The duties and liabilities of company directors

The woes of Steinhoff have been in the news since December 2017. As has been widely reported in the press, the share price of the company fell by about 95% after it became known that the company materially overstated its profits and materially understated some of its liabilities.

The board of Steinhoff consisted of eminent business people and professionals. At the time that the scandal broke, there were no less than six chartered accountants serving on the board. There were also lawyers and other very knowledgeable people.

The jury is still out on exactly what went wrong in the company and who was behind it. Whatever may in due course come out of the woodwork, the question that can already be asked is: How could this all have happened under the noses of this very strong board, without the wrongdoing being detected earlier?

It was reported that Dr Christo Wiese, who was at that stage chairperson of the board, reported to a Parliamentary committee that, in his view, it was impossible for him and the board to have detected the wrongdoing. At the very last minute, everything struck him like a bolt out of the blue. He said he did not know of any wrongdoing.

Is it really a defence to board members of a company to say that they did not know and could not have known?

As will be explained, ignorance is usually not a defence, and it is important for every person serving as a company director to familiarize him or herself with the duties and responsibilities which our Companies Act places upon a company director to ask questions, and not merely to accept things, willy-nilly, as they may be presented to the board of a company.

Section 76(3) of our Companies Act provides inter alia that every director of a company must exercise his or her powers, and perform his or her duties as director

"with the degree of care, skill and diligence that may reasonably be expected of a person –

– carrying out the same functions in relation to the company as those carried out by that director, and

– having the general knowledge, skill and experience of that director."

The use of the word "that director" in this quotation is very important. If a particular director is for instance a chartered accountant, he or she must bring his or her skills and training as a chartered accountant to the table of the board, and in judging whether that director has exercised his or her duties with the required degree of care, skill and diligence, the bench mark will be the knowledge and skill and diligence expected from a chartered accountant.

Section 76(4) of the Act then proceeds to provide that a director will have satisfied his or her obligation (to act with the required measure of care, skill and diligence) if that director took reasonably diligent steps to become informed about the matter, and also had a rational basis for believing, and indeed believed, that the information upon which that director acted, was in the best interest of the company.

The words "rational basis" are important. A director cannot believe and accept anything. What he or she believes and accepts must be rational, i.e. it must make sense and be credible.

This does however not mean that a company director must necessarily investigate everything by him or herself. Section 76(5) provides that a director is entitled to rely on what he or she is told by one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or in the information, opinions, reports or statements provided. Again, the words "reasonably believes to be reliable and competent" are important. If a director is provided with information which he or she reasonably cannot believe or regard reliable, by somebody that is not reasonably competent, the director cannot hide behind such information.

Section 76(5) also provides that a director can believe, and rely upon information provided by, legal advisors, accountants or other professional persons retained by the company, insofar as the director reasonably believes that the advice provided

by such professionals is within their professional or expert competence, or to the extent that such professional merits confidence. If the director is in doubt whether the professional is giving advice within his or her professional or expert competence, or that the professional does not merit confidence, the director cannot rely on such information. The director cannot blindly accept what he or she is told.

Section 77 of the Companies Act provides that company directors falling short of their duties in terms of Section 76, whereby any loss or damage is caused to the company, may be held liable for such losses or damages.

It is therefore clear that company directors have to ask pertinent questions and cannot turn a blind eye. Failing to perform their duties may have very serious consequences. Whether the Steinhoff directors will pass this test, only time will tell.

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