

**A LOOK AT DIRECTORS DUTIES AND THE ROLE OF THE BOARD IN
IMPLEMENTING GOOD CORPORATE GOVERNANCE PRACTICES IN
ZAMBIAN LISTED COMPANIES.**

BY

CHANSA MULELA

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(119281/69/1)


**A dissertation submitted to the University of Zambia in partial Fulfilment of the
requirements of the degree of Bachelor of Laws (LLB) in the School of Law**

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ABSTRACT

This paper is an attempt to identify the problem surrounding the implementation of good corporate governance practices by the board of directors in listed companies in Zambia. The need for investors in a country with an emerging capital market like Zambia is critical. The proper control and direction of companies is important for commercial development and wealth creation. It has been empirically proven that countries with good corporate governance attract high volumes of investment easily and quickly. The recent number of corporate failures around the world has highlighted the need to evaluate our corporate governance practices. Good corporate governance requires certain mechanisms to be effective. This paper examines the duties of directors, the composition of the board and the independence of directors as corporate governance mechanisms. It looks at how other countries such as South Africa and The United Kingdom have reformed and implemented these mechanisms. It questions the application of common law director's duties as opposed to statutory duties as is being done in other countries and the aspect of self-regulation when it comes to compliance with the corporate governance codes. It goes on to consider the possibility of codifying the relevant laws and rules of these mechanisms. It concludes by providing recommendations as to what measures must be taken in order to improve corporate governance. If a country does not have a reputation for strong corporate governance practices, investors together with their capital will go elsewhere. Companies with good governance and ethical conduct outperform those which do not.

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Salomon v Salomon [1897] AC 22 HL

LIST OF ABBREVIATIONS

LuSE: Lusaka Stock Exchange

IODZ: Institute of Directors Zambia

SECZ: Securities and Exchange Commission Zambia

IFC: International Finance Corporation

UKLA: United Kingdom Listing Authority

FSA: Financial Services Authority

JSE: Johannesburg Stock Exchange

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CHAPTER 1

1.1 Introduction

This paper begins by asking the question, what is corporate governance? The subject of corporate governance can be described as a hybrid of various disciplines such as corporate law, finance, and economics. It has been defined in many ways. The most authoritative definition of corporate governance is from the Cadbury report where it is commonly referred to as:

“A system by which organisations are directed and controlled”.¹

The Cadbury Committee explained this further by stating

‘Boards of directors are responsible for the governance of companies. The shareholders’ role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the board include setting the company’s strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The board’s actions are subject to laws, regulations and the shareholders in general meeting.’²

Corporate governance is traditionally concerned with how the company is directed and the relationship between the board of directors, management and shareholders.³ It refers to the laws, regulations and accepted business practices governing the corporation and the way that boards oversee the running of a company by its managers and how board members are held accountable to shareholders and the company.⁴

There are many aspects of corporate governance including management, audit, shareholders, accounting, enforcement and compliance. This paper looks at the role and structure of the board of directors as part of management, especially the role that director’s legal duties and the existing codes of best practice play in corporate governance in listed companies in Zambia. Directors’ duties and the composition of the board are both seen as important corporate governance mechanisms and should not be used in isolation of each other.⁵

¹ Sir Ian Cadbury. Report of the committee on the Financial Aspects of Corporate Governance (the UK Cadbury code), London 1992

² Cadbury Committee Report on the Financial Aspects of Corporate Governance. para 2.5

³ Boyle & Birds. Company Law. Sixth edition. Jordan Publishing Limited. 2007. Page 381

⁴ <http://www.ecgi.org> (accessed on 10/09/2010)

⁵ Harold Ford. Professor of commercial law. ‘Corporate Governance and the Duties of Directors.’ Editor: Ramsey Ian M, published by the Centre for corporate Law and Securities Regulation. Faculty of Law. University of Melbourne.

The main objective of having director's duties is to ensure directors act honestly and in the best interests of the company.⁶ Directors owe their duties to the company⁷ and as a result only the company may enforce them in the event of a breach. The rule that states that the company is the proper claimant in proceedings in respect of breach is known as 'the proper claimant rule'.⁸ This enforcement can be done via the majority shareholders and occasionally the minority shareholders.

Good corporate governance is very important because it is a key element in enhancing investor confidence, promoting competitiveness and ultimately improving economic growth. It aims to protect shareholder rights, enhance disclosure and transparency, facilitate effective functioning of the board and provide an efficient legal and regulatory enforcement framework. Well governed companies perform better. A well run corporation generates value for investors and lenders as well as for its employees, customers and society as a whole.⁹ Good corporate governance contributes to sustainable economic development by enhancing and increasing their access to outside capital.¹⁰ Internal Market Commissioner Frits Bolkestein said:

"Company law and corporate governance are right at the heart of the political agenda, on both sides of the Atlantic. That's because economies only work if companies are run efficiently and transparently. We have seen vividly what happens if they are not: investment and jobs will be lost; and in the worst cases, of which there are too many, shareholders, employees, creditors and the public are ripped off."¹¹

Good corporate governance contributes to sustainable economic development by enhancing and increasing their access to outside capital.¹²

A narrow definition of corporate governance is based on the idea of shareholder wealth maximisation while the broader definition of corporate governance is based on an effort being made to balance interests of both shareholders and stakeholders (employees, customers, creditors, suppliers and so on). The broader definition implies the concept of corporate social

⁶ *Re Smith v Fawcett Ltd* 1 [1942] 1 Ch 304

⁷ *Percival v Wright* [1902] 2 Ch 421

⁸ *Foss v Harbottle* (1843) 67 ER 189

⁹ Corporate Governance for Emerging markets. Published by the Centre for International Private Enterprise reform toolkit.

¹⁰ <http://www.ic.org/ifcext/corp>. (accessed on 10/09/2010)

¹¹ Modernising Company Law and Enhancing Corporate Governance in the European Union- A plan to move forward <http://www.ecgi.org/commission/index.htm> (accessed on 12/09/2010)

¹² www.cipe.org/regional/mena/pdf/ (accessed on 12/09/2010)

responsibility as good governance promotes effective and sustainable corporations that contribute to society by creating wealth and employment.¹³

As the number of shareholders in a company increases, it becomes impossible for everyone to be involved in the management and control of the company's affairs so a separation develops between those who own the company (the shareholders) and those who manage it (the directors). Problems can arise from this separation of ownership and control as distance from the day-to-day running of the business makes it difficult for shareholders to restrain any managerial excesses, whether such excesses are the result of incompetence or fraud.¹⁴ This lack of monitoring of the agent (management) by the principle (the shareholders) sometimes causes the interests of the principle which is primarily maximisation of wealth and the agent which may be to maximise their own wealth, to diverge. This is known as the Agency problem.

The focus is on listed companies because the problems are more acute in these types of companies due to their widely dispersed shareholdings. Listed companies are companies where the intention of its members (shareholders) is to raise large amounts of money from the general public by offering them shares of the company.¹⁵ They are the preferred mode of doing business due to their ability to raise capital. The paper specifically focuses on listed companies also because they are regulated by the Lusaka Stock Exchange in Zambia and that are under an obligation to comply with the prescribed corporate governance code. The Securities and Exchange Commission who are responsible for regulating securities in Zambia also plays a role in regulating listed companies.

The people that are entrusted with the management of company affairs are the directors.¹⁶ Boards in listed companies are typically made up of executive and non-executive directors. The former are usually full-time officers of the company who carry out the management of the company's business. Their management powers are typically given to them by the company's Articles of Association (the company's constitution) and they often have service contracts. The latter are normally appointed to the boards of larger companies to act as monitors of the executive management.¹⁷ They are generally drawn from backgrounds which

¹³ An Overview of Corporate Governance and Accountability in Southern Africa. United Nations Economic Commission for Africa, 2007. Addis Ababa, Ethiopia. (research paper). Page 16

¹⁴ Brenda Hannigan. Company law. Oxford University Press. 2003. Page 144.

¹⁵ Alan Dignam and John Lowry. Company law. Fifth edition. Oxford University Press. Pages 8-9.

¹⁶ Charlesworth's Company law. Seventeenth edition. Geoffrey Morse. Sweet & Maxwell. 2005.

¹⁷ Alan Dignam and John Lowry. Company law. Pages 269-270.

give them useful perspectives on the company's business. Non-executive directors are expected to play a huge role in implementing good corporate governance practices by ensuring the executive directors act in the best interests of the company. This will be discussed in further detail later. The legal position is the same for both executive and non-executive directors, that is, they are all subject to fiduciary and other duties.

As the company is an artificial person,¹⁸ there must be some organ or agent acting on its behalf. Directors are agents for companies and are therefore charged with the role or responsibility of running companies on behalf of shareholders. According to Lord Cranworth L.C in the case of *Aberdeen Railway Co. v Blaikie Bros*¹⁹

“The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is of course the duty of those agents to act so as to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal...”

In most countries, directors are defined and get their authority from the companies' legislation. In Zambia this is the Companies Act 1994.²⁰ Section 203 of the act defines a director as ‘any person who is appointed by the members of a company to administer and direct the business of the company’. Directors as the senior decision makers in the management of companies are therefore central in accomplishing corporate governance objectives.

Corporate governance makes directors accountable to shareholders for effective management of companies. Directors stand in a fiduciary relationship with the company. A fiduciary has been defined as

“someone who has undertaken to act on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence... a fiduciary must act in good faith, he must not take profit out of his trust, he must not place himself in a position where his duty and his interest may conflict, he must not act for his own benefit or the benefit of a third person without the informed consent of his principals.”²¹

In Zambia, most of the duties of directors are not found in statute but rather under common law, that is, those developed by the courts and found in case law such as the duty of care and skill. The common law duties of directors (which will be discussed in more detail below) are; the duty to act in good faith, not fetter their discretion, not to exercise power for the purposes for which they were not intended, a duty to avoid a conflict between his own interests and

¹⁸ *Salomon v Salomon* [1987] AC 22, HL. p.78

¹⁹ (1854) 1 Macq. 461 at p.417

²⁰ Chapter 388 of the Laws of Zambia

²¹ *Bristol and West Building Society v Mothew* [1998] Ch 1 per Millett LJ, p.18

those of the company (duties of loyalty based on fiduciary principles) and to exercise proper care, skill and diligence (duties of care) when carrying out their duties. Under Zambian law, section 215 of the Companies Act²², refers to directors' duties but does not state what they are. However, section 218 of the same Act which deals with contracts in which directors are interested appears to be based on the 'no-conflict rule' established in the old British case of *Aberdeen Railways Co. V. Blaikie Brothers*²³ which required directors not to place themselves in a position of conflict of interest unless they made sufficient disclosure of the interest.

A number of other commonwealth jurisdictions have codified directors' duties. In South Africa for example, sections 76 and 77 of the new Companies Act 2008 lay down the statutory duties imposed on directors. In the United Kingdom, sections 171-177 of the Companies Act 2006 contain the codified directors' duties. In Australia, these duties are found in sections 181-191 of the Corporations Act 2001. These legal obligations on directors underpin good corporate governance practices. All these countries previously relied on common law duties solely. There have been various reasons advanced for and against the codification of these duties. These will be discussed in detail in Chapter three.

It is important to strengthen legislation in regulating companies because not all companies are listed on the stock exchange meaning a lot of companies are not under any obligation to incorporate good corporate governance practices as required by the stock exchange.

1.2. Factual background

The concept of corporate governance in Zambia, particularly in listed companies is a fairly new one. Zambia has in recent years embarked on a vigorous reform programme aimed at attracting foreign investors. Foreign direct investment is important for economic development in any country. Consequently, the need for implementing good corporate governance in Zambian companies has become critical as investors are considering the quality of corporate governance along with financial performance and other factors when deciding whether to invest in a company. Few investors are willing to invest in countries or corporations with poor corporate governance practices.

²² 1994, Cap 388. Hereinafter referred to as the Companies Act 1994

²³ [1854] 1 Macq 461

The need for implementing good corporate governance in Zambia has resulted in complementary reforms such as the development of a corporate governance code for listed companies created by the Lusaka Stock Exchange and also the development by the Institute of Directors Zambia (IODZ) of a corporate governance code for small and medium enterprises (SME) and financial institutions (endorsed by the Lusaka Stock Exchange). The Institute of Directors of Zambia, since its formation in 1999, has been at the forefront in promoting corporate governance practices in Zambia. It has conducted corporate governance courses and seminars for executive and non-executive directors, chief executives and senior managers in private and listed companies as well as regulatory institutions and Non – Governmental Organisations (NGO's).²⁴ It is in the interests of society for large companies to grow and invest (usually done by listing on the Stock market), because it promotes economic growth and thus employment. However, investors require confidence in the market in order to invest.²⁵

It should also be noted that Zambian law is founded on English Common law principles. However, although a number of English Acts have experienced legislative changes and are up to date, Zambian laws tend to fail to keep up with the socio-economic changes around the world.

One of the reasons why corporate governance is a fairly new concept in Zambia is because most companies such as the then mining giant Zambia Consolidated Copper Mines (ZCCM) were owned by the state. The liberalization of the economy and the introduction of stock markets (to facilitate the development of capital markets) together with changes in political governance to democratic systems (even though still taking place) also triggered and brought with them new standards of governance in the economic sphere.²⁶

In Zambia, the Lusaka Stock Exchange (LuSE), established in 1993 to facilitate the development of capital market development in Zambia has a code of corporate governance for companies that are currently listed. The corporate governance rules in Zambia are not found in statute and are not legally binding. Rather, there exists a set of guidelines also referred to as the Lusaka Stock Exchange Corporate Governance Code. In South Africa and the United Kingdom for example, the corporate governance rules for listed companies are

²⁴ <http://www.times.co.zm/news/viewnews.cgi> (accessed on 15/09/2010)

²⁵ John Lessing. The checks and balances of good corporate governance. Bond University. Corporate governance eJournal. Faculty of law. ePublications@bond. Research paper. 21.11.2009.

²⁶ An overview of Corporate Governance and Accountability in Southern Africa. United Nations Economic Commission for Africa, 2007. Research paper. Jenniffer Kargbo.

found in what are referred to as the King III Report and Combined Code respectively. All of these codes are voluntary and companies are asked to either 'comply or explain' (or 'apply or explain' in South Africa's case) which simply requires the companies to comply with the rules found in the corporate governance codes or explain why they are not complying. However, South Africa and the United Kingdom have both in recent years codified their laws on director's duties. Zambia still relies mainly on common law duties as opposed to codified duties which make it easier for directors to perform their duties.

Several Corporate failures around the world have contributed to putting corporate governance in the spotlight. The recent global financial crisis and the increase in the number of institutional investors has highlighted the need for good corporate governance and spurred shareholders to be more active in demands for better performance by directors and to assert their rights as owners of the company. Good corporate governance is critical in attracting the much needed investors in Zambia.

1.3 Problem Statement

The main problem that has been identified is the lack of transparency and accountability in these listed companies. It is difficult to enforce duties where the wrongdoers are the people who control the company. Shareholders entrust the management of companies to directors and rely on these directors to run these companies honestly. It is therefore important for the legal system to devise some means of controlling the directors in the exercise of those powers.

Firstly, as a line of protection, the law imposes various duties on directors. However, Zambia unlike many other jurisdictions does not have a complete list of codified director's duties. It still relies mainly on common law ones. The lack of codified duties has been argued to have resulted in lack of clarity and accessibility making it difficult for directors to understand and carry out their duties efficiently and resulting in poor governance. The absence of statutory duties is also detrimental to the economy because there is no adequate legal protection for investors and thus makes it harder to attract investors.

Secondly, as already mentioned above, the corporate governance codes in Zambia are voluntary and self-regulatory. Listed companies are expected to merely comply with the rules set by the Lusaka Stock Exchange or explain why they have not complied. There is doubt as to how effective these provisions can be if companies are under no obligation to

apply them. The self-regulatory approach does not seem sufficient. There are no sanctions for failure to comply with these rules such as those for example resulting from non-compliance with the provisions in the Sarbanes Oxley Act of the United States²⁷ which include huge fines and prison sentences. Good corporate governance is achieved when directors who are responsible for the running of companies carry out their duties effectively and comply with the relevant codes.

The strongest justification for strict regulation is the need to protect not only investors but the public from any excesses of the persons controlling and managing the company- the directors.²⁸ The impact of a good Companies Act and corporate governance code would serve to strengthen and clarify the roles and responsibilities of directors in Zambia.

1.4 Hypothesis

The codification of director's duties will make directors duties clearer and more accessible making it easier for directors to understand and perform their duties. The codification of corporate governance rules will force companies to comply and provide legal sanctions for failure to comply with existing rules. Both of these actions will improve corporate governance.

1.5 Objectives of study

The objectives of this study are as follows; to find out whether the lack of statutory directors duties and corporate governance codes in Zambia impacts board effectiveness. Secondly, to compare Zambian corporate governance practices to those used in other commonwealth countries such as South Africa and the United Kingdom corporate governance systems to see which is more effective when it comes to the role of the board of directors and finally, to make recommendations as to how boards of directors can improve corporate governance practices in companies

1.6 Significance of study

The significance of this study arises from the need to improve governance practices in order to attract more investors in Zambia. Clarifying certain aspects of directors' obligations and

²⁷ Sarbanes Oxley Act of 2002

²⁸ Andrew Kibaya. AFRICA: Expert Opinion: Corporate Governance in Uganda- an overview. The Chambers Magazine. Published 2010 in Issue 32.

ensuring directors are held accountable for their actions will lead to good board governance which leads to good corporate governance and consequently a better economy.

The research questions will include firstly, should director's duties in Zambia be codified? Secondly; should the corporate governance rules be codified or remain a code of practice? And last but not least, can we learn anything from corporate governance practices being used in South Africa and other commonwealth countries such as the United Kingdom?

1.7 Operational definition of terms

"Company" means a company incorporated by the *Zambian Companies Act 1994. Cap 388* of the laws of Zambia

"Director" means a person appointed as a director of a company under section *two hundred and six* of the Companies Act and is employed by the company

"Non-executive director" means a director who is not employed by the company

"Shareholder" means a person who owns shares in a company

"Stakeholder" means anyone who has an interest in a company

"Listed companies" refer to companies that have satisfied the listing rules of the Stock exchange in this case the Lusaka Stock exchange

"Stock Exchange" refers to the market where the securities of companies and other institutions are traded (bought and sold).

"Codification" refers to the process of forming a legal code or restating the law in a statutory form.

1.9 Methodology

The methodology of this research will include mostly desktop research (data analysis) especially with regards to gathering information about the corporate governance rules in other commonwealth jurisdictions and their application. It will also include some field work in finding out how effective the legislation (if any) and rules are in listed companies in Zambia. This field work will be carried out by handing out a questionnaire to a number of Company secretaries in some listed companies in Zambia, analysing Listed companies' annual reports and conducting telephone or direct interviews as a follow up. Some information will also be

sourced from the Lusaka Stock Exchange and the Institute of Directors who have assumed most of the work on Corporate Governance in Zambia.²⁹

The limitations in this study are due to the fact that the study has a comparative aspect and therefore due to geographical constraints it will be impossible to find out whether the Corporate Governance rules in relation to the board are being complied with and proving to be useful in South Africa and the United Kingdom.

Chapter one includes the introduction, factual background, problem statement, objectives of study, significance of study and methodology while chapter two examines the role of the board of directors, the existing law on director's duties and the provisions relating to the board as stated in the Lusaka Stock Exchange corporate governance code. The chapter will also briefly look at the King III report of South Africa and the Combined Code of the United Kingdom. Chapter three takes a look at the different listed companies, finds out what Corporate Governance measures are being applied, whether they are complying with the LuSE code and whether the current director's duties are understood and are being enforced. It compares them with the measures being applied in South Africa and the UK. This is followed by Chapter 4 which identifies the problems encountered by the board of directors in companies when it comes to implementing Corporate Governance practices. It questions whether the self-regulatory approach taken using the 'comply or explain' method is appropriate in an emerging market such as the Zambian one and briefly looks at the Sarbanes–Oxley Act of the U.S in light of considering the aspect of putting the code on a statutory basis. Last but not least, chapter 5 draws conclusions and makes recommendations as to how the problems being encountered can be solved and considers out whether any lessons can be learned from other commonwealth countries' approach to corporate governance in respect of the board of directors and their duties.

²⁹ <http://www.iccwbo.org/corporate-governance> (accessed on 20/09/2010)

CHAPTER 2

This chapter considers a number of issues as they currently stand starting with the role and functions of the board of directors. It goes on to discuss the existing law on directors duties which are found under common law. An analysis of the relevant provisions of the LuSE corporate governance code is then carried out. Last but not least, the chapter considers the relevant provisions of the King III Report of South Africa and the Combined Code of the United Kingdom.

2.1 The role of the board of directors

As discussed in the previous chapter, corporate decision making and management of the company is entrusted to the board of directors of the company. The board is accountable to the company and its shareholders. It collectively sets goals for the company, appoints the CEO and oversees management of a company on behalf of its members. Directors are responsible for maximising the value of the company for the benefit of its members. Directors are a legal necessity. Section 215 of the Companies Act 1994 states: 'Subject to this Act, the business of the company shall be managed by directors who may pay all expenses incurred in promoting and forming the company , and may exercise such powers of the company as are not, by this Act or by the articles , required to be exercised by the company resolution.' It is also the role of the board of directors to implement good corporate governance practices. Other roles of the board also include determining strategy, direction and leadership. Beyond this, the actual roles of directors are dependent on the articles of association of the particular company.'

2.2 A look at the current law on director's duties in Zambia

As stated above, in order to promote investor confidence and thereby facilitate expansion of the country's capital market, investors need to be satisfied that they have redress against directors where there has been misconduct or mismanagement. When it comes to director's duties, it has already been stated that Zambia relies mainly on those found in English case law. This is because the area of Zambian company law is still in its developing stages as Zambia only became a liberalised economy about 20years ago. Another factor that contributes to this is the fact that company law disputes are normally resolved using arbitration as opposed to the court system. These common law duties will now be discussed in more detail. The first four of these common law duties are referred to as fiduciary duties or

duties of loyalty. These require that directors act in the interests of the company and avoid conflicts of interest. It has already been mentioned that directors stand in a fiduciary relationship with the company.

2.2.1 The duty to act bona fide in the interests of the company

The first and most basic common law duty of directors that must be considered when examining the conduct of any company director is the duty to act in good faith or to act *Bona fide* in the interests of the company. This is a fiduciary duty. This duty and the duty to act for proper purposes (to be discussed below) were formulated by Lord Greene MR in *Re Smith v Fawcett*³⁰ in which he explained that:

“[Directors] must exercise their discretion bona fide in what they consider- not what a court may consider-is in the interests of the company, and not for any collateral purpose.”

An example of the duty to act bona fide in the interests of the company being enforced is found in the case of *Re W & M Roith Ltd*³¹ where Mr Roith a director of a company had entered into a service contract with his company for the purpose of providing his wife with a pension in the event of his death. The court held that the contract was not binding as its object was to benefit Mrs Roith and not the company. Mr Roith therefore breached his fiduciary duty to act in the best interests of the company. The test of this duty is subjective as it is based on what the director and not the court thinks is bona fide in the interests of the company.³² Therefore if a director honestly believes that he is acting in the interests of the company, there is no breach of duty whether the court thinks that it was in the best interests of the company or not.

The test for this duty has made the courts very reluctant to rule that a director has acted in bad faith. However, even where the director fails to consider the interests of the company, he may not be liable if the objective criteria established in *Charterbridge Corporation Ltd v Lloyds Bank Ltd*³³ is applied. According to this case, ‘the proper test of whether a director of a company has acted bona fide in the interests of the company...must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.’ The objective test established in this case still makes it

³⁰ [1942] Ch 304, CA

³¹ [1967] 1 All ER 427

³² *Re Smith v Fawcett Ltd* [1942] Ch 304

³³ [1970] 1 Ch 62

difficult for the courts to find a director liable as it is based on what other directors do in those circumstances and not what the courts think should be done. This duty can be said to be ambiguous as both its subjective and objective nature allows directors to interpret it in their own way. Also, it makes it hard for the courts to prove a breach by a director.

The meaning of the term 'interests of the company' which has can be interpreted either as constituting the interests of the shareholders or alternatively the stakeholders (including creditors, employees and the general public) and 'good faith' is also a reason why this duty is perceived to be unclear or ambiguous. The board of directors in many cases may only act in the best interests of the controlling shareholders as opposed to those of the company.

2.2.2 The duty to act for proper purposes

The next common law (fiduciary) duty is the duty to exercise their powers for a proper purpose and not to act for any collateral purpose also referred to as the duty to act for proper purposes. This duty has frequently been applied in relation to the power to issue shares which tends to adversely affect the voting rights of majority shareholders. The purpose in questions should be that for which it was granted. Interpretation of this duty requires the term 'proper purposes' to be defined. Articles of association usually define the scope of director's powers. The court must examine the substantial purpose for which the purpose was exercised and whether that purpose was proper or not.

In the case of *Howard Smith v Ampol*³⁴, the board of directors issued shares to a new bidder for the purpose of reducing the proportionate shareholding of the majority shareholders to below 50 percent and thus enable the bidder to make an effective bid. The Privy Council held that the board had acted with an improper purpose, albeit honestly and within their powers and that the issue of the shares to the bid should accordingly be set aside. It was said that it would be a breach of duty for the directors to operate contrary to the memorandum or articles of the company³⁵ or to enter into a contract on behalf of the company whereby they remained in post as directors so that the shareholders could not exercise their constitutional rights to appoint new directors.

According to the same case, this proper purpose doctrine applies in all cases where directors use their powers. Lord Wilberforce in this case stated that when the exercise of a particular

³⁴ [1974] A.C. 821, PC

³⁵ Chapter 3 and 6

power is challenged, the determination of whether or not it has been exercised for an improper purpose is a twofold process. First it is necessary to consider the power in question in order to ascertain, 'on a fair view', its nature and the limits within which it may be exercised. Second, the substantial purpose for which the power was exercised should be examined so as to determine whether that particular purpose was proper or not.

There is tension between the duty to act bona fide and the duty to act for proper purposes as the latter operates to limit the authority of directors even if their interests were carried out in what they believed was bona fide in the best interests of the company. It is not sufficient for directors to act in what they believe is in the best interests of the company unless they can also establish that their actions are within the scope of the powers placed on them.

2.2.3 The duty not to fetter discretions

Another fiduciary duty is the duty not to fetter discretions sometimes referred to as the duty to exercise independent judgement. Directors must give adequate consideration in exercising discretion and must not delegate or fetter future exercise of discretion without authority. An example of this is contracting with a third party as to how a particular discretion conferred by the articles will be exercised. In *Boulting v Association of Cinematograph, television and Allied Technicians*³⁶, Lord Denning explained:

"It seems to me that no one who has duties of a fiduciary nature can be allowed to enter into an engagement by which he binds himself to disregard those duties or to act inconsistently with them. No stipulation is lawful by which he agrees to carry out his duties in accordance with the instructions of another rather than on his own conscientious judgement; or by which he agrees to subordinate the interests of those whom he must protect to the interests of someone else".

The duty is not breached where it can be shown that it was in the best interests of the company to enter such an agreement.

2.2.4 The duty to avoid a conflict of interest

Another common law duty is the duty of directors not to place themselves in a position of conflict of interest, also known as the 'no conflict-rule.'³⁷ This is also a fiduciary duty. This rule was formulated in the early case of *Bray v Ford*³⁸ by Lord Herschell who stated

"It is an inflexible rule of a court of equity that a person in a fiduciary position...is not...entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict."

³⁶ [1963] 2 QB 606

³⁷ *Guinness Plc v Saunders* [1990] a A.C. 633

³⁸ [1896] AC 44, HL

More recently, it was explained in the case of *Aberdeen Railways Co. v Blaikie Brothers* which involved the issue of self-dealing

“...no fiduciary...shall be allowed to enter into agreements in which he has or, can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect.”

A director therefore breaches this fiduciary duty if he enters into a contract with his company and places himself in a position where his personal interest conflicts or may conflict with the company's interest. Directors breaching this duty are liable to account for any profits made and to compensate the company for any losses incurred. If the director obtains corporate assets, he becomes liable as constructive trustee and the company will be able to recover the property or its proceeds from him.³⁹

Section 218 (4) of the *Zambian Companies Act* states that: A director who is interested in any contract or proposed contract of the company shall declare the nature and extent of his interest at a meeting of directors or shareholders of the company. Subsection 8 of the same section goes on to state that: subject to this section and the articles, where a contract or arrangement in which a director is interested is considered at a meeting – (a) the director shall not be counted in the quorum for that business; and (b) the director shall not vote in respect of that business. Subsection (10) states that: a director who fails to comply with this section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five hundred monetary units. This section appears to have mitigated the harshness of the no-conflict rule in the context of the self-dealing rule by allowing the director to declare their interest to the board.

2.2.5 The duty not to make a profit

The fourth common law and fiduciary duty is the duty not to make a secret profit sometimes referred to as the ‘no-profit rule.’ A director must not make an undisclosed or secret profit by reason of his position as director. If he does, he must account for it to the company. The possibility that the company itself might not have obtained the profit is immaterial.⁴⁰ In *Regal (Hastings) Ltd v Gulliver*⁴¹ the directors made use of a corporate opportunity that the company was unable to make use of it. The House of Lords held that they were liable for the profits they made. The directors acquired the profits only by reason of them holding their

³⁹ Pg 302 Charlesworth's *Company law*. Seventeenth edition. Geoffrey Morse. Sweet & Maxwell. 2005.

⁴⁰ *Industrial development Consultants Ltd v Cooley* [1972] 1 WLR 443

⁴¹ [1967] 2 A.C. 134

office of directors. It did not make a difference that they had acted in good faith and tried to assist the company in acquiring the opportunity.

Lord Russel of Kilowen at p. 144 stated

“ the rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would have otherwise gone to the plaintiff (that is, the company), or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from a mere profit having, in the stated circumstances been made. The profiteer however honest and well intentions, cannot escape the risk of being called upon to account.”

2.2.6 The duty of care and skill

Last but not least, directors have a duty of care and skill towards the company. Duties of care and skill are different from fiduciary duties because they require directors to exercise reasonable care and skill in the performance of their duties. The three propositions by which to measure a company director's skill and care were laid down by Romer J in the case of *Re City Equitable Fire Insurance*.⁴² These were firstly, that a director need not exhibit in the performance of his duties a greater degree of skill than may be reasonably expected from a person of his knowledge and experience and not that of the reasonable man. Secondly, a director is not required to give continuous attention to the affairs of his company. Thirdly, in respect of all duties that, having regard to the exigencies of business, and the articles of association, that may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

This means that the level of care and skill to be expected from a company director is 'the care and skill that an ordinary man might be expected to take in the circumstances on his own behalf.' This duty poses no difficulty where the director is highly experienced as such an individual would be judged fairly by his own exacting standards. However, it poses a problem where the director is unqualified as he will be measured against a generally unsatisfactory standard.

The duties of a non-executive director are of an intermittent nature to be performed at periodical board meetings, and any other meetings which may require his attention. He is not required to have special business expertise or experience in the running of the company. He is nevertheless expected to exercise the care which can reasonably expected of a person with his

⁴² [1925] Ch. 407, at p.428.

knowledge and experience. He is at liberty to rely on the judgement, and counsel of management.

These duties as seen in the bulk of case law have been found in most commonwealth countries such as the United Kingdom and South Africa to be too obscure and difficult for directors to understand and carry out. Consequently, the named countries have opted for a statutory list of duties to replace and in some cases merely re-state these duties.

It was suggested by the United Kingdom and Scottish Law commissions that a restatement of directors should make some reference to the possibility of the avoidance of liability through disclosure, approval, release and ratification.⁴³

2.3 The LuSE Corporate Governance Code

The Lusaka Stock Exchange (LuSE) was established with technical assistance from the International Finance Corporation (IFC) and the World Bank in 1993. The formation of the exchange is part of the Zambian government's economic reform programme aimed at developing the financial and capital market in order to support and enhance the private sector. The Lusaka Stock Exchange is also expected to attract foreign portfolio investment through recognition of Zambia as an emerging market with capital market with potentially high investment returns.⁴⁴ Its operations are governed by the Securities Act (No.38) of 1993 Cap 354 of the Laws of Zambia. The implementation of the Securities Act is the role of the Securities and Exchange Commission (SEC) Zambia.

The Lusaka Stock Exchange Corporate Governance Code which has been in existence and effective since 1st January 2005 has strict guidelines on how the management and directors of listed and quoted companies must conduct their affairs. It has no legal status. It is a compilation of best practices to provide a framework by which the business and management of listed companies are to be directed and controlled. It has enacted several provisions relating to the board of directors to promote good governance in listed companies. Most of the provisions in the code are based on those of Codes in other jurisdictions such as the Combined Code of the United Kingdom and the King I and II Report of South Africa. The provisions/ principles that are relevant to this study are mainly those addressing the composition of the board, the independence of non-executive directors and the roles of the

⁴³ Law commission and Scottish Law Commission, Company Directors: Regulating Conflicts of interests and formulating a statement of duties. Consultation paper no. 153. London: Stationary office. Part 3(4)

⁴⁴ www.luse.co.zm/index (accessed on 04/12/2010)

chairperson and Chief Executive officer (CEO). The structure of the company as recognised by company law is central to corporate governance.⁴⁵ None of these Codes have statutory backing.

Every company that is listed on the Stock Exchange is required under the Listing Rules to include in its annual report a statement as to how it applied the principles in the Code. An annual report is an important document for communicating with investors. It is the principle vehicle under the listing rules and the code for delivering corporate governance disclosures to investors. Listed and Quoted companies are required to submit to LuSE within 3 months from the end of their respective financial years a report stating their areas of compliance and non-compliance with the code. This is what is referred to as the 'comply or explain' approach. On the basis of these reports, LuSE publishes on an annual basis for the public and investor information, the awards given to the best listed and quoted companies in good corporate governance practices in terms of the Code.

Principle B.3 of the Code states that the board must ensure that the organisation complies with all relevant laws, regulations and codes of business practice. Principle B.10 states that the board must comprise a majority of non-executive directors to provide an appropriate balance in decision making. Non-executive directors should scrutinise the performance of management and constructively challenge the board's decisions with regards to strategy. This is in line with the monitoring function of non-executive directors discussed in the previous chapter. The non-executive directors should also be independent of management in order to protect minority shareholder interests. Links with management may allow non-executive directors to compromise their independence. These directors should not allow themselves to be sidelined by one or more dominant figures on a board.

Corporate governance practices recognise the different roles played by executive and non-executive directors. Unlike executive directors, non-executive directors do not have detailed knowledge of the company's day to day operations. These non-executive directors rely to a great degree on the information given to them such as the reports made by the chairman and the executive directors. According to principle B.11, a company must have formal and transparent procedures for appointments to the board. B.13 states that the board must adopt a procedure for the induction and training of newly appointed directors on their duties,

⁴⁵ Boyle & Birds Company Law. Page 381

responsibilities, powers and potential liabilities. Principle B.16 requires all directors to attend meetings of the organisation or give reasons for non-attendance.

Principle B.17 deals with the role of the chairperson and CEO. It states that; the role of the chairperson and chief executive officer must be performed by separate persons. The presence on the board of the chief executive officer makes a critical analysis of his performance potentially difficult. Principle B.18 allows for deviation from this by stating that; if the role of the chairperson and chief executive officer are performed by the same person: a) the board must have an independent director as deputy chairman and b) there must be a complement of independent directors sufficiently involved in the chairperson's annual performance.

The chairperson is the head of the board. He runs the board while the CEO in simple terms runs the business. In other words, the top managerial officer in the corporation is also chairperson of the group that is given the task of among other things, monitoring the performance of management. The chairman with approval of the board should be able to fire the CEO if he is underperforming. This is made difficult if the roles are held by an individual. It has been recognised that combining these roles concentrates power in the hands of one individual. Corporate governance principles recognise the conflict... principle B.19 states that the chairperson should be appointed on merit. It would not for example be in the interests of the company to appoint someone who would look after the interests of the shareholders even though those interests might not be in the best interests of the company.

With respect to executive and non-executive directors, principle B.22 states that non-executive directors should be individuals of high calibre and credibility, with the necessary skill and experience to bring judgement to bear, independent of management, on issues of strategy, performance, resources and standards of conduct and evaluation of performance. This principle is based on the idea of the independence of non-executive directors which has already been discussed above. Non-executive directors are also expected under principle B.23 to devote adequate time on a regular basis to the organisation, and the amount of time that non-executive directors spend on the organisation should warrant their compensation, what is 'adequate time' shall be determined by the board. Last but not least, with regards to non-executive directors, principle B.25 states that the board should establish a formal orientation programme to familiarise incoming directors with the organisations operations, senior management and its business environment and to induct them in their fiduciary duties and responsibilities.

With regards to the issue of frequency of board meetings, principle B. 39 requires the board to meet at least once a quarter. During these board meetings, directors can receive information and familiarise themselves with the issues before they vote on the major issues affecting the company. The last part of the section of the code dealing with the board states in B.44 that all directors should have access to the advice of the company secretary and in B.45 that the company secretary should provide the board as a whole and directors individually with detailed guidance as to how their responsibilities should be properly discharged in the best interests of the organisation.

Another important aspect with regards to accountability of the board is that found in provision C. of the Lusaka Stock exchange code which requires boards to appoint board committees such as an audit committee and remuneration committee.

The questions as to whether these provisions are being implemented and whether they are satisfactory will be analysed in the next chapter.

2.4 The King III Report

The King III report which took effect in South Africa in March 2010 is based on an ‘apply or explain’ basis. The King III replaces the King II report and strengthens previous requirements, clarifies certain issues, expands on existing recommendations and introduces new concepts and recommendations. It became necessary because of the new Companies Act in South Africa⁴⁶ which places emphasis on corporate governance compliance for all companies and also the changing trends in international governance.

Where the board believes it is in the best interests of the company, it can adopt a practice that may be different from that recommended in King III but must explain it. Unlike other codes, it applies not only to companies listed on the Johannesburg Stock Exchange (JSE) but to all entities regardless of the manner and form of incorporation or establishment. This enables companies to operate for the purposes for which they were intended without being bound to follow standards which are by nature, inflexible. The report recognises shareholder focus is not the only interest which directors should address. It places emphasis on evaluation of the board of directors.

⁴⁶ Companies Act 2008

Although King III largely relies on self-regulation and is not enforceable in any court, the listing requirements of the Johannesburg Stock Exchange (JSE) provide that all listed companies are contractually bound to adopt King III and any failure to do so would amount to a breach of listing requirements. If a company fails to comply with the listing requirements, the JSE may suspend or terminate the listing of the company if it is in the public interest to do so. The JSE may also publicly or privately censure the company or its directors, individually, or jointly, and thereafter may impose a penalty of up to R1 million on the company or its directors, individually or jointly.⁴⁷

Chapter 1 of the King III report deals with ethical leadership and corporate citizenship. Principle 1.2 of the King III report states that the board should ensure that the company acts and is seen to be a responsible corporate citizen. Principle 1.3 states that the board should cultivate and promote ethical corporate culture. Principle 1.8 states that the board and its directors should act in the best interests of the company. According to principle 1.9 the board of directors should manage conflicts of interest. Principle 1.15 states that the board should ensure that the company implements an effective compliance framework and processes.

Chapter 2 of the king III report is based on the board and its directors. It states the roles and functions of the board. A few of the more relevant principles will be discussed. According to principle 2.1, the board should act as the focal point for corporate governance. The board is responsible for ensuring the continued success of the company and that it is guarded by its charter. Principle 2.2 states that the board should appreciate that strategy, risk, performance and sustainability are inseparable. This puts more emphasis on opportunity as opposed to only risk. Principle 2.9 states that the board should ensure that the company complies with applicable laws and considers adherence to non-binding rules, codes and standards. Principle 2.14 states that the board and its directors should act in the best interests of the company. The report also states in Principle 2.16 that the board should elect a chairman of the board who is an independent non-executive director and that the CEO of the company should not also fulfil the role of chairman of the board.⁴⁸ Principle 2.18 states that the board should comprise a balance of power with a majority on non-executive directors and the majority of non-executive directors should be independent. Last but not least, principle 2.19 states that directors should be appointed through a formal process.

⁴⁷ http://www.globalcorporategovernance.com/n_africa/316_322.htm (accessed on 05/01/2011)

⁴⁸ Principle 2.16

2.5 The Combined Code

The Combined Code of the United Kingdom is a result of reports from the findings of three committees namely the Cadbury Report, the Greenbury Report and last but not least, the Hampel report. It is widely regarded as an international benchmark for good corporate governance practices. It uses the 'comply or explain' approach. This means that it expects companies to comply with the code's provisions but recognises that departure from the provision of the code may be justified in particular circumstances. It is directed to the boards of all listed companies in the United Kingdom but encourages other companies to aim at meeting its requirements. Responsibility for the Combined Code and compliance falls to the United Kingdom Listing Authority (UKLA), part of the Financial Services Authority (FSA), as the UKLA has responsibility for the Listing Rules.⁴⁹ It, like other corporate governance codes, sets out the standards of good practice in relation to issues such as board composition and development, remuneration, accountability and audit, and relations with shareholders.

One of the key features in this code is the use of non-executive directors as custodians of the governance process.⁵⁰ Part A.1 of the Combined Code states that every company should be headed by an effective board, which is collectively responsible for the success of the company. The main supporting principle behind this is that all directors must take decisions objectively in the interests of the company. Principle A1.1 states that the board should meet sufficiently regularly to discharge its duties effectively and that the annual report should include a statement of how the board operates.

Principle A.2 deals with the roles of the Chairman and Chief Executive Officer. The main principle is that there should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for the running of the company's business. No one individual should have unfettered powers of discretion. Principle A.2.1 states that the roles of chairman and chief executive should not be exercised by the same individual.

Principle A.3 is based on board balance and independence. The main principle behind this is that the board should include a balance of executive and non-executive directors (and in particular independent non-executive directors) such that no individual or small group of

⁴⁹ Financial Services and Markets Act 2000, s 96.

⁵⁰ Andrew Hicks & S.H. Goo. Cases & Materials on Company Law. Sixth Edition. Oxford University Press. 2008. Page.236.

individuals can dominate the board's decision taking. Principle A.3.1 requires the board to identify in its annual report each non-executive director it considers to be independent and to determine whether the director is independent in character and judgement and whether there are relationships or circumstances which are likely to affect, or could affect, the director's judgement. The board should state the reasons why it thinks a director is independent, notwithstanding the existence of circumstances which may appear relevant to its determination. Principle A.3.2 states that at least half the board, excluding the chairman, should comprise non-executive directors determined by the board to be independent.

Principle A.4 which deals with appointments to the board, states that these appointments should be made on merit and against objective criteria. A. 4.1 requires that there be a nominations committee which should lead the process for board appointments and make recommendations to the board. The majority of this committee should be independent non-executive directors.

Last but not least, Principle A.5 states that the board should be supplied in a timely manner with information in a form and of a quality appropriate for it to discharge its duties. All directors should receive induction on joining the board and should regularly update and refresh their skills and knowledge.

Most of the provisions in these three codes of best practice, that is, the Lusaka Stock Exchange Corporate governance Code, The King III report and the Combined Code, have similar provisions. However, the Zambian code – the LuSE Corporate Governance Code appears to be the least comprehensive of the three. Both the King III report and the Combined Code have replaced older codes in order to keep up with the ever changing economy. Also, these two codes have been subject to continuous review.

When comparing the LuSE corporate governance code with the King III report and the Combined Code, a few major differences were found. Both the King III report and Combined Code discuss the issue of corporate responsibility which require companies to have regard to their stakeholders as opposed to only the shareholders. Also the LuSE code is the only code that allows for exceptions when it comes to the role of the CEO and Chairperson, both of the other codes expressly prohibit the two roles being combined. They also point out the need for all decisions to be made in the interests of the company. The Combined code requires

nomination committee which should lead process for board appointments while the LuSE code and King III report states that there should be a formal process for appointing directors to the board. The Combined Code also refers to the effectiveness of the board which is not mentioned in the LuSE code or King III report. In order to enhance the effectiveness of the company, it is important to have a boardroom culture that encourages criticisms and alternative views should be developed. It is very important that the LuSE code be up to date and in line with international best practice.

CHAPTER 3

This chapter starts by considering how the existing common law director's duties are perceived by directors in listed companies in Zambia. It briefly discusses the reasons that have been advanced for and against the codification of directors' duties. It then goes on to address the compliance aspect of corporate governance in listed companies in Zambia by finding out whether companies have implemented the provisions in the LuSE corporate governance code and possibly those of other countries such as those considered in this paper. The chapter will also discuss whether the importance of non-executive directors is being seen and the independence of these non-executive directors. This will be done by using the actual findings collected by use of a questionnaire filled out by Company secretaries of some listed companies and analysing annual reports to see how corporate governance rules are being applied. In addition to listed companies, a brief interview was also held with the Company secretary of the Lusaka Stock Exchange.

3.1 Analysing corporate governance in Zambian Listed Companies

There are currently only nineteen Public companies listed on the Lusaka Stock Exchange compared to over 2000 listed on the United Kingdom Listing Authority and over 500 public companies listed on the Johannesburg Stock Exchange in South Africa .This is a very small number even for a country with an emerging market like Zambia, especially considering the governments current vigorous reform programme aimed at attracting investors. Also, the Lusaka Stock Exchange has been in existence for over five years. This highlights the need for government to ensure corporate governance practices are properly implemented as one of the measures to attract more investors.

The study was conducted involving 12 of these companies with regards to the two corporate governance mechanisms, that is, the legal duties of directors and the composition and structure of the board. The first batch of questions asked dealt with director's obligations towards the company. They addressed issues such as whether the existing directors duties were clear, accessible and consequently, enforceable. The question of compliance with the existing LuSE corporate governance code was also addressed. All the companies included in the study comply with the listing rule requiring companies to state whether they are complying with the code or not in their annual reports. There 'appeared' to be a high level of compliance with the LuSE code .However, the fact that a company states that it is complying does not necessarily mean that that is the case.

Corporate governance rules are a good starting point in promoting good governance in Zambia but they are not credible unless they are applied effectively. In order for this to happen, regulators must have sufficient authority and resources. The effectiveness of the rules depends on the regulatory agencies ability to enforce the rules and provide sanctions where they are broken. The regulator in this respect is LuSE. Likewise, director's duties are pointless if they cannot be enforced by the company and its members. As a result, it is important for the board of directors to understand their duties toward the company in order for the company to be able to enforce them in the incident of a breach and also to prevent liability by carrying them out efficiently.

3.2 How are the Common Law Duties perceived by Directors in Listed Companies in Zambia?

With regards to the duties of directors, the survey found firstly, that the job of informing the directors of their duties towards their company's in most of the companies was either left to the company secretary or the Articles of Association. The former method consisted of the directors undergoing training using induction programmes and being provided with continuous information through the use of workshops while the latter required the directors to familiarise themselves with the provisions of the Articles of Association guided by the Companies Act.

As to the question of whether directors understood their duties towards their respective companies, 70 percent of the company secretaries interviewed were of the opinion that they did after they had undergone training while the other 30 percent were of the opinion that they did not. All the Company secretaries taking part in the survey were of the view that it was time for Zambia to codify the existing law on director's duties. They agreed with the reasons given below such as the need for clarity and accessibility. Statutory duties can save directors much time and effort in ascertaining the law because they should provide clear guidelines as to how directors ought to behave.

3.3 Should Director's Duties in Zambia be codified?

The reasons that have been advanced in favour of codifying director's duties include; to provide greater clarity of what is expected of directors and to make the law accessible, to enable defects in the common law to be corrected in important areas where it no longer corresponds to accepted norms of practice and to make development of the law in this area

more predictable.⁵¹ Another reason given for the codification of directors duties in other jurisdictions was the introduction of listed companies. The common law duties were mainly applicable to directors acting in private (limited) companies as opposed to public (listed) companies. Codification was therefore seen as an opportunity to restate these duties in a way that would encompass both of these types of companies. Codification is also meant to ensure that no illusions exist about the different roles of the directors, shareholders and management. Codification also results in more scrutiny of directors. These duties, both common law and statutory coupled with good corporate governance practices as required by the various codes (which have been analysed) used in these countries contribute to effective management of companies. Codification will allow directors to clearly identify the scope of their duties. The fact that several commonwealth countries have codified their law on director's duties is evidence of this.

Those who are against codification of director's duties argue that it may restrict, that it may lead to loss of flexibility and that in the event of need for change, primary legislation would be then be necessary to amend it. It was also argued that the attempt to improve accessibility by codifying the law would prove to be illusory as the statement would still need to be interpreted by lawyers. There will be no loss of flexibility if the law sets out general principles. Should the statutory statement become out of step, there should be primary legislation in the form of a statutory instrument to amend the Act. As to the issue of accessibility, the reason that lawyers would be still be needed to interpret its meaning, was said to be an insufficient reason not to improve the accessibility.⁵² As Lord Herschell noted in *Bank of England v Valigano Brothers*⁵³

“the singular benefit of a codifying statute is there is no longer need to [roam] over a vast number of authorities in order to discover what the law [is], extracting it by a minute critical examination of the prior decisions”

Another important consideration is whether this codification should be full or partial. Full codification would be a statutory statement of all of a directors fiduciary duties as well as his duty of care and skill while partial codification would be a statement of the main settled

⁵¹ Modern Company Law for a Competitive Economy: Final Report (London DTI, July 2001)

⁵² Law Commission and Scottish Law Commission, *Company Directors: Regulating Conflicts of Interests and Formulating a statement of Duties* (law Com. No.261)

⁵³ [1891] AC 107 p.145

duties, including the director's duty of care. Unlike the former, it would not be exhaustive and the general law would continue to apply in those areas not covered by statute.

The general view of the respondents was that partial codification would be a better approach. This is because full codification entails the use of a rigid body of rules. It has been argued that full codification cannot accommodate an environment that keeps on changing as would a statutory scheme that is based on broader principles.⁵⁴ Partial codification on the other hand would adopt general principles of law while leaving room for the development of the common law. A potential problem with partial codification is that having some duties in a statutory statement and some under general law would make the law uncertain. Directors would think the statutory rules were exhaustive, when they were not. However this could be remedied by making sure that directors are told other duties may be contained in other legislation and regulations.

The United Kingdom for example, has adopted partial codification in the Companies Act 2006. This was based on the reasoning that the law governing director's duties is dynamic and continues to develop.⁵⁵ To set out in statute duties that were still developing might restrict their ability to adapt to changing circumstances. South Africa has also adopted partial codification of the common law fiduciary duties of directors in the Companies Act 2008.⁵⁶

3.4 Are Listed Companies in Zambia complying with the LuSE Code?

The LuSE corporate governance code requires that companies either confirm that they have complied with its provisions, or where they do not, provide an explanation. It recognises that a departure from its provisions may be justified in certain circumstances. All the companies included in the study stated that they have boards using unitary system, that is, they are all composed of both executive and non-executive directors. They also stated that the number of non-executive directors making up the board ranged from half to more than half of the board in line with Principle B. 10 requiring the board to comprise a majority of non-executive directors in order to prevent conflicts of interest.

⁵⁴ Sauveplanne. Codified and Judge made Law.45(4) (1982) 113.

⁵⁵ Law Commission and Scottish Law Commission, Company Directors: Regulating Conflicts of Interests and Formulating a statement of Duties (law Com. No.261)

⁵⁶ G. Lumb. Director's fiduciary duties. South Africa. December 2010. [Http:// www. Lexology.com/library/](http://www.Lexology.com/library/)

3.5 Are the Non-Executive Directors in Zambian Listed Companies Independent?

The most important issue when dealing with Non-Executive directors was that of independence. All the company secretaries interviewed were of the opinion that their Non-Executive directors were independent, nevertheless, 20 percent doubted that they were carrying out their monitoring function. There were concerns about the genuineness of this supposed independence of Non-Executive directors. It is important at this point to consider the very important aspect of director independence and their real ability to hold management to account. An independent director is not defined in the LuSE corporate governance code.

In South Africa, the King III report defines an independent non-executive director as one who; is not representative of a major shareholder who can control or significantly influence management or the board, does not have a material or direct interest in a company/group which is greater than 5 percent of the group's total number in shares or is less than 5 percent of the group's total number of shares in issue but is material to his/her personal wealth, has not been employed by the group or appointed as a designated auditor or partner in the group's external audit firm or senior legal advisor in the previous 3 financial years, is not related (immediate family) to someone who has been employed in the group in an executive capacity in the previous 3 financial years, is not a professional advisor to the group, is free from any other business or relationship that could be a conflict such as being a director of a material customer or supplier to the company and one who does not receive remuneration based on the company's performance.

The Combined Code also lists similar provisions on director independence which are set out in provision A.31. However, it adds to the list the requirement that the director/s should not receive or have received additional remuneration from the company apart from a director's fee, participates in the company's share option or a performance-related pay scheme, or is a member of the company's pension scheme and also that the director should not have served on the board for over 9 years from the date of their first election.

However, it has been said that the definition given by King III of independence appears to be lacking in substance. True independence has been suggested to be serving the interests of the

company to the exclusion of the interests of the nominator, employer, or principal. It has been stated that all directors should be independent, not just the majority of them.⁵⁷

Unfortunately there has been a history in all parts of the world, including Zambia, of directors getting appointed to the board on the basis of who they know as opposed to what they know.⁵⁸ Powerful shareholders usually have a huge say in who is appointed. Those who are friendly to him/her easily find their way into the boards of the companies concerned while those who go against the wishes and expectations of the significant shareholder are more likely not to get appointed.⁵⁹ The use of nomination committees, which is a fairly new idea, is hoped to help curb this problem as such directors are searched, selected, nominated and recommended for appointment or election by a nomination committee, itself composed of independent directors.⁶⁰

3.6 Should the roles of Chairperson and CEO be kept separate?

The next principle that was considered was that requiring that the roles of the Chief Executive Officer and Chairman be kept separate. Most of the companies have kept these roles separate although a few have not. The LuSE corporate governance code gives an exception as to when this rule cannot be followed in principle B.18 by stating that if the roles of the chairperson are performed by the same person, the director must board must have an independent director as deputy chairperson. The companies included in the survey that have an individual performing both roles are therefore still complying because they have independent deputy chairpersons. There are some views expressed that separating the chairmanship can trigger power struggles and confuse the staff especially where the chairman gets involved in daily operations. CEO's prefer to think it is preferable to have one boss at the helm as opposed to two.

Both the Combined Code and King III reports expressly state that the roles of chairperson and CEO should be kept separate. The rationale behind this according to the Cadbury report is that 'there should be clear division of responsibilities at the head of the company, which will ensure a balance of power and authority such that no one individual has unfettered

⁵⁷ Walter. G. Statutory, Common Law and other Duties of Directors. Paper for CIS Corporate Governance Conference on 10 to 11 September 2009. University of Kwa-Zulu Natal. Page.6

⁵⁸⁵⁸ Cnaan F. Dube. Corporate governance. Non-executive directors' independence-fact or fiction? Mambo press. 2008. Page.34

⁵⁹ C. Dube. Corporate governance. Non-executive directors' independence-fact or fiction? Page.39

⁶⁰ C.Dube. Corporate governance. Non-executive directors' independence-fact or fiction? Page 34

powers of decision.’ In countries like the United States, the role of the chairman and CEO have often been combined but now more and more companies are choosing to appoint separate individuals to carry out the roles.

With regards to the compliance aspect of frequency of board meetings, it was found that the majority of the boards in the companies included in the survey meet at least quarterly which is accordance with principle B.39 of the code.

3.7 The Securities and Exchange Commission Zambia

It is necessary to look briefly at the role that the Securities and Exchange Commission plays in implementing corporate governance issues in Zambian listed companies. The Securities and Exchange Commission Zambia was established in 1993 by the Securities Act. It ensures adequate investor protection and supports the operation of a free, orderly, fair, secure and properly informed securities market. It regulates and supervises the securities industry in Zambia. It regulates the operations of the Lusaka stock exchange to ensure they in turn regulate the market well. It mostly conducts off-site supervision. However, it should be noted that the Securities and Exchange Commission mainly deals with the financial disclosure aspect of corporate governance.⁶¹ LuSE deals with the other aspects of corporate governance in Zambian listed companies.

The interview carried out with the LuSE company secretary revealed that LuSE has no measures in place to monitor compliance with the LuSE code and relies completely on the annual reports submitted by the listed companies.⁶²

⁶¹ <http://www.sec.gov.zm/> (accessed on 16/02/2011)

⁶² Interview: Mrs. P. Sampa, 28/02/2011

Chapter 4

This chapter will look at the problems that have been encountered by listed companies in Zambia when implementing good corporate governance practices. It will also address the question of whether the 'comply or explain' approach used by LuSE is suitable for a country like Zambia which has an emerging market and whether it is working and finally it will look briefly at the enforcement of voluntary codes in the UK and South Africa and last but not least, the Sarbanes Oxley Act of the USA as an example of a code that has been codified to see whether it is effective or not.

4.1 Identifying the challenges faced by boards in listed companies in implementing the corporate governance practices discussed

According to the survey, there are a number of challenges faced when trying to implement good corporate governance practices. Firstly, where directors have difficulties understanding their obligations towards the company, the company secretary has to constantly explain to directors what their duties towards the company are. This is mostly due to lack of clarity and accessibility especially where there is no induction upon beginning the directorship or where the duties listed in the articles of association are unclear.

There are also sometimes conflicting interests of parties involved. As was already mentioned in chapter two, the board of directors in some instances may only acting in the best interests of the majority shareholders as opposed to acting in the best interests of the company. It may be problematic if there is a director with significant influence. Situations where directors are selected to a board at the instigation of a party with a considerable interest in the company are not unheard of. Efforts to change such a practice can certainly be challenging where the directors authority results in the company being operated according to their dictates. The situation is worsened if the director has controlling interest in the company⁶³. This could be detrimental to the long term survival of any company.

Boards also face significant challenges in identifying suitable non-executive directors, particularly with requisite expertise on public boards. This should be made easier by the use of nomination committees. The LuSE code does not require the use of nomination committees. This lack of nomination committees in companies sometimes leads to lack of

⁶³ S. Hemming. A look at some of the issues and complexities of implementing good corporate governance practices. August 2006. <http://www.riskregforum.org/data/pdf/> (accessed on 16/02/2011)

transparency in the appointment of directors as it is unclear what criteria are used in the appointment of these directors. Unfortunately, even companies with nomination committees are sometimes not transparent because after the nomination process has taken place, the final decision of who gets elected as a director is still left to the board. There is need for full disclosure in this election process.

Where the roles of chairperson and CEO are combined, it is difficult for the board to function properly. The presence of a single powerful individual can be very intimidating. Directors may fear losing their directorship if they hold opposing views to those of the individual holding those two positions non-executive directors should be able to bring independent judgement without fear of being maligned or dismissed. Boards should not be dominated by a single or group of individuals.

The cost of compliance has also been a major concern of these public companies. The requirements of nomination committees and other board committees would increase the cost of compliance. Also an increase in the number of non-executive directors and the [stringent] requirement that they be independent would mean more money would be spent on director remuneration. Requiring independent directors can also raise costs as finding directors fitting this criterion would be a process. Having two individuals as opposed to one holding the offices of chairperson and CEO is also another cost of compliance. It is important that the costs do not outweigh the benefits

Another challenge faced when implementing best practices is finding truly independent directors. As the meaning of independent directors is unclear, that is, it is not defined in the code, it is difficult to implement unless the meaning is taken to be that found in the other codes as discussed in the previous chapter. Due to this lack of a clear definition in the LuSE code, companies tend to club non-executive directors and independent directors as a single category when asked about issues of compliance.

Even where 'independent' directors have been found, the survey found that executive directors do not easily accept supervision by the non-executives as the executive directors are more familiar with the running of the company and its day to day affairs. This makes the situation difficult as non-executive directors may be forced to impose their will where there are divergent views.

It is essential that efficient, practical and ethical management is not sacrificed for increased profits and regulations do not become an obstacle to the ability of companies to operate efficiently and profitably in order to remain viable.

4.2 Is the ‘comply or explain’ approach suitable for Zambian listed companies?

Despite the existence of internal, market and legal controls, the concerns about corporate governance have not disappeared. Several countries around the world have responded to these inadequacies not by introducing new statutory provisions but instead encouraging self-regulation as a supplement to existing legislative provisions.⁶⁴ These as has already been mentioned usually come in the form of codes of best practice.

The LuSE corporate governance code applying to listed companies is self-regulatory. As has already been stated, it is based on the ‘comply or explain’ approach which requires Listed and Quoted companies to submit to the LuSE within 3 months of their respective financial years a report stating their areas of compliance and non-compliance with the code. Unfortunately, the survey found that there are no monitoring functions put in place so there is no way of confirming that what has been stated in the annual reports submitted by the listed companies is what is happening in practice. Also, the code does not impose any sanctions where there has been a failure by companies to comply with its provisions. There is therefore no way of enforcing the code in Zambian listed companies. This leads to the question of whether the current code is suitable for the Zambian market.

Those who advocate for the ‘comply or explain’ approach argue that it is good because it takes into account a company’s individual circumstances (flexibility) by allowing them not to comply where they can justify it. Those who are against it argue that shareholders could explain any deviations to themselves (seeing as it is self regulatory). For some markets, self-discipline and self regulation has proven to be sufficient while in others it has proven otherwise. In Zambia, this self-regulation mechanism appears to be insufficient for the reasons given above. There must be restrictions and obligations which can be enforced by regulators or through other legal enforcement mechanisms in case rules are not obeyed. The question as to what consists of a satisfactory explanation may also be asked. It is difficult to distinguish between the right and wrong reasons for non-compliance. One can question how reliable and credible the compliance statements in annual reports are. The conditions

⁶⁴ Boyle & Birds Company Law. Page 387

necessary for self-enforcement need to be present for it to work. Effective enforcement is key for the success and competitiveness of the 'comply or explain' approach. The distrust of self-regulation and self-enforcement paves the way to legitimise legal intervention. Enforcement mainly takes place through market mechanisms, including by shareholders using their legal and factual rights.⁶⁵

The UK Company Law Review also considered the effectiveness of a non-statutory code given the absence of legal sanctions for non-compliance. It was content generally to accept the code as it stands and it found no support for putting the Combined Code on a statutory basis.⁶⁶ It was of the view that companies require flexibility on matters such as the manner and duration of appointments to deal with their particular circumstances. The review also referred to the concept of independence noting that it cannot be legislated for since 'the quality required is a state of mind and character and relevant experience, rather than some formal indication of independence.'⁶⁷

Similarly in South Africa, it has been stated that the underlying intention of the King II report is not to force companies to comply with recommended practice. A legal framework would be expensive and time consuming, one size does not always fit all and the focus is moved from enterprise to compliance.⁶⁸ However, some form of enforcement is available as listed companies are contractually bound by the JSE under its listing requirements to adopt King III.

4.3 The Sarbanes- Oxley Act 2002

The United States of America is an example of a country that has codified their corporate governance rules. The Sarbanes-Oxley Act of The United States came into force in July 2002 and introduced many changes to the corporate governance and financial practice. It is intended to

"deter and punish corporate and accounting fraud and corruption, ensure justice for wrongdoers, and protect interests of workers and shareholders" (George Bush)⁶⁹.

⁶⁵ E. Wymeersch. The Enforcement of Corporate Governance Codes. *Journal of Corporate Law Studies*. 113.

⁶⁶ Company Law Review, Final Report vol 1 (2001) para 3.49; Completing the Structure (2000) para 12.50

⁶⁷ Company Law Review, Developing the framework (2000) para. 3.148

⁶⁸ J. Minnaar. Developments in the King 3 Report on corporate governance and the Companies Act 2008. http://www.ahibloemfontein.co.za/acs_king_3.pdf (accessed on 24/02/2011)

⁶⁹ <http://www/msc-inc.net/documents/sarbanesoxley.html>. (accessed on 27/02/2011)

It is mandatory and all companies regardless of their size are expected to comply. It was enacted by the American government in response to the global financial crisis and the collapse of high profile companies like Enron in order to protect shareholders and the general public from fraudulent practices in the company. It introduced highly significant changes to the financial practice and corporate governance regulation. The Act which is administered by the Securities and Exchange Commission (SEC) sets deadlines for compliance and publishes rules on requirements. The consequences of non-compliance are fines, imprisonment, or both. Its objective is to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws.

This brings us to the question, is the strict approach taken by the United States for example better or should the LuSE code despite its lack of enforcement mechanism be left as a self-regulatory code? The biggest obstacle in the implementation of the Sarbanes Oxley Act has been costs as many companies have found it extremely expensive to comply with this Act.

The biggest challenge in implementing better corporate governance practices generally is the attitude/mindset of the people and the organisational culture. At the end of the day, it is up to the board and management to ensure that regulatory frameworks in place are being adhered to. The government or the regulatory bodies can provide a conducive environment but the primary responsibility is that of the board of directors. Superficial compliance is not enough, all parties should apply these principles

Professor Kenneth Mwenda in one of his works⁷⁰ although based on corporate insolvency argues that Zambia continues to experience a weak compliance culture in the area of corporate governance, and that there are not many mechanisms to deal with the enforcement of director's liability other than to rely on the judicial process. Accordingly, as an incentive to promote more efficient compliance with best practices in corporate governance, and to deter misfeasance and misconduct by company directors, legal rules to disqualify persons convicted of such offences as wrongful trading and fraudulent trading should be introduced. Such a development could help to bolster and strengthen Zambia's legal framework for corporate insolvency.

Codifying the law on director's duties, increasing transparency in the process of appointing directors, changing certain provisions in the code and defining concepts such as director

⁷⁰ K. Mwenda. Legal aspects of Banking Regulation. Pretoria University Law press. 2010. Ch 9.

independence would remedy some of the challenges faced when implementing good governance that have been discussed above.

Chapter 5

5.1 Research Conclusions

This paper has examined a number of issues starting by looking at the existing law on director's duties in its current form (common law) and the role and composition of the board in Zambian Listed companies as mechanisms of corporate governance. It focused on issues of accountability, compliance and enforceability. It compared them to the corporate governance practices of mainly South African and the United Kingdom. It was observed that Zambia can learn a lot from these Jurisdictions even though it is lagging behind in many areas and is not as developed.

There is currently a lot of talk around the world about corporate governance, what is more important is transforming this talk into action. Good corporate governance is more than a set of rules or a Codes, it is state of mind and a culture that needs to be embedded from government right through to corporate level.

When it comes to carrying out their obligations, directors should have greater certainty in respect of their potential liabilities. The question is can good legislation ensure good corporate governance? A statutory statement of director's duties will provide greater clarity on what is expected of directors making the law more accessible and helping to improve standards of corporate governance. Having all of a director's general duties reduced from reams of case law down to a brief code of statutory principles means that directors should be able to access the law easily and understand what their obligations are. This has been seen in other common wealth countries such as the UK and South Africa.

With regards to codification of the corporate governance rules, it has been argued by many that the law is not perhaps the most effective means of promoting good management practices in companies. Especially for public listed companies, further initiatives have been needed to improve the functioning of the boards of companies within the existing legal structures.⁷¹ Some companies feel that excessive compliance may be a burden. Codification of the corporate governance code- may lead to rigidity and make players feel like there are too many rules. It is argued that a statutory regime would lead to box ticking approach that would

⁷¹ Andrew Hicks & S.H.Goo. Cases and materials on Company Law. Page 235

fail to allow for sound deviations from the rule and would not foster investors trust.⁷² Flexibility is a key theme of corporate regulation. It is important that the law be dynamic so that it can adapt to changes in the business environment. Also, self-regulatory codes are easier to amend and are more flexible. The paper looked at examples of the UK, South Africa and the US with regards to this aspect.

It should be noted that the countries where our corporate governance code provisions were borrowed from have had new and up to date codes put in place and as already mentioned have strong companies legislation. A number of significant changes were made to the King III report resulting in the King III report. The Combined Code is also under constant review. Unfortunately, the LuSE corporate governance code which borrows heavily from this report has remained the same. It is important to keep up with international best practices and identify the gaps between the Zambian code and its application with international best practice.

The main disadvantage of self-regulation is enforcement. The current guidelines are neither mandatory nor prescriptive and are designed to be flexible and responsive to new developments. It is difficult to assess the impact of the guidelines because they are not obligatory. It is an accepted fact that there are differences in business enterprise, the industry in which they operate their ownership structure and their markets among other factors. It is also accepted that all policies and practices may not be relevant or suitable to some businesses enterprise. However, there are certain issues that are common to all businesses and the policies could be modified to ensure adherence to the guidelines.⁷³

There may be a need for a formal process to be put in place to independently assess the performance of the individual directors in accordance with the guidelines. It is important that regulatory and legal requirements placed on directors do not seriously compromise their goal of maximising shareholder wealth as directors manage a company on behalf of the shareholders who own it. Concerns have been expressed that director's attentions are being focussed on compliance issues rather than wealth maximisation. A balance ought to be struck, directors should not feel suffocated by the law and shareholders should have their interests (the interests of the company)/investments protected from mismanagement.

⁷² S. Arcot, V Bruno, A.F.Grimad. corporate governance in the UK: is the Comply-or-Explain Approach working? Corporate Governance at LSE Discussion Paper Series. No 001, November 2005

⁷³ Hemmings. S. A look at some of the Complexities of implementing good corporate governance practices. the risk and regulatory forum. Jamaica. August 2006. Page 1

Government should not impose additional mandatory requirements unless there is a failure of the current requirements or of these regulatory mechanisms.

What needs to be avoided in this regard is unnecessary, prescriptive legislation imposing additional liabilities on directors that could tip the balance away from economically rational behaviour towards overly legalistic, defensive behaviour.⁷⁴ A balance needs to be established between compliance and performance and globalisation.

Companies should be able to provide evidence to both current and potential investors that the governance mechanisms within the company are working properly and that the spirit as well as the letter of the code is being complied with and is supported by underlying board behaviour. A number of companies feel that Good corporate governance has contributed to better their company's reputation.

5.2 Recommendations

1. The current Laws and Codes on corporate governance should be reviewed to reflect the market conditions in Zambia today.
2. The Companies Act should be strengthened -Directors duties should be partially codified to allow for clearer, more accessible duties which will improve the governance of companies
3. The Corporate Governance Code should be codified and failure to comply be sanctioned by for example by imposing fines. the current 'comply and explain' approach combined with its self regulatory nature , lack of sanctions and lack of monitoring allows companies to get away with not complying
4. As this may be a drastic measure promoting inappropriate structures and leading to rigidity and non- responsiveness, an alternative is to make sure LuSE monitors corporate governance practices in companies as opposed to merely relying on annual reports provided by companies stating they are complying even if they are not. Self assessment only works if there is an independent process and if certain individuals can be held accountable.

⁷⁴ Directors duties and corporate governance. P.25. Facilitating Innovation and Protecting Investors. Corporate Law Economic Reform Program. Proposals For Reform: paper no 3. Australian Government Publishing service.

5. All directors should sign a declaration assuming personal obligation for compliance with the listing rules at the risk of personal liability. This would make directors keen to find out whether the corporate governance code provisions are being implemented as opposed to the current practice of having one person sign a statement of general compliance.
6. Sanctions for failure to comply should be introduced. For example; fines for non-compliance, name and shame, corporate governance ratings for listed companies. Publishing the compliance levels of companies would put their reputations at risk and encourage compliance.
7. The LuSE corporate governance code should be reviewed to match international best practices and additions such as the need for effective nominations committees to nominate and select directors with the right credentials should be made.

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**QUESTIONNAIRE ON DIRECTOR'S DUTIES AND THE ROLE OF THE BOARD
IN IMPLEMENTING GOOD CORPORATE GOVERNANCE PRACTICES IN
LISTED COMPANIES IN ZAMBIA**

DIRECTORS DUTIES

1. Are the directors in this company aware of their duties towards the company?
Yes ☐ No ☐
2. How are the directors in this company made aware of their duties?
3. Do the directors find these duties difficult to understand and carry out? Yes ☐ No ☐
4. Would codifying directors' common law duties make it easier for directors to understand and carry out their duties? Yes ☐ No ☐
5. Should this codification be full or partial?

CORPORATE GOVERNANCE RULES

1. Is this company listed on the Lusaka Stock Exchange? Yes ☐ No ☐
2. How often does the board of directors meet?
3. Is the board of directors composed of both executive and non-executive directors?
Yes ☐ No ☐
4. Are at least half or more of the board non-executive directors? Yes ☐ No ☐
5. Do you have a nominations committee? Yes ☐ No ☐
6. Are the non- executive directors independent and carrying out their monitoring role?
Yes ☐ No ☐
7. Are the roles of CEO and chairperson in this company held by two separate individuals?
Yes ☐ No ☐
8. If not, why?
9. In your opinion, is the 'comply and explain' approach suitable for this company/
Zambian companies? Yes ☐ No ☐
10. Should the current Code of Best Practice issued by the Lusaka Stock Exchange be codified? Yes ☐ No ☐
11. What problems are faced when implementing corporate governance practices?