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DIRECTORS BEWARE: THERE'S A NEW MEANING TO BUSINESS RESCUE

All too often, the dream of setting up a company and establishing a business is rushed into by zealous individuals, eager to make a quick profit. Many self appointed, unqualified directors fail to ensure the business is grounded upon sound governance principals, and are often oblivious to the lurking legal requirements that protect the company as an entity, as well as the stakeholders who become involved in the company's business.

Directors who establish businesses in this haphazard manner ought to be reminded of the fact that there are a number of legal mechanisms that protect the rights of the company (the juristic entity), but there is little, if any, protection afforded to those who set up the company, and run its daily operations. The juristic entity is afforded the right -- through common law, legislation and the company's constitutional documents -- to be protected by the people charged with this duty, and who are now referred to as *prescribed officers* in the new Companies Act 2008 (the Act).

Rather ironically, many of the prescribed officers, who consist of the company's directors and its senior management, are not able to articulate what is expected of them in terms of their common law duties, which include the duty to act honestly, diligently and in the best interests of the company at all times. Moreover, their duties also extend to complying with all applicable law, acting with independence, but also notifying the company's stakeholders should there be any concern that the company may be in financial distress. For these errant directors, one would hope that they will rapidly rethink and change the nature of their reckless behaviour, which so often causes devastating financial losses to the company's shareholders, employees and creditors.

Fortunately, the legislation appears to be tightening its grips to control the actions of those company's directors whose imprudent actions and blasé attitudes result in financial distress to the company and all concerned.

Directors on the boards of South African companies are now legally bound to follow specific guidelines, as well as deliver a written notice to each of its affected stakeholders informing them that the company is in financial distress, as a result of Chapter Six and Section 129 of the Act -- which became effective on 01 May 2011 -- including those recommendations of the King III Report on Governance 2009 (King III). Business rescue proceedings may be initiated either by an ordinary company resolution or failing this, a court order may be issued for the proceedings to begin. More reassuring is the fact that if directors vote for a resolution for a business rescue, and it becomes evident that this was indeed not necessary, the directors of the company will be penalised.

Increasingly, directors of the board will need to ensure that they have the mental agility when conducting the affairs of the business. Never has this been more true as some directors -- particularly in tough economic times -- continue to chase the deals irrespective of the costs or implications. Whilst there are now better safeguards for the protection of the company's assets, cashflow and the stakeholder's interests; directors will most certainly need to raise their game, and broaden their knowledge of prudent risk management, or they will face the wrath of the law, the scorn of the investors and even delinquency.

As a result of these new provisions, it is most likely that the company's board will consider more carefully the manner and extent to which they engage future business, to ensure that they do not trade their companies whilst in an insolvent position where they cannot pay their creditors.

One wonders whether this gloomy message, which is intended specifically for those directors who have financially plundered so many companies and destroyed the lives of countless individuals, will take these new provisions to heart. Failure to do so could mean that these individuals will be subject to repaying the debt to the affected people, or even receive a declaration of delinquency, which carries criminal implications and could mean that the director is banned from serving on a board for life. This certainly should cause even the most reckless of boardroom junkies to rethink their next moves.

Never before in the history of South African law, has there been more of a need for directors to understand their fiduciary responsibilities, particularly when it comes to ensuring they are conducting business in the best interests of the company, and not their own.

Directors will need to understand how the new provisions of Business Rescue will affect them, both at a personal and at a business level, not least the fact that there is also a claw-back provision of three years which creditors can exercise should this be necessary.

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