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UNTIL DEATH US DO PART?

One wonders just how many people may have misunderstood the meaning and the commitment they made when they uttered the words, “until death us do part”? These words are mostly associated with special life-changing events such as the marriage between two people, or even when extraordinary acts of bravery may be required on the parts of one or many parties. Events such as the sinking of the Titanic, or the Japanese “kamikaze” pilots would also come to mind when one ponders the incredible implication behind this *pledge of service* which is made between parties. In the case of the World War II Japanese pilots, the commitment of death was pledged as a service of honour and victory.

Whilst physical death would not ordinarily be associated with directors accepting their appointments on a company’s board, one’s imagination could be stretched to comparing Japanese pilots and their commitment, as opposed to the many *so-called* ‘directors’ of companies today? When directors are appointed within a company, they essentially make a personal commitment to serve the company to the best of their ability, furthermore subordinating their personal interests to those of the company and its shareholders. In essence, the act of accepting a directorship position pre-supposes that the individual is prepared to ‘lay themselves on the line’ for what they believe in, whilst also protecting the shareholders’ investments.

Indeed it is the initial responsibility of the shareholders to appoint competent people who will devote their time and attention to direct and manage the affairs of a company in which the shareholders have invested their money. Hereafter, common practice generally allows the board of directors to appoint additional directors as the need arises, and careful consideration must be given to these appointments in order to ensure that things do not go awry.

Whilst the original allegiance between the shareholders and the first appointed directors may have been a stalwart relationship, one certainly needs to consider if the same level of commitment exists between the ‘next of line’ directors as the baton is handed from the one set of directors to the next?

Clearly this may be a contentious debate. One must be reminded of the directors’ pledge to serve the interests of the company and that they will hold themselves accountable to protect the shareholders’ investments -- as well as the other company stakeholders’ interests -- and at all times. Gauging from the many corporate collapses, most particularly those directly relating to poor leadership and governance practices, this begs the questions as to whether:

- i. directors have become blasé to the shareholders’ expectations and requirements, or whether
- ii. directors are truly informed of their liabilities for non-performance, reckless trading or willful misconduct and to which personal fines or even jail sentences are involved?

Of course not all directors fall into this ambit, and those who are *indeed* fulfilling their fiduciary duties and meeting the shareholders’ expectation should not be too concerned about the increased personal liabilities directors will incur for the non-performance of their duties (as provided in the new Companies Act, No 71 of 2008). Some would agree that more public examples should be made of directors who flout their duties and ignore the law, whilst others insist that the personal fines should be far greater, furthermore preventing delinquent directors from being able to hold office ever again after their conviction.

It is incumbent upon all directors to be constantly aware of their co-director’s conduct, commitment and performance and in terms of the new Companies Act, it does become a “one for all” and “all for one” type situation. Whilst the individual director will be held liable for their reckless behaviour or gross negligence, so too

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will the remaining directors be implicated with potential liability, most particularly where they did not act to prevent such behaviour.

Directors -- in fulfilling their directorship obligations both on the main board and other board committees -- are duty bound to act against their fellow directors who disregard their basic fiduciary responsibilities, which include the duty to:

- i. exercise the degree of care, skill and diligence which is exercised by a reasonably diligent individual and
- ii. act honestly and in good faith and in a manner the director reasonably believes to be in the best interests of and for the benefit of the company.

Moreover, the new Act makes provision for the Companies and Intellectual Properties Commission to determine whether the company is trading in a reckless manner and, if this is the case, can close the company down. In this regard, directors are well advised to act sooner against their fellow directors who may be falling short of their duties, rather than later. Not doing so, not only suggests their condoning of this behaviour, but also places a massive burden and liability upon the board and its remaining members who have diligently served the company and its shareholders. It is important to also remember that directors of the board no longer require the shareholder's approval to remove a non-performing director; they can do this themselves through an ordinary resolution. The power to remove a director is provided to the directors of the board and will provide a degree of comfort for those who have remained committed to their duties and loyal to their pledge of service, most notably to the shareholders. Willful misconduct or even a breach of trust in relation to the director's performance and duties is now also taken into consideration when declaring a director delinquent.

The stakes have most certainly been increased as the new Act and the recently launched King Code on Corporate Governance 2009 (King III) have taken their top spot positions in most South African boardroom discussions. Not only are there numerous, wide ranging personal liabilities attached to directors, there are also new areas that protect the company's stakeholders and which directors must become familiar with. These include business rescue, IT governance, risk management, new requirements for audit, social and ethics committees amongst other areas of similar importance.

There is no doubt that South Africa needs ethical, sustainable and profitable businesses to be able to provide decent employment for all its people. In order to achieve this, there must be excellent leadership at the helm of companies. Increasingly, these leaders are expected not only to provide good returns for their shareholders' investments, but also to satisfy their integrated reports when dealing with the 'people' and 'planet' components affected by their business and operations. Long may our companies live, and may our shareholders be protected from unscrupulous and greedy self-serving directors.

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