DUTIES AND RESPONSIBILITIES OF DIRECTORS AND SHAREHOLDERS

PRESENTED BY

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The Company

- The primary effect of setting up a Company is to create a new legal person separate from its subscribers capable of entering into contracts, suing & being sued and disposing of economic property. This is referred to as the “veil of incorporation”;
- The subscribers go on to become the owners / shareholders and their money invested in the company ceases to be theirs but instead belongs to the company. In the Companies Act they are referred to as Members;
- As the Company has no mind of its own, directors are appointed by the Members to give directions and instructions.
The Company (continued)

- Under the Companies Act, 2015 there are 2(two) basic types of companies:
  
  1) Private Company, where its articles restricts a members right to transfer shares and limits the number of members to 50(fifty) and it is not limited by guarantee. And its certificate designates it a private company – s.9;

  2) Public Company, where its articles allow members to freely transfer their shares and its articles do not prohibit invitations to the public to subscribe for shares or debentures of the company. And its certificate designates it a public company – s.10
Other Incorporated Possibilities:

1. Company Limited by Guarantee – Thus it does not have a share capital. In this formation shareholders agree to stump up some further sum on dissolution of a company (S.7). These are prevalent in the charity/not for profit sectors.

2. Corporation Sole – This has one shareholder/director. The main qualification is that the director must be a natural person (S.129)

3. Unlimited Companies – There is no limit on its members liability (S.8). Generally there is little purpose for them save for tax purposes.
Definitions

- S.3 of the Act defines “director” in relation to a body corporate to include-
  (a) Any person occupying the position of a director of the body (by whatever name called); and
  (b) Any person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of the body are accustomed to act;
• Further at S.3 a “member” is defined to mean a member of a company.
• Per S.92(1) & (2) the subscribers to the memorandum and articles become the members of the company on the effective date of registration of the Company.
• Any other person who later agrees to become a member does so when their name is entered into the register of members – S.92(3)
S.3 of the Act further defines “officer” in relation to a company or other body corporate to mean-

(a) Any director, manager or secretary of the company or body; and

(b) Any other person who is, because of a provision of this Act, to be treated as an officer of the company or body for the purposes of the provision.
• There can be no company without shareholders.

• The privilege they obtain from being removed from the company is to be protected from the attentions of the company’s creditors.
Shareholders’ Responsibilities

- Shareholders’ primary responsibilities are:-
  1) to subscribe for shares and inject capital into the company (S.30).

  ***The share is an interest measured in money – Farwell J in Borland’s Trustee v. Steel Brothers & Co. Ltd (1901) 1Ch.279 [commenting on forerunner to s.33, CA2006 equiv. to our s.30];
2) To appoint the right people as directors;

- The board as a whole needs to contain a mix of expertise and show a balance between executive management and independent non-executive directors.
- The South African King report (King Report) reporting within a racially mixed region stresses the importance of a good demographic balance.
- Another key factor of diversity is gender - Constitution,2010 – Article 27(8)
The King Report further identified the following moral attributes that Directors ought to have:

1. Conscience – acting with intellectual honesty and independence.
2. Inclusivity – especially of stakeholders;
3. Competence;
4. Commitment/diligence
5. Courage – having the courage to take the necessary risks.
3) To remove those directors they do not want;
   No limitations have been imposed on removal of directors and conspicuously missing is the unwritten requirement for Directors’ resignation letters and affidavits which we had become the norm. It remains to be seen if these will still be required by the Companies Registrar.

4) To ensure that the information they receive is properly assembled and adequate.
Rights of Members are set out at Part VIII as follows:
1) To be sent a proposed written resolution;
2) To require circulation of a written resolution;
3) To require directors to call a general meeting;
4) To receive notices of general meetings;
5) To require circulation of a statement;
6) To appoint a proxy to act at a meeting;
7) To receive the company’s annual financial statement and reports; and
8) The right to require the circulation of a resolution of the AGM of the company (Public Companies) – s.114(3)
Company Directors–Part IX of the Act

• The Companies Act, 2015 has made a formal statement of the obligations of directors at the key of which are:-

1) Directors must act within powers granted to them by the constitutive documents (S.142). Any acts outside are *ultra vires* and directors may become personally liable for them.

2) They must act in such a way as to promote the success of the company (s.143)

3) They must exercise independent judgment in the execution of their duties (s.144);

4) They must apply reasonable care, skill and diligence to their tasks (s.145);

5) They are under a duty to avoid conflicts of interest (S.146); and

6) They are obligated not to accept benefits from third parties (S.147); and

7) They must declare an interest in a proposed transaction or arrangement (S.151) in writing (S.152&153).
Duty to Promote the success of the Company:

The requirements of this duty are difficult to define and those the Act provides a list of the issues to keep in mind. Thus when exercising this duty directors need to consider:-

(i) The longterm consequences of their decisions;
(ii) The interests of their employees;
(iii) The need to develop good relationships with customers and suppliers;
(iv) The impact of the Company on the local community & environment;
(v) The desirability of maintaining high standards of business conduct and a good reputation; and
(vi) The need to act fairly as between all members of the Company.
• Duty to avoid conflict of interest

This often means a situation where a director may be influenced and tempted not to act in the best interest of the Company. As agents directors

(i) are therefore enjoined to retain their freedom of action and not fetter their discretion;

(ii) Owe a fiduciary duty to avoid conflict of interest and personal interest;

(iii) Must not obtain any personal advantage from their position without the consent of the company.
Directors’ Transactions requiring Member Approval

• Division 5 outlines the following transactions which require shareholder approval:-
  1) Credit Transactions (S.155);
  2) Director’s Long-term Service Contracts (s.157);
  3) Substantial Property Transactions (S.158);
  4) Loans to Directors (S.164)
Liabilities of Directors
Division 12

- There are huge potential risks under the new Companies Act for non-compliance;
- These comprise both fines, imprisonment or sometimes offences which carry combination of fines and/or imprisonments.
- Directors are liable for all false or misleading statements in Company financial statements and reports (S.703(1) if they knew or ought to have known that the statements were untrue/misleading/reckless (S.703(3)).
- They are liable to compensate the company for any loss suffered as a result (S.703(2)).
- They are not however personally liable for civil claims to rescind or repudiate agreements (S.703(5))
Disqualification of Directors
Part X

• This part empowers the Court to issue an order disqualifying a Director, Secretary or Liquidator of a Company and or barring a person from participating in the formation and/or management of a company.

• The Court will have due regard to whether the company became solvent while the director was serving as well as his/her conduct whilst in service.

• A person who serves whilst disqualified becomes personally liable for the debts of the Company (S.224). In addition to this they are liable to a fine of Kshs.1million

• The Registrar is mandated to enter the names and particulars of such a person in a dedicated register(S.227).
Thank you