

COMPANIES (AMENDMENT) ACT, 2022

No. 7



of 2022

ARRANGEMENT OF SECTIONS

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An Act to amend the Companies Act.

Date of Assent: 25.02.2022

Date of Commencement: 25.02.2022

ENACTED by the Parliament of Botswana.

1. This Act may be cited as the Companies (Amendment) Act, 2022 and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.

Short title and
commencement

Amendment
of section 2
of Cap. 42:01

2. The Companies Act (hereinafter referred to as “the Act”) is amended in section 2 (1) by —

(a) substituting for the definition of “beneficial owner” the following new definition —

““beneficial owner” has the meaning assigned to it under the Financial Intelligence Act;”;

(b) substituting for the definition of “entitled person” the following new definition —

““entitled person”, in relation to a company, means a —

(a) shareholder;

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

(c) beneficial owner;”;

(c) inserting in the correct alphabetical order, the following new definitions —

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

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

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

“security interest” has the meaning assigned to it under the Movable Property (Security Interests) Act;”.

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of 2022

Amendment
of section 11

3. The Act is amended in section 11 —

(a) subsection (1), by inserting immediately after paragraph (c), the following new paragraph —

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

(b) subsection (2), by inserting immediately after the words “to be” appearing therein, the words “publicly available and”.

Amendment
of section 21

4. The Act is amended in section 21 by —

(a) substituting for subsection (2) (c), the following new paragraph —

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

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

- (ii) where a company is identified as the beneficial owner, information of the natural persons who own, hold shares and control that company, their full names, residential addresses and categories and the number of shares they hold or their interests in that company expressed as a percentage,
- (iii) where a natural person identified as the beneficial owner, the position to be held by the person if the person is in a managerial position, and
- (iv) where some of the shares are to be held by a foreign company, the identification of natural persons who own, hold shares and control the foreign company, their full names, residential addresses and categories and the number of shares they hold or their interests in the foreign company expressed as a percentage.”

5. The Act is amended in section 22 by inserting the following new subsection immediately after subsection (2) —

Amendment
of section 22

- “(3) The Registrar shall, after entering the particulars of the company in the register under subsection (1), verify the beneficial owner information submitted in terms of section 21 using —
- (a) information held by financial institutions and other competent authorities;
 - (b) where disclosure requirements ensure transparency of beneficial owners, information on listed companies; or
 - (c) any other documents as the Registrar may determine.”

6. The Act is amended in section 27 by inserting the following new subsection immediately after subsection (4) —

Amendment
of section 27

- “(5) Notwithstanding the provisions of this section, a director who is resident in Botswana, the secretary of the company and, in the case of a close company, an accounting officer shall —
- (a) be accountable to any competent authority for providing all basic information and beneficial owner information of the company, including facilitating access to such information;
 - (b) provide, on request from a competent authority, the information in paragraph (a) within three days of such request being made; and
 - (c) cooperate with the competent authority and effectively provide all assistance that the competent authority may reasonably require.”

7. The Act is amended in section 37 by substituting for the section, the following new section —

Amendment
of section 37

“Requirement
for company
to have
constitution

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

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

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

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

- (a) submission of a constitution in terms of subsection (2) notwithstanding that the one year period has lapsed; and
- (b) payment, by the company that is restored, of a penalty of P2500 or such fee as may be prescribed from time to time.”.

Amendment of section 38

8. The Act is amended in section 38 by substituting for section 38, the following new subsection —

“Effect of Act on constitution 38. (1) A company, the Board, each director and each shareholder of the company shall have the rights, powers, duties, and obligations set out in this Act except to the extent that they are negated or modified, in accordance with this Act, by the constitution of the company.

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

Deletion of section 39

9. The Act is amended by deleting section 39.

Amendment of section 40

10. The Act is amended in section 40 by deleting —

- (a) the words “if it has one” appearing in the chapeau; and
- (b) paragraph (b).

Amendment of section 41

11. The Act is amended by substituting for section 41, the following new section —

“Contents of constitution 41. Subject to section 25 (2), the constitution of a company may contain —

- (a) matters contemplated by this Act for inclusion in the constitution of a company;
- (b) powers that regulate and bind the company, the names of natural persons having control over the company and those in senior management positions in terms of section 21; and
- (c) such other matters as the company wishes to include in its constitution.”.

12. The Act is amended in section 42 by inserting immediately after the words “company” appearing in subsection (2) (a), the words “, each director”.

Amendment
of section 42

13. The Act is amended in section 43 by deleting the words “that does not have a constitution” appearing in subsection (1).

Amendment
of section 43

14. The Act is amended in section 50 by substituting for subsection (1), the following new subsection —

Amendment
of section 50

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

Provided that —

- (i) no shares may be issued to bearer or an unidentified shareholder; and
- (ii) where the constitution of the company contains a provision authorising the company to issue shares to the bearer or an unidentified shareholder, the company shall immediately amend its constitution to remove such provision and deliver a copy of the amended constitution to the Registrar within a month from the date of commencement of this section.”.

15. The Act is amended in section 84 by —

Amendment
of section 84

(a) substituting for subsection (2), the following new subsection —

“(2) The principal register shall be kept —

- (a) in Botswana;
- (b) at the registered office of the company; and
- (c) at the office of the secretary of the company.”;

(b) substituting for subsection (3), the following new subsection —

“(3) If a share register is divided into two or more registers kept in different places —

- (a) notice of the place where each register and beneficial owner information is kept shall be delivered to the Registrar for registration within 10 working days after the share register is divided or any place where a register or beneficial owner information is kept is altered;
- (b) a copy of every register and beneficial owner information shall be kept at the same place as the principal register; and
- (c) if an entry is made or beneficial owner information is entered in a register other than the principal register, a corresponding entry shall be made within 10 working days in the copy of that register kept with the principal register.”; and

(c) substituting for subsection (4), the following new subsection —

“(4) In this section “principal register”, in relation to a company —

- (a) means —

- (i) if the share register is not divided into two or more registers, the share register, or
- (ii) if the share register is divided into two or more registers, the register described as the principal register in the last notice sent to the Registrar and every other register shall be a “branch register”; and

(b) includes beneficial owner information.”.

Amendment of section 88

16. The Act is amended by substituting for section 88, the following new section —

88. No notice of a trust, whether express, implied, or constructive, may be entered on the share register or be received by the Registrar, except where the beneficial owner is a trust.”.

Amendment of section 113

17. The Act is amended in section 113 by substituting for subsection (1), the following new subsection —

“(1) Any mortgage bond or notarial bond in pursuance of the provisions of section 112 and subsequent transactions relating thereto shall, subject to the laws governing registration of —

- (a) mortgage bonds and notarial bonds, be registered in the Deeds Registry; and
- (b) security interest in movable property, be registered in the Collateral Registry.”.

Amendment of section 134

18. The Act is amended in section 134 by —

- (a) inserting in subsection (1), immediately after the word “company” appearing in the chapeau, the words “or beneficial owner”;
- (b) inserting in subsection (1) (c), immediately after the word “director,” appearing therein, the words “beneficial owner,”; and
- (c) substituting for subsection (2), the following new subsection —
“(2) For the purposes of this Act, a director or beneficial owner of a company is not interested in a transaction to which the company is a party if the transaction comprises only the giving by the company of security to a third party which has no connection with the director or beneficial owner, at the request of the third party, in respect of a debt or obligation of the company for which the director, beneficial owner or another person has personally assumed responsibility in whole or in part under a guarantee, indemnity, or by the deposit of a security.”.

Amendment of section 186

19. The Act is amended in section 186 by substituting for —

- (a) paragraph (g) in subsection (1), the following new paragraph —
“(g) copies of all written communications to all beneficial owners, shareholders or all holders of the same class of shares during the last seven years, including —
(i) full names and residential addresses of natural persons identified as beneficial owners under 21 (2) (c) and supporting documents, and
(ii) annual reports made under section 212;”, and

(b) subsection (2), the following new subsection —
“(2) The references in paragraphs (b), (d), (e) and (g) of subsection (1) to seven years and the references in paragraphs (h) and (i) of that subsection to seven completed accounting periods include such lesser periods as the Registrar may approve by notice in writing to the company:

Provided that records for a dissolved company, including beneficial owner information of the dissolved company shall be kept for 20 years or such period as may be prescribed under the Financial Intelligence Act.”.

20. The Act is amended in section 218 (1) by inserting immediately after the word “directors” appearing in paragraph (d), the words “and beneficial owners”.

Amendment
of section 218

21. The Act is amended by inserting immediately after section 329, the following new section —

Insertion of
section 329A

“Disclosure by nominee shareholder or director 329A. (1) A nominee shareholder or director shall disclose the identity of their nominator to the Director for inclusion in the register.

(2) Where the nominator under subsection (1) changes, the nominee shareholder or director shall, within 10 working days, file a notice to that effect with the Registrar.

(3) The nominee shareholder or director shall, upon request by a competent authority, make information identifying their nominator available to the competent authority.

(4) A nominee shareholder or director who fails to comply with this section shall be guilty of an offence and liable to the penalty set out in section 493 (2).”.

22. The Act is amended in section 352 by substituting for subsection 5, the following new subsection —

Amendment
of section 352

“(5) On receipt of a notice from an authorised agent that the company has been dissolved the Registrar shall remove the name of the company from the register:

Provided that records, including beneficial owner information of the company shall be kept for 20 years or such period as may be prescribed under the Financial Intelligence Act.”.

23. The Act is amended in section 408 by substituting for the proviso thereto, the following new proviso —

Amendment
of section 408

“Provided that —

(a) the corporate state and corporate powers of the company shall, notwithstanding anything in its constitution, continue until it is dissolved; and

(b) records, including beneficial owner information of the company shall be kept for 20 years or such period as may be prescribed under the Financial Intelligence Act.”.

24. The Act is amended in section 461 by substituting for subsection (2), the following new subsection —

Amendment of
section 461

Amendment
of section 492

“(2) When any company has been wound up and is about to be dissolved, the books, papers and records of the company and of the liquidators shall, unless the court otherwise directs, be delivered to the Master; and such books, papers and records shall not be destroyed for a period of five years from the date of dissolution of the company:

Provided that such books, papers and records, including beneficial owner information of the company shall be kept for 20 years or such period as may be prescribed under the Financial Intelligence Act.

25. The Act is amended in section 492 by inserting the following new subsection immediately after subsection (4) —

“(5) The Registrar may —

(a) impose an administrative penalty not exceeding P500 000, where —

- (i) a person fails to notify the Registrar of a change in basic information of a registered company including beneficial owner, nominee shareholder or nominator information or other notification as may be provided for in this Act,
- (ii) a person falsifies basic information of a company including beneficial owner, nominee shareholder or nominator information,
- (iii) a person fails to provide basic information of a company including beneficial owner, nominee shareholding and nominator information, or
- (iv) the director who is resident in Botswana or the company secretary fails, upon request by a competent authority, including failure to submit audited financial statements for non-exempt companies or failure to adhere to any other reporting requirements in accordance with this Act;

(b) impose an administrative penalty not exceeding P250 000 where a director, secretary or an auditor of a company who has knowledge or who suspects another company of a suspicious conduct fails to report such suspicion to the relevant authority; or

(c) deregister a company, where the company, its directors, shareholders or auditor fails to pay administrative penalties within a prescribed period as directed by the Registrar:

Provided that —

- (i) the directors, shareholders or auditor of the company shall be prohibited from registering any other company under this Act, and
- (ii) the Registrar may, subject to section 341, restore the company to the register upon payment of the outstanding administrative fee and a restoration fee of P5 000.”

PASSED by the National Assembly this 1st day of February, 2022.

BARBARA N. DITHAPO,
Clerk of the National Assembly.