

SECTION 75 OF THE COMPANIES ACT – PERSONAL FINANCIAL INTEREST

INTRODUCTION

Directors have certain fiduciary duties that they owe to the companies of which they are directors. This includes the duty to act in the best interests of that company which in turn includes the duty to prevent a conflict of interest between the director and the company. Such conflict is, however, inevitable from time to time and section 75 of the Companies Act, No. 71 of 2008 (the “**Companies Act**”) regulates the disclosure and procedural obligations imposed on directors who (or whose related persons) have a personal financial interest that conflicts with the interests of the company and the consequences of non-compliance with such obligations.

WHO NEEDS TO BE CONSIDERED UNDER THE SECTION 75 ENQUIRY?

The duty governed in section 75 is similar to but much wider in its application than under section 234 of the previous Companies Act, No. 61 of 1973. Section 75 applies to registered directors and alternate directors, i.e. those persons who are recorded as a director in the companies registers and in the database of the Companies and Intellectual Property Commission. This also applies to prescribed officers and members of board committees irrespective of whether such persons are members of the board or not (jointly referred to as “**Directors**” throughout this article). This means that officials such as managing directors and so-called “shadow” or “de-facto” directors are bound by section 75 even though they are not registered as directors.

Section 75 goes even further to say that Directors are not only obliged to disclose their own personal financial interests but also those of parties related to them (including natural and juristic persons) making its application extremely broad. The definition of “related parties” is contained in section 2 of the Companies Act and includes the Director’s spouse, partner and persons within two degrees of consanguinity or affinity, as well as juristic persons, which that Director directly or indirectly controls. Section 75(1)(b) also extends the definition of related persons for the purpose of establishing whether a particular Director is conflicted to other companies of which that Director is also a Director.

This means that before attending board meetings and voting on matters each Director needs to consider whether she has a personal financial interest in a matter to be decided on and whether she knows that her related party has such a personal financial interest. In this regard the meaning of

“know” is also very wide and includes not only actual knowledge but what the Director should have known had she made reasonable enquiries. Thus, the Director must make reasonable enquiries whether any party related to her has a personal financial interest in the matter to be decided before the board.

WHAT CONSTITUTES A PERSONAL FINANCIAL INTEREST?

Simply put, a personal financial interest is a direct material (meaning it might reasonably affect a person’s judgement or decision-making) interest of a financial, monetary or economic nature or a direct material interest to which a monetary value may be attributed.

WHEN IS SECTION 75 TRIGGERED?

The duties contained in section 75 apply to transactions being proposed or matters to be considered at board meetings or decided on by way of round robin resolutions, but they apply equally to transactions already entered into by companies and matters already considered by the board. Consequently, if a Director or a related party acquires a personal financial interest in such transaction or matter after the board’s approval, the disclosure obligations under section 75 still apply.

COMPLIANCE WITH SECTION 75

Once it has been determined that a Director or her related party has a personal financial interest (the “**Personal Interests**”) and Section 75 applies, the Director must in terms of Section 75(5):

1. disclose her Personal Interests regardless of how obvious and known to other Directors they are (it needs to be put on record that the Personal Interests have been disclosed);
2. then leave the meeting and not participate in that meeting any further; and
3. not vote on the matter in which she has Personal Interests.

However, the “conflicted” Director counts towards the quorum requirements to establish whether there is sufficient quorum for the directors to make decisions.

CONSEQUENCE OF NON-COMPLIANCE WITH SECTION 75

If a Director does not comply with the obligations under Section 75 and does not disclose her Personal Interests, that board resolution taken without a proper disclosure is invalid.

The decision taken without a proper disclosure may only be ratified:

1. by an ordinary resolution of shareholders following the disclosure (Section 75(7)(b)(i)); or
2. by court on application of a interested party (Section 75(8)).

Sometimes all or the majority of Directors required to vote are “conflicted”. Section 75 does not provide for this scenario but, as mentioned in the preceding paragraph, it does provide for the ratification of decisions made without disclosure. We are of the view that in such instance the shareholders can also ratify (by an ordinary resolution) a board resolution where there has been proper disclosure but the Directors cannot recuse themselves from voting otherwise there would not be sufficient directors for the board to act.

EXCLUSIONS

Section 75 will not apply where the sole director is also the sole holder of all the company’s securities (including shares) (Section 75(2)(b)).

APPLICATION THROUGH CASE LAW

There is some debate as to whether a decision made without compliance with Section 75 is void or voidable at the instance of the company concerned.

Omar v Inhouse Venue Technical Management (Pty) Ltd (2015 (3) SA 146 (WCC)) is currently the only judgment dealing with the provisions and impact of section 75. In this matter the court stated that “non-compliance with the provisions of s 75(5)... [e.g. non-disclosure of one’s personal financial interest] renders the particular transaction or agreement approved of invalid unless there has been ratification under s 75(7)(b)(i) or validation by the court under s 75(8)” (paragraph 64). It therefore appears that our courts will favour the approach that such decision is void.

CONCLUSION

Given the broad scope of Section 75 and the serious consequences of non-compliance all Directors should have intimate knowledge of the provisions of Section 75 in order to recognise and disclose their Personal Interests.

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