

Directors' Legal Risk Guide

Understanding Directors' Duties Under South African Law.

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Purpose of This Guide

Serving as a director of a company carries significant legal responsibilities. Directors are required to act in the best interests of the company and must comply with various statutory and fiduciary duties.

Failure to comply with these obligations may expose directors to personal liability, regulatory penalties, and reputational damage.

This guide provides a practical overview of the legal duties of directors under South African law and outlines the key risks that directors should understand when managing a company.



Legal Framework Governing Directors

Directors' duties in South Africa arise primarily from:

- Information regarding the employer
- Job title and job scope
- Remuneration and payment intervals
- Working hours
- Leave accrual
- Notice periods
- Reference to the Disciplinary Code

The Companies Act codifies many of the duties historically recognised under common law.



Core Duties of Directors

Duty to Act in Good Faith

Directors must exercise their powers in good faith and for a proper purpose.

This means that directors must act honestly and in a manner that they reasonably believe is in the best interests of the company.

Duty to Act in the Best Interests of the Company

Directors must place the interests of the company above their personal interests.

Decisions should always be made with the objective of promoting the long-term success and sustainability of the business.

Duty to Avoid Conflicts of Interest

Directors must disclose any personal financial interests in matters being considered by the company.

Where a conflict exists, the director may be required to recuse themselves from the decision-making process.

Duty of Care, Skill and Diligence

Directors must exercise the degree of care, skill and diligence that would reasonably be expected from a person carrying out the same functions.

This includes:

- Being properly informed before making decisions
- Participating actively in board meetings
- Ensuring adequate oversight of company operations



Personal Liability of Directors

Under certain circumstances, directors may be held personally liable for losses suffered by the company.

Examples include:

- Breach of fiduciary duties
- Acting recklessly or negligently
- Trading while the company is financially distressed
- Authorising unlawful distributions

Personal liability can arise both under statutory provisions of the Companies Act and under common law.



Financial Distress and Business Rescue

Where a company becomes financially distressed, directors must consider whether the company should enter business rescue proceedings.

Business rescue is a statutory process designed to facilitate the rehabilitation of financially distressed companies.



Governance Best Practices for Directors

Directors can significantly reduce legal risk by implementing sound governance practices.

Recommended practices include:

- Holding regular board meetings
- Maintaining proper minutes and corporate records
- Implementing internal compliance programmes
- Obtaining professional advice when necessary

Good governance practices help demonstrate that directors have acted responsibly and in accordance with their duties.



Early Warning Signs of Legal Risk

Directors should be alert to warning signs that may indicate potential legal exposure.

These may include:

- Persistent cash flow difficulties
- Significant unpaid debts
- Disputes between shareholders or directors
- Regulatory investigations or compliance concerns
- Internal governance failures

Early intervention can often prevent legal risks from escalating.



When Directors Should Seek Legal Advice

Directors should consider obtaining legal advice where:

- The company is experiencing financial distress
- Significant commercial disputes arise
- Regulatory investigations begin
- Major corporate transactions are being considered
- Shareholder disputes develop

Early legal advice can assist directors in managing legal risk and ensuring compliance with their statutory duties.

Conclusion

Directors play a critical role in the governance and management of companies. The responsibilities associated with this role carry significant legal obligations.

By understanding their duties and implementing sound governance practices, directors can significantly reduce the risk of personal liability and contribute to the long-term stability of the company.

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