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FACULTY OF LAW

Department of Mercantile and Labour Law

***The Enlightened Shareholder Value (ESV) approach and the interpretation of the phrase 'best interests of the company' in South Africa*.**

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DECLARATION

I declare that ‘The Enlightened Shareholder Value (ESV) approach and the interpretation of the phrase ‘best interests of the company’ in South Africa’ is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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‘Feeling gratitude and not expressing it is like wrapping a present and not giving it.’ *William Arthur Ward*

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LIST OF ABBREVIATIONS

ASIC	Australian Securities and Investments Commission
CAMAC	Corporations and Markets Advisory Committee
CLRSG	Company Law Review Steering Group
CSR	Corporate Social Responsibility
DTI	Department of Trade and Industry
ESV	Enlightened Shareholder Value
MOI	Memorandum of Incorporation
NEDLAC	National Economic Development and Labour Council
PJC	Parliamentary Joint Committee
UK	United Kingdom

KEYWORDS

Corporate citizenship

Corporate governance

Directors

DTI Policy Document 2004

Enlightened shareholder value approach

King reports

Pluralist approach

Shareholder centric approach

Shareholders

Stakeholders

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CHAPTER 1: INTRODUCTION TO STUDY

1.1 BACKGROUND AND PROBLEM STATEMENT

According to section 76(3)(b) of the Companies Act 71 of 2008, directors are obligated to incorporate the *company's best interests* in their objectives. Generally, this phrase denotes the interests of the shareholders collectively.[1] It has been difficult to establish what exactly the term ‘company’ means. The phrase 'best interests of the company' has similarly been difficult to explain. Currently, the efforts to provide answers are represented by three approaches, *viz* (i) the shareholder value approach, (ii) the pluralist/stakeholder approach and (iii) the enlightened shareholder-value (ESV) approach. While some authors may be convinced that South Africa has adopted the ESV approach under the Companies Act 71 of 2008, the phrase ‘best interests of the company’ requires further unpacking to determine its exact meaning.[2] This research will highlight the ambiguity regarding the exact approach adopted by the Act and will point in the direction of what may need to be done to make the position clearer.

The Department of Trade and Industry published a company law reform document entitled *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* (hereafter, the DTI Policy Document in 2004),[3] which provided an approach, which according to Mupangavanhu, though hard to categorise, may provide a clue for the appropriate explication of the phrase ‘best interests of the company'.[4] The Policy Document points to an alternative viewpoint to the interpretation preferred by the common law. The DTI Policy Document asserts that in order to remain congruent with the Constitution of the Republic of South Africa, 1996, and significant company legislation,

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[1] Mupangavanhu BM *Directors’ standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa’s Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) 54.
[2] Mupangavanhu BM *Directors’ standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa’s Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) 56.
[3] GN 1183 in *GG* 2004-06-23.
[4] Mupangavanhu BM *Directors’ standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa’s Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) 54.

the interests of various stakeholders ought to be aligned with the interests of shareholders.[5] The economic objectives of the company should thus be balanced with the social and environmental constraints.[6] Many authors argue that the ESV approach was advanced by the Policy Document and that the Companies Act 71 of 2008 incorporated it. Davis and Cassim believe this approach nevertheless remain engrained within the shareholder value approach, yet it avoids moving towards a pure shareholder-centric model.[7] The ESV approach is the latest approach adopted to provide an answer to the question: whose interest should be incorporated in the company's objectives? According to the ESV approach, directors may only take cognisance of non-shareholder interests if it equates to the best interests of the shareholders as a collective.[8] As long as directors are still required to prioritise shareholder interests and take other stakeholders' interests into account only if doing so advances shareholders' interests, the ESV approach remains vulnerable to criticism.[9]

In spite of heated debate over the concept of company (as a metaphysical entity), it can readily be inferred from section 76(3)(b) that the common law notion of shareholder centrism has been maintained.[10] South Africa has traditionally had a shareholder-centric approach to corporate governance.[11] In this approach, directors are expected to manage the company in the interests of present and future shareholders.[12] However, there is

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[5] See the DTI Policy Document 2004 p24-27.

[6] One such example of environmental concerns cited by Mupangavanhu is section 24 of the Constitution of the Republic of South Africa which provides for a right to an environment that is not detrimental to anyone's health or well-being. See Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) 55.

[7] Davis D et al *Companies and Other Business Structures in South Africa* 2nd ed (Oxford University Press, Southern Africa Pty Ltd, Cape Town, 2011) at 11-12 and Cassim FHI et al *'Contemporary Company Law'* 2 ed. (2012) Juta and Company Ltd: Cape Town at 20-21.

[8] Wiese T, *'Corporate Governance in South Africa with International Comparisons'* (2017) Juta: Cape Town 8.

[9] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) 51.

[10] Irene-Marie Esser 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1' (2017) De Jure 97 at 108.

[11] Muswaka L Corporate Governance under the South African Companies Act: A Critique (May 25, 2012). Proceedings of World Business and Economics Research Conference 2012. Available at SSRN: https://ssrn.com/abstract=2184678 or http://dx.doi.org/10.2139/ssrn.2184678

[12] Wiese T *'Corporate Governance in South Africa with International Comparisons'* (2017) Juta: Cape Town 8.

growing controversy surrounding this approach, and more people are starting to question it. It has become increasingly clear that the corporate governance approach followed in South Africa warrants extensive scrutiny due to its intentional recognition of non-shareholder interests, such as employees, suppliers, customers, local communities, and society at large, as well as future generations and the environment.[13] The case of *Re Smith & Fawcett Ltd* confirmed the common law position that directors have a fiduciary duty to act in the company's best interests.[14] *Greenhalgh v Arderne Cinemas Ltd* concluded that the precedent created in *Re Smith & Fawcett Ltd* translates to striking a balance between profit making and the sustainability of the company.[15]

Section 76(3)(b), considered against the rest of the Companies Act 71 of 2008, reflects the vagueness of the Act's preferred approach to corporate governance in South Africa. According to section 5(1) of the Companies Act, the interpretation of the Act ought to be carried out so as to best achieve the objectives contained in section 7. A list of the stated purposes of the Companies Act can be found in Section 7 of the Act. In terms of this section, the purposes of the Act are to spur greater levels of corporate governance where needed taking into consideration the important function of companies in both the economic and social existence of a country[16]; to bring the concept of the company back to its proper role of achieving economic and social goals[17]; as well as to guarantee that all stakeholders' concerns are considered when it comes to the systematic recovery of financially distressed companies[18]. Section 7 reflects that the Companies Act by and large seeks to advance the interests of all stakeholders.[19] The *South African Fabrics v Millman* case emphasised the fact that 'interests' of a corporation are limited to those of its members and its corporate entity as a whole.[20] It is therefore unclear whether the *South African Fabrics Ltd* ruling still holds sway in contemporary corporate law since the

[13] Eric P 'Enlightened shareholder theory: Whose interests should be served by the supporters of Corporate Governance?' (2008) 8 *Social Science Research Network* 353-362 Available at https://ssrn.com/abstract=1262879.
[14] *Re Smith & Fawcett Ltd* [1942].
[15] *Greenhalgh v Arderne Cinemas Ltd* [1951].
[16] Section 7(b)(iii) of the Companies Act 71 of 2008.
[17] Section 7(d) of the Companies Act 71 of 2008.
[18] Section 7(k) of the Companies Act 71 of 2008.
[19] Muswaka L 'A Critical Analysis of the Protection of Stakeholders' Interests under the South African Companies Act: (Part 2)' (2014) 5 (3) *Mediterranean Journal of Social Sciences* 66 at 68.
[20] South African Fabrics Ltd v Millman 1972 4 SA 592 (A).

incorporation of section 7 in the Companies Act. As demonstrated by this research, the Companies Act now recognises non-shareholder interests, such as employees. By implication, Section 158 states that the courts have a duty to advance and clarify this position so as to guarantee consistency in the rights stipulated in the Bill of Rights, as well as to ensure their actualisation.[21] Therefore, it is quite clear that section 7 of the Companies Act occupies a significant role, and it is also within the context of the DTI Policy Document 2004 that section 7(b) requires directors to be mindful of non-shareholder interests.[22] The Companies Act 71 of 2008, which seeks to promote alignment between the Act and the Bill of Rights,[23] provides a comprehensive approach to business operations, and seeks active incorporation of a human rights culture into policy and practice.[24] The conscious inclusion of section 7 also reflects the legislature's intention to advance specific social objectives through the Companies Act 71 of 2008. It is up to the courts how to interpret the phrase 'best interests of the company', since the legislature left it to them. The South African judiciary may therefore be more inclined to give it a broader interpretation, for example, section 218(2) can be made more accessible for stakeholders to institute legal proceedings against directors who violate their legal obligations.

In Section 1, profit-making companies are defined as companies formed for the purpose of making a profit for shareholders.[25] Similarly, section 81(1)((d)(i)(bb) provides for the dissolution of a financially sound company in in instances where it is unable to continue to conduct its business for the advantage of its shareholders generally.[26] It is clear from the last two sections that maximising profits for shareholders is more important than benefiting all stakeholder groups.[27] Uncertainty is therefore created through provisions that are more specific, even though the general feel of the Act is to take cognisance of

[21] Section 158 of the Companies Act 71 of 2008.
[22] Joubert T & Lombard S 'The Legislative Response to the Shareholders v Stakeholders debate: a Comparative Overview' (2014) 14 (1) *Journal of Corporate Law Studies* 211 at 213.
[23] See section 7(a) of the Companies Act 71 of 2008.
[24] Katzew J 'Crossing the Divide Between the Business of the Corporation and the Imperatives of Human Rights: The Impact of Section 7 of the Companies Act 71 of 2008' (2011) *South African Law Journal* 686-711.
[25] Section 1 of the Companies Act 71 of 2008.
[26] Section 81(1)((d)(i)(bb) of the Companies Act 71 of 2008
[27] Esser I 'The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom's Enlightened Shareholder Value approach: Part 1' (2017) *De Jure* 97 at 108.

the interests of all stakeholders. This is because this ideology is not applied in a consistent manner.

In light of this, it should be clarified that the phrase 'best interests of the company' cannot constitute shareholder interests exclusively to the exclusion of all other stakeholders. An approach that balances the interests of shareholders and other key stakeholders is neither an ESV approach to corporate governance nor a pure pluralist approach. As demonstrated above, the ESV approach is not appropriately aligned to the policy direction desired by the DTI Policy Document 2004. The Pluralist approach also cannot be said to be the preferred approach since stakeholders have not received any formal recognition under the Act, unlike shareholders who are clearly recognised by the Act.[28] An approach balancing the EVS approach, and the stakeholder/pluralist approach is thus the answer to the legal conundrum: what is considered to be the 'best interests of the company'.

1.2 RESEARCH QUESTIONS

The central or key research question in this study is whether the ESV approach provides clear guidelines regarding the interpretation of the phrase in 'the best interests of the company'. Put differently, the question is whether the ESV approach said to be adopted by the Companies Act 71 of 2008 provides a clear and ascertainable interpretation of the phrase in 'the best interests of the company', in a manner that enhances corporate governance in South Africa. Answers to the following sub-inquiries will provide building blocks towards finding answers to the central research question:

1. Does the common law and the Act provide any answers regarding what is meant by 'best interests of the company'?
2. Did South Africa indeed adopt the ESV approach in the Companies Act 71 of 2008? Does this approach provide a solution to the legal conundrum pertaining to the interpretation of the phrase in the 'best interests of the company'?

[28] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) 56.

3. Are there international best practices relating to reforms in the interpretation of the phrase ‘best interests of the company’? Are there any lessons for South Africa?

1.3 LITERATURE REVIEW AND JUSTIFICATION OF THE STUDY

There has been a surge in research emphasising the importance of affording recognition to a broader group of stakeholders. As indicated from the outset, the exact meaning of the phrase in the ‘best interests of the company’, as provided in section 76(3)(b) of the Companies Act 71 of 2008, is unclear. Several scholars investigated and aimed to ascertain the exact definition of the phrase; however, a significant amount of vagueness still exists as to what the absolute meaning of the phrase is. Although Muswaka cites the reform of company law process as a superb opportunity for clarification, the language used in section 76(3)(b) does not clarify whether directors must prioritise shareholders' interests or consider the interests of other stakeholders.[29]

Additionally, Esser and Dekker questioned the conventional view that directors should run a company in their shareholders' best interest. As these authors noted, directors must manage a business to better meet the needs of not only shareholders, but also employees, creditors, consumers, and suppliers.[30] This act of taking into account the needs of diverse stakeholders refer to the concept of Corporate Social Responsibility (CSR).

The *King Reports* have also considered the controversy regarding the interpretation of the phrase. Although the King Reports are considered authoritative, they are not legally binding.[31] The phrase ‘best interests of the company’ will, consequently, remain nebulous until a court attach an enforceable meaning to it. In English case law, this phrase has

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[29] Muswaka L ‘Corporate Governance under the South African Companies Act: A Critique’ (2013) 3 (3) *World Journal of Social Sciences* 11 at 19.

[30] Esser I and Dekker A ‘The Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles’ (2008) *JICLT* 157-169.

[31] The King III Report is not binding but is very persuasive.

been interpreted to express the interests of the collective shareholders.[32] Accordingly, the common law interpretation of shareholder centrism remains in place. As argued by Cassim et al., this evidence indicates that the interests of non-shareholders of a company have been overlooked by the Act.[33] The Department of Trade and Industry's Policy Document 2004 supported the ESV approach and proposed that company law recognises stakeholder interests, including employee rights and customer requirements, as well as environmental and community concerns, but only insofar as this is required by the Constitution and relevant laws.[34] Similar to the *King Reports* , this Policy Document is not legally binding and was created to provide guidance to the drafters of the Companies Act 71 of 2008. This, then, leaves the impression that the interests of the shareholders collectively are still the primary concern of a company. This was the position up until the Companies Act came into effect. It is held that the position in *Millman* does not reflect the true position of our law.[35] Due to the constitutional framework within which companies operate, directors must consider the values of the Constitution and the Bill of Rights when determining the best interests of the company.[36] In the Bill of Rights, other stakeholders' rights and interests are explicitly protected in addition to the shareholders'. For example, the interests of employees and trade unions are protected under section 23, while the interests of the environment are protected under section 24 of the Bill of Rights.[37]

The aforementioned studies have revealed that the interests of stakeholders are now regarded as immanent aspects requiring acknowledgement by directors. The efforts to reach this conclusion, however, have mainly been based on the *King Reports*.[38] An area

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[32] See *Greenhalgh v Ardene Cinemas Ltd* 1951 Ch 286 at 29, *Hutton v West Cork Railway Co* (1883) 23 Ch D 654 and
Re Smith & Fawcett Ltd [1942].
[33] Cassim FHI et al *'Contemporary Company Law'* 2 ed. (2012) Juta and Company Ltd: Cape Town at 514.
[34] Muswaka L 'Corporate Governance under the South African Companies Act: A Critique' (2013) 3 (3) *World Journal of Social Sciences* 11 at 13.
[35] *South African Fabrics Ltd v Millman* 1972 4 SA 592 (A).
[36] Katzew J 'Crossing the Divide Between the Business of the Corporation and the Imperatives of Human Rights: The Impact of Section 7 of the Companies Act 71 of 2008' (2011) *South African Law Journal* 686-711.
[37] Gwanyana M 'The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities' (2015) 18 (1) *Potchefstroom Electronic Law Journal* 3102-3131.
[38] Muswaka L 'Corporate Governance under the South African Companies Act: A Critique' (2013) 3 (3) *World Journal of Social Sciences* 11 at 12.

of law that has not received adequate attention from legal scholars is the question surrounding whether or not the modern thinking in corporate governance is sufficiently reflected in the Companies Act 71 of 2008. By contrast, this study will go beyond existing literature and provide a clear analysis of how the South African Companies Act reflects corporate governance practices. South Africa's most recent effort at responding to the question 'in whose interests the business of the company should be conducted' is contained in the Companies Act.[39] To answer this question, Section 76(3)(b) states that directors must act in the company's best interests.[40] What exactly is meant by 'best interests of the company' is not defined under the Act. According to both the Companies Act and common law, companies are separate legal entities with assets distinct from those of its shareholders. Potential for conflict is, however, created if one considers how the common law interprets the phrase 'best interests of the company' which is poorly aligned with the Act.[41] Based on the common law interpretation, companies are ought to be operated in the best interests of all past and future shareholders. There is a contradiction between this common law interpretation and the fact that shareholders and the company are separate legal entities.[42]

Although some progressive research has been done on the interpretation of the phrase in 'best interests of the company', we are still unsure about how to accurately interpret it. While the ESV approach could have provided us with guidelines to solve this legal conundrum once and for all, there remains uncertainty as to whether South Africa indeed adopted the ESV approach with the enactment of the Companies Act 71 of 2008. This research is therefore necessary to determine the aforementioned. If South Africa adopted the ESV approach, this research would also lay the basis for the successful application of this theory as the successfulness of the approach is dependent on many factors,

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[39] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) 69.
[40] Cassim FHI et al *'Contemporary Company Law'* 2 ed. (2012) Juta and Company Ltd: Cape Town at 20.
[41] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) 69.
[42] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) 69.

including but not limited to the following: (i) how directors will apply their facultative powers, (ii) how the courts will interpret the duties of directors, (iii) the role of legal authors in refining this theory, and (iv) what recognition the application of this theory will enjoy from the general public.

Preliminary research shows that South Africa has not fully adopted the ESV approach. An example of the ESV approach is section 20(4) of the Companies Act.[43] In this section, shareholders, directors, and prescribed officers, as well as unions representing employees, have the right to institute proceedings to prevent a corporation from engaging in activities that are contrary to the Act. In terms of this section, trade unions representing employees now also have rights. Shareholders, directors, company secretaries, authorised officers of a company, or registered trade unions representing employees may approach a court for a declaratory order to proclaim a director of a company as delinquent, according to section 162(2).[44] According to section 165(2), legal proceedings may also be initiated or continued, or related actions taken by employees, registered trade unions, shareholders and authorised representatives to protect the business's legal rights.[45] Sections 162(2) and 165(2) therefore make it very clear that any employee representative has rights.

The content of section 20(4) is reflective of the ESV approach.[46] Section 20(4) and sections 162(2) and 165(2) are similar. Thus, as section 20(4) is regarded as an example of the ESV approach, it can be deduced that both sections 162(2) and 165(2) are also examples of the same approach. However, two critical questions are created: (i) whether the aforementioned sections substantiate the conclusion that the Companies Act 71 of 2008 has adopted the ESV approach and (ii) whether a broader stakeholder group is recognised by the Companies Act.

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[43] Davies D, Geach W & Mongalo T *et al 'Companies and Other Business Structures in South Africa'* (2010) Oxford University Press: Southern Africa 46.
[44] Muswaka L 'Corporate Governance under the South African Companies Act: A Critique' (2013) 3 (3) *World Journal of Social Sciences* 11 at 15.
[45] Muswaka L 'Corporate Governance under the South African Companies Act: A Critique' (2013) 3 (3) *World Journal of Social Sciences* 11 at 15.
[46] Muswaka L 'Corporate Governance under the South African Companies Act: A Critique' (2013) 3 (3) *World Journal of Social Sciences* 11 at 15.

Sections 20(4), 162(2), and 165(2) indicate that the Companies Act focuses on employees and excludes other stakeholders including suppliers, creditors, and the environment.[47] Hence, because only some stakeholders are recognised under the Companies Act, one cannot conclude that it follows an ESV approach.[48] This conclusion is not based on the number of stakeholders, but rather on the Act's ability to embrace a broader spectrum of stakeholders.[49] By failing to take into account a broader range of stakeholders, The Act may be viewed as being shareholder centric.

Another important point is the fact that sections 162(2) and 165(2) do not afford any rights to the employees, but rather equips the trade unions to initiate legal action to safeguard the interests of the company and not necessarily that of the employees. As a result, it is impossible for this group of stakeholders, the employees, to claim that their interests must be considered by directors when they can only rely upon the remedies pertaining to the interests of the company in the absence of direct and enforceable rights. As such, it is not an overstatement to say that employees are no better placed than suppliers, creditors, or the environment.

1.4 METHODOLOGY

The study's purpose requires an analytical and comparative research desktop methodology. Legislation, case law, journal articles, textbooks, reports, and internet sources are the primary sources. As a result, both primary and secondary sources will be used in the research.

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[47] Muswaka L 'Corporate Governance under the South African Companies Act: A Critique' (2013) 3 (3) *World Journal of Social Sciences* 11 at 16.
[48] Muswaka L 'Corporate Governance under the South African Companies Act: A Critique' (2013) 3 (3) *World Journal of Social Sciences* 11 at 15.
[49] Muswaka L 'Corporate Governance under the South African Companies Act: A Critique' (2013) 3 (3) *World Journal of Social Sciences* 11 at 15.

1.5 CHAPTER OUTLINE

Chapter 1: INTRODUCTION TO STUDY

There are four parts to this chapter: the background and statement of the problem that will be solved through this work, the rationale for conducting this work, the methodology that will be used to address the problem, and finally the research questions that will serve as guidelines for the topics to be discussed throughout the study.

Chapter 2: CONCEPTUAL FRAMEWORK

This chapter begins by considering the theories of the company which will assist in dealing with the director-company relationship, which is fiduciary in nature. This chapter will also look at the legal status of a company in South Africa, as well as at the legal status of company directors.

Chapter 3: INTERNATIONAL PERSPECTIVES- THE ESV APPROACH

The third chapter compares and contrasts corporate governance in South Africa, the United Kingdom (UK), and Australia. This chapter will look at how the UK and Australia influenced South African company law, particularly in the area of corporate governance, as well as the lessons South Africa can learn from the UK and Australia in dealing with the interpretation of the phrase ‘best interests of the company’.

Chapter 4: ‘BEST INTERESTS OF THE COMPANY’ UNDER SOUTH AFRICAN LAW

This chapter will look at how the phrase ‘best interests of the company’ is interpreted under company law and now the Companies Act 71 of 2008, and more specifically section 76(3)(b) and the implications thereof.

Chapter 5: RECOMMENDATIONS AND CONCLUSION

This chapter shall reach a conclusion on whether the current legal framework adopted the ESV approach and whether this approach is providing clear guidelines with the interpretation of the phrase ‘best interests of the company’.

CHAPTER 2: CONCEPTUAL FRAMEWORK

2.1 INTRODUCTION

In this chapter, some fundamentals of corporate or company law will be examined and explained for purposes of laying a solid foundation for the understanding of what the phrase 'best interests of the company' means. The main theories and debates in company law surrounding this phrase will be explored in this chapter. These theories include the shareholder-centric approach; the pluralist or stakeholder approach and the ESV approach. In each respect, the main propositions and criticisms will be discussed. Short reference will be made to section 172 of the UK's Companies Act 2006, which will be discussed in greater detail under Chapter 3. A closer examination of section 76(3)(b) within its context in 2008 Act as a whole reveals that directors are actually required to take stakeholders' interests into account.[50] This coincides with the triple bottom line approach which takes into consideration the economic, social, and environmental issues as enclosed in the *King III Report*, and stakeholder inclusiveness as highlighted in the *King IV Report*. Although the King Reports are not binding in nature, they are persuasive and useful for the courts. I will therefore consider the *DTI Policy Document 2004* and the King Reports to ascertain these documents' contribution towards interpreting the phrase 'best interests of the company' in South Africa.

2.2 DEFINING CORPORATE GOVERNANCE

There are various opinions of what exactly constitutes corporate governance. This is not surprising considering that corporate governance is quite a complex subject matter. The concept of corporate governance involves a convergence of competing multi-stakeholder interests and is thus by its very nature burdened by tension.[51] Directors are often faced

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[50] Hajat H *A South African Perspective: The Modern Company and Corporate Governance in the Companies Act, 2008* (unpublished LLM Research Paper, University of the Witwatersrand, 2019) at 2.
[51] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) 17.

with the task of balancing the corporation's profit-making objective with the need for accountability and the interests of non-shareholder stakeholders.[52]

Tricker defines corporate governance corporate governance as falling under various perspectives, namely an operational perspective, a relationship perspective, a stakeholder perspective, a financial economics perspective and a societal perspective.[53] The operational perspective focusses on governance structures, processes and practices of corporate governance.[54] The idea of best practices in the interaction of the board, the shareholders and management, as well as the emergence of the corporate governance codes such as the King Codes of Corporate Governance in South Africa, are by-products of the influence of the operational perspective.[55] A relationship perspective looks at the relationship amongst various participants in corporate governance.[56] There is probably no closed list among the participants, but to date, the following participants have featured prominently in definitions based on this perspective, namely shareholders, company management, the board of directors, employees, the community, creditors to a certain extent and the environment.[57] A stakeholder approach is not conceptually different from the relationship perspective, save for the fact that it takes a wider view of those involved and affected by corporate governance.[58] The main concern of the financial economics perspective is the ownership of capital in corporate governance systems and the legal protection afforded to investors.[59] The Societal perspective has been described by Tricker as one such perspective which sets corporate governance 'at a high level of abstraction' as it attempts to include a broad spectrum of stakeholders, in and outside the corporation, who could be affected by or have a vested interest in corporate behaviour.[60]

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[52] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) 18.
[53] Tricker B *Corporate Governance: Principles, Policies and Practices* 2ed (2012) 4.
[54] Tricker B *Corporate Governance: Principles, Policies and Practices* 2ed (2012) 4.
[55] Tricker B *Corporate Governance: Principles, Policies and Practices* 2ed (2012) 4.
[56] Tricker B *Corporate Governance: Principles, Policies and Practices* 2ed (2012) 4.
[57] Tricker B *Corporate Governance: Principles, Policies and Practices* 2ed (2012) 4.
[58] Tricker B *Corporate Governance: Principles, Policies and Practices* 2ed (2012) 5.
[59] Tricker B *Corporate Governance: Principles, Policies and Practices* 2ed (2012) 5.
[60] Tricker B *Corporate Governance: Principles, Policies and Practices* 2ed (2012) 5.

The most popular definition of the 1990s, however, is that advanced by the UK's Cadbury Report as well as the *King II Report*. The Cadbury Report simply defines corporate governance as 'the system by which companies are directed and controlled'. The *King I Report* adopted this definition as can be seen on page one, paragraph two of the *Report*. The latter document did not make any changes to the definition advanced by the Cadbury Report.[61] Likewise, the Organisation for Economic Co-operation and Development (hereafter OECD) defines corporate governance as being '…about the procedures and processes according to which an organisation is directed and controlled'.[62]

A more recent definition of corporate governance comes from the necropsy analysis of the collapse of HIH Insurance Ltd in Australia. The Report of the HIH Royal Commission views corporate governance as referring 'generally to the legal and organisational framework within which, and the principles and processes by which, corporations are governed'.[63] Mupangavanhu provides a more contemporary definition to corporate governance. He defines the concept as follows:

> …corporate governance has to do with a quest to achieve a balance within the key leadership relationships in the life and business of the corporation. In this regard, the shareholders provide capital for business, appoint or remove the company board of directors where necessary, make decisions affecting the company, and make the board accountable for its oversight on the management of company business. This provides checks and balances to the directors' duties of managing company resources as good stewards. The board provides oversight and supervision to the management of a company by appointing executive management. Senior Management/Executives do the actual management of the company including setting policies for proper functioning of the company, for the approval of the board.[64]

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[61] See page 1, paragraph 2 of the *King I Report*.
[62] See the *OECD Principles of Corporate Governance* 2004 document, available at www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf [accessed on 21 December 2021].
[63] See Background Paper 11 (HIH Royal Commission) *Directors' Duties and Other Obligations under the Corporations Act* (November 2001) 27 para 76 (the Owen Report), cited in Du Plessis et al *Contemporary Corporate Governance* 4.
[64] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) 20-21.

The principles of corporate governance include but are not limited to firstly, shareholder recognition, which is of utmost importance to the company because it is the basis of the company's share capital. Majority shareholders often put their interests before those of minority shareholders who have little effect on the share price. Good corporate governance, however, aims to achieve shareholder inclusivity and that all shareholders have an equal say and chance at participation in meetings.[65] Secondly, corporate governance should recognise stakeholder interests as well, in particular with regards to the importance of establishing good relationships with the community and other non-shareholder stakeholders such as creditors and employees.[66] Thirdly, shareholders and other stakeholders should be made aware of the responsibilities of the board because it is imperative that everyone is sharing the company's goal.[67] Fourthly, ethical behavior is crucial. The aforesaid requires the establishment of a code of conduct to be used in ethical decision-making, and fifthly the business should be managed on transparent and accountable principles in order to increase shareholder trust. This includes the publication of all financial statements and records.[68]

2.3 THEORIES ON THE NATURE OF A COMPANY

2.3.1 OVERVIEW OF THE RELEVANT THEORIES AND THE STAKEHOLDER QUESTION

There are ongoing efforts to define the phrase 'the best interest of the company'. Currently, the efforts to provide answers are represented by at least three theories. These three theories include the shareholder-centric approach, which is based on two premises, namely director's obligation to ensure wealth maximisation for shareholders and the now

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[65] Sun L *Why is Corporate Governance Important?* Available at http://www.businessdictionary.com/article/618/why-is-corporate-governace-important/ [accessed 15 June 2023].

[66] Harduth N and Sampson L, '*Review of King IV Report (Werksmans)'* (2013) Available at https://webcache.googleusercontent.com/search?q=cache:w-0sUvGHBeUJ:https://www.werksmans.com/wp-content/uploads/2013/05/061741-WERKSMANS-king-iv-booklet.pdf+&cd=1&hl=en&ct=clnk&gl=za [accessed 13 June 2023].

[67] Sun L *Why is Corporate Governance Important?* Available at http://www.businessdictionary.com/article/618/why-is-corporate-governace-important/ [accessed 15 June 2023].

[68] Sun L *Why is Corporate Governance Important?* Available at http://www.businessdictionary.com/article/618/why-is-corporate-governace-important/ [accessed 15 June 2023].

archaic belief that shareholders are sole owners of the corporation.[69] This approach found formal endorsement in the US case of *Dodge v Ford Motor Company*.[70] According to the court, company directors should exercise their discretion and power primarily to produce profits for shareholders and by extension maximise profits for shareholders.[71] The other two approaches are the Pluralist and the ESV approaches. As a result of these two approaches dominating debate during the company law reform negotiations in South Africa, the DTI issued its policy document entitled *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* (hereafter referred to as the DTI Policy Document 2004).[72]

Berle and Dodd debated stakeholder pluralism and shareholder centrism as early as 1930 in the USA.[73] Dodd, on the one hand, argued for stakeholder inclusivity whereas Berle advocated a shareholder-centric approach.[74] Berle argued that directors are put in a position of trust by the shareholders to manage their property in such a manner as to achieve maximum profits. Dodd, was of the different view that directors are elected to their specific position to serve the greater community in which they operate and should thus use the resources of the company to give recognition to the interests of all stakeholders.[75] In doing so, directors would have behaved in a manner based on social accountability.[76]

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[69] See *Short v Treasury Commissioners* [1948] 1 KB 116 (CA) and *Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd* 1962 (1) SA 458 (A) 471-472. Also see *Macaura v Northern Assurance Co. Ltd* [1925] AC 619; *The Shipping Corporation of India Ltd v Evdomon* 1994 (1) SA 550 (A).
[70] *Dodge v Ford Motor Company* 170 N.W 668 (Mich. 1919).
[71] *Dodge v Ford Motor Company* 170 N.W 668 (Mich. 1919).
[72] *South African Company Law for the 21st Century- Guidelines for Corporate Law Reform*, also see Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016); & Muswaka L *A Critical Analysis of the Protection of Stakeholders' Interests under the South African Companies Act: (Part 2)* (2014) 5 (3) *Mediterranean Journal of Social Sciences*.
[73] Esser I *Recognition of Various Stakeholder Interests in Company Management* (unpublished LLD thesis, University of Pretoria, 2008) at 22.
[74] Berle AA 'Corporate Powers as Powers in Trust' (1931) *Harvard Law Review* 44 at 1049.
[75] Dodd EM 'For Whom are Corporate Managers Trustees?' (1932) *Harvard Law Review* 44 at 1158.
[76] Esser I *Recognition of Various Stakeholder Interests in Company Management* (unpublished LLD thesis, University of Pretoria, 2008) 22.

Dodd distinguished shareholders from the company as a legal entity.[77] In essence, Dodd saw directors as agents of a corporation.[78] The directors' main duty, it was argued, are therefore towards the company, and the interests of shareholders is a secondary aspect.[79] Dodd further argued that corporations should balance the function of profit maximisation with its social obligations.[80] In essence, the question whether directors should take into account the interests of a broader group of stakeholders when pursuing the 'best interests of the company' dominated the debate.[81]

It may seem confusing for directors to act as protectors for all stakeholders, yet Berle acknowledges that directors can choose whether or not to acknowledge non-shareholder interests.[82] Both authors thus drew a distinction between the duty directors owe to shareholders and the duty they have towards other stakeholder groups. Furthermore, Dodd and Berle acknowledged that corporate governance should recognise non-shareholder interests.[83]

Since Berle and Dodd's debate, both local and international scholars have joined the conversation around shareholder centrism and stakeholder inclusion.[84] Jensen, has also referred to the stakeholder theory, highlighting that directors are answerable to all stakeholder groups.[85] Practically speaking, managers or directors are accountable to specific stakeholder groups such as shareholders who have the power to appoint and

[77] Dodd EM 'For Whom are Corporate Managers Trustees?' (1932) *Harvard Law Review* 44 at 1152.
[78] Laski CF 'The Personality of Associations' (1916) *Harvard Law Review* 404.
[79] Dodd EM 'For Whom are Corporate Managers Trustees?' (1932) *Harvard Law Review* 44 at 1152.
[80] Dodd EM 'For Whom are Corporate Managers Trustees?' (1932) *Harvard Law Review* 44 at 1152.
[81] Dodd EM 'For Whom are Corporate Managers Trustees?' (1932) *Harvard Law Review* 44 at 1146.
[82] Dodd EM 'For Whom are Corporate Managers Trustees?' (1932) *Harvard Law Review* 44 at 1148; Fisch JE 'Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy' (2006) The Journal of Corporation Law 31 at 648.
[83] See Dodd EM 'For Whom are Corporate Managers Trustees?' (1932) *Harvard Law Review* 44 at 1152 and Berle AA 'Corporate Powers as Powers in Trust' (1931) 44 *Harvard Law Review* at 1049.
[84] Coase RH 'The Nature of the Firm' (1937) *Economica* 4 at 386; Hodes L 'The Social Responsibility of a Company' (1983) *South African Law Journal* 100 at 468; Du Plessis JJ 'Direkteure se Pligte Teenoor Partye Anders as die Maatskappy' (1992) *De Jure* 25 at 378.
[85] Jensen MC 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' (2001) *Journal of Applied Corporate Finance* 14 at 8–21.

remove them.[86] Shareholders may remove directors by adoption of an ordinary resolution at a meeting of shareholders, according to Section 71(1).[87]

The stakeholder theory is, however, rejected by Steenberg. According to Steenberg, the said theory is inharmonious with the idea of corporate governance, and further compromises private property, agency, and wealth.[88] According to Steenberg, the key concept in corporate governance is accountability.[89] Accountability of directors to shareholders and of employees to the company via the directors.[90] Steenberg further contends that the stakeholder theory explicitly holds that corporations should be equally accountable to all their stakeholders.[91] The latter, according to him, is unworkable 'as a [corporation] that is accountable to everyone, is actually accountable to no one: accountability that is diffuse, is effectively non-existent'.[92]

The issue relating to stakeholder protection also enjoyed attention throughout South Africa's process of law review. This created the perfect opportunity to settle this issue and give clarity on the preferred theory to be applied in practice. I will argue in this thesis that the drafters of the Companies Act of 2008 did not address the matter sufficiently. Below, I will examine the three key theories which seem to have occupied the law reform debates on the DTI Policy Document at the National Economic Development and Labour Council (NEDLAC).[93] In the course of NEDLAC negotiations, the issue surrounding which category or categories of interests should be considered when managing the company was discussed, and the following theories were explored in an attempt to answer it.

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[86] Section 71 of the Companies Act 71 of 2008 deals with the removal of directors.
[87] See section 71(1) of the Companies Act 71 of 2008.
[88] Sternberg E 'The Defects of Stakeholder Theory' (1997) *Corporate Governance* 5 at 3.
[89] Sternberg E 'The Defects of Stakeholder Theory' (1997) *Corporate Governance* 5 at 4.
[90] Sternberg E 'The Defects of Stakeholder Theory' (1997) *Corporate Governance* 5 at 4.
[91] Sternberg E 'The Defects of Stakeholder Theory' (1997) *Corporate Governance* 5 at 5.
[92] Sternberg E 'The Defects of Stakeholder Theory' (1997) *Corporate Governance* 5 at 5.
[93] NEDLAC was set up to to provide a forum for organised business and organised labour to meet with government on issues of social and economic policy. Company law falls within the scope of NEDLAC.

2.3.2 SHAREHOLDER-CENTRIC APPROACH

Friedman proposed this theory, which states that a company's main purpose is profit maximisation for shareholders.[94] Put differently, a director must choose the stance that maximises shareholder interests above all else when faced with opposing interests from several stakeholders. Shareholder-centric management focuses on the idea that directors are brought on board to serve the shareholders by managing the company on their behalf, and thus are legally and morally obligated to do so.[95]

South African corporate law still reflects the notion of 'best interests of the company' as applied in various English common law; that is, collective shareholder interests. This means that the shareholder-centric approach still applies to our corporate law.[96] *Re Smith & Fawcett Ltd* established that directors must act in the company's best interests.[97] *Greenhalgh v Arderne Cinemas Ltd* ruled that the precedent set in *Re Smith & Fawcett Ltd* translates into balancing current shareholders' short-term interests with future shareholders' long-term interests.[98]

Shareholder-centric management is considered the traditional approach to business, as it presents many disadvantages if the company is focused exclusively on its shareholders' interests. In the next segment arguments in favour of this approach will be analysed.[99]

The understanding that the company's assets belong to its shareholders, who are therefore entitled to have the company managed accordingly is a mistaken understanding of the law.[100] This reasoning is flawed because, from the date and time of incorporation, companies are distinct, with separate legal personalities and, therefore, cannot be

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[94] *'Shareholder & Stakeholder Theories of Corporate Governance'* (2013) Available at http://www.corplaw.ie/blog/bid/317212/Shareholder-Stakeholder-Theories-Of-Corporate-Governance [accessed 12 June 2023].

[95] *Shareholder & Stakeholder Theories of Corporate Governance'* (2013) Available at http://www.corplaw.ie/blog/bid/317212/Shareholder-Stakeholder-Theories-Of-Corporate-Governance [accessed 5 July 2019].

[96] Muswaka L 'A Critical Analysis of the Protection of Stakeholders' Interests under the South African Companies Act' (2014) *Mediterranean Journal of Social Sciences* 5 (3) at 4.

[97] *Re Smith & Fawcett Ltd* [1942].

[98] *Greenhalgh v Arderne Cinemas Ltd* [1951].

[99] These relate to arguments generally provided for and against exclusive shareholder protection.

[100] Roach L 'The Paradox of the Traditional Justifications for Exclusive Shareholder Governance Protection: Expanding the Pluralist Approach' (2001) *The Company Lawyer* 22 at 13; Esser I 'The Enlightened-Shareholder-Value Approach Versus Plurism in the Management of Companies' (2005) at 721.

owned.[101] Legal implications or repercussions arise from an independent legal personality of the company. In the classic South African case of *Dadoo v Krugersdoorp Municipal Council*, it was confirmed that a company's independent existence is not only a mere artificial and technical thing, but a matter of substance.[102] The company's property or assets, income, debts, and obligations all vest in the company as a result of its legal personality.[103] They cannot be considered the property of a corporation's shareholders under any circumstances.[104] The motivations of incorporators in forming the company are irrelevant when assessing the rights and liabilities of a corporation, according to the famous English decision of *Salomon v Salomon & Co Ltd*.[105] Once a business is judged to be legally existent following formation, it should be regarded like any other independent person capable of enjoying the rights and duties that come with its newly acquired legal personality, to the degree that this is appropriate.[106]

The argument for company asset ownership by shareholders made in the paragraph above implies that assets solely refer to capital assets. Assets, on the other hand, go beyond the financial definition to include anything beneficial and valuable to the company. Even though arguments can be made for a shareholder-centric theory of ownership, the idea that shareholders own companies (or any other stakeholder) are completely false. The company should instead profit from the assets since it owns and benefits from them, as well as regular shareholders.

The element of risk is the second argument in favour of the shareholder-centric approach. Those who support this approach argue that shareholders are the ones who risk

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[101] As recently confirmed in South African statutory law through section 19(1)(a)-(b) of the Act.
[102] *Dadoo v Krugersdoorp Municipal Council* 1920 AD 530.
[103] Cassim FHI et al *'Contemporary Company Law'* 2 ed. (2012) Juta and Company Ltd: Cape Town at 29.
[104] In *Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd* 1962 (1) SA 458 (A) at paras 471-472, the court remarked that even an entitlement to share in the distribution of assets at winding-up indicates financial interest in the success of the company business only, but not of a right or title to any assets of a company.
[105] Davis D et al *Companies and other business structures* (2010) Oxford University Press: Southern Africa 23.
[106] See section 19(1)(b) of the Act which holds that after incorporation a company 'has all the legal powers and capacity of an individual', except where a juristic person unable to execute something and where the MOI of the company directs otherwise.

economic loss, so that they should be entitled to their profits, too.[107] Opponents, on the other hand, say that by diversifying their portfolios and selling their shares, shareholders can significantly lower their risk, and so their claim to exclusive protection should be weakened.[108] While the Memorandum of incorporation (MOI) and shareholder agreements of private companies may prohibit shareholders from selling their shares without offering them to current members first, shareholders in public corporations can simply sell their shares to forecast risk and minimise losses. For the original share capital contributors, there is almost little financial risk over time. A rise in the share price would quickly reduce a shareholder's risk to nil. While it can take time to realize returns on initial investments, investors still receive dividends when profits are produced. By way of shareholder agreements, there is also plenty of room for contractual protection of shareholders.[109] It has been argued that shareholders are not protected by distinct laws.[110] However, most modern jurisdictions have robust safeguards in place to protect shareholders and company laws provide for shareholder remedies to provide means for protection of shareholder rights and for promoting shareholder activism.[111]

The third argument is that because shareholders cannot protect themselves contractually, they should have exclusive protection. They may rely on the company constitution, but the conditions are set by management unilaterally in the company constitution. An arbitration provision in the company's constitution binds the member to refer disagreements between the member and the corporation to arbitration.[112] Employees and creditors, for example, can protect themselves with contracts, but shareholders cannot.[113]

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[107] Esser I *Recognition of Various Stakeholder Interests in Company Management* (unpublished LLD thesis, University of Pretoria, 2008) at 36.
[108] Esser I *Recognition of Various Stakeholder Interests in Company Management* (unpublished LLD thesis, University of Pretoria, 2008) at 36.
[109] Du Plessis JJ and Esser I 'The Stakeholder Debate and Directors' Fiduciary Duties' (2007) 19 *South African Mercantile Law Journal* at 358.
[110] Esser I *Recognition of Various Stakeholder Interests in Company Management* (unpublished LLD thesis, University of Pretoria, 2008) at 36. Protection measures include derivative actions, continuous disclosure obligations, and actions facing oppressive and unfairly prejudicial conduct.
[111] For example, the South African Companies Act 2008 provides for remedies available to shareholders to protect their rights and promote their interests in the company. See ss 162-165 of the Act.
[112] *Hickman v Kent or Romney Marsh Sheep Breeders' Association* [1915] 1 Ch 881.
[113] Roach L 'The Paradox of the Traditional Justifications for Exclusive Shareholder Governance Protection: Expanding the Pluralist Approach' (2001) *The Company Lawyer* 22 at 9 and Esser I *The Enlightened-Shareholder-Value Approach Versus Plurism in the Management of Companies* (2005) at 721.

The fourth and most compelling argument is that most of the other parties have their own legislation safeguarding their interests. See, for example, sections 8, 185 and 191 of the Labour Relations Act 66 of 1995 protecting the interests of employees.

Apart from the Companies Act, there is no special legislation protecting the interests of shareholders.

2.3.3 PLURALIST APPROACH

Edward Freeman, the original proponent of this approach, saw it as a critical component of Corporate Social Responsibility (CSR), a notion recognising the legal, philanthropic, economic, and ethical duties of companies in modern times.[114] According to the pluralist/stakeholder approach, the corporation bears a responsibility to all stakeholders in the company equally, not just the shareholders.[115] Employees, consumers, suppliers, creditors, and even the general public and competitors are all examples of stakeholders. The goal of corporate governance is to strike a balance between economic and social aims.

The idea of directors serving as trustees for the whole community instead of shareholders individually was outlined by Dodd[116] in contrast to Friedman's assertion that directors must maximise shareholder interests over all other considerations when faced with competing interests from many stakeholders.[117] Therefore, the corporation's directors are both responsible to its shareholders and to the persons and groups directly involved in the corporation's financial development. Employees, creditors, clients, suppliers, the environment, and the general public are among the important stakeholders. Hence, board

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[114] 'Shareholder & Stakeholder Theories of Corporate Governance' (2013) Available at http://www.corplaw.ie/blog/bid/317212/Shareholder-Stakeholder-Theories-Of-Corporate-Governance [accessed 12 June 2023].
[115] Wiese T, *Corporate Governance in South Africa with International Comparison* (2017) Juta: Cape Town 9.
[116] Dodd EM 'For Whom are Corporate Managers Trustees?' (1932) *Harvard Law Review* 44 at 1148.
[117] Friedman M *The Social Responsibility of Business is to Increase its Profits* (1970) *The New York Times Magazine* at 4.

members need to pay attention to the wider concerns of multiple stakeholders in their use of the company's resources.[118]

The stakeholder theory is fundamentally different from the shareholder theory in that all relevant stakeholders are to be considered, regardless of the impact on company profits.[119] In order to reach the end objective of making profits, directors should consider all relevant stakeholders equally.[120] By using these measures, directors could encourage a long-term perspective, instead of focusing on short-term competitive advantage at the cost of stakeholder interests.[121] Rather than seek short-term profits, the theory aims to make long-term profits while investing in the entire stakeholder community.[122]

As is the case with the shareholder-centric approach, there are also several flaws and problems associated with the pluralist approach. Firstly, there is difficulty in determining the stakeholders.[123] The company conducts business with various groups, and it would thus be difficult to determine who must be regarded as 'stakeholders'.[124] According to the pluralist/stakeholder theory, stakeholders' interests must be defined exogenously, which means that they should not be based on the company's board of directors or management. However, it is unclear how this will be accomplished.

Secondly, confusion exists as to the exact purpose of the pluralist approach. Organizations that try to be all things to all people or benefit all stakeholders, according to Argenti, are not only at a competitive disadvantage, but also unmanageable.[125]

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[118] Mathibela KP *Corporate Social Responsibility Legal Analysis and Social Transformation: The South African Experience in a Comparative Perspective* (unpublished LLM thesis, University of Cape Town, 2017) at 19.
[119] Hinson R & Ndhlovu T 'Conceptualising corporate social responsibility (CSR) and corporate social investment (CSI): The South African context' (2011) *Social Responsibility Journal* (1) at 73.
[120] Mathibela KP *Corporate Social Responsibility legal analysis and social transformation: The South African experience in a comparative perspective* (unpublished thesis, University of Cape Town, 2017) at 20.
[121] Mathibela KP *Corporate Social Responsibility legal analysis and social transformation: The South African experience in a comparative perspective* (unpublished thesis, University of Cape Town, 2017) at 20.
[122] Ramalho A 'Corporate Governance and the call for Stakeholder Inclusivity: Do shareholders lose out?' (2009) *The Corporate Report* at 22.
[123] Ramalho 'A Corporate Governance and the call for Stakeholder Inclusivity: Do shareholders lose out?' (2009) *The Corporate Report* at 23.
[124] Ramalho 'A Corporate Governance and the call for Stakeholder Inclusivity: Do shareholders lose out?' (2009) *The Corporate Report* at 23.
[125] Argenti J, '*Your Organization: What is it for?'* (1993), McGraw Hill, New York at 152.

Different stakeholders would pursue a different purpose, for example, some would want the company to grow, and some would want it to stagnate, and others would want the company to be taken over, while others would even want to see the company fail.

Thirdly, it is difficult to measure the 'stake' of each stakeholder in the company. The amount of shares that a shareholder holds in the company can easily be quantified. This is also the case with regards to the 'stake' of employees (their salary) and creditors (that which the company owes them). However, the same cannot be said of the 'stake' of other stakeholders like the environment and society as it is difficult to quantify their respective 'stakes'.[126] Fourthly, the adoption of a pluralist approach may intensify litigation. The acceptance and codification of stakeholder interests would give rise to expectations which cannot always be satisfied. This could lead to more legal action, diverting resources away from shareholders and employees and distracting the board of directors from achieving economic progress.[127]

2.3.4 INTRODUCING THE ENLIGHTENED SHAREHOLDER VALUE APPROACH

The ESV approach is the most recent method for selecting in whose interests a company should be managed. A director is allowed to consider the interests of other stakeholders under the ESV approach only to the extent that doing so will benefit the shareholders.[128] This approach is highlighted in the case of *Hutton v West Cork Railway Co* where the directors of a company which was in the process of liquidation proposed to give bonuses to employees who were on the verge of losing their jobs. The court held:

> Charity has no business to sit at boards of directors qua charity. There is, however, a kind of charitable dealing which is for the interests of those who practice it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board, but for no other purpose… The law does not say that there are to be no cake and ale, but that

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[126] Esser I *Recognition of Various Stakeholder Interests in Company Management* (unpublished LLD thesis, University of Pretoria, 2008) at 36.
[127] Ambler T and Wilson A 'Problems of Stakeholder Theory Business Ethics: A European Review' (2006) *Business Ethics* at 33.
[128] Wiese T, *'Corporate Governance in South Africa with International Comparisons'* (2017) Juta: Cape Town 8.

> there are to be no cake and ale except such as are required for the benefit of the company.[129]

Nevertheless, the ESV approach oblige directors to consider non-shareholder interests only insofar that they advance shareholder interests, which leaves the ESV approach open to criticism.[130] Consequently, in reality, the ESV approach is still based on the shareholder-centric approach which only advocates for the interests of the shareholders to take center stage.

There are, however, various justifications for the ESV approach. Supporters of the ESV model argue that it does not necessitate a change in the board of directors' responsibilities or the company's primary goal.[131] Furthermore, the ESV strategy is thought to be a huge step forward from the traditional shareholder-centric strategy because it focuses on the company's long-term benefits by considering the interests of both internal and outside stakeholders, resulting in the company's sustainability.[132] Employees may have more confidence in the ESV strategy when it comes to terminating employment contracts because they know the company will not terminate their contracts in the short term, and this confidence may translate into positive contribution of the employees to the company's overall productivity.[133] Directors in jurisdictions that have codified the ESV approach are legally permitted to consider the interests of all stakeholders without fear of being sued by shareholders.[134] Although the ESV strategy considers the interests of stakeholders to some extent, its primary goal remains the maximisation of wealth for the company's shareholders.[135]

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[129] *Hutton v West Cork Railway Co* (1883) 23 Ch D 654.
[130] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) 51.
[131] Mudawi OM 'Does the concept of ESV succeed in bridging the gap between shareholders and stakeholders value theories?' (2018) *Business and Economic Research* 8(2) at 61.
[132] Keay A 'Tackling the issue of the corporate objective: An analysis of the United Kingdom's enlightened shareholder value approach' (2007) *Sydney Law Review* 29(4) at 582.
[133] Mudawi OM 'Does the concept of ESV succeed in bridging the gap between shareholders and stakeholders value theories?' (2018) *Business and Economic Research* 8 (2) at 61.
[134] Keay A 'Tackling the issue of the corporate objective: An analysis of the United Kingdom's enlightened shareholder value approach' (2007) *Sydney Law Review* 29(4) at 582.
[135] Kiarie S 'At crossroads: shareholder value, stakeholder value and enlightened shareholder value: Which road should the United Kingdom take?' (2006) *International Company and Commercial Law Review* 17(11) at 332.

As shown in all previous theories of corporate governance, the ESV approach brings with it certain problems and shortcomings. When considering how the UK dealt with the question: 'in whose interests a company should be managed' in Chapter 3, the shortcomings of the practical application of the ESV approach will be discussed in more detail. However, for the sake of introducing the ESV approach, it is important to make brief mention of the shortcomings associated with the approach.

For starters, the ESV approach does not clearly define stakeholders, which places more pressure on directors. The Explanatory Notes on the UK's Companies Act 2006, where the ESV approach is codified, states that the list of recognised stakeholders is not a fixed/closed one, but rather acknowledges the need to reflect broader interests such as that of employees and customers for example.[136] This will make it harder for directors to organise stakeholders by importance in order to support the company's success. Furthermore, it is unclear what will happen if the interests of many stakeholders conflict with the company's success. The law has failed to provide direction for both directors and the courts regarding corporate decision making and the review of such decisions.[137] Because of this risk, companies may offer directors broad discretionary powers with little to no accountability.[138]

Another flaw in the ESV method is that stakeholders are given no meaningful rights because of the lack of enforceability against directors.[139] Section 172(1) of the Companies Act of 2006 in the UK provides relatively little protection against violations of stakeholders' rights because it only requires directors to perform their obligations in good faith while advancing the company's performance.[140] Directors are therefore placed in a position where they may discharge this duty without having to provide strong arguments for their

[136] Explanatory Notes on the United Kingdom's Companies Act 2006, paragraph 326
[137] See similar concerns expressed in Keay A 'Shareholder primacy in corporate law: Can it survive? Should it survive?' (2010) *European Company and Financial Law Review* 7(3) at 375. Available at https://doi.org/10.1515/ecfr.2010.369 [accessed 12 March 2019].
[138] Kiarie S 'At crossroads: shareholder value, stakeholder value and enlightened shareholder value: Which road should the United Kingdom take?' (2006) *International Company and Commercial Law Review* 17(11) at 333.
[139] Mudawi OM 'Does the concept of ESV succeed in bridging the gap between shareholders and stakeholders value theories?' (2018) *Business and Economic Research* 8(2) at 61.
[140] Kiarie S 'At crossroads: shareholder value, stakeholder value and enlightened shareholder value: Which road should the United Kingdom take?' (2006) *International Company and Commercial Law Review* 17(11) at 344.

actions, i.e. without showing evidence of how they would have met their fiduciary obligation. For example, directors can claim that a topic was discussed during a board meeting, and that this acknowledgement appears to be sufficient to claim that a specific decision was made in good faith.[141] Furthermore, stakeholders are not given the opportunity to institute legal proceedings if their interests are violated.[142]

2.4 THE DTI POLICY DOCUMENT & KING CODES

2.4.1 THE DTI POLICY DOCUMENT 2004 & THE APPROACH TO THE KEY QUESTION: IN WHOSE INTEREST SHOULD THE CORPORATION BE MANAGED?

The DTI Policy Document, developed by the Department of Trade and Industry advanced that the South African economy should be competitive and developed using company law.[143] Directors are required by common law to behave honestly and in the best interests of the company.[144] As a result, the common law approach equating the company's interests to that of the shareholders collectively, is analogous to the ESV approach.[145]

The topic of whose interests should be considered when managing the company is also addressed in the Policy Document, citing both the pluralist and the ESV approaches. The Policy Document summarises the ESV approach in the following manner: In consideration of long-term interests, directors, as appropriate, should take into account the necessity of ensuring effective relationships with other stakeholders, but only if it benefits the shareholders.[146] In the pluralist view, a business's ability to flourish depends on directors balancing the interests of shareholders and non-shareholder groups.[147] The Policy

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[141] Ho V 'Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) *The Journal of Corporation* 36(1) at 68.
[142] Payne J 'Minority shareholder protection in takeovers: A UK perspective' (2011) *European Company and Financial Law Review* 8(2) at 147. Available at https://doi.org/10.1515/ecfr.2010.369 [accessed 18 February 2019].
[143] DTI Policy Paper 2004 titled *South African Company Law for the 21st Century- Guidelines for Corporate Law Reform*, Chapter 1 Paragraph 2.
[144] The drafters refer to the English case of *Hutton v West Cork Railway* (1883) 23 ChD 654 (CA).
[145] DTI Policy Paper 2004 titled South African Company Law for the 21st Century- Guidelines for Corporate Law Reform, Chapter 3 Paragraph 3.2.1.
[146] DTI Policy Paper 2004 titled *South African Company Law for the 21st Century- Guidelines for Corporate Law Reform,* Chapter 3 Paragraph 3.2.2.
[147] DTI Policy Paper 2004 titled *South African Company Law for the 21st Century- Guidelines for Corporate Law* Reform, Chapter 3 Paragraph 3.2.2.

Document so demonstrates that while the ESV approach translates to a surge in the wealth of shareholders, the stakeholder approach may prioritise the interests of other stakeholder groups over shareholder interests.[148] The Policy Document lists various justifications for the use of the ESV approach:

- Since the business is built up with money invested by shareholders, this group should also be the ones benefitting from any profits made;
- Shareholders are also in the best position to monitor the company's efficiency since they are entitled to all profits once the required liabilities have been settled; and
- Many different stakeholder groups will benefit from a company's existence and economic performance.[149]

According to the Policy Document, in order to achieve fiscal gains for the corporation, the constitutional and legislative principles and policies should be evaluated by the directors for benefit of other stakeholder groups as well. The economic objectives of the company should thus be balanced with the social and environmental constraints. A company should maximize economic success of a corporation by conducting business activities in a manner that reflects its legitimate interests and those of other stakeholder constituencies, when appropriate.[150]

Under the aforementioned approach, stakeholders' interests will be valued independently of shareholder interests. In the Constitution and Promotion of Access to Information Act, a director may be legally required to provide employees with information, even if this compromises shareholder confidentiality.[151] The Policy Document's Chapter 3, paragraph

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[148] Esser I *Recognition of Various Stakeholder Interests in Company Management* (unpublished LLD thesis, University of Pretoria, 2008) 285.
[149] DTI Policy Paper 2004 titled *South African Company Law for the 21st Century- Guidelines for Corporate Law* Reform, Paragraph 3.2.2.
[150] DTI Policy Paper 2004 titled *South African Company Law for the 21st Century- Guidelines for Corporate Law Reform*, Chapter 3 Paragraph 3.2.3.
[151] Section 32 of the Constitution of the Republic of South Africa, 1996 and the Promotion of Access to Information Act 2 of 2000.

3.2.3 finds that, subject to the Constitution of the Republic of South Africa, 1996, it may be desirable to deal with some stakeholder concerns in separate legislation.[152]

2.4.2 INFLUENCE OF THE KING CODES ON CORPORATE GOVERNANCE

The *King I Report* was released in 1994 and came at the dawn of constitutional democracy in South Africa.[153] *The King I Report*, like all subsequent reports, was not prescribed by law and was a matter of voluntary or self-regulation.[154] Enforcement of the Code was, however, effective as the JSE made compliance with the Code one of its listing requirements.[155] The board of directors has a duty to behave honestly in the best interest of the company, according to Chapter 1 of the *King I Report*, and should support the conventional stance that directors ought to favour shareholders when managing the company.[156] In addition to this, Chapter 5 provides that directors must aim to increase the value of shareholders, while incorporating non-shareholder interests in the company's objectives.[157] It can thus be concluded that *King I* supports the contention that the company should be managed in the best interests of present and future shareholders, subject thereto that regard should be given to the interests of other stakeholders.[158] It is therefore safe to say that *King I* sought to promote an integrated approach to good

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[152] Mathibela KP *Corporate Social Responsibility legal analysis and social transformation: The South African experience in a comparative perspective* (unpublished thesis, University of Cape Town, 2017) at 20.

[153] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) at 31.

[154] Bouwman N 'Modification of the Director's duty of care and skill' (2009) 21 SA Mercantile Law *Journal* at 518. Also see Bekink M 'An Historical Overview of the Director's Duty of Care and Skill: From the Nineteenth Century to the Companies Bill of 2007' (2008) *South African Law Journal* at 108.

[155] See ss.8.63(a)(i) and ss8.63(a)(ii) of the JSE Listings Requirements available at http://www.jse.co.za/listing_requirements.jsp [accessed 13 June 2023].

[156] The *King Report on Corporate Governance for South Africa*, 1994- Chapter 1 Paragraph 3.

[157] The *King Report on Corporate Governance for South Africa*, 1994- Chapter 5 Paragraph 2.7.

[158] Esser I *Recognition of Various Stakeholder Interests in Company Management* (unpublished LLD thesis, University of Pretoria, 2008) 279.

governance.[159] This approach to corporate governance takes into account the interests of stakeholders and encourages economic, social and environmental accountability.[160]

In May 2002, *King I* was succeeded by *King II*. The transition from a single to a triple bottom line, which tied the economic, social, and environmental worlds together as it relates to a corporation, was a significant characteristic of *King II*.[161] This, however, did not change the primary focus of the company, which was profit maximisation for shareholders.[162] The financial and non-financial parts of the company's operations are addressed in the economic part of this strategy. The environmental component refers to the impact that a company's products or services have on the environment. The social component also encompasses relationships with non-shareholders.[163] The major beneficiaries of the directors' fiduciary obligations are still the shareholders collectively, although social, economic, and environmental considerations are also considered. In the reign of *King II*, the requirement that all authorised stakeholders be fully accounted for was rejected. The reason for this was the fact that boards would end up answering to no one simply if required to answer to all.[164]

King III came into effect in 2010 and further advanced the triple bottom line approach. *King III* encouraged directors to consider the interests of stakeholders other than shareholders.[165] *King III* was flawed by the fact that it did not provide any direction as to whether the ESV approach or the stakeholder approach was to be followed in this

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[159] Bekink M 'An Historical Overview of the Director's Duty of Care and Skill: From the Nineteenth Century to the Companies Bill of 2007' (2008) *South African Law Journal* at 108.
[160] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) at 32.
[161] Hajat H *A South African Perspective: The Modern Company and Corporate Governance in the Companies Act, 2008* (unpublished LLM Research Paper, University of the Witwatersrand, 2019) at 22.
[162] Esser I *Recognition of Various Stakeholder Interests in Company Management* (unpublished LLD thesis, University of Pretoria, 2008) 279.
[163] The King Report on Corporate Governance for South Africa, 2002- Paragraph 17.1, Introduction.
[164] The King Report on Corporate Governance for South Africa, 2002- Introduction and Background, paragraph 5 on page 7. Also see Mongalo T 'The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa' (2003) *South African Law Journal* 120 at 177.
[165]The King Report on Corporate Governance for South Africa, 2009- Introduction and Background, page 13. Also see Jennings BPL 'Are Shareholders Exclusive Beneficiaries of Fiduciary Obligations in South Africa? The Role of Fiduciary Obligations in the 21st Century' (2015) 2 *JCCL&P* 54 at 56.

respect.[166] Nevertheless, *King III* emphasised company ethics and the notion of being a good 'corporate citizen'. Corporate citizenship can be defined as the company as a person (albeit as juristic person) operating in a sustainable manner.[167] As a good citizen, a company should be conscious of its constitutional obligations of respecting and aiding the promotion of fundamental human rights as provided for in the Bill of Rights under the Constitution of the Republic of South Africa. However, *King III* retained the traditional view mandating directors to operate in the best interests of the company and its shareholders as contained in the common law.[168]

King IV came into effect in 2017. *King IV* proposes a stakeholder-inclusive approach and emphasises the level of dependency between the company and its stakeholders (and *vice versa*).[169] It also states that broader stakeholder interests must be balanced against the company's shareholders' interests.[170] Stakeholder inclusivity refers to the board's view of other stakeholders as having intrinsic value for making decisions in the company's best interests over time, rather than just as instruments to serve the interests of shareholders.[171] This is done as a means to an end rather than as an end in and of itself. The stakeholder-inclusive approach also means that shareholders do not enjoy preference over other stakeholders.

2.5 CONCLUSION

This chapter laid down a theoretical foundation on the various corporate governance approaches and how they can be used to deal with the question: in whose interests a company should be managed? The first approach, the shareholder-centric approach, prioritises shareholder interest, whereas the second approach, the pluralist/stakeholder

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[166] Mongalo T 'The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa' (2003) *South African Law Journal* 120 at 177.
[167] Institute of Directors in Southern Africa (IODSA) *King IV: Report on Corporate Governance for South Africa 2016* available at http://www.iodsa.co.za [accessed 14 June 2023].
[168] Institute of Directors in Southern Africa (IODSA) *King III: Report on Corporate Governance in South Africa 2009* available at http://www.iodsa.co.za [accessed 14 June 2023].
[169] Institute of Directors in Southern Africa (IODSA) *King IV: Report on Corporate Governance for South Africa 2016* Fundumental concepts, page 25 available at http://www.iodsa.co.za [accessed 12 April 2019].
[170] Hajat H *A South African Perspective: The Modern Company and Corporate Governance in the Companies Act, 2008* (unpublished LLM Research Paper, University of the Witwatersrand, 2019) at 24.
[171] Institute of Directors in Southern Africa (IODSA) *King IV: Report on Corporate Governance for South Africa 2016* available at http://www.iodsa.co.za [accessed 14 June 2023].

approach, prioritises stakeholder interests (see part 2.3). The ESV approach, the third and final approach, incorporates stakeholder interests but only to the extent that it is still in the best interests of the shareholders as a collective (see part 2.3.4). The benefits and drawbacks of shareholder primacy were discussed (see part 2.3.4). All three approaches were shown to have several shortcomings.

Generally, shareholder-centric strategies are viewed as being narrowly focused because their primary objective is to maximise profits for shareholders, ignoring other stakeholders, thus running the risk that management would use their power not in the best interests of the company at a given point in time. Similarly, flaws in the pluralist approach have been identified and higlighted (see part 2.3.3). An example of such flaws is a lack of a distinct stakeholder hierarchy, and because of such a flaw, there is no single purpose to pursue, and directors appear to be held to a lower standard of accountability. This relates to Steenberg's argument that a director who is accountable to many ends up being accountable to none (see 2.3.1, paragraph 6). Even though the ESV approach may seem like the best approach at this stage, it is yet to be determined whether South Africa indeed adopted this approach.

CHAPTER 3: INTERNATIONAL PERSPECTIVES- THE ESV APPROACH

3.1 INTRODUCTION

In response to the question whether directors must act in the best interests of the company, scholars have for numerous years debated whether the interests of shareholders, other stakeholders, or a mixture of the two, should be considered by the directors when making decisions affecting the companies. A limited number of jurisdictions have recognised that, in certain circumstances, the interests of other stakeholders, such as creditors, become relevant in corporate decision-making by the board of directors. As such, such jurisdictions have considered to shift from a purely shareholder-centric approach to a more inclusive approach.[172] Some of the best international practice jurisdictions have revisited this debate through law reforms and they include Australia and the UK. Comparative analyses of relevant UK and Australian laws are presented in Chapter 3 in order to demonstrate how far legislators in these jurisdictions have departed from the shareholder centric approach. Finally, this chapter evaluates these amendments to see if they can serve as models for South Africa. The UK and Australia were chosen because they have long been considered as international leaders in corporate governance, combining high standards with minimal constraints and flexibility.[173] The three jurisdictions, South Africa, Australia and the UK have strong common law influences in their company laws, and it therefore it makes sense to compare these jurisdictions. Finally, all three jurisdictions have mixed legal systems.

3.2 THE UNITED KINGDOM

3.2.1 Historical Development of the ESV Approach on the UK

The UK's company law has experienced much transformation and amendments since the mid-nineteenth century. Despite numerous revisions to company law, several provisions of the Companies Act of 1862 remained in effect at the turn of the century.[174] This

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[172] See section 172 of the Companies Act 2006.

[173] Green Paper: Corporate Governance Reform (2016) available at https://assests.publishing.service.gov.uk/governement/uploads/system/uploads/attachment_data/file/584013/corporate-governance-reform-green-paper-pdf [accessed 12 June 2023].

[174] Keay A 'Tackling the issue of the corporate objective: An analysis of the United Kingdom's enlightened shareholder value approach' (2007) *Sydney Law Review* 29(4) at 588.

prompted the UK's Department of Trade and Industry to establish a commission tasked with reviewing company law and formulating reform ideas.[175] A committee called the Company Law Review Steering Group (hereinafter referred to as the CLRSG) was in charge of the review process. The CLRSG began a public involvement process in which it issued multiple substantive papers outlining its positions and solicited responses to questions posed to the public. A final report was submitted to the Secretary of State for Trade and Industry by the CLRSG in July 2001.[176] This was followed by two White Papers as feedback on the CLRSG's Final Report.[177] After hearing public comments, the Company Law Reform Bill was presented to Parliament in November 2005. The Bill was finally enacted and became the Companies Act 2006 after extensive debate in both Houses of Parliament (UK).[178]

The question in whose interest directors should govern the company was clearly an important point of discussion in the CLRSG's deliberations.[179] The CLSRG suggested two options to dealing with this problem: a shareholder-centric strategy or a pluralist approach.[180] The CLSRG made this recommendation in order to codify the duties of directors in order to get them in line with the law of other common law jurisdictions, like Australia.[181] The CLRSG recognised reality that corporations were managed in favour of shareholders, giving shareholders complete power, 'such that the directors are required

[175] The Company Law Review Steering Group, Department of Trade and Industry, Modern Company Law for a Competitive Economy (1998) at <http://www.berr.gov.uk/files/file23283.pdf>.
[176] Keay A Tackling the issue of the corporate objective: An analysis of the United Kingdom's enlightened shareholder value approach' (2007) *Sydney Law Review* 29(4) at 588.
[177] Keay A 'Tackling the issue of the corporate objective: An analysis of the United Kingdom's enlightened shareholder value approach' (2007) *Sydney Law Review* 29(4) at 588.
[178] House of Lords and House of Commons.
[179] CLRSG *Modern Company Law for a Competitive Economy: Final Report* (2001) available at https://www.researchgate.net/publication/4746913_Modern_Company_Law_for_a_Competative_Economy_The_Strategic_Framework [accessed 12 June 2023].
[180] CLRSG *Modern Company Law for a Competitive Economy: Final Report* (2001) available at https://www.researchgate.net/publication/4746913_Modern_Company_Law_for_a_Competative_Economy_The_Strategic_Framework [accessed 12 June 2023].
[181] Company Law Review Group: First Report (2001) at 47 available at http://clrg/publications/first-report-of-the-company-law-review-group-2001.pdf [accessed on 16 June 2023].

to manage the business on their behalf…'[182] Further, it claimed that a company's ultimate task should be to maximize share price.[183]

The CLRSG went on to advocate for a strategy that it believed would result in more wealth production and competitiveness for everybody. The ESV approach was coined to describe this method. The ESV approach involved balancing the interests of various stakeholders to ensure that the shareholders still benefit in the long-term.[184] Even though shareholder centrism was still a feature of this strategy, it actively avoided focusing exclusively on short-term fiscal bottom lines and focused instead on developing relationships for the long-term.[185] Despite considering the pluralist theory of law, the CLRSG rejected it, because it would have meant modifying the law in order to encompass additional goals [other than shareholder maximisation].[186] The purpose is to have it serve a broader range of interests, not as a way of increasing shareholder value (as envisioned in the ESV approach), but as something which is valuable in itself.[187]

The CLRSG indicated that the stakeholder approach was impracticable and undesirable in the UK because it would involve significant revisions of the legislation governing the obligations of directors.[188] The CLRSG clarified its position in a subsequent consultation document, indicating that under the ESV approach, directors were required to ensure economic success for the shareholders by considering both short and long-term goals, maintain good working relationships with employees, customers, suppliers and others, and to pay attention of the effect of its operational tasks on the environment.[189]

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[182] The Company Law Review Steering Group, Department of Trade and Industry, Modern Company Law for a Competitive Economy (1998) at http://www.berr.gov.uk/files/file23283.pdf [accessed 13 June 2023].
[183] The Company Law Review Steering Group, Department of Trade and Industry, Modern Company Law for a Competitive Economy (1998) at http://www.berr.gov.uk/files/file23283.pdf [accessed 13 June 2023].
[184] Keay A 'Tackling the issue of the corporate objective: An analysis of the United Kingdom's enlightened shareholder value approach' (2007) *Sydney Law Review* 29(4) at 590.
[185] Sealy LS and Worthington S *'Cases and Materials in Company Law'* 11th ed. (2016) Oxford University Press at 324.
[186] Sealy LS and Worthington S *'Cases and Materials in Company Law'* 11th ed. (2016) Oxford University Press at 334.
[187] Armour J, Deakin S and Konzelmann S 'Shareholder Primacy and the Trajectory of UK Corporate Governance' (2003) 41 *British Journal of Industrial Relations* 531 at 537.
[188] Company Law Review Group: First Report (2001) at 47 available at http://clrg/publications/first-report-of-the-company-law-review-group-2001.pdf [accessed on 16 June 2023].
[189] CLRSG *Modern Company Law for a Competitive Economy: Final Report* (2001) available at https://www.researchgate.net/publication/4746913_Modern_Company_Law_for_a_Competative_Economy_The_Strategic_Framework [accessed 12 June 2023].

Upon reviewing the CLRSG recommendations, the UK government welcomed the concept first throughout a White Paper[190] and later through a Bill[191], and it has since been included in section 172(1) of the Companies Act 2006 (UK). In essence, section 172 refers to the duty to promote the company's success in light of a variety of conditions. There are several conditions that directors are required to consider when making decisions: the long-term effects; the interests of employees; the need to maintain healthy relations with vendors, customers, and all relevant stakeholders; company operations that affect the environment and the community, the organisation's commitment to business practices that are ethical, and ensuring fair treatment among its members.[192]

3.2.2 Statutory Interpretation and Application of the ESV Approach: Analysis of Section 172 of the Companies Act 2006

3.2.2.1 The section 172 Provision and its Interpretation

Section 172(1) of the Companies Act 2006 provides as follows:

> A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (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, and
>
> (f) the need to act fairly as between members of the company.

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[190] Department of Trade and Industry- Government White Paper, Modernising Company Law', Command Paper Cm 5553–1 (Comment) and 'Modernising Company Law: Draft Clauses', Command Paper 5553–11 (Draft Companies Bill), Her Majesty's Stationery Office (now Office of Public Sector Information) (2002) available at http://www.dti.gov.uk/companiesbill/whitepaper.htm [accessed 18 June 2023].

[191] Company Law Reform Bill available at https://publications.parliament.uk/pa/ld200506/ldbills/034/2006034.pdf/ [accessed 17 September 2019].

[192] Esser I *Recognition of Various Stakeholder Interests in Company Management* (unpublished LLD thesis, University of Pretoria, 2008) 114.

From the above section, it becomes clear that the CLRSG and subsequently the UK Government, seemingly wished to retain the notion that shareholders are the core focus of directors' decision-making, but also wanted to place more emphasis on the long-term future of companies.[193] Section 172 of the Companies Act of 2006 is certainly an example of the ESV approach as directors are now required to consider non-shareholder interests as listed under this section. The basic legal position, however, remains, that:

> …the duty of directors to act in good faith and in the best interests of the company…requires directors to treat *shareholders'* interests as paramount. The interests of employees, or other stakeholders, can be considered in performing these duties – but only where this would be in the company's (i.e., the shareholders') interests.[194]

The terms 'success of the company' and 'benefit of its members' both still boils down to the fact that the company is managed in the first instance for the interest of its shareholders. In the second instance, the interests of the listed stakeholders may be considered but only insofar as it is in the best interest of the shareholders collectively. The company's success in the long term, which directors are obligated to take into account, thus takes precedence over the factors listed in section 172(1)- which directors only need to have regard to, i.e., think about or give consideration to.[195] In the case of *R (on the application of People and Planet) v HM Treasury*, campaigners from the World Development Movement, PLATFORM and People & Planet applied for permission to hold a judicial review over the UK Treasury's lack of adequate environmental and human rights considerations in investing with the Royal Bank of Scotland (RBS).[196] The applicants argued that the RBS used public funds for various controversial projects which undermined the UK's commitment to fight climate change.[197] The High Court denied the application. The presiding officer in this case noted that there was compliance with the

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[193] Keay A 'Tackling the issue of the corporate objective: An analysis of the United Kingdom's enlightened shareholder value approach' (2007) *Sydney Law Review* 29(4) at 592.
[194] The Company Law Review Steering Group, Department of Trade and Industry, *Modern Company Law for a Competitive Economy*: *The Final Report, Volume 1* (2001) at 49–54.
[195] Hood P 'Directors' Duties Under the Companies Act 2006: Clarity or Confusion?' (2013) *Journal of Corporate Law Studies* at 19.
[196] *R (on the application of People and Planet) v HM Treasury* [2009] EWHC 3020.
[197] *R (on the application of People and Planet) v HM Treasury* [2009] EWHC 3020 at paragraph 34.

Green Book regarding the right manner 'in which social and environmental considerations may be taken into account by the directors of RBS in the context of . . . [their] duties . . . under section 172 of the CA 2006'.[198] It was also held that the respondent could not 'go further' and ultimately foist 'its own' climate change and human rights policies against the directors of the RBS as doing so would have undermined the RBS board's duties under section 172(1).[199] The aforementioned decision accords with the Explanatory Notes of the 2006 Companies Act which provides that 'the question of what amounts to "success" is a matter for "the good faith judgment" of the directors, and means that business decisions' regarding matters like strategy and tactics are for the directors, and not subject to decision by the courts, subject to good faith'.[200]

3.2.2.2 Shareholder Primacy Retained

Section 172(1) makes it possible to interpret or classify the ESV approach as one that puts shareholders first.[201] The essential legal position is straightforward: directors' obligations to act [in good faith] and in the best interests of the firm obligates them to prioritize the interests of shareholders.[202] These tasks can be completed while considering employee or other stakeholder interests, but only if doing so promotes the best interests of shareholders. This demonstrates that shareholder priority has been preserved. Additionally, directors may consider other factors, including those set forth in section 172(1)(a)-(f). As to what directors should consider when managing companies, section 172(1) currently presents the most comprehensive list.[203] Additionally, it represents the clearest recognition in modern business law as to the importance of interests other than those of shareholders, specifically employees, suppliers, and customers.[204]

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[198] *R (on the application of People and Planet) v HM Treasury [2009] EWHC 3020 at paragraph 34.*
[199] *R (on the application of People and Planet) v HM Treasury* [2009] EWHC 3020 at paragraph 34.
[200] See Companies Act 2006: Explanatory Notes at paragraph 327.
[201] Sealy LS and Worthington S *'Cases and Materials in Company Law'* 11th ed. (2016) Oxford University Press at 332.
[202] Keay A 'Tackling the issue of the corporate objective: An analysis of the United Kingdom's enlightened shareholder value approach' (2007) *Sydney Law Review* 29(4) at 590.
[203] Delport P and Esser I 'The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom's Enlightened Shareholder Value approach: Part 2' (2017) *De Jure* 97 at 236.
[204] Delport P and Esser I 'The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom's Enlightened Shareholder Value approach: Part 2' (2017) *De Jure* 97 at 236.

3.2.2.3 Practical Application of Section 172

Section 172's practical usefulness is still unknown. The confusion that has been created can be stated as follows: first, directors have unrestricted power under this provision.[205] This section mandates directors to manage the company in a way that will best contribute to the profitability of the corporation and its shareholders collectively. No guidance is, however, provided as to how this crucial discretion is to be exercised. The Ministerial Statement of June 2007 provides tandem manners to view and interpret the legal declaration of the duties of directors.[206] All things considered, it clarifies company directors' existing common law requirements.[207] At the same time, it represents a significant step forward in enunciating the link joining whatever is beneficial to the corporation and the community as a whole.[208]

Secondly, section 172 encapsulates a cultural shift in how businesses behave themselves.[209] The section is based on a new methodology (ESV approach) to promoting shareholder objectives while also addressing stakeholder interests. These two approaches (ESV and pluralist) are complementary rather than antagonistic. However, no guidelines as to how directors should consider non-shareholder interests are provided. Based on a recent 'Corporate Update' given by Ashurst, section 172(1) is at least likely to make directors think more seriously about their duties.[210] As a result, it is evident how section 172(1) is debilitated as directors are not given specific instructions on how to act in practice.[211] Despite the fact that directors are provided with a non-exhaustive list of non-shareholder interests they ought to regard, no guidance is provided as to the form that this ‘regard’ should take on and directors are therefore left in a space where they do

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[205] See section 172(1) of the Companies Act 2006.
[206] See the introduction to the Ministerial Statements of June 2007 available at http://uk.practicallaw.com/4-369-5991?q=&qp=&qo=&qe= [accessed 18 June 2023].
[207] See the introduction to the Ministerial Statements of June 2007 available at http://uk.practicallaw.com/4-369-5991?q=&qp=&qo=&qe= [accessed 18 June 2023].
[208] See the introduction to the Ministerial Statements of June 2007 available at http://uk.practicallaw.com/4-369-5991?q=&qp=&qo=&qe= [accessed 18 June 2023].
[209] Keay A ‘Section 172(1) of the Companies Act 2006: an interpretation and assessment’ (2007) *The Company Lawyer* 106 at 109.
[210] *Corporate update of Ashurst of November 2006 on the Companies Act of 2006* available at https://www.ashurst.com/en/news-and-insights/legal-updates [accessed on 19 August 2021].
[211] See the *Corporate Update* of Ashurst of November 2006 on the Companies Act of 2006.

not know how to accurately comply with this provision.[212] Another difficulty related to a lack of clarity is how directors should consider the interests listed in section 172(1) when there is a conflict between theses interests. While the CLRSG acknowledged that when the company's long-term interests are at stake, there is no guidance provided to outline how directors ought to fulfill the recently codified duties to ensure that the interests of the stakeholders mentioned in section 172(1) are not offset by the interests of shareholders.[213] On the other hand, one may argue that the common law can provide guidance in the interpretation of section 172. This is because section 172 codified some common law principles/duties of directors. However, if one relies on the common law interpretation of the phrase 'best interests of the company', shareholder supremacy is retained and little to no regard is given to the interests of other stakeholders as envisaged by modern company law.

Thirdly, there are also two other key interpretive issues that call for clarity. The one is the fact that directors are explicitly mandated to take note of these issues, among others.[214] However, no indication is given as to what these other matters may or may not entail. A further concern is that the phrase 'success of the company' is not defined. With this section, directors are required to do everything possible to ensure that the company succeeds.

Fourthly, directors must make judgments that are in the best interests of the company's shareholders. The term 'shareholders', according to the courts, refers to both current and future shareholders.[215] As a result, the decision-making process for directors is complicated because when the long-term perspective is not taken, it may provide better returns to current shareholders than to prospective investors.[216] *Provident International Corp v International Leasing Corp Ltd* concluded that the interests of prospective

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[212] Keay A 'Section 172(1) of the Companies Act 2006: an interpretation and assessment' (2007) *The Company Lawyer* 106 at 109.

[213] The Company Law Review Steering Group, Department of Trade and Industry, Modern Company Law for a Competitive Economy (1998) at 38-39 available at http://www.berr.gov.uk/files/file23283.pdf [accessed on 17 April 2019].

[214] Section 172(1)(a)-(f).

[215] See *Gaiman v National Association for Mental Health* [1971] and *Brady v Brady* (1987) 3 BCC 535 at 552.

[216] Keay A 'Tackling the issue of the corporate objective: An analysis of the United Kingdom's enlightened shareholder value approach' (2007) *Sydney Law Review* 29(4) at 601.

shareholders should be taken into account.[217] Authors Robert Austin, Harold Ford, and Ian Ramsay, however, believe that this is unusual, given that the current members of the corporation may have the firm wound up and the assets allocated to themselves.[218] This begs the question of whether the necessity that long-term interests be considered compels directors to be more worried with future shareholders. If this is the case, directors can argue that they have made actions in the present that will benefit the interests of a specific stakeholder identified in section 172(1) in the future, so helping future shareholders' interests.

Fifthly, the Companies Act of 2006 in the UK does not give any non-shareholder mentioned in section 172(1) the right to demand that company directors to take cognisance of their interests unless there's evidence they violated them.[219]

3.2.3 The UK as a Model for South Africa

At first look, section 172 of the Companies Act of 2006 in the UK looks to be a move away from a shareholder-centric approach and toward a pluralist or stakeholder approach. However, when one scrutinises the Act more closely, it can be concluded that this is in fact not the case. Based on the aforementioned discussion in this chapter, it becomes clear that the ESV approach lacks clarity and precision in relation to how exactly it is expected to work. In addition to this, the stakeholders mentioned in section 172(1) have no right of enforcement if the section in question is breached.[220] Furthermore, stakeholders also have the practical problem of proving that their interests were not considered by directors in instances where their interests should have prevailed.[221] The ESV strategy cannot be seen as an example of a move from a shareholder-centric to a stakeholder-inclusive strategy as directors are not held to account to stakeholders who

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[217] *Provident International Corp v International Leasing Corp Ltd* [1969] NSWR 424 at 440.
[218] Austin RP, Ford HAJ and Ramsay IM *Company Directors: Principles of Law and Corporate Governance* LexisNexis Butterworths, (2005) at 275.
[219] See sections 260-264 of the United Kingdom Companies Act of 2006.
[220] Keay A 'Tackling the issue of the corporate objective: An analysis of the United Kingdom's enlightened shareholder value approach' (2007) *Sydney Law Review* 29(4) at 611.
[221] Sealy LS and Worthington S *'Cases and Materials in Company Law'* 11th ed. (2016) Oxford University Press at 328.

are not shareholders.[222] It is therefore clear that the shareholder-centric approach remains quite strong in the UK.

The ESV approach was also designed with the goal of creating an environment that would make directors' decision-making easier and more informed, in the sense that they would take cognisance of the obligation to consider the interests of a wider group of stakeholders. However, one is compelled to wonder how progressive the ESV approach is in practice. The ESV approach resulted in many terms and notions in section 172 that are vague and untested by case law. For example, it is unclear how much protection stakeholders receive under section 172, and the responsibility to respect stakeholders' interests remains subjective.[223] Furthermore, director decisions are hindered by the prescriptive list of interests directors must take into account.

The preferred approach to corporate governance in the Companies Act 71 of 2008 is already unclear as briefly discussed under chapter 2. To use the vagueness of section 172 of the UK's Companies Act of 2006 as basis to our reform will create even more confusion in South Africa. It can therefore be concluded that the UK is not a good model for South Africa in its attempt to make its preferred approach to corporate governance clear.

3.3 AUSTRALIA

3.3.1 Statutory and General Duties of Directors in Australia

It is necessary to explore the roles of directors in Australian law in order to explore the subject of shareholder protection. Directors' responsibilities are divided into two categories: general law duties arising from contracts, principles of equity or the common law, and statutory duties[224] In addition, directors' responsibilities are enshrined in law. Because the Corporations Act of 2001 partly codifies the duties of directors, the common

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[222] Keay A 'Tackling the issue of the corporate objective: An analysis of the United Kingdom's enlightened shareholder value approach' (2007) *Sydney Law Review* 29(4) at 611.
[223] Dermansky P *Should Australia Replace Section 181 of the Corporations Act 2001 with wording similar to Section 172 of the Companies Act 2006 (UK)?* Unpublished paper at 26.
[224] Austin RP, Ford HAJ & Ramsay IM *Company Directors: Principles of Law and Corporate Governance* (2005) (LexisNexis Butterworths, 2005) at 243 and Farrar JH *Corporate Governance: Theories, Principles, and Practice* 2nd Ed (Oxford UP, 2005) at 100-101.

law *status quo* is retained.[225] Directors' responsibilities in Australia are separated into two groups, similar to those in South Africa. Both the duty of acting with care and diligence, as well as the fiduciary duty of loyalty and good faith, are categorised separately.[226]

Several conduct-requiring ('positive') and conduct-refraining ('negative') tasks mirror the loyalty norm. As part of the 'positive' obligations of loyalty, directors are required to act honestly and in the company's interests- a crucial part of this research as explained further below.[227] *Mills v Mills* is a case which dealt with the extent of the duty of good faith.[228] Director obligations to consider the company's interests, not their own, were examined. Requiring directors not to mention or analyse how a particular transaction would affect their shares, will equate to disregarding reality and render the functioning of the business almost impossible.[229] The law, however, expect directors to place the interests of the corporations above their own interests and not to permit their own interests or interests of third parties to interfere with their duty to the company. A director is also bound by conduct-restraining or negative duties, including the duty to avoid conflicts of interest. In addition, conflicts of interest enjoy attention in the Corporations Act of 2001.[230] Aside from that, the obligation requires acting according to the right purpose and exercising unrestricted discretion.[231] The Corporations Act of 2001 codifies these common law obligations.

Corporate directors must act honestly and for the benefit of the company and a proper purpose in compliance with the Corporations Act of 2001, which also prohibits conflicts of interest. Detailed discussions of directors' duties are included below, with an emphasis on acting in good faith in the company's best interests.

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[225] Sections 179(1) and 185 of the Corporations Act of 2001 clarifies the position that other laws, including the general law, continues to operate with the statutory duties contained in the Act.
[226] Langford RT 'Best Interests: Multifaceted but Not Unbounded' (2016) 75 *Cambridge Law Journal* at 508.
[227] See section 961B of the Corporations Act 2001.
[228] *Mills v Mills* (1938) 60 CLR 150 (HC) at 169.
[229] *Mills v Mills* (1938) 60 CLR 150 (HC) at 169.
[230] Sections 182 and 183 of the Corporations Act 2001.
[231] Section 181(1)(b) and 180(2)(a) of the Corporations Act 2001. Under section 181(1)(b) 'a director or other officer of a corporation must exercise their powers and discharge their duties for a proper purpose'.

3.3.2 Fiduciary Duty to Act in Good Faith in the Best Interests of the Company

Attenborough holds that the law requires people in power and trust to act in the best interests of those they hold in trust, and such relationships are called fiduciary relationships.[232] Australian company law requires directors to act in the company's best interests in good faith, among other things. Although this is a common law obligation, it has also been codified into law. Section 181(1) of the Corporations Act of 2001 mandates that directors act in the corporation's best interests.[233] In practice, this translates to the interests of the shareholders collectively.[234] Two Australian government reviews have been conducted to determine if Australia should follow the stakeholder approach used in countries such as Germany.[235] In both cases, the review considered that the law in Australia should remain the same. In both situations, the review concluded that Australian law should stay unchanged. In determining what is in the best interests of the shareholders, Australian directors are expected to consider broader interests (such as employees or creditors) to the extent that they are relevant to the shareholders' interests. The reviews will be discussed in 3.3.4 below.

3.3.3 The Traditional Position: To Who Are Directors' Duties Owed?

Directors ought to act in the company's best interests according to common law. In *Greenhalgh v Arderne Cinemas*[236] and *Darvall v North Sydney Brick and Tile Co*[237] it was concluded that directors must act in the company's best interests overall. This means that when it comes to operating a corporation, directors should think about future shareholders as well as current shareholders. Directors are traditionally considered to be obligated to the corporation, and to no one else.[238] The words 'the company' seems to suggest that decisions by directors should take the best interest of the full membership in mind, not

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[232] Attenborough D 'Recent Developments in Australian Corporate Law and Their Implications for Directors' Duties: Lessons to be Learned from the UK Perspective' (2007) *International Company and Commercial Law Review* at 314.
[233] Section 181(1) of the Corporations Act of 2004.
[234] Bidie SS 'Director's Duty to Act for a Proper Purpose in the Context of Distribution under the Companies Act 71 of 2008' (2019) *PER / PELJ* (22) at 7.
[235] *CAMAC Social Responsibility of Corporations Report* and *PJC Corporate Responsibility Repor*t**.**
[236] *Greenhalgh v Arderne Cinemas* [1951] Ch 286 at 291.
[237] *Darvall v North Sydney Brick and Tile Co* (1988) 6 ACLC 154.
[238] Loftus JA and Purcell JA 'Corporate Social Responsibility: Expanding Directors' Duties or Enhancing Corporate Disclosure' (2007) *Australian Journal of Corporate Law* 135 at 148.

only the company as a legal person separate from its shareholders.[239] The legal measures providing protection to particular stakeholders is discussed below. Shareholders, creditors, employees, and consumers are all considered. The way in which stakeholders are treated in Australia is also determined by a number of corporate governance initiatives.

(A) Individual Shareholders

Directors owe no direct fiduciary duty to individual shareholders. In the case of *Brunninghausen v Glavanics*, however, the court held that directors should take individual shareholders' interests into account.[240] A corporation had two directors who were also the sole shareholders in this case.[241] The shares of one director were sold to the other director.[242] A third party had provided a proposal to the buyer after talks with him.[243] Directors have fiduciary duties to their shareholders, so the court ruled that the director who bought the shares had a duty of informing the seller of his talks with the third party.[244] This case demonstrates the courts' readiness to take a commercial approach in closely owned businesses, although it makes no mention of a special obligation towards shareholders. The facts of a particular case are rather taken into consideration when making a decision. As long as there are no particular facts that give rise to a fiduciary obligation, directors are liable only to the corporation.

(B) Creditors

A few Australian precedents indicate that directors are held to an indirect obligation towards creditors, especially when a company is at the point where bankruptcy is imminent. A decision in *Walker v Wimborne* found directors should keep shareholders and creditors' interests in mind when performing their duties, in order to avoid negative consequences for the company.[245] The Supreme Court of New South Wales made reference, with approval, to the ruling in *Walker v Wimborne* in *Ring v Sutton*.[246] In the

[239] Langford RT ‘Best Interests: Multifaceted but Not Unbounded’ (2016) 75 *Cambridge Law Journal* at 515.
[240] *Brunninghausen v Glavanics* (1999) 17 ACLC 1247 at 1254.
[241] *Brunninghausen v Glavanics* (1999) 17 ACLC 1247 at 1254.
[242] *Brunninghausen v Glavanics* (1999) 17 ACLC 1247 at 1254.
[243] *Brunninghausen v Glavanics* (1999) 17 ACLC 1247 at 1254.
[244] *Brunninghausen v Glavanics* (1999) 17 ACLC 1247 at 1254.
[245] *Walker v Wimborne* (1976) 137 CLR 1 (HC) at 449.
[246] *Ring v Sutton* (1980) 5 ACLR 546.

latter instance, it was stated that when performing their fiduciary duty to the corporation, creditors' interests should be considered by board members.[247] It was held by the court in *New World Alliance (Pty) Ltd; Sycotex (Pty) Ltd v Baseler*, that directors are not bound to take into account the interests of creditors.[248] According to the case of *Spies v The Queen*, directors have no direct responsibility towards creditors.[249]

Other cases in the UK and Australia, on the other hand, viewed the *dicta* in *Walker v Wimborne* as directly referring to an obligation, rather than an incidental obligation, as previously stated.[250] In order for the company's affairs to run properly and for its property to be utilised for its own benefit rather than being used for the benefit of directors, it is the directors' duty to ensure that these issues are addressed, according to the English case of *Winkworth v Edward Barron Development Co Ltd.*[251] *Jeffree v National Companies and Securities Commission*, an Australian case, backed with this assertion.[252] However, because the remark was made obiter, it is contended that that no clear responsibility is created towards creditors in the *Winkworth* ruling. It was confirmed in the *West Mercia* case that the interests of creditors only come into play when directors act in the company's best interests overall.[253] The scope of the phrase 'interests of the company' is thus broadened in this context in order to be inclusive of creditors' interests. The company's interests, on the flip side, remain important. The owing of the duties by directors to creditors is not a rule of general application. This happens under certain circumstances only.

Particularly relevant to this is the *Spies v The Queen* ruling, which established that directors' duties belong to the corporation rather than to creditors directly.[254] Creditors' interests would thus take precedence in certain situations, such as insolvency

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[247] See *Ring v Sutton* at 550.
[248] *New World Alliance (Pty) Ltd; Sycotex (Pty) Ltd v Baseler* (1994) 51 FCR 425 at 550.
[249] *Spies v The Queen* (2000) 201 CLR 603 (HC).
[250] See *Lonrho v Shell Petroleum* (1980) 1 WLR 627 at 58, 60 and *West Mercia Safetywear Ltd* (in liq) *v Dodd* at 252.
[251] *Winkworth v Edward Barron Development Co Ltd* [1987] 1 All ER 114 (HL) at 118.
[252] *Jeffree v National Companies and Securities Commission* (1989) 15 ACLC 217 at 228.
[253] *West Mercia Safetywear Ltd (in liq) v Dodd [1988] BCLC 250 (CA).*
[254] *Spies v The Queen* (2000) 201 CLR 603 (HC) at page 37 para 95.

procedures, even if this consideration could be detrimental to shareholders.[255] The explanation for this is that when a corporation is in financial crisis, it is basically dealing with the money of its creditors. There are no clear criteria in the instances as to when such an obligation would arise.[256]

Directors of companies that are insolvent are also required by Section 588G to prevent the company from operating while it is insolvent, as is true of their subsidiaries.[257] Thus, creditors' interest preservation is a complex matter with issues such as whether the obligation should be indirect or direct, who should receive the obligation, and when the obligation should arise.

(C) Employees

Employees have several interests in a company, including but not limited to, job security, remuneration, a safe work environment and the provision of pension benefits, and is therefore an important stakeholder in decision-making.[258]

The Corporations Law Amendment (Employee Entitlements) Act of 2000 emphasised the importance of directors considering employees' interests when operating a company, thereby increasing employee protection.[259] The Corporations Act of 2001 included Part 5.8A of this Act, which became a criminal offence for anyone who purposefully participates in agreements and transactions so as to permanently or considerably restrict employee entitlements.[260] Although this section does not expressly mention directors and instead refers to ‘persons', it is safe to presume that it is about the obligation of directors to protect the rights of employees in corporate decision-making. Wages, superannuation payments, yearly leave, and long-service leave are all examples of entitlements.[261] It is,

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[255] *Connelly v Commonwealth of Australia*, *in the matter of Australian Road Express Pty Ltd (Receivers and Managers Appointed) (in liq)* [2018] FCA 1429.
[256] *Connelly v Commonwealth of Australia*, *in the matter of Australian Road Express Pty Ltd (Receivers and Managers Appointed) (in liq)* [2018] FCA 1429.
[257] Previously section 592.
[258] Du Plessis JJ, McConvill J & Bagaric M *Principles of Contemporary Corporate Governance* (2005) Cambridge UP at 19-22. See also Baxt R, Fletcher K & Fridman S *Corporations and Associations Cases and Materials* 9th ed (2003) Lexis Nexis Butterworhs on the position of employees.
[259] Corporations Law Amendment (Employee Entitlements) Act of 2000 at 596AA.
[260] Section 5.8A of the Corporations Law Amendment (Employee Entitlements) Act of 2000.
[261] *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84.

however, unclear how employees will enforce this right, and this still needs to be tested in courts.

The June 2006 Corporate Responsibility Report is a notable corporate governance intervention.[262] This report favoured shareholder primacy, although it did so with the caveat that other stakeholders, including employees, be protected.[263]

(D) Consumers

Director's consideration of consumers' interests is not established in case law. Consumer protection regulation, on the other hand, clearly applies to directors. Part V of the Trade Practices Act 51 of 1974 deals extensively with consumer protection and includes a thorough set of consumer rights, including a general prohibition against misleading and deceptive conduct. As a result, it can be stated that consumers in Australia are adequately protected under this Act.

3.3.4 Recent Corporate Governance Initiatives

It is also worth considering the latest Australian corporate governance investigations, filled with similar goals.[264] The *CAMAC* (Corporations and Markets Advisory Committee) *Social Responsibility of Corporations Report* is the first investigation, while the *PJC Corporate Responsibility Report* is the second.[265] The two inquiries' differing clarifications regarding the duty to act in the company's best interests will be analysed.

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[262] The Report on Corporate Responsibility: Managing Risk and Creating Value by the Parliamentary Joint Committee and Corporations and Financial Services (June 2006) available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/corporate_responsibility/report/index [accessed 17 June 2023].

[263] The Report on Corporate Responsibility: Managing Risk and Creating Value by the Parliamentary Joint Committee and Corporations and Financial Services (June 2006) available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/corporate_responsibility/report/index [accessed 17 June 2023].

[264] Marshall S & Ramsay I *Stakeholders and Directors' Duties: Law, Theory and Evidence* (2012) *UNSW Law Journal* 35(1) at 299.

[265] The Report on Corporate Responsibility: Managing Risk and Creating Value by the Parliamentary Joint Committee and Corporations and Financial Services (June 2006) available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/corporate_responsibility/report/index [accessed 17 June 2023] & The Social Responsibility Report of Corporations of the Corporations and Markets Advisory Committee (December 2006) available at https://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/$file/csr_report.pdf [accessed on 15 June 2023].

(A) CAMAC Social Responsibility of Corporations Report

The Parliamentary Secretary to the Treasurer solicited input in March 2005 to determine if the Corporations Act ought to contain corporate social responsibilities or specific requirements to consider the interests of specific stakeholder groups other than shareholders.[266] The *CAMAC Social Responsibility of Corporations Report* was published in December 2006 as a result of this.[267]

According to the *Report*, (i) under common law, the phrase 'best interests of the company as a whole' generally speaking refers to the financial health of the shareholders collectively;[268] (ii) section 181 of the Corporations Act 2001 reaffirms the position that directors should prioritise the interests of the shareholders collectively, while being aware of non-shareholder interests in so far as it is still in the shareholders' best interests;[269] (iii) directors must prioritise the interests of creditors when the company is facing liquidation[270]; (iv) directors are not constrained to only consider the financial health of the corporation but must also take note of the sustainability of the business in the future[271]; and (v) directors have a lot of leeway in deciding what factors to consider when acting in the company's best interests.[272]

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[266] The Social Responsibility Report of Corporations of the Corporations and Markets Advisory Committee (December 2006) available at https://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/$file/csr_report.pdf [accessed on 15 June 2023].
[267] The Social Responsibility Report of Corporations of the Corporations and Markets Advisory Committee (December 2006) available at https://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/$file/csr_report.pdf [accessed on 15 June 2023].
[268] The Social Responsibility Report of Corporations of the Corporations and Markets Advisory Committee (December 2006) available at https://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/$file/csr_report.pdf [accessed on 15 June 2023].
[269] Section 181 of the Corporations Act 2001.
[270] The Social Responsibility Report of Corporations of the Corporations and Markets Advisory Committee (December 2006) available at https://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/$file/csr_report.pdf [accessed on 15 June 2023].
[271] The Social Responsibility Report of Corporations of the Corporations and Markets Advisory Committee (December 2006) available at https://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/$file/csr_report.pdf [accessed on 15 June 2023].
[272] The Social Responsibility Report of Corporations of the Corporations and Markets Advisory Committee (December 2006) at pages 91-92 available at

The report concludes that contemporary legislation, including the common law is adequate to allow directors to consider non-shareholder interests, and amendments to the aforesaid is not necessary.[273]

(B) PJC Corporate Responsibility Report

This *Report*, which was released in June 2006, addressed the following controversies (i) the degree that company decision-makers consider non-shareholder interests[274]; (ii) the degree to which contemporary legal rules controlling the duties of directors boost or dishearten directors from considering stakeholder groups' interests[275], and (iii) uncertainty whether legal legislation, including the Corporations Act 2001, requires amendment in order to allow non-shareholder interests to be considered.[276]

The *PJC* has established its preferred way to interpreting the extent of directors' duties, which differs from that of the *CAMAC*. According to the *PJC*:

> Directors' duties as they currently stand have a focus on increasing shareholder value. This is important because the provision is first and foremost intended to protect those investors who trust company directors with their savings and other investment funds. Directors' duties enable such investors to have some confidence that their funds will be used in order to increase the income and value of the company they part own.[277]

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https://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/$file/csr_report.pdf [accessed on 15 June 2023].

[273] The Social Responsibility Report of Corporations of the Corporations and Markets Advisory Committee (December 2006) at page 69 available at https://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/$file/csr_report.pdf [accessed on 15 June 2023].

[274] The Report on Corporate Responsibility: Managing Risk and Creating Value by the Parliamentary Joint Committee and Corporations and Financial Services (June 2006) at page 7 available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/corporate_responsibility/report/index [accessed 17 June 2023].

[275] The Report on Corporate Responsibility: Managing Risk and Creating Value by the Parliamentary Joint Committee and Corporations and Financial Services (June 2006) at page 7 available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/corporate_responsibility/report/index [accessed 17 June 2023].

[276] The Report on Corporate Responsibility: Managing Risk and Creating Value by the Parliamentary Joint Committee and Corporations and Financial Services (June 2006) at page 7 available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/corporate_responsibility/report/index [accessed 17 June 2023].

[277] The Report on Corporate Responsibility: Managing Risk and Creating Value by the Parliamentary Joint Committee and Corporations and Financial Services (June 2006) at page 59 available at

As far as the shareholders' interests are concerned, this is in line with the CAMAC Report's assertion. The *PJC*, on the other hand, specifically rejected the so-called 'shareholder first' view of executing directors' duties. The *PJC* determined that this view was overly limited, and that taking care of the company's best interests and considering the shareholders' best interests are not always synonymous.[278]

The *CAMAC* Report and the *PJC* concluded that reforms to directors' duties are not needed. Both assumed that current corporate law allowed non-shareholder interests to be considered by boards of directors.[279] Nevertheless, both probes had differing views regarding the extent of the duty of acting in the company's interests.

3.3.5 Australia As a Model for South Africa

In its law reform, Australia opted to go with the 'enlightened self-interest' approach.[280] This approach is ultimately identical to the UK's ESV approach. However, unlike in the UK, the Corporations Act 2001 does not require directors to consider the interests of non-shareholder stakeholders when performing their obligations. Stakeholder interests are still protected through self-regulation and voluntary corporate governance efforts.[281] An insolvent corporation should consider its creditors' interests, just like they do in the UK, as discussed under 3.1.2 (b).[282]

Members, former members, and anyone authorized to be a member of the business, as well as directors and officers, may seek to initiate proceedings (derivative action) on behalf of the business.[283] While the extent of this action has been significantly broadened

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https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/corporate_responsibility/report/index [accessed 17 June 2023].

[278] The Report on Corporate Responsibility: Managing Risk and Creating Value by the Parliamentary Joint Committee and Corporations and Financial Services (June 2006) at page 52 par 4.31 available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/corporate_responsibility/report/index [accessed 17 June 2023].

[279] The Report on Corporate Responsibility: Managing Risk and Creating Value by the Parliamentary Joint Committee and Corporations and Financial Services (June 2006) at page 63 available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/corporate_responsibility/report/index [accessed 17 June 2023].

[280] Jensen M 'Value Maximization: Stakeholder Theory and the Corporate Objective Function' (2001) *Journal of Applied Corporate Finance* 201 at 16.

[281] Marshall S & Ramsay I *Stakeholders and Directors' Duties: Law, Theory and Evidence* (2012) *UNSW Law Journal* 35(1) at 297.

[282] See *Ring v Sutton* at 550.

[283] Section 236 of the Australian Corporations Act 2001.

through legislation in the UK, available derivative actions under section 260 of the Companies Act of 2006 remain dependent on shareholder status, as in Australia.[284]

Although creditors received consideration under the Corporations Act of 2001, employees and other non-shareholder stakeholders are still not adequately protected by the Act and rely on self-regulation. South Africa needs guidance on how to deal with all non-shareholder stakeholders.

3.4 CONCLUSION

This chapter examined how corporate governance in South Africa was influenced by UK and Australian law, as well as lessons that South Africa can learn from these jurisdictions in interpreting the phrase 'best interests of the company'.

The UK is the only country which adopted a directive approach, requiring directors to evaluate a variety of factors in maximising the through the success of the business and ultimately benefiting its shareholders collectively.[285] In the UK context, the requirement in section 172(1) of the Companies Act 2006 to take into consideration non-shareholder interests suggests that directors are not just protected from liability for not acting solely in the interests of shareholders, but are actually required to do so.[286] On the other hand, failure to consider their interests as mandated by section 172(1), the interest groups listed have no recourse as the company, or shareholders having sole access to the derivative action, still has control over enforcing directors' duties.[287] As a result, many legal scholars are of the opinion that only a perfunctory or symbolic effort was made to recognise non-shareholder interests through the enactment of section 172 of the UK's Companies Act 2006.[288]

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[284] Loughrey J and Key A 'Something Old, Something New, Something Borrowed: An Analysis of the New Derivative Action under the Companies Act 2006' (2008) 124 *Law Quarterly Review* 469.
[285] See section 172(1) of the UK Companies Act 2006 which also deals with the derivative action.
[286] Joubert T & Lombard S 'The Legislative Response to the Shareholders v Stakeholders debate: a Comparative Overview' (2014) 14 *Journal of Corporate Law Studies* 211 at 214. Available at http://hdl.handle.net/2263/42227 [accessed 15 August 2020].
[287] Section 250 of the UK Companies Act 2006.
[288] Yap JL 'Considering the Enlightened Shareholder Value Principle' (2010) *Company Lawyer* 31(2) at 35 and Omar P 'In the Wake of the Companies Act 2006: An Assessment of the Potential Impact of Reforms to Company Law' (2009) *International Company and Commercial Law Review* 20(2) at 44,48.

The *PJC* rejected a derivative view, citing worry over the fact 'that directive legislation would breed a culture of compliance'.[289] Based on its conclusions, the committee suggested retaining the current open-ended formula for directors' duties so that directors may consider the interests of parties other than shareholders without being legally obligated to do so.[290]

It can therefore be concluded that neither the UK's nor Australia's approach to dealing with the interpretational conundrum of 'best interests of the company' is an ideal model for South Africa. While the UK's approach seems to be more 'enlightened', the stakeholders mentioned in section 172(1) have no right of enforcement if the section in question is breached. Furthermore, stakeholders also have the practical problem of proving that their interests were not considered by directors in instances where their interests should have prevailed. On the other hand, the Australian approach only gave considerable recognition to the interests of creditors while the other stakeholders are still left in the cold. If South Africa ought to adopt either of the approaches as discussed, this will add to an already confusing section 76(3)(b) as will be highlighted in chapter 4.

[289] Joubert T & Lombard S 'The Legislative Response to the Shareholders v Stakeholders debate: a Comparative Overview' (2014) 14 *Journal of Corporate Law Studies* 211 at 215.
[290] The Report on Corporate Responsibility: Managing Risk and Creating Value by the Parliamentary Joint Committee and Corporations and Financial Services (June 2006) at page 63 available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/corporate_responsibility/report/index [accessed 17 June 2023].

CHAPTER 4: 'BEST INTERESTS OF THE COMPANY UNDER SOUTH AFRICAN LAW'

4.1 INTRODUCTION

A company's interests used to be equated with its shareholders' interests under classic common law.[291] This was referred to as the shareholder-centric strategy (see chapter 2). There were no social obligations for companies beyond paying taxes as companies were seen as mainly private concerns.[292] As a result, if directors made decisions to protect other stakeholders, they risked becoming personally accountable to the company for breaching their fiduciary duty to act in the business's best interests (which were associated with those of the shareholders).[293] Modern conditions, on the other hand, demand that businesses recognise and participate in the communities where they conduct business by fulfilling their social and private responsibilities.[294] In recent years, two ideas or approaches have evolved to balance a corporations' social responsibility toward stakeholders with their private shareholder obligations, namely the pluralist approach and the ESV approach (as mentioned in Chapter 2).[295] The differences between the two models should not be overstated because they both require the balancing of divergent interests of stakeholders and shareholders.[296] They differ primarily in that the ESV approach prioritises shareholder interests and believes that they should take precedence over those of other stakeholders.[297] This chapter will look at how the phrase

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[291] Nmehielle V and Ramnath M *Interpreting* 'Directors' Fiduciary duty to Act in the Company's Best Interests Through the Prism of the Bill of Rights: Taking Other Stakeholders into Consideration' (2013) 2 Speculum Jurus at 102.

[292] Berle A 'Corporate Powers as Powers in Trust' (1931) 44 *Harvard Law Review* at 1049.

[293] Nmehielle V and Ramnath M 'Interpreting Directors' Fiduciary duty to Act in the Company's Best Interests Through the Prism of the Bill of Rights: Taking Other Stakeholders into Consideration' (2013) 2 *Speculum Jurus* at 102.

[294] Nomadwayi B *The Directors' Fiduciary Duty to Act in the Best Interests of the Company: the Possible Developments of Common Law by Statute and How they Affect Human Rights* (unpublished thesis, University of Kwazulu-Natal, 2018) at 25.

[295] United Kindgom Department of Trade & Industry Modern Law for Competitive Economy: *The Strategic Framework* ed (Issued February 1999); URN 99/654) *('*UK *Policy Paper'*) para 5.1.

[296] Nomadwayi B *The Directors' Fiduciary Duty to Act in the Best Interests of the Company: the Possible Developments of Common Law by Statute and How they Affect Human Rights* (unpublished thesis, University of Kwazulu-Natal, 2018) at 26.

[297] Nmehielle V and Ramnath M 'Interpreting Directors' Fiduciary duty to Act in the Company's Best Interests Through the Prism of the Bill of Rights: Taking Other Stakeholders into Consideration' (2013) 2 *Speculum Jurus* at 110.

'best interests of the company' is interpreted under common law and now the Companies Act 71 of 2008, and more specifically section 76(3)(b) and the implications thereof. It will also answer the question of whether the ESV approach was indeed adopted in the Companies Act 71 of 2008. Finally, this chapter will summarise how 'best interests of the company' was dealt with by statutory law in Australia and the UK.

4.2 COMMON LAW DUTY PRIOR TO THE ACT

The phrase 'best interests of the company' was regarded in common law to refer to shareholders' (present and future) interests, as briefly mentioned above.[298] This has also been confirmed in a number of English cases that form part of our common law system.[299] A corporation's interests in this context are exclusively those of itself as a separate legal entity and those of its shareholders, the court held in *South African Fabrics v Millman*.[300]

The principle of separate corporate personality was established as early as 1897 in the case of Salomon v Salomon & Co. Ltd.[301] The following comments were made in the Salomon case:

> The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment…[302]

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[298] Nomadwayi B *The Directors' Fiduciary Duty to Act in the Best Interests of the Company: the Possible Developments of Common Law by Statute and How they Affect Human Rights* (unpublished thesis, University of Kwazulu-Natal, 2018) at 10.
[299] See, for example, *Re City Equitable Fire Insurance Co Ltd* [1925] Chapter 407 and *Hutton v West Cork Railway Company* [1883] 23 C D 654.
[300] *South African Fabrics Ltd v Millman* 1972 4 SA 592 (A).
[301] *Salomon v Salomon & Co. Ltd.* [1897] AC 22. Also see *De Bruyn v Steinhoff International Holdings NV and Others* [2022] (1) (SA) (GJ) at 442.
[302] *Salomon v Salomon & Co. Ltd.* [1897] AC 22 at page 27 of 38. Also see *De Bruyn v Steinhoff International Holdings NV and Others* [2022] (1) (SA) (GJ) at 442.

The aforesaid principle was reaffirmed in various other judgments, including *Peskin v Anderson* in which the directors of Royal Automobile Club Ltd were sued for failing to disclose plans for demutualisation to former members.[303] The case was dismissed on the basis that directors do not as a general rule owe a general obligation toward shareholders, even though they may owe a specific duty if there is a clear indication of assumption of such a duty.[304] Similarly, in a more recent judgement, the court in *Hlumisa*[305] had the task of deciding whether a civil claim under section 218(2) of the Companies Act 71 of 2008 was justifiable.[306] ABIL suffered losses as a result of the directors' alleged misconduct, and the SCA agreed that shareholders' shares lost value.[307] According to the SCA, the main issue to be resolved was whether section 218(2) of the Act provides for an action based on contraventions of sections 22(1), 45,74, and 76(3) by the directors.[308] SCA states that, when harm is done to a company, only the company can sue to recover damages suffered.[309] Shareholders do not have the same action available to their disposal.[310]

As previously indicated, the Act is silent on the exact meaning of the phrase in question and for this reason one may argue that section 76 refers to the company alone and not its shareholders.[311] However, it is possible to argue that the stance adopted in *Millman* is correct. To put it another way, including shareholders in the concept of 'best interests of the company' is correct because the corporation and its shareholders have a mutually

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[303] *Peskin v Anderson* [2000] EWCA Civ 326 paragraph 34.
[304] *Peskin v Anderson* [2000] EWCA Civ 326 paragraph 34.
[305] *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* (Case no 1423/2018) [2020] ZASCA 83.
[306] *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* (Case no 1423/2018) [2020] ZASCA 83 at paragraph 1-2.
[307] *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* (Case no 1423/2018) [2020] ZASCA 83 at paragraph 4-5.
[308] *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* (Case no 1423/2018) [2020] ZASCA 83 at paragraph 6-7.
[309] *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* (Case no 1423/2018) [2020] ZASCA 83 at paragraph 8-9.
[310] *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* (Case no 1423/2018) [2020] ZASCA 83 at paragraph 8-9.
[311] Nomadwayi B *The Directors' Fiduciary Duty to Act in the Best Interests of the Company: the Possible Developments of Common Law by Statute and How they Affect Human Rights* (unpublished thesis, University of Kwazulu-Natal, 2018) at 10.

beneficial relationship.[312] While shareholders raise capital for the company by buying shares at minimal prices and selling it at a higher price which in turn raises profit for the company, the company on its turn divides that profit amongst its shareholders to maximise their wealth.[313] Furthermore, the goal of a corporation is to raise money for its shareholders and any act or decision that is beneficial to the company is also beneficial to the shareholders.[314] It is therefore safe to say that although the company is regarded as a separate legal entity, it cannot be separated from its shareholders for the purpose of the duty to act in the company's best interests.[315] Shareholders clearly fulfill a vital function with regards to the survival of the business. However, this also applies to stakeholders such as creditors, employees, and customers. It is therefore worth mentioning that in *Millman*, the court should have considered the aforementioned and other stakeholder groups in its definition of 'interests of the company'.[316]

Under the common law it is believed that the term 'best interests of the company' means that a director must put the company's interests above the interests of individual or groups of stakeholders within the company and ensure the company complies with its legal requirements.[317] The decisions taken by directors were therefore expected to advance the financial interests of the shareholders and any decisions taken by the directors, which are purported at advancing the interests of any person other than shareholders, rendered such director personally liable for breach of this duty.[318] This pertains to Ramnath and Nmehielle's argument that businesses are treated as private businesses with no social

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[312] J Fredman *What is the Relationship Between a Corporation and its Shareholders?* (2017) Available at: https://pocketsensecom/relationship-between-corporation-its-shareholders-12022852 [accessed 17 June 2023].
[313] Nomadwayi B *The Directors' Fiduciary Duty to Act in the Best Interests of the Company: the Possible Developments of Common Law by Statute and How they Affect Human Rights* (unpublished thesis, University of Kwazulu-Natal, 2018) at 11.
[314] Cassim FHI et al *Contemporary Company law* 2nd Ed Cape Town, (2012) at 515.
[315] J Fredman, "What is the Relationship Between a Corporation and its Shareholders?" (2017) Available at: https://pocketsensecom/relationship-between-corporation-its-shareholders-12022852 [accessed on 15 January 2021].
[316] Nomadwayi B *The Directors' Fiduciary Duty to Act in the Best Interests of the Company: the Possible Developments of Common Law by Statute and How they Affect Human Rights* (unpublished thesis, University of Kwazulu-Natal, 2018) at 11.
[317] Cassim FHI et al *Contemporary Company law* 2nd Ed Cape Town, (2012) at 515.
[318] Nomadwayi B *The Directors' Fiduciary Duty to Act in the Best Interests of the Company: the Possible Developments of Common Law by Statute and How they Affect Human Rights* (unpublished thesis, University of Kwazulu-Natal, 2018) at 11.

responsibility beyond paying taxes. In the absence of such social obligations for companies, stakeholders could not enforce any rights against the company or its directors. This position has, however, changed considerably as stakeholders' rights are protected by specific legislation. For example, labour legislation[319] protects the rights of employees and the Consumer Protection Act[320] protects the rights of consumers. As a result, businesses must safeguard the rights and interests of stakeholders other than shareholders.

The case of *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*, further illustrated the common law stance requiring directors to serve the interests of shareholders only when operating the company.[321] On the advice of their counsel, the whole board of directors opted to resign in this case because the company had insufficient finances to comply with a court order, putting them at risk of being sued for reckless trading. The court, on the other hand, decided that the directors have a duty to act in good faith and in the company's best interests. If all of the directors resigned, the latter would not be conceivable. Furthermore, the goal of this duty is to safeguard the company from self-interested directors, as it stops directors from prioritising their own interests over the business's, compelling them to act in the company's best inetersts.[322]

The common law idea that directors should operate a corporation only for the interest of its shareholders is no longer valid, and company law has evolved since the decisions mentioned above were determined.[323] Section 7 of the Companies Act modifies the traditional view assigned to the duty of acting in the best interests of the company, aligning it with the Bill of Rights.[324] In addition, this section also places a social obligation upon companies. Section 7 has the effect of requiring directors to consider the rights and

[319] Labour Relations Act 66 of 1995.
[320] Consumer Protection Act 68 of 2008.
[321] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W).
[322] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W).
[323] The Companies Act 71 of 2008 was enacted after these cases and section 7 of this Act requires directors to consider the rights and interests of other stakeholders.
[324] Katzew J 'Crossing the Divide between the Business of Corporation and the Imperatives of Human Rights- the Impact of Section 7 of the Companies Act 71 of 2008' (2011) 128 *South African Law Journal* at 690.

interests of non-shareholder groups while operating a business.[325] As a result, the next part looks at sections 7 and 5 of the Act, as well as a few other key parts, in an attempt to reconcile the rights and interests of all other stakeholders with the duty to act in the company's best interests.

4.3 THE STATUTORY DUTY TO ACT IN THE BEST INTERESTS OF THE COMPANY

4.3.1 Interpretation of Provisions of The Act – The Relevant Approach

There are various methods of interpretation that can be utilised when analysing and interpreting statutory law. Mupangavanhu, in an article on statutory interpretation of company law, posits that the best approach to interpreting provisions of the Companies Act 71 of 2008 is the purposive or contextual approach.[326] This approach looks at the document leading to the promulgation of a particular Act before parliament, the objectives that the law reform wanted to achieve, and also at the Act itself.[327] For purposes of this research, one therefore has to look at the DTI Policy Document and what it sought to achieve, as well as the 2008 Act. The contextual method of interpretation includes the whole Act approach, which considers the context of a particular statute within the four corners of the Act.[328] As a result, a provision cannot be interpreted in isolation and various interlinking provisions need to be scrutinised in order to find a common thread. In this instance, the common thread is that the 'best interests of the company cannot be said to be the interests of the shareholders only. It is for that reason that section 7 deliberately included subsection (a), which provides that sections of the Act must be interpreted in a manner that is consistent with the Bill of Rights as explained below.[329]

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[325] Nomadwayi B *The Directors' Fiduciary Duty to Act in the Best Interests of the Company: the Possible Developments of Common Law by Statute and How they Affect Human Rights* (unpublished thesis, University of Kwazulu-Natal, 2018) at 14.

[326] Mupangavanhu BM 'Impact of the Constitution's Normative Framework on the Interpretation of Provisions of the Companies Act 71 of 2008' PER / PELJ 2019 (22) 5.

[327] Crowe J 'The Role of Contextual Meaning in Judicial Interpretation' (2013) *Federal Law Review* (41) at 419-420.

[328] See Mupangavanhu (2019) *PER/PELJ* 5, citing Wallis JA's words in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) para 18, when he said this about contextual interpretation: "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production".

[329] See section 7(a) of the Companies Act 71 of 2008.

It is thus crucial to examine section 7 of the Act in order to properly grasp the effects of the Act on the common law duty to act in the best interests of the corporation. Section 7 sets out the various purposes of the Act. [330] The first section of this provision that is relevant is section 7(a), which brings the application of the Companies Act within the realm of the Bill of Rights. This section highlights that the objective of the Act 'is to promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law'.[331] This provision effectively extends the duty to act in the best interests of the company and places an additional duty on directors to pay attention to human rights and other social obligations. For example, section 24 of the Constitution deals with environmental rights and a safe and healthy environment, while section 23, in broader terms, deals with the rights and interests of employees.[332] In actuality, section 7(a) could be interpreted to reflect the principles in some constitutional provisions such as section 8(1) of the Constitution, which provides that the Bill of Rights is applicable to all laws. It can also be said that section 7 aligns well with section 8(2) of the Constitution, which requires juristic persons to observe human rights in their affairs.[333]

Subsections 7(b)(iii) and 7(d) are the second relevant segments of section 7. These subsection seem to have changed the orthodox belief that directors must manage the company in a manner that benefit its shareholders, thereby requiring directors to take cognisance of both the economic and social issues when making decisions.[334] It is emphasized in Section 7(b)(iii) how important companies are in contributing to the social and economic well-being of the nation, while section 7(d) stresses the importance of companies as a means of realising social and economic benefits.[335] Although not explicitly stated, sections 7(a), 7(b)(iii), and 7(d) have the effect of requiring directors to

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[330] See Section 7 of the Companies Act 71 of 2008 and *Lazarus Mbethe v United Manganese of Kalahari* 2017 ZASCA 67 at paragraph 12.
[331] Section 7(a) of the Companies Act 71 of 2008.
[332] See sections 23 and 24 of the Constitution of the Republic of South Africa, 1996.
[333] See section 8(1) and 8(2) of the Constitution of the Republic of South Africa, 1996.
[334] Katzew J 'Crossing the Divide between the Business of Corporation and the Imperatives of Human Rights- the Impact of Section 7 of the Companies Act 71 of 2008' (2011) 128 *South African Law Journal* at 690.
[335] Katzew J 'Crossing the Divide between the Business of Corporation and the Imperatives of Human Rights- the Impact of Section 7 of the Companies Act 71 of 2008' (2011) 128 *South African Law Journal* at 690.

consider the rights and interests of stakeholders while managing the company.[336] On the other hand, sections 7(b), 7(c) and 7(g) reiterate the traditional purposes of regulating a company, one of which is to assist them in making a profit.[337] An examination of section 7 thus reveals somewhat a balance between the need to protect human rights and maximise profits. This consequently requires directors to balance the need to protect and uphold human rights and attain profit goals of the company.

As a result of the reference to the Bill of Rights in section 7(a), directors are required to consider every stakeholder's right when making decisions in the company's best interests.[338]

The pluralist stakeholder approach is also present in South African company law, as seen by section 144 of the Companies Act. Business rescue initiatives can be made by employees or their trade unions under Section 144 in situations when their initiative may be the only viable option for rescuing the company.[339] Furthermore, section 145 states that as affected persons, the creditors (including those employees who have become preferred unsecured creditors because of their unpaid remuneration due before rescue proceedings commenced) have the right to be notified of, and formally and informally partake in all phases of the proceedings.[340]

When it comes to preserving stakeholder interests, Section 218 of the Companies Act also comes into play. Section 218(2) provides that 'any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that

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[336] Esser I 'Corporate Social Responsibility: A company law perspective' (2011) SA 23 *Mercantile Law Journal* at 325; see also Gwanyanya M 'The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities' (2015) 18(1) *PER/ PELJ* at 3111.

[337] Samaradiwakera-Wijesundara C *Business and Human Rights: To what extent has the Constitution transformed theobligations of businesses* (2014) at 10 Available At: http://www.nylslawreview.com/wpcontent/uploads/sites/16/2014/11/SamaradiwakeraWijesundara.pdf [accessed on 14 June 2023].

[338] See Gwanyanya M 'The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities' (2015) 18(1) *PER/ PELJ* at 3109 and Katzew J 'Crossing the Divide between the Business of Corporation and the Imperatives of Human Rights- the Impact of Section 7 of the Companies Act 71 of 2008' (2011) 128 *South African Law Journal* at 704.

[339] Davies D, Geach W & Mongalo T *et al 'Companies and Other Business Structures in South Africa'* (2011) at 46.

[340] Muswaka L 'A Critical Analysis of the Protection of Stakeholders' Interests under the South African Companies Act: (Part 2)' (2014) 5 (3) *Mediterranean Journal of Social Sciences* 66 at 68.

person as a result of that contravention.'[341] The clause allows stakeholders to, for example, assert that directors acted contrary to section 76(3)(b) of the Companies Act.[342]

One can see the ESV approach at play in section 20(4) of the Companies Act.[343] A shareholder, director, or specified officer, in addition to a trade union representing employees, may take legal action against a corporation if it acts in a way that violates the Act. Trade unions representing employees now also have rights. In terms of section 162(2), a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may apply to a court for an order declaring a person delinquent or under probation if *inter alia* the person is a director of that company.[344] The aforesaid parties are further allowed to serve the company with a demand to initiate or continue a lawsuit or take comparable action to safeguard the company's legal rights with respect to derivative actions under section 165(2).[345] As a result, this section clarifies the fact that any employee representative now has rights.

Without digressing, prior to the enactment of the 2008 Act certain rights could only be enforced by and remedies were available to certain parties within the company or related to the company, but sections 165 and 157, it can be argued, now recognise other stakeholders' rights within the company. The derivative action under the common law for example, was only available to shareholders, however, section 165 abolished the common law, and this remedy is now also available to specified stakeholders within the company who feel that the directors are not protecting the interests of the company, and these parties can now 'derive' the power from the company and bring an action in the

[341] Section 218 (2) of the Companies Act 71 of 2008. Also see *Ryan and Others v Groenendaal and Others* (12142/2022) [2022] ZAGPJHC at 309.
[342] Delport P and Esser I 'The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom's Enlightened Shareholder Value approach: Part 1' (2017) *De Jure* 97 at 108.
[343] Davies D, Geach W & Mongalo T *et al 'Companies and Other Business Structures in South Africa'* (2010) at 46.
[344] Muswaka L 'A Critical Analysis of the Protection of Stakeholders' Interests under the South African Companies Act: (Part 2)' (2014) 5 (3) *Mediterranean Journal of Social Sciences* 66 at 68.
[345] Muswaka L 'A Critical Analysis of the Protection of Stakeholders' Interests under the South African Companies Act: (Part 2)' (2014) 5 (3) *Mediterranean Journal of Social Sciences* 66 at 68.

name of the company to protect its interests. One can therefore deduce that Act is also emphasising stakeholder interests.

In line with the above, it is also noteworthy that the Act has provided for expansion of *locus standi* to enforce stakeholders' rights and to enable them to apply for and enforce remedies. Section 157 specifically addresses the question of *locus standi* for company law remedies. *Locus standi in iudicio* can be defined to refer to a situation when a person, natural or juristic, has the right to sue or can be sued by someone else with regards to a particular matter.[346] *Locus standi* in short or simply standing, concerns 'the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted', and it has been, correctly so, said to be one of the first things to establish in a litigation matter.[347] Section 157 of the Companies Act 2008 now provides for *locus standi* beyond only a person 'directly contemplated in the particular provision of this Act'.[348] Now, *locus standi* extends to persons acting on behalf of those who cannot otherwise act for themselves,[349] those acting in a representative capacity including class actions,[350] and those 'acting in the public interest with the leave of the court'.[351] The above are quite considerable extensions of *locus standi* to more company stakeholders beyond the traditional stakeholders like shareholders.

4.3.2 Analysis of Section 76(3)(b)

The Department of Trade and Industry (DTI) stated in its policy paper that company law reform must always begin with the essential topic of in whose interests a company should be managed.[352] Essentially, this debate eludes to whether directors should consider non-shareholder interests when managing the company.[353] Non-shareholder interests include

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[346] Pete, S et al *Civil Procedure A Practical Guide* (3 ed, Oxford University Press Southern Africa (Pty) Ltd 2017) 72.
[347] Witts-Hewinson Jonathan 'Back to basics – locus standi in litigation' available at https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Dispute/dispute-resolution-27-february-back-to-basics-locus-standi-in-litigation.html, accessed on 2 September 2022.
[348] Per section 157(a) of the Companies Act 2008.
[349] Section 157 (b) of the Companies Act 2008.
[350] Section 157 (c) of the Companies Act 2008.
[351] Section 157 (d) of the Companies Act 2008.
[352] Hajat H *A South African Perspective: The Modern Company and Corporate Governance in the Companies Act, 2008* (unpublished LLM Research Paper, University of the Witwatersrand, 2019) at 10.
[353] Hajat H *A South African Perspective: The Modern Company and Corporate Governance in the Companies Act, 2008* (unpublished LLM Research Paper, University of the Witwatersrand, 2019) at 10.

the company's employees; creditors; customers; suppliers; and it also includes environmental needs and the local community in which the company is situated.[354]

The answer to the legal conundrum in whose interest companies should be managed are represented by at least three theories, as discussed under Chapter 2. These theories are the shareholder-centric approach, which holds that the company ought to be managed for the sole interests of present and future shareholders. Secondly, the stakeholder/pluralist approach, which provides that the company ought to be manage in the best interests of all stakeholders equally. Finally, the ESV approach holds that a corporation ought to be managed in the interests of all stakeholders, but only in so far as it is in the best interests of the shareholders. The latter approach is clearly still deeply rooted in the shareholder-centric approach.

Section 76(3)(b) of the Companies Act 71 of 2008 contains South Africa's latest attempt at responding to the question relating to whose interests the company should serve.[355] However, section 76(3)(b) does not fully answer this question and simply requires directors to perform their functions in the company's best interests.[356] This is so despite the fact that the phrase 'best interests of the company' is not defined or given meaning to under the Act. It is more evident than ever before that shareholder-centrism remains the dominant approach in South African company law tempered by an ESV approach.[357] To define the concept 'best interests of the company' is certainly not an easy and simple task as the 'concept remains so miserably indeterminate'[358] and undefined in the 2008 Act. The traditional view is that the best interests of the company means that directors owe their duties exclusively to the company's shareholders since it has already been

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[354] Hajat H *A South African Perspective: The Modern Company and Corporate Governance in the Companies Act, 2008* (unpublished LLM Research Paper, University of the Witwatersrand, 2019) at 10.
[355] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) at 54.
[356] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) at 54.
[357] Hajat H *A South African Perspective: The Modern Company and Corporate Governance in the Companies Act, 2008* (unpublished LLM Research Paper, University of the Witwatersrand, 2019) at 17.
[358] Parsons R 'The Director's Duty of Good Faith' (1967) 5 *Melbourne University LR* 395 at 396.

established under common law that 'the company' refers to the '…interests of the collective body of present and future shareholders'.[359]

Although difficult to categorise, the DTI Policy Document 2004 suggests one possible approach for aligning the phrase 'best interests of the company' with the Act.[360] The Document seemingly rejects the common law interpretation of the phrase and holds shareholder and non-shareholder interests should be even keeled if company law wants to pass the constitutional muster and consequential legislation. This means that the company must balance its economic objectives with social and environmental imperatives provided for in the constitution and other legislation.[361] The aforementioned ties in perfectly with Professor Tshepo Mongalo's acknowledgement of the modernity of the company and the socio-economic context in which it operates.[362] Mongalo argues that directorial duties are out of date and need some reform to reflect the reality of modern business.[363] He also noted the dysfunctional and unsustainable notion of shareholders being the only focus for directors and stated that directors cannot possibly owe their duties exclusively to shareholders.[364]

Davis et al seems to agree that South Africa has moved to the ESV approach. However, the author fails to indicate where in the DTI Policy Document and/or Act this is said.[365] It is in actual fact irrelevant what we call the approach adopted by the Act- what matters is that we see that there is a shift from a shareholder-centric approach to a stakeholder

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[359] Cassim R and Cassim F *The Reform of Corporate Law in South Africa* (2005) 16 *International Company and Commercial Law Review* at 415.
[360] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) at 54.
[361] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) at 55.
[362] Hajat H *A South African Perspective: The Modern Company and Corporate Governance in the Companies Act, 2008* (unpublished LLM Research Paper, University of the Witwatersrand, 2019) at 19.
[363] See *Vereniging Milieudefensie et al. v Royal Dutch Shell* [2021] Rechtsbank Den Haag and Tshepo H. Mongalo Corporate Actions and the Empowerment of Non-Shareholder Constituencies (unpublished PhD thesis, University of Cape Town, 2015) at 175.
[364] Tshepo H. Mongalo Corporate Actions and the Empowerment of Non-Shareholder Constituencies (unpublished PhD thesis, University of Cape Town, 2015) at 174.
[365] Davies D, Geach W & Mongalo T *et al 'Companies and Other Business Structures in South Africa'* (2010) at pages 18-20.

inclusive approach. When taking a closer look at the DTI Policy Document, it becomes apparent that this was the ultimate goal of it.

It is also clear that the policy document does not advocate for the ESV approach. This is because the policy document did not state that stakeholder interests can only be considered if it is ultimately in the interest of shareholders. The policy documents rather stated that an approach that will pass constitutional muster is one that will give independent value to stakeholder interests.[366] Botha & Jooste argued that the DTI Policy Document 2004, as well as the King Report provided that in certain instances directors have a direct obligation to advance stakeholders' interests as a means an end as opposed to being a means to achieving profit maximisation.[367]

The above paragraphs are sufficient evidence that ESV approach is not the approach adopted by the Act to provide meaning to the phrase 'best interests of the company'. It is also clear that the common law interpretation of this phrase is not properly aligned with the constitutional criteria as required by the DTI Policy Document 2004.[368] It is no longer acceptable to interpret the phrase 'best interests of the company' to solely mean the interests of shareholders to the exclusion of all other stakeholders. We are therefore faced with the question of how the disparity between the interpretation preferred by common law and policy aligned to the proper policy direction of the Act are to be resolved.[369] It is clear that the common law is lagging behind in terms of development and the Act points towards a possible solution. To facilitate the enjoyment of rights created by this Act, a court should develop the common law to determine the merits of a matter brought before it under the 2008 Act, as provided by section 158(a).[370]

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[366] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) at 55.
[367] Botha & Jooste R 'A critique of the Recommendations in the King Report regarding a Director's Duty of Care and Skill' (1997) *South African Law Journal* 65-76.
[368] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) at 55.
[369] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) at 55.
[370] Section 158(a) of the Companies Act 71 of 2008.

It is therefore discernible that the Act contains both traces of the pluralist/stakeholder approach and the ESV approach. However, neither the stakeholder nor the ESV approach is the appropriate approach to properly balances shareholder and non-shareholder interests as discussed above.[371] It is furthermore difficult to ascertain which approach is preferred by the Act. While the ESV approach is insufficiently connected with constitutional values and policy direction, the pluralist approach cannot be considered the preferred option because stakeholders, unlike shareholders, have gained no legislative status under the Act.[372] The fact that certain stakeholders have received indirect recognition under the Act cannot, however, be denied. For example, the Act clearly recognises the powers of basically three groups of stakeholders who can serve a demand on the company to initiate or continue legal proceedings or take associated acts aimed at defending the firm's interests under section 165 (2) of the Act.[373] Shareholders, directors/prescribed officers, and registered trade unions representing employees, as well as any other employee representative, fall into this category.

It is also ostensible from the reading of sections 4 and 22 of the Act that the Act considers the protection of creditors as important to sustainability of companies and promotion of enterprise efficiency.[374] This recognition is insufficient in comparison with that enjoyed by shareholders who are directly and specifically mentioned in the Act. It is therefore contended that an approach balancing the ESV, and pluralist approaches is the preferred approach. This would be an approach that uses the fundamentals of the ESV approach conjoined with the purposes of the 2008 Act, its interpretation provision, and the recommendations put forward in the King IV Report (particularly those on stakeholder inclusivity) in an eclectic manner.

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[371] Mupangavanhu BM *Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) at 55.
[372] Hajat H *A South African Perspective: The Modern Company and Corporate Governance in the Companies Act, 2008* (unpublished LLM Research Paper, University of the Witwatersrand, 2019) at 25.
[373] Section 165(2) of the Companies Act 71 of 2008.
[374] Sections 4 and 22 of the Companies Act 71 of 2008.

4.3.3 COMPARISON WITH THE UK & AUSTRALIAN STATUTORY APPROACHES

4.3.3.1 AUSTRALIA

As outlined in section 181(1)(a) of the Australian Corporations Act 2001, directors have a duty to act in the best interests of the company.[375] Thus, the board of directors must use its powers and responsibilities in good faith and for the benefit of the corporation.[376] Having no precise guidance as to what is meant by the phrase 'best interests of the company', the traditional manner of expressing this duty remains intact.

Similar to South Africa and the UK, a joint committee of the Australian parliament was given the chance to simplify the phrase of the director's duty to act in his corporation's best interest. When it came to interpreting the duty to act in the best interests of the corporation, the parliamentary committee decided that the approach of the enlightened self-interest was preferable.[377] This approach acknowledges that investments in CSR-programs add to the long-term profitability of the company, even if they do not involve immediate maximisation of profits and allows directors to take into account the interests of non-shareholders insofar as they are relevant to the corporation.[378] The parliamentary committee argued that because the enlightened self-interest approach allows directors to take into account non-shareholder interests, there was no need to amend provisions of the Corporations Act dealing with the duties of directors.[379] This accords with a number of commentators' viewpoints. For example, McConvill claims that there is simply no need to expand directors' responsibilities to include commitments to take cognisance of non-shareholder interests.[380]

Both the Australian Corporations and Markets Advisory Committee (CAMAC) and the Australian Securities and Investments Commission (ASIC) supported the notion that there

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[375] Section 181(1)(a) of the Australian Corporations Act 2001.
[376] Joubert T & Lombard S 'The Legislative Response to the Shareholders v Stakeholders debate: a Comparative Overview' (2014) 14 *Journal of Corporate Law Studies* 211 at 215.
[377] Joubert T & Lombard S 'The Legislative Response to the Shareholders v Stakeholders debate: a Comparative Overview' (2014) 14 *Journal of Corporate Law Studies* 211 at 215.
[378] Keay A 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' (2008) 71 *MLR* at 663.
[379] Keay A 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' (2008) 71 *MLR* at 663.
[380] McConvill *J* 'Directors' Duties to Stakeholders: A Reform Proposal Based on Three False Assumptions' (2005) 18 *Australian Journal of Corporate Law* 88 at 101.

is no need to amend the provisions dealing with directors' duties in the Corporations Act.[381] As these institutions assert, requiring a stakeholder or pluralistic approach to directors' duty to act in the corporation's best interest would result in uncertainty.[382]

4.3.3.2 UNITED KINGDOM

The UK chose to codify directors' duties in the Companies Act of 2006 (hereinafter referred to as the UK Act).[383] As a result, section 172 of the UK Act substituted the common law responsibility to act in the best interests of the company. Section 172 adopts the ESV approach which posits that the directors' prime mandate is to maximise value for shareholders by promoting the success of the company and allows directors to consider stakeholder interests if these will be subordinate to profit maximisation.[384] This implies that directors should put shareholder interests first while considering non-shareholder interests only when it is in the company's (shareholders') best interests.[385]

How far directors should go in considering non-shareholder interests is not properly explained and no guidelines are provided, and directors are therefore led by the nature of the company and its activities. The codification of the UK duty to act in the company's best interests has proven to be troublesome. This is due to a possible or real conflict of interests among numerous stakeholders, as well as the practical issue of enforcing a duty to a larger constituency.[386]

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[381] Joubert T & Lombard S 'The Legislative Response to the Shareholders v Stakeholders debate: a Comparative Overview' (2014) 14 *Journal of Corporate Law Studies* 211 at 215.
[382] See Corporations and Markets Advisory Committee *The Social Responsibility of Corporations* (2006) Available at http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSR_Report.pdf.
[383] Nomadwayi B *The Directors' Fiduciary Duty to Act in the Best Interests of the Company: the Possible Developments of Common Law by Statute and How they Affect Human Rights* (unpublished thesis, University of Kwazulu-Natal, 2018) at 25.
[384] See Corporations and Markets Advisory Committee *The Social Responsibility of Corporations* (2006) Available at http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSR_Report.pdf.
[385] Parliamentary Joint Committee on Corporations and Financial Services, Commonwealth of Australia *Corporate Responsibility: Managing Risk and Creating Value* (2006) at 51 Available at www.aph.gov.au/Senate/committee/corporations_ctte/corporate_responsibility/report/report.pdf
[386] *Modern Company Law for a Competitive Economy: Completing the Structure* (DTI 2000), Chapter 3.5.

4.3.3.3 SOUTH AFRICA

Like Australia and the UK, South Africa also revised its company laws with influences from the DTI Policy Paper 2004 and the *King Reports*. Both the Department of Trade and Industry's policy paper entitled *South African Company Law for the 21st Century- Guidelines for Corporate Law Reform* and the *King Report IV* advocated for a hybrid approach to corporate governance that would have balanced the interests of shareholders with those of other stakeholders.[387] Non-shareholder interests were recognised as having independent importance in the Policy Document. [388]

However, when the duties of directors were legislated in the Companies Act of 2008, the interests of stakeholders other than shareholders was? not further developed as was envisaged by the DTI Policy Paper 2004 and the *King Report IV*. Section 76(3)(b) merely states that directors are required to act in the best interests of the company. There is no statutory guidance on what constitutes or equates to the company's best interests, or which elements should be considered when assessing the company's best interests.[389] A strict interpretation of this section tends to imply that the policy document's emphasis on pluralism was neglected in the drafting of directors' duties, and that the traditional approach of shareholder dominance was maintained.[390]

While some authors are convinced that South Africa adopted an approach that provides for the consideration of wider stakeholder interests, others are of the view that the Companies Act of 2008 adopted an approach with lies between a pluralist approach and the ESV approach.[391] Despite the fact that section 7 of the Act requires directors to consider the interests of stakeholders, stakeholders do not have direct rights. As a result,

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[387] See the DTI Policy Paper 2004 titled *South African Company Law for the 21st Century- Guidelines for Corporate Law Reform* and *King Report IV*.
[388] Joubert T & Lombard S 'The Legislative Response to the Shareholders v Stakeholders debate: a Comparative Overview' (2014) 14 *Journal of Corporate Law Studies* 211 at 220.
[389] Joubert T & Lombard S 'The Legislative Response to the Shareholders v Stakeholders debate: a Comparative Overview' (2014) 14 *Journal of Corporate Law Studies* 211 at 220.
[390] Joubert T & Lombard S 'The Legislative Response to the Shareholders v Stakeholders debate: a Comparative Overview' (2014) 14 *Journal of Corporate Law Studies* 211 at 220.
[391] See Olson JF *South Africa Moves to a Global Model of Corporate Governance but with Important National Variations* in Mongalo TH (ed) *Modern Company Law for a Competitive South African Economy* (2010) Juta and Co at 220 and Cassim R and Cassim F 'The Reform of Corporate Law in South Africa' (2005) 16 *International Company and Commercial Law Review* at 412.

the extent to which other stakeholders' interests will be included under the canopy of the company's interests is a question of speculation and court interpretation.[392]

4.4. CONCLUSION

Chapter 4 looked at the history of the interpretation of the phrase ‘best interests of the company’ in terms of the common law. There was clearly a need for reform in the law, hence the enactment of the 2008 Companies Act. Unfortunately, the *lacuna* in the law has not been closed through section 76(3)(b). This is because the common law interpretation of the phrase ‘best interest of the company’ is very much retained, even though there is a shift in terms of the context of the Act. Sections 5 and 7 which deals with the interpretation of the Act emphasizes for stakeholder interests as a means to an end as opposed to being a means to achieving profit masimisation.[393] It is also evident from the interpretation of the Act and specifically, section 76(3)(b) that the ESV approach was not adopted by the Companies Act as many authors belief. This is because the policy document did not state that stakeholder interests can only be considered if it is ultimately in the interest of shareholders.[394] The policy documents rather stated that an approach that will pass constitutional muster is one that will give independent value to stakeholder interests- something that the ESV approach fails to adequately achieve. It is clear that there was a decent from a shareholder-centric approach towards a more stakeholder leaning approach.

As already discussed under Chapter 3, both Australia and the UK undertook the same corporate law reform process as South Africa but with different outcomes. Chapter 4 also looked at how these outcomes compares with one another.

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[392] Joubert T & Lombard S ‘The Legislative Response to the Shareholders v Stakeholders debate: a Comparative Overview’ (2014) 14 *Journal of Corporate Law Studies* 211 at 220.
[393] Botha & Jooste R ‘A critique of the Recommendations in the King Report regarding a Director‘s Duty of Care and Skill’ (1997) *South African Law Journal* 65-76.
[394] Mupangavanhu BM *Directors’ standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa’s Companies Act 71 of 2008: Future implications for Corporate Governance* (unpublished PhD thesis, University of Cape Town, 2016) at 55.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

This study set out to answer the central research question whether the ESV approach provides clear guidelines regarding the interpretation of the phrase in 'the best interests of the company'. Put differently, the question is whether the ESV approach provides a clear and ascertainable interpretation of the phrase, the 'best interests of the company', in a manner that enhances corporate governance in South Africa. In particular, this thesis interrogated whether it can be said with certainty that South Africa has adopted the ESV, and assuming that it did, whether for example, provisions such as section 76(3(b) of the Companies Act 71 of 2008 can now be interpreted and applied in a more ascertainable manner given the current state of that subsection. In this concluding chapter, the results of this investigation will be crisply presented, and will naturally culminate in specific proposals for law reform. Each chapter of the dissertation is summarised in relation to its contribution towards providing answers to the key research question(s) and sub-questions. Finally, recommendations will be made on how we can make the South African position clearer with regards to the interpretation of the phrase 'best interests of the company'.

5.2 SUMMARY OF THE CHAPTERS

The study is introduced in Chapter 1 along with its key research question and justification for the Study. It was considered significant to have this study at a time where uncertainty exists as to whether or not South Africa adopted the ESV approach in the Companies Act 71 of 2008. The sub-inquiries to the key question identified in Chapter 1 formed building blocks to the development of the main focus of the thesis and to answering the key research question.[395]

Chapter 2, inter alia, introduced the ESV approach and the interpretation of the phrase 'best interests of the company' in South Africa. Corporate governance was defined in this chapter, and key aspects of the concept were examined. The shareholder-centric

[395] See part 1.2 of Chapter 1 for the sub-inquiries.

approach, the pluralist approach, and the ESV approach were all explored as theories of corporate governance. This chapter also examined the Berle–Dodd debate regarding directors' duties in a company and who directors should manage the corporation for.[396] It was concluded that all theories of corporate governance either have a shareholder or stakeholder emphasis.

Still in Chapter 2, first, the shareholder-centric approach was discussed.[397] Per this approach, directors are expected to run the company solely in the interests of the shareholders, with no regard for the interests of other stakeholder. Second approach to be discussed was the pluralist approach, which recognises the interests of many groups while treating shareholders as one of many constituencies.[398] Thirdly, the ESV approach was introduced.[399] In the ESV approach, shareholder primacy is maintained, and the primary duty of directors is considered as promoting the company's performance, which is essentially equivalent to generating maximum value for shareholders without considering the interests of other stakeholders. The fact that other stakeholder interests are ignored is based on the 'too many masters' argument.[400] This argument contends that if more stakeholder interests were recognised, the various stakeholder groups would have to be named and the extent of directors' responsibility towards them determined, resulting in little to no accountability to anyone because there would be no comprehensible benchmark by which to judge their actions.[401]

The comparison study presented in Chapter 3 offered significant insights which could enrich South African jurisprudence and the interpretation of the phrase 'best interests of the company'. Lessons for law reform or for improving the enforcement of this directorial duty have been drawn from comparators of choice in this study. The UK and Australia were used as examples of international best practice experiences.[402] Two issues were

[396] Chapter 2, part 2.3.1.
[397] Chapter 2, part 2.3.2.
[398] Chapter 2, part 2.3.3.
[399] Chapter 2, part 2.3.4.
[400] Chapter 2, part 2.3.4.
[401] Kiarie S 'At crossroads: shareholder value, stakeholder value and enlightened shareholder value: Which road should the United Kingdom take?' (2006) *International Company and Commercial Law Review* 17(11) at 333.
[402] See Chapter 3, parts 3.2 and 3.3.

examined during the examination of UK law: (i) stakeholders' protection, and (ii) the regulation of directors' duties.[403] During its legal reform process, the UK chose the ESV-approach, emphasising that when directors manage a corporation, shareholder interests should take precedence, but that other stakeholders should be considered if doing so will enhance profit maximisation for the shareholders.[404] Where specific legislation so requires, directors may also consider the interests of other stakeholders even if it does not lead to the maximisation of shareholder profits.[405]

This dissertation considered the protection afforded to individual stakeholders in the UK, including but not limited to shareholders, employees, and creditors. However, the unexceptionable company law principle which holds that directors are fiduciaries to the company and the company alone, must again be emphasised.[406] It was concluded that due regard should be given to legislation as these may require directors to grant specific protection to stakeholders.[407] For example, directors are not obligated to regard the interests of creditors, as section 214 of the Insolvency Act of 1986 provides appropriate protection to this group of stakeholders.[408]

Employees and consumers are also protected by a number of statutes in the UK. For example, section 1 of the Employment Relations Act 1999. Consumers can also contact the Office of Fair Trading, a non-ministerial body established under the 1973 Fair-Trading Act. In addition, the Trading Standards Institute advises consumers about their rights regarding guarantees, credit purchases, refunds, and order cancellations, dispute resolution, and unfair contract conditions.[409]

With regards to the issue of codification of directors' duties in the UK, it was demonstrated in Chapter 3 that section 172 of the Companies Act of 2006 contains an exhaustive list of

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[403] See Chapter 3, parts 3.2-3.3.
[404] See Chapter 3, part 3.2.1 and 3.2.2.
[405] See Chapter 3, part 3.2.1 and 3.2.2.
[406] See *Peskin v Anderson* [2001] BCLC 372 para 33 and Mupangavanhu B 'Diminution in Share value and third-party claims for pure economic loss: The question of director liability to shareholders' (2019) *SA Mercantile Law Journal* (31) at 115-117.
[407] See Chapter 3, part 3.2.2.2.
[408] See section 214 of the Insolvency Act of 1986.
[409] See http://www.consumerdirect.gov.uk/ [accessed 15 June 2023].

directors' duties. Although the term 'exhaustive' is used in the definition of directors' duties, courts are free to add relevant precedents. However, the courts are prohibited from enacting new obligations.[410]

With respect to Australian law, Chapter 3 established that the duties of directors were partially codified in Australia in terms of the Corporations Act of 2001.[411] With regards to the protection afforded to stakeholders, the general rule is that directors should act in the best interests of the shareholders collectively.[412] When managing the company, it is important to consider the interests of other stakeholders as well. Stakeholders are not mentioned directly, as they are in the UK, and to achieve stakeholder protection, Australia relies on self-regulation, that is, it relies on voluntary corporate governance efforts in the country. Directors on the other hand, are not required to consider the interests of individual shareholders, nor are they required to consider the interests of creditors. In contrast, case law analysis implies that if a corporation is on the verge of bankruptcy, directors should consider the interests of creditors.[413]

The *Corporate Responsibility Report of 2005* in Australia advocates for the shareholder-centric approach, provided that stakeholders such as employees also enjoy protection.[414] This is due to the fact that employment contracts and labour regulations in Australia appear to provide little protection to employees.[415] This alludes to the fact that specialised stakeholder protection and acknowledgment from directors is [too] often contingent on the stakeholder's protection in laws other than corporate legislation.[416]

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[410] See Chapter 3, part 3.2.2.2.
[411] See Chapter 3, part 3.3.4.
[412] See Chapter 3, part 3.3.4.
[413] See Chapter 3, part 3.3.4.
[414] See Chapter 3, part 3.3.4.
[415] Deakin SF & Morris GS *Labour Law* 4th Ed Hart Pub, (2005) at 238.
[416] See The Report on Corporate Responsibility: Managing Risk and Creating Value by the Parliamentary Joint Committee and Corporations and Financial Services (June 2006) at page 7 available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/corporate_responsibility/report/index [accessed 17 June 2023].

It was further concluded, with respect to Australia, that consumers enjoy sufficient protection in specific legislation. The Trade Practices Act, for example, includes a long range of consumer rights, particularly in Part V.[417]

Chapter 4 dealt with how the phrase 'best interests of the company' is interpreted under the common law and modern company legislation, and more specifically the Companies Act 71 of 2008. The impact of the *King Codes*, as well as the DTI Policy Document of 2004 were also considered.

It was concluded that the Companies Act did not adopt the ESV approach, as is contended by various authors, nor does this approach provide clear direction as to how directors should deal with non-shareholder interests.[418] It also became clear that the stakeholder approach favoured by the Policy Document, and the stakeholder-inclusive approach referred to in *King Code IV*, was overlooked when section 76(3)(b) was formulated as shareholder centralism was retained.[419]

It was further established in Chapter 4 that, while individual stakeholders have rights under section 172(1) of the UK Companies Act, they have no recourse for enforcing those rights.[420] The situation in South Africa, it appears, is the exact opposite. While stakeholders other than shareholders are not given any consideration in the execution of the duty to act in the best interests of the company, certain stakeholders are afforded remedies against directors in specific circumstances.[421] Prior to the enactment of the 2008 Act, only shareholders could make use of the derivative action, but sections 165 and 157 also extends this remedy to a company director, a company secretary or prescribed officer of a company, as well as employee representatives (including trade unions).[422]

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[417] See Chapter 3, part 3.3.4.
[418] See Chapter 4, parts 4.3.1 and 4.3.2.
[419] See Chapter 4, parts 4.3.2.
[420] See Chapter 4, part 4.3.3.2.
[421] See Chapter 3, parts 3.2.2.1 and 3.2.2.2 & Chapter 4, part 4.3.1.
[422] See sections 165 and 157 of the Companies Act 71 of 2008 & Chapter 4, part 4.3.1.

5.3 RECOMMENDATIONS

This study, inter alia, examined the policy objectives in corporate law reform relevant to the study, in the form of the Department of Trade and Industry's law reform paper, titled *South African Company Law for the Twenty-First Century- Guidelines for Corporate Law Reform*, and the *King Report IV*. It must be admitted that the said policy paper, does not state with clarity which approach towards corporate governance it adopts between the ESV and the Stakeholder interests approach. It however appears that the paper advocates for a hybrid approach to corporate governance. Such an approach incorporates the interests of both shareholders and non-shareholder groups.[423] The proposed approach regards the company as an independent legal entity with numerous stakeholders, including shareholders, employees, consumers, the community, and the environment.[424] Our courts may consider the protection provided to these stakeholders in specific legislation, other than the Companies Act 2008 when determining the competing interests of numerous stakeholders.[425]

It is the thesis of this study that the policy position regarding the country's approach to corporate governance is ambiguous, obscure and uncertain. If the DTI Policy Document 2004 intended to state that South Africa follows an ESV approach towards answering the critical corporate governance question (in whose interests should directors govern or make corporate decisions?), it should have stated this clearly. If it intended the position to be a stakeholder or pluralist approach, it should also have been clearer than the current position. As indicated in this study already,[426] the policy document appears to, in some instances, emphasise stakeholder interests[427] and to advocate for such interests to be used as an end in themselves in corporate decision-making. Yet the Act still shows some considerable leaning towards a shareholder focus approach.[428] Perhaps there is therefore

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[423] See Chapter 2, part 2.4.1.
[424] See Chapter 2, part 2.4.1.
[425] See Chapter 4, parts 4.3.3.1 and 4.3.3.2.
[426] See part 4.3.2 in Chapter 4 above.
[427] See part 4.3.1 of Chapter 4 above
[428] It cannot be gainsaid that the Act emphasises shareholder interests. Sections 57 – 65 deal with shareholder meetings, interests and decision-making powers etc. A number of other provisions of the Act such as ss 161 – 165 focus on shareholder remedies when their rights or interests are threatened, and this is the case where shareholder interests are tied to the interests of the company.

merit in the assumption[429] that the Act follows an ESV approach. The concern in this study is that the policy document left the position vulnerable to conjecture, and the conclusion that the Act is based on an ESV approach is arrived at probably by way of deduction. The policy position could have been clearer, and this is the argument in this study. Clarifying the position is important for providing better guidance to law users and the courts when interpreting and applying the provisions of the Act such as section 76(3)(b) for example.

The following recommendations are therefore proposed:

1. Having established above, that the policy position regarding whether the Companies Act 2008 is based on the ESV or the stakeholder approach is not clear, it follows logically that the first recommendation must be that when the occasion arrives, it is preferable to make the position clearer than it presently is. The policy should clearly spell out that South Africa follows the ESV approach, which appears to be decidedly the position as reflected by provisions of the Act.

2. In line with the conclusion reached that it is not easy to decode the meaning of the phrase 'the best interests of the company' used in section 76(3)(b), it is hereby proposed to provide amendment in order to beef-up the content of section 76(3)(b) of the Act for example by taking a leaf from international best practices as already established in this study,[430] so that it clearly reflects what this study believes to be an ESV approach.

3. In the absence of the clarity suggested above, it is suggested here that the courts and other law users are not without guidance when interpreting and applying for example, section 76(3)(b) of the Companies Act 2008. A purposive approach to interpretation of the provision can be adopted, which considers the broad context of the provision to be interpreted. In this case, as already pointed out in this study,[431] the dicta in *Endumeni* is important in this regard. To borrow from the words of Wallis JA in

[429] It is an assumption because to the best of the author's knowledge, nowhere in the DTI Policy Document is it stated that the approach is an ESV or a stakeholder or pluralist approach.
[430] See the examples from the UK and Australia examined in Chapter 3, especially part 3.2.2 and part 3.3.
[431] See Chapter 4, part 4.3 generally, and specifically part 4.3.1.

Endumeni, when interpreting section 76(3)(b), important to consider are the following: 'the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production'.[432] In addition to the factors suggested in *Endumeni* for consideration, the Companies Act 2008 permits considerations of the purposes of the Act and the context in which the provision is located.[433] The Act further permits courts to consider foreign company laws and developments in international best practice jurisdictions relevant to a particular provision.[434] The point here is that courts and other law users can find guidance per the suggestion made above, when seeking to decode the meaning of the phrase 'the best interests of the company' in the interim, until the legislature provides the clarity as proposed above.

[432] *Natal Joint Municipal Pension Fund v Endumeni Municipality* supra, at para 18.
[433] See section 5(1) of the Companies Act 2008.
[434] In this regard see section 5(2) of the Companies Act 2008, which can be relied upon to for e.g., to consider the guidance that courts can draw from the content of section 172 of the UK's Companies Act 2006, until such time that section 76(3)(b) is amended to provide similar clarity, as already suggested in this study.

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