CORPORATE OPPORTUNITY DOCTRINE: A SOUTH AFRICAN COMPANY LAW PERSPECTIVE.

Dissertation submitted in fulfilment of the requirements for the degree of Master of Laws (LLM) at the University of Venda.

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MAY 2021

DECLARATION

I, **Lavhengwa Livhuwani Sosanah (Student No. 15000373),** hereby declare that this dissertation, for the LLM degree at the University of Venda, is my own work and has not been submitted previously at this university or any other university, and that it is my own work. All reference material contained herein has been duly acknowledged.

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ACKNOWLEDGEMENTS

It was going to be difficult or rather impossible to complete this research without the following persons, through their support. I give praise and glory to the highest God whom I serve. I thank Him for giving me life, good health, for showing His love, grace and strength.

Secondly, I would also like to thank and appreciate my supervisor, Prof A.O Nwafor of the University of Venda, and my co-supervisor CJMM Mkhabele for their comments and criticisms that enabled me to produce this work. In addition, I would like to thank Mr V.T. Bvuma for proof-reading my research. Without these individuals, it was not going to be possible for me to complete this study.

Thirdly, I would love to thank my family and friends for their support. Special thanks to my aunt, Takalani Joyce Nefale, Dakalo Happiness Mulaudzi and Mr Ramudzuli Fhatuwani Eric, for your words of encouragement and for always being by my side through difficult times.

DEDICATION

I dedicate this work to my late mother, Tshimangadzo Magareath Nefale. May her soul continue to rest in peace.

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Abstract

The corporate opportunity doctrine is a legal principle that demands that directors, officers and controlling shareholders of a company must not take for themselves any business opportunity that could benefit the company. However, this restriction does not apply to every member of a corporation. It is rather limited to those who could be said to stand in a fiduciary relationship with the company. The common law duties of directors are fiduciary duties of good faith, loyalty, and honesty. Every director owes to the company a duty to act in good faith and to serve in the best interests of the company. There are various responsibilities which stem from the duty of loyalty and honesty, that a director must show towards their company. These responsibilities include the duty to avoid conflict of interest, the duty of care, skill, and diligence, as well as the duty to disclose personal financial interests. These principles, which evolved at common law, are now statutorily recognised in South Africa. The Companies Act 71 of 2008 codifies the fiduciary duties of directors and makes them mandatory, prescriptive, and unalterable and applies to all companies. According to this Act, directors are not allowed to contract out of these duties. The aim of these duties is to raise the standard of corporate governance and directorial behaviour. It is the board of directors that has the full authority to exercise all the powers and perform the functions of the company to the extent that the Companies Act or company's Memorandum of Incorporation does not provide otherwise. The broad nature of these powers demands close statutory and judicial monitoring. This is to avoid abuses that could occur in dealing with corporate opportunities. In addition, the law dictates that opportunities available to the company must not be diverted by a director to personal use. This dissertation, through a doctrinal approach, explores this legal prescription in the South African law. It is aimed at ensuring probity in corporategovernance.

CHAPTER 1

INTRODUCTION

1.1 Background to the study

Directors and other officers of a corporation are vested with corporate power.[1] As persons in a position of trust, they owe fiduciary duty to act with utmost good faith when dealing with matters involving the corporation.[2] A director should give to the corporation the benefit of his/her best care and judgment and also exercise the discretion conferred on him/her solely in the corporation's best interests.[3] In addition, a director must not pursue personal interests over corporate interests in the fulfilment of his/her duty. Furthermore, he/she owes the corporation his/her "undivided attention and unselfish loyalty."[4] The general fiduciary duty of directors and officers gives rise to the corporate opportunity doctrine.[5]

The high standards required of fiduciaries were addressed in the old case of *Pepper v Litton*[6], where it was held that a fiduciary is not permitted to serve his/her interests first and the corporation's second. At all times, the interests of the corporation are of paramount importance and should come first. Thus, a director cannot disregard the standards of common decency and honesty and manipulate the affairs of his/her

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[1] Cassim HI *The Practitioner's Guide to the Companies Act 71 of 2008* Juta and Company Ltd South Africa (2013) 63. They have the right to exercise all of the powers and to perform any of the function of the company except to the extent that the Act or the company's Memorandum of Incorporation provides otherwise.
[2] Section 76 (3) (a) of the Companies Act 71 of 2008. See also *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd 2006 (5) SA 333 (W*) where the directors of the company had not acted in good faith and upon reasonable grounds in resigning. It was said that when the directors accepted the appointment, they simultaneously accepted the duties and obligations that goes with it. They had acted irresponsibly by merely abandoning the company as they were not allowed to walk away because it was convenient for them to do so.
[3] JE Jackson 'Corporate Opportunity Doctrine: A Historical View with a Proposed Solution' (1988) 53 (2) *Missouri Law Review* 1.
[4] Jackson (Note 1 above) 1.
[5] Jackson (note one above) 2.
[6] 308 U.S 295 (1939).

corporation to its detriment, or to pursue any interest which is injurious to the company that he/she is involved in.[7]

Directors are seen as constructive trustees of any profits acquired by the director in the course of performance of their duties. In *Lagarde v Anniston Lime & Stone Co*[8] the corporation had purchased a one-third interest in a limestone quarry. The corporation was attempting to buy the two remaining limestone quarries and had already contracted to purchase one. The defendants, who were also the directors of the company, purchased the two remaining limestone quarries. The court held that there was no breach of fiduciary duty in the purchase of the interest for which the company had merely negotiated its purchase, but that in relation to the one that the company had contracted, they were subject to constructive trustees.

The corporate opportunity doctrine is well-developed in the United States, where it has been laid down that directors of a company may not exploit for themselves an opportunity that in fairness belongs to the company of which they are directors.[9] That concept is illustrated by the judicial decision in *Guth v Loft Inc*[10]. Guth was a director of Loft Inc, which is a candy store. Guth, together with his family, also owned Grace Company, which manufactured syrups for soft drinks. The Coca-Cola Company was supplying Loft with the cola syrup. Guth was unhappy with Coca-Cola's high prices and decided to enter into an agreement with Roy Megargel. This was to enable Guth to acquire the trademark and formula for Pepsi-Cola. Financially, Guth and Megargel

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[7] Harvard Law Review 'Corporate Opportunity' (1961) 74 (4) *The Harvard Law Review Association* 765.
[8] 126 Ala. 496, 28 So. 199 (1900).
[9] Maleka Femida Cassim, Rehana Cassim, Richard Cassim, Joanne Shev, Jacqueline Yeats, "The duties and the Liability of Directors" in Farouk HI Cassim (managing editor) *Contemporary Company Law (*South Africa, Juta and Company (Pty) Ltd, (2012) 539. It is a requirement that a company must have had a legitimate interest in the opportunity and in order to establish this the Us courts have developed a 'line if business' test which laid down that if opportunity is closely related to business that the company is engaged in the opportunity would have met the requirement of being a corporate opportunity.
[10] 5 A 2d 503 (1939). See also *Olifants T in 'B' Syndicate v De Jager* 1912 TPD 301 where it was further explained that the opportunity must not only be in the line of business of the company or have close relation but it must the one the company must have been justifiably relying on the director to acquire it for the company. For example, where the director has a general mandate to from the company to acquire business opportunities for the company.

were unable to carry on with the new business venture and the family company became insolvent.

Thereafter, Guth used Loft capital, credit facilities and the employees to further the Pepsi enterprise, without the knowledge of the Loft board. The court held that corporate officers are not permitted to use their position of confidence and trust to further their private interests. The rule that requires undivided and unselfish loyalty to the corporation demands that there be no conflict between duty and self-interest.[11] The circumstances of this case demonstrate that Guth's appropriation of the Pepsi Cola opportunity placed him in a competitive position with Loft. The Supreme Court of Delaware held that the opportunity to acquire the Pepsi trademark and formula belonged to Loft, and that Guth, as the director, had no right to appropriate the opportunity to himself.

Until recently, the South African courts regarded the corporate opportunity doctrine as an aspect of non-profit rule or a no-conflict rule.[12] The challenge encountered with these rules is that they have failed to classify or address instances when an opportunity is regarded as corporate opportunity.[13] The Supreme Court of Appeal recognised the corporate opportunity rule in *Da Silva v CH Chemicals (Pty) Ltd*[14], where the court stated that "a consequence of the rule is that a director is in certain circumstances obliged to acquire an economic opportunity for the company if it is acquired at all. Such

[11] As above.
[12] Maleka Femida Cassim above 536. Although it is difficult to make a distinction between the two rules there are several cases where the distinction has not been rigidly observed. In *Re Allied Business and Financial Consultants Ltd Sub Nom O'Donnel v Shanahan* [2009] EWCA Civ 751 the court applied both rules. The two rules are separate and distinct either rule or both rule may apply.
[13] SA Kleyhans 'The Corporate Opportunity Rule: A Comparative Study' MA dissertation, University of South Africa 2016.
[14] 2008 (6) SA 620 (SCA).

an opportunity is said to be a 'corporate opportunity' or one which is the property of the company."[15]

The battle for defining corporate opportunity has been a long one. However, there is still no precise definition.[16] It was the opinion of the court that an attempt for an all-embracing definition is likely to prove a fruitless task.[17] A corporate opportunity is seen by the courts as an opportunity which the company is actively pursuing or one that can be said to fall within the company's existing or prospective business activities, or that which is related to the operations of the company within the scope of its business or falls within its line of business.[18] It does not make a difference that the opportunity would not have been taken up by the company; the opportunity would remain the opportunity of the company.[19] In *CMS Dolphin Ltd Ltd v Simonet*[20] it was held that a corporate opportunity is seen in law to be a corporate asset that belongs to the company. However, the corporate opportunity rule is not confined to tangible assets; rather, it extends to confidential corporate information which directors have used to make a profit for themselves.[21]

1.2 Scope of the study

The scope of a study refers to the grounds which the researcher will cover in the research project.[22] The present research focuses on the use of corporate opportunities by directors and other officers of a company who are seen by the law as occupying

[15] *Philips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) 482E. See also *African Claim & Land Co Ltd v Langermann* 1905 TS 494 where the court held that where a director has appropriated the opportunity and therefore being in breach of this duty the opportunity that he acquires for himself the law will refuse to give effect to his intention and will treat the acquisition as having been made on behalf of the company and the company may consequently claim the opportunity from the delinquent based on the principle that it is deemed that the director acquired the property for the company.
[16] As above.
[17] D.D Prentice 'The Corporate Opportunity Doctrine' (1974) 37 (4) *The Modern Law Review* 464.
[18] J. Lowry and R. Edmunds The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and its Remedies' (1998) 61 (4) The Modern Law Review 515 the writers assets that corporate opportunity is not limited to the assets of the company they are however referred to as such because it is not open to directors to exploit the opportunity for their personal gain.
[19] *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).
[20] [2001] 2 BCLC 704.
[21] *Boardman v Phipps* [1966] 3 All ER 721 (HL).
[22] Gill GS definition of scope of study https://shodhganga.inflibnet.ac.in (accessed 16 July 2019).

fiduciary positions in the corporate governance. In that sense, directors of a company are discussed in detail regarding when they become directors; how they are appointed; when and how they may pursue an opportunity without infringing or be in conflict with the rules and values espoused by the Companies Act and the company's memorandum of incorporation.

Section 76 of the Companies Act[23] is the core of this work's discussion. This Act unpacks the standards of the director's conduct. However, this section does not exclude the common law duties owed by a person occupying a position of trust in relation to the company. There are four aspects that section 76 addresses. The first aspect or instance is that a director must not use the position of a director or any information obtained while under that position in a way that will be injurious to the company.[24] In other words, he/she has the duty to avoid a conflict of interest. Secondly, the director has the duty to communicate the information to the company.[25] This is so because the directors are the custodians and trustees of corporate information.[26] The third aspect borders on duty of care, skill and diligence.[27] The general principle is that the directors are liable for negligence in the performance of their duties.[28] Lastly, it focuses on the business judgement rule or the safe harbour from liability for directors.[29] Different countries deal with this particular rule differently,

[23] Act 71 of 2008.
[24] Section 76 (2) (a) of the Companies Act. This further includes that the information gained in his position as the director must not be used to gain advantage for the director or any other person except the company that the director is involved in.
[25] Section 76 (2) (b) of the Companies Act.
[26] *Keech v Sanford* (1726) Sel Cas Ch 61. This is because the principles of company law in this area have been influenced by the by trust law.
[27] Section 76 (3) (c) (i)-(ii) of the Companies Act. See also *Sino Australia Oil and Gas Limited (in liq) v Sino Australia Oil and Gas Limited (in liq)* [2016] FCA 934 where it was said that an objective test is applied to determine whether what a reasonable director would have done in the same situation as well as the subjective test which takes into account the general knowledge, skill and experience of the specific director.
[28] *Fisheries Development Corporation SA Ltd v Jorgenson* 1980 (4) SA 156 (W) where it was held that the duty of care, skill and diligence is under the common law based on delict and the elements of delict must be proved for the liability to arise. An absence of loss or damage would not entail contravention of that duty under common law.
[29] Section 76 (4) of the Companies Act.

finding common ground on the principle that directors must exercise diligence, while enabling them to place reasonable reliance on facts and advice given by others.[30]

1.3 Justification for the study

Research justification refers to the rationale for the research or the reason for the research.[31] This study was conducted in order to establish how a balance can be struck between when a director can safely apply an opportunity that comes to him/her in the course of his/her duties to personal use and when such an opportunity must be reserved for the company. This is important because being a director of a corporation would not ordinarily prevent the director from working or being employed by another company. On the other hand, the company would not want its directors to use the information and knowledge acquired within the scope and course of their duties as directors of that particular corporation to benefit themselves or another company. Issues pertaining to what constitutes corporate opportunity and what does not is addressed in this work.

1.4 Problem statement

A problem statement can be defined as a clear description of the issues that form the crux of the research work.[32] A problem statement clearly defines or states the problem being addressed; it provides the evidence to support the existence of the problem and explains why researching the problem is important.[33] It has already been stated that the corporate opportunity doctrine extends to transactions that have a tendency to cause, not just actual harm, but also potential harm to the corporate entity.

On the one hand, if every business opportunity was to be made a corporate opportunity, this would restrict what directors can do and could discourage persons

[30] Note 9 above Contemporary Company law.
[31] Lisa MG Research Justification https//methods.sagepub.com (accessed 18 July 2019). See also Henning E, Gravett S and Rensburg Wilhelm *Finding your way in Academic Writing* 2nd edition Van Schaik Publishers South Africa 10.
[32] Chris E How to Write a Problem Statement www.ceptara.com (accessed 18 July 2019).
[33] As above.

from being directors in the first place. On the other hand, if a limit is placed on what constitutes corporate opportunities, the urge by directors to pursue personal interests at the expense of the company would be high. However, there is some uncertainty regarding where to draw the line between those in a fiduciary position, and those who are not, and therefore are not affected by the rule against the use of corporate opportunities. This work seeks solutions for defining the parameters within which the corporate opportunity concept operates.

1.5 Aim and objectives

1.5.1 Aim

An aim is the overall purpose of the study. The study aimed at discovering how best to protect the interests of the company through the instrumentality of the corporate opportunity doctrine, without placing fetters on the advancement of individuals' economic wellbeing, by utilising the skills and knowledge (information) acquired in the course of carrying out an individual's fiduciary duties.

1.5.2 Objectives

The stated aim was pursued through the instrumentality of the objectives set down below:

- A detailed examination of the duties of directors;
- Seeking an acceptable definition of the term 'corporate opportunity';
- Identifying how and why the concept 'corporate opportunity' originated in Company Law;
- Explaining how and when directorship may acquire a corporate opportunity belonging to the company;
- Discovering through a comparative analysis when a corporate opportunity ends, and a director could safely benefit from a particular venture without breaching the fiduciary duties owed to the company.

1.6 Research questions

A research question "is a clear, focused, concise, complex and arguable question around which you centre your research".[34] Research questions help writers focus their research, by providing a path through the research and writing process.[35] It is difficult, if not impossible, to conduct a research of this nature without a research question which is clear.[36] The study sought to answer the following questions:

- Who is a director and what are his/her duties?
- What does a corporate opportunity entail in the context of corporate governance?
- When does a corporate opportunity start and when does it end?
- When can a director who has retired from office or who has resigned exploit a corporate opportunity?

1.7 Literature review

The literature review places the research within the broader context of other literature on the topic.[37] It presents the knowledge of the most recent findings, discussions, developments in the research area and mainly consists of works of scholars and their position on related topics.[38] There is some literature and judicial decisions on the

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[34] Devin Kowalczyk Research Questions yakubugeorge.blogspot.com › 2017/08 › chapter-4 (accessed 20 June 2019)

[35] Devin Kowalczyk above.
[36] Note 31 above.
[37] Badenhorst C Dissertation Writing: A Research Journey 1st edition Van Schaik publishers South Africa 165.
[38] University of North Carolina at Chapel Hill Literature Reviews https://writingcenter.unc.edu (accessed 24 July 2019).

corporate opportunity doctrine. In these documents issues relating to when a director will be held accountable for the appropriation of corporate opportunities during or after his resignation are often discussed within the context of the general fiduciary duties of company directors. However, in her work, Cassim writes that the effect of the corporate opportunity concept is that directors must not appropriate for themselves or others economic or business opportunity in which the company has some interests.[39] The duty not to misappropriate a corporate opportunity arises out of the relationship between the director and the company, as well as the opportunity involved.[40] Cassim notes the various tests involved in checking whether an opportunity is corporate or not. The tests are broadly divided into two categories: the wide and narrow tests.[41] The wide approach is described in a manner that requires the director to first alert the company about the opportunity. This is irrespective of the nature of the opportunity. The narrow approach provides that the director must alert the company of the opportunity where the company has legal rights or interests in such a transaction.

In their article, Talley and Hashmall describe what constitutes a corporate opportunity. The writers observe that the first action to be taken is to find out whether the disputed project is a corporate opportunity. However, they have developed two tests which are different from those of Cassim.[42] The first test is the “interest or expectancy test”. This is described as the longest standing test for determining whether new business prospects are corporate opportunities or not.[43] The component of interest refers to those transactions on which the company has an existing contractual right, while the component of expectancy refers to the transactions which are not yet secured but

[39] A Cassim “Post-Resignation Duties of Directors: The Application of the fiduciary duty not to misappropriate corporate Opportunities” (2008) 125 (4) *South African Law Journal* 733.
[40] As above (A Cassim).
[41] As above (A Cassim)
[42] Talley, E and Hashmall, M The corporate Opportunity Doctrine (2001) https://weblaw.usc.edu/why/academics/cle/icc/assets/docs/articles/iccfinal.pdf (accessed 19 July 2019)
[43] As above.

which are likely to mature into contractual rights at a future date.[44] The second test is the line of business test, which suggests that if a new business falls within the line of business of the company, it is deemed to be a corporate opportunity. This includes any project that the company considers to be its assets, knowledge, expertise and talents, and the company will be able to adapt itself to pursue. They further contend that a corporation must assert its rights against a current or a former director who usurps an opportunity, as the company is the one that benefits from the fiduciary duty of loyalty. However, the scope of corporate opportunity, as espoused by these writers, seems too broad. The current research shows that there are limits within which a director could venture, without breaching the rules.

In *Aberdeen Railway Co v Blakie Brothers*[45] the court held that "it is a rule of universal application that no one, having the fiduciary duties to discharge shall be allowed to enter into engagements in which he/she has a personal interest conflicting with the interests of those he/she is bound to protect. This principle is so strictly applied that no question with regard to fairness and unfairness is allowed".[46] The decision suggests that the no-profit rule is strictly enforced by the courts. However, a closer scrutiny of some judicial decisions would be done later in this work which will reveal some level of flexibility in the application of that rule.

Nwafor asserts that "the key to the survival of every general rule lies on the inherent quality of adaptability of the rule and that each case should be judged by its own facts."[47] He espouses the adoption of flexibility when applying the corporate

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[44] *Letseng Diamondsv JCI Ltd* 2007 (5) SA 564 (W). In this case court ruled that where a third party knows that the contract was in breach of fiduciary duties of the director, the contract is void. See the opposite in *Kruger Investment Group Limited and another v Nuberry Holdings Limited and Others* [2015] ZAWCHC 159where the transfer of shares in contravention of a fiduciary duty not to compete with a company, to a company that knew of the breach of fiduciary duty was found to be valid.

[45] (1854) 1 Macq 461.

[46] As above. The no-profit rule was emphasised in this case as to extends not only to actual conflict of interests but, but also to situations in which there is a real sensible possibility of conflict.

[47] AO, Nwafor "The Corporate Opportunity Doctrine- An Inflexible or Flexible Rule" (2013) 9 (2) *Corporate Board: Role, Duties and Composition 9.*

opportunity doctrine, irrespective of statutory or common law regulation.[48] It is not fair and it makes no sense at all, he argues, that a director of all the people should not exploit the opportunity even when the company has no means of acquiring that opportunity. This would amount to discrimination, if viewed in the human rights perspective and thus violates a director's constitutional right.[49] The difficulties experienced in the inflexible application of the corporate opportunity rule have led to the judges voicing their desire for a more liberal approach in *Murad & Anr v Al-Saraj & Anr*.[50] Jonathan Parker LJ for instance, observed in that case as follows:

> There can be little doubt that the inflexibility of the "'no conflict' rule may, depending on the facts of any given case, work harshly so far as the fiduciary is concerned … it may be said that the commercial conduct which in 1874 was thought to imperil the safety of mankind may not necessarily be regarded nowadays with the same depth of concern… I can envisage the possibility that some time in the future the House of Lords may consider that the time has come to relax the severity of the 'no conflict' rule to some extent in appropriate cases.

Section 76 of the Companies Act provides for standards of a director's conduct. The section stipulates that:

> A director of a company must not use the position of director, or any information obtained while acting in the capacity of a director to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company or, to knowingly cause harm to the company or subsidiary of the company; and to communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director reasonably believes that the information is immaterial to the company or generally available to the public, or known to the other directors or is bound not to disclose that information by a legal or ethical obligation of confidentiality.[51]

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[48] *Shepherds Investment Ltd v Walters* [2006] EWHC 836. In this case the importance of the flexibility in the application of the rule was reflected and it was observed that the general fiduciary duty of loyalty is a residual concept that can include that no one has foreseen or recognized. The general duty permits the continuous evolution of the corporate law.

[49] See Section 9 of the Constitution of Republic of South Africa Act 108 of 1996. Compare Bester *v Wright 2011* 2 All SA 7 (WCC) the court held that in instances where a director does not comply with a legal rule be it Companies Act or any other law he will be deemed to be in breach of fiduciary duties. From this it can be concluded that a director can be held to be in violation of their fiduciary duties if in the exercise of their duties they disregard the Bill of Rights or any other provision which may be concerned with the realisation of human rights. Not meaning to dwell much on the Constitution and the Bill of Rights being outside the scope of this work, suffices to state that this constitutional precept is reaffirmed in *Pharmaceutical Manufacturers of South Africa: In Re Ex Parte President of the Republic of South Africa* that the "Constitution is the supreme law and all law including the common law regulating companies derives force from the Constitution and is subject to constitutional control". Companies ought to respect and protect human rights and to realise that they cannot take away existing rights in the chase of the profit motive without experiencing consequences.

[50] [2005] EWCA Civ 959.

[51] Section 76 (2) (a)-(b) of Companies Act 71 of 2008.

However, section 76 does not exclude the common law duties that are not expressly amended in the Act.[52] The codification of fiduciary duties is advantageous to the directors, as it provides clear and efficient guidelines for them and helps them to clearly identify the scope of their duties.[53] However, the codification lacks flexibility;[54] hence, common law will continue to be used to ensure that the directors' duties are flexible and continue to develop further.[55]

It would not be ideal to discuss section 76 while leaving out section 75 of the Companies Act. This is because section 75 regulates the position of the director who has personal financial interests in a company business. It is another section that regulates a director's duties. The common law rule is that a director must not benefit from any interest he/she may have in a company's business.[56] The interest could either be direct or indirect. The basis of the rule is the consequence of the fiduciary relationship between the director and the company; namely, that a conflict of duty is to be avoided.[57] At common law, all contracts between the director and the company are voidable at the instance of the company.[58] The position of the courts was that the approval of the contract by the other directors is not sufficient. The reasoning behind this position was that it would not make sense to make a director, who has some interests, participate in the decision as to whether to approve a contract or not.[59] However, statutory intervention presently allows the board to approve the transaction or agreement, except in circumstances where the director is the sole director but not

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[52] *Kensal Rise Investments (Pty) Limited v Marchant* [2014] ZAKZDHC 47 held that the Companies Act as a whole is not a codification of the law relating to the fiduciary relationship between directors and their companies this means that those conducts which are not forbidden by the Companies Act can be punished or sanctioned under common law.
[53] Coetzee L and Van Tonder JL "Advantages and disadvantages of partial codification of directors duties in the South African Companies Act 71 of 2008" (2016) 41 (2) Journal of Juridical Science 6.
[54] Coetzee L and Van Tonder JL above.
[55] As above.
[56] *Whitehouse v Carlton Hotel Pty Ltd* (1987) 11 ACLR 715.
[57] Henochsberg on the Companies Act 71 of 2008 1 (18)
[58] *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA).
[59] *Imperial Mercantile Credit Association v Coleman* (1871) LR 6 Ch App. See also *North-West Transportation Co Ltd v Beatty* (1887) 12 App Cas 589 (PC) where it was stated that directors are precluded from entering into contracts in which they have a personal interest conflicting or which possibly may conflict with the interest of those whom they are bound by fiduciary duty to protect.

the sole shareholder.[60] The approval should be made by the shareholders if "the agreement or determination is approved by an ordinary resolution of the shareholders, after the director has disclosed the nature and extent of the interest to the shareholders"[61]. The common law principle of conflict of interest should be approached by the courts on a common sense basis.[62] The provision of section 75 would be used in the argument to show that a director could benefit, to some extent, from corporate opportunity.

Khumalo, in his contribution, stated that the fact that the opportunity came to the director in his position as such, means the opportunity is corporate.[63] However, the case is different if the shareholders gave approval to the director to pursue the opportunity, or when the opportunity is not in the line of the company's business. He further argued that in instances where the director resigns and pursues the opportunity, his resignation serves no purpose because he obtained the opportunity while holding the office of a director.[64] Ndebele suggests that this rule applies even in circumstances where the opportunity is appropriated for a third party's benefit.[65] He stated that the difficulty the courts have lies in determining whether the opportunity exploited by the director qualifies as a corporate opportunity.

The corporate opportunity doctrine also extends to post-resignation contracts. In *Canadian Aero Service Ltd v O'Malley*[66] the plaintiff company offered mapping and geophysical exploration services mainly to governments. The two defendants had been directors of the plaintiff company and had been involved in carrying out preparatory work for the plaintiff in connection with a project in Guyana. The Canadian

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[60] Section 75 (3) of the Companies Act 71 of 2008.
[61] As above.
[62] *Mthimunye-Bakoro v Petroleum Oil Gas Corporation of South Africa (SOC) Limited and Another* [2015] (6) SA 338 (WCC). This was also held in *Boulting v Association of Cinematograph Television and Allied Technicians* [1963] 1 All ER 716 that a broad rule like this must be applied with common sense and together with the appreciation of the sort of circumstances.
[63] P Khumalo The Corporate Opportunity Rule: Are Directors allowed to make A Secret Profit at the Expense of the Company hhttps://m.polity.org.za accessed 24 July 2019.
[64] As above.
[65] I Ndebele 'The No Conflict of Interest' MA dissertation, University of Pretoria, 2014.
[66] *Canadian Aero Service Ltd v O'Malley* (1974) 40 DLR (3d) 371 (SCC).

government later invited the plaintiff company and others to submit tenders for this project. Subsequently, the defendants resigned their offices with the plaintiff company and formed their own surveying company, which submitted a tender and was awarded the contract.

The court found that the directors would not have become aware of the contract if they were not rendering their services to Canaero at the material time. It was clear that the two had resigned from their positions as directors with the desire to acquire the opportunity for themselves. Thus, they were in a fiduciary relationship with Canaero; they had breached their duty of loyalty, good faith and failed to avoid conflict of interests. The directors were held to be in breach of their fiduciary duty.[67] The court also noted that it does not matter whether the two were appointed properly as directors or whether they did not act as directors. The core of the issue was that they were acting as president and executive president of Canaero before their resignation. They acted in those positions and their remuneration and responsibilities verified their status as senior officers of Canaero.

The inability of the company to exploit an opportunity does not open the door for the directors. In *Bhullar v Bhullar*[68] the directors did not take for their own benefit opportunities which were being pursued by the company. In other words, there was no suggestion that the directors had used their position in the company to bring the opportunity to maturity and divert it to themselves, as in Canaero. In the former case the company's board had decided not to acquire any more properties. The opportunity arose after this decision was made and the decision was then reversed after the opportunity arose. However, the court found that the directors had breached their fiduciary duty.

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[67] *Framlington Group Plc v Anderson* [1995] 1 BCLC 475 (Ch) the directors after resigning took employment with the competitor whom their company had sold a fund management business. They had previously played a leading role in anticipation of their resignation but were not involved in the final negotiations which led to the actualization of the transaction. They were absolved from liability for a breach of duty of no conflict rule. See also *Bishopsgate Investment Management Ltd (in Liq) v Maxwell* (No 2) [1994] 1 All ER 261.
[68] *Bhullar v Bhullar* [2003] 2 BCLC 241 (CA).

In *Regal (Hastings) Ltd v Gulliver*[69] Regal owned a cinema and took out leases on two more cinemas in order to create a viable sale package. The landlord wanted personal guarantees from the directors but they refused to provide them. The landlord then offered to increase the share capital to £5000. Regal put in £2000 and could not afford to put more. The four directors each put in £500 and the company's chairman as well as the company solicitor each put £500. The directors sold the business and made a profit of nearly £3 per share. Regal successfully sued them for this profit. Their liability in this respect depended upon the proposition that a director must not make a profit out of the property acquired by reason of his/her relationship with the company of which he/she is a director. It does not matter that he/she could not have acquired the property for the company itself; the profit which he/she makes is the company's, even though the property by means of which he/she made it was not and could not have been acquired on its behalf.[70] These cases are illustrations of a strict application of the rule at common law, suggesting that a company's inability to exploit a particular opportunity does not open a window for a director.

Dorbyl Ltd v Vorster[71] suggests that the existence of a conflict of interest could also give rise to a director's liability. The plaintiff company sued its former executive director for his actions in the course of the sale of the shares. The defendant, while representing the company during the disposal of assets, also secretly and contrary to his contract with the company, acted on behalf of the purchasers. He is rewarded by both sides; the company pays him 4.5 million for representing it, while from the purchasers pay him cash and shares in the sum of 37 million. When the company becomes aware of the defendant's conduct, it dismisses him and sues him for both

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[69] [1942] 1 All ER 378 (HL).
[70] JT Pretorius, PA Delport, M Havenga and M Vermaas *Student Case Book on Business Entities* 3rd ed (2004) 94.
[71] 2011 (5) SA 575 (GSJ). See also *Volvo Southern Africa (Pty) Ltd v Gert Yssel* (2009) ZASCA 82 where the defendant was deemed to be in breach of fiduciary duties as there was a privity of contract between the defendant and the plaintiff which states that the defendant shall not engage in extra activities for remuneration without the written consent of the plaintiff. See *Mallison v Tanner* 1947 (4) SA 681 where it was stated that an agent who accepts, or agrees to accept, a secret commission forfeits the right to remuneration and is liable in damages for any loss sustained by the principal and is, furthermore liable to account for any profit to the principal.

sums on the ground of breach of fiduciary duties to it. The court found that Vorster breached key rules and ethical standards.[72] Under his contract of employment with Dorbyl, he was not allowed to do paid outside work without Dorbyl's written permission.[73] In this case the courts strictly upheld the notion that company executives have a fiduciary duty to act ethically with their employer's funds.[74]

Similarly, in *Robinson v Randfontein Estates Gold Mining Co Ltd*[75], the director and chairperson had purchased a farm for himself through an agent. The company, which was interested in purchasing that farm, had failed to reach the final agreement with the sellers. It was held that the company was entitled to claim from Robinson the profit made by him. The reason for this was that in circumstances where a man stands in to protect the interests of others, he is not allowed to make a secret profit at the expense of the other or place himself in a position where his interests conflict with his duty.[76]

It has been acknowledged that there are various tests for determining the existence of corporate opportunities. The interest or expectancy test defines a corporate opportunity with specific reference to the current activities of the corporation, rather than the prospective activities of the corporation.[77] However, the line of business test goes beyond the contractual interests of the corporation.[78] This is because the business test covers the prospective areas of growth and gives the doctrine a realistic

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[72] As above.
[73] Talley,E and Hashmall, M, The corporate Opportunity Doctrine 2001 https://weblaw.usc.edu/why/academics/cle/icc/assets/docs/articles/iccfinal.pdf (accessed 19 July 2019)
[74] As above.
[75] 1921 AD 168.
[76] This was similarly held in *Cook v Deeks* [1916] 1 AC 554 (PC) where the three of four directors who had equal shares decided to divert the opportunity to themselves. They passed a shareholder's resolution which they could do due to their 75 per cent voting majority, approving of what they had done. The court had no difficulty in ruling that the benefit belonged to the company and that the resolution passed by them had no effect. Directors cannot use their voting power to divert a corporate opportunity to themselves. The contract would have been taken by the company had the directors not appropriated for themselves.
[77] Howard *Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 and *Extrasure Travel Insurance v Scattergood* [2003] 1 BCLC 598 four tests were developed namely the power whose exercise is in question, the proper purpose for which the power was conferred, the substantial purpose for which the power was exercised in the instant case and lastly whether the purpose was proper.
[78] Talley E and Hashmall above 73.

and dynamic flavour. In *Thorpe v Cerbco Inc*[79], this test was criticised as being narrow, as it only encompasses the opportunities that are clearly linked to a corporation's existing operations, or those opportunities that would put the fiduciary in direct competition with the corporation's current endeavours.[80] It should be noted that the corporate opportunity doctrine also applies in circumstances where the director and the corporation compete against each other and that transactions which are not economically rational alternatives may not be considered by the courts when evaluating a corporate opportunity situation.[81]

The court in *Central Rly Signal Co v Dunhill Inc*[82] prescribed a larger domain to measure the similarity in terms of potential profitability and whether the tracking down of the opportunity presents a practical advantage to the corporation or fits within its prospective plans for expansion. This was extended to utilise a test that ensures that any project that the corporation has technological and financial ability to pursue and develop, without regard to what is economically practicable for a firm to undertake.[83] It was said, in addition to what is in the line of business proscribes, that the act of taking opportunities that a senior executive knows or ought to know are closely related to the corporation's current or anticipated future business is prohibited.[84]

The proposed research goes beyond these tests, to establish that they lean heavily in favour of the corporations and pay little attention to the interests of the directors. However, it is still unclear what constitutes a corporate opportunity, regardless of the tests laid down by the courts. Thus, it would not be fair to hold a director liable, who after resignation or retirement, forms his/her own company dealing or having its main business which is similar to the business of his/her former company. The researcher argues that directors as business persons cannot be expected to always stand aloof in order for a former company to acquire an opportunity whilst they themselves can do

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[79] 676 A.2d 436 (1996).
[80] *Demetriades and Another v Tollie and Others* [2015] ZANCHC 17.
[81] As above.
[82] 249 A.2d 427.
[83] *Irving Trust Co v Deutsch* 73 F.2d 121 Cir (1934).
[84] *Demoulas v Demoulas Super Mkts* 677 N.E 2d 159.

so personally, especially in instances where the company is not in an economically favourable state to acquire such an opportunity.

1.8 Research methodology

The term methodology connotes how the researcher seeks to answer the research questions or a way to systematically solve the research problem.[85] There are various research methodologies available. These include the doctrinal method and empirical method.[86] The doctrinal method or library-based research is said to be the most common methodology employed by those undertaking research in law.[87] This method is concerned with the discovery and development of legal doctrines, research for publications in text books and journals.[88]

The empirical method, on the other hand, entails field studies. It is beyond the desk.[89] However, these methodologies can be applied within the same research project. In the proposed study, the doctrinal method was used. This is because the research does not involve field study. It is a desktop research in which the researcher uses statutes, books, cases, articles in journals and other literacy works, but not questionnaires or interviews. The doctrinal method was deemed appropriate because the researcher did not require physical contact with persons and organisations, to analyse the existing authorities in this field of law, which is the precepts of empirical research.

1.9 Definition of key concepts

1.9.1 Director

Section 1 of the Companies Act 2008 defines a director as a "member of the board of a company, as contemplated in section 66, or an alternate director of a company and

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[85] CR Kothari, Research Methodology: Methods and Techniques (2004) 7.
[86] As above.
[87] SI Ali "Legal Research of Doctrinal and Non-Doctrinal" (2017) 74 (1) *International Journal of Trend in Research and Development* 1.
[88] As above.
[89] As above.

includes any person occupying the position of a director or alternate director, by whatever name designated".

1.9.2 Company

Company is a juristic person which is incorporated or recognised by the Companies Act 71 of 2008.

1.9.3 Fiduciary

A fiduciary is a person in a position of trust, and who owes a duty in equity to act always in the best interests of the beneficiary. Directors are by their positions in a company, a good example of fiduciaries.

1.9.4 Constructive trust

This is a legal or equitable imputation which implies that one holds property for the benefit of another, even when there is no intention of doing so.

1.10 Limitations of the study

The limitation of a study refers to matters that will prevent or hinder the researcher from getting to the level of perfection in the work.[90] In this work, the researcher may experience a shortage of materials in the library; for example, books, unstable internet facilities and unpredictable student strikes that often lead to the shutdown of the campus. Financial constraints may also hinder visits to advanced and well-stocked institutional libraries, as well as personal acquisition of the relevant materials by the researcher. The researcher endeavoured to maximise the benefits from the limited available resources and analysed the works within her capacity as an emerging intellectual.

[90] 'Research Study Limitations' available at http: libguides.usc.edu/writingguide/limitations, (accessed 20 June 2019).

1.11 Ethical considerations

Ethics are concerned with what is right and what is wrong.[91] They help to determine the difference between acceptable behaviour and unacceptable behaviour. It is the written code of value principles that is used in a particular context. The importance of ethical considerations in research is that they prevent the fabrication or falsifying of data, and therefore promote the pursuit of knowledge and truth, which is the primary goal of research.[92] The ethics and policy of the University of Venda with regard to research are known to the researcher. Any material or information used in this research work that does not belong to the researcher has been fully acknowledged. All instances of plagiarism have been avoided.

1.12 Proposed research structure

1.12.1 CHAPTER 1: INTRODUCTION

This chapter introduces the research work. It provides the background to the research, what the researcher aims to achieve. In addition, headings such as scope of study, justification of study, problem statement, research questions, literature review, proposed research methodology, definition of key concepts, limitations of the study and ethical considerations, are discussed.

1.12.2 CHAPTER 2: DIRECTORS AND THEIR DUTIES

This chapter discusses topics such as the origin and appointment of a director and duties of directors in broad terms.

1.12.3 CHAPTER 3: THE CORPORATE OPPORTUNITY DOCTRINE

[91] E Babbie and J Mouton The Practice of Social Research-South African Edition (2001) 470.
[92] Ethical Considerations https://cirt.gcu./research/developmentresources/tutorials/ethics (accessed 25 July 2019).

In this chapter the term ‘corporate opportunity’ is discussed. It also explains when a corporate opportunity starts and ends. Finally, it explores the various tests applied by the courts in identifying corporate opportunities.

1.12.4 CHAPTER 4: POST-RETIREMENT OR RESIGNATION UTILISATION OF CORPORATE OPPORTUNITY

In this chapter the researcher explores the legal position when a director who has retired or resigned from office exploits what the law considers as being a corporate opportunity.

1.12.5 CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

In this chapter the researcher draws conclusions from the work and makes recommendations that will improve on the existing position of the law.

1.13 RESEARCH SCHEDULE

This research work was conducted in the following manner:

25 June 2019 submission of first draft if the proposal

19 July submission of corrected proposal

August 2019 presentation of proposal and submission of Chapter 1

September 2019 submission of Chapter 2

October 2019 correction of Chapter 2

November 2019 submission of Chapter 3

December 2019 correction of Chapter 3

January 2020 submission of Chapter 4

February 2020 correction of Chapter 4

March 2020 submission of Chapter 5

April 2020 correction of Chapter 5

May 2020 submission of research draft

CHAPTER 2

COMPANY DIRECTORS

In this chapter the meaning of the word director is explained. The chapter also discusses the different types of directors, the status of director, the appointment of directors, ineligibility and disqualification of persons to be directors, delinquent directors and directors on probation, the removal of directors and remuneration of directors.

2.1 Introduction

A company as an artificial person cannot perform its own functions. Real persons are needed to represent it and to act on its behalf. Section 66 (1) of the Companies Act deals with the board, directors, and prescribed officers. It provides that the "business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Act or the company's Memorandum of

Incorporation provides otherwise."[93] This provision suggests that the board of directors is the primary organ of the company, although the Memorandum of Incorporation could also confer powers on order organs, such as shareholders, in a general meeting, to perform specific functions on behalf of the company.

This provision is a statutory recognition of the common law obligation of directors, as managers of the affairs of a company. This is a positive obligation on the directors. Previously, directors did not enjoy original powers to manage the company's business.[94] The power to manage the company's affairs had to be delegated to the board of directors by the members in a general meeting or by the constitution of the company. The powers in terms of section 66 are applicable from the moment a director is appointed to the board. Discussions in this chapter focus on who is a director, the appointment of directors, ineligibility and disqualification of persons to be directors, removal of directors, procedure to declare a director a delinquent or under a probation, as well as the remuneration of directors.

2.2 Meaning of a director

It is important to identify who is a director in a company, as well as the scope of their role in the company. This is because directors play a crucial role in the management of the affairs of a company. The general definition of a director is that a director "is an elected or appointed member of the board of directors of a company who -with other directors- has the responsibility for determining and implementing the company's policy".[95] In order for someone to become a director, he or she does not have to be a stockholder or a shareholder or an employee of the company. Rather, the person's relationship with the company could simply be restricted to holding the office of a director. The resolutions passed at the directors' meetings are the basis for the director's conducts. Furthermore, the directors derive their powers from the company's

[93] Section 66 (1) of the Companies Act 71 of 2008.
[94] See Companies Act 61 of 1973.
[95] Jeffrey Glen Company director definition http://www.businessdictionary.com/definition/company-director.html accessed 25 November 2019.

legislation and memorandum of incorporation. Because directors are deemed to be agents of the company, they can bind the company with valid contracts entered into with third parties, such as buyers and suppliers. In addition, directors do not incur liability, unless they act outside their powers or expressly or impliedly assume responsibility.

Section 1 of the Companies Act defines a director as "a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated".[96] The word 'includes' is an indication that the definition in that provision is not exhaustive. The meaning of the word director must be derived from the Act as a whole[97] and formalities are not important in attempting to identify persons who are directors in certain companies.[98] This definition is inclusive, to such an extent that it covers the formally appointed directors and directors who are not formally appointed but merely 'occupying the position of a director'. Such persons are generally referred to as de facto directors.[99]

In *Corporate Affairs Commission v Drysdale*[100]*,* a de facto director was defined as one who acts in the position of a director. This is regardless of whether the person has lawful authority or not. However, the phrase 'holds an office' refers to one who is the lawful holder of the office. For the purposes of the Act, a person who occupies the position of a director, whether with or without lawful authority, will be deemed to be a director.[101] Furthermore, the phrase 'by whatever name designated', as used in that definition, suggests that a director may be known by a name other than a director, but is identifiable as such by the nature of functions assigned or performed by such

[96] Section 1 of Companies Act 71 07 2008.
[97] *Re Lo-Line Electric Motors Ltd* [1088] Ch 477.
[98] J, Lacy ''The Concept of a Company Director: Time for a New Expanded and Unified Statutory Concept'' (2006) *Journal of Business Law* 269.
[99] J, Lacy above.
[100] *Corporate Affairs Commission v Drysdale* (1978) BCC 288
[101] Farouk HI, Cassim R, Jooste R, Shev, J and Yeats J Contemporary Company Law (Juta and Company, South Africa, 2012) 404.

individual. For example, a manager can be referred to as a director. The court in *Re Mea Corporation Ltd*[102] emphasised the point that the name or description of position is not relevant when determining whether a person is a director; what is relevant is the substance of the person's activities, which determines whether the person is a director or not.

2.3 Types of directors

Section 66 recognises four different types of directors. The first type is the one appointed in terms of the Memorandum of Incorporation. This type of director may be appointed by anyone who is named in the Memorandum of incorporation.[103] In instances where the director has to be appointed by a third party, the third party is not under any obligation to appoint, as the company would do, a most suitable person for the position.[104] Secondly, there is the ex officio director, who is a director of a company as a result of holding some other office, designation, title or similar status.[105] An ex officio director has all the powers and functions of any other director in the company, although they are limited by the Memorandum of Incorporation. An ex officio director is subject to any liability of any other director of the company.[106]

The third type of director is the alternate director, as defined in section 1 of the Companies Act. Section 1 defines an alternate director as "a person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company".[107] An alternate director only acts as a director in the absence of his/her appointor. It is

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[102] *Re Mea Corporation Ltd* [2007] BCC 288.
[103] Section 66 (4) (a) (i) of the Companies Act 71 of 2008.
[104] *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] AC 187 (PC) it was stated that "in the absence of fraud or bad faith, a shareholder or other person who controls the appointment of a director owes no duty to creditors of the company to take reasonable care to see that directors so appointed discharge their duties as directors with due diligence and competence.
[105] Section 66 (4) (a) (ii) of the Companies Act 71 of 2008.
[106] Section 66 (5) (b) (ii) of the Companies Act 71 0f 2008.
[107] Section 1 of the Companies act 71 0f 2008.

important to have an alternate director, to fill the gaps where the substantive director is unavailable. The Memorandum of Incorporation has to make a provision for the director to appoint an alternate director.[108] The Memorandum of Incorporation stipulates the alternative director's powers and other terms in relation to his appointment.[109] Lastly, we have a director who is elected by the shareholders, to serve as a director for an indefinite term or for such a term as stipulated in the Memorandum of Incorporation.[110]

2.3.1 De jure director

Mayson, French and Ryan stated that a person is described as a de jure director of a company if the person has been appointed to the office of director in accordance with the rules governing such appointment, the person has agreed to hold that office, the person is not disqualified from being a director of the company and the person has not vacated the office.[111] There is also a *de jure director* who is formally appointed and registered to the position of the company director and who has freely consented to that appointment.[112]

2.3.2 Temporary director

A temporary director is appointed in terms of the company's Memorandum of Incorporation of a profit company, to serve on temporary basis until such time that the vacancy is filled by a director who has been elected by the shareholders.[113] The

[108] Section 66 (4) (a) (iii) of the Companies Act 71 of 2008.
[109] *Australian Securities & Investment Commission v Doyle* [2001] WASC 187 it was said that alternate directors are recognized as independent directors and that they are responsible for their own actions after their appointment. When alternate directors are serving their terms they are not agent of their appointers.
[110] Section 68 (1) of the Companies Act 71 of 2008.
[111] French D, Mayson S, Ryan C, Company Law 30th edition (Oxford University Press, United Kingdom, 2012) 237.
[112] *Re Hydrodam (Corby) Ltd* [1994] BCC 161.
[113] Section 68 (3) of the Companies Act 71 of 2008.

temporary director has all the powers, functions and duties and is subject to all the liabilities of any other director of the company.[114]

2.3.3 Nominee director

A shareholder who controls sufficient voting powers in the company normally appoints a director to represent his/her interests.[115] A nominee director represents various categories, such as a major shareholder, a class of shareholders, a significant creditor or an employee group.[116] A nominee director is a de jure director who owes his or her nomination as a director to a shareholder or other third party. Nominee directors are useful in instances where a significant shareholder agrees to subscribe for shares in a company on condition that he or she has representation on the board of directors, or where a significant shareholder lacks the time or expertise to serve as director personally and, accordingly, wishes to appoint a nominee director to act on his/her behalf.

The practice of appointing a nominee director is legally recognized. However, the presence of a nominee director may lead to potential conflict of interests should it happen that the interests of the company do not coincide with those of the nominator.[117] In instances where there are conflicting interests, the nominee director is in law obliged to serve the interests of the company in exclusion of the interests of the nominator.[118] The position of a nominee director was described by Lord Denning MR in *Boulting v Association of Cinematograph, Television and Allied Technicians*[119] as follows:

> Take a nominee director, that is, a director of a company who is nominated by a large shareholder to represent his interests. There is nothing wrong in it. It is done every day. Nothing wrong, that is, so long as the director is left free to exercise his best judgment in the interests of the company which he serves. But if he is put on terms that he is bound to act in the affairs of the company in accordance with the directions of his patron, it is beyond doubt unlawful, or

[114] As above.
[115] *S v Shaban* 1965 (4) SA 646 (W) 651.
[116] E Boros "The Duties of Nominee and Multiple Directors: Part 1" (1989) 10 *Company Lawyer* 211.
[117] *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324.
[118] *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) 652.
[119] *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606.

if he agrees to subordinate the interests of the company to the interests of his patron, it is conduct oppressive to the other shareholders for which the patron can be brought to book.

2.3.4 Puppet director

A distinction has to be made between a nominee director and a puppet director. A puppet director, is self-explanatory: it is the puppet of the director he/she is serving on his/her behalf. He/she is placed on the board of directors with the intention that he/she has to blindly follow the instructions of his/her controller.[120] It is completely foreign to the basic concepts of our law and it is punishable as fraud.[121] A puppet director can be held liable for breach of fiduciary duty.[122] Furthermore, he/she cannot escape liability by laying the blame on the person who put him/her in the office.[123] This extends further to the director who had resigned and is later appointed as a puppet director: he/she is still bound by the fiduciary and other duties of a director.[124] This means that the puppet director will not escape liability on the grounds that he/she was not formally appointed to the office of the director.[125]

2.3.5 De facto director

A de facto director is a person who occupies the position of director of a company, but who has not been formally appointed. He/she claims to act and purports to act as a director. Such person, although not formally appointed, will be treated as a director of the company.[126] A de facto director of a company must be proved to have undertaken functions in relation to the company that could properly have been discharged only by a director; it is not sufficient to show that he/she has been involved in the management of the company's affairs or could have undertaken tasks that could have properly been

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[120] *S v Shaban* 1965 (4) SA 646 (W) 652.
[121] *Sage Holdings Ltd v Thenisec Group Ltd* 1982 (1) SA 337 (W) 354
[122] *S v Hepker* 1973 (1) SA 472 (W) 484.
[123] S v Hepker 1973 (1) SA 472 (W) 484.
[124] *S v De Jager* 1965 (2) SA 616 (A).
[125] *S v Hepker* above.
[126] Section 2 (1) of the Companies Act of 2008.

performed by the manager below board level.[127] The person must have been involved in the managing or directing the affairs of the company on an equal footing, with the other directors, and not in a subordinate role.[128]

A de facto director must have exercised 'real influence' in the corporate decision-making process of the company.[129] Though a de facto director does not have to be held out by the company as a director, this might be the evidence in support of the conclusion that the person did act as a director.[130] A disqualified director may become a de facto director[131] and a person can become a director not validly appointed; for example, there was a defect in the initial appointment of a person as a director or the defect appeared at a later stage.[132] Section 1[133]makes it clear in the words 'occupying the position of a director' that a de facto director constitutes a director for the purposes of the Act, and a director may not escape liability for a breach of duties because he/she has not been formally or validly appointed as a director. A de facto director is subject to the fiduciary and other duties of a director.[134]

2.3.6 Shadow director

The English law defines a shadow director as "a person in accordance with whose directions or instructions the director of a company are accustomed to act".[135] A shadow director 'lurks in the shadows', sheltering behind others who he or she claims are the only directors of the company, to the exclusion of himself. [136] A shadow director

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[127] *Re Hydrodam (Corbyl) Ltd* [1994] BCC 161.
[128] *Gemma Ltd v Davies* [2008] BCC 812.
[129] *Re Kaytech International plc; Portier v Secretary of State for Trade and Industry v Holier* [2007] BCC11.
[130] *Secretary of State for Trade and Industry v Hollier* [1999] BCC 390.
[131] *In re Canadian Land Reclaiming & Colonising Co* [1880] 14 Chd 660. In this case two persons had accepted directorship of a company in which the qualification for serving as a director in terms of the company's constitution was the holding of 100 shares in the company. Both persons had acted as directors of the company for some time but had never held any shares in the company. The Court of Appeal held that their appointment as directors nevertheless rendered them de facto directors of the company.
[132] *R v Mall* 1959 (4) SA 607 (N) 624.
[133] Companies Act 71 0f 2008.
[134] *Shepherds Investment Ltd v Walters* [2007] Ch 340.
[135] Section 251 (1) of the United Kingdom Companies Act 2006.
[136] *Re Hydrodam (Corbyl) Ltd* [1994] BCC 161.

is held out to be a director of the company, he/she exercises powers from the shadows. In practice, most directors are likely to want to remain anonymous. Therefore, concealment is not a prerequisite.[137] The court in *Re Hydrodam (Corbyl) Ltd* established a test of a shadow director of the company as follows:

> It is necessary to allege and prove who are the directors of the company, whether the de facto or de jure; that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; that those directors acted in accordance with such directions; and that they were accustomed to act. What is needed is, first, a board of directors claiming and purporting to act as such; and secondly a pattern of behaviour in which the board did not exercise any discretion or judgment of its own but acted in accordance with the directions of others.

The reason behind having shadow directors is to prevent the use of intermediaries acting as a façade for the real exercise of power within the company.[138] The Act does not specifically define the word 'shadow director'. However, the definition in section 1[139] is wide enough to include a shadow director because of the phrase 'occupying the position of a director'. Common law has recognized shadow directors, even though they were not referred to in that specific or particular way.[140]

Under the UK Companies Act, a person is not regarded as a director because the board of directors acts on advice that the person gives to them in his/her professional capacity.[141] However, in the Australian Corporations Act, the definition of a director extends to a person who is not validly appointed as a director, but in accordance with whose instructions or wishes the directors of the company are accustomed to act.[142] The Australian Corporations Act makes it clear that a person is not a shadow director because the company's director's act on advice given by the person in the proper

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[137] *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340. There are reasons why directors would want to remain anonymous. This may be because they wish to avoid being subject to certain of the duties or liabilities imposed on directors such as wrongful trading where a company fails or because they have been disqualified from being validly appointed as directors.
[138] HI Cassim et al Contemporary Company law 410
[139] Companies Act 71 of 2008.
[140] *S v De Jager* 1965 (2) SA 616 (A), where two directors of a company had resigned and had appointed two other persons as directors, who had acted simply on their instructions. It was held that even though the directors in question had formally resigned they nevertheless continued to be directors for the purposes of their fiduciary duties as directors.
[141] Section 251 of the UK Companies Act of 2006.
[142] Section 9 of the Australian Corporations Act 50 of 2002.

performance of functions attaching to the person's professional capacity, like it is provided in the UK Companies Act 2006.

There is some confusion regarding the differences between a shadow director and a de facto director. However, the two concepts do not overlap but are alternatives, and in most cases are mutually exclusive.[143] A de facto director is one who claims to act and purports to act as a director, although not validly appointed as such, while a shadow director does not claim or purport to act as a director, but claims not be a director.[144] A de facto director assumes functions that only a de jure director may properly perform, while a shadow director instructs directors, either de jure or de facto, on how to act in relation to the company's affairs, so that they become accustomed to act. A shadow director is a superior who instructs and directs the directors; he or she is not on an equal footing with the board of directors, like de facto and de jure directors.[145] However, the distinction between a de facto director and a shadow director is not always clear-cut. This is because the influence of a person may be concealed at times and open at others.[146]

2.3.7 Executive, non-executive and independent directors

There is no distinction among executive, non-executive and independent directors in the Act. However, the distinction exists in practice in the King III Report and Code. An executive director is involved in the day to day management of the company and he/she is in the full-time salaried employ of the company. On the other hand, a non-executive director is not involved in the day to day management of the company and is appointed from outside the company. He or she is a part-time director and is not an employee of the company. The reason behind appointing non-executive directors is that they are not involved in the day to day management of the company. In addition, they can bring an independent voice and perspective to the board on issues facing the

[143] *Re Hydrodam (Corbyl) Ltd* [1994] BCC 161.
[144] *Re Hydrodam (Corbyl) Ltd* [1994] BCC 161.
[145] C Noonan and S Watson "The Nature of Shadow Directorship: Ad Hoc Statutory Intervention or Core Company Law Principle" 2006 *Journal of Business Law* 763.
[146] *Re Kaytech International plc; Secretary of State for Trade and Industry* [1999] BCC 340.

company.[147] An independent, non-executive director is one who does not have a relationship with the company outside his/her directorship.

2.4 Status of directors

In *Imperial Hydropathic Hotel Co, Blackpool v Hampson*[148] it was said that:

> …when persons who are directors of a company are from time to time spoken of by judges as agents, trustees, or managing partners of the company, it is essential to recollect that such expressions are used not as exhaustive of the powers or responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered –points of view at which they seem for the moment to be either cutting the circle or falling within the category of the suggested kind. It is not meant that they belong to the category, but that it is useful; for the purpose of the moment to observe that they will fall *pro tanto* within the principles which govern that particular class.

A company is a juristic person and therefore functions through human agency. A company acts through its members in general meetings and through its directors and employees. It is the responsibility of the board of directors to manage the day-to-day running of the company and to ensure the security of the company's assets. A director acts for the benefit of some other person; that is, the company, and not for his or her own benefit. When they contract on behalf of the company, they do not incur liability, unless they act outside their powers or expressly or impliedly assume liability. Prior to the enactment of the Companies Act of 2008, a director did not enjoy original powers to act on behalf of the company. Instead, the director's powers were delegated to them by the company through a general meeting. In the exercise of such powers, they are seen as occupying a fiduciary relationship with the company.[149] Historically, the legal position of a director as fiduciary developed in England around the concept of trust.[150] However, the directors are not trustees in the true sense of the word. Under the South African law, trust property is vested in the trustee, whereas the property which the directors are bound to administer is not vested in them but in the company itself. That

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[147] *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) 165.
[148] *Imperial Hydropathic Hotel Co, Blackpool v Hampson* (1882) 23 ChD 1.
[149] Section 66 (1) of the Companies Act 71 of 2009 now confers original powers and duties on directors making the position of a director to change considerably under the Act.
[150] FHI Cassim Contemporary Company Law (Juta &co South Africa, 2012) 412. See also *Keech v Sanford* (1726) Sel Cas Ch 61.

is, directors do not own any part of the property of the company. The analogy of directors as managing partners is stronger in the case of a personal liability company, where the directors are jointly and severally liable, together with the company, for the debts and liabilities of the company contracted during their period of office.

The Act assigns authority to directors to perform all the functions and exercises all the powers of the company. It sets out the minimum standards of conduct and provides the personal liability where a director does not perform to the said standard. The Act does not specifically comment on the status of a director. Where no express contract has been entered between the company and its directors, the provisions contained in the Act and the company's Memorandum of Incorporation are generally viewed as guiding terms of the relationship that the director has with the company.[151] Thus, directors have severally been described as agents of the company, trustees of the company's property and as managing partners.

2.4.1 Directors as agents

That directors are agents is their first characteristic. A company is an artificial person and it functions through human agents who are the directors. However, directors being agents, are not personally liable for their acts, unless they contravene the provisions of the Act, as specifically-mentioned in it. It is said that the principle of agency operates as alter ego. It is quite distinct from the principle of agency. The acts and intention of its agents are the acts and intention of the body corporate. Even a company can be held liable for the malice contended by its directors. Directors are not agents of the members of the company. Rather, the position of directors as agents is superior to that of ordinary agents and, thus, they are more than agents. An ordinary agent derives his or her authority from his or her principal but the directors, as agents, derive their authority, not only from their principal; that is, the company, by virtue of its Memorandum of Incorporation, but they also derive their authority from the Act itself.

[151]DeloitteTouchDutiesofDirectorshttps://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-riskcompliance/ZA_DutiesOfDirectors2013_16042014.pdf (accessed: 28 January 20120).

Such authority cannot be overridden. In *Hawkes v Cuddy,*[152] it was stated that even a director who is an employee of a shareholder and was nominated to his or her directorship by that shareholder does not act as agent for that shareholder when acting as a director of the company. Furthermore, he/she does not owe a duty to that shareholder under company law.[153] There were two cases where there were particular circumstances which made the director of a company an agent of the members of the company. It was in the instance where directors acted for members in selling their shares. The first one is *Allen v Hyatt*[154]*,* wherein the directors of the company failed to disclose the profit made from selling the shares of the members of the company were held liable to them. The second one is *Briess v Woolley*,[155] wherein the managing director of a company made a fraudulent misrepresentation when arranging the sale of shares of the members of the company, and the members were held liable as principals to the purchasers for their agent's fraud.

2.4.2 Directors as trustees

Directors are trustees of the company's money and property. They safeguard the money and property. Furthermore, they use the money and property for and on behalf of the company. According to the law of trust, a trustee holds legal ownership over the trust property of which the equitable ownership lies with the *cestui que trust*; that is, the beneficiary. From this viewpoint, directors are not full-fledged trustees.

A trustee can make contracts in respect of the trust property in his own name. However, the directors cannot do so. They can only make such contracts in the name of the company. The company is the legal owner. In the Companies Act, the duties and rights of a trust are not defined the same way as in the Law of Trust. In fact, the position of directors is of fiduciary nature, with power delegated to them by the members. The directors, as trustees in a limited sense, shall act in good faith.

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[152] *Hawkes v Cuddy* [2009] 2 BCLC 427.
[153] *Hawkes v Cuddy* [2009] 2 BCLC 427.
[154] *Allen v Hyatt* (1914) 30 TLR 444.
[155] *Briess v Woolley* [1954] AC 333.

Furthermore, the directors do not hold any fiduciary relationship with individual members of the company. In addition, the directors are not trustees of a debt due to a company or for the company's creditors. The directors are, as such, quasi-trustees.

2.4.3 Directors as managing partners

In a company, the management is in the hands of plural executives. Therefore, the directors are managing partners (the term partner used in the sense of the Partnership Act). Even though substantial powers may be entrusted upon directors or to an outsider, such a person has to act under the superintendence, control and direction of the board of Directors. Therefore, unlike in a partnership firm, no power can be delegated to a single director as a managing partner. The principle of *delegatus non-potest delegera*; that is, power, once delegated, cannot be further delegated. This is applicable to company management. However, the Board may revoke at any time the power it has delegated to a committee or an individual director. From the preceding discussions, it is clear that directors are not agents, trustees or managing partners in the popular and legal sense of the terms. Rather, they have in them the elements of agency, trusteeship and partnership. However, none of these terms can describe directors in their totality.

The position of director is a combination of agency, trusteeship, and elements of partnership, and not an agent, a trustee or a managing partner in its real sense.

2.4.4 Director as an employee

A person who is a director of a company is not an employee of the company.[156] Being a director has been categorized by the court as 'holding an office', rather than being an employee of the company.[157] An employee serves as a director under a contract of service. On the other hand, the appointment of a person as a director of a company does not in itself form any contract between the person and the company. The non-

[156] *Hutton v West Cork Railway Co* (1883) 23 ChD 654.
[157] *McMillan v Guest* [1942] AC 561.

contractual nature of an appointment as director indicates that it is an office, not an employment.

2.4.5 The true status of a director

It is clear from the preceding discussion on the status of directors that directors cannot be placed into a distinct category as agents, trustee, managing directors or employees. This is because directors occupy a unique position. The legal status of directors is *sui generis,* as it stands in a class of its own. It is difficult to determine this status by reference to a single legal relationship, rather, it must be determined through reference to the facts of each case. The court in *Cohen v Segal*[158] summed up the legal status of directors as follows:

> Directors are from time to time spoken of as agents, trustees or managing partners of a company, but such expressions are not used as exhaustive of the powers and responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered, points of view at which, for the moment, they seem to be falling within the category of the suggested kind. It is not meant that they belong to the category, but that it is useful for the purpose of the moment to observe that they fall, *pro tanto*, within the principles which govern that particular class.

2.5 Number of directors

The mandatory minimum number of directors a company should have depends on the type of company. The Companies Act provides that a private and a personal liability company must appoint at least one director to the board of directors, and that a public company and a non-profit company must appoint at least three directors.[159] Where a profit company, other than a state-owned company, has only one director, that director may exercise any power or perform any function of the board at any time, without notice or compliance with any other internal formalities, except to the extent that the Memorandum of Incorporation provides otherwise.[160] In instances where the number of directors required by law is not sufficient, this includes directors appointed in terms

[158] *Cohen v Segal* 1970 (3) SA 702 (W).
[159] Section 66 (2) (a) of the Companies Act 71 of 2008.
[160] Section 57 (3) (a) of the Companies Act 71 of 2008.

of the Memorandum of Incorporation and *ex officio* directors. The board of directors must call a shareholders' meeting within forty (40) business days after the company has been incorporated, for the purpose of electing sufficient directors to fill all the vacancies on the board.[161] However, failure by a company to have the required minimum number of directors does not limit the board's authority or invalidate anything done by the board.[162] Internal defects in the appointment of the directors could make the appointment void.

2.6 Appointment of directors

2.6.1 Initial appointment of directors

The first directors of a company are the incorporators of the company, and they serve as directors of the company until the minimum number of required directors, in terms of the Act or the Memorandum of Incorporation, has been appointed.[163] Section 67 (1) of the Companies provides as follows:

Each incorporator of a company is a first director of the company and serves until sufficient other directors to satisfy the minimum requirements of this Act, or the company's Memorandum of Incorporation, have been— *(a)* first appointed, as contemplated in section 66(4)*(a)*(i); or *(b)* first elected in accordance with section 68 or the company's Memorandum of Incorporation. (2) If the number of incorporators of a company, together with any *ex officio* directors, or directors to be appointed as contemplated in section 66(4)*(a)*(i), is fewer than the minimum number of directors required for that company in terms of this Act or the company's Memorandum of Incorporation, the board must call a shareholders meeting within forty (40) business

[161] Section 67 (2) of the Companies Act 71 of 2008.
[162] Section 66 (11) of the Companies Act 71 of 2008.
[163] Section 67 (1) of the Companies Act 71 of 2008.

days after incorporation of the company, for the purpose of electing sufficient directors to fill all vacancies on the board at the time of the election.

Previously, the first directors of a company were appointed in writing by a majority of the subscribers of its memorandum.[164]

2.6.2 Appointment by a person named in the memorandum of incorporation

A director may be appointed and removed by a person named or determined in terms of the Memorandum of Incorporation.[165] In instances where a third party has the authority to appoint a director, such a third party is not under the obligation to appoint as a director the most suitable person for the position. The court in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd*[166] expressed the view of third parties as follows:

> In the absence of fraud or bad faith a shareholder or other person who controls the appointment of a director owes no duty to creditors of the company to take reasonable care to see that directors so appointed discharge their duties as directors with due diligence and competence.

The fact that the Memorandum of Incorporation is not binding on third parties and does not confer rights on third parties, which may be directly enforced against the company, makes it questionable whether a provision in the Memorandum of Incorporation, which gives the third party a right to appoint a director may be enforced by specific performance where such a person is not a director, a shareholder, a prescribed officer or a board committee member of the company. The Act makes it clear that the Memorandum of Incorporation is binding between the company and each shareholder. It is also binding between the shareholder of the company and between the company and each director or prescribed officer of the company or any other person serving the company as a member of a board committee, in the exercise of their respective

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[164] Section 209 of Companies Act 61 of 1973.
[165] Section 66 (4) (a) (i) of the Companies Act 71 of 2008.
[166] *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] AC 187 (PC).

functions within the company.[167] The court in *De Villiers v Jacobsdal Saltworks (Michaelis and De Villiers (Pty) Ltd*[168] proclaimed that the company's constitution has the legal status of a contract created by the statute. Under the 1973 Companies Act, there was a contractual relationship between the company and its shareholders that was based on the company's constitution. In the new Companies Act, the wording in section 15 (6) fails to specify the legal status of the various relationships based on the Memorandum of incorporation and the rules. The relationship between parties is binding in the Memorandum of incorporation, in the sense that it is a contractual relationship.[169]

A third party who wishes to ensure that his or right in the Memorandum of Incorporation to appoint and to remove a director is protected, must enter into a separate agreement outside the company's Memorandum of Incorporation in terms of which the shareholders agree to act in accordance with the instructions of the third party.

2.6.3 Appointment by the shareholders

Directors, other than first directors, appointed in terms of the Memorandum of Incorporation and an ex officio director of a profit company, must be appointed by the shareholders, to serve as a director of the company for an indefinite term or for a term set out in the Memorandum of Incorporation.[170] The election of a director is to be conducted as a series of votes, and each director is to be appointed by a separate resolution, unless the Memorandum of Incorporation of a profit company provides

[167] Section 15 (6) of the Companies Act 71 of 2008.
[168] *De Villiers v Jacobsdal Saltworks (Michaelis and De Villiers (Pty) Ltd* 1959 (3) SA 87.3 (O)
[169] *Abraham and Another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC)* [2014] JOL 32322 (KZD).
[170] Section 68 (1) of the Companies Act 71 of 2008.

otherwise.[171] There is no provision for cumulative voting in the Act.[172] A shareholder may exercise the right to vote once, and the vacancy will be filled if a majority of the voting rights exercised are in support of the candidate.[173] Shareholders are at liberty to vote for a director to protect their own interests, even if the interests are in conflict with those of the company. Shareholders are not under any obligation to choose the most suitable person to be a director.[174] Although it is the shareholders' interests to ensure that the director they support is competent, there is no duty to vote in this way.[175] The reason is that shareholders, unlike directors, are not fiduciaries of the company and are as such not expected to place the interests of the company above personal interests.

2.6.4 Appointment by the board of directors or other stakeholders or outsiders

In a profit company, other than a state-owned company, the Memorandum of Incorporation must provide for the election by shareholders of at least 50 per cent of the directors and 50 per cent of any alternate director.[176] At least half of the board of directors must be elected by the shareholders. A company could require 50 per cent or less of its directors to be appointed by parties other than the shareholders, such as the board of directors or other stakeholders or outsiders. This ensures that at least half of the board is elected by shareholders. In circumstances where the power to appoint directors is vested in the board of directors, it is a fiduciary power and must be

[171] Section 68 (2) (a) of the Companies act 71 of 2008.
[172] Commentary Company Law "Cumulative voting is where each shareholder receives a number of votes equal to the number of votes attached to his or her shares, multiplied by the number of directors to be appointed. The shareholder may cast his or her votes in favour of one candidate or distribute them among the candidates. By focusing all their votes on one candidate, a group of minority shareholders would be able to elect a director against the wishes of the majority group, thus ensuring that they do not remain unrepresented on the board. Cumulative voting thus ensures minority representation. It is useful to a minority when it combines a substantial number of shares and when there are several directors to be appointed."
[173] Section 168 (2) (b) of the Companies Act 71 0f 2008.
[174] *Re HR Harmer Ltd* [1959] 1 WLR 62.
[175] *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] AC 187 (PC).
[176] Section 66 (4) (b) of the Companies Act 71 of 2008.

exercised in good faith in the interests of the company and not for any improper or collateral purpose.[177]

2.7 Ineligibility and disqualification of persons to be directors

At common law the court may grant authority to a person to become a director of a particular company or a general authority to become a director of a company.[178] The court has unfettered discretion, although an applicant seeking general authority would ordinarily have to make a stronger case than an applicant seeking authority only in relation to a particular company.[179] The list of factors to be taken into account by the court are not closed; each case is considered on its own merits or facts.[180] The general rule that leads to a person being disqualified as a director is the public interest consideration to ensure a proper administration of companies. Since a director may inflict injury not only to the company but also members of the public, having dealings with it the relevant factors are those bearing upon the honesty and the trustworthiness of the applicant as a potential director.[181]

The court should exercise its discretion in favour of the applicant only in exceptional cases. However, reference should be construed merely as emphasizing that the court must exercise its discretion in the light of the intention of the legislature that a director should measure up to a high standard of honesty and trustworthiness.[182]

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[177] Cassim HIF, Casim MF, Cassim R, Jooste R, Shev, Yeats J Commentary Company Law (Juta and Company, South Africa, 2012) 423.
[178] *Ex Parte K* 1971 (4) SA 289 (D).
[179] *Ex Parte K* 1971 (4) SA 289 (D).
[180] *Ex Parte Scheunder* 1974 (2) SA 358 (O).
[181] *Ex Parte Scheunder* 1974 (2) SA 358 (O).
[182] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA). Referred to some of the relevant factors as being "the type of offence and whether or not it is a first conviction; type of punishment imposed; whether it is a public company in regard to which the applicant wishes to act as a director, or whether it is a private company; also, the attitude of shareholders and whether all shareholders support the application. In this regard a court could be more lenient in a case where a private company is involved because, in the case of a public company, a director deals with funds in which vast number of people may have an interest. Another factor would be the attitude of the prominent associates of an applicant."

The Companies Act distinguishes between ineligible and disqualified directors. A person may not be ineligible but be disqualified to be a director. The difference between ineligibility to be a director and disqualification from being a director is that disqualification is not absolute, and a court has discretion to permit a disqualified person to accept an appointment as a director. Such flexibility is not permitted with respect to an ineligible person, who is absolutely prohibited from being a director. The grounds of ineligibility and disqualification of directors apply not only to directors and alternate directors; rather, it extends to prescribed officers and persons who are members of the company's board committees or audit committees, irrespective of whether or not such persons are also members of the company's board of directors.[183] A person holding office as a director, prescribed officer, company secretary or auditor of a pre-existing company immediately before the effective date; that is, 1 May 2011, would continue to hold office as from the effective date, subject to the company's Memorandum of Incorporation and the Act.[184] If such a person is ineligible or disqualified from being a director, alternate director, prescribed officer, company secretary or auditor, such a person is regarded as having resigned from such office as from effective the date. There are some grounds laid down by the Companies Act upon which a person may be disqualified or declared ineligible to hold the office of a company's director. Some of those grounds evolved at common law but are now statutorily recognized and are aimed at ensuring probity in the conduct of a company's affairs.

2.7.1 Grounds of ineligibility

The Act provides that juristic persons, unemancipated minors or persons under a similar legal disability,[185] any persons who do not satisfy the minimum qualification set out in the Memorandum of Incorporation, are ineligible to hold the office of a director. The Act provides that a director must be a natural person. A company or a close

[183] Section 69 (1) of the Companies act 71 of 2008.
[184] Schedule 5 item 7(1).
[185] For example, a person who has been declared by a court of law to be unable to manage his own affairs.

corporation is a juristic person and therefore cannot be appointed as a director. The Act also regards a trust as a juristic person and may obviously not be appointed as director.[186] In the UK, a juristic person could be appointed as director, as long as there is at least one other director of that company who is a natural person.[187] A minor, under the South African law, is a person below the age of 18. The UK Companies Act provides that a minimum age requirement for a person to be elected as director of a company is 16 years.[188] The reason for the age difference is that in South African law one is considered to be of full capacity at the age of 18, as provided by the Constitution, while under the UK law a person who is 16 years of age is deemed to have the full capacity to understand his or her actions. However, the Companies Acts in both jurisdictions do not prescribe the maximum age beyond which a person may not be appointed as a director of a company. As it has been mentioned, a Memorandum of Incorporation may impose other qualifications to be met by directors of a company. That provision could be relied upon by a company to impose additional grounds of ineligibility to hold the office as director of a particular company.

2.7.2 Consequences of ineligibility

The Companies Act provides that an ineligible or disqualified person may not be appointed or elected as director of the company, or consent to be appointed as director or elected director or act as director of the company.[189] Another consequence is that a person who becomes ineligible or disqualified while serving as director of a company will cease to be entitled to continue to act as director with immediate effect. However, this is subject to section 70 (2) of the Companies Act.[190] It is a common cause that a

[186] See definition of a juristic person in Section 1 of the Companies Act 71 of 2008.
[187] Section 155 of the UK Companies Act 2006.
[188] Section 158 (1) of the Companies Act 2006.
[189] Section 69 (2) of the Companies Act 71 of 2008.
[190] Section 69 (4) of the Companies act 71 of 2008. In terms of section 70 (2) of the Act, if the board of directors of a company has removed a director on the ground that he has become ineligible or disqualified, incapacitated or has been negligent or derelict in the performance of his functions, a vacancy on the board will not arise until the later of the expiry of the time for filling an application to review in terms of section 71 (5) of the Act or the granting of an order by the court on such application. The director will however be suspended from the office during that time.

company will not knowingly appoint or permit an ineligible or disqualified person to serve or act as director.[191]

2.8 Delinquent directors and directors on probation

An important innovation made in the Companies Act is the provision that a person may make application to court to declare a director delinquent or have him/her placed under probation. The reason for this innovation is to raise standards of good behavior expected of director. In order for a director to be declared a delinquent director, there has to be a gross negligence, gross abuse of director's power or position or a breach of trust. This remedy is available to a company, a shareholder, a director, a company secretary or prescribed officer of the company, a registered trade union that represents employees of the company or another employee representative.[192] However, Cassim argues that this remedy tends to be abused because the South African company law has a much wider definition of who can act.[193] This is different from the United Kingdom Company law, where only a single director or shareholder cannot apply to court for an order to remove a director. In the UK the application should be made or brought derivatively by the board of directors or a shareholder; that is, in the name of the company.

However, South African company law takes a completely different route in that applications cannot be brought derivatively in the company's name but by a single shareholder in his or her own name. It is advantageous to bring an application derivatively, as they promote good faith. The implication is that an application is brought in law by the company and not by the individual director. When an application is brought by a single director, it may be used in a frivolous and vexatious manner. An application to court to declare a director delinquent may have a negative impact on his or her reputation and may affect a company's share price, especially when the

[191] Section 69 (3) of the Companies Act 71 of 2008.
[192] Section 162 (2) and (3) of the Companies Act 71 of 2008.
[193] Cassim R "Delinquent Directors under the Companies Act 2008: *Gihwala v Grancy Property Limited* 2016 ZASCA 35" PER/PELJ 2016 (19)-DOIhttp://dxdoi.org/10.17159/1727-3781/2016/vn0a1246 accessed 26th January 2020.

company is listed on the stock exchange, even before the application is argued in court. In *Old Mutual Limited and Others v Moyo and Another,*[194] the company's share price dropped drastically due to the unprecedented move by the former chief executive who had all the 14 non-executive directors declared delinquent, with the consequence of being banned as directors. The chief executive action was based on his belief that the board did not properly handle his termination of employment as the CEO of Old Mutual. Old Mutual said that the chief executive was dismissed on the grounds of conflict of business interests as there is no provision in the Companies Act for collective declaration of delinquency of an entire board.

In *Kukama v Lobelo and Others*[195] the court found that the conduct of the director was of serious nature, which qualifies him to be declared a delinquent director. Furthermore, the director had failed to pay R39 000 000, 00 to SARS, which caused irreparable harm to the company and exposed the company and the applicant to criminal liability. In *Gihwala and Others v Grancy Property Limited and Others*[196]*,* directors were held to be delinquent because they had used the company to provide themselves with financial benefits to the prejudice of the company's only other shareholder. In so doing, they had breached an investment agreement and had produced inaccurate and incomplete annual and financial statements. The cause of delinquency was described to mean or cover dishonesty, willful conduct and gross negligence in *Lewis Group Limited v Woollam and Others*.[197] A director may be declared delinquent due to continuing business in parlous and insolvent circumstances, as well as for using company money to pay directors' fees and to continue business while the director knows that permission is required.[198]

2.9 Grounds of disqualification

[194] *Old Mutual Limited and Others v Moyo and Another* [2020] ZAGPJHC.
[195] *Kukama v Lobelo and Others* [2012] ZAGPJHC 60.
[196] *Gihwala and Others v Grancy Property Limited and Others* 2017 (2) SA 337 (SCA).
[197] *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC).
[198] *Companies and Intellectual Property Commission v Cresswell and Others* [2017] ZAWCHC 38.

A person can be prohibited by the court from becoming a director under the following circumstances: a person declared to be a delinquent director by a court,[199] an unrehabilitated insolvent, a person prohibited in terms of any public regulation to be a director of a company, a person removed from an office of trust on the grounds of misconduct involving dishonesty, and a person convicted in South Africa or elsewhere and imprisoned without option of fine,[200] for fraud, theft, forgery, perjury or other offences involving fraud, misrepresentation or dishonesty, an offence in connection with the promotion, formation or management of a company and an offence under the Companies Act, Insolvency Act 24 of 1936, Close Corporations Act 69 of 1984, the Competition Act 89 of 1998, the Financial Intelligence Centre Act 38 of 2001, the Securities Services Act 36 of 2004 or Chapter 2 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 are disqualified from being a director of a company.

With regard to the offence involving dishonesty, dishonesty means disposition to deceive, defraud or steal and involves an element of fraud. An offence involving dishonesty is an offence of which actual dishonesty is an element or ingredient, whether the offence is one under common law or statute.[201] In *Nusca v Da Ponte*[202] the court held that illicit diamond dealing was an offence involving dishonesty and that a person convicted of such an offence could not be a director of a company without the authority of the court.

As is the case with the grounds of ineligibility, the company's Memorandum of Incorporation may impose additional grounds for the disqualification of directors.[203] The company's Memorandum of Incorporation may provide that a director will be disqualified from being a director should he or she absent himself or herself from

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[199] Either in terms of section 162 of the Companies Act or in terms of the Close Corporations Act 69 of 1984.
[200] *Entrepreneurial Business School (Pty) Ltd and Others v Africa Creek Investment (Pty) Ltd and Others* [2016] ZAWHC 53. If a person was found guilty of the offences and was fined in excess of the prescribed amount, but the fine has been suspended under certain circumstances, the person is nevertheless disqualified as suspension affects the operation of the sentence and not the sentence itself.
[201] *Ex Parte Bennett* 1978 (2) SA 380 (W).
[202] *Nusca v Da Ponte* 1994 (3) SA 251 (BG).
[203] Section 69 (6) (a) of the Companies act 71 of 2008.

meetings of directors for more than six months without permission of the board of directors, or become interested in any contract entered into by the company and fail to declare his/her interests there in, or hold any other office of profit without the consent of the company in general meeting. The aim of these provisions is not to punish the individual but to:

> Protect the public and to prevent the corporate structure from being used to the financial detriment of investors, shareholders, creditors and persons dealing with the company. In its operation, it is calculated to act as a safeguard against the corporate structure being used by individuals in a manner which is contrary to proper commercial standards.[204]

Disqualification does involve substantial interference with the freedom of the individual[205] and it also carries the stigma for anyone who is disqualified.[206] In *Re Westminster Property Management Ltd, Official Receiver v Stern*[207] a property Development Company had collapsed, with multi-billion-pound losses and the two directors before the court in disqualification proceedings were a father and his son. With respect to the son, the court considered that he was not conscious of his position or duties as a director, that he never undertook those duties, as dictated by his father, and that he barely applied his mind, if at all, to the consequence of his position as a director. He was disqualified for four years for abrogation of his duties as a director,

A person who becomes disqualified or ineligible ceases to be entitled to continue to act as a director immediately. This means that the director vacates the office. However, there has been an amendment[208] and the effect of the amendment is that the director now ceases to be entitled to act as a director but does not automatically and immediately vacate the office of director, with the resultant vacancy on the board, upon becoming ineligible or disqualified.[209]

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[204] *Re Magna Alloys & Research Pty Ltd* (1975) 1 ACLR 203 SC (NSW) 205.
[205] *Re Lo-Line Electric Motors Ltd* [1988] Ch 477.
[206] *Re Westminster Property Management Ltd, Official Receiver v Stern* [2001] BCC 121.
[207] *Re Westminster Property Management Ltd, Official Receiver v Stern* [2001] BCC 121.
[208] Section 46 (a) of the Companies Amendment Act 3 of 2011.
[209] *Freedom Property Fund Limited and another v Stavridis and Others* [2018] JOL 30034 (ECG).

2.10 Removal of directors

At common law, a director can be removed by an ordinary resolution, where the company's articles are silent in regard to both the power to remove directors and the director's term of office. The articles of a company may empower its members to remove directors or even a third party to remove a director from office. Under the Companies Act, a director may be removed from office by the shareholders or the board of directors at any time.[210] One might say this is a very dangerous and powerful weapon in the hands of the shareholders. The shareholder's right to remove a director is an addition to the right to place a director under probation or to have him declared a delinquent director under section 162 of the Act.[211] However, the Companies Tribunal is also empowered by the Act to remove a director in certain instances.[212] The power to remove a director is also vested on the business rescue practitioner who can at any time during business rescue proceedings apply to court for an order to remove the director from office on different specified grounds.[213] Section 66 (4) (a) (i) of the Act also provides that a company's Memorandum of Incorporation may make provision for the direct appointment and removal of one or more directors by a person who is named or determined in terms of the Memorandum of Incorporation.

2.11 Retirement from office and resignation of directors

The company's Memorandum of Incorporation may make provisions for the retirement of directors. Under the old law, such provisions are found in the model article, which usually provides that all directors shall retire from office at the first annual general meeting and that at the annual general meeting in every subsequent year, a number

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[210] Section 71 of the Companies Act 71 of 2008.
[211] Section 71 (10) of the Companies act of 2008.
[212] Section 71 (8) of the Companies Act 71 of 2008.
[213] Under section 137 (5) of the Companies Act the grounds upon which a business rescue practitioner may apply to court for an order removing a director from office, are that the director has failed to comply with a requirement of Chapter 6 of the Act which is Business Rescue and Compromise with Creditors, or by an act or omission, has impeded or is impeding(i) the practitioner in the performance of his powers and functions; (ii) the management of the company by the practitioner; or (iii) the development or implementation of a business rescue plan in accordance with Chapter 6 of the Act.

representing one-third of the directors shall retire.[214] Other provisions in the articles that regulate the terms of office of a director include those that state that a company in general meeting may from time to time determine the terms of office and manner of retirement of a director[215]; that the directors to retire every year shall be those who have been the longest in the office since their last election;[216] and that the retired director will be eligible for re-election.

Offices of the directors may also be terminated by the directors tendering their resignation. They can do so by giving oral or written notice to the company or board of directors, depending on the requirements of the company's Memorandum of Incorporation.[217] Resignation takes effect when notice is tendered. This is because it is taken to be final and unilateral act. However, the company's Memorandum of Incorporation or a contract between the director and the company may provide otherwise. There need be no concurrence or acceptance of the resignation by the company to terminate the appointment of the director.[218] However, the court in *Harding and Others NND v Standard Bank of South Africa Ltd*[219] reasoned that where a company's constitution requires written notice of resignation to be given by a director, oral notice will become effective upon acceptance by the company. However, if the Memorandum of Incorporation provides otherwise, acceptance by the company, of resignation by the director in accordance with the memorandum of incorporation, is not prerequisite to the effectiveness of resignation.[220] Once a director has tendered a resignation notice, he or she may not withdraw it unilaterally, without the consent of those entitled to appoint a new director.

A director's right to resign from office is not a fiduciary power.[221] This means that a director is entitled to resign from office even if his or her resignation may have a

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[214] Article 66 of Table A of Schedule 1 to the 1973.
[215] Article 67 of Table B of Schedule 1 to the 1973 Act.
[216] Article 67 of Table B of Schedule 1 to the 1973 Act.
[217] *Harding and Others NNO v Standard Bank of South Africa Ltd* 2004 (6) SA 464 (C) 469.
[218] *Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales (Pty) Ltd* 1969 (1) SA 300 (T)
[219] *Harding and Others NND v Standard Bank of South Africa Ltd* 2004 (6) SA 464 (C) 469.
[220] *Transport Ltd v Schonberg* (1905) 21 TLR 305 (Ch).
[221] *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704.

disastrous effect on the reputation of the company.[222] A director may also resign from the company at any time 'with complete immunity because freedom of employment and encouragement of competition generally dictate that such persons can leave their corporation at any time and go into competing business'.[223] However, a company's Memorandum of Incorporation or a contract may provide otherwise. A director who has contracted to serve the company for a fixed period may resign before the termination of that period, but he or she will be liable to the company for damages for any loss the company suffered as a result of premature termination of his or her services.[224] In instances where a director resigns and puts in a puppet director in his or her place while he continues to control the company, his resignation is a sham and will be disregarded. In *S v De Jager* it was held that the accused who had resigned as a director, nevertheless remained directors within the definition of director contained in section 29 of the Companies Act 46 of 1926.[225]

2.12 Remuneration of directors

Generally, the company is entitled to remunerate the directors for their services, unless there is a provision which states otherwise.[226] There is no provision in the Companies Act that directors have an automatic right to be remunerated for their services as directors. The Companies Act provides that "except to the extent that the Memorandum of Incorporation of a company provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to subsection (9) which provides that "remuneration contemplated in subsection (8) may be paid only in accordance with a special resolution approved by the shareholders within the previous two years".[227] Directors may be remunerated if they have entered into a contract with the company for that remuneration. Thus, in the absence of such contract

[222] *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704.
[223] *Canadian Aero Services Ltd v O'Malley* (1973) 40 DLR (3d) 371 (SCC) 386.
[224] *Southern Foundries (1926) Ltd v Shirlaw* [1940] Ac 701.
[225] *S v De Jager* 1965 (2) SA 616 (A) 622.
[226] *Guinnss plc v Saunders* 1990 2 AC 663.
[227] Section 66 (8) and (9) of the Companies Act 71 of 2008.

or the provision in the Memorandum of Incorporation empowering them to do so, directors may not pay themselves remuneration out of the company's funds, and if they do, they may be compelled to restore it even though they acted in good faith and honestly believed that the payment was permissible.[228]

In *Hutton v West Cork Rly Co*[229], Bowen LJ said:

> A director is not a servant or employee. He is a person who is doing business for the company, but not upon ordinary terms. It is not implied from the mere fact that he is a director, which he is to have a right to be paid for it. In some companies, there is a special provision for the way in which the directors should be paid; in others there is not. If there is a special provision for the way in which they are to be paid, you must look for a special provision to see how to deal with it. But if there is no special provision their payment is in the nature of a gratuity.

The directors of a company have no authority to pay the company's money to themselves or any one in their number, unless they are given authority by the company's constitution or the payment is approved by the members.[230]

2.13 Conclusion

There are different types of directors who are vested with enormous roles in the company. The next chapter discusses the duties of these directors and how they should not appropriate corporate opportunities.

[228] *Kerr v Marine Products Ltd* (1928) 44 TLR 292.
[229] *Hutton v West Cork Rly Co* (1883) 23 ChD 654.
[230] D. French, Mayson S and Ryan C Mayson, French & Ryan on Company Law (Oxford University, South Africa, 2012), 457

CHAPTER 3

THE CORPORATE OPPORTUNITY DOCTRINE

This chapter discusses what fiduciary duty entails, what a corporate opportunity is, when corporate opportunity arises and when it ends. The chapter also discusses the various tests which the courts have applied in determining or ascertaining whether corporate opportunity exists.

3.1 Introduction

The concept of corporate opportunity has become a doctrine, as it has continued to be used over and over again. A company, as mentioned earlier, is a juristic person and is run by directors. The directors' positions become effective from the date of their appointment in a fiduciary relationship with the company and are obliged to perform fiduciary duties to the company. They in fact owe this duty to the company. Some of those duties, which were recognized at common law, are now codified in the 2008 Act. Among the consequences of a director being in a fiduciary relationship with the company are that the director owes a duty to act in good faith towards the company and exercise his or her powers as a director for the benefit of the company. These duties demand that a director should avoid all transactions that could occasion a conflict between his interests and those of the company.[231] A director cannot be relieved of any breach of the fiduciary duties by a provision in the Company's

[231] HS Cilliers, ML Benade, JJ Henning, JJ Du Plessis, PA Delport, L De Koker and JT Pretorius *Corporate Law* (Cape Town Lexis Nexis, 2000) p. 139.

Memorandum of Incorporation or by a contract between the company and the director.[232]

3.2 Director's fiduciary duties

The existence of fiduciary duties is the *sine qua non* for the corporate opportunity doctrine. The fiduciary duty of a director requires him or her to exercise his powers bona fide and to display reasonable care and skill in carrying out the duties of his/her office. A fiduciary is someone who acts for or on behalf of another person in a relationship of trust and confidence.[233] As fiduciaries, the law imposes duties on the directors in the exercise of their powers. This is described as the duty not to use the fiduciary position in a way which is harmful to the interests of the person for whom the fiduciary is acting.[234] A person who accepts appointment as a director of a company undertakes legal responsibility for ensuring that he/she knows and understands the nature of the duties that they are required to perform. The courts have acknowledged in many occasions that the fiduciary duties of directors are derived from English law.[235] In *Fisheries Development Corporation of SA Ltd v Jorgernson; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd*[236] the court held that "the essential principles of this branch of our company law are the same as those in English law and English law cases provide a valuable guide."[237] Similarly, in *Le Roux Hotel Management (Pty) Ltd v E Rand (FBC Fidelity Bank (under curatorship)*[238]*,* the court recognized English law as the usual source of inspiration for matters relating to

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[232] See s 78 (2) of the Companies Act 2008.
[233] *Bristol and West Building Society v Mothew* [1998] Ch 1.
[234] *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594.
[235] HI Cassim, MF Cassim, R Cassim, R Jooste, J Shev, and J Yeats *Contemporary Company Law* (Juta, 2012) p. 509.
[236] *Fisheries Development Corporation of SA Ltd v Jorgenson; Fisheries Development Corporation of SA Ltd v AWJ Invvestments (Pty) Ltd* 1980 (4) SA 156 (W) 165.
[237] *Fisheries Development Corporation of SA Ltd v Jorgenson; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) 165.
[238] *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd (FBC Fidelity Bank (under curatorship), Intervening)* 2001 (2) SA 727 (C) 738.

companies."[239] There is thus a strong link between South African Corporate Law and English Law.

Fiduciary duties are owed by a director to the company by virtue of being a director. A director of a company does not by virtue of being a director owe any fiduciary duties to the members of the company[240], or to creditors, while the company is a going concern.[241] In *Brant Investments Ltd v Keep Rite Inc; Kohn v Meehan* it was held by the court that the fact that both claimant and defendant were directors and members of the company did not mean that the defendant owed the fiduciary duties to the claimant.[242] All the types of directors discussed in the previous chapter are subject to the fiduciary duties. Fiduciary duties extend to senior employees, senior manager of a division of the company,[243] prescribed officers, members of audit committees and board committee.[244] The reasoning behind the approach is that board committees and particularly the audit committee, play an increasingly important role in the functioning of corporate boards.

The most important duty of a director of a company is to act bona fide in what they consider and not what the court considers to be in the best interests of the company as a whole.[245] The goal of the directors of a company is the success of the company and the collective best interests of the shareholders of the company. "Directors occupy a fiduciary position towards the company and must exercise their powers bona fide solely for the benefit of the company as a whole and not for an ulterior motive."[246] Therefore, directors must consider both the short-term and the long-term

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[239] *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd (FBC Fidelity Bank (under curatorship), Intervening)* 2001 (2) SA 727 (C) 738.
[240] *Multinational Gas and Petrochemicall Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258.
[241] *Western Finance Co Ltd v Tasker Enterprises Ltd* (1979) 106 DLR (3d) 81.
[242] *Brant Investments Ltd v KeepRite Inc; Kohn v Meehan* (2003) LTL 4/62003.
[243] *Volvo (Southern Africa) (Pty) Ltd V Yssel* 2009 (6) SA 531 (SCA).
[244] Section 77 (1) of the Companies Act 71 of 2008.
[245] JC, Kanamugire "The Impact of the Companies Act 71 of 2008 on the Traditional Director's Duty to Avoid Conflict of Interest" (2014) 5 (9) *Mediterranean Journal of Social Sciences* 76.
[246] *Cohen v Segal* 1970 (3) SA 702 (W) 706.

consequences of their actions. In *Bristol and West Building -Society v Mothew*[247] ,Millet LJ stated the following:

> The distinguishing obligation of fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. The core liability has several facets. A fiduciary must act in good faith, he must not make a profit out of his trust, he must not place himself in a position where his duty and his interest may conflict, he may not act for his own benefit or benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

Company law reform in South Africa has resulted in the partial codification of director's fiduciary duties. This was done in order to prevent the abuse of power by company directors. Company law had to be aligned with international trends, so as to reflect and accommodate the transforming environment for businesses locally and internationally, while at the same time encouraging and promoting compliance with the Bill of Rights, as provided in the Constitution.[248] The codification of fiduciary duties does not entail a rigid fixation of the law. The reasoning behind partial codification is not to do away with the common law, but is to make sure that that particular codification is appropriate to the legal, economic and social context of South Africa as a constitutional democracy and open economy.[249]

Blackman lists the following fundamental fiduciary duties of a director: directors may not exceed their power, exercise their power for an improper or collateral purpose, fetter their discretion, place themselves in a position in which their personal interests conflict or may possibly conflict with their duties to the company, deal with the company otherwise than openly and in good faith, make a secret profit or take a certain economic opportunities, compete with the company, misuse confidential information.[250] These duties are now codified in section 76 of the Act, either expressly or implicitly. Section 76 of the Act, where most of these duties are contained, provides as follows:

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[247] *Bristol and West Building -Society v Mothew* [1996] 4 All ER 698 (CA) 711.
[248] Section 7 (a) of Companies Act 71 of 2008.
[249] FHI Cassim, M.F Cassim, R Cassim, R Jooste, J Shev and J Yeats, Contemporary *Company Law* (Juta, 2012) p. 507.
[250] FHI Cassim, M.F Cassim, R Cassim, R Jooste, J Shev and J Yeats, Contemporary Company Law p. 523.

76. Standards of director's conduct:

(2) A director of a company must-

(a) not use the position of director, or any information obtained while acting in the capacity of a director-

(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or

(ii) to knowingly cause harm to the company or a subsidiary of the company; and

(b) to communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director-

(i) reasonably believes that the information is-

(aa) is immaterial to the company; or

(bb) is generally available to the public, or known to the other directors; or

(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.

(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person-

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.

The duties, as laid down in the above provisions, will now be discussed.

3.2.1 Proper purpose

It is insufficient for the directors to exercise their powers for what they believe are the best interests of the company. Directors have to exercise their powers for a proper purpose.[251] However, the 2008 Act does not define proper purpose. At common law, it has always been taken to mean that directors must exercise their powers for the objective purpose for which the power was given to them, and not for a collateral or

[251] Section 76 (3) (a) of the Companies Act 71 of 2008.

ulterior purpose.[252] Section 76 (3) (a) of the Act provides for two co-related duties, namely, proper purpose and good faith. These duties are in some manner cumulative. This is because even if the directors have subjectively acted honestly in the interests of the company, they could still be in breach of their duty to exercise their powers for a proper purpose.

Section 76 (3) (a) re-captures common law and effects no change in this aspect of the common-law fiduciary duties of directors. The section serves the useful purpose of removing any doubt relating to the existence of this fiduciary duty, instead of regarding it as an aspect of the director's duty of good faith. The legal principles relating to the proper purpose duty are in effect an attempt by the courts to control or restrain the exercise by directors of the discretionary powers conferred on them. The duty to exercise power for proper purpose is a statutory and common law obligation. However, it is an abuse of power for directors to exercise their powers for a purpose other than that for which the power is conferred on them. The existence of subjective good faith is insufficient to save the purported exercise of power, if the power was exercised for a collateral purpose.[253] Therefore, the test of proper purpose is objective and is different from the subjective test of good faith.[254]

There are several cases where improper exercise of power was an issue. The first case is *Hogg v Cramphorn Ltd*[255]*,* where the directors of a family company issued preference shares that carried special voting rights of ten votes per share. This conduct or action was contrary to the memorandum of incorporation of the company. They did this in order to forestall a hostile takeover bid by a person who they honestly and genuinely believed to be inexperienced and unsuitable. The shares were allotted to the trustees of a trust established for the benefit of employees of the company. It was expected that the trustees, who were allies of the directors, would cast their votes in support of the directors, rather than the takeover bidder. An interest-free loan was

[252] *Howard Smith v Ampol Petroleum* [1974] 1 All ER 1126, *Tech Corp v Millar* (1972) 33 DLR (3d) 288 (BCSC).
[253] *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 15 ACLR 230 SC (NSW).
[254] *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598 (ChD).
[255] *Hogg v Cramphorn Ltd* [1967] Ch 254.

extended to the trust, to enable the trustees to pay for the shares. Even though the directors had honestly believed in good faith that takeover would be contrary to the best interests of the company, its employees and customers, the court ruled that the directors had improperly exercised their power to issue shares. In addition, it was irrelevant that they had acted in good faith and in the interests of the company.

The court found that the primary purpose of the allotment of the shares was not to raise capital required by the company, but to ensure that the directors retained control of the company. The manipulation of the voting position in the company was not a legitimate act on the part of the directors. The power to issue shares is a fiduciary power, which in this case was exercised for an improper purpose. It was, however, held by the court that the invalid allotment of shares was rectifiable by the members in general meeting. Emphasis was made that it was unconstitutional for the directors to exercise their fiduciary power to issue shares of the company purely for the purpose of defeating a takeover bid or for the purpose of destroying an existing majority or create a new majority. However, in *Teck Corp Ltd v Millar* the court refused to follow or allow this decision.[256] The court asserted that directors acting bona fide and in the interests of the company ought to be allowed to consider who is seeking control and why. It was ruled that directors have a right to consider the consequences of a takeover and exercise their powers accordingly. If directors honestly believe that a takeover is not in the interests of the company, they may issue shares to defeat that takeover bid.

The second case of improper exercise of power was in *Howard Smith Ltd v Ampol Petroleum Ltd*.[257] The board of directors of RW Miller (Holdings) Ltd was in favour of a higher takeover bid by Howard Smith Ltd, which they preferred to a competing and lower takeover bid made by the majority shareholder, Ampol Petroleum Ltd and another company. The board consequently allotted further shares to Howard Smith Ltd, in order to dilute the majority shareholding of Ampol Petroleum Ltd and to ensure a successful takeover bid made by Howard Smith Ltd. In setting aside the allotment of

[256] *Teck Corp Ltd v Millar* (1972) 33 DLR (3d) 288 (BCSC).
[257] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC).

shares to Howard Smith Ltd, the court ruled that it was unlawful for directors to use their powers to allot shares of a company for the purpose of destroying an existing majority or creating a new one which did not previously exist.

This applies even if the directors believed in good faith that they were acting in the best interests of the company, and even though there was no desire by the directors to obtain a personal advantage for themselves or to retain their position as directors of the company. In Howard Smith there was no self-dealing by the directors of RW Miller (Holdings) Ltd. The legal principle is that the company directors must not interfere with the constitutional right of shareholders to decide the fate of a takeover bid. However, in *Howard Smith Ltd v Ampol Petroleum Ltd* there were both the desire to raise further capital or finance for the company as well as a desire to defeat a takeover bid made by Ampol Petroleum. The court found on the facts that it was the latter purpose that was the primary or substantial purpose for the issue of further shares and set aside the allotment.

The next case is *Punt v Symons & Co Ltd*[258], where directors had issued shares to their friends and supporters with the object of creating a sufficient majority, to enable the directors to pass a special resolution to alter the constitution of the company to deprive certain shareholders of special rights conferred on them by the company's constitution. Similarly, in *Piercy v Mills*[259] the directors had issued further shares to create a sufficient majority to enable them to resist the election of additional directors that would have resulted in the incumbent directors becoming a minority on the board. In both cases the directors were held to have exercised their powers for an improper purpose. An issue of shares in order to distort or manipulate the balance of voting power is an improper exercise of power to issue shares.[260]

It is not a simple duty or an easy task to identify from the facts of a particular case the purpose for which a director has exercised his or her power. Where multiple purposes

[258] *Punt v Symons & Co Ltd* [1903] 2 Ch 506.
[259] *Piercy v Mills* [1920] 1 Ch 77.
[260] *Gainman v National Association for Mental Health* [1970] 2 All ER 362.

are revealed for the exercise of power, the court must determine what the substantial purpose or dominant purpose was. If the dominant purpose is found to be improper, the court must regard the exercise of power as voidable.[261] For the exercise of power to be valid, the impermissible purpose must not be causative in the sense that the power would not have been exercised without that purpose.[262] On the other hand, if the exercise of the power is found to be proper, and in the interests of the company, the fact that its incidental effect is to defeat a takeover bid or to enable directors to maintain themselves in office will not make the exercise of the power improper.

In *Extrasure Travel Insurances Ltd v Scattergood*[263] the court stated that the law relating to proper purpose is clear.[264] It was asserted that it is not necessary to prove that a director knew that he or she was pursuing a collateral purpose. The court applied a four-step test. The court must first identify the particular power that is being challenged. Secondly, the court has to identify the proper purpose for which the power was given to the directors. Thirdly, the court has to identify the substantial purpose for which the power was exercised and, lastly the court has to decide whether the purpose was proper. These are the common law principles of the duty to exercise power for proper purpose.

In the statutory context, the board of directors is conferred with the power to issue shares.[265] This is a fiduciary power that must be exercised bona fide for a proper purpose and not for a collateral purpose. This fiduciary duty is viewed in terms of section 38 to assume greater importance. The general principles or common law principles are still relevant, especially the view articulated in *Hogg v Cramphorn Ltd*[266]*,* where the court reaffirmed the principle that the directors' power to issue shares is given to them primarily for the purpose of raising capital when required for the purposes of the company. As was held by the courts in *Punt v Symons*[267] and *Howard*

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[261] *Mills v Mills* (1938) 60 CLR 150.
[262] *Mills v Mills* (1938) 60 CLR 150.
[263] *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598 (ChD) 619.
[264] *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598 (ChD) 619.
[265] Section 38 (1) of the Companies Act 71 of 2008.
[266] *Hogg v Cramphorn Ltd* [1967] Ch 254.
[267] *Punt v Symons* [1903] 2 Ch 506.

Smith Ltd v Ampol Petroleum Ltd[268], it is not correct to say that the only valid purpose for which shares may be issued is to raise capital for the company. An issue of shares to a large company to secure the financial stability of the company may be upheld as a proper exercise of power, even if it incidentally has the effect of defeating an attempt by someone to secure control of the company.

Where the directors' exercise of power is improper and is consequently set aside, the directors will be jointly and severally liable to compensate the company for any loss suffered as a consequence of the improper exercise of power.[269] The Act provides that a director will be held liable in accordance with the principles of common law relating to the breach of fiduciary duty by the director, as contemplated in section 76 (3) (a), which provide for the duty to act in good faith and for a proper purpose.[270]

3.2.2 The duty to exercise independent judgment.

Directors are, in exercising their power and deciding what is in the best interests of the company, required by law to exercise independent and unfettered discretion.[271] This principle was laid down at common law.[272] It is the director's duty to consider the affairs of the company in an unbiased and objective manner. A voting agreement under which a director binds himself or herself to vote or exercise his or her powers in accordance with the instructions of some other person, thereby fettering the director's discretion, will not be enforced by the court. The effect of such a voting agreement, if it were to be binding, is that the directors thereby disable themselves from acting honestly in what they believe to be in the best interests of the company.[273]

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[268] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1126.
[269] In *Bishopsgate Investment Management Ltd (In liquidation) v Maxwell (No 2)* [1994] All ER 261 (CA) the director was held to be in breach of his fiduciary duty in giving away company assets for no consideration to a private company of which he was a director.
[270] Section 77 (2) (a) of the 2008 Companies Act.
[271] *Kregor v Hollins* (1913) 109 LT 225 (KB and CA).
[272] *Kregor v Hollins* (1913) 109 LT 225 (KB and CA).
[273] Andrew Keay 'The Duty of Directors to Exercise an Independent Judgment' (2008) 29 (10) *The Company Lawyer* 290.

The duty to exercise independent judgment is seen by some commentators as an aspect of the directors' duty to act bona fide in the best interests of the company. This common-law duty is not explicitly referred to in section 76 of the Act, but inferences are drawn to that effect from section 76(4)(a)(iii), which requires that a director, in taking a decision, should have a rational basis for believing, and did believe, that the decision was in the best interests of the company. The duty to exercise independent judgment continues to form part of the fiduciary duties of directors. It is a general principle that directors may not bind themselves in the present on how to vote in future. It is irrelevant to this duty whether the director derives any personal benefit from such an agreement. However, in *Fulham Football Club Ltd v Cabra Estates Plc*[274] the court rejected the contention that the board of directors may never make a contract by which they bind themselves to the future exercise of their powers in a particular way, even though the contract as a whole is manifestly for the benefit of the company.[275] The board in this case was binding itself under a commercial contract which had conferred benefits on the company and which at the time the board had honestly believed was in the best interests of the company.

A company cannot rescind a binding contractual obligation that has been undertaken by its directors on the basis of their alleged failure to exercise independent judgment, even though the directors could be held liable for a breach of duty. There is of course a distinction between the situation in which the entire board of directors has entered into such an agreement and one in which an individual director has done so. The former, but not the latter, may in certain circumstances be beyond reproach, as shown in the *Fulham Football Club* case.

The duty to exercise an independent judgment is particularly important to nominee directors; that is, directors who are nominated by someone to represent his/her interests on the board. A nominee director is a lawfully elected director; that is, a *de jure* director appointed to the board of directors by a creditor, a financier or a significant

[274] *Fulham Football Club Ltd v Cabra Estates Plc* [1994] 1 BCLC 363 (Ch and CA).
[275] *Fulham Football Club Ltd v Cabra Estates Plc* [1994] 1 BCLC 363 (Ch and CA).

shareholder who controls sufficient voting power for this purpose. For instance, a holding company may appoint a nominee director to the board of directors of subsidiary company or, to take another common example, it may be agreed that a bank that has financed a company may appoint a representative to that company's board of directors. Joint venture companies also make frequent use of the practice of appointing nominee directors. The nominee director is expected to represent the interests of the nominator. This means that a nominee is undertaking a duty to a person other than the company, in addition to the fiduciary duty owed to the company.

A nominee director would usually report to his nominator on any development that may affect the interests of the nominator. However, a problem arises when the interests of the company conflict with the interests of the nominator. The legal principle as laid down by the courts is that nominee directors are under a duty to act in the interests of the company of which they are directors, instead of the interests of their nominator.[276] A nominee director would therefore be in breach of duty if they prefer the interests of the nominator to those of the company.

3.2.3 The duty to act within their powers

Under common law, directors are under a fiduciary duty not to exceed their powers or the limits of their authority. The important aspect of this duty is that they cannot enter into an ultra vires contract on behalf of the company or a contract that is illegal. Before 1973 a company could not itself enter into an *ultra vires* transaction. It inevitably followed that its directors likewise could not possibly have the power to do so because an agent cannot have the authority to enter into a contract that exceeds the legal capacity of the principal.[277] The doctrine of *ultra vires* was abolished by section 36 of the 1973 Companies Act.[278] The 2008 Act took this further by conferring on companies all the legal powers and the capacity of an individual subject to the company's

[276] *Kuwaitt Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187 (PC).
[277] *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653.
[278] FHI Cassim 'The Rise, Fall and Reform of the Ultra Vires Doctrine' (1998) 10 *SA Merc* LJ 293.

Memorandum of Incorporation.[279] If a company's Memorandum of Incorporation limits, restricts or qualifies the powers or activities of the company, the directors of the company would be acting beyond their powers by entering into a contract that is inconsistent with such a provision. They will consequently incur liability to the company for the breach of fiduciary duty not to exceed their authority unless their act has been ratified by a special resolution of the company's shareholders.[280] However, the contract that contravenes the Act may not be ratified because such a contract would be illegal.[281]

In *Cullerne v London and Suburban General Permanent Building Society*[282] the court held that if directors exceed the powers conferred on them by the company, they will be liable to the company for the breach of their fiduciary duties.[283] Similarly, if the director has made payments as a result of transactions that are beyond the capacity of the company, he or she may be called to compensate the company. This liability for a breach of fiduciary duty arises irrespective of the bona fide of the director in question or any fault on his part. There is no explicit reference in section 76 of the Act to this fiduciary duty as a separate and distinct duty. This duty is nevertheless an aspect of the fiduciary and statutory duty of directors to exercise their power in good faith for a proper purpose, and in the best interests of the company.[284]

It should be noted that there is a distinction between a lack of authority and an abuse of power, which also results in a lack of authority. In instances where a director disregards a constitutional limitation on his authority, a number of relevant statutory provisions may be triggered. Liability is imposed on a director in accordance with the principles of the common law relating to breach of fiduciary duty for any loss, damages or costs sustained by the company as a result of a breach of duty.[285] If directors disregard a constitutional limitation on their authority to act on behalf of the company,

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[279] Section 19 (1) (b) of the Companies Act 71 of 2008.
[280] Section 20 (2) of the Companies Act 71 of 2008.
[281] Section 20 (3) of the Companies Act 71 of 2008.
[282] *Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD 485.
[283] *Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD 485.
[284] Section 76 (3) (a) and (b) of the Companies Act 71 of 2008.
[285] Section 77 (2) (a) of the Companies Act 71 of 2008.

they may incur liability to the company for any loss, damages or costs sustained by the company as a result of their failure to act within the constitutional limits of their authority. A director may also be held liable in accordance with the principles of common law relating to any loss, damages or costs sustained by a company because of any breach by a director of any provision of the company's Memorandum of Incorporation.

Moreover, liability is imposed on a director for any loss, damages or costs sustained by a company as a direct or indirect consequence of the director having done some act in the name of the company, or purported to bind the company or authorize the taking of any action by or on behalf of the company, despite knowing that he or she lacked the authority to do so.[286] In an Australian case of *R v Byrnes*,[287] directors who entered into an unauthorized transaction, when they knew or ought to have known that they have no authority to enter into the transaction, were held to have made an improper use of their position as directors.[288] If a director knowingly enters into an unauthorized transaction on behalf of the company, there is a strong possibility of the court finding that the director has contravened the statutory duties[289] for which the director could be held liable for any loss incurred by the company.

3.2.4 The duty to avoid conflict of interests

One of the most fundamental duties of directors is to avoid any possible conflict of personal interest with the interests of the company he or she is involved in. The South African company law in this aspect has been heavily influenced by trust law, specifically the case of *Keech v Sanford*.[290] It is an accepted principle in South African law that directors are fiduciaries, and as a result of the trust placed in them, they are obliged to avoid placing themselves in a position in which their duties to the company

[286] Section 20 (6) of the Companies Act 71 of 2008.
[287] [1995] HCA 1-183 CLR 501.
[288] *R v Byrnes* (1995) 183 CLR 501.
[289] Section 76 (3) or (b) of the Companies Act.
[290] *Keech v Sanford* (1726) Sel Cas Ch 61.

conflict with their personal interests. It is also not prohibited for the directors to make a profit or retain a profit made by them in the course of and by means of their office as directors, without the informed consent of the company. Where such happens, the director will be compelled to disgorge the profits made by them. The duty to avoid conflict of interests is the core of fiduciary duty, and it requires the director to account for any profit he or she made or received in the breach of his fiduciary duty.[291]

This duty is "based on the consideration that human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interests than duty, and thus prejudicing whom he is bound to protect".[292] In *Aberdeen Rail Co. v Blaikie Brothers,* Lord Cranworth held that "a corporate body can only act by agents, and it is, of course, the duty of those agents to act to the best of their ability to promote the interests of the corporation whose affairs they are conducting. He further held that:

Such an agent has duties to discharge of a fiduciary character towards his principal. Furthermore, it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he/she is bound to protect. So strictly is this principle adhered to that no question can be raised as to the fairness and unfairness of a contract entered into.[293]

It was stated that the principle of conflict of interest also applies to a conflicting duty.[294] The duty to avoid conflict of interests does not depend on fraud or absence of good faith, or whether the company has incurred a loss as a result of breach of fiduciary duty. The liability arises from the mere fact of a profit having been made by the director

[291] *Imageview Management Ltd v Jack* [2009] BCLC 725.
[292] *Beach Petroleum NL v Abbot Tout Russel Kennedy* [1999] 33 ACSR 1 (NSW) 45.
[293] *Aberdeen Rail Co. v Blaikie Brothers* 1843-60 All ER 249 (HL) 252-253.
[294] *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 1 All ER 716 (CA) 723.

for himself.[295] There are several duties which flow out of the general rule, to avoid conflict of interests; namely, the rule against self-dealing and the rule that requires disclosure of interests in company contracts, the duty to account for secret or incidental profits, the duty not to take corporate opportunities, the duty not to misuse confidential information and lastly the duty not to compete with the company. These common law duties are now substantially codified by the Companies Act 71 of 2008. It is important to discuss these sub-duties in order to have a better understanding of the corporate opportunity doctrine.

3.3 The duty not to take corporate opportunities

The duty not to take corporate opportunities is a huge umbrella under which all the following duties fall under or emerge from. A corporate opportunity connotes any economic or business opportunity, whether property or rights, which rightfully belongs to the company or to which the company has some kind of claim.[296] A director acts in breach of his fiduciary duty to the company where he or she diverts the company's contractual opportunities to his own advantage or where he or she uses confidential information to advance the interests of a rival concern on his or her own business to the prejudice of those of his/her company.[297] This rule prohibits a fiduciary from exploiting an opportunity related to the corporation's business. This is a common law doctrine that limits a fiduciary's ability to pursue new business prospects individually without first offering them to the corporation.[298] Legodi[299] stated that there is no settled definition of corporate opportunity. However, he defined corporate opportunity as any economic or business opportunity, material or immaterial property, to which the company has a claim. This duty not to usurp an opportunity arises from the particular

[295] *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 (HL).
[296] M Havenga, Corporate opportunities: A South African update (1996) 8 SA Merc LJ 40.
[297] *Cybercene Ltd and Others v I-Kiosk Internet and Information (Pty) Ltd* 2000 3 SA 806 (C) 821.
[298] Talley E and Hashmall M "The corporate opportunity doctrine" (2001) 32 (2) *Harvard Journal of Law & Technology* 482.
[299] PK Legodi 'Director's Fiduciary Duty to Account for Corporate Opportunities' MA Dissertation, University of Limpopo 2010.

relationship which exists between the corporate fiduciary and his company or between the company and the particular opportunity.

There are three situations in which the duty attaches to a director. Firstly, where the director has been expressly or impliedly given a specific mandate either to acquire a particular opportunity for the company or to inform the company as to its suitability. Secondly, if he or she alone, or together with other directors, is given expressly or impliedly, a general mandate to acquire opportunities for the company, or to pass on information to it about opportunities, or if he or she in fact controls the company or those in power to manage its affairs. Lastly, if he or she usurps an opportunity which the company is actively pursuing or an opportunity which at least in so far as its directors are concerned can be said to belong to the company.

It may be possible that a company may be unable to take benefit of an opportunity in the line of its business. Various reasons such as restrictions in the company's constitution or separate contracts, other legal constraints, inability to finance the venture, absence of adequate physical facilities to make use of the opportunity, and unwillingness of the party offering the opportunity to deal with the company could contribute to such corporate inability to utilize an opportunity.[300] The opportunity must, however, be a corporate one in the sense that the opportunity should not only be in the line of business of the company, but the company should also be seen to have justifiably been relying on the fiduciary to acquire it or to assist in its acquisition for the company."[301] The courts have declined to accept corporate inability or rejection of the particular opportunity by the company as a defence for the director to acquire the opportunity.[302] The United States accept that a corporation's financial inability to take up a corporate absolves directors from liability for making personal use of opportunity. However, this is subject to certain restrictions, which are quite broad in scope.[303] In

[300] M Havenga, Appropriation of corporate opportunities by directors and employees 2007 TSAR 175.
[301] M Havenga, Appropriation of corporate opportunities by directors and employees 2007 TSAR 169 176.
[302] *Natural Extracts (Pty) Ltd v Stotter* (1997) 24 ACSR 110.
[303] Kanamugire JC The impact of Companies Act 71 of 2008 on the Traditional Director's Duty to Avoid Conflict of Interest Mediterranean Journal of Social Sciences (5) 9 2014 79.

South Africa it is still unsettled. However, it is submitted that directors should be allowed to acquire a corporate opportunity if the company is financially unable to do so or the company has genuinely rejected it.[304]

A director cannot simply divest himself/herself of the duty by merely resigning from the company. In *Magnus Diamond Mining Syndicate v Macdonald and Hawthorne*[305] Maasdorp, CJ held that the fact that the defendants had resigned their directorships did not affect their position in any way.[306] The court further held that "the resignation was merely an attempt to divest themselves of the responsibilities and obligations of their office, from which they could not in law free themselves without the consent of the corporation".[307] Where a director's resignation is influenced by a wish to acquire for himself or herself an opportunity or where his or her position with the company rather than a fresh initiative led him or her to the opportunity he remains prohibited from taking it. The case of *Industrial Development Consultants Ltd v Cooley*[308] demonstrates that fiduciary duty may continue after resignation. The defendant was a managing director and resigned from his office in order to benefit from the opportunity he had received due to his position. He misrepresented his state of health and was released from his directorship. Subsequently, he used the opportunity and received employment. It was held that he had to account to the plaintiff company. Employees also stand in a fiduciary position to the company and the scope of that duty depends on the circumstances and position of the employee.[309] An employee should not appropriate corporate opportunities for their personal gain. This would, however, depend on the nature of what the employee to do, his position and responsibilities in the company. If there is no relation or connection to the company's activity, an employee must be allowed to benefit from the opportunity.

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[304] *Magnus Diamond Mining Syndicate v Macdonald and Hawthorne* 1909 ORC 65.
[305] *Magnus Diamond Mining Syndicate v Macdonald and Hawthorne* 1909 ORC 65.
[306] *Magnus Diamond Mining Syndicate v Macdonald and Hawthorne* 1909 ORC 65.
[307] *Magnus Diamond Mining Syndicate v Macdonald and Hawthorne* 1909 ORC 65.
Kanamugire JC The impact of Companies Act 71 of 2008 on the Traditional Director's Duty to Avoid Conflict of Interest Mediterranean Journal of Social Sciences (5) 9 2014 79.
[308] *Industrial Development Consultants Ltd v Cooley* 1972 2 All ER 162.
[309] *Philips v Fieldsone Africa (Pty) Ltd and Another* 2004 3 SA 465 (SCA).

It accordingly becomes imperative to enquire under what circumstances opportunities should be regarded as corporate under nature, and in what circumstances they should cease to be regarded as such. The corporate opportunity rule has enjoyed the attention of the courts for years. Even though this is the case, no attempt has been to explain when an opportunity would be regarded as a corporate opportunity. The Supreme Court of Appeal in *Da Silva v CH Chemicals (Pty) Ltd*[310] explained what corporate opportunity entails. There are also various tests employed to help determine when an opportunity would be regarded as a corporate opportunity.

3.3.1 The duty to act in good faith towards the company

Good faith was not defined in the 2008 Companies Act. However, this duty implies that a director must exercise his/her powers as a director for the benefit of the company and avoid a conflict between his or her own interests and those of the company.[311] Emphasis was made in *Cyberscene Ltd v iKiosk Internet and Information (Pty) Ltd*[312] that fiduciary duty exists between the company and its directors. The duty to act in good faith was explained as being a fiduciary acting in good faith, abiding by the norms of corporate governance and complying with the legal standards while performing their duties.[313] Conspicuous failure to do so is subject to liability under the duty to act in good faith. It is required and it is important that, when a director is exercising his/her duty of good faith he or she should ensure that complaints about the company or officers are honestly and thoroughly investigated with sufficient care and attention to

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[310] *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).
[311] Coetzee L, Directors' fiduciary duties and the common law: the courts fitting the pieces together: *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* 2015 (6) SA 338 (WCC).
[312] *Cyberscene Ltd v iKiosk Internet and Information (Pty) Ltd* 2008 (3) SA 806 (C).
[313] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev and J Yeats *Contemporary Company Law* (Juta, 2012) p. 524.
The term corporate governance is widely used to refer to the balance of power between officers, directors and shareholders. Good corporate governance allows for a balance between what officers do and what shareholders desire. It implies that managers have the proper incentives to work on behalf of shareholders and that shareholders are properly informed about the activities of the managers. It is essentially about effective, responsible leadership that is characterized by the ethical values of responsibility, accountability, fairness and transparency.

detail.[314] It is their duty to listen to information reported to them and question it not only for accuracy but also for good faith of those reporting it. Furthermore, officers must set up appropriate systems within the company, to ensure its proper governance and share what they find with the directors. Failure to act in this manner results in fiduciaries violating their duty of good faith. When making material decisions, need to assure themselves that they know all the material and reasonably available facts and options before embarking on a major program granting their approval or discontinuing an investigation.[315]

Good faith depends largely but not exclusively on honesty. However, honesty is subjective. A breach of this duty consequently requires subjective awareness of wrongdoing. The court has laid down the long-standing and oft-quoted legal principle that the directors are bound to exercise; the powers conferred upon them bona fide in what they consider to be the best interests of the company.[316] Directors have more knowledge, time and expertise at their disposal to evaluate the best interests of the company, unlike the judge, who is not a business person.[317] The courts will not presume to act as a kind of supervisory board over directors' decisions that are honestly arrived at within the powers of their management.[318] Furthermore, it is not for the courts to review the merits of a decision that the directors have arrived at honesty.[319]

The principles of good faith, are which evolved at common law, are recognized by the 2008 Act. This duty entails the duty to exercise an independent judgment and the duty to act within the limits of authority and extends to the duty of a director to exercise his or her powers for a proper purpose.[320] When testing good faith, a subjective test is used. This is because the question that is being asked is whether the director honestly

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[314] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev and J Yeats *Contemporary Company Law* (Juta, 2012) p. 524.
[315] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev and J Yeats *Contemporary Company Law* (Juta, 2012) p. 525.
[316] *Re Smith & Fawcett Ltd* [1942] Ch 304.
[317] *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 15 ACLR 230 SC (NSW).
[318] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821.
[319] *Hogg v Cramphorn Ltd* [1967] Ch 254.
[320] Section 76 (3) (a) of the Companies Act 71 0f 2008.

believed that he or she was acting in the best interests of the company. The state of mind of the director is of paramount importance. The absence of reasonable grounds for believing that the director is acting in the best interests of the company may be the basis for finding lack of good faith.[321] In *Shuttleworth v Cox Brothers & Co (Mainhead)*[322] the court stressed that the best interests of the company are not assessed by the court itself. Instead, the test is whether there is a rational basis for the director to believe that the action taken by the director is in the best interests of the company.[323]

There must be reasonable grounds for the directors to believe that they were acting in the best interests of the company.[324] Reasonable grounds would be found to exist if an intelligent and honest person in the position of director could in the whole of the circumstances have reasonably believed that he or she was acting in the best interests of the company.[325] In *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald (No 2)*[326] the court held that the sole director of a company had not acted in the best interests of the company, by arranging for the company to make gratuitous or redundancy payments to him on termination of his service with the company. The director was acting in his own, rather than in the company's, interests.

3.3.2 Self-dealing rule

The rule against self-dealing prohibits a director from acting on behalf of his/her company in any matter in which he/she has an interest that conflicts or may possibly conflict with his/her duty to the company.[327] In *Robinson v Randfontein Estates Gold Mining Co Ltd* Innes CJ emphasised that this fiduciary duty prevents an agent from properly entering into any transaction that would cause his/her interests and his/her

[321] *Gething v Kilner* [1972] 1 WLR 337.
[322] *Shuttleworth v Cox Brothers & Co (Maidenhead)* [1972] 2 KB 9.
[323] *Shuttleworth v Cox Brothers & Co (Maidenhead)* [1972] 2 KB 9.
[324] *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598 (ChD).
[325] *Charterbridge Corporation Ltd v Lloyd's Bank* [1970] Ch 62.
[326] *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald (No 2)* [1995] 1 BCLC 352 (ChD).
[327] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168

duty to clash.[328] This rule helps or is there because a director is under a duty to obtain the best suitable terms for the company he or she is a director in, while his or her personal interests in the transaction would lead him or her to the opposite direction.[329] The rule ensures that the company obtains unbiased advice from the directors, as they cannot involve the company in any transaction which they have an interest or may possibly have an interest in.

There are certain situations or instances where a director may perform an activity where he or she has an interest. For instance, "a director may act on behalf of his company in a contract or other matter in which he has an interest if he obtains the consent of the general meeting to do so, after making full disclosure to it of his interest in the contract."[330] The disclosure must be made to the members in a general meeting and members alone have the power to sanction the contract.[331] If informed consent is given by the company, there is no breach and the conflict of interest is avoided.

3.3.3 Disclosure of information in contracts

There is no common law rule that states that a director cannot validly contract with a company of which he or she is a director. Therefore, a director may validly contract with his company.[332] In instances where a director wishes to contract with his or her company or it appears that he or she has an interest in a contract which his or her company proposes to enter into with a third party, he or she must entirely shake off his or her relationship with the company and he or she must do so openly and in good faith and deal with the company at arm's length. This is also regarded as a fair dealing rule. In *Tito v Waddel (No 2)*[333] the court held that where a "trustee purchases the beneficiary's beneficial interest, the beneficiary may have the sale set aside, unless the trustee can establish the propriety of the transaction by showing that he or she had

[328] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168
[329] *Aberdeen Rail Co. v Blaikie Brothers* 1843-60 All ER 249 (HL) 252-253.
[330] *Nepture (Vehicle Washing Equipment) Ltd v Fitzgerald* [1995] 3 All ER 811 (ChD).
[331] *Woolworths Ltd v Kelly* (1991) 4 ACSR 431 CA (NSW) 438.
[332] *Hely-Hutchinson v Brayhead Ltd* [1967] 2 All ER 14 (QBD) 27.
[333] *Tito v Waddel* (No 2) [1977] 3 All ER 129 (ChD).

taken no advantage of his or her position and that the beneficiary was fully informed and received full value".[334] The purpose of the requirement for the disclosure is not intended to protect the company against bad bargains, but rather to ensure that honesty and integrity which should inform corporate dealing and the internal management of the companies is scrupulously observed.[335]

A director may disclose any personal financial interest in advance.[336] This disclosure must be made to the board of directors or shareholders. The director must disclose the personal financial interest that he, she or a related person has and its general nature, before the matter is considered at the meeting, as well as any material information relating to the matter and known by him or her and any observations or pertinent insights relating to the matter.[337] A director may at any time disclose any personal financial interest in advance, by delivering to the board of directors a general notice or a standing notice, stating in writing the nature and extent of his or her interest.[338]

Failure by the director to make the required disclosure makes the contract voidable at the instance of the company.[339] It is at the discretion of the company whether to abide by the contract or to set it aside. Furthermore, the company may claim any profits made by the director as a result of the contract and any loss that it has suffered as a consequence of the director's non-disclosure. However, it has been held that "the mere non-disclosure, even though actionable, does not necessarily constitute fraud in its precise and proper sense".[340]

3.3.4 The duty to avoid secret profits

[334] *Tito v Waddel* (No 2) [1977] 3 All ER 129 (ChD).
[335] *Woolworths Ltd v Kelly* (1991) 4 ACSR 431 CA (NSW) 438.
[336] Section 75 (4) of the Companies Act 71 of 2007.
[337] Section 75 (5) (a) to (c) of the Companies Act 71 of 2007.
[338] Section 75 (4) of the Companies Act 71 of 2007.
[339] *Guiness Plc v Saunders* 1990 1 All ER 652 (HL) 662.
[340] *S v Heller and Another* 1964 1 SA 524 (W).

Directors must not make secret profits while performing their duties as directors. All the profits made by the director must be disgorged, except in instances where the majority of the shareholders in general meeting have consented to the director making the profit. Profit in this context is not specifically considered in monetary value, but may include every advantage obtained by a director in his/her capacity as such.[341] The case of *Regal Hastings (Ltd) v Gulliver and Others*[342] confirms that "any person in a fiduciary capacity is not allowed to make a profit out of property in regard to which a fiduciary relationship exists". The facts of that case are that Regal (Hastings) Ltd owned a cinema. Regal took out leases on two more cinemas, through a new subsidiary (Hastings Amalgamated Cinemas Ltd), in order to create a viable sale package. The landlord wanted personal guarantees from the directors; however, the directors refused to do that. The landlord instead offered to up share capital to Euro 5000. Regal itself put in Euro 2000, but could not afford more (though it could have got a loan). Four directors each put in Euro 500. Mr Gulliver, Regal's chairman, got outside subscribers to put in Euro 500 and the board asked the company solicitor, Mr Garten, to put in the last Euro 500. The directors sold the business and made a profit of nearly Euro 3 per share. Shortly afterwards, the buyers brought an action against the directors, on the grounds that the profit was in breach of fiduciary duty to the company. The directors had not gained fully informed consent from the shareholders.

The House of Lords held that the directors had made their profits "by reason of the fact that they were directors of Regal and in the course of the execution of that office".[343] The House of Lords further held that the directors therefore had to account for their profits to the company. The court emphasized that:

"The rule of equity which insists on those who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon questions or considerations as whether the property would or should otherwise have gone to the plaintiff, or whether he took a risk or acted as he

[341] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.
[342] *Regal (Hastings) Ltd v Gulliver and Others* [1942] 1 All ER 378 (HL).
[343] *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 (HL).

did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made."[344]

In *Cook v Deeks and Others*[345] the respondents had acquired a railway transaction for themselves by virtue of their position as directors. They passed a resolution in the general meeting of shareholders to the effect that the company had no interests in the transaction. This was because they held majority voting rights. Their decision was not ratified by the court. It was started that "a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority".[346] This rule against secret profits or incidental profits is inflexible. It aims at preventing directors from placing themselves in a position where they may be tempted to prefer their own interests to those of the company.[347] However, where a fiduciary has acted with complete honesty and in the interests of his beneficiary, the court may allow the fiduciary to retain, on a quantum merit basis, a sum in respect of his own work and skill.[348] This rule is strictly applied in order to discourage directors from participating in activities where their interests conflict with those of the company.

3.3.5. The duty not to compete with the company

A director of a company is relied on for his or her expertise and experience in the business of the company. As a result, they have a fiduciary duty towards the company that in essence demands that a director be loyal to the company and act in good faith and in the best interests of the company when conducting business on behalf of the company. The court in *London and Mashonaland Exploitation Co v New Mashonaland*

[344] *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 (HL).
[345] *Cook v Deeks* [1916] AC 554 (PC).
[346] *Cook v Deeks*[1916] AC 554 (PC).
[347] *Boardman and Another v Phipps* [1966] 3 All ER 721 (HL) 756.
[348] *Phipps v Boardman and Others* 1964 2 All ER 187 (ChD) 208.

Exploitation Co[349] held that if it is "not appearing from the regulations from the company that a director's services must be rendered to that company and to no other company, he was at liberty to become a director even of a rival company, and it not being established that he was making to the second company any disclosure of information obtained confidentially by him as a director of the company he could not at the instance of that company be restrained in his rival directorate".[350]

In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* [351] it was held that "It is inconceivable that this freedom to hold directorships in competing companies can exist in the case of a managing director actively so employed. It is impossible for one to advance the conflicting interests of two actively competing businesses as managing director of both".[352] A managing director was held guilty of a breach of his fiduciary duty, where he sabotaged his company's chances of obtaining a contract and, later, after severing connection with his company, subverted and took over the contract for his new company.[353] This is one of the conflicts that may possibly arise when a director serves two or more rival companies at the same time. A director should not compete with his or her company even during the notice period. In *Movie Camera Company (Pty) Ltd v Van Wyk,*[354] the court dealt with a managing director who took employment in competition with his former company after his resignation.[355] The court considered that the director's resignation had been brought about by unhappiness working for the plaintiff and had in no way been part of any deliberate strategy or intention to set himself up in competition with the plaintiff. His contract with the competitor, whom he joined after his resignation, had been offered other positions

[349] *London and Mashonaland Exploitation* Co *v New Mashonaland Exploitation Co* 1891 WN 165 (ChD).
[350] M Havenga, "Competing with the company when a director breaches his or her fiduciary obligations?"(1995) 7 SA Merc LJ 435. *London and Mashonaland Exploitation* Co *v New Mashonaland Exploitation Co* 1891 WN 165 (ChD).
[351] *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 2 SA 173 (T).
[352] *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 2 SA 173 (T).
[353] R Grantham, "Can directors compete with the company?" (2003) 16 MLR 109.
[354] *Movie Camera Company (Pty) Ltd v Van Wyk* [2003] 2 All SA 291 (C).
[355] *Movie Camera Company (Pty) Ltd v Van Wyk* [2003] 2 All SA 291 (C).

and he had continued to work diligently and faithfully for the plaintiff during the notice period.[356] He was therefore not in breach of his duty to the first company.

3.3.6 The duty not to misuse confidential information

"A director or officer is under a fiduciary duty not to use for his own purposes, or to disclose confidential information entrusted to him concerning the company's affairs. This duty continues even after the termination of his office."[357] In *Sibex Construction (SA) (Pty) Ltd and Another v Interjectaseal CC and Others* the court held that "it was unlawful for an employee to use his employer's confidential information in order to compete with the employer".[358] For information to be confidential it must not be something which is of public knowledge. In *Sibex Construction* the managing director and a general manager resigned and established a company that provided similar services to the previous company. They used confidential information acquired during their previous services in the company and solicited more customers from the former company. The court held that "the use of such information constitutes unfair and unlawful competition".[359]

3.3.7 The personal financial interests of a director

The Companies Act provides that "If a person is the only director of a company, but does not hold all the beneficial interests of all the issued securities of the company, that person may not – approve or enter into any agreement in which the person or a related person has a personal financial interest; or as a director, determine any other matter in which the person or a related person has personal financial interest, unless the agreement or determination is approved by an ordinary resolution of the shareholders after the director has disclosed the nature and extent of that interest to the shareholders."[360] This section codifies the self-dealing rule. This rule prohibits a

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[356] *Movie Camera Company (Pty) Ltd v Van Wyk* [2003] 2 All SA 291 (C).
[357] *Bennetts v Boardof Fire Commissionersof NSW* (1967) 87 WN (NSW) 307.
[358] *Sibex Construction (SA) (Pty) Ltd and Another v Interjectaseal CC and Others* 1988 (2) SA 54 (T).
[359] *Atlas Organic Fertilizers (Pty) Ltd v PikkewynGhwano (Pty) Ltd and Others* 1981 2 SA 173 (T).
[360] Section 75 (3) (a) and (b) of the Companies Act 71 of 2008.

director from dealing with himself or herself by participating in any activity of the company where he/she, or a related person, has a personal interest.

The director will need to get an approval from the shareholders by an ordinary resolution to validate such transaction. The requirements of approval by an ordinary resolution of shareholders may be easy to fulfil since the director can even be holding enough voting shares to allow him or her to pass such a resolution in this regard. In order to achieve the protection of the company, as well as shareholders', a special resolution or three-quarters of voting shareholders is necessary. The transaction should not operate to the detriment of the company or amount to a fraud on the minority. A director may also disclose any personal financial interest in advance, by delivering to the board, or shareholders, a notice in writing, setting out the nature and extent of that interest, to be used generally for the purposes of this section until changed or withdrawn by further written notice from that director.[361] This allows both parties to be at arm's length during the transaction and improves fairness.

The disclosure by a director assists the company (board of directors or shareholders) to make an informed decision on whether or not to approve the transaction in which the director or related person have an interest. If a director of a company has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director – he or she must disclose the interest and its general nature before the matter is considered at the meeting; must disclose to the meeting any material information relating to the matter and known to the director; may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors; if present at the meeting, must leave the meeting immediately after making any required disclosure; must not take part in the consideration of the matter, except making disclosure.[362] These provisions also codify the fair dealing rule. They oblige the director to disclose his or her personal financial interest to the board before

[361] Section 75 (4) of the Companies Act 71 of 2008.
[362] Section 75 (5) (a)-(c) of the Companies Act 71 of 2008.

the matter is considered. He or she has a duty to divulge any personal financial interest of the related person. The director does not participate in the board meeting that considers the matter. This ensures an unbiased decision. A director, while absent from the meeting that considers the matter where he/she or a related person has an interest, is to be regarded as being present at the meeting for the purpose of determining whether or not sufficient directors are present to constitute the meeting; and is not to be regarded as being present at the meeting, for the purpose of determining whether a resolution has sufficient support to be adopted; and must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board.[363] The essence of the provision is to ensure that the quorum requirement is met, while the director abstaining from the decision ensures fairness in consideration of the issue table before the meeting.

If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter, after the agreement and other matter has been approved by the company, the director must promptly disclose to the board or the shareholders, the nature and extent of that interest, and the material circumstances relating to the director or related to the person's acquisition of that interest.[364] If a director or a related person enters into a transaction with the company, where he or she has a personal financial interest, without the required disclosure, the contract is voidable at the discretion of the company. However, if the director or a related person acquires personal financial interest in the agreement or matter already approved by the company, compulsory disclosure must be made.[365] This provision promotes honesty and integrity in corporate governance.

A decision by the board, or a transaction or agreement approved by the board, or by a company, is valid in spite of any personal financial interest of a director or person

[363] Section 75 (5) (f) (i), (ii) and (g).
[364] Section 75 (6) of the Companies Act 71 of 2008.
[365] Section 75 (6) of the Companies Act 71 of 2008.

related to the director, if it was approved in the manner contemplated in this section; or has been ratified by any ordinary resolution of the shareholders.[366] This subsection provides unlimited powers for the board or company to use a fair-dealing rule or approve a transaction in which the director, or a related person, has a personal financial interest. It is submitted that if they commit a fraud on a minority, the transaction may be set aside. A court, on application by any interested person, may declare valid a transaction or agreement that has been approved by the board or shareholders despite the failure of the director to satisfy the necessary requirements.[367] There are remedial provisions for the aggrieved shareholder under section 163,164 and 165 of the Companies Act.

Section 163 of the Companies Act enables a shareholder or a director to apply to the court for relief if any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant; the business of the company, or a related person, is being or has been carried on in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

Section 164 provides for the appraisal remedy which is a new remedy in South Africa. The appraisal remedy is triggered when a company amends its Memorandum of Incorporation by altering the preferences, rights limitations or other terms of nay class of its shares in any manner materially adverse to the rights or interests of holders of that class of shares; or a company enters into transactions, such as the disposal of all or the greater part of the assets or the undertaking of a company, the conclusion by a company of a transaction of amalgamation or merger and a scheme of arrangement.

[366] Section 75 (7) of the Companies Act 71 of 2008.
[367] Section 75 (8) of the Companies Act 71 0f 2007.

Section 165 provides for the derivative action, which empowers various categories of persons to demand that a company commence or continue legal proceedings or take related steps to protect the interests of the company. Derivative action is generally utilized where the person who acts prejudicially in respect of a company also controls decision-making within that company, and that person uses that control to prevent the company from instituting or continuing legal proceedings, or taking related steps, against himself or herself or a third person to protect the company's interests.

3.4 The applicable tests

In arriving at the decisions discussed above, the courts have laid down a number of tests to guide the determination of when a director should not be allowed to make profit from his or her position as a director. The tests as set down in different judicial decisions are discussed below.

3.4.1 The scope-of-business test

The scope of the company's business test requires that an opportunity may be regarded as a corporate opportunity if it falls within the business that the company is actually carrying on or intends carrying on. This is determined by what is agreed by the shareholders and directors to be the company's business. Accordingly, unless the opportunity is one which, by agreement among and decision of the shareholders and directors, is one which the company should pursue, it would not be regarded as a corporate opportunity.[368]

3.4.2 The line-of-business test

[368] SA Kleyhans 'The Corporate Opportunity Rule: A comparative Study' MA Dissertation, University of South Africa 2016.

The line-of-business test referred to in *Movie Camera Company (Pty) Ltd v Van Wyk*[369], and originally considered in *Guth v Loft Inc*[370], has been described as the most prominent of the corporate-opportunity tests. The line-of-business test indicates that if an opportunity is "so closely associated with the existing business activities of the company" then it is deemed to be a corporate-opportunity.[371] The existing business opportunities include not only a company's current business activities and interests but also any prospective interests or activities as well as directions in which a company may expand. It is submitted that when determining the scope of a company's business, the court would be guided by what the company's memorandum states as its business.

The corporate-opportunity rule as set out in *Guth v Loft Inc*[372] suggests that a director may not take an opportunity if; the corporation is in a financial position to do so; the opportunity falls within the company's line of business; the opportunity is one in which the company has an interest or a reasonable expectation; and the director, by taking the opportunity for himself or herself, would bring his or her self-interests into conflict with those of his or her company. Commenting on the rule in *Guth,* the court, in *Broz v Cellular information Systems inc*[373], noted that the factors used to determine whether an opportunity is a corporate opportunity are merely guidelines, and that no single factor is decisive and that all the factors must be taken into account.

3.4.3 The position test

This is the test that lays emphasis on the surrounding circumstances in which the director had the knowledge of the opportunity. It is the duty of the court to determine in any given circumstances whether the director was acting in a fiduciary or a personal capacity.[374] The position test is an equitable principle which states that an agent or trustee should not be allowed to benefit from an opportunity which was acquired by

[369] *Movie Camera Company (Pty) Ltd v Van Wyk* [2003] 2 All SA 291 (C).
[370] *Guth v Loft Inc* 5 A 2d 503 (1939).
[371] SA Kleyhans 'The Corporate Opportunity Rule: A comparative Study' MA Dissertation, University of South Africa 2016. P.24.
[372] *Guth v Loft Inc* 5 A 2d 503 (1939).
[373] *Broz v Cellular information Systems Inc* 637 A.2d 148 (Del. 1996).
[374]Brusser, R "The director's duty of loyalty: corporate opportunities revisited" (1982) 198 SALJ 69 71.

virtue of the office of the agency or trusteeship. The approach of Lord Russel in *Regal (Hastings) Ltd v Gulliver*[375] illustrates the impact of equitable principles in determining dealings between a director and the company as follows:

> The rule of equity which insists on those, who by use of fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as to whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well intentioned, cannot escape the risk of being called upon to account.[376]

3.4.4 The conflict test

The rationale of the conflict test is that in the pursuit of the opportunity, a director should not place himself/herself in a position where his/her interests may conflict with his/her duties. If it is found that conflict of interests between the director's personal interests and his/her duty to the corporation exists, then the opportunity would become a corporate one. In *Boardman v Phipps*[377] the court held that liability could arise based on the conflict rule and it must be proven that there was a possibility of conflict between their own interests and their duty of trust.

3.4.5 The general fairness test

This test seeks to answer the question as to whether the fiduciary is taking advantage of an opportunity when the interests of the corporation justly call for protection. This depends on what is fair and equitable in the particular circumstance of the case.[378] If the circumstances of the case indicate that it would be unconscionable for the fiduciary to exploit a particular corporate opportunity, the opportunity will be classified as a corporate opportunity. The fairness test is an elastic concept and could encompass all

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[375] *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER (HL).
[376] *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER (HL).
[377] *Boardman v Phipps* (`1967) 2 AC 46 (HL).
[378] SA Kleyhans 'The Corporate Opportunity Rule: A comparative Study' MA Dissertation, University of South Africa 2016.

incidences of actual and potential conflicts between a director and the company arising from the exercise of power by a director in the conduct of the company's affairs.[379] There are a number of principles applied to decide as to whether the transaction was fair. This includes whether the director was guilty of overreaching, the corporation received full value and whether the contract was entered into primarily for the benefit of the corporation and not primarily for the benefit of the director.[380]

3.4.6 Determining the **existence** of corporate opportunity

Various tests have been adopted by the courts in ascertaining whether there is a corporate opportunity for the purpose of holding a director accountable. One such case in South Africa is *Da Silva v CH Chemicals (Pty) Ltd*.[381] In that case, the appellant (Da Silva) had, until his resignation, been the managing director of the respondent. He resigned so that he could establish a distribution agency in competition with the respondent. The agency was to be conducted through two companies (Resinex Plastics and Resinex South Africa). Da Silva was the managing director of both companies and a shareholder in one. The court was called upon to consider two opportunities, the Resinex and the Palstomark opportunities, which the respondent alleged were corporate opportunities.

In regard to the Resinex opportunity, the respondents contended that Da Silva and Resinex NV had entered into a contract in terms of which he would establish and head up Resinex NV's local office. According to the respondent, this contract was a corporate opportunity because it was a variant of one that the respondent and Resinex

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[379]Havenga M 'Corporate opportunities: A South African update'1996 (8) SA Merc LJ 42 made the following observations:

> South African courts have not laid down conclusive guidelines in respect of defining a corporate opportunity. However, decisions here and in other Commonwealth countries indicate that generally the test that should be applied is whether an opportunity can in all circumstances be said to actually belong to the company or whether the company was justifiably relying upon the director either to acquire the opportunity for it or at least attempting to acquire it. The opportunity should therefore not only be in line of business of the company, but in all circumstances the company should be seen to have been justifiably relying upon the director to acquire it or assist in acquisition for the company.

[380] The Corporate Opportunity Doctrine http://www.shareholderoppression .com/corporate-opportunity-doctrine accessed 24 March 2020.

[381] *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).

NV could have entered on an earlier occasion. Da Silva, however, contended that the opportunity was not a corporate opportunity as the contract differed from the one which could have been entered into earlier by the respondent and Resinex NV. With regard to the Plastomark opportunity, the respondent contended that the opportunity to be part of the Dows distribution business was a corporate opportunity which Da Silva should have exploited for its benefit.

Having considered the corporate-opportunity rule, the court concluded that neither of the opportunities could be considered a corporate opportunity. The only opportunity that the respondent had pursued in relation to the Resinex opportunity was a joint venture which had ultimately not materialised. Resinex NV set up a business in competition with the respondent which put paid to any possibility of a joint venture. As for the Plastomark opportunity, the court concluded that the decisions by Dow to sell the distributions part of its business was taken only after Da Silva had left the respondents' employ, and that the decision to sell was unrelated to any intervention by Da Silva in breach of his fiduciary duties.

Having evaluated the Resinex and Plastomark opportunities in accordance with the corporate-opportunity rule, the court concluded that neither of the opportunities was, in the circumstances, a corporate opportunity. Although the court concluded that neither of the opportunities was a corporate opportunity, the judgment remains significant in that the court confirmed the existence of the corporate-opportunity rule in South African law by stating that:

"A consequence of the rule is that a director is in certain circumstances obliged to acquire an economic opportunity for the company if it is acquired at all. Such an opportunity is said to be a 'corporate opportunity' or one which is the property of the company."[382]

[382] *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).

According to the court, a director would be required to acquire a corporate opportunity where he or she has been given an express or implied mandate to acquire the opportunity, is given a general mandate to acquire opportunities or pass on opportunities to the company, to control the company or those empowered to manage the affairs of the company, that the company cannot acquire opportunities or a particular opportunity without his consent.[383]

The court held that directors have a fiduciary duty to exercise their powers in good faith and in the best interests of the company, and that as a consequence of this rule, a director is sometimes required to acquire opportunities for the company. When a director acquires such an opportunity, it is regarded as a 'corporate opportunity' or one which is the 'property' of the company. If the director acquired the 'corporate opportunity' for himself or herself, the acquisition would be deemed to have been made for the company and the company would be able to claim the opportunity from the delinquent director. In the alternative, and where it was no longer possible to reclaim the opportunity, the company would have an alternate claim for any profits which the director may have made as a result of his or her breach of duties.

According to Havenga,[384] Da Silva serves as confirmation that the test that should be applied in determining whether a particular opportunity is a corporate opportunity is the 'line-of-business' test developed in Guth.[385] The author argues that Da Silva provides a clear exposition of the expropriation of a corporate opportunity by a director. However, Cassim[386] disagrees with Havenga and is generally critical of the court's judgment. Firstly, Cassim argues that the court's interpretation of the corporate-opportunity rule lacks understanding and depth. According to Cassim, although the court mentioned the tests to establish a corporate opportunity, it failed to deal in sufficient detail with the many complexities in this area of the law.

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[383]*Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).
[384]Havenga M "Directors' exploitation of corporate opportunities and the Companies Act 71 of 2008" 2013 TSAR 257 – 68.
[385]*Guth v Loft Inc* 5 A 2d 503 (1939).
[386]Cassim R "Post-Resignation Duties of Directors: The Application of the Fiduciary Duty not to Misappropriate Corporate Opportunities" 2009 SALJ 731 – 53.

Secondly, according to Cassim, the opportunity available to the company and director respectively need not be identical for purposes of the corporate-opportunity rule. Cassim argues that the court should have found that Da Silva had usurped a corporate opportunity, even though the opportunity available to CHC was to enter into a joint venture with Resinex, while the opportunity open to Da Silva was to be appointed as managing director of Resinex's South African subsidiaries and to compete with CHC. It will be seen below that the line-of-business test demands that a director may not usurp an opportunity in the company's line of business.

Cassim does not explain what these complexities are but they include drawing the line between a director who is required to act in the interest of the company and allowing a director to act in his/her own interests, determining the liability of a director where the company was not pursuing the opportunity that was in the company's line of business; or where, due to financial constraints, a company was unable to exploit an opportunity. As the court pointed out in *Da Silva*, whether an opportunity is a corporate opportunity or not is ultimately a question of fact to be determined by reference to the circumstances of a particular case.

It is submitted that despite the shortcomings expressed by Cassim, the court did provide a framework for the further development of the corporate-opportunity rule by laying down the possible tests that can be applied to determine whether a particular opportunity is a corporate opportunity. According to the court, an opportunity is a corporate opportunity if it is one which the company was actively pursuing, or it falls within the company's existing or prospective business activities, if it is related to the operations of the company within the scope of its business, or it falls within the company's line of business.[387]

In *Canadian Aero Services Ltd v O'Malley*[388] the court found that a director may not usurp for himself or herself or divert to another person or a company with whom or which he is associated, a maturing business opportunity which the company is

[387] *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).
[388] *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 (SCC).

pursuing.[389] While the court identified four definitions of what constitutes a corporate opportunity, it is submitted that this definition is in essence the line-of-business test. In assessing whether, in a particular case, a director had breached his or her fiduciary duty when appropriating an opportunity, a number of factors could be relevant. These factors, which the court stressed were not to be regarded as exhaustive, are the position or office held by the person appropriating the opportunity; the nature of the corporate opportunity; its 'ripeness'; its specificity; the director's relation to the opportunity; his or her knowledge of the opportunity; and how the opportunity was obtained.

Kleyhans[390] observes that it is unduly limiting to classify a corporate opportunity as one which the company was actively pursuing, as this would not bring all opportunities which come to a director's notice within the scope of his or her duty to disclose the opportunity to the company. Kleyhans suggests that an opportunity falling within the existing or prospective business activities of the company should be regarded as a corporate opportunity, even where the company has not yet identified the opportunity as one it wishes to take up. While the test will not, according to the present researcher, bring all corporate opportunities within the scope of the directors' duty to disclose the opportunity to the company, it would recognize the directors' duty to promote the company's business, as conceived of by senior management from time to time.

3.5 Conclusion

The extensive codification of common law principles by the Act highlights a demand for a more accountable corporate landscape in South Africa. A director occupies a fiduciary position and is required to act with utmost good faith and in the best interests of the company. The scope of fiduciary duty and what is a corporate opportunity have

[389] *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 (SCC).
[390] SA Kleyhans, The corporate opportunity rule: A comparative study, University of South Africa, 2016.

been covered in this chapter, together with the various tests that are applied to determine the existence of corporate opportunity. The next chapter discusses the safe harbours provided by the law for directors to benefit from corporate opportunities, especially in circumstances where the director has resigned and may wish to start his/her own business.

CHAPTER 4

POST-RETIREMENT OR POST-RESIGNATION UTILISATION OF CORPORATE OPPORTUNITY

Resigned, retired, and removed directors must continue to live, regardless of their not being part of the company they were engaged in. They have to support themselves and their families. However, in pursuing that aim in the corporate context, they must do so within the confines of the law. In this chapter the researcher explores the legal position when a director who has retired or resigned from office exploits what the law considers as being a corporate opportunity.

4.1 Introduction

An office or a director may be terminated either by removal, retirement or resignation. However, this does not mean the director's life has come to an end. He or she still has to make a living in order to survive. This means getting employment or starting his/her own business. The law imposes many restrictions to this effect. For instance, a director is not allowed to use the information he or she gained while acting in the capacity of a

director for his or her or another person's benefit, other than the company.[391] In general circumstances, it is impossible to assume that a director knew nothing prior to his/her appointment as a director. This is because directors in most cases are appointed because of their expertise; therefore, one can say that it is inappropriate to regard everything a director knows or does as belonging exclusively to his or her company. Thus, it may sound or appear unreasonable to expect a director who has been unlawfully dismissed by the company from using business contacts or information acquired during his or her term of office to establish alternative business.[392]

It is settled that the fiduciary duties of a director arise only once the appointment of the director takes effect. Thus, a prospective director does not occupy a fiduciary position.[393] Section 76 of the Companies Act leaves open the consideration as to whether fiduciary duties can be extended to a director who has resigned. The courts, in interpreting this section, have deemed it appropriate to -in certain circumstances- extend the fiduciary obligation of a director beyond his/her resignation. It has also been held that resignation from the office does not terminate the director's fiduciary obligation to the company.[394] The reasoning is that if this duty is not extended, directors could exploit opportunities for himself or herself after they have resigned from the company with impunity.[395] However, resignation by a director does not in itself breach the fiduciary relationship between the resigning director and the company. The reason for a director's resignation is usually the basis for the consideration as to whether the fiduciary duty of a director should be extended post-resignation and consequently breached through certain conduct. For this reason, the setting up of a competing business after resignation is not in itself unlawful. It is only unlawful when

[391] Section 76 (2) (a) of Companies Act 71 of 2008. A director of a company must not use the position of a director, or any information obtained while acting in the capacity of a director to gain an advantage for the director, or for another person other than the company or wholly-owned subsidiary of the company.
[392] Michele Havenga Çorporate opportunities: A South African update (Part 2)' (1996) 8 *SA Merc LJ* 233 at 234.
[393] Larkin, M "The fiduciary duties of the company director" (1979) SACLJ.
[394] *Spieth v Nagel* [1997] 3 All SA 316 (W) at 324.
[395] *Spieth v Nagel* [1997] 3 All SA 316 (W) at 324.

the resigning director takes advantage of his or her position in the company and diverts interests or opportunities of the company to the new competing business.

Friedlander stated that the fiduciary duty of directors no longer applies to ex-directors, unless they were breached.[396] That is, the breach should adversely affect an interest of the company and that interest must deserve protection. A breach occurs where a director uses confidential information of the company which is commercially valuable, and this information must have been obtained whilst in his/her position as a director. Thus, a company may seek to prevent such conduct by inserting restriction clauses in the director's employment contract.

4.2 The restraint of trade

A restraint of trade provision in an employment contract seeks to curtail the exercise of an employee's freedom to engage in business during and after the termination of employment. The main purpose of this provision is to protect the employer's proprietary interests, including trade secrets, confidential information, a company's clients and a customer base from falling into the competitors' hands. Employment agreements that are in restraint of trade are recognised by South African law as being *prima facie* enforceable.[397] Therefore, an applicant who seeks to enforce a contract in restraint of trade must prove only the existence of the restraint agreement and the breach thereof. Once this is done, the respondent has to show why the binding agreement should not be enforced.[398]

It is considered as being in the public interest that parties should comply with their contractual obligation, notion expressed by the maxim *pacta sunt servanda,* and that all persons should in the interests of the society be productive and be permitted to

[396] C.A Friedlander, The aftermath: Resignatiom of a director and the surviving fiduciary duties.
[397] Saner, J "Agreements in Restraint of Trade in South Africa" www.lexisnexis.co.za accessed 21 October 2020.
[398] Saner, J "Agreements in Restraint of Trade in South Africa" www.lexisnexis.co.za accessed 21 October 2020.

engage in trade and commerce or professions.[399] In *Reddy v Siemens Telecommunications (Pty) Ltd*[400] Reddy was employed by Siemens. He then resigned to take employment with Ericsson. He had agreed upon joining Siemens not to be employed by a competitor for a period of one year after termination of his employment and undertook not to disclose trade secrets and confidential information belonging to Siemens. In interdicting Reddy from taking up employment with Ericsson, the court found that the restraint was aimed at preventing a person with knowledge of confidential technologies as a result of his employment from utilising them to the detriment of the employer:

"It is confidential technologies which are to be protected, it is not necessary for the applicant to prove that information is not academic in the hands of Ericsson. By its very nature, such information in the hands of a competitor may be detrimental to the applicant's business".[401]

In *Littlewoods Organisation Ltd v Harris*[402] Lord Denning MR remarked:

> It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a trade covenant against disclosing confidential information. The reason is because it is so difficult to draw a line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is such of a character that a servant can carry it away in his head. The difficulties are such that the only practical solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period.

The preceding decisions demonstrate that the courts are willing to uphold contracts in restraint of trade when such contracts are inserted for a specific purpose and time and not generalized or be in perpetuity.

[399] Saner, J "Agreements in Restraint of Trade in South Africa" www.lexisnexis.co.za accessed 21 October 2020.
[400] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA).
[401] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA).
[402] *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026.

4.3 Resignation from office by a director

Office of a director may be terminated by the incumbent by tendering a resignation. The company's memorandum of incorporation may provide formality or a way of tendering such resignation. This can be in writing or orally to the company or board of directors. Resignation is considered to be a unilateral act and the company's concurrence, or acceptance is not required in order for the appointment to be terminated. However, in *Harding v Standard Bank of South Africa Ltd*[403] the court held that when the memorandum of incorporation provides that resignation must be in writing and if it is done orally, such oral resignation becomes effective upon acceptance by the company. The court has clarified that resignation by a director is not a fiduciary power and that a director is entitled to resign from the company even if his/her resignation may have a disastrous effect on the business or reputation of the company.[404] Unless restricted by a contract, a director may resign from the company at any time with complete immunity because freedom of employment and encouragement of competition generally dictate that such persons can leave their corporation at any time and go into a competing business.[405] As each case is judged on its merits, it would be different in circumstances where in the entire board of a public company resigns simultaneously. In a case similar to this, the court held that the board of directors was under a duty to act *bona fide* in the interests of the company, and that by resigning, they had failed to comply with this duty because what they had achieved by resigning was to incapacitate themselves from discharging their duties towards the company and its members.[406]

The first South African case to preclude a director from continuing to exploit corporate opportunity for himself after resignation is that of *Spieth v Nagel.*[407] In this case Spieth established a company (Lutro), the business of which was that of a supplier and

[403] *Harding v Standard Bank of South Africa Ltd* 2004 (6) SA 464 (C).
[404] *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704.
[405] *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR.
[406] *Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd & Others* 2006 (5) SA 333 (W).
[407] *Spieth & Another v Nagel* [1997] 3 All SA 316 (W).

installer of spray-painting and banking plants for motor vehicles. The business acquired the exclusive agency for the importation of certain products for distribution in Southern Africa. The business was run successfully as a one-man concern by the applicant, who was contemplating retirement in due course. Nagel was employed and became director and shareholder. A series of events over a period of two years resulted in the respondent being suspended from his employment. The applicant contended that the respondent had approached the distributor with the intention of having the distributorship awarded to him and that his solicitation of the distributorship constituted a breach of his fiduciary duty as a director. Schwartzman J made it clear that the fiduciary duty of a director does not terminate once a director ceases to hold office.[408] The court stated that:

> There is no reason in principle why in an appropriate case, a company should not, while such duty survives, be protected by way of an interdict from an irreparable loss it may otherwise suffer if the director, following his resignation, is allowed to continue to exploit a commercial opportunity created in breach of his fiduciary duty. To afford such protection must accord with public policy and the boni mores of the commercial community. To do so is not to punish the delinquent for his past misconduct but to secure the cessation of an unlawful course of conduct…[409]

The reasoning behind extending a director's fiduciary duty in certain circumstances beyond his or her resignation is that if this is not done, a director may with impunity conceive the idea of resigning, so that he may exploit some opportunity of the employer and having resigned proceed to exploit it to himself.[410] If what a director has learned before his or her resignation does not fall within the category of a corporate opportunity or if the opportunity arose after his or her resignation, or was one of which he or she was unaware prior to his or her resignation, it is not breach of his fiduciary duty to exploit the opportunity after his or her resignation.[411]

4.4 The courts' approach to the duty to avoid a conflict of interests: post-resignation of a director

[408] *Spieth & Another v Nagel* [1997] 3 All SA 316 (W).
[409] *Speith & Another v Nagel* [1997] 3 All SA 316 (W).
[410] *Island Finance Limited v Umunna* [1986] BCLC 460.
[411] *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).

There is a strict judicial approach to the fiduciary duty, to avoid conflict of interests. This is informed by the need to deter directors from breaching their fiduciary duty and to ensure a high degree of protection for companies which by their nature are vulnerable to fiduciaries.[412] In *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC*[413] Goldstone J stated that courts should enforce the strict ethic in this area of law, so that persons in positions of trust will be less tempted to place themselves in a position where duty conflicts with interest. Cardozo CJ held in *Mainhard v Salmon*[414] that such absolutism is necessary because human infirmity makes it difficult to resist temptation, and it is only in that manner that the level of conduct for fiduciaries can be kept at a level higher than that trodden by the crowd.[415]

John and Rod are of the view that the circumstances surrounding the breach of the fiduciary duty are irrelevant as a director's liability arises from his or her appointment to the office of the director.[416] It is that capacity that triggers the liability of a director. The court in *Regal (Hastings) Ltd v Gulliver*[417] concisely stated the principle as follows:

Both in law and equity, it has been held that, if a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not inquire whether the other person is damnified or has lost a profit which otherwise he or she would have received. The fact in itself is the fundamental breach of the fiduciary relationship. Nor can the court adequately investigate the matter in most cases. The facts are generally difficult to ascertain or are solely in the knowledge of the person who is being charged.[418]

In the United States (US) the courts have developed a corporate opportunity doctrine which prohibits a director from personally pursuing a business opportunity which

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[412] Grantham, J 'Can directors compete with the company?' (2003) 66 The Modern Law Review 515.
[413] *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T).
[414] *Mainhard v Salmon* (1928) 249 NY 456.
[415] *Mainhard v Salmon* (1928) 249 NY 456.
[416] Jonh Lowry and Rod Edmunds 'Judicial pragmatism: Directors' duties and post resignation conflicts of duty' (2008) The Journal of Business Law 83.
[417] *Regal (Hastings) Ltd v Gulliver* 1942 1 All ER 378 (HL).
[418] *Regal (Hastings) Ltd v Gulliver* 1942 1 All ER 378 (HL).

corresponds with the line of business of the company in which he or she is a director.[419] The US corporate opportunity doctrine differs from the traditional English-law capacity-based approach in that in seeking to identify those business opportunities which are corporate opportunities, the liability of a director is not capacity-based but the wider surrounding circumstances are investigated. This includes the nature of business opportunity, company's ability to exploit opportunity and the integrity of the director involved.

In a recent South African court decision in *Big Catch Fishing Tackle Proprietary Limited and Others v Kemp*[420], the court considered whether or not a former director of a company continued, after his or her resignation, to owe certain fiduciary duties to a company for which he or she previously worked and, in owing any fiduciary duties at all, he or she could be prevented from competing with his or her former company. The facts of the case are that in 2014 the now ex-director of Big Catch Fishing Tackle Proprietary Limited, Justin Kemp, became a 50/50 shareholder and co-director in a company trading in the supply of fly fishing equipment, the hosting of fishing and fly fishing tours for customers in international waters and foreign territories, as well as to inland and offshore locations in South Africa.

Kemp resigned as a director of the company in 2018 and went on to establish a brand-new company as a direct competitor to Big Catch. He remained a 50% shareholder in Big Catch and was accordingly still bound by the shareholders agreement. The applicant contended that the fiduciary duty of Kemp towards Big Catch, flowing from his position as director, did not cease to exist when Kemp resigned in 2018. The applicant's further contention was that a director may not appropriate any business opportunities of his or her former employer even after resignation. The court held that the default position is that an executive director may not carry on business activities which fall within the scope of his company's business during the time that he or she serves as a director but the default position changes upon resignation. Where there is

[419] John Lowry and Rod Edmunds 'The no-conflict no-profit rules and the corporate fiduciary: Challenging the orthodoxy of absolutism (2000) The Journal of Business Law 122.
[420] *Big Catch Fishing Tackle Proprietary Limited and Others v Kemp and Others* [2019] ZAWCHC 20.

no restraint of trade, or use of confidential information, a director does not commit a breach of his or her fiduciary duty merely because he or she takes steps to ensure that, on ceasing to be a director, he or she can continue to make a living even by setting up a business in competition with his or her former company.[421] The court found this view to be correct because otherwise directors would effectively have to change careers every time they leave the company. What the applicants are contending would mean that the director would not be able to continue working in the same line of business after leaving the company. This cannot be promoted.

The court agreed with the respondent's submissions that the fiduciary duties of a director survive the termination of the relationship with the company. However, the content of that duty does not remain the same after resignation. The duty will only be breached after resignation if it involves the use of confidential information or violates the interest of the company that is worthy of protection. An employee upon termination of his or her employment is free to draw upon his or her knowledge, experience, memory and skill howsoever gained provided he or she does not use, disclose or impinge upon any of the secret processes or business secrets of his or her former employer.[422]

4.5 Application of corporate opportunity rule after resignation

There are various factors which are taken into account when considering whether the corporate opportunity rule should apply after the resignation of a director. The factors include the maturity of the business opportunity that the company is actively pursuing, opportunity obtained by the director in his or her private capacity, the company's ability to take the opportunity, motive for resigning by the director and the position with the company that led the director to the opportunity which he or she acquired after his or her resignation. Each of these factors is discussed below.

[421] Blackman et al Commentary on the Companies Act (year) Vol 2 at 8-180-1.
[422] *Atlas Organic Fertilizers v Pikkewyn Ghwano* 1981 (2) SA 173 (T).

4.5.1 Maturing business opportunity the company is actively pursuing

Where a director resigns in order to personally take up an opportunity which the company is actively pursuing, his or her resignation will not prevent him or her from being held accountable to his or her former company. The court in *Canadian Aero Services Ltd v O'Malley*[423] used the concept of maturing business opportunity, which the company was actively pursuing, as the basis for drawing a line between permissible and impermissible conduct by a director. The same principle was accepted by the court in *Da Silva*. In *CyberScene Ltd v I-Kiosk Internet and Information (Pty) Ltd*[424] the court found that the former directors of CyberScene Ltd had diverted maturing business opportunities, which had existed for the benefit of the company by, shortly before their resignation, approaching a potential client of CyberScene Ltd and passing themselves off as being associated with the company.

Conversely, in *Industrial Development Consultants Ltd v Cooley*[425], Cooley was the managing director of Industrial Development Consultants Ltd which offered building consultant services. Mr. Cooley was the company representative and sought to obtain contracts for IDC from the Eastern Gas Board in connection with four depots, which the Eastern Gas Board planned to build. The deputy chairman of the Eastern Gas Board was not prepared to enter into contracts for the development of the depots with IDC, but they were willing to contract with Mr. Cooley in his private capacity. Mr. Cooley then resigned from his office on the pretext of ill health and personally entered into the contract with the Eastern Gas Board. The court found that there was no doubt that Mr. Cooley had obtained the contract for himself as a result of work that he had done while he was still a managing director at Industrial Development Consultants. It was Mr. Cooley's duty, once he got the information, to pass it on to his employers and not to guard it for his own personal purposes and profit.

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[423] *Canadian Aero Services Ltd v O'Malley* (1973) 40 DLR (3d) 371 (SCC).
[424] *CyberScene Ltd v I-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C).
[425] *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 551.

In *Island Export Finance Ltd v Umunna & another*[426] the court adopted a flexible approach by having regard to the wider circumstances surrounding the alleged breach of fiduciary duty by a director who had resigned from the company. Umunna had secured a contract for postal caller boxes for IEF Ltd from the Cameroon's postal authorities. IEF had hoped to receive further such orders but received no such assurance from the Cameroon's postal authorities that further orders would be forthcoming. Umunna resigned from IEF Ltd due to ill treatment and subsequently obtained for his own company an order for postal caller boxes from the Cameroon's postal authorities.

IEF Ltd's argument for IEF Ltd was that Umunna resigned in order to exploit a business opportunity which belonged to it, and therefore, breaching fiduciary duty owed to IEF Ltd. The court accepted the respondent's evidence that at all material times IEF Ltd was not actively interested in acquiring fresh contracts for postal caller boxes and was not actively pursuing further orders when Umunna resigned or when he obtained the contract with the Cameroon's postal authorities. The court found that Umunna had not breached his fiduciary duty. This was because IEF Ltd's hope of obtaining further orders for postal caller boxes was not a maturing business opportunity. Therefore, Umunna could rightly exploit the opportunity personally.

4.5.2 Opportunity obtained by a director in his private capacity

If a director becomes aware of a business opportunity which -if brought to the attention of the company- it might wish to pursue, but decides to exploit such opportunity in a private capacity, such a director would be in breach of his fiduciary duty.[427] This principle raises questions and uncertainty. The implication of this is that a director should disclose every information which he or she obtains in his or her private capacity which might be of interest to the company. Ferran contends that the strict application of corporate opportunity rule may have a disastrous impact on cost implications, as

[426] *Island Export Finance Limited v Umunna & another* [1986] BCLC 460.
[427] Cassim, R Post-Resignation duties of directors: the application of the fiduciary duty not to misappropriate opportunities, University of Witwatersrand, 744.

directors would be expected to receive remuneration packages which would compensate them appropriately for completely sacrificing their personal interests in all circumstances in favour of those of the company[428]. It sounds or rather appears to be too harsh to expect directors to disclose information which they hear of in their private capacity that might be of interest to the company. However, if a director is granted a wide discretion that he or she decides whether to disclose or not, directors would be unwittingly placing themselves in the position of conflict of interests. This is because a director may in good faith view certain opportunities as not important and sensitive to the company while the company, on the other hand, may believe the contrary.

4.5.3 Inability of the company to take opportunity

There are a number of reasons which could lead to a company being unable to take a business opportunity. Some of these could be financial constraints, the company's memorandum of incorporation or certain contracts which the company has with the other party may prevent it from doing so, or legal constraints hindering it.[429] However, resigning in order to pursue the opportunity that the company is unable to pursue would not absolve the director from liability. In *Industrial Development Consultants Ltd v Cooley*[430] the court made it clear that:

> "When one looks at the way the cases have gone over the centuries it is plain that the question whether or not the benefit would have been obtained but for the breach of trust has always been treated as irrelevant".[431]

It is of no consequence in the particular circumstances of the case that an opportunity would not or could not have been taken up by the company.[432] If directors were to be allowed to take opportunities on the grounds that the company has failed to exploit such opportunity, directors would refrain from exerting their best efforts on behalf of

[428] Eilis Ferran Company Law and Corporate Finance (1999) 195.
[429] Havenga M Çorporate opportunities: A South African update (1996) 8 SA Merc Law Journal 234.
[430] *Industrial Development Consultants Ltd v Cooley* [1972] 2 All SA 783 (A).
[431] *Industrial Development Consultants Ltd v Cooley* [1972] 2 All SA 783 (A).
[432] *Da Silva CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).

the company as the opportunity for profit would be available to them.[433] In *Peso Silver Mines Ltd v Cropper*[434] the court was of the view that a director may resign in order to take an opportunity which the board of directors has rejected. This was criticized on the grounds that it is not easy to establish whether the board of directors rejected the opportunity in good faith and in the interests of the company. It will never be clear whether the interested directors were acting in the best interests of the company or of their fellow directors in rejecting the corporate opportunity.[435]

4.5.4 Motives for resignation as a director

It is possible for the resignation of a director to be prompted or influenced by the desire to take the corporate opportunity for his or her own benefit. The court stipulated the principles applicable to directors who resign from their company in *Canadian Aero Service Ltd v O'Malley*[436] as follows:

> 'An examination of the case law in this court and in the courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired'.[437]

The court did set out two principles that are applicable to directors who have resigned. Firstly, a director may not take opportunity where his or her resignation was motivated by the desire to acquire for himself or herself the opportunity sought by the company.

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[433] *Industrial Development Consultants Ltd v Cooley* [1972] 2 All SA 783 (A).
[434] *Peso Silver Mines Ltd v Cropper* (1966) 58 DLR (2d) 1.
[435] Beck SM 'The saga of Peso Silver Mines: Corporate opportunity reconsidered' (1971) 49 *The Canadian Bar Review* 80.
[436] *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 (SCC).
[437] *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 (SCC).

Secondly, he/she may not do so where it was his/her position with the company, rather than a fresh initiative that led him or her to the opportunity which he later acquired. The second principle was criticized in *Island Export Finance Limited Service Ltd v Umunna*[438] as being very wide. The formulation of the principle could justify holding former directors accountable for profits wherever information acquired by them led them to the source from which they subsequently acquired business. The position of a director with the company provides the director with information about the markets in which the company operates.

This second principle is recognized in South African law. The court in *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC*[439] and *Spieth v Nagel*[440] accepted this principle without any qualification. This raises questions as to whether all former directors are to be held accountable whenever they exploit for their own or a new employer's benefit information, which they have obtained solely because of their position as directors of their former company. The Supreme Court of Appeal in *Da Silva* emphasized that 'the expertise and experience acquired by a director during his period of employment with his company and in general even the personal relationships established by him during that period belong to him and not the company.'[441] A distinction should be drawn between a director's innate knowledge as a business person and extraneous business information which a director acquires while running the affairs of a company, in deciding when to hold a director accountable for exploiting an opportunity.

4.6 Challenges of departing entrepreneurial fiduciaries

Where there are no special circumstances, such as a prohibition in an employment contract, a director will not be in breach of fiduciary duty merely because during his or her period of employment, he/she takes steps to ensure that on ceasing to be a

[438] *Island Export Finance Limited Service Ltd v Umunna* [1986] BCLC 460.
[439] *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T).
[440] *Spieth v Nagel* (1997) 3 All SA 316 (W).
[441] *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 123 (A).

director he or she would be able to immediately set up business in competition with the former company. The court in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*[442] made it clear that setting up a business that competes with the company was not unlawful by stating the following:

> 'The planning of the director's future and the preparatory steps taken to enable him to obtain alternative employment and earn a living even if taken during his month of notice cannot be regarded as against public policy and therefore unlawful. It can therefore not be branded as unfair competition.'[443]

A director is not obliged to disclose to the company that he/she is taking steps to enable him/her to obtain alternative employment. As long as the director does not divert opportunities while he/she is in the process of obtaining alternative employment.

In *London and Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd*[444] the court dismissed a company's application to restrain its chairman and director from acting as director of a rival company on the grounds that the chairman had no contract, express or implied, to give his personal services to the applicant. The case of *Manitoba Ltd v Palmer*[445] concerned a corporate officer who had resigned together with several employees and joined a competitor. The plaintiff sued the defendant for a breach of fiduciary duty in that the defendant diverted a corporate opportunity from the plaintiff by enticing the plaintiff's customers to deal with the plaintiff's competitor and employees to join the competitor. The court had to determine whether no restraint of trade agreements had been entered into with the employee and whether the employee owed any fiduciary duty to the company as in the case of a director. The court held that Palmer was in a fiduciary relationship with the plaintiff and this duty continued and survived defendant's resignation. The court had to strike a balance between the need of a company to impose fiduciary duty upon its managerial

[442] *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T).
[443] *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T).
[444] *London and Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd* [1881] WW 165 (ChD)
[445] *Manitoba Ltd v Palmer* (1985) 7 CPR (3d) 477 (BC).

employee against the need of the individual to earn a living and to be in productive employment.

In *Christie (WJ) & Co v Greer & Sussex Realty & Insurance Agency Ltd*[446] the court observed that there is nothing to prevent an ordinary employee from terminating his employment, and normally that employee is free to compete with his former employer. The right to compete freely may be constrained by a contract. However, it is different for a director who occupies a fiduciary position. Upon his/her resignation and departure that person is entitled to accept business from his/her former client, but direct solicitation of that business is not permissible. Having accepted a position of trust, the individual is not entitled to allow his/her own self-interest to conflict with fiduciary responsibilities. The solicitation of former clients traverses the boundary of acceptable conduct.

4.7 The position a director held in the company

The information that comes to directors merely because of their position in the company can be general in nature and it will be therefore unreasonable, unrealistic and too harsh to expect former directors to refrain from using such information indefinitely.[447] In modern times directors are appointed because of their expertise. This means that it was the knowledge which the particular director possessed which made the company interested in hiring the particular director. When he or she resigns, everything a director knows belongs to the company. Even in circumstances where a director is dismissed by the company, it will be prejudicial to expect him or her to abstain from using business contacts and information acquired during his or her term of office in order to establish alternative employment. However, this does not encourage a director to use information which he or she acquired by virtue of his or her position as a director in order to benefit from a corporate opportunity after resignation. A director is free to use his or her own knowledge and skills, which are

[446] *Christie (WJ) & Co v Greer & Sussex Realty & Insurance Agency Ltd* 121 DLR 472.
[447] Michele Havenga 'Corporate opportunities: A South African update (Part 2)' (1996) 8 SA *Merc LJ* 233.

not regarded as belonging to the company, but the information, must not amount to trade secrets or confidential information of the company.

4.8 A director setting up a competing business

A director will not commit a breach of his fiduciary duty merely because -during his or her notice period- he or she took steps to ensure that, on ceasing to be a director, he or she would be able to immediately set up business in competition with his former company unless there is a prohibition in an employment contract to that effect. In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*[448] the court made it clear that setting up a business in competition with the company was not unlawful by stating the following:

The planning of the director's future and the preparatory steps taken to enable him or her to obtain alternative employment and earn a living, even if is taken during his/her month of notice cannot be regarded as against public policy and therefore unlawful. It can therefore not be branded as unfair competition. It is not important or there rests no obligation on the director's part to disclose to the company that he or she is taking such steps. But as part of the steps, he/she may not diverge opportunities to himself/herself.

In *Da Silva v CH Chemicals (Pty) Ltd*[449] Jose Da Silva, a managing director of CH Chemicals (Pty) Ltd, had resigned from Chemicals (Pty) Ltd and while serving out his notice period he had acquired two shelf companies and had changed their names to Resinex Plastics (Pty) Ltd and Resinex Southern Africa (Pty) Ltd. Jose was appointed director of both companies and hired premises for the two companies. In accordance with and in full agreement with the principles laid down in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*[450], the Supreme Court of Appeal unanimously found that on a common sense approach this conduct did not amount to a breach of

[448] *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T).
[449] *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 SCA).
[450] *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T).

Da Silva's fiduciary duty or to unfair competition on the part of the second defendant on whose behalf the steps were taken.[451]

However, Da Silva had taken a further step than incorporating companies which would in the future compete with Chemicals (Pty) Ltd. While he was serving his notice period but acting for and on behalf of Resinex Plastics (Pty) Ltd, he had purchased three containers of a plastic substance called linear low density polyethylene (LLDPE), which he had arranged to be sold by Resinex Plastics (Pty) Ltd to a local South African Company. Da Silva argued that his conduct did not amount to a breach of fiduciary duty as Chemicals (Pty) Ltd did not deal with LLDPE products and that purchasers of the LLDPE products were not existing clients of Chemicals (Pty) Ltd. The Supreme Court of Appeal found that any transaction involving the purchase and sale of plastic products did fall within the scope of the business of Chemicals (Pty) Ltd and that any purchaser of plastic products in South Africa was a potential customer of Chemicals (Pty) Ltd.

The Supreme Court of Appeal stated that it may be difficult in certain circumstances to decide where to draw a line when adopting a common sense approach. The court was satisfied that the transaction in question was one which Da Silva, while still the managing director of Chemicals (Pty) Ltd, was obliged to pursue for the benefit of Chemicals (Pty) Ltd and not for the benefit of Resinex Plastics (Pty) Ltd. The court held that Da Silva's conduct amounted to a breach of his fiduciary duty owed to plaintiff and to unfair competition on the part of the second defendant on whose behalf the transaction was concluded. This approach is best expressed in *Balston Ltd v Healine Filters Ltd,*[452] where Falconer J expounded the legal principles relating to a director who sets up a business in competition with the company after his/her directorship has ceased as follows:

In my judgment an intention by a director of a company to set up business in competition with the company after his or her directorship has ceased is not to be

[451] *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 SCA).
[452] *Balston Ltd v Healine Filters Ltd* [1990] FSR 385.

regarded as a conflicting interest within the context of the principle, having regard to the rules of public policy as to restraint of trade, nor is the taking of any preliminary steps to investigate or to forward that intention as long as there is no actual competitive activity such as competitive tendering or actual trading while he or she remains a director.

4.9 Conclusion

There are certain circumstances where it may be appropriate to hold a former director accountable to his company for appropriating corporate opportunities which occur after resignation. Some of these circumstances include instances where a director resigns in order to take up personally a maturing business opportunity that the company is actively pursuing, where he or she obtains the opportunity in his or her private capacity, where he/she pursues an opportunity which his/her company is unable to take (not including opportunities which the board of directors has bona fide and for sound reasons rejected), where his or her resignation is prompted or influenced by a wish to acquire the opportunity for himself or herself and where his/her position with the company led to the opportunity which he or she acquired after his/her resignation. The courts apply these circumstances based on the merits of each case.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The reason the research was conducted was to establish how a balance can be struck between where a director can safely acquire an opportunity that comes to him or her in the course of his or her duties to personal use and when such an opportunity must be reserved for the company. The interests of the company should be protected while advancing individual's economic wellbeing.

A company is an artificial person and therefore it cannot perform its own functions.[453] Real persons are needed to represent it and to act on its behalf. These persons are the directors and shareholders.[454] They derive their powers from the company's

[453] Law Teacher "A company is an artificial person created by law" https://www.lawteacher.net/free-law-essays/business-law/a-company-law-essays.php accessed 07 February 2021.
[454] Law Teacher "A company is an artificial person created by law" https://www.lawteacher.net/free-law-essays/business-law/a-company-law-essays.php accessed 07 February 2021.

legislation and the Memorandum of Incorporation. The directors are the agents of the company.

There are different types of directors; namely, a de facto director, who is one who acts in the position of a director, one appointed in terms of the Memorandum of Incorporation. There is also *ex officio* director, who is a director of a company as a result of holding some other office. The next type is the alternate director, who is appointed or elected to serve as such occasion requires, as a member of the company in substitution for a particular elected director of that company. He or she only acts in the absence of his or her appointor. The last director is one who is appointed by the shareholders to serve as a director for an indefinite term or for such a term as stipulated in the Memorandum of Incorporation.[455]

Directors have different statuses. They may be agents of the company, trustees, managing partners, or employees. However, the true status of a director is *sui generis,* as they stand in a class of their own. These directors are appointed. There is an initial appointment, appointment by the shareholders, appointment by the board of directors or other stakeholders or outsiders.[456]

During a director's employment, directors are vested with a number of responsibilities. Directors ought to always act in the best interests of the company. Furthermore, they need to put the company first and disregard their own interests.[457] The duties of directors have been codified in the Companies Act.[458] This codification is said to help provide clear and efficient guidelines to clearly identify the scope of their duties.[459] However, the codification has been found to lack flexibility; hence, common law continues to be in use, to ensure flexibility and further development.[460] At common

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[455] Section 66 (4) of the Companies Act 71 of 2008.
[456] Section 68 (1) of the Companies Act 71 of 2008.
[457] Harvard Law Review 'Corporate Opportunity' (1961) 74 (4) *The Harvard Law Review Association* 765.
[458] Farouk HI, Cassim R, Jooste R, Shev, J and Yeats J Contemporary Company Law (Juta and Company, South Africa, 2012) 507.
[459] Farouk HI, Cassim R, Jooste R, Shev, J and Yeats J Contemporary Company Law (Juta and Company, South Africa, 2012) 508.
[460] AO, Nwafor "The Corporate Opportunity Doctrine- An Inflexible or Flexible Rule" (2013) 9 (2) *Corporate Board: Role, Duties and Composition 9.*

law, the contracts entered into by a director, is voidable at the instance of the company. In addition, statutory intervention allows the board to approve the contract.[461]

The fiduciary duties of a director have been discussed in detail in this work. Amongst other duties, there is a duty of a director not to take corporate opportunities, the duty to act in the best interests of the company, to act for proper purpose, the duty to exercise independent judgment, duty to act within their powers, and the duty to avoid conflict of interests.[462]

These duties have been put in place in order to safeguard the interests of the company and to ensure that directors know the scope of their duties. This will enable the directors to perform efficiently in their workplace. Most importantly, this was put in place in order to ensure that directors do not appropriate to themselves opportunities that belong to the company. A director who usurps corporate opportunities will be deemed to have breached their fiduciary duties.

In instances where a director becomes aware of the opportunity while serving in his or her position as a director in the company, it will result in that opportunity belonging to the company. It is deemed to be a corporate opportunity. The fact that he or she acquired the knowledge or information of the particular opportunity when he or she was rendering services to the company makes such opportunity corporate.[463] It may also happen that a company may be unable to obtain or exploit the opportunity. Its inability to do so does not set free a director to exploit the opportunity.[464]

There are different tests that are applied to establish whether the opportunity that a director is pursuing is corporate or not. These tests include the scope of business, the line of business test, the conflict test, the general fairness test, and the position test.

[461] Section 75 (3) of the Companies Act 71 of 2008.
[462] Section 76 (3) (a) of the Companies Act 71 of 2008.
[463] P Khumalo The Corporate Opportunity Rule: Are Directors allowed to make A Secret Profit at the Expense of the Company hhttps://m.polity.org.za accessed 24 July 2019.
[464] *Bhullar v Bhullar* [2003] 2 BCLC 241 (CA).

The courts seem to favour the corporation rather than individual directors in matters where corporate opportunity is in issue.[465]

These duties of directors are now codified by the 2008 Act.[466] The codification demands for a more accountable corporate landscape in South Africa. The Companies Act regulates the fiduciary duty to avoid conflict of interests in respect of a director's personal financial interest, their standards of conduct, their liability, indemnification and insurance. If a director is employed by the company and wishes to pursue the opportunity which he or she is interested in personally, he or she ought to disclose that opportunity to the company (shareholders or board of directors).[467] The disclosure assists the company to make an informed decision on whether or not to approve the transaction in which the director has an interest.

Anything could happen to a director during the course of his or her employment. He or she can get fired, resign, or even retire. After the occurrence of any of these, director's life ought to continue. Thus, he or she needs to work in order to earn a living. However, whatever step that he or she might intend to pursue must be within the confines of the law. Many elements are involved in this scenario (scenario in which a director resigns or retires). Different writers have presented their views on this issue, as discussed in this work.[468] They have different views when it comes to the extension of fiduciary duties after resignation or retirement. Some argue that fiduciary duties no longer apply to ex-directors, unless the breach adversely affects an interest of the company and that interest is worthy of protection.[469]

There are several factors which are taken into account when considering whether the corporate opportunity rule should apply after the resignation of a director. These

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[465] G, Harvey, "The Corporate Opportunity Doctrine-Recent Cases and the Elusive of Clarity" (1997) 31 (2) *University of Richmond Law Review* 371.
[466] The Companies Act 71 of 2008.
[467] Section 75 (5) (a) to (c) of the Companies Act 71 of 2007.
[468] A Cassim "Post-Resignation Duties of Directors: The Application of the fiduciary duty not to misappropriate corporate Opportunities" (2008) 125 (4) *South African Law Journal* 733. Talley, E and Hashmall, M The corporate Opportunity Doctrine (2001) https://weblaw.usc.edu/why/academics/cle/icc/assets/docs/articles/iccfinal.pdf (accessed 19 July 2019).
[469] C.A Friedlander, The aftermath: Resignation of a director and the surviving fiduciary duties.

include maturity of the business opportunity that the company is actively pursuing, opportunity obtained by the director in his private capacity, the company's ability to take the opportunity, the director's motive for resigning and the position in that company that led the director to the opportunity which he or she acquired after his or her resignation.[470]

In general, where there are no special circumstances, such as a restraint of trade, a director will not breach a fiduciary duty because he/she has set up a business in competition with his or her former company. However, it should be noted that each case is considered on its own merits.

5.2 Recommendations

The issues around different types of directors, what is corporate opportunity doctrine and its implications and the duties that directors owe after resignation from the company, were discussed in previous chapters.

Directors are free upon termination of their appointment to use their knowledge, expertise, memory and skills, provided that they do not disclose the secret processes or trade secrets of the former company to the new or rival company. It is therefore advisable that when drafting corporate documents, where individuals are shareholders, directors and employees should consider the key agreement provisions, such as corporate opportunities, confidentiality, shareholder restraints, restraints of trade, inventions, copyrights and discoveries of the company. The restraint of trade clause provides that an employee after termination of employment is restrained from performing similar work or accepting future employment in competition with his or her current employer, usually for a certain period of time after his or her termination of employment. There is no piece of legislation which regulates restraint of trade rights and thus is strictly a contractual agreement between employer and employee.

[470] SA Kleyhans, The corporate opportunity rule: A comparative study, University of South Africa, 2016.

Every citizen has the right to choose a trade, occupation, or profession freely. However, restraint of trade agreements is completely legal and enforceable against South African employees. These agreements are there to protect business from having its core services stolen from it.

There are limits to a director's ability to compete with the previous company. A former director would be in breach of his/her fiduciary duties to a company to the extent that he/she uses confidential information, trade secrets or appropriates a corporate opportunity of his/her former company.

The law of appropriation of corporate opportunities remains a complex and developing area in company law in South Africa and other jurisdictions around the world. More specifically, with regard to how to classify a corporate opportunity.

5.3 Suggestion for future research

The aim of this study was to discover how best to protect the interests of the company through the instrumentality of the corporate opportunity doctrine, without placing fetters on the advancement of individuals' economic wellbeing, by utilising skills and knowledge (information) acquired in the course of performing fiduciary duties. This aim was achieved; however, the law of corporate opportunity is still developing, and each case ought to be judged on its merits. Future research could examine how best to redefine corporate opportunity concept without necessarily placing fetters on how a director can use acquired skills and knowledge in a post-directorship undertaking.

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