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The meaning of 'company' and its implications for section 75 of the Companies Act

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The meaning of 'company'

It now appears to be settled law that, for purposes of the Companies Act No 71 of 2008 (Act), the term 'company' does not include a foreign company. By 'foreign company', we mean a company incorporated in a country other than South Africa (which has not transferred its registration to South Africa). Foreign companies may have to register in terms of the Act as 'external companies' if they conduct business in South Africa, but external companies are only regulated by the Act in a very limited way, quite separately from 'companies'. Generally, when the term 'company' is used in the Act, it does not include a foreign company.

So, for instance, when an Italian company attempted to institute business rescue proceedings under the Act, both the court *a quo* and the Supreme Court of Appeal held that it could not do so, because the Act only provides for 'companies' to institute such proceedings and the Italian applicant did not qualify (see *CMC Di Ravenna SC and Others v Companies and Intellectual Property Commission and Others* 2020 (2) SA 109 (GP) and *Cooperativa Muratori & Cementisti and Others v Companies and Intellectual Property Commission and Others* 2021 (3) SA 393 (SCA), respectively). The view that 'company' excludes a foreign company was reaffirmed in *Trevo Capital Ltd and Others v Steinhoff International Holdings (Pty) Ltd and Others* 2021 (6) SA 260 (WCC).

Section 75 of the Act

Section 75 of the Act requires a company director to disclose any personal financial interest which she, or any person **related to her**, may have in respect of a matter to be considered by the board. If such an interest exists, the relevant director is required, amongst other things, to recuse herself from voting on the relevant matter. A failure to comply with section 75 in respect of a particular decision, agreement or transaction may render the relevant decision, agreement or transaction invalid.

Importantly, section 75 contains a definition of 'related person' which is wider than the one generally applicable under the Act. In terms of the interpretation section of the Act, a director will be related to a company if the director controls the company concerned. However, section 75 goes further, by providing that the term 'related person' should be read to include 'a **second company** of which the director or a related person is also a director'.

In other words, for the purposes of section 75, a company will be deemed to be related to a director merely because the director sits on that company's board, regardless of the fact that the director does not control that company. However, taking into account what our courts have held regarding the meaning of 'company', it appears that the use of the word 'company' in the extended definition of 'related person' in section 75 means that foreign companies are not covered by the extended definition. This is best explained by way of example.

Hypothetical example

In practice, the extended meaning of 'related person' in section 75 is often relevant in intra-group transactions, where boards are (partially or completely) duplicated across multiple group companies. In our hypothetical example, let's assume that Thandi is a director of two South African companies within a group, Company A and Company B. Let's further assume that the board of Company A is considering whether

Company A should conclude a large supply agreement with Company B. Thandi herself does not have any personal financial interest in the proposed agreement and neither does any company that she controls. However, because of the extended definition of 'related person' in section 75, Company B is deemed to be related to Thandi merely because she is a director of Company B.

We therefore need to ask whether Company B has a personal financial interest in the supply agreement. The answer to that question will surely be affirmative, since Company B will be a party to the supply agreement and rendering performance in accordance with its terms. Accordingly, when the board of Company A meets to approve the supply agreement, it will be necessary to comply with the requirements of section 75 (i.e. Thandi will have to disclose her directorship in Company B to the other directors of Company A, recuse herself from voting etc).

Suppose in the example above the supply agreement is no longer to be concluded with Company B, but rather with Company C, which is another group company of which Thandi is a director, but which is incorporated in the United Kingdom. Given that Company C is not a 'company' for purposes of the Act, it appears that the extended definition of related person does not apply and Company C is, as a result, not deemed to be related to Thandi. Therefore, it appears that when the board of Company A meets to approve the conclusion of the supply agreement with Company C, there is no need to comply with the requirements of section 75, on the basis that neither Thandi nor any person related to her has a personal financial interest in the supply agreement.

Conclusion

The above mentioned result strikes one as anomalous. However, based on the plain meaning of the text of the Act and the interpretation of 'company' in the court cases mentioned above, there is a strong argument that foreign companies are excluded from the extended definition of 'related person' in section 75.

This article only deals with the application of section 75. Although not the subject of this article, it is worth noting that directors remain subject to common law fiduciary duties, including the duties to avoid conflicts of interests and conflicts of duties. Indeed, in our example above, it may very well be that the common law in any event requires Thandi to disclose her cross-directorship in Company C to her fellow directors. What this article draws attention to, is the fact that section 75, with its formal requirements and harsh consequences for non-compliance, does not appear to apply in these circumstances.



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