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A CRITICAL ANALYSIS OF THE INTERPLAY BETWEEN DIRECTORS' DUTIES AND THE PROMOTION OF CORPORATE SOCIAL RESPONSIBILITY IN ZIMBABWE

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DECLARATION

I Tapuwa Thomas Pasirayi 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 fulfillment of the requirements for degree purposes or academic qualification at any other university.

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ABSTRACT

This detailed investigation and subsequent analysis seeks to resolve the question of the interaction of directors' duties of care and acting in the best interest of the company relative to corporate social responsibility (CSR) in Zimbabwe. The method of the study is based on doctrinal desktop research encompassing comparative and critical examination of the link between the directors' duties and CSR. This approach is necessary for a discussion of the developments in company law brought about by the Companies and Other Business Entities Act [*Chapter 24:31*] (COBE Act). The codification of directors' duties in Zimbabwe has not abolished some common law principles from application as they operate alongside the statutory guidelines that mandate how directors are supposed to behave and exercise discretion in making decisions on behalf of a company.

This dissertation amplifies questions around the role of directors and how their duties are to be interpreted and applied in the context of the current legislation, the common law and the business environment that motivates and affects how directors exercise discretion in decision-making and their approach to the competing interest of the need to pay attention to CSR.

The dissertation focusses on the competing principles that arise from the legal make-up of a company which creates inherent conflict arising out of the requirement for directors to act with care and in the best interest of the company in circumstances where this requires directors at times to take into account the evolving business environment and expand the application of their duties over and above the interest of the company, which may conflict with the interest of the company to make profit. The issue requiring ventilation is the consideration of the approach that should be adopted by directors to avert this conflict. The issue concerning whether directors in applying their duties should prioritise CSR on a philanthropic basis, or whether there should be a rights based approach that mandates directors to prioritise CSR is a key aspect of this study.

The essence of this research is not a new issue as this has been subject to prior study in general. However, the study is novel in relation to the COBE Act which places the study a new perspective in Zimbabwe. The interpretation and application of the duties under discussion relative to the current law as contrasted with company objectives to make profit, and considerations of CSR assumes fresh relevance requiring interrogation.

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To my study buddies Ziwa, Nyakutombwa, Chivandire and Shana for making school fun.

Ad Majorem Dei Gloriam (AMDG)

DEDICATION

To my family. You are the best.

Ad Majorem Dei Gloriam (AMDG)

ACRONYMS AND ABRREVIATIONS

ABBREVIATION	MEANING
BJR	Business Judgement Rule
CA 2006	United Kingdom Companies Act 2006
CA 2008	South African Companies Act 71 of 2008
Companies Act	Zimbabwe Companies Act [24:03]
COBE Act	Zimbabwe Companies and Other Business Entities Act [Chapter 24:31]
CSR	Corporate Social Responsibility
EU	European Commission
ESV	Enlightened Shareholder Values
MNC	Multi-National Corporation
The Code	The 2014 Zimbabwe National Code on Corporate Governance
SA	South Africa
UK	United Kingdom
UN	United Nations
USA	United States of America

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Chapter One

Introduction to the study

1.1 BACKGROUND AND INTRODUCTION

This dissertation critically examines the interplay between the directors' duties of care, skill and attention and acting in the best interests of the company and the promotion of corporate social responsibility (CSR) in Zimbabwe. A company is a juristic entity that has separate legal personality.[1] The acts of a company are carried out and given effect by directors who have the duty to operate and manage the affairs of the company.[2] The responsibilities of directors are stipulated by legal rules found in legislation and the common law that provide a guideline on how companies should operate.[3] The corporate persona and identity of a company evolves from the manner in which the company is run by directors acting within the course and scope of their duties.[4]

A company does not operate in isolation. Instead, it operates within a business environment that includes other interested parties with competing interests to the company's purpose to maximise profits.[5] The legal relationships within a company create competing legal duties that are owed by directors to various constituents within the company including shareholders, and stakeholders like employees and the community at large.[6] Directors owe duties to the company, to shareholders, to directors

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[1] Section 76 of the Zimbabwean Companies and Other Business Entities Act [*Chapter 24:31*]; *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL); S Girvin, S Frisby A Hudson, *Charlesworth Company Law*,18th ed. Sweet & Maxwell, 2010.4; *Continental Tyre & Rubber Co (Great Britain Ltd) v Daimler Co Ltd* [1915] 1 KB 813 CA 916.

[2] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co* Ltd [1915] AC 705 (HL) 713; H Chitimira & F Hamadziripi, A Reflective Discussion of the Directors' Fiduciary Duties to Creditors under the South African Company Law, 2022. Vol 18 No 1. *Acta Universitatis Danudius* 81; Girvin Frisby Hudson (n 1 above) 313.

[3] Section 170 (3) of the United Kingdom Companies Act 2006; Girvin Frisby Hudson (n 1 above) 321 – 322; R Lawcards, *2012 – 2013 Company Law*, Routledge,2012.70.

[4] Girvin Frisby Hudson (n 1 above) 320 – 321.

[5] Section 195 (5) (a) - (e) of the Zimbabwean Companies and Other Business Entities Act [Chapter 24:31]; B Butcher, *Directors Duties A New Millenium A New Approach*, Kluwer Law International, 2000.322-323; F Hamadziripi & P C Osode, A Critical Analysis of Zimbabwe's Codified Business Judgment Rule and its place in the corporate governance landscape, 2021. Vol 25. *Law, Democracy & Development* 590 – 591. DOI: http://dx.doi.org/10.17159/2077-4907/2021/ldd.v25.20.; L Stout, New Thinking on "Shareholder Primacy, 2012. Vol 1. *Accounting Economics and Law* 2.

[6] Stout (n 5 above) 2.

themselves and to other interested stakeholders in the business environment within which the company operates.[7]

These factors influence how directors interpret and apply their duties to the company. This could affect the extent to which directors accommodate other stakeholder interests that are not strictly related to the company, but are relevant to the advancement of the company's purpose.[8] This aspect influences how directors' interpret and apply their duties of care and acting within the best interests of the company in decision making.

The interests of stakeholders in general, including Zimbabwe, have become an important factor to how a company operates and does business.[9] A company does not operate in a vacuum. The effect of a company's activities on the economic and social life of the community within which it operates is important for its sustainability.[10] The American judgement in the case of *State Tax Commission of Utah v Aldrich*[11] observed that the growth and impact of business has resulted in the company assuming a very significant role in the organisation of society's economic life in America.[12] The court observed that in America, business activity accounts for the bulk of economic activity which has a significant impact on society.[13] This important role of the company in society is subservient only to the state.[14]

The pressure for companies to become responsible corporate citizens led to the emergence of the concept of CSR as a factor that directors are required to take cognisance of when making business decisions.[15] The main competing interests that directors have to balance in operating a company are whether or not to prioritise the

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7 Stout (n 5 above) 2; Butcher (n 5 above) 323.

8 Stout (n 5 above) 2; Butcher (n 5 above) 323.

9 F Cassim et al, *Contemporary Company Law,* 2nd ed. Juta & Co, 2012. 477; Butcher, (n 5 above) 323; AA Somer, Whom Should the Corporation Serve? The Berle-Dodd debate revisited 60 years later, 1991.Vol 16 No 1. *Delaware Journal of Corporate Law* 38.

10 Cassim et al (n 9 above) 477.

11 (1942) 316 US 174 at192; Butcher (n 5 above) 7; Cassim et al (n 9 above) 477.

12 Butcher (n 5 above) 7.

13 Butcher (n 5 above) 7.

14 Butcher (n 5 above) 7.

15 Cassim et al, (n 9 above) 477; A Mickels, Beyond Corporate Social Responsibility: Reconciling the Ideals of a for-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe, 2009. Vol 32 No 1, *Hastings International and Comparative Law Review* 272; T Clarke, The Widening Scope of Directors' Duties: The Increasing Impact of Corporate Social and Environmental Responsibility, 2016. Vol 39 No 2. *Seattle University Law Review* 531-532; S Beate & L Anker-Sørensen, The Duties of the Board and Corporate Social Responsibility (CSR), 2013. *University of Oslo Faculty of Law Legal Studies Research Paper Series, Nordic & European Company Law Working Paper No. 10-40,*: https://ssrn.com/abstract=2322680.

profit objective[16] of a company, or consider other interests and objectives extraneous to the company which are relevant to the advancement of the corporate enterprise.[17] The research focuses on how the duty of care and the fiduciary duty to act in the best interest of the company and considerations of CSR interact and apply within the company law legal framework in Zimbabwe. The research will make relevant reference to applicable common law fundamentals of the duties under discussion. The discussion will include an analysis of the common-law development of the duties of care and acting in the best interest of the company for purposes of assessing how the current statutory provisions should be interpreted under the Companies and Other Business Entities Act [*Chapter 24:31*] ("COBE Act").

This approach is necessary for a discussion of the developments in company law brought about by the codification of directors' duties. Common law principles are still relevant as they have not been ousted from application.[18] Common law principles influence and operate alongside the statutory guidelines that mandate how directors should act in exercising discretion and making decisions on behalf of a company.[19]

1.2 STATEMENT OF THE PROBLEM

Studies undertaken on CSR in Zimbabwe suggest that companies are generally focused on profit maximisation with negligible consideration for implementing CSR initiatives.[20] This demonstrates the dominance of the profit-oriented approach by Zimbabwean company directors in discharging their duties. Furthermore, unlike the prevalent charitable motivations that drive CSR in Zimbabwe, there is no law that explicitly requires company directors to implement CSR initiatives.[21] This highlights the inadequacy of directors' legal obligations to prioritise CSR.

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16 A O Nwafor, Shareholders Profit Maximization and Stakeholders Interests in Corporate Governance. Corporate Ownership & Control, 2014. Volume 11 No 4.670; quoting E Merrick Dodd Jr, 'For Whom are Corporate Managers Trustees', 1932. Vol 45, *Harvard Law Review* 1145, 1146-1147; Hamadziripi & Osode, (n 5 above) 590.

17 Butcher (n 5 above) 323; Somer (n 9 above) 38.

18 See 197 (2) (a) of the Companies and Other Business Entities Act [*Chapter 24:31*].

19 See 197 (2) (a) of the Companies and Other Business Entities Act [*Chapter 24:31*].

20 F Maphosa, Corporate Social Responsibility in Zimbabwe: A Content Analysis of Mission Statements and Annual Reports, 1997. Vol XXIV No (ii). *Zambezia* 191; W Chidyausiku & T Muzingili, Community Reaction to Corporate Social Responsibility Programmes in Zimbabwe, 2017.Vol 11. *African Reviewers and Researchers* 61.

21 Maphosa (n 20 above) 191; N Zivengwa, K R Mbizi, & J Manyeruke, Beyond Philanthropy to Sustainable Community Development – Evaluation of Corporate Social Responsibilities Activities in Zimbabwe, 2013. Vol 4 No 12. *Institute of Interdisciplinary Business Research* 674.

Historically, the scope, application and interpretation of directors' duties depended on common law concepts.[22] These concepts developed through case law and have now been superseded by the recent enactment of the COBE Act which has formalised directors' duties.[23] The COBE Act resulted in the codification of the duties of directors of care, skill and attention and acting in the best interest of the company.[24] Section 54 of the COBE Act requires a director to act with care, skill and attention in performing duties on behalf of the company. Section 195(4) of the COBE Act mandates a director to act with good faith and to promote the success of the company for the benefit of its shareholders. Section 195(5)(a) to (e) of the COBE Act obliges directors to take into account the interests of other stakeholders in making decisions on behalf of the company.

There is developing Zimbabwean literature on the interpretation and application of the codified duties of care, skill and attention and acting in the best interest of the company.[25] However, the legal problem is that there is an interpretation gap on how these duties should be applied in relation to CSR in Zimbabwe. Current best practice in this connection is found in experiences of other jurisdictions like the United Kingdom ("UK") and South Africa.[26]

This research considers whether or not the codification expanded or narrowed the extent of the directors' duties of care, skill and attention, and acting in the best interests of the company relative to CSR. This analysis will result in recommendations of the ideal legal framework, interpretation, or application that can be proffered to advance CSR in Zimbabwe. The study also determines whether the recent codification of the duty of care and acting within the best interest of the company has created a

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22 Girvin Frisby Hudson (n 1 above) 314-321; P L Volpe, The Duties of Company Directors in Zimbabwe, *The Zimbabwe Law Journal* 125; 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* 40.

23 [Chapter 24:31]; Girvin Frisby Hudson (n 1above) 314-321.

24 Hamadziripi & Chitimira (n 22 above) 40.

25 Hamadziripi &Osode (n 5 above) 590-591, Hamadziripi & Chitimira (n 22 above) 39.

26 Hamadziripi & Chitimira (n 22 above) 39; J Louis van Tonder, An Analysis of the Directors' Duty to Act in the Best Interests of the Company, through the Lens of the Business Judgement Rule, 2015. Vol 36 No. 3. *Obiter* 702 – 724.**DOI:** https://doi.org/10.17159/obiter.v36i3.11599 ; J Kanamugire and T Chimuka, The Directors' Duty to Exercise Care and Skill in Contemporary South African Company Law and the Business Judgment Rule, 2014.Vol 5 No 20. *Mediterranean Journal of Social Sciences* 70 – 78.

sufficient and improved law to oblige directors to prioritise CSR and whether or not the codification will improve the advancement of CSR.

1.3 RESEARCH QUESTIONS

The research questions of this study aim to explore the following concepts:

1. How should the directors' duties of care, skill and attention, and acting in the best interest of the company be interpreted under the COBE Act in relation to CSR?

2. What is the concept of CSR and how and why is this concept relevant to the modern company?

3. How does the concept of CSR influence and interact with the directors' duties of care, and acting in the best interest of the company in Zimbabwe?

1.4 RESEARCH METHODOLOGY

In undertaking this dissertation qualitative research methods will be adopted and will be desktop based. Qualitative research methods are intended to allow a reflective understanding of the influences and causes that determine why certain actions are taken within a particular environment concerning a specific question.[27] This method will be relied on to seek an understanding of the interaction of directors' duties of care and acting in the best interest of the company relative to corporate social responsibility (CSR) in Zimbabwe. A qualitative approach has the advantage of providing context for understanding circumstances that lead to resolutions and actions.[28] Qualitative research is ideal for reviewing the interaction of directors' duties of care and acting in the best interest of the company relative to corporate social responsibility (CSR) in Zimbabwe.[29]

This research seeks to interrogate and analyse primary sources of law such as legislation and relevant case law. Reliance will also be placed on secondary sources of law such as textbooks and journal articles including internet based research. In answering the research questions, the researcher will adopt a comparative analysis of the law in the United Kingdom and South Africa. Comparative legal research is a logical explanation of the frameworks of rules, institutions and procedures established in one or more legal

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27 M Meyers, *Qualitative Research in Business and Management*, Sage Publications, 2013.5.
28 Meyers (n 27 above) 5.
29 Meyers (n 27 above) 9.

systems with a qualified assessment of their resemblances and dissimilarities and their effects.[30] This method can comprise doctrinal and historical elements.[31]

A comparative reference will be made to the interpretation and interaction of the directors' duties of care and acting in the best interests of the company relative to CSR. The approach in the UK as applicable in terms of the United Kingdom Companies Act 2006 ("CA 2006") and that applicable in terms of The Companies Act 71 of 2008 ("CA 2008") of South Africa will be analysed.

1.5 LITERATURE REVIEW

Davies examines directors' duties on the basis that directors are agents of the company and that a fiduciary relationship subsists between directors and the company.[32] He asserts that the directors' duties of care and that of acting in the best interest of the company are owed to the company alone.[33] Davies also argues that the duties of directors are subjective and it is up to directors to decide the extent to which the advancement of shareholders interest is to be prioritised over other interests for the benefit of the company.[34]

Sealy and Worthington argue that directors are obliged to perform their duties on behalf of the company.[35] They interrogate the debate on whether directors should in the exercise of their duties consider the interest of other interest groups known as stakeholders.[36] Sealy and Worthington state that there are boundaries to the capability of company law to resolve the conflict arising from the competing interests between shareholders and those of stakeholders that the directors in performing their duties would have to consider.[37] They opine that in circumstances where directors oblige stakeholder interests, these decisions will be problematic for the court or any other process to review as the court is generally reluctant to interfere with management decisions made on behalf of a company.[38]

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30 Meyers (n 27 above) 9.
31 P Ishwara, Comparative Method of Legal Research: Nature, Process and Potentiality, 2022.Vol 57 No. 2. *Journal of the Indian Law Institute* 149.
32 P Davies, *Gowers Principles of Modern Company Law* Sweet & Maxwell, 1997. 599.
33 Davies (n 32 above) 601.
34 Davies (n 32 above) 602.
35 L Sealy & S Worthington, *Cases and Materials in Company Law*, Oxford University Press, 2008.275.
36 Sealy & Worthington (n 35 above) 275 referred to stakeholders as including "the company's workforce and its customers and suppliers…. Then there are those who would go even further, and require the responsible company (and its directors) to have regard to wider considerations, such as the community, the environment, charitable and other good causes and even the national interest."
37 Sealy & S Worthington (n 35 above) 275.
38 Sealy & S Worthington (n 35 above) 275.

Cassim et al argue that directors in construing and relating to their duties when managing companies should not only prioritise the motive to make profit but should consider community, economic and environmental factors.[39] This view is taken in the interrogation of the competing enlightened shareholder value approach which requires directors to look at the enduring concern of the company in dealing with stakeholders for the end goal of ultimately advancing the interests of the company.[40] This is contrasted with the pluralist approach that requires companies to undertake CSR, obliging directors to consider stakeholder interests, and not only prioritize those of shareholders.[41]

Mickels contends that business does not prioritise CSR as shown by the dilapidation of natural resources and persistence of global poverty.[42] Mickels posits that many company directors now operate considering stakeholder interests and not solely the profit maximisation objective.[43] Mickels re affirms the definition of CSR as being an obligation by companies to operate ethically whilst contributing to economic and social development.[44] Despite Mickels contention that profit maximisation is not the sole objective of a directors' fiduciary duty, he also observes that the business judgement rule protects directors when they prioritize shareholder primacy.[45]

Clarke contends that due to changing circumstances of doing business in modern times and the emergence of CSR, companies have to consider the narrow application of directors' duties to solely promote the commercial success of companies is no longer acceptable and the application of directors' duties has to be expanded to meet the needs and expectations of CSR.[46] Clarke further posits that the fiduciary duties of directors are developing to take into account modern business conditions that require greater effective attention to be paid to CSR by directors to meet societal expectations in connection with CSR.[47]

Chidyausiku and Muzingili in their research on CSR in Zimbabwe argued that CSR in Zimbabwe has never been given legitimate status as it is prioritised as a philanthropic

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39 Cassim et al (n 9 above) 519.
40 Cassim et al (n 9 above) 519.
41 Cassim et al (n 9 above) 519.
42 Mickels (n 15 above) 275
43 Mickels (n 15 above) 275.
44 Mickels (n 15 above) 275.
45 Mickels (n 15 above) 275; Louis van Tonder (n 26 above) 702 - 724; L Muswaka, Shielding Directors against Liability Imputations: The Business Judgment Rule and Good Corporate Governance, 2013. No 1. *Speculum Juris* 26; Hamadziripi & Osode (n 5 above) 578.
46 Clarke (n 15 above) 531.
47 Clarke (n 15 above) 571.

obligation as opposed to a rights based obligation.[48] They opine that the compromise between shareholder's profit interests which are weighed against other priorities involving third parties is one of the problematic aspects of corporate management.[49] Their observation is that the absence of legislation or a framework specific to CSR is one of the problematic aspects in the promotion of CSR by companies.[50]

Maphosa agrees with the view that posits that since business operates within an environment where it is enabled and sustained by society and resources within society, the expectation of society is that business in turn is expected to be socially responsible.[51] Maphosa argues that his research findings on CSR in Zimbabwe show that profit maximisation remains the primary role of companies in Zimbabwe.[52] Maphosa argues that the absence of a specific framework or legislation mandating companies to effectively implement CSR is hampering its advancement in Zimbabwe.[53]

Beate & Anker-Sørensen make reference to the European Union definition of CSR as being the responsibility of companies for their effect on society.[54] Beate & Anker-Sørensen interrogate the view that the responsibility for CSR should be a key component in every directors' duty to the company.[55] In this context Beate & Anker-Sørensen note that the main duties of directors are to promote the interests of the company.[56] They contend that the interests of the company are a central factor in any discussion of directors' duties and CSR.[57] In this connection the discussion pertaining to legal compliance by directors and action beyond compliance relative to CSR is placed in perspective.

1.6 CHAPTER SYNOPSIS

The study is divided into five chapters.

Chapter one deals with the introduction and general summary of the dissertation outlining the research questions, methodology and sources.

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48 Chidyausiku & Muzingili, (n 20 above) 61.
49 Chidyausiku Muzingili (n 20 above) 61.
50 Chidyausiku Muzingili (n 20 above) 68.
51 Maphosa (n 20 above) 190.
52 Maphosa (n 20 above) 190.
53 Maphosa (n 20 above) 191.
54 https://ec.europa.eu/growth/industry/sustainability/corporate-social-responsibility-responsible-business-conduct_en; SWD (2019) 143 final Commission Staff Working Document Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress https://ec.europa.eu/docsroom/documents/34482.
55 Beate & Anker-Sørensen (n 15 above) 157.
56 Beate & Anker-Sørensen (n 15 above) 157.
57 Beate & Anker-Sørensen (n 15 above) 157.

Chapter two provides an analysis of the common law approach to the directors' duties of care and acting in the best interest of the company for context and evaluation of the next chapter that will deal with codification. The theoretical framework relevant to an assessment of the evolution of the duties and the nature and extent to which the theoretical premise has impacted the interpretation and application of the duties will be discussed.

Chapter three deals with codification of the directors' duties of care and acting in the best interest of the company as outlined in the COBE Act and analyses the effect of codification on the interpretation and application of the duties. A comparative analysis of this aspect will be made based on the UK CA 2006 and South African CA 2008.

Chapter four examines the concept of CSR in relation to its meaning, emergence, and relevance on the modern day business. This chapter deals with how CSR influences the scope, interpretation and application of the duties under discussion in comparison with how this applies in terms the UK and SA company law framework.

Chapter Five summarises the discussion and findings observed from the research and gives conclusions and proposes recommendations based on the outcome of the research.

Chapter Two

A Historical Analysis of directors' duties of care and acting in the best interest of the company

2.1 INTRODUCTION

The common law approach to the directors' duties of care and acting in the best interest of the company will be examined in this chapter. Understanding the legal nature of a company provides the foundation for assessing the evolution of a directors' obligations to a company. The competing theoretical approaches on the ultimate purpose of a company and to whom directors owe their duties have been a factor in defining the evolution, development and character of the duties under discussion in the context of modern business development and growth.

2.2 HISTORICAL OVERVIEW OF THE EVOLUTION OF THE COMPANY

Modern company law's evolution is inextricably linked to the evolution of directors' fiduciary duties.[58] The manner in which this evolution took place was significant because it influenced the approach, understanding and construction of directors' duties of care and acting in the best interests of the company.[59]

Modern English Company law evolved from mutually agreed upon joint business associations similar to partnerships.[60] The enterprise's agreement was based on a relationship between trustees and members of the association as full risk investors in the enterprise.[61] The company was run by directors who were appointed in accordance with the terms of the contract.[62] Common law held that the members of the deed of settlement were the company and had complete control over directors during the period of the deed of settlement companies.[63]The directors would also manage the assets of the organisation on behalf of the trustees.[64] During this time, only an act of

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58 Butcher (n 5 above) 12.
59 Butcher (n 5 above) 12.
60 Butcher (n 5 above) 12-13; JC Nkala & TJ Nyapadi, *Company Law in Zimbabwe*, ZDECO.1995.3-4; Davies (n 29 above)18.
61 Nkala & Nyapadi (n 60 above) 3-4.
62 Davies (n 32 above) 18.
63 B Slutsky, The Relationship between the Board of Directors and the Shareholders in General Meeting, 1969.Vol 3. *University of British Columbia Law Review* 81 citing *Foss v Harbottle* 1843 67 ER 189 where the court held that directors were subject to the superior control of the proprietors assembled in general meetings; Butcher (n 5 above) 12; Nkala and Nyapadi (n 60 above) 3-4.
64 Slutsky (n 63 above) 81.

parliament or a Royal Charter could be used to establish a company.[65] Upon registration, a parliamentary act limited an enterprise's liability to the value of its paid up shares.[66] However both methods of incorporation were costly and many businesses were unable to afford them.[67]

During this period there was a rapid increase in the number of companies formed in situations where company promoters were not properly supervised, resulting in many investors losing money due to deceit and manipulation.[68] Shares became significantly costly and subject to speculation, which harmed the economy.[69] The South Sea Bubble, involving the South Sea Company, was a significant event during this period of speculative enterprise.[70] The South Sea Company was established to consolidate and reduce national debt while also assisting the UK in expanding trade.[71] To accomplish this, the company offered securities at a significantly higher interest rate, attracting a large number of investors and as a result significantly increasing the price of its shares.[72] However, the company was unable to sufficiently expand trade in order to generate profits sufficient to pay out the interest on its securities, resulting in the financial collapse of the company.[73] As a result, in 1720, Parliament passed the Bubble Act, which prohibited the formation of joint stock companies without specific Royal Charter permission, preventing these entities from operating as incorporated companies.[74] This occurrence was significant because of the impact it had on shaping company law in relation to the no conflict rule, which requires fiduciaries to ensure that their personal interests are subservient to those of the company.[75]

The South Sea bubble was linked to the case of *Keech v Sandford*[76], in which the court recognised fiduciary law in relation to directors' duties.[77] The decision in this case

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65 Slutsky (n 63 above) 81.
66 Nkala & Nyapadi (n 60 above) 3-4.
67 Butcher (n 5 above) 12.
68 Nkala & Nyapadi (n 60 above) 3-4.
69 Davies (n 32 above) 24-27; Nkala and Nyapadi (n 60 above) 3-4; 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 Thesis, University of Fort Hare, 2016) 30-31; Butcher (n 5 above) 12.
70 Hamadziripi (n 69 above) 30-31.
71 Hamadziripi (n 69 above) 30-31.
72 Davies (n 32 above) 27.
73 Butcher (n 5 above) 12.
74 Nkala & Nyapadi (n 60 above) 3-4; M Abbasi, Legal analysis of Agency Theory: an inquiry into the nature of corporation, 2009. Vol 51 No 6. *International Journal of Law and Management* 414.
75 B Hannigan, Reconfiguring the No Conflict Rule Judicial Structures, a Statutory Restatement and the Opportunistic Director, 2011.Vol 23. *Singapore Academy of Law Journal* 716.
76 [1726] 25 ER 223 (Ch).
77 Hamadziripi (n 69 above) 26-27.

established the requirement that directors should not benefit personally from their fiduciary role in companies, or have a conflict of interest with the company as trustees.[78] This case influenced the interpretation of the directors' duty to act in the best interests of the company.[79]

2.3 THEORETICAL FRAMEWORK

The Theoretical Framework will be discussed with emphasis on Agency, Reliance and Corporatist Theories. The Agency theory is concerned with the company's contractual relationship with its directors. The Reliance Theory is concerned with the trust and confidence relationship between the company and directors. Corporatist theories are concerned with the relationship between the company and its larger stakeholders, which directors must consider.

2.3.1 Agency Theory

According to this theory, the contractual relationship between the company and directors creates a fiduciary nature of the duties imposed on directors that require directors to always be loyal to the company in how they act and make decisions on its behalf.[80] The theory states that directors are contractually obliged to act in the best interests of their principal being the company that is owned by the shareholders.[81] The decisions of a director as an agent of the company are performed solely for the benefit of the company.[82] This theory has flaws due of the conflict that arises when directors must consider and prioritise the interests of other stakeholders who may be relevant to advancing the company's objectives and purpose.[83]

2.3.2 Reliance Theory

In *Morrrison v Coast Finance Ltd*,[84] the court stated that a fiduciary relationship exists when two people have a relationship of trust or reliance. The factors stated in the *Morrison* case are the fundamental elements that support the reliance theory.[85] In this context, directors have the company's trust because of their position in the company

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78 A Hicks, The Remedial Principle of Keech v Sandford Reconsidered, 2010.Vol 69 No 2. *Cambridge Law Journal* 288; Hannigan (n 75 above) 716; Hamadziripi (n 69 above) 26-27.

79 Hamadziripi (n 69 above) 26-27.

80 M Jensen & W Meckling, Theory of the Firm: Managerial behaviour, agency costs and ownership structure, 1976. Vol 3. *Journal of Financial Economics* 310 to 311.

81 Hamadziripi (n 69 above) 42; Abbasi (n 74 above) 410.

82 *Boston Deep Sea v Ansell* [1888] 39 (ChD) 339; Abbasi (n 74 above) 402.

83 Mickels (n 15 above) 272; Hamadziripi (n 69 above) 43.

84 [1996] 55 DLR.

85 Hamadziripi (n 69 above) 43; *LLoyd's Bank v Bundy* [1974] (3) All ER 757 (CA).

and the significant nature and extent of the responsibilities and obligations that directors owe to the company.[86] The theory's flaw is that it does not apply in all cases where reliance between two individuals creates a fiduciary relationship.[87] In that regard, trust is not always required in a fiduciary relationship. In practice, however, a director assumes fiduciary duties based on the company's trust and confidence in a director.[88]

2.3.3 Corporatist Theories

This theory is based on the idea that a company does not operate in isolation and is duty bound to consider the interests of the other stakeholders in the surrounding business environment, including the community.[89] The theory advocates for a company to prioritise stakeholder interests over a constricted profit oriented goal.[90] The opposing theory contends that the purpose of forming businesses is to make money and is that this is the main purpose of directors in carrying out their obligations to the company.[91] Concern for stakeholder interests contradicts this goal and limits director's ability to fully discharge their duties to the company for this purpose.[92] In this regard, this theory is criticised because it creates ambiguities regarding who directors are supposed to serve.[93]

2.4 DEFINITION OF A COMPANY

Nkala and Nyapadi define a company as a body corporate incorporated under the Companies Act[94] formed by one or more individuals for the purpose of carrying on business in the name of the association with the goal of making profit.[95] This definition is useful in understanding the nature of a company because the previous Companies Act[96] interpretation section simply defined a company as an entity limited by shares or by guarantee.[97] The COBE Act's interpretation section also does not define a company other than to say that it is an entity incorporated under the act.[98] This means that the

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86 Hamadziripi (n 69 above) 44.
87 Hamadziripi (n 69 above) 44.
88 Hamadziripi (n 69 above) 44.
89 J Dine, *Company Law*, Sweet & Maxwell, 2001.27; Abbasi (n 74 above) 417-418.
90 Dine (n 89 above) 28.
91 Somer (n 9 above) 38; Abbasi (n 74 above) 410.
92 Dine (n 89 above) 29.
93 Dine (n 89 above) 29.
94 [*Chapter 24:03*]; see section 76 of the Companies and Other Business Entities Act [*Chapter 24:31*].
95 Nkala and Nyapadi (n 60 above) 8; Girvin, Frisby & Hudson (n 1 above) 916.
96 [*Chapter 24:03*].
97 See interpretation section of the Companies Act [*Chapter 24:03*].
98 See interpretation section of the Companies and Other Business Entities Act [*Chapter 24:31*].

common-law definition of a company as developed by the courts must be consulted for guidance.

The decision in *Salomon v Salomon* ("*Salomon* case") established the generally accepted principle of a company's separate legal identity.[99] However according to Butcher the Joint Stock Companies Act[100], Limited Liability Act[101] and the Joint Stock Companies Act[102] had already established the principle limited liability upon registration, including features such as the appointment of company directors, and the general and extra ordinary meetings of shareholders.[103] In that regard the principle in the *Salomon* case had been established prior to the effect of this principle being firmly entrenched in the *Salomon* case.[104]

The principle set in the Salomon case was followed in *Macaura v Northern Assurance Co Ltd*[105] in which the majority shareholder had continued to insure timber, which he had sold to the company and which was destroyed by fire, in his own name. The insurance company successfully argued that the timber belonged to the company. In the case *of Lonrho v Shell Petroleum*[106], the court found that an order for discovery did not extend to a company's subsidiary as it was a separate legal entity. In the case of *Adams v Cape Industries plc*[107] Slade LJ held that save where a particular statute or contractual provision stated otherwise, the court was not at liberty to abandon the principle set in the *Salomon* case merely because the justice of the case so requires.

In *Salma Ebrahim v Attiya Ebrahim (in her capacity as Executrix Dative of Estate late Basheer Ahmed Ebrahim) and 5 Ors*[108] Chitakunye J re affirmed the common law position that a corporation is a legal entity that conducts its own business apart from its shareholders.[109] The judge confirms as correct the legal fiction of the corporate veil

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99 *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL); E Lim, Of 'Landmark' or 'Leading' Cases: Salomon's Challenge, 2014. Vol 41 Number 4, *Journal of Law and Society* 530; Cassim et al (n 9 above) 34.

100 The Joint Stock Companies Act [1844] (UK) allowed Joint Stock companies with transferable shares to be formed by registering a deed of settlement. The company acquired corporate personality upon incorporation.

101 The Limited Liability Act [1855] (UK) provided those named in the registered deed of settlement with limited liability.

102 The Joint Stock Companies Act [1856] (UK) repealed the deed of settlement and established the Memorandum of Association and Articles of association.

103 Butcher (n 5 above) 13-14.

104 Routledge (n 3 above) 14.

105 [1925] AC 619 (HL (LR); Routledge (n 3 above) 15.

106 [1980] 2 WLR 367; Routledge (n 3 above) 15.

107 [1990] 1 Ch 433.

108 HH - 448 – 18 at 11-12.

109 *Salma Ebrahim v Attiya Ebrahim (in her capacity as Executrix Dative of Estate late Basheer Ahmed Ebrahim) & 5 Ors* HH - 448 – 18.

established in the *Salomon* case, which states that a company has legal personality separate and apart from its shareholders identities.[110] In this regard the judge confirms the position that a company's rights, obligations, or liabilities are distinct from those of its shareholders, who are liable only to the extent of their capital contributions being a concept known as limited liability.[111] Chitakunye J confirms that the English Company law principle of the distinct legal nature of a company established in the *Salomon* case is widely accepted as a fundamental norm of company law in the majority of common-law jurisdictions.[112] In that regard, once incorporated, a company has a separate legal identity, allowing it to perform various legal acts in order to pursue and further its business activities and objectives.[113] In that sense a company engages in a variety of legal acts to achieve its goals, such as appointing officers to run its operations, purchasing property, incurring debt and extending credit, and utilising the legal system to enforce its rights.[114] The decision confirms that a corporation can own property, enter into contracts, incur debt, make investments and assume other rights and obligations independent of its members.[115] The incorporation of the company grants a company the same powers as natural persons to perform acts for its purposes to the extent that the company through the board of directors is able to exercise such powers as are conferred upon the company in terms of the Memorandum of Association.[116]

The legal act of incorporation of a company confers the autonomous legal identity of a company separate and distinct from its owners.[117] A company, on the other hand, does business because its shareholders fund it to operate in exchange for a return on their

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110 *Salma Ebrahim v Attiya Ebrahim (in her capacity as Executrix Dative of Estate late Basheer Ahmed Ebrahim) & 5 Ors* HH - 448 – 18.

111 *Salma Ebrahim v Attiya Ebrahim (in her capacity as Executrix Dative of Estate late Basheer Ahmed Ebrahim) & 5 Ors* HH - 448 – 18.

112 Lim (n 95 above) 530; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550; Cassim et al (n 9 above) 31.

113 Cassim et al (n 9 above) 31; *Salma Ebrahim versus Attiya Ebrahim (in her capacity as Executrix Dative of Estate late Basheer Ahmed Ebrahim) and 5 Ors* HH - 448 – 18.11-12; see section 19 of the Companies and Other Business Entities Act [*Chapter 24:31*] that provides that "A company or a private business corporation shall be incorporated from the date of issue by the Registrar of its certificate of incorporation and the company or private business corporation shall thereupon become a body corporate, with the capacity and powers of a natural person of full legal capacity in so far as a body corporate is capable of having such capacity and exercising such powers, until it is struck off the register or dissolved in terms of the Insolvency Act [*Chapter 6:07*]".

114 Nkala and Nyapadi (n 60 above) 71-73; Girvin, Frisby & Hudson (n 1 above) 4.

115 *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HL(lr) Routledge (n 3 above) 3 states that "A company, as a separate legal entity, is able to mortgage all its assets by way of a floating charge to secure a borrowing from, for example, a bank."

116 Routledge (n 3 above) 3; Slutsky (n 63 above) 83; Nkala and Nyapadi (n 60 above) 88-89.

117 Butcher (n 5 above) 13-14; *Salma Ebrahim v Attiya Ebrahim (in her capacity as Executrix Dative of Estate late Basheer Ahmed Ebrahim) & 5 Ors* HH - 448 – 18.

investment.[118] The formation of a company is completed by incorporation, which lists the members of the company and outlines the company's objectives, granting the company legal standing.[119]

2.5 THE COMPANY AND ITS SHAREHOLDERS

The composition of a company as a legal entity results in an intricate network of legal relationships that arise within the company, first and foremost with shareholders who form the company and have an interest in its success.[120] A shareholder is a natural or legal person who owns stock in the company.[121] Shareholders in this capacity are not beneficial owners of the company's assets because the rights of ownership granted by shareholding does not extend to the company's assets due to the principle of the separate corporate personality of a company.[122] The decision in *Short v Treasury Commissioners*[123] held that there is a distinction between the company and the shareholders because shareholding does not confer ownership rights in the company as it is distinct from the shareholding.[124] In *Macaura v Northern Assurance Co*[125] the court determined that a shareholder in a company has no interest in the company's assets because the company can hold and own assets in its own name rather than as a trustee for its shareholders.[126]

Shareholders generally have no control over a company, save for particular rights and decisions reserved entirely for shareholders to the exclusion of directors terms of the companies legislation.[127] To establish a distinction between ownership and control, directors elected by shareholders are in charge of the company's control and management.[128] Directors are appointed on the basis of specific skills, knowledge and

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118 I Esser & J. J. Du Plessis, The Stakeholder Debate and Directors' Fiduciary Duties, 2007.Vol 19. *South African Mercantile Law Journal* 350.

119 Nkala and Nyapadi (n 60 above) 71-73; section 76 of the Companies and Other Business Entities Act [*Chapter 24:31*].

120 Girvin, Frisby & Hudson (n 1 above) 328; Jensen & Meckling (n 80 above) at 311; Abbasi (n 74 above) 404.

121 I Chiu, The Meaning of Share Ownership and the Governance Role of Shareholder Activism in the United Kingdom, 2008. Vol 8 No 2. *Richmond Journal of Law & Business* 118; Abbasi (n 74 above) 405.

122 Cassim et al (n 9 above) 36; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530.

123 [1948] 1 BK 116 at 122; Nkala and Nyapadi (n 60) above 71-73.

124 *Short v Treasury Commissioners* [1948] 1 BK 116 at 122.

125 [1925] AC 619 (HL (lr).

126 Nkala and Nyapadi (n 60 above) 71-73; Cassim et al (n 9 above) 39-40.

127 Girvin, Frisby & Hudson (n 1 above) 6; Sealy & Worthington (n 35 above) at 169

128 Sealy & Worthington (n 35 above) 273; Nkala and Nyapadi (n 60 above) 73-74; Girvin, Frisby & Hudson (n 1 above) 313; Slutsky (n 63 above) 93.

experience required to run the company.[129] This aspect, however, only applies to larger corporations because small entities frequently have a blurred distinction because shareholders also serve as directors responsible for the entity's management and control.[130]

2.6 THE COMPANY AND ITS DIRECTORS

The position of company director originated with the Dutch East India Company.[131] The role of directors as company managers gained prominence and became more defined over time. Directors' decision making functions on behalf of the company meant that they assumed duties and obligations on behalf of the company, for which they were liable both to the company and its members.[132] The case of *John Shaw & Sons (Salford) Ltd v Shaw*[133] established the supremacy of the directors' decision making powers on behalf of the company.[134] The role of company directors fosters cross functional relationships as well as legal obligations and responsibilities within the organisation.

A company's actions are not its own because it is incapable of physically carrying out its own actions.[135] A company's acts are carried out through the medium of natural persons called directors who are in some cases, appointees of the shareholders, and are contracted to run the company.[136] Directors are expected to run the affairs of the company and exercise independent judgement based on their own understanding,

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129 Nkala and Nyapadi (n 60 above) 74.

130 J Lowry, The Codification of Directors' Duties: Capturing the Essence of the Corporate Opportunity Doctrine, 2006. Vol2. *Virtus Interpress* 23.

131 https://nilsbangladesh.org/a-brief-description-of-company-directors-from-a-historical-and-the-legal-perspective-of-bangladesh/#_edn2 accessed on 9 June 2022.

132 *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34 where the company's articles of association vested all management powers in the board save in circumstances where this power could be altered by extra ordinary resolution. The directors had refused to comply with a resolution passed by shareholders for the sale of company assets. The court determined that directors were not mere agents of the general meeting subject to the control of shareholders as the management of the company had been delegated to management and on that basis the directors were entitled to disregard the resolution; Slutsky (n 63 above) 83; *Quin & Axtens v Salmon* [1909] AC 442.

133 [1935] 2 KB 113.

134 Slutsky (n 63 above) 84-87; *Gramophone & Typewriter Ltd v Stanley* [1908] (2) KB 89 CA Buckley, L.J., in an oft-quoted passage, said: "The Directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals.".

135 Girvin, Frisby & Hudson (n 1 above) 313; Sealy & Worthington (n 35 above).

136 Girvin, Frisby & Hudson (n1 above) 313.

experience and motivation while also furthering the company's objects and interests.[137] Directors are company officers because they have the most decision making and responsibility in a company. In some cases directors are also employees of the company.[138] In this sense, directors are the intellectual personification of the corporate entities, as the nature and characteristics of the company are derived from how they act and make decisions when operating the company.[139] Directors are directly responsible for the company's success or failure based on how they make decisions and run the company.[140]

The role and responsibilities of directors as company managers with full authority to manage the company places directors in a position where they are entrusted with the company's affairs.[141] Directors serve as fiduciaries for the company as trustees.[142] Directors' responsibilities on behalf of a company also entitle them to act agents of the company, with a duty of care owed to the company.[143] As previously stated, a company conducts all of its operations, including all transactions and asset acquisitions, through its board of directors. The assets procured and held on behalf of a company by directors are owned by the company but entrusted to directors who are responsible and accountable for company property.[144]

Directors must consider the factors that affect the business's operating environment when making decisions on the company's behalf in order to properly run the company and pursue its purpose and interests. In that regard, and due to the complicated nature of the directors' position, it became necessary to impose certain onuses and accountabilities upon directors that are owed to the company.[145] The standards imposed served as a guide on which to assess answerability by directors for their sense of judgement, resolve and principles in operating the company.

The old English court's understanding of what a director was and the duties that came with it influenced the creation and development of directors' duties.[146] Directors have been defined in a broad manner as sometimes being trustees, sometimes as proxies and

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137 Abbasi (n 74 above) 406; Girvin, Frisby & Hudson (n 1 above) 6.

138 *Lees v Lees Air Farming Limited* 1960; V. U. W. Law Review 254 http://www5.austlii.edu.au/nz/journals/VUWLawRw/1962/18.pdf accessed on 9 June 2022.

139 Kanamugire and Chimuka (n 26 above) 70; *H.L. Bolton (Eng.) Co. Ltd v T.J Graham & Sons* [1956] 3 WLR 804.

140 Kanamugire and Chimuka (n 26 above) 70.

141 Girvin, Frisby & Hudson (n 1 above) 319 - 320.

142 A Blake & HJ Bond, *Company Law,* 5th ed. Blackstone Press Limited, 1996.111-112.

143 Blake & Bond (n 142 above) 111-112.

144 Girvin, Frisby & Hudson (n 1 above) 319 – 320.

145 Blake & Bond (n 142 above) 111.

146 Volpe (n 22 above) 125.

sometimes as managing partners depending on the context within which their responsibilities are being viewed.[147] In this regard Davies believes that directors should be viewed as agents of the company who have fiduciary duties to the company rather than trustees.[148] Davies further differentiates directors' commitments into fiduciary responsibilities of loyalty and good faith and obligations of care and skill.[149] As a result, directors must understand the breath of their responsibilities to the company as they are the medium through which the company operates.[150]

2.7 **LEGAL POSITION OF DIRECTORS**

2.7.1 Directors as agents

In the case of *Great Eastern Ry.Co. v Turner*[151] the court determined that directors serve a dual function as trustees entrusted with the company's funds and assets, as well as agents through whom the company conducts business. It has been proposed that directors as the company's agents owe fiduciary duties and duties of care towards the company.[152] This is because they are the medium through which the company performs physical acts that allow it to conduct business, as a legal entity cannot perform acts on its own behalf.[153] The rules governing the law of agency apply under this classification.[154] Directors' authority as agents, on the other hand, is derived indirectly from their appointment and the company's constitutive documents, which outline in general the scope of directors' powers and how they are authorised to run the company.[155] Directors, on the other hand, have the authority to make decisions on behalf of the company that they believe are necessary to advance the business interests of the company.[156] In this regard, the view that directors' fiduciary duties imply that they are agents of the company falls short of the mark.[157]

2.7.2 Directors as trustees

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147 Volpe (n 22 above) 125, quoting Buckley on *The Companies Acts*, 1957 at 861.
148 Davies (n 32 above) 598.
149 Davies (n 32 above) 598.
150 Cassim et al (n 9 above) 411.
151 [1872] LR 8 Ch.149, 152.
152 Davies (n 32 above) 598; Girvin, Frisby & Hudson (n 1 above) 319-320; Hamadziripi (n 69 above) 39-40; Cassim et al (n 9 above) 411.
153 Hamadziripi (n 69 above) 39-40; Blake & Bond (n 142 above) 111-112.
154 Davies (n 32 above) 598.
155 Hamadziripi (n 69 above) 39-40.
156 Abbasi (n 74 above) 413; Cassim et al (n 9 above) 411.
157 Hamadziripi (n 69 above) 39-40.

This viewpoint implies that company directors have fiduciary duties because they are in a position of trust with the company.[158] The case law has also suggested that directors are trustees of the company.[159] The historical basis of this stemmed from the Bubble Act and the resultant partnership characteristic's it imposed on companies, with the implication that directors held company property as trustees.[160] The role of trustees and directors occasionally overlaps resulting in similarities between the two.[161] The legal position governing trust law and that of directors, however, differs, because trust property vests in the trustees who can be limited in the manner in which they can deal with trust property.[162] Company property belongs to the company and directors have wide discretion to deal with the company property as they deem fit in order make profit and further the business interests of the company.[163] Because directors bear a greater burden to meet the duty of skill and care than trustees, the structure of the duties and threshold for liability for trustee and directors duties differs[164]

2.7.3 Directors as managing partners

Directors have also been referred to as managing partners.[165] This point of view stems from the fact that directors and managing partners both run businesses.[166] The distinction is the liability that applies to partnerships as opposed to businesses.[167] Furthermore, directors have no financial stake in the company and are not personally liable for its obligations.[168] In contrast to partners, who owe their duties to their fellow partners, directors owe their duties to the company.[169]

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158 Cassim et al (n 9 above) 412; Nkala & Nyapadi (n 60 above) 270.

159 *Re German Mining Co, Ex parte Chippendale* 1853 4 De GM and G19; *Selangor United Rubber Estates Ltd v Cradock* (No.3) [1968] 1WLR 1555; *Great Eastern Ry.Co. v Turner* [1872] LR 8 Ch.149, 152.

160 Hamadziripi, (n 69 above) 37.

161 *Mulkana Corp NL (in liq) v Bank of New South Wales* 1983 8 ACLR 278 SC (NSW) the court commented that directors are not essentially trustees, but fiduciary agents, as they hold property on behalf of third parties in the same manner as trustees with the difference being that directors have wider scope to deal with property held in their discretion as opposed to trustees who have certain limitations in that connection.

162 Blake & Bond (n 142 above) 111-112.

163 *Mulkana Corp NL (in liq) v Bank of New South Wales* 1983 8 ACLR 278 SC (NSW); Blake & Bond (n 142 above) 111-112.

164 Nkala and Nyapadi (n 60 above) 267-270.

165 Cassim et al (n 9 above) 413-414.

166 Cassim et al (n 9 above) 413-414.

167 Cassim et al (n 9 above) 413-414.

168 Cassim et al (n 9 above) 413-414.

169 Cassim et al (n 9 above) 413-414.

2.7.4 Directors as fiduciaries sui generis

In the case of *Cohen v Segal* the court held that the classification of directors on the basis of trusteeship, agency, or managing partners may be problematic as they occupy a distinctive role that depends on the context in which they are being viewed.[170] However this has no bearing on their fiduciary duties. A trust or agency relationship may indicate the presence of a fiduciary relationship. Directors can be considered fiduciaries in their own right due to the nature of their relationship with the company.[171]

Company directors make decisions and share responsibilities collectively.[172] In some cases, a single director lacks the authority to bind the company whilst acting as an agent of the company, but he is still considered a fiduciary in relation to his actions on behalf on behalf of the company.[173] According to Davies, these fiduciary duties are owed solely to the company and not to the shareholders or any other third party unrelated to the company.[174]

The nature of the fiduciary duty is determined by the relationship between the parties.[175] However, because a fiduciary acts in the best interests of another person, the underlying rationale of a fiduciary's relationship with the person to whom the duty is owed is one of trust and confidence.[176] The fiduciary is required to act with good faith and loyalty when acting for and protecting the interests of the person for whom he is acting.[177] The fiduciary is obliged to exercise good faith and be loyal in acting for and upholding the interest if the person he is acting for.[178] In this regard a directors' fiduciary duties to a company include total loyalty to the company's interests.[179] The court explained in *Bristol and West Building Society v Mothew*[180] that the distinctive feature of a fiduciary is loyalty arising from good faith and the avoidance of conflict of interest.[181]

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170 1970 (3) SA 702 (W).
171 Hamadziripi (n 69 above) 41-42.
172 Davies (n 32 above) 599.
173 Davies (n 32 above) 599.
174 Davies (n 32 above) 599.
175 Cassim et al (n 9 above) 512-514.
176 Nkala and Nyapadi (n 60 above) 267-270.
177 Cassim et al (n 9 above) 512-514; Hannigan (n 75 above) 725.
178 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-7.
179 Nkala and Nypadi (n 60 above) 267-270.
180 [1996] 4 All E.R. 638; Cassim (n 7 above) 512-514.
181 Cassim (n 9 above) 512-514.

2.8 FIDUCIARY NORMS OF DIRECTORS' DUTIES

2.8.1 Duty to Avoid Conflict of Interest

This rule is fundamental to fiduciary duties of directors.[182] The case of *Keech v Sandford* established the rule.[183] The rule was created to eliminate the possibility and dangers of a director of a company prioritising personal interests ahead of those of the company that he is obligated to serve.[184] The director is duty bound to prioritise the company's interests. The rule is intended to prevent directors from abusing their authority for personal advantage and gain without the company's permission.[185] Under both common law and statutory provisions, a director may not have a conflict of interest with the company.[186] Directors must ensure that their responsibilities to the company and third parties do not overlap.[187] The rule's scope includes both actual conflict and situations where conflict is a real possibility. The rule is intended to prevent directors from having conflicts while performing their duties for companies. [188] The situations that the rule is designed to avoid include those in which directors can compete directly with the company for contracts, the making of secret profit by directors through bribes, unsanctioned insider loans and insider trading.

2.8.2 The No profit rule

In *Regal (Hastings) Ltd v Gulliver,* the company's directors used their personal funds to fund the company's expansion.[189] The company benefitted from the expansion, which was later sold as an operating business. The new management demanded that the directors compensate them for the profit they made on the sale of the company's stock. The House of Lords ruled that the directors obtained their stock through the use of their position as directors, and because they did not notify the company about this transaction, they were obliged to return the monetary gain made to the company.[190]

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182 Cassim (n 9 above) 534; Hamadziripi (n 69 above) 59-60.
183 [1726] Sel Cas Ch 61.
184 Hannigan (n 75 above) 718.
185 Hannigan (n 75 above) 718.
186 Hannigan (n 75 above) 718.
187 Gatsby, Frisby & Hudson (n 1 above) 341-342.
188 Cassim et al (n 9 above) 413-414.
189 1942 1 All ER (HL); Routledge (n 3 above) 77.
190 Routledge (n 3 above) 77.

The no conflict, and no profit rules are intertwined and overlap.[191] The rule is based on the *Sanford v Keech* case. Directors are not permitted to keep any profits earned while serving as directors on behalf of the company.[192] The courts apply a strict interpretation of this rule, and the fact that any such transaction in which a director may have made a hidden profit did not harm the company, or was beneficial to the company is irrelevant in determining a violation of this rule.[193] The scope of application and definition of profit cause the overlap with the corporate opportunity rule.[194] Profit derived from lost business opportunities differs from profit derived from ordinary business transactions in the course and scope of the company's operations.[195] The no profit rule applies to a broader range of situations, whereas the corporate opportunity rule only applies to commercial arrangements.[196]

2.8.3 Corporate opportunity rule

This rule prohibits a director from profiting from a company owned opportunity or property that arose or came to the directors' attention while performing duties as a director on behalf of the company.[197] A corporate opportunity is defined in this context as a company asset that directors cannot use for their personal gain or something entirely within the company's business activities related to the company's operations.[198] When personal interests collide with corporate opportunities, a director is obligated to prioritise a company's interests.[199] The leading case in this regard is *Regal (Hastings) Ltd v Gulliver*.[200]

In the case of *Industrial Development Consultants v Cooley,*[201] an architect named Cooley worked for Midlands Gas Board. He resigned from his job to become an IDC director. While working at IDC, he was approached personally by the Gas Board to do some architectural designs for the Board because they did not want to deal with IDC. Cooley then terminated his contract with IDC for a fictitious reason, allowing him to profit from the work of the Gas Board. The court ruled that he was liable to disgorge

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191 Hamadziripi (n 69 above) 59-6; Hannigan (n 75 above) 737.
192 Nkala and Nyapadi (n 60 above) 273-274 citing *Parker v Mckenna* [1874] 10 Ch App 96 at 118; Gatsby, Frisby & Hudson (n 1 above) 350-351.
193 *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 SCA and *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER (HL).
194 Hamadziripi (n 69 above) 64-65.
195 Hamadziripi (n 69 above) 64-65.
196 Cassim (n 9 above) 540.
197 *Cooks v Deeks* 1916 1 AC 554; Cassim (n 9 above) 539.
198 *Cooks v Deeks* 1916 1 AC 554.
199 *Cooks v Deeks* 1916 1 AC 554.
200 [1942]1 All ER (HL).
201 [1972] 2 All ER 551; Routledge (n 3 above) 77.

the profit he had made from the Gas Board because it resulted from a business opportunity that had presented itself to him virtue of being a director at IDC despite the fact that the opportunity was unlikely to be obtained by the company.[202]

2.8.4 The proper purpose rule

This rule states that directors must only use their authority for the purpose for which it was granted and not for any other secondary purpose. Directors must act in ways that protect and advance the interest of the company.[203] An improper purpose is one in which the directors act in their own self - interest.[204] In *Hogg v Cramphorn*[205], the directors of the company issued shares to dilute the company's share value in order to avoid a hostile takeover. The court determined that issuing shares created a fiduciary duty that could only be used to raise funds for the company and not for any other reason, such as preventing a hostile takeover. Because the issuance of shares requires the approval of stakeholders at a general meeting, the court ruled that the directors' actions could not be justified, even if the directors honestly believed it was in the best interests of the company. In determining whether there is compliance with this rule, the court in the case of *Extrasure Travel Insurances v Scattergood*[206] stated that the court must identify the power being challenged, the proper purpose for which the power was granted to the directors, the substantial purpose for which the power was exercised, and whether the exercise of that power was proper. In that connection the test to establish compliance with this rule is objective.

2.8.5 The independent judgement rule

This rule requires directors to make decisions on behalf of the company using independent judgement and unrestricted discretion.[207] In this regard when making decisions on behalf of the company, directors must not be swayed.[208] Directors must be objective and unbiased when making decisions on behalf of the company.[209]

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202 *Industrial Development Consultants v Cooley* [1972] 2 All ER 551.
203 Blake & Bond (n 142 above) 117.
204 Blake & Bond (n 142 above) 117.
205 [1967] Ch 254.
206 [2003] 1 BCLC 598 (ChD) 619.
207 *S v Shaban* 1965 SA 646 (W); Nkala and Nyapadi (n 60 above) 276; Gatsby, Frisby & Hudson (n 1 above) 334-335.
208 *S v Shaban* 1965 SA 646 (W).
209 Cassim (n 9 above) 528-529.

Directors are not permitted to commit to making pre-determined decisions in the future.[210] In the case of *Fulham Football Club and Others v Cabra Estates Plc,[211]* the football club and its directors were paid to vote for a specific position at a meeting. The court ruled that directors cannot bind themselves to vote in a specific manner in the future, even if doing so has no negative consequences for the company and may benefit it. The board made the decision in the genuine belief that it was acting in the best interests of the company because the position taken would benefit the company.[212]

This duty applies to nominee directors who act in the capacity of a representative, representing the interests of a lawfully elected director.[213] This is also true for subsidiaries and joint ventures.[214] In Fisheries Development Corporation of SA *Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd*[215] the court emphasised that a director owes it to the company to exercise independent judgement and to make decisions in its best interests. In this regard, nominee directors must ultimately act in the best interests of the company by exercising independent judgement for the benefit of the company rather than slavishly following nominator instructions that may conflict with this duty.[216]

2.9 THE DIRECTORS DUTY OF CARE

In general directors must ensure that their duties are performed properly failing which they will be held liable for negligence for the amount the loss suffered by the company as a result of their careless actions.[217] The duty of care is not a fiduciary duty and is not dependent a director acting in good faith for benefit of company to the exclusion of personal interest.[218] The standard for the duty of care is derived from English law with the remedy for breach founded upon delictual liability based on negligence.[219] The duty has been widely interpreted as being largely dependent on the directors' personal characteristics in relation to the level of skill, knowledge and experience required

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210 Cassim (n 9 above) 528-529.

211 [1994] 1 BCLC 363.

212 *Fulham Football Club and Others v Cabra Estates Plc* [1994] 1 BCLC 363.

213 *Neath Rugby Club Ltd, Re* [2009] 2 BCLC 427.

214 Cassim (n 9 above) 528-529.

215 1980 (4) SA 156 (W) 163.

216 *Neath Rugby Club Ltd, Re* [2009] 2 BCLC 427; *Fisheries Development Corporation of SA Ltd v Jorgensen & Another; Fisheries Development of SA Ltd v AWJ Investments (Pty) Ltd & Others* 1980 (4) SA 156 (W) at 156.

217 Kanamugire and Chimuka (n 26 above) 70; Nkala and Nyapadi (n 60 above) 227-228.

218 N Bouwman, An Appraisal of the Modification of the Directors' Duty of Care and Skill, 2009. Vol 21. *South African Mercantile Law Journal* 510- 511.

219 M Bekink, An Historical Overview of the Directors' Duty of Care and Skill: From the Nineteenth Century to the Companies Bill of 2007, 2008. Vol 20. *South African Mercantile Law Journal* 98.

relative to the scope and type of the company's operations.[220] On this basis, a director was protected by the subjective formulation of the applicable test for compliance with the duty.[221] Although directors are typically appointed based on specialised skill and knowledge, there is no requirement for a director to have specific or specialised understanding to justify appointment as a company director.[222] In general, the threshold for breach of the duty of care has always been low.[223] Due to the dynamic nature of business, as well as the diverse range of companies and business activities, enforcing an all-encompassing objective standard for all directors becomes difficult.[224] In this regard, the distinction between executive and non-executive directors becomes relevant in terms of the level of knowledge expected of them and adherence to company duties.[225]

In the case of *Re Brazilian Rubber Plantations & Estates Ltd*[226] the court dismissed a claim for losses arising from an unsuccessful business venture in Brazilian rubber plantations that was based on sham projections of output that the directors relied on in making the investment. The court held that the common law necessitates directors to exercise care and skill that would be expected of someone with the same knowledge, skill and experience when performing duties. The court also stated that a director is not liable for minor mistakes in decision making. In this regard, the liability threshold is dependent on and is relative to the directors' level of knowledge and experience.

Skill was defined as a directors' knowledge and experience in interpreting this duty under common law.[227] This according to Cassim, refers to the directors' technical competence arising from training and aptitude, whereas "Care" refers to how the skill is applied, which aspects which may be relevant considerations in the appointment of a director.[228]

The meaning of the duty of care and skill was defined in *Re City Equitable Fire Insurance Co Ltd,* (" City Equitable Fire") which upheld the subjective test used in *Re Brazilian Rubber Plantations and Estates Ltd*.[229] In this case, the company suffered significant

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220 Kanamugire and Chimuka (n 26 above) 72-74; Bowman (n 200 above) 511.
221 Cassim et al (n 9 above) 555; Bowman (n 200 above) 511.
222 Bouwman (n 218 above) at 511; Kanamugire and Chimuka (n 26 above) 72-74.
223 Kanamugire and Chimuka (n 26 above) 72.
224 Cassim (n 9 above) 554-558.
225 *Fisheries Development Corporation of SA Ltd v Jorgensen & Another; Fisheries Development of SA Ltd v AWJ Investments (Pty) Ltd & Others* 1980 (4) SA 156 (W) at 156.
226 [1911] Ch 425 (CA).
227 Cassim et al (n 9 above) 556.
228 Cassim et al (n 9 above) 556.
229 [1925] Ch 407; Volpe (n 22 above) 131; R Stevens, The Legal Nature of the Duty of Care and Skill: Contract or Delict, 2017. Vol 20. Potchefstroom Electronic Law Journal 6. DOI

financial losses as a result of the managing directors' fraud.[230] The other directors claimed that they had acted honestly in response to a negligence claim. Romer J reasoned that, when assessing the standard for directors' duties, dynamics such as the nature and magnitude of the company under management must be considered, as this defines the level of delegated responsibility to management by the directors.[231]

This case established three elements that constitute the duty of care, skill and diligence. The first element suggests that a director is only expected to exhibit skill and diligence to extent of his or her understanding and capability.[232] For example, a director of an engineering firm is not expected to have the same level of skill as engineer or electrician. In that regard directors are not made accountable for poor decision making.[233] In the case of *In Re Denham*[234] a country gentleman who had suggested the payment of a disbursement was not disciplined for negligence as the court found that he could not have understood the significance of accounting matters related to the disbursement. This reasoning established a subjective test for evaluating the actions of directors.[235] As a result, the subjective standard is based on what is expected of a director in light of the current state of society and business.[236] According to the second proposition, executive directors were exempt from attending company meetings on a regular basis.[237] The third suggestion proposes that directors give tasks for the affairs and operations of the company to managers only if they are reliable and provided directors exercise the necessary oversight.[238] In the case of *In Re Barings plc (No 5)*[239], the court found that directors were allowed to give responsibility to management and have sensible assurance in their aptitude. However, the court stated

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http://dx.doi.org/10.17159/1727- 3781/2017/v20n0a1202; V Powel - Smith, *The Law Relating to Company Directors,* Butterworths, 1969. 120- 121.

230 Powel-Smith (n 229 above) 124; *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407.

231 Powel (n 229 above) 124.

232 *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407; Bekink (n 219)100.

233 Bouwman (n 218 above) 511.

234 [1884] LR 25 Ch D 752.

235 In Re Denham [1884] LR 25 Ch D 752.

236 Cassim et al (n 9 above) 556.

237 Routledge (n 3 above) 72; *Re Cardiff Savings Bank, Marquis of Bute* [1892] 2 Ch 100 where the Marquis of Bute was appointed president and director of the Cardiff Savings Bank when he was only six months old. During the next 38 years he attended only one board meeting. During this time fraud were perpetrated by another director. The court held that the Marquis was not liable for breach of duty in failing to attend board meetings as he had never taken to do so.

238 Routledge (n 3 above) 72; *Davey v Cory* [1901] where a director had delegated the task of drawing up the accounts to others, and the court held that the director was entitled to rely on those accounts in approving the payment of dividend.

239 [1999] 1 BCLC 433; Routledge (n 3 above) 73.

that this did not excuse the director from responsibility to exercise oversight and that each case depended on its own circumstances.

Cassim points out that both in England and South Africa directors are not required to have any specialised qualifications to exercise responsibilities in order to be appointed as director.[240] In South Africa however, a distinction was made between the level of responsibility and liability of executive and non-executive directors, with the result that non-executive directors are not liable for poor decision making because they are not expected to have same level of competence and acumen executive directors, despite the fact they are duty bound to be diligent in dealing with company affairs.[241]

The court in *Daniels (formerly practising as Deloitte Haskins & sells) v Anderson*[242] proposed a more objective analysis to the common law duty of care and skill contenting that the subjectivity of directors' duties was out of date.

2.10 DIRECTORS DUTY TO ACT WITHIN THE INTERESTS OF THE COMPANY

This fiduciary duty has been developed by case law application. Directors bear a significant liability and duty because they are the company's life-force and have to ensure that their decisions benefit the company in such a way that its purpose and objectives are met.[243] In this context, this brings into question a contention of what the company is?, and who its constituents are?, in light of the common law requirement that obliges a director as a fiduciary duty to act in the best interests of the company. In the case of *Percival v Wright*[244] the court held that directors' fiduciary duties are owed to the company as a standalone entity rather than to shareholders.

The court however, determined in *Greenhalgh v Arderne Cinemas Ltd*[245] that a company is made up of its incorporators as a common group. The essence of this decision was that the company was defined as a combined group of shareholders that included both current and future shareholders, implying that directors owed shareholders duties to act in the best interests of the company.[246] This is in essence a duty of loyalty and honesty based on directors acting in good faith on behalf of the company in order to advance its goals and interests.[247] At common-law, this duty was interpreted to be owed

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240 Cassim et al (n 9 above) 556; *Brazilian Rubber Plantations and Estates Ltd* [1925] Ch 407.

241 Cassim et al (n 9 above) 556; *Brazilian Rubber Plantations and Estates Ltd* [1925] Ch 407.

242 [1995] 37 NSWLR 438.

243 Gatsby, Frisby & Hudson (n 1 above) 313.

244 [1902] 2 Ch 421 Ch D.

245 [1946] 1 All E.R. 512 CA.

246 Cassim et al (n 9 above) 515.

247 *Hutton v West Cork Rly Co* [1883] 23 ChD 654 (CA) in which Bowen LJ expressed the view that the judiciary is willing to accommodate to accommodate other stakeholder's interests in the exercise

by directors to the company and its shareholders only. In that regard directors were required to prioritise the interests of the company and its shareholders when running the company's affairs and making decisions on its behalf.[248] As a result, directors were required to ensure that decisions made on behalf of the company did not prioritize, or conflict with their personal, or third party interests, over the company's and shareholders' interests.[249] Directors were responsible for ensuring that their actions on behalf of the company did not prejudice or harm it.[250]

The New Jersey Supreme court, however, held in *Ap Smith Manufacturing Co v Barlow*[251] that the modern developments in business and society required companies to be aware of and accept the responsibility to assume social as well as private responsibilities as member of the community in which they operate.[252] This however contrasts with the position taken in *Parke v Daily News Ltd* [253] where the directors were prohibited from making a gratuitous redundancy payment to employees because it served no purpose in the company's short or long term interests in as much it was a commendable moral initiative by the directors to take care of the interest of employees. An examination of the interpretation of this duty reveals that it retains the common law characteristics that directors have the duty to act solely in the best interests of the company exclusively. In terms of the case of *Regentcrest Ltd v Cohen*[254] the interpretation of this duty was based on both partly subjective and objective factors to determine whether a director had complied with this duty.

2.11 PRELIMINARY CONCLUSIONS

This chapter examined the historical development of the directors' duty of care and fiduciary duty of acting in the best interest of the company. In explaining this development reference was made to the theoretical basis which impacted the development and interpretation of these duties form a common law perspective.

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of the directors' duties as long as it promotes the *interests* of the company; Nwafor, (n 16 above) 674; *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244; Gatsby, Frisby & Hudson (n 1 above)332-333; C K Kemp, *Stakeholders and the Duty to Act in the Best Interests of the Company: What is required of Directors?* (Unpublished thesis, University of Cape Town, 2021)30.; *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306.

248 Girvin, Frisby & Hudson (n 1 above) 324-325.

249 *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306.

250 *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306.

251 98 A2d 581 [NJ 1953] at 586.

252 *AP Smith Manufacturing v Barlow* 98 A2d 581 [NJ 1953] at 586.

253 [1962] 2 All ER 929 (ChD).

254 [2001] BCLB 80 at p 105b.

This chapter discussed the agency, reliance and corporatists theories which are fundamental to a broad perspective to understanding the different context within which directors' duties are viewed. This theoretical premise also laid the foundation for a modern development of these duties which are still structured to ensure that the interest of the company is a paramount consideration in the first premise.

The pertinent aspects that arose from the discussion is the obligation of directors to exercise fiduciary duties is solely for the benefit of the company. In as much as there is a recognition that other stakeholder interests are pertinent to the existence of the company, their interest it appears are only considered to the extent that they serve the purposes and benefit of the company. This is emphasised by the mainly subjective formulation of the test adopted by the common law to assess directors' compliance with the duties in circumstances where the courts generally defer to the directors in questions relating to the discretion applied in making decisions on behalf of the company.

Chapter three

The codification of Directors duties of care and acting in the best interest of the company

3.1 INTRODUCTION

This chapter examines the transition of the common law fiduciary duties as developed in English law up to the codification of the of the directors' duty of care and acting in the best interest of the company. The fiduciary duties of directors establish a standard of responsibility that they must strive to meet. Fiduciary duties of directors include acts of good faith and loyalty, as well as acting in the best interests of the company, as directors must always exercise reasonable care and skill.

A relevant dimension is the effect of the contrasting agency and stakeholder theoretical principles on the interpretation and application of the directors' duty of care and acting in the best interest of the company. In this context the scope and impact of codification will be examined to determine the nature and extent of directors' statutory fiduciary duties in light of the fact that common law principles are still widely applied in the definition and interpretation of the duties.[255]

An assessment will be made whether or not there has been an improvement and simplification of the understanding of the duties as outlined in the statutory provisions. The question is whether codification makes it easier to understand the directors' responsibilities. The impact of codification on the interpretation and application of duties will be discussed and whether or not codification improved, clarified, or obscured the application of the duties. The impact of codification on the test for interpreting these duties will be investigated.

The examination of this duty will be based on a comparative analysis of the UK CA 2006, and SA CA 2008. This analysis will also evaluate how the duty of care and acting in the best interest of the company has been implemented and interpreted as codified in UK and SA, and how this affects the interpretation of the same duties under the COBE Act. The meaning and implications of the business judgement rule, a new addition to the statutory codification that protects directors from errors in judgement and poor decision making will be discussed.[256]

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[255] Cassim et al (n 9 above)19-20
[256] Cassim et al (n 9 above)19-20

3.2 THEORETICAL FRAMEWORK

3.2.1 Shareholder Primacy/Profit Maximisation

The contention in the 1930's between Professor Berle and Professor Dodd commonly known as the Berle Dodd debate has retained its importance to the assessment of directors' duties and the role of the modern company.[257]

In terms of this theory's traditional position Professor Berle argued that the company is synonymous with shareholders and that the primary goal of the company is to maximise profits for the benefit of shareholders who are the ultimate beneficiaries of the company.[258] In other words, shareholders own the company. On that basis it is argued that the company's primary goal is to maximise shareholder returns through the payment of dividends when declared, and the growth in shareholder value and the company's fortunes.[259] In this regard, directors' responsibilities should be limited to prioritising shareholder interests in how the company is run and decisions are made.[260] The theory holds that the company's investor bears the greatest risk and reward in their investment in the company, and on that basis directors must ensure that their interests are prioritised and protected above all other interests surrounding the company.[261]

However, this theory has limitations. The *Salomon* case principle of separate legal personality refutes the assumption that shareholders own the company because shareholders do not own it but only have a shareholding interest in it.[262] Furthermore, a company does not operate in isolation and is able to do business due to a variety of other interested participants, including customers, the community, suppliers and employees all of whom enable the company's economic interests.[263]

3.2.2 Enlightened shareholder value perspectives

This approach strikes a balance between shareholder primacy and other stakeholders' interests.[264] In essence, shareholder primacy is preserved, but there is room for broader

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257 Esser and Du Plessis (n 118 above) 347; Somer (n 9 above) 38.
258 Cassim et al (n 9 above) 518.
259 Hamadziripi (n 69 above) 72; Nwafor (n 16 above) 671.
260 Abbasi (n 74 above) 405.
261 *Dodge v Ford Motor Co* (204 Mich. 459, 170 NW 668(1919) in which the court held that a company is set up for the objective of making profit for shareholders and on that basis directors duties should be carried out in a manner that achieves that purpose.
262 *Short v Treasury Commissioners* [1948] 1 BK 116 at 122.
263 Cassim et al (n 9 above) 518-519.
264 P Queen, Enlightened Shareholder Maximization: Is this Strategy Achievable? 2015. Vol 127, No 3. *Journal of Business Ethics* 683.

inclusion of stakeholders interests.[265] According to this theory, directors are obligated to promote the company's long term success for the benefit of shareholders while balancing the interests of other stakeholders, whose interests remain subordinate to those of shareholders.[266] This approach is intended to resolve competing interests among shareholders and stakeholders. This theory has been criticised because it limits the directors' main goal of enhancing shareholder value, thereby progressing the interests of stakeholders at the expense of the shareholders.[267]

3.2.3 Pluralist Stakeholder approach

This theory states that businesses should be run in a way that maximises the wealth and welfare of various stakeholders who have a stake in the company's operations and activities.[268] This theory was advocated by Professor Dodd on the basis that profit maximisation was not the only goal of the company which was also responsible for wider societal needs.[269] When making decisions and running the company, directors must balance the competing interests of shareholders and other interested stakeholders, according to this theory.[270] Directors must consider societal and environmental factors in addition to profit when making decisions on behalf of the company in the best interest of the shareholders.[271]

The theory's underlying rationale is that companies do not operate in a vacuum, but rely on society to support and enable them to do business and make money.[272] In that regard the interests of other stakeholders should not be relegated to shareholder interests alone.[273] The flaws of this theory stem from directors' accountability to shareholders.[274] Because directors control the company while also being required to be accountable to shareholders this creates a conflict.[275] This conflict arises when decisions are made for the benefit of non-shareholder's stakeholders in circumstances where this contradicts the investment objectives of shareholders.[276]

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265 Cassim et al (n 9 above) 519.
266 Queen (n 264 above) 683.
267 Queen (n 264 above) 683.
268 E Dodd, For Whom Are Corporate Managers Trustees? 1932. Vol 45, No 7. *Harvard Law Review* 1145-1163.
269 Stout (n 5 above) 37.
270 Stout (n 5 above) 37.
271 Stout (n 5 above) 37.
272 Quin, The Sustainable Corporate Objective: Rethinking Directors Duties, 2019. 11. *Multidisciplinary Publishing Institute* 2. doi:10.3390/su11236734 www.mdpi.com/journal/sustainability.
273 Quin (n 272 above) 2.
274 Quin (n 272 above) 2.
275 Queen (n 264 above) 683.
276 Queen (n 264 above) 683.

3.3 CODIFICATION OF THE DUTIES UNDER CA 2006 – UK

3.3.1 General Duties

The statutory duties of directors in the UK are outlined in section 170 of the CA 2006. A company's director has general duties to the company according to section 170(1). According to Section 170 (3) the general duties are based on common law rules and equitable principles that apply to directors and take precedence over those rules and principles when a director owes duties to a company. According to section 170 (4) general duties must be interpreted and applied in the same way that the common law rules or equitable principles are, and that interpretation and application must take the corresponding common law rules and equitable principles into account. This section' structure demonstrates that case law is still relevant in interpreting directors' duties.

3.3.2 Duty of Care, Skill and Diligence

Section 174 (1) requires directors to use reasonable care, skill and diligence when performing their duties on behalf of a company. According to 174 (2) a reasonably diligent director has —(a)the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and (b) the directors' general knowledge, skill and experience. This section creates a statutory obligation for directors to perform their duties with reasonable care, skill and diligence. This is apparent by the use of the word "must" in this section. In assessing this section, a contention arises as to whether the need to exercise reasonable care, skill and diligence applies collectively or whether the requirements of the duty apply on a singular basis as this is not clarified in this section.[277]

The issue of the applicable test to measure compliance with the statutory duty also arises. In that regard consideration of whether the directors' peculiar competencies are the proper yardstick to determine compliance with the duty or whether an objective standard based on what a reasonable person acting as director would act is appropriate in resolving the meaning of compliance with the terms reasonable care, skill and diligence.278 An analysis of this section shows that the test has migrated from the subjective to the objective standard as a measure of compliance based on the objective knowledge of an individual director with the subjective features surrounding his

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[277] Gatsby, Frisby & Hudson (n 1 above) 335 -339.
[278] Gatsby, Frisby & Hudson (n 1 above) 335 -339.

decision making related to his particular competencies being a measure of liability for the objective standard.[279]

In that connection a person acting as director should have the same general knowledge, skill and experience as a director. In the *City Fire Equitable* case, Lord Linley stated that directors fulfil their lawful and justifiable duty to the company if they act with reasonable care given their understanding and knowledge, and whether or not their actions were straightforward for the advantage of the company. Directors are not answerable for ordinary mistakes in decision making. The duty of care, skill and diligence applies to both executive and non-executive directors, as confirmed in *Dorchester Finance Co Ltd v Stebbing*[280], in which the court also held non-executive directors liable for negligence on an objective basis for failure to comply with their duty.

Section 174 of CA 2006 introduces an objective standard to the duty of care. This was confirmed in the case of *Re D' Jan of London Ltd*[281] in which the court applied an objective test in determining that directors actions were negligent in signing an incorrect insurance proposal form without having read the form. In the case of *Re Barings Plc (No 5)*[282] the court held that directors had both collectively and individually, a continuing duty to a acquire and maintain a sufficient knowledge and understanding of the company's business to enable them to properly discharge their duties as directors.

3.3.3 Duty to act in the best interest of the company

Section 172 requires a director to promote the company's success. In so doing a director must according to section 172 (1) act in a way in which he believes, in good faith will most likely promote the company's success for the benefit of its members as a whole. In carrying out this duty this section requires a director to consider and take into account -(a) any decisions likely long term consequences,(b) the interests of the company's employees, (c)the need to the company' to improve its business relationships with suppliers, customers and others,(d)the impact of the company's operations on the community and the environment,(e)the significance of the company's reputation for ethical business practices (f)the obligation to treat all members of the company fairly.

279 Gatsby, Frisby & Hudson (n 1 above) 335 -339.
280 [1989] BCLC 316 Ch D.
281 [1994] 1 BCLC 561 Ch D.
282 [1999] 1 BCLC 433.

Section 172 (2) states that if the company's purposes are not to promote the company's success for the benefit of its members, subsection (1) has the same effect as if the reference to promoting the company's success for the benefit of its members were a reference to achieving those goals. Section 172(3) requires directors to consider the interests of the company's creditors in certain circumstances.

The import of section 172 is that in striving to promote the success of the company directors must act in the best interest of the company. The common law approach did not specifically address the concept of promoting the success of the company as it focused on directors acting in the best interest of the company.[283]

Section 172 outlines six aspects that directors are mandated to consider in running the company. This brings into issue the meaning of the terms "interest of the company" as this is essential in resolving the question of whom directors owe their duties.[284] The duty has two elements that directors are required to meet. Firstly, directors are obliged to act in good faith in making decisions to promote the success of the company for the benefit of the members as a group.[285] In making decisions directors are required to take into account the baseline six factors listed in a manner based on good faith making this an obligatory consideration that directors have to take into account.[286] In *Re Smith v Fawcett*[287] the court emphasised that directors are duty bound to exercise their powers in good faith on the best interests of the company. In that regard the formulation of this section implies that in taking care of the interest of the shareholders the directors have to show that they honestly and deliberately considered stakeholder interest in their decision making.[288] The formulation of this section adopts the Enlightened Shareholder value approach in the way directors are required to perform their duties and is based on a subjective test arising from the structure of the duty.[289]

3.4 CODIFICATION OF THE DUTIES UNDER CA 2008 – SOUTH AFRICA

3.4.1 Duty of care, skill and diligence

Section 76 of the Companies Act of South Africa provides as follows:

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283 *Punt v Symons* [1903] 2 Ch 506; *Hogg v Cramphorn* [1967] Ch 254; Lowry (n 130 above) 22-32.
284 Lowry (n 130 above) 22-32.
285 Lowry (n 130 above) 22-32.
286 See section 171(1) (a) – (f) of the United Kingdom Companies Act 2006.
287 [1942] Ch 304.
288 Queen (n 264 above) 683.
289 Queen (n 264 above) 683; Quin (n 272 above) 6.

"(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director—
(a) in good faith and for a proper purpose;
(b) in the best interests of the company; and
(c) with the degree of care, skill and diligence that may reasonably be expected of a person—
(i) carrying out the same functions in relation to the company as those carried out by that director; and
(ii) having the general knowledge, skill and experience of that director"

The codified duty is largely consistent with the common law position. The emphasis, however, is on the additional requirement of skill and diligence in performing the duty. The duty is owed to the company and is an obligatory duty. The standard of care reflected in the duty is party subjective and partly objective.[290]

The subjective formulation is related to factors specific to the director.[291] The section retains the subjective test in relation to care and skill. In terms of the common law application, the nature of directors' duties is determined by personal factors unique to the director such as the level of knowledge and skill experience possessed by the director.[292] Section 76 (3) (c) establishes a dual subjective and objective test in determining compliance by a director with this duty.[293]

The reference to what a reasonable person would do in the circumstances lays out an objective test of what a reasonable person would do and in this case applies to a reasonable director.[294] The subjective element of the test is applied as specified in section 76 (3) (c) (ii) by assessing the level of knowledge skill and experience of the director.[295] Directors are obliged to follow the objective standard which Cassim defines as a minimum standard that is not limited to the directors' lack of knowledge or experience in terms of what a reasonable person would do.[296]

Section 76 (3) (c) implies a distinction between executive and non-executive directors in light of the test which implies a different standard of care applicable depending on the duties carried out by the director in question. According to Cassim the subjective and objective tests complement each other in raising or lowering the threshold applicable assessing directors' conduct and determining whether compliance with the

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290 Kanamugire and Chimuka (n 26 above) 73-74; Hamadziripi & Chitimira, (n 22 above) 42.
291 Bouwman (n 218 above) 513-514; Kanamugire and Chimuka (n 26 above) 73-74.
292 Kanamugire and Chimuka (n 26 above) 73-74.
293 Bekink (n 219 above) 95-116; Hamadziripi & Chitimira, (n 22 above) 42.
294 Hamadziripi & Chitimira, (n 22 above) 41-42.
295 Cassim et al (n 9 above) 558-559.
296 Cassim et al (n 9 above) 558-559.

duty has been met.[297] Because directors are not a standard group, the objective standard must be flexible and logical .An objective test was applied in the case of *Re D' Jan of London* to determine that a directors actions were negligent in signing an incorrect insurance proposal form without having read it.[298]

3.4.2 Duty to act in the best interests of the company

Section 76(3) retains the common law principle of a directors' duty to act in the best interests of the company. The sections formulation demonstrates that the duty is narrowly construed because it is owed to the company.[299] According to Cassim the definition of a company as defined by the common law means the shareholders and interest attached to their shareholding.[300] As a result directors who perform this duty for the benefit of the company are actually protecting the interest of current and prospective shareholders as company constituents.[301] Directors therefore balance their decision making to protect the interest of all shareholders.[302] In the case of *Parke v Daily News Ltd*[303] the directors were prohibited from making a gratuitous redundancy payment to employees as this did not serve any benefit to the company's short and long terms interest. In that connection the interpretation of this section retains the common law characteristics that the duty is owed to the company exclusively.

3.5 CODIFICATION OF THE DUTIES UNDER COBE ACT – ZIMBABWE

3.5.1 Duty to act with care, skill and attention

The predecessor to the COBE Act, the Companies Act[304] did not include any provisions defining this duty and how it should have been applied.[305] To aid in the definition, interpretation and analysis of the duty, Zimbabwean courts relied heavily on jurisprudence developed by South African and English courts.[306] This reliance especially on South African decisions was based Zimbabwe and South Africa's historical connection in terms of sharing common jurisprudence.[307]

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297 Cassim et al (n 9 above) 558-559.
298 *Re D' Jan of London Ltd* [1994] 1 BCLC 561 Ch D; Bouwman (n 218 above) 511.
299 Louis van Tonder (n 26 above) 712.
300 Cassim et al (n 9 above) 558-559.
301 Louis van Tonder (n 26 above) 712.
302 Louis van Tonder (n 26 above) 712.
303 [1962] 2 All ER 929 (CHD).
304 [Chapter 24:03].
305 See the preamble and section 2 of the Companies and Other Business Entities Act [*Chapter 24:31*].
306 L Madhuku, *An Introduction to Zimbabwean Law*, Weaver Press, 2010.15-18.
307 Madhuku (n 306 above) 15-18.

The codification of the duty of care, is introduced by section 54 (4) of the COBE Act that provides as follows:

> "(1) 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.
> (2) In performing that duty, the manager, officer or director as the case may be referred to in subsection (1) may rely on information, opinions, reports or statements (including financial statements) of independent auditors or legal practitioners or of experts or employees of the registered business entity whom the person reasonably believes are reliable and competent to issue such information, opinions, reports or statements.
> (3) Subsection (2) applies only if the person makes proper inquiry where the need for inquiry is indicated by the circumstances, and has no knowledge that such reliance is unwarranted."

The duty as written expands directors' responsibilities beyond mere care.[308] The requirement for directors to perform their duties on behalf of the company with expertise and thoroughness is introduced. A new requirement for directors is to act sincerely in the best interests of the company. This formulation has the effect of broadening the duty of care. Because the duty of care is an English law concept and the fiduciary duty to act in good faith is a Roman Dutch law construct, the expansion of this duty integrates English and Roman Dutch law elements.[309] This classification and expansion of this duty creates an ambiguity in its interpretation because it is not fiduciary in nature.[310] The formulation of section 54 (4) incorporates fiduciary characteristics into the duty of care.[311] The impact of this expanded duty raises a new question about how to reconcile the potentially contradictory principles that may apply.[312] The duty of care is supported by negligence, whereas good faith, as a fiduciary duty, is supported by a trust relationship.[313]

The basic duty of care requires directors to contemplate the conflict between their duty to manage the company and the opposite interest of shareholders by devoting sufficient time, attention and thoroughness to running the company in a sustainable

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308 Hamadziripi & Chitimira (n 22 above) 40-41.
309 Hamadziripi & Chitimira (n 22 above) 40-41.
310 Hamadziripi & Chitimira (n 22 above) 40-41.
311 Hamadziripi & Chitimira (n 22 above) 40-41.
312 Hamadziripi & Chitimira (n 22 above) 41-42.
313 Hamadziripi & Chitimira (n 22 above) 41-42.

manner by adequately supervising operations and demonstrating the necessary skills and know-how to carry out their duties effectiveness and efficiently.[314]

Hamadzirpi and Chitimira contend that because the applicable standard is unclear, merging the duties may result in legal loopholes and gaps, making it difficult to hold directors accountable for breaches of duty in circumstances where this is potentially misleading and creates confusion in determining whether there has been a breach of the duty.[315] In this connection the formulation of the duty appears to infuse both subjective and objective elements into its interpretation as the duty of care has both objective and subjective elements whilst the duty to act in the interest of the company appears to have a purely subjective element [316]

Looking more closely at this issue, the question of the test proposed by the legislative provisions to measure directors' performance of this duty arises. Section 54 of the COBE Act requires directors to carry out their responsibilities with the skill and care that a conscientious director would apply in the same situation. The section creates a guide and allows directors to seek specialized advice and rely on expert information when making decisions, provided this advice is based on a thorough investigation of the circumstances surrounding the decision.[317] The act does not define key terms, which creates an interpretation problem in itself.

The test proposed in section 54 is an objective test, according to Hamadziripi and Chitimira.[318] They contend that the requirement that directors should perform their duties with the level of competence that a reasonable person would expect demonstrates this.[319] This means that before making decisions on behalf of the company, directors should demonstrate a high level of competence and understanding of company issues, as well as utilise and make proper use of company assets. In this regard the test is a dual partly subjective partly objective test, which the objective test being a minimum standard that is regulated by subjective factors to determine the extent of liability and compliance with the effect of this integration likely to likely to result in greater responsibility on the part of the test taker.[320]

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314 Beate & Anker Sorensen (n 15 above) 157.
315 Hamadziripi & Chitimira (n 22 above) 41-42.
316 Quin (n 272 above) 5-6.
317 See section 54 (1) (2) of the Companies and Other Business Entities Act [*Chapter 24:31*].
318 Hamadziripi & Chitimira (n 22 above) 41-42.
319 Hamadziripi & Chitimira (n 22 above) 41-42.
320 Quin (n 272 above) 5-6; Cassim et al (n 9 above) 558-559.

Duty to act in the best interests of the company

Section 54 (4) (1) retains the common law principle of a directors' duty to act in the best interests of the company. As discussed previously looking at the formulation of section 172 of CA 2006 the sections formulation shows that the duty is narrowly construed because it is owed to the company. In that connection directors who perform this duty for the benefit of the company are actually protecting the interest of current and prospective shareholders as company constituents. Directors therefore balance their decision making to protect the interest of all shareholders. As discussed previously under the formulation of this duty in the UK the interpretation of this section retains the common law characteristics that the duty is owed to the company exclusively as seeing that this section mirrors the provision of CA 2006 it stands to follow that the same basis of interpretation will apply.

3.5.2 Extent of Codification

Section 192(2) of the COBE provides for the application of common law principles in relation to a breach by a director of fiduciary duty, or any loss sustained by the company as a result of the failure to perform a duty in terms of section 54 and section 55 on loyalty. According to Hamadziripi and Chitimira, the structure of this section, which provides for the application of common law principles in assessing a breach of the directors' duty demonstrates that the COBE has partially codified the directors' duty of care, skill and diligence.[321] In that connection the codification is not a full codification of the fiduciary duties of directors.[322] The effect of the codification however is that the law is more easily found and the guidelines constituting the duties are clearer and more clarified.[323] The codification will also provide an opportunity to resolve conflicting principles arising out of contrasting decisions on the interpretation of directors' fiduciary duties.[324] This is an advantage in that it enables directors to know what the law is and what fiduciary duties as stated in the act entail. The codification created an overlap between the statutory and common law duties which means that directors are now duty bound to try and find an applicable balance between the statutory duties as interpreted under common law.[325] However, in the event of conflict the statutory provisions prevail. The effect of codification is yet to be seen in judicial pronouncement.[326] However currently there is a great possibility that the current

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321 Hamadziripi & Osode (n 5 above)
322 Cassim et al (n 9 above) 507 - 508; Lowry (n 130 above) 23.
323 Lowry (n 130 above) 23.
324 Lowry (n 130 above) 23.
325 Cassim et al (n 9 above) 507 – 508.
326 Hamadziripi & Osode (n 5 above).

structure of the duties is likely to create confusion and grey areas which may conflict with the intention behind the codification.[327]

The legal provisions regulating governing directors' conduct in terms of the duty of care are set out in the act as a result of the codification. Because of the partial codification, common law principles will be used as an aid to interpretation in situations where the codification is unclear as to what was intended.

3.6 THE BUSINESS JUDGEMENT RULE

The Business judgement rule was developed in American Law.[328] The rule was established as standard to determine the level of compliance by directors with the duty to act with care, skill and diligence in making decision on behalf of the company.[329] According to the rule directors can be absolved or shielded from the risks consequent to the negative effect of decisions made on behalf of the company provided that they followed the requirements of the business judgement in the manner in which decisions were taken on behalf of the company.[330]

The rationale for this rule is based on the fluid and uncertain nature of business which requires directors to take risks in order to advance the company's economic prospects.[331] The reasoning is that directors are unable to predict with certainty or accuracy the likely effects of decisions they make in managing the company and, as a result should not be penalised when the company suffers losses or other adverse effects as a result of the decisions whether or not they could have been anticipated.[332] In other words, directors should not be judged on their decision making based on armchair reasoning of what a reasonable director would have done in the same circumstances.

Similarly, the court exercises its discretion in analysing director decisions based on armchair reasoning.[333] The court is not in a position to criticise directors' decisions in retrospect because the court lacks the same level of knowledge and expertise about

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327 Hamadziripi & Osode (n 5 above).

328 M Havenga, *The Business Judgment Rule Should We Follow the Australian Example*, 2000. Vol 12. *South African Mercantile Law Journal* 27-29; Cassim et al, (n 9 above) 563 to 565; L McMillan, The Business Judgment Rule as an Immunity Doctrine, 2013. Vol 4, Issue 2, *William and Mary Business Law Review* 226.

329 Bouwman, (n 218 above) 523 to 527.

330 Havenga (n 328 above) 28.

331 Havenga (n 328 above) 28.

332 Mcmillan (n 328) 534.

333 Mcmillan, (n 328) 534.

the business environment and nature of operations of the company run by directors that directors do, which are factors on which directors rely to make decisions for the company.[334]

The rule is applicable on the basis of one of three doctrines: abstention, legal responsibility as a standard, or protection. The abstention doctrine is a creation of American law.[335] The doctrine suggests that the court should avoid making business decisions in the sense of reviewing business decisions made by directors, except in cases where it is clear that elements of business judgement such as conflict of interest, fraud or lack of good faith have been violated.[336] If directors followed the elements of business judgement, were fully informed and acted rationally in making the decision, then the court would have no reason to intervene regardless of the decision's negative outcome.[337] The doctrine however can be refuted on the basis that it is geared towards protecting the company's and shareholders profit maximisation interest by allowing directors to take business risks in order to advance the company's fortunes.[338] The doctrines limitation is that the court is not permitted to consider the reasonableness of a decision made.[339] The effect of the doctrine is that it also restricts the rule to establishing an onus with regard to the manner in which the decision has been made. Finally, the doctrine ultimately benefits directors by shielding them from judicial scrutiny for breach of the duty of care.[340]

The immunity doctrine shields directors from liability for decisions made on behalf of a company if they were made in their official capacity as directors'. Directors must demonstrate that the manner in which decisions were made qualifies them for protection under the business judgement rule.[341]

The business judgement rule primarily serves as a standard of liability to determine whether directors performed their duties properly when making decisions on behalf of the company.[342] In order to remove a director from the protection of the business judgement rule it must be proven that the director acted fraudulently, was conflicted

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334 *Howard Smith v Ampol Petroleum Limited* [1974] AC 821.
335 Hamadziripi & Osode (n 5 above) 583; *Stalap Investments (Pvt) Ltd v Willoughby's investments (Pvt) ltd* HH – 726-19; Hamadziripi, (n 69 above) 163; Mcmillan (n 328 above) 534.
336 Mcmillan (n 328 above) 534.
336 *Howard Smith v Ampol Petroleum Limited* [1974] AC 821.
337 Havenga (n 328 above) 29.
338 Mickels (n 15 above) 282.
339 *Howard Smith v Ampol Petroleum Limited* [1974] AC 821.
340 *Howard Smith v Ampol Petroleum Limited* [1974] AC 821.
341 Hamadziripi & Osode (n 5 above) 167; McMillan (n 328) 567.
342 Hamadziripi & Osode (n 5 above) 167; McMillan (n 328 529.

or acted in bad faith.[343] This approach has been criticised because it gives the impression that directors decisions were made within the parameters of the business judgement rule in the first instance.[344] According to this approach if there is no evidence of misconduct, the court will not review the decisions of directors.[345]

3.6.1 The Business Judgement Rule in the UK

The UK lacks a statutory BJR.[346] The subjective formulation of the test for directors' liability for breach of the duty of care as framed in the *City Equitable Fire* case is dependent on directors' personal skills. The case provided the necessary flexibility in dealing with commercial realities and the dynamic nature of business practices in terms of the formulation of the applicable duty and standard.[347] Directors in the UK directors are supposed to be judged on their personal skills as confirmed in the *Re Barings Plc and Ors* case.[348] The duties of care and skill in the UK are based on flexible standards that are assessed based on the facts of each case as well as the nature and type of company in question.[349] Because directors are not liable for simple negligence, as is the case in the American application of the rule, the only requirement is that they acted in good faith and honesty in furthering the interests of the company.[350]

Furthermore, the BJR'S potential application is hampered by the complexities of bringing a derivative action in the UK.[351] In order to file a Derivative action in the UK, shareholders must demonstrate that the company is under the control of wrongdoers and that the breach complained of is not ratifiable by shareholders.[352] This is determined by the interpretation of wrongdoer control. The Derivative Action according to Giraldo, is not ordinarily applicable for a director's breach of the duty of care because judicial decisions on the issue require the wrongdoer element to be demonstrated by evidence of effective control, as well as the difficulty of meeting the requirement for ratification of the wrong action.[353]

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343 C Giraldo, Factors Governing the Application of the Business Judgement Rule: An Empirical Study of the US, UK, Australia and the EU, 2006. *University of Bogota (Columbia)* 133 to 137.
344 Quin (n 272 above) 6.
345 Quin (n 272 above) 6.
346 Giraldo n 343 above) 33 to 137.
347 [1999] 1 BCLC 433.
348 [1999] 1 BCLC 433.
349 *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407.
350 Quin (n 272 above) 6.
351 Quin (n 272 above) 8.
352 Giraldo (n 343) above 134-135.
353 Giraldo (n 343) above 134-135.

Furthermore, directors in the UK face a lower liability threshold, making legal action for breach of duty of care less likely.[354] In general, unless the decisions were made in bad faith, the courts in the UK do not get involved in reviewing the director decisions.[355] In general, the courts contend that director decisions should not be judged retroactively.[356] Due to the courts reluctance to intervene in decisions made in good faith for a proper purpose by directors, a common law BJR applies in the UK in this regard. [357]

3.6.2 The Business Judgement rule in South Africa

The Business judgement rule in South Africa is codified in section 76(4) of the Companies Act which states that:

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

The rule was enacted to serve as a standard for assessing directors' adherence to the duty to act in the best interests of the company and with care, skill and diligence.[358]

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354 Blake and Bond (n 142 above) 114.
355 Quin (n 272 above) 6.
356 *Howard Smith v Ampol Petroleum Limited* [1974] AC 821.
357 Giraldo (n 343) above 134-135.
358 Muswaka (n 45 above) 27 – 31.
359 Havenga (n 328 above) 28.
360 Havenga (n 328 above) 28.
361 Muswaka (n 45 above) 29-30.
362 Muswaka (n 45 above) 29-30; Cassim (n 9 above) 363-366.
363 Quin (n 272 above) 6.

Because directors are liable for both errors in commission and omission arising from decisions made that are not in accordance with the rule's requirements, the duty applies only when a decision has been taken.[359]

In terms of the South African formulation a director in the first instance is required to have reasonably informed himself of the matter that is subject to a decision to be taken.[360] The act is silent on how this requirement is deemed leaving, unanswered the question of how compliance with this aspect is assessed. According to Muswaka, the implication of this requirement is that a director must take reasonably diligent steps to inform himself is assessed based on delictual principle of wrongfulness taking into account what society would regard as reasonably diligent steps required for a director to inform himself about a matter on which a decision is to be made.[361] This is essentially an objective test to determine rule compliance because the enquiry would concern whether reasonably thorough steps were taken, and, if not, whether that conduct can be considered wrongful.[362]

The formulation of this duty, as well as the common law interpretation of the duty of care, which considers personal factors of directors and the company relevant to how the decision was made, allows for subjective assessment of compliance with this duty.[363] Personal factors considered may include the nature of the decision to be made, the level of knowledge and skills of the director, the type and size of company involved, and the quality of information relied on[364]. Because of these factors the test is partly subjective, Muswaka on the other hand, believes that the test remains objective because it is based on rational community expectations.[365]

The second requirement is that the director making the decision have no material financial interest in the decision's subject matter.[366] The amount of such monetary

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[364] Muswaka (n 45 above) 29-30.
[365] Muswaka (n 45 above) 29-30.
[366] See section 76(4)(a)(ii) of the South African Companies Act 71 of 2008.

interest is not specified in the act. However, interest is material if it puts the director in conflict with the company, putting him in a position where he likely to make a personal gain from the transaction or gain a material financial advantage from making the decision.

Finally, the board of directors must be confident that the decision is in the best interests of the company.[367] The act makes no distinction between what constitutes rational belief and what does not. According to this section, a director must have acted independently and considered all material factors relevant to making a proper decision. Muswaka observes that section 180(2) of the Australian Corporations Act, provides guidance, defining a rational belief as one formed in the best interest of the company, unless the belief is one which no reasonable person would hold. This opens the door to the argument that compliance with this requirement should be determined using an objective test.[368]

3.6.3 Business Judgement rule in Zimbabwe

Section 54 (4) of the COBE Act introduced a provision into Zimbabwe company law known as the business judgement rule. The section provides that:

> "(4) A person who makes a business judgment acting as stated in subsection
> (1), (2) and (3) fulfils the duty under this section 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
> (c) honestly believes when the judgment is made that it is in the best interests of the company or corporation."

Before a director can seek BJR protection, four requirements must be met, according to this section. The first requirement is that the director have no personal financial interest in the transaction.[369] The definition of a personal interest is derived from section 56. The section, unlike the SA formulation, does not specify the nature of the interest, implying that it does not have to be material, implying that any interest can be covered and subject to the transaction. In some ways, the nature of the interest

367 Muswaka (n 45 above) 29-30.
368 Hamadziripi & Osode, (n 5 above) 584.
369 See section 54(4)(a) of the Companies and Other Business Entities Act [*Chapter 24:31*].

considered raises the liability threshold. Section 56 of the COBE Act, on the other hand, refers to a direct material personal interest. This narrows the scope of application of the interest that may or may not be material or personal.

The SA formulation prohibits a director or related persons from having a financial interest in the subject of a financial decision in this regard.[370] The UK position is similar to the SA position in that the implied BJR allows court to intervene in cases where directors have made decisions that are clearly contrary to the interests of the company for personal gain.

The second requirement is that a director be informed before making a decision about the decisions subject matter.[371] The section enables the director to rely on information, opinions and reports from experts, lawyers and auditors. Before placing this reliance, a director must be satisfied that the information has been prepared by competent and reliable individuals, as a director cannot take information received at face value. A director meets the test of acting reasonably in seeking to be fully informed if he makes a decision after satisfying himself on the quality of the information received in circumstances where his actions in this connection are what a reasonable person would have done in the circumstances.[372]

This section also necessitates a thorough investigation by a director. The term "proper investigation" is not defined. In contrast the SA formulation requires a director to be reasonably informed as opposed to fully informed. This requirement places a very high burden on directors prior to making decisions, potentially stifling business and innovation, because having all the facts relevant to a decision to be made may not be practical or comply with the dynamism of business, sometimes requires decisions to be made in circumstances where full information may not be available at the time the decision is made.[373]

The requirement's required test is unclear. Given that full information may be related to the company's unique circumstances, as well as the type of information received and how it was received, which would attribute personal factors internal to the company and the director receiving the information to this aspect, the test can be justified on a subjectively.[374] The test can also be objective, because the factors

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370 See section 76(4)(a)(ii) of the South African Companies Act 71 of 2008.
371 See section 54(4)(b) of the Companies and Other Business Entities Act [*Chapter 24:31*].
372 Muswaka (n 45 above) 29-30.
373 Hamadziripi & Osode, (n 5 above) 584.
374 Hamadziripi & Osode, (n 5 above) 584.

pertaining to this investigation can be based on what is reasonably considered complete information for decision making purposes. According to Hamadziripi and Osode, the test should be objective and based on reasonableness which is the Australian standard established in the case of *ASIC v Rich*. In this case the Supreme Court of Australia agreed that an objective standard is applicable in considering information for purpose of making decisions.[375]

When making a decision, the third requirement is for a director to have an honest belief that it is in the best interests of the company.[376] The director must show that he truly believed the decision was made in the best interest of the company.[377] The formulation of this section envisions a subjective test because the manner and basis on which the decision is made is dependent on personal factors related to the director of the company. This section is distinct from the requirement in the SA Act as a rational belief that the decision is in the best interests of the company, which is based on logic and assumes an objective test.[378]

The meaning of "best interests of the company" in this section is determined by the company's philosophical outlook as well as the nature and purpose of the decision to be made.[379] As previously stated, the context in which the company is viewed determines its nature and meaning, taking into account the applicability of the pluralist or stakeholder approach, enlightened shareholder approach, and shareholder primacy approach that can be used.[380]

This takes into account the previously discussed section 195 of the COBE Act, which requires directors to consider and take into account interests of other stakeholders in making decisions on the best interest of the company. The act's wording clearly favours an enlightened shareholder approach, in terms of which directors required to act in the best interests of the company whilst considering stakeholder interests.[381] However, there is a conflict in the emphasis on the need for directors to first consider and promote the company's success, effectively relegating stakeholder considerations to a second tier after the company's interests.[382]

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375 Muswaka (n 45 above) 29-30.
376 See section 54(4)(c) of the Companies and Other Business Entities Act [*Chapter 24:31*].
377 Hamadziripi & Osode, (n 5 above) 584; Muswaka (n 45 above) 29-30.
378 Hamadziripi & Osode, (n 5 above) 584.
379 Mcmillan (n 328) 534.
380 Mcmillan (n 328) 534.
381 Cassim et al (n 9 above) 519.
382 Cassim et al (n 9 above) 519.

Section 197 of the COBE Act provides that:

> "(2) A director of a company may be held liable—
> (a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of—
> (i) a duty contemplated in section 54 ("Duty of care and business judgment rule "), 55 ("Duty of loyalty")"

This section provides a sanction mechanism against directors that fail to make proper business judgements as directors can be held personally liable for decisions that negatively affect the company or lead the company to financial ruin. Finally Hamadziripi and Osode argue that the BJR should be interpreted in a way that promotes accountability rather than judicial deference to decisions made on behalf of companies by directors, this can lead to abuse of corporate authority.[383]

3.7 PRELIMINARY CONCLUSIONS

In this chapter the development of directors' duties into the statutory framework of company legislation was examined. This discussion put into perspective the theoretical context arising from the shareholder primacy, enlightened shareholder value and pluralist theories.

Essentially the fiduciary duties of directors retained their common law characteristics which require that they be undertaken for the benefit of the company reflective a dominant enlightened shareholder value approach. However, the test for the duty of care has developed into a more stringent dual partially subjective partially objective test on the basis of an objective minimum standard regulated by subjective factors. The test for acting in the best interest of the company has however remained largely subjective.

There is however a more deliberate approach to accommodate stakeholder interests as shown in section 172 of CA 2006 which is mirrored in section 195 of the COBE Act which mandates directors in making decisions for the best interest of the company and in good faith to consider the interest of stakeholders.

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383 Hamadziripi & Osode, (n 5 above) 584.

The impact of the Business judgement rule however serves to extend the protection afforded to directors for taking decisions that have adverse consequences to the company which has a negative implication on stakeholder interest as long as they are made in the best interest of the company.

Chapter Four

Corporate Social Responsibility and the interplay with the directors' duty of care and acting in the best interest of the company

4.1 INTRODUCTION

This chapter examines the concept of CSR and in relation to its meaning, emergence, and relevance on the modern day company and business. An analysis of how CSR influences the scope, interpretation and application of the duties of care and acting in the best interest of the company in Zimbabwe as compared with how this applies in the UK and South Africa will be undertaken.

4.2 ORIGINS OF CSR

Traditionally companies were run and decisions were made with the sole purpose of prioritising the profit interests of shareholders.[384] With the advent of increased focus on human rights and a consumer conscious society, however, there was greater assessment of the activities of businesses and whether or not their activities were beneficial to society beyond their purpose and objectives to operate and make profits.[385] As businesses grew into multi-national corporations, the subject of CSR gained traction and became more relevant to modern business.[386]

4.2.1 Theoretical Framework of CSR

The underlying theories of directors' duties as previously discussed in terms of the Agency Theory and Social Contract or Corporatist Theory are relevant in the discussion of CSR and the approach of directors to CSR. As stated previously the Agency Theory suggests that directors make decisions on behalf of companies based on the fact that they owe fiduciary duties to the company based on contract. On that basis the priority of directors in running the company is to ensure that the shareholders interest to make a profit from their investment in the company is prioritised to the exclusion of other stakeholder's interests.[387] The Social Contract or Corporatist Theory suggests that

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384 M Khan et al, Corporate Social Responsibility (CSR) – Definition, Concepts and Scope (A Review), 2012.Vol 2 No 7. *Universal Journal of Management and Social Sciences* 41; Clarke (n 15 above) 531.
385 Clarke (n 15 above) 531.
386 Khan et al (n 384 above) 42.
387 Khan et al (n 384 above) 42; Jensen & Meckling (n 80 above) 310-311.

businesses have an implied agreement with the community that requires business to further its economic interest in a manner that is also beneficial to the community.[388]

4.3 DEFINITION OF CSR

CSR has been subject to varied interpretation by different authors with debate on the meaning and implication of the term to modern business depending on the context in which it is being utilised. According to Reinhardt et al (2008) and Benabou and Tirale (2009) CSR is defined a profit sacrifice for the sake of social good which requires the company to go above and beyond its legal and contractual obligations.[389] The social good aspect includes activities such as workforce relations, eco-friendly initiatives, support for the arts and creativity, education investment and other societal good causes.

Taking into consideration the various definitions applicable, Khan et al concluded that the 2001 European Union Commission description of CSR as a voluntary exercise in which businesses integrate societal and ecological issues into their business operations and dealings with other stakeholders was generally accepted as appropriate as it allowed for a broad range of CSR activities including conservation, poverty eradication, employment creation and industry practices.[390]

CSR was redefined by the EU in 2011 as a company's obligation to consider the societal impact of its business activities. The shift in how CSR is defined has implications for directors' responsibilities because it denotes that CSR is now a mandatory consideration that has to be taken into account and included in the way in which a company operates as opposed to the previous position in which CSR as implemented on a need to do basis. This redefinition makes CSR a mandatory element of directors' duties in their decision making when operating the company.[391]

4.4 IMPORTANCE OF CSR

The company has grown to be extremely important to society and the state arising from the significant effect that business has on the economic, social and political modern way of life.[392] Companies generate wealth through their operations, which allows the government to develop society through corporate taxes paid to government by business.

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388 Dodd (n 268 above) 1145 -1163.
389 Khan et al (n 384 above) 42.
390 Khan (n 384 above) 44; Beate & Anker-Sørensen (n 15 above)163-164.
391 Beate & Anker-Sørensen (n 15 above).
392 Beate & Anker-Sørensen (n 15 above) 153; Sealy & Worthington (n 35 above) 1.

Companies invest significant capital in developing their business, which necessities employment of labour and development of technology to increase the capacity of production of goods and services required by society.[393] Businesses have become an integral part of society and, as a result, have assumed a complimentary role to government efforts to develop society and improve people's livelihoods.[394] This secondary role is a natural result of businesses' significant impact on modern life. The scrutiny of company activities is also prompted by the fact that the company operates in an environment populated by numerous other interested parties, including the state itself, commercial rivals, contractors, the community and the workforce all of whom have vested interests in the nature, manner and effects of the company's operations which creates cross cutting legal obligations arising between the company and these other stakeholders.[395]

The rise of multinational corporations in society and their impact on society and the environment has resulted in company activities coming under increasing critical observation, particularly due to the negative effects that corporate activities sometimes have society and the environment.[396] As an example the BP Deepwater Horizon oil spill in 2010 in which directors of BP were faced with a disaster that had serious adverse consequences on ecology resulted in BP being held liable in 2015 for civil settlement claims in the sum of 20.8 billion dollars with US authorities.[397] Another example of the failure by companies to take account of the negative consequences of their activities to the needs of society and environment arose in the VW case where the company falsified laboratory emission results of their cars in circumstances where the cars were emitting pollutant gases into the atmosphere.[398] Cases such as BP and VW reflects impact the attitude of directors whom manage and control companies and are responsible for its activities can have on society in circumstances where profit is prioritised at the expense of other interests including the society and environment.

4.5 LEGAL COMPLIANCE WITH CSR

The competing interests of the directors' main duty to promote the company's purpose and objective of the company to make money and meet its economic objectives have

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393 Stout (n 5 above) 37.

394 M Kabir, J Petersen & M Petersen, Corporate Social Responsibility Evolution in South Africa, 2015. Vol13 Issue 4. *Problems and Perspectives in Management* 281.

395 Esser and DuPlessis (n 118 above) 348 -349.

396 Clarke (n 15 above) 572.

397 Clarke (n 15 above) 572.

398 Clarke (n 15 above) 572.

a significant impact on the approach taken by directors in fulfilling with their duties.[399] In this context, the way directors perform their duties and prioritise CSR is informed by both the legal and moral factors underpinned by applicable legislative provisions.[400] Because businesses exist to make a profit, directors are likely to apply and interpret their duties in relation to CSR based on whether or not it will have a positive economic impact and long term sustainability of the company.[401] Sustainability has been defined as the manner of making decisions in their operations in which directors consider advancing protection of the environment, social justice and exercise economic and financial discipline for the betterment of society.[402] In cases where expenditure on CSR does not translate to an outcome that results in increased profits, or an economic benefit to the company, directors may face a management agency conflict when considering and implementing CSR initiatives where this fulfils a moral rather than economic purpose for the company.[403]

CSR considerations highlight the conflict between the company's traditional economic interests and profit maximisation objectives and the considerations of the environment in which businesses operate, which includes other stakeholders.[404] Because of the conflict between these two conflicting interests, the profitability and corporate citizenship of the company are critical issues for directors to consider and reconcile in making decisions for companies.[405] Because the failure to prioritise CSR carries no legislated consequences other than a market perception, the fact that it is not specifically legislated in many jurisdictions hinders enforceability and instead maintains CSR as a moral obligation for directors rather than a mandatory legal requirement.[406]

Companies have become conscious that in order to achieve and sustain long term growth, the needs of other stakeholders must be incorporated into how the company operates.[407] The relationship between the company, the state and society has changed as it has become an important component in how business is conducted and decisions made on the company's behalf. However, this approach runs counter to the profit driven goal of doing business.[408]

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399 Beate & Anker-Sørensen (n 15 above) 159-160.
400 Beate & Anker-Sørensen (n 15 above) 159-160.
401 Clarke (n 15 above) 541.
402 Clarke (n 15 above) 541.
403 Dine (n 89 above) 28- 29; Clarke (n 135 above) 570.
404 Kabir, Petersen & Petersen (n 394 above) 281.
405 Kabir, Petersen & Petersen (n 394 above) 281.
406 Zivengwa, Mbizi & Manyeruke (n 21 above) 674.
407 Cassim et al, (n 9 above) 495 – 497.
408 Cassim et al, (n 9 above) 495 – 497.

4.6 CSR IN THE UK

The UK government promoted the advancement of a sustainable and balanced economic growth in the UK by advocating for CSR to build a stronger society.[409] In the UK the expectation of society is that business should contribute to social investment through local economic development initiatives in a manner that every business can adopt not just by big corporations. [410] CSR in the UK is now underpinned by section 172(1) of CA 2006 that requires directors to consider the impact of their operations on interested stakeholders including the community and environment.[411] Section 172 (1) of CA 2006 will be discussed below.

4.7 CSR IN SOUTH AFRICA

There are no specific laws that regulate CSR in South Africa.[412] The King Reports which contain voluntary recommendations mainly reflect South Africa's position on CSR and corporate governance.[413] The triple bottom line approach, which considers stakeholder's interests, was adopted by King III.[414] According to this recommendation CSR is a company's responsibility and directors should consider for the impact of their decisions and activities on society and the environment. Business according to King III, must be run in an honest and open manner in order to achieve long-term growth while also taking other stakeholder's interests into account.[415]

King IV promotes the concept of corporate citizenship, arguing that because of the business environment in which they operate, companies, as legal entities, are subject to the rights and obligations that come with that status.[416] Corporate governance according to King IV is concerned with how directors carry out their responsibilities.[417] Corporate Governance according to King IV, is defined as ethical and effective leadership that entails running the company with expertise, uprightness and accountability.[418] This also necessitates directors taking into account the company's

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409 C Fonceca & A Jebaseelan, CSR in UK and in India- An Overview, 2013. Vol 1, Issue 18. *Asian Academic Research Journal of Social Sciences and Humanities* 337 – 338.
410 Fonceca & Jebaseelan (n 409 above) 337-338.
411 Clarke (n 15 above) 570.
412 M Kabir, J Petersen & M Petersen (n 394 above) 284.
413 Cassim et al (n 9 above) 495; Bouwman (n 218 above)
414 Cassim et al (n 9 above) 495; King III Report at 22 para 18.
415 Cassim et al (n 9 above) 495.
416 King IV at 11.
417 King IV at 11.
418 King IV at 11.

economic, social and environmental impact.[419] The lack of legislative intervention, on the other hand, hampered the voluntary recommendations implementation although the courts in South Africa are now incorporating the King Code into their judgements and interpretation of directors' duties.[420]

Apart from the King recommendations, mining companies are required to submit environmental management plans to government as a pre requisite to commencing operations. The Johannesburg Stock Exchange also now incorporates some of King IV's requirements as part of their listing requirements.

4.8 CSR IN ZIMBABWE

Studies on CSR in Zimbabwe revealed common thematic elements that point to the fact that current CSR initiatives are primarily voluntary and philanthropic in nature, with company directors acting primarily on a discretionary need-to- basis, as opposed to long term sustainable initiatives.[421] Most businesses currently prioritise shareholder interest and profit maximisation over CSR. [422] This state of affairs has been attributed to the lack of a deliberate and purposeful enforceable statutory framework mandating the application and regulation of CSR as several pieces of legislation that deal with aspects related to CSR which are not in unison and serve industry specific and policy aspects.[423]

4.8.1 Section 195 of COBE Act

Section 195 of COBE provides that:

> "(4) Each or every director (as the case may be) 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.
> (5) For the purpose of subsection (4), every director shall have regard to, among other things—
> (a) the long-term consequences of any decision;
> (b) the interests of the company's employees;
> (c) the need to foster the company's relationships with suppliers, customers and others;

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419 King IV at 11.

420 *South Africa Broadcasting Corporation Ltd & Anor v Mpofu* [2009] 4 All SA 169 (GST).

421 Maposa (n 16 above) 190.

422 Chidyausiku and Muzingili (n 20 above) 61.

423 T Nyawuyanga, *'Corporate Social Responsibility as a Tool to Accelerate the Achievement of Development Goals in Zimbabwe'* (Unpublished thesis, University of the Western Cape, 2015) 23.

(d) the impact of the company's operations on the community and the environment;
(e) the desirability of the company maintaining a reputation for high standards of business conduct;
(f) the need to act fairly as between shareholders of the company."

Section 195 (4) and (5) of the COBE Act is identical to section 172 of the CA 2006. The section has a dual effect as it creates a requirement for directors ensure the success of the company by acting in the best interest of the company, whilst taking into account stakeholder interests as listed. This welcome compromise position adopted by the section is an attempt at bridging the gap in the conflict between shareholder and stakeholder interest in so much as the section attempts to implement a change of mind set in directors' decision making as they have to pay attention to stakeholder interests in the decision making process as a matter of practice rather than liability.[424]

In that regard and taking into account that the interest of the company has been held to be that of the shareholders, it is clear that the formulation of this section retains the common law aspect that to the effect that directors owe their duties to the company in the first instance with the consideration of stakeholder interest being considered to the extent that they benefit the interest of the company.[425] Lowry contends that in carrying out these responsibilities, directors must ensure that the six fundamental aspects of CSR inform their deliberations in decision making and are not simply dealt with informally for the sake of formality, as this will not suffice to demonstrate compliance with the duty to promote the company's success.[426] What promotes the company's success, on the other hand, is entirely within the directors' control and decision making. As a point of principle court will not interfere unless good faith is lacking from the decision making.[427]

The formulation of section 195 of the COBE Act implies that in taking care of the interest of the shareholders the directors have to show that they honestly and deliberately considered stakeholder interest in their decision making.[428] The subjective test applicable which underpins the Enlightened Shareholder value approach adopted in this section gives wide discretion to directors to determine what they consider to be

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424 G Tsagas, Section 172 of the Companies Act 2006: Desperate times call for Soft Law Measures. In N Boeger & C Villiers, *Shaping the Corporate Landscape: Towards Corporate Reform and enterprise Diversity*, Hart Publishing, 2018. 131-150.
425 G Tsagas (n 424 above) 131 -150.
426 Lowry (n 130 above) 22-32.
427 Lowry (n 130 above) 22-32.
428 Lowry (n 130 above) 22-32.

decisions necessary in the best interest of the company.[429] In that connection taking into account the difficulty of proving that a director failed to act in good faith,[430] coupled with the reluctance of the courts to review business decisions in retrospect[431], and the protection offered by the BJR,[432] the impact of this section is undermined and rendered limited in this connection.

4.8.2 National Code of Corporate Governance

The 2014 Zimbabwe National Code on Corporate Governance ("the Code") that came into effect in 2015 was a government supported initiative to develop a national corporate governance code covering all sectors of the economy. The code takes into account corporate social responsibility issues guided by the three "**Ps**" – people, planet and profit. The importance of CSR is recognized in this regard despite the fact that there is no definition given in the code of what CSR or the terms people, planet, profit entail.[433]

Chapter 3 paragraph 131 (b) of the code proposes that the CEO and senior managers should ensure that the company has a corporate culture that promotes sustainable ethical practices, encourages individual integrity, and fulfils the company's social responsibility objectives and imperatives, including compliance with all relevant laws, failing which they must explain the failure to the company's board and stakeholders.[434]

Chapter 8 of the code that deals with stakeholder relationships takes into account section 73 of the Constitution of Zimbabwe that provides for the right to a sustainable environment that is not harmful to health. Section 109 of the Constitution of Zimbabwe that provides for the right to ecologically sustainable development and use of natural resources while promoting economic and social development. This section of the constitution requires government to take legislative and other measures, to achieve the progressive realization of these rights.[435]

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429 *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306.
430 G Tsagas (n 424 above) 131 -150.
431 *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306.
432 *Howard Smith v Ampol Petroleum Limited* [1974] AC 821.
433 The Zimbabwe National Code on Corporate Governance at 8.
434 The Zimbabwe National Code on Corporate Governance at 40.
435 The Zimbabwe National Code on Corporate Governance at 98.

The code acknowledges that a company has multiple interests. It has a large number of stakeholders who have a vested interest in its operations and outcomes. The code underscores that the operations of companies have an impact on the community in which it operates, the national economy and the community as a whole. As a result, the code calls for the striking of a balance in corporate governance between maximisation of shareholder value and interest and protection and promotion of other stakeholders. Creditors, lenders, suppliers, customers, employees, society in general and communities are given as examples of stakeholders.[436]

The code requires integrated and long term reporting that should also address environmental, social and governance issues that affect the company's operations.[437]

4.8.3 The Mines and Minerals Act [*Chapter 20:05*]

This act was established to regulate the mining of the country's mineral resources. Mining is an activity that, by definition, has the potential to negatively impact the environment and community in which operations take place due to pollutant effects and environmental degradation, both of which have a negative impact on society and wellbeing.[438] The act makes provision to protect and manage the social and environment rights of communities where mining activities occur in a sustainable manner.[439] The act includes provisions that establish obligations for CSR activities in the mining sector with the goal of mitigating the potentially negative effects on mining communities.

4.8.4 The Indigenisation and Economic Empowerment Act [*Chapter 14:33*]

This statute was enacted to address Zimbabwe's historical colonial imbalance in the wealth distribution in key economic sectors. The act's initiative was to ensure social and economic equity of previously disadvantaged ethnic population in key economic sectors.[440] The act established Community Share ownership schemes which required mines to give at least 10 percent ownership in mines to local communities for purposes of fundraising for development initiatives in mining communities.[441] This requirement

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436 The Zimbabwe National Code on Corporate Governance at 98.
437 The Zimbabwe National Code on Corporate Governance at 98.
438 Section 188 of the Mines and Minerals Act [*Chapter 21:05*].
439 Section 188 of the Mines and Minerals Act [*Chapter 21:05*].
440 Indigenisation and Economic Empowerment Act [*Chapter 14:33*].
441 Indigenisation and Economic Empowerment Act [*Chapter 14:33*].

for Community share ownership schemes applied to entities with a US$ 500 000 or greater asset base.[442]

4.9 PRELIMINARY CONCLUSIONS

In this regard it will be observed that the National Code of Corporate Governance as read with the COBE Act create a legal framework within which CSR can be implemented taking into account the enlightened shareholder value approach taken by the COBE in terms of the structure and interpretation of section 195 suggested. Directors therefore essentially owe their duties to the company in the first instance but now have a mandatory obligation to actively consider CSR elements in how the company is run and decisions are made.

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[442] Indigenisation and Economic Empowerment Act [*Chapter 14:33*]

Chapter Five

Conclusions and Recommendations

5.1 INTRODUCTION

The responsibility of company directors for the manner in which they run companies makes their role in business and the economy and society in general very important. The actions of directors of companies can have harmful effects on the business environment in which it operates comprised of the community and the environment and employees internally within the company in the event that companies are run recklessly and for self-serving purposes without regard to the interest of other stakeholders. In that connection the competing interest is for companies to become active corporate citizens that operate in a sustainable manner for the benefit of the wider interest of stakeholders in a manner that is not voluntary but arises out of mandatory obligation. This factor shows that the traditional conflict between how directors utilise their discretion to undertake free enterprise in its entirety and make decisions on behalf of the company in a manner that addresses the needs of the company on the one hand whilst at the same time being liable to account for their actions to shareholders and wider stakeholders whose interest's directors are also liable to protect. This study approached this conflict in the context of CSR based on a comparative approach in respect to how directors' fiduciary duties to act with care, skill and attention, and in the best interest of the company balances the competing interest between shareholders and the wider stakeholders. In that context this chapter summarises the discussion and findings observed from the research and gives conclusions and proposes recommendations to the problems identified based on the outcome of the research.

5.2 RECAPITULATION

Chapter one dealt with the introduction and general summary of the dissertation outlining the research questions, methodology and sources.

Chapter two focused on an examination of the historical development of the directors' duties of care and the fiduciary duty to act in good faith in the interests of the company. This examination also took into account the theoretical context surrounding the development of the duties and how this interacted with the conflict between the obligation of directors to exercise good faith in acting the best interest of the company with reasonable care skill and diligence. The relationship between the director and the company in connection with the duties owed to the company and the attendant rights the competing interests of other stakeholders as assessed through the development of these concepts in case law showed that these duties are primarily owed to the company.

The formulation of the common law duty of care and acting in the best interest of the company pointed to the fact that these duties have historically been assessed based on a subjective test related to the directors' personal subjective characteristics which were the determining factor in assessing compliance and liability.

Chapter three examined how codification of the directors' duties of care and acting in the best interest of the company are structured and ought to be interpreted taking into account the developed common law principles on which the statutory duties were based and structured. Under the common law directors' fiduciary duties were owed exclusively to the company being the shareholders. The changes brought about by modern codification and how this impacted the traditional obligations of directors in terms of whom they owed their fiduciary duties and that of acting with care was undertaken in context of the competing agency and stakeholder theories which are also reflected in the structure of the statutory duties in a manner liable to interpretation. Codification has largely retained the priority of the interest of the company with stakeholder interests being subordinate to the shareholder's interest. However, the formulation of the duties and development of interpretation has shifted to an objective test underpinned by a subjective assessment as a measure of liability in respect of the duty of care, which is a more stringent test. The test for the duty to act in the best interest of the company has remained largely subjective with room for an objective minimum standard taking into account the combination of these duties within the COBE Act.

Chapter four examined the concept of CSR and in relation to its meaning, emergence, and relevance on the modern day company and business. This chapter examined how CSR influences the scope, interpretation and application of the directors' duties taking into account the conflicting interests between the company and that of other wider stakeholders. The assessment of who directors owe duties in light of the codification of the duty of care and acting in the best interest of the company which is based on an enlightened shareholder value formulation was undertaken bases on the common law interpretation that has been incorporated as mandatory guidelines in the codification of the duties.

5.3 CONCLUSIONS

The *Keech v Sandford* case and the South Sea Bubble were landmark developments in shaping the historical development of directors' duties of care and fiduciary duties of acting in the best interests of the company. The conflicting interest between the obligations owed by directors to the shareholders and the interest of the wider stakeholders were placed into perspective by the theoretical framework that defined how the duties developed under common law and eventually codified. The main contrasting theories assessed were the reliance theory that emphasises the obligation of directors to the company based on a relationship of confidence and trust. The corporatist theory on the other hand encompasses wider obligations on directors as the theory posits that the duties are owed not only to the company but wider stakeholders and societal interest within the business environment within which the company operates. In undertaking these duties, the directors are obliged to ensure that in acting on behalf of the company they act with independent discretion, are not conflicted, do not make secret profits and utilise their powers to operate the company for proper purposes for which it was intended with these aspects having an impact on the conflict as to who directors' duties are actually owed.

The study observed that the common law essentially defines a company as being the shareholders although this contrast with the principle of separate legal personality as established in the *Salomon* case. This definition of what a company is had a material effect on the common law considerations of who directors owed their duties. This however was modified by statutory guidelines which gave allowance for other stakeholder interests beyond the company to be considered though not implicitly on the basis of any duties owed to the stakeholders and societal considerations. This is apparent from the analysis of the three main theories being the shareholder primacy, pluralist and enlightened shareholder value theories which affected the formulation of the statutory guideline of directors' duties based on the common law. An on observation was made that the enlightened shareholder value theory approach is what the legislature intended to apply taking into account the modifications of the statutory duties of acting in the best interest of the company under the COBE Act.

In this context the business judgement rule was discussed and an assessment made that the rule is essentially a failsafe that provides directors with protection for bad errors of judgement that have adverse effect of the company as long as they have acted in good faith for the best interest of the company. The subjective formulation of the test to act in good faith and the reluctance of the court to interfere with decisions made by directors unless there is a lack of good faith which is underpinned by the abstention theory applicable to this rule essentially means that in order to hold directors liable it first has to be proved that they failed to act with good faith which is a problematic aspect to prove. This naturally has an effect on whether or not directors can be held liable for taking decisions that fail to protect or uphold or are negative to the interest of other stakeholders.

5.4 RECOMMENDATIONS

The current legal framework for CSR is now established Section 195 of the COBE Act, and the recommendations contained in the National Code of Corporate Governance which is soft law. In that connection it is no longer the case that there is no specific legal framework to regulate CSR. However, the theoretical foundations of section 195 of the COBE Act mandates directors to apply and enforce CSR activities for the interests of stakeholders as a consideration that is applicable within the course of acting in the best interest of the company. The ambiguity from this framework arises from the wide discretion that directors have in deciding what is in the best interests of the company which ultimately informs how they prioritise aspects of CSR. The drawback with section 195 of the COBE Act stems from an interpretation perspective as to how directors' duties relative to CSR will be assessed taking into account the applicable subjective factors applicable in relation to decision making by directors. The provisions of section 195 of the COBE Act and the National Code of Corporate Governance are disjointed in the sense that whilst the code on corporate governance is meant to be complimentary and provide a guideline on how directors should act in interpreting and applying section 195 of the COBE Act, the recommendations are merely guidelines as to best practice and not mandatory and are non-binding. Section 195 of the COBE Act prioritises the interests of the company in the sense that the CSR initiatives would have to benefit the success and sustainability of the company in order for them to be given priority and balance the need for shareholder to make profit. The effect of the Business Judgement Rule which protects directors for their decision making act as a counterbalance to the failure by directors to prioritise CSR.

In that connection it is suggested that:

5.4.1 Amendment of COBE Act to include Soft law provisions on CSR

Clause 8 of the code be incorporated as part of the COBE Act in order to make CSR a mandatory specific consideration of directors in excising their duties on behalf of the company. This will effectively ensure that continuous mandatory and proactive attention is govern to CSR by directors.

5.4.2 Mandatory Legislative threshold for CSR

The approach taken in the Indigenisation and Economic Empowerment act which has been taken in India can be adopted to the extent of requiring companies to utilise a stipulated percentage of their earnings for CSR initiative.[443] This ties in to the reporting requirements as emphasised in the Corporate Governance Code. This measure will create an effective regulatory mechanism that will ensure active advancement of CSR

443 See Section 135 of India's Companies Act of 2013; Nyawuyanga (n 415 above) 33-37; See Indigenisation and Economic Empowerment Act [*Chapter 14:33*]

as matter of regulation and beyond the directors' duties to simply consider CSR aspects in decision making but to actively undertake same.

5.4.3 Objective Interpretation of BJR

Whilst acknowledging that the fact that the duty to act in the best interest is owed to the company and dependant on the directors' subjective decision making as protected by the BJR, it is suggested that as the time when the courts may be called into question and determine the compliance by directors with their duties, the court should adopt a less abstention stance and seek to objectively determine whether or not directors complied with their duties to implement CSR.

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