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DIRECTORS' LIABILITY: NOT THAT ROSY

It sounds like some wonderful advertisement; experience teaches us when an offer 'sounds too good to be true', there's usually some sinister catch behind it. Similarly, by accepting and holding a *directorship* or *prescribed officer* (collectively 'company officers') post; at first may seem quite grand and somewhat elevates a person's self esteem, complimented by the awe of family, friends and business associates. But in times with increased governance, and more litigious rules and regulations, there is little doubt that being appointed as a company officer in an organisation may no longer be as attractive to times gone by, particularly if the appointee lacks the knowledge and experience required for this 'hard core' post. Moreover, with the introduction of the new Companies Act 71 of 2008 (the Act) and the provisions of the King Report on Governance for SA - 2009 (King III), additional areas surrounding the business and the organisation's leadership will be scrutinized. Where failure of sort has occurred, the company officers -- and even in some cases the organisation's senior managers -- could be brought to book in their joint and several capacities.

Notably, since the launch of the Act and the recommendations of King III, organisations and their company officers have had to grapple with the meaning and importance of a set of statutory duties that are apparently in addition to, and not in substitution of, their existing common law duties. There is a view that this step by the Legislature was intended to expand upon the duties of company officers and, consequently, the liabilities that attach to company officers for failure to comply with their duties.

And while aspects of common law have been codified in the Act, organisations are beginning to feel the burdens of leadership and the attached liabilities which are now more *financially* weighted, as opposed to *criminally* weighted as was the case with the previous Companies Act '73. Moreover, as organisations are now expected to produce an Integrated Report, many will find this a daunting task as this report must provide its stakeholders an unambiguous and honest view of the organisation in its entirety, including the *performance of its leadership*. In many instances, those who fail in their fiduciary and statutory duties will cause damages of some sort; and these will be a lot more difficult to pass by than in previous times where the scrutiny of company officers was not as intense. Of all the sections in the Act where liability is attached to company officers; sections 22 (reckless trading), 66 (powers of the board) and 77 (liability of company officers) will most likely cause them many new hardships. Notably, the provisions of section 66(10), discusses the fact that prescribed officers now share the same level of statutory duties and liabilities as those for directors.

Regardless of the organisation's size or type, the role of the directors remains fairly constant. Directors are responsible for governing the affairs of the organisation on behalf of its shareholders - they are expected to have a relationship of 'trust' with the organisation's stakeholders and it is from this trust that their fiduciary and statutory duties arise.

As case after case has revealed in many corporate failures -- and there have a number of them since Enron -- the collapses of organisations have invariably been due to poor organisational leadership and a lack of good governance practices. Stakeholders have in all cases had to bear the brunt of these failures, whilst the perpetrators have generally walked 'scot free' and generally have not -- rather ironically -- paid the price in the wake of their destructive greed and behavior. Of course this is expected to change as company laws and regulations intensify; all done with the ultimate aim of improving the governance of organisations. The effect of these increased liabilities will hopefully see the organisation's stakeholders being afforded better protection against errant and reckless behaviour on the part of company officers.

Company officers may become more cautious of accepting these positions, particularly if they are inexperienced in these matters. As Richard Leblanc and James Gilles put it, the co-authors of the book *Inside the Boardroom*, "Litigation has become a part of the landscape of corporate governance and all directors [company officers] should assure themselves that they are properly informed of and protected by director and officer liability insurance, and perhaps even more importantly, that they are well advised, when making complicated decisions, by competent legal counsel and other outside advisors."

Undoubtedly, company officers will have to 'up their game' and be more aware of their increased obligations and exposure they now face. Failure on their part to do so will most certainly be a recipe for disaster.

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