet in a register of private business corporations kept in terms of this Act.

(2) Any person may, after application in the prescribed manner and on payment of the prescribed fee—

(a) inspect any document kept by the Registrar under this Act; or

(b) require the Registrar to provide a certificate of the incorporation of any private business corporation or to certify a copy or extract of any document or part of any document kept by the Registrar under this Act.

(3) A document purporting to be a certificate of incorporation certified by the Registrar shall be admissible on its production by any person in any legal proceedings, whether civil or criminal, as *prima facie* proof of the incorporation of the private business corporation to which the certificate relates.

(4) A document purporting to be a copy of or extract from any document kept by the Registrar under this Act, and purporting to be certified by the Registrar, shall be admissible on its production by any person in any legal proceedings, whether civil or criminal, as of equal validity with the original document.

### **59 Provision as to fees**

(1) Where under this Act—

(a) a fee is payable for the performance of any act by the Registrar, the Registrar shall not perform the act until the fee is paid;

(b) a fee is payable for the performance of any act by any person other than the Registrar, the act shall be deemed not to have been performed until the fee is paid;

(c) a fee is payable in respect of the filing or delivery of a document, the document shall be deemed not to have been filed or delivered until the fee has been paid.

(2) Any fee payable under this Act to—

(a) the Registrar, shall be paid at the Companies Registration Office; or

(b) the Master, shall be paid at the office of the Master;

or at any other prescribed office in such manner as the Registrar or the Master, as the case may be, may determine with the approval of the Minister.

### **60 Transmission of copies of court orders to Registrar and Master**

When a court makes any order in terms of this Act in relation to a private business corporation, the registrar or clerk of the court shall without delay transmit a copy of the order to the Registrar and, if the order relates to the winding up or judicial management of the private business corporation, shall send a copy thereof to the Master as well.

### **61 ....**

[Section repealed by section 4 of Act No. 22 of 2001]

### **62 Regulations**

(1) Subject to subsection (3), the Minister may make regulations prescribing anything which in terms of this Act is required or permitted to be prescribed or which, in his opinion, is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Regulations made in terms of subsection (1) may provide for—

(a) fees payable, whether by the submission of revenue stamps or otherwise, in connection with the registration of incorporation statements or in connection with any other thing required or permitted to be done by or in terms of this Act;

(b) penalties for any contravention of the regulations:

Provided that no such penalty shall exceed a fine of level five or imprisonment for a period of six months or both such fine and such imprisonment.

[Paragraph as amended by section 4 of Act No. 22 of 2001]

(3) In making regulations in terms of subsection (1) the Minister shall have regard to such International Accounting Standards as may have been adopted by the Zimbabwe Accounting Practices Board.

### **SCHEDULE (Section 56 (2) )**

#### CONSTRUCTION OF REFERENCES IN COMPANIES ACT THAT ARE APPLICABLE TO THIS ACT

<i>Reference in Companies Act</i>	<i>Construction of Reference, when applied to this Act</i>
articles	by-laws
auditor	accounting officer or auditor, if one is appointed
company	private business corporation
contributory	member
court	the High Court or a magistrates court which has jurisdiction in the matter in terms of subsection (2) of section <i>two</i>
director	member
memorandum	incorporation statement
officer	member or manager or accounting officer
paid-up share capital	total of members' contributions
registrar of the court	registrar of the High Court or clerk of the magistrates court, as the case may be
secretary	manager, secretary or accounting officer
share	member's interest