A Study of the Impact of Company Legislation on the Fiduciary Duties of Directors with Regard to Contracts with the Company

Victor P Ngaleka

NGLVIC001

LLM

Supervisor: Dr T Wiese

Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the LLM in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signature:

Date:

Table of Content

Chapter 4 Director's Fiduciary Duties after the 1973 Act

Chapter 5 The Companies Act of 2008

Chapter 1

Introduction

1. Introduction

A company, as a separate legal personality, is not able to act on its own accord. It must necessarily participate in legal transactions through natural persons acting on its behalf.[1] Directors are the persons who act on behalf of the company in transactions with third parties. Their functions and responsibilities arise by virtue of the company as being a separate legal personality.

The company acts through its organs. One of its organs is the board of directors, which is entrusted with the management of the business of the company. The other organ, through which a company acts, is the general meeting of the company, which is not the object of this study.

The management of a company can only be effective if the directors are empowered with sufficient discretion to exercise their powers in an effective and efficient manner. However, it is also important that members of the company in its general meeting exercise effective oversight over the management of the company by the directors. It is, however, not easy for members to exercise judicious control over management because of the diversity and dispersal of shareholders. Hence, directors are subject to various duties, which are normally classified as the duty of care and skill, and the fiduciary duties. The effective control of the directors is dependent on the enforcement of these duties, which are based on common law. These common law

[1] Celliers & Benade *Corporate Law,* p 3

duties have, however, been supplemented by duties derived from statutory law.[2]

2. Directors and self-dealing

The focus of this study is on the fiduciary duties of directors, in particular the duty to avoid conflict of interests with regard to self-dealing in contracts of the company. Self-dealing occurs when a director is simultaneously a buyer and seller for and on behalf of the company in the same transaction. The position of the common on law on fiduciary duties has always been that such a situation was untenable.[3]The rule against self-dealing requires directors not to act on behalf of the company in a matter in which they have an interest.[4] The rule is strictly applied by our courts. This study does not deal with other situations of conflict of interests, such as exploitation of corporate opportunity by directors, misuse of company information and unlawful competition with the company.

The study analyzes the origin and development of the common law fiduciary duties of directors in South Africa and how company legislation has impacted and modified them through the various companies' acts. The law of fiduciary duties has existed for centuries as a fundamental principle underlying various disciplines, ie the law of agency, trust law, etc.[5]

Chapter 2 considers the origin and basis of the fiduciary duties of directors in South Africa; initially as it emerged from Roman-Dutch law and later, from English common law. It also examines the basis on which liability for breach of fiduciary duties has been determined.

---

[2] Havenga M *Fiduciary Duties of Directors* (PhD thesis), p 1
[3] Shepherd J C *The Law of Fiduciaries,* p 145
[4] *Cohen v Directors of Rand Colliers Ltd* 1906 TS 197
[5] Ibid p 2

Up until the enactment of the 1926 Companies Act, the fiduciary duties of directors were regulated exclusively by the common law. Chapter 3 deals with the intervention of the Legislature in this area of company law. It assesses the extent to which two major amendments effected by the 1939 Companies Amendment Act and the 1952 Companies Act modified the common law. Both amendments were preceded by the investigation of company law by commissions of inquiry.

Chapter 4 examines the review of the company law undertaken by the Van Wyk De Vries Commission and the 1973 Companies Act, which was a product of the work of the Commission.

Lastly, Chapter 5 assesses the major changes brought about by the 2008 Companies Act with regard to the fiduciary duties of directors, especially in regard to the duty to avoid a conflict of interests with respect to self-dealing. More importantly, it assesses the potential impact of the new approach inaugurated by the Act, ie the disclose and recuse approach.

3. Methodology

The methodology that the study follows is historical. At the outset, the origin and basis of the fiduciary duties owned by directors to their company is considered. Specific attention is given to the situation where a director has been involved in self-dealing with the company. Currently, South African company law is largely based on English law, which has been influential in the development of our company law. However, in the early development of company law, our courts also relied on the Roman-Dutch law.

Furthermore, the study examines the development of the company law through legislative interventions, which were preceded by

commissions of inquiry that investigated the law in the light of developments in the economy and comparable jurisdiction.

Chapter 2

Directors' Fiduciary Duties Prior to 1926

1. Introduction

When the Union of South Africa was formed in 1910, the main sources of company law were the common law and the various pieces of company legislation which existed in the provinces. The provincial statutes, which were based on English company law, remained in force until 1926 when the first national Companies Act was passed.[6] Since the nineteenth century, English company law has dominated our company law. Its dominance has almost obliterated the influence of Roman-Dutch Law, which was alive in the nineteenth century and at the turn of the twentieth century as reflected in the law reports of the time.[7]

2. The Cape under the rule of the VOC

The arrival of Jan van Riebeeck in 1652 marked, not only the beginning of the story of modern South Africa, but also the reception of Roman-Dutch law. On 7 April 1652, van Riebeeck formally took possession of the Cape for the *Vereenigde Geoctroyeerde Oost-Indische Campagnie* (VOC), the Dutch East India Company. The Cape was subjected to the rule of the VOC for a period of 150 years. Economic life was strictly supervised and controlled by the company. The company decided what occupations the settlers were to undertake by issuing licensing for such activities.[8] Under the rule of the company there was no *trias politica* (separation of powers) as executive, legislative and judicial functions were exercised solely by it.

---

[6] Mongolo T *Corporate Law and Corporate Governance,* p 3
[7] Blackman MS *The Fiduciary Doctrine and Its Application to Directors of Companies* (PhD thesis), p 244
[8] Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution,* p 11

The decline of the Dutch Republic during the eighteenth century saw a decline of its trading companies. In 1794, the once rich and powerful VOC had to declare that it was insolvent. Its charter was cancelled in 1795. [9] The demise of the VOC coincided with the occupation of the Cape by the British Empire in 1795.

3. Evolution of South African Law under the British Rule

Except for a brief period between 1803 and 1806, British rule lasted from 1795 until 1910. The British government retained Roman-Dutch law as the common law in South Africa, and this was affirmed in the First and Second Charters of Justice of 1827 and 1832 respectively. From the Cape, the Roman-Dutch law spread to the Transvaal, Orange Free State and Natal. Despite the retention of Roman-Dutch law, there was a general tendency to receive English law and institutions.[10]

The first company legislation adopted by the Cape was the Joint Stock Companies' Limited Liability Act, 1861,[11] which was based on the English Joint Stock Companies Act of 1844 and the Limited Liability Act of 1855. The Companies Act of 1892,[12] which regulated company law in the Cape until it was repealed by the Companies Act of 1926,[13] took en bloc the provisions of its English counterpart which were in force in 1890. The early Cape company statutes set the pattern for the Boer Republics and Natal.[14]However, many judges in the Cape kept Roman-Dutch law alive.[15]

In the Transvaal, the Volksraad in 1849 confirmed in article 31 of its Thirty-three Articles that Roman-Dutch law was the basis of the law

---

[9] Hahlo and Kahn *The South African Legal System and its Background,* p 541
[10] Ibid p 461
[11] Act No 23 of 1861
[12] Act No 25 of 1892
[13] Act No 46 of 1926
[14] Hahlo and Kahn *The South African Legal System and its Background,* p 561
[15] Ibid p 562

of the Republic in so far as it was not in conflict with legislation.[16] In the Orange Free State, the 1854 Grondwet provided in article 57 that, in the absence of legislation by the Volksraad, Roman-Dutch law was the basic law of the state. The courts in the Transvaal and Orange Free State did not consider themselves strictly bound to follow Roman-Dutch writers, but freely referred to and followed continental writers, English law, Scottish law, and even American writers. Moreover, Cape cases were referred to and followed in many judgments. The result was that both in the Transvaal and Orange Free State it was not the pure Roman-Dutch law of jurists such as Grotius and Voet which reigned supreme.[17]

In regard to company legislation, a similar process of borrowing took place. In the Transvaal, the Transvaal Law No 5 of 1874 followed very closely the Cape Act, No 23 of 1861. Similarly in 1909, the Transvaal enacted the Transvaal Companies Act of 1909 which was a copy of the British Consolidated Act of 1908, with few changes and additions to suit local conditions.[18]

Early company legislation in the Orange Free State, though allowing for limited liability, was less sophisticated until Law No 2 of 1892 and Chapter 100 of the Law Book were promulgated, which followed the English Acts.[19]

After the annexation of the Transvaal by the British, the Administration of Justice Proclamation of 1902 stipulated that 'except in so far as it is modified by legislative enactments Roman-Dutch law shall be the law of this Colony'.[20] Similarly with the annexation of the Orange Free State, the Laws Settlement and Interpretation Ordinance of 1902

---

[16] Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution,* p 21
[17] Ibid p 577
[18] Wille and Millin *Mercantile Law of South Africa,* p 226
[19] Ibid p 32
[20] Ibid p 220

and the General Law Amendment Ordinance of 1902 of the Orange Free State stipulated that 'Roman-Dutch law shall be the common law of the Colony in so far as it has been introduced into, and is applicable to South Africa'.[21]

In Natal, Ordinance No 12 of 1845 enacted that 'the system, code or body of law commonly called Roman-Dutch law, as the same has been and is accepted, and administered by the legal tribunals of the Colony of the Cape of Good Hope, shall be established as the law, for the time being of the District of Natal'. [22]Natal was in sentiment and composition the most English of the colonies in South Africa, and imported many English rules of law, both indirectly through the Cape and directly from England. Its company law, the Joint Stock Company's Liability Law 10 of 1864, however, followed very closely the Joint Stock Company's Liability Act of 1861 of the Cape.[23]

The focus of this chapter is on the common law fiduciary duty of company directors to avoid conflict of interests, in particular the duty to avoid self-dealing and to disclose interests in contracts with the company. Subsequent chapters deal with the impact of the various Companies Acts on this duty.

4. The Origins of Directors' Fiduciary Duties

In common law, directors are fiduciaries who stand in a fiduciary relationship to the company. In the seminal *Robinson case,* Innes CJ defines a fiduciary relationship thus: 'Where one man stands to another in a position of confidence involving a duty to protect the interest of that other…'[24] This relationship imposes an obligation on directors to act in good faith towards the company, to exercise their powers for its benefit

[21] Ibid p 221
[22] Ibid p 224
[23] Ibid p 225
[24] *Robinson v Randfontein Estate Gold Mining Co* 1921 AD 177

and to avoid a conflict or possible conflict between their own interests and their duty to the company.[25]

Two characteristics are therefore required to prove the existence of a fiduciary relationship. In the first instance, the fiduciary must have authority and scope to exercise discretion or power. Secondly, the fiduciary must be able to unilaterally exercise that power so as to affect the interest of the beneficiary in a legal and practical sense.[26]

The fiduciary relationship arises from the purpose for which a director is entrusted with his office. He and his co-directors are entrusted with powers to manage the affairs of the company. It seeks to ensure that those powers are exercised only for the benefit of the company as a whole, and never for personal gain. The purpose of this principle is articulated by Innes CJ in *Robinson* as follows:

> 'It prevents an agent from properly entering into any transaction which would cause his interest and his duty to clash. If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profits belong not to him, but to his principal'.[27]

The fiduciary duties of directors primarily protect the company and its shareholder. But they also protect the public interest, which is served by the integrity with which companies are conducted.

---

[25] Williams *Concise Corporate Law,* p 85
[26] *Robinson v Randfontein Estate Gold Mining Co* 1921 AD 177
[27] Ibid p 178

Although our courts have for the most part relied on English law when developing our common law on fiduciary duties of directors, the doctrine also has Roman-Dutch law origins.[28]

5. The Basis of Directors' Fiduciary Duties in Roman-Dutch Law

According to Blackman, in Roman-Dutch law the term 'fiduciary duty' is frequently used in connection with the administration of one person's affairs by another person. The manner in which it is used can be seen in the judgement of Innes CJ in *Robinson* where he says:

> 'The principle underlies an extensive field of legal relationships. A guardian to his ward, a solicitor to his client, an agent to his principal affords examples of persons occupying such positions. As pointed out in *Aberdeen Company v Blaikie Bros*, the doctrine is to be found in civil law (D18.1. 34.7.) and must of necessity form part of every civilised system of jurisprudence'.[29]

Blackman notes that of interest in connection with the fiduciary duties of directors are the rules prohibiting a tutor from concluding transactions with his pupil unless they are concluded with the consent of co-tutors or at a public auction. The existence of these rules is proof that Roman-Dutch law acted on similar considerations as the courts of Chancery.[30]

Referring to a statement by Voet about a sale entered into between a tutor and his pupil, Solomon JA said: '…an agent is put on the same footing as a tutor, the reason, no doubt being that each of them stands in a fiduciary relation, the former to his principal, and the latter to his

---

[28] Blackman MS *The Fiduciary Doctrine and Its Application to Directors of Companies (PhD Thesis),* p 245
[29] *Robinson v Randfontein Estate Gold Mining Co* 1921 AD 178
[30] Blackman MS *Fiduciary Doctrine and Its Application to Directors of Companies (PhD Thesis),* p 338

pupil'.[31] Thus the rule prohibiting a tutor from transacting with his pupil was extended by analogy to all those administering the affairs of others. This process of extending fiduciary obligations by analogy is similar to the processes which took place in English law, in which the fiduciary duties of trustees were extended by analogy to agents and, subsequently, to directors of companies.[32]

The fiduciary duties regarding the administration of affairs of others serve, among others, three functions which are similar to those found in equity. They prohibit self-dealing, require disclosure of interests in transactions with the beneficiary and render voidable such transaction at the election of the beneficiary. The effect of these fiduciary duties in Roman-Dutch law was to:

- hold an administrator accountable for any profit should he, without his beneficiary's prior consent, advance his own interest at the expense of the beneficiary;
- require the administrator to deal openly and in good faith with his beneficiary, should he wish to transact with him, by disclosing any relevant information concerning the transaction which he had acquired in his capacity as a fiduciary; and
- render voidable transactions entered into by the fiduciary on behalf of his beneficiary in which he had a personal interest.

The consequences of a breach of a fiduciary duty applied also to transactions entered into by the fiduciary with a third party who was

[31] *Hargreaves v* Andrews (1915) AD 522
[32] *Robinson v Randfontein Estate Gold Mining Co* 1921 AD 289

aware at the time of the transaction of the fiduciary's interest in the transaction.[33]

These rules were applied by our courts in a number of cases from the middle of the nineteenth century to the turn of the twentieth century.

One of the early cases which dealt with agents who had personal interests in a transaction with their principal was *Forbes, Still & Co v Sutherland.*[34] In this case two agents undertook to sell certain coal for the plaintiff on a commission basis. They approached and agreed with the defendant that they would become joint buyers with him of the coal. The defendant knew that the agents were acting on behalf of the plaintiff. In his judgement, Bell J said: 'When a commissioned agent has property entrusted to his care, he is bound to give his principal every benefit of his skill and information in regard to its disposal, to hold himself entirely aloof from any advantage other than the commission.'[35] In his judgment, he relied on *Story's Equity Jurisprudence*, an American writer. He further states that 'the same doctrine is found in Voet'.[36] In a concurring judgment, Watermeyer J, relying exclusively on Roman-Dutch authorities, states the rule as follows:

> 'The relation of principal and factor (agent) is of a fiduciary nature, and demands the utmost protection of the court. It is a clear rule of modern law, adopted from the civil law, that an agent for the purpose of sale cannot purchase his principal's goods – an agent cannot for the purchase himself be the seller…The principle is not alone in the civil law that the tutor, procurator, or factor cannot

---

[33] Blackman MS *Fiduciary Doctrine and Its Application to Directors of Companies* (PhD Thesis), p. 361
[34] (1856) 2 Searle 231
[35] *Forbes, Still & Co v Sutherland*(1856) (C) 2 Searle 236
[36] Ibid p 236

> purchase directly; but it is *neque per se neque per interpositam personam*; neither directly or indirectly.'[37]

The rule articulated in *Forbes, Still & Co* was accepted and applied, thirty years later, by the Appellate Division in *Hargreaves v Anderson.*[38] In *Hargreaves,* the plaintiff, Anderson, employed the defendant as his agent to sell a certain hotel property. The property was to be sold on terms agreed upon between the principal and the agent. The defendant sold the property, ostensibly to a certain Barlow, but he had already agreed with Barlow that the property would be sold to a joint partnership in which the defendant would take a half share in it. Thereafter, the principal adopted the sale but refused to pay the commission to the agent on the ground that the agent had acted both as seller and buyer at the same time or had a personal interest in the purchase which he had not disclosed. The court, as per Solomon JA, re-stated the rule in *Forbes, Still & Co* in the following terms:

> 'Now it is clear law, both in this country and in England, that an agent, employed to sell, cannot legally purchase the property entrusted to him for sale, and that his principal, on discovery of the fact, is entitled to repudiate the sale. This is a settled rule which is quite independent of fraud, or of the fact that the agent has gained any advantage by the transaction. Nor does it make any difference whether the agent is the sole purchaser or is jointly interested with others in the purchase. The rule is, however, subject to this qualification that, if the seller with full knowledge of the facts elects to adopt the sale to the agent, it then becomes binding upon him. It is scarcely necessary to quote authorities in support of these well established principles…'[39]

---

[37] Ibid p 238 - 239
[38] *Hargreaves v Andrews* (1915) AD 521
[39] *Ibid*

Furthermore, the *Forbes, Still & Co* case recognised into our law the exception admitted in Roman-Dutch law that a purchase by tutor which was made openly and in good faith with either the consent of the co-tutor or at a public action was valid. The exception was referred to and applied in *Osry v Hirsch, Loubser & Co*[40], where the principal gave feathers to an agent. The agent purchased the feathers for himself at an auction and thereafter resold them at a profit. The agent did not inform the principal that he was the purchaser of the goods at the auction. The principal discovered that subsequently. The agent put up the defence that his conduct fell within one of the exceptions granted in Roman-Dutch law that a tutor (by extension an agent) is at liberty to buy his pupil's property at an auction in the open market.

Kotze JP noted that "…the passage generally relied on in support of the rule that an agent, instructed to sell the property of his principal, cannot himself become the purchaser thereof is in Digest, 18. 1. 34. 7, where the jurist Paulus observed "A tutor is not able to buy the property of his pupil. The same principle should be extended to similar instances, that is to say curators, procurators, and those who administer the affairs of others."…Ulpian states that, although a tutor cannot, as such, be the seller and purchaser at the same time, he may in good faith purchase his pupil's property with the consent of his co-tutor…Ulpian adds that, if a creditor sells the pupil's property, the tutor can equally in good faith become a purchaser.'[41]

6. The Basis of Directors' Fiduciary Duties in English Law

Since the turn of the last century, English law has come to play a dominant role in our company law, including on the fiduciary duties of directors. The rules of equity pertaining to fiduciary duties have been

[40] *Osry v Hirsch, Loubser & Co*1922 (CPD) 548
[41] Ibid p 559

largely accepted into our law, and to the extent that they are not in conflict or inconsistent with our law. It has generally been accepted that directors owe a fiduciary duty to the company, however, there was at the beginning uncertainty regarding the exact basis of these duties. The courts of equity sought to base them on the position of director as either trustee or agent.[42]

The director stands, from the point of view of the company, in the position of one person administering the affairs of another. As we have seen in the case of Roman-Dutch law, the rules relating to such persons were developed and extended by a process of analogy. The rules formulated for one species of administrator were adapted and applied to others. In English law a similar process took place.

In general, the directors of a company have two functions in law. They administer the company's assets and represent it in transactions with third parties. As a result, the English courts have used the analogies of trustee and agent.[43] These analogies are examined below.

6.1 The Director as Trustee

The rules of courts of equity required that persons such as directors be placed in a relationship of confidence to the company; that is as a type of trustee. In 1742, the directors of a Charitable Corporation were found guilty of breaches of trust, for which they had to account to their corporation.[44] It has since been often stated that directors are trustees and that the nature of their duties can be explained on that basis.

There are various explanations for how this analogy arose. One explanation has been that before 1844 most of the joint-stock companies in England were unincorporated and therefore dependent for

---

[42] Havenga M *Fiduciary Duties of Directors (PhD Thesis), p 11*
[43] Ibid p 12
[44] Ibid p 11

the validity their acts on a deed of settlement which vested the property of the company in trustees. The deed of settlement was merely an enlarged partnership, with the partnership property vested in trustees. Thus, frequently the directors were trustees. It was therefore not unnatural that the courts extended the description of trustees to directors by analogy. In the *In re: Lands Allotment Co*[45]case the court explained the analogy as follows:

> 'Although directors are not, properly speaking, trustees, yet they have been considered and treated as trustees of money which comes to their hands, or which is actually under their control, and ever since joint-stock companies were invented directors have been held liable to make good monies which they have misapplied, upon the same footing as if they were trustees…'

In dealing with the duties of directors, the court in the *In re: City Equitable Fire Insurance Co Ltd*[46] case made the following remarks:

> '…It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company the statement is true enough. But if the statement is meant to be an indication by way of analogy of what those duties are, it appears wholly misleading. I can see but little resemblance between the duties of a director and the duties of a trustee of a will or of a marriage settlement.'

It was believed that the property of a corporation was held on trust by the corporation for its members. Since it was the directors who managed the property, they would, in English law, be held liable as constructive trustees if they misapplied the property. It is important to note that in

---

[45] Ibid p 12
[46] Hahlo's *South African Company Law: Through Cases – A Source Book*, p 379

South African law the doctrine of a constructive trust has never been recognised.

Another explanation for the use of the trust analogy was that the courts of equity, in general, applied the description of trustee to anyone occupying a fiduciary position. The terminology gradually became standard in cases where any fiduciary obligation was considered. Since the flexibility of the principles of fiduciary obligation had proved adequate to deal with problems that have arisen in company law, the court found it convenient to find the liability of company directors on the principles of trust law.

The influence of the English principles of the law of trust and equity is apparent in early South African cases dealing with company directors. One of these cases is *African Claim and Land* Co *Ltd v Landerman*[47] where Innes CJ said the following:

> '(T)he duties and liabilities of an agent to his principal have been very fully investigated by the English courts, upon principles recognised by our law. And the position of a director who sells his own property to his company without disclosing his interest therein has been held liable by decisions of the courts, the results of which we are fully justified in adopting.'

This legal position on directors was endorsed in *Robinson v Randfontein Estate Gold Mining Co Ltd*[48] when Innes CJ said 'The doctrine of the English decisions was adopted by the Transvaal court in *African Claim and Land Co* as being in accordance with principles of our law; and I think we should also adopt it.'

A company director is evidently in a position of trust. He is responsible for the administration of the company's assets; similar to a

[47] *African Claims and Land Co Ltd* (1905) TS 505
[48] *Robinson v Randfontein Estate G.M. Co Ltd* (1921) AD 180

trustee who administers trust assets. There are many similarities between company directors and trustees. One of them is that they are both in control of a fund in which others are beneficially interested. A trustee must be honest and adhere strictly to the terms of the trust instrument. For the director, company law requires him to be also honest and act within the terms of his authority and the company's constitution.

There are, however, clear differences between directors and trustees. An important distinction is that trustees are required to act unanimously, whilst a board of directors act by a quorum and the vote of a majority.

Another difference is that directors are allowed a much greater degree of discretion and to take more risks with company property than are trustees who are entrusted with trust property. Courts are not willing to intervene in the exercise of directors' discretion as business persons. They are not concerned with the commercial or financial wisdom of the decisions taken by directors of companies. [49] In the case of trusts, trustees are required to exercise caution and avoid risks.

Finally, the beneficiary on the trust-analogy is, in the case of directors, the company itself as a separate legal entity. In a trust, the beneficiaries are persons, or a person, and the trust is not a separate legal entity.

In conclusion, it may be inferred from the above that the designation of directors as trustees is inappropriate.[50] Fiduciary obligations are not imposed on directors because they are trustees but

---

[49] *Levin v Felt & Tweeds Ltd* (1951) 2 SA 415

[50] Beuthin RC & SM Luiz *Basic Company Law,* p 218; Blackman *Fiduciary Doctrine and its application to Directors of Companies* (PhD thesis), p 275

because they occupy an office similar to that of trustees, and they are relied upon to administer property belonging to others.

6.2 The Director as Agent

The law, for some purposes, treats the directors as if they are agents. A company, as a separate legal personality, is unable to act on its own accord. It must act through natural persons acting on its behalf. [51] This position of directors was stated in the English case of *Ferguson v Wilson*[52] thus:

> 'What is the position of directors of a public company? They are mere agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable those directors would be liable; where the liability would attach to the principal and the principal only, the liability is the liability of the company.'

Directors represent the company in transaction with third parties. Their acts are acts of the company. Their power to act on behalf of the company arises from and is limited by the authority conferred on them by the articles of association. When they contract on behalf of the company, they do not incur any liability unless they act beyond their powers or expressly assume liability. The relationship of the company and its directors is in many ways regulated by the law of agency. For this reason, directors are frequently referred to as agents of the company.[53]

---

[51] Celliers & Benade *Corporate Law,* p 3
[52] Hahlo's *South African Company law: Through the Cases – A Source Book,* p 367
[53] *Robinson v Randfontein Estate G.M Co Ltd*, (1921) AD 216

The idea of directors as agents was popular until the beginning of the twentieth century. Before then, the directors were subject to the control of the general meeting of the company because this body was seen as the company.[54] At the turn of that century, the principle emerged that if the powers of management were vested in the directors then they alone could exercise those powers. It became common to entrust the management of the company's affairs to the directors. The general meeting retained the right to remove directors at any time and to amend the articles. However, it may not direct or control the board in its management of the company's affairs, nor overrule any decision which the board may have made in the conduct of the company's affairs.[55]

However, since the company is itself incapable of acting and cannot confer authority on someone else to act on its behalf, its directors cannot strictly speaking be regarded as agents. Directors cannot act as a principal and at the same time also grant to themselves the authority to act as agents. Their authority as such is derived from the articles, not from any appointment as agents by the company.

Furthermore, each director does not individually have the authority to bind the company unless he is specifically delegated to do so.[56] But a director, as an individual, is subject to fiduciary duties in relation to the company. In addition, the powers of directors are much wider than those usually conferred on agents and are often subject to little control by their principal. Unlike agents, directors are sometimes subject to criminal and civil liability for failing to comply with statutory requirements.[57]

---

[54] Beuthin RC "The Range of Interest" (1969) SALJ p 156
[55] Ibid p. 158
[56] *Wolpert v Uitzigt (Pty) Ltd (*1961) 2 SA 257 (W) 262
[57] Williams RC *Concise Corporate Law,* p 82 - 83

It is evident from the above that directors of companies are more than mere agents of their companies. Their position is *sui generis.*[58]

7. The Duty to Avoid Conflicts of Interest

Directors have a duty not to place themselves in a position where their duty to act in the best interests of the company conflicts, or may possibly conflict, with their personal interests.[59] This rule was stated by Innes CJ in *Robinson.*[60] He was following the ninetieth century English case of *Aberdeen v Blaikie.*[61] An obvious example of a conflict of interest situation is where a director transacts with his company, ie as director sells his personal property to the company or buys property from the company. The general principle is that where a company enters into a contract in which a director has a personal interest the contract is not void but voidable at the election of the company. There are two important exceptions to this general rule. The first exception is that a director who breached his duty to avoid a conflict of interests may have it ratified by an ordinary resolution passed by the general meeting after full disclosure.[62] The second exception is that the company's articles may contain a clause which allows directors to have interests in contracts entered into by the company. Where the articles make for such a provision, they are effectively modifying, in advance, the directors' fiduciary duty.

7.1 Prohibition against Self-dealing

The duty to avoid self-dealing applies to transactions entered into by the director on behalf of the company, whether he enters into such

---

[58] *Robinson v Randfontein Estate GM Ltd (1921) AD 178*
[59] *Ibid p 79*
[60] Ibid p 180
[61] *Aberdeen Railway v Blaikie (*1854) 1 MaqL 461
[62] *Cohen v Directors of Colliers Ltd* (1906) TS 197

transactions with himself or with a third party, and where he has a personal interest in its outcome. A director may therefore not act on behalf of the company in a matter in which he has an interest that conflicts or may possibly conflict with his duty to the company. This rule against self-dealing is applied by the courts in an inflexible and harsh manner in order to prevent fraud being perpetrated against companies.[63]

In *African Claims and Land Co* the issue was whether the sale by the director of his own property to the company was a breach of his fiduciary duty.[64]The articles of the company required a director to abstain from voting on contracts of the company in which he has an interest and to disclose the nature of his interest at the meeting at which the contract was determined. The articles did not require the defended, as a director, not to prospect in minerals in his personal capacity, which was the field in which the company operated. In addition, they did not require the director to devote the whole of his time to the business of the company, which is usually the case with managing directors or chief executive officers.

A third party bought 200 claims and gave a half share of those claims to the employee of the company. The employee, in turn, sold to the director a half share of his interest; which gave the director a 25 per cent interest in the 200 claim. Subsequently, the third party reached an agreement with the company to sell the 200 claims. The director was aware of these negotiations and the agreement reached with his company. However, he was not at the meeting which ratified the agreement. It was in the process of contracting with the third party that the company discovered that the director had an interest in the contract which he did not disclose to the company. The company took the

---

[63] *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T) p 66
[64] *African Claims and Land Co* (1906) TS 506

position that it was not possible to rescind the contract but it wanted to claim any profits made by the director on the transaction. Regarding the fact that the defendant was a director and whether the facts render him liable the court said:

> 'An ordinary director is a mandatory, entrusted, in conjunction with his co-directors, with the management of the company' affairs; bound to exercise the utmost good faith in transacting with them; to give the company the benefit of his judgement and experience; and to render that amount of diligence which an ordinary, prudent and careful man would display under the circumstances. These things are expected of a director when acting as the company's agent. But he is not always acting so. Save when a special or general authority is given to him to represent the company, he only acts in the management of its affairs jointly with his co-directors.'[65]

The court held that at the time that the director acquired the property he was not in a fiduciary relation with the company. He was not legally obliged to obtain the property for the company. But it was a breach of duty to sell to his company without making a full disclosure of his interest in the claims.

The principle enunciated with regard to directors in *African Claims and Land Co* was followed in *Robinson,* which is a seminal case in South African case law on the fiduciary duties of directors.[66] In *Robinson,* the issue for decision was similar to the one in *African Claims and Land Co.* It was whether the director was in a fiduciary position to the company when he both acquired and later sold property to the company, and if he was, whether he could be made to account for profits he made from the

---

[65] *Ibid p* 504
[66] (1921) AD 168

property. In order to succeed in a claim for profit, something more than a non-disclosure is required. The director must have stood as a fiduciary both at the time of purchase of the property and at the time of its resale to the company.

The director had bought property which he later sold to the company at a profit. The director caused the company to create a trust whose sole purpose was to acquire the property. The court found that the trust was created by the director solely as a device to hide his dealing with the company. The director did not have a formally expressed authority to represent the company. However, after the director had bought out his former co-promoters of the company and had it restructured, the court found that he had assumed a de facto control of the company and had an implied mandate to represent and protect the interest of the company during the negotiations and acquisition of the property. He had assumed, with the acquiescence of the other directors, the functions of the board in respect of the acquisition of the property. Therefore, he stood in a fiduciary relationship to the company during the acquisition of the property and at the time he sold it to the company.

Solomon JA, in his concurring judgement, referred with approval to the *Transvaal Cold Storage Co Ltd v Palmer*[67]and the *African Claims and Lands Co* cases in which the law was laid down. The principal in such circumstances was entitled to be put in the position he would have been in had the agent properly discharged his duty. He was liable to restore to the company the profit that he made out of the transaction.

7.2 Disclosure of Interests in Contracts with the Company

There is, however, an exception to the rule prohibiting self-dealing. The exception permits a director to enter into a contract in which he has an

[67](1904) TS 4

interest, but only if he obtains the consent of the company in a general meeting after making full disclosure of the nature and extent interest of his interest. The director must in those circumstances, in relation to the contract, entirely sever his relationship with the company and deal with it at arm's-length.

This was held to be the rule in *Magnus Diamond Mining Syndicate v MacDonald and Hawthorne.*[68] In this case the directors, who were also managers, were sued by the company on the grounds that they had appropriated information and property for themselves instead of the company. It was alleged that they acquired the property in breach of their duty as directors and managers of the company. In the negotiations for the acquisition of the property they represented to the sellers that they were acting on behalf of the company. And as managers and directors they were subject to all the responsibilities and liabilities of directors in similar conditions. Maasdorp CJ said:

> 'The case therefore resolved itself into the question as to what were the duties of the defendants, as such managers and directors. Now there can be no doubt that one of their first duties as directors, to use the words of Lindley on *Companies* (6th ed. Vol. 1, p.510) was to "so conduct the business of the company, as to obtain for the benefit of the shareholders the greatest advantages that could be obtained consistently with the trust reposed upon them by the shareholders," and do therefore their utmost to obtain the Welgegund property upon the most favourable terms possible under the existing circumstances.'[69]

The court found that instead of seeking to secure the property for their company, the directors sought to acquire it for themselves. It stated that

---

[68] (1909) OFD 679
[69] *Magnus Diamond Mining Syndicate v MacDonald and Hawthorne (* 1909) OFD 75

the general principle of our law was that a person, who occupies a fiduciary position, was bound by law to act in good faith towards the company in whose service he was employed as a manager or director. The court pointed out that this rule has been elucidated by many weighty and valuable decisions in South African courts as well as in English courts. It said that one of the first rules laid down by our courts was that a director may not in any matter connected with the company place himself in a position where his interest and his duty conflict. The court referred, approvingly, to the judgment of Lord Cranworth in *Aberdeen Railway Co v Blaikie Bros*[70], which said:

> '(Director) he will not be allowed to enter into engagements, in which he has or can have a personal interest conflicting, which may possibly conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.'

The exception to the rule against self-dealing insists that if a director desires not to be bound by this rule, he must make a full disclosure of the exact nature and extent of his interest to the company, and that the company must consent to him engaging himself in a matter in which the company has an interest. This exception was succinctly stated by Innes CJ in *Robinson* thus:

> *"*There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent. In such a case the special relationship *quoad* that transaction falls away and the parties deal with at arm's-length with one another."[71]

---

[70] Hahlo's *South African Company Law: Through the Cases,* p 406
[71] *Robinson v Randfontein Estate Gold Mining Co Ltd* (1921) AD 178

Alternatively, the articles may relax the rules of disclosure, but they cannot waive the duty of directors to make a full disclosure to the company. The articles may permit disclosure to be made to the other directors at the level of the board. In order to obtain the protection of any provision in the articles, the board must be independent. In *Robinson* the defendant had claimed that he had disclosed his interest in the property which the company had sought to acquire to the board. The court, as per Innes CJ, said that '(a) disclosure to a board of directors entirely subservient to the defendant is not a disclosure such as would be necessary under article 74 in order to validate a sale of property made by him to it.'[72] Furthermore, the director must strictly comply with the provisions of the articles on disclosure.

Failure to make a full disclosure in terms of the articles render the transaction voidable at the election of the company as against the director or third party who had knowledge of the breach of duty by the director.

In this regard, there was a difference between the Transvaal and the Cape. The clause generally inserted in the articles, and which was adopted in Table A, clause 95, of the Transvaal Act, allowed a director to make a contract with his company provided that he fully disclosed to the board of directors his interest in the contract, but was not permitted to vote on the matter. In the Cape, Table A, clause 56 provided that a director must vacate his office if he participates in the profits of any contract with the company, unless he was merely a member of a company contracting with the company of which he was a director. In the latter case, he was prohibited from voting on the contract.[73]

---

[72] *Ibid p* 216
[73] Wille and Millin *Mercantile Law of South Africa* p 325

8. Conclusion

The existence of fiduciary duties for directors of companies has been recognised for centuries in Roman-Dutch law and English law, and for over a century in South African law.

In general, it is recognised that a director stands in a fiduciary relationship to the company. In order to determine the content of his obligation, his position was often compared to that of other fiduciaries. The most frequently used analogies were those of agent or trustee, but, legally, directors are neither trustees nor agents of the company.

In South African law a director is regarded as a creature of statute, who occupies a position which is peculiar to his office. It has been on that basis that a director's liability for breach of trust is seen as *sui generis*. In *Robinson,* Solomon JA reiterated that 'the action indeed is, as the Judges in the court below held, one that is *sui generis*.'[74]

[74] *(1921) AD 242*

Chapter 3

Directors' Fiduciary Duties after the 1926 Act

1. Introduction

In 1923, the South African government introduced a comprehensive Companies Bill in the Union Parliament.[75] When introducing the Bill, the then Minister of Justice informed Parliament that 'the Bill is largely based on the English Act and upon the Transvaal Act of 1909, which in itself was based on the English Act.'[76] The English Act referred to by the Minister was the Companies Act passed by the British Parliament in 1908.[77] The reason given by the Minister for basing the legislation on the Transvaal Act was that it was the most modern legislation on the subject in South Africa.

The Parliament passed the Companies Bill in 1926, which became the Companies Act, No. 46 of 1926, which for the first time provided a uniform company law throughout the Union. At the time of enactment, the Act did not modify the common law with regard to the fiduciary duties of directors, including with respect to directors contracting with the company.

In the year the Act was passed, the British Board of Trade appointed a committee to consider and report on what amendments were necessary in the British Companies Act of 1908. The recommendations of the committee led to the passing of the Companies Act of 1929 by the British Parliament. The developments in company activity in the early years of the twentieth century were so rapid that by 1926 the Transvaal Act of 1909 was already out of date.[78]

---

[75] Wille and Millin *Mercantile of South Africa,* p 566
[76] Debates of the House of Assembly, Third Session, Fifth Parliament, Vol 6, p 973
[77] *Report of the Company Law Commission 1935 – 1936*, p 6
[78] *Final Report of the Company Law Amendment Commission 1947 1948*, p 9

The Companies Act was, for the first time, substantially amended by the Companies Amendment Act, No 23 of 1939 (the 1939 Act). Further substantial amendments were made to the Act by the Companies Amendment Act, No 46 of 1952 (the 1952 Act).

In this chapter, my treatment of the subject of the principal Act of 1926 will be referred to as the Act and the references given are to the sections of the Act as amended.

2. Reform of the common law fiduciary duties by the 1939 Act

On 6 August 1935, the Governor-General of South Africa appointed a Commission on Company Law to:

> '(a) consider and report whether any, and if so what, amendments to the Companies Act, No 46 of 1926, are desirable in view of the altered conditions and financial practices since that date; and
>
> (b) draft the necessary legislation to give effect to any recommendations made.'

The Commission released its report in 1936. The report, *Report of the Company Law Commission 1935* – 1936, was accompanied by a draft legislation.

In its report, the Commission highlighted the issue of conflict of interest with regard to directors' interests in contracts with the company, which it suggested required the intervention of the Legislature. The Commission was of the view that a director's action in making a contract with the company was, as a rule, fraught with very serious consequences. This envisaged a modification of the common law position on directors contracting with the company.

The common law required directors to exercise their powers in good faith and for the benefit of the company only, and to avoid a conflict between their own interests and those of the company. A

director could not be relieved of this duty in the articles or in any other way. The company and its members found their best protection in the fiduciary duties imposed upon directors.[79]

In relation to the duty to avoid a conflict of interests, a) a director could not obtain any advantage from his office other than that to which he was entitled, ie by way of remuneration, and b) as a rule he could only contract with the company with the approval of the company in a general meeting or be permitted by the articles to do so.[80] The latter point was illustrated in *Gundelfinger v African Textile Manufactures Ltd and Others.*[81] It was alleged in this case that the defendants as the directors of African Textiles voted at a meeting of board of directors for their own remuneration. Subsequently, the plaintiff requested the company to convene a general meeting of the shareholders at which he wanted to submit a resolution objecting to the payment and to request the company to oblige the directors to return the monies already paid to them. The general meeting of the shareholder rejected the plaintiff's resolution, and instead adopted a resolution submitted by the impugned directors asking the meeting to approve, ratify and confirm the remuneration agreement made by the board. In this regard, the court said that it was an elementary principle of company law that, apart from an explicit power in the articles of association, a director could vote for the adoption of a contract on a matter in which he was an interested party.[82] However, the court held that the contract was not void, but was voidable at the election of the company.[83]

The 1939 Act did not modify these rigid and inflexible strictures of the common law on fiduciary duties of directors, except with regard to

---

[79] Blackman M, *The Fiduciary Doctrine and its Application to Directors of Companies* (PhD thesis), p 145
[80] S v De Jager 1965 (2) (A) SA 616
[81] *Gundelfinger v African Textile Manufacturers Ltd and Others* 1939 AD 314
[82] Ibid p 6
[83] Ibid p 9

whom to disclose the interest in a contract. It explicitly required a conflicted director to disclose his interest in a contract with the company to a meeting of other directors - instead of the shareholders as had been the case in common law.

Furthermore, the Commission observed that there was a tendency in the articles to relieve directors of liability for their fiduciary duties to the company. It proposed that a provision be made in legislation voiding such exemptions. The legislative intervention in this regard was section *70sext* which voided any provision in the articles or in any contract with a company exempting any director or manager or officer from any liability which would attach to such director for negligence, default or breach of duty or trust. The recommendation of the Commission in this regard followed a similar provision, namely section 152 of the British Companies Act of 1929.

2.1 Director's Interests in Contracts with the Company

The Commission reported that it heard evidence that there were many instances in which memoranda or articles of companies contained provisions which expressly permitted a director to be interested in a contract with the company, and mostly importantly, purport to relieve the director from any obligation to disclose any such interest or to account in any way to the company.[84] To aggravate the situation, the memoranda or articles would further disentitle any member of the company from impugning the conduct of the director in regard to such a contract.[85] The Commission took the view that it would not be practical or desirable to absolutely prohibit a director from being interested in a contract or proposed contract with the company, but there should be explicit provisions in legislation prohibiting any such freedom from

[84] Report of the Company Law Commission 1935 -1936, p 24
[85] Ibid p 24

disclosure by memoranda or articles.[86] It stated that such a disclosure of interests should be made to a meeting of directors.[87]

The proposed changes were effected under section 70*quin* of the Act. Subsection (1) imposed a general duty on a director of a company who was in anyway, directly or indirectly, interested in a contract or proposed contract with the company to declare the nature and extent of his interests to a meeting of the directors of the company as prescribed by the section. The ambit and scope of the nature and extent of the interest to be disclosed was dealt with in *S v Heller and Another.*[88] Trollip J said:

> 'According to the common law, section 70*quin* (1) of the Companies Act, and the articles of the companies concerned (exhs 201 to 205), a director must disclose the nature of his interest in any transaction with the company. That certainly includes revealing his identity in the transaction as vendor or otherwise. He must also disclose the fact and extent of his profit. According to the common law, material facts relating to the nature of his interest must ordinarily be disclosed, … Consequently, where the transaction is one of selling things to the company it would normally be the duty of the director to disclose the exact extent of the profit which he will make as a result of the transaction, as that would be a material fact in the above sense, especially if the actual value of the property was not readily or easily determinable. The director's duty of declaring 'nature of his interest' would therefore include making that disclosure in such a transaction.'

---

[86] Ibid p 24
[87] Ibid p 24
[88] 1964 (1) SA 524 W 537- 8

A director was therefore required to reveal or disclose the material facts relating to the nature of his interest in a transaction. The material facts included the following:

- the nature of his interest in any transaction with the company;
- his identity in the transaction, ie the capacity in which he was a party to the transaction, for example, whether he was the seller or purchaser;
- the fact and extent of the profit that the director would make; this could require disclosure of the purchase price of the goods sold to the company; and
- any commission that the director would receive as a result of the contract being concluded with the company.[89]

The word 'interest' was found to have a very wide meaning in *Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd and Another.*[90] The court defined 'interest' in business as follows:

> 'In my opinion "interest" means financial or pecuniary interest, the interest of a person who has some share or participation in either profits or losses, or in both the profits and losses of the business, or in the takings or sales of the business.'[91]

A director will therefore have an interest in a contract if he is a party to the contract, or has a pecuniary share or stake in the conclusion or outcome of the contract, or a claim upon anything in terms of the contract, or if he is concerned or affected in respect of any advantage or detriment flowing from the contract; in other words, if he has some

---

[89] Van Dosrsten J L, *Right, Powers and Duties of Directors,* p. 126
[90] 1962 (1) SA (A) 458
[91] Ibid p 589

share or participation in either the profits or losses resulting from the contract.

Subsection (2) stipulated that in the case of a proposed contract, the declaration must be made at the meeting of directors at which the question of entering into the contract was first taken into consideration or if the director only became interested after such meeting, then he had to make his declaration at the next meeting held after he became interested. In the case where the director became interested in a contract after it has been made, he had to declare his interest at the next meeting after his acquisition of an interest.

Subsection (3) provided that for purposes of complying with subsections (1) and (2) a general notice given to the directors of a company by a director to the effect that he was a member of a specified company or firm, as such, he was to be regarded as interested in any contract with that company or firm which may be entered into after the date of such notice, and that that notice was to be deemed as a sufficient declaration of interest to any contract made with that company or firm.

Furthermore, subsection (4) required that the notice convening the meeting where the contract or proposed contract in which the director, directly or indirectly, was interested was to be placed before the company for authorisation or confirmation had to include information on the nature and extent of the interest the director had in such a contract.

Lastly, subsection (5) stipulated that section *70quin* did not prejudice the operation of any rule of law which restricted directors of a company from being interested in contracts with the company. Its effect was that if the articles prohibited a director from contracting with the company and he failed to comply with them, the use of the disclosure

requirements of the 1939 Act would not be a defence for the director from being held liable in common law for breach of duty.

In *Rex v Milne and Erleigh*[92], the court was asked to decide whether the directors had a duty to disclose their interests in a proposed contract when a decision on the contract was not to be made at a meeting of directors. The accused had a controlling interest in the company and were its joint managing directors. The board gave them, through its articles, unlimited authority to deal in shares on behalf of the company and its group of companies at their own discretion. The contracts in which it was alleged that they were interested were never considered by a meeting of the board of directors and the question that arose was whether section *70quin* made it an offence for a director not disclose his interest in a contract which was not entered into on the authority of a resolution adopted at a meeting of the directors. The court held that it was clear that subsection (2) dealt with, among others, with the case where the question of entering into a proposed contract was taken into consideration at a meeting of directors. On the wording of the subsection, there was no obligation on a director to disclose his interest in a proposed contract unless the question of entering into that contract was to be taken into consideration at a meeting of directors.

In the view of the court the obligation to disclose arose only at the meeting of directors at which the question of entering into the contract was considered. For example, a director may be interested in a proposed contract and shortly afterwards a meeting of directors may be held at which the question of entering into the contract was not taken into consideration, in that case the court said there would be no obligation on the director concerned to disclose his interest. In other words, the

---

[92] 1951 (1) SA 401 (A)

obligation to disclose only arose at the meeting of directors at which the question of entering into the contract was considered.

As the section made no mention of contracts which did not require the authorisation of directors' meeting, the court said the following classes of contracts fell outside the ambit of the section:

- contracts concluded by company's officers;
- contracts concluded by a managing director or other directors who had been empowered by the board to enter into such contracts;
- contracts entered into by the authority of a written resolution signed by the directors in terms of any article authorising the passing of a resolution in that manner.

In the course of the judgement, the court pointed out that on its construction of section *70quin* the salutary provisions of the section could easily be evaded by unscrupulous directors when the articles empowered them to delegate to one of their own wide powers as a managing director to enter into contracts on behalf of the company or when the articles provided that a written resolution signed by the directors should be as effectual as if it had been passed at a meeting of directors.[93]

The loopholes identified by the court in *Milne and Erleigh* were closed by the revised wording of section *70quin,* which was proposed by the Company Law Amendment Enquiry Commission 1947 – 1948.

3. Reform of the common law fiduciary duties by the 1952 Act

The Companies Amendment Act (Act No 46 of 1952) (the 1952 Act), which came into effect on 1 January 1953, was the outcome of the recommendations of the Company Law Amendment Enquiry

[93] Suzman A *The South African Companies Act* p 28

Commission. The Commission was appointed by the Governor-General on 19 September 1947 with the following mandate:

> (1) To consider what major amendments were required in the law relating to the constitution, incorporation, registration, management, administration and winding-up of companies and other associations and matters incidental thereto, having regard in particular to:
>
> a. the requirements relating to the formation and the conduct of companies;
>
> b. the safeguards afforded for investors and the public interests;
>
> c. the recommendations of the Commission appointed by the Board of Trade in England on the 26th June, 1943, in order to consider; and
>
> d. report what major amendments were desirable in the English Companies Act, 1929, together with any legislation that has been drafted as a result of the said recommendations.
>
> (2) To submit a draft Bill for the purpose of giving effect to any recommendations that may be made for the amendment of the present law.[94]

The Commission submitted its final report in September 1948, which was accompanied by a draft Bill. In its report, the Commission recommended the adoption of many of the leading features of the English Act of 1947.[95] The terms of reference of the Commission were almost the same as those of the Cohen Committee appointed on 20 June

[94] *Final Report of the Company Law Amendment Enquiry Commission 1947 – 1948*, p 7
[95] Ibid p 8

1943 by the President of the Board of Trade in the United Kingdom, which was tasked to enquire on what changes were required to be made to the British Companies Act of 1929. The Committee appointed by the President of the British Board of Trade was referred to as the Cohen Committee and its report as the Cohen Report after its Chairman, Sir Lionel Leonard Cohen, at the time a Judge of the Chancery Division and later one of the Lord Justices of the Court of Appeal.[96]

The Commission was enjoined by its terms of reference to have regard to the recommendations of the Cohen Committee and to the resulting legislation in Britain. Consequently, the Commission was largely concerned with the question of how far these new provisions in the British Companies Act of 1947 could be usefully adopted in our legislation.

One of the observations made by the Cohen Report, with which the Commission agreed, was that company law as it existed was not adequate to the needs of the times. It found that the law was deficient in that it proceeded on the democratic principle that a company is subject to the control of its members. But, at that time already, capital had become so dispersed among a multitude of small shareholders that management was divorced from ownership and the control of shareholders had become illusory.[97] A key feature of the British Act of 1947 was that it went a long way towards remedying the state of affairs then existing.[98] It provided improved mechanism to enable shareholders to influence the management of their companies and to impose duties on directors to disclose information about their conduct in the company affairs, which in the past the law permitted them to withhold.

---

[96] Ibid p 8
[97] Ibid p 9
[98] Ibid p 9

Whilst the Commission recommended in its report the adoption of many of the leading features of the British Act of 1947, it did not by any means recommend everything in the Act as suitable to the conditions of South Africa.[99]

3.1 Directors' Interests in Contracts with the Company

The Commission reiterated that it was evident that a director's participation in a contract with the company was, as a rule, fraught with risks for the company. In the common law, there was at once a conflict of interests between a director's duty to the company and his private interests. If he made a profit, he forfeited it to the company.[100] These consequences do not follow, however, where the articles expressly provided for a director to contract with the company, but provided he fully disclosed his interest in the contract to the company. In terms of the 1939 Act, the disclosure had to be made to a meeting of directors; not to the shareholders of the company. The 1952 Act stipulated in great detail the disclosure requirements that had to be met by directors seeking to contract with the company.

Section *70quin* of the Act which had imposed a duty on directors to disclose to their boards their interests in contracts with the company was replaced by a new section.[101] It imposed a duty on a director who was in any way, directly or indirectly, interested in a contract or proposed contract with the company, to disclose the nature and extent of his interest at the meeting of the directors of the company.[102]

Firstly, the duty to disclose was imposed with regard to any contract entered into or proposed to be entered into:

---

[99] Ibid. p 10
[100] *Magnus Syndicate v Macdonald*, 1909 ORC 65; *Cohen v Directors of Rand Collieries* 1906 TS 197
[101] *Final Report of the Company Law Amendment Enquiry Commission, 1947 – 1948*, p 56
[102] Section 70quin (1)

- following a resolution taken or to be taken at a meeting of directors;

- following a written resolution signed or to be signed by the directors; or

- by a director or manager who, either by himself or with others, has been authorised by the board of directors to enter into the contract or a contract of that nature.

The declaration that was to be made by the director was to be made in the case of:

- a contract for which confirmation or authorisation was required at a directors' meeting, at that particular meeting, or if the directors' interest only arose at a later date, at the next meeting after such interest was acquired, and if disclosure was for any reason not possible at either meeting, then at the first possible meeting thereafter;[103]

- a contract for which confirmation or authorisation was required by written resolution, by means of a written notice given to the other directors at the time when the director interested in the contract heard of the proposed resolution concerning the contract;[104]

- a contract or proposed contract entered into by a director or manager of the company authorised by the board of directors to do so, the declaration must be made at the first meeting after the director became aware of such a contract or interested in it, and if

[103] Section 70quin (3)(a)
[104] Section 70quin (3)(b)

it was a proposed contract, by written notice to the director or manager authorised to enter into such a contract.[105]

- all other contracts, or where the interest arose after the contract was made, at the first meeting after the director became interested at which it is possible for him to attend.[106]

A general notice given by the director to the other directors of the company, to the effect that he was interested in all contracts made with a specified company or firm, was deemed to be a sufficient declaration of interests and compliant with the provisions of the section *70quin*, if the following requirements were fulfilled:

- the nature and extent of the interest the director had in the firm or company was stated;[107]
- the extent of the interest at the time when the confirmation of the contract was considered was not greater than that stated in the notice;[108]
- the notice was given at a meeting of the directors or the director had taken care to see to it that it was brought up and read at the first meeting of the board held after it was given;[109]
- where the contract was made by a manager authorised to make such contract, the director giving such notice must have taken all reasonable care to see to it that it was brought to the notice of the manager;[110] and
- a general notice to be effective was to be renewed every year.

---

[105] Section 70quin (3)(c)
[106] Section 70quin (3)(d)
[107] Section 70quin (5)(a)
[108] Section 70quin (5)(b)
[109] Section 70quin (5)(c)
[110] Section 70quin (5)(d)

Non-compliance with the provisions of section *70quin* was made an offence.

Lastly, the Act expressly provided that the requirements imposed by it were not intended to prejudice or to nullify the operation of any rule of law restricting directors of a company from having an interest in contracts with the company.[111] The rule of law referred to related to the right of the company to avoid the contract. It has been held that a contract between a director and his company or a company in which he was interested, was voidable at the instance of the company unless sanctioned by the articles and in compliance with their requirements.[112]

4. Conclusion

The fiduciary duties imposed on directors by the common law remained in force after the 1926 Act. The Act did not modify or alter them. The legal position remained that directors stood in a fiduciary relationship to the company, which required them to act in good faith and to avoid a conflict of interest between their personal interests and those of the company.[113]

The Commission appointed by the government in 1935 noted a tendency in the articles to relieve directors of their liability to their company for breach of their duty or where they were conflicted. The Legislature intervened in this regard and made a significant change with respect to the duties of directors.[114] It retained the common law position on the fiduciary duties of directors, except that it required a director who was tainted with a conflict of interest to disclose his interest to the other directors.

---

[111] Section 70quin(13)
[112] *Cohen v Directors of Rand Colliers Ltd* 1906 TS 197
[113] *Robinson v Randfontein Estates GM Co* 1921 AD p79 – 180; *S v De Jager* 1965 (2) SA 616 (AD)
[114] *The Companies Amendment Act*, No 23 of 1939

Further changes to the duties of directors were effected through the 1952 Act.[115] The changes introduced detailed disclosure requirements that directors seeking to contract with the companies had to comply with. This was in light of the loopholes highlighted in the *Milne and Erleigh* cases.

[115] *Companies Amendment Act*, No 46 of 1952

Chapter 4

Directors' Fiduciary Duties after the 1973 Act

1. Introduction

On 14 October 1963, the President of the Republic of South Africa appointed the Commission of Enquiry into the 1926 Companies Act (the Commission).[116] Its terms of reference required it to investigate and consider, amongst others, the protection afforded to investors and the public interest by the 1926 Act.

Until the enactment of the Act, it was general legislative policy to follow English company law. In this regard, the Main Report of the Commission said:

> 'In considering the Companies Act as a whole and in analysing certain specific provisions which have either given rise to difficulties in South Africa or which have proved to be ineffective, it has become clear that the 1909 Transvaal Act had been enacted with scant regard to the differences between the South African Common Law and the British Common Law. Some of these questionable provisions were perpetuated in the 1926 Companies Act'.[117]

The Report stated that 'the time has passed that South Africa can simply rewrite into its own legislation what it finds in the corresponding English legislations'.[118] The two previous Commissions, namely the Lansdowne and Millin Commissions, were required by their terms of reference to model the company law on that of England. The approach of the Commission marked a significant departure in this respect from its predecessors. It sought to ensure that any adaptation of the English law

---

[116] *Main Report of the Commission,* p. 1
[117] Ibid p 5
[118] Ibid p.5

would be compatible with the South African law. This was, however, not a unanimous position. Advocate Arthur Suzman, one of the Commissioners, disagreed with this approach in his Reservations.[119] In his view, any differences between the respective law of England and South Africa were minimal, and in the sphere of international trade and commerce there was a clear and obvious advantage in having like legislation.

As with the Company Law Amendment Enquiry Commission (the Millin Commission), the Commission dealt, inter alia, with the duties of directors with regard to directors' interests in contracts with the company.

2. Directors' Interests in Contracts with the Company

In common law, the fiduciary duties required a director to disclose his interest in a contract with the company to the members in general meeting.[120] Failure to disclose the interest may result in the contract being voidable. The voidability of the contract could be overcome by either permitting a contract between a director and the company in the articles or obtaining the approval of the contract at a general meeting of the members after full disclosure. The requirement that the disclosure should be made to members in a general meeting was changed by the Lansdowne Commission. It permitted a disclosure to be made to the board.

The Commission heard evidence that section 70*quin* was unsatisfactory and had serious deficiencies. Witnesses who appeared before the Commission alleged that the section was burdensome and imposed considerable administrative duties on companies and in the

---

[119] *Reservations in the Main Report of the Commission,* para 2.02
[120] *Gundelfinger v African Textile Manufacturers Ltd and Others* 1939 AD 314

process destroyed most of its value. They urged that it be scrapped.[121] The Commission felt that such suggestions were too drastic. It said that the fiduciary duties of directors and their implications in the event of a conflict of interest between a director and the company, as regulated by the common law, were well known.[122] The Commission, therefore, retained the position unaltered, except to propose new measures to ensure better compliance and protection of shareholders.

With regard to the principles enunciated by section 70*quin*, the Commission noted that the section covered the following principles:

- whenever an interest existed, it had to be disclosed;
- it was the duty of the director who had an interest to declare that interest;
- the declaration of the interest was to be made to the other directors;
- the other directors, by implication had the duty to examine the declared interest and determine the interests of the company in relation to it; and
- the contracts or proposed contracts were contracts of substance requiring the authority of the board.[123]

The Commission was, however, critical of subsections (5) and (9). Subsection (9) required the general notice, which had to be in writing, to be given once a year. It found that it was common for the notices to contain long lists of directorships and shareholdings of the directors in other companies. The notices were deemed to be sufficient declarations of interests in relation to future contracts with those companies, and no

---

[121] *Main Report of the Commission*, p. 80
[122] *Robinson v Randfontein Estates, GM Co Ltd* 1921 AD 168
[123] *Main Report of the Commission*, p. 80

further reference to a director's interest was required when such contracts were considered. The Commission held that it was virtually impossible for a director to remember every detail of all the general notices given by all its co-directors. It was not unlikely that contracts could thus be considered and authorised by boards which were unaware of the interest of a director while there was a technical compliance with the requirements of the law.[124]

Subsection 9 was also severely criticised with regard to disclosure to members. The declaration to members had to be done by way of a return, which had to be placed before the annual general meeting. However, a company could by a special resolution waive that requirement. The Commission noted that the return reflected contracts in respect of which declarations of interests were made under subsection (3). However, it listed contracts in respect of which the interest of a director had been disclosed in the manner prescribed by subsection (5). In practice, the contracts and declarations made under subsection (3) were found in the minutes of the meetings of directors. In the case of subsection (5), the contracts were also found in the minutes of directors but the declaration or disclosure of interest was contained in the general notice given by a director.

The evidence led at the Commission was to the effect that the inspection of the return at the annual general meeting was impracticable and that the subsection failed on that account. Lastly, it had become the general practice to waive the requirement by passing the special resolution. The net effect was that there was in practice no proper disclosure to members of contracts in respect of which directors had declared interests. The information about such contracts could not be obtained by members unless voluntarily given by the company.[125] If

[124] Ibid p. 82
[125] Ibid p. 81

the special resolution had been passed, the administration of the company need not prepare the return provided by subsection (9). Although the Commission concluded that the subsection was ineffective, it subscribed to the principle that members of companies were entitled to a full and transparent accounting by the directors in regard to transactions where conflict between duty and interest may have existed. The recommendations of the Commission were encapsulated in sections 234 to 241 of the Act.

Gower gave the following underlying reasons for a similar legislative intervention by England in 1929:

> 'Contracts with directors, such as service agreements, became increasingly common, and contracts in which the directors were interested, for example as directors of another company, more common still. And the directors were unwilling to suffer the delay, embarrassment and possible frustration entailed by having to submit all such contracts to the company in general meetings. But just as the normal restraints on trustees can be modified by express provisions in the will or deed under which they are appointed, so (within limits) can the normal fiduciary duties of directors be modified by express provisions in the company's constitution. Such provisions have become common-form in the articles of registered companies'.[126]

Developments in South Africa had been along the same lines. That emerged clearly in the Report of the Lansdowne Commission in the 1930s:

> 'Instances have been brought to our notice in which … articles of association have contained provisions expressly permitting any director to be interested in a contract with a company otherwise

[126]Davies P *Gower and Davies' Principles of Modern Company Law*, p 231

> than as a member of the company, and by purporting expressly to relieve such a director from any obligation to disclose any such interest or to account for same in any way to the company and to disentitle any member of the company from impugning the conduct of any such director in that regard. We recognise that it would not be practicable absolutely to prohibit a director from having any interest in a contract or proposed contract with his company, but there should be explicit provision forbidding any such freedom from disclosure as the … articles to which reference has been made purport to convey'.[127]

In order to prevent articles of association from being too generous in this regard, sections 234 – 241 of the Act were promulgated. The sections were designed to compel directors to disclose any personal interests in contracts with the company.[128] These provisions did not override or substitute the common law rule that where a director had a direct or indirect interest in a contract of the company and failed to disclose it, the contract was voidable at the election of the company. The purpose of the provisions was to lay down minimum disclosure requirements; in other words, articles of the company could not lay down less stringent disclosure requirements than those stipulated by the Act. The sections did not say that if they were complied with, the contract in question could not be impeached. If the articles of the company did not permit a director to have a personal interest in contracts of the company, the common law rule would remain applicable, namely that the contract would be voidable at the company's election.[129]

On the other hand, if the articles of a company gave a director permission to have an interest in a contract with the company, such a

---

[127] *Main Report of the Company Law Commission 1936 - 1952*, para 137
[128] Larkin M 'The Fiduciary Duties of the Company Director *1' 1979* SALJ p 11
[129] Williams R C *Concise Corporate Law* p 89

contract was valid.[130] But the Act still required a director to make a disclosure as prescribed by sections 234 – 241, and if he failed to do so, he would lose the protection afforded to him by the articles. The consequence of non-disclosure was that he could be made to pay any profits obtained from the contract over to the company.[131] Moreover, the failure to make disclosure as required by the Act was a criminal offence.[132]

2.1 Content of Sections 234 – 241 of the 1973 Act

The effect of section 234(2) was that the duty to disclose interests of directors in contracts with the company applied to contracts that were:

- of significance in relation to the company's business; and
- were entered into -
    - following a directors' resolution; or
    - by a director or officer duly authorised by the directors to enter into such contracts.[133]

The Act required a director who was in any way materially interested, directly or indirectly, in a contract or proposed contract with the company, or who became interested in such a contract after it had been concluded, to disclose his interest and full particulars to a board meeting.[134] It further required that the disclosure of interest be made in the manner prescribed by the Act. The qualification that the interest had to be material represented a departure from section 70*quin* of the 1926 Act.

---

[130] *Gundelfinger v African Textile Manufacturers Ltd* 1939 AD 314 p 323; *Ben-Tovin v Ben-Tovin* 2001 (3) SA1074 (C) 1089
[131] Williams R C *Concise Corporate Law*, p 89
[132] Section 234 (4)
[133] Section 234(2)
[134] Section 234(1)

The manner and time of disclosure was prescribed by section 235. Firstly, it stipulated that a disclosure must be made at or before the meeting of directors at which the entering into or confirmation of the contract was to be first considered.[135] If the disclosure was in writing, it had to be read out to the meeting or each director present had to state in writing that he had read it.[136] Secondly, if, for any reason, it was impossible for a director to make a disclosure at or before a particular meeting, he could make it at the first subsequent meeting at which it was possible to do so and state the reason why he could not make the disclosure at the relevant meeting.[137] The declaration could be made orally or in writing.[138] One of the ways in which it could be made was by way of tacit assent to assertions made in a meeting. [139] *In Novick*, the applicant had kept silent at the board meeting, however, others had disclosed his interest in a contract with the company. Coleman J said there was:

> 'substance in the contention … that an audible utterance of the relevant facts by (N) was not the only way in which the disclosure could be made. One of the ways in which it could be made, it was argued, was (N's) tacit assent to and adoption of the assertion made to the meeting by others'

The articles sometimes permit directors to act, instead of a meeting, by way of a written resolution signed by the directors, the so-called 'round robin'. In terms of s 236, for such a written resolution to be valid, the provisions of sections 234 and 235 had to be complied with.

A director could find that he was a member of a company or firm which contracted with the company regularly. To avoid repeated and

---

[135] Section 235(1)
[136] Section 235(1)
[137] Section 235(2)
[138] Meskin M P *Henochsberg on the Companies Act, p 276*
[139] *Novick v Comair Holding Ltd* 1979 (2) SA 116 (W) 138

identical disclosures, the Act provided for a general written notice to the effect that the interested director was a member of the company or firm and was to be regarded as interested in its contracts.[140] The general notice had to indicate the nature and extent of the interest in the other company or firm. It had also to be updated whenever circumstances had changed. Because the general notice expired at the end of the financial year, it had to be renewed yearly.

Section 237 dealt with a director or officer who had been authorised by the directors to contract for the company, but was materially interested in the contract he was supposed to conclude for the company. Such a director was required to disclose his interests and full particulars as required by section 235 before he entered into it.[141] Furthermore, the director was prohibited from entering into the proposed contract until the board had approved the proposed contract by way of a resolution. However, if the director became interested in a contract after it had been concluded, he had to declare his interest, not as prescribed by section 235, but by a written notice to the directors.[142]

The Act required that any notice convening a meeting to confirm a contract in which a director was interested had to state the full particulars of the interest.[143] This requirement also applied to cases where articles did not provide for directors to be interested in a contract with the company or permission was subject to the approval of the general meeting.

Section 239 required any declaration of interest to be recorded in the minutes of the meeting at which the declaration was made. It also required that where a declaration was made in writing and the copies of

---

[140] Section 234(3)
[141] Section 235(1)
[142]Section 237(2)
[143]Section 238(1)

the minutes at which the declaration was made were not circulated to the directors, the minutes recording the declaration had to be read out at the first subsequent meeting.[144] The purpose of the provision was to acquaint directors who were absent from the meeting with the content of the disclosure.

In terms of section 240, every company had to keep a register of interests in contracts with the company at registered offices, which had to be open to public inspection. Furthermore, the auditor had the duty to satisfy himself that the minutes reflecting the disclosures and the register of interests in contracts were done properly.[145]

These provisions showed the importance that the legislature attached to the principle that a company should be protected against a director who had a conflict of interest and duty.[146] Their purpose was to ensure that the interest of any director in any actual or proposed contract was made an item of business at a meeting of directors.[147]

4. Conclusion

The Act did not alter the position of the common law with regard to the interests of directors in contracts with the company. The position was still that directors must either be permitted by the articles or a resolution of the company in a general meeting to enter into such contract. If they failed to disclose their interests, the contract was voidable. However, the Act imposed minimum disclosure requirements that directors had to comply with, which could not be varied downward by the articles by means of less stringent requirements.[148]

---

[144] Section 238(2)
[145] Section 241
[146]Blackman MS *The Law of South Africa*, p 244
[147]Ibid p 244
[148] Larkin M '*The* Fiduciary Duties of the Company Director (3)' SALJ p 46

The Act required that the interest of the director that had to be disclosed had to be a material interest and of significance in relation to the business of the company. The interests had be declared to a meeting of the board or made an item of business of a board meeting. The Act also provided for the avoidance of the need for repeated disclosures of a director's interests in a company which the company dealt with regularly. To that effect, it provided for a general written notice to be submitted to the board which indicated the nature and extent of the interest in the other company.[149]

Furthermore, the Act still retained the importance of informing members about the interests of directors in contracts with the company. It required every company to keep a register of interests in contract with the company at its registered office, which had to be open to the public for inspection.

[149] Ibid p 48

Chapter 5

The 2008 Companies Act

1. Introduction

The 1973 Companies Act largely left to the common law and the Codes of Corporate Governance the regulation of the fiduciary duties of directors.[150]In the 1990s, a number of academic writers on company law began to argue that company law needed a comprehensive review to deal with such matters.[151] This was much so after the advent of a new constitutional and democratic dispensation in 1994, which created new demands on companies, such as employment equity and black empowerment. It was also notable that three decades had passed since the last review of company law. On 11 and 12 July 2003 the Department of Trade and Industry (DTI) officially launched a new company law reform process at the Local and International Roundtable on Company Law Reform in Johannesburg.[152]

The DTI informed the Roundtable that the first step of the reform process would be the production and publication of a document setting out the guidelines for corporate law reform. The guidelines were also to serve as drafting instructions for the chief drafter of the envisaged Act.[153] One area on which the Roundtable agreed, which required an overhaul was corporate governance. In the aftermath of the global corporate collapses and failures of corporate governance systems which

---

[150] Davis D & Cassim F (eds) *Companies and other Business Structures in South Africa,* p. 102

[151] Havenga, M 'Regulating Directors' Duties and South African Company Law Reform' (2005) Orbiter p 609; Mongalo, T 'Self-regulation versus statutory codification: Should the new regime of corporate governance be accorded statutory backing' 2004 *(67) THRHR, p 264*

[152]Mongalo T H *Modern Company Law: for a Competitive South African Economy,* p xiv

[153] Ibid p xiv

had occurred at the time of the Roundtable, domestically and internationally, the discussion on this area focussed on the need to improve corporate governance and the desirability of adopting a general statement on the duties of directors and their liability.[154]

The Roundtable was followed by the process of drafting the guidelines which, amongst others, acknowledged the following principles:

- company law should primarily govern the relationship between corporate managers (directors and officers), shareholders and, where appropriate, relevant stakeholders;
- the business and affairs of the company had to be managed under the direction of the board of directors;
- the board was to be invested with sufficient discretion to make business decisions and a wide choice of means to effect those decisions, subject to the limitations generally acceptable in corporate law;
- with the discretion afforded to directors, the company law was to be alive to the danger of possible abuse of powers by directors, and as a result, should deploy means to prevent and remedy disloyalty;
- safeguards should include (a) a general statement of the minimum duties of directors in a statutory form, (b) the mandatory annual election of directors, (c) and the identification of certain transactions that may not be implemented by the directors without shareholder approval.

In May 2004, the DTI released the Policy Framework for Company Law Reform, entitled '*South African Company Law for the 21st Century:*

---

[154] Ibid p xiv

Guidelines for Corporate Law Reform'.[155] The objective of the policy framework was to guide the law reform process. After its publication, the DTI held public consultations in all nine provinces from 24 June to 23 September 2004. Simultaneously, the department submitted the policy framework to the National Development and Labour Council's (Nedlac) Trade and Industry Chamber as required by the Nedlac Act.[156]

After the consultations on the policy framework had been completed, the department revised the guidelines with a view to prepare the drafter's instructions. After the drafting had been completed, the draft Bill was submitted to Cabinet for approval.

The Companies Bill was tabled in Parliament in June 2008 and referred to the Portfolio Committee on Trade and Industry for processing on behalf of the National Assembly. The Committee held its own public hearings on the Bill. The Bill was passed by Parliament on 19 November 2008, with minor amendments.[157] The Bill was signed into law by the President on 8 April 2009.

2. The Policy Framework Proposals

The policy guidelines noted that there had been no comprehensive reform of company law undertaken by South Africa since the investigation of company law by the Van Wyk De Vries Commission.[158] The stated objective of the latest reform was to ensure that a new legislation was appropriate to the legal, economic and social context of South Africa as a constitutional democracy and an open economy. Professor Havenga stated that far-reaching changes had occurred since the previous revision which had culminated in the 1973 Companies

---

[155] Government Gazette 26493, Vol 468, Notice 1183 of 2004
[156] Act 35 of 1994
[157] Mongalo T H *Modern Company Law for a Competitive South African Economy*, p. xxv
[158] *Guidelines for Corporate Law Reform*, p.7

Act.[159] An important factor in the changed circumstances was the new Constitution and related legislation, which promoted its objectives and provisions, such as the Promotion of Access to Information Act of 2000 and the Broad-Based Black Economic Empowerment Act of 2003.[160]Professor Havenga said that company law should reflect the fundamental changes that have occurred since the last company law review.

The guidelines stated that it was important that rules governing the conduct of directors in South Africa were clarified.[161] It reaffirmed that directors' duties play a significant role in ensuring good corporate governance. However, the legal principles governing these duties were all found in common law, specifically in case law that dated back to the early eighteenth century. They were therefore not easily accessible to directors. The guidelines argued that there was merit in the view that the new Act should contain a statutory standard of directors' duties. A statutory standard of conduct and a clear statement of duties would assist in capturing the legal principles and give the directors a degree of certainty about their duties, the standard of their conduct and associated liabilities.[162]

Furthermore, the guidelines suggested a possible set of duties and standards of conduct, which were the duty of fair dealing and care, and the duty to act in the interests of the company. It proposed that directors should have an obligation to disclose to the company any business opportunity that comes to the director if the director had a reasonable belief that the company would be interested in the

---

[159] Havenga M 'Regulating Directors' Duties and SA Company Law Reform' (2005) Orbiter, p 610
[160] Ibid, p 610
[161] *Guidelines for Corporate Law Reform*, p 37
[162] Ibid, p 38

opportunity, as well as the duty to disclose relevant material information not known to other directors.

3. The 2008 Companies Act

The Act inaugurated a radical departure from previous company legislation, by partially codifying the fiduciary duties of directors. Under it, the fiduciary duties of directors are mandatory, prescriptive and unalterable, and apply to all companies. The stated objective of the codification is to make the law clearer and accessible, particularly to directors.[163] The codified duties are best understood in the context of the common law which has governed corporate conduct for over a hundred years.

In common law, directors have a fiduciary duty to avoid a conflict of interest between their interests and their duty to the company. The Act preserves and codifies this common law rule on conflict of interest.[164] However, it does not repeal the common law which remains applicable to the extent that it is not in conflict with the Act. When determining a matter before it in terms of the Act, a court will have regard to the common law.[165] The no-conflict rule is encapsulated in section 76(2) of the Act, which provides that directors must not use their office or any information obtained while in the capacity of director to:

- gain an advantage for the director, or for another person other than the company or a wholly owned subsidiary of the company; or
- knowingly cause harm to the company or a subsidiary of the company.[166]

---

[163] Cassim FHI *Contemporary Company Law*, p 463
[164] Section 76(2)
[165] Section 158(a)
[166] Section 76(2)

According to Cassim, the section is wide enough to include the duty to avoid a conflict of interest and duty.[167] It is aimed at deterring directors from using their position for personal gain while in the capacity of directorship. It would also deter directors from engaging in self-dealing. The rule against self-dealing requires directors not act on behalf of the company in a matter in which they have an interest.[168] The rule is applied strictly and inflexibly by the courts. However, there are exceptions. Directors will escape liability for contravening the rule if they obtain the consent of the company, after making a full disclosure.[169] Alternatively, they escape liability if the articles relax the rule by granting directors permission to enter into contracts with the company after disclosure to the board. If the directors declare their interests in a contract to the board, they have to ensure that they do so to an independent board.[170]

4. Contracts with the Company

The most obvious form of a conflict of interest situation is where a director has a material interest in a contract entered into by the company. The underlying principle behind the prohibition against self-dealing is that it is untenable for a director to be simultaneously a seller and buyer or lender and debtor. In such a situation, a director has total control over both sides of the transaction, and a wide ability to misuse his powers.[171] To deal with this situation, the Act provides for the disclosure of directors' interests in transactions of the company to the board.

It imposes a duty on a director to disclose any personal financial interest that he or a related person may have or have in a transaction to

---

[167] Cassim FHI *The Duties and Liabilities of Director, p 550*
[168] *Cohen v Directors of Rand Collieries Ltd* 1906 TS 197 p 201
[169] *Magnus Diamond Mining Syndicate v Macdonald & Hawthorne* 1909 ORC 65 p 79
[170] *Robinson v Randfontein Estates Gold mining Co Ltd* 1921 AD 168 p 215
[171] Shepherd JC *The Law of Fiduciaries*, p 156

be considered by the board.[172] Personal financial interest means a 'direct material interest of a person that is of a financial, monetary or economic nature or to which a monetary value may be attributed'.[173]However, an interest held by a director in a unit trust or collective investment scheme is excluded from the meaning of a personal financial interest unless he has a direct control over the investment decisions of the fund or investment. The financial interest of a director or a related person must be direct and material, ie it must be a significant financial interest and not an indirect and trivial interest. The provision does not apply to non-financial interest. Section 1 defines 'material' thus:

> 'material', when used as an adjective, means significant in the particular circumstances to a degree that is –
>
> a) of consequence in determining the matter; or
> b) might reasonably affect a person's judgement or decision-making in the matter.

Although the Act requires the disclosure of direct material interests, indirect interests are also taken care of through the requirement that a director must disclose the interests of a related person who are known by the director to hold personal financial interests in a contract with the company.[174] In relation to section 75, a 'related person' to the director has the meaning in section 1. A related person, when used in respect of two persons, means persons who are connected to one another in any manner contemplated in section 2(1)(a) to (c).[175] Section 2(1)(a) provides that, for all purposes of the Act, an individual is related to another individual if they are –

---

[172] Section 75
[173] Section 1
[174] Section 75(5)
[175] Section 1

(i) married, or live together in a relationship similar to marriage; or
(ii) separated by no more than two degrees of natural or adopted consanguinity or affinity.

Section 2(1)(b) provides that, for all purposes of the Act, an individual is related to a juristic person if the individual directly or indirectly controls the juristic person. Lastly, section 2(1)(c) provides that two juristic persons are related to one another if –

(i) either of them directly or indirectly controls the other, or the business of the other;
(ii) either is a subsidiary of the other; or
(iii) a person directly or indirectly controls each of them, or the business of each of them.

4.1 Interests in Future Contracts

Section 75(5)(a) to (c) is triggered whenever a director or a related person (to the knowledge of the director) has a direct material financial interest in a matter to be considered by the board of directors. It requires that the interest and its general nature must be disclosed to the board before it is considered at the meeting. At the meeting, the director must disclose any material information relating to the matter that is known to the director, including any observations or pertinent insights relating to the matter if requested to do so by the other directors. If section 75(5) is complied with, and the board duly makes a decision, or approves the agreement or transaction, or if it is ratified by the ordinary resolution of the shareholders, the decision, agreement or transaction is valid despite any personal financial interest of a director or related person in it.[176] This implies that a contract which does not comply with section 75(5) is invalid.

[176] Section 75(7)

However, if a director fails to declare his interest in a transaction a court may, on an application by an interested person, declare the transaction or agreement approved by the board valid despite the director's failure to disclose his interests.

In common law, where a conflicted director contracted with his company, the contract was voidable at the election of the company.[177] He was liable to account to the company for any profits he made on the contract, unless the contract had been approved or ratified by the shareholders. The principle that a conflicted contract is voidable at the option of the company seems to be modified by the principle that the contract is not valid if the statutory requirements have not been complied with.

4.2 A Disclosure and Recuse approach

After making a full disclosure, the director, if present at the meeting, must leave it and may not take part in the consideration of the matter, except to disclose any material information and any observation or pertinent insights with regard to the matter.[178] It is thus clear that a director who has a personal financial interest in a matter is prohibited from participating and voting on the matter at a board meeting. There are no exceptions to the prohibition. The director's departure from the meeting does not affect the quorum for the meeting. These provisions embody the new 'disclose and recuse' approach of the Act.[179] Furthermore, the director is prohibited from executing any document on behalf of the company in respect of the matter unless he is specifically requested to do so by the board.[180]

4.3 Interests in Existing Contracts

---

[177] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168
[178] Section 75(5)(d) and (e)
[179] Farouk HI Cassim *The Duties and the Liability of Directors*, p 571
[180] Section 75(5)(g)

Section 75(6) regulates the situation where a director or a related person acquires a personal financial interest in a matter which the board has already approved. It stipulates that where a director or related person acquires a financial interest after the board has approved a matter, he must promptly disclose to the board or the shareholders the nature and extent of the interest and the material circumstances relating to its acquisition.[181]

4.4 An Advance General Disclosure

The Act provides for a general disclosure in advance by way of a general notice or standing notice.[182] It requires a director at any time to deliver to the board a general notice or standing notice in writing stating the nature and extent of his financial interest in any company which may transact with the company. The general notice may be used generally for the purpose of section 75. It has the effect of facilitating the prior disclosure of personal financial interest. It is the equivalent of section 243(3) of the 1973 Companies Act.

3.5 Exemptions from the Disclosure Requirements

Directors are exempted from the requirements of disclosure of financial interests in certain limited circumstances.[183] The exemptions are in respect of:

- decisions generally affecting all the directors in their capacity as directors;
- decisions that affect a class of persons of which a director is a member, unless the only members of the class are the director or persons related or inter-related to the director;

[181] Section 75(6)
[182] Section 75(4)
[183] Section 75(2)

- a proposal to remove that director from office in terms of section 71; or
- single member companies where the sole securities holder is also the sole director of the company.

Furthermore, section 75(3) prevents a person who is the only director of the company but is not the sole holder of all the beneficial interest of all the issued securities of the company to disclose to himself. It requires the disclosure of personal financial interests to be made to the shareholders of the company and their approval to be obtained by an ordinary resolution. Otherwise, such a director may not approve or enter into an agreement in which he or a related person has a financial interest or determine any other matter in which he or a related person has a personal financial interest. The provision seeks to ensure that a sole director does not abuse his powers where he has a financial interest in a matter.

4.6 The Effect of Section 75

A decision of the board or a transaction that has been approved by the board or ratified by shareholders by an ordinary resolution is valid despite any financial interest of a director or related person if it was approved after disclosure in the manner set out in section 75.[184] Furthermore, on application by an interested person, a court may declare valid a transaction that has been approved by the board despite the failure of a director or related persons to satisfy the disclosure requirements of section 75.[185] As stated earlier, the provision that a court may declare a contract valid implies that the common law principle that such a contract is voidable at the election of the company has been modified. The effect of this provision is to protect the interest

[184] Section 75(7)
[185] Section 75(8)

of innocent third parties to the agreement who were unaware of the director's interest in the transaction.[186]

5. Conclusion

The DTI policy framework had argued that there was merit in the new Act to contain a statement of directors' duties. It said such a statutory standard of conduct and clear statement of duties would assist in capturing the legal principles and give legal certainty about duties of directors. The Act has given effect to that objective. This inaugurated a radical departure from all previous company law.

With regard to a director's interest in contracts with the company, the Act requires him or a related person to the director to disclose it to the board.[187] An innovation of the Act is the requirement that the director must disclose to the board any material information in regard to the transaction that is known to the director, including any observations or pertinent insights relating to the transaction if asked by the board. Furthermore, after making a full disclosure the director must vacate the meeting and take no further part in the consideration of the matter.

[186] Rehana Cassim *The Duties and Liabilities of Directors*, p 573
[187] Section 75

Chapter 6

Conclusion

1. Introduction

In this final chapter the principles pertaining to the fiduciary obligations of directors as apparent from the previous chapters are summarized and certain conclusions drawn. Firstly, the fiduciary duties of directors as reflected in common law are examined. Secondly, the impact of company law legislation until the 1973 Companies Act is reviewed. Lastly, the implications of the partial codification of the fiduciary duties of directors with regard to the duty to avoid conflict of interests, especially with regard to self-dealing are examined.

2. Fiduciary obligations of Directors in Common law

In common law, directors of companies stand in a fiduciary relationship to their companies. In *Robinson,* Innes CJ defines a fiduciary relationship thus; 'Where one man stands to another in a position of confidence involving a duty to protect the interests of the other '.[188] The relationship imposes on directors a duty to act in good faith towards the company, exercise their powers in its best interests and avoid a conflict between their own interests and their duty to the company.[189]

Two characteristics are therefore essential to prove the existence of a fiduciary relationship. Firstly, the fiduciary should have scope to exercise a discretion or power. Secondly, the fiduciary must be able to unilaterally exercise the discretion or power in a way that affects the interests of the beneficiary in a legal and practical sense.[190] The fiduciary obligation seeks to ensure that directors exercise the powers

---

[188] *Robinson v Randfontein Estate Gold Mining Co* 1921 AD p 177
[189] See Chapter 2 p 4
[190] See Chapter 2 p 5

entrusted upon them only for the benefit of the company, and never for their personal gain.[191]

Historically, our courts have often compared the position of directors to that of other fiduciaries. The most frequent comparison has been that between a director and a trustee, and between a director and an agent.[192] These analogies do little more than prove the existence of a fiduciary duty. They do not determine the content of a director's fiduciary obligation; neither do they prove the basis of his liability for its breaches. A director is neither a trustee nor an agent. His relationship with the company is unique, or *sui generis*.[193] Consequently, specific legal principles and guidelines have been developed by the courts to regulate directors' conduct.

The fiduciary duties of directors, broadly stated, require them to act in good faith and in the interests of the company, and that they should avoid a conflict of interests. The duties are not a closed list. A director may therefore not make secret profit from his position, other than as specified in the articles or a separate contract he had concluded with the company.[194]

It is necessary to retain a strict rule as a deterrent against the potential abuse by management of their privileged, often highly rewarded, position in the company. This is necessary because shareholders often find it difficult and costly to enforce their rights.

3. Impact of Company Legislation until the 1973 Companies Act

In common law directors had a duty to avoid placing themselves in a situation where their duties to the company conflict or may possibly

---

[191] *Robinson v Randfontein Estate Gold Mining Co* 1921 AD p 177
[192] See Chapter 2 paras 6.1 and 6.2
[193] See Chapter 2 p 15
[194] Chapter 2 pare 7

conflict with their personal interests. The general principle was that where a company enters into a contract in which a director has a personal interest the contract was not void but voidable at the election of the company. There were two important exceptions to this general rule. The first exception was that a director who breached his duty to avoid a conflict of interests may have it ratified by an ordinary resolution passed at a general meeting, after full disclosure.[195] The effect of the company decision was to validate the contract against potential invalidity. The second exception was that company articles may permit directors to have interests in contracts entered into by the company. In this instance, the articles modified, in advance, the fiduciary duties of the directors.

When the 1926 Companies Act was enacted, it did not modify the common law on the fiduciary duties of directors.[196] In its report, the Lansdowne Commission observed that a director's action in entering into a contract with his company was, as a rule, fraught with very serious consequences, and that such conduct on the part of directors required to be regulated by the Legislature. It found that there was a tendency in the articles to relieve directors of liability of their fiduciary duties to their company.

Furthermore, the Commission found that the articles did not only permit directors to be interested in a contract with the company, but purported to relieve directors from any obligation to disclose any interest or to account in any way to the company.[197] To aggravate the situation, the articles would disentitle any member of the company from challenging the conduct of the director with regard to the contract. The Commission took the view that it would not be practical or desirable to

---

[195] *Cohen v Directors Ltd* 1906(TS) 197
[196] *Report of the Company Law Commission* para 2
[197] See Chapter 2 para 2

absolutely prohibit a director from being interested in a contract with the company, but said that there should be an explicit provision in legislation prohibiting any freedom from disclosure in the articles.[198] However, such a disclosure was to be made to a meeting of the board of directors. The requirement for a disclosure to be made to the other directors was, in effect, a modification of the common law which had always required the disclosure to be made to the general meeting of the company.

The Millin Commission endorsed the view of the Lansdowne Commission that a director's participation in a contract with the company was, as a rule, fraught with risks to the company. The Companies Amendment Act (No 46 of 1952), drafted by the Millin Commission, enacted in great detail the disclosure requirements that had to be complied with by directors seeking to contact with their companies.[199] The Act expressly provided that the disclosure requirement imposed by it were not intended to prejudice or nullify the operation of any rule of law restricting directors from having interest in a contract with their company.[200]

The 1973 Companies Act retained the provisions relating to the disclosure requirements for directors interested in contracts with the company. It also retained the importance of informing members about the interests of directors in contracts with the company by requiring every company to keep a register of interests in contracts with the company at its registered office, which was open to the public for inspection.[201]

---

[198] Ibid
[199] See Chapter 3 para 3.1
[200] Section 70*quin*
[201] See Chapter 4 para 4

4. Implications of the Partial Codifications of Directors' Duties

The 2008 Companies Act inaugurated a radical departure from the previous company legislation by partially codifying the fiduciary duties of directors. It has made the fiduciary duties mandatory, prescriptive and unalterable. The Act preserves and codifies the common law rule on the conflict of interests by requiring directors to act in good faith and in the best interest of the company.[202]

In relation to contracts with the company, the Act introduces a new approach; the so-called disclose and recuse approach. Further, the Act stipulates that a decision of the board or a transaction that has been approved by the board or ratified by an ordinary resolution is valid despite any financial interest of a director or a related person if it was approved after disclosure as set out in section 75.[203] Furthermore, on application by an interested person, a court may declare valid a transaction that has been approved by the board despite a failure by a director to satisfy the disclosure requirements of section 75. The effect of the provision that a court may declare a contract valid implies that the common law principle that such contracts are voidable at the election of the company has been modified.

[202] Section 76(2), See Chapter 5 para 3
[203] See Chapter 5 par 3.6

Bibliography

Table of Cases

A

Aberdeen Railway v Blaikie (6) (1854) 1 Maql 461

African Claims & Land Co Ltd (1905) TS 495

Allen v Gold Reefs of West Africa Ltd (1900) 1 Ch 656

Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & Others 1981 (2) SA 173 (T)

B

Bellairs v Hodgenett 1978 (1) SA 1109 (AD)

C

Canadian Aero Services Ltd v O'Malley (1973) 40 DLR (3d) 371 (SCC)

Cohen v Directors of Colliers Ltd (1906) TS 197

Cohen Bros v Samuels 1905 TS 224

Cohen NO v Segal 1970 (3) SA 702 (WLD)

Cook v Deeks (1916) AC 554

Cyberscene Ltd and Others i-Kiosk Internet and Information (Pty) Ltd 2000 (3) SA 806 (C)

D

Da Silva and Others, CH Chemicals (Pty) Ltd (2008 (6) SA 620 (SCA)

Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530

Deawoo Heavy Industries (Pty) Ltd v Banks & others (2004) 2 All SA 530 (C)

Davies v Donald 1923 CPD 295

Du Plessis NO v Phelps 1994 (4) SA 165 (C)

E

Ex part Keir & Cawder (SA) Ltd 1968 (2) SA 207 (T)

F

Fisheries Development Corporation of South Africa Ltd v Jorgensen 1980 (4) SA 156 (WLD)

Forbes, Still and Co v Sutherland (1856) 2 Searle 231

Foss v Harbottle (1843) 2 HARE 462

G

Gundelfinger v African Textile Manufactures Ltd and Others 1939 AD 314

H

Hargreaves v Andrews 1915 AD 522

Howard v Herrigel & Another NNO 1991 (2) SA 660 (A)

K

Kirsten and Another v Bankorp Ltd Others (1993) 4 All SA 749 (C)

Kopke v Ship Tank Services (Pty) Ltd (4) SA 339 (C)

L

Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd (FC Fidelity bank Ltd (Under Curatorahip) Intervening) 2001 (2) SA 727 (C) 727

Levin v Felt & Tweeds Ltd 1951 (2) SA 401 (A)

N

Neugarten v Standard Bank 1989 (1) SA 797 (A)

Novick v Comair Holding Ltd 1979 (2) SA 116 (w)

M

Magnus Diamond Mining Syndicate v MacDonald and Hawthorne 1909 (OFD) 59

Markham v SA Finance & Industrial Co Ltd 1962 (2) SA 5 (W) 10

Movie Camera Company (Pty) Ltd v Van Wyk and Another (2003) 3 All SA 291 (C)

O

Osry v Hirsch, Loubser & Co Ltd 1922 CPD 531

P

Percival v Wright (1902) 2 Ch 421

Phillips v Fieldstone Africa (Pty) Ltd 2003 (3) SA 486 (SCA)

Phipps v Boardman (1967) 2 AC 46

Premier Medical & Industrial Equipment (Pty) Ltd v Winkler 1971 (3) SA 866 (W)

R

R v Herhlodt 1957 (3) SA 265 (A)

R v Jona 1961 (2) SA 301 (W)

Re City Equitable Fore Insurance Co (1925) Ch 407

Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA)

R v Kritzinger 1971 (2) SA 57 (AD)

R v Milne & Erleigh 1951 (1) SA 401 (A)

Regal (Hastings) Ltd v Gulliver (1967) 2 AC 46

Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168

S

S v Heller and Another 1964 (1) SA 524 W 537

S v De Jager 1965(2) SA 616 (A)

S v Pourouis 1993 (4) SA 575 (W)

S v Shaban 1965 (1) SA 616 (W)

Samel v President Brand GMC Ltd 1969 (3) SA 629 (A)

Standard Bank of South Africa v Neurgarten 1988(1) SA 652 (W)

Speith and Another v Nagel (1997) 3 All SA 316 (W)

Sibex Construction SA (Pty) Ltd and Another v Injectaseal CC and Others 1988 (2) SA 54 (T)

Stellenbosch Farmer's Winery Ltd v Distillers Corporation (SA) Ltd Another 1962 (1) SA 458 (A)

V

Volvo (Southern Africa) (Pty) Ltd v Yssel 2009 (6) SA 531 (SCA)

W

Wolpert v Uitzigt Properties (Pty) Ltd and Others 1961 (2) SA 257 (W)

T

Transvaal Cold Storage Co Ltd v Palmer (1904) TS 4

Treasure Trove Diamonds v Hyman 1928 AD 468

Books

Beuthin RC & SM Luiz (1992) *Company Law*, 3rd edition, Butterworths, Durban

Blackman MS *(1970) The Fiduciary Doctrine and Its Application to Directors of Companies,* PhD Thesis, University of Cape Town

Blackman MS (1996) *The Law of South Africa, first Reissue 4 part Companies,* Butterworhs, Durban

Blackman MS, Jooste RD and Everingham GK (2000) *Commentary on the Companies Act* (2002) Revision Vol 2 (Revision Service 5, 2008)

Celliers HS & Benade ML (1968) *Company Law*, Butterwoths, Durban

Celliers HS, Benade ML, Henning JJ, Du Plessis JJ and Delport PA (2000) *Celliers& Benade: Corporate Law*, Lexis Butterworths, Durban

Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J and Yeats (2011) *Contemporary Company Law,* Juta & Co Ltd, Claremont

Davis D, Cassim F, Greach W, Mongolo T, Butler D, Loubser A, Coetzee and Burdette D *(2006) Companies and other Business Structures in South Africa*, Oxford University Press Southern Africa (Pty) Ltd, Cape Town

Davies P (2003) *Gower and Davies' Principles of Modern Company Law*, Sweet & Maxwell, London

Dorstein JL (1992) *Rights, Powers and Duties of Directors,* Obiter Publishers, Sandton

Emmet E & Barlow JB (1948) *Principles of South African Company Law*, Juta & Co, Johannesburg

Emmet E & Barlow JB (1953) *Principles of South African Company Law*, 2nd edition, Juta & Co, Cape Town

Emmet E & Barlow JB (1969) *Principles of South African Company Law*, 3rd edition, Juta & Co, Cape Town

Hahlo HR and Kahn E (1960) *The Union of South Africa: The Development of its Laws and Constitution*, Steve & Co, London

Hahlo HR and Kahn E (1968) The South African Legal System and its Background, Juta & Co, Cape Town

Henochsberg ES (1963) *Henochsberg on Companies Act*, 2nd edition, Butterworts, Durban

Henochsberg ES (1953) *Henochsberg on Companies Act*, 3rd Butterworts, Durban

Levenson G (1970) *Company Directors: Law & Practice,* Butterworths, Durban

Meskin PM (Ed) (1985) *Henochsberg on the Companies Act,* 4th Edition, Butterworts, Durban

Mongolo T (2011) *Modern Company Law: for a Competitive South African Economy* Juta & Co, Claremont

Mongolo T (2003) *Corporate Law & Corporate Governance,* New African Books (Pty) Ltd, Claremont

Pretorius JT, Delport PA, Havenga M, and Vermaas M (1991) *Hahlo's South African Company Law through the Cases,* 5th edition, Juta, Cape Town

Shepherd JC (1981) *The Law of Fiduciaries*, The Carswell Company Ltd, Toronto, Canada

Suzman A *The South African Companies Act* Juta & Co, Cape Town

Wille G and Millin P (1966) *Mercantile Law of South Africa, 4th edition,* Horters Ltd, Johannesburg

Wille G and Millin P (1945) *Mercantile Law of South Africa, 3rd edition,* Horters Ltd, Johannesburg

Wille G and Millin P (1925) *Mercantile Law of South Africa, 2nd edition,* Horters Ltd, Johannesburg

Wille G and Millin P (1917) *Mercantile Law of South Africa*, Horters Ltd, Johannesburg

Williams RC (1994) *Concise Corporate Law*, Butterworths, Durban

Articles

Baker CD 'Disclosure of Director's Interests in Contracts' (1975) JBL 181

Benade ML 'A Survey of the Main Report of the Commission of Enquiry into the Companies Act' 1971 4 CILSA 277

Beuthin RC 'Theft by a Director' (1965) SALJ 479

Beuthin RC 'Foiling the Take-Over Bidder' (1967) SALJ 349

Beuthin RC 'The Range of Interest' (1969) SALJ 156

Beuthin RC 'The Principle of Unanimous Assent' (1974) SALJ 2

Beuthin RC 'Corporate Opportunities and the Non-profit Rule' (1978) SALJ 459

Beuthin RC 'More about Financial Assistance' (1980) SALJ 477

Brussser R 'The Role and Liability of Non-Executive Directors' (1983) SALJ 8

Cassim R 'Post–Resignation Duties of Directors: The Application of the Fiduciary Duty not to Misappropriate Corporate Opportunities' (2008) SALJ 731

Havenga M 'Regulating Directors' Duties and South African Company Law' (2005) Orbiter 609

Havenga M 'The Enlightened Shareholder Value Approach versus Pluralism in the Management of Companies' (2005) Orbiter 719

Havenga M 'Directors' Fiduciary Duty Under Our Future Company-Law Regime (1997) 9 SA Merc LJ 310

Havenga M 'Corporate Opportunities: A South African Update' (1996) 8 SA Merc LJ 233

Havenga M 'Competing with the Company – When Does a Director Breach His or Her Fiduciary Obligation' (1995) 7 SA Merc LJ 435

Havenga M 'Director's Secret Profit – Accounting to the Company' (1991) 3 SA Merc LJ 95

Havenga M 'Company Directors – Fiduciary Duties, Corporate Opportunities and Confidential Information' (1989) SA Merc LJ 124

Larkin M, The Fiduciary Duties of the Company Director (1), (1979) SALJ 1

Larkin M, The Fiduciary Duties of the Company Director (11), (1979) SALJ 11

Larkin M, The Fiduciary Duties of the Company Director (111), (1979) SALJ 22

Larkin M, The Fiduciary Duties of the Company Director (1V), (1979) SALJ 32

McLennan JS 'Duties of Company Directors' (1971) 1 Businessman's Law 10

McLennan JS 'Directors' Duties and Misapplication of Company Funds' (1982) SALJ 394

McLennan JS 'Directors' Fiduciary and the Companies Act' 1983 SALJ 417

McLennan JS 'No Contracting out of Fiduciary Duties' (1991) SA Merc LJ 86

McLennan JS 'The Condonation by Companies of Wrongs Committed Against Themselves' (1998) SALJ 129

Mongalo T, 'The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa' (2004) SALJ 173

Mongalo T 'Shareholder Activism in the United Kingdom Highlights the Failure of Remuneration Committees: Lessons for South Africa' (2004) SALJ 756

Mongalo T 'Self-regulation versus statutory codification: Should the new regime of corporate governance be accorded statutory backing' 2004 (67) THRHR 264

Mongalo T 'Self-regulation versus Statutory Codification: Should the New Regime of Corporate Governance be Accorded Statutory Backing' 2004 77 THRHR 277

Statutes

The Joint Stock Companies Limited Liability Act, 23 0f 1861 (C)

The Joint Stock Companies Limited Liability Act, 10 of 1864 (N)

The Companies Act, 25 of 1892 (C)

The Companies Act, 31 of 1909

The Companies Act, 46 of 1926

The Companies Act, 61 of 1973

The Companies Act, 71 of 2008

Law 5 of 1874 (T)

*Law 3 of 1885 (*T)

Law 1 of 1891 (T)

Law Book of 1891 (O)

Law 2 of 1892 (O)

Government Reports

Final Report of the Company law Commission 1935 – 1936, Pretoria: Government Printers

Final Report of the Company Law Amendment Enquiry Commission 1947 – 1948, Pretoria: Government Printers

Commission of Enquiry into the Companies Act, Main Report, 1970, Pretoria: Government Printers

South African Company law Reform for the 21st Century: Guidelines for Corporate Law Reform, Government Gazette 26493, Vol 468, Notice 1183 of 2004

Parliamentary papers

Debates of the House of Assembly, Third Session, Fifth Parliament, 1926