

The appointment of directors under the new Companies Act 71 of 2008

The new Companies Act, 71 of 2008 has numerous changes for the appointment, resignation, removal, obligations and duties of directors.

The Act introduces a partial codification of directors' duties, which includes both a **fiduciary duty**, and a duty of **reasonable care**, which operate in addition to existing common law duties

Section 76 of the Act, in particular, requires a director when acting as a director, to act:

- in **good faith** and for a proper purpose
- in the **best interests** of the company
- with the degree of **care, skill and diligence** that may reasonably be expected of a person
 - carrying out the same functions in relation to the company as those carried out by the director
 - having the general knowledge, same skill and experience of that director – a reasonable man/women test.

Number of Directors

Private Company – 1 Director Minimum

Public Company/Non Profit Company – 3 Directors minimum

Appointment

- Each **Incorporator** of a company becomes its first directors
- Directors are thereafter appointed by the majority **shareholders entitled to vote** on their election, for an indefinite term or as the Memorandum of Incorporation (MOI) stipulates
- Any **vacancies on the board** may be filled temporarily by election of other board members or as the Memorandum of Incorporation provides

Disqualification – of persons to act as a director

- A Court has declared that person delinquent
- A juristic person
- Un-emancipated minor
- Un-rehabilitated insolvent
- Prohibited by Public regulation
- Removed from office of Trust, due to dishonesty
- Convicted of a crime of dishonesty (theft, fraud etc), without option of a fine
- Does not meet qualifications as set out in the Memorandum of Incorporation of the company

Exemption – even though disqualified

- If all shares held by that person alone – 100% Shareholder
- Shares held by disqualified person, and related persons, who have consented in writing to that director acting as such

Termination – on board

- Term of office expires as per Memorandum of Incorporation
- Resignation
- Death
- Incapacitated
- Declared delinquent
- Becomes disqualified
- Removed by a resolution of the shareholders or the Board or court order

Removal – of a director

- Despite anything to the contrary in the Memorandum of Incorporation, or rules, or an agreement – Director may be removed by an **ORDINARY** resolution of shareholders entitled to vote, or by board meeting (when alleged that director is disqualified, incapacitated or negligent in duties)
- Director must be given **opportunity to be heard** at meeting before vote on removal
- Removed director has right to **apply to court** for damages for loss of office

Board meetings

- Board authorised director may call a meeting at any time
- Must call meeting when **25% of directors** - when Board has at least 12 members, or **two directors** in any other case, request a meeting
- Company **MUST keep minutes** of all board meetings and every resolution taken at meeting
- Each director has **one vote** and majority vote approves resolution
- Directors may vote on a resolution by **round- robing**, by written or electronic means – without need for physical meeting

Liability of directors

- Director - includes alternate director, prescribed officer (CEO, MD CFO etc), Audit committee or board committee members.
- Liable for breach of fiduciary duty, or delictual act, acting without authority, party to supplying false or misleading information about company or making of an untrue statement in a prospectus.
- Director must disclose any **personal financial interests** in any matter before the Company
- The Director may not **use the position as director or information gained** as a director to make a secret profit or gain advantage for him- or **herself or someone else [related person]** or to cause harm or detriment to the company.
- Directors or related persons must also disclose to the company any financial interest acquired, **after the agreement or other matter has been approved by the company.**
- A sole Director who does not hold all the beneficial interest of securities or related persons to the director, who discloses a personal financial interest in a company agreement, **may acquire approval to enter into that agreement by the passing of a ordinary resolution of the shareholders**

In addition, directors could be held liable to shareholders for fraudulent acts or acts of gross negligence or to a third party who has suffered damages due to the acts of the directors.

The Act also includes the “**business judgment test**” which states that if a director has applied reasonable care, skill and diligence, has no material financial interest and has a basis for believing that the decision made was in the best interest of the company, the director will not be held liable for a breach of duty. This is only if a director did not act in bad faith or for improper purpose.

Indemnification and Insurance

- Company **may not indemnify a director** for willful misconduct or breach of trust, or for a director acting without proper authority from company or undertaking a prohibited act (reckless or insolvent trading), or for perpetuating a fraudulent act.
- A Company may take **indemnity insurance** on behalf of its directors in order to aid in any lawsuit against the director as related to the company
- Company may **purchase insurance** to protect a director against permitted liability
- A Company is entitled to **claim restitution** from a director of a company or of a related company for any money paid directly or indirectly by the company to, or on behalf of that director, for claim

While the Act has removed many of the criminal offences which are found in the current Companies Act, the potential for civil claims against directors in terms of the New Companies Act is far greater.

Important to note is that members of board- and audit committees will have the same liability as directors, even if the members of the board committees are not directors and even though they have no voting rights on matters considered by the board committees.