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Increasing Regulation, Economic Volatility and Transparency Drive Demand for D & O Cover

Opinion by Gillian Wolman at Aon South Africa's Financial Services Group

Today's business executives face a very different set of risks from that of their predecessors. New risks continue to emerge ranging from cyber-crime and security breaches, through to the risks that are associated with meeting increasingly complex regulatory and compliance requirements. Many executives will have to find a balance between making tough and multifaceted decisions while operating in a challenging global environment.

All businesses, whether a small SMME or a listed corporate company, have to contend with a seemingly endless list of requirements for better transparency, disclosure, accountability and governance, to name a few. It inevitably brings about a barrage of responsibilities that directors and officers (D&O's) need to comply with, not to mention keeping abreast of various enactments, corporate codes and best practices. D&O's ultimately need to illustrate to various stakeholders that they are running their organisations efficiently and profitably.

The personal risks for executives and the reputational risks for corporates themselves are significant. In extreme cases directors and officers may even be forced to surrender personal assets due to circumstances beyond their control.

Negligent acts that one could be held liable for can however be mitigated through a correctly structured D&O liability insurance policy. The main purpose of a D&O policy is to offer financial protection for today's executives in addition to providing legal coverage in the event of a claim.

The cover that a D&O liability insurance policy provides is an absolute necessity when it comes to the protection of the personal interests of directors, officers and other employees that are charged with supervisory and managerial responsibilities, and who can be held liable for wrongful acts which may occur in their day to day management activities.

A claim is normally lodged by a third party who has a relationship with or an interest in the company and who alleges that a director or officer has acted wrongfully. In some cases this results in financial loss to a third party. The third party has the right to litigate against the company as well as the individual directors and officers, which involves substantial legal costs and in some instances, civil damages.

A wrongful act is typically defined as an actual or alleged breach of duty, breach of trust, neglect, error, misstatement, misleading statement, omission, breach of warranty or authority or any other act.

An analysis of claims that have been lodged in South African certainly underscores the need for the cover that a D&O liability insurance policy provides. In many instances these claims have led to the demise of large corporate companies due to claims that arose as a result of mismanagement by key executives, or the failure of accounting and auditing firms to unveil financial irregularities to mention two examples. Another example could include extensive press coverage of directors' faults, including alleged irregularities.

Ultimately a programme of this nature must encourage a corporate culture that supports ethical and responsible behaviour in addition to reducing the frequency and severity of possible claims against directors and officers.

D&O liability cover remains reasonably inexpensive in South Africa, while the insurance market continues to be relatively 'soft' at the moment, and therefore makes it the ideal time to purchase and review existing covers.

Finally, there is a view that the 'New Companies Act' may see the development of renewed litigation that could potentially have an adverse effect on the cost of the cover. In addition to this, there is also a perspective that the promulgation of the "Protection of Personal Information" Bill (POPI) could see the emergence of additional claims in the corporate arena.

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