

DIRECTORS' CONFLICT OF INTEREST POLICY



I. Document Information and History

I.2 Document Review History

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I.3 Change Mechanism

- I.3.1 Any requirement for change or clarification should be addressed to the Document Owner, who will log the issue.
- I.3.2 These issues will usually be collected until the regular Policy review date, at which point they will be addressed, as part of the Policy review and update process.
- I.3.3 Urgent issues will be addressed as soon as possible, and where necessary, passed via the normal governance process, for acceptance, before being communicated.
- I.3.4 Any changes to this Policy must adhere to the Change Policy.

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1. DEFINITIONS

In this policy -

Act	Land and Agricultural Development Bank of South Africa Act 8 of 2002 as amended.
Bank	The Land and Agricultural Development Bank of South Africa trading as the Land Bank.
Board	The board of Directors of the Bank constituted in terms of Section 8 of the Act.
Control	<p>A Director Controls a juristic person or its business if-</p> <p>(a) in the case of a juristic person that is a company, that Director together with any related or inter-related person—</p> <p>(aa) is directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or</p> <p>(bb) has the right to appoint or elect, or control the appointment or election of, Directors of that company who control a majority of the votes at a meeting of the board; or</p> <p>(cc) has the right to receive the majority of any distributions made by that company;</p> <p>(b) in the case of a juristic person that is a trust, that Director has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust or receive the majority of the benefits declared by that trust; or</p> <p>(c) that Director has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in <u>paragraph (a),(b) or (c) above.</u></p>
Companies Act	Companies Act No. 71 of 2008.
Cross Directorship	Where a Director holds the position as director on the board of more than one company, and shall include without limitations, all instances where a Director sits on the Board and any other board of directors of a company.
Directors	<p>Individuals appointed by the Minister to oversee the management of the Bank, and any reference to a Director shall refer to any one of the aforesaid individuals.</p> <p>We refer you to the advisory note attached hereto as Annexure C for detail on the duties of Directors.</p>
Executive Director	A board member who is involved in the day-to-day running and management of the Bank and is a full time salaried employee of the Bank.
King IV	King IV Report on Corporate Governance for South Africa, 2016.
Minister	The Minister tasked by the President of the Republic of South Africa with the administration of the Bank

Non-Executive Director	A board member who is not involved in the day-to-day management of the Bank and is not a salaried employee of the Bank.
Personal Financial Interest	A direct, material interest of a Director of a financial, monetary or economic nature, or to which a monetary value may be attributed.
PFMA	Public Finance Management Act No. 1 of 1999
Related Person	Includes any persons to whom a Director is: <ul style="list-style-type: none"> (a) married, or lives together with in a relationship similar to a marriage; (b) any person separated to the Director by no more than two degrees of natural or adopted consanguinity or affinity; (c) any juristic person that a Director directly or indirectly Controls; (d) any company, close corporation or trust, other than the Bank, of which the Director or Related Person is also a Director, member or trustee as the case may be; and (e) shall include any inter-related persons, being persons who are related to one another in a linked series of relationships, such that two of the persons are related in a manner contemplated in (a), (b), (c), or (d) above, and the one of them is related to the third in any such manner, and so forth in an unbroken series.

2. POLICY STATEMENT

2.1. OVERVIEW

- 2.1.1. Directors (both Executive and Non-Executive) owe fiduciary duties to the Bank. As such, Directors are obliged to act in good faith and in the best interest of the Bank. The aforesaid duties require that at all times Directors ensure that, when exercising their powers and performing their functions, they do so lawfully and in accordance with the purpose for which their powers and functions have been conferred on them.
- 2.1.2. To the extent that any Director exercises his or her powers or performs his or her functions for an ulterior purpose (i.e. for personal gain), such Director will have breached his or her fiduciary duties owed to the Bank and could be held personally liable therefor. Any conduct by a Director of the aforesaid nature, could not only adversely impact the Director, but could (and likely will) damage the reputation of the Bank.
- 2.1.3. The Bank, being a state owned company established in terms of the Act, exercises public power and performs public functions, and must therefore be, and be seen to be, acting in the interests of the public.
- 2.1.4. Accordingly, Directors are required to:
- 2.1.4.1. maintain the highest standard of ethics;
 - 2.1.4.2. at all times, conduct themselves in a manner that enhances and promotes the reputation of the Bank;
 - 2.1.4.3. not put themselves in a position that could lead to possible or perceived conflicts of interest between his/herself and the Bank; and

- 2.1.4.4. to ensure that his/her interests or those of a Related Person do not (and are not perceived to) take precedence over the interests of the Bank.

2.2. PURPOSE

- 2.2.1. The purpose of this policy is to inform Directors of their duty to disclose any interests that could or will conflict with those of the Bank and to set out the procedure pursuant to which such disclosure should be made.
- 2.2.2. Furthermore, this policy shall be used by Directors to avoid :(i) breaching the fiduciary duties they owe to the Bank and; (ii) incurring any reputational harm to the Bank that may arise by virtue of that Director having breached the aforesaid duties.
- 2.2.3. To ensure that the aforesaid purposes are achieved, this policy has been drafted in accordance with the following governance instruments:
- 2.2.3.1. the Act;
- 2.2.3.2. the PFMA;
- 2.2.3.3. the Companies Act, even though this Act is not applicable to the Bank, not being a company registered under the Companies Act, the key provisions of the Companies Act relating to the disclosure of conflicts of interest have been adopted herein, as the Companies Act deals with the aforesaid in a comprehensive and commendable manner;
- 2.2.3.4. King IV; and
- 2.2.3.5. best international practice.

3. SCOPE

This policy is applicable to Directors (both Executive and Non-Executive Directors) of the Bank, and relates to a Director's duty to act in the best interest of the Bank, as well as, in relation to any subsidiaries of the Bank.

4. WHAT IS A CONFLICT OF INTEREST?

4.1. OVERVIEW

- 4.1.1. At its most basic, a conflict of interest arises where a Director has one/ more interests that conflict with or are perceived to conflict with the duty that that Director owes to the company to act in its best interest. As such, in these circumstances, a Director's judgment, objectivity and discretion in making decisions for and on behalf of the Bank may be, or may be perceived to be, compromised.
- 4.1.2. Whether a Director is conflicted (or is perceived to be conflicted), is determined with reference to whether an independent observer might question whether a Director's professional actions were motivated or influenced by a potential or actual Personal Financial Gain or of that of a Related Person or some other gain.
- 4.1.3. Traditionally a duty to avoid conflict of interest required that a Director should avoid a conflict of interest between the Director's personal interest and the Director' duty to the company. Subsequently it has been confirmed by the courts that a Director is in addition, required to avoid a conflict "*between duty and duty*". An example of the latter includes where one Director sits on the boards of two competing companies – here duties are owed to both companies and

may conflict. The aforesaid may likewise arise where a Director sits on the board of two contracting companies.

- 4.1.4. In addition to the above components of the duty to avoid a conflict of interest, it is likewise a requirement that a Director, may not, in the absence of the informed consent of the company, make a profit or retain a profit made by them in the course of and by means of their office as Directors (i.e. whilst performing their duties). Should any profit be made in breach of the duty to avoid a conflict of duty by a Director, then such profit must be disgorged and paid over to the company. The aforesaid is referred to as the no-profit rule and aims at precluding Directors from misusing or making improper use of their positions as Directors for their own personal advantage.
- 4.1.5. With respect to both aspects of this duty, a conflict arises where there is a real or possible conflict of interests. The latter refers to situations where the “*reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real, sensible, possibility of conflict.*” As such, the duty to avoid a conflict will arise both where there is a real conflict and a possibility of a conflict of interests.

4.2. TYPES OF CONFLICTS OF INTEREST

- 4.2.1. It is important to note that conflicts of interest can arise in various forms and situations. It may be financial or non-financial. It may be direct or indirect. It may be professional or family related. It is therefore impossible to provide an exhaustive list of possible conflicts of interest. A Director is the person best placed to identify when a conflict of interest may arise.
- 4.2.2. Typical examples of situations where a conflict of interest may arise include, but are not limited to, the following:
- 4.2.2.1. Cross Directorships or other employment with other entities e.g. having private or professional, political, academic or other interests that may conflict with the Bank's interests;
- 4.2.2.2. the retention of an interest in a business enterprise or professional practice with which the Bank is involved or intends to be involved (e.g. Directors having an interest in a sector that the Bank is involved in or planning to be involved in);
- 4.2.2.3. share ownership in businesses that do business with the Bank;
- 4.2.2.4. holding a beneficial interest in a trust, that directly or indirectly conducts business with the Bank;
- 4.2.2.5. where Directors are affiliated with organizations that receive aid or funding from the Bank;
- 4.2.2.6. where Directors accept business considerations from any person or business with which the Bank has or does conduct business;
- 4.2.2.7. where a Director uses confidential information he/she has as a result of his or her position as a Director to his or her own benefit; and
- 4.2.2.8. where a Director takes an opportunity that belongs to the company for his or her own benefit. In this instance the Director is appropriating an opportunity that he or she is required to acquire for the company, for his or her own benefit.

4.2.3. To the extent that a Director is uncertain as to whether he or she has any interests that may or do conflict with those of the Bank, such Director must contact one of the following persons, who will assist the Director make this determination:

- 4.2.3.1. the Chairman of the Board;
- 4.2.3.2. the Chairman of the Social and Ethics Committee;
- 4.2.3.3. the Chairman of the Risk and Governance Committee;
- 4.2.3.4. the Chairman of the Audit Committee; or
- 4.2.3.5. the Company Secretary.

5. BOARD INVOLVEMENT

- 5.1. The Board, being the directing mind of the Bank, and which body acts for and on behalf of the Bank, must be appraised of all real or perceived conflicts of interest. As such, all Directors must ensure that in all cases, any conflicts of interest, whether real or perceived, direct or indirect, should be disclosed timeously and in full to the Board. The responsibility of identifying and disclosing conflicts of interest vests with each Director, being the person best placed to identify such conflicts. This being so, it is therefore vital to ensure that each Director is constantly aware of and apprised of situations in which conflicts of interest may arise and that each Director proactively deals with such conflicts by way of full disclosure to the Board at the earliest opportunity.
- 5.2. Pursuant to a disclosure, the Board must apply its mind to the substance of every disclosure and must make a decision about the materiality of the interest and whether the Director can proceed to vote on the matter and/or participate in any other processes relating to the matter in which that Director has an interest.

6. PROHIBITIONS

Members of the Board of directors and related parties are, for the duration of the member's term of office as a director of the Land Bank and for a period of 3 years after the expiry of such member's term of office, prohibited from directly (or indirectly):

- 6.1. providing goods and services to the Bank and its subsidiary companies; and
- 6.2. applying for any of the financial services and products offered by the Bank and its subsidiary companies.

The only exceptions are circumstances where:

- 6.3. the board member or related party is the only supplier of particular goods or services and no other person is able to provide those goods or services (single-source procurement);
- 6.4. the Land Bank or its subsidiary companies are the only providers of the goods or services;
- 6.5. there is an emergency and a tender process cannot be followed;

- 6.6. there is an emergency and it is impractical to follow a tender process (i.e. there are exceptional circumstances and reasonable grounds to deviate from the requirement to conduct a competitive procurement process);
- 6.7. the board member or related party is already providing goods and services to the Bank in terms of a valid contract entered into between such board member or related party and the Bank; and
- 6.8. the board member or related party is already a beneficiary of the financial services and/or products offered by the Bank in terms of a valid contract entered into between such board member or related party and the Bank

7. DIRECTORS' RESPONSIBILITIES REGARDING CONFLICTS OF INTERESTS

- 7.1. Directors are required to disclose any real or perceived conflicts of interest, which disclosures shall be both general and specific. General disclosures will entail the disclosure of any personal interest/s (financial or otherwise) held by a Director on an annual basis in accordance with clause 7.2, which could or will in due course conflict with the interests of the Company. Specific Disclosures will entail the disclosure, by a Director, of all conflicts of interest (actual or perceived) that arise during the course of each year and which relate to any item that may form part of the Board's agenda, in accordance with clause 7.2 below.
- 7.2. General Disclosures must be made in writing and by each Director prior to the first Board meeting immediately following the appointment of that Director and once every year thereafter for the duration of his/her appointment. Specific disclosures must be made, when applicable, before the matter giving rise to the conflict of interest is considered by the Board at a particular Board meeting. The latter obligation shall endure for the duration of each Director's appointment.
- 7.3. Both general and specific disclosures must be recorded in writing, and must be submitted to the Board and the National Treasury (in the case of a Director making the disclosure) within a reasonable time after the Director making the disclosure became aware of the actual or perceived conflict of interest.
- 7.4. General disclosures must be submitted by each Director to the Board and must substantially comply with the form attached hereto as **Annexure A**, and at minimum must set out a list of all Related Persons, any relevant material interests held by these Related Persons and any Cross Directorships held by that Director.
- 7.5. All specific disclosures must be submitted to the Board and must substantially comply with the form attached hereto as **Annexure B** and must at minimum (i) set out the nature of the interest/s held by the Director in a matter being considered by the Board (ii) set out whether the interest is or would be considered material to the Bank or to that Director and (iii) state that he/or she shall recuse him or herself from voting on the matter and/ or from any decision-making in respect of that matter, unless authorized otherwise by the Board.
- 7.6. A register of declaration of interests shall be kept and updated regularly. On first appointment and once every year, or at any time when circumstances change, all Directors shall in good faith, disclose to the Board for recording any business or other interest that is likely to create a potential conflict of interest, including but not limited to:
 - 7.6.1. all business interests, direct or indirect in any other Bank, partnership or business venture;
 - 7.6.2. membership to trade, business or other economic activities;

- 7.6.3. shareholding, shares options and/or other interests;
 - 7.6.4. any direct or indirect interest in any transactions within the Bank; and
 - 7.6.5. any gifts, monies, commissions, benefits or other favours extended or received from any party in respect of or in relation to any business dealings with the Bank.
- 7.7. The fact that a conflict of interest has been declared does not mean it has been addressed. Such conflict still needs to be managed as set out in paragraph 8 below.
- 7.8. It is possible for relationships with clients, intermediaries and suppliers to give rise to situations where there might be a conflict of interests. As such it is advisable that, if at all possible, Directors should avoid developing business interests with Bank clients, intermediaries and suppliers. Where such business interests arise, the Director shall, in respect of such interest, recuse himself/herself from the decision-making of the Bank or of the outside interest.
- 7.9. The Bank's Directors shall not divulge to any third parties any confidential information or information obtained by a Director by virtue of his/her position as a Director. This includes information on how to package a proposal for any tenders of the Bank.
- 7.10. The Directors shall avoid influencing decisions that benefit their own company (s) or Related Persons, whether financially or otherwise.
- 7.11. Directors should also avoid contacting employees of the Bank in an endeavour to lobby them and influence them to make decisions for their own benefit or for the benefit of a Related Party.
- 7.12. Each Director should ensure that he/she is independent and seen as being independent of any business or person with whom the Bank has a service relationship.

8. DECLARATION PROCEDURE

- 8.1. Annually each Director must complete a general declaration of interest form, which form must be completed in full and returned to the Company Secretary for purposes of maintaining the Director's declaration register. The Director should inform the Company Secretary of any change thereto as soon as it arises to ensure that the amendment of the annual declaration is effected timeously.
- 8.2. In respect of specific declarations, each Director must raise any conflicts of interest before the agenda item to which the specific conflict relates is discussed by the Board. The Company Secretary shall then record such disclosure accordingly.
- 8.3. Directors must declare all conflicts of interest (direct or indirect, real or perceived, personal or of family members or business partners) as well as the details of the nature of the interest. It is recommended that all personal interests should be declared whether a conflict exists or not. Moreover, if a Director has a personal financial interest in respect of a matter to be considered at a meeting of the Board or knows that a Related Person has a financial interest in the matter, the following procedure must be followed:
The Director:-
- 8.3.1. must make a specific disclosure to this extent as set out and described in paragraph 7.5 above, before the matter is considered at the Board meeting;
 - 8.3.2. must disclose to the Board at the Board meeting any material information relating to the matter, and known to the Director;
 - 8.3.3. may disclose any observations or pertinent insights relating to the matter if requested to do so by any other Director;

- 8.3.4. if present at the meeting, must leave the meeting immediately after making any disclosure contemplated above;
 - 8.3.5. must not take part in the consideration of the matter, except to the extent contemplated in paragraphs 8.3.1 and 8.3.3 above;
 - 8.3.6. while absent from the meeting in terms of these provisions, the Director is to be regarded as being present at the meeting for the purpose of determining whether sufficient Directors are present to constitute a quorum, but is not to be regarded as being present at the meeting for the purpose of voting on the matter; and
 - 8.3.7. must not execute any document on behalf of the Bank in relation to the matter unless specifically requested or directed to do so by the Board.
- 8.4. The Office of the Company Secretary must record all declarations made under this paragraph and the decision in the minutes of that meeting, including the following details:
- 8.4.1. the nature of the conflict;
 - 8.4.2. which Director it relates to;
 - 8.4.3. whether a declaration was made in advance of the meeting;
 - 8.4.4. a brief overview of what was discussed;
 - 8.4.5. whether the Director recused himself/herself from the Board meeting; and
 - 8.4.6. any decisions taken in respect thereof by the Board.
- 8.5. No contract where a board member or Related Party of the Director is involved shall be finalized without reference to the Company Secretary to establish that a declaration disclosing the Director's interest has been filed and that the contract does not involve a conflict of interest.
- 8.6. It is specifically stated that a Director may not participate in the decision-making process in respect of any transaction or any matter between the Bank and any of the following persons:
- 8.6.1. a person who is that Director's Related Person;
 - 8.6.2. a person who is a debtor or creditor of Director or its Related Persons;
 - 8.6.3. a person who is in partnership or any financial association with that Director or Related Person;
or
 - 8.6.4. a person who is in the employ of that Director or its Related Persons.

9. COMPENSATION

When a Non-Executive Director is appointed by the Bank to participate in outside organizations on behalf of the Bank (where the Bank has an investment), any remuneration will accrue to the Non-Executive Director.

10. NON-COMPLIANCE WITH THIS POLICY

- 10.1. To the extent that a Director has failed to comply with the provisions of this Policy, the following consequences may ensue. The Director:
- 10.1.1. may be removed from office by the Minister and/or the relevant authority;
 - 10.1.2. the Director may be held personally liable for any breach of his or her fiduciary duties to the Bank; or

10.1.3. any profits earned by the Director attributable to his or her non-disclosure shall be disgorged to the Bank.

10.2. Any violation of this policy by Directors will be referred to the Chairperson of the Board for consideration and action in line with the Land Bank Act 2002.

11. MONITORING AND POLICY REVIEW

11.1. The Office of the Company Secretary shall be responsible for monitoring the implementation of this policy.

11.2. The policy shall be reviewed on an annual basis.

ANNEXURE A: GENERAL DISCLOSURE FORM**LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA****GENERAL DECLARATION OF PRIVATE INTERESTS**

To : Company Secretary

Date:

1. Introduction

- I.1. All directors of the Land and Agricultural Development Bank of South Africa (“**Bank**”) are expected to perform their duties conscientiously, honestly and in accordance with the best interest of Bank, its subsidiaries and other businesses. Directors must not use their position, or knowledge gained through their employment or association with the Bank, for private or personal advantage, or in such a manner that a conflict or an appearance of conflict arises between the Bank’s interest and their personal interests. A conflict could arise where a director, a member of their family, or a business with which the director or family is associated, obtains a gain, advantage or profit by virtue of the employee’s position with the Bank or knowledge gained through that position.
- I.2. If directors of the Bank feel that a course of action which they have pursued, are pursuing or are contemplating pursuing, may involve them in a conflict of interest situation or a perceived conflict of interest situation, they should immediately make all the facts known to the person to whom they report.
- I.3. Other than shares held in public companies quoted on a recognised stock exchange representing a minority shareholding, directors of the Bank will be required to complete and keep current this declaration of interest in other business organisations or business organisations where such director may be a director, officer, partner, member and/or co-owner, or in which the director has a financial interest.

2. Undertakings

- 2.1. I specifically undertake that I will not allow my interest(s) to influence my obligations of good faith towards the Bank.
- 2.2. I will further guard against any conflict of interest that may arise between the best interests of the Bank and the interest of the legal entity/organisation in which I am holding an interest. In the event of such conflict I will declare such conflict immediately and will further remove myself from any decision-making process which could have a bearing on this conflict of interest.

DECLARATION OF PECUNIARY AND PERSONAL INTEREST**Name:**

.....

Identity Number:

.....

Position:

.....

3. I [Name], declare as a director of the Bank that I hold the following personal and/or pecuniary interest(s):

Pecuniary interests	Please provide details of the interest
Current employment	
Businesses (of which I am a Director or shareholder (including a nominee shareholder) or otherwise have an interest in)	
Trusteeships – details of all trust of which I am a trustee	
Membership of professional bodies, membership organisations, public bodies or special interest groups of which I am a member and have a position of general control or management	
Gifts or hospitality offered to you by external bodies while acting in your position as a Director of the Land Bank and whether this was declined or accepted in the last 12 months	
Contracts offered by you for the supply of goods and/or services to the Bank	
Any other conflict	

Personal interests	Name	Relationship to me	Organisation	Nature of the interest
Related Persons to Director				
Company directorships or trusteeships of Related Persons				

If you are a director, trustee or officer or shareholder of any other entities, please provide details below:

Name of Entity	Position Held	Industry

4. To the best of my knowledge the information supplied above is correct and complete. I understand that it is my responsibility to declare any conflict of interest/loyalty, business or personal interest that relates directly or indirectly, to myself or any relation in any contract, proposed contract or other matter when present at a meeting at the Bank where such contract or matter comes under consideration. I understand that I must recuse myself from any meeting during the discussion of such contract or matter and must not vote in respect of it or otherwise seek to influence the deliberations or outcome thereof.
5. I undertake to inform the Bank immediately should the above declared information change.
6. I specifically undertake that I will not allow my interest(s) to influence my obligations of good faith towards the Bank.
7. I will further guard against any conflict of interest that may arise between the best interests of the Bank and the interest of the legal entity/organisation in which I am holding an interest or any other personal interest. In the event of such conflict I will declare such conflict immediately and will further remove myself from any decision-making process which could have a bearing on this conflict of interest.

SIGNATURE: _____

NAME PRINTED:

DATE:

1. GUIDANCE NOTE IN RESPECT OF CONFLICTS OF INTEREST

- I.1. Directors have a legal duty to act only in the best interests of the Bank. Where a situation arises in which they cannot do this due to a personal interest they have, steps should be taken to identify, prevent and record the conflict. This ensures that Directors are acting in the best interests of the Bank.
- I.2. In the general declaration above, you must provide details relating to:
 - I.2.1. your ownership, or partnership or interest in a company or organisation which may be engaged by the Bank to provide goods or services;
 - I.2.2. goods or services you or your Related Persons offer which may be used by the Bank;
 - I.2.3. any close relation you have to someone who satisfies either of the above; and
 - I.2.4. any close relationship you have to someone who is employed by the Bank.
- I.3. Take note on the following relating to pecuniary interests and non-pecuniary interests, briefly include the following:
 - I.3.1. Pecuniary interests

Generally, Directors should not participate in any discussions in which they may directly or indirectly benefit from a pecuniary interest, except where authorised by the Board. A direct benefit refers to any personal financial benefit and an indirect benefit refers to any financial benefit you may have by virtue of a relationship to someone who stands to gain from a decision of the Board. Both direct and indirect interests must be declared.
 - I.3.2. Non-pecuniary interests (conflicts of loyalty)

Declarations must be made in respect of non-pecuniary interests in terms of which the Director does not stand to gain any benefit. For example, in Cross Directorship situations. While the Director might not benefit personally, his/her judgment could be impaired in transactions relating to the two entities.

ANNEXURE B – SPECIFIC DISCLOSURE FORM

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA

SPECIFIC DECLARATION OF PRIVATE INTERESTS

To : Company Secretary

Date:

2. I [Name], hereby, declare that :

2.1. I have no pecuniary or other personal interest, direct or indirect, in any matter that will be discussed during the meeting of the board of directors (“**Board**”) or any other meeting to which this declaration relates, to be held on [Date] that raises or may raise a conflict with my duties as a director of the Land and Agricultural Development Bank of South Africa (“**Bank**”); or

2.2. I have a pecuniary or other personal interest, direct or indirect, in a matter that will be discussed during the Board meeting or any other meeting to which this declaration relates, to be held on [Date] that raises or may raise a conflict with my duties as a director of the Bank. The particulars of such matter are stated below :

[Note: Please provide a description of the nature of your interest, including whether it is held by you or a Related Person and whether it is a direct or indirect interest, the matter being considered by the Board with which this interest does or may conflict, and any other details that may be relevant to a decision by the Board as to whether this interest is material.]

Note

(a) Please put a “√” in the appropriate box

(b) Please continue on supplementary sheet if necessary

3. To the best of my knowledge the information supplied above is correct and complete. I understand that it is my responsibility to declare any conflict of interest/loyalty, business or personal that relates directly or indirectly, to myself or any relation in any contract, proposed contract or other matter when present at a meeting at the Bank

where such contract or matter comes under consideration. I understand that I must withdraw from any meeting during the discussion of such contract or matter and must not vote in respect of it.

4. I undertake to inform the Bank immediately should the above declared information change.
5. I specifically undertake that I will not allow my interest(s) to influence my obligations of good faith towards the Bank.

SIGNED: _____

NAME:

DESIGNATION:

DATE:

ANNEXURE C – ADVISORY NOTE ON DIRECTORS' DUTIES AND LIABILITIES

1. INTRODUCTION

- 1.1. This memorandum is intended to provide guidance to directors in relation to their primary legal duties and responsibilities towards the Bank and it is not intended to be exhaustive on the subject herein and therefore should not be construed as such.
- 1.2. The purpose of this memorandum is only to highlight the aforesaid primary legal duties and responsibilities owed by each of the Directors towards the Bank with a view to achieving best corporate practice. In this regard, Directors are advised to educate themselves of other duties and responsibilities which may be contained in the Bank's governance instruments, primary agreements in which the Bank is a party and other policy documents of the Bank.

2. DUTIES AND RESPONSIBILITIES OF DIRECTORS

- 2.1. South African corporate law sets out the standard of Director's conduct in section 76 of the Companies Act, 71 of 2008 (the "Act"). This standard of Director's conduct imposes two primary duties on a Director: firstly, the 'fiduciary duty' and secondly, the 'duty of skill and care'. These duties form the basis for all other duties of Directors in the Act and in the King Report on Corporate Governance, 2016 (the "King Report IV"). Each of the aforesaid primary duties and its component duties are analysed below.

2.2. Fiduciary duty

- 2.2.1. A Director stands in a fiduciary position to his company and must therefore act in good faith in his dealings with or on behalf of the company, and must exercise his powers and fulfil the duties of his office with honesty, integrity and without self-interest.
- 2.2.2. The basis on which a Director is held liable by his company for a breach of his fiduciary duty is the general principle that a person standing in a fiduciary relationship towards another commits a breach of trust if he acts for his own benefit or to the prejudice of the person to whom he stands in a fiduciary position.
- 2.2.3. Directors' fiduciary duties in turn encompass the following: (i) duty to avoid a conflict of interest; (ii) duty not to exceed their powers; (iii) duty not to exercise powers for an improper or collateral purpose, and (iv) a duty to exercise an unfettered discretion. We briefly discuss these duties below:

Duty to avoid a conflict of interest

- 2.2.3.1. A Director, in occupying a fiduciary position, has a legal duty to prevent a conflict arising between his own interests and those whom he serves. It follows from this that a Director may take no advantage from his office other than by way of Directors' remuneration to which he may be entitled.
- 2.2.3.2. The duty to avoid a conflict of interest was illustrated in *Robinson v Randfontein Estates Gold Mining Co Ltd*¹: Robinson (the chairman of the board) acquired a farm in his own name after his company (though anxious to acquire the farm) could not reach agreement with the sellers. Robinson purchased the farm

¹ 1921 AD 168.

through an agent for £60 000 and subsequently sold it to the company for £275 000. The then Appellate Division held that Robinson was not justified in making a profit from his office, or in placing himself in a position where his personal interest conflicted with those duties arising from his fiduciary position, and ordered him to pay to the company the profit of £215 000 made from the transaction.

- 2.2.3.3. The duty to avoid a conflict of interest further requires that a Director may not act in any matter in which he has a material interest which conflicts with his duties towards the company, save with the consent of the company in a general meeting, and after having made full disclosure of the interest concerned.
- 2.2.3.4. The requirement for disclosure stems from the need to ensure the observance of both honesty and integrity. Failure to make the requisite disclosure renders the contract voidable as against the Director, at the instance of the company².
- 2.2.3.5. A further important implication is that the duty to avoid a conflict of interest prohibits a Director from making secret profits on the one hand, and from misappropriating corporate opportunities and exploiting such opportunities for his personal benefit on the other. A Director may be held to account to the company for all secret profits or benefits acquired by him, unless acquired or retained with the full knowledge and consent of the company.

Duty not to exceed powers

Directors have a fiduciary duty to observe limitations applicable to the company's powers, as well as the limits of their own authority to act on the company's behalf. Where a Director enters into a transaction on behalf of the company and in so doing exceeds the company's powers, neither the company nor the third party to the contract may rescind from the transaction on the basis that the company was without the requisite power or capacity to conclude the transaction, or because the Director was without the appropriate authority to transact on behalf of the company.

Duty not to exercise powers for an improper or collateral purpose

- 2.2.3.6. Directors may exercise their powers only for the purpose for which they were conferred and not, for example, for frustrating the wishes of the majority or minority shareholders, defeating the interests of the company or furthering their own interests.
- 2.2.3.7. In *Punt v Symons Co. Ltd*³, further shares were issued in the share capital of the company in order to secure sufficient votes for the directors to enable them to amend the company's articles of association in such a manner that certain

² *African Claim and Land Co. Ltd v WJ Langermann* 1905 TS 494

³ 1903 2 Ch. 506.

shareholders would lose their right to appoint and remove directors to the board. The court held that the directors had improperly exercised their powers to allot shares, and the allotment was set aside.

Duty to exercise an unfettered discretion

- 2.2.3.8. Directors must consider the affairs of the company in an objective manner, and accordingly Directors should not contract to vote in a particular manner. Although this clearly does not contemplate a prohibition on the conclusion of voting pool agreements, a director who is appointed as a nominee representing certain shareholders remains obliged to exercise his or her own discretion and must act positively to protect the interests of the company, even where such interests conflict with those of the shareholder who appointed him.
- 2.2.3.9. In the case of *Fisheries Development Corporation of SA Ltd v Jorgensen and another*; *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd*⁴, the Court ruled that in discharging the duty to observe the utmost good faith towards the company, a director is required to exercise independent judgement and to take decisions according to the best interests of the company. The Court remarked further, that a director may in fact be representing the interests of the member who nominated him and he may even be the servant or agent of that person, but in discharging his duties and functions as director, he is in law obliged to observe the interests of the company, to the exclusion of the interests of any such nominator, employer or principal. Accordingly, the director may not be a mere dummy or puppet blindly following the instructions of another; any director who acts in such manner opens himself to potential liability for breach of fiduciary duties.

2.3. Duty of skill and care

- 2.3.1. The second part of the primary duty imposed on Directors is the duty to act with care and skill.
- 2.3.2. A Director must exercise his powers and carry out his office in good faith and for the benefit of the company. In doing so, he must, display the same care as would a reasonable person in the conduct of his own affairs, and display the degree of skill which may reasonably be expected from a person of his particular knowledge and expertise.
- 2.3.3. A director is not required to have any special qualification, special business acumen or expertise, any singular ability, or even any experience in the business in which the company is engaged. He is, however, expected to exercise the care which can reasonably be expected of a person with his particular knowledge and experience and is required to apply such skill to the advantage of the company.
- 2.3.4. Whilst a director has a duty to devote sufficient time to overseeing the affairs of the company to allow him to discharge his responsibilities to it, he is not bound to provide

⁴ 1980 4 SA 156 (W) 163.

continuous attention to the company's affairs, unless required to do so in terms of a contract with the company (e.g. a managing director, who would typically be contractually bound to give the company his full attention). It must also be noted that there exists a difference between the full-time or executive director who participates in the day-to-day management of the company's affairs and the non-executive director, who has not undertaken any special obligation. The latter is not bound to provide continuous attention to the company's affairs - his duties are of an intermittent nature, to be performed at periodic board meetings and at other meetings which may require his attention. He is not, however, bound to attend all such meetings (although such director should do so whenever reasonably possible).

3. PERSONAL LIABILITY

- 3.1. In regard to personal liability of Directors, the following are instances in which Directors may be held liable for any loss damages or costs sustained by the company, namely:
- 3.1.1. where a Director breached his fiduciary duties or any other statutory duty imposed on such a Director;
 - 3.1.2. where a Director has bound himself personally for the liability of the company, e.g. as a surety and co-principal debtor;
 - 3.1.3. on the grounds of breach of warranty of authority, where he has acted beyond the scope of his powers and such fact was not actually or constructively known to the counterparty;
 - 3.1.4. where a Director has acted fraudulently;
 - 3.1.5. where a Director as acted negligently, except if such negligence can be justified on the basis of an error in an honest and considered business decision;
 - 3.1.6. where a Director has acquiesced in the carrying on of the company's business recklessly, with gross negligence, with intent to defraud any person or for fraudulent purpose;
 - 3.1.7. where a Director was a party to any fraudulent action by the company;
 - 3.1.8. where a Director was a party to the publication of a false or misleading financial statement or prospectus;
 - 3.1.9. where a Director has wrongfully procured a breach of contract by the company or deliberately committed an act disabling the company from performing its duties under the contract;⁵ and
 - 3.1.10. where a Director has constituted the company for purposes of performing a wrongful act or, being in control, has directed that a wrongful act be committed.⁶

4. CRIMINAL LIABILITY

- 4.1. Section 332 of the Criminal Procedure Act 51 of 1977 imposes liability on directors for certain offences committed by the company. A number of statutory provisions state that, where an

⁵ *Torquay Hotel Co. Ltd v Cousins* 1969 2 Ch. 106 at 138.

⁶ *Rainham Chemical Works Ltd v Belvedere Fish Guano Co. Ltd* 1921 2 AC 465 (HI)

offence has been committed by a company, with the consent or connivance of, or attributable to, the neglect of a director, such director may also be guilty of the offence unless he proves on a balance of probabilities that he did not take part in the commission of the offence and could not have prevented it.

- 4.2. There are also a number of statutes which impose direct criminal liability upon a company's directors, for example section 34(7) of the National Environmental Management Act 107 of 1998 imposes criminal liability on directors of firms guilty of contravening environmental laws. Furthermore, in certain instances a cause of action may be construed against a director where he causes the company to commit a delict. For instance, in *McLelland v Hullet & Others*⁷ the issue was whether shareholders could sue directors for pure economic loss arising from directors' failure to carry out an undertaking to acquire land on behalf of the company which resulted in a reduction in the value of the shareholder's interest in the company: the Court found in favour of the shareholder, based on public policy considerations.

5. EXCUSE FROM LIABILITY

The philosophy of our company law is that Directors should not be held liable for honest and reasonable errors in business decision-making. Therefore, where the Director acted honestly and in good faith but erred in his/her reasonable business judgment, he/she will be excused for any loss or damages that may flow from such error.

⁷ 1992 (1) 456 (D)