

Who is a Prescribed Officer?

By
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The 2008 Companies Act (the new act) defines a prescribed officer as:

“a person who, within a company, performs any function that has been designated by the Minister in terms of section 66 (10).”

The definition is important because the new act extends to prescribed officers the obligations which a director owes to a company under section 75 and 76, and thus the risk of liability that is described in section 77.

Unfortunately the Minister did not designate any functions in the ordinary sense when he exercised his powers under section 66(10). Regulation 38 describes a prescribed officer in the following terms:

“Despite not being a director of a particular company, a person is a ‘prescribed officer’ of the company for all purposes of the Act if that person—

(a) exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or

(b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.”

The phrase *“general executive control”* is not defined nor has the term been considered by our courts. There is also a similar lack of clarity with part (b) of the designation.

Hence the question, what is a prescribed officer?

I suppose the question could just as easily be asked whether regulation 38 is a proper exercise of the Minister’s powers under section 66(10) and thus whether prescribed officers in fact exist under South African law at the present time. I don’t think the Minister has properly exercised his powers but this is only my opinion. This is a further addition to the growing pile of questions which will have to be dealt with by the legislature or the courts.

In the meantime we need to try and make some sense of this. So what can one say about the definition of a prescribed officer?

I think the definition is very narrow, bearing in mind the issue it is trying to address. I am referring to the idea that companies must be managed by or under the direction of the board of directors. This is, I believe, what is meant by general executive control. The board of directors exercises general executive control in the majority of South African companies. However this is not normally so in the case of the large companies and their subsidiaries that for the most part

drives the South African economy. The main board of such companies usually supervise professional managers who in truth exercise executive management control. These managers may or may not be directors as well. They need not be employed or even work inside the company. It is not unusual for executive management control of a subsidiary to be exercised by employees at the group head office, the senior management of the subsidiary playing the role of functionaries with limited discretionary decision-making ability. Indeed in many cases the board of directors of these subsidiaries operates as a rubber stamp for the decisions of the board of the holding company or its or executive management.

I assume that the purpose of having prescribed officers is to bring those managers who exercise general executive power into the same net as directors insofar as the standard of their conduct and their liability is concerned. After all if you in fact exercise the kind of power that is ordinarily exercised by the board of directors then you should be subject to the same duties and risk.

The trouble is that this is easier said than done especially in the case of corporate legislation that is intended to regulate all companies from the smallest mom and pop operation to the local presence of the largest multinational corporation.

Where do you draw the line? Do you try to bring what is in essence the exercise of power by a dominant shareholder into the net as the British, Australian and New Zealand acts have tried to do or do you limit its application to designated functions within the company as the Canadian act has done?

I think the legislature had the Canadian model in mind. The Canadian Corporations Act defines an "officer" as:

"an individual appointed as an officer under section 121, the chairperson of the board of directors, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager, a managing director, of a corporation, or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices".

However the Minister seems to have had other ideas and this I submit is where the problem with the present definition lies. The result in my view is a definition that is very limited in its scope.

In my opinion:

1. The reference to *"inside the company"* excludes those head office officials who by the exercise of shareholder dominance in fact exercise *"general executive control over and management of the whole, or a significant portion, of the business and activities of the company"*.
2. The reference to the exercise of *"general executive control over and*

management of the whole, or a significant portion, of the business and activities of the company” excludes those senior managers who notwithstanding their titles are in fact subject to the direction and control of others. This will largely exclude the senior management of subsidiaries. Indeed in my view the definition of a prescribed officer will for the most part only have relevance in head office situations where the board does not exercise “*general executive control*”.

3. It is true that part (b) of the regulation has the potential to widen the scope of the definition. However if I am right in saying that what is meant by “*general executive control*” has to be determined in the context of how the board of directors exercises its powers, then part (b) merely extends the definition to those cases where a committee exercises those powers rather than an individual. Part (b) thus applies to cases where the company is run by an executive committee.

It is unfortunate that confusion exists about who is and who is not a prescribed officer. Designation has very important consequences for the employment relationship as well as the designated employee’s exposure to risk. The clear line that exists between the duties owed by an employee and those owed by a director is that the former has no right to be informed and is obliged to obey the lawful instructions of his or her employer whereas the latter has a right to be informed and is obliged to exercise his or her independent judgement. It is vital that the managers and employer know in advance of the manager’s enhanced rights and obligations and respect them.

It would be sensible for Companies to formally recognise prescribed officers, to ensure that they receive the same consideration and status as members of the board and are insured against claims just as directors are.

The uncertainty generated by the definition means that companies are going to have to adopt a practical approach to identifying prescribed officers.

Unfortunately they are going to have to do this largely unaided by any legal precedent or authority. The scheme underlying the designation of prescribed officers in the new act is unique to South Africa. The concept of a prescribed officer was a late inclusion in the development of the new act, it seems as a result at least in part of representations made by the Law Society of South Africa who complained that the bill, unlike the British companies act, made no provision for so-called shadow directors. No mention was made of the term in the explanatory memorandum to the 2007 bill. It appeared in the 2008 bill but as no explanatory memorandum accompanied that bill, it is difficult to determine the thinking and

purpose underlying its inclusion with any degree of confidence. Henochsberg suggests corporations could be prescribed officers and that it was intended to apply to what are termed shadow directors and the company secretary. I do not, with respect, think this can be correct. The notion of a juristic person owing duties as if it were a director does injury to the personal and inherently human nature of those duties. The duties assigned to a company secretary in section 86 are in any event inimical to the exercise or participation to a material degree in the “*general executive control over and management of the whole, or a significant portion, of the business and activities of the company*”. The scheme which underlies the idea behind shadow directors in the British companies act was not followed in this country so the term shadow director is also inappropriate, in my respectful opinion.

There is an urgent need for a proper analysis of exactly what is trying to be achieved with prescribed officers and a realignment of the new act to precisely meet that need. The current situation has a huge potential to place senior managers in a situation where they do not know if they are fish or fowl.