

How to maintain good corporate governance during uncertain times

By [Giles White](#)

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The Covid-19 pandemic and emergency measures taken by the South African Government have caused unprecedented business disruption. They have forced companies to respond to new and ever-changing risks and challenges, from employees' health and safety to site closures, supply chain disruptions and decreased demand for many goods and services.



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During these extraordinary times, robust corporate governance is more important than ever.

Business leadership - core principles

The current crisis threatens the lives and livelihoods of millions of people in South Africa. At their core, the decisions taken now by business leaders must be guided by principles which address this profoundly human side of the loss of life and deep personal anxiety caused by the crisis.

Business leaders will need to re-evaluate standard crisis management measures, develop new policies and take urgent and unprecedented action. Exceptional leadership through clear, empathetic communication and personal example will be required.

These are some thoughts about the core issues that boards should be considering.

The role and responsibility of boards in the crisis

Boards set the tone for the whole organisation. The actions they take now may define the reputation of their companies for years to come.

Those actions must comply with the radical emergency legislation and regulations being put in place on a daily basis. Clear, pragmatic and up-to-date legal advice on the company's position will be an essential element of the information to be taken into account by boards.

For many businesses, the immediate duties of directors will be to ensure the survival of the business by taking steps now that will allow operations and services to resume as the lockdown eases. The Companies and Intellectual Properties Commission's suspension of invoking its powers in respect of reckless trading during the Covid-19 crisis will clearly help boards and give them greater flexibility in assessing the steps that they take now.

Management of companies whose operations can continue as emergency services will have to take care that they are not seen to be taking advantage of the crisis by hiking the price of their products, even if those increase revenues and profits.

Emphasis on a stakeholder-inclusive approach

In making decisions now, boards must consider the key stakeholders of these companies. In recent times, there has been increasing international emphasis on the purpose of companies being to embrace wider societal values, rather than focus only on shareholder value.

There has been extensive legal debate about the meaning of this shift when looking at the duties of directors. These duties, as set out in the South African Companies Act and common law, include the fiduciary duties to act in good faith and for a proper purpose and the duty to act in the best interests of the company, with care, skill and diligence.

Acting in the best interests of the company has broadly been treated under our common law as acting in the interests of the shareholders as a whole.

In this crisis, it will be critical for boards to take into account the views of and consequences for key stakeholders in setting policies and making decisions. This stakeholder-inclusive approach is also recommended by the King IV Report on Corporate Governance and is implicit in the preamble to the Companies Act. Having regard to and, in these circumstances, balancing the interests of all stakeholders in making decisions may well be perceived as acting in the best interests of the company.

For example, it may be legally hard and ethically unacceptable to argue against the position that prioritising the health and job security of employees during this time is in the best long-term interests of the company.

In South Africa, engaging meaningfully and empathetically with employees should be a primary responsibility of boards, particularly at this time.

Decisions to reduce workforces or suspend employment (without or on reduced pay) need to be thoroughly weighed up in light of detailed analysis of the capacity of the business to get through the crisis period without taking or minimising those steps.

A reduced business is clearly better than no business at all. However, not all decisions will be so binary. Boards will have to reconsider capital allocation policies during this period, including dividend payments, share buybacks and executive compensation. For example, have executives taken proportionate compensation cuts to share the pain and to preserve cash for the continuing pay of employees? Boards and remuneration committees will be held to account by the public for decisions made now that do not reflect personal and meaningful support for the workforce. These issues will be accentuated and subject to greater scrutiny for companies that receive state aid.

There will be many other key stakeholders to take into account. These, of course, must include the shareholders. In addition to employees, others will include customers, suppliers, banks, insurers, communities (and the environment) and regulators.

Regular communications and discussions with these stakeholders about emergency policies and actions will be critical. Typically, for example, updates to shareholders take place at specified times, but in this setting, frequent updates outside the formal cycle may be welcomed and generate a supportive approach.

Effective delegation of board's duties and responsibilities

This stakeholder engagement means multiple lines of communication and information gathering for assessment at board meetings.

Boards should organise themselves to enable this as effectively as possible. There is no single right way to do this, but many boards will establish a Covid-19 Crisis Committee. Responsibility for multiple and urgent day-to-day decisions can be delegated to the Covid-19 Crisis Committee. Boards should consider preparing a clear written framework under which the Covid-19 Crisis Committee can make decisions, reverting to the board when decisions fall outside the framework. Ultimately, the decisions of any board committee are also the decisions and responsibility of the board.

In addition to the executive management, this is a time for the Chair and non-executive directors to visibly assume and demonstrate governance leadership. There are critically important and urgent roles that the full board of directors can play in the stewardship of companies during this crisis. Boards should take advantage of the range of experience, specialist skills and relationships that their individual directors offer. For example, non-executive directors could engage with and report back to boards on the views of key stakeholders.

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