STATUTORY, COMMON LAW AND OTHER DUTIES OF DIRECTORS

Paper for CIS Corporate Governance Conference on 10 to 11 September 2009

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ABSTRACT

This paper examines the composition of boards, the independence of directors and the duties of directors in depth. The term “director” has a wider meaning than most people think and challenges the reader to think about who should be a director; what the fiduciary relationship really involves; and what the true meaning of independence is. It goes on to consider the “codification” of the duties of directors and challenges some of the provisions of the King III code.

Key words

A system, direction and control and leadership, independence, accountability, stakeholders
Meaning of the word ‘director’

A ‘director’ is a member of the board of a company, as contemplated in section 66 or an alternate director and includes any person ‘occupying the position of a director or alternate director, by whatever name designated’. Section 66 recognises different types of director.

King 2 also recognized the existence of ‘shadow directors’. These are people who are not officially appointed as directors, they do not complete the consent to act form nor comply with other formalities on appointment, nor do their particulars appear in the register of directors and officers. Despite this, these people may be able to give instructions to the Board, and on whose instructions the Board does indeed act. King 2 discouraged the existence of shadow directors.

The 2008 Companies Act recognises the following types of director:

<table>
<thead>
<tr>
<th>Type of director</th>
<th>Characteristics</th>
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</thead>
<tbody>
<tr>
<td>(a) An <em>ex officio</em> director</td>
<td>An <em>ex officio</em> director is a person who holds office as a director of a company solely as a result of that person holding another office or title or status. Ex officio directors are not appointed by the shareholders. An <em>ex officio</em> director of a company has all the powers and functions of any other director, except to the extent that the company’s MOI restricts such powers and functions. Such director has all of the duties and is subject to the liabilities of any other director.</td>
</tr>
<tr>
<td>(b) A MOI appointed director</td>
<td>Such director does not have to be appointed by the shareholders. The MOI can specify how and/or by whom such a director is appointed.</td>
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<tr>
<td>(c) An alternate director</td>
<td>The definition of ‘director’ specifically includes an alternate director.</td>
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</tbody>
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1 Section 1 definition in the Companies Act 71 of 2008 (hereinafter referred to as the 2008 Companies Act)
2 The word ‘director’ specifically includes an alternate director of the company. For the types of director recognised by section 66 see discussion below
3 Section 1 and section 66 (4) (a) (ii)
4 See ‘Practical Issue’ in this paragraph for further explanation
5 Section 66 (4) (a) (i)
An alternate director may be appointed or elected depending on contents of the MOI.

An ‘alternate director’ is defined as a person elected or appointed to serve, as occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company. Section 66 (4) (a) (iii) provides that a MOI can provide for the appointment or election of one or more persons as alternate directors.

In the case of a profit company at least 50% of alternate directors must be elected by shareholders.

(d) An elected director

In the case of a profit company at least 50% of directors must be elected by shareholders.

(e) A temporary director

A MOI can provide for the appointment of a temporary director who is appointed in order to fill a vacancy. Unless the MOI provides otherwise, the directors may appoint a temporary director.

In *Howard v Herrigel* 1991 (2) SA 660 (A) the Court held that ‘it is unhelpful and even misleading to classify company directors as ‘executive' or 'non-executive' for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them. No such distinction is to be found in any statute. At common law, once a person accepts an appointment as a director, that person becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf.’

For the purposes of section 76 (section 76 provides for ‘Standards of directors conduct’) the 2008 Companies Act also includes as a ‘director’ all of the following:

- Directors
- Alternate directors

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6 Section 1 and section 66 (4) (a) (iii)
7 See section 1 definition of ‘director’
8 Section 1 definition of alternate director
9 Section 66 (4) (b) and section 68
10 Section 68 (3)
11 Section 76 is discussed later
• A prescribed officer
• Members of board committees (even if they are not Board members)
• Members of the audit committee (who all have to be Board members)

Therefore, in discussing the duties of ‘directors’ it must be noted that the word ‘directors’ must, for the purposes of determining standards of conduct, be applied in a wider sense than is first obvious.

Board composition, independence and directors’ duties

As to Board composition, King 3 has a recommendation that there should ideally be a majority of non-executive independent directors (Para. 67) because this reduces the possibility of conflicts of interest. However very little guidance is given as to what is meant by ‘independence’. King 3 states (Para. 68) that a lack of available and sufficiently experienced directors should not be a reason for boards not to seek to constitute the majority of the non-executive directors as independent. I personally find this comment quite alarming. Is it suggesting that it is permissible to appoint a buffoon to the Board, and this can be justified because such a person is independent? Take, for example, the Australian bottom-of-the-harbour schemes. Such directors were truly independent, but they hardly added value. In practice the issue of independence may lead to the appointment of directors who are so far removed from the business that they simply do not know what is going on, and this could have unfortunate consequences for the well-being or sustainability of a company.

Some commentators take the view that if a director has been a director of a board for a lengthy period of time, length of service in itself can impair that director’s independence. I respectfully disagree with that assertion, and would like to suggest that in practice, the continued appointment of a director who is experienced in the matter of a company’s business is far more useful and will have far greater positive impact on a company’s sustainability than a newcomer who is appointed solely because he or she is independent and new.

I would respectfully suggest that ‘independence’ relates to the manner in which a director carries out his or her duties. What I mean by this is as follows: in the first instance, directors are accountable to the company itself and they are not agents or representatives of shareholders or any other stakeholders. As was made clear in PPWAWU National Provident Fund v Chemical, Energy, Paper, Printing, Wood and Allied Workers’ Union 2008 (2) SA 351 (W), directors must act independently regardless of the views or decisions of those who appointed them. In this case the Court said………….. A director is in that capacity not the servant or agent of a shareholder who votes for or otherwise procures his appointment to the board……………………………………in carrying out his duties and functions as a director,
he is in law obliged to serve the interests of the company to the exclusion of the interests of any such nominator, employer or principal..." Surely this is what is really meant by ‘independence’? If this is the case, then all directors should be independent, not just a majority of them.

Duties of directors: where are they found?

It is submitted that the duties of directors are to be found in the following places (in this order):

- The Companies Act
- The common law
- Other statutes
- A company’s own constitution (MOI)

The obvious omission from the above list as to where the duties of directors are to be found is Codes of practice, such as the King 3 Code. I have intentionally made that omission, for reasons that I will shortly give.

Whilst some of the directors’ common law duties are stated in the new Companies Act, one must bear in mind that the provisions in the Act are subject to, and not in substitution for, any duties of a director under the common law. The courts may still have regard to the common law, including past case law when interpreting the provisions of the Act, and it has been made clear that the reform of company law in South Africa does not seek to discard the foundation laid down for company law over the century, but to introduce new legislation, where necessary, that is suitable and apt for the unique constitutional and culturally diversified South African economy.

King 3 and the duties of directors vs. duties of managers

King 3 itself states that the Code will apply to all companies ‘regardless of the manner or form of incorporation or establishment’, and companies must adopt an ‘apply or explain’ policy. However I must respectfully point out that none of the King Codes have statutory backing, although, as far as listed companies are concerned, the JSE has adopted some of the recommendations. Accordingly, as far as King 3 is concerned, I personally disagree with the ‘apply or explain’ principle, because it elevates a set of principles and recommendations to that of law.

King 3 attempts to impose itself on companies by stating that ‘..any failure to meet a recognised standard of governance, albeit not legislated, may render a board or individual director liable at law’.
In my opinion, it is this sort of utterance that may cause the King Code to be elevated to a position that is beyond and misrepresentative of its legal standing.

Firstly, in my opinion, assuming that King 3 really introduces something new into corporate life, many companies will find that the costs of complying with the Code may very well exceed the benefits of compliance, and shareholders would rather see the monetary successes and rewards of being in business distributed to them by way of dividends, or being profitability reinvested in the company, rather than amounts being spent on compliance issues. The impact of non-compliance on the share price or value could be positive if the directors continue to deliver growth and dividends to shareholders, irrespective of lack of compliance with the Code. In my opinion this is particularly true of SMMEs and it may well be that non-adherence to the King Codes could be fully justified and explained on the basis that shareholders have voted or otherwise agreed to dispense with the principles enunciated in the Code.

I would also respectfully like to suggest that certain parts of King 3 are wholly inappropriate as far as directors and their duties are concerned.

For example, under stakeholder relationships, King 3 in Para. 18 provides that (and I quote) “Notwithstanding that the law directs the board only to act in the best interests of the company as a whole, the board should strive ... to achieve ... an appropriate balance between the interests of its various stakeholders ... The board, while accountable to the company, should take account of the legitimate expectations of its stakeholders in its decision-making”.

Thus King 3 stresses the need to engage with stakeholders, and for there to be an effective management of stakeholder relationships and states in Para.5 that “Companies need to realise that stakeholder expectations, even if not warranted, need to be managed and cannot be ignored unless the board after due consideration, decides that it is appropriate to ignore such expectations”.

I respectfully suggest that there is an important distinction between being a ‘manager’ and a ‘director’. Whilst a unitary board structure, consisting of both executive and non-executive directors may fudge this issue, and whilst King 3 and the 2008 Companies Act, I respectfully submit, sometimes ignore this distinction, I believe that a board of directors should not ‘manage’ a company. This should be for ‘management’ to do. It is for the Board to determine strategy, direction and leadership, and then for managers to implement such decisions. Therefore, I suggest, it is for management to manage stakeholder relationships, and it is not for the Board to do so.

I would however concur with King 3 that (Para. 48) that the board should ensure that there is transparent and relevant communication with stakeholders. I therefore take the view that the need to liaise and interact with stakeholders must not be
overemphasised in practice, and that directors only need to be accountable to stakeholders, firstly, in the sense that certain stakeholders are entitled to certain information, and, secondly, in the sense that a company must fulfil its legal obligations towards stakeholders. As to the latter I accordingly point out the following:

- Shareholders are entitled to dividends, if and when declared,
- Employees are entitled to financial reward on the basis negotiated between themselves, their representatives and the company
- Suppliers are entitled to be paid for goods and services provided. In other words, directors must manage this relationship by ensuring that the company can pay its debts when they become due (the liquidity test).

I would therefore caution any director or Board from over-interacting with stakeholders, because it is the directors and the directors alone that are ultimately responsible for the sustainability of the company and should make decisions based on what is good for the company itself. Directors are not the agents of shareholders, employees, suppliers or other stakeholders.

Most certainly, for example, if the directors take a course of action that leads to disaster, I am of the opinion that it would be no excuse whatsoever for the directors simply to argue that the decision to take such a course can be justified because the shareholders or employees agreed to that decision or demanded it. Directors must independently act in the interests of the company.

**Duties of directors: 2008 Companies Act**

Directors need to know what their duties are, and directors must be aware of what is expected of them, because the standards of director’s conduct can influence the profitability of a company, determine the extent of foreign and domestic investments and ultimately determine the success of a company.12

Therefore, perhaps in an attempt to create certainty, certain duties of directors have been partially codified in the 2008 Companies Act. Codification does not entail a rigid fixation of law, but a proposed code with provisions that, if used correctly by the courts, can ultimately lead to development of the law, based on the existing principles of South African common law.13

A distinction should also be drawn between complete codification and partial codification. Complete codification entails the use of a body of rigid rules. Complete

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codification cannot accommodate an environment that keeps on changing as would a statutory scheme that is based on broader principles. Partial codification entails adopting the general principles of law but allows some room for the development of the common law. The provisions in the Companies Act relating to directors duties are a partial codification of the company law, and the common law principles remain, but only to the extent that they have not been narrowed by the 2008 Companies Act.

**Duties of directors: section 66**

Section 66 provides that ‘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 of the powers and perform any of the functions of the company, except to the extent that the Act or the company’s Memorandum of Incorporation (‘MOI’) provides otherwise. It is therefore clear that both the Act and the MOI can curtail the powers, and thus the duties, of the board of directors.

I do have some difficulty with the wording of section 66 because, based on what I have suggested above there is a distinction between directors and managers. I therefore propose that the Companies Act 2008 should merely state that the business of a company must be managed, not ‘by’, but purely ‘under’ the direction of its board.

In terms of the King Code the key functions of the board of directors are the following:

(a) To give strategic direction to the company;

(b) To ensure that management implements board plans and strategies; and

(c) To be responsible for the performance and affairs of the company and to retain full and effective control over the company.

It is therefore apparent that a lot is expected of the Board.

**Duties of directors: section 76 of the 2008 Companies Act**

Section 76 introduces new law, entitled ‘Standards of directors’ conduct’, in the form of a codified regime of directors’ duties, which includes (1) a fiduciary duty, and (2) a duty of reasonable care. The provisions governing directors’ duties are supplemented by other new provisions addressing conflict of interest (section 75), and directors’ liability (section 77), and indemnities and insurance (section 78).

\[14\] *Ibid*
The fiduciary duty

The 2008 Companies Act does not introduce anything new in section 76 regarding a director’s fiduciary duty. In *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C) it was confirmed that a director stands in the fiduciary relationship to the company of which he or she is a director, even if he or she is a non-executive director (*Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) at 678B - C.) The Court stated that it ‘is a long-established principle of South African law that such a fiduciary duty exists and that the breach thereof is remediable by means of an interdict’ and the Court referred to a long list of cases dealing with the fiduciary duty including *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (W) at 426E - J; *Knox D'Arcy Ltd and Others v Jamieson and Others* 1992 (3) SA 520 (W) at 529B - D; and *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) at 179B - 186D.) The Court also made it clear that the common-law fiduciary duty of directors owed to the company subsists even after the appointment has ceased, and referred to numerous authorities, including *Multi Tube Systems (Pty) Ltd v Ponting and Others* 1984 (3) SA 182 (D) ; and *Sibex Construction (SA) (Pty) Ltd and Another v Injectaseal CC and Others* 1988 (2) SA 54 (T).

A fiduciary duty simply means that a director of a company must exercise the powers and perform the functions of director in good faith and in the best interests of the company. The director owes the duty to the company itself and not to shareholders or other stakeholders.

A director must not use the position of director, or any information obtained as a director, to gain personal advantage or for personal gain, nor advantage for any other person, other than the company itself. Nor must the director cause harm to the company. However in terms of section 76 of the 2008 Companies Act a director must not cause harm to the company or to a subsidiary. In terms of the common law directors never owed fiduciary duties to a subsidiary.

In *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 a director of the plaintiff company had purchased property in circumstances under which it was his duty to have acquired the property not for himself but for the company. He thereafter re-sold the property to the company. The company was held to be entitled to claim from the director the profit he had made out of the transaction. The Appellate Division held that the action was neither one for breach of contract nor for damages arising from a delict. It arose because the director breached his fiduciary duty to the company. The court held that: ‘where one man stands to another in a position of

\[\text{15} \text{ 177}\]
confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other’s expense or place himself in a position where his personal interests conflict with his duty.’

There are however limits to the duties that a director owes to his or her company. In Ghersi and Others v Tiber Developments (Pty) Ltd and Others 2007 (4) SA 536 (SCA) the provisional curator had recommended the institution of proceedings against the directors for a statement of account of all property developments and opportunities undertaken by them over the previous 23 years which were not offered to the company, for debatement of the account and for payment of all profits made by them. The Court held that it does not follow that, because a person is a director of a company which engages in property development, such person is automatically, in the absence of an agreement to the contrary, obliged to offer all property developments of whatever nature to the company, on pain of being held to have breached his or her fiduciary duty to the company and being required in consequence to hand over profits made from the developments not so offered. It is therefore apparent that the facts of each case are important in determining whether or not a person has acted in breach of the fiduciary duty owed to his or her company.

Section 75 deals specifically with a director’s personal financial interests, and provides that if a director’s personal interests conflict with those of the company, the director should disclose the conflict of interest to the shareholders or the board of directors of the company.

In Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd 2000 (3) SA 806 (C) it was held that clearly a director acts in breach of his fiduciary duty to the company where he sabotages the company’s contractual opportunities for his own advantage, or where he uses confidential information to advance the interests of a rival concern or his own business to the prejudice of those of his company. In the Cyberscene case whilst the respondents in this case were still directors of a company (‘Cyberscene’), they made a presentation to the City of Tygerberg for the marketing of a product which was exactly the same product as Cyberscene’s product. But they had done this for their own account, not on behalf of the company of which they were directors. The Court held as follows: ‘This conduct was clearly unlawful as the respondents have placed themselves in a situation of conflict of interest and duty with CyberScene. The respondents have set up a business in direct competition with CyberScene and they have also replicated the entire business of CyberScene using its assets, goodwill, trading name and proprietary information………..The respondents were under a duty not to interfere with existing contracts of CyberScene and the maturing business opportunities accruing to it. The presentation by the respondents to the City of Tygerberg….constitutes clear proof that the respondents acted in breach of their fiduciary duties owed to CyberScene.’
A director must communicate to the board any information that comes to the director’s attention (section 75 (2) (b), unless the director reasonably believes that the information is:

- immaterial to the company;
- generally available to the public;
- known to the other directors

A director is also not compelled to disclose information where a legal or ethical obligation of confidentiality prevents him from disclosing the information.

An example of the misuse of information could be where the director commits insider trading in terms of the Securities Services Act 36 of 2004. It is important to remember that the duty of directors relating to the misuse of information as contained in the Company’s Act is not limited to when a director commits insider trading. A director could be liable for breach of the statutory duty not to misuse information even where the misuse of the information does not constitute insider trading.

**The duty to act with care, skill and diligence (section 76 (3))**

The Companies Act has partially codified the duty of skill and care.

An objective test is applied to determine what the reasonable director would have done in the same situation, but there is also a subjective element in that the general knowledge, skill and experience of the particular director in question are taken into account.

Section 76 thus provides that a director must act with the degree of care and skill (1) that may reasonably be expected of a person carrying out the functions of a director and (2) having the general knowledge, skill and experience of that director

To illustrate this point take the following example: an employee devises an ingenious plan that causes company funds to be embezzled. The plan is so clever that the directors cannot objectively be accused of negligence. However one of the directors had uncovered a similar fraud at a company of which he was previously a director. If he had been alert he would have recognised the signs of the same method used to defraud. He falls foul of the subjective test.16

16 See JS McLennan, TSAR 2009:1 page 184 onwards ‘Directors’ fiduciary duties and the 2008 Companies Bill’
In *Du Plessis v Phelps* 1995 (4) SA 165 (C) the Court made it clear that liability in the event of a director failing to take reasonable care in the management of the company's affairs is based upon the principles of the *lex Aquilia*. The basic requisite for liability under the *lex Aquilia* is fault (*dolus* or *culpa*), which results in loss to the claimant. Liability for a breach by a director of his fiduciary duties, on the other hand, does not necessarily involve *dolus* or *culpa*. Where damages are claimed for breach of a fiduciary duty, even though the claim is not based on fault, it is necessary for the company to allege and prove the causal connection between the damages claimed and the breach of a fiduciary duty giving rise thereto.

**A statutory defence in terms of the 2008 Companies Act**

Section 76 (4) provides that a director satisfies the statutory obligations if

- The director has taken steps to be informed
- The director had no financial interest in the matter or disclosed such interest; and
- The director had a rational basis for believing the decision was in the best interests of the company

The 2008 Companies Act thus introduces the business judgment rule into South African Company law. Section 76 (4) is thus a deeming provision regarding compliance by directors of their obligations, and, in my opinion, significantly narrows the common law duties of a director.

The business judgement rule entails that a director should not be held liable for decisions that lead to undesirable results, where such decisions were made in good faith, with care and on an informed basis, which the director believed was in the interest of the company. In support of the business judgment rule it is argued that apart from the exemption from liability, the rule also serves as a motivation for capable persons to undertake the position of directorships, and that it encourages directors to engage, safely, in risk-taking activities.

It is also important to note that a director is entitled in terms of section 76 to rely on certain other person’s *performance*

Employees: on one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed;

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17 Coetzee & Kennedy-Good 2006 27(2) Obiter 278.
• Legal counsel
• Accountants
• Professional persons

Committees: on a committee of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.

Persons to whom the Board may reasonably have delegated the duty to perform one of more of the board’s functions that are delegable under applicable law

It is also important to note that a director is entitled to rely on information obtained from 1 to 5 above.

**Section 214: duty to ensure that financial statements are not misleading**

Section 214 provides that if any financial statement of a company is false or misleading, any person who is ‘a party’ (as defined) to the preparation, approval or publication of that statement is guilty of an offence

**Directors’ duties: liquidity and solvency**

In my opinion, one of the most important duties of a director, both in terms of the new Companies act and in terms of King 3, is to ensure that the company is both liquid and solvent.

King 3 specifically provides that (Para. 51) the board should disclose that the company is a going concern, and whether it will continue as a going concern. King 3 (Para. 60) provides that the board should consider the consequences involved where it becomes evident that the company will be unable to pay its debts as they fall due in the ensuing six months, or if it is evident that the company will become insolvent in the immediately ensuing six months.

The new Companies Act itself lays great emphasis and importance of the concepts of ‘liquidity and solvency’. The new Companies Act provides that the solvency and liquidity test must be applied in each of the following circumstances:

When a company wishes to provide financial assistance for subscription of its securities in terms of section 44;

• If a company grants loans or other financial assistance to directors as contemplated in section 45;
• Before a company makes any distribution as provided for in section 46;
• If a company wishes to issue capitalization shares in terms of section 47;
• If a company wishes to acquire its own shares as provided for in section 48;

Moreover, a company will, according to section 128(2) (f), be financially distressed in the following circumstances:

If the company is unlikely to be able to pay all its debts as they become payable within the next six months;

If the company is likely to become insolvent (i.e. its debts are likely to be more than its assets) within the next six months.

Section 4 of the Act basically provides that a company will satisfy the solvency test if, considering all reasonable foreseeable financial circumstances at that time, the assets of the company, ‘as fairly valued’, equal or exceed the liabilities ‘fairly valued’.

Section 4(2)(b) provides that in applying the solvency and liquidity test the board or any other person must consider a ‘fair valuation’ of the company’s assets and liabilities including any reasonably foreseeable contingent assets and liabilities, and may consider ‘any other valuation’ that is reasonable in the circumstances.

Section 4(2) provides that any information to be considered must be based on accounting records that satisfy the requirements of section 28 and on financial statements that satisfy the requirements of section 29.

Section 28: records must be kept to enable a company to satisfy its obligations with regard to the preparation of its financial statements;

Section 29: this section emphasis the need to have ‘fair presentation’ and to the need to comply with IFRS.

It is therefore suggested that financial information based predominantly or entirely on historic cost accounting methods is unlikely to meet the requirements of the Companies Act.

**Directors’ duties: indemnification and directors’ insurance**

The company cannot undertake not to hold a director liable for breach of fiduciary duties and any provision in an agreement, the Memorandum of Incorporation or rules of a company, or a resolution adopted by a company, whether express or implied, is void to the extent that it directly or indirectly purports to relieve a director of a duty. Except to the extent that a company’s Memorandum of Incorporation provides
otherwise, the company may advance expenses to a director to defend litigation in any proceedings arising out of the director’s service to the company.

The company is entitled to take out indemnity insurance to protect a director against any liability or expenses for which the company is permitted to indemnify a director. The company may also take out indemnity insurance to insure itself against any expenses that the company is permitted to advance to a director or for which the company is permitted to indemnify a director.

Directors’ duties and the use of committees

Section 72 of the 2008 Companies Act provides that the board may appoint any number of committees and delegate any authority of the board. It is however important to note that the Board does not appoint the audit committee in terms of the 2008 Companies Act. It is appointed by the shareholders.

King 3 encourages the use of Committees and makes specific provisions for the audit committee and the risk committee.

Whilst King 2 specifically stated that directors cannot shield or hide behind committees, and King 3, for example (Para. 45) specifically provides that the use of an Audit Committee does not diminish the ultimate responsibility of the Board to ensure the integrity of a company’s financial reporting, in my opinion, in practice, boards may very well leave matters to committees, and the formation and operation of powerful committees with extensive functions, specifically relating to risk and audit, may very well result in a two-tier board, with the board of directors merely rubber-stamping every ‘decision’ of those committees (albeit that the decision of a committee is cloaked or described as a ‘recommendation’).

In other words, whilst King 3 allows directors to delegate powers to a committee, in practice this may result in an abdication, not a delegation of those powers and directors need to ensure that this does not happen.

Section 72 (3) of the new Companies Act provides that the board of directors will remain liable for the proper performance of a director’s duty despite the delegation of the duty to a committee. This statutory provision must not be overlooked by directors and they need to guard against a ‘rubber-stamping’ approach.

That important matters might be left to a committee and not be properly decided by the board of directors as a whole, can perhaps be seen from the King recommendation (Para. 8) that there is a need for the audit committee as a whole to have a thorough understanding of the complexities of IFRS, SA GAAP, Global Reporting Initiative standards and any other financial reporting framework. When a committee consisting of such highly qualified individuals meets and makes a
recommendation, it is certainly going to be a very brave director that speaks against such recommendation when that recommendation comes before the board as a whole. Such recommendation is likely in practice to be rubberstamped without query or discussion.

Whilst on the topic of committees, it is interesting to note that the new Companies Act provides that a director-appointed committee may include persons who are not directors of the company, but section 72 (2) (a) provides that such person cannot be a person who is not ineligible or disqualified to be a director. Furthermore a non-director appointed to a board committee will not have any voting rights on any matter to be decided upon by that committee. King 3 on the other hand (Para. 142) provides that board committees should only comprise members of the board.

**Corporate governance and directors’ duties: conclusion**

All company law is about corporate governance

- A system
- Direction and control and leadership (the Board is the focal point)
- Achievement of objectives
- Sustainable manner: planet, people, profit
- Accountability
- Stakeholders