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WHY NON-EXECUTIVES SHOULDN'T DO IT FOR THE FEES ALONE

By Terrance M. Booysen

While the board attendance fees paid to Non-Executive Directors ('NEDs') may be a strong incentive for certain individuals to avail themselves for these boardroom positions, it may be well worth reconsidering the risk and rewards. The onerous duties and responsibilities which are placed on NEDs -- including the demands made by the organisation's key stakeholders on the board -- significantly increase the liability factor and make the 'lure' of the board attendance fees less appealing.

It is important that potential NEDs acknowledge this fact, as well as their own strengths and weaknesses before accepting a position on any board. This being the case, those who are responsible for appointing NEDs should properly identify and select NEDs who genuinely possess the relevant skills, experience and competencies required by the board. The candidates being selected should be able to act independently, and be seen to be acting with independence of mind in respect of the matters being addressed by the board. It is further incumbent on the board to provide incoming NED's with the necessary board induction and orientation in order to ensure that they can perform their function to the highest of standards in the shortest possible time.

What NEDs are required to do

In terms of the Companies Act, 2008 ('the Act'), the King IV Report on Corporate Governance for South Africa 2016™ ('King IV™') and good business practice; a NED must be independent and add value to the board. Furthermore, they should contribute appropriate knowledge and expertise to the board, whilst also enhancing the board's diversity and its composition.

NEDs are required, among other things, to remain up-to-date with the business of the organisation which they serve. They should meet with the organisation's executive management on a regular basis to learn about the business and the environment in which it operates, thereby enabling them to keep abreast with the organisation's strategic progress and make valuable and constructive contributions at board meetings.

"For the individual, Non-Executive Directorships can offer lucrative recompense along with opportunities for broadening cross-sector exposure. However, the legal duties and responsibilities should not be underestimated, either by those considering such directorships or the companies seeking to appoint them."

The NED Role (Chartered Institute of Personnel and Development)

(January 2016)

Besides maintaining a heightened awareness of the organisation's overall strategic direction -- as well as keeping abreast with issues that are pertinent to the business of the organisation -- NEDs must also be cognisant of the relevant changes in law and the organisational policies to ensure that the organisation's risk exposure does not exceed the board's risk appetite and tolerance levels.

In ensuring that the organisation continually assesses and responds to any strategic or risk-related challenges, NEDs fulfil an important function by constructively leveraging their experience, knowledge and expertise to engage and / or challenge the board and the organisation's executive leadership to develop appropriate strategy. In addition, NED's play a critical role in identifying and advising on new challenges, initiatives and market opportunities available to the organisation.

NEDs should objectively monitor the performance of the executive management of the organisation, and must be adequately equipped to offer an independent perspective in any matters where there are, or may be, areas of conflicting interests.

When NEDs fail to fulfil their duties

Negligent, reckless or delinquent behaviour of NEDs can have a negative impact on an organisation's business strategy, operations and reputation. To this extent, NEDs generally have a significant influence on the determination and direction of an organisation's strategy. Through such influence, it stands to reason that the potential liability attached to poor decision making and risk-taking is directly proportional to the damages and liability the organisation stands to suffer. It is therefore critical that organisations carefully select not only NEDs who are experienced and skilled in the afore-mentioned matters, but that they are also perfectly aligned and act in a manner that is congruent to the organisation's risk management framework and related policies. As members of the board, similar to their executive director counterparts, NEDs are custodians of good governance and they must assist in overseeing that risks are effectively managed within and by the organisation.

"The future of the Board will change to reflect increased business risks and it is predicted that non-executives will become specialised professionals. Boards are under pressure to continually transform and to ensure that they have the right expertise, experience and diversity to be an effective board in this rapidly-changing business environment."

– Gerald Seegers, PWC

(January 2017)

Whilst the general statutory duties of a director will be found in the Act, the consequences for NEDs who fail in their duties towards the organisation will generally be found in the organisation's Memorandum of Incorporation (MOI), Board and Committee Charters, Codes of Conduct and other organisational policy documents.

NEDs are also exposed to personal liability by virtue of their board position, and they need to inform themselves of these risks. Moreover, they need to exercise even greater caution than their executive boardroom colleagues, since they tend to be more vulnerable because they may not know or understand all the intricacies of the organisation's day-to-day operations and associated risks. While NEDs may have limited organisational involvement, they have the same accountability and liability as an executive director who is more familiar with the daily 'ins and outs' of the organisation.

Considerations for potential NEDs

Potential NEDs need to carefully consider their decision to accept or decline the offer to fill a position on a board of directors. In addition to the fees they may be paid, they should critically reflect on their skills, experience and personal attributes to determine whether they are compatible with the position and the

demands expected of them. In addition, it is important for potential NEDs to consider whether they have the appetite for the risks which typically accompany a position of this nature.

Among other things, NEDs are expected to attend meetings of the board and board committees; acquire and maintain a wide knowledge of the economic environment, industry and business of the organisation; adequately fulfil the role of a director (which takes effort and dedication); and undertake that they will have sufficient time to meet the duties expected of them. This is no mean feat for individuals already employed in other professions, and who are fulfilling the role of a NED as an additional occupation. Accordingly, NEDs should therefore be prudent and carefully assess the number of directorships they intend to commit themselves to and fulfil. They should avoid the temptation of occupying more directorships than is possible for them to properly exercise their fiduciary duty of care, skill and diligence.

Potential NEDs should also ensure that they are aware of -- and prepared to take upon themselves -- the inevitable legal and personal exposures that accompany the position, and they should reflect on whether they have sufficient independence from the organisation to offer critical, objective input when required to do so. They should be confident enough to raise difficult questions and prompt creative tension in meetings, while acting with integrity and applying their intellectual honesty. In particular, they should also have the self-assurance to play an active role in board and similar meetings, not least also being able to dissent on matters when they believe this is necessary to do so.

Potential NEDs should determine whether the organisation which they intend to serve will provide them with the necessary induction, training and development in order for them to properly fulfil all of the requirements expected in their role. They should furthermore complete a 'due diligence' of the organisation prior to accepting the position, researching its business model and the challenges that management is facing, in order to gain an understanding of these critical areas. Being unprepared or ill-equipped for the role of a NED, and being blinded by the board attendance fees is simply short-sighted, selfish and devoid of fulfilling the statutory obligations owed to the organisation by a director.

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