

Understanding the fundamental duties and responsibilities of a Director of a company



Prior to the introduction of the Companies Act, the duties of company directors were governed by South African common law.

This dictates that directors act in the utmost good faith and in the best interests of their companies and includes the need to exercise care, skill and diligence so as to promote company success through independent judgment.

Failure to properly perform the common law duties may render a director personally liable to pay monetary damages.

The Companies Act now extends the duties of directors and increases the accountability of directors of the company. The purpose of this blog is to highlight a number of legal issues people should be aware of as a director of a company.

This insight will specifically focus on *the elementary duties and responsibilities of new directors*. It may also serve as a good refresher for existing directors who need to remind themselves of the basics.

Who is a “ Director” of a company?

In terms of section 1 of the Companies Act 71 of 2008, a director is defined as a member of the board of a company or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated.

- The Companies Act identifies two bodies of Stakeholders, namely the Shareholders and the Board of Directors in respect of the governance of a company.
- Section 66 of the Companies Act provides that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company.
- The board of directors oversees the management of the company’s business; they make the strategic and operational decisions of the company and are responsible for ensuring that the company meets its statutory obligations. The role of shareholders is limited to longer-term strategic direction of the company, while the role of Shareholders in the day-to-day operations is to a large extent muted. The involvement of shareholders in this regard is their right to appoint or remove directors.

In general terms, the directors of a company are those individuals empowered by the the company’s Memorandum of Incorporation (Moi) to execute its operations. The directors are entrusted by the shareholders of the company with the ultimate responsibility for the functioning of the company, while the day-to-day running of the company is generally delegated to some level of management. The ultimate responsibility for the actions performed in the name of the company rests with the directors.

What are the standards required from directors in the execution of their duties?

Section 76 of the Companies Act determines the standards required from directors in the execution of their duties. These provisions embody the common law fiduciary duties but are not an all-encompassing list of all common law fiduciary duties.

Legal duties and responsibilities of directors

The legal duties and responsibilities of directors are actually derived from two sources, namely the Companies Act (Statutory) and the Common Law as found in the decisions of the courts. They can be summarised as follows:

- To act within the powers granted to them in the Memorandum of Incorporation;
- To act in good faith and in the best interest of the company;
- To exercise their powers for a proper purpose;
- The duty to exercise an independent judgement in all decision-making;
- To avoid, or declare, any conflict of interest;
- Not to accept benefits from third parties or use their position to benefit themselves;
- To disclose to the company their financial interests in proposed or existing transactions or arrangements with the company or other entities;
- To apply reasonable care, skill and diligence in exercising their duties.

Liability of directors in terms of the Companies Act

Section 77 of the Companies Act states that a director of a company may be held liable–

- in accordance with the principles of a common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76 (2) or 76 (3) (a) or (b).
- if the director acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so.
- if he or she acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1) of the Companies Act

Conclusion

Remember that once you accept your appointment as a director to a board, you accept the full extent of the duties and responsibilities that the Companies Act and the Common Law impose on you. Ensure that you fully understand the legal implications that come with being a director.

You may be a Shareholder or an employee of the company (or both) and, if so, will have additional rights and duties beyond those purely connected with your office as a director. It is crucial that you draw a distinction between these separate roles and 'wear the right hat for the job'.

SERR Synergy assists start-up and existing businesses to comply with the new Companies Act and amended Close Corporations Act by bringing all relevant company documents in line with new legislation. As part of our service we also assist directors with any liability issues they may face within the ambit of the Companies Act.

About the Author: Mmapitso Morulane joined SERR Synergy in September 2019. Since then, she has had the opportunity to be part of the Corporate Legal Advisors Department, assisting clients from an ownership point of view. She prides herself on being a SERR Synergy Brand Ambassador, representing our company in a positive and professional way.

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