

## CHAPTER 24:27

# RECONSTRUCTION OF STATE-INDEBTED INSOLVENT COMPANIES ACT

Act 27/2004

## ARRANGEMENT OF SECTIONS

### PART I

#### PRELIMINARY

#### Section

1. Title.
2. Application.
3. Interpretation.

### PART II

#### RECONSTRUCTION ORDERS

4. Requirements for and scope of reconstruction order.
5. Contents of reconstruction order.
6. Effect of reconstruction order.
7. Transmission of reconstruction order to certain officers.
8. Confirmation of reconstruction order.

### PART III

#### CULPABLE PERSONS IN RELATION TO COMPANIES UNDER RECONSTRUCTION

9. Statement of company's affairs.
10. Identification of culpable persons.
11. Special commissioners for taking evidence.
12. Forfeiture or vesting in State of rights held by culpable persons.
13. Attachment of assets of culpable persons in satisfaction of their liabilities to company under reconstruction.
14. Powers of administrator in relation to culpable persons.
15. Transactions by culpable persons.
16. Offences by culpable persons.
17. Power of administrator to compromise with persons liable to be prosecuted or declared culpable.

### PART IV

#### FUNCTIONS OF ADMINISTRATOR IN RECONSTRUCTION

18. General powers of administrator in relation to company under reconstruction.
19. Application of certain provisions of the Act to reconstruction.
20. Voidable dispositions of property by companies under reconstruction and culpable persons.
21. Initial meeting of creditors and members.
22. Subsequent meetings of creditors and members.

### PART V

#### SCHEMES OF RECONSTRUCTION AND INTERIM MANAGEMENT OF RECONSTRUCTED COMPANIES

23. Powers of administrator with respect to scheme of reconstruction.
24. Approval of scheme of reconstruction.
25. Consequences where reconstruction not possible or scheme therefor unapproved.
26. Implementation of scheme of reconstruction and matters incidental thereto.
27. Duties of interim board.

### PART VI

#### GENERAL

28. Persons employed by company before its reconstruction.
29. Application of assets during reconstruction.
30. Remuneration of administrator and assistant administrators.
31. Liabilities incurred by administrator and interim board to have preference over pre-reconstruction liabilities.
32. Period of reconstruction excluded in determining preference under mortgage bond.
33. Position of auditor during reconstruction.

34. Reconstruction expenses.
35. Cancellation of reconstruction order.
36. Offences consequent upon a reconstruction.
37. Saving of powers exercised under Statutory Instrument 187 of 2004.

**AN ACT to provide for the reconstruction of State-indebted companies and associate companies that are unable to repay credits made to them from public funds, or in respect of whose liabilities the State has issued any guarantee that has become due; to provide for appointment and functions of administrators of companies under reconstruction; to provide for formulation and implementation of schemes of reconstruction in respect of such companies; and to provide for matters connected with or incidental to the foregoing.**

[Date of commencement: 25th February, 2005.]

## PART I

### PRELIMINARY

#### 1 Title

This Act may be cited as the Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*].

#### 2 Application

This Act shall apply to all State-indebted companies, including those formed or incorporated before the date of commencement of this Act and regardless of when they became indebted to the State:

Provided that if in relation to a State-indebted company there is made or presented to the court—

- (a) an application in terms of section 191 of the Act for the sanctioning of a compromise or arrangement proposed between the company and its creditors or members, sections 191 to 194 of the Act; or
- (b) a petition for the winding up of the company in terms of section 207 of the Act, Part V or VI of the Act; or
- (c) an application for a provisional judicial management order in terms of section 299 of the Act, Part V or VI of the Act;

shall apply to such company unless, within thirty days of the date of presentation of the petition or the making of the application, as the case may be, the Minister issues a reconstruction order in respect of the company.

#### 3 Interpretation

(1) In this Act—

“the Act” means the Companies Act [*Chapter 24:03*];

“administrator” means an administrator appointed under section 5(1)(b), and includes any assistant administrator appointed under that provision;

“associate”, in relation to—

- (a) a company referred to in paragraph (a) of the definition of “company” or any body or association referred to in paragraph (c) of that definition which is registered or incorporated in terms of the Act, means—
  - (i) its subsidiary, as defined in section 143 of the Act; or
  - (ii) any company of which the company is the single largest shareholder; or
  - (iii) its holding company, as defined in section 143 of the Act; or
  - (iv) where the company is itself a subsidiary of a holding company, as defined in section 143 of the Act, any other such subsidiary of the same holding company; or
  - (v) any person who has power, directly or indirectly, to control the company’s management or policies;

- (b) an entity referred to in paragraphs (b), (c), (d) or (e) of the definition of “company”, means any person who has power, directly or indirectly, to control the entity’s management or policies;

“company” means—

- (a) a company registered or incorporated in Zimbabwe or a company, wherever registered or incorporated, that carries on business in Zimbabwe or is liable to be wound up under the Act;
- (b) a private business corporation;
- (c) any body or association incorporated or registered under any law relating to banking, building societies, co-operative societies, insurance or pensions or under a special law;
- (d) a trust;
- (e) a partnership, a syndicate, a club or any other association of persons which is not a body corporate;

and includes any associate company;

“company under reconstruction” means a company subjected to a reconstruction order that has not yet been reconstructed in accordance with a scheme of reconstruction;

“credit” means any loan, advance or other disbursement of a sum of money in exchange for a right to repayment of the amount disbursed and to the payment of interest or other charges on such amount;

“culpable person” means any person identified by the administrator as a culpable person in terms of section 9(1)(b);

“financial institution” means—

- (a) any banking institution registered or required to be registered in terms of the Banking Act [Chapter 24:20]; or
- (b) any building society registered or required to be registered in terms of the Building Societies Act [Chapter 24:02]; or
- (c) the People’s Own Savings Bank established in terms of the People’s Own Savings Bank of Zimbabwe Act [Chapter 24:22]; or
- (d) the Reserve Bank of Zimbabwe referred to in section 4 of the Reserve Bank of Zimbabwe Act [Chapter 22:15]; or
- (e) an asset manager as defined in the Asset Management Act [Chapter 24:26]; or
- (f) a collective investment scheme as defined in section 3 of the Collective Investment Schemes Act, 1997; or
- (g) any person who carries on a business of acceptance of deposits and other repayable funds from the public;

“interim board” means the board of directors in which the management of a reconstructed company is vested in terms of section 23(1)(m);

“member”, in relation to a company, means—

- (a) a shareholder, debenture-holder or other person having a right to vote at meetings of the company; or
- (b) any contributory as defined in section 202 of the Act;

“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;

“public funds” means funds held by or on behalf of the State (whether or not appropriated by Act of Parliament) and includes the funds of any statutory corporation or State-controlled company;

“reconstructed company” means a company that has been reconstructed in accordance with a scheme of reconstruction, and includes a company formed in succession to a company under reconstruction that was dissolved;

“reconstruction”, in relation to a company, means the reconstruction of the company in accordance with a reconstruction order or a scheme of reconstruction;

“reconstruction order” means a reconstruction order issued in terms of section 4;

“Reserve Bank of Zimbabwe” means the Reserve Bank of Zimbabwe referred to in section 4 of the Reserve Bank of Zimbabwe Act [Chapter 24:22];

“scheme of reconstruction” means a scheme referred to in section 23;

“State-controlled company” means a company in which the State holds directly the controlling interest;

“State-indebted”, in relation to a company, means that the company is indebted to the State, a statutory corporation or State-controlled company by reason of having received any credit or guarantee in its favour that is disbursed or payable out of public funds or which imposes any liability upon the State;

“statutory corporation” means any body corporate established directly by or under any Act of Parliament for special purposes specified in that Act.

(2) Any word or expression to which a meaning has been assigned in the Act shall have the same meaning when used in this Act.

## PART II

### RECONSTRUCTION ORDERS

#### 4 Requirements for and scope of reconstruction order

(1) If it appears to the Minister that, by reason of fraud, mismanagement or for any other cause —

- (a) a State-indebted company is unable or is unlikely to be able to make any repayment of a credit made to it from public funds on a date when the repayment is due; or
- (b) the State has become or is likely to become liable to make any payment from public funds in terms of a guarantee issued in favour of a State-indebted company;

and it further appears to the Minister that—

- (c) the State-indebted company has not become or is prevented from becoming a successful concern; and

- (d) there is a reasonable probability that if the company is placed under reconstruction it will be enabled to pay its debts or meet its obligations and become a successful concern; and
- (e) it would be just and equitable to do so;

the Minister may, after affording the company an adequate opportunity to make representations in the matter, issue a reconstruction order in relation to the company and publish the order by notice in the *Gazette*:

Provided that, where the Minister considers that immediate action is necessary to prevent irreparable harm to the company or its creditors, members or employees, the Minister may take such action before affording the company an opportunity to make representations in terms of this subsection.

(2) The appropriate Minister may issue a single reconstruction order in relation to two or more companies that are not apparently associated with each other where—

- (a) they benefited from the same credit or guarantee payable from public funds; or
- (b) they carry on any business or activity in partnership or conjunction with each other and one or more of them benefited from any credit or guarantee payable from public funds.

(3) A reconstruction order shall, in addition to the company named therein, be deemed to be issued in relation to every—

- (a) associate company of that company; and
- (b) company not formally associated with the first-mentioned company but which—
  - (i) benefited from the same credit or guarantee payable from public funds as the first-mentioned company; or
  - (ii) carried on any business or activity in partnership or conjunction with the first-mentioned company;

whether or not the existence or names of such associate or other companies are known to the Minister at the time the order is issued or are named in the order, unless the company in question satisfies the administrator that—

- A. it has not benefited from any credit or guarantee payable from public funds; or
- B. it has not been a party to any misappropriation or loss of property of the State, a statutory corporation or State-controlled company, whether by theft, fraud or other unlawful means; or
- C. it has not received property from the State, a statutory corporation or State-controlled company, whether directly or indirectly, in contravention of any law or as a result, either direct or indirect, of the action of any company named in the reconstruction order which has caused any misappropriation or loss referred to in subparagraph B.

(4) Even where a company referred to in subsection (3) satisfies the administrator that it should not be subjected to reconstruction, any share, right or interest in or claim upon the company held by a culpable person shall be dealt with in accordance with sections 9 and 12 as if the share, right or interest in or claim upon the company were held by such person in a company under reconstruction.

(5) The reconstruction of a company commences on the date on which the reconstruction order relating to it is published in terms of subsection (1).

## **5 Contents of reconstruction order**

(1) A reconstruction order shall contain—

- (a) the name of the company and, if known, the name of—
  - (i) each of its associate companies, if any; and
  - (ii) every company connected with the company as described in section 4(3)(b), if any;and
- (b) the name of the administrator appointed by the appropriate Minister to administer the company, and the names of such assistant administrators, if any, as the Minister may consider to be necessary to assist the administrator, who shall be under the control and direction of the administrator and to whom the administrator may delegate any of his or her or functions; and
- (c) directions that the company named therein shall be under the control and management of the administrator, and that any other person vested with the management of the company's affairs shall from the date of commencement of the order be divested thereof; and
- (d) such other directions as to the control and management of the company, or any matter incidental thereto, including directions conferring upon the administrator the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders, as the Minister may consider necessary.

(2) The appropriate Minister, after consultation with the administrator, may at any time and in any manner, on the application of a creditor, a member of the company, the Master or any person who would have been entitled to petition for the winding-up or apply for the judicial management of the company concerned, vary the terms of a reconstruction order or cancel it by further notice published in the *Gazette*.

## **6 Effect of reconstruction order**

A reconstruction order shall have the following effect, namely that—

- (a) the administrator shall assume the control and management of the company and recover and take possession of all the assets of the company; and
- (b) no action or proceeding shall be proceeded with or commenced against the company except by leave of the administrator and subject to such terms as the administrator may impose; and
- (c) any attachment or execution put in force against the assets of the company after the commencement of the reconstruction shall be void; and
- (d) every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the reconstruction, shall, unless the administrator otherwise orders, be void.

## **7 Transmission of reconstruction order to certain officers**

(1) The administrator shall, within seven days of the commencement of the reconstruction, transmit a copy of the reconstruction order and of every order amending or setting aside the same to the Registrar, Master and Sheriff and—

- (a) in respect of any immovable property within Zimbabwe which appears to be an asset of the company, to the Registrar of Deeds; and
- (b) in respect of any interest in minerals within Zimbabwe which appears to be an asset of the company, to the Secretary of the Ministry responsible for mines; and
- (c) to the messenger of every magistrates court by the order whereof it appears that property of the company is under attachment; and
- (d) in respect of any account with a financial institution known by the administrator to be operated by the company, the chief executive officer of every such institution.

(2) Upon receipt by the Registrar of Deeds of a reconstruction order he or she shall enter a caveat against the transfer of any immovable property or the cancellation or cession of any bond registered in the name of or belonging to the company.

(3) Upon the receipt by the Secretary of the Ministry responsible for mines of a reconstruction order he or she shall cause a caveat to be entered against the transfer of any interest whatsoever in minerals or the cancellation or cession of any bond registered in the name of or belonging to the company.

(4) Every such public officer concerned shall register every copy of an order transmitted to him or her and note thereon the day and hour when it is received.

(5) Upon receipt of a reconstruction order by the chief executive officer of a financial institution the chief executive officer shall cause such account to be immediately frozen.

## **8 Confirmation of reconstruction order**

(1) No later than thirty days (or such longer period as a judge referred to in this section may allow) after a reconstruction order is issued under section 4, the Minister shall, by application made by the Minister or on his or her behalf, seek an order confirming the reconstruction order from a judge in chambers on not less than fourteen days' written notice (accompanied by the documentation in support of the application referred to in subsection (2)(a) and (b)) to the shareholders, creditors and former members of the board of the company under reconstruction:

Provided that the publication by or on behalf of the Minister of a notice in the *Gazette* to shareholders, creditors and former members of the board (whether named individually or by class) notifying them of the intention of the Minister to make such an application not earlier than fourteen days from the date of publication of the notice in the *Gazette*, and containing particulars of where the documentation in support of the application referred to in subsection (2)(a) and (b) may be collected by any party interested in the application, shall be deemed to constitute sufficient service of the notice of the application upon any such party.

(2) There shall be submitted together with the application referred to in subsection (1) —

- (a) a copy of the reconstruction order relating to the company which is the subject of the application; and
- (b) a statement of the reasons why it appeared to the appropriate Minister that the circumstances referred to section 4(1)(a) or (b) were present in relation to the company; and
- (c) proof that the shareholders, creditors and former members of the board of the company under reconstruction have been served with or notified of the application under subsection (1).

(3) A judge before whom an application is made under subsection (1) may—

- (a) grant an order confirming a reconstruction order unconditionally or subject to any amendment or variation; or
- (b) set aside a reconstruction order and give such directions as may be necessary to reverse any of the effects of the reconstruction order.

(4) A decision by a judge not to issue a confirming order in terms of subsection (1), or to issue it subject to any amendment or variation, shall not prevent the Minister from making a fresh application in terms of that subsection on the basis of new evidence obtained since the original application, or to correct any mistake in the original application, and subsections (1) and (2) shall apply to such fresh application.

(5) The Minister may appeal to the Supreme Court against any setting aside or amendment or variation of a reconstruction order under subsection (3), and where such appeal is made the reconstruction order shall continue to have effect until the appeal is determined.

### PART III

#### CULPABLE PERSONS IN RELATION TO COMPANIES UNDER RECONSTRUCTION

## 9 Statement of company's affairs

(1) The administrator shall make and submit to the Minister a statement, as at the commencement of the reconstruction or such other convenient date as the Minister may allow—

- (a) showing the particulars of the company's assets, debts and liabilities, the names, addresses and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as the appropriate Minister may require; and
- (b) identifying, subject to section 10, any past or present director of the company or other person who it appears to the administrator was knowingly a party to the carrying on of the business of the company in the manner or circumstances referred to in section 10(1), and specifying the extent, if ascertainable, to which any such person may be held liable for the debts and other liabilities of the company:

Provided that if it is not possible to ascertain the extent to which any such person is so liable, it shall be presumed, unless the contrary is shown in any application referred to in subsection (7), that every such person is personally responsible, without limitation of liability, for all the debts and liabilities of the company;

- (c) determining, if possible, whether any share, right, or interest in or claim upon the company that is purported to be held by a person referred to in paragraph (b) was obtained by or resulted from any fraud committed by such person in relation to the company:

Provided that, for the avoidance of doubt, it is declared that no criminal conviction for fraud is required in order for the administrator to make a finding of fraud under this paragraph.

(2) The part of the statement relating to the matters referred to in subsection (1)(a) shall be submitted and verified by affidavit by one or more of the persons who are at the relevant date the directors and by the person who is at that date the secretary of the company or by such of the persons hereinafter in this subsection mentioned as the administrator may require to submit and verify the statement, that is to say, persons—

- (a) who are or have been officers of the company;
- (b) who have taken part in the formation of the company at any time within one year before the relevant date;
- (c) who are in the employment of the company or have been in the employment of the company within the said year and are in the opinion of the administrator capable of giving the information required;
- (d) who are or have been within the said year officers of or in the employment of a company which is, or within the said year was, an officer of the company to which the statement relates.

(3) The part of the statement relating to the matters referred to in subsection (1)(b) and (c) shall be given to the persons named therein or published in such manner as, in the opinion of the administrator, will give any person affected by it an adequate opportunity of getting to know of it:

Provided that the publication by the administrator by notice in the *Gazette* of the names of the persons mentioned in the relevant part of the statement, together with an allegation that they were knowingly parties to the carrying on of the business of the company in the manner or circumstances referred to in subsection (1)(b), and a statement of the extent—

- (a) whether limited or unlimited, to which they are personally liable for the debts and liabilities of the company; and
- (b) to which any share, right or interest in or claim upon the company purportedly held by any of them was obtained by or resulted from any fraud committed by any of them;

shall be sufficient notice to any person specified in the notice.

(4) The statement shall be submitted within twenty-one days from the date of the reconstruction or within such extended time as the Minister may for special reasons allow.

(5) Any person making or concurring in making the statement and affidavit required by subsection (2) shall be allowed and shall be paid out of the assets of the company such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the administrator may consider reasonable.

(6) If any person, without reasonable excuse, makes default in complying with the requirements of subsection (2), he or she shall be guilty of an offence and liable to a default fine not exceeding level eight.

(7) Any person objecting to—

- (a) being identified as a party who knowingly carried on the business of the company in the manner or circumstances referred to in subsection (1)(b); or

- (b) the extent to which he or she is stated to be personally liable for the debts and liabilities of the company;  
or
- (c) a finding that any share, right, or interest in or claim upon the company that is purported to be held by him or her was obtained by or resulted from any fraud committed by him or her in relation to the company;

may, within seven days of the notification thereof in terms of subsection (3), make written representations to the administrator to amend the part of the statement relating to the matters referred to in subsection (1)(b) or (c) accordingly and, if the administrator refuses to make the amendment, the administrator shall, within twenty-one days after the date of a notification in terms of subsection (3), apply to a judge in chambers for an order confirming the identification or finding referred to in paragraph (a) or (c), or confirming the extent to which the person may be held liable for the debts and liabilities of the company, whichever matter is the subject of the objection.

(8) Where a person referred to in subsection (7) makes no objection to any matter referred to in paragraph (a), (b) or (c) of that subsection within seven days of the notification thereof in terms of subsection (3), or where a judge issues a confirming order in terms of subsection (7) in relation to any matter in issue, the person concerned shall become a culpable person for the purposes of this Act.

(9) A person referred to in subsection (7) shall bear the onus of satisfying the administrator or a judge that any amendment, rescission or variation of any matter referred to in paragraph (a), (b) or (c) of that subsection should be made in his or her favour.

(10) A decision by a judge not to issue a confirming order in terms of subsection (7), or to issue it subject to any amendment, rescission or variation of any matter referred to in paragraph (a), (b) or (c) of that subsection in favour of a respondent, shall not prevent the administrator from making a fresh application in terms of that subsection on the basis of new evidence obtained since the original application, or to correct any mistake in the original application, and subsections (3), (7), (8) and (9) shall apply to such fresh application.

(11) Any person shall be entitled by himself or by his agent at all reasonable times, on payment of the fee fixed by the administrator and notified in the *Gazette*, to inspect the statement submitted in pursuance of this section and to a copy thereof or extract therefrom.

## **10 Identification of culpable persons**

(1) If, in the course of compiling a statement under section 9, the administrator is of the opinion that any past or present director of the company or other person who it appears to the administrator was knowingly a party to the carrying on of the business of the company—

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

or that a fraud has been committed by any person in the promotion or formation of the company, the administrator may direct that any person who is or has been a director or officer of the company or has taken part in the promotion or formation of the company shall attend before him or her on a day and at a place he or she shall appoint for that purpose and be publicly examined as to the promotion or formation or the conduct of the business of the company or as to his or her conduct and dealings as director or officer thereof.

(2) An administrator shall for the purposes of this section have the power of summoning and examining witnesses, administering oaths, requiring the production or delivery of documents, punishing defaulting or recalcitrant witnesses in terms of subsections (3) to (9), and allowing costs and expenses to witnesses.

(3) If any person who has been summoned under subsection (1) fails to appear in answer to the summons or if that person fails to remain in attendance at the examination, the administrator at the examination may issue a warrant authorising any member of the police to apprehend that person and to bring him or her before the administrator.

(4) Upon the apprehension and production before the administrator of any person in terms of subsection (3), the administrator may, unless satisfied that that person had a reasonable excuse for failing to appear at or to attend the examination or for absenting himself or herself from the examination, commit the person to prison to be detained there for a period not exceeding forty-eight hours.

(5) The officer in charge of a prison to which a person has been committed in terms of subsection (4) shall detain the person and produce him or her at the time and place appointed by the administrator.

(6) If a person summoned in terms of subsection (1) appears in answer to the summons but fails to produce any book or document which he or she was summoned to produce or if any person so summoned refuses—

- (a) to be sworn by the administrator; or
- (b) to answer fully and satisfactorily any question lawfully put to him or her;

the administrator may issue a warrant committing that person to prison until he or she has undertaken to do what is required of him or her.

(7) If a person who has been released from prison after having undertaken in terms of subsection (6) to do what is required of him or her fails to fulfil his or her undertaking, the administrator may recommit him or her to prison as often as may be necessary to compel him or her to do what is required of him or her.

(8) A person committed to prison in terms of this section may apply to the High Court for his or her discharge from custody and the Court may order his or her discharge if it is of the opinion that he or she was wrongfully committed to prison or is being wrongfully detained.

(9) In connection with the apprehension of a person or with the committal of a person to prison in terms of this section the administrator shall enjoy the same immunity which is enjoyed by a judicial officer in connection with any act performed by him or her in the exercise of his or her functions.

(10) The person examined shall be examined on oath and shall answer all such questions as the administrator may put to him or her, notwithstanding that any answer may tend to incriminate him or her.

(11) A person ordered to be examined under this section may at his or her own cost employ a legal practitioner, who shall be at liberty to put to him or her such questions as will enable the person to explain or qualify any answers given by him or her.

(12) Notes of the examination shall be taken down in writing and shall be read over to or by and signed by the person examined, and may thereafter be used in evidence against him or her, and shall be open to the inspection of any creditor or member at all reasonable times.

### **11 Special commissioners for taking evidence**

(1) The administrator may, for the purpose of taking evidence or holding any inquiry under this Act in cases where a company is reconstructed in any part of Zimbabwe or outside Zimbabwe, appoint as commissioners one or more assistant administrators or other persons, and the administrator may refer the whole or any part of the examination of any witnesses or of any inquiry under this Act to any person hereby appointed commissioner.

(2) Any creditor or member may be present at an inquiry referred to in subsection (1) or be represented by a legal practitioner.

(3) Every commissioner within Zimbabwe shall have in the matter so referred to him or her the same powers of summoning and examining witnesses, of requiring the production or delivery of documents, of punishing defaulting or recalcitrant witnesses, and of allowing costs and expenses to witnesses, as the administrator under section 10.

(4) The examination so taken shall be returned or reported to the administrator in such manner as the administrator directs.

### **12 Forfeiture or vesting in State of rights held by culpable persons**

(1) The administrator shall cancel or nullify any share, right or interest in or claim upon a company under reconstruction purportedly held by a culpable person which was obtained by or resulted from any fraud committed by the culpable person.

(2) Any share, right or interest in or claim upon a company under reconstruction held by a culpable person that is not a share, right or interest in or claim upon the company referred to in subsection (1) and which properly vests in a culpable person shall, with effect from the date he or she becomes a culpable person in terms of section 9(8), vest in the State, which, in consideration therefor, shall apply the same by way of set-off towards discharging the culpable person's liability for any or all of the debts and liabilities of the company.

(3) The administrator may, in accordance with a scheme of reconstruction—

(a) consolidate or redivide any shares referred to in subsection (2) into any number of shares of any denomination equivalent to the true or fair value of the shares previously held by the culpable person;

(b) convert any right, interest or claim referred to in subsection (2) into shares equal in value to the true or fair value of the right, claim or interest previously held by the culpable person;

and the shares resulting from the exercise of the administrator's powers under paragraph (a) or (b) shall be issued to the State.

### **13 Attachment of assets of culpable persons in satisfaction of their liabilities to company under reconstruction**

(1) If a judge issues an order in terms of section 9(7) confirming the extent, whether limited or unlimited, to which a culpable person is liable for the debts and liabilities of a company under reconstruction, such order shall have the effect, for purposes of enforcement, of a civil judgment in favour of the company under reconstruction for the satisfaction of—

(a) such of its debts and liabilities as have been attributed to the culpable person by the order; and

(b) the reconstruction expenses referred to in section 34(2).

(2) The administrator may submit for registration the copy of the order referred to in subsection (1) to the court of any magistrate which would have had jurisdiction to make the order had the matter been determined by it, or, if the decision, order or determination exceeds the jurisdiction of any magistrates court, the High Court.

(3) If any statement in terms of section 9(1)—

- (a) specifies the extent, whether limited or unlimited, to which a culpable person is liable for the debts and liabilities of a company under reconstruction; and
- (b) such statement has not been confirmed by a judge because the culpable person did not object to it in terms of section 9(7);

the administrator may, within a period of six months from the date when the statement was first notified to the culpable person in terms of section 9(3), and on not less than fourteen days' written notice to the culpable person, apply to a judge in chambers for an order confirming the statement, and subsections (1) and (2) shall, if the judge confirms the statement, apply to the order of the judge confirming it.

#### **14 Powers of administrator in relation to culpable persons**

For the duration of the reconstruction or a period of six months from the commencement of the reconstruction, whichever is the shorter period, the administrator shall have power—

- (a) to call for the production of, and examine, take extracts from and take possession of any books, accounts or records belonging to or in the custody of a culpable person or any other person employed by or associated with the culpable person;
- (b) to examine any property of the culpable person;
- (c) to question a culpable person or any other person employed by or associated with the culpable person;
- (d) to enter any premises—
  - (i) belonging to or controlled by a culpable person;
  - (ii) wherein or whereon he or she has reason to believe there may be evidence as to any transaction carried out by or on behalf of a culpable person.

#### **15 Transactions by culpable persons**

(1) For the duration of the reconstruction or a period of six months from the commencement of the reconstruction, whichever is the shorter period, a culpable person shall not, subject to this section—

- (a) expend or in any way dispose of any of his or her property; or
- (b) enter into any contract for the disposal of any of his or her property; or
- (c) operate any account with any financial institution; or
- (d) increase his or her indebtedness or adversely affect his or her estate;

without the approval of the administrator or otherwise than in accordance with any conditions imposed by the administrator.

(2) The administrator may—

- (a) grant general approval for any specified class of transactions on the part of the culpable person concerned; and
- (b) impose conditions on any approval granted by him or her in terms of this section.

(3) Subsection (1) shall not apply in respect of—

- (a) any transaction on the part of a culpable person where the total value of the property or expenditure does not exceed one hundred thousand dollars; or
- (b) anything done in pursuance of any order of any court.

(4) Any transaction carried out in contravention of subsection (1) shall be void, and where any property has been transferred as a result of any such transaction, the administrator may, on behalf of the culpable person, recover any such property by proceedings in any court of competent jurisdiction.

#### **16 Offences by culpable persons**

(1) Any culpable person who—

- (a) threatens, resists, hinders or obstructs or uses foul, abusive or insulting language towards or at the administrator; or
- (b) fails or refuses to answer fully, to the best of his or her ability, any question put to him or her by the administrator; or
- (c) fails to produce any book, account or record when required to do so by the administrator;

shall be guilty of an offence and liable to a fine not exceeding level five or imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

(2) Any culpable person who contravenes section 15(1) or who takes part in any transaction prohibited by that subsection, shall be guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

#### **17 Power of administrator to compromise with persons liable to be prosecuted or declared culpable**

(1) An administrator may enter into a written agreement with any person liable to be identified as a culpable person under section 10(1), or prosecuted under section 36, in terms of which the administrator undertakes not to identify such person as culpable or cause such person to be prosecuted in return for—

- (a) full disclosure by such person of the circumstances that led to a company under reconstruction becoming insolvent, including evidence concerning the involvement of any other person liable to be identified

under section 10(1) or prosecuted under section 36 who may have contributed to those circumstances; and

(b) the payment of moneys and the surrender to the administrator of any shares, rights or interests in or claims upon the company under reconstruction held by such person towards discharging the whole or an agreed part of such person's liability for the debts and liabilities of the company and for the reconstruction expenses referred to in section 34(2).

(2) If a person with whom the administrator has concluded an agreement under subsection (1) does not, within the agreed period or on the agreed date, honour any undertakings referred to in—

(a) subsection (1)(a) or (b), the administrator may institute proceedings for the identification of such person as a culpable person or for the prosecution of such person or both;

(b) subsection (1)(b), the administrator may institute civil action in a court of competent jurisdiction for the recovery of any moneys due or the surrender of any shares, rights or interests in or claims upon the company under reconstruction held by such person, and section 13 shall apply to such action.

## PART IV

### FUNCTIONS OF ADMINISTRATOR IN RECONSTRUCTION

#### **18 General powers of administrator in relation to company under reconstruction**

(1) The administrator in reconstruction shall have the following powers, which he or she may exercise without the authority of the directors or shareholders of the company under reconstruction—

(a) to carry on or discontinue any part of the business of the company in so far as may be necessary for the reconstruction thereof;

(b) to operate every account with a financial institution operated by the company immediately before the commencement of its reconstruction;

(c) to draw, accept, make and endorse any cheque, bill of exchange or promissory note in the name and on behalf of the company, and, for the purpose of carrying on the business of the company in terms of paragraph (a), to impose any additional liability upon the company;

(d) to raise money in any way;

(e) to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature and, subject to any law relating to criminal procedure, any criminal proceeding;

(f) to agree to any offer of composition made to the company by any debtor or contributory and take any reasonable part of the debt in discharge of the whole or give reasonable time;

(g) to compromise or admit any claim or demand against the company, including an unliquidated claim;

(h) to execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose to use the company's seal;

(i) to prove a claim in the estate of any contributory or debtor and receive payment in full or a dividend in respect thereof;

(j) to submit to the determination of arbitrators any dispute concerning the company or any claim or demand by or upon the company;

(k) to elect to adopt or to abandon any contract entered into by the company before the commencement of the reconstruction to buy or receive in exchange any immovable property, transfer of which has not been effected in favour of the company:

Provided that—

(i) if the administrator does not make an election within six weeks after being required in writing to do so, the person entitled under the contract may apply by motion to the court for cancellation of the contract and delivery of possession of the immovable property and the court may make such order as it thinks fit;

(ii) nothing in this paragraph contained shall affect any concurrent claim against the company for damages for non-fulfilment of the contract;

(l) to terminate any lease entered into by the company as lessee by notice in writing to the lessor, subject however to the following terms and conditions—

(i) nothing in this paragraph contained shall affect any claim by the lessor against the company for damages he or she may have sustained by reason of the non-performance of the terms of the lease;

(ii) if the administrator does not, within three months of the commencement of the reconstruction, notify the lessor that he or she is prepared to continue the lease on behalf of the company he or she shall be deemed to have terminated the lease at the end of such three months;

(iii) the rent due under any lease so terminated from the commencement of the reconstruction to the termination of the lease by the administrator shall be included in the costs of reconstruction;

(iv) the fact that a lease has been terminated by the administrator shall not deprive the administrator of any right to compensation for improvements made during the period of the lease;

(m) to sell, by public auction or otherwise, deliver or transfer the movable and immovable property of the company.

(2) In addition the administrator shall have the powers specified in sections 224, 228, 229, 230, 231, 232, 233, 234, 235, 237, 239 and 240 of the Act, subject to such modifications as may be necessary, including in particular the substitution of references therein to the “court” or “liquidator” by references to the “administrator” and references to “winding-up” or the “making of a winding-up order” by “reconstruction” or the “commencement of the reconstruction”.

### **19 Application of certain provisions of the Act to reconstruction**

Sections 220, 236, 269, 270, 278 and 290 of the Act shall apply to the proof of claims against a company under reconstruction, the dissolution of a company under reconstruction, voidable and undue preferences made by a company before reconstruction, the application of certain provisions of the law relating to insolvent estates to the company under reconstruction, the books to be kept by the administrator and the use of the books of the company under reconstruction by the administrator as evidence, subject to such modifications as may be necessary, including in particular—

- (a) in section 220, in subsection (1) by the deletion of “section *one hundred and eighty-nine*” and the substitution of “subsections (4) to (6) of section 21”, and the deletion of subsection (2);
- (b) in section 236, the deletion of “upon the application of the Master,” in subsection (1) and the deletion of subsection (3), and the substitution of references to the “court” and “the registrar of the court” by references to the “administrator”, and references to “winding-up” by “reconstruction”;
- (c) in section 269, the deletion of paragraphs (a) and (b) and the substitution of “the commencement of the reconstruction”;
- (d) in section 270 by the deletion of “liquidator” wherever it occurs and the substitution of “administrator”;
- (e) in section 278 by the deletion of references to “liquidator” and “Master” wherever they occur and the substitution of “administrator” and “Minister” respectively;
- (f) in section 290 by the deletion of references to “being wound up” and “liquidators” and the substitution of “under reconstruction” and “administrator” respectively.

### **20 Voidable dispositions of property by companies under reconstruction and culpable persons**

(1) If an administrator has reasonable grounds for believing that a company under reconstruction or culpable person has made any disposition of the property of such company or of his or her own property, as the case may be, in collusion with another person for the purpose of securing that property against sequestration in the course of insolvency or reconstruction proceedings, the administrator may, on not less than fourteen days' written notice to the person in whose favour the disposition was made, apply to a magistrate or judge in chambers (depending on which court has jurisdiction in the matter) for an order setting aside such disposition and causing such property to be delivered to the administrator.

(2) A disposition shall not be set aside in terms of subsection (1) if the person in whose favour the disposition was made proves that the disposition was not collusive but made in the ordinary course of business without the intention of securing that property against sequestration in the course of insolvency or reconstruction proceedings.

(3) For the avoidance of doubt it is declared that no criminal conviction for an offence under section 36 is required in order for the administrator to take action under this section.

### **21 Initial meeting of creditors and members**

(1) The administrator shall as soon as possible after completing the statement referred to in section 9, convene separate initial meetings of the creditors and the members of the company under reconstruction, which shall be held as nearly as may be—

- (a) in the case of a meeting of creditors, in the manner prescribed for creditors' meetings under the law relating to insolvency; or
- (b) in the case of a meeting of members, in the manner prescribed by rules made under section 359 of the Act.

(2) The purpose of a meeting referred to in subsection (1) shall be—

- (a) to consider a report of the administrator incorporating—
  - (i) the statement referred to in section 9; and
  - (ii) a statement of the reasons why it appeared to the appropriate Minister that the circumstances referred to in section 4(a) or (b) were present in relation to the company and why it has not become, or is prevented from becoming, a successful concern; and
  - (iii) particulars as to any source from which money has or is to be raised for the purposes of carrying on the business of the company; and
  - (iv) the considered opinion of the administrator as to the prospects of the company becoming a successful concern and of the removal of the facts or circumstances which prevent the company from becoming a successful concern;

- (b) in the case of a meeting of creditors, the proving of claims against the company under reconstruction;
- (c) the election by the creditors and members of one person each (who need not be a creditor or member) to represent their interests to the administrator:

Provided that if a meeting of the creditors or members fails, neglects or refuses to elect any person for the purpose of this paragraph, the administrator shall appoint one of their number for that purpose.

(3) Subsections (4) to (9) shall apply to the initial and every subsequent meeting of creditors and members.

(4) In a reconstruction every creditor shall be entitled to vote at any meeting of creditors of the company as soon as his or her claim has been proved:

Provided that—

(i) he or she may not vote in respect of a claim that is dependent upon the fulfilment of a condition until he or she proves that the condition has been fulfilled or, on written application by the creditor to the administrator, the administrator otherwise orders;

(ii) he or she may not vote in respect of any claim acquired by him or her by cession or purchase from any person after the commencement of the reconstruction.

(5) The vote of a creditor shall be reckoned according to the value of his or her claim.

(6) Any creditor holding any security, other than a general notarial bond, shall put a value on his or her security when proving his or her claim and, except in the election of the administrator and upon any question affecting his or her security, his or her vote shall be reckoned according to the value of the balance, if any, of his or claim remaining after deduction therefrom of the said value of his or her security.

(7) The administrator shall, subject to any directions of the appropriate Minister, appoint—

(a) a single representative to represent the State as a creditor of the company at the meetings of the creditors;

(b) one representative each to represent the State and every statutory corporation and State-controlled company that is a creditor of the company at the meetings of creditors.

(8) At every meeting of members of the company under reconstruction the votes of each member shall be those to which he or she is entitled according to the articles of the company in force at the commencement of the reconstruction.

(9) No creditor or member who is a culpable person shall participate, whether in person or by proxy, in any meeting of creditors or members.

## **22 Subsequent meetings of creditors and members**

(1) The administrator shall to the extent possible inform the representatives elected or appointed in terms of section 21(2)(c) (hereinafter referred to as “the representatives”) of the manner in which he or she intends to exercise any of his or her powers in terms of section 18, and, to the extent that it is not possible to so inform them, the administrator shall inform them as soon as possible after the exercise of any such power.

(2) The representatives may at any time, on not less than seven days’ notice to the administrator, convene joint or separate meetings of the creditors and members at which the creditors or members may make any recommendation—

(a) rejecting any action proposed to be taken by the administrator in the exercise of his or her powers and additionally, or alternatively, recommending an alternative course of action; or

(b) reversing any action taken by the administrator in the exercise of his or her powers, to the extent that such reversal is possible; or

(c) generally as to the manner in which the administrator is to exercise his or her powers;

and the administrator shall promptly respond in writing to any such recommendation, but he or she shall not be bound by any such recommendation unless—

(d) there is no difference in the recommendation of the creditors and members; and

(e) either of both of the following conditions apply, namely that—

(i) the claims of the creditors participating at the meeting represent more than fifty *per centum* in value of the debts owed to them by the company; or

(ii) the interests of the members participating at the meeting represent more than fifty *per centum* in value of the shares or assets of the company.

(3) Where the administrator rejects any recommendation that he or she is not bound by, either or both of the representatives may appeal in writing to the Minister against the administrator’s decision no later than seven days after being informed of it, and the Minister may on such appeal confirm, vary or set aside the administrator’s decision.

## PART V

### SCHEMES OF RECONSTRUCTION AND INTERIM MANAGEMENT OF RECONSTRUCTED COMPANIES

#### 23 Powers of administrator with respect to scheme of reconstruction

(1) Subject to section 25, the administrator shall have powers to formulate and implement a scheme of reconstruction of the company under reconstruction, for which purpose the administrator may do any one or more of the following things—

- (a) issue to the State shares or other securities in a reconstructed company in satisfaction of any credit owed to the State by, or payment by the State of any guarantee on behalf of, the company under reconstruction;
- (b) consolidate or redivide shares of the same or different classes held by a member in a company under reconstruction into any number of shares (whether of the same or different classes) of any denomination equivalent to the true or fair value of the shares previously held by the member;
- (c) cancel any shares held by a member in a company under reconstruction and issue to such member any number of shares of any denomination in a reconstructed company that are equivalent to the true or fair value of the shares previously held by the member;
- (d) convert any right, interest or claim held by a creditor in relation to a company under reconstruction into shares equal in value to the true or fair value of the right, claim or interest previously held by the creditor and issue the shares to the creditor as fully paid up shares;
- (e) issue to any creditor of the company under reconstruction any debentures or other securities not being shares in a reconstructed company in satisfaction of any claim, right or interest held by the creditor in relation to the company under reconstruction;
- (f) amend the memorandum and articles of association of the company under reconstruction;
- (g) amalgamate the company under reconstruction with any of its associate companies;
- (h) where two or more companies are under reconstruction together, amalgamate both or any of them;
- (i) dissolve the company under reconstruction or any of its associate companies and secure the formation of one or more companies limited by shares, which shall be the successor company or companies to the company under reconstruction or any of its associate companies;
- (j) redistribute the assets and liabilities of the company under reconstruction and any of its associate companies between them or between its successor company or companies formed pursuant to paragraph (i);
- (k) dissolve the board of directors of the company under reconstruction and substitute therefor any assistant administrator;
- (l) confirm in office any director of the company under reconstruction;
- (m) appoint and vest the management of any reconstructed company in an interim board of directors of any reconstructed company which shall hold office until the next annual general meeting of the members of the company following its reconstruction.

(2) Subject to subsection (3), the administrator may issue debentures referred to in subsection (1)(e)—

- (a) to creditors of a specified class, or creditors whose debts or claims are less than or exceed a specified value, whether in respect of the whole claim or the portion of the claim that is less than or exceeds the specified value; and
- (b) on the following terms, or on terms not less favourable to the creditors than the following terms, namely that each debenture shall—
  - (i) secure a sum equivalent to the money value of the debt or claim at the date of reconstruction; and
  - (ii) bear zero interest or interest at a fixed rate only; and
  - (iii) be payable to bearer; and
  - (iv) have a maturity date not exceeding twenty-four months from the date when the scheme of reconstruction is approved under section 24, and be fully redeemable by the reconstructed company on maturity.

(3) Where the administrator proposes to issue debentures referred to in subsection (1)(e) on terms that are less favourable to the creditors of the company under reconstruction than are specified in subsection (2)(b), such proposal shall require the specific approval of creditors representing not less than fifty *per centum* in value of the debts owed to them by the company.

(4) For the avoidance of doubt it is declared that a “creditor” in this section includes a depositor with a financial institution.

#### 24 Approval of scheme of reconstruction

(1) No later than two months after the commencement of the reconstruction the administrator shall produce a scheme of reconstruction providing for any of the matters specified in section 23 and present it to a joint meeting of creditors and members.

(2) The administrator may vary the scheme of reconstruction in accordance with the opinions and wishes of the creditors and members expressed at the meeting referred to in subsection (1).

(3) As soon as possible after the meeting referred to in subsection (1) the administrator shall submit the scheme of reconstruction, with variations, if any, to the Minister, together with a report summarising the opinions and wishes of the creditors and members in relation to it.

(4) The Minister may, after considering the scheme of reconstruction and the report referred to in subsection (3), approve the scheme of reconstruction submitted to him or her or approve it subject to such variations as he or she may direct.

## **25 Consequences where reconstruction not possible or scheme therefor unapproved**

If—

(a) after representations made to him or her by the administrator, the Minister—

- (i) is of the opinion that, in the circumstances pertaining to the company under reconstruction, no feasible scheme for its reconstruction can be formulated except by advancing additional public funds to it; and
- (ii) such funds are unavailable;

or

(b) a scheme of reconstruction is not approved under section 24;

the appropriate Minister shall cancel the reconstruction order in terms of section 35 and thereupon Part V or VI of the Act shall apply to such company.

## **26 Implementation of scheme of reconstruction and matters incidental thereto**

(1) The administrator shall do and have power to do all things necessary to carry out the reconstruction of a company in accordance with a scheme of reconstruction approved in terms of section 24.

(2) The appropriate Minister shall nominate the persons who, on behalf of the State, will hold the shares of the State in any reconstructed company.

(3) Any dividends or other moneys received by a person referred to in subsection (2) in right of or on the disposal of any share or right acquired by the State by virtue of this Act shall be paid into the Consolidated Revenue Fund.

(4) Stamp duty shall not be chargeable under the Stamp Duties Act [*Chapter 23:09*] in respect of any share issued to the State or any other person in accordance with a scheme of reconstruction.

(5) It shall not be necessary for the Registrar of Deeds to make any endorsement on title deeds or other documents or in his or her registers in respect of any immovable property, right or obligation which passes to a reconstructed company from a company under reconstruction, but the Registrar of Deeds, when so requested in writing by the administrator or interim board, shall cause the name of the reconstructed company to be substituted, free of charge, for that of the company under reconstruction on the appropriate title deed or other document or in the appropriate register.

(6) Any licence, permit or authority held by the company under reconstruction under any enactment immediately before the transfer of its business to the reconstructed company shall continue in force on and after that date as if it had been issued or granted to the reconstructed company to which its business was transferred, and may be amended, renewed or terminated accordingly.

## **27 Duties of interim board**

An interim board shall, subject to the memorandum and articles of the reconstructed company—

- (a) take over from the administrator and assume the management of the company; and
- (b) manage the company in such manner as it may consider most economic and most likely to promote the interests of the members and creditors of the company; and
- (c) lodge with the Registrar a copy of the scheme of reconstruction relating to the company within seven days of its appointment; and
- (d) comply with any of the requirements of section 123 of the Act with which the company would have been obliged to comply if it had not been placed under reconstruction; and
- (e) keep such accounting records and prepare such annual financial statements as the company or its directors would have been obliged to keep or prepare if it had not been placed under reconstruction; and
- (f) convene the annual general meeting and other meetings of members of the company provided for by the Act and, in that regard, comply with all the requirements with which the directors of the company would in terms of the Act have been obliged to comply if the company had not been placed under reconstruction; and
- (g) convene meetings of the creditors of the company by notices issued separately on the dates on which the notices convening annual general meetings of the company are issued or on which any interim report is sent out to members and, in the case of a private company, not later than six months after the end of its financial year; and

- (h) submit to meetings of creditors convened under paragraph (g) reports showing the assets and liabilities of the company and its debts and obligations as verified by the auditor of the company, and all such information as may be necessary to enable the creditors to become fully acquainted with the company's position as at the end of the financial year or the end of the period covered by any such interim report or, in the case of a private company, as at a date six months after the end of its financial year; and
- (i) lodge with the Master copies of all the documents submitted to the meetings as provided in paragraphs (f) and (h).

## PART VI

### GENERAL

#### **28 Persons employed by company before its reconstruction**

(1) To the extent that it is possible to do so without prejudicing the viability of the company under reconstruction or the reconstructed company, the administrator and interim board shall endeavour to retain in employment every person, other than a culpable person, employed by the company immediately before the commencement of its reconstruction on terms not less favourable than those enjoyed by him or her immediately prior to the commencement of the reconstruction.

(2) The provisions of the Labour Act [*Chapter 28:01*] with respect to the retrenchment, dismissal or termination of the employment of employees shall not apply to any employee of a company under reconstruction whom the administrator retrenches, dismisses or otherwise does not retain in the employment of the company.

(3) For the avoidance of doubt it is declared that section 103 of the Insolvency Act [*Chapter 6:04*] shall apply to the salary or wages of any employee of the company under reconstruction whom the administrator retrenches, dismisses or does not retain in the employment of the company.

#### **29 Application of assets during reconstruction**

(1) The administrator or interim board shall not, without the leave of the Minister, sell or otherwise dispose of any of the company's assets except in the ordinary course of the company's business.

(2) Any moneys of the company which become available to the administrator or an interim board shall be applied by the administrator or interim board towards—

- (a) paying the costs of reconstruction; and
- (b) conducting the company's business in accordance with the reconstruction order or scheme of reconstruction; and
- (c) so far as circumstances permit, paying the claims of creditors which arose before the date of the reconstruction.

(3) The costs of the reconstruction and the claims of creditors of the company shall be paid in accordance with the law relating to insolvency as if those costs were costs of the sequestration of an estate and those claims were claims against an insolvent estate.

#### **30 Remuneration of administrator and assistant administrators**

(1) An administrator not in the employment of the State shall be remunerated for his or her services by reference to paragraph (3) of the Fifth Table of fees contained in the Seventh Schedule to the Act, and such remuneration shall be taxed by the Master.

(2) An administrator in the employment of the State and any assistant administrator shall be entitled to such reasonable remuneration for their services as may be fixed by the Minister from time to time.

(3) In fixing the remuneration of an administrator or assistant administrator in terms of subsection (2), the Minister shall take into account the manner in which the administrator or assistant administrator has performed his or her functions and any recommendation by the members or creditors of the company under reconstruction relating to such remuneration.

#### **31 Liabilities incurred by administrator and interim board to have preference over pre-reconstruction liabilities**

(1) All liabilities incurred or to be incurred by the administrator or interim board in the conduct of the company's business shall be paid in preference to all other liabilities not already discharged, exclusive of the costs of the reconstruction, and thereupon all claims based upon such first-mentioned liabilities shall have preference in the order in which they were incurred over all unsecured claims against the company except claims arising out of the costs of the reconstruction.

(2) If a reconstruction order is superseded by a winding-up order—

- (a) the preference conferred in terms of subsection (1) shall remain in force except in so far as claims arising out of costs of the winding up are concerned; and
- (b) all claims based on such liabilities incurred by the administrator or interim board shall be taken to have been proved, and section 220 of the Act shall not apply in respect thereof.

### **32 Period of reconstruction excluded in determining preference under mortgage bond**

The time during which any company, which is a debtor under a mortgage bond, is subject to a reconstruction order, shall be excluded from the calculation of any period for the purpose of determining whether the mortgage confers any preference in terms of section 111(3) of the Insolvency Act [*Chapter 6:04*] as applied to the winding up of companies by the Act.

### **33 Position of auditor during reconstruction**

Notwithstanding the publication of a reconstruction order in respect of any company and for so long as the order is in force, the provisions of the Act relating to the appointment and reappointment of an auditor and the rights and duties of an auditor shall continue to apply as if any reference in those provisions to the directors of the company were a reference to the administrator.

### **34 Reconstruction expenses**

(1) The expenses of the reconstruction of a company (hereinafter in this section referred to as “reconstruction expenses”), including in particular the remuneration of the administrator and any assistant administrator, shall be defrayed in the first instance by the company, but every culpable person shall, to the extent mentioned in subsection (2), be liable to repay the company for reconstruction expenses.

(2) Every culpable person shall be liable for reconstruction expenses to the extent of fifty *per centum* of the amount of the debts and other liabilities of the company for which such person is liable or, if the liability of such person is unlimited, to the extent of fifty *per centum* of the amount of the reconstruction expenses:

Provided that if the amount due from all culpable persons for reconstruction expenses exceeds the actual amount of reconstruction expenses, the amount due from each culpable person shall be prorated accordingly.

### **35 Cancellation of reconstruction order**

(1) If at any time the administrator notifies the Minister in writing that the purpose of the reconstruction order has been fulfilled or that for any reason it is undesirable that the order should remain in force, the Minister may, by notice published in the *Gazette*, cancel the order and thereupon the administrator shall be divested of his or her functions.

(2) In cancelling any reconstruction order the Minister may (insofar as these matters have not been provided for under a scheme of reconstruction relating to the company) give such directions as may be necessary for the resumption of the management and control of the company by the officers thereof, including directions for the convening of a general meeting of members for the purpose of electing directors of the company.

(3) Upon the cancellation of a reconstruction order any action or proceeding commenced against the company concerned at the time when the reconstruction order was issued, or right of action held against the company at that time, shall be revived or may be recommenced, as may be appropriate.

### **36 Offences consequent upon a reconstruction**

(1) Where a company is under reconstruction, every person shall be guilty of an offence and liable to imprisonment for a period not exceeding three years who, at any time within the six months immediately preceding the commencement of the reconstruction of the company, and while being an officer of the company, does any of the following acts, unless he or she satisfies the court, in each case, that he or she had no intention to defraud, namely, every person who—

- (a) conceals, destroys, mutilates or falsifies, or is privy to the concealment, destruction, mutilation or falsification, of any book or document relating to the property or affairs of the company or makes or is privy to the making of any false entry in any such book or document; or
- (b) conceals any part of the property of the company to the value of ten thousand dollars or upwards which ought by law to be divided amongst the creditors of the company; or
- (c) causes or permits any property of the company, which it has obtained on credit and has not paid for, to be pledged, mortgaged or disposed of otherwise than in the ordinary course of the company’s business.

(2) Every person shall be guilty of an offence and liable to imprisonment for a period not exceeding three years who, while being an officer of a company and with intent to defraud the creditors of the company in the event of its being subjected to a reconstruction order—

- (a) does any act specified in subsection (1); or
- (b) removes or disposes of any part of the property of the company to the value of ten thousand dollars or upwards; or
- (c) parts with or is privy to the removal or disappearance of any books or documents relating to the property or affairs of the company.

(3) Where a company is under reconstruction, every person shall be guilty of an offence and liable to imprisonment for a period not exceeding three years who, within the twelve months immediately preceding the commencement of the reconstruction of the company and while being an officer of the company, acts as follows, unless he or she satisfies the court that he or she had no intention to defraud, namely, every such person who, when making any statement either verbally or in writing in regard to the business or affairs of the company and for the information of its creditors or of any person who became its creditor on the faith of such a statement,

conceals any liability, present or future, certain or contingent, which the company may then have contracted or mentions, as if it were an asset of the company, any right or property which, at the time, is not an asset or in any way conceals or disguises or attempts to conceal or disguise any loss which the company has sustained or gives any incorrect account thereof, unless he or she satisfies the court that he or she had no intent to defraud. For the purposes of this subsection an auditor of the company shall be deemed to be an officer of the company.

(4) Every person shall be guilty of an offence and liable to imprisonment for a period not exceeding one year who, while being an officer of the company—

- (a) causes or knowingly permits an undue preference as defined by the Insolvency Act [*Chapter 6:04*] to be given by the company; or
- (b) causes or knowingly permits any debt or debts to the aggregate amount of one hundred thousand dollars or upwards to be contracted by the company without any reasonable expectation that the company will be able to discharge the same and the company thereafter, being still a debtor for the said debt or debts, is subjected to a reconstruction order.

(5) Every person shall be guilty of an offence and liable to imprisonment for a period not exceeding two years who, while being a director, secretary or manager of a company and at any time during the reconstruction of the company—

- (a) knowing or suspecting that a false debt has been or is about to be proved against the company, fails for a period of seven days to inform the administrator thereof in writing; or
- (b) fails to disclose to the administrator to the best of his or her knowledge all the property of the company of any kind and the manner in which, the person to whom, the consideration for which and the time when any part thereof was disposed of unless he or she satisfies the court that he or she had some lawful excuse for such failure; or
- (c) fails to deliver to the administrator all books, documents, papers and writings in his or her custody or under his or her control relating to the property or affairs of the company, unless he or she satisfies the court that he or she had some lawful excuse for such failure; or
- (d) prevents the production or delivery to the administrator of any books, documents or papers relating to the property or affairs of the company.

(6) Every person shall be guilty of an offence and liable to imprisonment for a period not exceeding one year who, while being a director, manager or secretary of a company and at any time during the reconstruction of the company, grants, promises or offers any consideration in order to induce any person to refrain from the investigation of the affairs of the company or from the prosecution on a criminal charge of any officer of the company or of any person with whom the company may have had business relations.

(7) Where a company is under reconstruction, every person shall be guilty of an offence and liable to imprisonment for a period not exceeding six months who, while being a director, manager or secretary of the company and being under examination at a meeting and being thereto required by the administrator or any creditor or member or their respective agents, fails to account for or to disclose what has become of any of the property of the company which is proved to have been in his or her possession or, to his or her knowledge, in the possession of the company so recently before the commencement of the reconstruction that in the ordinary course he or she ought to be able to account for the same.

(8) For the purposes of subsection (1)(a) and subsection (2)(a), an auditor of a company shall be deemed to be an officer of the company. For the purposes of subsections (5), (6) and (7), a person who is a director, manager or secretary of a company at the commencement of the reconstruction thereof shall be deemed to be a director, manager or secretary during the reconstruction thereof notwithstanding that his or her duties may have ceased or that he or she is no longer gainfully employed by the company or by its administrator on its behalf.

(9) Any person who falsely holds himself or herself out to be an administrator, assistant administrator or a member of an interim board shall be guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

### **37 Saving of powers exercised under Statutory Instrument 187 of 2004**

Every—

- (a) order made; and
- (b) action or decision taken or thing done by the Minister of Justice, Legal and Parliamentary Affairs or any administrator or assistant administrator;

in the valid exercise of any power in terms of the Presidential Powers (Temporary Measures) (Reconstruction of State-Indebted Insolvent Companies) Regulations, 2004, published in Statutory Instrument 187 of 2004, shall (notwithstanding any lapsing of those regulations) be deemed to have been validly made, taken or done, as the case may be, in terms of this Act.