

Focus on Directors

Presenter: Caryn Maitland CA(SA)

Operating in a crisis

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Presenter

Caryn Maitland

Caryn is a qualified CA(SA and RA, who has lectured extensively at UKZN (and other institutes) where she lectured Advanced Financial Accounting up until 2011 as well as co-ordinating the module on the Pietermaritzburg campus and was appointed Section Head of Financial Accounting and Deputy Head of the School of Accounting (managing the Pietermaritzburg campus) prior to leaving UKZN.

She has conducted independent workshops and seminars for professional accountants since 2006 on various topics and has consulted on a number of technical issues. Since January 2011, she has focused on her own business as technical freelance consultant and trainer to those working within the accounting profession. Caryn is a technical advisor to the SAICA Eastern Region Midlands District, Northern District and Southern District Associations, as well as the Small Practice Interest Group in Durban – specialising in financial reporting (IFRS, IFRS for SME's and general accounting), assurance, legislation and ethics. Caryn has a passion for Corporate Governance, which together with her Companies Act specialism and Financial Management for Non Financial Management lecturing background, has served her well in consulting and advising various Boards of Directors in recent years.

Caryn is also a platform presenter for various institutes as well as many small to medium accounting practices across the country and into Southern Africa. Maitland was appointed as a visiting Associate Professor to the University of Limpopo tasked with mentoring their Financial Accounting staff (Aug 2011 to Dec 2013).

Maitland's passion is IFRS and IFRS for SME's and was delighted at the opportunity granted in 2013 to serve on the APC subcommittee constituted to investigate the need for Micro GAAP and the role of IFRS for SME's for small and medium sized practitioners. Caryn, also serves on the Joint Accountants, Auditors and Attorneys Committee of SAICA, and is part of the School Governing Body project initiated by SAICA in KwaZulu-Natal, and has been appointed as an alternative member to the APC in June 2020

Caryn was elected as the first woman Chairperson for the Midlands District Association for SAICA in 2018 and also serves on the Eastern Region SMP Committee as well as the Local Subvention Committee for SAICA. In 2019 Caryn was appointed to the SAICA Eastern Region Council. As someone who is committed to environmental affairs, Caryn serves as a non-executive director for the Institute of Natural Resources, a Non Profit Company focusing on research. Since 2018 Caryn has worked extensively with commerce and industry, assisting analysts, directors and other users of financials to interpret, prepare, analyse and forecast based on the results of financial statements.



Course Outline

Table of Content

- 1) Creating a healthy corporate culture - leadership, ethics, managing remote working environment
- 2) Companies Act requirements and responsibilities of Directors
- 3) Directors responsibility to internal controls
- 4) Directors assessment of going concern and potential business rescue challenges
- 5) Management's assessment of fraud
- 6) Looking forward to the year ahead

Quote xxx

The secret to success is to be ready for your opportunity when it comes.

- Benjamin Disraeli

Introduction

- Where have we come from, 1973 Act to the 2008 Act?
- How has business changed over the years?
- Recent corporate scandals – what role did the directors play as opposed to the shareholders?
- Looking at the general economic and political landscape the companies are trading in today?

Creating a healthy corporate culture

- Leadership
 - Tone from the top
- Strategy
- Risk management
- Corporate culture
- Ethics
- Empathy
- Remote working

CIPC and directors

Steinhoff

- Compliance notice issued giving directors 6 months to identify directors involved in falsification of accounting records and to institute criminal action against them
- Irrespective of geographical location
- S77 Directors liability and SI 62 Application to declare a director delinquent
- BoD required to give CIPC monthly reports
- Non compliance will result in a fine or imprisonment of directors
- Parliamentary portfolio committee established to interrogate how the following regulators should interact on the matter:
 - JSE, IRBA, FSB and PIC
 - Plus German and Netherland authorities
- Third compliance notice of this nature
 - Quantum Properties was first(subsequently delisted), and
 - Telkom was second (CEO had to attend governance classes and recover R6m paid to CFO)

KPMG

- Criminal compliant
- provided legal opinions and conclusions for a fee of R23 million relating to alleged criminal activity at SARS
- Deemed to be outside the mandate of KPMG SA and outside the professional expertise of those working on the report
- CIPC accused KPMG of knowingly failed to apply to apply its own risk management and quality controls

McKinsey

- Criminal compliant
- For informing Eskom that Trillian was a subcontractor, when it wasn't (no formal contract existed)
- Eskom made a R400m payment directly to Eskom, directors accused of looting public resources

SAP

- The use of a compliance software provider of an outside contractor to win business from SO Transnet
- SAP was aware that the business was not in the same line of business as SAP

Complaints made under S214(1)(c) Making a false statements, reckless conduct and non compliance with the Co Act

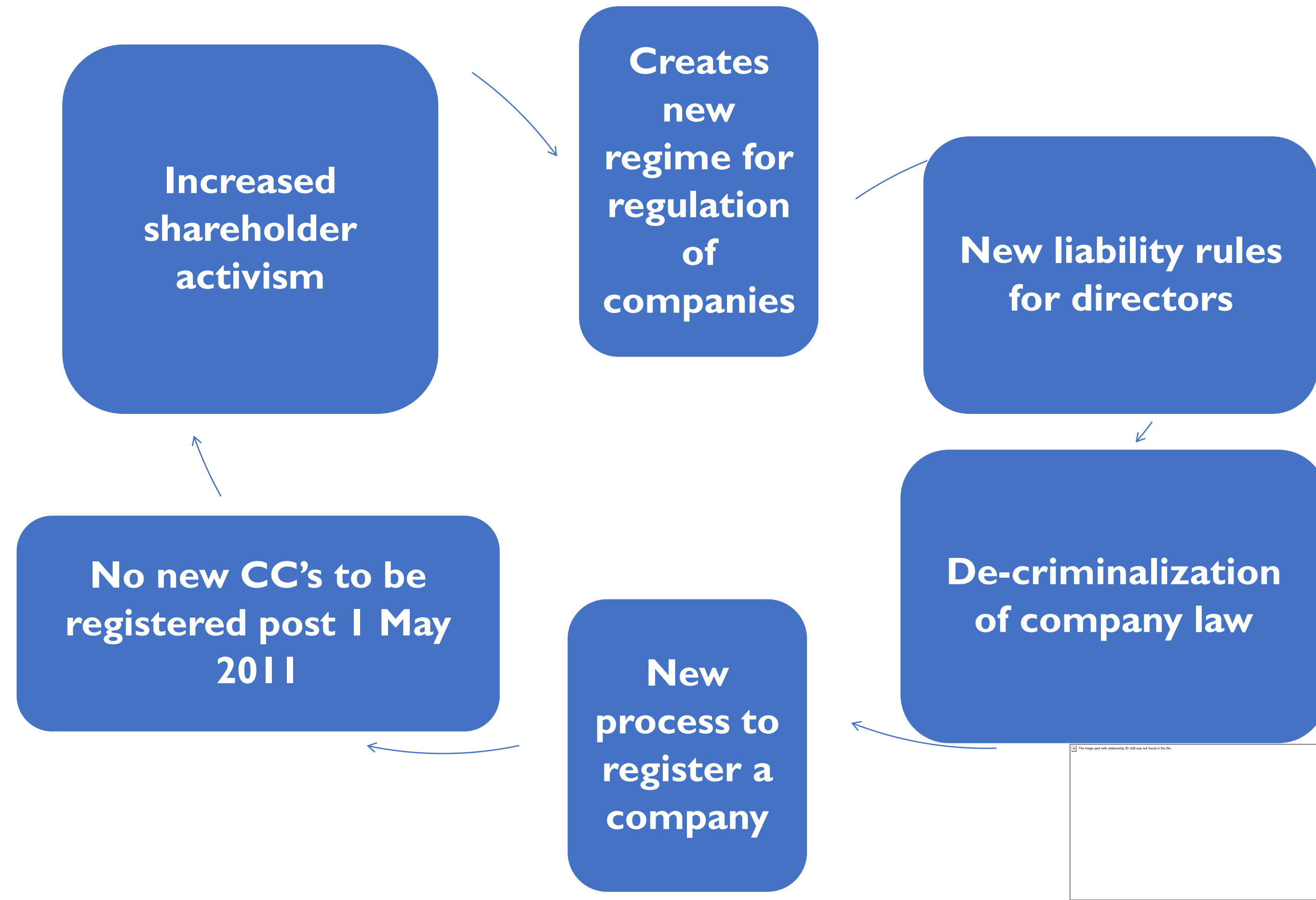
- Dudu Myeni removed as Chairwoman of SAA – CIPC challenged her on contraventions of Companies Act (related to purchase of 10 Airbus' purchased in 2013 via signed board resolutions – **convicted in 2020**)

Refresher on the Companies Act

POLICY BEHIND THE ACT



MAIN FEATURES



Who can be a Director?

DEFINITION OF DIRECTOR EXTENDED

'Director' includes an alternate director, prescribed officer, a person who is a member of a committee of the Board or the Audit Committee (irrespective of whether or not the person is also a member of the company's board)

Such officers are subject to the same duties of care, skill and diligence and to the fiduciary duties applicable to directors and held jointly and severally liable with directors

The MOI and any additional rules are also specifically binding between the company and such officers

- The company must not knowingly permit an ineligible or disqualified person to serve or act as a director
- A person who becomes ineligible or disqualified while serving as a director of the company
 - ceases to be entitled to serve as a director immediately
 - subject to section 70(2) and article pertaining to vacancies of directors.

Disqualifications per the Act

- The company may not elect as a director-
 - A juristic person or
 - an unemancipated minor, or person under a similar legal disability.

A person cannot be a director per S69 if they are

- Is an unrehabilitated insolvent;
- Is prohibited in terms of any public regulation to be a director of the company;
- Has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or
- Has been convicted, in the Republic of elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury

Can personalise requirements in MOI

- Attendance of meetings
- Qualifications
- ???

Remove a director

- Elected (as opposed to appointed)
 - By ordinary resolution of shareholders
- Incapacity, delict or negligent?
 - Shareholders or board members can apply
- By Business rescue practitioner
- Court order – delinquent or on probation

DELINQUENT AND ON PROBATION

The company, a shareholder, director, company secretary, prescribed officer, a registered trade union that represents employees of the company or other representative of the employees may apply to court to declare a director delinquent or on probation

The director in question must be a current director of the company or within the twenty four months immediately preceding the application, was a director of the company

The Commission will keep a register of all those persons declared delinquent or on probation

- 50% of the Board of Directors must to appointed/elected by shareholders
- Consider directors term of office in the Mol
 - Annual election?
 - Indefinite term of office??
- How many directors are needed
 - NPC and Public company – 3
 - Mol
 - No Board??

Owners spilt from Managers

- Importance of MOI to manage relationships
- Shareholder activism
 - They are table 13 at the wedding
- Directors need to be accountable to shareholders
- Special resolution be shareholders
 - Directors remuneration
 - Financial assistance to directors
 - Constructive notice and directors liability S77

Code of Conduct

Fiduciary Duty

- Common law vs. Companies Act
- Act in the COMPANY'S best interest, regardless as to how appointed
 - Must apply independent judgement
- Section 75 : Directors must disclose personal financial interests in decisions
 - incl. related persons
- Act within the confines of the Mol
- Just because they have the power, doesn't mean they should use it

Section 76

- Directors Conduct (incl. prescribed officers and committee members):
 - Can't personally gain
 - Can't harm company
 - Must communicate info to board.
 - Can't disclose info to third parties.
 - Must act in good faith, in best interests of Co. and to best of abilities.
- Must use reasonable diligence to adhere, allowed to rely on advice of attorneys and accountants.

Directors Liability

Different liabilities in Act

- S218 – Civil liability
- S 77 - Directors liability
 - Shareholders and directors

Directors: personal liability if contravening Co Act

- A director must exercise the powers and perform the functions of director
 - With the degree of **care, skill and diligence** that may reasonably be expected of such a person
 - S218(2) personal liability for any contravention of the Act

NB: S218(2) of Companies Act

- Compliance through personal liability
- S218(2)
 - Any person who contravenes the provisions of this Act
 - Is liable to any other person
 - For any loss or damage suffered by that person as a result of that contravention

Reckless and Fraudulent Trading

- S22, Reg 20 and 21
- A company must not carry on its business
 - Recklessly
 - With gross negligence
 - With intent to defraud any person, or
 - For any fraudulent purpose (s22)
- Liquidation of solvent and insolvent companies
 - S22 NCA and S424 of old Act...

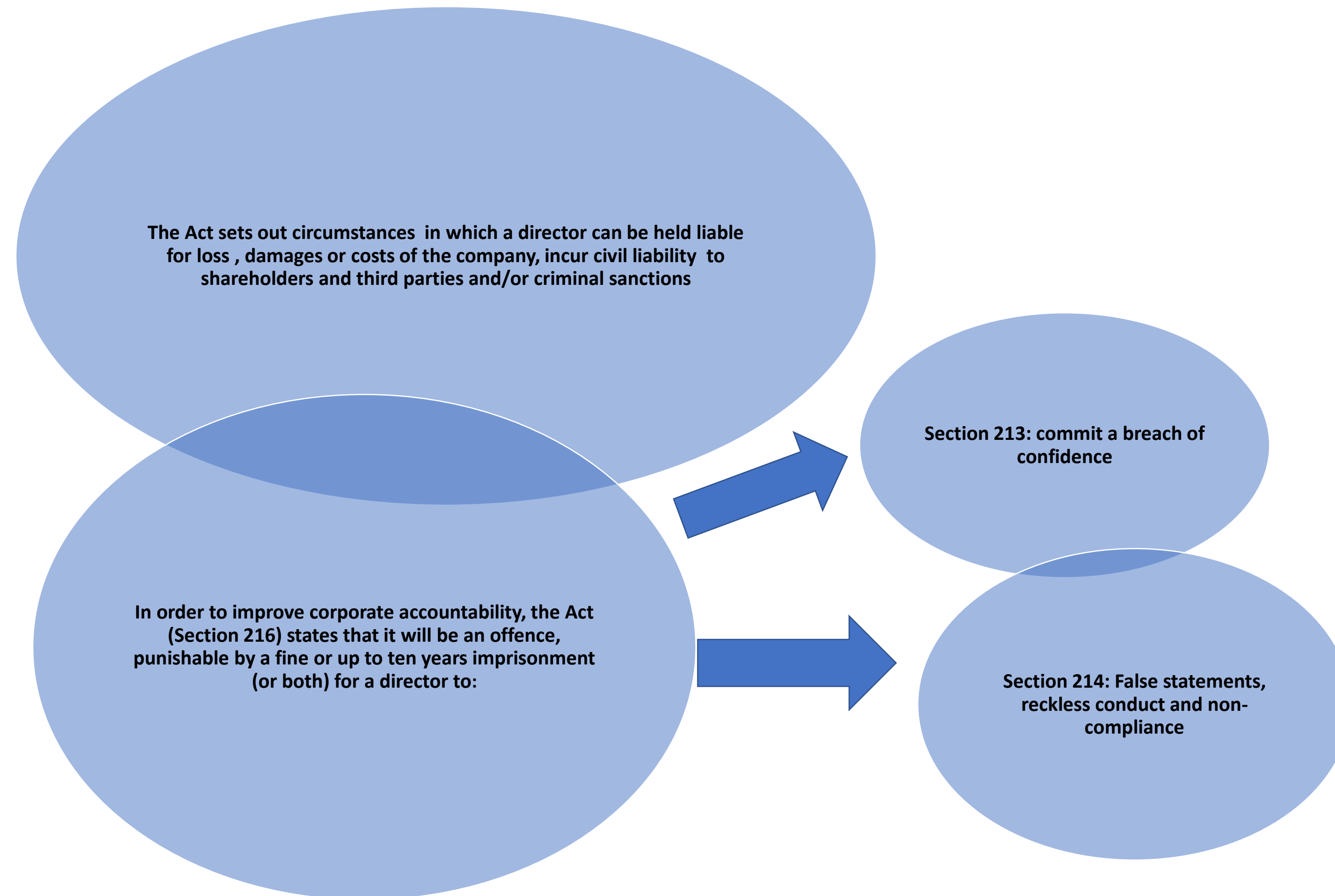
Bellini v Paulsen and others (17096/209) 2012 ZAWCHC 199 (28 Nov 2012)

- Contravention of the Act: personal liability
- When is a business person reckless?
- “...The defendant, with reckless disregard of his duties, allowed this situation to continue... ..well knowing that the company had no assets and no way of servicing the debt.”

Personal liability for non-compliance: specific sections

- S77(3) A director of a company is liable for
 - Any loss, damages or costs
 - Sustained by the company
 - Having failed to vote against a resolution despite
 - **Knowing** that the distribution was contrary to S46 (declaration of a dividend)
- **Knowing, knowingly or knows per Co Act**
 - Means that the person either had actual knowledge of the matter, or
 - Was in a position in which the person reasonably ought to have
 - Had actual knowledge
 - Investigated the matter or taken other measures that would have gained the actual knowledge.

LIABILITY OF DIRECTORS



CODIFIED LIABILITY-SECTION 77

A director is **generally** liable for:

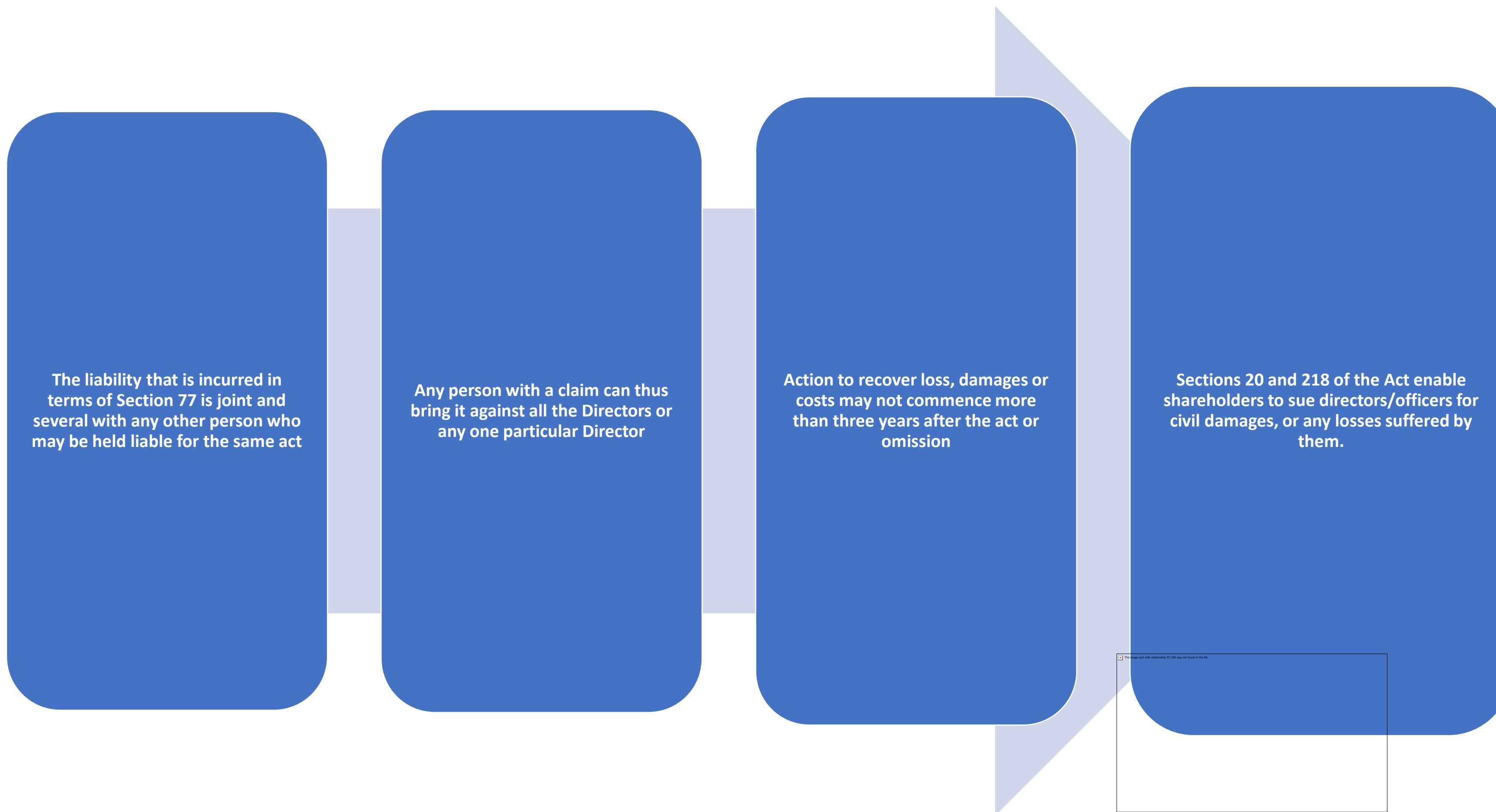
for any losses damages or cost sustained by the company from breach of Sections 75, 76(2), 76(3)(a) or (b) (relating to non-disclosure of personal financial interests, misusing the position as director to gain personal advantage, or not acting in good faith and for proper purpose or in the best interests of the company)

A breach of fiduciary duty

for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in Section 76(3)(c) [acting with the degree of care, skill and diligence that may be reasonably expected of such a person], or a duty as set out per the MOI, or any provision of the Act not otherwise mentioned in Section 77

Delict

SECTION 77 LIABILITY



Governance – Directors

- Directors Liability S 77,
 - Directors, prescribed officers and committee members
- S77(2) A Dir. may be held liable to common law of delict for any 'loss, damages or cost' arising out of:
 - a breach of fiduciary duty,
 - failure to act with required competence, or
 - breach of any other provision of Act or MOI.

- S77(3) Similar to sub 2 but includes ‘indirect consequences’ out of situation where Dir. had:
 - Acted without authority,
 - Acquiesced to reckless, grossly negligent or fraudulent activity by Co.,
 - Been a party to act or omission designed to defraud creditors, shareholders, employees or third parties,
 - Signed, consented to or auth. publication of false financial statements or prospectus **but** allowed to rely on accountants,
 - Been at meeting and failed to vote against:
 - Issuing unauthorised shares or securities,
 - Granting of options to subscribe to unauth. Securities,
 - Provision of financial assistance for buying of shares,
 - Making a distribution (S&L),
 - Making an allotment of shares, or
 - Acquisition of own shares by Co.

Governance – Directors

- Where potential liability, a director may apply to court to set decision of Board aside,
- Liability is joint and several,
- Liability capped to three year period from event,
- Defence if Dir. acted 'honestly and reasonably',
- Dir. can apply to court for exemption.
- MOI can't contract out of this liability and Co. can't indemnify Dirs.

Indemnification and Insurance

- S78
- Be careful
- Can the Board offer to pay for legal costs?
 - Implications to other board members if found guilty?
- Will insurance pay?
- Who is the puppet master?
 - Joint and several liability in personal capacity

Directors meetings and committees

- Social and Ethics
- Audit
- Others

Directors Responsibilities

Directors are the captains of the ship

- Scan the environment that the business operates in
- Risk assessment
 - Capitals of business: Natural, Human, Social, Financial, Technological....
- Control Environment
 - Internal controls: Prevent, detect and correct
 - Prevention of Fraud

Financial assistance

- Loans and Debtors
- Expected credit loss

S45 Loans or other financial assistance to directors

(1) In this section, “financial assistance”—

(a) includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation; but

(b) does not include—

(i) lending money in the ordinary course of business by a company whose primary business is the lending of money;

(ii) an accountable advance to meet—

(aa) legal expenses in relation to a matter concerning the company; or

(bb) anticipated expenses to be incurred by the person on behalf of the company; or

(iii) an amount to defray the person’s expenses for removal at the company’s request.

(2) Except to the extent that the Memorandum of Incorporation of a company provides otherwise,
the board may authorise the company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, **subject to subsections (3) and (4).**

(5) If the board of a company adopts a resolution to do anything contemplated in subsection (2), the company must provide written notice of that resolution to all shareholders, unless every shareholder is also a director of the company, and to any trade union representing its employees—

(a) within 10 business days after the board adopts the resolution, if the total value of all loans, debts, obligations or assistance contemplated in that resolution, together with any previous such resolution during the financial year, exceeds one-tenth of 1% of the company's net worth at the time of the resolution; or

(b) within 30 business days after the end of the financial year, in any other case.

(6) A resolution by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, **is void to the extent that the provision of that assistance would be inconsistent** with—

(a) this section; or

(b) a prohibition, condition or requirement contemplated in subsection (4).

(7) If a resolution or an agreement is void in terms of subsection (6) a **director of a company is liable** to the extent set out in section 77 (3) (e) (v) if the director—

(a) was present at the meeting when the board approved the resolution or agreement, **or participated in the making of such a decision** in terms of section 74; and

(b) failed to vote against the resolution or agreement, despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in subsection (4).

Statutory responsibilities

- FICA – S29 Suspicious transactions
- PRECCA
- Labour law
- Compliance – annual returns, tax
- Consumer Protection Act
- National Credit Act
- POPI

- Preparing and submitting financial statements
- Required to be audited or reviewed – directors responsible
- Maintaining accounting records
- Setting up committees
- Business Rescue
 - Required to initiate business rescue proceedings if financially distressed

The definition of financial distress

- in reference to a particular company at any particular time, means that:
 - it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or
 - it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.

Assessing going concern

Going Concern

- Management's assessment – When performing risk assessment procedures:
 - Management assessed
 - Management did not assess
 - Request assessment
- Events and conditions identified
 - Evaluate management assessment
 - If events identified
 - At least 12 months
 - Period beyond assessment
- Going concern applicability
- Auditor response

Going Concern

- **Financial Factors**

- Net liabilities or current liabilities
- Borrowings due
- Withdrawal of creditor support
- Negative cash flow
- Adverse ratios
- Operating losses
- Dividends in arrears
- Unable to pay creditors
- Credit to COD
- Unable to obtain financing

- **OPERATING FACTORS**

- Intention to liquidate
- Loss of key management
- Loss of market, customer, supplier, etc.
- Labour difficulties
- **Supply shortage**
- **New competitor**

Going Concern

- **OTHER FACTORS**
- Non-compliance with legal requirements
- Pending litigation
- Changes in laws and regulations
- **Underinsured catastrophes**

Estimates and disclosures

- **Valuation assumptions and techniques**
- Financial instruments
- Impairments of monetary and non monetary assets
 - indicators
- Fair values
- Recoverability of financial assets
- Risk disclosures
- Property plant and equipment
- Subordination agreements
- Letters of comfort vs letters of support
- Related party transactions
- Deferred tax assets
- Provisions
- Intangibles (GW)
- Loan covenants
- Securities etc

Using King IV to manage risk

Looking at the *year* ahead

Q&A

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technicalquestions@accountingacademy.co.za

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participation**