

**EX PARTE : IRBA AND SAICA**

**IN RE: COMPANIES ACT, 2008 (“THE ACT”)**

**OPINION**

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SA CILLIERS SC  
9 July 2012

1 Section 90(2) of the Act provides :

“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 of 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).”

2 I am asked to advise whether the restrictions on the appointment of auditors set out in section 90(2)(b) applies only to individual auditors (ie individual natural persons), or applies also to a firm appointed as auditor of a company.

3 Before adverting to the question posed above it is pointed out that Chapter 3 of the Act applies (subject to certain exceptions) to public companies and state-

owned companies; and to private companies, personal liability companies and non-profit companies falling within the parameters of section 84(c)(i) or (ii) of the Act. Section 90(2)(b) falls within Part C of Chapter 3 of the Act, and thus applies to public companies; state-owned companies; and private, personal liability, and non-profit companies required by the Act or regulations to have its annual financial statements audited every year. The requirement to have annual financial statements audited appears in sections 30(2)(a), 30(2)(b)(i) and 30(2)(b)(ii)(aa) of the Act.

- 4 For the following reasons section 90(2)(b) of the Act should be construed as applying, where appropriate,, also to firms appointed as auditors.

#### 4.1

- 4.1.1 The opening words of section 90(2) refer to both persons and firms, without drawing a distinction between them:

“To be appointed as an auditor of a company, ... a person or firm—

a) must be a registered auditor;

b) in addition to the prohibition contemplated in section 84(5), must not be –” (emphasis added)

- 4.1.2 It is true that some subsections of section 90(2)(b) are not applicable to a “firm”, eg subsection 90(2)(b)(i) (referring to directors and prescribed officers); subsection 90(2)(b)(ii) insofar as it refers to an “employee”; subsection 90(2)(b)(iii) (referring to “a director, officer or employee”). But other subsections are capable of referring to both individuals and to firms, eg

subsection 90(2)(b)(ii) insofar as it refers to a “consultant”; and subsection 90(2)(b)(iv) (a “person who ... with ... employees ... performs the duties of an accountant or bookkeeper or performs related secretarial work for the company”); and, correspondingly, subsections 90(2)(b)(v) and (vi). Note that the word “person” used in subsections 90(2)(b)(iv), (v) and (vi) is defined in section 1 as including a juristic person, in contrast to the definition of “individual” which means a natural person.

Thus, textually, it is not justified to limit the provisions of section 90(2) as applying only to individuals / natural persons; some of the subsections of section 90(2)(b) will in their own terms apply only to natural persons, but other subsections are not so limited.

- 4.2 I do not think that the provisions of section 90(3) disturb the above conclusion. Section 90(3) deals with the case governed by section 44(1) of the Auditing Profession Act, 2005, which provides that a firm appointed to perform an audit must select one or more individual auditors to be responsible and accountable for the audit. The requirements of section 90(3), applicable to such individual auditor, are in addition to the requirements applicable under subsection 90(2) to a firm as auditor. Thus, for instance, a firm cannot select an individual within the firm to perform an audit if that individual in the preceding five years was disqualified under subsections 90(2)(b)(i) to (iv), although the firm itself was not thus disqualified. However, the firm would not itself be disqualified from being appointed as auditor only because it had as

partner or employee an individual who in the previous five years was disqualified under subsections 90(2)(b)(i) to (iv), provided that the individual was not determined by the firm as the individual responsible and accountable for the audit in question.

- 4.3 In summary, some subsections of section 90(2)(b)(i) to (vi) will, in their own terms, apply only to individuals. Other subsections, notably (iv) to (vi) can apply to individuals and to firms. Where the firm itself is to be appointed as auditor, it will be disqualified under section 90(2)(b) only if the firm itself is a consultant under section 90(2)(b)(ii), or an accountant or bookkeeper as described in section 90(2)(b)(iv), and it will be disqualified from determining that an individual within the firm (who is disqualified under any of sections 90(b)(i) to (vi)) be responsible for the audit in question. I do not think that the provisions of section 92 (which deal with the rotation of individuals serving as auditors) affects the above conclusion.

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- 5.1 Section 30(2)(b)(ii)(bb) of the Act provides :

“The annual financial statements must-

(a) be audited, in the case of a public company; or

(b) in the case of any other profit or non-profit company –

(i) ...

(ii) be either –

(aa) ...

(bb) independently reviewed in a manner that satisfies the regulations made in terms of subsection (7)...”

5.2 Section 30(7) provides :

“The Minister may make regulations ...prescribing—

a) ...

b) the manner, form and procedures for the conduct of an independent review under subsection (2)(b)(ii)(bb), as well as the professional qualifications, if any, and duties of persons who may conduct such reviews and the accreditation of professions whose members may conduct such reviews.” (emphasis added)

5.3 Regulation 29(4) of the Companies Act Regulations, 2011 provides :

“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 a registered auditor, or a member in good standing of a professional body that has been accredited in terms of section 33 of the Auditing Professions Act; or

b) in the case of a company whose public interest score for the 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) and (4) of the Close Corporations Act, 1984 (Act No. 69 of 1984).”

6 The view of SAICA (the only body accredited by the IRBA, and then with full accreditation under Part 1 of Chapter III of the Auditing Professions Act, No. 26 of 2005) is that all members of SAICA entitled to use the designation CA(SA) are entitled to conduct independent reviews as envisaged by the Act. The view of the IRBA is that only SAICA members who qualified via the “audit route” and qualify to be registered as RAs, are entitled to conduct independent reviews as envisaged by the Act. I note that attorneys Werksmans have advised SAICA that its view is correct, while attorneys Norton Rose advised IRBA that neither

view was entirely correct. Norton Rose relied on regulation 29(3) which provides :

“A company to which this regulation applies must have its annual financial statements independently reviewed in accordance with ISRE 2400” (emphasis added)

Norton Rose then referred to ISRE2400, considered that ISRE2400 should be read “in the context of ‘Preface to the International Standards on Quality Control, Auditing, Review, other Assurance and Related Services’”, which latter “framework document” defines “practitioners” as “Professional accountants in public practice”; and concludes that “the reference to membership of SAICA as an accredited body was ... intended to refer only to ‘professional accountants in public practice.’”

- 7 I have not considered ISRE2400 nor the “Preface” referred to above, but I do not consider it necessary to do so. The specific enabling legislative provision for promulgating Regulation 29 is section 30(7)(b) of the Act. That section authorises the Minister to make regulations prescribing, first, “the manner, form and procedures for the conduct of an independent review”. That the Minister has done in Regulation 29(3) : the review is to be done “in accordance with ISRE2400”. Section 30(7)(b) of the Act, secondly, authorises the Minister to make regulations prescribing “the professional qualifications, if any, ... of persons who may conduct such reviews and the accreditation of professions whose member may conduct such reviews.” That the Minister has done in regulation 29(4) :

“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 a registered auditor, or a member in good standing of a professional body that has been accredited in terms of section 33 of the Auditing Professions Act; or
- b) in the case of a company whose public interest score for the 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 ...”

I do not think that regulation 29(3) can be read as prescribing” the professional qualifications ... of persons who may conduct such reviews”, as envisaged and authorised by section 30(7) of the Act, when regulation 29(4) specifically covers this field. This conclusion particularly applies when, first, reference is made to a “Preface” outside the ambit of ISRE2400; and, secondly when the effect of such interpretation of regulation 29(3) would be to qualify the words “or a member in good standing of a professional body that has been accredited in terms of section 33 of the Auditing Professions Act” by reading in restrictive wording requiring such member to be in public practice. Further, regulation 29(5) prescribes that such review must not be carried out by an “independent accounting professional who was involved in the preparation of the said annual financial statements”; the applicable definition of “independent accounting professional” which appears in regulation 26(1)(d) has many requirements, but the requirement of the accountant having to be in public practice is not mentioned. It may be added that, save for ISRE2400, which is incorporated by reference into regulation 29(3), and extraneous documents, such as

Constitutions and Codes of Conduct, cannot be used to interpret the Act and the Regulations.

- 8 In the result I interpret section 30(7) to authorise what it plainly says, ie that the “Minister may make regulations prescribing the accreditation of professions (sic) whose members may conduct such reviews.” Presumably the reference to “professions” in section 30(7) should be understood as a reference to professional bodies – compare the definitions of “accreditation” and “professional body” [“a body of , or representing, registered auditors or both accountants and registered auditors.”] in section 1 of the Auditing Professions Act, No 26 of 2005, and sections 32 and 33 of that Act.
- 9 I further interpret regulation 29(4) to mean what it plainly says : an independent review may be carried out by a registered auditor or a member in good standing [which means the member’s fees are paid and there are no disciplinary proceedings pending against the member] of a professional body that has been accredited in terms of section 33 of the Auditing Professions Act. SAICA is a professional body so accredited, and “a member” in good standing of SAICA (ie any CAs(SA)) is thus entitled to do an independent review, whether or not such member is or is not in public practice or a registered auditor. (The comment at p145 in Henochsberg on the Companies Act 71 of 2008, which appears to say the contrary, is in my view wrong). This conclusion also accords with the provisions of the Act (section 30(8)) that an independent review is not an “audit” as defined in section 1 of the Auditing Professions Act, but a less comprehensive exercise (which may be performed by less qualified persons), while a company which is not otherwise compelled to have its financial

statements audited may also have such audit done if the company's MOI or a shareholders resolution requires it, or its board so determines. The question of the extent of the IRBA's jurisdiction over independent reviews, is not relevant to the interpretation of the Act or the Regulations; Regulation 29(4) resolved that question by authorising independent reviews being performed either by a registered auditor or by a member of a professional body accredited under section 33 of the Auditing Professions Act.

SA Cilliers SC  
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