



Companies and Intellectual  
Property Commission

a member of the dti group

**NON-BINDING OPINION  
IN TERMS OF  
SECTION 188 (2) (b) OF THE COMPANIES ACT, 2008**

**SUBJECT: INTERPRETATION OF SECTION 45 OF THE COMPANIES ACT, 2008, IN RELATION TO THE PROVISION OF FINANCIAL ASSISTANCE BY A COMPANY TO ANOTHER COMPANY THAT IS RELATED OR INTER-RELATED**

1. Webber Wentzel, per Mr. Jeff Buckland, requested the CIPC to provide it with a non-binding opinion in terms of section 188 (2) (b) of the Companies Act, 2008, on the interpretation of section 45 of the Act. The relevant parts of section 45 read as follows:

**"45. Loans or other financial assistance to directors**

- (1) In this section, 'financial assistance' –

- (a) includes lending money, guaranteeing a loan .....; but
- (b) does not include.....

- (2) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject subsections (3) and (4).

- (3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless –

- (a) the particular provision of financial assistance is –

- (i) pursuant to .....; or
- (ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

- (b) the board is satisfied that –

- (i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and
- (ii) the terms ..... are fair and reasonable to the company."

(My underlining)

2. Webber Wentzel contend , in relation to the purpose of section 45, that –

“the purpose of section 45 is to protect a company and its shareholders from directors of the company abusing their position and diverting or placing at risk the company's assets and cash flows (in the form of loans or financial assistance) directly or indirectly to or for the benefit of directors or prescribed officers (and not for legitimate business and commercial purposes).

The purpose (and language) of section 45(2) is therefore aimed at addressing the provision of financial assistance by the company to:

- (a) directors/prescribed officers of the company;
- (b) directors/prescribed officers of a company related or inter-related to the company;
- (c) *a company or corporation that is related or inter-related to any such directors/prescribed officers;*
- (d) a member of a corporation that is related or inter-related to any such directors/prescribed officers;
- (e) any person who is related to any director or prescribed officer or company or corporation or member contemplated under (a) - (d) above.

The purpose of section 45 is therefore not to hamper the board (acting in the best interests of the company) exercising the company's power to provide financial assistance to any other company or corporation or person unrelated to a director or prescribed officer.”

Webber Wentzel argue further –

“It follows from this logically that the purpose of section 45(2) is not to hamper the provision of financial assistance by the company to another company that is related or inter-related to the company eg a subsidiary or group company or holding company etc (but is not related or inter-related to any director or prescribed officer or company or corporation or member contemplated under (a) - (e) above). If this is correct, then a company has the power (and the board has the power in terms of section 66(1) to exercise this power of the company) to efficiently allocate and re-allocate surplus cash among group companies so that they can achieve optimum use of cash and value creation; and to provide security for another group company so that it can raise cheaper funds and operate more efficiently, without having to revert to shareholders for shareholder approval. Requiring shareholder approval for these normal type of business decisions would fly in the face of the rationale for the division of powers between shareholders and directors now embedded in section 66(1) of the Companies Act. Forcing companies to first secure a general authority by special resolution so that the board(s) may continue with intra group financial assistance for the benefit of the group also does not appear to solve or prevent any other possible mischief and probably won't affect intra group cash flows from going where they need to go for commercial reasons.

The provisions of section 45 (financial assistance to directors) therefore amount to an improved and refined version of section 226 of the now repealed Companies Act, 1973; and no more.

The purpose of section 45 as described above is evident from the language used for example in the heading of section 45 (financial assistance to directors); and in section 45(1)(b)(iii); 45(3)(a)(i); 45(7) read with 77(3)(e)(v) - each of which expressly refer to and make sense only in relation to the provision of financial assistance to a director or prescribed officer.

If there is another purpose for section 45, it certainly does not appear from the language used in section 45.”

Webber Wentzel then submit, in relation to the interpretation of section 45 (2), as follows:

“Bearing in mind the above purpose of section 45, the words "related" and "inter-related" underlined below in the following extract from section 45(2) : " ....the board may authorise the company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, ...." should be read in

relation to and qualify the preceding reference(also underlined) to the "director" or "prescribed officer" concerned.

This interpretation of the words (underlined) "related" and "inter-related" would give effect to the purpose of section 45 described above.

To the extent that the language used in section 45(2) can be reasonably construed to have more than one meaning, then in terms of section 158(b)(ii), preference must be given to the meaning that best promotes the spirit and purpose of the Act. I suggest that the spirit and purpose of section 45 is as described above."

3. Having considered section 45 and Webber Wentzel's contentions and submissions it appears in essence that they are of the opinion that the prohibition on financial assistance to directors and prescribed officers, and to companies and other persons related to them, without being authorised by a special resolution of shareholders to do so, does not extend to the provision of financial assistance to a related or interrelated company or corporation of the company itself (companies within the same group). The other school of thought is that section 45 expressly includes companies within the same group under this prohibition. They consequently seek from the Commission a non-binding opinion on the correct interpretation of section 45 (2).

4. Webber Wentzel is correct in suggesting that section 45 is rooted in section 226 of the repealed Companies Act, 1973. In several important respects, it is similar to the old section 226, but in other respects it is dissimilar. Section 226 (1) was originally silent on the question whether a company could make a loan or grant other assistance *to its own subsidiary or holding company*, but an amendment in 1977 introducing section 226 (1B) made it clear that such loans were entirely exempt from the application of section 226. In other words, section 226 dealt only with assistance to directors and managers, either directly, or by way of assistance to companies controlled by those directors/managers. Section 226 did not target assistance from a company to another company within the same group, even if the various companies had common directors/managers.

5. Section 45 is totally different in this regard. Unlike the repealed 1973 Act, section 45 (2) does not exempt assistance *to the company's own subsidiary or holding company* from the application of the section. It does exactly the opposite, expressly referring to such assistance in subsection (2), which permits such assistance "*subject to subsections (3) and (4)*". The reference to "or to a related or inter-related company or corporation ..." and the words that follow could hardly have a different meaning than what is stated in the section. Subsections (3) and (4) spell out the requirements that must be satisfied before a company may extend financial assistance to any recipient who falls within the class of persons enumerated in 45 (2). In the result, irrespective whether the assistance is to be granted to a director, manager, or to another company within the same group of companies, the applicable requirements of subsections (3) and (4) must still be satisfied and more specifically, such assistance may only be given if sanctioned by a special resolution of shareholders.

6. **Policy:** During 2007, the then Minister of Finance, Mr. Trevor Manuel, specifically mentioned intra-group company loans without shareholder knowledge or approval as a matter of concern. This led to the shift in the drafting policy as reflected in the difference between section 226 of the 1973 Act, and section 45 of the 2008 Act. This wording was thus intended and is accurately reflected in the wording of the Act. Parliament supported this policy in the face of several commentators who argued that this would be an additional burden on companies and would lead to inefficiencies.



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