

A COMPARATIVE ANALYSIS OF COMPANY DIRECTORS' ACCOUNTABILITY AND THE STATUTORY DUTY OF CARE, SKILL AND DILIGENCE IN SOUTH AFRICA AND ZIMBABWE

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Abstract

This article provides a comparative analysis of company directors' accountability and the application of the duty of care, skill and diligence under the South African and Zimbabwean company law. Notably, Zimbabwe has recently partially codified company directors' duty of care, skill and diligence for the first time in the Companies and Other Business Entities Act [Chapter 24:31] 4 of 2019 (COBE Act), which came into effect on 13 February 2020. On the other hand, the Companies Act 71 of 2008 (Companies Act 2008) of South Africa also partially codified company directors' duty of care, skill and diligence and it came into effect on 1 May 2011. Consequently, South Africa has developed some good academic literature and jurisprudence on the duties of company directors for almost a decade. This is one of the reasons why South Africa's Companies Act 2008 was chosen for a comparative analysis with Zimbabwe's COBE Act on directors' duties. Accordingly, the article discusses the gaps and flaws in the relevant company laws in South Africa and Zimbabwe in relation to the interpretation and application of the directors' duty of care, skill and diligence. This is done to recommend some measures that could be adopted by the relevant regulatory bodies and companies to enhance their directors' accountability in both jurisdictions.

Keywords: company directors, duty of care, skill and diligence, business judgment rule, director accountability.

JEL Classification: K33, K34

1. Introductory remarks

A company is an artificial being and a juristic person that is created by a statute.³ Thus, a company may only act through natural persons, mainly its board of directors. A board of directors is regarded as a governing and controlling body of any company in both Zimbabwe and South Africa.⁴ Therefore, although a company has capacity to acquire rights and obligations which can be enforced in a court of law, it cannot be compared and equated with a natural person in respect of all aspects because it does not have a physical substance since it exists only by virtue of the enabling statute.⁵ For example, in *R v. Kritzinger*,⁶ the court held that a company reads and hears a representation through the eyes and ears of its directors while acting in the course of their duties.⁷ Despite a company's financial success, its juristic nature places all its resources and wealth at the mercy of its

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³ P.L. Davies, and S. Worthington, *Gower's Principles of Modern Company Law*, 10ed, (London, Sweet and Maxwell Publishers, 2016) 29; D. French, S. Mayson, and C. Ryan, *Company Law*, 33ed, (Oxford, Oxford University Press, 2016), p. 5; A.O. Nwafor, 'Corporate Criminal Responsibility: A Comparative Analysis', 57(1) *Journal of African Law* (2013), p. 81, 82; S.J. Padfield, 'The Role of Corporate Personality Theory in Opting out of Shareholder Wealth Maximization' *Transactions: The Tennessee Journal of Business Law* (2017), p. 415, 418.

⁴ Paragraph 52 of the Zimbabwe National Code on Corporate Governance 2014 (Code 2014).

⁵ F. Hamadziripi, *Derivative Actions in Contemporary Company Law: A Comparative Assessment from An Enhanced Accountability Perspective* (LLD Thesis University of Fort Hare 2020), p. 10; R.C. Beuthin, and S.M. Luiz, *Beuthin's Basic Company Law*, 3ed, (South Africa, Butterworths, 2000), p. 7. Section 8(4) of the Constitution of the Republic of South Africa 1996 (1996 Constitution) provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person. The Constitutional Court of South Africa took note of the fact that the way the right to privacy is applied to natural persons cannot be the same when it is applied to juristic persons in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 1 SA 545 (CC)*.

⁶ 1971 2 SA 57 (A).

⁷ *R v. Kritzinger* 1971 2 SA 57 (A). See also *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* E 1915 AC, where it was held that "the directors are the directing mind and will of the corporation". Further see D. French, S. Mayson, and C. Ryan, *Company Law*, 33ed, (Oxford, Oxford University Press, 2016), p. 5.

agents who, in practice, are usually its directors.⁸ A company cannot protect or vindicate itself against wrongdoing and/or enforce its rights without its representatives such as directors, officers or any other agents.⁹ This juristic nature of a company has sometimes made it vulnerable to abuse by its officers and agents, especially its board of directors.¹⁰

To achieve corporate goals and objectives, directors must possess certain qualities, play certain roles and perform certain functions and duties on behalf of their companies.¹¹ One of the important duties of company directors in South Africa and Zimbabwe is the duty to act with care, skill and diligence. Company directors are obliged to carefully exercise their duty to act with care, skill and diligence when making corporate decisions and/or representing their companies. In South Africa and Zimbabwe, company directors that breach their duty to act with the requisite care, skill and diligence will face serious consequences including being held personally liable and accountable for their actions.¹² According to Black's law dictionary, accountability means the state of being responsible or answerable.¹³ The accountability of company directors is a key feature of any efficient corporate governance regime.¹⁴ Poor accountability of directors could enable directors to breach their duty to act with care, skill and diligence with impunity in South African and Zimbabwean companies and escape liability.¹⁵ Good corporate governance could be best achieved when company directors are held accountable for their behavior, conduct and decisions, so that they do not breach their duty to act with care, skill and diligence in South Africa and Zimbabwe.¹⁶ Therefore, company directors should be carefully and consistently held accountable for any breach of their duties in order to effectively enforce their duty to act with care, skill and diligence.¹⁷

Following the 2007-2008 global financial crisis (GFC), there has been amplified calls by policy makers in South Africa and Zimbabwe to extend the scope of company directors' accountability to include directors' misjudgments.¹⁸ This could be attributed to the fact that most of the corporate failures that led to the GFC were generally attributed to poor corporate governance measures, market abuse and the rampant breach of directors' duties, especially the duty to act with care, skill and diligence. South Africa has developed some good academic literature and jurisprudence on the duties of company directors for almost a decade. This is one of the reasons why South Africa's Companies Act 2008 was chosen for a comparative analysis with Zimbabwe's COBE Act on directors' duties. Notably, any South African court may consider foreign law when interpreting and/or applying the directors' duty of care, skill and diligence.¹⁹ Moreover, South Africa has useful case law on directors' duties and accountability which could be utilised to effectively promote and enforce the directors' duty of care, skill and diligence in Zimbabwe.²⁰ For that reason, it is hoped that the Zimbabwean policy makers will carefully consider following the South African approach on the directors' duty to act with care, skill and diligence and accountability. Accordingly, the article discusses the gaps and flaws in the relevant company laws in South Africa and Zimbabwe

⁸ F. Hamadziripi, (2020), p. 15; D. Francis, 'The Top 25 Corporate Nations', <http://foreignpolicy.com/2016/03/15/these-25-companies-are-more-powerful-than-many-countries-multinational-corporate-wealth-power/>, accessed 15 August 2017, shows that if Walmart were a country, it would surpass the Gross Domestic Product of more than 150 countries. Other "metanational" corporations, as the author puts it, that amass hundreds of billion US\$ in annual revenue include Exxonmobil, Apple, Samsung and Glencore.

⁹ Section 66(1) of the Companies Act 71 of 2008 (Companies Act 2008); Article 3 of the Table A: Model Articles for Public Companies, sixth schedule to the Companies and Other Business Entities Act [Chapter 24:31] 4 of 2019 (COBE Act).

¹⁰ F. Hamadziripi, (2020), p. 15; J.E. Abugu, 'The Monster Theory: Setting the Boundary for Corporate Financial Malpractice', *An Inaugural Lecture Delivered at the University of Lagos* (Lagos, University of Lagos Press and Bookshop Ltd, 2015), p. 13.

¹¹ Paragraph 52 of the Code 2014.

¹² Section 77 of the Companies Act 2008.

¹³ B.A. Garner, *Black's Law Dictionary* 8ed (Thomson Reuters, 2004), p. 55.

¹⁴ F. Hamadziripi, (2020), p. 15; A. Keay, 'An Analytical Study of Board Accountability in Transnational Codes of Corporate Governance', (2017), https://link.springer.com/chapter/10.1007/978-3-319-51868-8_6, accessed 25 April 2020, page unknown.

¹⁵ A. Keay A., J. Loughrey, T. McNulty, F. Okanigbuan and A. Stewart, 'Business Judgment and Director Accountability: A Study of Case-Law Over Time', 20(2) *Journal of Corporate Law Studies* (2019) p. 359, 364.

¹⁶ A. Keay, (2017), https://link.springer.com/chapter/10.1007/978-3-319-51868-8_6, accessed 25 April 2020, page unknown.

¹⁷ *Ibid*, F. Hamadziripi, p. 69.

¹⁸ A. Keay, J. Loughrey, T. McNulty, F. Okanigbuan, and A. Stewart, 20(2) *Journal of Corporate Law Studies* (2019) p. 359, 360.

¹⁹ Section 5(2) of the Companies Act 2008 provides that a court interpreting or applying this Act may consider foreign company law to the extent appropriate.

²⁰ L. Madhuku *An Introduction to Zimbabwean Law* (Weaver Press, 2010), p. 23.

in relation to the interpretation and application of the directors' duty of care, skill and diligence. It also discusses the possible advantages and disadvantages that could ensue to company directors owing to the partial codification of directors' duties under the COBE Act and the Companies Act 2008 in Zimbabwe and South Africa respectively. The article further analyses the incorporation of the business judgment rule into the directors' duty of care, skill and diligence. Thereafter, the article recommends some measures that could be adopted by the relevant regulatory bodies and companies to enhance their directors' accountability in Zimbabwe and South Africa.

2. The duty to act with care, skill and diligence

Prior to the enactment of the COBE Act, the directors' duty to act with care, skill and diligence was regulated by the common law in Zimbabwe. The previous Companies Act²¹ which was repealed by the COBE Act did not contain any provision on the directors' duty to act with care, skill and diligence.²² Similarly, before the Companies Act 2008 was enacted, the directors' duty to act with care, skill and diligence²³ was regulated by the common law in South Africa. This indicates that Zimbabwe and South Africa had similar underlying rationales which resulted in the partial codification of the directors' duty of care, skill and diligence. Some of these rationales include the need to enhance corporate governance standards,²⁴ the balancing of the rights and corporate responsibilities of directors and shareholders²⁵ and to promote the accountability of company directors.²⁶

However, a notable cause for concern regarding Zimbabwe's codification of directors' duties is the fusion of the duty of care, skill and diligence with the directors' fiduciary duty to act in good faith and in the best interests of the company.²⁷ This approach could confuse company directors in Zimbabwe regarding the scope of their duties as well as the meaning and application of their duty to act with care, skill and diligence.²⁸ The fusion of company directors' duty to act with care, skill and diligence with the directors' fiduciary duty to act in good faith and in the best interests of the company could also give rise to legal uncertainty and the poor accountability of company directors in Zimbabwe. The directors' duty of care, skill and diligence is not similar to and should not be treated as the same with the directors' fiduciary duty to act in good faith and in the best interests of the company for a couple of reasons. Firstly, the fiduciary duty of directors to act in good faith and in the best interests of the company emanates from Roman-Dutch law.²⁹ On the other hand, the duty of care, skill and diligence was developed from English law.³⁰ Evidently, the two duties emanated from different legal systems based on different legal principles hence fusing them together under the COBE Act could result in interpretation confusion and legal uncertainty. Secondly, although the same conduct may result in breach of both the fiduciary duty to act in good faith and in the interests of a company and the duty of care, skill and diligence, the consequences that could be suffered by the offenders are different.³¹ The fiduciary duty is based on a breach of trust and not the commission of a delict or breach of contract.³² On the other hand, a breach of the directors' duty of care, skill and diligence raises a delictual question in the form of negligence.³³ Consequently, the fusion of the

²¹ [Chapter 24:03] 47 of 1951 as amended (Companies Act 1951).

²² See the preamble and section 2 of the COBE Act.

²³ Section 76(3)(c) of the Companies Act 2008.

²⁴ Section 7(b)(iii) of the Companies Act 2008 and the Memorandum to the Companies and Other Business Entities October 2018 Bill.

²⁵ Section 7(i) of the Companies Act 2008 and the Memorandum to the Companies and Other Business Entities October 2018 Bill.

²⁶ Section 7(h) and (j) of the Companies Act 2008 and the Memorandum to the Companies and Other Business Entities October 2018 Bill.

²⁷ Section 54(1) of the COBE Act provides that every director of a company has a duty to act in good faith in the best interests of company with the care, skill, and attention that a diligent business person would exercise in the same circumstances.

²⁸ Section 54(1) of the COBE Act.

²⁹ L. Madhuku, (2010), p. 16-18; E. Jones, 'Directors' Duties: Negligence and the Business Judgment Rule', 19(3) *South African Mercantile Law Journal* (2007), p. 326, 327.

³⁰ E. Jones, 19(3) *South African Mercantile Law Journal* (2007), p. 326, 327.

³¹ *Ibid*, p. 326, 327.

³² *Ibid*, p. 326, 334.

³³ *Ibid*, p. 326, 334.

directors' duty to act with care, skill and diligence and the fiduciary duty to act in good faith and in the best interests of a company could make it difficult to hold company directors accountable in Zimbabwe. A court could mistakenly venture into an enquiry of breach of trust when faced with a question of breach of directors' duty of care, skill and diligence because the legislature formulated section 54(1) of the COBE Act in a way that could seem as if the duty of care, skill and diligence is a sub-category of the fiduciary duty to act in good faith and in the best interests of the company. This could be too onerous for any stakeholder attempting to hold directors accountable considering the current challenges that are associated with the approval of any breach of the duty to act in good faith and in the best interests of the company by directors in both Zimbabwe and South Africa.³⁴

In South Africa, the legislature has clearly alienated the directors' duty to act with care, skill and diligence from the fiduciary duties. The duty to act with care, skill and diligence is provided for in section 76(3)(c) of the Companies Act 2008 whereas the fiduciary duties are provided for in section 76(3)(a) and (b) of the same Act. Zimbabwe should consider following the South African approach in this regard to combat possible confusion that is embedded in section 54(1) of the COBE Act.

2.1. Is the test objective or subjective?

Company directors in Zimbabwe are obliged to discharge their duties with the care, skill and attention that a diligent business person would exercise in the same circumstances.³⁵ However, the COBE Act does not define what a diligent business person is. Company directors in Zimbabwe can rely on information, opinions, reports or statements (including financial statements) of independent auditors, legal practitioners, experts or employees of the registered business entity whom they reasonably believe are reliable and competent to issue such information, opinions, reports or statements.³⁶ Such reliance is only applicable if the person makes a proper inquiry that was required and/or indicated by the circumstances.³⁷ Notably, the COBE Act does not define or provide guidance on the meaning of a proper enquiry.³⁸ The authors argue that since section 54 of the COBE Act is only a partial codification of the directors' duty of care, the courts should consult the common law to ascertain the meaning of the phrases such as "proper enquiry" and "diligent business person".³⁹ However, considering that Zimbabwean courts rely more on South African company law judgments and academic literature, the authors argue that Zimbabwe could end up consulting South African common law to make up for the definitional deficiency in the COBE Act. This could result in Zimbabwe inheriting the flaws and inconsistencies that have characterised South African common law on the duties of company directors.

Unlike the COBE Act, the Companies Act 2008 does not provide how the courts could rely on common law to remedy its statutory defects. In this regard, the COBE Act should be amended to expressly enact provisions on the possible use of common law to remedy its statutory defects. Notably, directors in South African companies are also allowed to reasonably rely on the performance and information provided by other professionals such as lawyers and accountants in the process of diligently making informed decisions.⁴⁰ In South Africa, directors may further rely on information, opinions, recommendations, reports or statements, including financial statements and other financial data.⁴¹ There are two schools of thought that have developed in South Africa regarding the question whether the directors' duty to act with care, skill and diligence should be tested objectively or subjectively. On one hand, the directors' duty to act with the relevant care, skill and diligence has been couched as an objective one whereby directors are expected to exercise the care, skill or

³⁴ Ibid, p. 326, 335.

³⁵ Section 54(1) of the COBE Act; paragraph 61 of the Code 2014.

³⁶ Section 54(2) of the COBE Act.

³⁷ Section 54(3) of the COBE Act.

³⁸ Section 54(3) of the COBE Act.

³⁹ Section 54 of the COBE Act.

⁴⁰ See section 76(4)(b) read together with section 76(5)(a), (b) and (c) of the Companies Act 2008.

⁴¹ Section 76(3) of the Companies Act 2008.

diligence which is reasonably expected of a person with the same knowledge and experience.⁴² On the other hand, Delpont *et al* believe that the test whether a company director has complied with his or her duty of care, skill and diligence is partly objective and partly subjective.⁴³ Jones further supports the view that the test includes subjective or personal elements by arguing that a reasonable director is imbued with the knowledge and experience of the director whose decision is in question.⁴⁴ Furthermore, whilst the requisite care can be determined objectively, the determination of directors' skills and diligence ought to be determined through a subjective approach since the level of skills and/or diligence are different.

In Zimbabwe, the test whether directors acted with the requisite care, skill and diligence is an objective one. This is clear from the requirement that company directors should act with the degree of care expected of a reasonable person, they should be good stewards of the company's assets, and that they should apply their minds honestly in making decisions concerning the company's business.⁴⁵ The duty of diligence requires that directors should understand the information given to them and come to any decision-making forum fully prepared and informed about the issues to be discussed.⁴⁶ In this regard, company directors in Zimbabwe should study, understand and implement every duty imposed upon in accordance with the law and/or the best practice.⁴⁷ The authors submit that the adoption of a partially subjective and a partially objective test in Zimbabwe's standard of care is plausible because it is likely to enhance director accountability in a more balanced manner.

2.2. Partial codification versus total codification of directors' duty of skill, care and diligence

Another issue that needs to be investigated is whether the COBE Act and the Companies Act 2008 partially codified or completely codified the directors' duty of care, skill and diligence. Partial codification refers to a systematic and authoritative statement of the leading legal principles on a given subject, whether the rules are found in statutes or in common law.⁴⁸ Complete codification of the law refers to a processing of collating and restatement of the law in a statute undertaken usually to abolish the common. The codification of directors' duty of care, skill and diligence provides clear guidelines for directors in Zimbabwe and South Africa.⁴⁹ The codification of the law forfeits the flexibility of the common law.⁵⁰ The Companies Act 2008 partially codified the directors' duty of care, skill and diligence.⁵¹ The Companies Act 2008 further provides that the South African courts have a duty to develop the common law whenever they determine a matter in terms of the Companies Act.⁵² Likewise, by virtue of section 197(2)(a)(i) of the COBE Act which states that company directors who breach their duty of care may be held liable in accordance with the principles of the common law, the authors argue that Zimbabwe has also partially codified directors' duty of care, skill and diligence.⁵³ Consequently, company directors and other stakeholders in both South Africa and Zimbabwe will enjoy the several benefits of partial codification of the directors' duty of care, skill

⁴² E. Jones, 19(3) *South African Mercantile Law Journal* (2007), p. 326, 332; *Fisheries Development Corporation v Jorgensen* 1980 (4) 156 (W) 165.

⁴³ P.A. Delpont, Q. Vorster and E.S. Henochsberg, *Henochsberg on the Companies Act 71 of 2008* Vol 1 Service Issue 2 (Durban, LexisNexis, 2012), p. 297. See also *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1124.

⁴⁴ E. Jones, 19(3) *South African Mercantile Law Journal* (2007), p. 326, 332.

⁴⁵ Section 54(1) of the COBE Act; paragraph 63 of the Code 2014.

⁴⁶ Paragraph 64 of the Code 2014.

⁴⁷ Paragraph 64 of the Code 2014.

⁴⁸ L. Coetzee, and L.J. Van Tonder, 'Advantages and Disadvantages of Partial Codification of Directors' Duties in the *South African Companies Act 71 of 2008*', 41(2) *Journal for Juridical Science* (2016), p. 1, 3.

⁴⁹ I. Esser, and J. Coetzee, 'Codification of Directors' Duties', 12(1) *Juta's Business Law* (2004), p. 26, 29.

⁵⁰ I. Esser, and J. Coetzee, 12(1) *Juta's Business Law* (2004), p. 26, 30.

⁵¹ L. Coetzee, and L.J. Van Tonder, 41(2) *Journal for Juridical Science* (2016), p. 1, 8-9.

⁵² Section 158(a) of the Companies Act 2008. See also section 39(2) of the 1996 Constitution, which provides that when interpreting any legislation, and when developing the common law or customary law, every court must promote the spirit, purport and objects of the Bill of Rights; *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13 paras 14 and 160 and L. Coetzee, and L.J. Van Tonder, 41(2) *Journal for Juridical Science* (2016), p.1, 2.

⁵³ Section 197(2)(a)(i) of the COBE Act.

and diligence. Firstly, the codification of the directors' duty of care, skill and diligence in South Africa and Zimbabwe simplifies the law by reducing it to written provisions which enhances legal certainty and enable directors to access the relevant law more easily.⁵⁴ Therefore, company directors in South Africa and Zimbabwe could spend less time, effort and money to establish what is required of them to comply with their duty of care, skill and diligence through partial codification.⁵⁵ Partial codification of the common law on directors' duty of care, skill and diligence does not replace all the jurisprudence developed through case law. Instead, it calls for the adoption of the general principles of law projected through a statutory statement, while allowing some room for further development of the common law through the courts.⁵⁶ The common law relating to the directors' duty of care, skill and diligence will continue to apply in Zimbabwe and South Africa in the areas not covered by the statutory provisions and the courts should always consult established common law principles in complex cases.⁵⁷ However, statutory provisions will take precedence over the common law in all matters relating to the directors' duty to act with care, skill and diligence in Zimbabwe and South Africa.⁵⁸ Partial codification preserves the common law to the extent that it does not conflict with the relevant statutory provisions.⁵⁹

Partial codification of the common law on the directors' duty of care, skill and diligence in South Africa and Zimbabwe also has its disadvantages. Firstly, partial codification means the law on directors' duty of care, skill and diligence could now be derived from two sources namely, legislation and the common law which could result in confusion and/or double jeopardy.⁶⁰ Statutory provisions of the main duties of directors may also create unnecessary rigidity on the interpretation and application of such duties.⁶¹ For example, section 54(3) of the COBE Act requires directors to make a proper enquiry.⁶² Nonetheless, the phrase proper enquiry is not defined in the COBE Act. Aspects of the directors' duty of care, skill and diligence could be too sophisticated to be reduced to a few statutory provisions and this gives rise to rigidity and/or poor enforcement of this duty.⁶³ These flaws could be minimised by providing appropriate educational awareness measures to equip directors on the codification of the duties of directors and the application of the relevant statutory provisions in both Zimbabwe and South Africa.⁶⁴

2.3. Directors' duty of care, skill, diligence and the business judgment rule

The COBE Act links the directors' duty to act with care, skill and diligence with the business judgment rule.⁶⁵ Most commentators argue that the business judgment rule is an American legal export originally developed as a common law rule by American judges of the Delaware State.⁶⁶ It

⁵⁴ I. Esser, and J. Coetzee, 12(1) *Juta's Business Law* (2004), p. 26, 30; L. Coetzee, and L.J. Van Tonder, 41(2) *Journal for Juridical Science* (2016), p. 1, 3.

⁵⁵ L. Coetzee, and L.J. Van Tonder, 41(2) *Journal for Juridical Science* (2016), p. 1, 4; I. Esser, and J. Coetzee, 12(1) *Juta's Business Law* (2004), p. 26, 29.

⁵⁶ Section 158(a) of the Companies Act 2008; section 39(2) of the 1996 Constitution; L. Coetzee, and L.J. Van Tonder, 41(2) *Journal for Juridical Science* (2016), p. 1, 3.

⁵⁷ L. Coetzee, and L.J. Van Tonder, 41(2) *Journal for Juridical Science* (2016), p. 1, 3.

⁵⁸ I. Esser, and J. Coetzee, 12(1) *Juta's Business Law* (2004), p. 30; L. Coetzee, and L.J. Van Tonder, 41(2) *Journal for Juridical Science* (2016), p. 1, 3.

⁵⁹ L. Coetzee, and L.J. Van Tonder, 41(2) *Journal for Juridical Science* (2016), p. 1, 5.

⁶⁰ I. Esser, and J. Coetzee, 12(1) *Juta's Business Law* (2004), p. 30; L. Coetzee, and L.J. Van Tonder, 41(2) *Journal for Juridical Science* (2016), p. 1, 6-7.

⁶¹ I. Esser, and J. Coetzee, 12(1) *Juta's Business Law* (2004), p. 26, 29; L. Coetzee, and L.J. Van Tonder, 41(2) *Journal for Juridical Science* (2016), p. 1, 7.

⁶² Section 54(3) of the COBE Act.

⁶³ I. Esser, and J. Coetzee, 12(1) *Juta's Business Law* (2004), p. 26, 29; L. Coetzee, and L.J. Van Tonder, 41(2) *Journal for Juridical Science* (2016), p. 1, 7.

⁶⁴ L. Coetzee, and L.J. Van Tonder, 41(2) *Journal for Juridical Science* (2016), p. 1, 10.

⁶⁵ Section 54 of the COBE Act.

⁶⁶ F.W. Triem, 'Judicial Schizophrenia in Corporate Law: Confusing the Standard of Care with the Business Judgment Rule' 24 *Alaska Law Review* (2007), p. 23, 27; A. Gurrea-Martinez, 'Re-examining the Law and Economics of the Business Judgment Rule: Notes for Its Implementation in Non-US Jurisdictions' 18(2) *Journal of Corporate Law Studies* (2018), p. 417, 418; M.K. Havenga, 'The Business Judgment Rule - Should We Follow the Australian Example', 12 *SA. Merc LJ* (2000), p. 25, 27; N. Bouwman, 'An Appraisal of the Modification of the Director's Duty of Care and Skill', *SA Merc LJ* (2009), p. 509, 523; H.H. Stoop, 'The Derivative Action

appears that the business judgment rule is applied together with the directors' duty of care, skill and diligence in South Africa.⁶⁷ The business judgment rule is treated as a rebuttable presumption⁶⁸ that a director acts in the best interests of a company if certain preconditions are met.⁶⁹ Despite the fact that the business judgment rule has been in existence for a long time, the rule remains misunderstood and there is no one precise definition for it yet.⁷⁰ This lack of definition presents a significant problem of legal certainty.⁷¹ The necessity for specificity is heightened when dealing with influential and controversial principles of business judgment rule⁷² which give judges excessive discretion that could hinder the promotion of directors' accountability in South Africa and Zimbabwe.⁷³

Shareholders have not been very successful in holding directors accountable for their breach of directors' duty of care, skill and diligence because it is difficult for them to prove the lack of diligence on the part of the affected directors.⁷⁴ Shareholders may suffer from information asymmetry if they cannot access most of the corporate information which they need to prove that the directors breached their duty to act with care, skill and diligence. Historically, the blossoming of the business judgment rule has had a tendency of diminishing the relevance of the directors' duty of care, skill and diligence.⁷⁵ Furthermore, the business judgment rule has also affected the distinction between the directors' fiduciary duty to act in good faith and in the interest of the company and the directors' duty to act with care, skill and diligence.⁷⁶

At the heart of company directors' duties is the responsibility of decision-making.⁷⁷ Decision-making involves taking risks. However, the decisions of some directors are marred by their lack of the requisite knowledge⁷⁸ and inherent human limitations.⁷⁹ As a result, some of the decisions that directors make may seem unreasonable *ex post facto*.⁸⁰ The pertinent question is when (exact time) should directors be held accountable for any harm suffered by the company as a result of their decisions?

Provisions in the Companies Act 71 of 2008' 129(3) *SALJ* (2012), p. 527, 547; B. Mupangavanhu, 'Standard of Conduct or Standard of Review? Examination of an African Business Judgment Rule under South Africa's Companies Act 71 of 2008', 63(1) *Journal of African Law* (2019), p. 1, 2; F. Hamadziripi, and P.C. Osode, 'The Nature and Evolution of the Business Judgment and its Transplantation to South Africa under the Companies Act of 2008', 33(1) *Speculum Juris* (2019), p. 27, 27.

⁶⁷ N. Bouwman, *SA Merc LJ* (2009), p. 509, 523.

⁶⁸ M.F. Cassim, *The New Derivative Action under the Companies Act: Guidelines for Judicial Discretion* (Cape Town, Juta and Co., 2016), p. 102-103; M.F. Cassim, 'When Companies are Harmed by Their own Directors: The Defects in the Statutory Derivative Action and the Cures (Part 1)', 25 *South African Mercantile Law Journal* (2013), p. 172, 174; H.H. Stoop, 129(3) *SALJ* (2012), p. 527, 547.

⁶⁹ Section 76(4) of the Companies Act 2008 and D. Davis, D. Butler, D. Burdette, W. Geach, T. Mongalo, and L. Coetzee, *Companies and Other Business Structures in South Africa*, 3ed, (Southern Africa, Oxford University Press, 2013), p. 124. See also I.M. Millstein, E.J. Odoner, and A. Sharma, 'Fiduciary Duties of Corporate Directors in Uncertain Times' 30(1). *Journal of Applied Corporate Finance* (2018), p. 17-22; M.F. Cassim, (2016), p. 105; D. Rosenberg, 'Supplying the Adverb: The Future of Corporate Risk-Taking and the Business Judgment Rule', 6(2) *Berkeley Bus. L.J.* (2009), p. 216, 217.

⁷⁰ B. Mupangavanhu, 63(1) *Journal of African Law* (2019), p. 2; S.S. Arshat, 'The Business Judgment Rule Revisited', 8(1) *Hofstra Law Review* (1979), p. 93, 111.

⁷¹ Section 76(4) of the Companies Act; section 54(4) of the COBE Act; Keay, A., and Loughrey, J., 'The Concept of Business Judgment', 39(1) *Legal Studies* (2018), p. 36, 40.

⁷² A. Gurrea-Martinez, 18(2) *Journal of Corporate Law Studies* (2018), p. 417, 419.

⁷³ C.X. Weng, 'Assessing the Applicability of the Business Judgment Rule and the 'Defensive' Business Judgment Rule in the Chinese Judiciary: A Perspective on Takeover Dispute Adjudication' 34(1) *Fordham International Law Journal* (2010), p. 123, 145.

⁷⁴ E. Jones, 19(3) *South African Mercantile Law Journal* (2007), p. 327.

⁷⁵ *Ibid*, p. 327.

⁷⁶ *Ibid*, p. 327.

⁷⁷ J.L. Van Tonder, 'An Analysis of the Directors' Decision-Making Function Through the Lens of the Business Judgment Rule', 37(3) *Obiter* (2016), pp. 562, 563; G.K. Sahu, 'Investors Protection: The Derivative Action', 3(3) *International Journal of Law* (2017), p. 101.

⁷⁸ C. Yaru, 'The Business of Judging Directors' Business Judgments in Singapore Courts' 28(1) 2016 *SAC LJ* (2016), p. 428, 428; C.X. Weng, 34(1) *Fordham International Law Journal* (2010), p. 123, 129; I.M. Millstein, E.J. Odoner, and A. Sharma, 30(1) *Journal of Applied Corporate Finance* (2018), p. 17-22.

⁷⁹ Directors are not fortune-tellers or prophets of future events, so it stands to reason that if their honest decisions turn out to adversely affect the company, they must not be crucified for what a reasonable person placed in their position could not have foreseen. See J.S. McLennan, 'Duties of Care and Skill of Company Directors and Their Liability for Negligence', 8 *South African Mercantile LJ* (1996), p. 94, 95.

⁸⁰ J.Y. Wang, *Company Law in China: Regulation of Business Organisations in a Socialist Market Economy* (Cheltenham, Edward Elgar Publications, 2015), p. 215.

Bainbridge argues that the business judgment rule exists to protect directors and to encourage them to fully exercise their powers.⁸¹ Directors have the responsibility to manage the affairs of their companies.⁸² In this regard, the business judgment rule is acceptable in South Africa since it gives effect to section 66(1) of the Companies Act 2008.⁸³ According to Bainbridge, the purpose of the business judgment rule is to strike a compromise between two competing values namely, authority and accountability.⁸⁴ Muswaka posits that the business judgment rule exists to further the objectives of the Companies Act 2008.⁸⁵ One of the purposes of the Companies Act 2008,⁸⁶ is to balance the rights and obligations of shareholders and directors within companies. Also, the preamble to the Companies Act 2008 reveals that it is aimed at, *inter alia*, defining the relationship between shareholders and directors. The business judgment rule seeks to establish the parameters of directorial authority and accountability of company directors in South Africa. The business judgment rule was introduced into South African company law by the Companies Act 2008.⁸⁷

Delpont *et al* have correctly argued that the business judgment rule is incorporated into South African company law as part of both the directors' fiduciary duty to act in the best interests of the company and their duty to act with care, skill and diligence.⁸⁸ Cassim *et al* contend that section 76(4) creates a presumption⁸⁹ which necessarily means that the plaintiff bears the burden of proof. Although Schoeman concedes that the adjudication and application of the business judgment rule have not been decisively tested by South African courts,⁹⁰ Delpont *et al* opine that the test of whether a director's decision is covered by the business judgment rule is partly subjective and objective.⁹¹ The way the business judgment rule is provided for in section 76(4) of the Companies Act 2008 has been criticised on the basis that it blurs the distinction between the directors' fiduciary duty to act in good faith and in the best interests of the company and the common law duty on directors to act with care, skill and diligence.⁹² This can be attributed to the fact that there is no such distinction in the United States of America (USA), where the business judgment rule originated.

Additionally, it is argued that the South African version of the business judgment rule is too wide and therefore, open to abuse as it applies in respect of any particular matter arising from the exercise of the powers and/or the performance of the functions of directors.⁹³ The vulnerability of

⁸¹ S.M. Bainbridge, 'The Business Judgment Rule as Abstention Doctrine' 83 *Vanderbilt Law Review* (2004), p. 83, 111; G. Neri-Castracane, 'Does the Business Judgment Rule Help Promote Corporate Social Responsibility' 10(1) *Frontiers of Law in China* (2015), p. 8; 11.

⁸² B.S. Sharfman, 'The Importance of the Business Judgment Rule' 14(1) *New York University J.L. & Bus.* (2017), p. 27, 55; R. Cassim, 'The Power to Remove Company Directors from Office: Historical and Philosophical Roots', 25(1) *Fundamina* (2019), p. 37, 62; P.A. Delpont, Q. Vorster, and E.S. Henochsberg (2012), p. 247.

⁸³ This section provides that "[t]he business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise".

⁸⁴ S.M. Bainbridge, 83 *Vanderbilt Law Review* (2004), p. 83, 85; A. Ponta, 'The Business Judgement Rule - Approach and Application', 5(2) *Juridical Tribune* (2015), p. 25, 29.

⁸⁵ L. Muswaka, 'Directors' Duties and the Business Judgment Rule in South African Company Law: An Analysis', 3(7) *International Journal of Humanities and Social Sciences* (2013), p. 89, 92.

⁸⁶ Section 7(i); P.A. Delpont, Q. Vorster, and E.S. Henochsberg, (2012), p. 45, point out that the purposes of the Companies Act 71 of 2008 were founded on the guidelines provided in the *South African Company Law for the 21st century – Guidelines for Corporate Law Reform (Policy Paper)* Government Gazette 26493 June 2004 published by the Department of Trade and Industry. See also Wiese, T., *Corporate Governance in South Africa with International Comparisons*, 2ed, (Cape Town, Juta, 2016), p. 15.

⁸⁷ Section 76(4)(a) provides as follows "in respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company- (a) will have satisfied the obligations of subsection (3)(b) and (c) if: the director has taken reasonably diligent steps to become informed about the matter; (ii) either- (aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or (bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and (iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company".

⁸⁸ P.A. Delpont, Q. Vorster, and E.S. Henochsberg, (2012), p. 298. Also see N. Bouwman, *SA Merc LJ* (2009), p. 509, 528.

⁸⁹ F.H.I. Cassim, M.F. Cassim, R. Cassim, R. Jooste, J. Shev, and J.L. Yeats, (2012), p. 564.

⁹⁰ N. Schoeman, 'How the Companies Act Impacts on Directors: Company Law' 13(6) *Without Prejudice* (2013), p. 11, 12.

⁹¹ P.A. Delpont, Q. Vorster, and E.S. Henochsberg, (2012), p. 297.

⁹² See F.H.I. Cassim, M.F. Cassim, R. Cassim, R. Jooste, J. Shev, and J.L. Yeats, (2012), p. 564.

⁹³ Section 76(4) of the Companies Act 2008.

section 76(4) to abuse is amplified if one reads the said provision with section 66(1) of the Companies Act 2008, which unequivocally states that: “[t]he business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company”.⁹⁴ According to Black’s law dictionary, the word “business” refers to both commercial⁹⁵ and non-commercial transactions.⁹⁶ It is also clear that section 66(1) of the Companies Act 2008 provides that directors have all the powers to perform any functions of the company.⁹⁷ Ultimately, this suggests that all directors’ decisions may end up qualifying for treatment as business judgments. Against this background, it is submitted that South Africa’s overly elastic version of the business judgment rule may potentially offer arbitrary immunity to mischievous directors. Pillay and Natesan submit that the South African version of the business judgment rule is too broad.⁹⁸

The incorporation of the business judgement rule to the statutory provisions for the directors’ duty of care, skill and diligence could compromise the directors’ accountability in Zimbabwe and South Africa.⁹⁹ For instance, the application of the business judgement rule in South Africa is not limited to business judgements since it includes “the exercise of the powers and/or the performance of directors in general”.¹⁰⁰ The business judgement rule could result in the poor accountability of directors since it allows directors to merely justify their conduct even if such conduct was not undertaken in the best interests of the company.¹⁰¹ The introduction of the business judgement rule also suggests that foreign legal concepts that may be incompatible to the South African and Zimbabwean company law will be utilised.¹⁰² The exact parameters and functions of the business judgement rule are difficult to define.¹⁰³ Moreover, there appears to be very minimal judicial pronouncements and/or court decisions on the scope of the business judgment rule and its interplay with the directors’ duty to act with care, skill and diligence in South Africa and Zimbabwe.

Notably, both the COBE Act and the Companies Act 2008 require directors to be disinterested¹⁰⁴ from the impugned transaction and/or decision but none of these Acts obliges company directors to be independent.¹⁰⁵ A director’s disinterest and a director’s independence are two different concepts. An independent director¹⁰⁶ is one who is totally free from the influence, control or determination of someone or something. Thus, a director should be disinterested in order to be totally independent.¹⁰⁷ In *Teixon Corp v Meyerson*,¹⁰⁸ the court held that directors must not only be independent but must actually act independently.¹⁰⁹ In *Rales v Blasband*,¹¹⁰ it was held that an

⁹⁴ Section 66(1) of the Companies Act 2008. See also Cassim, R, 25(1) *Fundamina* (2019), p. 37, 62; P.A. Delpont, Q, Vorster, and E.S. Henochsberg, (2012), p. 247-248.

⁹⁵ Keay, A., and Loughrey, J., 39(1) *Legal Studies* (2018), p. 36, 54, submit that the traditional meaning of the word “commercial judgment” as per the United Kingdom courts strictly refers to transactional dealings of buying and selling between the company and third parties.

⁹⁶ B.A. Garner, (2004), p. 211. See also Keay, A., and Loughrey, J., 39(1) *Legal Studies* (2018), p. 36, 54.

⁹⁷ R. Cassim, 25(1) *Fundamina* (2019), p. 37, 62.

⁹⁸ D. Pillay., and P. Natesan, ‘The Business Judgment Rule’ <http://financialmarketsjournal.co.za/oldsite/18thedition/printedarticles/judgementrule.html>, accessed 20 March 2019. See also F.H.I. Cassim, M.F. Cassim, R. Cassim, R. Jooste, J. Shev, and J.L. Yeats, (2012), p. 566.

⁹⁹ L. Coetzee, and L.J. Van Tonder, 41(2) *Journal for Juridical Science* (2016), p. 1, 8.

¹⁰⁰ L. Coetzee, and L.J. Van Tonder, 41(2) *Journal for Juridical Science* (2016), p. 1, 8.

¹⁰¹ *Ibid*, p. 1, 8.

¹⁰² *Ibid*, p. 1, 8.

¹⁰³ *Ibid*, p. 1, 8.

¹⁰⁴ See section 76(4)(a)(ii) of the Companies Act 2008 and section 54(4)(a) of the COBE Act.

¹⁰⁵ F.H.I. Cassim, M.F. Cassim, R. Cassim, R. Jooste, J. Shev, and J.L. Yeats, (2012), p. 791.

¹⁰⁶ For more on independent directors see A. Gurrea-Martínez, ‘Towards a Credible System of Independent Directors in Controlled Firms’, *Social Sciences Research Network Online Journal* (2019), pp. 31-55.

¹⁰⁷ S. Aronson, S.L. Tomkins, T. Hassi, and A.R. Escobar, ‘Shareholder Derivative Actions: From Cradle to Grave’ (2009), p. 1, 60. M.F. Cassim, 25 *South African Mercantile Law Journal* (2013), p. 307, argues that “disinterestedness is narrower than independence”.

¹⁰⁸ 802 A.2d 257 264 (Del. 2002).

¹⁰⁹ *Telxon Corp. v Meyerson* 802 A.2d 257 264 (Del. 2002).

¹¹⁰ 634 A.2d 927 936 (Del. 1993).

interested director will receive a personal financial benefit¹¹¹ from the transaction that is not equally shared by the other shareholders.¹¹² Therefore, a disinterested director must not appear on both sides of a transaction.¹¹³ Black's law dictionary provides that a person is independent when he or she is "not subject to the control or influence of another" person.¹¹⁴ The same dictionary states that a disinterested individual is "free from bias, prejudice or partiality" and does not have a pecuniary interest in a matter or aspect under consideration.¹¹⁵ Nonetheless, since there is no requirement for company directors to be independent in both the COBE Act and the Companies Act 2008, some unscrupulous directors could evade accountability to their company and abuse their authority to the detriment of their companies and still escape liability by arguing that they are not statutorily obliged to be independent when making decisions. Accordingly, the Companies Act 2008 and the COBE Act should be amended to enact provisions that expressly require directors to act independently to combat possible corporate abuse of power by company directors in South Africa and Zimbabwe.¹¹⁶ It is submitted that the wholesale incorporation of the business judgment rule in South Africa and Zimbabwe was unwarranted considering the fact that some judges of the Delaware State Supreme Court have significantly restricted judicial deference to directors' duties in the wake of some corporate scandals that were induced by the misconduct of company directors in the USA.¹¹⁷

3. Concluding remarks

As indicated above, similar trends can be deduced between South Africa and Zimbabwe's regulatory frameworks on the directors' duty to act with care, skill and diligence. Before the extant company law statutes were enacted in both jurisdictions, the directors' duty to act with care, skill and diligence was regulated under common law. Notably, both South Africa and Zimbabwe have now partially codified the directors' duty of care, skill and diligence.¹¹⁸ In this regard, both jurisdictions should be applauded for their adopting of partial codification as opposed to complete codification of the directors' duty of care, skill and diligence. This follows the fact that partial codification offers some flexibility in the dynamic nature of contemporary business environments in Zimbabwe and South Africa. Nonetheless, Zimbabwe's legislature regrettably fused the directors' duty to act with care, skill and diligence with the directors' fiduciary duty to act in good faith and in the best interests of the company. This approach could give rise to confusion and legal uncertainty. Consequently, it is recommended that the Zimbabwean policy makers should consider amending section 54(1) of the COBE Act to avert and combat the potential confusion and legal uncertainty that could result in the interpretation and application of this provision in the future. In this regard, the Zimbabwean policy makers should also consider adopting the South African position as postulated in section 76(3)(a)-(c) of the Companies Act 2008.

It is further recommended that Zimbabwean courts should consider one of the schools of thought that were developed in South Africa, which accepts that the test to be applied when dealing with the directors' duty to act with care, skill and diligence is partly objective and partly subjective. Since skills differ from one director to another, the test to determine whether directors complied with their duty to act with care, skill and diligence should be considered by carefully combining both objective and subjective considerations of their conduct.

¹¹¹ It should be noted that the benefit need not be expressed in financial terms. See A.M. Scarlett, 'Confusion and Unpredictability in Shareholder Derivative Litigation: The Delaware Courts' Response to Recent Corporate Scandals', 60 *Florida L. Rev.* (2008), p. 589, 616.

¹¹² *Rales v Blasband* 634 A.2d 927 936 (Del. 1993).

¹¹³ *In re Riverstone National Inc. Stockholder Litigation* Consol. C.A. No. 9796-VCG Del. Ch. July 28 2016.

¹¹⁴ B.A. Garner, (2004), p. 785.

¹¹⁵ B.A. Garner, (2004), p. 502.

¹¹⁶ M.F. Cassim, 25 *South African Mercantile Law Journal* (2013), p. 308.

¹¹⁷ E. Jones, 19(3) *South African Mercantile Law Journal* (2007), p. 326, 327. Also see *In re Walt Disney Co Derivative Litigation* (825 A 2nd 275 (Del Ch, 2003)).

¹¹⁸ See section 76(3)(c) of the Companies Act 2008 and section 54(1)(a) of the COBE Act.

The incorporation of the business judgment rule in the Companies Act 2008 and the COBE Act could compromise the directors' accountability since the scope and application of the business judgment rule is still difficult to define in both Zimbabwe and South Africa. In this regard, it is submitted that the business judgment rule should not be confusingly applied when determining the directors' accountability and compliance with their duty to act with care, skill and diligence. The Companies Act 2008 and the COBE Act should be amended to enact provisions that expressly oblige directors to conduct their duties independently so that they can successfully enjoy the protection that is afforded to them by the business judgment rule. This approach helps to combat unscrupulous company directors that conduct their duties recklessly while hoping to escape accountability and liability by merely invoking the business judgement rule. It is further recommended that the Companies Act 2008 and the COBE Act should be amended to refine the business judgment rule by providing a definition of what the rule entails and prescribing the circumstances and/or further guidelines regarding when and how the business judgment rule may be invoked by directors.

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