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**<u>Duties and Liabilities of Directors</u>**

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The recent Steinhoff debacle has dominated conversation across South Africa over the festive season. In light of this, the duties and liabilities of directors has found renewed interest with Markus Jooste's actions forming the basis of the debate. This article will attempt to provide some clarity on the role of directors and the fiduciary duties they may owe to the company, and in doing so may provide the reader with a better understanding of the matter.

Section 66 of the Companies Act ("the Act") states that management of the company vests in the board of directors. The Act grants directors the authority to exercise all the powers and perform all the functions of the company, except to the extent that the Act or the company's Memorandum of Incorporation (MOI) provide otherwise. Prior to the introduction of the Act the duties of company directors were governed by the South African common law. Failure to adequately perform to these standards could lead to personal liability and monetary damages. The new Act does not attempt to eradicate the common law position, but rather attempts to codify and clarify the position. Despite this codification, the common law still plays an instrumental role in giving content to the duty.

In addition to common law, the Act extends the list of fiduciary duties owed to the company and provides that liability should encompass both the shareholders as well as the directors of the company. Section 76(3) of the Act deals with the standard expected of directors and states that they should exercise their powers and perform their functions acting in good faith and for a proper purpose, whilst considering the best interests of the company. This entails acting within the company's capacity at all times, and exercising one's powers for the purposes for which they have been assigned. Let's consider the following example: Company X is ripe for a takeover. The directors are then offered a large retrenchment package to assist the takeover, which they wilfully accept. This is in their own best interests, but is a takeover in the company's best interests? If not, this would expose them to liability in terms of section 77 of the Act.

Furthermore, the Act provides that directors should act with a degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions as that director, bearing in mind the knowledge of that specific director. According to section 76(4) a director is expected to disclose any material information to the board at the earliest practical opportunity. Further, according to section 75 any conflict of interest should also be disclosed, and decisions should be made free of external pressures and in an unfettered manner. The matter of *Regal v Gulliver* served as an illustration that directors also may not make profit from their office. This ensures that directors do not use their position to gain any unfair advantage. This extends to ensuring that corporate opportunities available to the company are not seized by individual members of the board for their own benefit. In *Bellairs v Hodnett* the court clarified this position when it stated that one should look at the company's intention in order to determine whether the corporate opportunity fell within the company's ambit of business. In any instance where it does, the director can be held liable for hindering the company in furthering its enterprise.

With the above in mind it is clear that should a director further his own interest above the company's, as alleged in the Steinhoff case, he or she would be in breach of their fiduciary duty and stand to be liable for any loss, damages or costs sustained by the company. The Act provides the mechanisms to expose improper conduct by the board, and in doing so protects the company itself from suffering the full consequences. Should the board of directors be found to have known of the irregular activities conducted by a specific director, they may also face personal liability and be held accountable.

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