South Africa

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CORPORATE ENTITIES

The main corporate entities are the:

- Close corporation (which is typically a company owned and managed by a small number of members and in which no shares are issued).
- Company.

The close corporation is unsuitable for most foreign investors as no corporate entity can be a member of a close corporation.

The most important companies are companies with share capital. This type of company can be:

- A public company, which requires at least seven persons associated for a lawful purpose, and can raise capital from the general public. The transferability of shares and interests in the company allows its shareholders to dispose of their investments freely without withdrawing these investments from the company. Certain public companies can be listed on a stock exchange (listed companies).
- A private company, which only needs one shareholder and must:
  - restrict its right to transfer its shares;
  - limit its membership to 50;
  - prohibit any offer of its shares or debentures to the public.

LEGAL FRAMEWORK

1. What is the regulatory framework for corporate governance and directors' duties?

Corporate governance and directors' duties are regulated by:

- Common law rules (case law relating, for example, to fiduciary duties).
- The Companies Act No. 61 of 1973 (Companies Act).
- The company's articles of association (articles).
- The Listings Requirements of the JSE Securities Exchange 2003 (Listings Requirements), which apply to companies listed on the JSE Limited.
- The Code of Corporate Practices and Conduct (King Code) in the King Report on Corporate Governance for South Africa 2002 (King Report), applying mainly to companies listed on the JSE Limited. Its provisions are not mandatory, but listed companies must disclose and give reasons in their annual report if they do not comply with the King Code. All public sector enterprises and agencies must also comply with the King Code.

BOARD COMPOSITION AND REMUNERATION OF DIRECTORS

2. What is the management/board structure of a company? In particular:

- **Is there a unitary or two-tiered board structure?**
- **Who manages a company and what name is given to these managers?**
- **Who sits on the board(s)?**
- **Do employees have a right to board representation?**
- **Is there a minimum or maximum number of directors or members of the managerial and supervisory bodies?**

- **Structure.** South African companies have a unitary board structure.
- **Management.** The board of directors normally manages a company, except in relation to matters specifically conferred on other organs by the Companies Act or the articles.
- **Board members.** The board is comprised of executive and non-executive directors.
- **Employees' representation.** Employees are not entitled by law to board membership but they can be represented on the board.
- **Number of directors or members.** A public company must have at least two directors and a private company must have at least one director (*section 208, Companies Act*). Listed companies must have at least four directors (*paragraph 10.23 of Schedule 10, Listings Requirements*). The articles can, and usually do, specify a minimum and maximum number of directors.

3. Are there any age or nationality restrictions on the identity of directors?

General restrictions

Any person can be appointed as a director if he:

- Is a natural person.
- Is at least 21 years old.
- Has the necessary legal capacity.
- Meets any requirements in the articles.
- Is not disqualified by section 218 of the Companies Act, examples of which include:
  - a non-rehabilitated insolvent;
  - a person removed from an office of trust due to misconduct.

The Listings Requirements prohibit directorships for life.

Nationality restrictions

Unless specifically stated otherwise in the articles, there are no nationality restrictions on directors. If a director is a non-South African resident, this must be disclosed on the company's letterhead.

4. In relation to non-executive, supervisory or independent directors:

- **Are they recognised?**
- **Does a part of the board have to consist of them? If so, what proportion?**
- **Do non-executive or supervisory directors have to be independent of the company? If so, what is the test for independence or what makes a director not independent?**
- **What is the scope of their duties and potential liability to the company, shareholders and third parties?**

- **Recognition.** The Listings Requirements and the King Code distinguish between executive, non-executive and independent non-executive directors.
- **Board composition.** The King Report recommends that the board has a balance of executive and non-executive directors, preferably with a majority of non-executive directors, of whom a sufficient number are independent of management, so that shareholder interests (including minority interests) can be protected.
- **Independence.** A sufficient number of directors should be independent. Independent directors are those who (*section 1, chapter 4, paragraph 6, King Report*):
  - are not employed by a company;
  - do not participate in the company's day-to-day management;
  - do not contract with the company or advise the company professionally;
  - do not represent a dominant shareholder.
- **Duties and liabilities.** All directors are bound by fiduciary duties and duties of care and skill (*see Question 14*). Directors must act in the company's best interests. No fiduciary relationship exists between directors and individual shareholders of the company, or between directors and third parties.

5. Are the roles of individual board members restricted? For example, can one person be the chairman and chief executive?

The Listings Requirements (*paragraph 3.84(b)*) and the King Code (*paragraph 2.3.1*) require that there be a policy evidencing a clear division of responsibilities at board level to ensure a balance of power and authority, such that no one individual has unfettered decision-making powers. The chief executive officer (CEO) of listed companies cannot also be the chairman (*paragraph 3.84(c), Listings Requirements*).

6. How are directors appointed and removed? Is shareholder approval required?

Appointment of directors

At common law, a person's appointment as a director is complete on his appointment by those with the authority to do this and his acceptance of or consent to this appointment. The subscribers to the company's memorandum are deemed to be the directors until the first directors are appointed (*section 208(2), Companies Act*).

For listed companies, the board must have a clear policy setting out the procedures for board appointments (*paragraph 3.84(a), Listings Requirements*).

The Companies Act, the articles and any shareholders' agreement relating to the appointment of directors determine who can appoint directors. The articles typically provide that the directors be appointed in a general meeting of the shareholders (general meeting) (*section 210, Companies Act*).

Removal of directors

The articles usually provide for the retirement and removal of directors in certain circumstances (for example, insolvency). The shareholders can also remove a director by ordinary resolution at a general meeting (*section 220, Companies Act*). For an ordinary resolution to be passed, it must be supported by a majority of shareholders present at a quorate general meeting.

7. Are there any restrictions on a director's term of appointment?

The Companies Act does not limit a director's term of appointment. A person automatically ceases to be a director when he vacates office under the articles or becomes disqualified under section 218 of the Companies Act (*see Question 3*).

An executive director's fixed-term service contract should not exceed three years. If it does, this fact should be fully disclosed and shareholder' consent should be obtained (*paragraph 2.5.9, King Code*).

The model articles in Schedules 1 and 2 of the Companies Act require directors to retire by rotation at a company's annual general meeting (AGM). The Listings Requirements also require rotation and the articles of listed companies to prohibit directorships for life (*paragraphs 10.28 and 10.59 of Schedule 10, Listings Requirements*).

8. Do directors have to be employees of the company? Can shareholders view directors' service contracts?

Directors employed by the company

It is not necessary for a director to be an employee of the company, but he can be.

Shareholders' inspection

Shareholders cannot view directors' service contracts, but the company's annual accounts must disclose details of directors' service contracts (*section 297, Companies Act*).

The annual accounts of listed companies must disclose certain details relating to directors, such as (*Listings Requirements*):

- Term of office.
- The manner and terms of appointment.
- Remuneration.

9. Are directors allowed or required to own shares in the company?

There is no legal requirement for a director to be a shareholder, but the articles can require this.

10. How is directors' remuneration determined? Does it need to be disclosed? Is shareholder approval required?

Determination of directors' remuneration

The fact that a person is appointed as a director does not entitle him to claim remuneration. Directors' remuneration is generally governed by the articles. Usually, the articles require that directors' remuneration be determined, from time to time, in a general meeting.

The King Code (*paragraph 2.5.2*) recommends and the Listings Requirements (*paragraph 3.84(d)*) require that companies appoint a remuneration committee, consisting mainly of non-executive directors, to make recommendations to the board relating to executive directors' remuneration and to determine specific remuneration packages for each of the executive directors.

Disclosure

The Companies Act requires various disclosures in the annual accounts including:

- The fees paid for directors' services.
- Any payments to a person for his acceptance of the office of director, which are deemed to be fees paid for directors' services.

Listed companies must (*Listings Requirements*):

- Analyse emoluments paid or accrued.
- Appoint a remuneration committee and disclose the mandate, composition and function of the committee in the annual accounts.

The King Code recommends that companies provide full disclosure of directors' remuneration on an individual basis, giving details of earnings, share options, restraint payments and all other benefits.

Shareholder approval

If the articles require the directors' remuneration to be determined in a general meeting, the directors agree to act for the remuneration determined in the meeting.

MANAGEMENT RULES AND AUTHORITY

11. How is a company's internal management regulated? For example, what is the length of notice and quorum for board meetings, and the voting requirements to pass resolutions at them?

A company's internal management is regulated mainly by its articles, which have provisions relating to directors':

- Appointment, remuneration and removal.
- Powers (including delegation of powers).
- Proceedings (including notice of meetings, quorum and voting requirements).

12. Can directors exercise all the powers of the company or are some powers reserved to the supervisory board (if any) or a general meeting? Can the powers of directors be restricted and are such restrictions enforceable against third parties?

Directors' powers

The articles must determine which body can conduct the company's business or affairs (*Companies Act*). The board is usually

given these powers and can delegate them to the managing director and to directors' committees. The articles usually authorise the directors to exercise all the powers of the company, other than those required by the Companies Act or the articles to be exercised in a general meeting.

Restrictions

The articles can restrict directors' powers. Where a director's powers are exercised for an improper purpose, the transaction is voidable at common law on the company's insistence. A transaction with a third party is only voidable against the third party if that party knew the director was acting for an improper purpose.

13. Can the board delegate responsibility for specific issues to individual directors or a committee of directors? Is the board required to delegate some responsibilities, for example for audit, appointment or directors' remuneration?

The articles normally allow the board to delegate any of its powers to an individual director or a committee of directors.

The Listing Requirements require an audit committee and a remuneration committee to be appointed (*paragraph 3.84(d)*).

The King Code recommends that each board should have, at a minimum, an audit and a remuneration committee (*paragraph 2.7.5*).

DUTIES AND LIABILITIES OF DIRECTORS

14. What is the scope of a director's duties and personal liability to the company, shareholders and third parties? Please distinguish between civil and criminal liability under each of the following (if relevant):

- **General duties.**
- **Theft and fraud.**
- **Securities law.**
- **Insolvency law.**
- **Health and safety.**
- **Environment.**
- **Anti-trust.**
- **Other.**

- **General duties.** A director can be personally liable for the company's acts where he, among other things:
  - does not exercise the necessary care, skill and diligence in performing his duties;
  - does not act in the best interests of the company or the shareholders;
  - takes an action that benefits certain shareholder(s) or a third party at the expense of the company or another shareholder;
  - subject to the articles and service contract, competes with the company;
  - uses or discloses company information which he acquired as a director;
  - does not disclose to the board his interest in contracts with the company;
  - violates the law or the articles;
- **Theft and fraud.** If a director is knowingly a party to the reckless or fraudulent carrying on of the business, he is personally liable for the company's liabilities and is guilty of a criminal offence, and can be fined or imprisoned for up to two years (or both) (*section 424, Companies Act*).

  If a director makes false statements in any document required by the Companies Act, or falsifies books or records, he is guilty of a criminal offence, and can be fined or imprisoned for up to one year (or both) (*sections 249 and 250, Companies Act*).

  Every director, officer or accountant employed by or auditor of a company, who makes, circulates or publishes (or concurs in any of these) a certificate, written statement, report or financial statement in relation to any property or affairs of the company, which is false in a material way, is guilty of a criminal offence and can be fined or imprisoned for up to one year (or both) (*section 251, Companies Act*).
- **Securities law.** The following acts are prohibited (*Securities Services Act 2004*):
  - the use of any manipulative, improper, false or deceptive practice of trading in a listed security which creates a false or deceptive appearance of the trading activity in connection with the security or creates an artificial price for that security. Certain practices are deemed to be manipulative, improper, false or deceptive practices;
  - the publication of any statement, promise or forecast in respect of a listed security which is false, misleading or deceptive.

  A person who breaches these prohibitions is liable to:
  - a fine not exceeding ZAR50 million (about US$8.2 million);
  - up to ten years' imprisonment; or
  - both of the above.
- **Insolvency law.** A court can, on application, declare a person personally responsible for any of the company's debts or other liabilities, where that person was knowingly a party to any business of the company that was or is being carried on (*section 424, Companies Act*):
  - recklessly;

- with intent to defraud the company's creditors or any other person; or
- for any fraudulent purpose.

A director or officer (or a person who was a director or officer) is guilty of an offence and liable to penalties under insolvency law if both of the following apply:

- a winding-up order has been granted in relation to a company that is or was unable to pay its debts;
- that person has committed any act or omission in relation to any assets, books, records, documents, business or affairs of the company, which would have been an offence under insolvency law.

- **Health and safety.** Employers must provide and maintain a safe and healthy risk-free working environment (*Occupational Health and Safety Act 1993*). Directors, and especially the CEO, can incur personal liability for a failure to do so. Although this Act mainly applies to the company's employees, it also provides for the health and safety of non-employees.
- **Environment.** A person who is or was a director when the company commits an offence under various environmental laws, is liable to penalties if the offence resulted from the director's failure to take all reasonable steps necessary to prevent the offence.
- **Anti-trust.** There are no specific criminal penalties for directors who breach the anti-trust provisions of the Competition Act 1998. The company is liable to an administrative penalty for a breach of the anti-trust provisions of up to 10% of the company's combined annual turnover in South Africa and the value of its exports from South Africa during the previous financial year in the affected line of commerce (*section 59(2), Competition Act 1998*).
- **Other.** Directors and officers can face civil or criminal liability for various other breaches, including failure to:
  - call a general meeting if one has been requisitioned by shareholders (this is a criminal offence (*section 181, Companies Act*));
  - ensure that the company does not give financial assistance for the purpose of, or in connection with, the purchase of its shares (*section 38, Companies Act*).

15. Can a director's liability be restricted or limited? Is it possible for the company to indemnify a director against liabilities?

A company cannot exempt its directors from the liabilities attached to them by law. A provision in the articles or in a contract with the company will therefore be void, if it attempts to (*section 247, Companies Act*):

- Exempt a director from liability for negligence, default, breach of duty or breach of trust, which he may be guilty of in relation to the company.
- Indemnify the director against this liability.

A company can indemnify a director for liability incurred by him in defending legal proceedings where one of the following apply (*section 247, Companies Act*):

- Judgment is given in the director's favour.
- The director is acquitted.
- The proceedings are abandoned.
- Relief is granted to the director by a court following an application under section 248 of the Companies Act.

16. Can a director obtain insurance against personal liability? If so, can the company pay the insurance premium?

A company can take out insurance against negligence, default, breach of duty or breach of trust by directors. However, it is debatable whether the Companies Act allows the directors themselves to be protected by this insurance, or just the company (*section 247, Companies Act*).

17. Can a third party (such as a parent company or controlling shareholder) be liable as a director (even though such person has not been formally appointed as a director)?

There is no specific statutory provision for this issue. The Companies Act defines "director" to include any person occupying the position of director, by whatever name called. Whether someone has acted as a director is often a question of degree and requires consideration of the duties performed in the context of the company's operations and circumstances.

At common law, a person who manipulates a director has the fiduciary duties of a director.

The King Code discourages the use of shadow directors (persons in accordance with whose instructions the directors are accustomed to act).

TRANSACTIONS WITH DIRECTORS AND CONFLICTS

18. Are there general rules relating to conflicts of interest between a director and the company?

Directors are subject to fiduciary common law duties. A director must not put himself in a position where his personal interests or duties conflict with the company's interests. A director can be liable to the company if he allows an actual or potential conflict between personal and company interests to prejudice his ability to take objective decisions, to the best advantage of the company.

The King Report suggests that full and timely disclosure of any conflict, or potential conflict, must be made to the board. Where a conflict arises, on declaring his interest, a director can participate

in the debate and/or vote on the matter, but must carefully consider his own integrity in these circumstances, and the potential consequences for the board, the company and himself (*section 1, chapter 1, paragraph 6, King Report*).

19. Are there restrictions on particular transactions between a company and its directors?

The Companies Act has a number of provisions in relation to transactions between a company and its directors, including:

- A duty on the directors to disclose any interest held directly or indirectly in a contract with the company (*section 234*).
- Restrictions on loans to directors or providing security for directors.

The Listings Requirements (*section 10*) impose certain requirements on "related party transactions". These include transactions between a listed company and a person who is, or within 12 months preceding the date of the transaction was, a director (or shadow director) of the listed company (or its subsidiary, holding company or a subsidiary of its holding company). The Listings Requirements also require shareholder approval for certain transactions with directors and other related parties.

20. Are there restrictions on the purchase or sale by a director of the shares and other securities of the company he is a director of?

Even if the memorandum, articles or a company resolution authorise directors to allot or issue company shares, directors cannot allot or issue shares (*section 222, Companies Act*):

- To any director of the company.
- At a general meeting where the director or his nominee can exercise or control the exercise of 20% or more of the voting rights.
- To any subsidiary of the company.

These prohibitions do not apply where:

- The allotment or issue was previously approved by the company in a general meeting.
- The shares are allotted or issued under a contract underwriting the shares.
- The shares are allotted or issued in proportion to existing shareholdings, on the same terms and conditions as have been offered to all the members of the company, or to all shareholders of the class or classes being allotted or issued.
- The shares are allotted or issued on the same terms and conditions as have been offered to members of the public.

Also, under the Listings Requirements:

- Announcements and disclosures must be made where directors purchase shares in the listed company. Announcements must contain certain information, including the name of the director and the nature of the transaction.
- A director cannot deal in any securities relating to a listed company without first advising and receiving clearance from the chairman.

Persons who have inside information relating to securities or financial instruments are prohibited from dealing in them, and there are criminal and civil penalties (*Securities Services Act 2004*).

Every listed company must prohibit dealing in its securities by directors, officers and other selected employees for a designated period before the announcement of its financial results, or in any other sensitive period.

DISCLOSURE OF INFORMATION

21. Do directors have to disclose information about the company to shareholders, the public or regulatory bodies?

There is no general obligation on directors to disclose all information requested by shareholders.

There are various disclosure obligations for public companies when offering shares or other securities to the public. Listed companies must inform the market immediately when there is an event that, if known, would be likely to have a material impact on the company's share price.

In certain circumstances, an exchange can require an issuer of listed securities to disclose to it any information at the issuer's disposal about those securities or about the affairs of that issuer (*Securities Services Act 2004*).

COMPANY MEETINGS

22. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved?

Companies must hold an AGM (unless all the shareholders agree otherwise), where the general body of shareholders meet to express their wishes in relation to the company's affairs (*section 179, Companies Act*).

The first meeting must be held within 18 months after the date of incorporation. Subsequent meetings must be held within nine months after the end of the financial year and within 15 months of the previous meeting.

The issues generally dealt with at an AGM include:

- Consideration of the annual accounts of the company and group accounts.
- The appointment and removal of the auditor and directors.
- Dealing with resolutions of which notice has been given by requisition.

- Whether or not there should be approval of certain loans to directors to be obtained not later than at the next AGM.
- Consideration of a resolution to renew the directors' general authority to allot or issue shares.
- Matters addressed in the articles, as well as any matters which are capable of being dealt with by a general meeting, subject to the Companies Act.

23. Can shareholders call a meeting or propose a specific resolution for a meeting? If so, what level of shareholding is required to do this?

Unless otherwise provided in the articles, two or more members holding at least 10% of the company's issued share capital can call a general meeting (*Companies Act*). This must be distinguished from the right of members to requisition the company to call a meeting or to call the meeting themselves if the company fails to respond (*section 181, Companies Act*). A meeting can be requisitioned by either:

- 100 members.
- Members holding, at the date of lodging the requisition, at least 5% of the voting shares at a general meeting.

MINORITY SHAREHOLDER ACTION

24. What action, if any, can a minority shareholder take if it believes the company is being mismanaged and what level of shareholding is required to do this?

If a minority shareholder believes that the company is being mismanaged, he can:

- Apply to court to appoint a representative to start proceedings to recover damages caused as a result of an offence, breach of trust or breach of faith by a director or officer of the company, if the board fails to do this on the company's behalf.
- Requisition a meeting to propose resolutions to remove directors (*see Question 23*).
- Apply to court for an order that the company is being run in a way unfairly prejudicial to the interests of its members.
- Request the Minister of Trade and Industry to appoint an inspector to investigate a particular transaction. The application must be made by not less than 100 members or of members holding not less than 5% of the shares issued.

INTERNAL CONTROLS, ACCOUNTS AND AUDIT

25. Are there any formal requirements or guidelines relating to the internal control of business risks?

The board should maintain a sound system of internal control and ensure that it effectively manages risks in the way the board has approved (*King Code*). Certain risk management disclosures are required from the board and a register of key risks must be kept by it. A risk management committee should review the risk management processes and the significant risks facing the company.

The board is responsible for the total process of risk management and for forming its own opinion on the effectiveness of the process (*paragraph 3.1.1, King Code*).

A risk committee should be established by listed companies (*paragraph 3.84(d), Listings Requirements*).

26. What are the responsibilities and potential liabilities of directors in relation to the company's accounts?

The directors must ensure that the annual accounts are prepared and present them to the AGM. These statements must fairly present the state of affairs of the company and its business at the end of the financial year and the profit or loss of the company for that year. A director or officer of a company who fails to take all reasonable steps to comply or ensure compliance with this is guilty of an offence (*section 288, Companies Act*).

Directors must make a statement "collectively and individually" accepting full responsibility for the accuracy of the information in the annual accounts of listed companies (*Listing Requirements*).

The directors must confirm in their annual report that, among other things (*paragraph 8.4, King code*):

- It is the directors' responsibility to prepare accounts that fairly present the state of affairs of the company at the end of the financial year and the profit or loss and cash flows for that period.
- The auditor is responsible for reporting on whether the accounts are fairly represented.

27. Do a company's accounts have to be audited?

Every company's accounts must be audited.

28. How are the company's auditors appointed? Is there a limit on the length of their appointment?

Every company must have an auditor. The appointment takes place at each AGM, for which shareholder approval is required by simple majority. If an auditor is not appointed at an AGM, the directors must appoint an auditor within 30 days. If they fail to do so, the Registrar of Companies can at any time appoint an auditor. There is no limit on the duration of an auditor's appointment, subject to annual shareholder approval. Special notice is required to remove an auditor. An audit committee must be appointed for listed companies (*paragraph 3.84(d), Listings Requirements*).

29. Are there restrictions on who can be the company's auditors?

The Auditing Profession Act 2005 prohibits a person from performing any audit unless he is registered as an auditor in terms of this Act. The auditor must be independent and not under the control of the company through its directors or otherwise.

A person is disqualified from being an auditor if he is a:

- Director, officer or employee of the company (or of a company performing secretarial work for the company).
- Partner, employer or employee of a director or officer of the company.
- Person who by himself or his partner or employee regularly performs the duties of the company's secretary or bookkeeper.
- Past director or officer of the company.
- Person who is not qualified to act as an auditor.

A person who acts as an auditor while disqualified is guilty of an offence (*section 275, Companies Act*).

30. Are there restrictions on non-audit work that auditors can do for the company that they audit accounts for?

A public company's auditor cannot perform secretarial work for the company. A private company's auditor can perform secretarial work provided that all the following apply:

- All the shareholders have consented in writing to his appointment.
- None of the shares are held by a public company.
- The auditor is registered under the Auditing Professions Act 2005.
- The relevant circumstances are set out in the auditor's report on the affairs and annual financial statements of the company (*section 275(3), Companies Act*).

The audit committee of listed companies must set out the principles for recommending the use of the company's external auditors for non-audit work (*paragraph 7.F.6(d), Listings Requirements*).

The King Code requires the separate disclosure of:

- The amount paid for non-audit services.
- The nature of the non-audit services.
- The amounts paid for each of the services described.

31. What is the potential liability of auditors to the company, its shareholders and third parties if the audited accounts are inaccurate? Can their liability be limited or excluded?

The auditor can incur civil and criminal liability and can be subject to disciplinary measures by the Independent Regulatory Board for Auditors for inaccuracies in the audited accounts.

An auditor can incur criminal liability for, among other things (*Companies Act*):

- Knowingly making a materially false statement in any document required by the Companies Act.
- Concealing, destroying or falsifying any company document or, with intent to defraud, erasing all or part of a company document.

If a registered accountant and auditor does not perform his duties with the necessary degree of care and skill, or is negligent, the board can impose certain punishments.

Auditors do not have a contractual or fiduciary relationship with third parties. Consequently, auditors are potentially liable to third parties on the basis of the general principles of common law delictual law liability. An auditor is not liable to a third party in respect of any document produced by him if he acts in good faith even if the information produced relates to confidential information about his clients (*section 47(4), Auditing Profession Act 2005*).

A provision which purports to exempt an auditor from, or indemnify an auditor against, liability attached to him by law in respect of any negligence, default, breach of duty or breach of trust by him in relation to the company, is void. However, this does not prohibit a company from indemnifying an auditor for liability incurred by him in defending proceedings, whether civil or criminal, in which any of the following apply (*section 247, Companies Act*):

- Judgment is given in his favour.
- He is acquitted.
- Relief is granted to him by the court.

CORPORATE SOCIAL RESPONSIBILITY

32. Is it common for companies to report on social, environmental and ethical issues? Please highlight, where relevant, any legal requirements or non-binding guidance/best practice on corporate social responsibility.

Every company should:

- Report at least annually on the nature and extent of its social, transformation (that is, the promotion of equal opportunities for the previously disadvantaged, notably black people and women), ethical, safety, health and environmental management policies and practices (*paragraph 5.1.1, King Code*).

- Codify its standards of ethical behaviour in a code of ethics and directors should make disclosures as to the extent to which they believe the company's ethical standards are being met (*paragraph 5.2.3, King Code*).

ROLE OF GENERAL COUNSEL

33. Is it common for the general counsel to be on the company's board or to have a formal role in corporate governance?

In some companies, the general counsel is a board member or can be present at board meetings as company secretary (the role of company secretary and general counsel is sometimes combined).

It is not common for the general counsel to have a formal role in corporate governance.

ROLE OF INSTITUTIONAL INVESTORS AND SHAREHOLDER GROUPS

34. How influential are institutional investors and other shareholder groups in monitoring and enforcing good corporate governance? Please list any such groups with significant influence in this area.

South African institutional investors have been passive in their involvement in companies in which they invest. Their focus has been on companies' investment merits, rather than on governance issues and it is only in extreme circumstances that institutions have been known to intervene. The following are some of the few instances where institutional investors played a role in enforcing corporate governance:

- Public Investment Corporation (a state-owned entity which manages pension funds for state employees) (PIC) which owns shares in Sasol (a petroleum company) objected to the appointment of a director who, in PIC's view, was not the most suitably qualified candidate for the position. This position was nevertheless filled by that director.
- Some of the asset managers who held shares in Comparex (now BCX), namely, Allan Gray Limited, Investment Asset Management, RMB Asset Management, Coronation Asset Management and Sanlam Investment Management, agreed to act as a consortium for changing the board of directors of Comparex and were successful in their bid.

WHISTLEBLOWING

35. Is there statutory protection for whistleblowers (persons who disclose criminal activity or other serious malpractice within a company)?

Employees can disclose information in relation to unlawful or irregular conduct by their employers or other employees (*Protected Disclosures Act 2000*). These employees are protected if the disclosure complies with the Act.

REFORM

36. Please summarise any impending developments or proposals for reform.

South Africa's corporate law is being reviewed. The Department of Trade and Industry has published a policy document (South African Company Law for the 21st Century), which sets out guidelines and the scope of the review. The review aims to develop a legal framework to cover the formation, maintenance and termination of companies. The object of the review is to ensure that the new legislation is appropriate to the legal, economic and social context of South Africa as a constitutional democracy and an open economy. Current laws which meet these criteria will remain.

The review focuses on:

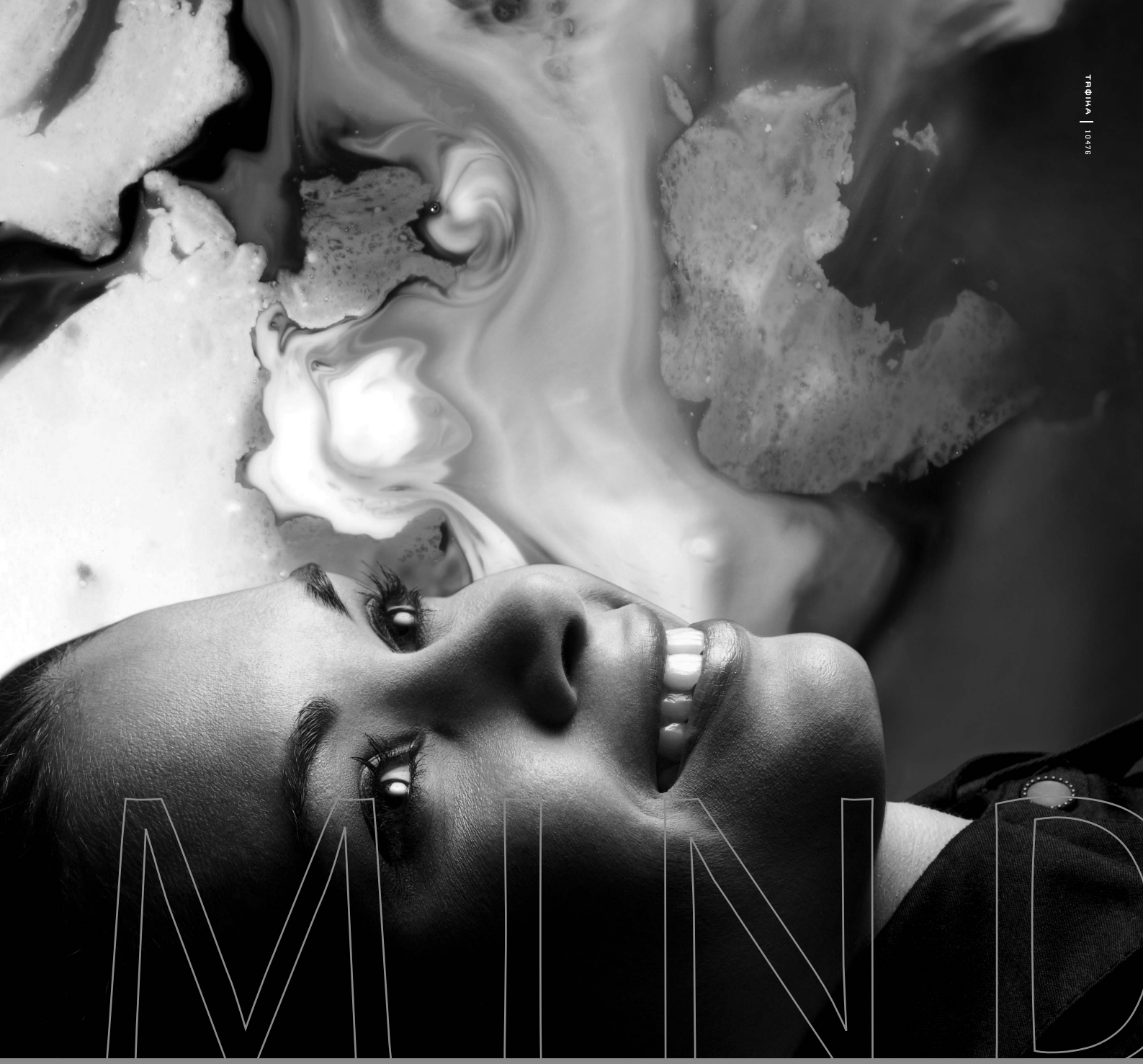
- Company formation.
- Corporate finance.
- Corporate governance.
- Mergers and takeovers.
- Insolvency and corporate rescue.
- Administration and enforcement.

The King Report recommends changes to company law and practice, to ensure the development of effective corporate governance in South Africa. The King Report includes a recommendation that legislators should extend the regulations introduced by the Registrar of Banks, relating to directors and corporate governance of banking institutions, to the Companies Act.

A Corporate Laws Amendment Bill (amending the Companies Act and the Close Corporations Act 1984) has been proposed and it seeks to:

- Introduce and distinguish between public interest companies and limited interest companies.
- Require every public interest company to appoint an audit committee.
- Define non-executive directors and independent director.
- Set out auditors' duties, auditors' professional requirements and auditor independence.

The Bill has not been finalised and no proposed date of effect had been published.



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