

Brief to counsel

Consultants :

The Independent Regulatory Board for Auditors – IRBA

and

The South African Institute of Chartered Accountants - SAICA

Request for an opinion on the interpretation of :

- Section 90(2) of the Companies Act, 2008

- Regulation 29 of the Companies Act, 2008

Introduction

1 The Companies Act, 2008 has given rise to a range of interpretational challenges to the accounting and auditing professions. The IRBA is the statutory body that controls that part of the auditing profession involved with public practice in the Republic of South Africa. The Board functions in terms of the Auditing Profession Act, 2005 (Act 6 of 2005). SAICA is a non-statutory accountancy body that provides a wide range of support services to its members. IRBA and SAICA have collectively agreed to seek counsel's opinion on two important issues in relation to the Companies Act and the regulations issued in terms of the Act and which are currently the subject of differing interpretations.

Issue 1 : The Interpretation of Section 90(2) of the Companies Act, 2008

2 Section 90 deals with the appointment of auditors. Section 90(2) provides :

“(2) To be appointed as an auditor of a company, whether as required by subsection (1) or as contemplated in section 34(2), a person or firm –

- (a) must be a registered auditor;
- (b) in addition to the prohibition contemplated in section 84(5), must not be-
 - (i) a director or prescribed officer of the company;
 - (ii) an employee or consultant of the company who was or has been engaged for more than one year in the maintenance of any of the company's financial records or the preparation of any of its financial statements;
 - (iii) a director, officer or employee of a person appointed as company secretary in terms of Part B of this Chapter;

- (iv) a person who, alone or with a partner or employees, habitually or regularly performs the duties of accountant or bookkeeper, or performs related secretarial work, for the company;
 - (v) a person who, at any time during the five financial years immediately preceding the date of appointment, was a person contemplated in any subparagraphs (i) to (iv); or
 - (vi) a person related to a person contemplated in subparagraphs (i) to (v); and
- (c) must be acceptable to the company's audit committee as being independent of the company, having regard to the matters enumerated in section 94(8) in the case of a company that has appointed an audit committee, whether as required by section 94, or voluntarily as contemplated in section 34(2).
- (3) If a company appoints a firm as an auditor, the individual determined by that firm, in terms of section 44(1) of the Auditing Profession Act, to be responsible for performing the functions of auditor must satisfy the requirements of subsection (2)."

- 3 The contentious issue is whether the limitation in respect of the disqualification in Section 90(2) applies only to the individual auditor or to the whole firm where a company has appointed a firm as its auditor.
- 4 The Act states that a person cannot be appointed as auditor if that person has performed any of the functions set out in Section 90(2)(b). Under the 1973 Act the disqualification of auditors was dealt with in Section 275 with Section 275(3) providing an exemption to the prohibition contained in Section 275(1)(d). This exemption allowed the appointment of an auditor to a private company who had provided secretarial or bookkeeping services or whose employee or partner had, provided no shares were held in the private company by a public company. This exemption has not been carried over.
- 5 The issue of whether the disqualification which is provided for in Section 90(2) extends only to the individual auditor or to the entire firm is an issue of considerable commercial importance to the profession. Self-evidently if the restriction extends to the entire firm as opposed to the individual partner and auditor concerned, there will be a significantly large number of appointments in respect of which auditors are affected by the prohibition and where the registered auditor cannot accept the appointment. The impact of the prohibition is increased by Section 90(2)(b)(v) which provides that :

"a person who, at any time, during the five financial years immediately preceding the date of appointment, was a person contemplated in any of the subparagraphs (i) to (iv)."

SAICA have indicated to their members that in their opinion, the prohibition extends only to the individual partner. SAICA believe that the provisions of Section 92 which refer to rotation of auditors support the view that Section 90(2) refers only to the individual auditor and not to the entire firm. The IRBA have not expressed a view on what the correct interpretation of the section is.

6 It has been argued that the provisions of Section 90(3) which have been quoted above, make it clear the prohibition extends only to the individual designated auditors where a firm has been appointed and does not extend to the designated auditors partners or fellow employees.

7 The contrary view is that Section 90(2) and (3) should be read together and that if regard is had to the provisions of Section 90(2)(b)(iv) which refers to –

“a person who alone or with a partner or employees, habitually or regularly performs the duties of account or bookkeeper, or performs related secretarial work, for the company;”

It is clear that the prohibition is not limited to the designated auditor but to fellow partners or employees as well.

8 Counsel's view is sought on the correct interpretation of the prohibition contained in Section 90(2) of the Companies Act, 2008.

Issue 2 : Regulation 29

9 The second issue in respect of which counsel's opinion is sought relates to Regulation 29 of the Companies Act.

10 Regulation 29 deals with the independent review of annual financial statements and should be read in conjunction with Section 30(2)(7) of the Act. In terms of the provisions of paragraph 1(a) of Regulation 29 “an independent reviewer” means a person referred to in Regulation 29(4) and who has been appointed to perform an independent review under this Regulation 29(4) in turn provides that “an independent review of a company's annual financial statements must be carried out:-

(a) In the case of a company whose public interest score for the particular financial year was at least 100, by registered auditor, or a member in good standing of a professional body that has been accredited in terms of Section 33 of the Auditing Profession Act;

(b) In the case of a company whose public interest score for a particular financial year was less than 100, by-

(i) a person contemplated in paragraph (a); or

- (ii) a person who is qualified to be appointed as an accounting officer of a close corporation in terms of Section 60(1)(2)(iv) of the Close Corporations Act, 1984 (Act 69 of 1984)."

The same definition as appears in sub-paragraph (bb) of the definition of an independent accounting professional in Regulation 26.

The contentious aspect of this Regulation as far as the IRBA and SAICA are concerned, is the reference to "a member in good standing of a professional body that has been accredited in terms of Section 33 of the Auditing Profession Act". SAICA are the only body accredited by the IRBA having being granted full accreditation on 1 April 2008. The IRBA granted accreditation and recognised the following SAICA programmes:

- (i) Recognised training programmes;
- (ii) Recognised academic programmes;
- (iii) Recognised core assessment programmes;
- (iv) Recognised education programmes.

11 It is the contention of SAICA that as the only body accredited by the IRBA, all members of SAICA entitled to use the designation Chartered Accountant South Africa – CA(SA) are entitled to and eligible to conduct independent reviews. The IRBA contend that only SAICA members who have qualified via the "audit route" and who are (or were) thus eligible to be registered as RAs (Registered Auditors) whether or not they have chosen to register, are eligible to perform independent reviews. In this regard, SAICA members are not all in public practice, SAICA has numerous members who are in business, retired, the public sector, or involved in education. The SAICA code of conduct also differentiates between chartered accountants in public practice and chartered accountants in business. It is the contention of the IRBA that independent reviews can only be conducted by SAICA members who have qualified through the IRBA recognised programmes and who are or were eligible for registration with the IRBA.

12 The issue of the categories of companies that are required to be audited as opposed to subject to internal review changed significantly in the course of the drafting process of the Act and regulations. There were also changes to the relevant regulations insofar as they dealt with the identity of those practitioners entitled to undertake independent reviews and the qualifications required to undertake independent reviews. Counsel's view is sought as to whether any member of SAICA may perform reviews.

13 Included in counsel's brief are the following relevant documents:

- (a) IRBA manual of information 2012;

- (b) IRBA accreditation model 2007;
 - (c) IRBA notice confirming accreditation of SAICA;
 - (d) SAICA Constitution;
 - (e) SAICA annual report, 2010;
 - (f) SAICA Code of Conduct;
 - (g) IRBA's Code of Professional Conduct is contained in the manual of information;
 - (h) Summary of meeting held between IRBA / SAICA / CIPC in relation to Regulation 29 of the Companies Act;
 - (i) Request to Norton Rose from IRBA for an opinion on Regulation 29 dated 18 July 2011;
 - (j) Opinion from Norton Rose to IRBA dated 1 August 2011;
 - (k) Opinion from Werksmans to SAICA dated 17 August 2011;
 - (l) Extracts from the Companies Regulations
 - (i) Part C – Transparency, accountability and integrity of companies – Government Gazette 22 December 2004;
 - (ii) Part C – Transparency, accountability and integrity of companies – Government Gazette 29 November 2010;
 - (iii) Part C – Transparency, accountability and integrity of companies – Government Gazette 20 April 2011.
- 14 Counsel is invited to contact his instructing attorneys to request any additional information including the ability to consult with representatives of IRBA and SAICA, should it be considered necessary.

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