

OPINION

for

THE SOUTH AFRICAN INSTITUTE OF CHARTERED ACCOUNTANTS

on

SECTIONS 90(2) AND (3) OF THE COMPANIES ACT

by

Wim Trengove SC and Robin Pearce

for

Ms Burger-Van der Walt of Webber Wentzel

1. Under the Companies Act 71 of 2008<sup>1</sup> read with the Auditing Profession Act 71 of 2008<sup>2</sup>, a company may appoint as its auditor either an individual auditor or a firm of auditors. If it appoints a firm, the firm must designate an individual auditor within the firm as the person responsible for the company's audit.<sup>3</sup>

2. Sections 90(2) and (3) of the Companies Act provide that:

*“(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)<sup>4</sup>, 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*

<sup>1</sup> Sections 84(4)(b) and 90(1) read with the definition of “*auditor*” in s 1

<sup>2</sup> The definition of “*registered auditor*” read with ss 37 and 38

<sup>3</sup> Section 44(1) of the Auditing Profession Act

<sup>4</sup> Section 84(5) states that “[*a*] person who is disqualified in terms of section 69(8) to serve as a director of any particular company may not be appointed or continue to serve that company in any capacity mentioned in subsection (4)”, including as auditor.

(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. A candidate for appointment as company auditor – “a person or firm” – must thus be a registered auditor, be regarded by the audit committee as independent of the company<sup>5</sup> and not be disqualified on a listed ground.<sup>6</sup>
4. SAICA seeks advice on the question whether, when a company appoints a firm as its auditor, it is the firm or the designated individual within the firm who must meet the requirements of – not be disqualified by – s 90(2).
5. We are, for the following reasons, of the view that both the firm and the designated individual auditor must meet the requirements of s 90(2).

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<sup>5</sup> Sections 90(2)(a) and (c) of the Companies Act

<sup>6</sup> Section 90(2)(b) of the Companies Act

6. The starting point is the ordinary meaning of the language of ss 90(2) and (3).<sup>7</sup> Section 90(2) says that, to be appointed as auditor of a company, “a person or firm”<sup>8</sup> must comply with its requirements. Section 90(3) adds that, if the company appoints a firm, the designated individual within the firm must satisfy the same requirements. The ordinary meaning of these provisions, read together, is that an individual auditor or a firm of auditors must meet the requirements of s 90(2) to qualify for appointment as auditor and, if the company appoints a firm, the designated individual within the firm must also meet the same requirements.
7. SAICA argues that s 90(3) clarifies s 90(2) by providing that, in the case of a firm, it is the designated auditor who must comply with s 90(2) and not the firm. But we do not think, with respect, that this interpretation is compatible with the language of the two sections. Section 90(2) expressly says that, in order to qualify for appointment as an auditor, “a person or firm” must meet its requirements. It says in other words that, in

<sup>7</sup> In interpreting a statutory provision, the courts seek to ascertain the intention of the legislature. In doing so, they consider the ordinary, literal meaning of the words used by the legislature: *Venter v R* 1907 TS 910 913; *Bhyat v Commissioner for Immigration* 1932 AD 125 129; *Abrahamse v East London Municipality & Another; East London Municipality v Abrahamse* 1997 (4) SA 613 (SCA) 632G-H. The words are to be viewed in the context of the statute as a whole: *Jaga v Donges NO & Another; Bhana v Donges NO & Another* 1950 (4) SA 653 (A) 664E-H; *Stellenbosch Farmers' Winery Ltd v Distillers Corp (SA) Ltd* 1962 (1) SA 458 (A) 476. When the plain meaning of the language of a statutory provision, read in its proper context, does not reveal the intention of the legislature (e.g. where it gives rise to ambiguity or absurdity), it is necessary to look beyond the general principles for other indications of such intention, including the *purpose* for which the statute was enacted: *Venter v R* 1907 TS 910 914-915; *Francis Jackson Developments Ltd v Hall* [1951] 2 KB 488; *Public Carriers Association & Others v Toll Road Concessionaries (Pty) Ltd & Others* 1990 (1) SA 925 (A) 943C-G.

<sup>8</sup> Section 1 defines “person” as including “a juristic person”, “unless the context indicates otherwise” but does not define a “firm”. In the context of s 90, these terms should in our view be interpreted as follows. In terms of s 90(1), a company must appoint an “auditor”. Section 1 says that “auditor” has the meaning “set out in the Auditing Profession Act”. Whilst the Auditing Profession Act does not define “auditor”, it provides for “individuals” and “firms” to register as auditors in terms of ss 37 and 38. Section 90(1) thus means that the auditor appointed by a company may be an individual registered in terms of s 37 or a firm registered in terms of s 38. This understanding is reinforced by s 90(2)(a) which adds that, to be appointed auditor of a company, “a person or firm” must be a registered auditor, that is, registered in terms of s 37 or s 38.

the case of a firm, it is the firm itself that must meet the requirements of s 90(2). Section 90(3) goes on to say that the designated auditor within the firm must (also) meet the requirements of s 90(2).

8. This understanding is reinforced by the fact that s 90(2) governs the company's appointment of the firm while s 90(3) governs the firm's designation of an individual auditor within the firm. It would unduly stretch the language of these two provisions to interpret them to mean that the legality of the company's appointment of the firm depends on the firm's designation of an individual auditor within the firm who complies with the requirements of s 90(2).
  
9. An additional consideration is that, had the legislature intended the meaning for which SAICA contends, it could more easily have achieved the outcome by inserting the words "*the person or the individual determined by the firm, in terms of section 44 (1) of the Auditing Profession Act, to be responsible for performing the functions of auditor*" before the words "*must not be*" in s 90(2)(b). Section 90(3) would then have been unnecessary. The legislature must be presumed to have intended to deal separately with the disqualification of a firm and of its designated individual.<sup>9</sup>
  
10. SAICA argues that s 90(2)(b) could not have been intended to apply to firms because some of its provisions can only be applied to individuals. It points, for instance, to subsections (i), (ii) ("*employee*") and (iii) of s 90(2)(b).

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<sup>9</sup> The courts will favour an interpretation which does not give rise to redundancy or superfluity: *Wellworths Bazaars Ltd v Chandler's Ltd & Another* 1947 (2) SA 37 (A) 43; *Portion 1 of 46 Wadeville (Pty) Ltd v Unity Cutlery (Pty) Ltd & Others* 1984 (1) SA 61 (A) 70A-F; *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 (SCA) [13].

11. But it must be borne in mind that s 90(2)(b) sets negative requirements for the appointment of an auditor. It repeats the prohibition in s 84(5) which says that someone who is disqualified to serve as a director of a company may also not be appointed to serve as its auditor. It goes on to add a list of further negative requirements (“*a person or a firm ... must not be*”) in subsections (i) to (vi). They are all in the nature of disqualifications. Some of them can only disqualify individuals while others may also disqualify firms.<sup>10</sup> It does not warrant SAICA’s inference that the list only applies to individuals and not to firms. It merely means that firms cannot fall foul of some of the disqualifications but may fall foul of others. Section 90(2)(b) says that, to be appointed as auditor, “*a person or a firm ... must not be*” disqualified under any of the provisions of subsections (i) to (vi). The fact that a firm can never fall foul of some of the disqualifications does not warrant an inference that the list does not apply to firms at all. A firm that falls foul of any of the disqualifications in the list is disqualified from being appointed as auditor. A firm that does not fall foul of any of the disqualifications meets all the requirements of s 90(2)(b). The section is accordingly capable of meaningful application, not only to individuals but also to firms.
12. This interpretation accords with the careful distinction the legislature has made in the same chapter of the Companies Act between a firm appointed as auditor and the designated individual auditor within the firm who is responsible for the audit. It draws this distinction for instance in ss 85(1)(b), 92(1) and 92(2). It would have been out of keeping with this pattern for the legislature to have blurred the distinction in ss 90(2) and (3) as SAICA’s argument suggests.

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<sup>10</sup> A firm may not be appointed auditor of a company if it serves or served (within the preceding five financial years) in the capacity listed in subsection 90(2)(b)(iv); or is related to any (natural or juristic) person who/that serves or served in any capacity listed in subsections 90(2)(b)(i) to (iv).

13. One of the implications of our interpretation is that, in terms of s 90(2)(iv), a firm is disqualified from appointment if it “*habitually or regularly performs the duties of accountant or bookkeeper, or performs related secretarial work, for the company*”. This provision does not preclude the auditor from doing any other non-audit work. It permits the auditor,
- to render accounting, bookkeeping and/or related secretarial services to the company as long as it does not do so “*habitually or regularly*”; and
  - to render any other services to the company.
14. This implication is consistent with the provisions of s 94(8), which allow an auditor to render non-audit services, including consultancy, advisory and other services, to the company to the extent permitted by its audit committee in terms of s 94(7)(d). It simply means that the non-audit services the audit committee may permit the auditor to render to the company may not include habitual or regular accounting, bookkeeping and/or related secretarial services.
15. It has been suggested that our interpretation of ss 90(2) and (3) might entail professional sterilisation of entire firms in harsh and anomalous circumstances. But these concerns are unfounded. They are based on the misconception that an entire firm is disqualified from appointment if any of its individual auditors suffers any of the disqualifications in s 90(2), for instance because of his or her association with, or services provided to, the company as member of another firm. That is not correct. A firm is disqualified only if the firm itself suffers any of the disqualifications. When it is merely one of its individual auditors who suffers disqualification by reason of his or her association with, or services provided to, the company in a different capacity, the firm

may take the appointment but may not designate the disqualified individual as the responsible auditor.

16. SAICA points to a complication that might arise from our interpretation of s 90(2)(b)(iv) if it is read with subsection (v). The latter provision disqualifies from appointment any person who, at any time during the immediately preceding five financial years, was a person contemplated in any of subsections (i) to (iv) of s 90(2)(b). Subsections (iv) and (v), read together, in effect say that any person who at any time during the past five years habitually or regularly provided accounting, bookkeeping and/or related secretarial services to the company may not be appointed as its auditor. SAICA explains that, before the Companies Act came into operation on 1 May 2011, it was commonplace for audit firms to provide such services to the companies of which they were the auditors. All of them would now be disqualified from appointment, at least for the first five years from the date of commencement of the Companies Act, if s 90(2)(b) is interpreted to apply to firms and not only to the designated individuals within the firms.
  
17. But this is merely a transitional issue. We are told that the Companies and Intellectual Property Commission holds the view that "*the five years only begins to count on 1 May 2011*" when the Companies Act came into effect. The courts will probably resolve the issue on the same basis by holding that a "*person contemplated in any of subparagraphs (i) to (iv)*", within the meaning of subsection (v), only became such a person when subsections (i) to (iv) came into effect, that is, on 1 May 2011. We are in any event of the view that, even if we are wrong, this transitional incongruity will not

suffice to persuade the courts to limit the requirements of s 90(2)(b) to individual auditors.

18. The purpose of s 90(2)(b) is clearly to ensure that the auditor is sufficiently independent of the company. The legislature has sought to achieve this independence by requiring that both the individual auditor responsible for the audit and his or her firm comply with the requirements of s 90(2)(b). Whether one agrees with this policy decision or not, it does make sense to say that the individual auditor responsible for the audit cannot be sufficiently independent of the company if his or her co-directors or partners are not. Our interpretation accordingly serves the evident purpose of the section whether one agrees with the level of independence required by the legislature or not.
19. It should in conclusion be noted that the disqualification of a “*firm*” only disqualifies the “*firm*” as defined in the Auditing Profession Act, that is, “*a partnership, company or sole proprietor referred to in section 40*”. The disqualification of a firm does not disqualify any other firm associated with it.<sup>11</sup>

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<sup>11</sup> unless they are persons related to one another within the meaning of s 90(2)(b)(vi)