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DEFINING THE CONTOURS OF COMPANY DIRECTORS' DUTIES AND AUTHORITY DURING SHAREHOLDER ACTIVISM IN ZIMBABWE

By

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DECLARATION

I, Chantelle Tinotenda Chivandire do hereby declare that, save for the references indicated in the text and any other assistance I have recognized and acknowledged, this dissertation is entirely a product of my own research, opinion, analysis and industry, and has not been submitted in fulfilment of the requirements for degree purposes or academic qualification at any other university.

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ABSTRACT

This dissertation discusses the duties of directors, particularly the duty to act in the best interests of the company and the duty of loyalty in the context of shareholder activism in Zimbabwe. These duties were previously under common law but have now been codified in the Companies and Other Business Entities Act [Chapter 24:31] 4 of 2019 (the COBE Act). This has necessitated an investigation of the duties of directors as provided for in the COBE Act and these duties are discussed primarily in the context of who those duties are owed to during shareholder activism. In order to achieve this objective, an examination of the theories, the shareholder primacy theory, the pluralist theory as well as the enlightened shareholder approach are discussed extensively and juxtaposed with the provisions of the COBE Act on the duties of loyalty and to act in the best interests of the company. It is concluded that the COBE Act seems to take an enlightened shareholder approach in how directors should exercise their duties.

Shareholders activism is examined with the initial focus being an investigation why there is shareholder apathy in Zimbabwe notwithstanding the fact that the global trends show that shareholder activism is on the rise. Corporate governance failures like the Enron scandal shocked the world and have been attributed to the need for shareholders activism. Reasons for shareholder apathy are put forward including the prohibitive costs of engaging in shareholders activism, lack of awareness of shareholders rights, to mention but a few. An analysis of the provisions of COBE Act as well as the National Code on Corporate Governance which provide for shareholders activism are discussed to determine the extent to which they support shareholders activism and in so doing, shareholders activism strategies such as AGMs, appraisal remedy, oppression remedy and derivative action are discussed. It is therefore concluded that while the COBE Act makes significant strides to support shareholders activism, more still needs to be done to encourage shareholders activism as the COBE Act places stringent technical requirements for shareholders to exercise their rights and therefore has the adverse effect of shareholder apathy.

The discussion then focuses on the interplay of directors' duties in the face of shareholders activism and describe how shareholders should respond when faced with shareholders activism. It is concluded that shareholders should not simply accede to shareholders activism as they owe duties to act in the best interests of the company and loyalty and should always be guided by those duties. Acceding to shareholder pressure raises fiduciary concerns for directors and they can therefore be held liable especially when they do not reasonably believe that the decision is not in the best interests of the company; in such instances directors cannot rely of the business judgment rule to avoid liability.

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DEDICATIONS

I dedicate this dissertation to my late mother Alice, a teacher by profession, who always told me to pursue education. This one is for you mum!

LIST OF ACRONYMS

AGMs	Annual General Meetings
COBE Act	Companies and Other Business Entities Act [*Chapter 24:31*] 4 of 2019
EGMs	Extraordinary General Meetings
ESV	Enlightened Shareholder Value

Table of Contents

Chapter one

INTRODUCTION

1.1 Background and Introduction

A company is a juristic being which is separate from its members, that is the shareholders.[1] Therefore, directors are entrusted to manage the company's business and affairs by the shareholders.[2] Shareholders have a legitimate interest in the affairs of the company as well as its performance as it affects the return on their investments. However, some shareholders are passive investors, sometimes not of their choosing but because they may lack the requisite skill, time and therefore rely on the directors' judgment and expertise that they will get a return on their investment.[3] One of the roles of shareholders in a company is to select the directors and vote on important matters such as approval of disposal of the company's assets, filling a vacancy on the board of directors and to ratify actions by the directors.[4] They have power only in respect of their shares which gives them the right to vote and to sell their shares.[5] Shareholders generally do not have power to interfere with the board's management and have limited grounds to hold the directors to account for their decisions.[6]

Shareholder activism has been defined as actions a shareholder may take on the basis of his/her rights as a shareholder with the intention of influencing the management of

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1 *Salomon v Salomon* 1897 AC 22 (HL); F. H. I. Cassim et al, Contemporary Company Law, Juta & Co, 2nd ed, 31; *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd* 2007 (5) SA 564 (W); S. Girvin et al, *Charlesworth's Company Law*, 18th ed. Sweet & Maxwell 313; V. Powell – Smith, *The Law and Practice relating to Company Directors*, Butterworths 1969. 106; H. S Cilliers & M. L Benade, Company Law, Butterworths, 4th ed. 1982 10.

2 P. J. Dalley, Shareholder (and Director) Fiduciary Duties and Shareholder Activism 2008, vol 8. *Houston Business and Tax Law Journal* 307; Cassim et al (n 1 above) 403 and 411; Girvin et al (n 1 above) 313

3 Dalley (n 2 above) 307; E. S. Adams, Corporate Governance After Enron and Global Crossing: Comparative Lessons for Cross – National Improvement 2003, vol. 78 Issue 2 *Indiana Law Journal* 731; M. I. Muller – Kahle, What is Influencing Financially – Driven Shareholder Activism in the US and UK – Principal – Agent or Principal – Principal Problems? (Unpublished dissertation, Old Dominion University 2010) 1 – 2.

4 Dalley (n 2 above) 307; Cassim et al (n 1 above) 369.

5 Dalley (n 2 above) 302.

6 Sections 60 and 61 of the Companies and Other Business Entities Act allows shareholders to bring action against directors where they are in breach of the duty of care (section 54) and the duty of loyalty (section 55). Shareholders cannot usurp the powers of directors as held in the case of *John Shaw & Sons (Salford) Ltd vs Shaw* [1935] 2 KB 113 (CA) 134.

the company.[7] Globally, there has been an increase in shareholders holding directors to account and influencing the direction of the company in order to increase performance value.[8] In Zimbabwe, shareholder activism is obscure and largely insignificant. This is worrying considering that it can be used by shareholders to assert their rights and influence a company's behavior and enhance accountability.[9] Contrastingly, in other countries like South Africa, shareholder activism has been steadily increasing due to the influence of shareholder activism trends worldwide as well as the corporate governance framework that recognizes the importance of shareholder activism.[10] Shareholder activism takes different forms including derivative action, appraisal rights, calling an extraordinary general meeting by shareholders with at least 10% shareholding where a shareholder believes a wrong has been done against a company, blocking or passing of resolutions, reconstituting the board of directors through electing or removing directors.[11]

The duties of directors in Zimbabwe were previously regulated by common law. However, they have now been partially codified in the COBE Act.[12] In addition, this dissertation will also focus on the fiduciary duty of loyalty in terms of section 55 of the COBE Act and to whom the duty is owed to. A general principle is that the directors have a duty to manage the affairs of a company and therefore fiduciary duties arise from the duty to act in the best interests of the company.[13] The fiduciary duty to act in the best interests of the company is now provided for in terms of section 54 as read with section 195(4) of the COBE Act, provides that directors are required to act in good faith in the best interests of the company and in the exercise of that duty to perform with care, skill and attention as required of a diligent paterfamilias.[14] The directors are

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7 R. Han - Kyun, On defining Shareholder Activism: Exploring the Terrain for Research, *Corporate Ownership & Control* 2006 – 2007 vol. 4 Issue 2 304; S. Othman & W. G. Borges, Shareholder Activism in Malaysia: Is it Effective? 2014, *Procedia - Special and Behavioral Sciences* 428.

8 C. J. Chawafambira, Shareholder Activism: A fact or fiction. An analysis of Zimbabwean Companies listed on the Stock Exchange (Unpublished thesis, University of Zimbabwe 2015) 3; Dalley (n 2 above) 26.

9 Z. L Dube & N. M. Mkumbiri, An analysis of the impact of Shareholders Activism in Corporate Governance: The case of the Zimbabwean Banking Sector 2014 Vol. 5 No. 25. *Mediterranean Journal of Social Sciences* 11.

10 Othman & Borges (n 10 above) 428, Companies Act 71 of 2008; Chapter 5 of the Companies Regulations 2011; The King IV Report on Corporate Governance for South Africa 2016

11 R. Cassim, An Analysis of Trends in Shareholder Activism in South Africa, 2022 vol 30 no. 2, *African Journal of International and Comparative Law* 154 – 154.

12 [Chapter 24:31].

13 E. Davids & R. Kitkat, *The Shareholder Rights and Activism Review,* The Law Reviews, 6th ed, August 2021. 141; Powell – Smith (n 1 above) 127. Dalley (n 2 above) 4.

14 *Shuttleworth v Cox Brothers & Co (Maidenhead Ltd* [1927] 2 KB 9 at 23; *Charterbridge Corporation Ltd v Lloyd's Bank* [1970] Ch 62 at 74; *Re Smith & Fawcett Ltd* [1942] Ch 304 at 306; Cassim (n 1 above) 513.

therefore shielded from liability by the business judgment rule to show that they exercised their discretion in good faith and having been fully informed of the subject matter.[15] In discharging their duties, company directors must have regard to the stakeholders and the shareholders of the company.[16]

The partial codification of the directors' duties has brought with it the need to look at the interplay between directors' duties and shareholders' activism. This brings into question the legal issues of to whom are the fiduciary duties of directors owed and more particularly what happens in the event of conflict between directors' duties and shareholders' interest. Where the board of directors applies their own judgment in the exercise of their duties and such judgment is in direct confrontation with the shareholders' interests, the directors cannot simply abandon their role of judgment making to the shareholders.[17] It is this legal relationship that this dissertation seeks to investigate in light of the new Companies and Other Business Entities Act.[18]

To fully investigate the extent of this relationship, the long-standing debate by Berle and Dodd on stakeholder and shareholder primacy will be looked at closely. The proponents of the shareholder theory argue that directors must concentrate on generating profit for the shareholders.[19] The other view is that directors should have regard to the interests of shareholders and other stakeholders including employees, creditors.[20] Of particular importance is the need to look at the extent of the authority of directors and the duties imposed on them during periods of shareholder activism in that to whom do they owe their duties to. However, the directors must have regard to the interests of the company and its stakeholders,[21] including the shareholders. It is therefore crucial that directors should always prepare for shareholder activism in order to respond appropriately when it arises.

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15 Section 54 (4) of the Companies and Other Business Entities Act; Dalley (n 2 above) 32; L. Muswaka, Shielding Directors against Liability Imputation: The Business Judgment Rule and Good Corporate Governance 2013 vol 1, *Speculum Juris* 36.

16 E. M. Dodd Jr, For Whom are Corporate Managers Trustees? 1931 – 32 Vol. 45 *Harvard Law Review* 1156; This is otherwise known as the enlightened shareholder approach; Cassim et al (n 1 above) 519; Section 195 (4) and (5) of the COBE.

17 Dalley (n 2 above) 308; Cassim (n 1 above) 513 and 528; Girvin (n 1 above) 335; Powell – Smith (n 1 above) 128.

18 [Chapter 24:31].

19 P. E. Queen, Enlightened Shareholder Maximization: Is this Strategy Achievable? 2015 Vol. 127 No. 3, *Journal of Business Ethics* 685; A. A. Berle, Corporate Powers as Powers in Trust 1931 Vol 44 *Harvard Law Review* 1049; A. O. Nwafor, Shareholders Profit Maximization and Stakeholders Interests in Corporate Governance 2014 vol. 11 Issue 14 *Corporate Ownership & Control* 671.

20 Cassim et al (n 1 above) 518.

21 Davids & Kitkat (n 12 above) 142; Nwafor (n 18 above) 675; A. A. Somer Jr, Whom Should the Corporation Serve? The Berle – Dodd Debate revisited Sixty Years Later, 1991 vol 16 *Delaware Law Journal* 54.

1.2 Statement of the problem

The study on shareholder activism and its relation to directors' duties has been necessitated by the introduction of the Companies and Other Business Entities Act [Chapter 24:31] 4 of 2019 (the COBE Act) in Zimbabwe. The COBE Act came into force in the first quarter of 2020. This legislation codifies the fiduciary duties of directors, particularly the duty to act with diligence in the best interests of the company as well as the duty of loyalty for the first time.[22] This has warranted academic scrutiny of the codified duties of directors and how they interact with shareholder activism. Since shareholder activism has not been prominent in Zimbabwe as compared to other jurisdiction like South Africa, it is imperative to investigate if the legislative framework in Zimbabwe particularly the COBE Act as well as the National Code on Corporate Governance are enough to provide an environment that encourages shareholder activism. This entails an enquiry into the extent to which a director can accede to shareholder activism and still enforce his duties of acting with diligence in the best interests of the company as well as the duty of loyalty to the company.

1.3 Research questions

The questions are as follows:

1. What is the scope of shareholder activism in Zimbabwe as provided for in terms of the COBE Act and the National Corporate Governance Code?
2. How is the relationship between directors' duties and authority during shareholder activism?
3. What lessons can Zimbabwe learn from South Africa's legal framework on shareholder activism?

1.4 Literature review

Davies et al[23] describe shareholder activism as a tactic employed by shareholders to the directors and sometimes to other shareholders, to effect change and such activism can be brought about by events like a merger or acquisition or can be strategic to tackle operational performance or governance. Dalley[24] argues that shareholders vote on pertinent issues and select directors and have no further legal role in relation to the directors. Shareholders can institute derivative action to get directors to pay attention to a particular matter, however there is no requirement for directors to seek the opinions of shareholders on every matter regarding the affairs of the company. The

[22] Sections 54 and 55 of the COBE Act.
[23] G. Davies, G. Mulley & M. Bardell, *The Shareholder Rights and Activism Review*, 4th ed. 2019. 146.
[24] Dalley (n 2 above) 308 – 309.

author then seeks to answer the question was to whom the directors owe their duties to and is of the view that the duties are owed to the company and its shareholders thus taking a shareholder supremacy approach.

Simoni[25] argues that generally, shareholders do not have fiduciary duty to the company while directors are obligated to act in good faith in the interest of the company. He brings in a different angle to the discussion by focusing on the dilemma arises where a person is both a director and a shareholder, the implications that arise when a director leads shareholder activism which may not be in the best interests of the company. Such a director can be held liable for breaching his fiduciary duties owed to the company.[26] Another author, Fairfax[27] argues that there are circumstances where directors accede to shareholder activism that can and ought to be deemed as a breach of their fiduciary duties.[28]

Regarding the duty of loyalty, Fairfax contends that directors' actions should be made in the interests of the company rather than their own interests and that often directors' accede to shareholder pressure in order to retain their seat on the board which can be an unintentional breach of their duty of loyalty.[29] Dalley takes the argument further and states that directors owe their duty to "exercise independent judgment in the best interests of the corporation no matter who appointed them."[30] In respect of the duty of care, it is the author's contention that compliance with this duty requires that directors should reasonably believe that the actions they take are in the best interests of the company.[31] Thus if directors concedes to shareholder activism, they can be in breach of this duty as they would have failed to independently exercise their discretion as required of a reasonable person.[32] Cassim also argues that directors should not blindly follow the instructions of those who appointed them.[33] Therefore acceding to shareholder demands is a breach of director's duties to its stakeholders including employees and the community.[34]

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25 L. Simoni, Where to draw the line? – dual roles and shareholder activism, *Without Prejudice*, September 2019 Accessed 14 April 2022 www.withoutprejudice.co.za

26 Simoni (n 25 above).

27 L. M. Fairfax, Just say Yes? The Fiduciary Duty Implications of Directorial Acquiescence, 2021, Vol 106, *Iowa Law Review* 1321.

28 Fairfax (n 27 above) 1324.

29 Fairfax (n 27 above) 1337.

30 Dalley (n 2 above) 327.

31 Fairfax (n 27 above) 1335.

32 Fairfax (n 27 above) 1336.

33 Cassim (n 1 above) 531.

34 Fairfax (n 27 above) 1361.

Simoni states that directors can be held liable when they use information that they acquired in their role as directors to instigate shareholders to take action against the board to make the latter act in a way favorable to the shareholders.[35] Dalley further argues that a director who fails to use his/her discretion in the best interests of the company therefore have breached their duty of care, skill and loyalty[36] and if directors abdicate their duty of loyalty to the company either out of fear or pressure from activist shareholders, and make a decision that is not in the best interests of the company, they would have breached their duty to the company and can attract liability to themselves.

Fairfax further argues that failure to examine the consequences of acquiesce in light of shareholder activism can have negative ramifications including proper understanding the contours of directors duties.[37] In advancing this argument, the author focuses on two fiduciary duties: the duty of care and the duty of loyalty and takes a stakeholder approach by stating that directors owe a duty to the company and its stakeholders and that primary focus of directors should not always be shareholder interests. The author makes a clarion call for directors to focus on their fiduciary duties when taking actions and not acceded to shareholder pressure as it can result in breach of their fiduciary duties.

Bouwman[38] argues in favor of the business judgment rule in that it curbs unnecessary litigation by shareholder activists who seek to interfere or influence the decisions of directors. Therefore, it discourages shareholder activism as there is difficulty in succeeding against the rule which protects decisions by directors. On the other hand, Fairfax advocates for maintenance of a delicate balance between accountability from directors by enhanced shareholder power and a potential overreach by shareholders that can negatively affect the company and by extension the stakeholders.[39]

1.5 Research Methodology

The methodology used in this thesis will consist of qualitative information obtained from desk research. The researcher will make use of primary sources being legislation particularly the COBE Act and case law. There will also be a review of secondary sources including articles, journals and textbooks.

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35 Simoni (n 25 above).
36 Dalley (n 2 above) 332.
37 Fairfax (n 2 above) 1321 – 2.
38 N Bouwman, An Appraisal of the Modification of the Director's duty of Care and Skill, 2009 vol. 21 no.4. *South African Mercantile Law Journal*. 524.
39 Fairfax (n 27 above) 1322.

A comparative analysis will be made to determine how shareholder activism applies in South Africa which has seen more shareholder activism in its companies.[40] In addition, South Africa, like Zimbabwe also codified the duties of directors in the Companies Act.[41] It is therefore imperative to look at how South Africa has managed to draw the line between directors' duties and the growing trend of shareholders' activism.

1.6 Chapter synopsis

This study has a total of five chapters.

The first chapter provides the general overview of thesis by introducing the subject of shareholder activism and defining directors' duties. It further states the methodology to employed in the research, the problem statement that has necessitated the study and discusses the literature on the subject.

The second chapter will focus on the duties of directors particularly the duty to act in good faith in the best interests of the company and the duty of loyalty. The debate on shareholder versus stakeholder theory will be discussed in light of the duties of directors as provided for in terms of the Companies and Other Business Entities Act.

Chapter three will explore shareholder activism as provided for in terms of the Companies and Other Business Entities Act and the National Corporate Governance Code and assess whether the provisions are sufficient to promote shareholder activism. It will discuss the parameters of directors' duties in the face of shareholder activism and the extent of the duties of directors.

Chapter four will take a comparative analysis with South Africa and examine the scope of shareholder activism and how directors.

Chapter five will conclude the thesis by summarizing the discussions in the preceding chapters and provide recommendations on how the line can be drawn between shareholder activism and the duties of directors.

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[40] Davies & Kitkat (n 12 above) 142

[41] 71 of 2008.

Chapter two

THE RELATIONSHIP BETWEEN DIRECTORS AND THE COMPANY

2.1 Introduction

A company has been defined as a juristic person which has a right to obtain legal rights and incur legal obligations.[42] A company therefore has a separate legal personality from its shareholders.[43] Since a company is a juristic person, its functions can only be done through human agency, that is either through its shareholders in general meetings, through its directors as well as employees.[44] The role of directors is crucial as they manage the affairs of the company and make important decisions for the running of the company[45] and are therefore the company's primary human actors.[46] As a result of the crucial role of directors, there is a need to hold directors at a higher standard and hold them accountable in their conduct in running the affairs of the company as the effect of the duties of directors to third parties including shareholders, creditors, employees among others, is important in the control of company.[47] This chapter will explore the nature of the fiduciary duties of directors and to whom the duties are owed.

2.2 Scope of the relationship between directors and the company

The fiduciary duties of directors have ordinarily been derived from English law.[48] The duties include the duties of good faith, honesty and loyalty.[49] It is imperative to understand who can be classified as a fiduciary and there have been several attempts to define a fiduciary. However, a common position is that the content and extent of the duty differs depending on the kind of relationship that exists between the parties, whether it's between attorney and client, trustees and beneficiaries, agents and principals, directors and companies. However, a fiduciary is person who "acts on behalf of and in the interests of another."[50]

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42 Cassim et al (n 1 above) 31; 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 and Public Administration* 38.

43 *Salomon v Salomon* 1897 AC 22 (HL); Cassim et al (n 1 above) 31.

44 Cassim et al (n 1 above) 411; Hamadziripi & Chitimira (n 42 above) 38 – 39.

45 Cassim et al (n 1 above) 403.

46 Girvin (n 1 above) 320; *Bolton Engineering Co. Ltd vs Graham & Sons* (1957) 1 Q. B. 159.

47 Girvin (n 1 above) 320 – 321.

48 Cassim et al (n 1 above) 509.

49 Cassim et al (n 1 above) 509.

50 Bouwman (n 38 above) 509 – 510; Cassim et al (n 1 above) 513; Dalley (n 2 above) 4; H. Sher, Company directors' duties and responsibilities, 2005 vol 13 Part 3 *Juta's Business Law*.

The totality of fiduciary duties can be summed up to mean that a fiduciary has some power or discretion. A fiduciary can unilaterally use that power or discretion to change the beneficiary's interests and the beneficiary is vulnerable to the fiduciary.[51] The fiduciary duties are the duty of loyalty, good faith, avoidance of conflict of interest.[52] In the case of *Bristol & West Building Society v Mothew*, the court held that,

> "The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single – minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he must not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of the fiduciary obligations. They are the defining characteristics of the fiduciary."[53]

The overall duty of directors is to act in good faith in the best interests of the company.[54] There has been a debate as to the proper classification of directors, that is whether they can be regarded as trustees or agents of the company.

2.2.1 Directors as trustees

Directors are comparable to trustees as the assets and money of the company are controlled by them and they are in a fiduciary position in the exercise of the authority in managing the company.[55] It has been said that directors duties are derived from duties of trustees, however, they are not undistinguishable from the duties that trustees owe beneficiaries.[56] In order to curb abuse of power by the fiduciary, there have been duties imposed by common law upon fiduciaries to ensure that there is trust and confidence in the relationship between the fiduciary and the beneficiary. Thus directors can be held liable if they breach any fiduciary duties as they exercise their powers in the course of managing the company.[57] However, the description of directors as trustees is not proper as the legal ownership of the property that they administer is not bestowed in them but in the company.[58]

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51 *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) at 482.

52 P. L. Davies & D. D. Prentice, Gower's Principles of Modern Company Law, 6th ed Sweet & Maxwell 598.

53 [1996] 4 All ER 698 (CA) 711; B. S. Butcher, Directors' Duties A New Millennium, A New Approach? Kluwer Law International 100 -101.

54 *Cohen v Segal* 1970 (3) SA 702 (W) at 706.

55 Cassim et al (n 1 above) 513; Girvin (n 1 above) 319; J.C Nkala & T. J. Nyapadi, Company Law in Zimbabwe 1995 Zimbabwe Distance Education College Publishing House 270.

56 Cassim et al (n 1 above) 513.

57 Girvin (n 1 above) 319 – 320.

58 Nkala & Nyapadi (n 55 above) 267 – 268.

2.2.2 Directors as agents

An agent is a person who acts on behalf of another (the principal) and is under the control of the principal.[59] As already noted above, a company needs human agency to exercise its functions. Thus, directors are the agents through which a company can perform its functions[60] and as agents they owe fiduciary duties to the company. As agents, directors, collectively as a board, have the power to bind the company and each director owes the company the duty of good faith.[61] In the context of directors, they have a fiduciary duty to act in the best interests of their principal which is the company.[62] Their primary goal should be the success of the company and the collective interests of the shareholders[63] and they ought to be held accountable when they fail to exercise their duties properly. However, the relationship between directors and the company does not fully resemble that of agent and principal.

2.2.3 Directors as fiduciaries

There is a debate as to whether directors are agents or trustees as can be seen from the argument above. What is clear is that none of the two descriptions and adequately express the role of directors in as much as they perform similar tasks. The fiduciary duties of directors are *sui generis*.[64] While the fiduciary relationship between directors and the company is like that of a trustee as well as that of an agent and a principal, it is a distinct relationship in a class of its own.[65] This position was emphasized in the case of *Regal (Hastings) Ltd v Gulliver*[66] where the court held that "directors of a limited company are creatures of statute and occupy a position peculiar to themselves." It is submitted that this is the proper description of the fiduciary relationship between the board of directors and the company.

2.3 Relationship between shareholders and the board of directors

The relationship between shareholders and directors was aptly explained in the case of *John Saw and Sons (Salford) v Shaw*[67] as follows;

> "A company is an entity distinct alike from its shareholders and directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in the general meeting. If powers of management

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59 Dalley (n 2 above) 13.
60 Girvin (n 1 above) 320.
61 Davies & Prentice (n 52 above) 599.
62 Davies & Prentice, (n 52 above) 598; Dalley (n 2 above) 10.
63 Cassim et al (n 1 above) 514.
64 Cassim et al (n 1 above) 513 – 514.
65 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.
66 (1967) 2 A. C. 134 at 147.
67 [1935] 2 KB 113 (CA) 134.

> are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if the opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders."[68]

Therefore, in a company, directors and shareholders have different functions and powers. There exists a corporate nexus in that shareholders invest capital into the company which is managed by the board of directors.[69] Shareholders have the immutable rights to appoint and remove directors and to vote on fundamental issues.[70] On the other hand, the business affairs of the company are run by the board of directors. Shareholders have limited grounds to interfere with the management of the company. Directors generally do not have fiduciary duties to individual shareholders but to shareholders as a whole.[71] The question therefore becomes in whose interests and benefit should the company be managed. In answering this question, it is necessary to look at the Berle vs Dodd debate otherwise known as the shareholder vs stakeholder theories.

2.4 Duty to act in the best interests of the company

Under common law, a director must act in the best interest of the company[72] and this duty originated from Roman Dutch law. However, a company is an abstract entity and, in an attempt, to make the rule more practical, it is often said that the interests of the company are similar to the interests of the shareholders collectively.[73] Previously in Zimbabwe, this duty was regulated in terms of the common law. However, there has been a partial codification of the duties of directors and this duty is now provided for in terms of section 54 of the COBE Act. It is important to note that, in terms of the COBE, this fiduciary duty has now been fused with the duty of care, skill and diligence which are English law principles[74] which leads to confusion and uncertainty as the latter is not a fiduciary duty. The partial codification of directors' duties is to ensure that directors are aware of their fiduciary duties as they are easily accessible.[75]

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68 [1935] 2 KB 113 (CA) 134.
69 Dalley (n 2 above) 18.
70 Dalley (n 2 above) 18.
71 Cassim et al (n 1 above) 515; *Percival v Wright* (1902) 2 Ch 421; Section 195 (4) of the COBE Act.
72 Cassim et al (n 1 above) 515.
73 H. Adamu, Analysis of the Director's Duty to Act in the Best Interests of the Company: A Proposal for Amendment; Dalley (n 2 above) 10; Nkala & Nyapadi (n 55 above) 271.
74 Hamadziripi & Chitimira (n 42 above) 40.
75 Cassim et al (n 1 above) 19.

The duty to act in the director breach the company requires directors to act in good faith in what they consider to be in the best interests of the company and not what the court considers is in the best interests of the company.[76] This is because directors, unlike judges, have the expertise, knowledge and time to assess the best interests of the company.[77] The courts therefore should not have supervisory role over decisions of directors where such decisions are reached honestly and within the powers of the directors management of the company.[78] If the court were to make its own determination of what the best interests of the company are, it would be tantamount to usurping the powers and functions of directors.[79] In the case of *Lenvin v Felt & Tweeds Ltd*, it was held that "the court is not concerned with the commercial wisdom"[80] of the decisions of the directors.

It is important to note that other fiduciary duties, that is the duty to avoid conflict, loyalty, fettering discretion, exercise of power for improper purpose are actually subservient to the duty to act in the best interests of the company.[81] This is because when a director is in breach any of these duties, for example, he has a conflict of interest, he can be found in breach of the prevailing duty to act in good faith for the benefit of the company.[82] The test of whether or not a director has complied with this duty is both subjective and objective.[83] It is subjective in that the question will be whether or not the director believed that he was acting in the interest of the company.[84] It therefore refers to the director's state of mind.[85]

However, the limits of the subjective test also require an objective test to be employed. The best interests of a company are not evaluated by the court but by whether or not a diligent paterfamilias would regard the act to be in the best interests of the company.[86]

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76 *Re Smith v Fawcett Ltd* [1942] Ch 304 at 306.

77 Cassim et al (n 1 above) 524.

78 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832; Cassim et al (n 1 above) 524.

79 Nkala & Nyapadi (n 55 above) 272.

80 1951 (2) SA 401 (AD) at 414.

81 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* 217

82 Langford (n 81 above) 218.

83 Cassim et al (n 1 above) 524

84 Cassim et al (n 1 above) 524.

85 *Greenhalgh v Ardene Cinemas Ltd* [1950] 2 ALL ER 1120 (CA); Cassim et al (n 1 above) 524.

86 *Shuttleworth v Cox Brothers Co (Maidenhead) Ltd* [1927] 2 KB 9 at 23; Cassim (n 1 above) 524; *Teck Corp Ltd v Millar* (1972) 33 DLR (3d) 288 (BCSC); Nkala & Nyapadi (n 55 above) 272.

The fiduciary duty to act in the best interests of the company has been codified in the COBE Act. Section 54 (1) of the Companies and Other Business Entities Act provides that,

> "Every manager of a private business corporation and every director or officer of a company has a duty to perform as such in good faith, in the best interests of the registered business entity, and with the care, skill, and attention that a diligent business person would exercise in the same circumstances."

It is clear that this duty is not only limited to directors but to managers and officers of a company. The test provided is partially subjective and partially objective test.[87] This is because the personal elements of the director in question, that is the level of knowledge and experience, must be determined subjectively.[88]

Section 54 (2) of the COBE Act states that in exercising that duty, the manager, officer or director can rely on information, opinions, reports or statements (including financial statements) of professionals or experts such as independent auditors, legal practitioners or even employees of company whom the director or officer reasonably believes are reliable and skilled to issue such information, opinions, reports or statements. The law further provides that section 54 (2) of the COBE Act only applies where the officer or director makes a 'proper enquiry' where the circumstances dictate the need for enquiry and has no knowledge that the reliance is unjustified.[89] It is important to note that the meaning of proper enquiry is not stated in the COBE Act. Hamadziripi & Chitimira postulates that there is a lacuna in the law as to how this should be approached, that is, whether the courts will revert to the common law to define the terms 'proper enquiry' and 'diligent businessperson' or if the courts will turn to South African jurisprudence.[90] It is prudent in the circumstances to revert to the common law to define the terms mentioned above as the COBE Act does not succinctly define the terms proper enquiry and diligent businessperson.

In terms of section 54(4) of the Companies and Other Business Entities Act, a person who makes a business judgment acting as stated in subsections (1), (2) and (3) is deemed to have fulfilled the duty with respect to that judgment if that person:

> "(a) does not have a personal interest as defined in section 56 ("Transactions involving conflict of interest") in the subject of the judgment; and
> (b) is fully informed on the subject to the extent appropriate under the circumstances; and

87 Hamadziripi & Chitimira (n 42 above) 42.
88 Hamadziripi & Chitimira (n 42 above) 42.
89 Section 54 (3) of the COBE Act.
90 Hamadziripi & Chitimira (n 42 above) 41.

(c) honestly believes when the judgment is made that it is in the best interests of the company or corporation."[91]

In addition, a director cannot avoid liability if he fails to act in the best interests of the company and cannot be excused by such liability through a provision, whether contained in a company's articles.[92] It is now important at this stage to assess as to who the directors owe this duty to; this requires an analysis of the shareholder theory and the stakeholder theory.

2.5 Theories on whose interests' directors should serve

2.5.1 Shareholder primacy

In terms of the common law as well as the COBE Act, directors are required to act in the best interests of the company.[93] The question becomes, what is a company? It has been said that the 'company' refers to the interests of the combined body of shareholders.[94] This school of thought, as put forward by Berle, contends that directors must always have regard to the interests of the shareholders which are the maximization of their property.[95] Put differently, "the ultimate measure of a company's success is the extent to which it enriches its shareholders."[96] The interests of other stakeholders, including creditors, suppliers, customers, employees and the community, are subservient to the interests of shareholders.[97]

This view emanated from the traditional view that a company is an association of shareholders created for their pecuniary benefit and is managed by the board for this purpose.[98] Since directors are appointed by shareholders, their objective is to increase the economic interests of the shareholders.[99] It is therefore almost impossible to determine the best interests of the company without having regard to the interests of the present and future shareholders.[100] Directors should therefore exercise their duties

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91 Section 54 (4) of the COBE Act.

92 Section 54 (5) of the COBE Act.

93 Cassim et al (n 1 above) 523; *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) para 13; Section 54(1) of the COBE Act.

94 Cassim et al (n 1 above) 20; F. Hamadziripi, Does the directors' fiduciary duty to act in the best interests of the company undermine other stakeholders' interests? A comparative assessment of corporate sustainability, (Unpublished Master's Thesis, University of Fort Hare) 81.

95 I. Esser & J. J. Du Plessis, The Stakeholder Debate and Directors' Fiduciary Duties, vol 19 no. 3 *South African Mercantile Law Journal* 348; Berle (n 18 above).

96 Nwafor (n 19 above) 671.

97 Cassim et al (n 1 above) 495.

98 Nwafor (n 19 above) 671.

99 Somer (n 19 above) 54 - 55; Nwafor (n 19 above) 671; Dalley (n 2 above) 11.

100 *Gainman v National Association of Mental Health* [1971] Ch 317 at 330; *Brady v Brady* [1988] BCLC 20 at 40.

in the best interests of the company, which is the same as increasing shareholder value, and if they depart from this objective in the exercise of their powers, they are deemed to be in breach.[101]

There are several justifications for this theory. The first argument being that since shareholders' 'own' the company, directors should prioritize shareholders' interests.[102] However, this argument has been critiqued on the basis that shareholders do not own the company because a company has a separate legal person from its members and cannot therefore be owned.[103] Shareholders own shares which in turn give them control and certain financial rights but they have indirect control of the company's underlying assets.[104]

In addition, it has been argued that shareholders are the sole residual claimants.[105] Proponents of this argument state that other non-shareholder groups like employees, managers and even creditors are protected as they have contracts which entitle them to payments.[106] On the other hand, shareholders have implicit contracts which only allow them to the remainder of what is left after the company has met its other obligations and paid any fixed claims.[107] This argument has been criticized as the only time shareholders are considered residual claimants is when the company is bankrupt.[108] However, even in such instances, it is improper for a company to declare dividends when there are creditors who ought to be paid.[109]

The shareholder primacy theory has also been discredited on the basis of what is known as the team production argument which acknowledges that shareholders alone do not make up a company but that there is input from other groups including but not limited to employees, creditors, customers and managers.[110]

2.5.2 Enlightened Shareholder Value

The enlightened shareholder approach asserts that directors should increase profits for shareholders but also allows directors to take into consideration the interests of stakeholders, but the interests of the stakeholders are subordinate to those of the shareholders.[111] This approach is based on the fact that the operations of a company

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101 Nwafor (n 19 above) 673.

102 L. A Stout, Bad and Not -so -bad arguments for Shareholder Primacy, vol 75 2002, *Southern California Law Review*, 1190

103 Salomon v Salomon1897 AC 22 (HL); Nwafor (n 19 above) 671; Stout (n 102 above) 1190; Esser & Du Plessis (n 95 above) 358.

104 Esser & Du Plessis (n 95 above) 358.

105 Stout (n 103 above) 1193

106 Esser & Du Plessis (n 95 above) 358; Stout (n 102 above) 1192.

107 Stout (n 102 above) 1192 – 1193.

108 Stout (n 102 above) 1193.

109 Hamadziripi (n 94 above) 84; Stout (n 102 above) 1193.

110 Stout (n 102 above) 1195.

111 Cassim et al (n 1 above) 519; Nwafor (n 19 above) 675.

have a wide reach and therefore directors, in the exercise of the duties, should consider the interests of not only the shareholders but also stakeholders.[112] The enlightened shareholder approach aims to balance the long and short term goals of a company, that is, pursuing the interests of shareholders by increasing their profits while at the same time maintaining relationships with stakeholders including but not limited to employees, customers, suppliers, while also taking into consideration the effect of the company's operations in the community that it operates in as well as the environmental impact.[113] The enlightened shareholder value approach therefore encompasses tenets of the traditional shareholder primacy theory as well as the pluralist approach. In essence, the shareholder primacy theory and the enlightened shareholder value approach are similar in that they both prioritize profit maximization for the shareholders but the latter does not give regard to profit maximization exclusively.[114] The enlightened shareholder value approach is also proposed in the King Code 3 paragraph 18 which states that;

> "Notwithstanding that the law directs the board to act in the best interests of the company as a whole, the board should strive … to achieve … an appropriate balance between the interests of its various stakeholders. The board, while accountable to the company, should take account of the legitimate expectations of its stakeholders in its decision making."[115]

The enlightened shareholder approach has been criticized for sacrificing shareholder profit maximization by satisfying the interests of various stakeholder groups.[116] Directors are therefore required to be accountable to shareholders but are also responsible to various stakeholder groups.[117]

2.5.3 Stakeholder theory

This theory is also known as the pluralist approach which states that directors have a duty to balance the interests of stakeholders and shareholders.[118] Stakeholders refers to creditors, lenders, customers, employees, suppliers, society in general, potential investors, to mention but a few.[119] The pluralist approach asserts that directors should give independent value to stakeholders' interests and that those interests are not secondary to the interests of shareholders.[120] This approach recognizes that stakeholders are a vital part of a company and that shareholders are only but one of

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112 Nwafor (n 19 above) 675.
113 Nwafor (n 19 above) 675.
114 Hamadziripi (n 94 above) 91.
115 Kings Code III paragraph 18.
116 P. E. Queen, Enlightened Shareholder Maximization: Is this Strategy Achievable? 2015 vol. 127 no. 3 *Journal of Business Ethics* 686.
117 Hamadziripi (n 94 above) 92.
118 Cassim et al (n 1 above) 495.
119 Esser & Du Plessis (n 95 above) 350; Cassim et al (n 1 above) 495.
120 Cassim et al (n 1 above) 495.

several parts of a company.[121] Therefore in terms of the pluralist approach, directors should ignore the interests of shareholders and consider the interests of stakeholders where such action is in the best interests of the company.[122] Thus directors can sacrifice shareholder profits in exchange of promoting the interests of other stakeholders.[123] Professor Dodd contends that a company "has a social service as well as a profit making function…".[124]

The pluralist approach is premised on the fact parties which are affected by the activities of a company should be considered in the process of decision making.[125] Put differently, "the development of loyal, inclusive stakeholder relationships will become one of the most important determinants of commercial viability and business success."[126]

The stakeholder theory is also riddled with criticism. The first is that it defies the principles of corporate governance in that the basis of corporate governance relates to accountability of directors to shareholders of a company.[127] Berle argues that if directors' duties are recognized in favour of other interested groups (stakeholders) it deteriorates the standard of duties of directors to shareholders.[128] The issue of lack of accountability was also addressed as follows;

> "What is the question? It is not whether the various corporate constituencies have equal entitlements or whether any of them should have preference. It is not whether the interests of each group are to be quantified in a definition of long – term value for the enterprise. It is – rather – whether corporate management is effectively accountable to any informed, motivated, independent and effective entity."[129]

Secondly, critics of the stakeholder theory contend that it is difficult to evaluate the interests of diverse groups.[130] It is practically impossible to define the nature and extent pf duties of directors in respect various stakeholder groups and consequently directors' performance cannot be appraised properly.[131]

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121 Esser & Du Plessis (n 95 above) 348; Cassim et al (n 1 above) 518.
122 Cassim et al (n 1 above) 518.
123 Queen (n 116 above) 685.
124 Dodd (n 16 above) 1148.
125 Hamadziripi (n 94 above) 93; Cassim et al (n 1 above) 519.
126 D. Wheeler & M. Sillanapaa, The Stakeholder Corporation: A Blueprint for Maximizing Stakeholder Value, Pitman 1997 at ix; Nwafor (n 19 above) 676.
127 Hamadziripi (n 94 above) 94.
128 Esser & Du Plessis (n 95 above) 348.
129 RAG Monks as quoted by Esser & Du Plessis (n 95 above) 349; Queen (n 116 above) 685.
130 Nwafor (n 19 above) 674
131 Nwafor (n 19 above) 674.

2.6 Codification of the duty to act in the best interests of the company in Zimbabwe

Having considered the three approaches to whose interests' directors should serve, it is imperative to assess which theory has been employed in the COBE Act. A reading of section 54 of the COBE Act states that the duty is owed to the company, thus seemingly taking a traditional approach of the shareholder theory which also takes into account the interests of the shareholders, which are profit maximization. This is further emphasized in section 195 (4) of the COBE Act states that a director "shall exercise independent judgment and shall act within the powers of the company in a way that he or she considers, in good faith, to promote the success of the company for the benefit of its shareholders as a whole."[132] This is clearly shareholder primacy approach in that directors should exercise their duty and give priority to the success of the company and interests of the company.

However, the COBE Act then takes an enlightened shareholder approach by stating that a director should have regard to the interests of employees[133], the need to develop relationships between the company and its customers, suppliers and others[134],the effect of the operations of the company to the community and the environment[135], the reputation of the company to have high standards[136] as well as to act fairly between shareholders.[137] It is evident that the shareholders' interests are to be given priority in terms of section 195 (4) of the COBE Act but are not considered exclusively as enunciated in section 195 (5) of the COBE Act as various stakeholder interests should be considered.

The business judgment rule originated from USA where "it is a rule of restraint that prevents a court from interfering, with the benefit of hindsight, in honest and reasonable business decisions of the directors of the company."[138] The rule therefore exists to ensure that directors are protected and encourage the exercise of their powers.[139]

The business judgment rule has been incorporated in the COBE Act in section 54 (4) and a director or officer is deemed to have fulfilled this duty if he;

> "(a) does not have a personal interest as defined in section 56 ("Transactions involving conflict of interest") in the subject of the judgment; and
> (b) is fully informed on the subject to the extent appropriate under the

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132 Section 195 (4) of the Companies and Other Business Entities Act.
133 Section 195 (5) (b) of the COBE Act.
134 Section 195 (5) (c) of the COBE Act.
135 Section 195 (5) (d) of the COBE Act.
136 Section 195 (5) (e) of the COBE Act.
137 Section 195 (5) (f) of the COBE Act.
138 Cassim et al (n 1 above) 563,
139 Hamadziripi & Chitimira (n 42 above) 45.

circumstances; and
(c) honestly believes when the judgment is made that it is in the best interests of the company or corporation."[140]

This provision mirrors section 76 (4) (a) of the South African Companies Act 2008.

The first application of the business judgment rule requires a director to be free from any personal interest, which is personal financial interests as enunciated in section 56 of the COBE Act. The director must therefore be disinterested in the from the transaction or decision.[141] Secondly, the director is required to be fully informed when making the decision. The final requirement is that he must reasonably believe that the decision is in the best interests of the company. The business judgment rule therefore protects directors from liability where they have made "an informed decision in the best interests of the company without any undisclosed self – dealing on their part or on the part of a person related to them."[142] If a director complies with these three requirements, it is not for the court to inquire into the merits of the business decision as the court is not a business expert.[143] In the event that the business judgment rule is applied, the court should not substitute its decision on the merits and impose it on the directors.[144]

2.7 Duty of loyalty

The duty of loyalty requires that directors should not be engaged in self-dealing, they should avoid conflict.[145] In the Companies and Other Business Entities Act, the duty of loyalty is provided for in terms of section 55. The directors' duty of loyalty, in terms of the Companies and Other Business Entities Act extends to the subsidiary of the company.[146] In exercising this duty, a director is prohibited from using the property of the company for his own benefit or that of another person except the company.[147] In addition, the duty entails that the director should not disclose confidential information or use the information for his own benefit or of another person but for the entity.[148] The duty of loyalty also involves that the director should not compete with the company's business.[149]

140 Section 54 (4) of the COBE Act.
141 Hamadziripi & Chitimira (n 42 above) 46.
142 Cassim et al (n 1 above) 564.
143 Cassim et al (n 1 above) 565.
144 Cassim et al (n 1 above) 565.
145 Langford (n 81 above) 216.
146 Section 55 (2) of the COBE Act.
147 Section 55 (3) (a) of the COBE Act.
148 Section 55 (3) (b) of the COBE Act.
149 Section 55 (3) (f) of the COBE Act.

2.8 Preliminary Conclusion

In conclusion, the duties of directors, particularly the duty to act in the best interests of the company and the duty of loyalty are owed to the company and the shareholders as a whole. The business judgment rule protects directors where they would have made a business decision if they do not have personal interest, are fully informed of the subject matter and believe that the decision is in the best interests of the company. The COBE Act takes an enlightened shareholder value approach as it prioritizes the interests of shareholders but also takes into account the interests of stakeholders.

Chapter three

A SCRUTINY OF SHAREHOLDER ACTIVISM AND THE INTERPLAY BETWEEN DIRECTORS' DUTIES AND SHAREHOLDER ACTIVISM

3.1 Introduction

This chapter examines shareholder activism and the various forms it can take, particularly oppression remedy, appraisal remedy, derivative action as well as Annual General Meetings (AGMs). Shareholders provide the company with capital. However they may lack the requisite skills, knowledge or technical know how to manage a company.[150] Directors are therefore entrusted by the shareholders to manage the affairs of a company.[151] It is the interplay between directors' duties and shareholder activism that is to be explored; particularly the manner in which directors perform their duties in the face of shareholders activism. While shareholder activism ensures accountability of directors to the shareholders, the directors should know how to exercise their duties in periods of shareholder activism as will be fully explored below.

3.2 Shareholder activism

Shareholder activism has been defined to include any action taken by a shareholder or a group of shareholders with the intention of bringing change in a company.[152] Put differently, it refers to "any legal or self-regulatory mechanisms that disgruntled shareholders invoke to change an investee company's undesirable decisions, policies and practices."[153] Shareholder activism comes in different forms including campaigns, measures or proposals used by shareholders to bring change in the manner in which the company's governance, management, business or strategy or regarding an action or transaction that is being contemplated by the company.[154]

Shareholder activism has not been fully explored in Zimbabwe[155] even when there has a significant rise in shareholder activism worldwide owing to high profile scandals in

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150 Dalley (n 2 above) 307.

151 Dalley (n 2 above) 307; Cassim et al (n 1 above) 403 and 411; Girvin et al (n 1 above) 313.

152 P. Rose & B. S. Sharfman, Shareholder Activism as a Corrective Mechanism in Corporate Governance, 2015 vol 2014 Issue 5, *BYU Law Review* 1015; Cassim (n 11 above) 149; Simoni (n 25 above).

153 H. Chitimira & F. Hamadziripi, An Overview Analysis of Shareholder Activism in Zimbabwe, 2022 vol. 11 Issue 1 *Perspectives of Law and Public Administration*, 176.

154 Chitimira & Hamadziripi (n 153 above) 176.

155 Dube & Mkumbiri (n 9 above) 11; C. Rademeyer & J. Holtzhausen, King II, Corporate Governance and Shareholder Activism 2003 vol. 120 no. 4 *South African Law Journal* 767.

corporates as well as corporate governance failures such as the Enron scandal.[156] Shareholder activists ensure that there is an effective supervisory system that that can improve the practice of corporate governance in a company.[157] The lack of shareholder activism results in directors doing as they please resulting in lack of compliance in good corporate governance principles.[158]

There has been a debate as to whether or not shareholder activism is beneficial to a company.[159] The proponents who argue in support of shareholder activism argue that companies that have shareholders who are actively involved will likely be successful as the shareholders try to adhere to good corporate governance practices unlike companies which have passive shareholders.[160] It has also been reasoned that shareholder activists provide effective monitoring which can advance companies corporate governance practices.[161] On the other hand, those who argue against shareholder activism are of the view that shareholder activism results in disorderly behavior which in turn negatively impacts the company.[162] Individual shareholder activists at annual general meetings tend to be seen as a nuisance by the board of directors and this often leads to hostile interactions primarily from the directors.[163]

Other authors argue that shareholders are not involved in the day to day affairs of the company and do not have the information on the operations of the company.[164] Resultantly, they lack the necessary knowledge and expertise to make informed decisions.[165] There is the belief that shareholders should not be involved in corporate matters as directors were better placed to make decisions for the company owing to the fact that they have the knowledge and expertise as well the fact that they owe fiduciary duties to the company to act in good faith and in its best interests.[166] There has also been criticism of shareholder activists as they are deemed to be focused on short term returns such as increasing shareholder investments instead of being concerned with the long term interests of shareholders and creation of value.[167] Shareholders do not owe any fiduciary duty to the act in the best interests of the

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156 Dube & Mkumbiri (n 9 above) 11; L. M Fairfax, From Apathy to Activism: The Emergence, Impact and Future of Shareholder Activism as the New Corporate Governance Norm, 2019 Vol 99 *Boston University Law Review,* 1305; https://nehandaradio.com/2017/12/02/zim-lacks-shareholder-activism/ accessed on 6 June 2022.

157 Fairfax (n 27 above) 1321; Cassim (n 11 above) 151.

158 Cassim et al (n 1 above) 498.

159 Fairfax (n 156 above) 1312; Cassim (n 11 above) 150

160 Cassim (n 11 above) 150.

161 Cassim (n 11 above) 150.

162 Cassim (n 11 above) 150.

163 Fairfax (n 156 above) 1312); Cassim (n 11 above) 150.

164 Fairfax (n 156 above) 1311; Dalley (n 2 above) 8.

165 Fairfax (n 156 above) 1311.

166 Dalley (n 2 above) 32; Fairfax (n 156 above) 1311.

167 Fairfax (n 156 above) 1311; Cassim (n 11 above) 150.

company[168] and therefore their interests are divergent from the company's interests. Collectively, all these factors made shareholder activism undesirable.

Shareholder activism directly addresses the issues that underpin shareholder apathy.[169] One of the reasons for shareholder apathy is that shareholders do not believe that using their right to vote will not change anything or guarantee compliance with corporate governance principles and therefore they refrain from voting.[170] Even when they utilize their right to vote, shareholders would rather rubber stamp the proposals or decisions of the board than utilize their voting rights to actively contest those decisions.[171] Another reason for shareholder apathy is that shareholders simply are not aware of the of the rights and powers that are legally available to them and they would be actively engaged in activism if they are knowledgeable of whether directors are compliant with corporate governance principles.[172] Shareholder apathy is also because shareholders find it easier to simply to sell their shares instead of getting involved in actions that safeguard compliance with corporate governance principles.[173] The costs of being actively engaged in a company's affairs are inhibitive as shareholders are usually spread all over the world and attendance of an annual general meeting can result in travel expenses as well as loss of valuable productive work hours.[174] Therefore the costs involved in actively engaging in activism can dissuade shareholders from monitoring the conduct of directors and ensuring compliance with principles of good corporate governance.[175]

3.3 Forms of shareholders activism

Shareholder activism in Zimbabwe can be categorized as voice and exit mechanisms.[176] Exit mechanisms, also referred to as walk activism, refers to when a shareholder sells his shares as a way to protest and show his displeasure in the decisions or actions of the company.[177] It is said that "when shareholders divest from a company and sell their shares, particularly in large amounts, it may have a disciplinary effect on companies,

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168 Simoni (n 25 above); Fairfax (n 156 above) 1311.

169 Cassim et al (n 1 above) 498.

170 Rademeyer & Holtzhausen (n 155 above) 769; Cassim et al (n 1 above) 498 – 499; Fairfax (n 156 above) 1308.

171 Fairfax (n 156 above) 1307.

172 Cassim et al (n 1 above) 498; Rademeyer & Holtzhausen (n 155 above) 769; Fairfax (n 156 above) 1304.

173 Rademeyer & Holtzhausen (n 155 above) 769; Cassim et al (n 1 above) 498.

174 Cassim et al (n 1 above) 498; Rademeyer & Holtzhausen (n 155 above) 770; Fairfax (n 156 above) 1311.

175 Rademeyer & Holtzhausen (n 155 above) 770; Cassim et al (n 1 above) 498.

176 Chitimira & Hamadziripi (n 153 above) 178.

177 Chitimira & Hamadziripi (n 153 above) 178; Cassim (n 11 above) 152; Cassim et al (n 1 above) 498.

which ultimately leads to a change in governance."[178] When a board of directors is faced with the threat of large shareholders divesting their shares, it may reconsider and make decisions which are in the best interests of the company as divestment can negatively impact the company's reputation.[179]

On the other hand, voice mechanisms refer to when a shareholder clearly expresses his displeasure by openly communicating the reasons as a way to rectify the conduct or make changes in the company.[180] Therefore the shareholder does not sell his shares but retains them while trying to make changes in the company.[181] Voice strategies include proposing shareholder resolutions, dialogue with the board, seeking support from other shareholders to obtain additional voting rights, bringing concerns to the attention of the board at Annual General Meetings, instigating public debate as well as voting against resolutions that are proposed by the board.[182] Voice mechanisms may be public or private as institutional shareholders can request to express their concerns to the board in a private meeting.[183] Shareholder activists can also bring their concerns on the public forum using media platforms including but not limited to television, radio, social media as well as print media and is normally adopted by minority shareholders who may not be able to hold a private meeting with the board.[184] This form of shareholder activism is meant to enable engagement with the board of directors outside the traditional communication platforms like Annual General Meetings.[185] In Zimbabwe the media option has been utilized in expressing and exposing noncompliance with corporate governance standards.[186]

In Zimbabwe, shareholder activism is found in the COBE Act and the National Corporate Governance Code of 2014. It has already been stated that shareholder activism in Zimbabwe is a developing area that is yet to be fully explored.[187] This section will analyze the COBE Act as well as the National Corporate Governance Code and the various forms of shareholder activism methods that are provided therein.

3.3.1 Derivative Action

Another strategy is litigation by taking legal action against the company which is a form of public voice mechanism.[188] This includes derivative action which is when legal

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178 Cassim (n 11 above) 152.
179 Cassim (n 11 above) 152.
180 Chitimira & Hamadziripi (n 153 above) 178; Cassim (n 11 above) 152.
181 Chitimira & Hamadziripi (n 153 above) 178.
182 Cassim (n 11 above) 152 – 153.
183 Cassim (n 11 above) 153.
184 Cassim (n 11 above) 153.
185 Fairfax (n 27 above) 1319.
186 Chawafambira (n 8 above) 20.
187 Chitimira & Hamadziripi (n 153 above) 177; Dube & Mkumbiri (n 9 above) 11; Chawafambira (n 8 above) 3.
188 Chitimira & Hamadziripi (n 153 above) 178; Cassim (n 11 above) 153.

proceedings are instituted by "persons given standing to litigate in their own names for and behalf of the corporation in respect of wrongs done to the corporation."[189] It is derivative in that it is derived from the rights of the company.[190] Under common law, the directors who would ordinarily be the majority shareholders of the company would commit a wrong against the company and use their control to prevent the company seeking recourse through litigation to correct the wrong committed against the company.[191] Therefore derivative action is a procedural inroad that allowed the court to bring justice where a company was controlled by 'miscreant' shareholders.[192]

Derivative action is an exception to the common law rule set out in *Foss vs Harbottle*[193] which states that the company is the 'proper plaintiff' in any legal proceedings affecting it.[194] Under common law, the claim belonged to the company and therefore a shareholder did not have an automatic right to bring an action on behalf of the company.[195] Where the company failed to institute legal proceedings, there were limited exceptions in which a shareholder could bring proceedings on behalf of the company but a shareholder could not institute proceedings where the wrong could be remedied by majority shareholders condoning or ratifying the wrong.[196] The common law principle was premised on two principles; the first is that a company is a separate legal entity from its shareholders and is therefore the proper plaintiff in any proceedings affecting it this is known as the proper plaintiff rule.[197] Secondly, the courts will not interfere with the management of the company where such management exercises its powers within the parameters of those powers, this is known as the internal management rule.[198]

Derivative action therefore allows minority shareholders to remedy a wrong done to the company which the board of directors would not have attended to since they are the wrongdoers.[199] In *Mbethe v United Manganese of Kalahari (Pty) Ltd*[200] the Supreme

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189 Cassim (n 11 above) 169; H. Stoop, The Derivative Action Provisions in the Companies Act 71 of 2008, 2012 *The South African Law Journal* 529; Cassim et al (n 1 above) 775; Girvin et al (n 1 above) 511; *Grandwell Holdings (Pvt) Ltd v Minister of Mines & Mining Development* HH – 193 – 16 at 11; *Dahaw (Pvt) Ltd & Anor v Willdale Ltd & 5 Ors* HH – 235 – 22.

190 Davies & Prentice (n 52 above) 666; Cassim et al (n 1 above) 775; F. Hamadziripi & P. C. Osode, A Critical Assessment of Pertinent *Locus Standi* Features of the Derivative Remedy under Zimbabwe's New Companies and Other Business Entities Act, 2022 vol 66 Issue 2 *Journal of African Law* 317.

191 Cassim et al (n 1 above) 776; Girvin et al (n 1 above) 513.

192 Girvin et al (n 1 above) 512; *Nurcombe v Nurcombe* [1985] 1 W. L.R. 370; Hamadziripi & Osode (n 190 above) 317.

193 (1843) 67 ER 189.

194 Cassim et al (n 1 above) 778; Stoop (n 189 above) 529.

195 Girvin et al (n 1 above) 511; Stoop (n 189 above) 529.

196 Cassim et al (n 1 above) 778.

197 Stoop (n 189 above) 529.

198 Stoop (n 189 above) 529.

199 Cassim (n 11 above) 169; Stoop (n 189 above) 530; Cassim et al (n 1 above) 777.

200 2016 (6) SA 409 (SCA).

Court emphasized that "derivative action is not only a tool to protect minority shareholders but is a fundamental tool to enforce good corporate governance."[201]

In Zimbabwe, derivative action was previously in terms of the common law. The Companies Act (Chapter 24:03) did not have provision for derivative action. The approach to derivative action was that the principle of corporate personality should not be used "to defeat public convenience, justify wrong, protect fraud and defend crime or other improper conduct."[202] Derivative action is now provided for in terms of section 61 of the COBE Act. Section 61 (1) of the COBE Act provides that derivative action can be brought by a shareholder in his own name on behalf of the company to enforce or recover from the director damages for breach of duties owed by the director to the company.[203] Therefore, the claim for damages is restricted to breach of duties by the directors in terms of the COBE Act and not instances of negligence, omissions or proposed controversial acts.[204] Resultantly, the scope of conduct that create the basis for derivative action is limited and therefore can consequently discourage shareholder activism.[205]

The COBE Act introduces the contemporaneous ownership rule[206] which states that shareholders should prove that they were shareholders at the time the transactions occurred for them to institute derivative action against the directors.[207] It is reasoned that "a wholesale application of the contemporaneous ownership rule in a dynamic legal, business and political environment like Zimbabwe could impose undesirable barriers on shareholder activists' access to justice."[208] In addition, only shareholders with a 10% shareholding can institute derivative action.[209] Therefore the act is restrictive in who can exercise derivative action and can discourage shareholder activism. Derivative action is an expensive form of shareholder activism as the applicant will have to pay the high costs of litigation as the costs are prohibitive.[210]

3.3.2 Appraisal rights

Appraisal rights relate to the rights of dissenting shareholders who disapprove of specific triggering events and have a right to have their shares bought by the company in cash and at a price which reflects the fair value of those shares and in some instances

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201 Cassim (n 11 above) 169.
202 *Kufandada v Dairiboard Zimbabwe Ltd & Others* HC – 564 – 15.
203 Section 61 (1) of the COBE Act.
204 Chitimira & Hamadziripi (n 153 above) 181.
205 Chitimira & Hamadziripi (n 153 above) 181.
206 Section 61 (3) (b) of the COBE Act.
207 Chitimira & Hamadziripi (n 153 above) 181.
208 Chitimira & Hamadziripi (n 153 above) 181.
209 Section 61 (3) (c) of the COBE Act.
210 Chitimira & Hamadziripi (n 153 above) 182.

such value is determined by the court.[211] This strategy is an exit mechanism for shareholders who have been disappointed as the company's policies and/or practices do not align with their expectations and therefore they can exercise their right to leave the company by selling their shares in cash for their fair value.[212]

Appraisal rights are activated, broadly speaking, where in instances where a company passes a special resolution to change the rights concerning a class of shares in accordance with the memorandum of incorporation or to take on a major transaction such as a merger.[213] Cassim stipulates that "the grant of appraisal rights in these triggering circumstances involves the implicit acknowledgement that such events may have significant and far reaching consequences for shareholders."[214] In such circumstances the rights of the shareholders as well as the nature of the company can be extremely altered.[215] Dissenting or dissatisfied minority shareholders should not be forced to agree with the majority shareholders but can withdraw from the company by giving up their shares and receive the fair value of their shares in cash.[216]

The company, when dealing with circumstances giving rise to appraisal rights, is faced with a complicated scenario. On one hand, it is imperative that majority shareholders should be given leeway to restructure or essentially change the company and adjust the rights of investors in order to adjust to shifts in business and other prevailing conditions.[217] The other side of the coin is that there is a significant need for minority shareholders to keep their shares in the company and that their expectations, regarding the preservation of their investment on the conditions that they made their investment, are met.[218] Appraisal rights are therefore a strategy to balance the interests and rights of majority shareholders with those of minority shareholders as they allow dissenting minority shareholders an opportunity to exit the company instead of being compelled to accede to the decision of the majority.[219]

Where minority shareholders dispute the price offered for their shares, they can utilize the appraisal remedy to challenge the fairness of the price offered.[220] In such instances, the interplay between the directors' duties of acting in the best interests of the company and loyalty and the appraisal procedure are laid bare. This is because directors negotiate the terms of the transaction and can therefore be induced by side payments

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211 Cassim et al (n 1 above) 796.
212 Chitimira & Hamadziripi (n 153 above) 179; Cassim et al (n 1 above) 797.
213 Chitimira & Hamadziripi (n 153 above) 179; Cassim et al (n 1 above) 796.
214 Cassim et al (n 1 above) 796.
215 Cassim et al (n 1 above) 796.
216 Chitimira & Hamadziripi (n 153 above) 179; Cassim et al (n 1 above) 796.
217 Cassim et al (n 1 above) 796.
218 Cassim et al (n 1 above) 796.
219 M. Phakeng, The Appraisal Right in terms of section 164 of the Companies Act 71 of 2008; An Overview, 2022, *Potchestroom Electric Law Journal* 3; Cassim et al (n 1 above) 797.
220 Chitimira & Hamadziripi (n 153 above) 179.

offered to them by the dissatisfied shareholders to disregard their duties to the company and accept a price which is not the best price for the company.[221]

Appraisal rights can be an effective method of shareholder activism in that they "serve as a deterrent or a restraint on bad business judgment by the directors."[222] This is due to the fact that if a large number of dissenting shareholders exercise their appraisal rights, the board may be forced to reassess the transaction especially when the appraisal can deplete the company's cash resources.[223]

In Zimbabwe, appraisal rights as a method of shareholder activism is a complex one as it is riddled with several technical obstacles. Firstly, there are formalities and procedures which must be complied with in terms of the COBE Act. In terms of Section 233 (2) of the COBE Act, a shareholder 'may' give written notice of his objection to the resolution.[224] However, it is argued that the use of the word 'may' appears to give the shareholder discretion to give the written notice but such dissenting shareholder will face difficulty in invoking shareholder appraisal rights in terms of the Act.[225] This is because the COBE Act further requires that only shareholders who have sent the notice of objection can make a demand for determination of the fair value of their shares. [226] In addition, the COBE Act also states that the company will only send a notice that the resolution has been adopted to shareholders who would have given a notice of objection.[227] Further, section 233 (4) (a) (i) of the COBE Act provides that a shareholder can demand payment of the fair value of shares if he has submitted a notice of objection. Therefore, while section 233 (2) of the COBE Act seems to make the notice of objection to be optional, a reading of Section 233 (2) as well as section 233 (4) of the COBE Act actually makes the notice of objection mandatory.[228]

Another obstacle is that the determination of fair value of shares is a difficult task. In terms of section 233 (4) of the COBE Act, a dissenting shareholder can apply to the court to get a determination of the fair value of his shares. However, even where the shareholder demands payment for the fair value of shares, the company can make an application to the court for variation of the company's obligations and the court may make an order that is just an equitable and take into consideration the company's financial circumstances.[229] In terms of section 233 (10) of the COBE Act, the company is required to give written notice to the shareholders with what the directors consider

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221 Cassim et al (n 1 above) 797.
222 Cassim et al (n 1 above) 797; Phakeng (n 219 above) 2.
223 Cassim et al (n 1 above) 797.
224 Section 233 (2) Of the COBE Act.
225 Chitimira & Hamadziripi (n 153 above) 179.
226 Section 233 (4) of the COBE Act.
227 Section 233 (3) of the COBE Act.
228 Chitimira & Hamadziripi (n 153 above) 179.
229 Section 233 (16) (a) and (b) of the COBE Act.

to be the fair value of the shares. However, there is no clear consequence on the company if it fails to give such written notice.[230]

The determination of the fair value of shares is done on the date in which and the time immediately before the resolution was adopted which prompted the appraisal rights.[231] If the shareholder accepts the offer for the shares, the company has an obligation to pay the accepted value of shares within ten business days from the date of acceptance.[232]

It is clear that the technical requirements of the appraisal rights are extremely complicated and therefore discourage shareholder activists from taking this route to challenge policies, decisions and/or practices in a company as there should be strict compliance with the procedural steps before a shareholder can exercise appraisal rights.[233] The complex web of legal restraints make it difficult for shareholders to be active and actually work adversely by fostering shareholder apathy.[234]

3.3.3 Oppression Remedy

This refers to where shareholders of a company may apply to court and seek recourse in instances where directors or other persons in control of the company commit an act or omission which is oppressive, illegal, fraudulent or unfairly prejudicial to the affected shareholder or unfairly disregards his or her interests.[235] It also includes actual or proposed acts or omissions which are unfairly prejudicial or oppressive.[236]

In Zimbabwe, the oppressive remedy is provided for in terms of section 223 as read with section 62 of the COBE Act. It is important to note that these provisions of the COBE Act make reference to 'members' instead of shareholders and it has been reasoned that the terms are meant to be used interchangeably as some of the provisions in the COBE Act were mainly taken from English legislation, that is UK's Companies Act of 2006.[237] However, the term 'member' also "includes a person who is not a member of the company but to whom shares in the company have been transferred or transmitted by operation of law"[238] Any shareholder or member can exercise the oppression remedy as there are no threshold requirements as compared to derivative action where a shareholder should own at least 10% of the voting powers.[239]

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230 Chitimira & Hamadziripi (n 153 above) 179.
231 Section 233 (15) of the COBE Act.
232 Section 233 (12) (b) of the COBE Act.
233 Cassim et al (n 1 above) 25; Chitimira & Hamadziripi (n 153 above) 179; Phakeng (n 219 above) 3.
234 Fairfax (n 140 above) 1313.
235 Chitimira & Hamadziripi (n 153 above) 179; Cassim et al (n 1 above) 24; *Stalap Investments (Pvt) Ltd & 3 Ors v Willoughby Investments (Pvt) Ltd* & 2 Ors HH - 726 – 19.
236 Cassim et al (n 1 above) 766.
237 Chitimira & Hamadziripi (n 153 above) 180.
238 Section 222 (1) of the COBE Act.
239 Chitimira & Hamadziripi (n 153 above) 180.

While the COBE Act makes provision for the oppression remedy as a strategy for shareholder activism, it has been reasoned that it is not an effective activism tool. This is because the provision can only be exercised by current shareholders and does not extend to those who became shareholders after the oppressive or unfairly prejudicial conduct was committed and resolved.[240] Resultantly, the new shareholders could suffer the consequences of oppressive or prejudicial conduct or acts or omissions that unfairly disregard their interests, which were committed before they became shareholders.[241]

3.3.4 Annual General Meeting

Annual General meetings provide shareholders an opportunity to express their concerns regarding the company's policies, by exercising their rights to vote, present proposals as well as ask questions.[242] In Zimbabwe, Annual General Meetings should be held once every twelve months[243] and failure to do so constitutes an offence which attracts a civil penalty.[244] Annual General Meetings provide shareholders the platform to make business decisions regarding the company and take appropriate action to protect and develop the company.[245] Further, the AGM allows shareholders an opportunity to formulate strategies and get information from the board concerning the operations, administration and management of the company.[246]

Shareholders are entitled to place issues on the agenda of the meeting.[247] Shareholder proposals are one of the primary ways for shareholders to engage with the board as shareholders can encourage the board to adopt some measures and influence corporate policies.[248] All important documents such as the company's strategic plan, reports on the performance indicators of the company and growth prospects, reports on analyst briefings, management practices and policies pursued by the board, should be availed to the shareholders and give them adequate time to prepare for the shareholders meeting.[249] Shareholders must be given sufficient time to prepare for the meeting and formulate their position on the agenda and make consultations[250] and participate in the meeting.[251] Directors have a responsibility to ensure that AGMs are easily accessible to all shareholders.[252] Therefore, it is necessary that AGMs be held at a place, date and

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240 Chitimira & Hamadziripi (n 153 above) 180.
241 Chitimira & Hamadziripi (n 153 above) 180.
242 Chitimira & Hamadziripi (n 153 above) 182.
243 Section 167 (1) of the COBE Act.
244 Section 167 (7) of the COBE Act.
245 Paragraph 15 of the National Code on Corporate Governance.
246 Paragraph 16 of the National Code on Corporate Governance.
247 Section 167 (6) of the COBE Act.
248 Fairfax (n 156 above) 1310.
249 Paragraph 32 of the National Code on Corporate Governance.
250 Paragraph 26 of the National Code on Corporate Governance.
251 Paragraph 30 of the National Code on Corporate Governance.
252 Chitimira & Hamadziripi (n 153 above) 182.

time which is possible for all shareholders to attend.[253] If shareholders fail to attend Annual General Meetings in person, they can take part through proxies.[254] A quorum of shareholders must be clearly defined to guarantee involvement by all classes of shareholders.[255]

AGMs can be an effective form of shareholder activism. However, the challenge is that they are held one annually which is a lengthy period for shareholders to gather and effect change through passing resolutions.[256] It is recommended that shareholders should utilize Extraordinary General Meeting (EGM) to lessen the adverse effects of the status quo.[257] However, in terms of section 168 (1) of the COBE Act, only shareholders with at least five percent paid up shareholding can request an extra ordinary general meeting. Further, the level of attendance by shareholders at AGMs is concerning as it is often poor and even those who attend often fail to ask the critical questions.[258] The poor attendance at AGMs means that the quorum is not met and therefore no binding decisions are made.[259] In terms of section 170 (3) of the COBE Act, if a quorum is not met, then the meeting will be adjourned.

AGMs, when utilized effectively, can be useful tool for shareholder activism. However, despite the provisions in the National Corporate Governance Code as well as the COBE Act which provide for the effective use of Annual General Meetings, they are not sufficiently utilized by the shareholders who fail to attend for several reasons including but not limited to geographical distance involved, ignorance of shareholders' rights, limited time to present their concerns as well as failure to take Annual General Meetings seriously.[260] Shareholders do not have any incentive to attend AGMs as the costs of travel, finding the requisite informed opinion from experts as well as the time involved in attending the Annual General Meetings requires them to devote resources and time.[261]

Even though the COBE Act as well as the National Corporate Governance Code provides for the use of proxies, the shareholders still do not exercise that right.[262] Section 170 (10) (a) and (b) of the COBE Act provides for the use of virtual meetings where shareholders cannot physically attend the meeting provided that they can be seen or heard by other members.[263] Further, minority shareholders have a general perception

253 Section 27 of the COBE Act.
254 Paragraph 40 of the National Code on Corporate Governance; Section 171 (1) of the COBE Act.
255 Section 36 of the National Cde on Corporate Governance.
256 Chitimira & Hamadziripi (n 153 above) 183.
257 Chitimira & Hamadziripi (n 153 above) 183.
258 Dube & Mkumbiri (n 9 above) 13; Cassim et al (n 1 above) 498.
259 Section 170 (2) of the COBE Act; Chitimira & Hamadziripi (n 153 above) 183.
260 Chitimira & Hamadziripi (n 153 above) 1849; Fairfax (n 156 above) 1308.
261 Fairfax (n 156 above) 1311; Cassim et al (n 1 above) 498; Rademeyer & Holtzhausen (n 155 above) 770.
262 Dube & Mkumbiri (n 9 above) 13; Chawafambira (n 8 above) 53.
263 Paragraph 29 of the National Code on Corporate Governance 2014.

that even if they participated in AGMs, their contribution will not bring any meaningful change.[264] Shareholders need to be made aware of the rights and powers that they have so that they can effectively make use of their votes which have been referred to as most important power in the shareholders' arsenal.[265]

3.4 Scope of directors' duties in the face of shareholders activism in Zimbabwe

Shareholder activism, as discussed above, is a strategy used by shareholders to invoke change on the company's policies, practices or decisions.[266] Often, the decisions of directors are in direct confrontation with the intentions of shareholders. It is important at this point to investigate what directors should do in the face of shareholders activism; whether they strictly adhere to their duties of loyalty and to act in the best interests of the company or acquiesce to the pressure from shareholders. It must be noted that the contours of directors' duties can be negatively impacted in the face of shareholder activism as the need for accountability of directors by shareholders can result in overreach by the shareholders. Put differently, there are fiduciary duty concerns when directors yield to shareholder demands especially when they do not believe that those decisions are in the best interests of the corporation.[267] While directors are applauded for acquiescing to shareholder activism, the fiduciary duty implications should not be overlooked.

When directors make a decision, it must be made in the best interests of the company and the shareholders as a whole.[268] Often, shareholder activists can threaten to exercise their rights to remove a director at a general meeting[269] when such director does not accede to their demands. In such circumstances, directors may accede to shareholder demands, not because they agree with them, but because they are blackmailed, pressured or coerced.[270] However, the directors must exercise independent judgment in the best interests of the company regardless of who appointed them.[271] In this regard, they are protected by the business judgment rule, which curbs unnecessary from activist shareholders.[272] However, where a director only serves as a spokesperson for a shareholder, they would have breached their fiduciary duty to act in the best interests of the company as they would have failed to exercise their

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264 Adams (n 3 above) 731; Chawafambira (n 8 above) 53; Fairfax (n 156 above) 1310; Chitimira & Hamadziripi (n 153 above) 184.

265 Fairfax (n 156 above) 1308.

266 Chitimira & Hamadziripi (n 153 above) 176.

267 Fairfax (n 27 above) 1323.

268 Dalley (n 2 above) 32; Section 195 (4) of the COBE Act.

269 Section 167 (5) (a) of the COBE Act.

270 Fairfax (n 27 above) 1323.

271 Cassim et al (n 1 above) 529 – 530; Dalley (n 2 above) 34; *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) 163.

272 Bouwman (n 38 above) 524.

independent, informed judgment.[273] It is argued that "a director's following the instructions of a shareholder, rather than exercising her own judgment about what is in the best interests of the corporation and all its shareholders, would appear to fall squarely within this definition of bad faith."[274] Such a director is usually in conflict as he seeks to safeguard the interests of the shareholder whom he represents and therefore fails to take into account the interests of the company, other shareholders as well as stakeholders as required in terms of the COBE Act.[275]

It has been reasoned that when directors' thwart shareholder activism can they be held to be in breach of their fiduciary duties since they also owe their duties to the company and shareholders as a whole. Contrastingly, shareholders do not owe a fiduciary duty to the company, to act in its best interests.[276] Therefore, occasionally shareholders will act selfishly and seek to change the policies, decisions and/or strategies of the company even when their position may not be in the best interests of the company as their interests may not be aligned with the company's.[277] Usually, shareholders' interests are short term and focus on wealth maximization at the expense of the company's long term goals which also cater for other stakeholders.[278] Much of the criticism of shareholder activism is centered on the fact that directors are forced to bow to shareholder activists even when the decision may not be in the best interests of the company.[279] The approach by directors in such circumstances ought to be handled delicately, as they owe a fiduciary duty to the company and the shareholders as a whole and ought to balance such interests. However, the directors also need to consider the interests of other stakeholders as stated in section 195 of the COBE Act in accordance with the enlightened shareholder approach. The underpinning principle is that whether directors resist or accede to the demands of shareholders, they should be guided by the fiduciary duties, which in this context, are to act in the best interests of the company and loyalty.[280] Whether the outcome of the decision is considered to be best practices and is satisfactory to shareholders and stakeholders, a director can still be deemed to be in breach of the duty to act in the best interests of the company.[281] This is because the business judgment rule is not hinged on the outcome of the decision but that the director reasonably believed that the decision was in the best interests of the company.[282]

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273 Dalley (n 2 above) 38; *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 1 ALL ER 716(CA) 723; Section 195 (4) of the COBE Act; Fairfax (n 156 above) 1336.

274 Dalley (n 2 above) 40; Cassim et al (n 1 above) 531.

275 Chawafambira (n 8 above) 54.

276 Simoni (n 25 above); Cassim et al (n 1 above) 140; Fairfax (n 156 above) 1311.

277 Fairfax (n 156 above) 1311.

278 Simoni (n 25 above); Fairfax (n 156 above) 1311.

279 Fairfax (n 27 above) 1322.

280 Cassim (n 11 above) 150; Fairfax (n 27 above) 1333.

281 Fairfax (n 27 above) 1336.

282 *Re Smith v Fawcett Ltd* [1942] Ch 306.

It also brings into question whether or not a director who follows the dictates of a shareholder can be said to be in breach of his duty of loyalty. The duty of loyalty dictates that the actions of directors should not be directed at furthering their own self-interests over the interests of the company and its shareholders.[283] The underlying principle is that directors owe their fiduciary duty of loyalty to the company and not a single shareholder.[284] Directors should not further their own interests of getting re-elected into office by acceding to pressure from shareholders.[285]

There ought to be a balance as to when shareholder activism can influence the company's decisions, policies and practices as well as when the directors can voluntarily accede to the shareholders' demands. Shareholders have an obligation to act fairly between shareholders in the exercise of their duties.[286] Therefore, while directors do not owe fiduciary duties to a single shareholder, they ought to consider the shareholder's concerns and act fairly between majority and minority shareholders.

Where a director, who has a dual role of being a shareholder and a director, uses information he obtained as a director to influence shareholders against the company's decision, policy or practice, whether or not such a shareholder can be held liable has not been explored in this jurisdiction. However, a recent UK case, *Stobart Group v Tinkler*[287], dealt with such a scenario. In that case, the court held that a director who is also a shareholder activist should distinguish the respective roles and abide by the respective integrity requirements. If a director fails to differentiate between the duties of the respective roles, he may be found in breach of his duty to the company, to act in its best interests of the company. In the Zimbabwean context, such a director can be held to be in breach of the duty of loyalty as he/she would have used confidential information for his/ her benefit and the benefit of other shareholders and not the company.[288] In addition, the director would have breached the duty to act in the best interests of the company as he/she would have only considered his interests as a shareholder and placed those interests ahead of the best interests of the company.[289]

3.5 Preliminary Conclusion

In conclusion, shareholder activism should be encouraged to allow shareholders to shape and influence corporate decisions, policies and practices. Directors should be held accountable by shareholders to ensure good corporate governance practices. The regulatory framework in Zimbabwe, while making provision for shareholder activism, also puts stringent conditions in which it can be exercised, for example with derivative

283 *Bristol and West Building Society v Mothew* [1996] 4 ALL ER 698 (CA) 711; Fairfax (n 27 above) 1336.
284 Cassim et al (n 1 above) 515; *Percival v Wright* (1902) 2 Ch 421.
285 Fairfax (n 27 above) 1323.
286 Section 195 (5) (f) of the COBE Act.
287 [2019] EWHC 258
288 Section 55 (3) (b) and (d) of the COBE Act.
289 Simoni (n 25 above).

action, only a shareholder with 10% shareholding can institute derivative action. Similarly, only a shareholder with five percent paid up shareholding can request for an extra ordinary general meeting. In addition, appraisal rights, as provided for in the COBE Act, require that a dissatisfied shareholder should follow the technical requirements with precision. It appears that the legislature is giving with one hand, that is providing for shareholder activism strategies, and taking with the other by setting a threshold of the number of shares that a shareholder has in order to exercise those strategies. The litany of legal constraints actually aids shareholder apathy instead of encouraging shareholder activism. More needs to be done to encourage shareholder activism in Zimbabwe as the trend worldwide.

However, there are fiduciary duty implications when directors are faced with shareholder activism. The contours of directors' duties during shareholder activism ought to be viewed as to whether or not the decision is in the best interests of the company, that is the guiding principle. The director must believe that the decision is in the best interests of the company so that he can be protected by the business judgment rule. If the director simply gives in to pressure for the shareholders when he does not believe that the decision is in the best interests of the company then he can be held liable. Directors must have regard to the interests of shareholders as a whole as well as stakeholders.

Chapter Four

AN ANALYSIS ON THE SOUTH AFRICAN POSITION ON SHAREHOLDERS' ACTIVISM

4.1 Introduction

This chapter seeks to make a comparative analysis of shareholder activism in South Africa and the contours of directors' duties in light of shareholder activism. South Africa has the legal framework providing for shareholder activism being the Companies Act[290] as well as the King IV Report on Corporate Governance. It has been argued that the growth of shareholder activism in South Africa can be notably attributed to the Companies Act which has provided an enabling environment for shareholders to be more involved in the company's affairs.[291] Shareholders are said to be the ultimate compliance officers as they check whether directors are complying with good corporate governance principles.[292]

4.2 Legal framework supporting shareholders participation

Of importance is that section 7 of the Companies Act provides for shareholder activism as it provides for development of the South African economy through encouragement of transparency and high standards of corporate governance given the substantial role of companies in the economic and social life.[293] In addition, one of the purposes of the act is to balance the rights and duties of directors and shareholders in a company.[294] It also seeks to promote active participation in the economic organization, management as well as productivity.[295]

4.2.1 Shareholder meetings

The King IV Report on Corporate Governance provides that the board of directors should supervise that the company emboldens shareholder participation through active engagement with shareholders, including Annual General Meetings.[296] The King IV Report also recommends that all directors should avail themselves at Annual General Meetings to answer to shareholders' questions on how they conducted governance duties.[297]

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290 71 of 2008.
291 Cassim (n 11 above) 149.
292 King Report at 32
293 Section 7 (b) (iii) of the Companies Act.
294 Section 7 (i) of the Companies Act.
295 Section 7 (f) of the Companies Act.
296 King IV Report, principle 16, recommended practice 6.
297 King IV Report principle 16 recommended practice 7.

4.2.2 Annual General Meetings

The Companies Act has raised the quorum of shareholders to attend Annual General Meetings to twenty five percent of all voting rights required to be exercised in respect of the issue to be decided at the meeting.[298] In terms of the Companies Act 61 of 1973 the quorum in a public company was three shareholders and in a private company it was two shareholders.[299] The significant increase in the quorum requirements obliges companies to convince shareholders to attend meetings, either in person, or through proxies in order to comply with the quorum requirement.[300] Section 58 (1) of the Companies Act[301] actually provides for increased attendance at shareholders meetings as it makes it easier for shareholders to appoint proxies as the proxies do not necessarily have to be shareholders of the company, thus widening the scope of people who can be appointed to participate, speak and vote for the shareholder.[302] In the case of *Barry v Clearwater Estates NPC and Others*[303] the court held that the memorandum of incorporation of a company cannot restrict the right of shareholders to appoint proxies, for example give a cut off time to submit proxies before an Annual General Meeting.

Section 63 (2) of the Companies Act also provides for shareholder meetings to be held electronically. However, the electronic means in which the meeting is held should allow all parties in the meeting to communicate concurrently without the use of a go-between and allows them to participate effectively. This is similar to section 170 (10) (a) and (b) of the Zimbabwean COBE Act. Electronic meetings induce shareholder activism as the costs of travelling and time spent to attend the meeting are significantly reduced and therefore encourage participation and voting by shareholders.[304] The South African Companies Act goes a step further in section 61 (10) by making it compulsory for every shareholders meeting of a public company to be reasonably accessible in South Africa for electronic participation by the shareholders regardless of whether or not the meeting was held in South Africa. However, section 63 (3) (b) of the Companies Act provides that shareholders or their proxies should bear the costs of the electronic communication, which then impedes the benefits of holding meetings electronically and discourages shareholder participation.[305] It is recommended that the company should pay the costs for the electronic meeting as it will encourage participation by shareholders.[306]

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298 Section 64 (1) of the Companies Act.
299 Section 190 of the Companies Act 61 of 1973.
300 Cassim (n 11 above) 158.
301 71 of 2008
302 Section 58 (1) of the Companies Act.
303 2017 (3) SA 364 (SCA).
304 Cassim (n 11 above) 159.
305 Cassim (n 11 above) 159.
306 I. Esser & M. Havenga, Shareholder Participation in Corporate Governance, 2008 vol. 1 *Speculum Juris* 84 – 85; Cassim (n 11 above) 159.

Annual General Meetings are an effective platform for shareholder activism as they allows shareholders the platform to raise critical questions. In South Africa, Comair Ltd, a South African airline operator held an Annual General Meeting in October 2019. A minority shareholder questioned the tenure of the board of directors as the minority shareholder believed that the long tenure can affect the independence of the directors. It is intriguing to note that there were four independent non – executive directors who each served for a period of 25, 39, 40 and 46 years individually. The aforesaid directors were elected each year with some shareholders raising queries of their recurring appointments. Soon after the AGM, some of the directors resigned due to insurmountable pressure from shareholders and Comair Ltd had to replace them with independent directors.

Section 61 (3) of the Companies Act is an important provision for shareholders' activism in South Africa. It allows shareholders to request for meetings and the board of directors is required to call for shareholders' meeting when one or more written and signed demands are delivered to the company. However, the demands should be signed by shareholders holding in aggregate at least ten percent of the share capital of the company who are entitled to vote on the proposed resolution. It is important to note that a request by shareholders for a meeting should not be done in a manner which is frivolous and vexatious and only reserved for important actions. This is because the board is legally entitled to challenge frivolous and vexatious actions by making an application to the court in terms of section 63 (1) of the Companies Act to set aside the request for the meeting on the grounds that it is frivolous and vexatious or that it has already been determined by the shareholders.

In addition, section 61 (8) of the Companies Act provides that shareholders can raise any issues in an Annual General Meeting with or without providing prior notice to the company. Even a single shareholder is allowed to raise a matter with or without giving notice to the board of directors or giving them time to formulate a response.[307] This provision is meant to promote shareholder activism. However, it has been noted that, due to the advent of the global COVID – 19 pandemic which brought the need for electronic meetings, the tendency of the board of directors of South African companies has been to request that shareholders submit their questions in advance which would end up being moderated before being submitted to the chairperson, notwithstanding the provision in section 61 (8) of the Companies Act.[308] This trend is also a direct violation of section 63 (2) of the Companies Act which was discussed above which states that the communication in an electronic meeting should be conducted without the need of an intermediary.[309]

Another provision in the Companies Act which provides for shareholder activism is section 65 (3) (a) which provides that any two shareholders of the company can suggest

[307] Cassim (n 11 above) 161.
[308] Cassim (n 11 above) 161 – 162.
[309] Cassim (n 11 above) 162.

a resolution in regards to any matter in which they are entitled to use their voting rights. In terms of section 65 (3) (b) of the Companies Act, the two shareholders can require that the resolution be brought before shareholders at the next shareholders meeting for consideration or by a round robin resolution. It has been argued that this resolution has been used effectively by shareholder activists, like in the Standard Bank case where sometime in 2019, an activist shareholder used this provision to propose a resolution that the bank should adopt and disclose publicly a policy on its lending to coal operated and coal mining projects. The board recommended that the shareholders should vote against the proposal on the several bases but one of which was that it was not in the groups' interests. The shareholders voted in favour of the proposal resulting in Standard Bank adopting and releasing the Coal Fired Power Finance Policy which allowed shareholders to evaluate if Standard Bank was conversant with the climate and financial risks presented by the financing of coal fire powered projects and enabled shareholders to evaluate information to make properly informed investment decisions. However, the proposed resolution must be articulated with acute specificity and must have adequate information so that other shareholders who are entitled to vote can determine whether or not they should participate in the meeting or vote or against the resolution.[310]

4.2.3 Access to company records

In terms of section 26 (1) of the Companies Act, shareholders with beneficial interest in the securities of the company can exercise their right to inspect the records of the company and make copies of those records which include record of directors, minutes of shareholder meetings, annual financial statements as well as any document which was made available to the company to the shareholders in respect of the securities register and resolutions. This position was further enunciated in the case of *Nova Property Group Holdings Ltd v Cobbett and Another*[311] in which the court confirmed that the provision in section 26 (2) of the Companies Act permitted unfettered access to the companies' securities register and the reason for seeking such information is immaterial.

4.2.4 Litigation remedies

4.2.4.1 Application to protect rights of security holder

This application is provided for in terms of section 161 of the Companies Act which allows a shareholder to make an application to the court to determine his rights and protect those rights or remedy any harm perpetrated by a director to the shareholder to any extent that the director can be held liable in accordance with section 77 of the Companies Act for costs, damages or loss that were caused by the director's actions. In

310 Cassim (n 11 above) 171 – 172.
311 2016 (4) SA 317 (SCA) at 47.

the case of *Du Plooy NO and Others v De Hollandsche Mollen Shae Block Limited*[312] the court held that the import of section 161 of the Companies Act is to enable a shareholder to protect his rights.

In addition, shareholders can apply to the court to declare a director delinquent in terms of section 162 of the Companies Act.

4.2.4.2 Oppression remedy

As already discussed in Chapter three, this remedy allows a shareholder to make an application to the court where an act or omission done by a company is oppressive or prejudicial to the shareholder or that it disregards his interests.[313] Hamadziripi posits that the conduct complained of in itself does not have to be oppressive but that the result of the conduct should be oppressive.[314] In the South African Companies Act, this remedy is provided for in terms of Section 163 and not only applies to shareholders but extends to employees and creditors as compared to the Zimbabwean Companies Act and Other Business Entities Act which only makes reference to 'members' in terms of section 223 as read with section 62. Chitimira and Hamadziripi posit that Zimbabwe, like South African courts, may fail to ascertain the meaning of what constitutes oppressive, unfairly prejudicial conduct or acts which unfairly disregard the interests of the applicant.[315] This assertion was premised on the case *of Aspek Pipe Co (Pty) Ltd v Mauerberger*[316] in which the court held that the meaning of oppressive conduct is vague. However, activist shareholders have exercised this remedy, an example is Sovereign Foods Investments Ltd in which the company sought to obtain approval for a share buyback scheme. There were minority shareholders who did not agree due to the costs and the arrangement of the scheme and promptly notified the company that they intended to exercise their appraisal rights. In response, the company reintroduced an amended transaction in a bid to avoid the appraisal rights of the disgruntled minority shareholders. The shareholders approached the court on the basis that the company's actions were oppressive and unfairly prejudicial as the minority shareholders were being denied the right to participate fairly in the company's matters and the court found in their favour.[317]

4.2.4.3 Appraisal remedy

The appraisal rights are provided for in terms of section 164 of the Companies Act and are regarded as a minority shareholder's exit mechanism.[318] This remedy allows a

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312 2017 SA 274 (WCC).
313 Section 163 (1) (a) of the Companies Act.
314 Hamadziripi (n 94 above) 141.
315 Chitimira & Hamadziripi (n 153 above) 180.
316 1968 (1) SA 517 (C).
317 *In Justpoint Nominees (Pty) Ltd and Others v Sovereign Foods Investments Ltd & Others (BNS Nominees (Pty) Ltd and Others Intervening*) (ECP) (unreported case No. 876 /16, 26 – 4 – 2016).
318 Cassim (n 11 above) 170.

shareholder to sell his/her shares and the company must buy the shares at fair value in cash and this is usually triggered by mergers or sale of a great portion of the company's assets.[319] An example is the case of *Cilliers v La Concorde Holdings Ltd*[320] in which the plaintiff, a shareholder activist sought to exercise appraisal rights as the assets of the company's wholly owned subsidiary were to be sold. However, the plaintiff did not hold any shares in the subsidiary but in the holding company, which is the defendant. The defendant argued that the plaintiff could not exercise appraisal rights in respect of a subsidiary which was disposing its assets and not the holding company. The court found in favour of the plaintiff and held that while the plaintiff did not hold shares in the subsidiary, he was entitled to exercise his appraisal rights. This was premised on the fact that the subsidiary could not proceed with the sale of assets without the approval of the holding company and that the shareholders of the holding company would be required to vote on it, which in turn would activate appraisal rights. Further, the court went on to affirm the significance of enhancing shareholder activism and protecting shareholder rights.

However, like the Zimbabwean Companies and Other Business Entities Act, the South African Companies Act has technical and complex requirements for appraisal rights which should be strictly complied with or shareholders will not be able to exercise their appraisal rights. The shareholder is required to give notices and demands to the company in terms of section 164 of the Companies Act and there are prescribed time limits within which each action is to be taken.[321] This position was set out in the case of *Standard Bank Nominees (RF) (Pty) Ltd and others v Hospitality Property Fund Ltd*[322] in which the court held that where a dissenting shareholder refuses to accept the fair value of shares offered by the company, that shareholder must institute proceedings in the court for determination of fair value within thirty days as provided for in terms of section 164 (14) of the Companies Act. If the dissenting shareholder fails to institute the proceedings within thirty days, the dissenting shareholder loses his/her right to demand fair value of the shares and exit the company.

4.2.4.4 Derivative action

Derivative action refers to proceedings instituted by a shareholder, in his own name, on behalf of the company in relation to wrongs committed against the company.[323] In South Africa, derivative action is provided for in terms of section 165 of the Companies Act. It serves to protect minority shareholders to cure a wrong done to the company which the board would have refused to correct as they are usually the perpetrators of the wrong.[324]

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319 Cassim (n 11 above) 170; Phakeng (n 219 above) 3.
320 2018 (6) SA 97 (WCC).
321 Phakeng (n 219 above) 25
322 [2019] 4 ALL SA 561.
323 Cassim (n 11 above) 169.
324 Cassim (n 11 above) 169; *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA).

4.3 Directors Duties in South African Law

In South Africa, the fiduciary duties of directors were based on common law. However, there has been a partial codification of the duties of directors in the Companies Act. Cassim posits that the aim of partial codification of the duties of directors is to make sure that directors are aware of what is required of them and that the duties could be accessible.[325]

4.3.1 Duty to act in the best interests of the company

This duty is derived from common law and now codified in the Companies Act requires that directors should exercise their powers in good faith and in the best interests of the company.[326] This duty is provided for in terms of section 76 (3) (b) of the Companies Act. The term 'company' relates to the interests of shareholders, both present and future shareholders.[327] The Companies Act therefore takes a shareholder primacy approach as it does not specifically address stakeholders but simply the interests of the collective shareholders.[328] The duty of good faith demands that directors should exercise their independent judgment.[329] The test is subjective and objective. It is subjective in that the question is whether or not the director believed that he was acting in the best interests of the company.[330] It is also objective in that there must be reasonable grounds for the belief that the director was acting in the best interests of the company.[331] If the director reasonably believed that the act was in the best interests of the company, he can be protected by the business judgment rule in section 76 (4) of the Companies Act. However, it has been reasoned that the business judgment rule in South Africa is too wide and therefore prone to abuse as it relates to any matter arising out of the exercise of powers by directors.[332]

The main point of departure between the COBE Act and the South African Companies Act is that the COBE Act lumped up fiduciary duties with non-fiduciary duties in the same provision; that is the duties of care and skill with the duties of good faith and acting in the best interests of the company. Hamadziripi and Chitimira posit that the fusing of the fiduciary duties with non-fiduciary duties can lead to confusion and uncertainty.[333]

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325 Cassim et al (n 1 above) 19; Hamadziripi & Chitimira (n 42 above) 43.
326 *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).
327 Cassim et al (n 1 above) 517.
328 Cassim et al (n 1 above) 517.
329 Cassim et al (n 1 above) 524.
330 *Re Smith v Fawcett Ltd* [1942] Ch 304.
331 *Teck Corp Ltd v Millar* (1972) 33 DLR (3d) 288 (BCSC); *Shuttleworth v Cox Brothers Co (Maidenhead) Ltd [1927] 2 KB 9.*
332 Hamadziripi & Chitimira (n 42 above) 45.
333 Hamadziripi & Chitimira (n 42 above) 47.

4.4 Interplay of directors' duties with shareholder activism in South Africa

The duties of directors ought to be defined when faced with shareholder activism, the focus is on how they should respond. In the case where two shareholders request shareholder meetings requested in terms of section 61 (3) of the Companies Act, directors can, before the general meeting, evaluate whether or not the resolutions are competent and in the best interests of the company. There is no requirement in terms of the Companies Act for directors to respond to an activist shareholder before the general meeting. However, best practices of corporate governance in terms of the Kings Report, the directors should deal fairly with the activist shareholders. An example of such proactive approach is the Pretoria Portland Cement Company Limited (PPC) case in which some minority shareholders requisitioned a shareholders' meeting in which they sought removal of the board of directors and replace them with their preferred nominees. The special shareholders meeting was scheduled for the 8th of December 2014 and the time leading up to the meeting, the board engaged with shareholders and stakeholders as wells as the requisitioning shareholders and decided to reconstitute the board at the next AGM, therefore effectively cancelling the meeting by the requisitioned by the shareholders. It has been said that this approach allowed the board to refocus its role in the company as the fiduciary of the company, its stakeholders as well as its shareholders.[334]

Directors should always act in the best interests of the company, which is the collective interests of the shareholders. The Companies Act makes no formal recognition of the interests of stakeholders, however, the King's Report requires directors to take into account the interests of stakeholders. This is different from the Zimbabwean COBE in that the COBE Act recognizes the interests of stakeholders in terms of section 195 (5) of the COBE Act although it takes an enlightened shareholder value approach.

A director who is also a shareholder should be cognizant of the respective roles and the responsibilities that each role carries. This is particularly important as if a director obtains information in his capacity as a director and uses the information for his personal benefit and to influence other shareholders to challenge directors to act in the interests of shareholders and not the company. In such circumstances, a director can be found in breach of fiduciary duty and therefore liable for any loss or damages incurred by the company in terms of section 77 (2) (a) of the Companies Act.[335] Further, section 76 (2) of the Companies Act states that a director should not use their position, or information they obtained as a director for their personal benefit or for the benefit of another other than the company or its subsidiaries. Therefore, such a director can

[334] E. Davids & X. Ntamane, The Shareholder Rights and Activism Review, *The Law Reviews*, 2nd ed 2017, 106.

[335] Simoni (n 25 above)

be declared a delinquent in terms of section 162 of the Companies Act, as he would have committed material breach of his fiduciary duties and abused his position and taken advantage of the information or opportunity as contemplated in section 76 (2) of the Companies Act.

It is therefore imperative that directors should always be guided by their duties in relation to how they respond to shareholder activism. the fiduciary implications of acquiescence to shareholder activism cannot be ignored as the Companies Act places statutory liabilities on directors who breach their fiduciary duties.

4.5 Preliminary Conclusion

As seen in the cases discussed above, shareholder activism has significantly increased in South Africa and this has been attributed to the legislative framework which supports shareholder activism. The strategies utilized by the shareholders range from non-litigation remedies to litigation remedies. Directors, when faced with shareholder activism should always act in the best interests of the company. The Zimbabwean COBE Act unlike the South African Companies Act fuses fiduciary duties of good faith and acting in the best interests of the company with non-fiduciary duties like the duty of care and skill. The lawmakers ought to separate these two duties as it can result in confusion. The South African Companies act has increased the protection of shareholders; however, some remedies require strict compliance with the technical requirements, failing which the shareholder may lose out. The technical and complex procedures discourage shareholder activism as is the case with the COBE Act as discussed in chapter three above.

Chapter Five

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The interplay between the duties of directors and shareholder activism is crucial to the success of the company. On the one hand, directors are required to act in the best interests of the company and the shareholders as a whole. However, in some instances, the interests of shareholders may not be in the best interest of the company. How directors handle such a dilemma should be guided by their fiduciary duties as acquiescence to shareholder pressure can result in the directors breaching their duties to the company. Shareholder activism should be encouraged as it enhances accountability of directors to the company. However, the fiduciary duty concerns when directors accede to shareholder activism cannot be overlooked. Overall, there needs to be a balance in how directors engage with shareholders consider their concerns about the company's strategy, policies or decisions. This chapter will focus on the concluding remarks of the dissertation by giving a snapshot of the issues discussed in the earlier chapters and providing the necessary recommendations.

5.2 Recapitulation

The first chapter introduced the subject under discussion by setting out the background of the study through stating the importance of shareholder activism in influencing the strategies, policies and decisions of the company. It also assessed the role of directors in the company and sets out the duties to be discussed, that is, the duty to act in the best interests of the company and the duty of loyalty. Further, the chapter then lists the research questions to be investigated and the methodology to be utilized. There is also a review of existing literature regarding the relationship between directors' duties and shareholder activism.

Chapter two examined the duties of directors particularly the fiduciary duties of directors to act in the best interests of the company and the duty of loyalty. The discussion goes further to determine what the relationship between the directors and the company is, whether they are agents, trustees or if the relationship is sui generis. The question of whom directors owe their duty to is explored and the Berle vs Dodd debate is revisited; with in depth analysis of shareholder primacy theory, pluralist theory and enlightened shareholder value. These theories are then juxtaposed with COBE Act to determine which theory is upheld in the COBE Act.

Chapter three begins by defining shareholder activism and sets out the importance of shareholder activism. The reasons for shareholder apathy are studied in order to understand why shareholders have not been involved in the affairs of the company. The chapter investigates strategies for shareholder activism including voice and walk

mechanisms and the effectiveness of each method of shareholder activism. The COBE Act and the National Corporate Governance Code is scrutinized to determine if they are progressive in advancing shareholder activism. A debate then ensues to analyze the contours of director duties in the face of shareholder activism.

Chapter four was a comparative analysis of the South African Companies Act and King IV Report of the provisions which promote shareholder activism. The strategies employed by activist shareholders are scrutinized and the shortcomings of the legislation to encourage shareholder activism. The partial codification of directors' duties is also examined.

5.3 Conclusions

In Zimbabwe, shareholder apathy has been the norm despite the growing trends in shareholder activism worldwide.[336] The COBE Act has made significant strides in providing platforms for shareholder activism. However, the provisions have drawbacks which may have the adverse effect of discouraging shareholder activism. For instance, the COBE Act provides for the use of electronic shareholders meetings. However, it does not go further to demand that the company should pay the costs for the electronic meeting. There is therefore no incentive for shareholders to attend the meetings if they burden of costs falls on them.

Directors should be guided by the COBE Act when dealing with shareholder activism. While they have a duty to the company and the collective body of shareholders, they should not acquiesce to shareholder demands simply because the shareholders disagree with strategies, policy or decisions. Shareholders do not owe any fiduciary duties to the company and are often concerned with profit maximization, which may not always align with the company's interests. On the other hand, directors are required to act in the best interests of the company and directors should accede to shareholder activism if the directors believe that such action or decision is in the best interests of the company. It is unfortunate that the legislature fused the fiduciary duties of acting in the best interests of the company with non-fiduciary duties of care and skill which causes uncertainty.

5.4 Recommendations

5.4.1 Less stringent technical requirements

The COBE Act should have less technical and complex requirements for shareholders to exercise their rights, for example appraisal rights. The stringent technical requirements actually deter activist shareholders from exercising the appraisal rights as if

[336] Dube & Mkumbiri (n 9 above) 11.

shareholders fail to take the prescribed action within the time frame stated, they will not be able to exercise appraisal rights. It is therefore recommended that the requirements for shareholders to exercise appraisal rights should be flexible and less stringent.

5.4.2 Removal of threshold of shares to request meetings

The threshold for shares which allows shareholders to request an extraordinary general meeting ought to be removed to allow all shareholders to make requisitions for meetings. The current provision only allows for shareholders with at least five percent paid up shares to request a meeting, therefore shareholders with less percentage of shares cannot request for a meeting and can only wait until the next AGM which is only held once every year.

5.4.3 Removal of contemporaneous rule in derivative action

It is further recommended that the contemporaneous ownership rule in derivative actions ought to be removed. This rule requires shareholders to prove that they were shareholders at the time the transactions occurred.[337] Thus, if one becomes a shareholder shortly after the transaction and is affected by the transaction they are barred from instituting derivate action. In addition, the derivative action, in its current form fosters shareholder apathy as only shareholders with a minimum of ten percent shares can institute derivative action. It is recommended that the scope of derivative action should be widened beyond breach of duties by directors but to also cover instances of negligence, omissions and proposed contentious actions.

5.4.4 Costs of virtual meetings to be borne by the company

The COBE Act provides that AGMs can be conducted virtually in terms of section 170 (10) (a) and (b). However, it does not go further to place a requirement on the company to pay for the costs incurred by the shareholders in attending the meeting virtually. It is therefore recommended that the COBE Act needs to place an obligation on the company to cater for costs incurred by shareholders in attending shareholders meetings as this will encourage shareholders to be more involved and attend meetings.

5.4.5 Educate shareholders of their rights

There needs to be more awareness of the rights of shareholders and how they can actively engage in shareholder activism. The importance of attending AGMs allows shareholders to ask the critical questions and influence the decisions made by the board as seen in the South African cases. The votes by shareholders can shape the manner in which the affairs of the company are conducted and minority shareholders should be educated on the importance of their voting rights.

[337] Section 61 (3) (b) of the COBE Act.

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