AN ANALYSIS OF DIRECTORS' DUTIES DURING MASS RESIGNATIONS OF DIRECTORS IN ZIMBABWE

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ABSTRACT

Zimbabwe's new Companies and Other Business Entities Act signifies one of the important developments in amplifying corporate governance principles by codifying the directors' duties. The duties of a company director are a notion that is not only academic in nature, but also crucial in any dynamic commercial environment. Trust and confidence are key prerequisites to the exercising of these duties by any director. The primary purpose of this article is to contribute to the body of knowledge in corporate governance, specifically in relation to the regulation of mass resignation of director and their duty to act in the best interests of the company.

***Keywords*:** Directors' duties, company's best interests, corporate governance, mass resignation.

1. INTRODUCTION

This article provides a compelling perspective on Zimbabwean company law, particularly corporate governance. It delves into the duties of company directors to act in the company's best interests when it comes to mass resignation and/or removal. Overall, the literature reviewed in this article identifies the legal gap in the directors' duties to act in the best interests of the company during mass resignation, the need to acknowledge the possibility of mass resignations, and ultimately, the need

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for policymakers to establish a regulatory framework for mass resignation and/or removal of directors in Zimbabwe. This necessitates a historical exploration of the regulation of directors' duties in Zimbabwe before focusing on the current legislative framework under the Companies and Other Business Entities Act ("COBE Act"), which partially codifies the directors' duties under consideration. Both the historical and contemporary analyses point to a legal gap in the regulation of directors' duties during mass resignations in Zimbabwe. The research reveals how jurisdictions such as Canada and India have dealt with the issue of mass resignation and/or removal of directors in order to better safeguard the company's and stakeholders' interests. The article then concludes with some recommendations for amending the current COBE Act to provide for the regulation of directors' duties during mass resignations and/or removals of directors. It also provides conclusions and lessons that Zimbabwe can learn from the comparator jurisdictions.

2. Background to Company Law in Zimbabwe

Before one can dwell on the fiduciary duties of director, it is trite to point out that the foundations of Zimbabwe business law under the Companies Act included a rich history of ancient to modern regulations and organizations. It also included rules from Roman Dutch, English, and Germanic law, as well as canon law and South African law. In Zimbabwe, common law had a crucial role, and it was mostly based on Roman Dutch law.

The evolution of law in Zimbabwe from the chartering of the British South African Company in 1889 to the current new statutory system is noteworthy. In Zimbabwe, common law plays a crucial role and is mostly based on Roman Dutch

law. When Dutch immigrants invaded South Africa in 1652, Roman Dutch law was transmitted to Zimbabwe via South Africa. During the preceding centuries, one of the Netherlands' provinces, Holland, got a significant injection of legal norms of Roman origin into its legal system, thanks to the efforts of attorneys and legislators of the period, thus the term Roman Dutch law.

A company is viewed as a legal persona having a different personality from its members, as mentioned in the previous chapter, and during the existence of the Companies Act. By legal fiction, it is intended to manage its own business without relying on any of its members. Though, in actuality, it can only work if the company had officials to govern it and perform its business operations.[137] According to Section 9 of the Companies Act, a company shall have the ability and functions of a natural person of full capacity. This proved categorically that after incorporation, a company had a personality resembling that of a real person.[138] The directors of the corporation are the persons that work as its officials. A public company is mandated to have at least two directors, while a private company must have at least one director.

The term directors can be confusing because it is commonly used to refer not just to the plural of individual directors but also to the entire board of directors. A director is defined in Section 2 of the Companies Act as any individual who holds the role of director or alternate director of any corporation, regardless of their title.[139]Once nominated,

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137 F. Hamadziripi, H. Chitimira, "A comparative analysis of company directors' accountability and the statutory duty of care, skill and diligence in South Africa and Zimbabwe", 2021, Vol 10, No 2. *Perspectives of Law & Public Administration Journal*.

138 Companies Act *[Chapter 24:03]* Section 9.

139 H S Cilliers et al *Corporate law*, 3rd ed, Butterworth, 2000. 139; section 2 Companies Act.

directors do so at their own risk and must fulfil the duties imposed on them by the Act, the Articles of Association, and the Common Law. It is not sufficient, and it is not a defence, for a director to claim that his appointment was only a formality to meet legal requirements.

The duties expected to be fulfilled by the directors include but are not limited to the duty to exercise powers in the company's best interests, duty not to make secret profits, duty not to have personal conflicts of interest with the company's best interests, duty to disclose, duty of care and skill, and duty to exercise independent discretion were all listed as duties of directors.

2.1. Overview of fiduciary duties of directors under common Law

Fiduciary duties are the common law obligations that directors are required to uphold as a result of the nature of their job as directors, as well as the powers and responsibilities that come with it. Fiduciary duties are based on the principles of agency and trust. The company's directors have a position of authority and trust. They have a responsibility to behave entirely in the best interests of their firm and to safeguard its rights.[140] Directors have a higher obligation of good faith than ordinary agents since they operate on behalf of a company that does not exist in reality and is merely a legal fiction. As a result, it is unable to function independently. Honesty and integrity are major things expected of directors. They have a fiduciary responsibility to the company and only the company and of these duties, the majority of the responsibilities are owed

140 J.R. Boatright, Fiduciary Duty, Business Ethic 2015 https://doi.org/10.1002/9781118785317.weom020115

to the company. The case *Percival v Wright*[141] established this concept. Case law and statute, notably the Companies Act, establish the obligations. The company is the directors' principal duty of devotion.[142]

A focus should be placed on how a director is subject to fiduciary responsibilities under common law, which require him to employ his powers in good faith and for the benefit of the company, as well as to exhibit reasonable skill and care in carrying out his duties. A director has a fiduciary connection with his firm, which means he has a responsibility to act in his company's best interests.[143] As a result, the general principle that a person in a fiduciary relationship to another commits a breach of trust if he acts for his own benefit or to the detriment of that other is the basis on which a director is held liable by his company for a breach of his fiduciary duty. The cause of action is neither criminal nor contractual, but one sui generis. - *Robinson v Randfontein Estate Goldmining Co Ltd*.[144]

After noting that directors are expected by common law to act in the company's best interests and the interconnectedness of the common law responsibilities, one could ask if a board's choice to resign immediately would be considered a breach of fiduciary responsibility. It has been stated that while a corporation is a separate legal body, it is governed by its directors on a day-to-day basis. The lack of a structure that regulates how the firm would exist if all of the directors decide to quit at the same time created a legal void.

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141 *Percival v Wright (1902) 3 Ch D 421.*

142 A. Clark, *Business Entities: A practical guide, Sweet and Maxwell*, 1996. 142

143 Ibid 139.

144 Ibid 141.

2.2 Directors' duties under common law

Despite the fact that the Companies Act covers a lot, it becomes necessary for a student of laws governing companies and its officials to refer to common law to solve some of the problems about companies and their officials since not everything is covered under Companies. The Companies Act[145] made no attempt to codify the duties of directors. The assumption that directors' obligations came from the fiduciary relationships they owed to the firms they governed was well-established. In the case of a company's director, a fiduciary responsibility refers to the relationship between the director and the company that creates a duty of loyalty, trust, and confidence on the side of the director according to the most understandable definition of the director's fiduciary relationship with the company.[146]

The term fiduciary lacks a precise definition, however in his book Fiduciary Obligations, Finn[147] defined a fiduciary relationship, of which directors are a subcategory, as to include the duty of loyalty which is a fiduciary's defining requirement. The principle is that the company is entitled to the directors' fiduciary's undivided attention. There are various aspects to this primary liability. A fiduciary must in essence act in good faith; he is not allowed to profit from his trust; he may not place himself in a situation where his duty and interests conflict; and he may not act for his own or a third party's gain without his principal's informed agreement.

The essential connection between a company and its board of directors has its roots in common law. The

145 Companies Act (n 5 above).

146 A. Clark, *Business Entities: A practical guide, Sweet and Maxwell*, 1996 142.

147 Dr Finn, Fiduciary Obligations, https://www.goodreads.com/book/show/3721616-fiduciary-obligations.

responsibilities of care and loyalty certainly have their origins in common law and custom, and they have sparked a lot of litigation; they define key obligations in a complicated relationship.[148] The courts also recognized at common law the responsibilities that directors owed the company, including the need to act in good faith in the company's best interests, as well as the duty to use reasonable skill, care, and diligence in carrying out their duties.

Shareholders may provide investments that allow the company to exist, but they are rarely in a position to direct how the company functions on a day-to-day basis. As a result, businesses require directors to oversee the company and make the day-to-day choices required to optimize earnings. This puts the board of directors in a position of enormous influence, as they have the authority to decide on the company's future course. As a result, directors have a set of responsibilities that must be understood.[149]

It is reasonable to think of common law obligations as a collection of connected but distinct responsibilities, many of which are fiduciary in character that is, based on a trust relationship and in this situation, the shareholder's faith in the director's honesty and capacity to handle the company's affairs. The directors' fiduciary obligation is determined to be due to the firm itself, not to the shareholders or creditors.[150]

It has been asserted that a director's role is to promote his company's interests rather than to draw business away from

148 R. W. Hamilton. The *law of corporations in a nutshell*, 5th ed, West publishing Group, 2000.446.

149 C. Taylor, *Company law* Pearson Education Limited, 2009. 58.

150 C. Taylor, *Company law* Pearson Education Limited, 2009. 58.

it. The circumstances in the case of *Horcal v Gatland*[151] were such that a corporate director named Gatland was nearing retirement. The Board of Directors decided to give him a golden handshake as a token of their appreciation. Gatland received a phone call from a customer who wanted to do business with the company shortly after the decision was made. Gatland repurposed the company for his personal purposes. When the enraged client called to complain about the terrible job, the company learned about it. Gatland was sued for the earnings as well as the golden handshake pay-out. Gatland was compelled to pay the earnings, but not the golden handshake, by the court. The decision to award the money was made before Gatland converted the contract, according to the court's rationale. Although there were terrible ideas, there were no evil acts.

The position was reiterated in the matter of *Industrial Development Consultancy v Cooley*[152], where a company director claimed to be unwell so that he could be absent from work and collect certain commercial contracts meant for the company. He had broken his fiduciary obligations, according to the court. Despite the fact that directors have a responsibility to the company, they do not have a responsibility to the shareholders. The conventional perspective is that the company's interests are those of the shareholders, hence directors are required to work in the company's best interests rather than their own selfish objectives. The issue that needed to be addressed was what meant by the company's interests?

2.3 Directors' duty of care under common law

151 *Horcal v Gatland* ChD [1984] IRLR 288.

152 *Industrial Development Consultancy v Cooley* 1 [1972] W.L.R. 443.

Before the COBE Act was passed, Zimbabwe's common law governed the directors' obligation to act with care, skill, and diligence. The COBE Act replaced the former Companies Act, which lacked a provision requiring directors to exercise due care, skill, and diligence.[153]Directors must exercise reasonable care and skill in carrying out their responsibilities. As determined by the courts, this responsibility is neither onerous nor burdensome. In the case *RE: City Equitable Fire and Insurance Company Ltd*[154], the company suffered significant financial struggles. The doctor was found guilty of fraud. Other directors were held responsible in negligence by the liquidators for failing to identify the frauds. The court ruled that a director need not demonstrate a higher level of ability in the discharge of his duties than is reasonably anticipated of a person of his knowledge and experience. For example, being a director of an insurance business does not imply that someone is an actuary or a physician. In light of their expertise and experience, directors should act with the competence and care that is fairly expected of them. They are not accountable for simple judgment errors.

Following from the above, it is important to note that in the case *of RE: Denham & Co.*,[155] a director suggested that the dividend be paid out of capital. Because he was merely a country gentleman and not an accountant, he was not held accountable. The scope of this responsibility will also be determined by the nature of the company's operations. Given the demands of company and the Articles of Association, some functions may be delegated to other

153 See the preamble and section 2 of the Companies and Other Business Entities Act Chapter [24:31]; Hamadziripi and Chitimira, (n 4 above).

154 *RE: City Equitable Fire and Insurance Company Ltd* 1925 Ch 407.

155 *RE: Denham & Co. on Habeas Corpus*. 211 Cal. App. 4th 702 (Cal. Ct. App. 2012).

officials, and a director may be justified in placing his or her faith in that official to carry out his or her responsibilities honestly. Where a director was assigned the responsibility of preparing accounts to others in *Dovey v Metropolitan Bank of England and Whales*[156] the court decided that he had the right to respond and that those accounts were correct in proposing the payment of a capital dividend.

Romer J in confirmation of the same view pointed out in *RE: City Equitable Fire and Insurance Company Ltd (1925)*[157] that a director does not have to show more ability in the discharge of his responsibilities than is reasonably anticipated of a person of his knowledge and experience. The board of directors, which is supposed to work as a collegiate body, is in charge of the company's day-to-day operations. A director must uphold the principles of honesty and fairness.

While the responsibilities of care and skill are minor in comparison to those of loyalty and good faith, the directors cannot be indifferent or ignorant about them. A director is obligated to prioritize the company's interests over the interests of third parties. As enunciated in *Coronation Syndicate Ltd v Lilienfield & New Fortune Co Ltd (1903)*[158], the ability to act in the best interests of the company should not be fettered, and courts are hesitant to interfere with their discretion and compel them to do what they honestly believe would be detrimental to the interests of the shareholders.

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156 *Dovey and The Metropolitan Bank (of England and Wales), Limited v Cory*: HL [1901] AC 477.

157 *City Equitable Fire and Insurance Company Ltd* case (n 21 above).

158 *Coronation Syndicate Ltd v Lilienfield & New Fortune Co Ltd* (1903) TS 489.

Directors have a fiduciary commitment with their companies, and one of the consequences of this relationship is that directors' powers must be employed in the interests of the company as a whole to fulfil the reasons for which they were bestowed. Most companies' articles of association provide the board of directors' complete authority to administer and oversee the company's activities, with the exception of specific topics that must be approved by the company's general meetings. While it is true that directors are the sole competent individuals to allot shares, such a power, like any other authority of the directors, is a fiduciary one and must be employed in good faith to the benefit of the business,' the court stated in *Tika Tore Press Ltd v Ajibade Abria & Ors (1973)*.[159]

A director must act in good faith and for the interest of the company, using their powers and performing their duties with the utmost care and skill. Though care may be proved objectively, there is no clear standard to which the degree of care and expertise should be judged. *Fisheries Pvt Corp of SA Ltd v Jorgensen (1980)*[160] said that the level of care and competence required is primarily determined by the nature of the company's operation as well as any specific tasks accepted or assigned to the director.

2.4 Old Companies Act and the duties of directors

Section 172 (1) of the Companies Act required every director who is needed to possess a specified share qualification by the articles of the company and who was not already qualified, to earn that qualification within two months of their appointment or such shorter time as the

159 *Tika Tore Press Ltd v Ajibade Abria & Ors* (1973) LCN/1659 (SC).

160 *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156.

articles may specify.[161] According to Section 124 of the Companies Act, every public company must have a general meeting of its members, known as a statutory meeting, within a period of not less than one month nor more than three months from the day it is permitted to begin operation. As a result, the board of directors will be required to submit a statutory report to each company member 14 days before to the meeting.[162]

A director of a company who is in any way, whether directly or indirectly, interested in a contract or prospective contract with the business must declare the nature and full extent of their interest at a meeting of the company's directors, according to Section 186.[163] The directors' common law fiduciary responsibilities are given actual legislative force by this provision. A director may provide a general notice that they are interested in a contract with a specific company or firm, but such notice must be delivered at a meeting of directors, or the director must make sure that it is brought up or read at the next meeting of directors after it is given *Rex vs. Milne and Erleigh (1951)*.[164]

3. A Historical Analysis of Company Directors' Duties During Mass Resignation or Removal in Zimbabwe

3.1 Appointment of directors under the Old Companies Act

The appointment of directors is subject to individual vote under Section 174. Directors are chosen during a general meeting and should be voted on separately.[165] In relation to

161 See section 172 Old Companies Act (n 5 above).

162 See section 124 Old Companies Act (n 5 above).

163 See section 186 Old Companies Act (n 5 above).

164 *Rex v Milne and Erleigh* (6) 1951 (1) SA 1 (A).

165 Ibid 138. COBE Act (n 20 above).

the issues surrounding the issuance of notices, quorum voting, proxies, qualifications, and any other relevant issue, full credit to the articles of association must be adhered to.[166] In the case of *James North Zimbabwe Pvt Ltd v. Mattinson*[167], the court reaffirmed the law's stance that the appointment must be properly made in accordance with the Act and the Articles of Association.

3.2 Removal of directors under the Old Companies Act

Directors may terminate their employment with the company by voluntarily resigning or by being removed by the shareholders at a general meeting. Because the directors are the company's managers, its eyes and ears, having a good working relationship with each other and with shareholders is critical to the company's success. However, there may be conflicts that lead to the expulsion of one or more directors by shareholders.[168]

The removal of directors is governed by Section 175 of the Act. It states that directors can be removed by resolution before their term expire if specific notice is given. Under the Companies Act, directors can be dismissed at any moment by ordinary resolution with simple majority votes. Regardless of anything in the company's memorandum or article of association, or any agreement between it and him, this authority is given to the company.[169] Because regular resolutions rather than special resolutions are used to remove directors, their position is tenuous, and they must go to great lengths to ensure the success of their company, or they risk being removed. The Director, on the other hand, is permitted to make representations.

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166 As in section 169 Companies Act (n 5 above).

167 *James North Zimbabwe Pvt Ltd v Mattinson* 1950 (4) SA 146.

168 Ibid 138.

169 Ibid 126.

In the case of *James North Zimbabwe v Mattinson*, a director of the firm wrote to the company's chairman to voluntarily resign from the board of directors, and Mattinson's father did the same. Their resignations would have been accepted if it weren't for the general meeting's improper holding and calling.

3.3 Removal of directors in terms of the company's articles

Section 175 of the Act of the Act expressly states that any legislative authority to remove a director must not be regarded as precluding any other power to remove a director that may exist. As a result, businesses can arrange for the removal of their directors in their articles in detail, including altering the articles to include such rights. As a result, in order to be removed from office under the articles, it will be required to follow the statutorily specified method.[170]

Fair procedure is required, and no wrongdoing should be inferred or suspected. John Moxon and his team attempted remove three directors and install five new directors without even the slightest adherence to the company bylaws, specifically article 63, in the case *African First Renaissance Corporate Limited v. ACM Investments (Pty) Ltd and other*.[171] The court emphasized that, in accordance with Section 126(1) of the Companies Act, it was improper to call a general meeting without the directors' request; as a result, the notice calling an extraordinary meeting for the 23rd of October 2008 was declared void and without any legal standing.

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170 Ibid128.

171 *African First Renaissance Corporate Limited v ACM Investments (Pty) Ltd and other* HH 95 2008.

4 DIRECTORS' DUTIES AND RESIGNATION UNDER THE COMPANIES AND OTHER BUSINESS ACT *[CHAPTER 24:31]*

4.1 Appointment of directors

According to the COBE, only a human can be appointed to the board of directors. Typically, shareholders are the ones who appoint directors.[172] A company, with a fictitious legal personality may not be appointed as a director. According to the COBE or Memorandum of Association, a private company with more than one but less than ten shareholders must is obligated to have two or more directors, whilst a private company with ten or more shareholders is obligated have at least three directors, and whereas a public company is obligated to have at least seven and no more than fifteen directors.[173]

4.2 Directors' duties under COBE

4.2.1 Directors' duty of care

Compared to judges, directors are assumed to have superior knowledge of the company's daily operations and expertise in the business and economic worlds.[174] The management of a company's affairs is under the purview of the board of directors.[175] The duty of care ensures that directors commit appropriate time and effort to manage the company, act only when fully informed[176], have the requisite skills and expertise to make smart business judgments, and thoroughly evaluate the possible consequences of their

172 See section 195 COBE (n 20 above).

173 See section 195 COBE Act (n 20 above)

174 F. Hamadziripi and P. C. Osode, "A critical analysis of Zimbabwe's codified business judgment rule and its place in the corporate governance landscape,"2021. Vol 25. *Law, Democracy and Development* 580.

175 R. Cassim, "The power to remove company directors from office: historical and philosophical roots," 2019. Vol 25 No 1. *Fundamina*. 62.

176 Section 54(4)(b) of the COBE Act (n 20 above).

decisions.[177] The duty of care as the need to pay attention and attempt to make appropriate judgments is associated with circumstances when they do not have a conflict of interest. It is actually surprising how little the directors' duty of care needs them to perform in the literal sense. They are not required to make rational decisions. All they have to do is show up, pay attention, and make a decision that isn't totally illogical.

In *Matanda v. CMC Packaging (Pvt) Ltd*[178], it was emphasized that before a member asks the Court to get involved in a private company's internal affairs, that member must keep in mind that a Court is not in the business of judging the wisdom of a course taken by a company in the management of its own affairs. Section 20A of the Banking Act[179] requires a director of a banking institution to have consent of the Reserve Bank of Zimbabwe (RBZ) Governor for his appointment. The two-tier approach ensures that the appointment brings a person with a moral and professional obligation to devote his attention and commercial obligations principles to the obligation and objectives of the institution appointing him

The Court in *Howard v Herrigel*.[180] Identifies with how in common law, once a person accepts an appointment as a director, he becomes a fiduciary in respect to the company and is expected to demonstrate the utmost good faith towards the company and in its transactions on its behalf. The essential and considered more important or

177 See also Smit I *The application of the business judgment rule in fundamental transactions and insolvent trading in South Africa: foreign precedents and local choices* (unpublished LLM thesis, University of the Western Cape, 2016) 29. See also S. Lombard *"Importation of a statutory business judgment rule into South African company law: yes or no"*, 2005. 68 *THRHR* 614. 617.

178 *Matanda v CMC Packaging (Pvt) Ltd* [2003] ZWHHC 113.

179 Banking Act [Chapter 24:20].

180 *Howard v Herrigel* 1991 (2) SA 660 (A) at 678.

encompassing duty of company directors is to act bona fide in what they consider and not what the court may consider to be in the best interests of the company as a whole, and not for a collateral purpose, according to authors Cassim et al in their influential work *Contemporary Company Law*.[181]

Fiduciary law emphasizes broader social and economic purposes that are consistent with the creation and maintenance of interdependency in order to balance individualistic concepts rooted in contract law, such as the "reasonable expectations of the parties" and private ordering. The legislation that governs a relationship and the range of rights and obligations that flow from it are both described as having a fiduciary nature. A number of related responsibilities and advantages are part of fiduciary relationships.[182]

The Companies and Other Business Entities Act *[Chapter 24:31]* (COBE Act) now also codifies this viewpoint. Section 54 of the COBE Act together with sections 61 to 64 of the National Code on Corporate Governance('National Code')[183] dictates that every company's manager, officer, and director undertake their duties in good faith, in the company's best interests, and with the care, skill, and attention that a diligent businessperson would exercise.[184],the director may rely on financial information from the company or information, views, reports, and statements provided by employees or independent advisers that the director reasonably thinks are qualified to provide such information,

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181 Cassim et al, *Contemporary Company Law* 2nd ed, Juta 2012. 514.

182 L. I. Rotman, "Understanding Fiduciary Duties and Relationship Fiduciarity," 2017. Vol 62 No 4, *McGill Law Journal*. 975.

183 See also moral duties in section 65 to 75 of the Zimbabwe National Code on Corporate Governance 2014 (Code 2014).

184 N. Munzara, T Muchinguri, *A guide to the Companies and Other Business Entities Act (Chapter 24:31).* 2021.

opinions, reports, and statements.[185] Directors must not be crucified for what a reasonable person in their position could not have foreseen since they are not fortune-tellers or prophets of future events, so it stands to reason that if their honest decisions turn out to be detrimental to the company, they should not be held accountable. [186]

There is mention of company's manager, officer and director to take heed of the duties under section 54 however the main focus of the study is on the directors. The section goes on to list the factors that are considered in fulfilling the duty, including whether the director has a personal interest in the subject under discussion, as defined in section 56, whether the director is fully informed on the subject to the extent appropriate, and whether the director honestly believes that the decision is made in the company's best interests.[187]

In practice, directors exercise such power over the company that the company's success or failure is primarily determined by how well they do their tasks. In *The Bell Group Ltd v Westpac Banking Corporation*[188], Justice Owe pointed out that a company's decision-making process is influenced by a variety of organs, all of which are involved in corporate governance. The board of directors, on the other hand, has major governance duty. In formal terms, they are appointed by and answerable to the body of shareholders, and in general, it is the directors who are the company's directing intellect and will, its very ego and

185 Ibid 58; see section 54 COBE Act (n 20 above).

186 See J.S. "McLennan, Duties of Care and Skill of Company Directors and Their Liability for Negligence," 1996. Vol 8, *South African Mercantile Law Journal* 94, 95.

187 Munzara and Muchinguri (n 51 above). 28. Rotman (n 49 above).

188 *The Bell Group Ltd v Westpac Banking Corporation* [2008] WASC 329.

centre of personality.[189] They are fiduciaries, with fiduciary responsibilities to the company, its members, employees, and creditors. This duty's breach gives rise to a breach of trust claim. It is unique and not founded on either a contract or a delict.[190]

4.2.2 Directors' duty to act in the best interests of the company under the COBE

Section 54 of the COBE Act read together with section 57 of the National Code requires the director to work in the best interests of the company, preserving its assets, advancing its business, and promoting the objectives for which it was established, while also taking into account the interests of employees and members. The business judgment rule in section 54 specifies the conditions in which a director will fulfil the obligation to act in the best interests of the company as well as the duty of care, skill, and diligence. The National Code also support the notion by making a provision that the Board should have a charter that specifies its role and responsibilities. The fiduciary loyalty demanded of directors is centred on this obligation, which compels directors to act in good faith in the best interests of the company as a whole. The obligation that directors consider the company's interests is a fundamental component of the responsibility.[191]

The stakeholder theory therefore entails that the directors should have regard, were appropriate to ensure productive

189 Bell Group Ltd case [No 9] WASC 239.

190 See M Havenga "Directors in Competition with Their Companies," 2004. Vol 16 No 275 *South Africa Mercantile Law Journal*. 286.

191 R. T. Langford "The Duty of Directors to Act Bona Fide in the Interests of the Company: A Positive Fiduciary Duty? Australia and the UK Compared," 2011. Vol 11, No 1, *Journal of Corporate Law Studies*, 215-242.

relationship with a range of interested parties.[192] Benade[193] postulates that corporate governance involves balancing of interest of all internal stakeholders and other parties who can be affected by the corporates conduct. The basic assumption is that excellent business reputation is a corporate asset, and that by considering the interests of stakeholders, the company's interests are increased.[194] This approach is also said to have acknowledged the growing influence of individuals and entities directly affected by corporate action. The preceding viewpoint supports the notion that a company's existence and success are inextricably linked to the consideration of the interests of other stakeholders such as employees, customers, suppliers, and so on.[195]

In recent times there has been debate on the proper definition of loyalty in the context of fiduciary relationships. The only legitimately recognized fiduciary obligations, according to popular belief, are the duty to avoid conflicts and maximize profits.[196] However, a more comprehensive loyalty, as expressed in the fiduciary obligations that have historically been placed on directors, is more acceptable, at least in the context of the connection between director and company. These include the obligations to behave in the company's best interests, to act for appropriate reasons, and to maintain confidentiality, as well as the obligations to prevent

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192 D. Davies, et al, *Companies and Other Business Structures*, Oxford University Press, 2010.

193 M.L. Benade et al, Entrepreneurial law, *Lexis Nexis*, 2008.

194 F. M Cassim, F. Cassim, R. Cassim, *Contemporary Company Law*, Juta, 2011. 20-21.

195 Muswaka L, An *Appraisal of the protection of stakeholder interest under the South African companies act and king III, proceedings of the 6th international business and social science research conference*, 2013.

196 S. Panesar, (2005) "Fiduciary relationships and constructive trusts in a commercial context," 2005. Vol 16 No. 12 *International Company and Commercial Law Review*. 1.

conflicts and profits.[197] The introduction of these fiduciary obligations, together with the availability of equitable remedies in the event of a violation, has conveyed a strong message to directors that a high level of behaviour is expected and that the company's interests come first.[198]

The responsibility to act in the best interests of the company functions both as an obligation attached to the exercise of discretionary authority and as a source of an obligation to act independently of power. Directors are bound by fiduciary obligations under common law, which require them to execute their powers in good faith and for the benefit of the company.[199] They must also exercise reasonable caution, skill, and effort in carrying out their responsibilities. As a result, except when the common law obligation is explicitly altered or contradicts with the COBE Act, a director must comply with both the COBE Act's and the common law's duties.[200]

A company becomes an artificial person in the eyes of the law when it is incorporated; it has a perpetual succession; its members may come and go, but the company survives until it dies as previously stated. In order for a corporation to fulfil its objectives as outlined in its Memorandum of Association's objectives clause, it must rely on a third party, known as the Board of Directors. The requirements pertaining to the retirement of all directors may be included in the Company's articles. If the article does not specify otherwise, at least two-thirds of the total number of directors of a public company must be people whose

197 Ibid 2.

198 Ibid 215-242.

199 Cassim et al, *Contemporary Company Law* 2nd ed, Juta 2012. 514.507.

200 See section 197 (2) and 245 (4) COBE Act.

term of office is subject to rotation and who are entitled to be reappointed at the annual general meeting.

The Act goes into greater depth on the corporate responsibilities of directors than the previous Act. The Act aims to encourage effective company governance by stressing the responsibility of directors. It recommends that companies have at least two directors in charge of managing and guiding their activities. One of the director's lives in Zimbabwe on a regular basis and has a physical address there.[201]

Because Section 204 of the Act recognizes sole directorships, the suggestion for at least two directors appears to be inconsistent. It is impossible for all of a company's directors to be based in another country. At least one locally based director with a local address is required for foreign companies. Directors are expected to make independent but informed decision and operate in the best interests of their company.[202] They might face charges of carelessness and be held personally accountable for neglecting to act in the company's best interests.

A director's duty of care means that he or she must handle the company's operations as a reasonably sensible individual would manage his or her personal affairs. The director must guarantee that he has enough time to adequately carry out his responsibilities and duties to the organization. And that he is completely aware of the company's financial, legal, social, and political surroundings.[203]

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201 See section 195 COBE Act.

202 COBE Act section 195 (4) and (5)).

203 See section 54 COBE Act (n 20 above).

Several facets of the duty of loyalty are described in section 55[204]. The director may only use his or her powers for the purposes for which they were granted, and not for any other. A unique and distinct fiduciary obligation is due to each company of which the director is a director, regardless of whether these companies are subsidiaries or related group companies. The obligation is owed to each entity as a separate legal person.[205]

Prior to shareholders or other interests, they have a first obligation to the company. They are not allowed to delegate their primary managerial tasks to others. It is illegal for public company directors to serve on more than six boards of directors. Directors are forbidden from acquiring company shares on terms and conditions that differ from those of ordinary shareholders. The common law responsibilities are nevertheless useful in interpreting the new duties in sections 54 to 57. That is why, under section 195 (2) of the COBE Act, a director can be held accountable for violation of fiduciary obligations.

This background establishes the importance of directors in a company and the impact their decisions can cause to the company. It is agreed that it is not every time a person acts with good intentions. Sometimes individuals are forced to react to certain situation in which case, at the instance of the company, if directors resign *en masse,* it means the company ceases to function properly. To that end the need to regulate their mass resignation or removal is created. Their appointment does not even allow them to be appointed all at the same time so that their term of office does not end at the same time. The same reason the

204 COBE Act.

205 Ibid 29.

provision is there should prompt the emergence of a regulatory framework for their mass resignation or removal or alternatively make provisions for an alternative plan that guarantees a company's functionality while the resigned director or the removed directors are being replaced.

5 DIRECTORS' RESIGNATION AND REMOVAL UNDER THE COBE

Mass resignation and mass removal of board of directors reflect a major flow in the company's corporate governance. The revelation of such issues can in turn lead to large declines even in share prices and can also trigger charges in the top management or make company vulnerable to being taken over. The liability regime of directors constitutes a necessary corollary to control issues within a company. Fully regulating the way they exit the companies directorship establishes the limit of their behaviour and provides stakeholders and third parties dealing with the company with legislative protection and establishes effective compliance and risk mechanism. The findings in respect of the relevant issues are set out below, followed by the current legal landscape governing directors' duties in Zimbabwe. Corporate governance is a wide notion that encompasses not only the common-law and statutory responsibilities of directors, but also the codes of conduct of numerous (typically non-judicial) organisations.[206]

The COBE Act's section 202 (Removal and resignation of directors)[207] differs significantly from the Old Companies Act's section 175. It starts off by stating that, with or without cause or reason, one or more directors may be

206 I.M. Esser, P. Delport. "The duty of care, skill and diligence: the King Report and the 2008 Companies Act," 2011. Vol 74, *Journal of Contemporary Roman-Dutch Law.* 449.

207 COBE Act.

removed at a general meeting by a majority of votes of shares expected to vote at a director election, with the exception that no director may be removed unless the notice meeting states that one of the meeting's purposes was to vote on removal of such director at the meeting.[208] The removal of a director does not affect any entitlement to compensation upon removal that the director may have under a contract with the company, but the election or position as a director does not confer such rights. The clause provides that a director may resign at any time by providing the board or its chairman written notice as far in advance as practicable. Unless the notification specifies a later date, the resignation is effective when it is issued. The vacancy can be filled before the resignation takes effect, but the replacement will not assume office until the resignation takes effect.[209]

The problem with this provision is that it simply states that one or more directors can be removed from office at a general meeting for any reason or no reason, but it fails to account for their expedient yet mandatory replacement, which could leave the company unable to carry out its objectives and continue to exist.[210] The government should step in with laws to control the mass dismissal or resignation of directors, allowing for scheduled processes and ensuring that the company's survival and operation are not jeopardized.

The procedure for removing a director is outlined in the section, which states that it must be included in the general meeting notice, that it requires only an ordinary

208 See section 202 COBE Act; Munzara and Muchinguri (above) 89.

209 See section 202 COBE Act; Munzara and Muchinguri (above) 89.

210 Munzara and Muchinguri (above) 89.

resolution by a majority vote of shares entitled to vote at the meeting, and that it can be done with or without stating any reasons or cause. The section, on the other hand, does not allow the director to address the meeting before the item is presented to a vote. As a result, it's worth noting that the COBE Act doesn't need board permission or acceptance of a director's departure. In a slew of cases, the above-mentioned section of the Companies Act has been upheld by the courts.[211]

A director may provide written notice of his resignation to the board or the chairman, according to the provision. Resignation is a unilateral act, and the company does not have to accept the director's resignation in order for it to be legal.[212]it is against this background that the necessity of this study is noted. The COBE Act only goes as far as laying out procedures for resignation by a director. It does not anticipate that there may be times when directors may decide to resign at once despite the fact that their terms of office would have not expired. We have seen different scenarios from the first chapter of this study, of how many companies outside the Zimbabwean jurisdiction, that decided to resign at once for various reasons. The fact that there are not many cases recorded in Zimbabwe does not mean that there is immunity or that directors do not think about it, hence the need to prepare the governing frameworks before the occurrences to ensure reasonable

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211 *Renuka Datla and Ors. v Biological E Limited* MANU/AP/0196/2015. *Murari v State of Tamil Nadu (Madras HC)* [1976] 46 COMP. CAS. 613 (MAD.) in this case it was said that If the articles contain a provision allowing a director to resign at any point, the resignation will prevail without the necessity for approval by the board or the company in a general meeting. In the absence of any provision in the articles of association pertaining to resignation, it is widely established that a resignation once tendered takes effect immediately when the intention is made apparent.

212 R. Naidoo, *Corporate Governance-An Essential Guide for South African Companies* 3rd ed, LexisNexis 2016.146-147.

protection and proper functionality of companies in any case.

It is this writer's opinion that, the fact that the legislators only make mention of the shareholders ability to remove more than one director from the board, makes the law half baked. There must be some backup either by government or by way of law that they may not remove a director before they have found a replacement. Not far from home, in South Africa, a matter was reported in which all the company's directors resigned at the same time. South Africa, like Zimbabwe at the time and even up to now, lacked a regulatory framework to guide instances like these, as well as case law that might be used as precedence. Courts ended up relying primarily on the unfairness of the directors' action of resigning *en masse* when the company was going through difficulties, and they did not even see to the election of the new directors before they left the company.[213]

Stilfontein Gold Mining Co Ltd[214] was a publicly listed company that engaged in gold mining, which poisoned subsurface water if not brought to the surface and handled appropriately. The Minister of Water Affairs and Forestry issued directives against the corporation, requiring it to provide the Minister with specific information and pay interim contributions to cover the expenses of water pumping and treatment. After the company failed to comply with these orders, the Minister sought a court injunction, which resulted in subsurface water being contaminated if it was not brought to the surface and properly treated.

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213 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* [2006] ZAGPHC 47.

214 *Stilfontein* case (above).

The Minister of Water Affairs and Forestry issued directions against the company, requiring it to provide the Minister with specific information and make interim payments to cover the expenses of water pumping and treatment. After the company refused to comply with these orders, the Minister sought a court order against the company, and all of the company's directors resigned at the same time.[215]

Hussain J remarked that what the directors of this company had done in quitting as directors was a highly exceptional occurrence of the collective resignation of the directors. In the corporate history of the nation of South Africa, they had never seen a situation when all of the directors of a publicly listed company resigned at the same time and the court was hardly surprised when they could not discover any case law that addressed the issue, nor could they find anything similar in English case law. The thought was that it was probably because it was most likely due to the fact that they did not anticipate that to happen in the business world.[216]

The directors in question had resigned as directors on June 17, 2005, after abandoning the winding-up of the company application. The directors had resigned in accordance with the independent legal advice they had sought. They were told by the legal counsel that if they stayed in office, they risked being involved in irresponsible trading or being obliged to manage the company in winding up because they did not follow court instructions. [217]The court identified the actions of the directors of resigning from a publicly listed

215 Esser and Delport (above).

216 *Stilfontein* case (above).

217 *Stilfontein* case para 16.3.

company, at once as reckless because the company was left adrift. [218]

The court criticized the style in which the resignations were made and the date in which they were made was also be criticized. The second directors decided to quit and did so. The court shared its sentiments in saying that one does not anticipate the whole board of directors of a public company to suddenly quit in the corporate world. At the very least, there should be some type of notification.[219] The directors ought to have convened a special general meeting of the company to tell the members of their decision to quit at the very least. At the very least, members in a meeting might have been given the opportunity to decide the company's future fate. Investors and shareholders do not expect or anticipate that all of a public company's directors will abruptly quit with no notice. The stock exchange would suffer as a result of this.[220]

What makes this case extraordinary, and a good reference point is the fact that there was nothing in the South African Companies Act or the company's Articles of Association that specified the implications of all directors retiring at the same time, or that prevents them from doing so. The board of directors is known as the only way for a publicly listed company to function and function properly. The company's directors are individuals who, under its articles, are authorized to exercise all of the company's functions save those that must be performed by the company in general meeting under the Companies Act or the articles.[221]

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218 *Stilfontein* Case Para 16.4

219 Stilfontein Case Para 16.4

220 Stilfontein Case Para 16.5

221 Stilfontein Case Para 16.5

As an artificial legal entity, a company can only function through its human agents. That human agency is ultimately the board of directors of the corporation at any given time. The company's 'directing mind and will' has been termed as the human agency in the case *Levy v Central Mining and Investment Corporation Ltd (A)*[222]. *In* the case *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd*[223]*,* Viscount Haldane stated that in the case of a fictitious person, such as a company, one must try as hard as possible to figure out who is or are the controlling mind or thoughts.' It is undeniable that the directors are the "directing brains" at all relevant periods just as it is being emphasized in this whole study. The directors are therefore obligated to act in the best interests of the company at all times material. This is the basic obligation that precludes the directors from exercising whatever powers they may have. In this sense, the 'interests' are only those of the company as a registered legal entity and its members as a body.[224]

It is not convincing to think of the directors resigning all at once as acting in good faith especially if they resign when the company is at its lowest and in dire need and relying heavily on its human agents for resuscitation or proper or formal winding up process. It is also interesting to note that the South African Company's Act contained a somewhat go to provision which aided in the event that all of a company's directors cease to be directors. Section 182 of the South African Companies Act allows the Registrar of Companies to call a general meeting. [225]

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222 *Levy v Central Mining and Investment Corporation Ltd* (A)1955 (1) SA 141.

223 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* E 1915 AC.

224 *Lennards Carrying Co* case.

225 See Section 182 of the South African Companies Act 71 2008.

With all the discussion noted above, one can safely say that it can be concluded that mass resignations cannot be said to be fulfilling the best interests of a company. The National Code requires that directors honestly apply their minds and act in the best interests of the company and ensure no conflict of interests and that they be loyal to the business of the company.[226] Section 61[227] also requires the directors to Act with a degree of care required of a businessperson in charge of an incapacitated person.[228]

It is also in the above-mentioned case [229] that a lesson is learnt on how sound corporate governance is critical for a company's success and is in the best interests of the country's economic growth, particularly in attracting new investments. To this aim, the conclusions and recommendations of the King Committee on Corporate Governance[230] have been generally and almost unanimously embraced by the corporate community in South Africa. The King Report asserts that the corporate governance framework revolves around the Board of Directors. It is ultimately accountable and liable for the company's performance and operations. Delegating authority to board committees or management does not relieve the board and its directors of their obligations and responsibilities in any manner.[231]

The basic idea of all King Reports is that directors should act not only according to the letter of the law, but also in line with the spirit of their fiduciary duties when it provides

226 Section 61 National Code. Section 54 to 57 COBE Act.

227 National Code and Section 54 to 57 COBE Act.

228 See section 61 South African Companies Act.

229 *Stilfontein* Case (above).

230 King Report on Corporate Governance for South Africa March 2022.

231 Paragraph 2.1.1 King Report (above) 22.

that it is the legal obligation of directors to act in the best interests of the company.it required the Implementation of the 'apply or explain' method, so that the board of directors might come to the conclusion that following a suggestion would not be in the best interests of the company. If only directors are guided to see things in this way, they would really exercise their duties in the best interests of the company as they would really need to consider their moves before making a decision that would impact a company negatively.[232]

It is this writer's submission that at the end of this study, there be a persuasion for the lawmakers to amend the existing company laws to cater for mass resignations or removals of directors.

5.1 Resignation or removal of directors under the COBE Act

Removal of directors is governed under section 202 of the COBE Act. It is worth noting that this provision in section 202 differs from the section 175 of the Old Companies Act in several ways. It begins by stating that with or without reasons or cause, one or more directors may be removed at a general meeting by a majority of votes of shares expected to vote at a director election, with the exception that no director may be removed unless the notice meeting states that one of the purposes of the meeting was to vote on removal of such director. It also goes on to mention that the removal of the director does not preclude any right to compensation upon removal that the director may have under a contract with the company, but election or position as a director does not generate such rights.

232 Stilfontein Case (above).

The section also provides that a director may resign at any time by giving the board or its chairman written notice as far in advance as practicable. Unless the notification specifies a later date, the resignation is effective when it is issued. The pending vacancy may be filled prior to the resignation's effective date, but the replacement will not enter office until the resignation's effective date.[233]

The procedure for removing a director is outlined in the section 202[234], which states that it must be included in the general meeting notice, that it requires no more than an ordinary resolution passed by a majority of shares entitled to vote at the meeting, and that it can be done with or without stating any reasons or cause. It has been noted that the section, on the other hand, does not allow the director to address the meeting before the matter is presented to a vote.[235]

A director may provide written notice of his resignation to the board or the chairman, according to the provision. Resignation is a unilateral act, and the business does not have to accept the director's resignation in order for it to be legal.

Just by looking at these provisions once can already see the need for a regulatory framework that covers resignations for more than one director at a time. The section 202 attempts to include scenarios where more than one director is involved but it is unfortunate that the section appears to be incomplete as nothing is said after mentioning that one or more directors may be removed. The study of this chapter has successfully brought out the lacunas that exist

233 See section 202 COBE Act.

234 COBE Act.

235 Munzara and Muchinguri (above) 89.

in the current COBE Act and the aim is to make recommendations at the end, to cover the gaps.

6. Comparative Analysis of the Regulation of Directors' Mass Resignation or Removal

6.1 Indian perspective on directors' duties and mass resignation or removals of directors

In the Indian context, Section 166 of the Indian Companies Act, 2013 ("ICA") states that a director of a company shall act in good faith in order to promote the company's objects for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community, and the protection of the environment. As a result, regardless of his position or scope, the director has a responsibility to act in the company's best interests and guarantee that they take precedence over his own.[236]

When the company is solvent, section 166 mandates that the directors execute their fiduciary obligation, operate in good faith, and make choices that are in the best interests of the company and its shareholders. Because they engage in a fiduciary position toward the corporation, courts have found that directors function as agents, trustees, or representatives of the company.[237]

The Indian Parliament took a different route with section 166(2) of the ICA. A company director must act "in the best interests of the firm, its employees, shareholders, the community, and for the protection of the environment," according to this rule. At first view, it appears to impose a requirement on directors to treat non-shareholder interests as a goal in and of themselves. To put it another way,

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236 See Section 166 of the Indian Companies Act 2013.

237 *Tristar Consultants vs. customer Services India Pvt. Ltd. & Anr.*; AIR 2007 DEL 157

section 166(2) takes a pluralist approach by putting all interests (whether those of shareholders or other stakeholders) on a level playing field, without imposing any hierarchy, and guaranteeing that they are corporate goals in and of themselves (without necessarily constituting a means of enhancing shareholder value).[238]

6.1.1 Directors' appointment in India

Companies (Appointment and Qualification of Directors) Rules 2014 and Chapter XI of the India Companies Act 2013 outline legislative requirements relating to director appointment, director identity number, disqualification, vacation, and so on. It provides under section 149(1) that every company must have a minimum of three directors in the instance of a public company, two directors in the instance of a private company, and one director in the case of a One Person Company. A company can appoint up to 15 directors. After passing a special resolution in general meeting, a company may select more than fifteen directors, and approval from the Central Government is not required.[239]

To function as a director of a company, a director must grant his or her approval. The company must ratify the nomination of an independent director in a general meeting, and the appointment of an independent director must be formalized with a letter of appointment. The letter of appointment must include the prescribed terms and conditions of employment.[240] The directors will however

238 *Bank of Poona Ltd v. Narayandas*, AIR 1961 Bom 252. *Cook v. Deeks* {1916} 1 AC 554.

239 Institute of Company Secretaries of India, Company's Act, 2013: Appointment and Qualifications of directors. Accessed July 1, 2022. https://www.icsi.edu/media/portals/0/APPOINTMENT%20AND%20QUALIFICATIONS

240 Institute of Company Secretaries of India, Company's Act, 2013: Appointment and Qualifications of directors. Accessed July 1, 2022. https://www.icsi.edu/media/portals/0/APPOINTMENT%20AND%20QUALIFICATIONS

cease to hold office in India in three ways which are removal by passing an ordinary resolution, removal by the court, resignation and retirement by rotation.

6.1.2 Directors' duties in India

The following are the responsibilities of directors as outlined in section 166 of the India Companies Act, 2013. It is the responsibility of directors to conduct themselves in accordance with the company's articles of association. The obligation to behave in good faith entails that a director of a company must work in good faith to advance the company's objects for the benefit of all of its members, as well as in the best interests of the company, its employees, shareholders, the community, and environmental preservation.[241] It is incumbent upon the director to use reasonable caution they must exercise independent judgment and apply due and reasonable care, skill, and diligence in carrying out his obligations.[242]

With the duty to prevent potential conflicts of interest, a company director is not allowed to be involved in any circumstance in which he may have a direct or indirect interest that conflicts, or may conflict, with the company's interests. It is the director's responsibility to avoid gaining an unfair advantage or seek to obtain any undue benefit or advantage for himself, his family, partners, or acquaintances, and if such director is found guilty of obtaining such gain, he shall be obliged to pay the company a sum equivalent to such gain. It is his responsibility not to assign his office to any other person, the result of any such assignment is invalid. If a director of the company violates the terms of this section, the Act explicitly provides that he

241 *Turner Morrison & Co v. Shalimar Tar* Products 1980 50 CompCas 296 Cal

242 *Turner Morrison* case above (above)

or she is subject to a punishment of not less than one lakh rupees but not more than five lakh rupees.[243]

These duties are very similar to the ones under the Zimbabwe company law governed by the COBE Act and the provisions of the Zimbabwe National Code on Corporate governance which creates a good base for comparative analysis.

6.2 Directors' resignation and removals in India

6.2.1 Directors' removal in India

After providing him a reasonable opportunity to be heard and following with certain other stipulated circumstances, a corporation can remove a director (where that director has not been nominated by the Tribunal) before the end of his term of office by passing an ordinary resolution removing him from office (based on section 169 of the ICA). The term "appointed by the Tribunal" refers to someone who has been appointed by the National Company Law Tribunal. When a member of a company files an application with the Tribunal alleging repression and mismanagement, the Tribunal has the authority to issue whatever orders it sees fit in order to put a stop to the situation. Such an order may, for example, mandate the appointment of directors who would be obligated to report to the Tribunal on certain issues.

According to the ICA, a minimum of two-thirds of the total number of directors of a public company must be individuals whose term of office is subject to rotational retirement. At the annual general meeting, one-third of the total number of directors will step down. They are,

243 Section 166(7) of India Companies Act: "If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one lakh rupees, but which may extend to five lakh rupees."

nevertheless, eligible for re-appointment as a director at the annual general meeting.

6.2.2 Removal of directors in terms of section 169[244]

Apart from directors nominated by the Tribunal, a corporation can remove a director by ordinary resolution before the term of his office expires, after providing him a reasonable opportunity to be heard. A special notice with the objective of removing a director by a defined number of company members must be passed at least 14 days before the meeting at which it must be moved, except the day the notice is delivered and the day of the meeting. A vacancy formed by the removal of a director may be replaced by the company at the annual meeting or by the board if specific notice is given. The director thus chosen will serve until the date that the predecessor would have served if he had not been removed.[245]

6.2.3 Directors' retirement by rotation

The company's articles of incorporation may include provisions pertaining to the retirement of all directors. If the article does not specify otherwise, at least two-thirds of the total number of directors of a public company must be people whose term of office is subject to rotation and who are entitled to be reappointed at the annual general meeting. The Indian Companies Act actually notes the possibility of all company directors retiring at once and provides for how the company can deal with such a scenario. It is note to worth how careful the ICA is by allowing the board to retire but on rotational basis,

244 See section 169 ICA.

245 See section 169 ICA.

safeguarding the interests of the company and ensuring continuous functionality of a company.[246]

6.2.4 Resignation of directors in India

With Section 168(1) A director may resign from his office by giving written notice to the company, and the Board shall take note of the same upon receipt of such notice, and the company shall notify the Registrar in such manner, within such time, and in such form as may be prescribed, and shall also include the fact of such resignation in the report of directors laid before the company's next general meeting: Provided, however, that a director shall also forward a copy of his or her resignation letter to the company. (2) A director's resignation takes effect on the day the notice is received by the company or, if stated by the director in the notice, the date specified by the director in the notice, whichever is later. Even after his departure, the departed director is accountable for the offenses committed during his term.[247]

Chapter eleven, Section 168[248], and Rules 15 and 16 of the Companies (Appointment and Qualification of Directors) Rule 2014 all provide for the resignation of a director (Rule). Introduction A director can resign from his or her position as a director by giving the business written notice. Whether or not the firm accepts the resignation is unimportant because a director's resignation is a unilateral act unless otherwise stipulated in the business's Articles of Association.[249]

246 See section 152(6) ICA. The section only applies to public companies, hence private companies are not subject to retirement by rotation.

247 See section 168 (2) ICA.

248 ICA.

249 See section 168 ICA.

According to Section 168 of the Companies Act, 2013, a director may resign from his position by giving the company reasonable notice, and the board of directors shall take note of the resignation and notify the Register of Companies. The fact of such resignation will also be brought up at the Board's next meeting.[250] The resignation will take effect on the day the company receives the notification or, if stated by the director in his notice, the date designated by the director in his notice, whichever comes first. Even after his resignation, a retiring director's culpability extends to all of the offenses committed during his term. Finally, in the event that all of a company's directors quit, the Central Government will appoint the required number of directors, who will serve until the company's general meeting appoints new directors.[251]

A director may resign from his office by giving notice in writing. The Board shall, on receipt of such notice within 30 days intimate the Registrar in Form DIR-12 and also place the fact of such resignation in the Directors' Report of subsequent general meeting of the company and post the information on its website. The director shall also forward a copy of resignation along with detailed reasons for the resignation to the Registrar in Form DIR-11 within 30 days from the date of resignation. The notice shall become effective from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later. Provided that the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure. If all the directors of a company resign from their office or vacate their office, the promoter or in his absence the Central

250 See section 168 ICA.

251 Section 168(3) ICA.

Government shall appoint the required number of directors to hold office till the directors are appointed by the company in General Meeting.

6.2.4.1 Mass resignation of directors with one director remaining- Section 167(3)[252]

The Indian Companies Act provides that when all of a company's directors resign due to any of the disqualifications listed in the Act, the promoter or, in his absence, the Central Government, appoints the appropriate number of directors, who will serve until the company's directors are elected in a public meeting.[253]

6.2.4.2 Mass resignation of directors with no director remaining- Section 168(3)

When all of a company's directors retire and, as a result, all of the directors' digital signature certificates (DSC) are deactivated, the company's DIR-12 cannot be filed since it lacks an authorized signatory director. To facilitate the filing of DIR-12 in such a circumstance, the Registrar is entitled to allow any of the resigned directors who was an authorized signatory director for the purpose of submitting DIR-12 only, upon request by the stakeholder and after appropriate inspection. (March 3, 2015, General Circular No. 03/2015). The Companies Act of 2013 ensures that a company's accountability and transparency are upheld, as all companies must adhere to all statutory provisions regarding board meetings and conferences, audit committees, business transactions with third parties, and financial statement disclosures, among other things.

252 ICA.

253 See section 167(3) ICA.

When just one director remains on the board and all other board members have resigned The Company can seek relief under Section 174(2) of the Companies Act, 2013 and its Articles of Association under. If the number of directors falls below the quorum, This Section 174(2) states that the continuing directors may: appoint a director in the meeting for the purpose of increasing the number of directors to that fixed for the quorum; or summon a general meeting of the company for the sole purpose of appointing a director.[254]

Clause 69 of Table F states that if the number of directors falls below the quorum set by the Act, the surviving directors can call a General Meeting of the Company to raise the number of directors to the predetermined quorum.[255] The Company can refer to section 168(3) of the Companies Act, 2013 in in a scenario where all directors resign at once, the promoter or, in the absence of the promoter, the Central Government, appoints the requisite number of directors to retain office until the directors may be selected at a general meeting.[256]

In general, companies with all of the directors resigning have a lot of trouble filling out the papers for appointing new directors. The Authorised Signatory Director's digital signature is required for filing e-forms on the MCA site. There are no approved signatory directors remaining in the Company when all the directors leave from the Board (due to deactivation of DSC of resigning director on filing of

254 See section 174 (2) ICA.

255 B. Samrish & Co. Company Secretaries. All Directors Resigned; What to Do? Accessed April 18, 2022. https://bsamrishindia.com/all-directors-resigned-what-to-do/.

256 B. Samrish & Co. Company Secretaries. (above).

DIR-11). As a result, an e-form for the appointment of a new director cannot be submitted.[257]

MCA provided a clarification in this respect on March 3, 2015, with General Circular No. 3/2015. The ROC may enable any resigned director (who was an authorised signatory of the Company) to file the e-form as appropriate and subject to compliance with other requirements of the Companies Act, 2013, in such a scenario (as indicated in scenario b.).[258]

7. Canadian Perspective on the Duties of Directors and Mass Resignation

In Canada, directors have two distinct responsibilities which are the duty to act honestly and in good faith in the corporation's best interests (commonly referred to as the "duty of loyalty"), and the duty to exercise the care, diligence, and skill that a reasonably prudent person would exercise in similar circumstances (commonly referred to as the "duty of care"). When directors work in favour of corporate goals, they owe a duty of loyalty and a duty of care, which are referred to as the "fiduciary obligations" of directors. Directors owe such fiduciary obligations to the company itself, rather than to the company's shareholders, according to Canadian courts. The Canada Business Corporations Act[259](CBCA) and the Business Corporations Act (Québec)[260], as well as the Civil Code of Québec[261], all impose two broad obligations on directors: the duty of care and the duty of loyalty. Also, article 102 (1)[262] states that

257 B. Samrish & Co. Company Secretaries. (above).

258 B. Samrish & Co. Company Secretaries. (above).

259 Canada Business Corporations Act, R.S.C. 1985, c. C-44

260 Business Corporations Act, CQLR, c. S-31.1 art. 119

261 Civil Code of Québec, CQLR, c. C-1991, sections 321 and following

262 Canada Business Corporations Act.

the directors shall oversee or supervise the management of a company's operations and activities, subject to any unanimous shareholder agreement.

7.1 Directors' duties in Canada

7.1.1 Directors' duty of care in Canada

The duty of care is one of the most significant responsibilities enumerated in the CBCA for company directors and officials. In carrying out their duties, directors and officers must are mandated to exercise at least the level of care and diligence that a reasonable person would exercise in similar circumstances; and act honestly at all times, in good faith, and in the company's best interests, rather than their own personal interests.[263]

In the *Peoples Department Stores Inc. (Trustee of) v. Wise*[264], the Supreme Court of Canada construed the obligation of diligence as that directors and officers will not be held liable under the CBCA's s. 122(1)(b) duty of care if they act responsibly and with reasonable knowledge. In light of all the factors that the directors or officers knew or should have known, the judgments they make must be commercially reasonable decisions. Its important noting that perfection isn't required for deciding whether or not directors have broken their duty of care. Courts are ill-equipped to second-guess the application of business expertise to the considerations that go into corporate decision-making, but they are capable of determining whether an appropriate level of prudence and diligence was applied in reaching what is claimed to be a reasonable

263 OCBA, s.134(1).

264 *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68

business decision at the time it was made, based on the facts of any case.[265]

Furthermore, Canadian courts, like Zimbabwe, follow the "business judgment rule," which accords sufficient respect to a good faith decision made by directors if it is made on a sound basis and falls within a fair range of options.

Moreover, In the ground-breaking case of *BCE Inc. v. 1976 Debenture Holders*,[266] (the "BCE Decision"), Canada's highest court considered, among other concepts, the duty of loyalty and held that in determining what is in the best interests of the corporation, directors of a Canadian corporation may consider the interests of a variety of stakeholders, including shareholders, employees, creditors, consumers, governments, and the environment. Unlike the prevalent opinion in the Zimbabwe and India, the Supreme Court of Canada stated that there is no concept in Canada that one group of stakeholders' interests, such as shareholder interests, should always prevail over all other interests.[267]Instead, the directors must use their business judgment to determine what is in the best interests of the company in any given scenario. Importantly, the court highlighted that, if the company is a going concern, directors should exercise their obligations with the company's long-term interests in mind.

7.1.2 Meaning of best interests in Canada

Because it relates to an entity with an indefinite life, the definition of "company interest" is wide and contextual. As

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265 *Peoples Department Stores* case (above).

266 *BCE Inc. v. 1976 Debenture Holders* [2008] 3 S.C.R. 560, 2008 SCC 69

267 Y. Allaire, S. Rousseau. "To Govern in the Interest of the Corporation: What Is the Board's Responsibility to Stakeholders Other than Shareholders?" 2014, Vol 3 No 5, *Social Sciences Research Network Electronic Journal*. 202.

a result, the Supreme Court of Canada[268] declared that a director's duty of loyalty is not limited to short-term profit or share value. According to the Court, this idea relates to the maximizing of the company's worth from an economic standpoint.[269] In relative to standard terms, it requires the board of directors to operate in a way that makes the company a better company. The Supreme Court's use of the term "maximization of value" shows that it was trying to account for the variety of interests that come together in and around the company.[270] It declined to limit the company's interests to their short-term market worth in this way. Indeed, by acting in the company's best interests, the board of directors will be making decisions that will benefit all stakeholders in the long run. However, in some situations, their judgments will result in winners and losers among the many stakeholders.[271] In the BCE[272] decision, the Supreme Court acknowledged this fact, noting that the duty of loyalty belongs to the company rather than the stakeholders, and that no "one group of interests — for example, the interests of shareholders — should prevail over another set of interests."

7.2 Stakeholder treatment in Canada

The Canada Business Corporation Act, on the other hand, limits the directors' obligation to treat stakeholders fairly, limiting the "oppression remedy" to the rights and interests of securities holders, creditors, directors, and officers. Other stakeholders' rights and interests, like as workers, suppliers, or civil society, are not covered by the remedy. In terms of procedure, these other parties do not have the

268 BCE Inc Case (above).

269 Allaire and Rousseau. (above) 16.

270 Allaire and Rousseau. (above) 16

271 Allaire and Rousseau. (above) 16.

272 BCE Case (above) para 84.

legal authority to bring an oppression remedy. In reality, studies demonstrate that Canadian courts seldom acknowledge these stakeholders' right to seek such redress. In summary, the existing condition of the legislation makes the responsibility to treat stakeholders equitably who are not included in the statute effectively non-existent. As a result, the Supreme Court orders boards of directors to make decisions in the company's long-term interests without favouring any specific stakeholder, but provides stakeholders (other than shareholders, creditors, directors, and officials) little recourse if they are harmed by a decision.[273]

Every director and officer have a fiduciary obligation to their particular company in a Canadian corporate governance setting, and in compliance with Canadian federal and provincial rules, to act honestly and in good faith in the best interests of the company.[274] In Canada, fiduciary obligation is an equitable notion inherited from the English Court of Equity.[275] Fiduciary duties are defined as "the relative legal circumstances [where] one party is at the mercy of the judgment of the other."[276]

7.3 Directors' resignations and removals in Canada

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273 Allaire and Rousseau. (above) .14.

274 Canada Business Corporations Act, s 122(1): "Every director and officer of a corporation in exercising their powers and discharging their duties shall: (a) act honestly and in good faith with a view to the best interests of the corporation. Provincially: Ontario Business Corporations Act, c B.16 s 134(1): Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall, (a) act honestly and in good faith with a view to the best interests of the corporation. Other provinces have similar regulations."0

275 Otherwise known as Court of Chancery.

276 Justice LaForest in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574 cites Justice Dickson in the earlier case of *Guerin v. The Queen*, [1984] 2 SCR 335, 383-384: "The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery (equity).

7.3.1 Removal of directors in Canada

Regardless of anything in the company's articles or any agreement between the director and the company, shareholders have the ability to remove directors under the Canada Business Corporations Act (CBCA) and the Ontario Business Corporations Act4 (OBCA). A director of a company may be dismissed by an ordinary resolution of the shareholders approved at a special meeting of shareholders held for that purpose, according to sections 109(1) of the CBCA and section 122(1) of the OBCA.

Also, every now and then, a director may prove to be a poor fit for the board. The standard first response is to ask them to consider resigning, but if they refuse, they can be removed. The process will be governed by legislation and bylaws. Thus, members may remove any director or directors by ordinary decision at a special meeting under (CNCA) section 130. Directors cannot be removed by written resolution; a meeting must be held. The CNCA makes no provision for the board to remove directors; only members have the authority to do so.

7.3.2 Court's removal of directors in Canada

Courts in Canada have used their power to dismiss directors in unusual circumstances. However, it should be noted that court-ordered director removal is a radical approach that should only be used when corrective action is absolutely essential. This concern stems from the court's long-standing aversion to interfering with a company's internal operations, as well as the court's well-established deference to the judgments made by directors and officers in the exercise of their business judgment. The oppression remedy provided under section 241 of the CBCA was acknowledged as a statutory basis for the court to remove a

director in *Catalyst Fund General Part I Inc. v. Hollinger Inc*.[277] However, in *Albrecht v. Kuhn*,[278] Justice Ground noted that the court will exercise its power of removal only in the most extraordinary circumstances where the continuation of the board of directors in its current state would be detrimental to the company or where the director's conduct reaches the level of improper conduct.

7.3.3 Resignation of directors in Canada

A director's term ends when his or her mandate expires, or when he or she is replaced. If he no longer satisfies the eligibility requirements, he should vacate the office or resign before the mandate's expiration date. A resignation must be issued in accordance with the director's duty of loyalty to the legal entity. This means that the resignation must be given in a dignified manner, with the goal of minimizing the negative consequences of the resignation for the legal person. According to the Ontario Business Corporations Act (OBCA), a director's resignation becomes effective when the corporation receives a written resignation or at the time specified in the resignation, whichever is later.[279] This implies that the resignation must be submitted in writing and delivered to the company. While courts and tribunals have ruled that email resignations satisfy the criteria of a "written resignation," they are generally wary of accepting a copy of the sent email as confirmation that it was sent to the company.

The resignation of a director specified in the articles shall not be effective until the first meeting of shareholders, unless a predecessor has been chosen or appointed at the

277 (2006), 79 O.R. (3d) 288 (C.A.).

278 (2006) 15 B.L.R. (4th) 8 (O.N.S.C).

279 Section 180(2) CBCA. Section 121(2) OBCA (n 36 above).

time the resignation is to become effective.[280] If all of the directors resign or are removed by the shareholders without a successor, any person who oversees or supervises the management of the company's business and affairs is presumed to be a director for the purposes of the Act.[281]

8. CONCLUSION

It has been shown in this article that the directors are the most important persons in the company, and they are the backbones of the company. They have greater authority and responsibility in the company, and they keep track of all management actions, monitoring and managing them in order to keep the business on course and preserve the interests of stakeholders.[282] Furthermore, the board of directors is legally responsible for the choices they make on behalf of its company.[283]

It has been clearly established how the major goal of the governance system is to guarantee that the rights of stakeholders are not curtailed by the company's internal management, and that corporate management is held accountable to its stakeholders in order to maintain trust and protect their interests. It is worth reiterating how the Indian government and the Canadian government have created a set of rules/legislative framework for the business sector in order to ensure appropriate corporate governance specially to effect that ensures the directors profess their duty of loyalty and the duty to act in the best interests of the company directly and indirectly.

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280 Section 119(2) OBCA.

281 Section 109 (4) CBCA. Section 115(4) OBCA.

282 Cassim (n 42 above) 1. J. Kose, L. Senbet, "Corporate governance and board effectiveness,"1998 Vol 22 No. 4. *J Bank.4. Finan*, E. Fama, M. C. Jensen, "Separation of ownership and control," 1983. Vol 26 No. 2 Journal *of Law and Economics*. 14.

283 Taylor, (above). 58.

The bottom line is that vacancies, resignations, and other events can leave boards and other representatives of companies unsure of how to proceed. If at all possible, resigning directors should find their replacement and present their names as recommendations to the remaining members of the board. If a whole board of directors want to resign, which in essence and in all fairness should never happen, they must do so in a legally correct and reasonable manner so that replacements can be appointed, and the company can continue to operate. Personal liability for breach of fiduciary duty should actually result from failure to appoint successors.

It is against this background that the writer hereby makes a recommendation to the lawmakers to consider amending and or develop the current COBE Act so as to include regulation of the mass resignation or mass removal of directors in Zimbabwe to avoid worst case scenarios where the courts might be faced with matters that require interference of this sort but they are left confused as to the approach to use to resolve such matter as there will be a gap in law. Allowance has been evidently given by the Constitution to develop laws and also to ensure accountability. Regulating mass resignation of directors will also be fulfilling the objects of the Constitution and ensuring the directors are not acting at the detriment of the company but in the best interests.