

# Companies Act, 71 of 2008

## Enhanced Accountability and Transparency

**Chapter 3** of the Companies Act of 2008 (the "Act") contains provisions for enhanced accountability and transparency to be met by certain categories of companies.

### *What you should do:*

*Determine whether your company must appoint a company secretary, auditor and audit committee.*

In terms of section 84, the provisions of Chapter 3 to appoint a **company secretary, auditor and audit committee**, apply to:

- public companies, unless exempted; and
- state-owned companies, unless exempted.

The appointment of an **auditor**, will apply to a private, a personal liability and a non-profit company **if** the company:

- is required by the Act or its regulations to have its annual financial statements audited every year; or
- otherwise only to the extent that the company's Memorandum of Incorporation so requires (sections 84 (1) (c) and 34(2)).

### *What you should know:*

*Depending on the provisions in Chapter 3 and the type of entity, a company may be required to appoint a company secretary, an auditor and an audit committee.*

It is important to note however, that the requirement to appoint a **company secretary and an audit committee** is **not** applicable to a private, a personal liability and a non-profit company **except** to the extent that the company's Memorandum of Incorporation requires it do so.

### Public companies

In terms of section 84(4) a public company must appoint a **company secretary, an auditor and an audit committee**.

Exemptions:

- In respect of the appointment of an audit committee, the appointment of such a committee in terms of section 94(1) of the Act applies concurrently with section 64 of the Banks Act, to any company that is subject to that section of the Banks Act and sections 94(2), 94(3) and 94(4) will not apply to the appointment of an audit committee.
- The appointment of an audit committee does not apply to a company that has been granted an exemption in terms of section 64(4) of the Banks Act.

State-owned companies

The provisions of section 84(4) to appoint a **company secretary, an auditor and an audit committee** also apply to state-owned companies.

Exemptions:

- If there is a conflict between a provision of Chapter 3 of the Act and a provision of the Public Audit Act (Act 25 of 2004), the provisions of the Public Audit Act will prevail.
- Despite the provisions of Chapter 3 of the Act to the contrary, the state-owned company is not required to appoint an auditor for any financial year in respect of which the Auditor-General has elected to conduct an audit of that company.
- In any year in which the state-owned company is required by Chapter 3 of the Act to appoint an auditor, any requirement in terms of the Public Audit Act, to have the appointment of the company's auditor approved by the Auditor-General applies to that company, in addition to the relevant provisions of Chapter 3.

Appointment of a company secretary (sections 86 - 89)

- A company secretary can be appointed in terms of the Act or Memorandum of Incorporation.

***What you should know:***

*A person who is disqualified to serve as a director of any company may not be appointed or continue to serve that company as a company secretary.*

- The Memorandum of Incorporation will determine if a private, personal liability or non-profit company has to appoint a company secretary.
- Record must be kept of each person appointed as the company secretary.
- Within 10 (ten) business days after appointing a company secretary the company must file a notice to this effect.
- A company secretary must have the requisite knowledge and/or experience in respect of the relevant laws and must be a permanent resident of South Africa.
- A company secretary of a public company or state-owned company can be appointed by the incorporators of the company or by the directors or through an ordinary resolution by the shareholders within 40 (forty) business days after incorporation.
- A company secretary appointed in terms of a Memorandum of Incorporation (in the case of a private, personal liability or non-profit company) must be appointed by the directors of the company or through an ordinary resolution by the shareholders within 40 (forty) business days after determining that it has to appoint a company secretary.
- The position of a company secretary may not be vacant for more than 60 (sixty) business days.
- A legal entity can also be appointed as the company secretary if its employees (or at least one of its members) have the requisite knowledge and/or experience and are permanently resident in South Africa.
- The company secretary is accountable to the board and Chapter 3 of the Act prescribes some of the duties of a company secretary.
- A company secretary may resign by giving 1(one) month written notice.
- If a company secretary is removed from office, he or she may request the company to include in its annual financial statements the reason why he or she was removed.

#### Appointment of an auditor (sections 90 - 93)

- An auditor can be appointed in terms of the Act or Memorandum of Incorporation.

***What you should know:***

*A person who is disqualified to serve as a director of any company may not be appointed or continue to serve that company as an auditor.*

- The auditor must:
  - o be a registered auditor;
  - o not be a director or prescribed officer of the company;
  - o not be an employee or consultant of the company;
  - o not be anyone of the company secretaries' offices;
  - o not be any person related to the abovementioned people.
- A legal entity may also be appointed as an auditor.
- The auditor must be appointed within the first 40 (forty) business days after incorporation.
- An auditor holds office until the first annual general meeting of the company.
- An existing auditor may be reappointed without a resolution being passed - deemed to be re-appointed.
- The position of an auditor may not be vacant for more than 40 (forty) business days.
- The audit committee must be notified within 15 (fifteen) business days of such a vacancy and the name of the new auditor.
- The audit committee has 5 (five) business days to reject the proposed new auditor.
- An auditor partner may not serve for longer than 5 (five) consecutive financial years.
- The rights and functions of an auditor are also set out in chapter 3 of the Act.

#### Appointment of an audit committee (section 94)

- An audit committee can be appointed in terms of the Act or Memorandum of Incorporation.

***What you should know:***

*A person who is disqualified to serve as a director of any company may not be appointed or continue to serve that company as a member of an audit committee.*

- An audit committee must comprise of at least 3 (three) members all of whom must be non-executive directors who meet the requirements of section 94(4).

- A subsidiary of a company with an audit committee does not need a separate audit committee.
- The audit committee may be appointed by the incorporators or by the board within 40 (forty) business days after incorporation. Thereafter the audit committee is appointed each year by shareholders at the annual general meeting.
- Each member must be a director of the company, who is not involved in the day to day management of the company.
- At least one third of the members of a company's audit committee must have academic qualifications or experience in economics, law, corporate governance, finance, accounting, commerce, industry, public affairs or human resource management.
- The audit committee's duties are set out in chapter 3 of the Act.
- An appointment of an auditor of a company is only valid if the audit committee is satisfied that the auditor is independent.
- The company is responsible for all the reasonable expenses incurred by the audit committee.

#### **Failure to comply with Chapter 3 of the Act**

If a company fails to appoint a company secretary, an auditor or an audit committee as required, section 84(6) makes provision that:

- The Commission may issue a notice to that company to show cause why the Commission should not proceed to convene a shareholders meeting for the purpose of making that appointment; and
- If the company fails to respond to such a notice or fails to satisfy the Commission that the board will make the appointment, the Commission may give notice to the shareholders of the company of a general meeting, convene such a meeting to make the appointment and assess a pro rata share of the cost of convening the meeting to each director who knowingly permitted the company to make such appointment.

#### **NEED ASSISTANCE WITH THE IMPLICATIONS OF THIS ACT?**

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