



**THE UNIVERSITY OF CAPE TOWN
SCHOOL OF ADVANCED LEGAL STUDIES
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MINOR DISSERTATION

**IS THE CORPORATE GOVERNANCE LAW APPLICABLE TO
ZAMBIAN BANKS AND FINANCIAL INSTITUTIONS ADEQUATELY
PROMOTING GOOD CORPORATE GOVERNANCE?**

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DEDICATION

This work is dedicated to my lovely family. In particular, my wife Nzhyaleni and our two children, Chanza Jr. and Chalingo. All your sacrifice and hard work was not in vain.

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CHAPTER 1

INTRODUCTION

Good corporate governance has been hailed as an important factor for the growth of sustainable economic development by enhancing the development of companies and increasing their access to outside capital.¹ Furthermore, for emerging markets like Zambia, improving corporate governance can serve a number of important public policy objectives. Good corporate governance reduces emerging markets vulnerability to financial crisis, reinforces property rights, reduces transaction costs and the cost of capital and leads to capital market development.² Since Banks are primarily companies, they also fall within the preserve of corporate governance.

For banks and financial institutions, the failure to comply with good corporate governance practices can mean the unfortunate reality of an insolvent bank and a collapse of a countries financial system. The former Bank of Zambia Governor made the following observation:

*'In Zambia, over the period 1995-2000 the Banking sector experienced numerous episodes of bank failures that have had the adverse effects on the confidence in the financial system. Ten banks were closed during this period and major weaknesses in all failures were the weak governance structures and practises in banks. A close examination of the failed banks identified the following weaknesses which were common in most of them, large credit exposures, lending to connected parties, poor or absence of a credit policy, incompetent management coupled with ineffective boards, foreign exchange exposures and an absence of or inadequate risk management framework. In other banks, the board chair [person] was also the majority shareholder and the chief executive of the bank. Such basic risk management failures do largely reflect a breakdown in corporate governance.'*³

¹ World Bank Report on the Observance of Standards and Codes (ROSC) Corporate Governance Zambia Assessment 2006 under heading *why is corporate governance important?* available at www.worldbank.org/ifa/rosc_cg_zam.pdf accessed on 20 December 2013.

² Ibid.

³ Caleb Fundanga (former Bank of Zambia Governor) Corporate Governance and its impact on Financial Institutions speech page 3, 27 April 2011, available at www.bis.org/review/r110504c.pdf accessed on 20 December 2013.

The aforementioned statement highlights and underscores the value of corporate governance to the survival and sustenance of banks and financial institutions. This dissertation seeks to answer this major question, Is the corporate governance law obtaining in Zambia as it relates to banks and financial institutions adequately promoting good corporate governance? In answering this vital question, I wish to identify, analyse and examine the legal corporate governance infrastructure within which Zambian banks and financial institutions operate and assess its overall efficiency and effectiveness.

In so doing, the research shall involve a critical look at the Zambian Banking and Financial Services Act⁴, The Bank of Zambia Act⁵ and shall study the Corporate Governance guidelines,⁶ introduced in the Zambian banking sector in 2006. A brief look at the Zambian Companies Act⁷ focusing on provisions, which relate to corporate governance, will also, be done. The research will also attempt to glean from the experience of South Africa in terms of King III⁸. South Africa is relevant as a champion of corporate governance in Africa and the world⁹. The research will conclude with some recommendations on the improvement and reform of corporate governance law and regulations in the banking and financial sector in Zambia.

To achieve this objective the dissertation will take the following structure: after establishing the scope and parameters of the thesis by way of this introduction, I will explore the concept of corporate governance in terms of establishing an operational definition and main principles and the overall approach to corporate governance that I have adopted as a model. I will look at the importance of good corporate governance in banks and financial institutions generally before I zoom into the Zambian banks and financial institutions corporate governance legal regime. The reason for discussing corporate governance in general terms before getting to the specifics in the initial chapters

⁴ The Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁵ The Bank of Zambia Act Chapter 360 of the Laws of Zambia.

⁶ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006.

⁷ The Companies Act Chapter 388 of the Laws of Zambia.

⁸ The King [III] Report on Governance for South Africa 2009 and the King [III] Code of Governance Principles 2009 referred to as King Report III or King Code III to distinguish from previous King Reports and Codes.

⁹ J Schulschenk, *Interview Summary Report August 2012*, Corporate Governance Research Programme at 4.

of this dissertation is to clarify the lens or microscope through which the Zambian corporate governance regime will be looked through. I will then focus on the particular laws and regulations that formulate Zambia's corporate governance regime in relation to banks and financial institutions. I will attempt to compare and contrast the laws and regulations and the approach to corporate governance that is prevalent in Zambian banks and financial institutions with the corporate governance approach in King III¹⁰ of South Africa.

The study focuses mainly on privately owned and incorporated banks and financial institutions.

The goal is to learn positive lessons which could go a long way in strengthening corporate governance laws, regulations, systems, practices and processes in the banking and financial sector in Zambia. The dissertation will conclude with a summary of findings, conclusions and recommendations for reform to the Zambian corporate governance law applying to banks and financial institutions.

In terms of research methodology, this dissertation shall examine the sources of corporate governance statutes and regulations, literature by experts and academics in this field, in order to make a fresh contribution to the subject matter at hand.

The research does not advocate for a full legal transplant of South African law and principles, into Zambia but seeks to use the corporate legal experience of South Africa as a springboard for the improvement of Zambia's own corporate governance regulatory and legal framework.

¹⁰ King Report III and Code III op cit (n8)

CHAPTER 2

CORPORATE GOVERNANCE OPERATIONAL DEFINITION AND PRINCIPLES

Corporate governance defined

It is important to note from the onset that the concept of corporate governance has no set definition of what it means.¹¹ Many commentators and scholars have attempted to provide a definition of corporate governance yet it is clear that one definition varies over the other.¹² In view of all the varying definitions of corporate governance out there, and for the purpose of this research, it becomes important to focus on a particular approach and adopt an operational definition with supporting major principles. This will enable our discussion have focus and keep in mind what tools we are using to achieve our aims. There is a fear with this realisation that one would be too narrow in their approach and not be able to have a broad and holistic understanding of corporate governance. To bring some balance to this challenge I have begun this chapter with a general approach towards defining corporate governance. Towards the end of the chapter, I focus on the core of the angle and approach that I will use throughout this dissertation to view the entire corporate governance legal framework applying to Zambian banks and financial institutions. This is a necessary block in the foundation of the house of analysis I intend to build.

Corporate governance is concerned with the structures and processes associated with management, decision making and control in organisations.¹³ The Cadbury Report defined corporate governance as ‘the system by which companies are directed and controlled.’¹⁴ To clarify the concept of corporate governance subsequent reports have stated that:

‘[c]orporate governance refers generally to the legal and organisational framework within which, and the principles and processes by which

¹¹ Jean Jacques du Plessis, James McConvill, Mirko Bagaric, *Principles of Contemporary Corporate Governance* (2005) 1.

¹² Ibid.

¹³ Farouk HI Cassim, Maleka Femida Cassim, Rehana Cassim, et al, *Contemporary Company Law* 2ed (2012) 472.

¹⁴ Richard Smerdon, *A Practical Guide to Corporate Governance* (1998) 1.

corporations are governed. It refers in particular to the powers, accountability and relationships of those who participate in the direction and control of a company. Chief among these participants are the board of directors, and management. There are aspects of the corporate governance regime that have an impact on the relationship between shareholders and the company.'¹⁵

Groot concurs with this view but adds that:

*'corporate governance is the regulation of the corporate form that by re-thinking corporate law with the purpose of guaranteeing the enhancement of shareholder value in the long term-addresses the roles of the corporation's centrali[s]ed administration (unitary or dual board and the managers) and of the corporation's shareholders, by specifically taking into account elements like integrity, transparency, proper supervision and accountability.'*¹⁶

However, the following definition of corporate governance by Australian justice Owen fully captures the spirit and essence of this dissertation and therefore will serve as our operational definition:

*' "Corporate Governance-as properly understood- describes the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations. Understood in this way the expression Corporate Governance embraces not only the models or systems themselves but also the practices by which that exercise and control of authority is in fact effected" .'*¹⁷

It is my considered view that this definition is sufficiently expressive to breakdown the elements that consist in corporate governance such as rules, relationships, systems, processes and practises. This notion of corporate governance being about relationships by which and within which authority is exercised and controlled in a corporation is further explored by Pinto and Visentini in highlighting that, corporate governance has to do with accountability of the relationships in and outside of the corporate set up.¹⁸ Additionally, they go on to add another element relating to corporate governance as having a cultural and historic element to it.¹⁹ They argue that corporate governance practices are cultural and historical products. In their

¹⁵ Plessis, McConvill, Bagaric op cit (n11) 2.

¹⁶ Cornelius de Groot *Corporate Governance as a Limited Legal Concept* (2009) 18.

¹⁷ Plessis, McConvill, Bagaric op cit (n11) 2.

¹⁸ Arthur R. Pinto and Gustavo Visentini (eds) *The Legal Basis of Corporate Governance in Publicly Held Corporations* (1998) x.

¹⁹ Pinto and Visentini op cit (n18) 4.

view, companies are a cultural response to economic and social pressures.²⁰ They identify the relationship between the owners of capital and the managers who use it and single out this relationship as being the heart and soul of corporate governance²¹.

In this research, I shall endeavour to be alive to the issues of culture and history in appreciating the challenges of corporate governance and proposing changes to the *Zambian law*.

It would be worth noting that this aspect of corporate governance as having a cultural and historic element is crucial, especially when comparing corporate governance frameworks of two different countries. It follows that at some point, the historical and cultural element can be said to be the reason for some differences in the corporate governance practice and orientation of different countries. Consequently, in as much as Zambia differs from South Africa historically and culturally, it is not absurd to expect some of these variations to reflect in their corporate governance framework.

A panoramic view of corporate governance from an international perspective will show that though corporate governance as a concept was discussed as early as 1932 in the USA, the concept became very prominent due to the collapse of several huge corporations between 1990 and 2002, such as WorldCom and Enron.²² To sternly deal with the lack of good corporate structure and lax accounting standards, the US introduced the Sarbenes-Oaxley Act of 2002.²³ Similarly, the United Kingdom had a number of corporate scandals in the twenty years before the dawn of the 21st century and as a result set up a number of committees that issued report after report on the importance of corporate governance.²⁴ In stating all this, one must observe that corporate governance has generally developed on the backdrop of corporate failure and scandal. It is thus seen as a panacea to the problems associated with the corporation.

²⁰ Ibid.

²¹ Ibid.

²² Plessis, McConvill, Bargaric op cit (n11) 292.

²³ Plessis, McConvill, Bagaric op cit (n11) 296.

²⁴ Smerdon, op cit (n14) 1.

The major focus of this dissertation is the corporate governance model of South Africa. The King Committee was formed at the instance of the Institute of Directors in Southern Africa and published a report on corporate governance and a code of conduct in 1994 called King I.²⁵ In 2002, King I was superseded by the King report on Governance for South Africa (King II) which also contained a code of corporate practices and conduct. The latest report King III came into effect on the 1st March 2010 and replaced King II, it includes the King Report on Governance for 2009 and the King Code of Governance of 2009.²⁶

The King III report was necessitated due to the advent of the new South African Companies Act no. 71 of 2008 and changes in international trends.²⁷

The King III Report and King Code of Governance Principles focus on nine aspects which were deemed crucial for corporate governance in South Africa and internationally namely,

- 1. Ethical leadership and corporate citizenship*
- 2. Boards and directors;*
- 3. Audit committees;*
- 4. The governance of risk;*
- 5. The governance of information technology;*
- 6. Compliance with laws, rules codes and standards;*
- 7. Internal audit;*
- 8. Integrated sustainability reporting and disclosure;*
- 9. Governing stakeholder relationships;*²⁸

It is very important to note that the whole South African corporate governance approach steeply favours a voluntary basis for governance compliance by having corporate institutions ‘apply or explain’ the principles of good corporate governance on a non-legislated basis.²⁹

The foregoing paragraph outlines nine major principles upon which the corporate governance framework of South Africa is premised. These principles and the ‘apply or explain’ non-legislated approach will form the lens through which we will analyse and examine the Zambian corporate governance framework existing for banks and financial institutions. Therefore, when we ask

²⁵Cassim, op cit (n13) 473.

²⁶ Cassim op cit (n13) 474.

²⁷ King Code III op cit (n8) 5.

²⁸ King Report III op cit (n8) 5.

²⁹ King Report III op cit (n8) 11.

the question does Zambian corporate governance law applicable to banks and financial institutions adequately promote good corporate governance? The answer involves an analysis of these nine major principles highlighted above against the framework of the Zambian laws, rules, regulations, relationships, systems, processes and practices within which the banks and financial institutions operate. It also includes a reference to the general system of approach to corporate governance issues that has been adopted among Zambian banks and financial institutions. Has Zambian corporate law applicable to banks and financial institutions provided for the nurture of the said principles or has it stifled these principles? South Africa is a suitable model for such a task as it is highly ranked and considered among the best governed in the world's emerging economies in the area of corporate governance.³⁰ It is viewed as a champion of corporate governance in Africa and in the whole world.³¹

Conclusion

Corporate governance is not easily defined because it means so many things to different people.³² Not only is the concept international it is also cultural and historical,³³ in the sense that the particular history and culture of a place may dictate its approach and view on corporate governance. It is clear that the prominence of corporate governance has increased in the past few decades due to the many corporate failures that occurred in America and the United Kingdom.³⁴ The American response to these corporate collapses was to introduce strict regulation in form of Sarbanes Oxley Act of 2002.³⁵ South Africa has a voluntary compliance approach to corporate governance.³⁶ Regardless of where one is in the world, a common thread can be said to pass through the principles of corporate governance. The principles argue for a means by which companies can be better governed. Additionally, it can be said, that corporate governance entails the effective, responsible leadership characterised

³⁰ King Code III op cit (n8) 9.

³¹ Schulschenk, op cit (n9) 6.

³² Plessis, McConvil, Bargaric op cit (n 11) 1.

³³ Pinto and Visentini op cit (n8) 4.

³⁴ Plessis, McConvil, Bargaric op cit (n11) 292.

³⁵ Plessis, McConvil, Bargaric op cit (n11) 296.

³⁶ King Report III op cit (n8) 19.

by the ethical values of accountability, fairness and transparency.³⁷ These principles can without a doubt, go along way to improve the standing of companies both large and small and thereby increase productivity and enhance economic performance and value in the countries where these companies are corporate citizens. These are the principles that we will use in the coming chapters to examine the corporate governance framework of Zambian banks and financial institutions.

³⁷ King Code III op cit (n8) 16.

CHAPTER 3

THE LEGAL FRAMEWORK OF CORPORATE GOVERNANCE IN ZAMBIAN BANKS AND FINANCIAL INSTITUTIONS

The preceding chapter dealt with the issue of corporate governance on a general scope. As this concept relates to banks and financial institutions, one must bear in mind that the standards set for the banking and financial services industry are generally much higher than the standard for ordinary companies.³⁸ This is because banks and financial institutions are custodians of the economic and financial systems of the world.³⁹ They are the gatekeepers of the countries financial system. The failure of such a system has several terrible repercussions for a countries financial system and economy. Banking is too important to leave to the bankers alone.⁴⁰ It follows that the expectations on banks and financial institutions are very high in terms of the type and form of corporate governance that they adopt. This chapter takes a closer look at the Zambian corporate legal framework of corporate governance under which banks and financial institutions operate. In order to appreciate the Zambian corporate law it is necessary to understand the brief historical, political, economic and social context within which these laws were enacted. This is in tune with the assertion that corporate governance contains a cultural and historical element.⁴¹ That will be the starting point of this chapter. After that, the actual laws that govern and regulate the banking and financial system will be referred to. This will include a detailed look at selected portions of the Banking and Financial Services Act,⁴² Bank of Zambia Act,⁴³ selected portions of the Companies Act,⁴⁴ and the Banking and Financial Services (corporate governance) guidelines⁴⁵.

³⁸ Hamid Mehran and Lindsay Mollineaux *Corporate Governance of Financial Institutions* Federal Reserve Bank of New York Staff Report No. 539 pages 1 to 3, January 2012 available at http://www.newyorkfed.org/research/staff_reports/sr539.pdf accessed on 2 September 2013.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Pinto and Visentini op cit (n18) x.

⁴² The Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁴³ The Bank of Zambia Act Chapter 360 of the Laws of Zambia.

⁴⁴ The Companies Act Chapter 388 of the Laws of Zambia.

⁴⁵ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006.

Political, social, economic and historical context of Zambia's current banking laws

Zambia was colonised by Great Britain and gained its independence on 24 October 1964. First President of Zambia, Dr Kenneth David Kaunda and his United National Independence Party (UNIP) government retained the largely colonial and repressive laws that existed prior to Zambia's independence.⁴⁶ The period between 1964 and 1972 was called the First Republic where Zambia continued with the multi party system of government inherited from the colonial days.⁴⁷ However, UNIP in its bid to strengthen its grip on power promulgated the creation of the Second Republic, where the constitutional order was amended to outlaw multi party politics and to ban opposition political parties.⁴⁸ Zambia became a one party state between 1973 and 1990. It was also during this period that the Kaunda administration cultivated the nationalisation programme. Government began to take over key sectors of the economy by setting up various state owned entities referred to as parastatals and having them run by executive government appointees.⁴⁹ Government was at the centre of all political, business, social and economic activity. Unfortunately, Zambia's economic mainstay, copper mining, went through ever declining fortunes as the copper prices on the London Metal Exchange had plummeted to an all time low.⁵⁰ This was followed by massive food shortage and countrywide food riots in 1990. The growing political instability forced President Kaunda to succumb to pressure from the Zambian people to reintroduce multi party politics in Zambia.⁵¹ In 1991 after 27 years of the reign of UNIP and President Kaunda, Zambia held its multiparty elections and ushered into office the Movement for Multiparty Democracy (MMD) and its leader Fredrick Titus Jacob Chiluba became Republican President.⁵² All this was significant and was to have an over

⁴⁶ A Chanda 'Zambia's Fledgling Democracy: Prospects for the future' (1993-1996) volumes 25-28 *Zambia Law Journal (ZLJ)* 126

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Chanda op cit (n46) 128.

⁵⁰ Ibid.

⁵¹ Chanda op cit (n46) 129.

⁵² Ibid.

bearing effect on the mode and form of the laws particularly in terms of business, investment, banking and financial services. The MMD had come to power with a message of privatisation, liberalisation and economic diversification. The switch from nationalisation to privatisation, from a fixed controlled economy, to free market economy would have to reflect in the laws of Zambia. The focus of the new government was to adhere to a strict IMF structural reform programme, in the process ensuring fully liberalised exchange, and a withdrawal of controls on import, export, prices and interest rates⁵³. This was the context and background that fuelled the enactment of the laws that existed between 1991 and 2011 the twenty years of the MMD rule. The laws referred to include the laws that are the focus of this chapter namely, The Banking and Financial Services Act⁵⁴ and the Companies Act⁵⁵ were enacted in 1994.⁵⁶ They set up a liberalised banking and financial services sector that saw 12 new banks in five years in Zambia⁵⁷. The Bank of Zambia Act⁵⁸ was enacted in 1996.⁵⁹ The banking and financial services corporate governance guidelines were published in 2006.⁶⁰ Politics played a crucial role in birthing these core laws that we are examining in this research. We will now turn to examining each one of these laws in specific detail.

The Banking and Financial Services Act⁶¹

The Banking and Financial Services Act impacts directly on the corporate governance of banks and financial services in six major areas namely: licensing, ownership, administration, operations, financial accountability and

⁵³ Chanda op cit (n46) 133.

⁵⁴ The Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁵⁵ The Companies Act Chapter 388 of the Laws of Zambia.

⁵⁶ Preamble to the Banking and Financial Services Act Chapter 387 of the Laws of Zambia and Preamble to the Companies Act Chapter 388 of the Laws of Zambia.

⁵⁷ Chanda op cit (n46) 135.

⁵⁸ The Bank of Zambia Act Chapter 360 of the Laws of Zambia.

⁵⁹ Preamble to the Bank of Zambia Act Chapter 387 of the Laws of Zambia.

⁶⁰ Preamble to the Zambia Banking and Financial Services (Corporate Governance) guidelines 2006.

⁶¹ The Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

supervisory regulation. Each area is crucial to the financial service provider's existence and there are different levels and aspects of corporate governance that are emphasised in the said areas by the Banking and Financial Services Act.

Licensing

The Banking and Financial Services Act⁶² applies to all banks and financial institutions in Zambia, regardless of whether they are incorporated under an act of parliament or not.⁶³ However, even though the Banking and Financial Services Act⁶⁴ is binding on all banks, the Bank of Zambia is exempt unless where the Banking and Financial Services Act⁶⁵ imposes express duties on it.⁶⁶ To be able to conduct business as a bank, a company must first be incorporated, either under the Companies Act,⁶⁷ or under an act of parliament.⁶⁸ After being incorporated, the company must then apply for a banking license from the registrar of banks and financial services (the registrar).⁶⁹ The registrar must consult the minister of finance before granting the licence to bank.⁷⁰ In terms of the application process, the company is required to submit its application in the prescribed form and part of the information prescribed includes; the articles of association for the company,⁷¹ the full physical address of the head office, the names and permanent residential addresses of all directors, chief executive officer, managers and shareholders.⁷² Other details required are, the full names and addresses of the subscribers who have shares exceeding one percent of any class or series of shares whether the shares have

⁶² The Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁶³ Section 3 of the Banking and Financial services Act Chapter 387 of the Laws of Zambia.

⁶⁴ The Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁶⁵ The Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁶⁶ The Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁶⁷ The Companies Act Chapter 388 of the Laws of Zambia, this Act is discussed in later on in this chapter. See pages 38 to 41

⁶⁸ Section 4(1) of the Banking And Financial Services Act Chapter 387 of the Laws of Zambia.

⁶⁹ Section 4 (1) of the Banking And Financial Services Act Chapter 387 of the Laws of Zambia.

⁷⁰ Section 4(1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁷¹ The Articles of Association under section 2 and 7 of the Companies Act Chapter 388 of the Laws of Zambia can be likened to the Memorandum of incorporation which exists under section 1 the South African Companies Act no 71 of 2008; the articles of association are the constitution and governance document of the company and outlines the way in which the company is regulated, setting out the terms of the relationship between the directors and shareholders and managers of the company.

⁷² Section 4(1) (b) of the Banking and Financial services Act Chapter 387 of the Laws of Zambia.

voting rights or not,⁷³ addresses of proposed branches, amount of capital, and type of business to be run under the license sought.⁷⁴ The requirements highlighted above are by no means exhaustive as the registrar is at liberty to issue specific requirements, for different particular applicants.⁷⁵ In essence, the requirements between applicants or categories of applicants may differ depending on the discretion of the registrar.⁷⁶ A foreign company on the other hand, may be given a licence to bank on condition that the Bank of Zambia is satisfied that the foreign company is authorised to conduct banking in its country of origin and it is properly supervised in that country.⁷⁷ The registrar has 180 days within which to make the decision to approve or decline the application for the banking licence.⁷⁸ Within the time frame of 180 days, the registrar is under a mandatory obligation to consider the following matters in making the decision; the capital adequacy of the applicant, financial condition and history of the applicant, applicant's associates and affiliates, the character and experience of the directors, proposed managers, and major shareholders of the applicant, the convenience and the needs of the community intended to be served by the prospective bank and prospects for profitable operation of the prospective bank.⁷⁹

It is necessary to make several relevant observations of the manner the application and licensing process affects the corporate governance of banks and financial institutions. The term corporate governance is not used anywhere in the Banking and Financial Services Act.⁸⁰ However, this does not entail that its presence cannot be felt. The initial requirements of the application process require companies to furnish the registrar with their articles of association as the constitutive and governance documents of the company.⁸¹ It is my argument that

⁷³ Section 4(1) (c) of the Banking and Financial services Act Chapter 387 of the Laws of Zambia.

⁷⁴ Sections 4(1) (d) (e) and (f) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁷⁵ Section 4 (5) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁷⁶ Section 4 (5) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁷⁷ Section 4 (8) (a) and (b) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁷⁸ Section 5 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁷⁹ Section 7 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁸⁰ Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁸¹ Section 4 (2) (a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

this is in an effort to analyse and assess whether the prospective bank or financial institution has the proper corporate governance structure to be trusted with the licence to bank. Additionally, once the company is granted a license to conduct financial services they are not allowed to effect any change to their memorandum or articles of association without the express approval of the registrar.⁸² This is notwithstanding the fact that the financial service provider would have ordinarily met the conditions to amend the articles of association under the Companies Act.⁸³ The Banking and Financial Services Act even empowers the Bank of Zambia to notify a bank or financial institution of a provision in its articles of association, which is inappropriate to the carrying out of its operations.⁸⁴ The bank or financial institution so notified is bound to amend its memorandum or articles of association in line with the directive of the Bank of Zambia.⁸⁵ Furthermore, the prescribed information requires the prospective bank to provide the details of the directors, chief executive officer, managers and shareholders of the company.⁸⁶ This shows the importance that the application process attaches to the composition and character of the board. Similarly, the state of management and the identity of the shareholders of the company are equally important in this process. In fact, the point is that the registrar must consider whether the character and experience of the directors and managers is appropriate to carry out financial services. The identity, character and experience of the major shareholders are also relevant in this regard to ensure that the owners of these companies are upright and above reproach. The registrar must scrutinise all these aspects and must also ensure that the financial condition, resources and history of the company are sound.⁸⁷ This scrutiny extends to the affiliates and associates of the applicant. It should be noted that the terms ‘associates’ and ‘affiliates’ are not defined in the Banking and Financial Services Act.⁸⁸ This could therefore, include political affiliates and associates. The potential for abuse here is very ripe. Another requirement is for

⁸² Section 38 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁸³ Section 38 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁸⁴ Section 39 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁸⁵ Section 39 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁸⁶ Section 4 (2) (b) and (c) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁸⁷ Section 7 (c) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia

⁸⁸ Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

the full identity and addresses of all the shareholders and the subscribers who have at least more than 1 per cent of shares in any class.⁸⁹ The language of these sections denotes the use of the term subscriber to shares rather than shareholder and the reason for this is not apparently that clear. The effect of these strict prescriptions is for the applicant company to ensure that its governance structure meets the standard set by the registrar, although one weakness in this system is that the standard is not very clear. It is vague and the requirements can change depending on the category or type of applicant. Another issue of concern to corporate governance is the fact that the minister must be consulted before a license is granted.⁹⁰ This provision leaves abundant room for political influence to pervade the whole process of licensing of banks and financial institutions. To understand how much political influence this section allows it is necessary to appreciate how ministers are appointed in Zambia. The minister of finance is an appointee of the president of the Republic of Zambia.⁹¹ To be minister of finance one must first be qualified to be a member of parliament,⁹² either elected as such by constituents of one of the 150 constituencies in Zambia⁹³ or nominated as a member of parliament by the president in the use of his power to nominate eight members of parliament.⁹⁴ Once one is a member of parliament, the president can subsequently appoint them as minister of finance.⁹⁵ In Zambia, ministers serve under the supervision and control of the president. They serve at the president's will and pleasure.⁹⁶ They do not have security of tenure and can be fired at any whim or caprice of the president. The president can exercise this power without any need for explanation. This makes the ministers' allegiance and loyalty to the president absolute. It leaves the minister of finance in a compromised condition in the execution of duties. The minister will invariably make sure that he does not cross the president's path as it were. It is most likely than not, that the consultations between the minister and the registrar will be

⁸⁹ Section 4 (2) (c) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁹⁰ Section 4(1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁹¹ Article 46 (1) of the Constitution of the Republic of Zambia Chapter 1 of the Laws of Zambia.

⁹² Article 46 (2) of the Constitution of the Republic of Zambia Chapter 1 of the Laws of Zambia.

⁹³ Article 63 (2) of the Constitution of the Republic of Zambia Chapter 1 of the Laws of Zambia.

⁹⁴ Article 68 (1) of the Constitution of the Republic of Zambia Chapter 1 of the Laws of Zambia.

⁹⁵ Article 46(2) of the Constitution of the Republic of Zambia Chapter 1 of the Constitution of the Republic of Zambia Chapter 1 of the Laws of Zambia.

⁹⁶ Article 44 (5) of the Constitution of the Republic of Zambia Chapter 1 of the Laws of Zambia.

influenced by political considerations rather than corporate governance principles.

The registrar is also obliged to look at the convenience and the needs of the community in which the applicant company seeks to operate.⁹⁷ This relates to the concept of stakeholder inclusive approach on corporate governance. This requirement forces the prospective bank to consider the convenience and needs it will be catering for in terms of the community, as a stakeholder and interested party so to speak, in the activity of conducting banking and financial business. It's not just about the applicant but it's also about the environment and the stakeholders that exists in the community that the company wishes to operate from. A further consideration is the prospective profitability of the company.⁹⁸

The office of the registrar is crucial to the application and licensing process. This position is created by the Banking and Financial Services Act.⁹⁹ In the licensing process there seems to be an overlap between the duties of the registrar and the Bank of Zambia. One thing to note is that the registrar and deputy registrar are to be all times under the control and supervision of the Bank of Zambia.¹⁰⁰ This as we shall examine in the succeeding section of this chapter may have its own negative effects on the application and licensing process.

The whole point of examining this is to see whether the laws are adequately promoting corporate governance in banks and financial institutions. The problem that is clearly identifiable at the early stage of licensing is the potential for political interference with the process. The problem with political interference is that the aim and goals of the regulators move from looking at the corporate structure and governance processes in a bank to looking at the political inclination or affiliation of the bank or financial institution in question. The fact that the law empowers the registrar to impose different conditions on different applicants also leaves this process up to abuse, concerning matters that are not in line with good corporate governance standards and principles.

⁹⁷ Section 7 (d) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁹⁸ Section 7 (e) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁹⁹ Section 20 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁰⁰ Section 20 (4) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

The successful company in the application and investigation process is granted the banking licence. This licence empowers the bank to engage in a number of banking activities including, making loans and extending credit,¹⁰¹ to deal as principal or agent in the bills of exchange,¹⁰² promissory notes, cheques, travellers cheques and like instruments,¹⁰³ trading in Zambian currency, foreign exchange, gold, silver, platinum bullion or coins, providing money transfer services,¹⁰⁴ the issue and administration of credit and debit cards,¹⁰⁵ providing guarantees, letters of credit and other assurances of payment.¹⁰⁶ Other activities authorised by the license are finance leasing, acting as trustee of any trust, executor or administrator of any estate, acting as financial agent for any person, providing safekeeping for financial assets and securities, dealing as principle or agent in financial futures and options.¹⁰⁷ All these activities are subject to the definition ascribed to them by the minister of finance through regulation on recommendation of the Bank of Zambia.¹⁰⁸

Banks are not allowed to open any branch without the written approval of the Bank of Zambia and must apply in the prescribed form for that approval.¹⁰⁹

As regards financial institutions and financial services businesses, the conditions and requirements for licensing are generally the same as banks.¹¹⁰ Except that applicants could be either a company, or body corporate or a building society in the case of financial institutions and the applicants may include individuals, partnerships and associations of people operating in concert, as it relates to applying for a licence to conduct financial services business.¹¹¹

¹⁰¹ Section 8 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁰² Section 8 (1) (a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁰³ Section 8 (1) (b) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁰⁴ Section 8 (1) (c) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁰⁵ Section 8 (1) (d) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁰⁶ Section 8 (1) (f) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁰⁷ Section 8 (1) (h) and (i) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁰⁸ Section 8 (2) of the Banking And Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁰⁹ Section 9 (1) of the Banking and Financial Services Act chapter 387 of the Laws of Zambia.

¹¹⁰ Section 11 of the Banking and financial services act chapter 387 of the Laws of Zambia.

¹¹¹ Sections 10 (1) and 10 (4) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

Our focus in this research is the treatment of companies, which become banks and financial institutions.

The licence granted by the registrar may contain certain conditions, restrictions and prohibitions that the registrar thinks fit to impose.¹¹² The conditions may include payment of periodic licence fees, allowing the Bank of Zambia access to records and the offices of the head office of a subsidiary bank outside Zambia to ensure compliance with the Banking and Financial Services Act.¹¹³ The important consideration that the registrar must keep at all times is public interest. The Banking and Financial Services Act places a direct and mandatory obligation on the registrar to consider the public interest when making decisions.¹¹⁴ This resonates quite well with the stakeholder inclusive model, which argues that it is not just the interest of the company shareholders that is important. The views and interests of the stakeholders including the general public and the community, within which the company operates,¹¹⁵ have a bearing on the company and should invariably influence the company's decisions. In as much as this promotes the interests of the stakeholder namely the public, from a corporate governance point of view it should be borne in mind that this obligation should be brought to bear on the company/bank itself and not just the registrar of banks. Another danger is the lack of a definition of public interest in the Banking and Financial Services Act.¹¹⁶ It may therefore be open to abuse as it relates to the licensing of banks and financial services. Suffice to say, that these concepts will be examined in more detail, in the next chapter when comparing these laws with the corporate governance principles and evaluating whether the laws adequately promote the said principles.

The licence to conduct banking and financial services remains in force until revoked by the registrar.¹¹⁷ It is not to be transferred, assigned or encumbered except in the event of an amalgamation or corporate restructuring

¹¹² Section 13 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹¹³ Section 13 (2) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹¹⁴ Section 13 (5) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹¹⁵ Plessis, McConvill, Bagaric op cit (n11) 24.

¹¹⁶ The Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹¹⁷ Section 14 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

which must be approved by the Bank of Zambia.¹¹⁸ The registrar has powers to revoke the licence on specified grounds namely; if the application was fraudulent or contained a materially false statement, the licensee has failed to comply with any condition or qualification of its licence or with any order of the Bank of Zambia, licensee is seriously or in persistently in breach of any provision of the act or regulations or bulletins.¹¹⁹ It is worth mentioning that the Banking and Financial Services Act provides that a serious or persistent breach of the Banking and Financial Services Act is a ground for the revocation of the licence.¹²⁰ This suggests that a one off breach of the law may not be enough to warrant a revocation of the licence. The terms ‘seriously’ or ‘persistently’ are not defined in the Banking and Financial Services Act¹²¹ and leaves the registrar with discretion on what may constitute a serious and persistent breach of the Banking and Financial Services Act¹²² to warrant a revocation of the licence. For the purpose of this dissertation, one would point out that the term ‘serious and persistent breach of the Banking and Financial Services Act’ does not clearly refer to the laws that relate to corporate governance. In effect it is not clear whether the laws that relate to corporate governance fall within the category, the breach of which would cause the revocation of a financial service licence. Could a bank or financial institution lose its licence for seriously and persistently breaching the provisions of the Banking and Financial Services Act that deal with corporate governance? Unfortunately, that question cannot be answered by just looking at the law. It can therefore be argued that this is a question of fact that is best decided on a case-by-case basis. Although admittedly, this approach does not benefit the banks and financial institutions because it does not help to guide them on priority corporate governance areas to focus on, to avoid a revocation of the licence. One last observation concerning licensing is that the Banking and Financial Services Act criminalises the provision of banking services or financial services by persons without a licence.

¹¹⁸ Section 15 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹¹⁹ Section 16 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹²⁰ Section 16 (1) (c) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹²¹ The Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹²² The Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

A conviction may attract a fine or imprisonment of a term not exceeding five years or both.¹²³

In terms of ownership and administration, the Banking and Financial Services Act affects corporate governance of banks and financial institutions in several ways beginning with the laws on shareholding in banks and financial institutions.

Ownership

The Banking and Financial Services Act prohibits the issuing of shares of any class or series except with the approval of the Bank of Zambia.¹²⁴ In the same vein, no one person is allowed to control more than 25 per cent of the total votes that could be cast on any general resolution at a general or special meeting. This restriction on the amount of control on the voter's rights does not apply to a company that is publicly listed on a securities exchange outside Zambia, acceptable to the Bank of Zambia.¹²⁵ The contravention of this rule attracts a penalty of a fine or imprisonment of a term of up to five years.¹²⁶ The law even gave a grace period of two years for those that were not compliant at the time this law came into force in 2005.¹²⁷ This section hinders monopoly of control of the shares, which would invariably affect the operation of the Board and in turn management of banks and financial institutions negatively. This intention is further underscored by the regulation that precludes any person having control of a financial service provider to acquire or maintain control over another financial provider, without written approval of the Bank of Zambia.¹²⁸ The law further prohibits ownership of shares by trusts altogether, in a bank or financial institution.¹²⁹ Apart from just prescribing, the type of shareholding required in a bank and financial institution the Banking and Financial Services

¹²³ Section 17 (4) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹²⁴ Section 23 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹²⁵ Section 23(1)(b) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹²⁶ Section 22 (6) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹²⁷ Section 23A (2) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹²⁸ Section 24 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹²⁹ Section 24 A of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

Act impacts further on the corporate governance of banks and financial institutions by providing that banks and financial institutions are not allowed to effect corporate restructuring with another company that is not a bank, financial institution or financial business.¹³⁰ Corporate restructuring is defined in the Banking and Financial Services Act as an amalgamation of a bank and financial institution with another company or the transfer by a bank or financial institutions to another company of the whole or more than the prescribed part of its assets or liabilities in Zambia otherwise than in the ordinary course of business.¹³¹ The bank or financial institution that seeks to enter into any form of corporate restructuring must obtain the consent of the Bank of Zambia.¹³² To apply for consent for corporate restructuring the applicant bank or financial institution should include a statement of the nature of the proposed transaction and the text of all material documents required to implement the transaction.¹³³ In considering the application for corporate restructuring, the Bank of Zambia will investigate the capital adequacy,¹³⁴ financial condition, resources and history of the applicant.¹³⁵ Other factors to consider include; experience and character of directors and management of the applicants and the prospects of profit for the prospective corporate restructuring.¹³⁶ These factors are very similar to the issues under scrutiny when the company is applying for a licence to conduct banking or financial services. The idea seems to be that the Bank of Zambia is interested with the conditions prevailing at the said bank or financial institution to evaluate whether at that time immediately prior to the application the applicants meet the criterion and the restructuring will bear more good than harm to the financial sector of the country.

¹³⁰ Section 26 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹³¹ Section 25 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹³² Section 26 (2) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹³³ Section 27 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹³⁴ Section 28 (a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹³⁵ Section 28 (b) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹³⁶ Section 28 (1) (c),(d),(e) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

The effect of the corporate restructuring is a new entity that is vested with all assets and liabilities as the old entities had.¹³⁷ There is a carry over of all agreements, contracts, and mortgages to the new entity and the rights of all the creditors are not affected by the corporate restructuring.¹³⁸

Administration

In addition to shareholding and corporate restructuring, the Banking and Financial Services Act¹³⁹ has a direct bearing on the core aspects of the management and control of the company that is licensed to carry out banking or financial services. It sets out the corporate governance framework within which banks and financial institutions must work. It places a mandatory obligation for every bank, financial institution and incorporated financial business to have a board of directors and vests all the powers and control of management in the board of directors.¹⁴⁰ It further provides that the board of directors must be in charge of the formulation of the policies of the bank, financial institution and financial business.¹⁴¹ This places the board of directors of a bank and financial institution at the centre and heart of corporate governance of the bank and financial institution. The board of directors must have no less than five members.¹⁴² There appears to be no upper limit to this. There is also no directive about whether the number of directors should be an even or odd number.

The majority of all board members of a bank and financial institution should not be employees of the banks and financial institutions.¹⁴³ This is in a bid to ensure that there are many independent and non-executive directors that will bring independent minds to bear on the happenings in the bank and the financial institution. The chief executive officer (CEO) and the chief financial officer (CFO) are not allowed to hold more than one office in a bank or financial

¹³⁷ Section 29 (1) (a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹³⁸ Section 29 (2) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹³⁹ Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁴⁰ Section 30 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁴¹ Section 30 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁴² Section 30 (1) of the Banking and Financial services Act Chapter 387 of the Laws of Zambia.

¹⁴³ Section 32(1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

institution at a time.¹⁴⁴ The qualifications for a director, CEO, CFO and manager of a bank and financial institution are the same. A person will not be qualified to be appointed a director, CEO, CFO and manager if the person: does not have integrity and professional experience;¹⁴⁵ is not above 21 years;¹⁴⁶ has been adjudged bankrupt in Zambia or elsewhere before;¹⁴⁷ is a convicted felon or convicted for any crime involving dishonest conduct;¹⁴⁸ has been declared mentally insane;¹⁴⁹ has been a director, CEO, CFO or manager of a company adjudged insolvent, liquidated or entered into composition with its creditors in Zambia or elsewhere;¹⁵⁰ or is under suspension or removed from office under the act; or has been removed from an office of trust on account of misconduct or breach of trust by a competent court in Zambia or elsewhere.¹⁵¹ A director requires written approval from the Bank of Zambia to be able to be a director in more than one financial service provider at the same time.¹⁵² Furthermore, the law has gone to the extent of codifying the duties of the directors.¹⁵³ It is worth pointing out that the duties of directors are the same with the duties imposed on the CEO, CFO and the managers of the banks and financial institutions. The duties are mandatory. The duties of the directors, CEO, CFO and managers of the financial enterprise stipulate that they must act at all times with honesty, in good faith, and in the best interest of the financial service provider.¹⁵⁴

Additionally, the Banking and Financial Services Act provides extensive disclosure of interest requirements for directors, CEO's, CFO's and managers of a financial services provider. On an annual basis, a director is required to declare

¹⁴⁴ Section 30A of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁴⁵ Section 31(1)(a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁴⁶ Section 31 (1)(b) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁴⁷ Section 31 (1)(c) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁴⁸ Section 31 (1) (d) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁴⁹ Section 31 (1) (e) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁵⁰ Section 31(1)(f) and (g) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁵¹ Section 31 (1) (h) of the Banking and Financial Services Act Chapter 387 of the laws of Zambia.

¹⁵² Section 31 (4) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁵³ Section 33 (a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁵⁴ Section 33 (a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

in writing to the board the names and addresses of the directors associates and full participants of every material interest.¹⁵⁵ An interest is classified as material if it relates to the wealth, business or family interests of the person having interest.¹⁵⁶ Furthermore, a person has material interest in a company of which the person owns, directly or indirectly more than 10 per cent of any class of the voting shares or of which the person is a director;¹⁵⁷ and any partnership in which the person is a partner¹⁵⁸ and persons have a material relationship with each other if they are associated,¹⁵⁹ that is, one person is a company of which the other is a manager or director,¹⁶⁰ one person is a company controlled by the other person,¹⁶¹ one person is a partnership of which the other is a partner; both members are members of a voting trust or other arrangement relating to shares; one person is the spouse, parent, child, brother, or sister of the other person or of the other person's parent, child, brother or sister.¹⁶²

The duty to disclose these material interests is not just on the director, but extends to the CEO, CFO and manager of the bank or financial institution.¹⁶³ Failure to comply with these disclosure requirements by a director, CEO, CFO or manger may lead to the financial service provider, or its shareholders or the Bank of Zambia to apply to court to set aside a contract involving the material interest of the said officers of the financial service provider.¹⁶⁴ Apart from this, the director CEO, CFO and manager who fail to

¹⁵⁵ Section 35 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁵⁶ Section 35(10) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁵⁷ Section 35(10)(a)(i) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁵⁸ Section 35 (10) (a) (ii) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁵⁹ Section 2 (3) (b) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁶⁰ Section 2(3) (b) (i) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁶¹ Section 2(3) (b) (ii) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁶² Section 2 (3) (b) (v) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁶³ Section 35(2) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁶⁴ Section 35 (9) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

disclose material interests in a contract or proposed advance is liable on conviction to a fine and suspension by the Bank of Zambia.¹⁶⁵

The Banking and Financial Services Act further imposes duties on directors, CEO's, CFO's, agents, accountants, legal advisers or any other adviser of a financial service provider not to negligently make any false or misleading statement in any report or statement of the financial services provider.¹⁶⁶ The officers aforementioned are also not allowed to obstruct an auditor from the proper performance of their duties as an auditor or a lawful inspection by a Bank of Zambia inspector. The penalty for obstructing an auditor or a lawful inspection is a fine or imprisonment of not more than one year.¹⁶⁷

As regards the directors and managers, the Banking and Financial Services Act empowers the minister of finance to suspend any director, CEO, CFO, or manager who fails to take all reasonable steps to secure compliance with the Banking and Financial Services Act. The suspension may not extend beyond six months.¹⁶⁸ The Bank of Zambia may recommend the actual removal from office of a director, CEO, CFO or manager without suspension.

Operations

A bank or financial institution is obliged to establish and make available in writing, procedures for dealing with complaints made by customers concerning their relations with the financial service provider.¹⁶⁹

A manager or employee of the financial service provider must be designated to deal with all complaints received by the financial service provider.¹⁷⁰ The record of all complaints received by the financial service

¹⁶⁵ Section 35 (8) and 35 (9) (b) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁶⁶ Section 36 (a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁶⁷ Section 36 (b) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁶⁸ Section 37(1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁶⁹ Section 48 (a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁷⁰ Section 48 (b) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

provider must be kept for at least two years or any longer period prescribed by the Bank of Zambia.¹⁷¹ The Banking and Financial Services Act places a very high premium on the manner in which banks and financial institutions interact with the members of the public and customers. The foregoing provisions show that a financial service provider is bound to consider the complaints of its clients and customers and have established channels and systems to deal with such complaints. The duty to maintain confidentiality, of all confidential information obtained in the course of service by the financial service provider extends to every director, CEO, CFO, manager and employee of the bank or financial service provider.¹⁷² Only in instances where the customer has expressly given consent, or the court orders for that information or the Bank of Zambia requests such information is there an exception to this rule.¹⁷³ The Banking Financial Services Act prescribes that the records or registers must be maintained in bound or loose form, photographic form, electronic or mechanical data processing format.¹⁷⁴

The provisions of the Banking and Financial Services Act that relate to the treatment of customer complaints, customer information and confidentiality seek to protect one of the very important stakeholders in the financial sector, the customer. This duty equally applies and extends towards directors, CEO's, CFO's, managers and all employees of the financial service provider alike. Its one of the few duties that extends all the way from directors down through to management and every other employee regardless of their level.

¹⁷¹ Section 48 (b) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁷² Section 50 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁷³ Section 50 (2) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁷⁴ Section 53 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

Financial Accountability

The law places a mandatory obligation on directors to present the financial statements to the shareholders during the annual general meeting.¹⁷⁵ The financial statements must contain a balance sheet, a profit and loss account, a cash flow statement, a statement of changes in shareholders equity and capital adequacy computation.¹⁷⁶ Additionally, the directors must present a directors report containing common enterprise and party transactions; risk management processes and practices; during the past year, directors interests disclosed; the existence of prohibited borrowing or lending and internal controls.¹⁷⁷ Apart from that, the directors are obliged to present the auditor's report to the shareholders in the annual general meeting.¹⁷⁸ The financial statements of the financial service provider must be sent to the Bank of Zambia and each shareholder at least 21 days prior to the annual general meeting.¹⁷⁹ Every bank and financial institution shall also publish in a newspaper of general circulation in Zambia a copy of its annual financial statements and its monthly financial statements.¹⁸⁰

The law makes it mandatory for a financial service provider to appoint an auditor approved by the Bank of Zambia and a member in good standing of the Zambia Institute of Certified Accountants.¹⁸¹ The duties of the auditor include auditing the accountants and to make a report to the shareholders on the annual balance sheet, profit and loss account and other matters required by the Act.¹⁸² A

¹⁷⁵ Section 56 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁷⁶ Section 56 (a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁷⁷ Section 56 (a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁷⁸ Section 56 (3) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁷⁹ Section 61 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁸⁰ Section 61 (3) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁸¹ Section 62 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁸² Section 62 (2) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

director, CEO, CFO, manager or employee of that financial service provider or any person associated or affiliated with it shall not be qualified as an auditor.¹⁸³

The auditor is empowered by the Banking and Financial Services Act to have access at all times to all books, accounts and records of the financial service provider and is entitled to be granted explanation and information from the directors, CEO, CFO, managers, in order to perform the auditor duties under the Banking and Financial Services Act.¹⁸⁴ Furthermore, the auditor is granted immunity with respect to any claim against the auditor regarding any oral or written statement made in good faith.¹⁸⁵ Apart from making the appointment of an auditor mandatory, the law puts an obligation on the bank and financial institution to establish an audit committee.¹⁸⁶ The composition of the committee should include at least three directors, a majority of whom are persons who do not hold the offices of CEO, CFO, manager or employee of the bank or financial institution.¹⁸⁷ The duties of the audit committee include reviewing the annual financial statements before they are approved by the directors;¹⁸⁸ ensure proper internal controls and procedures are in place;¹⁸⁹ meet with the auditor to discuss the annual statement, the returns, investments and transactions and to report to the directors before any approval is given by the board to any financial statement of the financial service provider.¹⁹⁰ The audit committee may call a meeting of the board to consider any matter of concern to the committee¹⁹¹ and

¹⁸³ Section 63 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁸⁴ Section 64 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁸⁵ Section 66 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁸⁶ Section 62 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁸⁷ Section 67 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁸⁸ Section 67 (2)(a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁸⁹ Section 67(2) (c) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁹⁰ Section 67(2) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁹¹ Section 67(5) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

shall meet at least once per quarter.¹⁹² A member of the audit committee who votes against a resolution carried by the majority shall provide a written statement explaining the reasons for that dissent.¹⁹³ A certificate of compliance with these rules must be sent to the Bank of Zambia within six months after the end of the financial year.¹⁹⁴ It is worth noting that that the above-mentioned provisions put emphasis on the need for a financial service provider to appoint an auditor and an audit committee. The composition of the audit committee must be independent persons without any form of ties or connections to the financial service provider, to ensure that there is total independence of the auditor in the execution of duties.

Supervision and Prudential Regulation

The Bank of Zambia is empowered under the law to conduct inspections on financial service provider to determine whether it is in a sound financial condition and operating safely and complying with the provisions of the Banking and Financial Services Act and any of the laws of Zambia in the conduct of their business.¹⁹⁵ In instances where the financial service provider refuses to comply with the directive of the Bank of Zambia; or refuses to have an inspection; or in the case where an inspection is carried out and that inspection reveals unsafe and unsound practices; or that the financial institution is unable to continue its operations; or that the financial service provider's capital is less than the prescribed minimum;¹⁹⁶ then the Bank of Zambia has authority in the aforementioned circumstances to take supervisory actions. The supervisory actions include: taking possession of the financial service

¹⁹² Section 67 (6) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁹³ Section 67 (8) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁹⁴ Section 67 (a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁹⁵ Section 80(1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁹⁶ Section 81 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

provider;¹⁹⁷ suspending the financial service provider's licence for not more than six months;¹⁹⁸ restructuring or revoking the licences.¹⁹⁹ These actions can only be taken once the Bank of Zambia has informed the minister of finance regarding its intention to take such action.²⁰⁰ The implications of the Bank of Zambia taking possession of a financial institution are vast and wide. The first thing that happens when the Bank of Zambia takes possession is that it becomes vested with the full and exclusive powers of management and control of the financial service provider.²⁰¹ This power allows the Bank of Zambia to continue or discontinue any operations,²⁰² to borrow money on the security of the assets of the financial services provider,²⁰³ with or without security; to stop or limit the payment of any obligation,²⁰⁴ to employ or re-employ or retain in employment any officer or employee,²⁰⁵ to execute any instrument in the name of the financial service provider and to initiate any legal action or legal proceedings,²⁰⁶ to terminate the interests of shareholders at a value to be determined by the court,²⁰⁷ and to enforce the individual liability of the directors and of the

¹⁹⁷ Section 81 (2)(a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁹⁸ Section 81 (2) (b) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

¹⁹⁹ Section 81(2)(c) and (d) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²⁰⁰ Section 81 (2) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²⁰¹ Section 84A of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²⁰² Section 84A (a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²⁰³ Section 84A (b) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²⁰⁴ Section 84A (c) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²⁰⁵ Section 84A (d) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²⁰⁶ Section 84A (e) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²⁰⁷ Section 84A (g) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

shareholders of the financial service provider, incurred in the ordinary course of business or on unpaid shares;²⁰⁸ The law further allows the financial service provider to challenge the possession by the Bank of Zambia in court within 21 days after possession.²⁰⁹ The right to challenge the Bank of Zambia possession on any bank or financial institutions extends to any interested person acting on behalf of the financial service provider.²¹⁰

These sweeping powers of taking possession of a financial service provider that is vested in the Bank of Zambia have been used before. An interesting case in point is the possession of Finance Bank Zambia Limited. It would be good to analyse this particular event to observe how the laws, rules and regulations that have been under focus in this chapter have been applied.

The possession of Finance Bank Zambia Limited by the Bank of Zambia

The Bank of Zambia conducted several inspections on Finance Bank Zambia Limited during the period 2007 to 2010.²¹¹ The inspections revealed that Finance Bank Zambia Limited had weak corporate governance and risk management systems facilitating the persistent breach of the Banking and Financial Services Act, subsidiary legislation and other regulations.²¹²

The particular violations that the inspections revealed included breaches of the Banking and Financial Services Act:

- a) Limitation on voting control section 23(2);
- b) Conduct of directors, CEO's, CFO's and managers section 33;
- c) Disclosure of interest section 35;
- d) Credit Administration section 52;

²⁰⁸ Section 84 A (h) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²⁰⁹ Section 84C of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²¹⁰ Section 84 C of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²¹¹ Bank of Zambia Statement on the acquisition of Finance Bank Zambia Limited selected assets and liabilities by FNB Zambia Limited, paragraph 1, dated 12 September 2011 available at <http://www.boz.zm/publishing/Speeches/BOZPressStatement.pdf>, accessed on 20 November 2013.

²¹² Ibid.

e) Submission of prudential returns section 36,²¹³

The Bank of Zambia concluded that the findings showed blatant violations of the Banking and Financial Services Act and warranted the exercise of its supervisory powers pursuant to section 81 (1) (c) (i) and (ii) of the Banking and Financial Services Act as read with section 81 (2) (a) of the Banking and Financial Services Act.²¹⁴ On 10 December 2010, the Bank of Zambia took possession of Finance Bank Zambia Limited at 16:00 hrs.²¹⁵ The Bank of Zambia saw it fit to proceed to terminate shareholders interests in line with section 84A (g) of the Banking and Financial Services Act.²¹⁶ This step was seen by the central bank as necessary to unravel the obscure shareholding structure of Finance Bank Zambia Limited.²¹⁷ Furthermore, Bank of Zambia appointed an agent First Rand Limited to run the affairs of Finance Bank Zambia Limited whilst it was under possession. Mr Leonard Haynes was appointed as interim CEO of Finance Bank (in possession).²¹⁸ The Bank of Zambia moved swiftly and removed the managing director and CEO, executive directors responsible for special projects, finance and credit, corporate banking and marketing, treasury and international banking, retail banking, and financial consultant.²¹⁹ The Bank of Zambia then decided that the best course of action would be to restructure Finance Bank Zambia Limited by means of purchase and assumption transaction with another healthy bank.²²⁰ The parent company of First National Bank, the First Rand Group was selected as favourites to take up this role.²²¹ Under the purchase and assumption transaction Finance Bank Zambia Limited was to have selected assets and liabilities purchased by First

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Bank of Zambia statement on the acquisition of selected assets and liabilities of Finance Bank Zambia Limited by First National Bank Zambia Limited paragraph 2.2 dated 12 September 2011 available at <http://www.boz.zm/publishing/Speeches/BOZPressStatement.pdf>, accessed on 20 November 2013.

²¹⁸ Statement by Bank of Zambia Governor on the Bank of Zambia possession of Finance Bank Zambia Limited page 2, dated 10 December 2010, available at <http://www.boz.zm/Publishing/Speeches/PressStatementOnFinanceBank.pdf>, accessed on 20 November 2013.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Ibid.

National Bank Zambia Limited.²²² However, certain residual assets and liabilities were to remain under the care of the Bank of Zambia through Finance Bank Zambia Limited (in possession).²²³ The Bank of Zambia made this announcement about the acquisition to the public on 12 September 2011. Less than a month later on 7 October 2011, the Bank of Zambia announced that Finance Bank Zambia Limited had been handed back to its previous shareholders and would continue to conduct normal operations.²²⁴

To start with, on 10 December 2010 the Bank of Zambia Governor issued a press statement, announcing the possession of Finance Bank Zambia limited was necessitated after inspections conducted between October, 2009 and October 2010.²²⁵ In a subsequent official communication by the Bank of Zambia public relations department, it was mentioned that the inspections were conducted during the period 2007 to 2010.²²⁶ Interestingly, the Bank of Zambia decided to move in and take over Finance Bank of Zambia Limited and appointed agents to conduct the possession and stabilisation of Finance Bank.²²⁷ They settled for First Rand Group.²²⁸ Between 10 December 2010 and 12 September 2011, First Rand Group fulfilled their mandate as agents by controlling and managing Finance Bank.²²⁹ When the time came to consider restructuring Finance Bank, the Bank of Zambia decided that First National Bank Zambia Limited (part of the First Rand Group) should purchase certain selected assets and selected liabilities of Finance Bank.²³⁰ While Finance Bank would remain with what the central bank termed as toxic assets and liabilities.

²²² Ibid.

²²³ Bank of Zambia statement on the acquisition of selected assets and liabilities of Finance Bank Zambia Limited by First National Bank Zambia Limited paragraph 4 dated 12 September 2011 available at <http://www.boz.zm/publishing/Speeches/BOZPressStatement.pdf>, accessed on 20 November 2013.

²²⁴ Bank of Zambia statement on the return of Finance Bank Zambia Limited shares to the previous shareholders dated 7 October 2011, available at http://www.boz.zm/publishing/Speeches/PressReleaseFBZL_07102011.pdf, accessed on 20 November 2013.

²²⁵ Statement by Bank of Zambia Governor on the possession of Finance Bank Zambia Limited page 1, dated 10 December 2010, available at <http://www.boz.zm/Publishing/Speeches/PressStatementOnFinanceBank.pdf>, accessed on 20 November 2013.

²²⁶ Bank of Zambia statement op cit (n211).

²²⁷ Bank of Zambia statement op cit (n217).

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

Those toxic assets and liabilities were to remain the responsibility of Finance Bank (in possession).²³¹

This announcement of the acquisition by the Finance Bank of selected assets and liabilities of the Finance Bank was made on the backdrop of having terminated the shareholding of the shareholders of Finance Bank.²³² Just less than a month after the announcement of First National Bank Zambia acquiring selected assets of Finance Bank acquisition was made on 12 September 2011, the Bank of Zambia announced on 7 October 2011 that Finance Bank Zambia Limited had been handed back to its previous shareholders. The million rand question is what dramatically changed between 12 September 2011 and 7 October 2011? I wish to argue that the answer is politics. The politics of Zambia changed during that period. On 20 September, 2011 Zambia held its tripartite presidential, parliamentary and local government elections.²³³ On the 23 September 2011, the Chief Justice of the Republic of Zambia announced that Mr Michael Sata of the Patriotic Front (PF) had won the elections and defeated, incumbent Mr. Rupiah Banda of the Movement for Multiparty Democracy (MMD).²³⁴ This means that the government had changed and therefore the approach of the new government differed with the previous government. One important point to note, is that in as much as section 84A (g) of Banking and Financial Services Act empowers the Bank of Zambia to terminate the interests of the shareholders at a value to be determined by the court;²³⁵ there is no express provision of the Banking and Financial Services Act that empowers the Bank of Zambia to re-instate the interests to the shareholders once a termination has been effected. It should also be noted that in all previous press statements the Bank of Zambia extensively quoted provisions of the Banking and Financial Services Act. However, in the Bank of Zambia's announcement of the reversion to the previous shareholders there was no reference whatsoever to any legal provision. Furthermore, one would not be faulted for arguing that since the

²³¹ Bank of Zambia statement op cit (n 223).

²³² Bank of Zambia statement op cit (n 211).

²³³ Zambia 2011 Tripartite Election held on 20 September 2011, Electoral Commission of Zambia available at http://www.elections.org.zm/2011_elections.php accessed on 28 November 2013.

²³⁴ BBC Africa news *Zambia election: Sata wins presidential race* available at <http://www.bbc.co.uk/news/world-africa-15029463> accessed on 28 November 2013.

²³⁵ Section 84A (g) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

original shareholders would welcome such a move in any event, no one would be ready or willing to challenge the legality of reinstating the interests of the previous shareholders.

The case of Finance Bank Zambia Limited shows just how powerful politics is in the application and enforcement of laws relating to corporate governance in the banking and financial sector. This view is further fortified by the Banking and Financial Services Act, which grants the minister of finance power to exempt any bank or financial institution from any or all of the provisions of the Act.²³⁶

This view of politics coming into play is strengthened by the fact that in previous instances where the Bank of Zambia had moved in to possess a bank, there was never a reversion of interests to the previous shareholders.²³⁷ Additionally, the agents appointed were all local agents and not foreign entities like First Rand Group. For instance, when Commerce Bank was taken over by Bank of Zambia in April 2000, Indo Zambia Bank was appointed as the Bank of Zambia agent and when Chase Trust Bank was taken over by the Bank of Zambia, the Zambia National and Commercial Bank was tasked to be the Bank of Zambia agent in December 1997.²³⁸ In all these examples, there was no reversion of the interests to the previous shareholders.

On the other hand, admittedly, one could argue that once the possession of the bank has ceased then automatically, the termination would also be reversed. However, that argument may fall on its face because the termination of shareholders interests is not an automatic consequence of possession of a bank but rather an independent action that could occur after the possession has taken place.²³⁹ Therefore, since it does not happen as an automatic consequence of possession of the financial service provider, the reinstatement of the interests likewise may not automatically occur once possession has been undone. The law does make provision for any interested party to challenge the possession in court

²³⁶ Section 130 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²³⁷ Bank of Zambia statement on the acquisition of Finance Bank Zambia Limited by First National Bank (FNB) Zambia Limited paragraph 2, dated 12 September 2011, available at <http://www.boz.zm/publishing/Speeches/BOZPressStatement.pdf>, accessed on 20 November 2013.

²³⁸ Ibid.

²³⁹ Sections 81 (2)(a) and 84A (g) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

within 21 days of the occurrence of the possession.²⁴⁰ The termination of possession could therefore be done with the courts intervention, which could include an order for reversion to previous shareholders.²⁴¹

It remains clear that there is no particular section that empowers the Bank of Zambia to restore the shareholding to the previous shareholders after termination of shareholding has been undone.

The Bank of Zambia Act²⁴²

For the purpose of this dissertation, I will make a very brief and restricted view of the Bank of Zambia Act, concentrating on the issues that directly affect the corporate governance of banks and financial institutions.

The Bank of Zambia is established by the Bank of Zambia Act.²⁴³ It is mandated to formulate and implement monetary and supervisory policies in order to ensure the maintenance of price and financial systems stability, thereby promoting macro economic development.²⁴⁴ The principle functions of the Bank of Zambia are to licence and regulate the activities of banks and financial institutions to promote the safe, sound and efficient operations and development of the financial system; promote efficient payment mechanisms and to regulate all matters relating to the currency in the Republic of Zambia.²⁴⁵ It is worth noting that the minister of finance has power under the Bank of Zambia Act to convey to the Bank of Zambia governor such general or particular government policies and the Bank of Zambia is bound to implement and give full effect to such policies.²⁴⁶

The foregoing provisions of the Bank of Zambia Act reveal the sweeping powers and influence that the minister of finance and central government has in the operations of the Bank of Zambia. The Bank of Zambia is under a mandatory obligation to give full effect to the policy directives it receives from

²⁴⁰ Section 84C of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²⁴¹ Section 84C of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²⁴² The Bank of Zambia Act Chapter 360 of the Laws of Zambia.

²⁴³ The Bank of Zambia Act no 24 of 1985 of the Laws of Zambia.

²⁴⁴ Section 4(1) of the Bank of Zambia Act Chapter 360 of the Laws of Zambia.

²⁴⁵ Section 4 (2) of the Bank of Zambia Act Chapter 360 of the Laws of Zambia.

²⁴⁶ Section 5 of the Bank of Zambia Act Chapter 360 of the Laws of Zambia.

the minister of finance. This directly impacts on the manner the Bank of Zambia will carry out its functions as a regulator of banks and financial institutions. It follows that politics has found room to reside in the operations of the Bank of Zambia and this invariably affects the way in which the Bank of Zambia will regulate the banks and financial institutions. This ultimately impacts on how the central bank implements compliance to corporate governance laws, rules and regulations.

The Companies Act²⁴⁷

As we look at the Companies Act,²⁴⁸ it is important to note that in relation to banks and financial institutions the provisions of the Banking and Financial Services Act supersede the Companies Act. In the event of any conflict between the two, the Banking and Financial Services Act will prevail.²⁴⁹ Furthermore, the provisions of the Companies Act do not affect the law that relates to companies that are carrying out the business of banking and insurance.²⁵⁰ However, we are aware that before these banks and financial institutions are granted licences to conduct financial business they must first be incorporated as companies.²⁵¹ Of particular interest in this regard are the provisions that relate to the requirements to incorporate a company that directly impinge on the corporate governance structure of that company before it presents itself to the Registrar of Banks and Financial Services as a worthy applicant for a licence. We will take a brief look at these provisions hereunder.

To incorporate a company in Zambia, the law requires at least two people (or more) to subscribe their names to the application for incorporation.²⁵² The application must be lodged with the Registrar of Companies and should be accompanied by: the proposed articles of the company,²⁵³ a statutory declaration, signed consent from each person named in the application as

²⁴⁷ The Companies Act Chapter 388 of the Laws of Zambia.

²⁴⁸ The Companies Act Chapter 388 of the Laws of Zambia.

²⁴⁹ Section 85 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²⁵⁰ Section 399 of the Companies Act Chapter 388 of the Laws of Zambia.

²⁵¹ Section 4 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²⁵² Section 6 (1) of the Companies Act Chapter 388 of the Laws of Zambia.

²⁵³ The Articles of Association of a company under Zambian law are comparable with the Memorandum of Incorporation under the South African company law.

director/or secretary of the company.²⁵⁴ The application must be signed by each subscriber and specify the following details: proposed company name, physical and postal address of proposed registered office, the type of company to be formed, share capital of the company, the names of the first two directors and company secretary, the name of the person lodging the application, nature of proposed business and proposed date of subsequent financial year for company.²⁵⁵ A subscriber to an application for incorporation of a company must be over 18 years, not bankrupt or of unsound mind.²⁵⁶

When we were looking at the Banking and Financial Services Act, it was mentioned that the registrar of banks and financial institutions must have a copy of the articles of association of a company as part of the information required during the application process.²⁵⁷ This leads one to ask, what is really contained in the articles of association? The Companies Act has standard articles,²⁵⁸ which applicants are allowed to adopt as their own.²⁵⁹ The standard articles have a heading, which states: ‘regulations for management of a company limited by shares.’²⁶⁰ Some of the relevant portions of the standard articles will give some insight as regards what type of regulations are acceptable for the incorporation of a company. The standard articles are the bare minimum required to fulfil the conditions set by the law on having articles. As the law provides that, the articles of a public company or a private company shall be deemed to have adopted the standard articles.²⁶¹ The relevant aspects of the standard articles deal with general meetings, directors, proceedings of directors, and the appointment of the managing director.

A director has power to convene a general meeting whenever he thinks its necessary, by notice.²⁶² The notice must state the place, time and nature of the

²⁵⁴ Section 6(1) (a) to (d) of the Companies Act Chapter 388 of the Laws of Zambia

²⁵⁵ Section 6 (2) (a) to (i) of the Companies Act Chapter 388 of the Laws of Zambia.

²⁵⁶ Section 6(6) of the Companies Act Chapter 388 of the Laws of Zambia.

²⁵⁷ See the portion of this chapter dealing with Licensing pages 13 to 21 and Section 4 (2)(a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

²⁵⁸ First Schedule of the Companies Act Chapter 388 of the Laws of Zambia.

²⁵⁹ Section (7)(4) of the Companies Act Chapter 388 of the Laws of Zambia.

²⁶⁰ First Schedule of the Companies Act Chapter 388 of the Laws of Zambia.

²⁶¹ Section 7 (5) of the Companies Act Chapter 388 of the Laws of Zambia.

²⁶² Division 10 Regulation 40 (1) of the First schedule of the Companies Act Chapter 388 of the Laws of Zambia.

business to be transacted at the meeting.²⁶³ The standard articles also make provision for the manner of proceedings at general meetings. The general meeting cannot transact any business unless the quorum of members is present at the time of the meeting.²⁶⁴ Two members shall constitute a quorum.²⁶⁵ The directors should elect a chairman from among themselves. The manner of voting at a general meeting is by share of hands unless a poll is demanded by the chair, or 3 members or their proxies.²⁶⁶ Furthermore, the articles prescribe that the office of a director would become vacant if the director makes any arrangement or composition with his/ her creditors.²⁶⁷ The directors are empowered to appoint a managing director to exercise any powers that the directors possess.²⁶⁸

In effect, the standard articles do not contain regulations for the management of a company limited by shares per se. They contain rules on how directors should convene meetings, make notices, the requisite quorum at meetings, and how voting ought to be done at meetings. In general, they contain regulations that have to do with the way directors are to interact with each other and to a short extent, the way shareholders ought to vote. Strictly speaking, the only aspects that relate to management of the company are the appointment of a managing director.²⁶⁹ The law makes it a requirement for a company to have articles, particularly if it is a company that intends to apply for a licence to provide financial services. As can be seen from the foregoing, the information contained in the standard articles is generally insufficient to prescribe the type and nature of management in a company as it only addresses the directors and how they go about some of their roles such as convening general meetings and voting. There is little link in the standard articles between the directors and the management. Additionally, there is no prescription of how the managing

²⁶³ Division 10 Regulation 40 and 41 of the First schedule of Companies Act Chapter 388 of the Laws of Zambia.

²⁶⁴ Division 10 Regulation 42 (1) of the First schedule of Companies Act Chapter 388 of the Laws of Zambia.

²⁶⁵ Division 10 Regulation 43(9) of the First schedule of the Companies Act Chapter 388 of the Laws of Zambia.

²⁶⁶ Division 10 Regulation 54(1) of the First schedule of the Companies Act Chapter 388 of the Laws of Zambia.

²⁶⁷ Division 12 Regulation 58 of the First schedule of the Companies Act Chapter 388 of the Laws of Zambia.

²⁶⁸ Division 15 Regulation 66 (1) of the First schedule of the Companies Act Chapter 388 of the laws of Zambia.

²⁶⁹ Division 15 Regulation 66 (1) of the First schedule of the Companies Act Chapter 388 of the Laws of Zambia.

director should conduct the day to day affairs of the management of the company. Therefore, even though the articles of association are sought for the purpose of the licensing application the information contained therein is not fit for purpose.

The Banking and Financial Services (Corporate Governance) guidelines²⁷⁰

The Bank of Zambia introduced these guidelines pursuant to its powers under the Banking and Financial Services Act.²⁷¹ These corporate governance guidelines are applicable to all banks and financial institutions operating in Zambia.²⁷²

The guidelines are divided into 15 major areas covering the following matters:

- (i) Shareholders
- (ii) Ethical standards and corporate values
- (iii) Board responsibilities and composition
- (iv) Board committees
- (v) Evaluation of board performance
- (vi) Roles of senior management
- (vii) Reporting and disclosure
- (viii) Remuneration
- (ix) Risk management
- (x) Internal audit
- (xi) Internal control compliance
- (xii) External auditors
- (xiii) Stakeholders interests
- (xiv) Board relationship with supervisors
- (xv) Transparency.²⁷³

We will look at each of these principles.

²⁷⁰ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006.

²⁷¹ Section 125 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia

²⁷² The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 3.

²⁷³ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006

1. Shareholders

Shareholders are to be active and should engage constructively with the entities they own shares in through their participation at general meetings.²⁷⁴

2. Ethical standards and corporate values

The board of directors should commit to achieving long-term shareholder value with the highest level of integrity and ethics. Consequently, the directors and senior management must be an example of trust, integrity, honesty, judgment, respect, responsibility and accountability.²⁷⁵

3. Board responsibilities and composition

The board shall have a balance of skills, knowledge, experience and perspectives amongst the directors in order to ensure that the board works effectively in building long-term safety and soundness of the institution.²⁷⁶

4. Board committees

The board should use committees to assist it in discharging its duties and responsibilities. The committees shall consist mostly of non-executive directors.²⁷⁷

5. Evaluation of board performance

The board should embrace self-evaluation as a proactive measure to encourage excellence and higher performance levels.²⁷⁸

6. Roles of senior management

Management under the direction of the CEO must conduct the affairs of the business ethically and through the strategic plan, established by the board of directors.²⁷⁹

²⁷⁴ The Zambia Banking and financial services (Corporate Governance) guidelines 2006 page 6 paragraph 5.

²⁷⁵ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 4, paragraph 6.

²⁷⁶ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 7, paragraph 7.

²⁷⁷ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 10, paragraph 8.

²⁷⁸ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 11 paragraph 9.

²⁷⁹ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 12, paragraph 10.

7. Reporting and disclosure

The board shall require integrity of all-financial reporting and balance of disclosures of the affairs of the institution.²⁸⁰

8. Remuneration

The remuneration of directors and executives shall be transparent, fair and reasonable.²⁸¹

9. Risk management

The corporate governance structures in an institution must include structures that identify, monitor and manage all material risks. The board must verify that the institution has put in place appropriate processes to deal effectively with risk management.²⁸²

10. Internal Audit

Internal audit must work to assure the institution that the processes in place of control and mitigation of risk are adequate, effective and efficient.²⁸³

11. Internal control compliance

It is largely connected to principles 9 and 10 relating to risk management. The institution must ensure compliance with all applicable laws and strengthen capacity to respond appropriately to business opportunities.²⁸⁴

12. External auditors

The board shall ensure the quality and independence of the external audit process.²⁸⁵

²⁸⁰ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 14, paragraph 11.

²⁸¹ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 15, paragraph 12.

²⁸² The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 16, paragraph 13.

²⁸³ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 17, paragraph 14.

²⁸⁴ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 19, paragraph 15.

²⁸⁵ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 20, paragraph 16.

13. Stakeholder interests

The board shall respect the interests of stakeholders within the context of institutions ownership and its purpose.²⁸⁶

14. Board relationship with supervisors

The board shall strive to maintain a relationship with the Bank of Zambia that promotes mutual trust and confidence.²⁸⁷

15. Transparency

Transparency must be the foundation upon which the shareholders, stakeholders effectively and properly hold the board of directors and senior management accountable.²⁸⁸

The Bank of Zambia introduced the banking and financial services corporate governance guidelines in 2006.²⁸⁹ It is my contention that the introduction of these regulations was an admission on the part of the Bank of Zambia that on its own the Banking and Financial Services Act would not be able to adequately promote good corporate governance. Hence, the importance of these guidelines to the proper management of banks and financial institutions cannot be overemphasised. In terms of the substance of the guidelines, they seem to provide a solid basis for promoting corporate governance in the sense that they are broad in the scope of the players that they envelope. They deal with different stakeholders, shareholders, the board of directors, and senior management. This presents a broad based approach of all the essential components of the banks and financial institutions as corporate citizens.

Whether these guidelines would still be a shining example in the light or under comparison to the South African system of corporate governance (King III) is yet to be answered in the next chapter.

²⁸⁶ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 21, paragraph 17.

²⁸⁷ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 21 paragraph 18.

²⁸⁸ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 22 paragraph 19.

²⁸⁹ Preamble to the Zambia Banking and Financial Services (Corporate Governance) guidelines 2006.

CHAPTER 4

KING REPORT ON GOVERNANCE FOR SOUTH AFRICA 2009 AND KING CODE OF GOVERNANCE PRINCIPLES (KING III)²⁹⁰ VS. CORPORATE GOVERNANCE LAW APPLYING TO ZAMBIAN BANKS AND FINANCIAL INSTITUTIONS

In this chapter, I will attempt to compare the Zambian corporate governance laws, regulations and rules, which are applicable to banks and financial institutions with King III.²⁹¹ By so doing, I will seek to establish whether the Zambian corporate law and regulations applying to banks and financial institutions adequately promote good corporate governance as determined and expressed in King III.

To achieve this objective this chapter will be divided into two parts. Part I will isolate and expand on particular principles that will be under consideration in this paper. Part II will proceed to compare the Zambian corporate governance law and regulations applicable to banks and financial institutions with the said principles of King III, to see whether the laws adequately cover the aspects brought out by the principles.

It is necessary to mention that this dissertation seeks to compare the Zambian corporate governance law applicable to banks and financial institutions law to King III because King III represents the finest of corporate governance in South Africa and the world.²⁹² In fact, the reason King III has been identified as a model is because it is seen as a shining example not only for Africa but also for the whole world.²⁹³ Today, corporate governance in South Africa is among the most advanced in the world largely supported by the three codes of governance principles.²⁹⁴

²⁹⁰ King Report III and King Code III op cit (n8).

²⁹¹ Ibid.

²⁹² Schulschenk, op cit (n9) 4.

²⁹³ Ibid.

²⁹⁴ Schulschenk, op cit (n9) 1,4.

To begin with, we will briefly look at the background of how the King III came about in order for us to have a comprehensive view of what King III stands for.

Part I

South Africa's unique history has given rise to arguably strong affinity to the values of inclusivity, dialogue and consultation.²⁹⁵ These factors play an important role in the development of corporate governance in South Africa.²⁹⁶

King I

The King committee was commissioned in 1992 by the Institute of Directors amidst a period of tremendous political and economic turmoil.²⁹⁷ It was greatly influenced by the Cadbury report issued in the United Kingdom. At the time the first King Report, King I was released in 1994 it went beyond financial and regulatory aspects, placing a strong emphasis on inclusivity and the central role of the stakeholder. Stakeholder recognition was a key driver for King I.²⁹⁸ Furthermore, the King committee sought not only to address the poor state of corporate governance in South Africa but aspired to set international standards of best practise.²⁹⁹ King I was principles based. Its not law or regulation.³⁰⁰ King I dealt with five key areas: directors, audit, stakeholders, ethics and compliance.³⁰¹ The 1994 Report of the King committee codified the standards of governance applicable to listed companies and other defined entities. For the first time in South Africa, the governance standards on companies listed on the Johannesburg Stock Exchange, large public entities, banks financial and insurance companies and large unlisted public corporations were regulated by more than just legislation.³⁰²

²⁹⁵ Schulschenk, op cit (n9) 6.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Schulschenk op cit (n9) 7.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Naidoo, Ramani *Corporate Governance: An essential guide for South African Companies 2ed* (2009) 32.

King II

In March 2002, the King committee published the second King Report (King II). King II included a review of King I in the light of the developments both locally and internationally.³⁰³ King II introduced the concept of the triple bottom line reporting which required companies in addition to their financial performance, to report on their social, health, ethical and environmental practices.³⁰⁴ Additionally, King II placed major emphasis on risk management as a responsibility of a company's board of directors.³⁰⁵ Apart from that it made a specific reference to the African values of 'Ubuntu' - 'I am because you are, you are because we are'.³⁰⁶ King II also dealt with executive remuneration and IT governance.³⁰⁷

King III

A third King Report became necessary because of the changes in the company law brought about by the South African Companies Act 2008 as well as the need to see alignment with international governance trends.³⁰⁸ King III, which was released in 2009, placed a strong emphasis on leadership, sustainability and corporate citizenship.³⁰⁹ It sets out aspirational best practise governance standards for all companies and corporate entities.³¹⁰ In King III there is a clear shift from 'comply or explain' approach to 'apply or explain' approach.³¹¹

For the purpose of this dissertation, I have highlighted nine major principles that will be used to compare to the Zambian law and regulations applicable to financial service providers. I do not intend to reproduce the King Code and Report but to crop the major principles under the nine headings and see how these principles have been projected in the Zambian legal regime concerning banks and financial institutions. The headings are:

(i) Ethical leadership and corporate citizenship

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Schulschenk, op cit (n9) 10.

³⁰⁷ Ibid.

³⁰⁸ Naidoo, op cit (n302) 34.

³⁰⁹ Schulschenk, op cit (n 9) 12.

³¹⁰ Naidoo, op cit (n302) 34.

³¹¹ King Code III op cit (n8) page 10

- (ii) Board and directors*
- (iii) Audit committee*
- (iv) The governance of risk*
- (v) The governance of information technology*
- (vi) Compliance with laws, codes, rules and standards*
- (vii) Internal audit*
- (viii) Governing stakeholder relationship*
- (ix) Integrated reporting and disclosure.*³¹²

Hereunder we concisely expand on each of them as they are projected in King III.

Ethical leadership and corporate citizenship

The board should provide effective leadership based on an ethical foundation.³¹³ The board should ensure that the company is and is seen to be a responsible corporate citizen.³¹⁴ This implies that the board should consider not only the performance of the company, but also the impact of the company's operations on society and the environment.³¹⁵ One cannot talk in terms of good governance without effective and ethical leadership that is made up of responsibility, fairness and transparency.³¹⁶

Boards and directors

The board should act as the focal point and custodian of corporate governance.³¹⁷ It should appreciate that strategy, risk, performance and sustainability are inseparable.³¹⁸

The board should elect a chairperson of the board who is an independent non-executive director. The CEO of the company should not also fulfil the role of chairperson of the board.³¹⁹ Furthermore, the board should comprise a balance of power, with a majority of independent non-executive directors.³²⁰ In terms of the appointment of the directors, they should be appointed through

³¹² King Report III op cit (n8) 5.

³¹³ King Report III op cit (n 8) principle 1.1, 36.

³¹⁴ King Report III op cit (n8) principle 1.2, 41.

³¹⁵ King Code III op cit (n8) principle 1.2.1, 36.

³¹⁶ King Code III op cit (n8) 16,17

³¹⁷ King Report III op cit (n8) principle 2.1, 54.

³¹⁸ King Report III op cit (n8) principle 2.2, 55.

³¹⁹ King Report III op cit (n8) principle 2.16, 64.

³²⁰ King Report III op cit (n8) principle 2.18, 73.

formal process and should be properly qualified and experienced.³²¹ A nomination committee should assist with the process of identifying suitable members of the board.³²² The evaluation of the board and its committee and individual members should be performed every year.³²³ Apart from this, the remuneration of directors and executives should be granted fairly and responsibly and should be open for disclosure.³²⁴

Audit committee

It is the responsibility of the board to ensure that the company has an effective and independent audit committee.³²⁵ The audit committee should comprise at least three members,³²⁶ who should be suitably skilled and experienced independent non-executive directors.³²⁷ The chairperson of the audit committee should be an independent non-executive director.³²⁸ The major functions of the audit committee are to oversee the integrity of the integrated report for which the board of directors is responsible;³²⁹ oversee the internal audit;³³⁰ form an integral component of the risk management process;³³¹ recommend the appointment of the external auditor and oversee the external audit process.³³² The audit committee is responsible to the board of directors and shareholders on how it has discharged its duties.³³³

The governance of risk

The board of directors should determine the levels of risk tolerance at least once a year and should review these limits during periods of increased

³²¹ King Code III op cit (n8) principle 2.19 49.

³²² Ibid.

³²³ King Code III op cit (n8) principle 2.22 and recommended practice 2.22.2, 52.

³²⁴ King Code III op cit (n8) principles 2.25 and 2.26, 56, 57.

³²⁵ King Report III op cit (n 8) principle 3.1, 110.

³²⁶ King Code III op cit (n8) recommended practice 3.2.2, 60.

³²⁷ King Report III op cit (n8) principle 3.2, 112.

³²⁸ King Report III op cit (n8) paragraph 11, 57.

³²⁹ Cassim, op cit (n13) 446.

³³⁰ Ibid.

³³¹ Ibid.

³³² Ibid.

³³³ Ibid.

uncertainty or changes in the business environment.³³⁴ Undue, unexpected or unusual risks should be disclosed in the integrated report.³³⁵

Governance of information technology (IT)

IT governance should be the responsibility of the board of directors.³³⁶ The IT governance framework should include the relevant structures, processes and mechanisms to enable IT to deliver value to the business and to mitigate IT risks. The CEO should appoint a chief information officer (CIO) to be responsible for the management of information technology.³³⁷ The board should monitor and evaluate significant IT investments and expenditure.³³⁸

Compliance with laws, rules, codes and standards

The King III Report requires the board of directors to ensure that the company complies with all applicable and relevant laws and adherence to non-binding rules codes and standards that apply to the company.³³⁹

Internal audit

The King III Report requires the board of directors to ensure that there is an effective risk based internal audit.³⁴⁰ The internal audit should provide a written assessment of the effectiveness of the company's system of controls and risk management.³⁴¹

Governing stakeholder relationships

It is important for the board of directors to understand that stakeholder perceptions affect a company's reputation.³⁴² Additionally the board of directors should strive to achieve the appropriate balance between various stakeholders including the efficient and expeditious resolution of disputes.³⁴³

³³⁴ Ibid.

³³⁵ Cassim op cit (n13) 447. See also King Code III op cit (n8) recommended practice 4.1.1 to 4.1.4, 67 to 68.

³³⁶ King Report III principle 5.1, 162.

³³⁷ King Code III op cit (n8) recommended practice 5.3.3, 76.

³³⁸ King Report III op cit (n8) principle 5.4, 167.

³³⁹ Cassim, op cit (n 13) 448.

³⁴⁰ Ibid.

³⁴¹ King Report III op cit (n8) principle 7.3, 187.

³⁴² King Report III op cit (n8) principle 8.1, 195.

³⁴³ King Report III op cit (n8) principle 8.6, 204.

Integrated reporting and disclosure

The board of directors should ensure the integrity of the company's integrated report.³⁴⁴ Sustainability reporting and disclosure should be integrated with the company's financial reporting.³⁴⁵ Sustainability reporting and disclosure should be independently assured. The general oversight and reporting of sustainability should be delegated by the board of directors to the audit committee, which should assist the board by receiving the integrated report to ensure the information is reliable and does not conflict with financial aspects of integrated report.³⁴⁶

The foregoing passages briefly expound each of the major themes and principles of the King III Report. We will now proceed to look at the Zambian laws, rules and regulations through the lens of the said principles in a bid to answer the question does Zambian law that applies to banks and financial institutions adequately promote good corporate governance as espoused and expounded by the nine principles enunciated in the previous paragraphs?

Part II

This part seeks to align each of the principles of corporate governance referred to in the King III Report and Code with the Zambian laws, rules and regulations that apply to banks and financial institutions.

Ethical leadership and corporate citizenship

The terms ethical leadership and corporate citizenship are not used in the Banking and Financial Services Act.³⁴⁷ Although the Banking and Financial Services Act provides that the registrar of banks and financial institutions must consider the character of the directors, major shareholders, owners and founders proposing to be concerned with the management of the business.³⁴⁸ My argument is that the reason for the registrar to single out character is to ensure

³⁴⁴ Cassim, op cit (n 13) 457.

³⁴⁵ King Report III (n8) principle 9.2, 214.

³⁴⁶ Cassim, op cit (n 13) 457.

³⁴⁷ The Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

³⁴⁸ Section 7 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

that ethical people, with character beyond reproach are trusted with the licence to conduct the business of financial services. Furthermore, the Banking and Financial Services Act also requires the CEO and CFO of the incorporated financial service provider to possess the requisite qualifications, expertise and integrity.³⁴⁹ That lends credence to my argument that the need to scrutinise character was to make sure that ethical people are applying for the licence. This requirement of integrity extends towards directors and managers of a financial service provider as one of the qualifications for holding such office.³⁵⁰ It is further amplified by the duties that every director, CEO, CFO or manager has in discharging the duties of their office: they must act honestly and in good faith, exercising due diligence, care and skill in the best interests of the financial service provider.³⁵¹ It is true to say that integrity is not necessarily equal to ethics or ethical leadership but it is also true that you cannot have ethical leadership without integrity and therefore integrity is part of ethical leadership. As regards corporate citizenship, the registrar of banks and financial institutions must consider the effects that the prospective financial provider would have on the community's needs.³⁵² Although this consideration should actually be brought to bear on the actual financial service provider rather than the registrar to be effective. The corporate governance guidelines³⁵³ clearly spell out the need for ethical standards and corporate values.³⁵⁴ The board of directors is under an obligation to lead by example in a culture of trust, integrity, honesty, judgment, respect, responsibility and accountability.³⁵⁵ Under this head, the financial service provider is to come up with a code of ethics. The code of ethics is to be reviewed annually.³⁵⁶ This is in harmony with the prescription of the King III Report on the establishment of an ethical code of conduct.³⁵⁷ It is safe to observe that on the issue of ethical leadership the relevant Zambian laws, rules and

³⁴⁹ Section 30A of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

³⁵⁰ Section 31 (1) (a) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

³⁵¹ Section 33 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

³⁵² Section 7 (d) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

³⁵³ The Zambia Banking and Financial Services (Corporate Governance) guidelines, 2006.

³⁵⁴ Principle II, The Zambia Banking and Financial Services (Corporate Governance) guidelines, 2006 page 4 paragraph 6.

³⁵⁵ Principle II, The Zambia Banking and Financial services (Corporate Governance) guidelines, 2006 page 4 paragraph 6.

³⁵⁶ The Zambia Banking and Financial Services (Corporate Governance) guidelines, 2006 page 5 paragraph 6.5.

³⁵⁷ King Report III op cit (n8) paragraphs 40 and 41,49.

regulations are at par with the King III in principle. However, it is clear that there is no direct reference to corporate citizenship and aspects that relate to the financial service provider as a corporate citizen with all the responsibilities attached to that status.³⁵⁸ It omits the issue of the triple bottom line and the responsibility that the board of directors has to ensure that the financial service provider is developed in the context of economic, social and environmental factors.³⁵⁹ Therefore, the Zambian legal regime lacks in its approach to sustainability as regards corporate citizenship.

Board and directors

As regards the board and directors, there are quite a number of similarities between the King III and the Zambian legal complexion. They both advocate for the board of directors to report on the integrity of risk management, internal controls, communication policy, director selection, orientation and evaluation.³⁶⁰ The idea of induction training for new directors is also a common thread that runs through both lines.³⁶¹ Furthermore, there is a joint call for the formal process for evaluating the board, board committees and directors.³⁶² In addition to this, there is a mutual demand for the board of directors to be comprised of a majority of independent non-executive directors.³⁶³ The standard exists in both camps, which requires the chairperson of the board of directors to be independent, non-executive and should not be CEO and chairperson at the same time.³⁶⁴ There are still more similarities between King III and the Zambian legal regime, for example concerning the board committees responsible for audit, risk management, nominations it has been stated that they should have a majority of

³⁵⁸ King Report III op cit (n8) paragraph 16, 41.

³⁵⁹ Ibid.

³⁶⁰ The Zambia Banking and Financial Services (Corporate Governance) guidelines paragraph 7.1.1 page 7 and King Report III op cit (n8) principle 2.1.3, 59.

³⁶¹ The Zambia Banking and Financial Services (Corporate Governance) guidelines paragraph 7.1.3 page 7 and King Report III op cit (n8) principle 2.20, paragraph 89,82.

³⁶² The Zambia Banking and Financial Services (Corporate Governance) guidelines paragraph 7.1.4 page 7 and King Report III op cit (n8) principle 2.22, 86.

³⁶³ The Zambia Banking and Financial Services (Corporate Governance) guidelines paragraph 7.2 page 8 and King Report III op cit (n8) principle 2.18, 73.

³⁶⁴ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 paragraph 7.2.1 page 8 and the King Report III op cit (n8) principle 2.16, 64.

independent non-executive directors,³⁶⁵ and chaired by the board chairperson in the case of the nominations and executive committee.³⁶⁶ In terms of board evaluation, it is an agreed position of both systems under consideration that this should be conducted annually and there is discretion as to whether to conduct this as self-evaluation or external evaluation.³⁶⁷ In terms of remuneration of the directors and executives, the position is the same. The remuneration of directors and executives shall be transparent, fair and reasonable.³⁶⁸

Apart from the similarities there are also differences, for instance there is a reference in King III for the board to consider resorting to business rescue proceedings whenever a company is financially distressed.³⁶⁹ Under Zambian law applying to banks and financial services and indeed under Zambian law in general there is no provision whatsoever on the subject of business rescue. The concept currently does not exist under Zambian law, at all. Another difference is the reference to group boards that is made in King III.³⁷⁰ Again, there is silence on the aspect of group boards under Zambian law applying to banks and financial services. There is a very pronounced slant towards corporate citizenship through out the King III and in particular with regards the boards and directors.³⁷¹ The concept of corporate citizenship has not taken root in the Zambian law that applies to banks and financial institutions or indeed Zambian law as a whole. Some other minor variations are found in the restrictions put on the directors in the Zambian context that they are not allowed to be a member of more than six boards of other companies and they would not be considered independent directors after serving for a period of ten years.³⁷² Under King III, it is prescribed that an independence assessment is required after nine years³⁷³ and this does not mean that the director will not be considered independent just

³⁶⁵ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 principle IV page 10 and King Report III op cit (n8) 90.

³⁶⁶ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 paragraph 7.2.5 page 9 and the King Report III op cit (n8) paragraph 131, 91.

³⁶⁷ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 principle V, page 11 and the King Report III op cit (n8) paragraph 113, 87.

³⁶⁸ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 principle VIII page 15 and the King III Report principle 2.25, 96.

³⁶⁹ The King Report III op cit (n8) principle 2.15, 62.

³⁷⁰ The King Report III op cit (n8) principle 2.24, 94.

³⁷¹ The King Report III op cit (n8) principle 2.4, 57 and principle 1.2, 41.

³⁷² The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 paragraph 7.2.13 page 10

³⁷³ The King Report III op cit (n8) paragraph 77, 78.

because of having served nine years.³⁷⁴ Additionally, King III clearly and in great depth spells out the roles and responsibilities of the CEO,³⁷⁵ and company secretary.³⁷⁶ The Zambian regulations provide a skeleton framework of the duties of the company secretary³⁷⁷ and then vague mention of the role of CEO³⁷⁸ incomparable to the depth exhibited in King III.

Audit committee

The Banking and Financial Services Act requires that every financial service provider have an audit committee, of at least three non-executive directors.³⁷⁹ This is equivalent to the provision contained in the King III that relates to having an audit committee and non-executive directors in the committee.³⁸⁰ They are further similarities in that the Banking and Financial Services Act establishes the audit committee as a statutory requirement for banks and financial institutions,³⁸¹ which is also a statutory obligation for public and state owned South African companies and banks.³⁸² The functions of the audit committee include: review of information returns, ensure internal controls and procedures are in place,³⁸³ report to the board of directors, review annual financial statements before they are approved by the directors, review investment transactions, meet with the auditors³⁸⁴ and chief internal auditor to discuss the matters relating to the financials, investment transactions and internal controls.³⁸⁵ It matches with the responsibilities of the audit committee as stated in King III³⁸⁶ to comment on financial statements, the accounting

³⁷⁴ The King Report III op cit (n8) paragraph 78, 78.

³⁷⁵ The King Report III op cit (n8) paragraph 60, 72.

³⁷⁶ The King Report III op cit (n8) paragraphs 99 to 108, 85 and 86.

³⁷⁷ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 paragraphs 10.3.3 to 10.3.6 pages 13 to 14

³⁷⁸ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 paragraphs 10.2.3 page 13

³⁷⁹ Section 67 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia and paragraph 8.1 of the Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 page 10

³⁸⁰ King Report III op cit (n8) principle 3.2, 112.

³⁸¹ Section 67 (1) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia

³⁸² Section 94 of the Companies Act No. 71 of 2008 of the Laws of South Africa

³⁸³ Section 67(2) (a),(b) and (c) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia

³⁸⁴ Section 67 (2) (d)and(e) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia

³⁸⁵ Section 67 (2) (f) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia

³⁸⁶ King Report III op cit (n8) paragraph 30, 116 to 117.

practices and internal financial control of the company.³⁸⁷ The other areas that are common include the audit committee overseeing the internal audit,³⁸⁸ the audit committee should ensure the quality and independence of external audit process³⁸⁹ and recommend the appointment of the external auditor.³⁹⁰ On the other hand, the King III has placed additional requirements on the audit committee such as the need for the audit committee to produce summarised information of the integrated report for the benefit of the users.³⁹¹ The audit committee under King III is also faced with the additional challenges of being an integral part of the risk management process,³⁹² ensuring a combined assurance model is applied to assurance activities,³⁹³ reviewing fraud risks and encouraging whistle blowing by employees or customers.³⁹⁴ It is clear from the foregoing that the obligations and prescriptions of the King III are much more elaborate than the requirements under the Zambian regulations that apply to banks and financial institutions.

Governance of Risk

Under Zambian law, the director's report must contain risk management processes and practices during the year.³⁹⁵ This is akin to the duty expressed under the King III where the board should be responsible for the governance of risk.³⁹⁶ Further similarity exists with the duty of the board to periodically review and approve risk exposure limits.³⁹⁷ The King Report goes further in this regard to clearly call the board to delegate to management the responsibilities to design,

³⁸⁷ Ibid.

³⁸⁸ King Report III op cit (n8) principle 3.7, 124. And the Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 appendix page I.

³⁸⁹ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 principle XII paragraph 16 page 20 and the King Report III op cit (n8) principle 3.9, 130.

³⁹⁰ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006 principle XII paragraph 16 page 20 and the King Report III op cit (n8) principle 3.9, 130.

³⁹¹ King Report III op cit (n8) paragraph 41, 120.

³⁹² King Report III op cit (n8) principle 3.8, 125.

³⁹³ King Report III op cit (n8) principle 3.5, 122.

³⁹⁴ King Report III op cit (n8) paragraphs 71,73; 128 to 129.

³⁹⁵ Section 56 (1) (b) (ii) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia and the Zambia Banking and Financial services (Corporate Governance) guidelines paragraph 13.2 page 16.

³⁹⁶ King Report III op cit (n8) principle 4.1, 144.

³⁹⁷ The Zambia Banking and Financial Services (Corporate Governance) guidelines paragraph 13.10 page 17 and King Report III op cit (n8) principle 4.2, 146.

implement and monitor the risk management plan.³⁹⁸ There is also an additional requirement that is at variance with the Zambian legal regime in that the board of directors should receive assurance regarding the effectiveness of the risk management process (through internal audit).³⁹⁹

Governance of information technology (IT)

There is no direct reference whatsoever to the governance of IT under Zambian banking law or indeed the regulations and guidelines falling there under. The only hint under the Banking and Financial Services Act is where the law allows a financial service provider to prepare and maintain records, in bound, loose form, photographic film or mechanical or electrical data processing.⁴⁰⁰ Even this does not amount to the governance of IT, it simply points to the forms that financial service providers could retain records.

Compliance with laws, rules, codes and standards

The Zambian standard places the burden on the audit committee to ensure that the institution complies with regulatory requirements, including prudential requirements, taxation rules and various reporting obligations.⁴⁰¹ This differs slightly with the King Report, which places the responsibility for compliance squarely on the board.⁴⁰² The Zambian law says nothing else on this issue. King III on the other hand goes on to prescribe that directors should know the laws for compliance purposes and delegate to management the implementation of an effective compliance framework.⁴⁰³ The apparent silence on compliance issues from the board of director's standpoint is a sign of very weak reference to compliance matters under the Zambian law that applies to banks and financial institutions.

³⁹⁸ King Report III op cit (n8) principle 4.4, 149.

³⁹⁹ King Report III op cit (n8) principle 4.9, paragraph 51,158.

⁴⁰⁰ Section 53 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia

⁴⁰¹ The Zambia Banking and Financial Services (Corporate Governance) guidelines paragraph 15.3 page 19.

⁴⁰² The King Report III op cit (n8) principle 6.1, 176.

⁴⁰³ King Report III op cit (n8) principles 6.2 and 6.4, 178 to 179.

Internal Audit

Generally, there are similar positions taken as regards internal audit. The internal audit must be empowered with an internal audit charter.⁴⁰⁴ The charter shall include audit role and responsibility for governance, risk management, consulting services and fraud investigations. Chief of internal audit reports to the board of directors.⁴⁰⁵ This is on all fours with the provisions of King III⁴⁰⁶. Although in the King Report there is a clear focus on risk based internal auditing as opposed to just the normal internal audit function.⁴⁰⁷

Governing stakeholder relationships

Zambian law provides for the board of directors to have the responsibility to have written policies for the institutions relationships with significant stakeholders.⁴⁰⁸ In as much as there is this push for caring for stakeholders, the emphasis is on subjecting the treatment of other stakeholders to the interests of the shareholders.⁴⁰⁹ It is strikingly at variance with the approach in King III which directs that the board of directors should operate in the best interests of the company but it should take into account as far as possible the legitimate interests and expectations of its stakeholders in decision making.⁴¹⁰ Apart from that, the Zambian regulations fall short with regards to the handling of disputes or resolving conflict with stakeholders. As opposed to the King III which clearly outlines the importance of alternative dispute resolution mechanisms such as mediation, conciliation, expert determination and arbitration.⁴¹¹ The Zambian law generally provides recourse to court or a tribunal (whose decision is also

⁴⁰⁴ The Zambia Banking and Financial Services (Corporate Governance) guidelines paragraph 14.1 page 18.

⁴⁰⁵ The Zambia Banking and Financial Services (Corporate Governance) guidelines paragraphs 14.2.1 and 14.2.3 page 18.

⁴⁰⁶ King Report III op cit (n8) principles 7.1 and 7.2 (see in particular paragraphs 2 and 5) 183, 184.

⁴⁰⁷ King Report III op cit (n8) principle 7.2, 185.

⁴⁰⁸ The Zambia Banking and Financial Services Act (Corporate Governance) guidelines 2006 paragraph 17.1 page 21

⁴⁰⁹ The Zambia Banking and Financial Services Act (Corporate Governance) guidelines 2006 paragraph 17.2 page 21

⁴¹⁰ King Report III op cit (n8) paragraph 23, 200 to 201.

⁴¹¹ King Report III op cit (n8) paragraph 39, 205.

subject to appeal in a court of law) for the determination of disputes concerning stakeholders of the bank and financial institution.⁴¹²

Integrated Reporting and disclosure

Zambian law is silent on this aspect. No direct reference is made in the Zambian statutes to integrated reporting, sustainability and corporate citizenship. Although it is worth mentioning that there is a slight and brief mention of the requirement that the annual report of the directors should include information on how the financial service provider served the interests of stakeholders and they must state the extent of social transformation, environmental management policies subject to the interests of the shareholders.

Conclusion

The Banking and Financial Services Act on its own is not adequate in terms of promoting good corporate governance in banks and financial institutions. That is the reason why the corporate governance guidelines are so important because they seem to take after the King III Report in several respects. For instance, they take after King III in the principles of ethical leadership, boards and directors, audit committee, internal audit, risk management. By saying that they have similarities is not to imply that they are identical but that they have a common aspiration and spirit along the lines referred to above. However, the Zambian legal regime admittedly lacks in very basic, important and fundamental areas of sustainability, integrated reporting, corporate citizenship, governance of IT and stakeholder relations. There is also weak mention of compliance to laws, rules and regulations in the Zambian law applying to banks and financial services. If one would like to quantitatively analyse the manner in which the Zambian banking and finance law has fared in comparison to the King III, Zambian law has scored of five out of nine. In the sense that at least five of the nine principles are mentioned, acknowledged and promoted by Zambian law and regulations applying to banks and financial institutions. King III expressly provides that every principle is of equal

⁴¹² Section 111 (2) of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia and see also section 84C of the Banking and Financial Services Act chapter 387 of the Laws of Zambia.

importance and represents a holistic approach to corporate governance.⁴¹³ It follows therefore, that substantial application to the code and report do not achieve compliance.⁴¹⁴ Consequently, gauging the Zambian law through the high standard set by King III reveals that the Zambian law lamentably fails in several respects by simply omitting to mention areas of corporate citizenship, sustainability, integrated reporting, governance of IT and stakeholder interests which are central to King III. Does Zambian law adequately promote good corporate governance? The answer is no. There is a lot of work to be done to enable the Zambian law to holistically promote good corporate governance.

⁴¹³ King Code III op cit (n8) 31.

⁴¹⁴ Ibid.

CHAPTER 5

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

Summary of main findings and conclusions

I set out to answer the question does the corporate governance law applying to Zambian banks and financial institutions adequately promote good corporate governance? To answer this question, I had to obtain an operational definition of corporate governance. I found that there were several definitions of corporate governance. It means different things to different people. I settled for the position that explains corporate governance as:

‘the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations...it embraces... the practices by which that exercise and control of authority is in fact effected.’⁴¹⁵

It was also established that corporate governance has cultural and historical components to it.⁴¹⁶ Thus in analysing Zambia’s legal framework which relates to corporate governance of banks and financial institutions, the historical, political, economic and social (cultural) context of the laws were relevant to understand the operation of these laws. The Zambian laws that influence corporate governance in banks and financial institutions are a product of the Zambian government policy that focused on liberalisation of the economy, at the time of formulation.⁴¹⁷ These laws include the Banking and Financial Services Act,⁴¹⁸ the Bank of Zambia Act,⁴¹⁹ the Companies Act,⁴²⁰ and later on the Banking and Financial Services (corporate governance) guidelines⁴²¹. The Banking and Financial Services Act grants the minister of finance overriding powers, which have potential for abuse. Due to the manner of his /her appointment, the minister of finance is subject to give preference to

⁴¹⁵ Plessis, McConvill, Bagaric, op cit (n11) 1.

⁴¹⁶ Pinto and Visentini, op cit (n18) x.

⁴¹⁷ Chanda op cit (n46) 125 at 133.

⁴¹⁸ The Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁴¹⁹ The Bank of Zambia Act Chapter 360 of the Laws of Zambia.

⁴²⁰ The Companies Act Chapter 388 of the Laws of Zambia.

⁴²¹ The Zambia Banking and Financial Services (Corporate Governance) guidelines of 2006.

political considerations rather than corporate governance principles and ideals. The study has shown the powerful hand of politics in the formulation, application and enforcement of laws relating to the corporate governance of banks and financial institutions in Zambia. The sweeping powers of the minister of finance go to the extent of exempting any bank or financial institution from the application of any or all of the provisions of the Banking and Financial Services Act.⁴²² Even the regulator of the banks and financial institutions in Zambia, the Bank of Zambia, is under direct control of the minister of finance and must give full effect to the minister's policy directives.⁴²³

This view of politics taking a centre stage in the formulation, application and enforcement of corporate governance law applicable to Zambian banks and financial services is at variance with King III, in the sense that King III was born out of the voluntary work of private individuals under the Institute of Directors.⁴²⁴ The principles from the King Report and Code invariably influenced the content of South African company law.⁴²⁵ As opposed to the Zambian legal system which has politics as the fuel of the content of the law relating to corporate governance.

This study noted that the introduction of the corporate governance guidelines in 2006⁴²⁶ by the Bank of Zambia was an admission that the law was not doing enough in promoting good governance among banks and financial institutions. These guidelines are regulations that are applicable to all banks and financial institutions. In terms of content, the corporate governance guidelines follow the spirit of King III.

Of the nine principles contained under the nine chapters of the King III Report, the corporate governance law applying to Zambian banks and financial institutions mention, identify and promote at least five of them, namely ethical leadership, boards and directors, audit committees, governance of risk, and internal audit. In general, it was noted that King III was much more elaborate and detailed in its approach to the principles than the Zambian laws, rules and

⁴²² Section 130 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁴²³ Section 5 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

⁴²⁴ King Code III op cit (n8) 6.

⁴²⁵ Naidoo, op cit (n302) 29.

⁴²⁶ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006.

regulations that relate to the corporate governance of banks and financial institutions.

The Zambian laws, regulations and rules applying to banks and financial institutions lack in terms of their approach to corporate citizenship, governance of IT, governing stakeholder relationships, integrated reporting and disclosure. They also have a very weak reference to the principle of compliance with laws.

Even though statistically, five out of nine is not a bad score *per se*, the high standard set by King III cannot embrace that as an acceptable score. The Zambian laws, rules and regulations fail to promote good corporate governance because ‘each principle is of equal importance and together forms a holistic approach to corporate governance...substantial application... does not achieve compliance.’⁴²⁷ The several gaps in the Zambian corporate governance laws applying to banks and financial institutions avoid the holistic promotion of good corporate governance as envisioned by King III.

Recommendations

Politics has been identified in this research, as a serious issue in the formulation, application and enforcement of the laws that relate to corporate governance in banks and financial institutions. One very important point that should be dealt with is the sweeping powers that the law gives to the minister of finance, particularly when it comes to providing exemption to banks and financial institutions to the provisions of the Banking and Financial Services Act.⁴²⁸ It is strongly recommended that this section be out rightly repealed. In the event that the supporters of this section and the sweeping powers of the minister of finance insist that it remains, I would strongly urge that an amendment be passed that would specify the instances where a bank or financial institution would qualify to be exempted from any provision of the law. This is necessary to ensure equality before the law for all banks and financial institutions. It would not be fair for one bank or financial institution to be

⁴²⁷ King Code III op cit (n8) 31.

⁴²⁸ Section 130 of the Banking and Financial Services Act Chapter 387 of the Laws of Zambia.

granted an exemption from the provisions of the act that relate to corporate governance or any other aspect, while every other financial service provider is under the obligation to strictly adhere to all the provisions of the same law. It is imperative therefore, that the wide discretion that this section grants the minister of finance be curtailed, by either repealing the section altogether or defining specific instances in which the minister may exercise those powers to exempt financial service providers from the law. The said instances should be few and well defined, in order to ensure that banks and financial institutions are abiding by the law.

Considering the fact that Zambia's legal framework responsible for corporate governance in banks and financial institutions has gaps in the concept areas of sustainability, corporate citizenship, triple bottom line, integrated reporting and disclosure, governing IT and stakeholder relations, there is need for reform of the law that would include these components. It is recommended that instead of having this reform driven by the regulators or the government, it should be market led. The Bankers Association of Zambia should spear head the formulation of their own voluntary aspirational ideals upon which corporate governance in Zambian banks and financial institutions will be operating. The principles should adopt the concepts of sustainability, corporate citizenship, triple bottom line, integrated reporting and disclosure, governing IT and stakeholder relations. The Zambian banks and financial institutions should be proactive in this regard to develop their own principles and guidelines for corporate governance.

It is clear that the corporate governance guidelines⁴²⁹ enacted in 2006 (seven years ago) are in serious need of reform, to bring them in tune with the principles of King III. In reforming these guidelines, the Bank of Zambia should ensure maximum levels of consultation and participation of the actual banks and financial institutions, before they are implemented. The revised corporate governance guidelines should exist side by side with the corporate governance principles, which should come from the Bankers Association of Zambia. This will give life to a unique hybrid system of corporate governance that represents the best of corporate governance systems that Zambian banks and financial

⁴²⁹ The Zambia Banking and Financial Services (Corporate Governance) guidelines 2006.

institutions can adopt because that is the system adopted by South Africa and this represents the global trend in this area.⁴³⁰

⁴³⁰ Naidoo, op cit (n 302) 29.

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