

REGULATING DIRECTORS' DUTIES AND SOUTH AFRICAN COMPANY LAW REFORM*

Michele Havenga
BA(Law) LLM LLD
Professor of Mercantile Law
University of South Africa (UNISA)

SUMMARY

It has for some time been apparent that South African company law needs to be comprehensively rewritten. Far-reaching changes have occurred since the previous revision that led to the Companies Act of 1973. Amongst other factors, there is a new political, social and economic dispensation, and our company law should, as far as is feasible, be harmonized with the laws of international investors and other Southern African states. The policy document issued in June 2004 by the Department of Trade and Industry on the reform of corporate law, and their structured approach to the reform process, should therefore be welcomed.

The inevitable influence of the Constitution and related legislation promoting its provisions, are considered in this article with specific regard to the proposals contained in the policy document on directors and their duties. The Promotion of Access to Information Act of 2000 and the Broad-based Black Economic Empowerment Act of 2003, which serve as examples of such related legislation, are considered, as are the suggestions contained in the policy document with regard to the structure of the board and on the possible codification of directors' duties.

The new Companies Act should ensure that directors will be held accountable for their actions and that the interests of interest groups other than shareholders may also be considered in corporate decision-making. Existing mechanisms provided for in our law should not be in conflict with the provisions of the new Act. But unnecessary amendments are undesirable and do not promote legal certainty. It should also be kept in mind that social change might be better advanced by other means than in corporate legislation. Furthermore, specific aspects in other jurisdictions should not be incorporated in our law without a proper understanding of the broader context of the corporate laws of those jurisdictions. The DTI's quite ambitious reform programme envisages draft legislation by 2006.

1 INTRODUCTION

The statutes that regulate South African corporate law are the Companies Act of 1973¹ and the Close Corporations Act of 1984.² The latter Act

* This article is based on a paper read at the Corporate Law Teachers Association Conference, Sydney, Australia, February 2005.

¹ 61 of 1973. The Act came into effect on 1 January 1973 after a comprehensive review by a Commission of Enquiry under the chairmanship of Justice Van Wyk de Vries into the previous Companies Act 46 of 1926.

provides a less complex way of regulating smaller businesses whilst retaining the advantages of separate legal personality and limited liability.³ Neither of these Acts codifies the existing law. So common law principles remain not only the main source of law for partnerships and business trusts which are not regulated by the Acts, but also almost exclusively govern important areas of company law like directors' fiduciary duties and their duties of care and skill. They also still play a role in some areas of close corporations law.

It has been acknowledged for some time that South African corporate law needs to be comprehensively rewritten, as opposed to the piecemeal amendments that have taken place as and when the need arose. In 1994 an international conference was held to identify key areas requiring review.⁴ In 1997 the Standing Advisory Committee on Company Law⁵ issued a press statement through the Department of Trade and Industry on the development of entrepreneurial law in South Africa. It envisaged five main statutes, namely a redrafted Companies Act; a separate Securities Act dealing with the raising of capital and including the obligation to issue and register prospectuses; the Close Corporations Act; a new Bankruptcy Act which would deal with all aspects relating to the insolvency of individuals and corporations as well as compromises and judicial management; and a new Business Enterprises Act which would regulate unincorporated forms of business enterprise, focusing on partnership law and the law of business trusts.

Reform of the bankruptcy laws has since proceeded through various, perhaps rather too many, initiatives.⁶ Company law reform has taken rather longer to get underway, with the Department of Trade and Industry (DTI) only recently formally embarking on the reform of national corporate laws. Fortunately, the process envisaged by the DTI seems rather more structured. A policy document on the reform process was published for public comment in June 2004.⁷ At the same time, several task teams were appointed on the key areas identified. Their submissions will be considered

² 69 of 1984.

³ Membership is, generally, restricted to between one and ten natural persons: ss 2(1), 28 and 29 of the Close Corporations Act.

⁴ The conference proceedings were published in Henning, Delpont and Katz (eds) *The Future Development of South African Entrepreneurial Law* (1994) 1.

⁵ S 18 of the Companies Act provides for the appointment of this committee. Its function is to make recommendations from time to time for the amendment of the Companies Act and to advise the Minister on matters referred to it. The committee is obliged, under s 11 of the Close Corporations Act, to maintain a sub-committee to fulfill the same function in respect of close corporations.

⁶ See Burdette "Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa (Part 1)" 2004 *SA Merc LJ* 241 242 for a brief discussion of the various reform initiatives. In March 2003 the Cabinet of the South African government approved the introduction of a Draft Insolvency and Business Recovery Bill in principle. The official Bill is yet to be published. As a result of concerns regarding the liquidation industry, it was also announced that a Draft Business Recovery Bill would be published. For the moment, the position regarding insolvency law reform is still somewhat uncertain.

⁷ See DTI *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* GN 1183 in GG 2649 of 2004-06-23 (hereinafter "the policy document"). For a concise synopsis of the policy document, see Pretorius "The Future of South African Company Law?" 2004 *JBL* 66.

before a drafter's memorandum will be prepared. The draft legislation will then be drawn up and published. The policy document gave a broad indication of the direction the DTI sought to take with the reform process, and was widely consulted upon.⁸

This article focuses on the proposals with regard to directors' duties, an area which the DTI has identified as one of the most important challenges of the new Act. These proposals should be considered against the backdrop of the legislative framework specific to the South African context and the general approach to company law reform taken by the DTI. Various specific duties of directors are, of course, currently regulated by statute and should remain thus regulated. They are not discussed here.⁹

2 GENERAL APPROACH AND LEGISLATIVE FRAMEWORK

The policy document states that the reform of South African company law will involve an overall review of statutory and common law corporate law principles, but will exclude other areas of entrepreneurial law like partnerships.¹⁰ There is therefore some deviation from the 1997 plan, and it seemed initially that the existence of the close corporation as a separate entity was in danger.¹¹

The DTI proposes that a company should aim to conduct its business activities with a view to enhancing its economic success, taking into account as appropriate the legitimate interests of other stakeholder constituencies.¹² The policy document acknowledges that companies and governments alike are increasingly aware that higher standards of corporate governance and ethics are required and that there should be greater interdependence between enterprises and the societies in which they operate.

⁸ Amongst others, with the National Economic Development and Labour Council (NEDLAC), formed in terms of the Nedlac Act 35 of 1994, who issued their *Nedlac Report on Corporate Law Reform* in February 2005. The DTI is also engaged in ongoing consultations with local and international experts in corporate law.

⁹ Some of these duties concern directors' benefits and emoluments, loans to directors, compensation for loss of office, directors' interests in the company's securities, payment of dividends, directors' duties with regard to the maintenance of capital, and insider dealing. In this regard, see generally McLennan "Company Dividends: The New Law" 2001 *SALJ* 126; Wainer "The Companies Act Changes – Problems and Doubts" 2001 *SALJ* 133; and Kiggundu and Havenga "The Regulation of Directors' Self-serving Conduct: Perspectives from Botswana and South Africa" 2004 *CILSA* 272.

¹⁰ Policy document 10. The task of the review is described (11) in general terms as the development of a legal framework, based on the principles reflected in the Companies Act, the Close Corporations Act, and the common law, which covers the requirements for the birth, existence or maintenance, and death of companies. The review aims to identify the fundamental rules governing the procedures for company formation, corporate finance law, corporate governance, mergers and acquisitions, the cessation of the existence of a company and the administration and enforcement of the law. The review will also consider the relationship between company law and other rules and measures for the protection of the interests of shareholders, creditors, employees, and other participants and interests, such as the State, the environment, consumers, suppliers and black economic empowerment (BEE) initiatives.

¹¹ The policy document indicated that the close corporation should no longer be available as a separate business form. There has, however, been such strong opposition to this notion, especially from the business sector, that it has apparently been abandoned.

¹² Policy document 26.

The DTI further points out that socio-political and economic change in South Africa has underscored the need for social responsiveness and accountability of enterprises and that the mobility of international capital requires domestic laws to be investor-friendly and competitive with international trends. The rise in international trade and foreign investment since 1994 and initiatives to harmonise the business laws of the SADC (Southern African Development Community) countries,¹³ demand the harmonization and modernization of company law, as well as specific provision for foreign firms to operate in South Africa. The growth of the small business sector has also created a need for simpler and more accessible laws. These factors together have contributed to fundamental changes in the environment in which businesses operate and the consequential need for a comprehensive company law review.

Clearly any new law must not only bring South African law in line with international trends, but should also reflect the fundamental changes that have occurred in the country since the last review of our company law. These include a new political, social and economic environment following the election of a democratic government in 1994, as well as developments in corporate governance and new legislation.¹⁴ The influence of the Constitution is considered below. The influence of legislation promoting black economic empowerment and access to information are then briefly discussed. They serve as examples of legislative measures that entrench certain constitutional principles. The board structure and the extent to which the interests of stakeholders other than the shareholders should be taken into account, are discussed, followed by consideration of the possible codification of directors' duties.

2.1 The Constitution

The Bill of Rights in the Constitution of the Republic of South Africa, 1996 goes beyond the traditional task of protecting individuals against the State, and also protects them against abuses of their rights by other individuals. Juristic persons are one of the entities entitled to the protection of constitutional rights to the extent required by the nature of the rights and of that juristic person.¹⁵ Section 39(2) of the Constitution obliges every court, tribunal or forum, when developing the common law, to promote the spirit, intent and objectives of the Bill of Rights. The evaluation of statutory and

¹³ Most legal systems in the SADC area have been influenced by English law, which should facilitate this process.

¹⁴ The King Committee on Corporate Governance, formed in 1992, published two reports: see Institute of Directors in Southern Africa *The King Report on Corporate Governance* (1994) (King I) and Institute of Directors in Southern Africa *King Report on Corporate Governance for South Africa 2002* (King II). Some of its recommendations were given statutory confirmation, either in the Companies Act, like the compulsory appointment of a company secretary for public companies (s 268A-G) and more detailed disclosure requirements in respect of directors' emoluments (s 197), or in new legislation like the Employment Equity Act 55 of 1998. See also Naidoo *Corporate Governance* (2002) 12. Others are enforced through the listings requirements of the JSE Securities Exchange, South Africa. Paragraph 3.84 of the revised 2003 *Listings Requirements* makes several recommendations of King II obligatory, eg that the chief executive officer must not also hold the position of chairperson, and that all issuers must have an audit committee and a remuneration committee.

¹⁵ S 8(2). See, generally, Havenga "Corporations and the Right to Equality" 1999 *THRHR* 495-498.

common law rules against constitutional principles is imperative in a political dispensation so different from the previous one.

In the context of directors' duties, any limitation imposed on a director must be justifiable if it affects one of the director's constitutionally entrenched rights. To take but one example, the appropriation of a corporate opportunity after a director has resigned from his or her office, is generally regarded as being in breach of her fiduciary obligation to the company where the resignation was influenced by a wish to acquire that opportunity, or where the director's position with the company, rather than a fresh initiative, led her to it.¹⁶ Limitless accountability could, however, set too harsh a standard, especially in view of the right conferred by section 22 of the Constitution which grants everyone the right to freedom of trade, occupation and profession. Section 36 of the Constitution, containing the limitations clause, provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the nature of the right, the importance of the purpose of the limitation, its nature and extent, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose. Factors to be taken into account to determine whether the director had indeed breached her fiduciary duties would, it is submitted, include the lapse of time, the nature of the company's business and of the information involved, and the circumstances resulting in the director's resignation.¹⁷

2.2 Black economic empowerment (BEE)

Since the democratic government came into power in 1994, much has been done to encourage effective participation in the economy by black people. Various statutes were enacted,¹⁸ but it was generally accepted that they did not succeed in ensuring broad-based participation of black people in the economy rapidly enough. The Broad-Based Black Economic Empowerment Act of 2003¹⁹ was therefore enacted to establish a legal framework for the promotion of black economic empowerment, which is defined as "the economic empowerment of all black people and collective enterprises, human resource and skills development, employment equity, preferential procurement and investment in enterprises owned or managed by black

¹⁶ *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T); *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 2 SA 54 (T); *Movie Camera Company (Pty) Ltd v Van Wyk* 2003 2 All SA 291 C; Havenga *Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities* (1998) published LLD thesis, 29; and Havenga *Transactions of the Centre for Business Law* University of the Free State (1998) 370ff.

¹⁷ See also Havenga "Directors in Competition With Their Companies" 2004 *SA Merc LJ* 275 284.

¹⁸ The Marine Living Resources Act 18 of 1998; Competition Act 89 of 1998; Employment Equity Act 55 of 1998; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; Preferential Procurement Policy Framework Act 5 of 2000; Land and Agricultural Development Bank Act 15 of 2002; and Mineral and Petroleum Resources Development Act 28 of 2002 are some examples.

¹⁹ 53 of 2003.

people".²⁰ The objectives of this Act are to facilitate broad-based black economic empowerment by promoting economic transformation in order to enable meaningful participation of black people in the economy; achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises; increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training; increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training; promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity; empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills; and promoting access to finance for black economic empowerment.²¹ The Act obliges the Minister of Trade and Industry to issue a strategy for broad-based economic empowerment and provides for Codes of Good Practice to be issued.²² During December 2004 various draft Codes, including *Code 200 Measurement of the Management and Control Element of Broad-Based Black Economic Empowerment*, were published. *Statement 200: The General Recognition of Management Control*, issued under this Code, provides a scorecard for the management and control element of BEE, defines the key measurement principles associated with management and control, specifies the formulas for measuring board and executive management participation, and defines the approach to awarding the bonus points under the Statement.²³ It seeks to ensure that black people have

²⁰ S 1. The strategies envisaged include, but are not limited to, increasing the number of black people that manage, own and control enterprises and productive assets; facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises; human resource and skills development; achieving equitable representation in all occupational categories and levels in the workforce; preferential procurement; and investment in enterprises that are owned or managed by black people.

²¹ S 2.

²² S 9. The Codes must consider the Minister's strategy and may include the further interpretation and definition of broad-based black economic empowerment and the interpretation and definition of different categories of black empowerment entities; qualification criteria for preferential purposes for procurement and other economic activities; indicators to measure broad-based black economic empowerment and the weighting attached to them; guidelines for stakeholders in the relevant sectors of the economy to draw up transformation charters for their sector; and any other matter necessary to achieve the objectives of the Act. The *Scorecard* sets indicators for measuring black economic empowerment and attaches weighting to these indicators. It will be used by Government and the council to measure the progress made in achieving black economic empowerment of organs of state, public entities and private sector enterprises not covered by a transformation charter. It has weightings of 20% for ownership and 10% for management control. The *Code of Good Practice on Ownership and Management* specifies how to measure the ownership and management elements of the *Scorecard*, including delineations of the various elements of ownership such as economic interest and voting rights. To eliminate any uncertainty about the use of share options and other derivatives, clear definitions and formulas have been provided. It has been suggested that the Code and Scorecard would make it more difficult to finance BEE transactions. However, this is probably good for BEE in the long run and might eliminate fronting, thus ensuring genuine black empowerment.

²³ Par 6.

sufficient influence over the strategic direction and core management of enterprises and has special incentives to promote management control by black women.

The Minister may further publish and promote industry or sectoral charters if they meet the objectives of the Act and were developed by major stakeholders in the sector.²⁴ The Act also provides for a Black Economic Empowerment Advisory Council.²⁵ Organs of state and public entities have to consider the Codes and apply them as far as is reasonably possible when qualification criteria are determined for the issue of licences, concessions, authorisations or the sale of state-owned enterprises and when a preferential procurement policy or criteria for entering into partnerships with the private sector are developed.²⁶

The DTI has taken the view that social change can be facilitated by other means than company legislation, bearing in mind of course that company law, like all South African law, is subject to the supremacy of the Constitution. Attempts to effect social and environmental changes through the medium of company law alone would possibly have an impact only on South African incorporated companies and not on overseas companies operating through branches or to partnerships or sole traders. Therefore it is suggested by the DTI that BEE and matters regarding the environment and employees are best dealt with in specific law.²⁷ This is, it is submitted, a sound approach and the new Companies Act is, accordingly, not expected to address BEE directly. The provisions dealing with financial assistance for the purpose of buying a company's shares are, however, likely to be relaxed.²⁸ Although not exclusively aimed at them, the new provisions should facilitate BEE transactions.

23 Access to information

The Bill of Rights recognises the fundamental right of access to information.²⁹ The Promotion of Access to Information Act of 2000³⁰ was enacted to further the protection of this right.³¹ The Act serves as an example of legislation related to the Constitution which furthers the rights

²⁴ The Energy and Petroleum Charter, Mining Charter, Charter of Empowerment and Transformation in the Tourism Industry, Financial Charter and Information Technology Charter are examples.

²⁵ Ss 4-8.

²⁶ Ss 9(1) and 10 of the Constitution. Affirmative action in awarding state contracts can serve as a strong incentive for transformation to private business, since the government is the largest buyer of goods and services.

²⁷ Policy document 27. Also, the DTI suggests that allowing enforcement rights for all legitimate stakeholders in company law would lead to multiplicity of unnecessary and avoidable legislation.

²⁸ S 38 of the Companies Act presently prohibits such transactions, except in limited cases. It is anticipated that the prohibition will be lifted, but that proper disclosure will be required.

²⁹ S 32(1) of the Constitution provides that everyone has the right of access to any information held by the state; and to any information that is held by another person and that is required for the exercise or protection of any rights.

³⁰ 2 of 2000.

³¹ S 32(2) of the Constitution directed that national legislation be enacted to give effect to this right, and that it might provide for reasonable measures to alleviate the administrative and financial burden on the state.

protected by it, and that may guide the drafters of the new Companies Act. The Act applies to public and private entities, although not necessarily to the same extent, and provides that a requester must be given access to any record of a private body (which includes a company) if that record is required for the exercise or protection of any rights, the proper procedure has been followed to access the record, and access is not denied in terms of any ground for refusal provided in the Act.³² A request for access to records may be refused by the head of a private company in prescribed circumstances, for example if the record contains trade secrets of the private body; or financial, commercial, scientific or technical information other than trade secrets of the private body and the disclosure of this information would be likely to cause harm to the commercial or financial interests of the body; or if disclosure of information in the record could be expected to put the private body at a disadvantage in contractual or other negotiations or to prejudice it in commercial competition.³³

In *Davis v Clutchco (Pty) Ltd*,³⁴ a member based his claim in terms of this Act, on his right to value his shareholding for the appropriate selling price. He was dissatisfied with a valuation obtained from the company's auditors and with the annual financial statements, to which he was entitled, and had obtained, in terms of the Companies Act. The Cape High Court ruled that the Promotion of Access to Information Act allows a member of a company access to all the financial records of a company and not only to the last annual financial statements as provided for in the Companies Act.³⁵ This decision was overturned by the Supreme Court of Appeal.³⁶ The latter court confirmed that the mechanisms established by legislation and common law for the protection of shareholders could not lightly be disregarded. In enacting the Promotion of Access to Information Act, Parliament could not have intended that the books of a company should be thrown open to members on a whiff of impropriety or on the ground that relatively minor

³² S 50.

³³ Ss 62-70.

³⁴ 2004 1 SA 75 (C), discussed by Locke "Access to a Company's Accounting Records by Means of the Promotion of Access to Information Act 2 of 2000" 2005 SA *Merc LJ* 221.

³⁵ The decision did not consider whether a distinction should be made between public and private bodies when determining what type of right is exercised by the requester of the information. Currie and Klaaren *The Promotion of Access to Information Act Commentary* (2002) 70 par 5.12 suggest that a narrower approach should be followed in the case of private companies. "Rights" in "the exercise or protection of any rights" in s 50 of the Act can be interpreted in a wide or a narrow sense. In a narrow sense the phrase may limit the meaning of "rights" to rights protected in the Bill of Rights, that is, fundamental rights. In its wider sense it may connote contractual and delictual rights such as a right created by legislation. No clear indication has as yet been provided by the case law on which of the above interpretations should apply where information is requested from a private body and no clear direction has been provided by other jurisdictions where the right to access of information concentrates on public entities. Currie and Klaaren regard it as doubtful whether the Act should apply to contractual rights. See also Havenga "Transforming Insurance Law: The Role of Legislation" 2002 SA *Merc LJ* 718 724. The decision by the Cape High Court seemed to prefer the wider interpretation, but did not express any clear view on this aspect. Nor did it discuss the provisions in the Companies Act relating to disclosure of a company's annual financial statements, or indicate why access to additional information was considered justifiable.

³⁶ *Clutchco (Pty) Ltd v Davis* 2005 3 SA 164 SCA.

irregularities or errors had occurred. A far more substantive foundation would be required for an order under the Act.³⁷

The policy document indicates that the new company law will set out under what conditions shareholders can access additional information from companies and what type of information may be demanded.³⁸ The decision by the Supreme Court of Appeal makes this unnecessary, and will guide directors as to their duties, at least in respect of the furnishing of financial information. It is, in any event, doubtful whether a comprehensive set of conditions can or should be given in an Act.

3 BOARD STRUCTURE

It has been debated for some time whether South Africa should follow the example of continental Europe in establishing a two-tier board or whether the unitary board structure is more appropriate. It seems clear that the latter structure will be retained. This was recommended by the King Committee and is also favoured in the policy document.³⁹ However, the policy document adds that stakeholder representation on the board should be optional and that the Swedish model for a unitary board with stakeholder representatives will be examined in greater detail, particularly to determine whether stakeholder representatives could be exempted from certain directors' duties.⁴⁰ Although wider stakeholder representation is certainly worth investigation, I would caution against incorporating aspects of legal systems without due regard to the wider background of their corporate laws generally as well as the different circumstances and the socio-economic context within which those laws operate. Transposing only one aspect of the law governing company directors from another jurisdiction could have unforeseen consequences.⁴¹

4 DIRECTORS AND BROADER STAKEHOLDER INTERESTS

The entity to which directors owe their fiduciary duties is commonly explained as "the company as a whole",⁴² a phrase which has been

³⁷ 493 par [17].

³⁸ 38.

³⁹ King II Report 46; policy document 39. The DTI points out that the European experience has shown that the two-tier structure is often inefficient, may deter investment and is not necessarily desirable for stakeholders. Also, South Africa has largely adopted a unitary board structure and imposing a legal requirement for a two-tier structure would be costly. Labour supports the unitary board structure, but recommends the inclusion of non-executive directors on the board to represent key stakeholders. Labour suggests that, as a minimum, major companies should have an advisory body involving representatives of communities, workers and other groups in civil society: *Nedlac Report on Corporate Law Reform* 9.

⁴⁰ 39.

⁴¹ See also DeMott "Directors' Duty of Care and the Business Judgment Rule: American Precedents and Australian Choices" 1992 *Bond LR* 133 141; and Havenga "The Business Judgment Rule - Should We Follow the Australian Example?" 2000 *SA Merc LJ* 25 37 for similar arguments in respect of the statutory incorporation of a business judgment rule.

⁴² *Allen v Gold Reefs of West Africa, Limited* 1900 1 CH 656 671; *Re City Equitable Fire Insurance Co Ltd* 1925 Ch 407; and *Charterbridge Corporation Ltd v Lloyds Bank* 1970 1 Ch 62.

interpreted in various ways.⁴³ One of the fundamental questions facing the drafters of the new Companies Act is whether a company's interest will be governed by an "enlightened shareholder value" or "pluralist" approach.⁴⁴ The enlightened shareholder value theory reflects traditional company law in giving primacy, but not exclusivity, to shareholders' interests, while the pluralist theory dictates that companies should be run in such a way that wealth and welfare are maximised for a number of different constituencies, each with a legitimate stake in the company's development and activities.

The policy document suggests that, whatever the theoretical merits of a shareholder-oriented approach, South African law needs to take into account the unique South African context, including the best interests of South Africa and its citizens, the recent political developments and peculiar socio-economic situation of the country and the mandates of the Constitution.⁴⁵ Stakeholders like the community within which the company operates, its customers, employees, suppliers and the environment should be considered. The "triple bottom line" approach, acknowledging social, economic and environmental considerations is recommended by the DTI. Here again, the recommendation of the King Committee has been approved. The model proposed in the policy document states that

"[A] company should have as its objective the conduct of business activities with a view to enhancing the economic success of the corporation, taking into account as appropriate the legitimate interests of other stakeholder constituencies."⁴⁶

This formulation aims to achieve a balance between the interests of shareholders and those of other stakeholders when this is appropriate, or required by the Constitution and related legislation. Sometimes a direct duty to another party may arise, for example to provide information, even when this is or may be prejudicial to the maximisation of shareholder wealth. The limitation clause in the Constitution should, however, provide the parameters for such rights.⁴⁷ And, as was indicated in respect of black economic empowerment,⁴⁸ the DTI recognises that there are means of facilitating social change other than company law, which would restrict the obligations to companies incorporated in South Africa, thereby creating an uneven playing field. It also warns against a multiplicity of unnecessary and avoidable legislation by allowing enforcement rights for all legitimate stakeholders. It therefore seems unlikely that this duty will be interpreted as a general obligation to consider other stakeholder interests.

⁴³ See generally Sealy "'Bona Fides' and 'Proper Purposes' in Corporate Decisions" 1989 *Monash University LR* 265 269 who describes the phrase as "of notoriously elusive meaning"; and Fourie "Die Plig van Direkteure teenoor Skuldeisers" 1992 4 *SA Merc LJ* 25 26-27.

⁴⁴ This was the one issue on which the NEDLAC partners could not agree in their deliberation of the policy document: *Nedlac Report on Corporate Law Reform* 4.

⁴⁵ 26.

⁴⁶ 25.

⁴⁷ S 36 of the Constitution, discussed under par 2 1 above.

⁴⁸ Par 2 2 above.

5 A STATUTORY STANDARD?

It has been suggested that the new South African Companies Act should contain a statutory standard for directors' duties.⁴⁹ It is argued that not only will it make the law accessible and go some way to ensuring that directors are clear about their obligations, but that it would clarify to foreign and domestic investors which rules govern the behaviour of directors and what remedies are available when those "rules" are violated. As has been the issue in other jurisdictions, the difficulty lies in deciding whether this statutory statement should be an exhaustive code, or a partial codification intended to be primarily educational.⁵⁰ It has been suggested that part regulation would be the most appropriate for South Africa, and that the 2003 amendments to the Banks Act 94 of 1990 provide an example of the way to go about it.⁵¹ It should, however, be borne in mind that the Banks Act regulates directors of a very limited industry, whilst companies generally are very diverse in size and nature. It is also submitted that the principles formulated in the Banks Act can only be properly understood if the common law principles are taken into account. This confirms the view, expressed in respect of United Kingdom company law reform, that it would be almost impossible to comprehensively codify directors' fiduciary duties and their obligations of care and skill.⁵² There are simply too many matters to be taken care of.⁵³

⁴⁹ Policy document 38.

⁵⁰ See also Hannigan *Company Law* (2003) 244.

⁵¹ Esser and Coetzee "Codification of Directors' Duties" 2004 *JBL* 26 28. This was also the view taken by the King II Committee. The Banks Act contains a statement on the fiduciary duty and duties of care and skill of directors of banks in s 60(1). These obligations are elaborated on in s 60(1A) which states that each director, chief executive officer and executive officer of a bank owes a duty towards the bank to act *bona fide* for its benefit; avoid any conflict between the bank's interests and the interests of such a director, chief executive officer or executive officer; to possess and maintain the knowledge and skill that may reasonably be expected of a person holding a similar appointment and carrying out similar functions as are carried out by the director, chief executive officer or executive officer of that bank; and to exercise such care in the carrying out of his or her functions in relation to that bank as may reasonably be expected of a diligent person who holds the same appointment under similar circumstances, and who possesses both the knowledge and skill mentioned in par (c) and any such additional knowledge and skill as the director, chief executive officer or executive officer in question may have. This test is clearly objective, removing the common law uncertainty in this regard. The provisions are supplemented by statements on compliance and corporate governance in ss 60A and 60B. The regulations promulgated under the Act contain further guidelines relating to directors' duties.

⁵² In March 1998 the Government launched a fundamental review of the framework of core company law in the United Kingdom. See *Modern Company Law for a Competitive Economy*, Department of Trade and Industry, March 1998. The consultations were concluded with a *Final Report* in 2001 and the Government's response was published in a White Paper, *Modernising Company Law* (2002). The DTI subsequently confirmed its commitment to the revision of company law generally, but deemed it of greater importance first to draft a post-Enron Bill before the anticipated Companies Bill comes into being. See, generally, De Lacy (ed) *The Reform of United Kingdom Company Law* (2002); Hannigan v-vii. The 'trial draft' of a statement of the general duties of a director which the Consultation Document *Developing the Framework* (2000) proposes should be set out in the next Companies Act, is comprehensively discussed by Berg "The Company Law Review: Legislating Directors' Duties" 2000 *JBL* 472. He points out several difficulties with the proposed statement.

⁵³ Birds "Reform of Directors' Duties" in De Lacy (ed) *The Reform of United Kingdom Company Law* (2002) 157 mentions several of the issues that would have to be dealt with. He shows that the drafts proposed for English company law reform express the duties as owed by an individual director, but that this approach ignores the collective responsibility

And, as is pointed out by Hannigan⁵⁴ with regard to the proposed formulation regarding the exercise of independent judgment by directors, the difficulty that arises is that statements are often difficult to interpret without background knowledge of the law as developed by cases. The provision then fails the criteria of clarity and accessibility. A complete codification could also place constraints on the development of common law, a point acknowledged in the policy document.⁵⁵ At most there should, it is submitted, be a statement confirming directors' obligations to act in good faith and with the care and skill that could reasonably be expected of a person with their knowledge and experience.⁵⁶

There are, of course, aspects of directors' duties that are, and should remain, regulated by statute.⁵⁷ Codification of the common law duties would, however, in my view, be too problematic and might stifle development. It is imperative that bodies like the Institute of Directors of Southern Africa should continue to play a vital role in the task of educating and informing directors. Companies should also offer induction programmes to new directors.⁵⁸

6 CONCLUSION

The South African Companies Act of 1973 has generally worked quite well and unnecessary changes to it should be avoided.⁵⁹ But there can be little doubt that a new political dispensation, greater international participation and foreign investment, corporate governance initiatives, and the changed constitutional framework make a comprehensive review of our company legislation both inevitable and necessary. It is also important that South African company law be harmonised with the laws of countries that provide significant investment and with other SADC jurisdictions.

and supervisory role of the board and seems to assume that an individual director has management powers. See also Berg 2000 *JBL* 481. Birds also suggests that a statement of directors' duties should make it clear that (executive) directors may have additional, contractual, duties.

⁵⁴ Hannigan 244.

⁵⁵ 40.

⁵⁶ See also Birds "Making Directors Do Their Duties" 1980 *Company Lawyer* 67 68-69; and Havenga *Fiduciary Duties* 406-410 where the difference between a complete, exclusive, codification and a statement which has as its object to inform, but not to replace the existing law, is explained.

⁵⁷ See Kiggundu and Havenga 2004 *CILSA* 272 in respect of the statutory regulation of directors' benefits and emoluments, loans to directors, compensation for loss of office, directors' interests in the company's securities, and insider dealing. One of the key areas is that of remuneration. Following the recommendations of the first King Committee, the Companies Act was amended to require that separate, full and clear disclosure of the total of executive and non-executive directors' earnings be made in the annual financial statements (s 197). The listing requirements of the JSE Securities Exchange demand that such disclosure be made of individual directors' remuneration packages: *Listings Requirements* par 8.63(l). This requirement is likely to be taken up in the new Act.

⁵⁸ The King Committee's *Code of Corporate Practices and Conduct* requires a board to establish a formal orientation programme to familiarise incoming directors with the company's operations, senior management and its business environment, and to induct them in their fiduciary responsibilities. Directors should also be briefed on an ongoing basis as the need arises (par 2.4.6). An induction programme for directors is required for listing on the Alternative Exchange (a market for small to medium companies that are in a growth phase): *Listings Requirements*, par 21.3(d).

⁵⁹ Mongalo "South Africanizing Company Law for a Modern Competitive Economy" 2004 *SALJ* 93 115.

The area of directors' duties is seen as one of the most important challenges of the new Act. Company law should seek to ensure the proper recognition of director accountability and appropriate participation of stakeholders other than the company's shareholders in corporate decision making. Mechanisms already available in the South African legal framework, like the workplace forums provided for in sections 78-94 of the Labour Relations Act 66 of 1995, should be considered and harmonised with company law. Social change can be facilitated by means other than company legislation, bearing in mind that company law, like all South African law, is subject to the supremacy of the Constitution. Attempts to effect social and environmental changes through the medium of company law alone would possibly have an impact only on South African incorporated companies and not on overseas companies operating through branches or to partnerships or sole traders. Issues like black economic empowerment are, therefore, best regulated outside the company legislation. The new Companies Act should not place unnecessary obstructions in the way of such regulation.

Reform initiatives already undertaken in jurisdictions that share our common law background, like England, Australia, Canada and New Zealand may provide important insights. They have also been considered in the development of the company laws of other SADC countries.⁶⁰ But there are also specific considerations that apply to South Africa. Aspects should not be taken over from other systems in isolation and without consideration of the particular context of that system.

Whilst directors should be aware of their duties and the consequences should they not comply with them, over-regulation is not beneficial and can confuse rather than clarify. Certain duties can, and should continue to, be regulated by statute. But commentators on the draft statement on directors' duties put forward in the English company law reform process have indicated the complexities of codification of directors' common law duties, and I suggest that this should not be attempted.

The DTI set itself an extremely ambitious timeframe for the completion of the South African company law reform process and substantial progress has been made. But it has already become apparent that the new Act will not come into force in 2006 as originally predicted. It seems that 2007 is a more likely target.

⁶⁰ The Botswana Companies Bill of 2003, eg, was based largely on the New Zealand model.