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 11 (3) (b) READ WITH SECTIONS 65 (12) AND 15 (2) (a) (3) OF THE COMPANIES ACT, 2008, IN RELATION TO THE USE OF "(RF)" IN THE NAME OF A COMPANY

1. Graeme Fraser & Veldra Morris of Companies Act Online requested that clarity be provided on the following statement and question flowing from the statement:

"Section 65(11) (a) to (m) set out the various instances in which the Act requires that a special resolution is required from the shareholders of a company but –

(a) section 65(12) allows the Memorandum of Incorporation of a company to require a special resolution to approve any other matter not contemplated in subsection (11); and

(b) section 15(2)(a)(iii) states that the Memorandum of Incorporation of a company may impose on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would apply to the company in terms of an unalterable provision of the Act.

If a company's Memorandum of Incorporation contains a clause which would fall within (a) or (b) above, would that company's MOI be regarded as falling within the provisions of section 15(2)(b) or (c) resulting in that company being required to include the letters "(RF)" at the end of the company's name and a reference to such clause in the company's Notice of Incorporation."

2. No opinion or views on the question was expressed by the applicants but it seems clear that there is sufficient uncertainty regarding the use of "(RF)" in the name of a company and the reasons for the requirement to warrant that guidelines be provided in by way of a non-binding opinion under section 188 of the Companies Act, 2088.

3. RF is the abbreviation for "Ring Fenced" and section 11 (3) (b) requires every company to use "(RF)" as part of its name if the company's MoI includes any provision contemplated in sections 15 (2) (b) or (c) restricting or prohibiting the amendment of a particular provision of the MoI. Section 15 (2) (b) refers to provisions that "contain any restrictive conditions applicable to the company" (and any requirement for the amendment of any such condition in addition to the requirements set out in section 16) and 15 (2) (c) refers to provisions that "prohibit the amendment of any particular provision" of the MoI of the company.

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4. To understand the rationale behind the requirement the difference between the repealed Act and the Companies Act, 2008, in relation to the powers of a company must be understood.

Under the repealed Act a company had the powers and capacity determined by its main object as stated in the specific company's memorandum of association and the complex "doctrine of constructive notice" applied to all outsiders. In terms of this doctrine anyone dealing with the company is presumed to be aware of the contents of the company documents as filed because they are open to inspection by the public. In terms of this doctrine the public is, therefore, presumed to have knowledge of any limitations on the powers and capacity of the company.

Under the Companies Act, 2008, a company has, in terms of section 19 (1) (b), the powers and capacity of a natural person or individual of full capacity except to the extent that a juristic person is incapable of exercising any such power or having such capacity (a juristic person, for instance, cannot get engaged or get a driver's licence). Furthermore, section 19 (4) specifically excludes the operation of the doctrine of constructive notice under the Act. Under the Companies act, 2008, therefore, a person that interacts with a company can accept that the company has the necessary power and capacity to participate in that activity and to bind the company. However, should there be any limitation the outsider would in terms of section 19 (5) (a) only be bound by it if the company's name includes the element "RF" as contemplated in section 11 (3) (b) and the company's Notice of Incorporation or subsequent Notice of Amendment has drawn attention to the relevant provision.

The doctrine of constructive notice would, therefore, only apply under the Companies Act, 2008, in very limited circumstances.

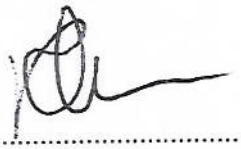
5. It is against this background that that it must be considered whether the requirement to use (RF) in the company name is applicable or not in any particular case. In principle, if a limitation could have any effect on third parties, it would be advisable to use (RF) in the name. If on the other hand, it is of no consequence to third parties there would also be no need to warn them. The wording of section 15 (2) (b) or (c) is, however, not sufficiently clear to limit the use of (RF) to those instances only.

6. The answer to the questions posed in paragraph 1 would, therefore, be that it is conceivable that in both cases the conditions as set out in section 15 (2) (b) or (c) could be met although in many cases it might be irrelevant to third parties.

7. In the circumstances the CIPC would recommend that expression (RF) be used in all cases where –

- the purpose or objectives of the company is restricted or limited in the MoI of the company;
- the powers of the company is restricted or limited in any way in its MoI;
- any other limiting or restricting condition is contained in the MoI of the company;
- any requirement in addition to those set out in section 16, for the amendment of any of the abovementioned restrictions or limitations is contained in the MoI;

- a special resolution to approve any matter not contemplated in section 65 (11) is prescribed in the MoI of a company;
- the MoI of a company imposes on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would apply to the company in terms of an unalterable provision of the Act; and
- the MoI of a company contains a prohibition on the amendment of any particular provision of the MoI.



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Deputy Commissioner
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