

3 MARCH 2021

# CORPORATE & COMMERCIAL ALERT

## IN THIS ISSUE

### A spotlight on the value of Social and Ethics Committees in times of crisis

On 28 February, President Cyril Ramaphosa announced that South Africa had moved from adjusted alert level 3 lockdown to alert level 1. This positive move came as new daily infections fell to around the 1,000-mark in recent days as South Africa comes out of a devastating second wave of COVID-19 infections.

## A spotlight on the value of Social and Ethics Committees in times of crisis

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Despite this positive news, there is no doubt that South Africa's path to recovery from the economic and societal devastation of the past year will be long and difficult. However, as the pandemic has illustrated, the issues faced by our society are best resolved not by government alone but with the collaboration and active participation by the private sector including NGOs, community organisations, as well as corporate South Africa.

The economic volatility and government-mandated restrictions experienced over the last year have changed the corporate landscape and illustrated the delicate balance that companies need to traverse between economic viability and social and ethical issues. Directors have been expected to respond quickly to these real economic, social and health challenges, often without having dealt with a crisis as severe as this before.

The companies that will survive the current crisis are companies which would have been able to respond quickly, not just in relation to technology and enabling "working from home" but also to support their staff and their communities.

In terms of South African company law, these issues are mandated to be dealt with by Social and Ethics Committees (SECs). SECs are statutory board committees established to ensure that companies conduct their business in a responsible manner as well as contribute to the economic and social development of the communities in which they operate.

Section 72 (4) of the Companies Act 71 of 2008 as amended (Companies Act) read with Companies Regulation 43, requires all listed public companies, state owned companies, and companies which (in any two of the previous five years) score above 500 public interest points to appoint an SEC. Despite this limited category of companies, the King Code suggests that all companies, even those that are not legally bound to do so, appoint a committee with a similar function.

Although many companies have embraced the role of the SEC, trends show that organisations have in the past begrudgingly made the appointment as a tick-box exercise, generally failing to use the committee to its full potential.

In 2017, the Department of Trade Industry and Competition (DTIC) and the Companies Tribunal hosted a seminar on SECs where the levels of non-compliance with the SEC requirement were highlighted and recommendations were made to encourage and facilitate compliance in key industries. One recommendation was that the Companies and Intellectual Property Commission (CIPC) should aggressively issue compliance notices to companies that do not comply with the SEC requirement.

## A spotlight on the value of Social and Ethics Committees in times of crisis

*...continued*

In light of the DTIC's view to take a harder line on SEC non-compliance, companies should hasten to ensure that they are compliant both in form and in substance so as not to miss the opportunity to extract real benefit from their SEC structures.

In January 2020, CIPC introduced its Compliance Checklist (Compliance Checklist) which requires companies to declare their compliance with specific mandatory sections of the Companies Act. The Compliance Checklist specifically requests confirmation of compliance with Regulation 43 and is used by CIPC to, *inter alia*, monitor and regulate proper compliance with the Companies Act.

If companies are non-compliant, CIPC takes action accordingly by issuing compliance notices and, where appropriate, penalties. The Compliance Checklist gives companies little room to hide and directors should be aware that they have a duty to ensure that the company complies with the relevant sections of the Companies Act at all times.

In light of the DTIC's view to take a harder line on SEC non-compliance, companies should hasten to ensure that they are compliant both in form and in substance so as not to miss the opportunity to extract real benefit from their SEC structures.

Whilst the focus on the ethical corporate governance and social responsibility is in the spotlight due the COVID-19 pandemic, trends in recent years have also long-evidenced the need for drastically improved standards of corporate governance. The SEC needs to assume its rightful role as the structure promoting social and ethical responsibility at the board level and facilitating good corporate citizenship.

As cumbersome as it can be to set up an SEC, its benefits significantly outweigh the potential loss companies could incur from a failure to detect unethical practices, failings in corporate governance or failure to respond to broader social issues adequately in times of crisis. The principles driven by the SEC should permeate throughout the entire organisation and the SEC should be recognised for its ability to be a value driver in good times, and an important tool to manage risk and crisis in bad times.

*Vivien Chaplin and Haafizah Khota*

## STICKING TO THE ABCS OF DDS

In this alert, our Corporate Investigations team looks at the growing requirements for comprehensive anti-bribery and corruption (ABC) or integrity due diligences as an essential feature in greater merger and acquisition (M&A) due diligences.

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### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

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.

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