



ERIC
LEVENSTEIN

DIRECTORS' DEALINGS: COMPANIES ACT

Risky business

THE ESTEEM ASSOCIATED with multiple non-executive directorships is fading fast. If sued for losses incurred on their watch, non-executive directors with irons in too many fires could be hard pressed to prove they acted properly. "The new Companies Act makes no distinction between

executive and non-executive directors," says Eric Levenstein, director at Werkmans Attorneys. He says it's a misconception the liability of non-executive directors is limited because they aren't involved in day-to-day management. "The courts don't make that distinction. They will, of course, look at the facts and circumstances of each case, but that doesn't make the duties of non-executive directors less onerous.

"Directors can defend themselves against any liability claim if they can show in court they acted rationally in the best interests of the company, had no conflict of interest and took reasonably diligent steps to be informed about the matter," says Levenstein. "These are the key elements of the business judgment rule, which has been included in the new Companies Act to allow directors to take justifiable business risks."

Levenstein says the increased emphasis on directors' liability in the Companies Act – which comes into force in April next year – should make leaders in business think twice about overburdening themselves with multiple board memberships.

A second issue with major implications for directors is the personal liability of reckless trading or trading under insolvent circumstances. The new Companies Act specifically prohibits trading in insolvent circumstances and on conviction

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directors can be sentenced to 10 years' imprisonment. They can also be sued in their personal capacity by their creditors.

"Rather than trading in insolvent circumstances, directors should follow the business rescue process or liquidate the company," says Levenstein. "If they take on credit – knowing full well the company can't pay its debts – they'll be held personally liable."

Yet another issue non-executive directors should be aware of is the importance of exercising their independence and avoiding the pitfalls of being a "puppet director" (also a nominee director). A puppet director is placed on the board by a shareholder to only look after that shareholder's interests and is therefore no longer independent. "Although a shareholder can nominate a director, that person must still exercise independent judgment and not blindly follow the shareholder's instructions," says Levenstein.

"Directors are required to act in the best interests of the company, not the shareholder. Meaning they must take independent decisions – even if they may conflict with the interests of the shareholder." Levenstein says a director who fails to act independently is breaching his fiduciary duties, again with implications for personal liability. ■