

19 JUNE 2019

# CORPORATE & COMMERCIAL ALERT

## IN THIS ISSUE

### In the Line of Duty: Duties of “Divisional Directors” under the Companies Act

“A divisional director can incur personal liability for a failure to comply with their duties under the Companies Act.” That should be a sentence that catches the attention of divisional directors and companies across South Africa’s commercial space.

## In the Line of Duty: Duties of “Divisional Directors” under the Companies Act

The appointment of divisional directors is becoming more and more frequent in the South African business sphere as expanding companies seek to exercise greater control over their operations.

**“A divisional director can incur personal liability for a failure to comply with their duties under the Companies Act.” That should be a sentence that catches the attention of divisional directors and companies across South Africa’s commercial space.**

The appointment of divisional directors is becoming more and more frequent in the South African business sphere as expanding companies seek to exercise greater control over their operations. Divisional directors are appointed by a company to manage a particular division or department. Generally, these divisional directors are not appointed to the board of the company and if this is the case then they do not fall under the ambit of a “Director” in terms of the Companies Act, No 71 of 2008 (Companies Act). The Companies Act also does not specifically mention “divisional directors” within the Act and does not attribute any duties to divisional directors specifically.

If a divisional director does not fall under the definition of a “Director” and doesn’t have the duties of a “Director” then “what is the issue?” you may ask.

The issue is that a divisional director of a company (when not elected to the board of directors) will still potentially fall under the definition of a “prescribed officer” under the Companies Act.

A “prescribed officer” under the Companies Act (and in particular regulation 38) is defined as:

*“Despite not being a director of a particular company, a person is a ‘prescribed officer’ of the company for all purposes of the Act (being the Companies Act) if that person;*

*exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or*

*regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.”*

Again, in general, a divisional director will exercise a great deal of general executive control and management over a significant portion (a division) of the business of a company and therefore falls under the definition of a “prescribed officer”. Note that this could apply to a number of senior managers (not only divisional directors) of a company.

## In the Line of Duty: Duties of “Divisional Directors” under the Companies Act...*continued*

CDH conducts various training sessions on director’s duties and many other aspects of the Companies Act.

### So what does this mean for divisional directors?

Divisional directors would be subject to s76 and s77 of the Companies Act, being the duties and liabilities of directors (including any common law duties). A (very) brief summary of these duties are:

1. To not use the position of prescribed officer, or any information obtained while acting in the capacity of a prescribed officer, to gain an advantage for anyone other than the company or a wholly-owned subsidiary of the company or to knowingly cause harm to the company or a subsidiary of the company and to communicate to the board any information that comes to the prescribed officer’s attention.
2. To exercise the powers and perform the functions of a prescribed officer in (a) good faith and for a proper purpose, (b) in the best interests of the company, and (c) with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions.

3. A prescribed officer must exercise independent discretion.
4. A prescribed officer must not exceed the powers provided to him/her.

These are far reaching provisions and it is important to note that personal liability can be imputed on these prescribed officers for a failure to comply with their respective duties.

Daunting.

Companies can however mitigate the risks faced by: (i) identifying prescribed officers and informing them of this designation as well as the duties and liabilities that are attributed to them, (ii) taking out insurance that covers the actions of any identified prescribed officers of the company, and (iii) running frequent training programs for directors and prescribed officers to ensure they are aware of their duties.

CDH conducts various training sessions on director’s duties and many other aspects of the Companies Act. Kindly contact us for further information on the next training session or a training session tailored to your business.

*Deepa Vallabh, Nick Wright and Mamello Thulare*

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

## OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:



**Willem Jacobs**  
National Practice Head  
Director  
Corporate & Commercial  
T +27 (0)11 562 1555  
M +27 (0)83 326 8971  
E willem.jacobs@cdhlegal.com



**David Thompson**  
Regional Practice Head  
Director  
Corporate & Commercial  
T +27 (0)21 481 6335  
M +27 (0)82 882 5655  
E david.thompson@cdhlegal.com

**Mmatiki Aphiri**  
Director  
T +27 (0)11 562 1087  
M +27 (0)83 497 3718  
E mmatiki.aphiri@cdhlegal.com

**Roelof Bonnet**  
Director  
T +27 (0)11 562 1226  
M +27 (0)83 325 2185  
E roelof.bonnet@cdhlegal.com

**Tessa Brewis**  
Director  
T +27 (0)21 481 6324  
M +27 (0)83 717 9360  
E tessa.brewis@cdhlegal.com

**Etta Chang**  
Director  
T +27 (0)11 562 1432  
M +27 (0)72 879 1281  
E etta.chang@cdhlegal.com

**Clem Daniel**  
Director  
T +27 (0)11 562 1073  
M +27 (0)82 418 5924  
E clem.daniel@cdhlegal.com

**Jenni Darling**  
Director  
T +27 (0)11 562 1878  
M +27 (0)82 826 9055  
E jenni.darling@cdhlegal.com

**André de Lange**  
Director  
T +27 (0)21 405 6165  
M +27 (0)82 781 5858  
E andre.delange@cdhlegal.com

**Werner de Waal**  
Director  
T +27 (0)21 481 6435  
M +27 (0)82 466 4443  
E werner.dewaal@cdhlegal.com

**Emma Dempster**  
Projects & Energy  
Director  
T +27 (0)11 562 1194  
M +27 (0)79 491 7683  
E emma.dempster@cdhlegal.com

**Lilia Franca**  
Director  
T +27 (0)11 562 1148  
M +27 (0)82 564 1407  
E lilia.franca@cdhlegal.com

**John Gillmer**  
Director  
T +27 (0)21 405 6004  
M +27 (0)82 330 4902  
E john.gillmer@cdhlegal.com

**Sandra Gore**  
Director  
T +27 (0)11 562 1433  
M +27 (0)71 678 9990  
E sandra.gore@cdhlegal.com

**Jay Govender**  
Projects & Energy Sector Head  
Director  
T +27 (0)11 562 1387  
M +27 (0)82 467 7981  
E jay.govender@cdhlegal.com

**Johan Green**  
Director  
T +27 (0)21 405 6200  
M +27 (0)73 304 6663  
E johan.green@cdhlegal.com

**Allan Hannie**  
Director  
T +27 (0)21 405 6010  
M +27 (0)82 373 2895  
E allan.hannie@cdhlegal.com

**Peter Hesselting**  
Director  
T +27 (0)21 405 6009  
M +27 (0)82 883 3131  
E peter.hesselting@cdhlegal.com

**Quintin Honey**  
Director  
T +27 (0)11 562 1166  
M +27 (0)83 652 0151  
E quintin.honey@cdhlegal.com

**Roelf Horn**  
Director  
T +27 (0)21 405 6036  
M +27 (0)82 458 3293  
E roelf.horn@cdhlegal.com

**Kendall Keanly**  
Director  
T +27 (0)21 481 6411  
E kendall.keanly@cdhlegal.com

**Yaniv Kleitman**  
Director  
T +27 (0)11 562 1219  
M +27 (0)72 279 1260  
E yaniv.kleitman@cdhlegal.com

**Justine Krige**  
Director  
T +27 (0)21 481 6379  
M +27 (0)82 479 8552  
E justine.krige@cdhlegal.com

## OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

### Johan Latsky

Executive Consultant  
T +27 (0)11 562 1149  
M +27 (0)82 554 1003  
E [johan.latsky@cdhlegal.com](mailto:johan.latsky@cdhlegal.com)

### Giada Masina

Director  
T +27 (0)11 562 1221  
M +27 (0)72 573 1909  
E [giada.masina@cdhlegal.com](mailto:giada.masina@cdhlegal.com)

### Nkcubeko Mbambisa

Director  
T +27 (0)21 481 6352  
M +27 (0)82 058 4268  
E [nkcubeko.mbambisa@cdhlegal.com](mailto:nkcubeko.mbambisa@cdhlegal.com)

### Nonhla Mchunu

Director  
T +27 (0)11 562 1228  
M +27 (0)82 314 4297  
E [nonhla.mchunu@cdhlegal.com](mailto:nonhla.mchunu@cdhlegal.com)

### Ayanda Mhlongo

Director  
T +27 (0)21 481 6436  
M +27 (0)82 787 9543  
E [ayanda.mhlongo@cdhlegal.com](mailto:ayanda.mhlongo@cdhlegal.com)

### William Midgley

Director  
T +27 (0)11 562 1390  
M +27 (0)82 904 1772  
E [william.midgley@cdhlegal.com](mailto:william.midgley@cdhlegal.com)

### Tessmerica Moodley

Director  
T +27 (0)21 481 6397  
M +27 (0)73 401 2488  
E [tessmerica.moodley@cdhlegal.com](mailto:tessmerica.moodley@cdhlegal.com)

### Anita Moolman

Director  
T +27 (0)11 562 1376  
M +27 (0)72 252 1079  
E [anita.moolman@cdhlegal.com](mailto:anita.moolman@cdhlegal.com)

### Jo Neser

Director  
T +27 (0)21 481 6329  
M +27 (0)82 577 3199  
E [jo.neser@cdhlegal.com](mailto:jo.neser@cdhlegal.com)

### Francis Newham

Director  
T +27 (0)21 481 6326  
M +27 (0)82 458 7728  
E [francis.newham@cdhlegal.com](mailto:francis.newham@cdhlegal.com)

### Gasant Orrie

Cape Managing Partner  
Director  
T +27 (0)21 405 6044  
M +27 (0)83 282 4550  
E [gasant.orrie@cdhlegal.com](mailto:gasant.orrie@cdhlegal.com)

### Verushca Pillay

Director  
T +27 (0)11 562 1800  
M +27 (0)82 579 5678  
E [verushca.pillay@cdhlegal.com](mailto:verushca.pillay@cdhlegal.com)

### David Pinnock

Director  
T +27 (0)11 562 1400  
M +27 (0)83 675 2110  
E [david.pinnock@cdhlegal.com](mailto:david.pinnock@cdhlegal.com)

### Allan Reid

Director  
T +27 (0)11 562 1222  
M +27 (0)82 854 9687  
E [allan.reid@cdhlegal.com](mailto:allan.reid@cdhlegal.com)

### Megan Rodgers

Oil & Gas Sector Head  
Director  
T +27 (0)21 481 6429  
M +27 (0) 79 877 8870  
E [megan.rodgers@cdhlegal.com](mailto:megan.rodgers@cdhlegal.com)

### Ludwig Smith

Director  
T +27 (0)11 562 1500  
M +27 (0)79 877 2891  
E [ludwig.smith@cdhlegal.com](mailto:ludwig.smith@cdhlegal.com)

### Ben Strauss

Director  
T +27 (0)21 405 6063  
M +27 (0)72 190 9071  
E [ben.strauss@cdhlegal.com](mailto:ben.strauss@cdhlegal.com)

### Tamarin Tosen

Director  
T +27 (0)11 562 1310  
M +27 (0)72 026 3806  
E [tamarin.tosen@cdhlegal.com](mailto:tamarin.tosen@cdhlegal.com)

### Roxanna Valayathum

Director  
T +27 (0)11 562 1122  
M +27 (0)72 464 0515  
E [roxanna.valayathum@cdhlegal.com](mailto:roxanna.valayathum@cdhlegal.com)

### Deepa Vallabh

Head: Cross-border M&A,  
Africa and Asia  
Director  
T +27 (0)11 562 1188  
M +27 (0)82 571 0707  
E [deepa.vallabh@cdhlegal.com](mailto:deepa.vallabh@cdhlegal.com)

### Jurg van Dyk

Construction & Engineering Sector Head  
Director  
T +27 (0)11 562 1216  
M +27 (0)82 826 2808  
E [jurg.vandyk@cdhlegal.com](mailto:jurg.vandyk@cdhlegal.com)

### Roux van der Merwe

Director  
T +27 (0)11 562 1199  
M +27 (0)82 559 6406  
E [roux.vandermerwe@cdhlegal.com](mailto:roux.vandermerwe@cdhlegal.com)

### Charl Williams

Director  
T +27 (0)21 405 6037  
M +27 (0)82 829 4175  
E [charl.williams@cdhlegal.com](mailto:charl.williams@cdhlegal.com)

### BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E [cdh Stellenbosch@cdhlegal.com](mailto:cdh Stellenbosch@cdhlegal.com)

©2019 8032/JUNE

