



GENERAL GUIDANCE NOTE

Directors' Duties

Purpose

The purpose of this guidance note is to clearly illustrate the different directors' duties taken from the common law, the Companies Act 71 of 2008 ("**the Act**") and the King III Report and Code on Governance ("**King III**").

One should always keep in mind that directors of an organisation are in a fiduciary relationship with that organisation and therefore should always act in good faith towards the organisation and in the best interests of the organisation. This fiduciary relationship forms the basis and the foundation from which all director duties emanate.

In Annexure A we have a comparative table setting out the overall overlap of the director duties across the common law, the Act and King III.

Common Law

Many of the common law directors' duties have been codified into legislation, primarily through the Act. However it must always be kept in mind that in the event that the common law duty has not been codified, the duty still exists and is upheld by the courts, which is confirmed in the Act. Therefore one should not assume the common law duties have fallen away in lieu of the codification of some in the Act.

Fiduciary Duties	These are good faith duties. They are derived directly from the fact that directors of an organisation need to act in good faith towards the organisation. Fiduciary duties are non-negotiable and cannot be waived by either sides. Fiduciary duties include the below stated.
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	1. A director should act in the best interests of the company.	This common law duty has been codified in Section 76(3)(b) of the Act
	2. A director should not act beyond or exceed the limitations of powers or capacity which means a director should always act within the ambit of their authority.	This common law duty has no equivalent codified legislation however on interpreting Section 20(5) and (6) of the Act, it may support this common law duty
	3. A director should act within their powers and for a proper purpose . This means that they should act in the best interests of the company and in a manner that benefits the company as a whole and bona fides towards the company interests.	This common law duty has no equivalent codified legislation however on interpreting Section 76(3)(a) of the Act it may support this common law duty
	4. Should exercise unfettered and independent discretion and judgement . This requires that a director should exercise independent and unbiased judgement when reaching and making decisions for the company	This common law duty has no equivalent codified legislation however on interpreting Section 76(4)(a) of the Act, it may support this common law duty
	5. Should not be in a position or should avoid a position of conflicts of interests . Their personal interests should not conflict with those of the company and this also includes the duty to disclose any potential conflicts of interests	This common law duty has been codified in Section 76(2) of the Act
	6. Should not make any secret profits or possible incidental profits at the expense of the company	This common law duty has no equivalent codified legislation however on interpreting Section 76(2) further, it may support this common law duty

	7. Should disclose any personal interests in any contracts with the company	This common law duty has been codified in Section 75 of the Act, particularly subsections 4, 5 and 6.
	8. Should not misappropriate corporate opportunities due to the company as well as improperly competing with the company	Not directly codified however on interpreting Section 76(2) read together with Section 76(3), it may support this common law duty
Duty of Skill, Care and Diligence	This duty requires a director to display and demonstrate the same care as a reasonable person in their personal affairs as well as degree of skill which one would reasonably expect from a reasonable person with his/her knowledge and experience.	This common law duty has been codified in Section 76(3)(c)(i) and (ii) of the Act

Companies Act

Director duties, primarily taken from the common law, have been expanded upon or created anew and have been formalised into law through the Act. The codified director duties as found within the Act are set out below.

Section 20(5) of the Act	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: <ul style="list-style-type: none"> a) obtained those rights in good faith; and b) did not have actual knowledge of the limit, restriction or qualification.
Section 20(6) of the Act	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: <ul style="list-style-type: none"> a) this Act; or b) a limitation, restriction or qualification contemplated in this section, unless that action has been ratified by the shareholders in terms of subsection (2).

Section 75(4) of the Act	At any time, a director may disclose any personal financial interest in advance, by delivering to the board, or shareholders in the case of a company contemplated in subsection (3), a notice in writing setting out the nature and extent of that interest, to be used generally for the purposes of this section until changed or withdrawn by further written notice from that director
Section 75(5) of the Act	<p>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</p> <ul style="list-style-type: none"> a) Must disclose the interest and its general nature before the matter is considered at the meeting; b) must disclose to the meeting any material information relating to the matter, and known to the director; c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors; d) if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in paragraph (b) or (c); e) must not take part in the consideration of the matter, except to the extent contemplated in paragraphs (b) and (c); f) while absent from the meeting in terms of this subsection (i) is to be regarded as being present at the meeting for the purpose of determining whether sufficient directors are present to constitute the meeting; and (ii) is not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted; and g) 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.
Section 75(6) of the Act	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 in the case of a company contemplated in subsection (3), the nature and extent of that interest, and the material circumstances relating to the director or related person's acquisition of that interest.

Section 76(2) of the Act	<p>A director of a company must</p> <p>a) not use the position of director, or any information obtained while acting in the capacity of a director</p> <ul style="list-style-type: none"> • to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or • to knowingly cause harm to the company or a subsidiary of the company; and <p>b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director</p> <ul style="list-style-type: none"> • reasonably believes that the information is either immaterial to the company; or generally available to the public, or known to the other directors; or • is bound not to disclose that information by a legal or ethical obligation of confidentiality.
Section 76(3)(a) and (b) of the Act	<p>Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director:</p> <p>a) in good faith and for a proper purpose</p> <p>b) in the best interests of the company ...</p>
Section 76 (3)(c)(i) and (ii) of the Act	<p>Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director with the degree of care, skill and diligence that may reasonably be expected of a person:</p> <p>(i) carrying out the same functions in relation to the company as those carried out by that director; and</p> <p>(ii) having the general knowledge, skill and experience of that director</p>
Section 76(4)(a) of the Act	<p>In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company —</p> <p>a) will have satisfied the obligations of subsection (3)(b) and (c) if:</p> <p>(i) the director has taken reasonably diligent steps to become informed about the matter;</p> <p>(ii) either:</p> <p>(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</p> <p>(bb) the director complied with the requirements of section 75 with respect to any interest contemplated in (aa) above; and</p> <p>(iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and ...</p>

King III Report and Code on Governance

King III provides directors' duties in alignment with the common law and the Act, in that it requires:

Principle 2.14	<p>The board and its directors should act in the best interests of the company.</p> <p>When the principle is explained further it provides that:</p> <ul style="list-style-type: none">• The foundation of each decision should be intellectual honesty, based on all relevant facts. Objectively speaking, the decision should be a rational one considering all relevant facts at the time.• The board has a reflective role with collective authority and decision-making as a board, but directors carry individual responsibility.• Directors of companies are appointed in terms of the constitution of the company and in terms of the Act. Each director of a company has:<ol style="list-style-type: none">1. A duty to exercise the degree of care, skill and diligence that would be exercised by a reasonably diligent individual who has<ul style="list-style-type: none">- the general knowledge, skill and experience that may reasonably be expected of an individual carrying out the same functions as are carried out by the director in relation to the company; and- the general knowledge, skill and experience of that director; and2. a fiduciary duty to act in good faith and in a manner that the director reasonably believes to be in the best interests of the company• directors should exercise objective judgement on the affairs of the company independently from management, but with sufficient management information to enable a proper and objective assessment to be made.• Failure to perform these duties properly may render a director personally liable.• The personal interests of a director; or of people closely associated with that director, should not take precedence over the interests of the company.• Certain conflicts of interest are fundamental and should be avoided. Other conflicts (whether real or perceived) should be disclosed in good time and in full detail to the board and then appropriately managed.
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What are the courts deciding?

While the common law has always been available to the courts and which has resulted in vast juristic precedents. The codification of director duties in the Act supported many elements already been applied in our courts, however this codification made these clearly for the courts and directors. Furthermore it formalised the risk to directors in respect of personal liability.

So if we look at some prominent cases that have been decided by our courts in the last few years we can see clear application of the law in holding directors accountable – however this is a drop in the ocean as many cases either settle before court whereby agreements are reached or are dragging through our lengthy court process waiting for resolution.

<p>Tsung & Another V Industrial Development Corporation of South Africa Limited and Another Judgment on 25 March 2013 Supreme Court of Appeal (“SCA”)</p>	<p>The SCA found the directors had reckless and fraudulent traded. The directors had repaid a creditor company, in which they were the shareholders, utilising all remaining monies the company had – the elements of this conduct was unique due to other factors – however it is important to note that the directors conduct is a direct breach of their fiduciary duties in terms of the Act – in that they had not acted in the best interests of the company.</p>
<p>Gardener and another V The State Judgment on 18 March 2011 (SCA)</p>	<p>The executive directors were found guilty of fraud and a criminal conviction was upheld. The directors had owned the minority shareholder in the company and they intentional failed to disclose same to the board in order to benefit financially from a transaction.</p>
<p>Alliance Mining Corporation Limited (in liquidation) & others NNO V De Kock & others Judgement 8 February 2013</p>	<p>The Directors of the company were held personally liable for recklessly trading the company. The directors (current and past) knowingly falsified the company’s AFS and allowed the company to trade while been insolvent and unable to pay its debts.</p>
<p>Msimang NO and another V Katuliiba and Others Judgement on 27 November 2012</p>	<p>The court confirmed that breaches by a director of company law [the Act] amounted to a breach of fiduciary duties. The directors were declared delinquent directors because the failed to comply with the director duty to convene AGM and to prepare and audit AFS.</p>
<p>Fourie V FirstRand Bank Limited Judgment on 18 September 2012 (SCA)</p>	<p>The financial Manager (director) was held personal liable for fraudulent conduct whereby he falsified financial statements.</p>

Summary

DIRECTORS' DUTY	COMMON LAW	COMPANIES ACT	KING III
Act in the best interests of the Company	✓	✓	✓
Not exceed powers or capacity	✓	✓ #	✓ **
Exercise powers for proper purpose	✓	✓	✓ **
Exercise independent and unfettered discretion	✓	✓ #	✓ **
Avoid conflicts of interest between their personal interests and those of the company	✓	✓	✓
Not make any secret or incidental profits	✓	✓ #	✓ **
Disclose personal interests	✓	✓	✓ **
Not misappropriate corporate opportunities	✓	✓ #	✓ **
Exercise care, skill and diligence	✓	✓	✓

- Subject to interpretation of sections within the Companies Act

** - Subject to interpretation of what fiduciary duty entails as a collective of various other duties