

Companies Act, 71 of 2008

Public Offerings of Company Securities

Chapter 4 of the Companies Act of 2008 (the "Act"), contains provisions in respect of public offerings of company securities. The reason for the regulation of public offerings is that members of the public who are offered shares in a company are entitled to full disclosure of the nature of what is on offer before they make a financial commitment and to provide them with effective remedies to redress any loss incurred as a result of failure on the part of the company to make complete or accurate disclosure.

Section 95 of the Act contains certain **definitions** applicable to public offerings of company securities.

What you should know:

An 'offer to the public' includes an offer of securities to be issued by the company to any section of the public whether selected:

- *as holders of that company's securities;*
- *as clients of the person issuing the prospectus;*
- *as the holders of any particular class of property; or*
- *in any other manner.*

Section 96 specifies offers that will **not** be regarded as offers to the public. An offer to the public also excludes a secondary offer affected through an exchange.

What you should know:

An 'employee share scheme' means a scheme established by a company, whether by means of a trust or otherwise, for the purpose of offering participation therein solely to employees, officers and other persons closely involved in the business of the company or a subsidiary of the company, either by means of the issue of shares in the company or by the grant of options for shares in the company.

The **standards for qualifying employee shares schemes** is specified in section 97 of the Act, one of which is the appointment of a compliance

officer who will be responsible for ensuring that the requirements for lodgement of specified documents and forms are complied with.

What you should know:

An 'offer', in relation to securities, means an offer made in any way by any person with respect to the acquisition, for consideration, of any securities in a company.

As an alternative to any other manner of making or presenting an offer to the public, such an offer may be made or presented by way of an **advertisement**, as contemplated in section 98, that:

- satisfies all of the requirements of the Act with respect to a registered prospectus; and
- is subject to every provision of the Act relating to the making of a prospectus.

Such an offer may be drawn to the attention of the public by an advertisement that fulfils the requirements and must include a clear statement to the effect that it is not a prospectus and an indication as to where and how a person may obtain a copy of the full registered prospectus relating to that offer. It must also not contain any untrue statement or mislead a person that reads the advertisement to believe that the advertisement is a prospectus.

What you should know:

A person is to be regarded, by or in respect of a company, as being a member of the public, despite that person being a shareholder of the company or a purchaser of goods from the company, for the purposes of Chapter 4 of the Act.

An advertisement drawing attention to an offer to the public that satisfies the requirements for the advertisement is not required to be filed or registered with an exchange.

What you should know:

An advertisement drawing attention to an offer to the public that does not satisfy the requirements for an advertisement will be regarded as having been intended to be a prospectus issued by the person responsible for publishing the advertisement and is subject to every provision of the Act relating to such a prospectus.

Section 99 of the Act contains **general restrictions on offers** to the public which should be noted.

What you should know:

A provision of an agreement is void to the extent that it:

- *requires an applicant for securities to waive compliance with a requirement of Chapter 4 of the Act; or*
- *purports to affect an applicant for securities with any notice of any agreement, document or matter not specifically referred to in a prospectus or written statement.*

A person must **not offer** to the public any securities of any person unless that second person

- is a company; and
- in the case of a foreign company, a copy of its Memorandum of Incorporation, and a list of the names and addresses of its directors, has been filed within 90 (ninety) days before the offer to the public is made.

What you should know:

An 'initial public offering' means an offer to the public of any securities of a company if no securities of that company have previously been the subject of an offer to the public or have subsequently been re-acquired by the company.

What you should do:

When an initial public offering is made, that offer must be accompanied by a registered prospectus.

Except with respect to securities that are the subject of a company's initial public offering, a person must **not make** a:

- primary offer to the public of any:
 - listed securities of a company, otherwise than in accordance with the requirements of the relevant exchange; or
 - unlisted securities of a company, unless the offer is accompanied by a registered prospectus that satisfies the requirements of section 100; or

- secondary offer to the public of any securities of a company, unless the offer satisfies the requirements of section 101.

What you should know:

A 'primary offering' means an offer to the public, made by or on behalf of a company, of securities to be issued by that company or by another company:

- *within a group of companies of which the first company is a member; or*
- *with which the first company proposes to be amalgamated or to merge.*

What you should know:

A 'secondary offering' means an offer for sale to the public of any securities of a company or its subsidiary, made by or on behalf of a person other than that company or its subsidiary.

A person must not issue, distribute, deliver or cause to be issued, distributed or delivered a **letter of allocation** unless it is accompanied by all documents that are required, and have been:

- filed, in the case of unlisted securities; or
- approved by the relevant exchange, in the case of listed securities.

What you should know:

A 'letter of allocation' means any document conferring a right to subscribe for shares in terms of a rights offer.

What you should know:

A 'rights offer' means an offer, with or without a right to renounce in favour of other persons, made to any holder of a company's securities for subscription of any securities of that company, or any other company within the same group of companies.

Despite anything contained in a company's Memorandum of Incorporation, the company **may exclude** from any rights offer any category of holder of the company's securities who are **not resident** within the Republic:

- if the Commission has approved that exclusion in advance, on application by the company in the prescribed manner and

form on the grounds that the number of those persons is insignificant relative to:

- the number of existing holders of the company's securities who are resident within the Republic; and
- the administrative cost and inconvenience of extending the rights offer to them; and
- subject to any conditions attached to the approval.

A person must not issue a prospectus or a document that purports to be a prospectus, or a document that may reasonably be misapprehended to be intended as a prospectus, unless it is a registered prospectus.

What you should know:

A 'registered prospectus' means a prospectus that complies with the Act and: in the case of listed securities, has been approved by the relevant exchange; or otherwise, has been filed.

A **prospectus** may not be registered unless the requirements of the Act have been complied with and it has been filed for registration, together with any prescribed documents, within 10 (ten) business days after the date of that prospectus. As soon as the Commission has registered a prospectus, it must send notice of the registration to the person who filed the prospectus for registration. A prospectus may not be issued more than 3 (three) months after the date of its registration, and if a prospectus is so issued, it is regarded to be unregistered.

Section 100 of the Act contains the **requirements concerning a prospectus** of a company and does not apply in respect of listed securities, except listed securities that are the subject of an initial public offering.

Every prospectus is subject to the requirements and provisions of sections 102 (consent to use of name in prospectus) and 111 (conditional allotment if prospectus states securities to be listed) and, in addition, must:

- contain all the information that an investor may reasonably require to assess:
 - the assets and liabilities, financial position, profits and losses, cash flow and prospect of the company in which a right or interest is to be acquired; and
 - the securities being offered and rights attached to them; and
- adhere to the prescribed specifications.

The **date of registration of a prospectus** is the date of the issue of the prospectus unless the contrary is proven. A prospectus must not be registered unless there is attached to it:

- a copy of any material agreement as prescribed; or
- in the case of an unwritten agreement, a memorandum giving full particulars of the agreement.

If any part of the abovementioned agreement is in a language that is not an official language, a certified translation, in an official language, of that part must be attached to the agreement.

What you should know:

Section 103 of the Act contains the requirements for variation of agreements mentioned in the prospectus and should be noted.

Any referral in a prospectus of the offered securities that is underwritten may not be registered until the **underwriting agreement** has been filed, together with a sworn declaration stating that to the best of the deponent's knowledge and belief the underwriter is and will be in a position to carry out the obligations in the underwriting agreement even if no share are being applied for. The declaration must be sworn to by the person named as the underwriter or, if the underwriter is a company, by each of 2 (two) directors of that company, or if it has only 1 (one) director, by that director.

The Commission, or an exchange in the case of listed securities, on application (which must be in writing and accompanied by the prescribed fee) may allow required information to be omitted from a prospectus, if the Commission or exchange is satisfied:

- that the publication of the information would be unnecessarily burdensome for the applicant, seriously detrimental to the company whose securities are the subject of the prospectus, or against public interest; and
- the users will not be unduly prejudiced by the omission.

As long as an initial public offering or other primary offering to the public of unlisted securities remains open, **any person responsible for information in the prospectus** must, when that person becomes aware of it:

- correct any error;
- report on any new matter; and
- report on any change of a matter included in the prospectus,

provided these are relevant or material in terms of Chapter 4 of the Act. A correction or report must be registered as a supplement to the prospectus, simultaneously published to known recipients of the prospectus and included in future distributions of the prospectus.

If a correction or report, as mentioned above, has been published:

- any person who subscribed for the issue of shares as a result of the offer, before the date of that publication, may withdraw the subscription by written notice within 20 (twenty) business days after the date of publication;
- the offeror, upon receipt of a notice of withdrawal, may either:
 - accept the withdrawal, and restore the person any consideration already paid in respect of the subscription;
 - or
 - apply to the court for an order as mention below;
- and the court, on an application as mentioned above, may make any order that is just and equitable in the circumstances, including, but not limited to, an order:
 - negating the right of the subscriber to withdraw the offer;
 - or
 - to reverse any transaction, or restore any consideration paid or benefit received by any person in terms of the offer and subscription.

What you should know:

Section 101 of the Act contains provisions in respect of secondary offers to the public. However, the provisions in section 101 do not apply to securities that are listed on an exchange or in respect of which an exchange has granted permission to deal.

A person making a **secondary offering** of the securities of company must ensure that the offer is accompanied by either:

- the registered prospectus that accompanied the primary offering of those securities, together with any revisions required to address changes in any material matter since the date the prospectus was registered; or
- a written statement that satisfies certain requirements.

The **requirements** that must be satisfied in respect of a **written statement** are the following:

- file a copy of the written statement for registration before it is issued, distributed or published (in respect of securities of a public company);
- not issue, distribute or publish the statement more than 3 (three) months after the date on which it is registered;
- the written statement must be dated and signed by the person making the offer or issuing, distributing or publishing the material and if that person is a company, by every director of the company;
- it must not contain any matter other than the particulars required by section 101;
- not be in characters smaller or less legible than any characters used in the written offer, if any, or any document that accompanies the statement;
- be accompanied by a copy of the last annual financial statements of the company together with any subsequent interim report or provisional annual financial statement of that company; and
- contain the particulars specified in section 101(6)(d).

Section 102 of the Act **prohibits the use of the name of:**

- a second person as a director or proposed director of that company in the prospectus, without a written consent filed and the prescribed return reflecting the particulars of the second person; or
- an expert, where a statement was made by the expert, unless the expert consented in writing to the use of the statement before the prospectus was filed and the written consent is endorsed on or attached to the copy of the filed prospectus and the prospectus includes such a statement of consent by the expert; or
- auditor, attorney, banker or broker of a company, unless the prospectus is accompanied by the written consent of the person agreement to be named to act in the stated capacity and to the use of the person's name in the prospectus.

What you should know:

A person responsible for the use of any name in a prospectus without the required consent is set out in sections 104(4) and 104(5) of the Act. The persons mentioned above should also be aware of the provisions of section 105 relating to the liability for untrue statements made.

The **liabilities for untrue statements** in a prospectus are dealt with in section 104 of the Act.

What you should know:

An 'untrue statement' includes a statement that is misleading in the form and context in which it is made, subject to the following:

- *an untrue statement is regarded to have been included in a prospectus, written statement, or summary directing a person to either a prospectus or written statement, if it is contained in any report or memorandum:*
 - * that appears on the face of the prospectus, written statement, or summary; or*
 - * that is incorporated by reference within, or is attached to or accompanies, the prospectus, written statement or summary; and*
- *an omission from a prospectus or written statement of any matter that, in the context, is calculated to mislead by omission constitutes the making of an untrue statement in that prospectus or written statement, irrespective of whether the Act requires that matter to be included in the prospectus or written statement.*

If securities are offered to the public for subscription or sale, pursuant to a prospectus, the following **persons are liable to compensate** any person who acquired securities on the faith of the prospectus for any loss or damage the person may have sustained as a result of any untrue statement in the prospectus, or in any report or memorandum appearing on the face of, issued with, or incorporated by reference in, the prospectus:

- person who becomes a director between the issuing of the prospectus and the holding of the first general shareholders meeting at which directors are elected or appointed;
- person who has consented to be named in the prospectus as a director, or as having agreed to become a director either immediately or after an interval of time;
- promoter of the company; or
- person who authorised the issue of the prospectus or, under the Act, is regarded as having authorised the issue of the prospectus or made that offer to the public.

The liability for untrue statements in the prospectus, as mentioned above is in addition to the liability of a director of the company, as set out in section 77(3)(d)(ii).

What you should know:

A 'promoter', in relation to civil and criminal liability in respect of an untrue statement in a prospectus, means:

- *A person who was a party to the preparation of the prospectus, or of the portion of it that contains the untrue statement; but*
- *Does not include any person acting in a professional capacity for persons engaged in procuring the formation of the company or preparing the prospectus.*

The circumstances where liability for untrue statements does not attach to a person are set out in section 104(3) of the Act.

A person who, by reason of:

- being a director, or having been named as a director;
 - having agreed to become a director;
 - having authorised the issue of the prospectus; or
 - having become a director between the issue of the prospectus and the holding of the first general shareholders meeting at which directors are elected or appointed,
- has satisfied any liability under section 104 of the Act by making a payment to another person, **may recover a contribution**, as in cases of contract, from any other person, who, if sued separately, would have been liable to make the same payment, **unless** the person who has satisfied such liability was, and that other person was not, guilty of fraudulent misrepresentation.

If a prospectus contains a statement that is untrue, section 106 of the Act stipulates that every person referred to in section 104(1) or 104(2) is equally responsible for that untrue statement, in terms of the enforcement provisions of the Act.

The **expert person** is solely responsible for a statement, if:

- a published prospectus contains or is accompanied by a report of an expert, or an extract from such a report;
- the report or extract contains a statement that is untrue; and
- the expert has consented to the inclusion of the statement in the prospectus in the form and context in which it appears.

A person will however not be responsible for an untrue statement if the untrue statement was immaterial or liability for the untrue statement does not attach to that person for any reason set out in section 104(3).

What you should know:

A company should note the provisions for:

- *the time limit for allotment or acceptance, stipulated in section 107;*
- *the restrictions on allotments, stipulated in section 108;*
- *voidable allotments, stipulated in section 109; and*
- *the minimum interval before allotment or acceptance, stipulated in section 110 of the Act.*

Section 111 of the Act stipulates that a prospectus containing a statement to the effect that the application has been or will be made for permission for the securities offered thereby to be **listed on an exchange** must not be issued unless:

- an application has in fact been made in accordance with the requirements of the relevant exchange on or before the date of issue of that prospectus; and
- the prospectus names the particular exchange to which the application has been made.

Any allotment of securities in pursuance of a prospectus referred to above is subject to the condition that:

- the application mentioned above is granted; or
- an appeal against a refusal of such an application is upheld.

What you should know:

Nothing in Chapter 4 of the Act limits any liability that a person may incur under the Act apart from Chapter 4, or under any other public regulation, or under the common law. The potential liability of those involved in the issuing of a prospectus therefore warrants careful consideration of the content thereof prior to publication.

NEED ASSISTANCE WITH THE IMPLICATIONS OF THIS ACT?

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