It has become custom, specifically amongst directors, to challenge and to debate the enforceability of the provisions of the King Codes™ I thru IV. The argument against the legal sanction of King IV™ and its predecessors is that the Code has always been issued on the basis that it is a voluntary code of compliance. It has also been conventionally accepted, to some extent, that the principles, although relevant in the context of good corporate governance, in themselves do not create legally binding obligations on directors, and are merely guidelines to assist directors in so far as good corporate governance is concerned.
The King IV Code on Corporate Governance™ for South Africa (the Code) asserts that its legal status is the same as its predecessors – a set of voluntary principles of good practices. It expands on that statement by also saying that “...the adoption of good corporate governance will be especially important where a court considers whether the protection afforded by the business judgement rule provided for in the Companies Act, 2008 (Companies Act), would be applicable under certain circumstances.” Looking at these statements in isolation, the Code seemingly soft-pedals its own enforceability against directors, whereas a “Hawkeye” interpretation of the Companies Act actually highlights ample mechanisms to enforce the provisions of King IV™ if required.

In understanding the enforcement vigor of the Code on directors, it is first necessary first to discern the concept of the Business Judgement Rule, specifically as embodied in the Companies Act. Before 2010, South African company law did not contain a codified business judgement rule mechanism, although it was referred to in some court cases. However, with the advent of the Companies Act in 2010, this position was changed, and it now contains specific reference to the concept of a business judgement rule.
The basis of this principle is to provide that, to the extent that directors follow certain prescribed principles, they would be able to defend themselves from liability in instances where it is alleged that they did not act in accordance with their duties under Companies Act or the common law. Section 76 (3) explains the manner in which a director must exercise the powers granted under the Companies Act:

- In good faith and for a proper purpose
- In the best interests of the Companies
- With the degree of care, skill and diligence that may reasonably be expected of a person—
  - carrying out the same function in relation to the company as those carried out by that director; and
  - having the general knowledge, skill and experience of that director.

This draws clear lines for the obligation of duty and care that a director has towards a company and also forms the basis against which the actions of a director would be tested to determine whether or not he/she has complied with those duties.
Wherever there is reason to suspect that directors have not acted in accordance with these duties, the business judgement rule becomes an important mechanism in determining whether a director acted in accordance with his or her duties of care. In other words, to the extent that a director complies with these requirements, actions taken by the directors, which on the face of it may appear to have been in contravention of their duties, would be excusable, and would not render them liable to the company, shareholders or other stakeholders.

Section 76 (4) sets out in detail the basis of the rule, but for purposes of King IV, the important requirements are that the director took reasonably diligent steps to become informed about the matter and is entitled to rely on any information, opinions, recommendations, reports or statements provided to the director in performing those duties. The Code would form part of such information and plays a vital role in the decision-making process of directors, to ensure compliance with the provisions of the Companies Act.

Conversely, to the extent that directors fail to satisfy themselves of the matter or obtain information such as set out in King IV, they would not have complied with their duties as set out under the provisions of the Companies Act, and from this perspective the provisions of King IV becomes both enforceable against him/her.

The line call is clear: Directors who ignore the principles and provisions of the Code, do so at their own peril, compliance with those principles would have a direct bearing on decisions taken by the directors who could, under appropriate circumstances form the basis of liability towards the company, shareholders or stakeholders.

Queries regarding the application of King IV to your corporate structure and strategies may be directed to André Visser (Partner) and Danie Strachan (Partner).