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**The Enhancement of Corporate Governance in Zambia through
Company Law Reform**

by

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A Dissertation submitted to the University of Zambia in partial fulfilment of the requirements
for the award of the Degree of Bachelor of Laws (LLB).

UNIVERSITY OF ZAMBIA

LUSAKA

(2013)

DECLARATION

I, Kadidja Banda, declare that this dissertation represents my own work, and that it has not previously been submitted for a degree at this or another University.

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DEDICATION

I dedicate this work to my amazing mother, **Nana Munsanda Mudenda**, who put her legal career on hold to be the best mother a child could ever hope for and then went on to become one of the most successful female lawyers of her generation and the best role model a lady lawyer could ever hope for.

ABSTRACT

Corporate Governance is the term used to describe the way in which companies are controlled and directed. The legal basis for Corporate Governance in Zambia lies with the Companies Act, Cap. 388 of the Laws of Zambia. The importance of Corporate Governance has increased and been pressed globally following a number of corporate scandals that shook the corporate world (i.e. Enron and Parmalat) and the Zambian corporate market (i.e. Meridian BIAO).

This research seeks to establish whether the current law on companies is adequate particularly in respect of Corporate Governance. Once complete, this paper should give a clear picture on the state of company law and corporate governance in Zambia. This paper will also put forward company law reforms that will bring the Companies Act up to the standard of the trends obtaining in the same area around the globe.

This research finds that the law on companies has become out-dated and does not adequately provide for Corporate Governance. The research goes on to propose reform of the Companies Act. The research proposes a statutory statement of directors' duties as well as the introduction of provisions on disclosure and transparency, particularly in respect of financial reporting.

It is important that legislation on the manner in which directors conduct the affairs of companies and themselves be clear and easy to understand as it shall promote good Corporate Governance practices and in hindsight help prevent the collapse of other corporate entities.

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LIST OF ABBREVIATIONS

CACG – Commonwealth Association for Corporate Governance

IoDZ – Institute of Directors of Zambia

JSE – The Johannesburg Stock Exchange

LuSE – The Lusaka Stock Exchange

OECD – Organisation for Economic Co-operation and Development

PACRA – Patents and Companies Registration Agency

SOX Act – Sarbanes-Oxley Act of 2002

UK – The United Kingdom

US – The United States of America

TABLE OF STATUTES

Banking and Financial Services Act, Cap. 387 of the Laws of Zambia

Companies Act, Cap. 388 of the Laws of Zambia

Competition and Fair Trading Act, Cap. 417 of the Laws of Zambia

Securities Act, Cap. 354 of the Laws of Zambia

TABLE OF FOREIGN STATUTES

The Companies Act 1948 (United Kingdom)

The Companies Act 1985 (United Kingdom)

The Companies Act 2006 (United Kingdom)

The Companies Act No. 71 of 2008 (South Africa)

The Companies Act, Cap 486 of the Laws of Kenya (Kenya)

The Sarbanes-Oxley (SOX) Public Company Accounting Reform and Investor Protection
Act of 2002

TABLE OF CASES

Salomon v Salomon & Co. Ltd [1897] AC 22

Ferguson v Wilson (1866) LR 2 Ch

John Bairstow v Queens Moat House Plc (2002) 1 BCLC 495

Dorchester Finance Co. v Stebbing (1977) [1989] BCLC 498

Regal (Hastings) Ltd v Gulliver & Others [1942] 1 All ER 378

Bell v The Eden Project Limited (1) The Eden Trust (2) (2002) 1 BCLC 313

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CHAPTER ONE

1.1 Introduction

A company is a legal entity. It is formed by incorporation which requires complying with registration procedures defined under specific legislation. It is an artificial person that is capable of entering into contracts and owning property.¹ The company is a vehicle that enables a number of persons to conduct business whilst limiting the risk of loss of capital in the event of failure of the business. A company is a legal person, separate and distant from its members.²

All companies incorporated in Zambia are incorporated under the Companies Act, Cap 388 of the Laws of Zambia. The Act was enacted "...to provide for the formation, management, administration and winding-up of companies; to provide for the registration of charges over the undertakings or properties of companies..."³ amongst other things.

In Zambia, the company law legislation provides for various types of companies. Inter-alia, the Companies Act provides for Public Limited Companies and Private Limited Companies. Private Companies include those private companies limited by shares, private companies limited by guarantee and unlimited companies.

Best practices in corporate governance requirements are emphasised more in public limited companies than in private companies. The reason is that most public limited companies raise capital from the public through recognised stock exchanges such as the Lusaka Stock

¹ Stephen Mayson et al., *Company Law* (Oxford: Oxford University Press, 2009), 4

² *Salomon v Salomon & Co. Ltd* [1897] AC 22

³ The Companies Act, Cap 388 of the Laws of Zambia

Exchange. The emphasis in this paper concerns Corporate Governance practices pertaining to public limited companies and private companies limited by shares.

Regardless of the type of Company, good corporate governance is essential for the survival let alone growth for all types of companies, even though the degree and extent of its application differs depending on whether the company is a plc or a private company.

The basic structure of a company is that it consists of members, also known as shareholders, who own it. The company also has directors who control how it is managed and what it does. It is possible, and quite common, for shareholders to also be directors. The company itself cannot act in its own person but can only do so through human agents who are referred to as Directors.⁴ The ownership and control of companies or the system by which companies are directed and controlled is generally known as Corporate Governance.⁵

Corporate Governance requires management to be more efficient, transparent and accountable. It also encourages them to make customer-friendly policies and decisions. This in turn protects the rights of all stakeholders; customers, employees, shareholders and suppliers. Directors are at the centre of Corporate Governance and a few general rules governing companies are set out in the Companies Act. The Companies Act states some powers and duties of directors in general. It does not stipulate or set out a threshold required for good Corporate Governance.

The Companies Act, Cap 388, is based on the 1948 version of the United Kingdom (UK) Companies Act and was enacted in 1994. The UK however embarked on a fundamental review of company law. To that end a Company Law Review was constituted in 1998. This culminated in the most extensive review of company law ever undertaken.⁶ The final report of the Company Law Review was released in 2001. The modernisation of company law was

⁴*Ferguson v Wilson* (1866) LR 2 Ch

⁵The Cadbury Report at para 2.5

⁶Stephen Mayson et al., *Company Law*, 4

part of a drive to facilitate enterprise and the attractiveness of the UK as a location to do business.⁷ It has been observed that notwithstanding the fact that the law on which the *Zambian Act* was premised has been reformed; the *Zambian law* has not changed. This paper however comes at an opportune time as there have been calls for and even manoeuvres commenced towards reform.

1.2 Problem Statement

The company is a legal person but can only carry out its functions through its directors; the system by which these functions are performed is referred to as Corporate Governance. It is therefore imperative that these directors practice good corporate governance. There are no guidelines on the duties and liabilities of directors set out under the *Companies Act*. The fiduciary duties of directors are however found in common law. There are no corresponding provisions under the *Act* that express the duties of directors in explicit terms.

The *Companies Act* has been in place since 1994. This *Act* is based on the *Companies Act* 1948 (UK). Company law in the UK has undergone immense reform and modernisation since then, particularly the areas in respect of Directors' Duties and liabilities which are central to Corporate Governance practices. The law was reformed in order to simplify incorporation and the management of businesses as well as encourage foreign and domestic investment.

The Corporate Governance system as governed by the current *Companies Act* has become anachronistic and in order to enhance and achieve higher levels of corporate governance in Zambia there is a need to update the law through reform.

⁷ Ellis Ferran, *Company Law Reform in the UK* - Available at: <http://ssrn.com/abstract=294508> or <http://dx.doi.org/10.2139/ssrn.294508>, 2

1.3 Research Questions:

1. What is the current state of the Law on Companies and Corporate Governance in Zambia?
2. Is the law on corporate governance adequate in its current state?
3. How can the law be reformed and modernised in order to enhance and improve Corporate Governance in Zambia?

1.4 Purpose and Objectives of the Study

It has been observed that the Companies Act, Cap 388, in its current has become anachronistic, particularly with regard to the provisions on governance and accountability. The purpose of this study is to look at the relevant sections of the Companies Act in order to propose reforms that will enhance and improve corporate governance in Zambia. The objectives are to establish:

- a) the current state of the law relating to corporate governance;
- b) whether the current law on corporate governance is adequate in its current state; and
- c) how the law can be reformed in order to enhance Corporate Governance in Zambia.

1.5 Significance of the Study

This study will bring to light the current state of the law on companies and corporate governance in Zambia. The study will provide information for policy makers on the modern trends in respect of legislation and techniques of corporate governance.

More significantly the study will present recommendations on the specific law reforms that need to be conducted in order to enhance Corporate Governance in Zambia. Good Corporate Governance encourages foreign investment which the Government seeks to encourage as pronounced in its policies.

1.6 Operational Definitions of Terms

In this study, unless the context otherwise requires –

“articles” means the articles of association of a company;

“audit” means the examination by an independent auditor;

“body corporate” means a company or corporation incorporated under or by virtue of the Laws of Zambia or of any other country;

“chairman” means the individual responsible for the running of a Board;

“common law” refers to the legal principles that stem from case law;

“comply or explain” is the Corporate Governance practice that requires Boards to comply with an appropriate Corporate Governance Code and requiring them to explain a failure in any aspect of the Code;

“Companies Act” means the Companies Act, Cap 388 of the Laws of Zambia;

“fiduciary duty” means an obligation to act in the best interests of another party;

“member” means a member or shareholder of a company; and

“stakeholder” means any individual or group on which the activities of a company will have an impact.

1.7 Review of Related Literature

This review will focus on the major topics which emerge throughout the literature reviewed; the topic to be tackled in this research will focus on how company law can be reformed in order to enhance corporate governance in Zambia. A study of company law and its reform in other jurisdictions where corporate law reform and corporate governance are very topical will be carried out. It will seek to establish how effective the reforms proposed and carried out are and how, if at all, Zambia can emulate them. The literature reviewed presents these topics in a variety of contexts.

It is important to have a clear understanding of what a company is and the purpose of companies. The Company is a kind of entity that is brought into being by the registration procedures laid down by the Companies Act.⁸

Good corporate governance enhances and promotes the attractiveness of any market and thus the economy of the country. Corporate Governance is an integral part of everyday business life and lack of good corporate governance can result in the failure of the business and corporate collapses which in turn results in shareholder investments reduced to nothing as well as employees loss of employment as security of a pension.⁹

An extensive growth and appreciation of the importance of Corporate Governance has been witnessed recently.¹⁰ Internationally acceptable standards of Corporate Governance have been developed by international organisations such as the Organisation for Economic Cooperation and Development (OECD).¹¹

⁸ Len Sealy and Sarah Worthington, *Cases and Materials in Company Law* (Oxford University Press: Oxford, 2008), 1

⁹ Christine Mallin, *Corporate Governance* (Oxford: Oxford University Press) p.1

¹⁰ Jill Solomon, *Corporate Governance and Accountability* (Chichester: John Wiley & Sons, 2010) [Kindle Digital Edition] retrieved from Amazon.co.uk

¹¹ Jill Solomon, *Corporate Governance and Accountability*, Kindle Digital Edition

The implementation of the proposed reforms in the UK was intended to create a better corporate legal framework throughout the jurisdiction and the strength of this new legal framework would lie in its clarity and accessibility.¹² There is a lot of discussion on the changes in company law in the UK particularly following the implementation of the Companies Act 2006, particularly on the codification of Directors' Duties.

The company is directed and controlled by directors. The Companies Act 2006 has codified directors' general duties as well as introduced new provisions on directors' liability.¹³ It is important to understand how directors' duties were developed by case law over time and how these duties and liabilities have now been codified under the Companies Act 2006. The codification of directors' duties includes provisions for the consequences of breach of general duties by a director.¹⁴

1.8 Research Methodology

The research methodology will be of a qualitative nature. This will include desk research, which will revert to relevant books on the topic as well as articles and papers by scholars on the same in order to understand Corporate Governance in depth. Further, it will clarify why its importance has increasingly been attached to it. This research will analyse the nature of corporate governance in Zambia. The methodology will also include interviews with relevant individuals employed at the Patents and Companies Registry (PACRA), particularly the Deputy Registrar of Companies, as well as various individuals at the Institute of Directors. The interviews will be semi-structured and conversational in order to understand the state of Corporate Governance and the current levels of compliance.

¹²Jill Solomon, *Corporate Governance and Accountability*, Kindle Digital Edition

¹³Salans, "Directors' Duties & Liabilities under the Companies Act 2006," *Salans Newsletter: Corporate Briefing* (London: Salans, 2006) 1

¹⁴Salans, "Directors' Duties & Liabilities under the Companies Act 2006," 6

The research will interrogate the current trends obtaining in the world of corporate governance around the globe in order to make informed comparisons and thus, propose well evaluated recommendations.

1.9 Outline of Chapters

Chapter One serves as an introduction and largely incorporates the research proposal. It states the problem observed by the author and put forward research questions. It also outlines the purpose, objectives and significance of the study.

In Chapter Two this paper looks at Corporate Governance and outlines its importance as well as the need for guidance on Codes of Practice. It looks at some of the Codes of Best Practice from which inspiration for the law reform can be drawn.

In Chapter Three this paper discusses the legal basis for corporate governance in Zambia. It also looks at the origin and enactment of the Companies Act, Cap 388 of the Laws of Zambia, particularly the provisions relating to corporate governance being the provisions on directors' duties and accountability and addresses the inadequacies of the law on corporate governance in Zambia, particularly in respect of the guidance provided to directors.

In Chapter Four the paper conducts a study of the company law reform exercises that have been carried out in other jurisdictions and the laws that have been enacted as a result i.e. the Companies Act 2006 of the United Kingdom, the Sarbanes-Oxley Act of the United States of America, the Companies Act 2008 of South Africa and the Companies Act, Cap 486 of the Laws of Kenya. In doing so, it will take an in-depth look at the reform that has been carried out in order to implement new international corporate models.

In Chapter Five the conclusion on the findings of the research are put forward. In this chapter recommendations will be made and reforms will be proposed so as to bring the law up to date with current trends obtaining in respect of corporate governance.

1.10 Scope

The research will involve an analysis of the current Companies Act, Cap 388 of the Laws of Zambia. This analysis will be limited to the provisions that cover the management and governance of companies that is; directors' powers, duties and liabilities.

1.11 Conclusion

The aim of this study is to assess the state of Corporate Governance in Zambia and determine how this can be enhanced through law reform. It is imperative to emphasise that good Corporate Governance practices are necessary to promote investment and corporate success.

The importance of Corporate Governance has grown extensively over time. Good Corporate Governance practices promote investor confidence which in turn contributes to the economy. As a result of the global growing importance of Corporate Governance many jurisdictions have embarked on law and policy reforms. It is imperative that the law on companies and relating to Corporate Governance be up to date with trends obtaining around the globe.

It has been observed that the law governing companies in Zambia and as such the law upon which the foundations for Corporate Governance are laid have become somewhat anachronistic. This paper shall discuss the current state of the law on companies as well as the adequacy of Corporate Governance in Zambia.

In conclusion, once complete, this research will provide a clear status of the current state of the law on companies in relation to Corporate Governance. The research shall put forward recommendations on how the law can be reformed and modernised to enhance good Corporate Governance practice in Zambia, particularly in respect of the guidance given to directors on their duties.

CHAPTER 2

Corporate Governance & Directors' Duties

2.1 Defining Corporate Governance

Corporate Governance is defined as "...a system by which the power of a corporation or an organisation was exercised in the stewardship of the corporation's total portfolio of assets and resources with the objective of maintaining and increasing shareholder value, with the satisfaction of other stakeholders in the context of the organisations' aims and objectives".¹⁵ This is the system by which companies are owned, directed and controlled. The term Corporate Governance is derived from American corporate law but has become a widely used term in modern corporate practice.

The concept of Corporate Governance emerged with the formation of public limited companies. It developed from the evolution of "the village shop" to large complex undertakings that required a board of directors to be charged with the responsibility of governing the business.¹⁶ Corporate governance involves the use and limitation of powers and identifies rights and responsibilities, legitimises actions and determines accountability. Hence, corporate governance policies should not only be concerned with the direction and management of power. The term Corporate Governance is used globally and encompasses all issues faced in owning, directing and controlling a company's operations.¹⁷

¹⁵The Cadbury Report (1992) at para 2.5

¹⁶Robert Monks and Nell Minow, *Corporate Governance* (Chichester: John Wiley & Sons, 2011) 7

¹⁷Tim Shaw, *Corporate Governance: Director's Handbook* (Auckland: CCH New Zealand Limited, 1999) 2

The relationship between the board of directors and the shareholders lies at the heart of the issue of corporate governance.¹⁸ The two components of this issue are the structure and role of the board of directors, and shareholder engagement. Corporate Governance creates an environment where management must become more efficient, transparent and accountable. In this efficient and transparent environment the rights of stakeholders are protected ensuring that shareholders are more involved and directors unable to misuse their power. The main task of corporate governance in any modern company is to reduce its costs so that it may increase productivity and managerial efficiency. Good Corporate Governance practices stem from the internal structures of an organisation. Good corporate governance also helps ensure that a company honours its legal commitments, and forms value-creating relations.¹⁹

The Global Corporate Governance Forum in its mission statement states that:

Corporate Governance has become an issue of worldwide importance. The corporation has a vital role to play in promoting economic development and social progress. It is the engine of growth internationally and, increasingly responsible for providing employment, goods and services both in the public and private sectors, as well as infrastructure.²⁰

In recent times Corporate Governance has become an increasingly topical issue following a number of corporate scandals and the ensuing business collapses that resulted in investors losing billions of dollars and loss of employment for many people. These incidents have shaken the confidence of investors. The damage caused to investor confidence by the incidents has encouraged many governments and regulators to institute initiatives aimed at restoring investor confidence. Good Corporate Governance has become imperative as a beacon to attract investors and assure them that their investments will be secure and efficiently managed in a transparent and accountable process.

¹⁸Brenda Hannigan, *Company Law* (Oxford: Oxford University Press, 2009) 116

¹⁹Fianna Jesover and Grant Kirkpatrick, "The Revised OECD Principles of Corporate Governance" *Corporate Governance: An International Review* 13, no. 2 (2005): 130

²⁰Global Corporate Governance Forum Charter (as amended March 2010) -

<http://www.gcgf.org/wps/wcm/connect/54b4568048a7e7c9ad37ef6060ad5911/Phase%2B3%2Bcharter%2B-%2BFINAL.pdf?MOD=AJPERES> accessed on the 4th of April 2013

It is observed that the definition of Corporate Governance by Sir Adrian Cadbury, in his Cadbury Report of 1992, recognised the fact that any process of Corporate Governance must possess an element that incorporates Corporate Social Responsibility principles.²¹ These principles must be sure to cover the following:

- corporate responsibility;
- human resources;
- safety management;
- health management;
- environmental management;
- business ethics;
- planning and implementation of long term growth strategies; and
- community development.

While the definition that has been given above is simple and direct, as governance structures evolve and new rules develop it is envisaged that amplified or varied definitions will emerge. The concept of Corporate Governance will become more complex as it evolves and endeavours to meet the diverse needs of various sectors. Overall, corporate governance must be concerned with directing corporations to achieve their maximum efficiency.

2.2 An over-view of some of the Best Practice Codes on Corporate Governance

There are a number of Codes that have been written and published in order to advance best practice with a view to giving guidance on Corporate Governance to Directors and other stakeholders. The proliferation of most Codes of Corporate Governance Best Practice was

²¹ Kala Anandarajah, *Corporate Governance: Practice and Issues* (Singapore: Academy Publishing, 2010) 72

preceded by corporate scandals or corporate failure that arose from mismanagement by Directors and consequently in the financial collapse of those corporations. In 2002, the European Commission carried out a review of Corporate Governance Codes from the region and was able to establish that practically each member state had at least one code on Corporate Governance. This paper will establish whether some of the content of these codes can inspire law reform in order to promote Corporate Governance. Below is a general overview of some of the Codes that have been published.

2.2.1 The Cadbury Report

The Committee on the Financial Aspects of Corporate Governance, which was chaired by Sir Adrian Cadbury, was set up by the Financial Reporting Council, London Stock Exchange and accounting profession in 1991.²² The main objectives of the Committee, among others, were to:

- (a) review the structures, rights and roles of Boards of Directors, shareholders and auditors and put forward guidance so as to make them more accountable and more effective; and
- (b) raise the standards of Corporate Governance.

The Cadbury Committee Report was published in December 1992. It was feared that the report would put forward a heavy-handed recommendation such as legislation mandating specific boardroom practices; however the Cadbury Committee adopted an approach that “compliance with a voluntary code coupled with disclosure would prove more effective than

²²University of Cambridge Judge Business School, *The Cadbury Report – The Cadbury Archive*, Available at: www.jbs.cam.ac.uk/cadbury/report/, p.1

a statutory code.” This pioneering work by the Cadbury Committee encouraged corporate bodies and even other jurisdictions to devise their own codes of Corporate Governance.²³

The Cadbury Committee put forward the ‘comply or explain’ principle which has gained widespread acceptance, and is now a near-universal feature in Corporate Governance Codes.²⁴ This principle is also now enshrined in the EEC Fourth Company Law Directive on the annual accounts of companies.²⁵ The Directive requires companies to state which Corporate Governance Code they comply with, to state instances of non-compliance and if any, the reasons for it.

2.2.2 The Combined Code

In 1996 the Greenbury Report was published by a Committee chaired by the then chairman of Marks & Spencer. The report recommended changes to the existing principles of the Cadbury Report. The main recommendations related to the establishment of Remuneration Committees for Boards as well as the introduction and disclosure of long term performance related pay for directors. The Greenbury Report also recommended that these principles be reviewed every three years. In 1998, a third committee was chaired by Sir Hampel and in the report it was recommended that the Cadbury and Greenbury proposals be consolidated into a “Combined Code”.

The Combined Code is a voluntary code and as such it only applies to companies that choose to adhere to its principles. There is no legal sanction that attaches to non-compliance of the Combined Code. Since the Fourth Company Law Directive came into being, the Combined

²³Brenda Hannigan, *Company Law*, 117

²⁴Brenda Hannigan, *Company Law*, 119

²⁵78/660/EEC

Code has reached an elemental level in status as the Directive requires the following of all companies trading on a regulated market:

- (a) an indication of which Code the company is complying with, which would undoubtedly be the Combined Code for UK companies, and an explanation for any non-compliance;
- (b) a description of the company's internal control and risk management systems; and
- (c) a description of the company's board and its committees.

2.2.3 The King Reports

The King Report was issued by the King Committee, chaired by Judge Mervyn E. King at the request of the Institute of Directors in South Africa. The purpose of this exercise was and remains to promote the highest standard of Corporate Governance in South Africa.²⁶ There have been three reports issued, the King I in 1994, the King II in 2002 and the King III in 2009.

It is a requirement for companies listed on the Johannesburg Stock Exchange to comply with the King Reports. It was the first report of its kind in South Africa and has been cited as "...the most effective summary of the best international practices in Corporate Governance."²⁷ The Code is non legislative and it espouses the 'apply and explain' approach which is similar to the Combined Code's 'comply or explain' principle. Although the Code is

²⁶King Committee on Corporate Governance, *Executive Summary of the King Report 2002* (Johannesburg: Institute of Directors of South Africa, 2002) 3

²⁷Steve Banhegyi, *Management: Fresh Perspectives* (South Africa: Pearson Education, 2007) 317

not enforced through legislation it does co-exist with the Companies Act and regulations such as the JSE Securities Exchange Listing Requirements.²⁸

The first report established standards of conduct for boards and directors of listed companies, banks and large public entities. The first report covered, among other minor issues, the following:

- (a) the mandate and make-up of Boards of Directors;
- (b) guidance on appointments to the Board;
- (c) the disclosure of directors' remunerations;
- (d) the frequency of Board meetings;
- (e) annual reporting; and
- (f) the company's Code of Ethics

In 2002 the first report was reviewed and revised. Although groundbreaking at the time of its publication, the evolving economic market and legislative developments made it necessary to review the Report. Apart from the institutions to which the first report applied, the second report was extended to be applicable to national, provincial and local government administration. The following were the key areas covered by the revision:

- (i) directors and their responsibilities and duties;
- (ii) the establishment and role of risk management institutions; and
- (iii) internal and external auditing and accounting.

The King III was published in 2009 and in contrast to the earlier versions it applies to all types of corporate bodies whether private, public or non profit. The report still maintains the 'apply or explain' principle still applies. The following were the areas covered by the King III report:

²⁸ King Report on Corporate Governance, *Executive Summary of the King Report 2002*, 5

- (i) the use of Alternate Dispute Resolution to resolve problems;
- (ii) the need for shareholder approval in respect of the remuneration of directors; and
- (iii) the regular evaluation of the performance of the Board of Directors.²⁹

Although the King Reports are not enforced by legislation, most of the principles that were laid out in the King II have since been embodied as law in the South African Companies Act.

2.2.4 The Organisation for Economic Co-operation and Development (OECD) Principles of Corporate Governance

The OECD principles were endorsed by the Organisation for Economic Co-operation and Development (OECD) ministers in 1999. The policies are an international benchmark and standard for policy makers and stakeholders in both OECD countries and non-OECD countries.³⁰ The principles were intended to assist governments to improve the legal and regulatory framework in respect of Corporate Governance in their countries and have actually become a tool of reference for countries all over the world.³¹ The principles have formed the basis for a number of reform initiatives by both governments and institutions in the private sector.

The principles were revised in 2003 and the revised principles were adopted the following year. The OECD organised Regional Round Table meetings so as to establish what Corporate Governance challenges exist in the regions. They went on to produce White Papers identifying priority areas for reform and developing and implementing the proposed reforms.

²⁹Institute of Directors, *Report on King Report on Corporate Governance for South Africa*, 2009 www.library.up.ac.za/law/docs/kingIIreport.pdf accessed on 18th April 2013

³⁰OECD principles of Corporate Governance, 3

³¹FiannaJesover and Grant Kirkpatrick, "The Revised OECD Principles of Corporate Governance", 2

The principles cover the following main areas:

- (a) ensuring the basis for effective corporate governance through the promotion of transparency, efficiency and consistency with the rule of law;
- (b) the rights of shareholders and ownership functions;
- (c) the equitable treatment of shareholders;
- (d) the role and rights of stakeholders in Corporate Governance;
- (e) timely and accurate disclosure and transparency of Board activity and performance;
and
- (f) the strategic guidance on the responsibilities of the Board.³²

The principles actually address the lack thereof and need for laws and regulations that are enforceable and backed by efficient enforcement agencies.³³

2.2.5 The Commonwealth Association for Corporate Governance (CACG) Principles for Corporate Governance in the Commonwealth

The Commonwealth Association for Corporate Governance was established in 1998 to promote excellence in Corporate Governance in the Commonwealth. Its main objectives are to:

- (i) provide good standards in Corporate Governance and business practice throughout the Commonwealth; and
- (ii) facilitate the development of appropriate institutions which will advance, teach and disseminate these standards.

³²FiannaJesover and Grant Kirkpatrick, "The Revised OECD Principles of Corporate Governance", 7 – 9

³³FiannaJesover and Grant Kirkpatrick, "The Revised OECD Principles of Corporate Governance", 9

The principles are intended to be a guideline to promote and facilitate best business practice.³⁴ These guidelines are not meant to be regarded as legal statutes but as standards of conduct which ought to be observed by directors but are neither mandatory nor prescriptive. Good Corporate Governance hinges on the competence and integrity of directors and the board.³⁵ The guidelines set out 15 principles aimed at Boards of Directors. The principles are laid out as follows:

- Principle 1 states that the Board must exercise leadership, enterprise, integrity and judgment in directing the corporation so as to achieve continuing prosperity for the corporation and to act in the best interest of the business enterprise in a manner based on transparency, accountability and responsibility.
- Principle 2 states that the Board must ensure that Board appointments are made through a managed and effective process that provides a mix of proficient directors, each of whom is able to add value and to bring independent judgment to bear on the decision-making process;
- Principle 3 states that the Board must determine the corporation's purpose and values, determine the strategy to achieve its purpose and to implement its values in order to ensure that it survives and thrives, and ensure that procedures and practices are in place that protect the corporation's assets and reputation.
- Principle 4 states that the Board must monitor and evaluate the implementation of strategies, policies, management performance criteria and business plans.
- Principle 5 states that the Board must ensure that the corporation complies with all relevant laws, regulations and codes of best business practice.

³⁴ Commonwealth Association for Corporate Governance, *CACG Guidelines: Principles for Corporate Governance in the Commonwealth: Towards Corporate Competitiveness and Economic Accountability* (New Zealand: Commonwealth Association for Corporate Governance) 4

³⁵ Commonwealth Association for Corporate Governance, *CACG Guidelines*, 5

- Principle 6 states that the Board must ensure that the corporation communicates with shareholders and other stakeholders effectively.
- Principle 7 states that the Board must serve the legitimate interests of the shareholders of the corporation and account to them fully.
- Principle 8 states that the Board must identify the corporation's internal and external stakeholders and agree a policy, or policies, determining how the corporation should relate to them.
- Principle 9 states that the Board must ensure that no one person or block of persons has unfettered power and that there is an appropriate balance of power and authority on the board which is, inter alia, usually reflected by separating the roles of the chief executive officer and Chairman, and by having a balance between executive and non-executive directors.
- Principle 10 states that the Board must regularly review processes and procedures to ensure the effectiveness of its internal systems of control, so that its decision-making capability and the accuracy of its reporting and financial results are maintained at a high level at all times.
- Principle 11 states that the Board must regularly assess its performance and effectiveness as a whole, and that of the individual directors, including the chief executive officer.
- Principle 12 states that the Board must appoint the chief executive officer and at least participate in the appointment of senior management, ensure the motivation and protection of intellectual capital intrinsic to the corporation, ensure that there is adequate training in the corporation for management and employees and a succession plan for senior management.

- Principle 13 states that the Board must ensure that all technology and systems used in the corporation are adequate to properly run the business and for it to remain a meaningful competitor.
- Principle 14 states that the Board must identify key risk areas and key performance indicators of the business enterprise and monitor these factors.
- Principle 15 states that the Board must ensure annually that the corporation will continue as a going concern for its next fiscal year.³⁶

2.2.6 The Sarbanes-Oxley Act

The Sarbanes-Oxley Act of 2002 which is also known as the “Public Company Accounting Reform and Investor Protection Act” is a United States federal law that has enhanced the standards expected of Boards of Directors and management of corporations throughout America. The Act was drafted as a reaction to a number of major corporate scandals that cost investors billions of dollars.

The Act was signed into law by George W. Bush who said:

... (the Act is) the most far reaching reforms of American business practice since the time of Franklin D. Roosevelt. The era of low standards and false profits is over: no boardroom in America is above and beyond the law.³⁷

In the time since the Act was passed there have been a number of SOX type Acts have been enacted in other jurisdictions, France, Italy, Australia and South Africa being among them.

The SOX Act is separated into eleven parts referred to as Titles which are set out as follows:

³⁶Commonwealth Association for Corporate Governance, *CACG Guidelines*, 7

³⁷Elisabeth Bumiller, “Bush Signs Bill aimed at Fraud in Corporations.” *The New York Times*, 31 July, 2002, accessed on 13th May 2013

<http://query.nytimes.com/gst/fullpage.html?res=9C01E0D91E38F932A05754C0A9649C8B63>

- Title I establishes the Public Company Accounting Oversight Board to oversee firms that provide auditing services. All these firms are required to register with the PCAOB.³⁸
- Title II establishes standards for external auditor independence so as to limit conflicts of interest. It restricts firms from providing non-audit services to companies that they audit.³⁹
- Title III states that senior executives must take individual responsibility for the accuracy and completeness of the company's financial reports and specifies the responsibility of corporate officers for the validity of the financial reports.⁴⁰
- Title IV describes enhanced reporting requirements and disclosure for financial transactions. It mandates internal controls for ensuring accuracy of financial reports.⁴¹
- Titles V, VI and VII define practices and measure to help restore investor confidence.⁴²
- Title VIII also referred to as the "Corporate and Criminal Fraud Accountability Act of 2002" and Title IX also referred to as the "White Collar Crime Penalty Enhancement Act of 2002" describe criminal penalties for manipulation, interference and alteration of financial records and enhance penalties associated with white collar crime.⁴³
- Title X stipulates that the Chief Executive Officer should sign the company tax return.⁴⁴
- Title XI identifies corporate fraud and record tampering as criminal offences and puts forward specific penalties for the offences.

³⁸ SOX Act, ss.101 - 109

³⁹ SOX Act, ss.201 - 209

⁴⁰ SOX Act, ss.301 - 308

⁴¹ SOX Act, ss.401 - 409

⁴² SOX Act, ss.501, 601 – 604 and 701 - 705

⁴³ SOX Act, ss.801 – 807 and 901 – 906

⁴⁴ SOX Act, s.1001

2.3 Fiduciary Duties of Directors

There is no definition of the term “director” in the Companies Act however it does state that “...any person who is appointed by the members of a company to direct and administer the business of the company shall be deemed to be a director of the company...”⁴⁵ According to Lord Cranworth L. C. in the case of *Aberdeen Railway Co. v Blaikie Bros*⁴⁶:

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...

The fiduciary duties of directors are laid out in case law, following the English common law system however, case law in Zambia is sparse and emphasises loyalty to the company.

The main common law duties of directors are outlined as follows:

- (a) A director must act *bona fide* in the interests of his company. Therefore directors have a duty to avoid any conflict of interest and ensure that they separate their personal interests from that of the company. Lord Greene MR in *Re Smith v Fawcett*⁴⁷ stated:

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

In the case of *Bell v The Eden Project Limited (1) The Eden Trust (2)*⁴⁸ one of the directors registered the company name as a trademark in his own name. It was held that the director was in breach of his fiduciary duty as his decision to register the trademark was in his personal interest.

⁴⁵ CA, s.203(1)

⁴⁶ (1854) 1 Macq. 461 at 417

⁴⁷ [1942] Ch 304, CA

⁴⁸ (2002) 1 BCLC 313

Directors must also account for any profits made from the advantage of their position as a director in the company.

In the case of *Regal (Hastings) Ltd v Gulliver and Others*⁴⁹ the company owned one cinema and had the opportunity to acquire two more. The company did not have the capital however the directors acquired shares in a subsidiary company to supply the capital, the shares were later sold for a profit. It was held that the directors had an obligation to disclose these profits as knowledge of the opportunity only arose as a result of their positions as directors.

(b) A director is expected to exercise reasonable care and skill in carrying out his duties.

In the case of *Dorchester Finance Co. v Stebbing*⁵⁰ two non-executive directors signed blank cheques at the request of a full time director who in turn embezzled company funds. The two non-executive directors were found to be negligent especially as they were both qualified accountants.

In determining whether a director has applied reasonable care a judge looks to the general knowledge, skill and experience expected from a 'reasonable diligent person' in their position.

In the case of *John Bairstow v Queens Moat House Plc*⁵¹ four directors authorised the unlawful distribution of dividends. It was held that any director that authorised such a payment must be held liable as a 'reasonable, competent and diligent' director ought to be aware that dividends cannot be paid from capital.

It is only as a result of awareness-raising by various bodies, such as the IoDZ, that directors have become more aware of their fiduciary duties under the law.⁵²

⁴⁹ [1942] 1 All ER 378

⁵⁰ (1977) [1989] BCLC 498

⁵¹ (2002) 1 BCLC 495

⁵² The World Bank, *Report on the Observance of Standards of Codes: Corporate Governance Country Assessment – Zambia* (Washington D.C.: The World Bank, 2006) 4

2.4 Conclusion

Corporate Governance is an issue of global importance. It promotes the efficient use of resources by the corporation. It also promotes investor confidence and encourages business.

The Cadbury Code defines Corporate Governance as a system by which companies are controlled, while the OECD principles of Corporate Governance describe it as a set of relationship rules between management, the Board, shareholders and other stakeholders. Corporate Governance provides structure through which corporations set objectives and the means by which these objectives shall be attained.

It is easily contended that Corporate Governance practices cannot be standard or operate in any standard form. It is important for standards of best practice to be laid out clearly so Boards of Directors have a clear guide. As was the concept behind the establishment of the Cadbury Code, such practices raise and enhance Corporate Governance. Although Codes like the King Reports are voluntary the practice of the principles has been embodied in South African Company Law. In America legislators have taken the guidance of Best Practice to another level by enacting the SOX Act of 2002.

The fiduciary duties of directors are outlined under common law. The decisions made by judges are the law in that respect.

The Codes of Best Practice discussed above are meant to be a guide to Boards on how best to conduct the management of a company and can be referred to and used as a guide in developing a new specific Code of Best Practice.

CHAPTER 3

Company Law and Corporate Governance in Zambia

3.1 Introduction

The first objective of this research is to determine the current state of the law relating to Corporate Governance in Zambia. The second objective of this essay is to establish whether the law referred to above, particularly the Companies Act 1994, is adequate in its current state.

In this chapter the research will look at the law on companies and Corporate Governance. It will assess the provisions of the Companies Act and identify the inadequacies particularly in respect of the guidance given to directors. At the end of this chapter the reader should have a clear picture of the inadequacies as well as the need for reform.

3.2 Company Law in Zambia

The government of the newly independent Republic of Zambia inherited the Companies Act of 1921 at independence. The 1921 Act was repealed by the Companies Act of 1994, Cap 388 of the Laws of Zambia which is currently the primary source of company law in Zambia. The most prominent change to the Act consisted of the dispensation with the Memorandum of Association and introduction of the application for incorporation.

The Companies Act, Cap 388 is supplemented by other statutes such as the Banking and Financial Services Act, Cap 387, The Securities Act, Cap 354, the Competition and Fair

Trading Act, Cap 417, stock exchange requirements in the case of public limited companies; and case law which depicts and outlines the interpretation of the provisions of the statutes by the Courts. The registration of companies in Zambia is regulated by the Companies Act, Cap 388 of the Laws of Zambia. The Companies Act is described as:

An Act to provide for the formation, management, administration and winding-up of companies; to provide for the registration of charges over the undertakings or properties of companies; to provide for the registration of foreign companies doing business in Zambia; and to provide for matters connected with or incidental to the foregoing.

Some participants in the market note that the Companies Act is in general confusing, inadequately organised, and not fully harmonised with other key pieces of legislation.⁵³ The Companies Act was enacted in 1994 and is based on the UK Companies Act 1948.

It has been observed that there is limited director accountability. The fiduciary duties of directors are not described in the Companies Act. The Act states that:

...the business of a company shall be managed by the directors, who may pay all expenses incurred in promoting and forming the company, and may exercise all such powers of the company as are not, by this act or the articles, required to be exercised by the company by resolution...⁵⁴

It is imperative that company law be up to date and aligned with global corporate practices. This will promote direct foreign investment which will in turn enhance economic empowerment of Zambia and its nationals.

3.3 Corporate Governance in Zambia

In the 1990s Zambia was witness to a number of business entities and corporations going into liquidation, for instance the liquidation of Meridian BIAO and the collapse of Agri-Flora to

⁵³ The World Bank, *Report on the Observance of Standards of Codes: Corporate Governance Country Assessment – Zambia*, 17

⁵⁴ CA, s 215(1)

name a few. It has been stated that these collapses were largely due to the non-practice of or non adherence to good Corporate Governance principles.⁵⁵

The concept of Corporate Governance is quite new in Zambia and seems to have very little appreciation, particularly in the private companies and state-owned enterprises where issues of transparency and accountability were, till recently, not taken on board. It must be noted however that the larger corporations, particularly those listed on the Lusaka Stock Exchange and banks seem to be faring well.

Foreign Direct investment promotes economic development. There is need to implement good Corporate Governance practices in Zambian companies as this is the criteria upon which investors base their considerations on. It would be unlikely to find a foreign investor that would invest in a corporation with poor Corporate Governance practices.

Corporate Governance has been pushed onto the national agenda by the Institute of Directors of Zambia which was launched in April 2000. Since the IoDZ was established a large effort has been made to sensitise the corporate sector on the benefits and importance of Corporate Governance, however there is virtually no evidence on how compliant body corporates are in respect of good Corporate Governance practices.

It has been observed 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 directors' liability.⁵⁶

⁵⁵The Committee on Legal Affairs Governance Human Rights and Gender Matters, *Second Report of The Committee on Legal Affairs Governance Human Rights and Gender Matters* (presented at Lusaka in January 2008) 2

⁵⁶Kenneth Mwenda, *Legal aspects of Banking Regulation* (Pretoria: Pretoria University Law Press, 2010) 9

Further as discussed earlier, the definition of Corporate Governance by Sir Adrian Cadbury well recognises the fact that any process of Corporate Governance has to incorporate Corporate Social Responsibility principles.⁵⁷

The environmental management, health management and community development contributions would benefit the Zambian community in general.

3.3.1 The Institute of Directors of Zambia (IoDZ)

The need for the enhancement of Corporate Governance in Zambia is vital and it is evident that ever since the IoDZ was established a significant effort has been made to sensitise the corporate sector on the importance and benefits of good corporate governance, including the transparency and disclosure to all stakeholders. It was following the work of the National Task Force on Corporate Governance in 1999, which led to the establishment of the IoDZ, that work to promote Corporate Governance in Zambia has been assumed by the IoDZ.⁵⁸

The reason behind non-application and non-compliance is that many do not understand or appreciate the importance of Corporate Governance. The IoDZ is a forum that is committed to improving and enhancing Corporate Governance in Zambia. There is need for guidance of directors to ensure high standards of ethics and skills in carrying out their fiduciary duties, particularly with the rapidly growing private sector.⁵⁹

The IoDZ monitors development in the field of Corporate Governance as well as in issuing guidance on best practice where appropriate.

⁵⁷ Kala Anandarajah, *Corporate Governance: Practice and Issues* (Singapore: Academy Publishing, 2010) 72

⁵⁸ The World Bank, *3rd Pan African Consultative Forum on Corporate Governance* (Washington D.C.: The World Bank, 2005)

⁵⁹ Institute of Directors of Zambia Website

http://iodzambia.org/?page_id=23 accessed on the 4th of April 2013

3.3.2 The Lusaka Stock Exchange (LuSE)

The LuSE was established in 1993, as part of a plan to reform the economy. The operations of the LuSE are governed by the Securities Act, Cap 354 of the Laws of Zambia and regulated by the Securities Exchange Commission.

Zambia has taken strides towards the improvement of Corporate Governance over the years. The Lusaka Stock Exchange, being a principal player in the promotion of good Corporate Governance principles realised the need to establish specific norms. The LuSE Corporate Governance principles were published in 2005 and provided for body corporates listed and quoted on the LuSE. With guidelines aimed at enforcing internationally recognised standards of Corporate Governance.

It must be noted that the LuSE has been an effective tool in the enhancement of positive corporate reputations for listed companies in Zambia. One example is the ranking of Investrust Bank Plc as the second best performing stock on the continent by the Databank Group Half Yearly Performance Review of African Stock Markets.⁶⁰

The LuSE Corporate Governance code takes the 'comply or explain' approach, which requires body corporates to submit, within three months of their respective financial year, a report outlining their areas of compliance and areas of non-compliance.

The LuSE seeks to enable a sound environment for investment and to improve the overall reputation of the country as a favourable place to conduct business.

⁶⁰Pan African Capital Group, Databank: *Half Yearly Performance Review of African Stock Markets* (Ghana: Databank Group, 2006) 6

3.4 Conclusion

Corporate Governance is relatively new to Zambia and has only been pushed high on the national agenda since the establishment of the IoDZ. The IoDZ has made a large effort to sensitise the corporate community and the State as a whole on matters of and on developments in Corporate Governance. The IoDZ monitors developments in the field of Corporate Governance and issues guidance where needed. The LuSE has also been instrumental in the enhancement of Corporate Governance and corporate reputation.

The principle source of company law in Zambia is the Companies Act, Cap 388 of the Laws of Zambia and case law. The Zambian Companies Act, Cap 388, is based on the UK Companies Act of 1948 and all company law principles are based on the English Common Law. However, although the English law has evolved over time and experienced legislative changes such that the principles are current and up to date with the trends obtaining around the globe, the Zambian Act and company law principles remain the same.

The effectiveness of the 'comply or explain' principle must also be considered; particularly in respect of whether the direction of placing the code on a statutory basis would be better. The United States of America is an example of a country that has codified its Corporate Governance codes.

The duties of directors are not outlined in the Companies Act but are derived from decided cases. There is no fixed and clear guidance provided in respect of the duties and obligations of directors. The Companies Act does not adequately provide for any such guidance.

With the rapidly developing and constantly changing Corporate Governance practices it is time to examine the status and propose legal reform that puts Zambia in line with other jurisdictions that have adopted more modern Corporate Governance practices through their

own reform. The examination of our current status and proposals for reform must also seek to determine how corporations can be encouraged to carry out more Corporate Social Responsibility activities. This research comes at an opportune time as there have been calls for a reformed Companies Act from scholars and practitioners.

CHAPTER 4

Corporate Law Reform in other Jurisdictions

4.1 Introduction

The objective of this paper is to determine how Corporate Governance can be enhanced through law reform. In this chapter the research will look at some company law reform exercises that have been conducted in other jurisdictions recently. The study will also look at the laws that have been amended or passed as a result of these reform exercises.

The research will look at four jurisdictions which are the United Kingdom, the United States of America, South Africa and Kenya. The reasons for looking at these specific jurisdictions are as follows:

The United Kingdom – because the UK Companies Act of 1948 was the foundation for the Zambian Companies Act, Cap 388;

The United States of America – because it has had the largest over-haul and most thorough stating in respect of the law on Corporate Governance and codes of best practice;

South Africa – because it is very close to Zambia; and

Kenya – because it is a Commonwealth state in the region that has undergone such reforms.

At the end of this chapter, the research will have shown how other jurisdictions have conducted reforms and what possible reforms can be made to the Companies Act so as to modernise it and enhance Corporate Governance in Zambia.

4.2 Reform in other Jurisdictions

4.2.1 The United Kingdom

The UK embarked on a fundamental review of its company law.⁶¹ The UK Companies Act 2006 is the most all-encompassing piece of corporate legislation as well as the largest Act ever enacted in the UK.⁶² The modernisation of company law was part of a drive to enhance the attractiveness of the UK as place to do business and invest.⁶³ The UK government wanted to review the law so as to contribute to the modernisation of the nation.⁶⁴

The Companies Act 2006 either re-states or amends almost all the provisions of its predecessor.⁶⁵ The major changes made were in respect of the way in which the law governs duties and liabilities of directors among other things.⁶⁶ The common law duties that were set out in case law were codified. These duties are set out as follows:

1. a duty to act in accordance with the company's constitution and within his or her powers;⁶⁷
2. a duty to promote the success of the company for the benefit of its members and other stakeholders as a whole;⁶⁸
3. a duty to exercise independent judgment;⁶⁹
4. a duty to exercise reasonable care, skill and diligence;⁷⁰

⁶¹Ellis Ferran, *Company Law Reform in the UK*, 1

⁶²Arad Reisburg, "Corporate Law in the UK after Recent Reforms: The Good, The Bad and the Ugly," *Oxford University Press: Current Legal Problems* Vol 63 (2010) 317

⁶³Ellis Ferran, *Company Law Reform in the UK*, 2

⁶⁴Roman Tomasic, "Company Law Modernisation and Corporate Governance in the UK – Some Recent Issues," *Victoria Law School Journal* Vol 1, (2011): 44

⁶⁵Len Sealy and Sarah Worthington, *Cases and Materials in Company Law*, 3

⁶⁶James Barabas and Sara Trapani, "Changes to English Company Law: Directors' Duties" *Insights Journal: The Corporate and Securities Advisor* Vol 22, no. 2 (2011): 23

⁶⁷CA 2006, s.171

⁶⁸CA 2006, s.172

⁶⁹CA 2006, s.173

⁷⁰CA 2006, s.174

5. a duty to avoid conflicts of interest, particularly the exploitation of any business opportunities;⁷¹
6. a duty not to access or accept benefits from third parties;⁷² and finally,
7. a duty to declare an interest in any proposed transaction or arrangement with the company to the other directors.⁷³

The company law reforms that led to the 2006 Companies Act and codification of directors' duties have clarified any uncertainty, for instance the enacting of s.174 which imposes a more objective duty of care.⁷⁴

4.2.2 United States of America

The Enron Andersen scandal in 2001 which were quickly followed by the ImClone and Global Crossing incidents were the first wave of widely publicised corporate scandals in America. The government of the USA decided to make an attempt to restore confidence in the stock markets and deter corporate fraud.⁷⁵

The SOX Act, referred to earlier in this paper, was passed in response to these corporate scandals and seeks to require greater accountability by executives and boards.⁷⁶ The SOX Act

⁷¹CA 2006, s.175

⁷²CA 2006, s.176

⁷³CA 2006, ss.177 and 182

⁷⁴Roman Tomasic, "Company Law Modernisation and Corporate Governance in the UK: Some Recent Issues," 48

⁷⁵Larry Bumgardener JD, "How does the Sarbanes-Oxley Act impact American Business?" Reforming Corporate America Vol 6, no. 1 (2010)

www.gbr.pepperdine.edu/2010/08/reforming-corporate-america/ accessed on 13th June 2013

⁷⁶Larry Bumgardener, "How does the Sarbanes-Oxley Act impact American Business?"

is the most significant enactment of corporate legislation in American since the Securities Act of 1933 and Securities and Exchange Act of 1934.⁷⁷

This paper looks at the structure of the SOX Act in Chapter Two in the review of Codes of Best Practice. The US government imposed stricter controls in respect of auditors, with the establishment of the Public Company Accounting Oversight Board (PCAOB) to oversee auditors. The SOX Act requires that CEOs and CFOs of public companies are required to personally certify the accuracy of financial reports.⁷⁸ The penalties for companies and directors that do not comply with the provisions of the SOX Act are stiff.⁷⁹ The US government introduced criminal penalties under the SOX Act for any officer or director that fraudulently influences or coerces financial report or CEOs and CFOs that fail to certify financial statements.⁸⁰

According to the SEC Chairman Christopher Cox the SOX Act has helped restore trust in US markets by increasing accountability, speeding up reporting and making audits more independent.⁸¹

4.2.3 South Africa

The law reform process commenced on the 11th of July 2003.⁸² The objectives for the company law reform were as follows:

⁷⁷Elizabeth Keating and Eli Goldston, "Sarbanes-Oxley Act: What has it wrought?" (Cambridge: Harvard Law School, 2006) available at <http://dx.doi.org/1-2139/ssrn.951254> accessed on 13th June 2013

⁷⁸SOX Act s.302

⁷⁹Rosemary Peavler, *The Sarbanes-Oxley Act and the Enron Scandal*

www.bizfinance.about.com/od/smallbusinessfaqs/a/sarbanes-oxley-act-enron-scandal.htm visited on 13th June 2013

⁸⁰SOX Act ss.802 and 906

⁸¹Greg Farrell, "SOX Law Has Been a Pretty Clean Sweep." *USA Today*, 20 July 2007, accessed on 18th June 2013 www.usatoday.com/money/companies/regulation/2007-07-29-sarbanes-oxley_N.htm

- to encourage entrepreneurship and enterprise diversity by simplifying the incorporation process;
- to promote innovation and investment in South Africa by providing a predictable, effective and well regulated environment;
- to promote the efficiency of companies and their management;
- to encourage transparency and high standard of corporate governance; and
- to ensure compatibility and harmonisation with best practice jurisdictions internationally.⁸³

The Companies Act No. 71 of 2008 was assented by the President on 9th April 2009.⁸⁴ The 2008 Act completely re-writes South African company law. The new Act includes a detailed definition of directors' duties. Two of the duties outlined that particularly stand out in respect of governance of companies state that:

a director must not use the position of director to gain an advantage for himself or knowingly cause harm to the company, and to ensure that he communicates to the board, at the earliest possible opportunity, any information that comes to his attention unless it is immaterial to the company;⁸⁵ and;

a director must act in good faith, in the best interests of the company, with the degree of care, skill and diligence that may be reasonably expected of a person carrying out the same functions in relation to the company as that director and having the general knowledge skill and experience of that director.⁸⁶

⁸²The Record of Proceedings of the Local and International Round Table on Company Law Reform hosted by the Department of Trade and Industry on 11th and 12th July 2003 at p.9 as referenced by: TshepoMongalo, "An overview of Company Law Reform in South Africa: From Guidelines to the Companies Act 2008," *ActaJuridica: Modern company law for a competitive South African economy* (2010): 14

⁸³TshepoMongalo, "An overview of Company Law Reform in South Africa: From Guidelines to the Companies Act 2008," 22

⁸⁴Linda Muswaka, "Corporate Governance under the South African Companies Act: A Critique," *World Journal of Social Science*, Vol. 3, no. 3 (2004): 14

⁸⁵CA No. 71 of 2008, s.76(2)

⁸⁶CA No. 71 of 2008, s.76(3)

The 2008 Act also introduces the requirement for auditor rotation. The Act states that "...the same individual may not serve as the auditor or designated auditor of a company for more than five consecutive financial years."⁸⁷ This is another provision introduced by the new Act that promoted good corporate governance practices.

The Companies Act, 2008 has been modernised and brought into line with international best practices.⁸⁸ However, there are concerns that the Act does not adequately provide for stakeholder interests or social and environmental responsibilities of companies.⁸⁹

4.2.4 Kenya

The statutory law governing Corporate Governance and companies in Kenya is the Companies Act, Cap. 486 of the Laws of Kenya.⁹⁰ The Kenyan Companies Act is based on the UK Companies Act of 1948.⁹¹

Post-independence Kenya has had its record of massive public and private sector frauds as poor Corporate Governance led to the collapse of many corporations.⁹² Among these corporate collapses were KCC, Kenya Bus Services, Kenya National Assurance and the closure of over 33 banks.⁹³

⁸⁷CA No. 71 of 2008, s.92(1)

⁸⁸Entrepreneur, "The New Companies Act," *The Entrepreneur South Africa*, 11 January, 2012, accessed on 20 June 2013

<http://www.entrepreneurmag.co.za/advice/starting-a-business/start-up-guide/the-new-companies-act/>

⁸⁹Linda Muswaka, "Corporate Governance under the South African Companies Act: A Critique," 14

⁹⁰Lois Musikali, "The Law affecting Corporate Governance in Kenya: a need for review," *International Company and Commercial Law Review*, (2008): 2

⁹¹Chris Muratha, *Companies Bill aims to modernize Kenya's business sector*, 9 December, 2011, accessed on 20 June 2013

<http://www.internationallawoffice.com/newsletters/detail.aspx?g=c8fe15eo-69c3-476d-96bc-2bd864bec928>

⁹²Linda Muswaka, "Corporate Governance under the South African Companies Act: A Critique," 13

⁹³BarakoDulacha, et al., "Factors Influencing Voluntary Disclosure by Kenyan Companies," *Corporate Governance: An International Review* Vol 12, no. 2 (2006): 107

The Kenyan government held Consultative Corporate Sector Seminars between 1998 and 2000.⁹⁴ Since then, the Kenyan government have drafted a Company Law Bill meant to repeal the current Act. The Bill aims to develop a modern company law and put Kenya on par with the developments in other common law jurisdictions.⁹⁵

The Bill takes on a lot from the UK Companies Act of 2006, particularly the codification of common law fiduciary duties of directors.⁹⁶

4.3 Conclusion

The UK Companies Act of 2006 is the product of the largest company law review conducted yet. It totally restates and amends the provisions of the Companies Act 1985. The most highlighted change however is the codification of the fiduciary duties of directors. The Companies Act 2006 is modernised and easier to understand, making it easier for directors to comply with.

The US government on the other hand enacted law specifically designed to regulate good Corporate Governance practice. The SOX Act was an answer to a number of corporate scandals that had shaken America. The SOX Act tends to focus on disclosure and transparency within corporations, particularly in respect of audits and financial reporting. The SOX imposes strict penalties for fraudulent activity and failure to comply with its provisions. The provisions on disclosure and transparency are without a doubt elemental in the

⁹⁴The Committee on Legal Affairs Governance Human Rights and Gender Matters, *Second Report of The Committee on Legal Affairs Governance Human Rights and Gender Matters* (presented at Lusaka in January 2008)

⁹⁵PravinBowry, "Great Prospects on Law Reform" *Standard Media Digital*, 3 March, 2010, accessed on 20 June, 2013

www.standardmedia.co.ke/?articleID=2000004659&story-title=Great-prospects-on-law-reform-

⁹⁶Joyce Karanja, "Reform of Kenyan Company Law," Coulson Harney Advocates Blog, 3 March, 2010, accessed on 20 June, 2013

www.coulsonharvey.com/News.Blog/Blog/CCM-Reform-of-Kenyan-Company-Law

enhancement of good Corporate Governance. The strict penalties imposed ensure that directors are discouraged from non-compliance.

In South Africa and Kenya the governments recognised the need for modernisation of the company laws in place so as to keep up with the trends obtaining around the globe. The governments also realised that reforms were necessary in order to promote investment. In South Africa a new companies act was passed, the Companies Act 2008. In Kenya a new bill has been drafted, the Companies Bill 2010 as a step towards a new act. In both instances the fiduciary duties of directors have been codified.

In conclusion, from the observation of these jurisdictions we are able to see a pattern. The modernisation of the law on companies is necessary to keep up with trends obtaining around the globe as well as to promote investment. The codification of directors' duties makes it easier for directors to perform their duties as they are clearly laid out and accessible. Finally it is also clear that strict penalties discourage non-compliance.

CHAPTER 5

Corporate Law Reform for Zambia

5.1 Conclusion

The aim of the research is to assess the current state of Corporate Governance in Zambia and propose company law reforms so as to enhance Corporate Governance. The Companies Act is very important and has a significant impact on the economy. The research has found that the current law on companies has become out-dated and does not adequately provide for good Corporate Governance practices. Considering all the reforms that have been applied in other jurisdictions, the Zambian companies act has become obsolete.

In this chapter the paper shall present its findings on the research topic. It will then recommend some company law reforms based on the findings. This is in order to fulfil the final objective of the research.

The corporate and financial scandals that have occurred over time have shown that good Corporate Governance practices are important. The research has established that Corporate Governance is the term used to describe the means by which companies are directed and controlled. The research has also established that directors are the human agents through which companies carry out their functions and these directors control and direct the company. It is thus clear that the way in which directors conduct themselves in performing their functions is at the centre of any Corporate Governance practices.

This research finds that in order to enhance Corporate Governance in any jurisdiction the first step is to ensure that directors perform their function and conduct their duties in the correct manner. The question to be asked is what steps can be taken in order to ensure that directors conduct their duties in the correct manner. This research therefore proposes reform of the Companies Act, particularly the codification of directors' duties is the first step towards enhancing Corporate Governance in Zambia.

5.2 Recommendations

This paper comes at a time when a Bill to amend the 1994 Companies Act is being created. Therefore, this paper recommends that the Bill contain a statutory statement of directors' duties. It is also important that the law not be complex or confusing and this easier for all stakeholders to understand. Directors must understand the duties and obligations they are committing themselves to by accepting to act in such a capacity prior to making the commitment. Further, in order to enhance Corporate Governance in Zambia, the inclusion of some key provisions on issues such as disclosure and transparency in the reformed act be included in the new Bill.

This research therefore recommends that the proposed reforms for the new Bill provide for, but not be limited to the following:

- a provision imposing a duty on directors to only act within their powers as provided for by the Act;

- a provision imposing a duty on directors to promote the success of the company, having full regard for all stakeholders and the impact of the

company's activities on the community and the environment, specifically referring to the same as Corporate Social Responsibility;

a provision imposing a duty to exercise independent judgment;

a provision imposing a duty to exercise reasonable skill, care and diligence;

a provision imposing a duty to avoid conflict of interest;

a provision imposing a duty not to accept benefits from third parties; and

a provision imposing a duty to declare any interest in a proposed transaction, if any, to the other directors.

This research also proposes that a provision or provisions that provide for enhanced reporting requirements and disclosure in respect of audits and financial reporting be included in the revised Act so as to deter misfeasance and misconduct. There have been concerns raised in other jurisdictions where such provision have been enacted over the expense incurred from the audit requirements and whether smaller companies with smaller turnovers will manage to comply. It must be decided, however, after conducting further studies on the same, whether this provision must only apply to a certain type of company (i.e. Public Companies) or the consideration of turnover thresholds so as to protect the smaller companies.

Finally it is observed earlier in the research that the introduction of stricter liability and heavier penalties for failure to comply with the law dissuades company officers from non-compliance. This research therefore recommends that a provision or provisions imposing heavier penalties be introduced for any manipulation, interference and, or, alteration of financial reports as was done in the US with the SOX Act. It would be prudent however, to conduct a study on the feasibility of imposing criminal penalties taking into consideration the

current state of the judicial system, policies of government and capacity of the prisons. The issue ought to be what would be most effective.

The reforms proposed above are put forward as an initial step towards the enhancement of Corporate Governance in Zambia. This list is not exhaustive and the area of Corporate Governance continues to grow in importance and in respect of areas of relevance.

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