

# CORPORATE & COMMERCIAL ALERT

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INCORPORATING  
KIETI LAW LLP, KENYA

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In terms of South African company law, the directors of a company owe certain fiduciary duties to that company. These duties, though founded in the common law, are codified in the Companies Act 71 of 2008 (Companies Act), to include, *inter alia*, that a director must not use their position, or any information obtained while acting in the capacity of a director: (i) to gain an advantage for themselves, or for any person other than the company, or (ii) to knowingly cause harm to the company.



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AND SERVICES

## What does POPI mean for my business?

The Protection of Personal Information Act 4 of 2013 (POPI) impacts any business which collects, stores, processes or disseminates personal information.

### WHAT IS POPI?

POPI regulates the collection, storage, use and dissemination of personal information, and promotes the protection of personal information processed by public and private bodies (referred to as responsible parties under POPI). It introduced certain conditions to establish minimum requirements for the processing of personal information.

### WHAT IS PERSONAL INFORMATION?

Personal information includes, in broad terms, the following:

- information relating to the race, gender, sex, pregnancy, marital status, national, ethnic, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, belief, culture, language and birth of a person;

- information relating to the education or the medical, financial, criminal or employment history of a person;
- the e-mail address, physical address and telephone number of a person;
- the biometric information of a person;
- the personal opinions, views or preferences of a person; and
- the name of a person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.

Personal information is found in five key areas: market research via direct marketing; online browsing from clients and customers via websites; employment agreements; customer-facing service agreements and third-party supply agreements. Personal information is collected, stored and disseminated all of the

time – sending an email, writing notes about an applicant in a job interview, filling in personal information at a security gate or building entrance, throwing documents in the bin – all of this falls within the ambit of POPI.

### WHAT DOES THIS MEAN FOR START-UPS?

All businesses that process personal information are considered responsible parties and are required to comply with the provisions of POPI.

### WHAT DO BUSINESSES NEED TO DO NOW?

Businesses should carry out a review of their company policies and procedures to ascertain the extent to which they comply with POPI's requirements and, to the extent that they fall short, they should take appropriate steps to remedy such non-compliance. In carrying out such a review, the typical areas of focus are the following:

- make sure that the business has a POPI policy;

## What does POPI mean for my business

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- make sure that the business has registered its “*information officer*” responsible for ensuring compliance with POPI and the Promotion of Access to Information Act 2 of 2000 (PAIA), including the development and publication of an access to information manual (i.e. a PAIA manual);
- check that all existing company policies and procedures are POPI compliant (including any IT policies, market research/direct marketing methods, and online terms and conditions);
- if any personal information is shared among group companies/suppliers/clients across international borders, ensure that these data transfers are carried out in compliance with the requirements of POPI;
- ensure that all customer facing documentation and supply agreements are POPI compliant;
- check that all employment agreements (including application forms, permanent, fixed-term, independent contractor, and consultancy agreements) are POPI compliant; and
- ensure that any other documents specific to the business which regulate the collection, storage or dissemination of personal information are POPI compliant (including implementing records retention and destruction policies, implementing complaints processes for breach of personal information, and educating staff members).

### WHAT ARE THE OBLIGATIONS ON BUSINESSES?

Businesses must ensure that the necessary consents for the collection, storage and dissemination of personal information are obtained, as and when required. In this regard, POPI prescribes certain minimum

requirements for where, how, and why personal information is collected, stored, and transferred. The important steps include: (i) obtaining consent from the persons whose personal information is collected, to the extent required; (ii) restricting any collection, storage and dissemination to what is strictly necessary and the specific and lawful purpose for which collected; (iii) ensuring that records of personal information are not retained any longer than is necessary for achieving the purpose for which the information was collected; (iv) ensuring information accuracy; (v) ensuring that persons are aware what information is stored, the reason for storage, and their obligations and rights as regards such personal information; and (vi) ensuring that the necessary security safeguards to secure the integrity and confidentiality of the personal information collected are in place. Personal information includes so much, that compliance cannot be achieved by one person only – the whole business needs to take responsibility for POPI compliance.

## What does POPI mean for my business

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### WHAT ARE THE IMPLICATIONS OF NON-COMPLIANCE?

Non-compliance with the provisions of POPI bears the risk of incurring significant penalties. In terms of section 107 of the act, any person who obstructs the Regulator, fails to comply with an enforcement notice, gives false evidence before the Regulator, or fails to ensure lawful conditions for processing, is liable, on conviction, to a fine or imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment. Any person who fails to notify the Regulator if processing is subject

to prior authorisation, breaches the duty of confidentiality, obstructs the execution of a warrant, or fails to comply with an enforcement notice is liable, on conviction, to a fine or imprisonment for a period not exceeding 12 months or to both a fine and such imprisonment. The act also provides for certain administrative fines, which may not exceed R10 million.

**JUSTINE KRIGE**



## 2021 WINNERS OF M&A DEAL FLOW 2021

### 2021

1<sup>st</sup> by M&A Deal Flow.  
2<sup>nd</sup> by General Corporate  
Finance Deal Flow.  
2<sup>nd</sup> by BEE Deal Value.  
3<sup>rd</sup> by General Corporate  
Finance Deal Flow.  
3<sup>rd</sup> by BEE Deal Flow.  
4<sup>th</sup> by M&A Deal Value.

### 2020

1<sup>st</sup> by M&A Deal Flow.  
1<sup>st</sup> by BEE Deal Flow.  
1<sup>st</sup> by BEE Deal Value.  
2<sup>nd</sup> by General Corporate Finance Deal Flow.  
2<sup>nd</sup> by General Corporate Finance Deal Value.  
3<sup>rd</sup> by M&A Deal Value.  
Catalyst Private Equity Deal of the Year.

### 2019

**M&A Legal DealMakers of the  
Decade by Deal Flow: 2010-2019.**  
1<sup>st</sup> by BEE M&A Deal Flow.  
1<sup>st</sup> by General Corporate  
Finance Deal Flow.  
2<sup>nd</sup> by M&A Deal Value.  
2<sup>nd</sup> by M&A Deal Flow.

### 2018

1<sup>st</sup> by M&A Deal Flow.  
1<sup>st</sup> by M&A Deal Value.  
2<sup>nd</sup> by General Corporate  
Finance Deal Flow.  
1<sup>st</sup> by BEE M&A Deal Value.  
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Lead legal advisers on the  
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## Can a director be incompetent and still not breach their fiduciary duties?

In terms of South African company law, the directors of a company owe certain fiduciary duties to that company. These duties, though founded in the common law, are codified in the Companies Act 71 of 2008 (Companies Act), to include, *inter alia*, that a director must not use their position, or any information obtained while acting in the capacity of a director: (i) to gain an advantage for themselves, or for any person other than the company, or (ii) to knowingly cause harm to the company.

Furthermore, directors must perform their functions in the best interests of the company and with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions and having the general knowledge and experience of that director. One would think this means that where a person displays incompetence as a director they would be in breach of their fiduciary duties. However, the decision of the Supreme Court of Appeal (SCA), in the case of *Mirchandani v Unica Iron & Steel (Pty) Ltd* [2022] JDR 0980 (SCA), relating to the breach of fiduciary duties in terms of the common law, highlights that this is not necessarily the case.

### CASE LAW

Mr. Mirchandani was a technical director of Unica Iron & Steel (Pty) Ltd (the company). Mirchandani was responsible for commissioning and running the company's steel-rolling mill (Unica 1), which ran successfully. After some years, the relationship between

Mirchandani and his two co-directors soured, and his employment was terminated. Following his termination, Mirchandani reported the company to the Gauteng Department of Rural Development, alleging that in establishing Unica 1, the directors deliberately breached the provisions of the National Environmental Management Act 107 of 1998 (NEMA), in that Unica 1 was operating without complying with the provisions of NEMA. He alleged that NEMA was not complied with as a result of a deliberate and conscious decision by the directors of the company not to comply with the provisions of NEMA, as to do so would have delayed Unica 1 coming into operation by up to two years, and the company was eager to begin generating income. It must be noted that NEMA does make provision for the rectification of non-compliance, but this process was never followed. The company was subsequently charged in terms of the Criminal Procedure Act 51 of 1977 and fined R5 million.

The company then lodged a damages claim against Mirchandani for the R5 million penalty on the basis of, *inter alia*, a breach of fiduciary duty, which was granted by the High Court in Pretoria. However, upon Mirchandani appealing the decision, the SCA formed a different view. The SCA found that during his tenure as director of the company, Mirchandani pursued the interests of the company rather than his own in ensuring that Unica 1 was operational and profitable before his dismissal. The SCA stated, referring to the judgment in Master of the High Court, Western Cape Division, *Cape Town v Van Zyl* [2019] JOL 41274 (WCC), that a "breach of fiduciary duties entails something materially different from the negligent discharge" of one's functions; a breach of fiduciary duties "connotes disloyalty or infidelity" to the organisation one serves, and "mere incompetence is not enough". It was found that Mirchandani was, at most, incompetent in that he (and his co-directors), "with eyes open",

## Can a director be incompetent and still not breach their fiduciary duties?

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breached the provisions of NEMA in the furtherance of the company's interests and not his own, and as a result, Unica 1 became operational and profitable. Tsoaka AJA stated that although Mirchandani "may have done his 'incompetent best' to see to it that Unica 1 was operational and profitable, it cannot be said that he was unfaithful and disloyal to Unica". It was thus held by the SCA that the company's claim for damages arising out of a breach of fiduciary duties in terms of the common law failed.

### CONCLUSION

Although it can be argued that Mirchandani did not attempt to gain an advantage for himself and that he performed his functions in the interests of the company, it is clear that he did not perform with the degree of care, skill and diligence that may reasonably be expected of a director in his position. While it may not have been possible to bring the claim in this case under the provisions of section 76 of the Companies Act,

the facts of the case demonstrate a standard of conduct on the part of directors which is objectively unacceptable and illustrates the advantages of the codification of the duty of directors to perform their duties with care, skill and diligence.

In addition to pursuing a director for a breach of the duty to conduct themselves with the degree of care, skill and diligence that would be expected of someone in their position, where a director has acted incompetently, but still in the interests of the company, stakeholders could, subject to the company's memorandum of incorporation, adopt an ordinary resolution removing that director in terms of section 71 of the Companies Act or, in terms of section 162(5) of the Companies Act, and apply to court to have the director declared delinquent on the grounds that they acted in a manner that amounted to gross negligence, willful misconduct or breach of trust in relation to their duties to the company.

**REFENTSE CHUENE AND  
VERUSHCA PILLAY**

## 2022 RESULTS

### CHAMBERS GLOBAL 2021 - 2022

ranked our Corporate & Commercial practice in Band 1: corporate M&A and in Band 2 capital markets: Debt and capital markets: equity.

**Ian Hayes** ranked by **CHAMBERS GLOBAL 2022** in Band 1: corporate M&A.

**David Pinnock** ranked by **CHAMBERS GLOBAL 2022** in Band 1: corporate M&A: private equity.

**Johan Latsky** ranked by **CHAMBERS GLOBAL 2022** as a Senior Statesperson for capital markets: equity.

**Jackie King** ranked by **CHAMBERS GLOBAL 2022** in Band 2: capital markets: debt.

**Peter Hesseling** ranked by **CHAMBERS GLOBAL 2022** in Band 2: corporate M&A.

**Willem Jacobs** ranked by **CHAMBERS GLOBAL 2022** in Band 2: corporate/M&A and in Band 3: corporate/M&A: Private equity.

**Sammy Ndolo** ranked by **CHAMBERS GLOBAL 2022** in Band 4: corporate/M&A, Kenya.

**David Thompson** ranked by **CHAMBERS GLOBAL 2022** in Band 4: corporate/M&A.



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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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