

Conflicts of interest



One of the fundamental duties of a director is to avoid any possible conflict of interests with the company. It is an accepted principle in South African law that, as a result of the trust placed in the director, he or she is bound to put the interests of the company before their own personal interests.

Section 75 of the Act makes clear provision for dealing with a director's use of company information and conflict of interest. Where a director has a conflicting personal financial interest (where his or her own interests are at odds with the interests of the company), he or she is prohibited from making, participating in the making, influencing, or attempting to influence any decision in relation to that particular matter. This provision seems to impose a strict duty on directors not to allow their personal financial interest to impact, in any way, on their dealings with the company. In addition, where a director has a conflicting personal interest in respect of a matter on the board agenda, he or she has to declare that personal interest and immediately leave the meeting. A director is also prohibited from any action that may influence or attempt to influence the discussion or vote by the board, and is prohibited from executing any document on behalf of the company in relation to the matter, unless specifically requested to do so by the board.

It should be noted that section 75 of the Act extends the application of the conflict of interest provisions to prescribed officers and members of board committees (even if those persons are not directors).

The conflict of interest provisions apply equally to persons related to the director. Thus, where a director knows that a related person has a personal financial interest in a matter to be considered at a meeting of the board, or knows that a related person has acquired a personal financial interest in a matter, after the board has approved that agreement or matter, the director should disclose that fact to the board. In this regard, it should be noted that for purposes of section 75 the definition of a "related person", when used in reference to a director, not only has the ordinary meaning as set out in the Act, but also includes a second company of which the director or a related person is also a director, or a close corporation of which the director or a related person is a member.

The conflict of interest provisions do not apply to a company or its director, if the company has only one director, and that director holds all the beneficial interest in all the issued securities of the company. However, where that one director does not hold all the beneficial interest in the issued securities, he or she may not approve or enter into an agreement, or determine any other matter, in terms of which a person related to him may have a personal financial interest. In these instances, the director has to obtain shareholder approval by ordinary resolution.

The provision makes it clear that conflict of interest is taken seriously by the legislature, and one may assume that the Commission and the Takeover Regulation Panel will enforce these provisions strictly.

The provisions will potentially have an impact on the way in which members of boards are selected and appointed, as membership of a number of different boards might lead to possible conflicts, which in turn means that those directors will not be able to participate in or contribute to discussions and decisions related to such matters.

“It is an elementary principle of company law, that (apart from explicit power in the articles of association) a director cannot vote for the adoption of a contract or on a matter in which he is an interested party”.

- Gundelfinger v African Textile Manufacturers Ltd 1939 AD 314

Where a director somehow acts in competition with the company, a fundamental conflict of interest is inevitable. There are a number of ways in which such a situation could occur. One is where a director takes an opportunity that could have been taken by the company, in his or her personal capacity. Another is where the director holds directorships on rival companies.

Where an opportunity arises that could have been acted upon by the company, the director is precluded from acting upon it in his or her individual capacity. The director has a fiduciary duty to pass this opportunity on to the company. The courts have held that even where the company did not have the resources to pursue the opportunity, the director who came across it was not at liberty to pursue it personally.

It is debatable whether the holding of directorships on the boards of rival companies in itself constitutes a breach of the director's fiduciary duties. However, it would be almost impossible for the director not to prejudice one of the two or more companies that he or she serves.

“It would be a most unusual situation which allowed directors... of one company to act in the same or similar capacity for a rival without actual or potential conflict situations arising with frequent regularity”.

- **Sibex Construction (SA) (Pty) Ltd v Injectaseal CC 1988 2 SA 54 (T)**

Of course, the provisions of the Act relating to conflicts of interest (as discussed above) will prevent a director from such a position

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