

Editorial issued by CGF Research Institute and Werksmans (Incorporating Jan S. de Villiers)

DATE: 22 September 2009

Directors being squeezed for better performance and delivery

There is no longer any doubt that being a director, and charged with common law and legislative duties, is serious business in South Africa as new laws, regulations and business codes continue to flood the business landscape. Not only are directors being 'squeezed' for better performance with higher delivery expectations recommended through reports such as King III on Corporate Governance, they are also being swamped by more litigious legislation such as the Competition Act of 1998 and the recently approved Competition Amendment Act of 2009.

Since South Africa became a full democracy and a truly global player in 1994, we have seen some remarkable changes occurring both in our business and social environments. In our early democracy, transformation was based initially in trying to establish a balance between racial and gender lines of representation in South African boardrooms and its workforce. There was a flurry of activity, most particularly seen in new director appointments characterised by many new black and female individuals. Many boardrooms underwent a combination of either a major overhaul or a few 'shuffles' placing new directors in various positions to satisfy the requirements of acts such as the Broad Based Black Economic Act 53 of 2003, the Employment Equity Act 55 of 1998 and the Gender Equality Act 39 of 1996.

"Whilst many folk across the racial and gender lines jostled for these lucrative positions, their acceptance to become directors is hardly comparable to the onerous accountabilities placed upon directors and senior management a decade later", says Terry Booysen, CEO of a leading governance research company, CGF Research Institute (Pty) Ltd. "The new regime of director stewardship has tightened substantially in comparison, so much so that anyone accepting a post of directorship today, and who is uninformed of the vicious sting of new legislation such as the Competition Act and its Amendments, is frankly delusional," continues Booysen.

As the business competitive forces in South Africa increase, directors will need to deploy extraordinary measures to keep themselves informed of the increasing rules for business survival - these being found within the evolving laws, regulations and codes for good corporate governance practices. Whilst South Africa's economic system is mostly built upon free market principles, directors must now more than ever before be on the alert that their companies are not intentionally or unintentionally partaking in anti competitive conduct or restrictive business practices such as price fixing or collusive tendering.

The new Competition Amendment Act 2009 goes well beyond the recently publicised cases of 'power house bullies' who maintain certain pricing thresholds. The Competition Amendment Act now extends the reach of the Competition Act to those companies in concentrated markets which coordinate their conduct, without necessarily reaching an agreement to raise price or entry barriers. Says Paul Coetser, a director at Werksmans Incorporating Jan S De Villiers and a specialist in Competitive Law in South Africa, "If a firm is found guilty of price fixing, market division or collusive tendering, its directors and executives can be held personally liable for the breach of the Act and receive a criminal sentence of up to 10 years imprisonment or a fine of R500 000 or both if they are convicted."

In a marketplace which has become 'free' since our new 1994 democracy, directors may well be cautioned to know that the market and their personal actions may not be as 'free' as they may want to believe. There are a number of new adversaries waiting to pounce on directors who don't adhere to the law and their fiduciary duties, including the behaviour expected of them. As more power is given to institutional stakeholders and activists to challenge and test the legitimacy of directors' business dealings, it is more likely that any deviations from the law will be scrutinised by the relevant regulatory authorities.

It is hardly surprising then, that we may just find directors taking their positions more seriously as they comprehend the gravity of their duties in terms of laws such as the Competition Act. Failing to do so, will be a certainty for personal disaster.

ENDS

WORDS: 683

Further Media Information:

Terry Booyesen
CEO: CGF Research Institute (Pty) Ltd
Office: (011) 476 82 64 / 1 / 0
Cell: 082-373 2249
Fax: 086 623 1269
Email: tbooyesen@cgf.co.za
www.cgf.co.za
www.corporate-governance.co.za

Paul Coetser
Director: Werksmans incorporating Jan S de
Villiers
Office: (011) 535 8290
Email: pcoetser@werksmans.com
www.werksmans.co.za