



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 30 (2) and 30 (4) OF THE COMPANIES ACT, 2008, IN  
RELATION TO THE DISCLOSURE OF DIRECTORS' REMUNERATION IN PRIVATE COMPANIES**

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 30 (4) of the Act. The relevant parts read as follows:

"30 (4) The annual financial statements of each company that is required in terms of this Act to have its annual financial statements audited, must include particulars showing-

- (a) the remuneration .....received by each director.....;
- (b) the amount of –
  - (i) any pensions paid by the company to .... directors ....;
  - (ii) an amount paid by the company to a pension scheme with respect to .... directors.....;
- (c) the amount of compensation paid in respect of loss of office ..... to ... directors;
- (d) the number ...of any securities issued to a director.....;and
- (e) details of service contract of ... directors...".

2. Webber Wentzel contend as follows:

"It follows from the language of the preamble to section 30(4) that if a company is not **"required in terms of the Act"** to have its annual financial statements ("AFSs") audited, then it is not required in terms of section 30(4) to include in its AFSs the particulars with respect to directors' remuneration and benefits set out in section 30(4), (5) and (6).

In our view, on a proper reading of section 30(4) read with section 30(2) of the Act, and for among others the reasons stated below and policy considerations, a private company and a personal liability company are not companies that are **required in terms of the Act** to have their AFSs audited; and consequently (even when they are required in terms of the regulations to have their AFSs audited) do not need to include in their AFSs the private and confidential details of directors' remuneration and other benefits in terms of section 30(4). Policy considerations for this private treatment of private companies (and personal liability companies) would be that, having regard to the nature of these type of companies and the prohibition against their offering securities to the public, members of the public are not potential investors in these type of companies and consequently have no need of knowledge or access to the private and confidential remuneration packages of directors of private companies. In the result, the inclusion in the AFSs of details of the remuneration and benefits payable to directors of private companies and the making of that information available to the public at large is neither necessary nor desirable and serves no purpose.

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Therefore, in our view, the consequence of being a *private* company, *in terms of the Act*, are that its AFSs need not be audited and need not be filed with its annual return, and need not contain details of private remuneration packages of its directors. The consequences of a private company being required to have its AFSs audited *in terms of the regulations* because of its social and economic impact, are that its AFSs must be audited and must be filed with its annual return, but still do not need to contain details of the private remuneration packages of its directors."

3. Section 30 (2) of the Act determines the sources of the requirement to have annual financial statements audited. In terms of paragraph (a) thereof the annual financial statements of a public company must be audited (and as a result of the provisions of section 9 (1) also that of a state owned company) but paragraph (b) provides that the annual financial statements of all other profit and non-profit companies would only have to be audited if so required by the regulations made under section 30 (7). The source for the requirement to have annual financial statements of companies other than public and state owned companies audited is, therefore, the regulations. Webber Wentzel continues by identifying other relevant provisions of the Act where reference is made to the source of the audit requirement and finds it in sections 84 (1) (c) (1) and 33 (1) (a). In these sections the reference is specifically made both sources of this requirement, being the Act on the one hand and the regulations on the other.

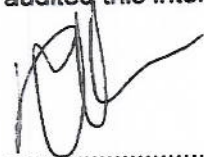
4. The CIPC agrees with the view of Webber Wentzel that section 30 (4), by not referring to the requirement of the regulations to have annual financial statements audited, in fact places that requirement on public and state owned companies only and that private companies and personal liability companies whether they are required in terms of the regulations to have the annual financial statements audited or not, are not required to disclose particulars of directors' remuneration and other benefits envisaged in section 30 (4), (5) and (6).

5. The CIPC also agrees with the incidental conclusions of Webber Wentzel that a private or personal liability company that is not required in terms of the regulations to have its annual financial statements audited

- is not required to comply with Chapter 3 of the Act in terms of section 84 (1) (c); and
- is not required to file its annual financial statements with its annual return in terms of section 33 (1) (a);

but that these requirements would apply to any such company if required in terms of the regulations to have its annual financial statements audited.

6. **Policy:** When the Bill was introduced in Parliament it was the stated intention to exempt all private companies from preparing financial statements. Parliament introduced the requirement that all companies must prepare financial statements and that larger companies should also be subject to an audit of their financial statements. The latter was left to be determined in the regulations. The requirement in section 30 (4) that directors' remuneration and benefits should be disclosed was from the outset meant to apply to public companies only and if the legislature intended for this disclosure to extend to all companies that have to be audited this intention would have been clearly stated.



Adv Rory Voller  
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27 October 2011