

Media release  
IoDSA

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## **WRITTEN IN STONE: THE IoDSA WELCOMES COMPANIES ACT'S INCREASED FOCUS ON DIRECTORS' DUTIES**

The Institute of Directors in Southern Africa (IoDSA) has welcomed Government's move to codify directors' duties in the new Companies Act's (71 of 2008). The Act is due to come into effect later this year.

Up until now, the common law - created mostly by case law - imposed fiduciary duties and duties of care and skill on directors. But now, the translation of the spirit of the law to the letter, "Effectively echoes the King Code on Corporate Governance (King III) in stressing the importance of directors – especially new ones – understanding their duties," said Natasha Bouwman, the IoDSAs Supervisor: Centre for Corporate Governance.

"Directors will have absolutely no excuse," she added. "It is their responsibility to ensure that they are familiar with their duties to make sure that they do not risk being in breach thereof."

Whereas the new Act does not replace or change the common law principles governing these duties, Bouwman says the existing common law principles will be used in conjunction with and for interpretation of the new Act's provisions.

*Fiduciary duties* require directors to act in good faith and for the benefit of the company. "This means, for example, a duty not to exceed their powers, to maintain unfettered discretion and to avoid a conflict of interest," she said.

The *duty of care and skill* requires a director to act with due care, skill and diligence to the level that would be expected from someone with that director's knowledge, skills and experience and also with due care, skill and diligence to the level that would be expected from someone that performs that director's functions. "This means a higher standard will be set for directors with more knowledge, skills and experience. However, a lower standard will not be set for directors lacking the average knowledge, skills and experience required."

### *Business Judgement Rule*

The new Act also introduces a new defence for directors to avoid being found in breach of their duties. Known as the *business judgment rule*, "This defence will assist directors who were reasonably informed; had no financial interest (or complied with the disclosure of financial interest provisions) and rationally made or supported the decision," says Bouwman.

This defence originated in the American state of Delaware, which is known to have a sophisticated and developed corporate law system as the domicile of more than 850,000 businesses, including 63% of all Fortune 500 companies.

“The IoDSA is pleased to see the codification of director duties and the increased focus on director’s duties” Bouwman concluded. “It certainly brings South Africa in line with what the rest of the world is doing to ensure directors take full responsibility for the positions of power they hold.”

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