# The International Bar Association Company Director Checklist – South Africa

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## Introduction

This checklist is intended to serve as a practical guide to the main duties and obligations of the directors of

- listed public companies which are incorporated in South Africa; and
- private companies incorporated in South Africa

arising primarily from the following legal sources:

- Companies Act 71 of 2008
- Common law
- JSE Listings Requirements
- The King Report on Corporate Governance (King IV)
- Financial Markets Act 19 of 2012

If any specifics of listed public companies are relevant, see the third column of this checklist below.

## Disclaimer

This checklist is informational in character only and is not intended to be comprehensive in all respects or to serve as a substitute for professional advice. In all cases, however, specific legal advice should be sought. This checklist was last updated on 12 January 2022.

| DUTIES AND OBLIGATIONS OF THE DIRECTORS | | | |
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| | **Action/issue** | **Specifics of listed public companies (if relevant)** | **Comments/notes** |
| | **Before appointment** | | |
| **1. Items to understand** | Directors must have a good working knowledge and understanding of their fiduciary duties and duty of reasonable care, skill and diligence, in particular as set out in sections 75 and 76 of the Companies Act.<br><br>Directors must also peruse the memorandum of incorporation (MOI) of the company and the shareholders agreement (if any), as these may limit or qualify their powers in terms of general law.<br><br>Directors must understand the business, corporate structure and operations of the company.<br><br>Non-executive directors are not expected to devote as much time and attention to the affairs of the company as executive directors, however they must nevertheless apply themselves fully at board meetings and in the context of *ad hoc* attendances as may be required of them.<br><br>The director's role, term of office, remuneration, reimbursement for expenses and specific duties should be set out in an appointment letter. | In terms of the JSE Listings Requirements, the listed company's sponsor must be satisfied that new directors have had explained to them by the sponsor the nature of their responsibilities and obligations arising from the listings requirements. In particular, directors must understand what is required of them to enable holders of securities and the public to be able to appraise the position of the issuer on an ongoing basis and to avoid the creation of a false market in the issuer's securities once they are listed.<br><br>Directors must have a working knowledge of the rules regarding insider trading, the disclosure of inside information, and market manipulation.<br><br>Directors must also have a working knowledge of the principles set out in the King Report on Corporate Governance (King IV). | Directors of listed companies must sign and submit to the JSE a declaration in terms of Schedule 13 of the JSE Listings Requirements, which sets out a number of questions to be answered regarding the director's qualifications, experience and integrity.<br><br>There are stock exchanges in South Africa other than the JSE, and each has its own set of listings requirements. Whilst the content of these may differ in a number of material respects, broadly the principles with regard to directors and governance have common themes across all exchanges. In this checklist, the focus is from a JSE listings requirements perspective, as the JSE remains by far the largest stock exchange licensed in South Africa.<br><br>The rules relating to fiduciary duties and obligations of directors, apply also to "prescribed officers". These are persons who are not on the board of directors but nevertheless exercise, or regularly participate in the exercise of, general executive control over the company or over a significant portion of its business and activities. |
| **2. People to meet with** | Directors must meet with the company's management team, and it would be prudent to also be introduced to and have a discussion with the company's professional advisors. | Directors of listed companies should meet with the company's sponsor, which is the advisor primarily tasked with guiding the company through its obligations under the exchange's listings requirements / rules. | For companies listed on the JSE's alternative exchange (which is for companies with smaller market capitalisations) the "designated advisor" takes the role of the sponsor. |

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| | | A new director will initially have extensive interaction with the sponsor as it is the sponsor's obligation to ensure that it is satisfied with regard to the director's understanding of his duties in terms of the listings requirements. | |
| **3. Documents to review** | The MOI and shareholders agreement of the company should be perused.<br>A director should peruse the past 3 annual reports of the company.<br>Any other business or company documentation that may be provided by the board to the new director, as preparatory reading material, should be perused.<br>There should be a working knowledge of the company's directors & officers (DO) insurance policy, if there is such in place.<br><br>As a general rule, a director has access to all information and documentation of the company insofar as same is necessary for the proper fulfilment of his fiduciary duties. | A listed company would additionally have a number of internal policies on directors' dealings, price sensitive information, ethics, conflicts of interests and remuneration. A director should peruse and have an understanding of what these policies entail. | |
| **Ongoing duties** | | | |
| **4. Points for attention** | Directors owe a fiduciary duty to the company, and a duty to act with reasonable care, skill and diligence.<br><br>The company's business and affairs are run by or under the direction of the board. The board must take decisions by resolution, by way of a majority vote. An individual director has no powers to bind the company unless these are delegated / entrusted to him by the board.<br><br>The board may reasonably delegate any of its functions or powers, subject to the principles | Directors must ensure that a listed company complies with its ongoing, continuing obligations under the listings requirements. These pertain to financial disclosures and announcements regarding material developments / information.<br><br>Directors of listed companies may further be liable for administrative fines should they breach the listings requirements of the exchange, or participate in / facilitate breaches by the company of the listings requirements. In the listed environment there is an enhanced and stringent duty of transparency and to | It is recommended that directors undergo a training course on their fiduciary duties and duty of care, skill and diligence.<br><br>There may be civil liability to the company, and potentially to third parties, for loss or damages suffered as a result of a breach of a director's duties.<br><br>Material / gross breaches of duty, or dereliction of duty, may result in a director being declared a "delinquent" by the high court, which would result in the director being disqualified from holding any directorship in a South African company. |

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| | set out in more detail below with regard to delegation. | ensure the accuracy and fullness of information that is published to shareholders.<br>Directors of listed companies are, additionally, subject the rules on insider trading and disclosure of inside information. | |
| **5. Legal status of directors** | Directors occupy a *sui generis* position / office vis-à-vis the company. They are fiduciaries towards the company, and must act in its best interests at all times.<br><br>A director has the right to carry out his fiduciary duties and to access all documentation of the company for this purpose.<br><br>South Africa follows the "unitary board" model in terms of which there is one board consisting of both executive and non-executive directors. Unless the MOI of the company provides otherwise, each director has one vote, i.e. the votes of executive directors do not carry more weight than non-executive directors. | No specifics regarding listed companies. | Executive directors hold two capacities within a company, namely as company director and as an employee of the company. Their relationship with the company is accordingly regulated by two sets of laws, namely company law and employment law.<br><br>However there is no difference in the legal status between executive and non-executive directors.<br><br>The MOI of the company may provide for the appointment or election of alternate directors, who act as a substitute when the "principal" director is unavailable. Alternate directors are directors in their own right and must exercise their judgment independently. They have the same status as directors. |
| **6. Parties to which duties are owed** | Directors owe fiduciary duties to the company, and must at all times act in good faith in the best interests of the company.<br><br>Directors do not owe a legal duty to individual shareholders. Directors must promote the interests of the general body of shareholders, both future and present.<br><br>Directors do not owe a general duty to creditors. Their duty to creditors is to not trade recklessly, with gross negligence, or with an intent to defraud creditors. Insolvency laws also protect creditors, insofar | No specifics regarding listed companies. | Traditional company law dictates that the duty to act in the best interests of "the company" translates into a duty to act in the best interests of the shareholders as a whole, both current and future.<br><br>King IV adopts a "stakeholder inclusive" approach whereby the interests of other stakeholders, such as the community, employees, customers, suppliers and regulators are taken into consideration, however the predominant stakeholder is the general body of shareholders. |

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| | as the impeachment of pre-insolvency dispositions is concerned. | | |
| **7. Powers of the board of directors** | 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 Companies Act or the company's MOI provides otherwise.<br><br>The Companies Act limits the powers of the board to effect certain fundamental transactions, corporate actions, fundamental changes or out-of-the-ordinary course matters. These matters typically require shareholder approval by special resolution (75% of votes exercised). It is therefore important for directors to understand the limits of their corporate powers. | The listings requirements of the exchange provide for additional shareholder approvals that may be required for certain transactions, which go over and above the Companies Act.<br><br>These would include:<br>• related party transactions<br>• category 1 transactions (30% or more of the listed company's market capitalization<br>• issues of shares for cash<br>• share buy-backs on a non-*pro rata* basis | Examples of matters where the board's powers are limited (and where shareholder approval is required):<br>• Amendments to the company's MOI<br>• Fundamental transactions such as mergers, business disposals or schemes of arrangement<br>• Financial assistance to related companies, or in connection with the acquisition of shares in the group<br>• Certain issues and buy-backs of shares<br>• The winding up of the company<br><br>Additionally, the MOI of the company may place additional limitations on the board's powers, for instance on material borrowings or encumbrances, entry into material contracts, changes to accounting policies, and/or the hiring of senior executive personnel. These have to be assessed on a case-by-case basis. |
| **8. Duty of loyalty** | Directors owe a fiduciary duty to the company to –<br>• act in good faith, in the best interests of the company<br>• act with a proper purpose<br>• not use their position, or information acquired in their capacity as directors, for the advantage of anyone other than the company<br>• communicate material information to the company's board at the earliest practicable opportunity, unless a legal or ethical duty | No specifics with regard to listed companies. | The duty to act with a proper purpose is typically encountered in practice in the context of the issue of fresh shares by the board. When exercising this power, the board must do so for a proper purpose, for instance raising needed capital for the company and/or introducing a strategically important investor. It cannot do so for the purpose of entrenching control with certain shareholders, diluting others, or thwarting a takeover of the company. |

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| | prohibits them from communicating certain information<br>• not appropriate or divert corporate opportunities | | |
| **9. Duty of care** | A director must act with such care, skill and diligence as would be reasonably expected from a director occupying that position. If, over and above this, a director possesses particular expertise, experience or specialisation, he will be held to a higher standard than the reasonable director, in light of his higher qualifications. | No specifics with regard to listed companies. | The duties of loyalty are, as a general rule, applicable strictly and are not based on any fault or culpability on the part of the director. Thus, for instance, a director may be guilty of breaching his duty to act with a proper purpose, even though he genuinely and reasonably believed that his conduct was in the best interests of the company.<br>The duty of care, on the other hand, is based on the fault, and the degree of negligence, of the director.<br><br>Directors are protected by the business judgment rule. |
| **10. Duty to have and maintain skills** | A director does not need to have any particular skills or qualifications in order to act as a director of the company. However, if a director does happen to possess special skills, he will be held to that higher standard. | No specifics with regard to listed companies. | |
| **11. Additional duties (confidentiality, etc.)** | Directors owe a strict common law duty to maintain confidentiality of all board information, discussions and papers. These are regarded as sacrosanct.<br><br>Directors have a common law duty to act objectively and with an unfettered discretion – therefore they may not contractually bind themselves to vote, or exercise any other directorial power, in a particular way.<br><br>These duties apply equally to so-called "nominee directors" who represent a certain shareholder or constituency. Where there is a conflict or misalignment between the | Directors must disclose to the company all dealings by them or their associates in the listed company's securities. These must be published by the company on the stock exchange's news service.<br>Directors have a duty to not deal in the company's securities during certain prohibited / closed periods, as set out in the listings requirements. | The Companies Act largely codifies the duties of directors, in section 76, however this is not a full codification. The common law duties of directors still apply alongside with those set out in section 76.<br><br>Additionally, the company may have confidentiality or information-sharing policies in place which must be observed. |

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| | shareholder's interests and those of the company, the nominee director's duty to the company prevails. | | |
| **12. Delegation of powers/authority** | The board may delegate any of its powers or functions to a committee or any officers / employees within the company.<br><br>However certain decision-making is within the exclusive domain of the board, and must therefore be exercised by the board (and not a delegate). Such matters include corporate actions and corporate capital transactions where the solvency and liquidity test must be assessed and resolved on by the board, and the approval of the company's annual financial statements.<br><br>A board committee may consist of non-directors, however they will not have a vote on the committee. | No specifics with regard to listed companies. | Delegation does not of itself absolve the board of liability / responsibility, except insofar as the audit committee's function with regard to the appointment of the independent external auditor is concerned.<br><br>The board must exercise its power of delegation reasonably and in the best interests of the company. The reasonableness and appropriateness of the board's delegation will be assessed taking into various factors such as:<br>• whether the function delegated is such as may be properly left to that person<br>• the extent that the directors have been put on inquiry of an issue or should have been put on inquiry by the exercise or ordinary care<br>• whether the board holds the belief that the delegate is trustworthy and competent<br>• the risk and importance of the issue<br>• the position of the delegate in the governance structure. |
| **13. Conflicts of interest (inc. intragroup dealings)** | It is a fundamental fiduciary duty of directors to avoid a conflict of interest, namely a situation where the director may be particularly tempted to promote his personal interests above those of the company.<br><br>In terms of section 75 of the Companies Act, a director who has a material personal financial interest, or who knows that a related person has such an interest, in a matter being considered by the board must disclose that | The listings requirements additionally regulate so-called "related party transactions", which include transactions between the listed company and its directors (or directors' associates) or with material shareholders of the listed company (i.e. a shareholder that holds 10% or more of the issued shares of the listed company). | The company may also have an internal conflicts policy, which has contractual force, and must be adhered to in addition to the legal provisions which have been referred to. |

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| | interest and recuse himself from the board's decision-making.<br><br>A "related person" includes a second company of which one is a director. Thus in group scenarios, where there are common directorships across multiple companies, where those group companies deal with each other (for example provide goods, services or financial assistance to one another) section 75 is often triggered and requires the "conflicted" director to recuse from the board decision, or otherwise the board decision should be ratified by shareholders after full disclosure.<br><br>Directors must not use their position, or information acquired in their capacity as directors, to gain an advantage for anyone other than the company.<br><br>Issues of shares to, and buy-backs of shares from, directors and related parties requires the approval of shareholders by special resolution. | Such transactions, depending on their size, typically require shareholder approval, with the vote of the related party being excluded.<br><br>Furthermore, an independent expert's fairness report may be required in respect of the related party transaction. | |
| **14. Compliance with statutory obligations** | It is the duty of the board, as the primary body responsible for the governance of the company and its affairs, to ensure that the company complies with all of its statutory obligations. The company secretary must guide and advise the board in this regard.<br><br>Basic statutory obligations include:<br>• preparing annual financial statements within 6 months after the financial year end<br>• procuring the audit of those annual financial statements (to the extent the company falls within a category | Listed companies must produce interim and annual financial statements, within 3 months of their half-year or financial year-end, as the case may be. | In terms of the governance principles in King IV, a company's board should not only ensure the company is complying with binding laws, but also with voluntary codes and guidelines that establish best practice, where applicable. |

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| | of companies requiring a statutory audit)<br>• maintaining statutory registers such as the securities register and register of directors<br>• filing annual returns with the Companies and Intellectual Property Commission (CIPC)<br>• maintaining all accounting records at the registered office of the company or such other location as notified to the CIPC<br>• ensuring the company's tax affairs are up to date<br>• complying with employment equity obligations and submitting any reports required under employment equity legislation<br>• complying with the Protection of Personal Information Act<br>• ensuring the company possesses, and has renewed (as the case may be) any relevant licences or permits applicable to the company's business / industry | | |
| **15. Disclosure obligations of listed companies** | | Additionally to the usual financial disclosures such as interim financial statements and annual financial statements, listed companies are obliged to announce, on the stock exchange news service (SENS), developments or transactions which are "price sensitive", i.e. which may have a material impact on the share price of the company. "Material" is generally regarded, as a rule of thumb, as 10%. | A listed company would have a price sensitive information policy or protocol in place which regulates the handling and dissemination of price sensitive information, as well as clearance for directors to deal in securities of the company. |

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| | | There must be equal and timeous dissemination of price sensitive information to shareholders.<br><br>Listed companies may however hold over announcing price sensitive information until the matter or transaction is final, and certainty has been reached on the matter; but as soon as it is suspected that there is a leak of the information, it must be announced.<br><br>Furthermore, all dealings by directors or their associates in the securities of the listed company, must be announced on SENS.<br><br>Listed companies must publish trading statements if there is a reasonable degree of certainty that certain metrics in its upcoming financial results will differ in a substantial respect (20%) from its last financial results.<br><br>Listed companies must announce changes to their board. | |
| **16. Potential liability** | As a fundamental rule, the company is a separate juristic person with its own assets and liabilities. Directors and shareholders are not liable for the company's obligations, unless they participated in reckless or fraudulent trading.<br><br>Directors are liable for loss or damages suffered by the company as a result of a breach of their duties.<br><br>Directors are, as a general rule, not liable to shareholders or creditors directly for loss or damages suffered by them as a result of a breach of their duties, for example any | Directors may additionally be fined or publicly censured by the stock exchange for breaches of the listings requirements. | The company may have insurance in place which protects the company and its directors in the case of claims against the directors, however such policies will not cover reckless, intentional or criminal conduct.<br><br>Shareholders may potentially invoke the "derivative action" under section 165 of the Companies Act whereby they procure that the company institutes action against miscreant directors. Thus whilst shareholders do not have a direct cause of action against directors for damages (due to the so-called "proper plaintiff" and "reflective loss" |

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| | diminution in share price or reduced recoverability of a claim. However, exceptional circumstances may be present which would bring such liability about, namely reckless trading, fraud, or misrepresentation which induced the shareholder or creditor to enter into or approve a transaction. | | principles), they may apply to court to compel the company to bring such an action. |
| **17. Duration of duties** | A director's term of office will be determined by the company's MOI and/or the appointment letter.<br><br>Shareholders have an inherent right to remove any director by ordinary resolution (after having given the director a reasonable opportunity to make representations), and no provision in the company's MOI may derogate this right of shareholders. The board may also remove a director from office, however this may only be done on certain grounds such as incapacity, disqualification or dereliction of duty.<br><br>A director's duties terminate upon him vacating office.<br><br>However director's duties may extend after they resign if they resign with the objective of appropriating a corporate opportunity of the company.<br><br>A director may also not use confidential information or trade secrets of his former company, in order to compete with that company, after his resignation. | No specifics with regard to listed companies. | A director may have agreed to a restraint of trade with the company, which will have contractual force and which will limit / restrict the ability of the director to compete with the company after termination of his office. Restraints of trade are enforceable under South African law, save to the extent such restraint is unreasonable or excessive, in which case a court has a discretion to reduce the restraint within reasonable bounds. |
| **Special circumstances** | | | |
| **18. Bankruptcy** | Where a company is financially distressed, there is an obligation on the board to consider whether the company should be | A listed company which is placed in business rescue or liquidation will have its listing | Directors should be aware of the definition of "financially distressed" as contemplated in Chapter 6 of the Companies Act. It means |

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| | placed in business rescue under Chapter 6 of the Companies Act. It must also notify its creditors and shareholders in this regard.<br><br>Where a company is placed in business rescue, a business rescue practitioner (administrator) takes over control of the management of the company, and is to derive a business rescue plan to restore the company to solvency. This plan is to be voted on by creditors (and, in some instances, shareholders as well).<br><br>If a company is beyond rescue, it will be placed in liquidation, either voluntarily (by special resolution of the shareholders), or by the court upon application of a creditor.<br><br>Directors are not liable for the debts of a company which is placed in liquidation, unless a court orders so on the grounds that the directors participated in reckless or fraudulent trading (which would include trading under commercially insolvent circumstances). | suspended or terminated by the stock exchange, as the case may be. | that it appears reasonably likely that the company will be insolvent (technically or commercially) within the ensuing 6 months. |
| **19. Takeover bids** | Takeover offers in respect of regulated companies are subject to the takeover laws as set out in the Companies Act and Takeover Regulations. The Takeover Regulation Panel has jurisdiction in respect thereof.<br><br>Directors continue to owe a fiduciary duty to act in the best interests of the company, during a takeover.<br><br>Certain powers of the board are however restricted from the time the company receives a *bona fide* takeover offer, or when an offer is imminent. The board may not, for | The listings requirements may additionally provide for some regulation of takeover bids. These mainly pertain to information disclosures to be made in the circular to shareholders. However, the main area of law which regulates such transaction, is takeover law as set out in the Companies Act (Parts B and C of Chapter 5). | "Regulated companies" include all public companies, and certain private companies namely those in which more than 10% of the issued securities have been transferred amongst unrelated parties in the past 24 months.<br><br>Under takeover law, when a firm offer is received the board must constitute an "independent board" of at least three directors who will consider the offer and opine to shareholders thereon. |

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| | instance, issue shares, make abnormal distributions, or dispose of material assets other than in the ordinary course of business.<br><br>The board must not frustrate a *bona fide* takeover bid, and must allow the shareholders a fair opportunity to consider the merits thereof.<br><br>There are high standards concerning information disclosure, accuracy of information and equal treatment of shareholders where the takeover laws become applicable. | | The procedure and substantive rules regulating takeover bids is highly complex, and the board should accordingly appoint specialist corporate and legal advisors as soon as a takeover bid is imminent. |
| **20. Market abuse/insider dealing** | Market abuse and insider dealing rules apply only in respect of listed securities. | "Inside information" is non-public, specific or precise information which, if made public, would have a material effect on the price or value of a listed security. An "insider" is anyone who learns or obtains inside information by virtue of a connection to the listed company such as being a director, officer, employee or shareholder thereof.<br><br>It is an offence for an insider –<br>• to deal in listed securities while knowingly in the possession of inside information;<br>• to disclose inside information to any third party, unless it is necessary to do so for purposes of one's employment and profession, in circumstances unrelated to any dealing in the listed securities<br>• to cause or encourage someone to deal in the relevant listed securities.<br><br>It is an offence for anyone to engage in an act or a course of conduct which creates, or is likely to create, an artificial price for listed securities | A listed company would have a price sensitive information policy or protocol in place which regulates the handling and dissemination of price sensitive information, as well as clearance for directors to deal in securities of the company.<br><br>This policy may extend beyond the ambit of the law, and may impose more stringent rules on directors than the law. |

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| | | or which creates a false or artificial market for the supply of or demand for listed securities.<br><br>In terms of the listings requirements, directors and their associates may also not deal in securities during "closed periods", such as the period between the listed company's financial year end and the publication of its financial results. This is regardless of whether the directors possesses inside information or not. | |
| **Defences** | | | |
| **21. Good corporate governance** | The board should ensure that the company has undertaken an assessment of King IV and has taken a view on the extent to which it is appropriate and practical for the company to comply with its principles.<br><br>Furthermore, the board should not follow a "tick box" approach to governance. Directors should apply their collective minds to the company's governance and corporate citizenship. Compliance with best corporate governance practice goes a long way in shielding the board from personal liability, i.e. it is important for the board to be able to demonstrate that it has put in place all governance systems and protocols as recommended by best practice. | Listed companies are obliged to comply with certain mandatory governance provisions emanating from King IV, namely:<br>• having an independent non-executive chairman, and a lead independent director who fulfils the role of the chairman as and when necessary (e.g. due to a conflict of interest on the chairman's part)<br>• having an audit committee, social and ethics committee and remuneration committee in place<br>• ensuring at least a majority of directors are non-executives, and a majority of the non-executive directors are independent | Listed companies must produce an annual integrated report, which is submitted to shareholders, wherein the company details its compliance with corporate governance principles. |
| **22. Minutes of board meetings and publication requirements** | All board resolutions must be minuted (if a board meeting was held) or recorded in a written round robin resolution. The chairman must sign board minutes.<br><br>Minutes need not be a transcript of the meeting but should capture essential points | No specifics with regard to listed companies. | In terms of section 77(3)(e) of the Companies Act, a director who participated in a board resolution pertaining to certain corporate capital / corporate finance transactions, and did not vote against the resolution despite knowing that the transaction is not authorised or in compliance with the Companies Act, will be liable for loss or |

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| | of debate and the resolutions that were taken by the board.<br><br>There is no requirement to publish board minutes or resolutions.<br><br>The company secretary must ensure that board minutes and resolutions are kept for at least 7 years after they were passed. | | damages suffered as a result of the company implementing that transaction. Such transactions include distributions, share buy-backs, share issues and certain categories of financial assistance.<br><br>It is therefore important that in the context of such transactions, the board minute or resolution accurately reflects which director(s) voted for, against or abstained from the resolution. |
| **23. Discharge and Indemnification** | A company may indemnify its directors for any loss or damages suffered as a result of a breach of their duties, however this can only be done on a case-by-case basis with regard to specific facts. It is not permissible for the company's MOI, or a resolution of the company, to contain a provision with generally exempts directors from any of their duties.<br><br>Furthermore, a company may not indemnify its directors for willful, reckless or criminal conduct.<br><br>A court may also, on application, relieve a director of liability if the court finds that the director, despite breaching his duties, nevertheless acted reasonably in the circumstances. | No specifics with regard to listed companies. | It is not common practice for companies to follow the indemnification route. Companies would instead have insurance policies in place which protect both the company and its directors in connection with breach of duty. However, as with indemnification, there are limits to the type of conduct which an insurance policy may permissibly cover. |
| **24.Insurance** | Companies may, but are not obliged to, have insurance policies (D&O insurance) in place which protect both the company and its directors in connection with breach of duty. As with indemnification, there are limits to the type of conduct which an insurance policy may permissibly cover. | No specifics with regard to listed companies. | D&O insurance policies would typically contain a provision which requires the company or director to notify the insurer as soon as reasonably practicable after learning about information / facts that a claim or investigation may be instituted against the director. Thus a director who is threatened with a claim or investigation must act swiftly in notifying the insurer of the potential issue |

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| | | | and liability, and not wait until formal proceedings are actually instituted. A delay in notification to the insurers will give the insurer the right to reject coverage of the matter. |
| **25. Resignation** | A director may resign at any time by written notice to the company. Resignation will not however absolve the director of liability for breach of duty which occurred during his tenure as director. | The resignation of a director must be promptly announced by the listed company on SENS.<br><br>The stock exchange's jurisdiction to investigate and hold a former director accountable for past breaches of listing requirements / rules, does not cease upon resignation of the director. | A director does not owe a fiduciary duty to stay on the board during difficult or troublesome times, i.e. it is not a breach of fiduciary duty to resign. However case-law has held that if the whole board resigns *en masse* this could be a breach of fiduciary duty, as the company is left rudderless. |
| **26. Restructuring of assets** | The board may in its discretion consider and approve a restructuring of assets if this will be beneficial to the company. Depending on the nature and extent of such restructure, it may require shareholder approval. | No specifics with regard to listed companies. | For instance, the board may consider statutory mergers and amalgamations with other companies, but the merged / amalgamated company must meet the solvency and liquidity test as set out in section 4 of the Companies Act. Shareholders must approve same by special resolution, and creditors must be notified in advance of the merger / amalgamation. |
| **27. ESG and D&I policies, metrics, reports** | Although not binding law, King IV recommends that the company have in place a D&I policy with regard to composition of its board.<br><br>A company which seeks to do business with government or parastatals, must ensure that it complies with the Broad-Based Black Economic Empowerment Codes of Good Practice (BBBEE Codes). This will also be applicable when dealing with many large, private sector corporations and institutions, which will regularly require that suppliers / vendors comply with thresholds as set out in the BBBEE Codes. | All listed companies must have a social and ethics committee in place.<br><br>Listed companies are, by virtue of the listings requirements, obliged to consider all of the principles and practices in King IV and must account in this regard in their annual integrated report. Thus they are obliged to have a policy in place which sets out its targets with regard to diversity and inclusion on the board. | In terms of regulation 43 of the Companies Regulations, the role of the social and ethics committee is to monitor and report to the board and shareholders on the company's compliance and standing with regard to *inter alia* the following matters:<br>• corporate citizenship<br>• charitable activities<br>• international labour law instruments<br>• international anti-corruption protocols<br>• employment equity<br>• human rights<br>• Black economic empowerment and transformation<br>• environmental law |

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| | ESG aspects are primarily within the domain of the social and ethics committee, which must be established by the board (the draft Companies Amendment Bill however suggests that with regard to public companies, this committee will in future be elected by the company's shareholders at the AGM). All companies with a public interests score of 500 or more in any 2 of the past 5 years, must have a social and ethics committee in place. | | • consumer relationship<br>• health and safety |