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COVID-19 and Directors: Your Duties and Liabilities in the Coronavirus Crisis

There are significant obligations placed on directors by the Companies Act and personal and criminal liabilities if they fail to meet these obligations.

As a director you will no doubt be focusing on critical issues like keeping your business afloat and solvent (the CIPC has waived its right to intervene when a company becomes temporarily

insolvent due to the lockdown and other restrictions imposed. This concession will be withdrawn 60 days after the lifting of the National Disaster regulations), don't forget that the Companies Act is still in force.

The coronavirus has created an unprecedented situation which demands swift, decisive action by directors – for example, the President only gave the country 72 hours' notice before the lockdown came into effect, which gave little time for directors to react to the new reality.

No change in your duties or liabilities

Despite the coronavirus there is no change to the duties or liabilities of directors. They must perform their role:

- "in good faith…,
- in the best interests of the company
- with the degree of care, skill and diligence that may reasonably be expected of a person -
    - carrying out the same functions in relation to the company as those carried out by that director; and
    - having the general knowledge, skill and experience of that director."

"Good faith", "best interests" and "care, skill and diligence" are onerous terms. For a director to be protected against falling foul of these provisions that director needs to show that he/she took diligent steps to be informed of the issue and made a rational decision in the best interests of the company. This is known as the Business Judgment Rule and courts look to this when considering a director's personal liability.

The impact of the King IV Report

When considering the Business Judgment Rule, the courts have relied on whether a director followed the King IV Code of Good Governance when reaching their decision.

One issue that will arise with the coronavirus is that King IV mandates that a company be a good corporate citizen and part of this is to look after the health and safety of employees (following the requirements of the Occupational Health and Safety Act and now government's Disaster Management Act Regulations) – for example, were adequate steps taken in terms of the National State of Disaster declared by the President such as social distancing (working from home where feasible) and ensuring employees had access to masks, hand sanitisers and so on at work?

Failure to comply with King IV in this scenario means directors will not be able to rely on the Business Judgment Rule and can be held personally liable for losses incurred.

Will your indemnity insurance cover you?

Directors can take out indemnity insurance, covering claims awarded, in their personal capacity, when they commit "wrongful acts". However, the insurance will not apply if there is "wilful misconduct or wilful breach of trust" by the director (check your policy's exact wording). An example might be the director being convicted under the Occupational Health and Safety Act.

As a director you could find yourself being held personally liable for your decisions and being denied access to your indemnity insurance cover.

Dealing with the pandemic increases the pressure on

directors but doesn't absolve them of their liabilities.

Tips for Managing your Staff Working from Home

In this brave new world of COVID-19, many people are working from home. Even after there is a cure for the virus, this trend will likely continue.

Researchers at Harvard University have come up with some good ways to ensure you get maximum productivity and loyalty from your employees working remotely.

Key points

1. **Both managers and staff miss face to face meetings** – managers worry how effectively their people are working and employees miss the support and guidance they get from managers.

   Managers should introduce structure and discipline into their interactions with their staff – setting up a time each day (or whatever is needed) to connect to each other and, possibly, the team the employee is in. This can cover all the employee's and team's work requirements, bringing them up to date with events in the company. Not only does this improve productivity but it increases staff morale and loyalty.

2. **Access to information** can become difficult between staff members – for example, a relatively new employee asks a staff member for information who initially ignores the request until the new staff person starts sending out more aggressive emails.

   Managers need to be aware of this type of conflict and focus on new employees to iron out any potential difficulties.

3. **Employees get lonely** and can over time feel they've been cut adrift which is bad for their stress levels and can lead to a drop in productivity.

   If managers don't have good listening skills and empathy, then they need to add these to their armoury and be on the lookout for loneliness manifesting in people who report to them. In the initial stages, it may pay to also have Human Resources contact employees working remotely.

4. **Home distractions**. Working from home can lead to distractions of members of staff by spouses and family.

The company needs to ensure that the employee has the required technology and IT security in his or her home. Having a separate office in their homes is also important.

5. **Staff need time to catch up with their colleagues' personal lives** and the manager should allow time for this when there are video calls. This will reinforce that employees belong to and are part of a team.

There is much to learn in terms of skills and keeping staff morale and productivity at high levels, when employees work from home.

How Different Will Our Landscape Be Post-Coronavirus?

"Prediction is very difficult, especially if it's about the future" (Niels Bohr)

Pandemics kill more people than wars – the introduction of the Black Death plague led to 14th Century Europe losing 40% of its population within two years. What will our world look like when normal life begins to return?

Predicting the future can never be an exact science, but the consensus seems to be that the following four main trends are, in line with historical precedent (except perhaps the 1918 Flu Pandemic which was dwarfed by the effects of the First World War) likely to await us -

1. ***Labour is stronger, capital is weaker***

   A recurring feature of pandemics is that workers get higher wages for up to four decades after the end of the pandemic. Already, a strike at Amazon has led to better benefits for workers. In South Africa, we have seen health workers demanding better protective equipment.

   Research shows that this increase comes at the expense of capital which means lower returns for shareholders.

2. ***Globalisation will be weakened***

   Coronavirus has exposed the flaws within global supply chains, such as an overreliance on China supplying key medical ingredients. Governments are reducing this risk by turning to local manufacture and

services for such ingredients. Thus, globalisation will be clipped in favour of local production and services – creating opportunities for South African companies.

3. ***Slow recovery***

   The end of a war is accompanied by massive investment as businesses and infrastructure are rebuilt. This usually quickens economic growth. Pandemics result in no or anaemic growth – there is no scope for massive investment and economic recovery takes a while to reboot.

   This is exacerbated by people feeling down and exhausted after the pandemic. They are cautious and save money, contributing further to the economic malaise. This reduction in economic activity leads to low interest rates.

4. ***Victimisation***

   Another thread running through post-pandemic times is people looking for someone to blame for the virus – often foreigners become the targets. Here with our record of xenophobia, this is something we need to guard against.

Whilst the historical evidence of events after a pandemic points to difficult times, there may be opportunities for your business in, for example, the reduced global supply chain. You will also need to keep an eye on your staff to keep their morale up.

Be Ready for a SARS Lifestyle Audit

We read about Eskom staff having to undergo lifestyle audits so that corruption can be identified and stamped out.

SARS have been conducting lifestyle audits since 2007. These audits are conducted when SARS suspects that the taxpayer is not declaring all his or her income and thus is underpaying tax due.

SARS have access to many sources of information

Data can be accessed from:

- Your banks
- The Deeds Office for property transactions

- Financial institutions for mortgage loans or motor vehicle finance
- Vehicle registrations
- Social and other media where your lifestyle can be ascertained
- Perhaps most significantly jealous neighbours or "friends" who tip off SARS that your lifestyle exceeds the purported income you earn (SARS actively encourage people to tip them off when they think people they know are living beyond their means).

How do SARS select people for lifestyle audits?

SARS does not disclose the criteria it uses to start probing taxpayer's affairs or how it selects those who have to complete a lifestyle audit. If you are selected, you have to complete the audit in the time set out by SARS.

One individual selected demanded to know the reasons why he was picked, and refused to complete the 26 page "lifestyle questionnaire" sent to him by SARS (seemingly after a 'third party' tip off). He had never registered as a taxpayer, nor had he ever submitted tax returns. The matter went to the High Court which rejected the individual's right to demand "SARS confidential information" and ordered him to provide the information required by SARS, on pain of committal to prison for contempt of court until he submitted the lifestyle questionnaire.

What to expect if you are selected

You will need to provide details of day to day living expenses including rent or bond payments, groceries, entertainment, vehicle expenses, holidays – in fact every item of cost you and people related to you incur. These will be reconciled to bank statements. In addition, SARS will probe all sources of your income.
In doing this process SARS can request information going back five years. If you don't have the necessary documentation to justify income or expenditure, then SARS can levy taxes on these amounts. Keep good records.

It pays to be honest and as thorough as possible when completing this process. As noted above SARS have many sources of information to check the data provided by you.

The bad news

If a taxpayer has been under-declaring income or cannot justify expenses that have been claimed, then SARS will issue assessments for these amounts. Penalties of up to 200%, plus interest may be levied by SARS who can also report the taxpayer to the National Prosecuting Authority for potential criminal proceedings. The only bit of good news is that SARS do not use search and seizure operations when conducting lifestyle audits – these are for criminal cases that SARS pursues.

Lifestyle audits are nerve racking and risky for taxpayers. Keep good records and consult your accountant before submitting information to SARS.

Your Tax Deadlines for May 2020

- 7 May – Monthly PAYE submissions and payments
- 25 May – VAT manual submissions and payments
- 28 May – Excise Duty payments
- 29 May – VAT electronic submissions and payments
- 29 May – CIT Provisional Tax Payments where applicable
- 31 May - End of Employer Annual Reconciliation.

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