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Shareholder Value versus Stakeholders' Interests– A Critical Analysis of Corporate Governance from a South African Perspective

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ABSTRACT The board is the focal point of the corporate governance system. In South Africa, and internationally, the board of directors is regarded as the directing mind and will of the company. The board has a collective responsibility to provide effective corporate governance that involves monitoring the relationships between the board and management of the company, and between the company and its stakeholders. Traditionally, corporate governance focuses on the regulation of the directors' duties for the maximum welfare of the shareholders. As a result, stakeholder interests have held very little relevance under classical company law. However, the argument for imposing wider accountability on companies has gained importance and the issue of protecting stakeholders' interests has thus become crucial. Given this background, this paper examines the issue of the protection of stakeholders' interests under the Companies Act 71 of 2008. The main concern is whether the Companies Act adequately protects the interests of stakeholders. The paper concludes that even though efforts have been made in the Companies Act to ensure that other stakeholders, apart from just shareholders are protected, it seems that legislation is far from effectively providing for the rights of stakeholders. In this regard, recommendations for law reform are made.

INTRODUCTION

"In A *Christmas Carol* (Dickens 1843), Charles Dickens writes about the spiritual conversion of Ebenezer Scrooge. The story begins with Scrooge miserly guarding his wealth. However, as the story develops, he encounters a series of spirits who show him the impact of his approach. The happy ending of the story occurs only after Scrooge sees the harm of his wealth maximizing ways and decides to benefit the poor family of his employee, Bob Cratchit, with an increase in salary, a Christmas turkey and general assistance to his clerk's crippled son, Tiny Tim. In its essence, *A Christmas Carol* is an illustration of the shareholder-stakeholder debate, and this debate is at the heart of corporate governance" (Sheehey 2005-2006).

The shareholder-stakeholder debate is centered on the issue relating to the corporate objective. This issue is important in that it influences the kind of corporate governance system that will exist. The board is the focal point of the corporate governance system (The King Report on Corporate Governance in South Africa 2009). In South Africa and internationally, the board of directors is regarded as the directing mind and will (*Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) 713; *Canada and Dock Co v The Queen* 1985 SCR 662) of the company. The company therefore operates through its board of directors. In *R v Kritzinger*1971 (2) SA 57 (A), the point was made that a company is an artificial person that cannot read a written representation or hear a spoken representation. It reads or hears a representation through the eyes or ears of, *inter alia*, its directors acting in the course of their duty, and "board" is the collective term used to designate the directors when they act together in the course of their duty to the company. The board has a collective responsibility to provide effective corporate governance that involves monitoring the relationships between the board and management of the company, and between the company and its stakeholders. Traditionally, corporate governance focuses on regulation of directors' duties for the maximum welfare of the shareholders. As a result, stakeholder interests have held very little relevance under classical company law. However, the argument for imposing wider accountability on companies has gained importance in the last decade, hence the definition of corporate governance by Benade et al. who state that corporate governance involves the balancing of the interests of all internal stakeholders and other parties who can be affected by the corporation's conduct (Benade et al. 2008).The King Report 2009 states that the board's paramount responsibility is the positive performance of the company in creating value and that in doing so, it should consider the legitimate interests and expectations of all its stakeholders. The issue of protecting stakeholders' interests has thus, become crucial. It is against this background that this paper examines the issue of the protection of stakeholders' interests under the Companies Act 71of 2008. The main concern is whether the Companies Act adequately protects the interests of stakeholders. The paper concludes that although efforts have been made in the Companies Act to ensure that other stakeholders, apart from just shareholders are protected, it seems that legislation is far from effectively providing for the rights of stakeholders. In this regard, recommendations for law reform are made.

CORPORATE GOVERNANCE APPROACHES – AN OVERVIEW

The Shareholder Value Approach

The shareholder value approach refers to the concept that the primary objective for a company is to increase the wealth of its shareholders by paying dividends and/or causing the share price to increase (Gamble and Kelly 2001; Stout 2002; Keay 2008). In terms of this approach, although directors may consider the interests of other stakeholders, they are unable to act in a way that has a negative impact on shareholders. There is no certainty as to when the shareholder value approach rose to prominence. However, one of the early manifestations of the approach is said to be the English case of *Hutton v West Cork Railway Company*(1883) 23 Ch D 654.In this case, the court had to deal with an extra-contractual payment to the employees of a company in liquidation. Describing the payment as "charity," the court stated:

Charity has no business to sit at boards of directors *qua* charity. There is, however, a kind of charitable dealing, which is for the interest of those who practice it, and to that extent and in that garb charity may sit at the board, but for no other purpose… The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.

Directors could therefore, spend money on "charity" but it had to benefit the company and the company meant the shareholders. In other words, incidental welfare expenditure could only be incurred for the primary purpose of earning profits for shareholders' benefit. In the United States of America (USA), the court in the classic case of *Dodge v Ford Motor Company*170 N.W. 668 (Mich. 1919) which endorsed the shareholder value approach stated:

The business corporation is organized and carried on primarily for the profit of stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to reduction of profits or to the non-distribution of profits among stockholders in order to devote them for other purposes.

The shareholder value approach entails two distinct principles, namely, the shareholder wealth maximization norm, and the principle that shareholders are the sole owners of a corporation (Gamble and Kelly 2001). It is, however, important to note that although a company may exist to maximize shareholders' wealth, it is well known that a company has a separate legal existence from its shareholders. Hence, by virtue of owning shares in a company, shareholders do not become owners of the company. In *Short v Treasury Commissioners* [1948] 1 KB 116 (CA) 122 it was stated that shareholders are not, in the eyes of the law, part owners of the undertaking. In other words, a share in the share capital of a company does not imply ownership of a part of the assets or property of the company as the company's assets or properties belong to the company itself and not to its members. This follows from the concept that the company is a separate legal entity distinct from its members as was pronounced in the case of *Salomon v Salomon and CoLtd* [1897] AC 22 (HL).In the case of *Dadoo Ltd v Krugersdorp Municipal Council*1920 AD 530 550-551, the court found that the property vests in the company and cannot be regarded as vesting in any or all of the members of the company. In the case of *Airport Cold Storage (Pty) Ltd v Ebrahim and Others*2008 (2) SA 303 (C), the court confirmed that one of the most fundamental consequences of incorporation is that a company is a juristic entity separate from its members. The Companies Act 71 of 2008 reinforces the common-law position as outlined. It provides that from the date and time that the incorporation of a company is registered, the company is a juristic person (section 19(1)).

The Stakeholder Approach

Unlike the shareholder value approach, the stakeholder approach rejects the idea of maximizing a single objective, as one gets with the shareholder value, where focus is all on maximizing shareholder wealth (Ryan 1990). The stakeholder approach aims at inclusion and broader accountability and contends that no group that has contributed to the company's success should go unrecognized (Dean 2001; Etzion 1998; Mitchell 1997). The stakeholder approach argues for a 'fair' division of 'the pie' created by the company, since all stakeholders have a role in determining the ultimate size of 'the pie' (Wallace 2003). The view is that even though shareholders play a vital role in providing the capital, the return on the capital should not come at the expense of other important stakeholders. The argument is that stakeholders play a vital role in the success of the company and they have a right to be regarded as an end and not a means to an end (Reynolds et al. 2006).

The Enlightened Shareholder Value Approach

The enlightened shareholder value approach has its origins in the United Kingdom (see The Company Law Review Steering Group, Department of Trade and Industry *Modern Company Law for a Competitive Economy: Developing the Framework* (2000)). As the name suggests, the enlightened shareholder value approach is grounded squarely within a shareholder value paradigm that emphasizes economic efficiency and returns on shareholder investments. In terms of the enlightened shareholder value approach companies should pursue shareholder wealth with a long-run orientation that seeks sustainable growth and profits based on responsible attention to the full range of relevant stakeholder interests. Retaining the shareholder value element, the need is to foster effective relationships, with *inter alia*, creditors, employees, customers, suppliers and the community as a whole (see Roach 2005). Thus, while the enlightened shareholder value approach is clearly based on shareholder value and involves directors having to act in the collective best interests of shareholders, it eschews an 'exclusive focus on the short-term financial bottom line' and seeks a more inclusive approach that values the building of long-term relationships (see The Company Law Review Steering Group, Department of Trade and Industry *Modern Company Law for a Competitive Economy: Developing the Framework* (2000)). It involves 'striking a balance between the competing interests of different stakeholders in order to benefit the shareholders in the long run' (Armour et al. 2003).

The enlightened shareholder value approach is reflected in section 172(1) of the United Kingdom Companies Act 2006 dealing with the directors' duty to promote the success of the company, which provides as follows:

A director of a company must act in a way that he considers, in good faith, would be most likely to promote the success of the company for the benefit of the 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 between members of the company.

Section 172(1) therefore, introduces the concept of enlightened shareholder value by imposing a duty on directors to be more inclusive in their decision-making, namely, taking into account the relationships the company has with stakeholders in seeking to benefit the members as a whole. The expression 'members as a whole' has been used on several occasions in the UK company law. It is noteworthy that the courts have tended to hold that it means the present and future shareholders. For example, see *Gaiman v National Association for Mental Health* [1971] Ch 317 330; *Brady v Brady* (1987) 3 BCC 535 552; *Provident International Corporation v International Leasing Corp Ltd* [1969] 1 NSWR 424 440; *Darvall v North Brick and Tile Co Ltd* (1987) 12 ACLR 537 554. It is, however, debatable whether directors, will on many occasions be held accountable for their consideration of the interests enumerated in section 172(1) of the UK Companies Act (Keay 2007). It is likely that the only situation that will require directors to be accountable is where members, who are aligned to stakeholder groups covered by section 172(1)(b)-(d), are ready to take proceedings against directors (Keay 2007). However, even in this instance, it has been shown that the courts may be reluctant to hold directors liable. In the case of *R (On the application of People and Planet) v HM Treasury* [2009] EWHC 3020 (Admin), an environmental pressure group tried to compel the UK government to use its position as a majority shareholder in the Royal Bank of Scotland to force the bank to ignore profit maximization and make the board consider human rights and climate change issues when reaching decisions. Sales J held that for the board to focus on something other than profit maximization would conflict with the board's duties to shareholders*(R (On the application of People and Planet) v HM Treasury* [2009] EWHC 3020 (Admin) paragraph 34). Although the judgment was framed in terms of such deviation being a potential majority shareholder oppression of the minority (namely the minority's right for their share value to be maximized), the judgment might suggest that the judiciary is hostile towards a broader view of directors' duties than simple shareholder wealth maximization.

AN ANALYSIS OF THE CORPORATE GOVERNANCE APPROACH IN SOUTH AFRICA

Company directors are subject to various duties. These include statutory duties in terms of the Companies Act 71 of 2008, other legislation (For example, the Labour Relations Act 66 of 1995; the Promotion to Access of Information Act 2 of 2000; the Broad Based Black Economic Empowerment Act 53 of 2003 and the Constitution of the Republic of South Africa, 1996) as well as the common law duties which have now been partially codified (Davies et al. 2011) in the Act. They are also subject to any duties, which a company's Memorandum of Incorporation (MOI) or a separate agreement may specify. Many of these duties have been confirmed in case law (see for example, *Cyberscene Ltd v i-Kiosk Internet and Information (Pty) Ltd* 2000 3 SA 806 (C) 813-814; *Du Plessis v Phelps* 1995 4 SA 165 (C) 170; *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 2 SA 54 (T) 64; *Fisheries Development Corp of SA Ltd v Jorgensen: Fisheries Development Corp of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) 163). All directors, both executive and non-executive, are bound by the fiduciary duties and the duty of care, skill and diligence (see the Companies Act section 76(3)), and the law does not recognize any distinction between executive and non-executive directors in this regard *(Howard v Herrigel and Another NNO* 1991 (2) SA 660 (AD) 678A). Hence, in relation to these duties, the legal rules are the same for all directors.

The Company Act introduces a number of provisions relating to the standards of conduct of directors. Section 76(3)(b) provides that 'directors must exercise their powers and perform the functions of director in the best interests of the company.' However, what 'the best interests of the company' mean, is not defined. The word 'company' is defined in section 1 of the Companies Act as a 'juristic person incorporated in terms of the Act.' However, in the context of section 76(3)(b) it holds no value, hence the reason for considering the common law. The court in *Greenhalgh v Arderne Cinemas Ltd*1951 Ch 286 291 stated that the phrase 'company as a whole' does not mean the commercial entity as distinct from the shareholders. It means the shareholders or incorporators as a general body. Thus, at common law, the phrase 'the best interests of the company' has generally been interpreted to mean the interests of the shareholders collectively, that is, 'all the shareholders, present and future.' Hence, *Cassim et al* state that the word 'company' in the context of section 76(3)(b) is merely a synonym for the shareholders of the company (Cassim et al. 2011).

While not defining the phrase 'the best interests of the company,' the *King Report on South Africa 2009 (King III)* highlights the fact that in terms of our common law, as developed through jurisprudence, the best interests of the company has been interpreted to equate to the best interests of the body of shareholders (the shareholder value approach). However, it is noted that the Companies Act states as one of its purpose, to promote compliance with the Bill of Rights as provided for in the Constitution *(King III)*. According to *King III*, this purpose, as stated, constitutes a departure from the traditional narrow interpretation of the best interests of the company. On this basis, one could argue that the Companies Act has expanded the meaning of 'the best interests of the company' to include not only shareholders but also stakeholders. While this argument appears attractive, it is submitted that section 76(3)(b) of the Companies Act has not been framed in ways that clearly indicate that directors must now take cognizance of the interests of stakeholders when managing their companies. What is clear currently, is that in light of section 76(3)(b), the duty of directors to act in the best interest of the company has become mandatory but at the same time still keeping to its common-law foundation. With this section, it can be suggested that South African company law prefers the shareholder value approach. The result of this is that whereas shareholders have received recognition, the interests of stakeholders have received no formal, legal recognition. In this regard, it is recommended that the section be amended to read as follows: "Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director— …(b)in the best interests of the company and *all key stakeholders*; and …"

The above proposed amendment will clarify the position of directors with regard to key stakeholders. It makes it clear that directors have a fiduciary duty to consider the interests of the company as well as those of all key stakeholders. However, the question that may arise is what is meant by 'key stakeholders.' In this light it is recommended that section 1 include the following definition for key stakeholders: "For purposes of this Act (Companies Act) the term 'key stakeholders' shall refer to stakeholders collectively, with legitimate interests in the business – stakeholders that merit and receive consideration in business decisions." Each company will have a different set of stakeholders, depending on its core business. A socially responsible business should attend to the legitimate interests of all of its key stakeholders and act in the interest of all its stakeholders, not just the shareholders. Stakeholders could include employees, local communities, the government, customers, and suppliers. A company may engage with stakeholders only if it has identified those stakeholders with legitimate interests in the business – stakeholders that merit and receive consideration in business decisions.

Exceptions - Stakeholder Oriented Provisions

It has been argued above that the current wording of section 76(3)(b) creates the impression that the South African company law favors the shareholder value approach. In this discussion, exceptions that can be debated to be found in provisions of the Companies Act are articulated.

Section 20(4) of the Act provides that shareholders, directors and prescribed officers or a trade union representing employees may take proceedings to restrain a company from doing anything inconsistent with the Act. While in terms of this section, the persons who may take proceedings are restricted to shareholders, directors and prescribed officers or a trade union representing employees, section 157 provides for "extended standing to apply for remedies." It provides that when, in terms of the Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person *inter alia* acting as a member of, or in the interest of, a group or class of affected persons or acting in the public interest, with leave of the court (Section 157(1)). The scope of persons who can bring an application or a matter before the courts, Companies Tribunal or the Commission has therefore been widened by the Act. In light of section 20(4) read with section 157(1) any interested stakeholder of the company may institute proceedings to restrain a company from doing anything inconsistent with the Act. However, it is questionable whether section 20(4) read with section 157(1) would be effective in safeguarding the interests of stakeholders. This is because in the event of a conflict or dispute as to whether a director's failure to consider stakeholders' interests would render his conduct inconsistent with the Act, his conduct will be measured against section 76(3)(b).In this light, the right in terms of section 20(4) read with section 157(1) is thus not with regard to the interests of the stakeholders but is with regard to the interests of the company. In order to guarantee effective protection of stakeholders' interests, an affirmative obligation must be placed on directors to consider these interests. Hence, the recommended amendment to section 76(3) made earlier.

Another relevant provision that is stakeholder oriented is section 165(2) of the Companies

Act. The section provides for the statutory derivative action. The statutory derivative action allows certain specified persons to institute proceedings on behalf of a company where the company has been prejudiced by acts of its controlling directors and where the company has failed to take the necessary action to call these directors to account. Section 165(2) provides that the persons who may use the statutory derivative action are (essentially) a shareholder, a director, a representative of employees or any other person with leave of the court. In terms of section 165(2)(d), a person may serve a demand upon a company to commence or continue legal proceedings or to take related steps, to protect the legal interests of the company if the person has been granted leave of the court to do so. However, such granting of *locus standi* to other stakeholders is left to the discretion of the court. Ultimately, if the stakeholders can prove to the court's satisfaction that they have *locus standi* to bring a demand to institute a derivative action and that it is in the best interests of the company to do so, then such court has no other alternative but to grant such leave. Section 165(2)(d) allows the possibility of legal recognition for stakeholders' rights, including effective enforcement of such rights should they prove to have *locus standi*. If such standing is successfully proved and depending on the discretion of the court, then stakeholders can be said to have an effective action against management if their rights have been prejudiced. However, it needs to be noted that while there is some recognition of stakeholder interests in terms of section 165, the ultimate purpose of the derivative action is to protect the legal interests of the company and not the legal rights of other stakeholders. As Cassim et al. contend, the intention of section 165 may be to allow courts to grant standing to stakeholders whose legal rights are indirectly affected due to an infringement of the company's legal interests (Cassim et al. 2011).In order to provide stakeholders with a right of enforcement with regard to their own interests as opposed to only the interests of the company as is the case in the current wording of section 165(2), the following amendment to the section is proposed: "A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company and *all key stakeholders* if the person— …" The recommendation will further make it easier for the stakeholders to prove to the court's satisfaction that they have *locus standi* to bring a demand to institute a derivative action and that it is in the best interests of the company and all key stakeholders to do so. It is however noted that a court will only grant such leave upon compliance by the company with one of the factors stated in section 165(5) of the Companies Act.

Section 218 of the Companies Act dealing with civil actions is also relevant to the issue of the protection of stakeholder interests. In particular, 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 person as a result of that contravention.' In light of this section, stakeholders can therefore argue that by not considering their specific interests, directors did not act in the best interests of the company. This will, however, be hard to prove, as the third party will have to show that by not acting in his or her best interest the director did not act in the best interest of the company.

Exceptions – Company Law Principles

To a certain extent, it may appear that the shareholder primacy approach has become significantly more nuanced through the operation of other company law principles, such as the business judgment rule and the provision for the MOI. For instance, one may argue that the Companies Act allows for parties to guarantee the recognition and protection of stakeholder interests simply by including a clause in the MOI giving directors the duty to consider stakeholder interests. Furthermore, one may argue that the business judgment rule protects a board's decision to pursue not only financial but also social and environmental goals. While these arguments appear attractive, it is submitted that they are fraught with complexities as will be highlighted.

The MOI is defined in section 1 of the Companies Act as the document, amended from time to time, that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company, and other matters as contemplated in section 15. The Companies Act allows a large degree of flexibility with regard to the content of the MOI. However, each provision of a company's MOI must be consistent with the provisions of the Act. The MOI can therefore determine the rights, powers and duties of stakeholders. However, a matter of concern that arises is, how, where a company's shareholders change their minds about the entity's social or environmental goals and vote to amend the MOI, will the board be able to prevent the amendment? A social or environmental mission embodied in the MOI of a company can be easily amended or eliminated if the company is acquired by a majority of investors who do not have interests aligned with those of the company's stakeholders. A company's MOI can be amended *inter alia* "at any other time if a special resolution to amend it (i) is proposed by, (a)the board of the company; or (b)shareholders entitled to exercise at least ten percent of the voting rights that may be exercised on such a resolution; and (ii) is adopted at a shareholders meeting…" (See section 16(1)). Thus, there exists the possibility for companies to easily amend the original MOI to pursue goals not in the best interests of the original stakeholders should there be a need to attract outside investors and investment capital.

The business judgment rule has played an important role in expanding director discretion to allow for consideration of the interests of stakeholders other than shareholders. The rule developed, in part, due to judicial reluctance to interfere *ex post* with board decisions. Given the difficult nature of the determinations that directors make, and the potential for hindsight bias, the Act has given deference to directors provided they *inter alia* had a rational basis for believing, and did believe, that their decision was in the best interest of the company (Section 76(4)). The impact of the business judgment rule is to insulate board decisions from court scrutiny. Business judgment deference gives directors wide discretion to make decisions that may in fact advance the interests of one group of stakeholders over another. However, a matter of concern that arises is whether the business judgment rule protects director's decisions that favor stakeholders but are to the detriment of shareholders. This issue emanates from the fact that the Companies Act does not provide clarity on what is meant by the best interests of the company. In line with the wording in section 76(3)(b), section 76(4)(iii) simply states that the director must *inter alia* have rationally believed that the decision was in the best interests of the company. Unfortunately, determining whether a decision was in "the best interests of the company" may be a more difficult task.

Be that as it may, in light of the stakeholder oriented provisions contained in the Companies Act and the above discussed company law principles, it is accepted that the Companies Act adopted the enlightened shareholder value approach (See also Davies et al. *Companies and Other Business Structures in South Africa*, 2011: 10). It has been asserted that the enlightened shareholder value approach kills two birds with one stone since stakeholders get more consideration and shareholders maintain the profit maximization goal and remain to hold directors accountable (Kiarie 2006). In this regard, it may appear that to some degree, the enlightened shareholder value approach endeavors to satisfy the demands of both the shareholders and the stakeholders. It is however, argued that due to the fact that the enlightened shareholder value approach does not make directors accountable to stakeholders, and there are likely to be few occasions when any breach against the interests of stakeholders will be enforced, protection of stakeholder interests under the enlightened shareholder value approach is merely an illusion.

Furthermore, it needs to be noted that directors' consideration of stakeholders' interests is not an entirely new phenomenon (however, previously the protection of stakeholder interests have not been embedded in statutes but instead implemented through guidelines and codes such as the *King III)*. Directors have always managed companies for shareholder value whilst giving due regard to relevant stakeholder interests. In this regard, it is argued that the Companies Act has not departed from the shareholder value principle, but has rather added to the existing common law, the duty of the directors to consider the interests of other stakeholders in situations where doing so benefits the shareholders. It must be noted that directors cannot pursue a course of action that might be good for all material interests, unless it ultimately benefits the shareholders. This would therefore, appear to rule out the possibility of actions such as directors declining to dismiss employees, unless that would ultimately benefit shareholders.

CONCLUDING REMARKS

While the Companies Act has striven to ensure that stakeholders, apart from just shareholders, are protected and catered for, it is however, far from effectively providing for such rights. The shortcoming of the Companies Act is that it excludes from explicit consideration, the interests of other stakeholders such as employees, customers, creditors, the state and communities within which companies operate. It imposes on directors no affirmative obligation to consider the interests of other stakeholders. Protection of stakeholder interests therefore is left almost entirely to forces outside of company law.

RECOMMENDATIONS

It is submitted that section 76(3)(b) of the Companies Act should have been framed in ways that clearly indicates that directors must now take cognizance of the interests of stakeholders when managing their companies. In this regard, it is recommended that the section be amended to read, "a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director in the best interests of the company and *all key stakeholders*." The recommendation necessitates a further amendment to section 76(4) which deals with the business judgment rule and is closely linked to section 76(3)(b) and (c). It is recommended that section 76(4) be amended to also reflect the position that directors have a fiduciary duty to consider the interests of the company as well as those of all key stakeholders. It is further recommended that the Companies Act must, in section 1, define "key stakeholders." It is recommended that 'key stakeholders' be defined as stakeholders collectively, with legitimate interests in the company, those that merit and receive consideration in business decisions. With regard to section 165(2) it is recommended that the purpose of the statutory derivative action should be broadened to also provide for the interests of key stakeholders. In this regard, it proposed that section 165(2) be amended to read as follows: "A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company and *all key stakeholders* if the person— …" This will provide stakeholders with a right of enforcement with regard to their own interests as well, as opposed to only the interests of the company as is the case in the current wording of section 165.

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