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Steering Point



Duties of directors and prescribed officers under the Companies Act

An overview of the duties of directors and prescribed officers under the Companies Act, No. 71 of 2008.

In this issue:

- Definition of 'director' in the Act
- Election and removal of directors
- Ineligibility, disqualification and delinquency of directors
- Duties and liabilities and the link with the common law
- Directors' liability exposure reference table
- Remuneration
- Solvency and liquidity
- Reckless trading
- Prescribed officers
- Update on recent court cases

Table of Contents

Introduction	3
Definition of ‘director’ in the context of the Act	3
The minimum required number of directors	5
First directors and elections	5
Election of directors of profit companies	5
Ineligibility, disqualification and delinquency of directors	6
Vacancies on the board	8
Removal of directors	8
Directors’ duties	9
Directors’ duty to disclose personal financial interests	13
Directors’ liability	14
Companies Act, 1973	15
Available defences or relief for directors	15
Application of the solvency and liquidity test	16
Reckless trading, solvency and liquidity	17
Business rescue provisions and the meaning of ‘financially distressed’	18
Financial assistance to directors	18
Directors’ remuneration	19
Authorisation of directors’ remuneration	19
Prescribed officers	20
Appendix A: Liability exposure	23
Appendix B: Summary of recent court cases	28

Introduction

South African companies have been subject to the provisions of the Companies Act, No. 71 of 2008 (the Act) since its effective date of 1 May 2011. The past 3 years have seen the first precedents being set by our courts, some of which may have significant impact on directors. Refer to Appendix B for a summary of recent court cases.

An example of this can be found in the South Gauteng High Court decision of *Kukama v Lobelo and Others* (38587/2011) [2012] ZAGPJHC 60 ('Kukama case') on the delinquency provisions in Section 162, which is more fully discussed later in this publication.

Another significant precedent is to be found in the case of *Mouritzen v Greystone Enterprises (Pty) Ltd & Another* (10442/2011) [2012] ZAKZDHC 34; 2012 (5) SA 74 (KZD) ('Mouritzen case') handed down in the KwaZulu-Natal High Court. In this case, permission was sought to institute a derivative action against a co-director in terms of Section 165. The order was granted by the Court. Derivative actions are discussed further in this publication.

This publication discusses directors' and prescribed officers' duties and responsibilities in terms of the Act and the most pertinent sections that directors should be aware of. The sections dealt with here do not constitute an exhaustive list of matters to be considered by directors and prescribed officers, but aim to offer guidance in the performance of their duties.

Other duties and responsibilities in terms of the common law, other legislation, contractual obligations (where applicable) and those set out in a company's Memorandum of Incorporation (MOI), should always be considered in addition to the duties and responsibilities stipulated by the Act.

Definition of 'director' in terms of the Act

Section 66(1) provides directors with statutory power and a positive obligation by stating 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, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

A person becomes entitled to serve as a director of a company when that person has been appointed or elected in accordance with the Act, or holds an office, title, designation or similar status entitling that person to be an ex officio director of the company; and the person has delivered written consent to serve as its director to the company.

The appointment or election of a director becomes effective on the date of delivery of such written consent, unless the person is ineligible or disqualified in terms of Section 69. The Act does not have similar provisions for the acceptance of office by prescribed officers. They were automatically scoped into the definition of prescribed officers when the Act became effective on 1 May 2011.

The Act attaches specific meaning by way of definition to the term director, alternate director and ex officio director in Section 1. Sections 66 and 68 further expand on the meaning of ‘director’ in the context of appointed and elected directors, the distinction of which becomes relevant for director removal procedures.

In addition, certain sections of the Act equate the liabilities and duties of directors to those of prescribed officers. For purposes of these sections, prescribed officers are regarded as directors. (Refer to the sections in this publication that deal with prescribed officers).

A company’s MOI may provide for the name of a person to be specifically appointed as director or to be determined therein. It may also determine matters such as the appointment and removal of one or more directors and for persons to be made *ex officio* directors. The MOI must, however, provide that the shareholders of a profit company other than a state-owned company must elect at least 50% of its directors and 50% of any alternate directors.

Meanings attached to the term ‘director’ in the Act

Type of director	Companies Act, 2008 definition or meaning
Director [Section 1]	A member of the board of a company or an alternate director of a company, including any person occupying the position of a director or alternate director, by whatever name designated.
Alternate director [Section 1]	A person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company.
Appointed director [Section 66(4)(a)(i)]	A company’s MOI may provide for the direct appointment and removal of one or more directors by any person who is named in or determined in terms of the MOI. This director is sometimes referred to as an appointed director.
Elected director [Sections 66 (4)(a)(i) and (b) and 68(1)]	In the case of a profit company other than a state-owned company, the MOI must provide for the election by shareholders of at least 50% of the directors, and 50% of any alternate directors. Each director of a profit company, other than the first director or a director contemplated in Section 66(4)(a)(i) or (ii), must be elected by the persons entitled to exercise voting rights in such an election, to serve for an indefinite term, or for a term as set out in the MOI. These directors are sometimes referred to as elected directors.
Ex officio director [Sections 1, 66 and 69]	A person who holds office as a director of a particular company solely as a consequence of that person holding some other office, title, designation or similar status specified in the company’s MOI. The wording of this section suggests that ex officio directors can only be appointed and removed as determined by the Memorandum of Incorporation. An <i>ex officio</i> director has all the powers and functions of any other director of the company, except to the extent of any restrictions specified in the MOI. An <i>ex officio</i> director has all the duties and liabilities of any other director of the company and remains subject to disqualification in terms of Section 69 notwithstanding holding the relevant title, office or designation.
Temporary director [Section 68(3) and (2)]	Unless the MOI of a profit company provides otherwise, the board may appoint a person who satisfies the requirements for election as a director to fill any vacancy and serve as a director of the company on a temporary basis until the vacancy has been filled by election in terms of Subsection (2), and during that period any person so appointed has all of the powers, functions and duties as well as also being subject to all of the liabilities of any other director of the company.

The minimum required number of directors

[Section 66]

Section 66 states that a private company or personal liability company must have at least one director and that a public or non-profit company must have at least three directors. This number is in addition to the minimum number of directors that the company must have to satisfy any requirement to appoint an audit or social and ethics committee. The audit committee must comprise of at least three directors.

The social and ethics committee may comprise of two prescribed officers and a non-executive director. Directors may also serve on more than one committee. Public companies are thus now required to have at least six directors. The King report on Corporate Governance for SA, 2009, recommends that the majority of directors should be non-executive. The Act does not make a distinction between

executive- and non-executive directors. The company's MOI may stipulate a higher number of directors over and above the minimum number required in Section 66.

Section 66(11) further determines that any failure by a company at any time to have the minimum number of directors required by this Act or the company's MOI, does not limit or negate the authority of the board, or invalidate anything done by the board or the company.

First directors and elections

[Sections 66(4)(a)(i), 67, 68]

Section 67 determines that each incorporator of a company is a first director of the company, and serves until sufficient other directors have been appointed, in accordance with Section 66(4)(a)(i) or first elected in accordance with Section 68. If the number of incorporators of a company, together with any ex officio directors, or directors to

be appointed, is fewer than the minimum number of directors required for that company in terms of the Act or the company's MOI, the board must call a shareholders' meeting within 40 business days after incorporation of the company for the purpose of electing sufficient directors to fill all vacancies on the board at the time of the election.

Election of directors of profit companies

[Sections 66(4)(a)(i) or (ii) and 68]

Section 68 determines that each director of a profit company, other than the first director or a director contemplated in Section 66(4)(a)(i) or (ii), must be elected by the persons entitled to exercise voting rights in such an election, to serve for an indefinite term, or for a term set out in the MOI. Unless a profit company's MOI provides otherwise, in any election of directors, the election is to be conducted as a series of votes. Each vote is conducted on the candidacy of a single individual to fill a single vacancy, with the series of votes continuing until all vacancies on the board at that time have been filled.

In each vote to fill a vacancy, each voting right entitled to be exercised may be exercised once; and the vacancy can be filled only if a majority of the voting rights exercised support the candidate. Unless the MOI of a profit company provides otherwise, the board may appoint a person who satisfies the requirements for election as a director to fill any vacancy and serve as a director of the company on a temporary basis, until the vacancy has been filled by election. During that period, any person so appointed has all of the powers, functions and duties, as well as also being subject to all of the liabilities, of any other director of the company.

Ineligibility, disqualification and delinquency of directors

[Sections 69, 70, 77(2)(b), 162 and 218]

Over and above the personal liability that directors can incur, directors are also exposed to disqualification and delinquency provisions in the Act. In addition, the Companies and Intellectual Property Commission (CIPC) must establish a public register of persons who are disqualified from serving as a director, or who are subject to an order of probation as a director, in terms of a court order. Being named on such a register may adversely affect the person's reputation.

Section 69 distinguishes between ineligible directors and disqualified directors. In terms of this section, additional grounds for ineligibility or disqualification of directors, or minimum qualifications to be met by directors, may be imposed by the MOI. A person who becomes ineligible or disqualified ceases to be entitled to continue to act as a director immediately in terms of Section 70 and a vacancy arises on the board.

A company must not knowingly permit a disqualified or ineligible person to serve as a director. If loss or damage is suffered by the company, liability can be incurred by the director under Section 77(2)(b) or by a third party as a result of Section 218(2).

In terms of Section 162, directors can be declared 'delinquent' or 'under probation' by a Court on the grounds set out in the table below, on application by certain categories of applicants such as the company, a shareholder, director, company secretary or prescribed officer.

A court may also order the delinquent director to undertake a programme of remedial education or carry out a designated programme of community service. A court may also order the delinquent director to pay compensation to any person adversely affected by the person's conduct as a director, to the extent that such a victim does not otherwise have a legal basis to claim compensation.

In the case of an order of probation, the court may order the director to be supervised by a mentor in any future participation as a director while the order remains in force, or be limited to serving as a director of a private company or a company of which the person is the sole shareholder. As mentioned, the CIPC must establish and maintain in the prescribed manner a public registry of persons who are disqualified or subject to an order of court in terms of Section 162.

A person who has been declared 'delinquent' or 'under probation' can in certain circumstances apply for the order to be suspended and/or set aside.

In the *Kukama* case, the director in question was declared delinquent in terms of the delinquency provisions of Section 162. In this instance a 50% shareholder applied to court to declare a director delinquent. Vast amounts of money in tax refunds owing to the company were diverted by the delinquent director to another company in which he had an interest.

Having due regard to the fiduciary duties of directors in terms of the Companies Act, the Court declared the director delinquent. The court held that it was not necessary to order the removal of the director as this was inherent and automatic under Section 162.

The delinquent director was ordered to pay the costs of the application. The court also granted leave for further proceedings to be instituted for recovery of the amounts in question as well as interest and costs.

Relevant sections addressing ineligibility, disqualification and delinquency.

Ineligibility of directors [Section 69]	Disqualification of directors [Section 69]	Delinquency of directors [Section 162]
<p>A person is ineligible to be a director if the person is:</p> <ul style="list-style-type: none"> • A juristic person; • An unemancipated minor or under similar legal disability. (In terms of the Children’s Act No. 38 of 2005, a person is a minor until he or she attains the age of 18 years or marries before doing so.); or • Does not satisfy any qualification set out in the company’s MOI. 	<p>A person is disqualified to be a director if:</p> <ul style="list-style-type: none"> • A court has prohibited that person from being a director; • A court declared the person to be delinquent in terms of Section 162 of the Act, or in terms of Section 47 of the Close Corporations Act, 1984; • The person is an unrehabilitated insolvent; • The person is prohibited in terms of any public regulation to be a director of the company; • The person has been removed from an office of trust on the grounds of misconduct involving dishonesty (This disqualification ends five years after removal or completion of sentence or at the end of one or more extensions imposed by the Court on application by the CIPC. This disqualification does not apply in a private company where all the shares are held by the disqualified person or related persons); • The person has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than R1 000, for theft, fraud, forgery, perjury, or an offence involving fraud, misrepresentation or dishonesty; in connection with the promotion, formation or management of a company, or in connection with any act contemplated in Subsection (2) or (5); or • Under the Act, the Close Corporations Act, 1984, the Financial Intelligence Centre Act, 2001, the Securities Services Act, 2004, the Insolvency Act, 1936, the Competition Act, 1998 or Chapter 2 of the Prevention and Combating of Corruption Activities Act, 2004. The disqualification under Section 69(8)(b)(iv) does not apply to a private company where all the shares are held by the disqualified person or related persons. 	<p>A person may be declared delinquent on the following grounds. The director:</p> <ul style="list-style-type: none"> • Consented to serve as a director, or acted while disqualified in terms of Section 69; • While under a court order of probation acted as a director in a manner that contravened that order; • While a director grossly abused the position of director; • Took personal advantage of information or an opportunity, contrary to Section 76(2)(a); • Intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary contrary to Section 76(2)(a); • Acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust; as contemplated in Section 77(3)(a), (b) or (c); • Has repeatedly been personally subject to a compliance notice or similar enforcement mechanism for substantially similar contraventions of any legislation; • Has at least twice been personally convicted of an offence or subjected to an administrative fine or similar penalty in terms of any legislation; or • Within a period of five years, was a director of one or more companies or a managing member of one or more close corporations, or controlled or participated in the control of a juristic person, irrespective of whether concurrently, sequentially or at unrelated times, that were convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation, and: <ul style="list-style-type: none"> • the person was a director of each such company at the time of the contravention that resulted in the conviction, administrative fine or other penalty and • the court is satisfied that the declaration of delinquency is justified, having regard to the nature of the contraventions, and the person’s conduct as prescribed.

Vacancies on the board

[Sections 60(3), 66(4)(a)(i), 68(1), 69, 70, 71(3), 162]

In terms of Section 70, vacancies on the board may arise as a result of different circumstances. These include:

- Where the MOI provides fixed terms of office and such a term expires, referred to in Section 68(1). (The Act does not prescribe the tenure of directors);
- Where the director resigns or dies;
- Where an *ex officio* director ceases to hold the office, title, designation or similar status that entitled the person to be an *ex officio* director;
- Where the director becomes incapacitated to the extent that the person is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time, subject to Section 71(3);
- Where the director is declared delinquent by a court, or placed on probation under conditions that are inconsistent with continuing to be a director of the company, in terms of Section 162;
- Where the director becomes ineligible or disqualified in terms of Section 69, subject to Section 71(3); or
- Where the director is removed by a resolution of shareholders or the board or by a court order in terms of Section 71.

If a director has been removed by the board, a vacancy on the board does not arise until 20 days have expired from the date of approval of the resolution to remove. This gives the director an opportunity to file an application for review. If the director files for review under these circumstances, the vacancy may only arise once a court hands down its decision on the review, but the director is suspended from office during this time.

Removal of directors

[Sections 66(4)(a) and 71]

Removal of directors in terms of Section 71 by shareholders or the board applies to directors elected by shareholders in terms of Section 66. In terms of Section 66 (4)(a) *ex officio* directors are removed as determined by the MOI.

Removal by shareholders

Section 71(2) determines among other things that a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director. Before the shareholders of a company may consider such a resolution, the director must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and the director must be afforded a reasonable opportunity to make

If a vacancy arises on the board, other than as a result of an *ex officio* director ceasing to hold that office, it must be filled by a new appointment, by any person who is as such named in the MOI.

If the appointment is not determined by the MOI as set out in Section 66(4)(a)(1), the vacancy must be filled by a new election conducted at the next annual general meeting of the company, if the company is required to hold such a meeting.

If the company is not required to hold an annual general meeting, that vacancy must be filled within six months after the vacancy arose at a shareholders meeting called for the purpose of electing the director; or by a poll of the persons entitled to exercise voting rights in an election of the director, as contemplated in Section 60(3). If, as a result of a vacancy there are no remaining directors of a company, any holder of voting rights entitled to be exercised in the election of a director, may convene a meeting for the purpose of such an election.

Unless the MOI of a profit company provides otherwise, the board may appoint a person who satisfies the requirements for election as a director to fill any vacancy and serve as a director of the company on a temporary basis until the vacancy has been filled by election. During this period, any person so appointed has all of the powers, functions and duties, and is subject to all of the liabilities, of any other director of the company. These appointments are temporary and are often referred to as temporary vacancies.

a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.

Removal by Companies Tribunal

Removal by the board takes place in terms of Section 71(3). This section does not apply if a company has fewer than three directors, in which case any director or shareholder of the company may apply to the Companies Tribunal to make a determination.

Removal by the board

Section 71(3) determines that if a company has more than two directors, the board may by resolution, remove a director if it is determined that the director is ineligible or disqualified, incapacitated, negligent or derelict.

Before the board of a company may consider such a resolution, the director concerned must be given notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, to reasonably permit the director to prepare and present a response.

The director must be afforded a reasonable opportunity to make a presentation to the meeting, in person or through a representative, before the resolution is put to a vote. If the board determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, the director may apply within 20 business days to a court for a review of the determination of the board.

Removal by the court

Section 71(5) determines that if the board makes a decision that the director is not ineligible or disqualified, incapacitated, or has been negligent or derelict, any director who voted otherwise or a shareholder who can vote on the election of that director, can apply to court to confirm the determination of the board or to remove the director from office, at the risk of picking up the liability for costs of the application if the court does not confirm the board's decision.

The court can either confirm the board's decision or remove the director. Section 71 is in addition to the right of a person, in terms of Section 162, to apply to a court for an order declaring a director delinquent, or placing a director on probation.

Directors' duties

The common law

The common law is a combination of common principles and judicial precedents. Common law requirements are often absorbed into legislation and then referred to as 'codified' or 'statutory' requirements. The 'codification' of the fiduciary duties of directors from our common law is an example of this. The common law duties of directors are supplementary to the duties that are specifically codified in the Companies Act, 2008. The table below sets out the duties that were codified in the Act.

The meaning of fiduciary relationship

What is of utmost fundamental importance, amongst others, is the fiduciary duty which they individually owe to the company of which they are the directors.... such fiduciary duty entails, on the part of every director... to 'act in good faith' and 'in the best interests of the company'.

– Justice J Ndlovu in the Mouritzen case

A person stands in a fiduciary relationship when he or she controls the assets of another, or holds the power or authority to act on behalf of another. A director of a company stands in a fiduciary relationship to the company and must consequently act in good faith towards the company, avoid conflict between his own interests and those of the company and exercise his powers for the benefit of the company. A director commits a breach of trust if he acts for his own benefit.

The link between directors' common law duties and statutory duties of the Companies Act, 2008

Common law duties*	Comparable sections in the Companies Act, 2008*	Comment
<p>* The inability to link a common law duty to a specific section in the Act does not indicate that the common law duty should not be complied with. It is submitted that such a duty still applies unless expressly excluded in the Act or in conflict with the Act. Section 77 also states that a director may still be held liable in terms of common law principles.</p>		
<p>The duty to act bona fide in the best interests of the company and for proper purpose.</p>	<p>[Section 76(3)(a) and (b)]</p> <p><i>[A] director of a company, when acting in that capacity, must exercise the powers and perform the functions of director</i></p> <ul style="list-style-type: none"> - in good faith and for a proper purpose; - in the best interests of the company; 	<p>Comparable section in the Act as indicated.</p>
<p>The duty to act with care and skill.</p>	<p>[Section 76(3)(c)(i) and (ii) with differences as indicated]</p> <p><i>A director of a company, when acting in that capacity, must exercise the powers and perform the functions of director</i></p> <p><i>with the degree of care, skill and diligence that may reasonably be expected of a person</i></p> <p><i>(i) carrying out the same functions in relation to the company as those carried out by that director; and</i></p> <p><i>(ii) having the general knowledge, skill and experience of that director.</i></p>	<p>A partially comparable section was found as indicated.</p> <p>There are differences in the test for the measurement of care and skill between the common law and Section 76(3).</p> <p>The Act introduced a combined objective-cum-subjective test with higher standards for those directors who are more experienced.</p> <p>Under the common law the test for reasonability is of a subjective nature.</p>
<p>The duty to prevent a conflict of interest.</p>	<p>[Section 76(2) with the exclusions mentioned below]</p> <p><i>A director of a company must</i></p> <p><i>(a) not use the position of director, or any information obtained while acting in the capacity of a director</i></p> <p><i>(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or</i></p> <p><i>(ii) to knowingly cause harm to the company or a subsidiary of the company.</i></p> <p><i>(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention...</i></p>	<p>A partially comparable section was found as indicated. One could argue that this common law duty is generally mirrored in Section 76.</p> <p>However, the more specific common law duties of disclosure of personal interests, accounting for secret profits, not to misappropriate corporate opportunities and not to improperly compete with the company emanate from this duty.</p> <p>With the exception of the disclosure of personal interests in contracts with the company, these duties cannot be linked completely to specific sections in the 2008 Act as indicated below.</p>

Common law duties*	Comparable sections in the Companies Act, 2008*	Comment
The duty to disclose personal interests in contracts with the company	<p>[Section 75]</p> <p><i>(5) If a director of a company, other than a company contemplated in subsection (2)(b) or (3), has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director</i></p> <p><i>(a) must disclose the interest and its general nature before the matter is considered at the meeting;</i></p> <p><i>(b) must disclose to the meeting any material information relating to the matter, and known to the director;</i></p> <p><i>(c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;</i></p> <p><i>(d) if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in paragraph (b) or (c);</i></p> <p><i>(e) must not take part in the consideration of the matter, except to the extent contemplated in paragraphs (b) and (c)...</i></p> <p><i>(6) If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter, after the agreement or other matter has been approved by the company, the director must promptly disclose to the board....</i></p>	Comparable section in the Act as indicated.
The duty to account for secret profits	No specific comparable section	A wide interpretation of Section 76(2) and Section 76(3) potentially supports the inclusion of this common law duty.
The duty not to misappropriate corporate opportunities	No specific comparable section	A wide interpretation of Section 76(2) and Section 76(3) potentially supports the inclusion of this common law duty.
The duty not to improperly compete with the company	No specific comparable section	A wide interpretation of Section 76(2) and Section 76(3) potentially supports the inclusion of this common law duty.

Common law duties*	Comparable sections in the Companies Act, 2008*	Comment
The duty not to exceed the limitations of powers	No specific comparable section	<p>A wide interpretation of Section 20(5) and (6) supports the inclusion of this common law duty. This determines that:</p> <p><i>(5) One or more shareholders, directors or prescribed officers of a company may apply to the High Court for an appropriate order to restrain the company or the directors from doing anything inconsistent with any limitation, restriction or qualification contemplated in subsection (2), but any such proceedings are without prejudice to any rights to damages of a third party who</i></p> <p><i>(a) obtained those rights in good faith; and</i></p> <p><i>(b) did not have actual knowledge of the limit, restriction or qualification.</i></p> <p><i>(6) Each shareholder of a company has a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with</i></p> <p><i>(a) this Act; or</i></p> <p><i>(b) a limitation, restriction or qualification contemplated in this section, unless that action has been ratified by the shareholders in terms of subsection (2).</i></p>
The duty to maintain unfettered discretion	No specific comparable section	<p>A wide interpretation of Section 76(4)(a) (i) and (ii) supports the inclusion of this common law duty.</p> <p>This section determines that a director will have satisfied the obligations of acting in the best interests of the company and with the required care and skill if:</p> <p><i>(i) the director has taken reasonably diligent steps to become informed about the matter;</i></p> <p><i>(ii) either</i></p> <p><i>(aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or</i></p> <p><i>(bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa);</i></p>

Directors' duty to disclose personal financial interests

[Section 75]

Section 75 aligns with the common law duty to disclose any personal financial interests and deals with a director's duty not to have a personal financial interest in future or existing contracts with the company. The requirements extend to alternate directors, prescribed officers and persons who are members of a committee of the board of a company, irrespective of whether they are also members of the company's board; and related persons, as prescribed.

The section does not apply to a director of a company in respect of a decision that may generally affect all of the directors of the company in their capacity as directors or a class of persons, despite the fact that the director is one member of that class, unless the only members of the class are the director or persons related or inter-related to the director. The section is also not applicable to a company where the only director holds all of the beneficial interests of all of the issued securities of the company.

If a person is the only director of a company, but does not hold all of the beneficial interests of all of the issued securities of the company, the director may not approve or enter into any agreement or determine any other matter in which he or a related person has a personal financial interest, unless the agreement or determination is approved by an ordinary resolution of the shareholders after the director has disclosed the nature and extent of that interest to the shareholders.

A director may disclose any personal financial interest at any time in advance by delivering a notice in writing, setting out the nature and extent of that interest to the board, or shareholders where applicable.

If a director of a company with more than one director has a personal financial interest in a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director:

- Must disclose the interest and its general nature before the matter is considered at the meeting;
- Must disclose to the meeting any material information relating to the matter, and known to the director;

- May disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;
- If present at the meeting, must leave the meeting immediately after making any disclosure contemplated; and
- Must not take part in the consideration of the matter, except to the extent described.

While absent from the meeting under the above circumstances, the director must be regarded as being present for the purpose of determining whether sufficient directors are present to constitute the meeting and must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board.

If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter, after the agreement or other matter has been approved by the company, the director must promptly disclose to the board, or to the shareholders where applicable, the nature and extent of that interest and the material circumstances relating to the director or related person's acquisition of that interest.

A decision by the board, or a transaction or agreement approved by the board, is valid despite any personal financial interest of a director or person related to the director, only if it was approved following disclosure of that interest in the manner described or despite having been approved without disclosure of that interest, it

- Has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest; or
- Has been declared to be valid by a court.

A court, on application by any interested person, may declare an agreement or transaction that has been approved by the board, or shareholders, valid, despite the failure of the director to satisfy the disclosure requirements of this section.

Directors' liability

Section 77 is the primary section of the Act, that deals with the liability of directors. For purposes of this section, a director includes a prescribed officer and a member of a committee of the board. The section incorporates reference to other sections that relate to the duties of directors, such as Sections 75 and 76.

It should be noted that the liability of directors in Section 77 cannot be divorced from director's liability that may arise in terms of other legislation or the common law. Liability for breach of fiduciary duties by the director, or any provision of the Act not otherwise mentioned in Section 77, or any provision of the company's MOI, will be incurred in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence thereof.

Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company, as a direct or indirect consequence of a director contravening the specific requirements laid down in Section 77. Liability may further be incurred towards other persons and shareholders as set out in Sections 20, 214, 218 and 165.

I have indicated that section 165 of the Act introduces a new regime which has overhauled completely the common law system governing the aspect of litigation by any person on behalf, and in the name, of a company. At the time of this judgment I am not aware of any existing domestic case law authority on the issue. As pointed out earlier, the purposes of the Act include promotion of compliance with the Bill of Rights and the development of the country's economy by encouraging transparency and high standards of corporate governance.

– Comment by Justice Ndlovu in the Mouritzen case

In the recent case of *Mouritzen v Greystone Enterprises (Pty) Ltd & Another* (10442/2011) [2012] ZAKZDHC 34; 2012 (5) SA 74 (KZD,) the KwaZulu-Natal High Court handed down its decision on an application to institute action based on Section 165, dealing with derivative actions.

A derivative action may be instituted on behalf of a company by a third party against a party that has caused harm to the company. Where directors, for example, have

caused harm to a company and minorities are indirectly prejudiced as a result of the company's loss not being recovered from the directors, Section 165(5) allows for a person to apply to court to institute an action in the name of the company.

In this case personal credit cards linked to the company's bank account were issued in the names of each of the directors. The applicant alleged that his co-director grossly abused his credit card to the prejudice of the company and its shareholders.

The court granted the order and was satisfied that the applicant was acting in good faith and had the best interests of the company at heart.

The summarised director's liability exposure indicated in Appendix A is therefore not exhaustive, but may serve as a good indication of what directors should take cognisance of when performing their duties.

Civil versus criminal liability

A clear distinction can be made between civil liability (delictual or contractual) arising from the common law, statutory liability specifically incorporated and referred to in the Act and criminal liability in terms of the Act and common law.

Not all contraventions of the Act by directors are criminalised or converted into offences and as a consequence linked to the imposition of criminal fines and or imprisonment. The majority of contraventions of the Act seem to be linked to civil action for compensation in the form of payment to the plaintiff such as costs and expenses and loss as a result of damages.

Section 218 also provides an 'overarching' liability clause that seems to offer a general remedy to any person, which could include the company, a shareholder or creditor, to institute action against any person, including a director or prescribed officer, who contravenes any provision of the Act, for any loss or damage suffered as a result of the contravention. The section also imposes both civil and criminal liability.

Section 216 is the general clause that prescribes the penalties in terms of the offences referred to in the Act. The procedure for prosecuting a company is regulated by Section 322 of the Criminal Procedure Act, No. 51 of 1977.

This section determines, among other things, under the heading 'Prosecution of corporations and members of associations' that the director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, be dealt with as if he were the person accused of having committed the offence in question.

The term 'director' is defined in this section but for purposes of prosecution of offences committed in terms of the Companies Act, the director as defined in Section 1 of the Companies Act, 2008 applies. (*S v Vandenberg* 1979 (1) SA 208 (D) at 214-215).

Certain sections state that a person is guilty of an offence if he 'knowingly' is 'a party' to or 'permits' the particular offence. In these instances, the element of knowledge or permission must exist for the offence to have been committed and this must be proved by the prosecution.

The words are defined in Section 1 of the Act as having actual knowledge of the matter; or having been in a position in which the person reasonably ought to have had actual knowledge. The section further brings into the ambit of knowledge the fact that the person investigated the matter

to an extent that would have provided the person with actual knowledge; or take other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter. This definition is also relevant for determining negligence in the context of civil liability.

Refer to the liability exposure table in Appendix A of this publication. The table seeks to summarise the different sections in the Companies Act, 2008 and remaining sections of the 1973 Act dealing with directors' liability. Some of the sections are not always exclusively applicable to directors, but nevertheless hold potential liability for directors. As mentioned above, for purposes of director's liability in general, this list is not exhaustive.

Companies Act, 1973

Despite the repeal of the 1973 Act, the transitional provisions in Schedule 5 of the 2008 Act, determines that certain sections in the 1973 Act continue to apply. Item 9 of Schedule 5 provides that Chapter 14 of the 1973 Act continues to apply with respect to the winding-up and liquidation of companies.

Sections 423 and 424 in Chapter 14 will remain available to be used by creditors against directors where companies have been wound up or liquidated, and has caused losses to creditors. Item 11(1) of Schedule 5 determines further that Section 424 is still available to a debtor in respect of claims that arose prior to 1 May 2011 and where companies have not yet been wound up.

Available defences or relief for directors

Ratification of actions by special resolution

[Section 20(2)]

Where the MOI limits, restricts or qualifies the powers, purpose or activities of the company, Section 20(2) allows the shareholders to ratify any action by the company by way of a special resolution, except if it is in contravention of the Act.

It should be noted that certain actions are expressly not ratifiable in terms of the Act. These include the provision of financial assistance in contravention of Section 45.

Application to court where director removed

[Section 71]

Refer to the section or review procedures in terms of Section 71 discussed in this publication. In terms of common law principles, a director may also retain the right to claim damages or compensation for loss of office due to the removal.

Business judgement rule

[Section 76(4) and (5)]

Section 76(4) incorporates the so-called business judgement rule into the Act. The section determines that a director will have satisfied the obligations of acting in the best interests of the company and with the required care and skill if the director:

- Has taken reasonably diligent steps to become informed about a matter;
- Had no material personal financial interest as defined, or the director complied with the requirements of Section 75 with respect to any interest contemplated; and
- Made a decision, or supported the decision of a committee, or the board, and had a rational basis for believing and did believe that the decision was in the best interests of the company.

Section 76(5) further determines that a director is entitled to rely on the advice or information provided by employees, professional advisors, legal counsel, accountants and board committee members provided that the persons are reliable and qualified in respect of the particular matter.

Court relief for honesty

[Sections 77(9) and (10)]

If, in any proceedings against a director, other than for wilful misconduct or wilful breach of trust, it appears to the court that the director is or may be liable, but has acted honestly and reasonably and having regard to all the circumstances of the case, the court may relieve the director, either wholly or partly, from the liability on any terms, as the court considers just.

The definition of knowledge excludes reasonableness in many instances. Wilful misconduct or wilful breach of trust means that the director did not act 'honestly'. A director who has reason to believe that a claim will be made alleging that the director is liable, other than for gross negligence, wilful misconduct or breach of trust, may apply to the court for relief, and the court may grant relief to the director on the same grounds as if the matter had come before the court in terms of the principles above.

Insurance and indemnification

[Section 78]

Section 78 determines that any provision of an agreement, the MOI, rules of a company, or a resolution:

- Is void if it directly or indirectly purports to relieve a director of a duty under Section 75 and 76; or
- Liability in terms of Section 77; or
- Limits, negates or restricts any legal consequences arising from an act or omission that constitutes wilful misconduct or wilful breach of trust.

A company may not directly or indirectly pay any fine that may be imposed on a director of the company, or on a director of a related company, as a consequence of that

director having been convicted of an offence, unless the conviction was based on strict liability.

This requirement does not apply to a private or personal liability company if a single individual is the sole shareholder and sole director of that company; or two or more related individuals are the only shareholders.

Except to the extent that the MOI provides otherwise, a company may indemnify a director in respect of any liability, except if the director:

- Acted or purported to act in the name of the company or on behalf of the company despite knowing that he lacked the authority to do so;
- Acquiesced in the carrying on of the company's business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose or acquiesced to trading under insolvent circumstances (Section 22);
- Has been a party to an act or omission by the company, despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose; or
- Committed wilful misconduct or wilful breach of trust.
- A company may advance expenses to a director to defend litigation in any proceedings arising out of the director's service to the company and may directly or indirectly indemnify a director for:
 - *The litigation expenses, irrespective of whether it has advanced those expenses; or*
 - *Any liability arising out of the director's service to the company in respect of any action that the company may indemnify the director. The company may also purchase insurance to protect the director against this liability and expenses.*

Application of the solvency and liquidity test

[Section 4]

Insolvency law determines that 'insolvency' exists simply where liabilities exceeds assets. A distinction is, however, sometimes made between technical/factual insolvency (used to refer to a situation where liabilities exceed assets) and commercial insolvency (referring to an inability to pay debts as they become due).

The solvency and liquidity test is based on the premise that as long as the test is satisfied, creditors will not be prejudiced. The test for purposes of Section 4 of the Act requires factual and commercial solvency. The directors of a company are responsible and accountable for performing the solvency and liquidity test as required.

Section 4 in summary determines that a company satisfies the solvency and liquidity test at a particular

time if, considering all reasonably foreseeable financial circumstances of the company at that time:

- The assets of the company, as fairly valued, equal or exceed the liabilities of the company, as fairly valued; and
- It appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the date on which the test is considered; or
- In the case of a distribution contemplated in paragraph (a) of the definition of 'distribution' in Section 1, 12 months following that distribution.

Depending on the section that triggers the test; other elements may also be required for purposes of the test.

Section 4 should thus be read in conjunction with the section that requires the test to be performed. The solvency and liquidity test must be applied in the following circumstances:

- When a company intends to provide financial assistance for subscription of its securities in terms of Section 44;
- If a company grants loans or other financial assistance to directors as contemplated in Section 45;
- Before a company makes any distribution as provided for in Section 46;
- If a company intends to issue capitalisation shares with a cash payment offer in lieu of awarding capitalisation shares in terms of Section 47;
- If a company intends to acquire its own shares as provided for in Section 48; and
- Amalgamations or mergers in Section 113.

Reckless trading, solvency and liquidity

[Section 22; Section 424 of 1973 Act]

Directors should be aware of their liability exposure under the relevant reckless trading provisions. Section 22 of the 2008 Act and Section 424 of the 1973 Act are relevant in the context of reckless trading. The sections should also be read against the liability implications of Section 77(3)(b). Refer to the liability exposure table in this publication.

As mentioned, Item 9(1) of Schedule 5 of the 2008 Act, has the effect that Section 424 of the 1973 Act, dealing with the liability of directors and others for fraudulent conduct of business, will continue to apply in the event of the winding-up and liquidation of companies. It appears that the sections are similar for all intent and purpose, subject to the difference emphasised later in this discussion.

Section 22(1) of the 2008 Act prohibits a company from carrying on its business 'recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose', while Section 77(3)(b) holds directors liable for loss or damages sustained by the company as a direct or indirect consequence of the director having 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).

It is an offence in terms of Section 214 of the Act to trade recklessly. A person who is knowingly a party to an act or omission by a company calculated to defraud a creditor or employee of the company, or a holder of the company's securities, or with another fraudulent purpose is guilty

of an offence. Section 216(a) sets the penalty as a fine or imprisonment for a period not exceeding 10 years, or both. Also refer to the civil liability exposure table in this publication with reference to Section 218.

In terms of Section 22(2), the Commission may furthermore issue a notice to a company providing the company with a 20 business day period to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be, if the Commission has reasonable grounds to believe that a company is unable to pay its debts as they become due and payable in the normal course of business.

If the company fails to satisfy the Commission that it is not engaged in prohibited conduct, as regulated by Section 22, the commission may issue a notice to require the company to cease carrying on with its business or trading.

One of the differences between Section 22 of the new Act and Section 424 of the old Act is that the Commission has the power to require the company to cease carrying on its business or trading, while Section 424 exposes directors to personal liability.

However, as already indicated, Section 77(3)(b) also determines that a director is liable to the company for any loss, damage or costs arising as a direct or indirect consequence of him or her trading as prohibited in Section 22.

Business rescue provisions and the meaning of ‘financially distressed’

[Sections 128 and 129]

Section 129 requires the board of a company to consider commencing voluntary business rescue proceedings when the company is ‘financially distressed’. If directors decide not to start business rescue proceedings, they are required in terms of Section 129(7) to notify each affected person in writing, giving their reasons.

There are divergent interpretations on the phrase ‘will become insolvent’ in Section 128(1)(f)(ii). The phrase can be interpreted in the context of ‘financially distressed’ at the beginning of Section 128(1)(f). This interpretation leads to the conclusion that if the company is able to continue business on a basis that does not amount to reckless, fraudulent or grossly negligent trading in terms of Section 22 of the Act, the company is neither distressed nor is it insolvent within the meaning of Section 128.

Accordingly, and whether or not the company’s liabilities exceed its assets, both fairly valued, if it is able to continue to do business in the normal course, then it is not financially distressed within the meaning of Section 128.

Other interpretations seek to equate solvency and insolvency for the purposes of the definition of ‘financially distressed’ with the definition of solvency in Section 4. Directors should, however, always seek independent professional advice in this regard.

Financial assistance to directors

[Section 45]

Section 45 deals with financial assistance to directors and prescribed officers and also covers financial assistance to related and interrelated companies. Financial assistance is widely defined and includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation, but excludes any of these if the primary business of the company is the lending of money, and the loan is made in the ordinary course of that business. Whether the financial assistance is the ‘primary’ business of the company is a factual question.

A board may only authorise financial assistance if:

- Financial assistance is not prohibited by the MOI;
- Financial assistance is pursuant to an employee share scheme or in terms of a special resolution adopted within the last two years;

- The board is satisfied that immediately after providing the financial assistance, the solvency and liquidity test will be satisfied;
- The terms are fair and reasonable to the company.

A notice of any resolution passed by the board relating to such financial assistance must be given to the shareholders and to any trade union representing employees as prescribed.

A resolution by the board to provide financial assistance, or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with Section 45 of the Act; or a prohibition, condition or requirement of the company’s MOI.

Directors' remuneration

[Sections 5, 7, 30, 65(11), 66(8) and (9)]

The concept of directors and prescribed officers' remuneration disclosure must be read in the context of Section 5, which determines that the Act must be interpreted and applied in a manner that gives effect to the purposes set out in Section 7. This section states, among other things, that one of the purposes of the Act is to promote the development of the South African economy by encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation.

Section 66(8) and (9) require directors' remuneration 'for their service as directors' to be authorised by a special resolution approved by shareholders within the previous two years. Section 65(11)(h) states that a special resolution is required to authorise the basis for compensation to directors of a profit company, as required by Section 66(9).

Section 30(4) of the Act requires the annual financial statements of every company that is required in terms of the Act to have its annual financial statements audited, to disclose remuneration received by:

- Each director of the company; and
- Each individual holding any prescribed office in the company.

The term 'remuneration' for the purposes of Section 30(4) and (5) is defined in Section 30(6) as:

- Fees paid to directors for services rendered by them to, or on behalf of the company, including any amount paid to a person in respect of the person's accepting the office of director;
- Salary, bonuses and performance-related payments;
- Expense allowances, to the extent that the director is not required to account for the allowance;

- Contributions paid under any pension scheme not otherwise required to be disclosed in terms of Subsection (4)(b);
- The value of any option or right given directly or indirectly to a director, past director or future director, or person related to any of them, as contemplated in Section 42;
- Financial assistance to a director, past director or future director, or person related to any of them, for the subscription of options or securities, or the purchase of securities, as contemplated in Section 44; and
- With respect to any loan or other financial assistance by the company to a director, past director or future director, or a person related to any of them, or any loan made by a third party to any such person, as contemplated in Section 45, if the company is a guarantor of that loan, the value of:
 - any interest deferred, waived or forgiven; or
 - the difference in value between the interest that would reasonably be charged in comparable circumstances at fair market rates in an arm's length transaction; and the interest actually charged to the borrower, if less.

In terms of Section 30(5), the remuneration disclosure must show the amount of any remuneration or benefits paid to or receivable by persons in respect of services rendered as directors or prescribed officers of the company; or while being directors or prescribed officers of the company:

- As directors or prescribed officers of any other company within the same group of companies; or
- Otherwise in connection with the carrying on of the affairs of the company or any other company within the same group of companies.

Authorisation of directors' remuneration

[Sections 65(11)(h); 66(8) and (9)]

Section 66(8) and (9) require directors' remuneration for their service as directors to be authorised by a special resolution approved by shareholders within the previous two years. Section 65(11)(h) states that a special resolution is required to authorise the basis for compensation to directors of a profit company, as required by Section 66(9).

Prescribed officers

Despite the fact that the indices to the Companies Act, 2008 and its regulations only refer to the term ‘prescribed officer’ four times, there are at the very least 33 sections (including regulations) that govern the prescribed officer.

Scoped into this list are the sections concerning the winding-up of companies contained in Chapter XIV of the Companies Act of 1973. Despite the repeal of the this Act, until a date to be determined, the majority of Chapter XIV of the old Act continues to apply with respect to the winding-up and liquidation of companies, as if the relevant sections had not been repealed.

The relevance of this to a prescribed officer is the fact that there are certain references in Chapter XIV to the term ‘officer’. By definition, the term ‘officer’ is not completely comparable to that of the ‘prescribed officer’ contained in the new Act.

An officer includes the managing director, manager or secretary in terms of Section 1 of the 1973 Act. However, depending on the factual circumstances of the ‘officer’, they may be one and the same person as a ‘prescribed officer’. Furthermore, the transitional arrangements are extended to prescribed officers as contemplated in Schedule 5(7) of the Act.

A person who is an officer in terms of the 1973 Act will continue to hold that office, subject to the company’s MOI and the Act. However, if the person is disqualified or ineligible in terms of the 2008 Act, then he or she is regarded as having resigned from office as a prescribed officer.

Determination of prescribed officers of a company

It is imperative for companies to identify who its prescribed officers are, as some of the provisions contained in this publication, and the table that follows, which apply to directors, also apply to prescribed officers.

This impacts on the compliance risk profile of companies, as failure to identify prescribed officers may increase the risk of non-compliance with the Companies Act. Similarly, it is important for prescribed officers to know who they are, as they should recognise their increased civil and criminal liability in terms of the Act. They may also make use of the indemnity and insurance relief available in terms of Section 77.

A prescribed officer is defined in Section 1 as a person who performs any function that has been designated by the minister in terms of Section 66(10). Within a company, Section 66(10) grants the necessary authority to the minister to make regulations designating any specific function or functions within a company to constitute a prescribed office for the purposes of the Act.

In terms of this authority, Regulation 38 was promulgated and states that despite not being a director of a particular company, a person is a ‘prescribed officer’ of the company for all purposes of the Act if that person:

- Exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or
- Regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.

This regulation applies to a person irrespective of any particular title given by the company to an office held by the person in the company; or a function performed by the person for the company.

These definitions are not helpful in determining who the prescribed officers are, but certainly create the parameters in which the prescribed officers operate. Attempting to list all possible designations as per earlier drafts of the Act, is too restrictive and may lead to the creation of superficial titles in an organisation.

Factual circumstances will ultimately determine who the prescribed officers are, regardless of whether prescribed officers are officially identified or not. A person does not have to be employed by a particular company to fall within the definition of a prescribed officer.

Prescribed officers’ liability under the Companies Act

The Act contains several sections (including regulations) placing prescribed officers on an equal regulatory footing with directors. Section 76 dealing with the standards of directors’ conduct and Section 77 concerning the liability of directors and prescribed officers, specifically includes prescribed officers.

Prescribed officers face increased criminal and civil liability in terms of the Act. However, they may apply to a court for relief from liability in terms of the business judgement rule introduced by Section 77(9) and (10). They may also make use of the indemnity and insurance relief available in terms of Section 78.

Differences in the liability of directors and prescribed officers

Prescribed officers do not have the primary statutory authority of directors in terms of the Act or the MOI to govern a company.

Certain corporate actions are not the direct responsibility of prescribed officers and can only be performed by directors. These include:

- Performing solvency and liquidity tests;
- Issuing and acquiring shares of the company;
- Authorising distributions (e.g. dividends) to shareholders;
- Approving any financial assistance to directors and related companies;
- Approving the annual financial statements;
- Initiating voluntary business rescue proceedings or a compromise with creditors;
- Resolving to wind-up or deregister the company; and
- Approving fundamental transactions.

Even though prescribed officers are not required to perform the duties of directors, they have to react when they become aware that directors are in breach of the Act by any action or omission. They have to formally note their disapproval at the appropriate governance levels and consider their legal position if the directors persist with the contravention.

Practical issues for consideration

From a governance perspective it is submitted that it is the directors of the company's responsibility to identify the prescribed officers, subject to the approval of the board and audit committee. Directors should be led by the following practical considerations in their determination in addition to the Act and regulations:

- It is prudent for directors to obtain legal advice on the topic;
- In a group situation, the organisational structure or organogram of the company may be indicative of whom the various heads of divisions are and to whom they report;
- Determination of the significance of the division in relation to the group is not necessarily restricted to the majority or 51% of a company's business. It is submitted that 'significant' may be given a wider grammatical meaning, such as 'substantial' or 'important'.
- Evidence of who the prescribed officers are may reflect in the board's policies on delegation of authority to management.

- Board and other committee minutes reflecting conduct and participation in meetings may be indicative of regular participation in the exercise of general executive control over, and management of the whole, or a significant portion of the business and activities of the company.

Exclusion of juristic persons as prescribed officers

Regulation 38 to the Act refers to the term 'person' when it defines the circumstances in which a person will be regarded as a prescribed officer. By definition the term 'person' includes juristic persons as reflected in Section 1 of the Act. The question arises whether a juristic person can be regarded as a prescribed officer.

Following a purposive and contextual interpretation, it is our submission that a juristic person cannot be a prescribed officer as a result of the operation of Section 69. Section 69 prominently scopes the prescribed officer into the eligibility and qualification requirements of directors. In terms of Section 69(7)(a), a juristic person is ineligible to be a director of a company. Section 69(1) states that for the purpose of Section 69, 'director' includes a prescribed officer, among others.

Possible positions scoped into the definition of a prescribed officer

Subject to the definitions contained in the Act and regulations, consideration should be given to the following positions that may as a general rule inevitably fall within the ambit of the prescribed officer description:

- The chief executive officer;
- A senior divisional financial manager in a group structure;
- A senior financial manager in a company that does not have a financial director;
- A general/divisional/regional manager;
- Regular attendees with decision-making power on the executive committee or management committee
- The shadow director [a person who is not appointed as a director, but influences the major decisions of a company].

International Financial Reporting Standards considerations **Disclosure of remuneration**

- **IAS 24 Related Party Disclosures**

Key management personnel as defined in IAS24, are those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity. A prescribed officer as defined in the Act is not necessarily also a member of key management personnel as defined in IAS 24. The requirements of IAS 24 and the Companies Act, 2008, must be measured against the factual circumstances of each case.

- **IFRS 8 Operating Segments**

IFRS 8 requires an entity to identify a chief operating decision maker (CODM) of an operating segment. The CODM identifies a function, not necessarily a manager with a specific title. That function is to allocate resources to, and assess the performance of, the operating segments of an entity. Often, the chief operating decision maker of an entity is its chief executive officer or chief operating officer, but for example, may be a group of executive directors or others. Companies should consider whether individuals identified as CODMs will also be prescribed officers as defined in Regulation 38.

The disclosure of prescribed officers' remuneration was not previously required under the old Companies Act, 1973 or the JSE Listings Requirements. The 2008 Companies Act, however, requires disclosure of directors' and prescribed officers' remuneration per individual, together with benefits received as prescribed.

For directors this is not a new requirement. Paragraph 8.63(k) of the JSE Listings Requirements requires JSE listed companies to disclose individual directors' remuneration.

Appendix A

Civil liability exposure of directors in terms of the Companies Act, 2008

<p>1. [Section 77(2),(6) and (8)] Breach of fiduciary duties.</p>	<p>For purposes of this section, a director includes a prescribed officer and member of a committee of the board.</p> <p>Refer to the discussion on prescribed officers in this publication.</p> <p>Section 77(2) determines that a director is liable in terms of the principles of the common law relating to a breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of</p> <ul style="list-style-type: none"> • Any breach by the director of a duty to disclose a personal financial interest (Section 75); • Failure to avoid a conflict of interest (Section 76(2)); • Failure to act in good faith and for a proper purpose or in the best interests of the company (Section 76(3)(a) and (b)); • Breach by the director of the duty to act with the required degree of care, skill and diligence (s 76(3)(c)); • Any provision of the Act not otherwise mentioned in this section; or • Any provision of the company's MOI. <p>This is in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence thereof.</p> <p>Liability in terms of Section 77 is joint and several, and also includes the repayment of any amount 'improperly paid' by the company and not recoverable in terms of the Act.</p> <p>'Improperly paid' potentially includes payment in contravention of Sections 44, 45, 46, 47 and 48 i.e. an omission to apply the solvency and liquidity test as prescribed.</p> <p>The solvency and liquidity test must be applied in the following circumstances:</p> <ul style="list-style-type: none"> • When a company intends to provide financial assistance for subscription of its securities in terms of Section 44; • If a company grants loans or other financial assistance to directors as contemplated in Section 45; • Before a company makes any distribution as provided for in Section 46; • If a company intends to issue capitalisation shares in terms of Section 47; • If a company intends to acquire its own shares as provided for in Section 48; or • Amalgamations or mergers in terms of Section 113.
<p>2. [Sections 75 and 77] Failure to disclose personal financial interest</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company for failure to disclose personal financial interests.</p> <p>Also refer to the discussion in 1 above.</p>
<p>3. [Sections 76 and 77] Failure to meet the prescribed standard of conduct</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company for failure to meet the prescribed standard of conduct or fiduciary duty.</p> <p>Also refer to the discussion in 1 above.</p>
<p>4. [Section 77(3)(a)] Acts outside the directors' authority</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company as a direct or indirect consequence of acts performed outside the directors' authority.</p>
<p>5. [Sections 77(3)(b) and 22(1)] Conducting business contrary to Section 22</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company as a direct or indirect consequence for having acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by Section 22.</p> <p>An example would be to allow the company to proceed with transactions contrary to the requirements pertaining to the solvency and liquidity test.</p> <p>Also refer to the discussion on reckless trading in this publication.</p>

<p>6. [Section 77(3)(c)] Defrauding creditors, employees or shareholders</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director being a party to an act or omission by the company, despite knowing that it was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose.</p>
<p>7. [Sections 77(3)(d), 95 and 101] Publication of false or misleading information</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having signed, or consented to the publication of a financial statement that was false or misleading in a material respect or of a prospectus, or a written statement contemplated in Section 101 that contained an 'untrue statement', as defined in Section 95, knowing that, or with reckless disregard as to whether, the statement was false, misleading or untrue.</p> <p>Also refer to the reference to Section 104 below and the possibility of limiting the director's liability.</p>
<p>8. [Sections 74, 77(3)(e)(i) and 36] Issuing unauthorised shares</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company as a direct or indirect consequence of a director being present at a meeting, or having participated in the making of a decision in terms of Section 74, and having failed to vote against issuing unauthorised shares or options on those shares, despite knowing that those shares had not been authorised under Section 36.</p> <p>The director can, however, apply to court for an order setting aside the transaction. The court may make an order as provided for in Sections 77(5)(b) and 77(5)(a).</p>
<p>9. [Sections 74, 77(3)(e)(ii) and 41] Issuing authorised securities</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director being present at a meeting, or having participated in the making of a decision in terms of Section 74, and having failed to vote against issuing any authorised securities without shareholder approval under Section 41.</p> <p>The director can, however, apply to court for an order setting aside the transaction. The court may make an order as provided for in Sections 77(5)(b) and 77(5)(a).</p>
<p>10. [Sections 77(3)(e)(iii), 36, 41 and 42] Issuing authorised securities</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director being present at a meeting, or having participated in the making of a decision in terms of Section 74, and having failed to vote against the granting of options to any person contemplated in Section 42(4), despite knowing that any shares for which the options could be exercised; or into which any securities could be converted, had not been authorised in terms of Section 36.</p> <p>The director can, however, apply to court for an order setting aside the transaction. The court may make an order as provided for in Sections 77(5)(b) and 77(5)(a).</p>
<p>11. [Sections 77(3)(e)(iv) and 44] Financial assistance to any person</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director being present at a meeting, or having participated in the making of a decision in terms of Section 74, and having failed to vote against the provision of financial assistance to any person or the acquisition of securities of the company, knowing that the financial assistance is in contravention of Section 44 or the company's MOI.</p> <p>The director can, however, apply to court for an order setting aside the transaction, and the court may make an order as provided for in Sections 77(5)(b) and 77(5)(a).</p>
<p>12. [Sections 77(2)(b), 77(3)(e)(v) and 45] Financial assistance to a director</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director being present at a meeting or having participated in the making of a decision in terms of Section 74, and having failed to vote against the provision of financial assistance to a director under Section 45, knowing that it was in contravention of the Act or the company's MOI. Liability under these circumstances could also fall within the ambit of Section 77(2)(b).</p> <p>The director can, however, apply to court for an order setting aside the transaction and the court may make an order as provided for in Sections 77(5)(b) and 77(5)(a).</p>
<p>13. [Sections 77(3)(e)(vi) and 46] Approval of a distribution</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director being present at a meeting, or having participated in the making of a decision in terms of Section 74, and having failed to vote against a resolution approving a distribution, despite knowing that the distribution was contrary to Section 46.</p> <p>The director can, however, apply to court for an order setting aside the transaction. The court may make an order as provided for in Sections 77(5)(b) and 77(5)(a).</p>

<p>14. [Sections 77(3)(e)(vii), 46 and 48]</p> <p>Acquisition by the company of its shares</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director being present at a meeting, or having participated in the making of a decision in terms of Section 74, and having failed to vote against the acquisition by the company of any of its shares, or the shares of its holding company, despite knowing that the acquisition was contrary to Sections 46 or 48.</p> <p>The director can, however, apply to court for an order setting aside the transaction. The court may make an order as provided for in Sections 77(5) (b) and 77(5)(a).</p>
<p>15. [Section 77(3)(e)(viii) and Chapter 4]</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director being present at a meeting, or having participated in the making of a decision in terms of Section 74, and having failed to vote against an allotment by the company, despite knowing that the allotment was contrary to any provision of Chapter 4.</p> <p>The director can, however, apply to court for an order setting aside the transaction. The Court may make an order as provided for in Sections 77(5)(b) and 77(5)(a).</p>
<p>16. [Sections 4, 46 and 77(4)]</p>	<p>Directors are jointly and severally liable to the company for any loss, damages or costs sustained by the company as a direct or indirect consequence of a resolution approving a distribution, despite knowing that the distribution was contrary to Section 46.</p> <p>In terms of Section 77(4), this liability is only incurred if the company was either insolvent or illiquid as determined in Section 4 and it was unreasonable at the time of the decision.</p>
<p>17. [Section 20(2) and (6)]</p>	<p>Each shareholder may claim damages from a person, including a director, who fraudulently, recklessly or due to gross negligence causes the company to do anything inconsistent with the Act or MOI.</p>
<p>18. [Section 20(9)]</p>	<p>Directors are liable to an interested person in the event of unconscionable abuse of the juristic personality of the company.</p> <p>This section codifies the general principle of ‘piercing the corporate veil’. The Act, however, does not define the term ‘unconscionable abuse’.</p>
<p>19. [Sections 214(4) and 99]</p>	<p>Both civil and criminal liability can be incurred in terms of these sections.</p> <p>Directors are liable to any other person for any losses sustained as a consequence of a contravention of an ‘offer of securities to the public’ provisions.</p> <p>A person who contravenes Section 99, and if the person is a company, every director or prescribed officer who was knowingly party to the contravention, is guilty of an offence and liable to any other person for losses sustained as a consequence of the contravention.</p> <p>The penalty is a fine or imprisonment for a period not exceeding 12 months, or both.</p> <p>Concerning alternate directors and prescribed officers of a company that is liable, the words ‘every director or prescribed officer... is liable’ appears to introduce joint and several liability.</p>
<p>20. [Section 218(2)]</p>	<p>Any person, including directors, is liable to any person for a contravention of any provision of the Act for a resultant loss or damage suffered.</p> <p>This section does not affect the right to any other remedy that a person may have and therefore may apply in addition to other sections in the Act and otherwise in terms of law.</p>
<p>21. [Section 104]</p> <p>Liability for untrue statements in prospectus</p>	<p>Section 104 does not deal per se with the liability of directors exclusively, but also the liability of promoters and others who have authorised the issue of the prospectus.</p> <p>The liability is jointly and severally incurred for payment of compensation to all persons (including the company) who have suffered loss as a result of acquiring securities in a company on the strength of an untrue statement in a prospectus.</p> <p>This liability is in addition to the liability of a director of the company, as set out in Section 77(3) (d)(ii), and therefore extends to the company.</p> <p>Subsection 4 provides relief to a director (or person) whose name appears in a prospectus without his consent and who is liable to pay compensation.</p> <p>A director who did not know of the issue of the prospectus or knew of its issue, but did not consent thereto, is exempt from the obligation to pay compensation.</p>
<p>22. [Section 165]</p> <p>Derivative actions</p>	<p>In terms of this section, a person may serve a demand upon a company to commence or continue legal proceedings, or take related steps to protect the legal interests of the company.</p> <p>Directors may become potentially liable in terms of this section.</p>

Civil liability exposure of directors in terms of remaining sections of the Companies Act, 1973

<p>23. [Section 423 and Schedule 5 of the 2008 Act]</p>	<p>Where in the course of the winding-up or judicial management of a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or has been guilty of any breach of faith or trust in relation to the company, the Court may, on the application of the Master or of the liquidator or of any creditor or contributory of the company, enquire into the conduct of the promoter, director or officer concerned and may order him at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retention, breach of faith or trust as the court thinks just.</p>
<p>24. [Section 424 and Sections 22 and 218 and Schedule 5 of the 2008 Act]</p>	<p>When it appears during, inter alia, the winding-up of a company that any business of the company was carried on recklessly, fraudulently or with intent to defraud creditors of the company or creditors of any other person, the court may, on application declare that any person who was knowingly a party to the carrying on of the business as such, personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company.</p> <p>Liability attaches to any person, including directors, if found to have been knowingly a party to the carrying on of the business recklessly. This section empowers the court to declare the respondent personally liable without any limitation, for all debts or liabilities (including those incurred prior to the alleged reckless or fraudulent conduct) of the company, or for any of them.</p> <p>Section 22 of the new Act furthermore provides that a company must not carry on its business recklessly, with gross negligence, with the intent to defraud creditors or for any fraudulent purpose.</p> <p>Section 424 is relevant in the context of Section 22 .Refer to the discussion on reckless trading in this publication.</p>
<p>Criminal liability exposure of directors in terms of the Companies Act, 2008</p>	
<p>25. [Sections 99 and 214] General restrictions on offers to the public</p>	<p>Both civil and criminal liability can be incurred in terms of these sections.</p> <p>Refer to the discussion in the civil liability section above.</p> <p>A person may not offer to the public any securities of any person unless that second person is a company and that offer is accompanied by a registered prospectus.</p> <p>The section also contains numerous other requirements such as:</p> <ul style="list-style-type: none"> • A primary offer must be accompanied by a registered prospectus in the case of unlisted securities, or must be made in accordance with the requirements of an exchange; • A letter of allocation must comply with the requirements of the exchange in respect of listed securities or filed with the Commission in respect of unlisted securities; and • A person must not issue a document that can reasonably be seen as a prospectus or intended to be a prospectus unless it is registered. <p>A person who contravenes Section 99 who was knowingly party to the contravention is guilty of an offence and liable to any other person for losses sustained as a consequence of the contravention.</p> <p>The penalty is a fine or imprisonment for a period not exceeding 12 months, or both.</p>
<p>26. [Section 213 and 216] Breach of confidence</p>	<p>This section, inter alia, determines that it is, with certain exceptions, an offence to disclose any confidential information concerning the affairs of any person obtained in carrying out any function in terms of this Act.</p> <p>This can extend to directors in the carrying out of their functions.</p> <p>The penalty for a contravention of this section is a fine or imprisonment for a period not exceeding 10 years, or to both.</p>

<p>27. [Section 214 and 216] Falsification of statements and defrauding of creditors</p>	<p>Both civil and criminal liability can be incurred in terms of this section. Also refer to the discussion on this section above.</p> <p>The penalty for a contravention of this section constitutes a fine or imprisonment for a maximum period of 10 years.</p> <p>A person is guilty of an offence if the person :</p> <ul style="list-style-type: none"> • Is a party to the falsification of accounting records (Section 28); • Fraudulently provides false or misleading information; • Knowingly is a party to defrauding a creditor, employee or security holder; • Is a party to the preparation, approval, dissemination or publication of a prospectus or a written statement contemplated in Section 101 that contains an 'untrue statement' as defined and described in Section 95; or • Fails to satisfy a compliance notice.
<p>28. [Section 215 and 216] Hindering the administration of the Act</p>	<p>The section in summary determines that it is an offence to hinder, obstruct or improperly attempt to influence the CIPC, the Panel, the Companies Tribunal, an inspector or investigator, or a court when any of them is exercising a power or performing a duty delegated, conferred or imposed by the Act.</p> <p>The penalty for a contravention of this section is a fine or imprisonment for a period not exceeding 12 months, or both.</p>

Appendix B: Summary of recent court cases

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Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd (43825/2012) [2013] ZAGPJHC 40 (13 March 2013)	Convening of a shareholders' meeting Sections 61 and 62	A shareholders' meeting has to be convened by the board of directors or a person specified in the company's memorandum of incorporation. Notices of a shareholders' meeting sent by a director of own accord are not valid.
Tsung & Another v Industrial Development Corporation of South Africa Limited & Another (173/2012) [2013] ZASCA 26 (25 March 2013)	Reckless and fraudulent trading Companies Act 61 of 1973, Section 424	The exit strategy from an ailing company by directors constitutes reckless trading where they use the company's assets to reduce their own liability and withdraw their investment.
Msimang NO & Another v Katuliiba & Others [2013] 1 All SA 580 (GSJ) (27 November 2012)	Delinquency of directors Section 162	The motives of a shareholder who applies for an order to declare directors delinquent or put them on probation are irrelevant if the directors conducted themselves in a way that justifies such an order.
Kukama v Lobelo & Others (38587/2011) [2012] ZAGPJHC 60 (12 April 2012)	Delinquency of directors Section 162(5)(c)	A director of a company has been declared delinquent with the effect that he cannot serve as a director of any company nor be a managing member in a close corporation for the next seven years. The director <i>in casu</i> was declared delinquent for failing to detect and reverse fraudulent value-added tax refund claims.
Grancy Property Limited v Manala (665/12) [2013] ZASCA 57 (10 May 2013)	Appointment of directors by the Court Section 163	Appointing directors in addition to or in substitution of existing directors is provided for in Section 163(2). In its discretion, the court adjusted the number of directors each shareholder could nominate and reserved specific functions for the court-appointed directors.
Grancy Property Limited v Manala (1961/10; 12193/11) [2014] ZAWCHC 97 (26 June 2014)	Delinquency of directors Section 162(5)(c)	Directors were declared delinquent in terms of section 162(5) (c).
Gardener and another v The State (Case no 253/07) 18 March 2011 (SCA)	Conviction of directors of fraud Criminal Procedure Act, 1977	Directors face an increased risk of criminal liability for fraud through non-disclosure if the circumstances show that they intended to deceive and prejudice the company.
Alliance Mining Corporation Limited (In Liquidation) & Others NNO v De Kock & Others (48387/11) [2013] ZAGPJHC 10 (8 February 2013)	Personal liability for reckless trading Companies Act 61 of 1973, Section 424. Companies Act 71 of 2008, Section 22 read with Sections 77(2)-(3).	Section 424 of the 1973 Act imposes personal liability on those involved in reckless trading. Director liability for a contravention of Section 22 is regulated in s 77(3) while others, such as creditors, may rely on s 218(2), read with s 214(1)(c) of the 2008 Act.
Mouritzen v Greystone Enterprises (Pty) Ltd & Another (10442/2011) [2012] ZAKZDHC 34; 2012 (5) SA 74 (KZD)	Derivative action against directors Section 165	Permission was granted by the Court to institute a derivative action against a co-director in terms of Section 165.

How PwC can help you

PwC has significant experience in assisting clients with the changing terrain of regulatory compliance. We take a structured approach to enable clients to achieve and sustain compliance in an efficient and cost-effective manner.

Our solutions help companies to assess the impact of the Companies Act and other legislation on their business as well as designing and implementing the changes required to ensure ongoing compliance.

Our understanding of the specific requirements of the Companies Act, together with our blend of regulatory compliance, auditing, tax, risk management, information technology, process consulting and industry-specific expertise, allows us to provide an end-to-end compliance solution.

Services with which we can assist you include:

- Performing a gap analysis on the requirements of audit and board committees to ensure compliance with the requirements of the Act;
- Guidance for directors and company secretaries regarding eligibility requirements;
- Performing a regulatory compliance risk assessment;
- Setting up records of directors, notices, minutes and a securities register that comply with the standards for company records in the Act;
- Maintenance of all secretarial records and lodging all forms, where permitted; and
- Training for affected persons in the company, such as directors.

This list is not exhaustive and has been provided to assist you to identify critical issues that should be dealt with promptly to minimise the risk of potential non-compliance with the Act.

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