Companies and Intellectual Property Commission
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GUIDELINE 2 OF 2020

DIRECTOR QUICK REFERENCE GUIDE

INTRODUCTION

This Guideline is issued in terms of Regulation 4 of the Companies Regulations 2011 and is designed to highlight specifically, although not exclusively, critical issues of the Companies Act No. 71 of 2008 (as amended) (Companies Act) that a director should be aware of.

The central message of this Guide, which is divided into 10 basic markers, is that a director of a company when acting in that capacity: -

- must not cause harm to the company;
- must always act in the best interests of the company; and
- must ensure that there is no conflict of interest between the director and the company. [section (s.) 75, 76 (2) (a) (ii) and 76 (3)(b) of the Companies Act].

A director differs from a shareholder in terms of function; power and authority and is legally distinct from the company itself. A person can act in different capacities, for example a person can be shareholder, director, employee and creditor of a specific company – the importance is that the rights and duties differ depending on the capacity – one must remember which "hat" a person is wearing.

A shareholder is a holder of a share issued by a company and like a director does not own the assets of a company. The company is an independent legal entity that owns the assets of the company. A share in a company gives you rights against the company not in the assets of the company. The director is the controlling mind of the company and is the legal link between shareholder and company.

1st Marker: You conceptualize a new company

Before one registers a company it is important to research and determine the best company type that suits one's needs. A company is a juristic person incorporated in terms of the Companies Act. [s.1- defn]. The company exists continuously until its name is removed from the Companies and Intellectual Property Commission's (CIPC) companies register through de-registration or liquidation. The company has all the legal powers and capacity of an individual except to the extent that it is incapable of exercising any such power or having such capacity or the company's Memorandum of Incorporation (MOI) provides otherwise. [s.19(1)].

The company can sue and be sued and it can be charged criminally.

The Companies Act allows for two main categories of companies to be formed, i.e. profit companies or non - profit companies. [s.8 (1) & (2)].

Profit companies

A profit company is incorporated for the purpose of financial gain for its shareholders, and include:

- private companies - (Pty) Ltd;
- personal liability companies - (Inc.);
- public companies - (Ltd); and
- state owned companies - (SOC) where the state or a state entity holds all the shares. A SOC is subject to modified application. [s. 5 (4) (b) (ee) & s.9].

Non-profit companies

- A Non –Profit Company (NPC) is incorporated for a public benefit purpose, or it must have an object relating to one or more cultural or social activities, or communal or group interests. These may include the promotion of religion, arts, sciences, education, charity or recreation. A NPC is subject to modified application [s.10 + Schedule 1].

2nd Marker: You create the new company

One or more persons, or an organ of state, i.e. a SOC may incorporate a profit company. [s.13 (1)].
Three or more persons, an organ of state or a juristic person may incorporate a nonprofit company.
One must complete and sign a Notice of Incorporation and MOI and file these documents with the CIPC.
A Notice of Incorporation is [s.13(2) to (4) read with regulation 14] the form by which the Incorporators of a company inform the CIPC of the incorporation of that company for the purpose of having it registered. When the CIPC registers the company it comes into existence.

An MOI is a document that sets out the rights, duties and responsibilities of shareholders, directors and others within and in relation to a company. [s. 1 & 15]. It constitutes the governance documents of the company.

An MOI must be consistent with the Companies Act and is void to the extent that it contravenes, or is inconsistent with the Companies Act. One can use a standard MOI, as provided for legislatively or compile your own.

The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all the powers and perform any of the functions of the company, except to the extent that the Companies Act or the MOI provides otherwise. A single director cannot act for the company unless the board gives authority [s.66(1)].

The board of a company must have at least one director in the case of a private company or a personal liability company. In the case of a public company or a nonprofit company at least three directors. [s.66 (1) & (2)]. In the case of a profit company, other than an SOC, at least 50% of the directors must be elected by the shareholders and their remuneration must be approved by a special resolution.

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3rd Marker: You must look after the company

A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. [s.22 (1)].
Reckless trading is when the directors should reasonably have known, that the company was unable to pay its creditors and still continues to trade and do business. A director has a duty to pass a resolution for a company's business rescue or alternatively, resolve to wind up or liquidate the company as soon as she or he becomes aware that the company is either financially distressed or is trading in insolvent circumstances.

4th Marker: The company needs money to function

A company can be financed in various ways. The Companies Act allows for the company for example to be financed through the issuance of securities (shares/ debentures) and/or loans.
A company's MOI must set out the classes of shares and the number of shares of each class that a company is authorized to issue. Each class of shares must have a distinguishing designation and specific rights, preferences and limitations associated with that class.
Each issued share of a company, regardless of its class, has associated with it one general voting right unless provided otherwise by the Companies Act or as determined by the company's MOI. [s.36 & s.37].
The board of directors may authorize the company to provide financial assistance by way of a loan, guarantee, the provision of security or otherwise to any person for the purpose of or subscription or purchase of any shares of the company.

The solvency and liquidity test is important as it talks to the financial and economic sustainability of a company. The Companies Act applies the solvency and liquidity test in a number of provisions for example:

- when a company declares a dividend;
- buys back its own shares;
- provides financial assistance for the purpose or in relation with the acquisition of its own shares or
- undertakes an amalgamation or merger.

The solvency and liquidity test must be applied before any financial decision is made.
A company satisfies the solvency and liquidity test at a particular time, if considering all reasonably foreseeable financial circumstances of the company at that time, the assets of the company, as fairly valued, equal or exceeds the liabilities of the company, as fairly valued [solvency]; and
it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the date on which the test is considered or it appears that the company will be able to pay its debts as they become due in the course of business for twelve months following a distribution. [liquidity].

5th Marker: The company must be able to do business

A person dealing with a company in good faith, is entitled to presume that the company in making any decisions in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of the Companies Act, its MOI and any rules of the company. This must be read with any relevant common law principal relating to presumed validity of actions of a company in the exercise of its powers.
The company can therefore never say that for example the meeting where a person was authorized to buy something was invalid and therefore it is not bound by the contract.

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6th Marker: The company must be maintained

A director must safeguard that a company is properly maintained from a compliance perspective by ensuring that:

- the company keeps accurate and complete accounting records [s.28];
- files its annual return with the prescribed fee [s.33];
- complete the compliance checklist;
- audit or independently review the company's financial statements if applicable [s. 30(2) read with s. 30(7) & regulation 27; 28; 29];
- inform the CIPC of any director; MOI or company address changes within the prescribed period.

7th Marker: Each director and company must comply with the law

A director in his/her personal capacity and the company may be held criminally liable [s.214 & s.215 (2) (e)] for:

- The falsification of the company's accounting records.
- Providing false and misleading information.
- Is a party to an act or omission by a company calculated to defraud.
- Is a party to a prospectus or written statement that contains an untrue statement.
- Failing to satisfy a compliance notice.

A director (in his/her personal capacity) of a company may incur legal (civil) liability in the event that the company (of which he/she is a director) incurred loss or damage as a result of said director [s.77(3)]:

- Acting on behalf of the company without the necessary authority.
- Trading recklessly.
- Being a party to an act or omission by a company calculated to defraud.
- Party to false and misleading financial statements.
- Party to a prospectus or written statement that contains an untrue statement.
- Is/was present at a meeting and failing to vote against an unauthorized or inconsistent provision of the Companies Act.

8th Marker: The company must act responsibly

Every state owned company; listed public company and any other company that has in any of the two of the previous five years; scored above 500 points in terms of its Public Interest Score must have a Social and Ethics Committee whose role and function is to monitor the company's activities to certain legal requirements or prevailing codes of best practice as set out in Regulation 43 (5).

A Compliance programme with respect to combatting corruption should be considered by the director. See Guideline 1 of 2018 on CIPC Homepage under legislation/practice notes.

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9th Marker: The company can fall ill and die

When a company is financially distressed, i.e. when it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable and/or become insolvent within the immediately ensuing 6 months the director(s) of a company need to take a decision to:

Facilitate the rehabilitation of the company by placing it into business rescue in terms of Chapter 6 of the Companies Act; or

Voluntarily wind up and liquidate the company if it is a solvent company in terms of [s. 79; 80 & 81]; or wind up and liquidate the company if it is insolvent in terms of Chapter 14 of the 1973 Companies Act read with Item 9 of Schedule 5 of the 2008 Companies Act.

If the business rescue process is successful, then the company is resuscitated and can continue in existence (illness cured). If the company cannot be rescued, it must then be placed in liquidation (company dies and no longer exists).

10th Marker: The company can live forever

A company can have perpetual succession, which means that it can continue to exist irrespective of the continuity of its shareholders or directors, except in the case of a liquidation or winding up of the company.

CONCLUSION

The director of a company must:

- be vigilant when he/she conducts the affairs of the company.
- have regard to the Companies Act and what is legally required to be a director.
- do the basics right.
- Ensure that he/she acts in the best interest of the company.

To learn more go to the www.cipc.co.za Home Page and click on Register your business and/or Maintain your business.

Yours sincerely



Adv. Rory Voller
CIPC COMMISSIONER

……11…… August 2020