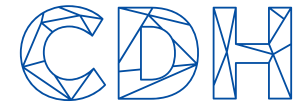


# Corporate & Commercial

ALERT | 10 September 2025



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Disclosures of "*personal financial interests*" under section 75 of the Companies Act

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## Disclosures of “personal financial interests” under section 75 of the Companies Act

Some things in life can be quite difficult to put into words but are instantly recognisable when you see them. A tap-dancing elephant, for example, is an image that is not easy to describe, but if you ever came across an elephant practicing its heel drops and shuffles while brandishing a cane and wearing a top hat, you’d have an innate sense of what you’ve just witnessed.

When it comes to obtaining corporate authorisations, section 75 of the Companies Act 71 of 2008 (Companies Act) is a frequently encountered provision. The section is a codification of a director’s fiduciary duty to avoid and disclose conflicts of interest, to act in good faith and in the best interests of the company and, by extension, not for their personal benefit.

Yet, despite the frequency with which it is encountered, section 75 is bedevilled with uncertainty and lacunae that can make its application somewhat difficult. One such challenge relates to the nature of the personal financial interests that are required to be disclosed and, more specifically, how “direct” they need to be in order to fall within the disclosure requirements.

Below, we revisit some of the fundamental provisions and requirements of section 75 in light of the clarity provided by the courts on how close to home a personal financial interest needs to be before a director is obliged to tell everyone about them.

### Section 75 of the Companies Act

For purposes of section 75, a “director” includes an alternate director, a public officer, and a member of a board committee (irrespective of whether such person is a formally appointed director of the board).

In terms of section 75(5), a director is bound to disclose a conflict of interest (as well as any material information relating to the matter) to the board where (i) the director themselves has a “personal financial interest” in the matter to be considered by the board or (ii) knows that a related person has a “personal financial interest” in the matter. This disclosure requirement applies to both in-person meetings of the board and round robin resolutions in terms of section 74 of the Companies Act.

After making such disclosure, the director is obliged to recuse themselves and not take part in the consideration and determination of the matter being decided. In addition, the director may not execute any document on behalf of the company in relation to the matter unless specifically requested to do so by the board. Notwithstanding such recusal, the director is still considered present for purposes of determining quorum.

In terms of section 75(7), a decision by the board, or a transaction or agreement approved by the board, remains valid notwithstanding the personal financial interest, only if:

- the personal financial interest was disclosed, and the decision, transaction or agreement was approved following disclosure; or
- to the extent that the decision, transaction or agreement was approved without disclosure of the personal financial interest, it is subsequently ratified by an ordinary resolution of shareholders, or declared valid by a court in terms of section 75(8).

## Disclosures of “personal financial interests” under section 75 of the Companies Act

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A director who fails to comply with the prescripts of section 75 may be held liable (in accordance with the common law principles relating to breach of fiduciary duty) for any loss, damages or costs sustained by the company as a consequence of any breach by a director of their duties contemplated in section 75 (section 77(2)(a) of the Companies Act).

### Who is “related” and what is a “personal financial interest”?

The categories of persons or entities considered to be related or inter-related to a director is set out in section 1 read together with section 2(1) of the Companies Act. However, for the purposes of section 75 specifically, a “related person” also includes another company of which a director or a related person to that director is also a director (section 75(1)(b) of the Companies Act).

Section 1 of the Companies Act defines “personal financial interest” as a **direct material interest** of a person, of a **financial, monetary or economic nature**, or to which a **monetary value may be attributed**.

The courts have recently provided some clarity on the interpretation of personal financial interests and how “direct” they need to be in order to qualify for disclosure. In the case of *Dimension Data Facilities (Pty) Ltd and Others v Identity Property CO (Pty) Ltd and Others* (2022/040174) [2024] ZAGPJHC 1209 (25 November 2024), it was held that:

- the word “direct” is properly construed as being an interest which can be discerned by reference to the matter or transaction in issue to benefit the director directly;
- this will often involve following the intricacies of transactional relationships which have been structured deliberately for the purposes of concealing the personal interest of the director; and
- what the requirement of directness does not mean is that the director has to, from a technical perspective, hold the interest in their personal capacity. Section 75 cannot be evaded by clever structures which seek to conceal the interests of parties.



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## Disclosures of "personal financial interests" under section 75 of the Companies Act

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Therefore, it need not be a direct personal financial interest in the traditional sense of the word "direct" (i.e. that a director or related party stands to directly benefit in a personal capacity). In other words, the proximity of the interest or the interposition of various layers between the director and the matter under consideration is irrelevant to the analysis of the conflict. As a result, any interest, no matter how remote it may be, ought to be disclosed.

For those who think partnerships, with varying levels of limited and general partners, might be a way to get around the requirements of section 75, the court also remarked that the complexity at the level of *en commandite* partnerships, within *en commandite* partnerships and the interposition of various parties or layers between a director and the matter under consideration, does not absolve a director from the obligation to disclose a conflict they may have in the matter under consideration.

### Practical considerations and board compositions

A commonly encountered conflict of interest, particularly in transactions that involve multiple companies within the same group of companies, is where there are general cross-directorships (that is, a director sits on the board of two separate contracting parties). In this scenario, each of the two contracting parties is "related" to the director for the purposes of section 75 of the Companies Act, and the director will be duty bound to disclose any "personal financial interests" of each company to the respective boards.

The *Dimension Data* case takes things a bit further. Given the finding that the proximity of an interest is not relevant to the disclosure requirements, a director may need to give further thought to their position in the overall group structure of the contracting parties. If, for example, a person sits on the board of a contracting party and also sits on the board of a direct or indirect shareholder of another contracting party, it may be prudent for such director to disclose this fact to the board when making the decision. This is because the shareholder company on whose board the director sits is a related person to the director and has an interest in the contract that its underlying subsidiary will be a party to, albeit through various layers or levels in the corporate structure of the contracting parties.



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Generally, it is advisable to stay away from having complete mirror boards within a corporate structure. This is not only helpful for strong corporate governance, but assists with avoiding a scenario where an entire board of directors is conflicted in making a decision involving a transaction between related entities. To solve for this, the shareholders would be required to either pre-approve the board’s participation in a decision or ratify the conflicts of interest after the fact (although this latter solve is problematic as it raises questions about the validity of the board’s resolutions in the first place, having been made entirely by persons who have conflicts of interest). In either case, there is a constant need to resort to shareholders for pre-approval or ratification, which can stifle decision making at board level.

Best practice would dictate constituting the board in such a way that a majority of directors will always be unconflicted such that, even after conflicted directors have recused themselves, there is still a sufficient number of directors unconflicted, able to vote, and pass the resolution on majority. Where this is not possible, the directors would either have to convene a meeting where the non-conflicted directors pass the resolution after the conflicted directors have recused themselves, or one would ultimately have to resort to shareholders to approve the transaction and/or the board’s participation in the approval of the transaction.

In the end, when it comes to the disclosures of personal financial interests, it is always best to err on the side of caution. Where a director has an innate sense that they should be informing the board of a personal financial interest, the safest thing to do is to disclose it. And while you do so, you might also wish to tell the board about that tap-dancing elephant you saw the last time you went on safari.

**Josh Da Costa and Andrew Giliam**

The logo for the IFLR 1000 2024 ranking. It features the text "IFLR" in a bold, sans-serif font above the number "1000" in a similar font. Below "1000" is the year "2024". The logo is set against a dark blue background with a white border.

Cliffe Dekker Hofmeyr

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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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