THE MAKING OF RIGHT CHOICES BETWEEN SHAREHOLDERS AND STAKEHOLDERS IN CORPORATE OPERATIONS IN SOUTH AFRICA

A DISSERTATION SUBMITTED IN FULFILLMENT OF THE REQUIREMENTS OF THE LLM DEGREE

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AT THE SCHOOL OF LAW, UNIVERSITY OF VENDA

(2018)

DECLARATION

I, **OPHELLIA KIMBINI (Student No. 11633456),** hereby declare that this dissertation for the LLM degree at the University of Venda, hereby submitted by me, has not been submitted previously for a degree at this or any other university, and that it is my own work in design and in execution, and that all reference materials contained therein have been duly acknowledged.

STUDENT

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DEDICATION

This research is dedicated to my husband, Courage Matobobo, whose support was tremendous throughout this research.

ACKNOWLEDGEMENT

First and foremost, special thanks goes to the Almighty God for the wisdom, good health, skills and strength to do this research.

I am also indebted to my supervisor, Prof. AO Nwafor for his tremendous support, guidance and encouragement throughout the writing of this dissertation.

I owe a debt of gratitude to my husband, Courage Matobobo for his great support and prayers. Without his prayers and support I could not have achieved anything. I also extend my sincere gratitude to my parents for their support and prayers for the research.

Last but not least I would like to thank my friends and my family members for their prayers and their moral support.

LIST OF ABBREVIATIONS AND ACRONYMS

CBCA	Canada Business Corporations Act
CIC	Community Interest Company
CRS	Corporate Social Responsibility
ESVA	Enlightened Shareholder Value Approach
EU	European Union
MOI	Memorandum of Incorporation
MSG	Monosodium glutamate
SVA	Shareholder Value Approach
UK	United Kingdom

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ABSTRACT

For a considerable period of time the primary goal of corporations was seen as being to increase the wealth of the investors (shareholders). Priority was given to shareholders' profit maximisation at the very expense of stakeholders` interests in corporate governance. Stakeholders` interests were seen to be falling outside the range of the needs and objectives of the corporate world. However, in contemporary times, schools of thought have emerged which proposed that the corporations should not solely focus on maximising profit for the benefit of shareholders but should consider the interests of stakeholders in the management of their affairs. This issue has attracted enormous debate and arguments have been brought forward to support the view that those in management positions should consider stakeholders` interests in the corporate governance. However, there is no unanimity among scholars on what should be the right approach. It is against this backdrop that the study therefore assesses how companies are practically run in order to determine whether the interests of stakeholders are considered in corporate governance as much as they should. This dissertation explores, through doctrinal and empirical methods, the conflicting theories and existing debates on corporate governance and to show that it is for the good of the company as an entity that there be equal recognition and treatment of the two groups of the competing interests in corporate operations. The research employed the doctrinal research approach in order to evaluate the positions advocated by the different schools of thought as well as to give a comparative analysis of the position of the law in cognate jurisdictions on this matter. The empirical research approach, through questionnaires, was used to collect qualitative data from different stakeholders of different categories of chosen companies in order to ascertain from the perspective and actual experiences of stakeholders the extent to which companies consider the interests of stakeholders. The research established that, in the main, companies do not consider the interests of stakeholders and in cases where they do, the interests of shareholders are still dominant to those of stakeholders. Recommendations are made from inferences drawn from the study on how to guarantee an enhanced protection of the stakeholders' interests in the corporate scheme.

Keywords: Shareholder, Stakeholder, Directors, Company, Interests, Protection

CHAPTER 1

INTRODUCTION OF THE STUDY

This chapter gives an overview of the research. It introduces the research topic, provides a brief background of the study, statement of problems, aims and objectives, research questions, scope of the study, justification of the study, hypothesis, research methodology, literature review, definition of key terms, ethical considerations, limitations of the study and chapter outline.

1.1 Background of Study

Corporate governance is a term which emerged around the 1980s.[1] Prior to that period, it was not such a familiar concept. It was only around the 1990s that this concept held grip in company law and attempts to define it started.[2] There is no universal way of defining this concept. In terms of the UK Cadbury Report, corporate governance is defined as "the system by which companies are directed and controlled."[3] A recent and more elaborate definition of that concept was proffered by Du Plessis who opined that corporate governance is:

> The system of regulating and overseeing corporate conduct and of balancing the interests of all internal stakeholders and other parties (external stakeholders, governments, and local communities) which can be affected by the corporation`s conduct, in order to ensure responsible behavior by corporations and to create long-term, sustainable growth for the corporation.[4]

Noteworthy is that at the heart of the above definitions is the issue of control and management. This issue gave birth to the debate in corporate governance. This debate in corporate governance became particularly prominent when the basic perception of the company changed. Previously maximization of profit was the only real concern for a company.[5]

It is trite law that a company is a separate legal entity. This means that it exists and is treated as separate from its members. It functions through its board of directors. In *Salomon v Salomon & Co Ltd*[6], the court established that a company is a separate legal entity distinct from its members. Holding shares in a company does not invariably entail that the holders of such shares have become the company itself. Section 19(1) of the South African Companies Act,[7] provides that

[1] B Tricker, *Corporate Governance: Principles, Policies and Practices* 2nd ed (2012) p 4.
[2] JJ du Plessis, A Hargovan, M Bagaric and J Harris, *Principles of Contemporary Corporate Governance* 3rd ed (2015) p 4.
[3] Report of the Committee on the Financial Aspects of Corporate Governance (1992) para 2.5.
[4] Du Plessis *et al* (note 2 above) p 13.
[5] Tricker (note 1 above).
[6] [1897] AC 22 (HL).
[7] 71 of 2008 (the new Act).

"[f]rom the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company is a juristic person, which exists continuously until its name is removed from the companies register in accordance with this Act." It is of importance to note that the section implicitly suggests that even if a company is to lose all its members, it remains an incorporated company until it has been deregistered. This therefore reinforces the legal standing that a company exists as an entity which is independent of its members.

It is axiomatic that although a company is a separate legal entity capable of having rights and duties, it cannot, however, perform its duties on its own as it does not have the hands or brain to run its business. In *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*[8] the court captured the status of a company as follows:

> [A] corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

This means that the company must have a channel of leadership in the form of natural person(s) for the company to function as a going concern. It is against such backdrop that a company is mandated to have a board of directors which manage the affairs of the company. This is specifically stated in section 66 (1) of the new Act which 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 this Act or the company's Memorandum of Incorporation provides otherwise.

The wording of the section, particularly the use of the word "must", points to the fact that it is imperative for every company to have directors or at least one director, depending on the type of the company.[9] This actually implies that shareholders are not necessarily the ones who manage the affairs of the company. It is submitted that this separation of ownership and control thereof could lead to a situation whereby directors of the company usurp their control function to their advantage and to the detriment of the shareholders. This is why directors are monitored to ensure that they control companies in ways that serve the interests of the shareholders of the company.[10]

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[8] [1915] AC 705 (HL) p 713.
[9] See s 66(2) of the Companies Act.
[10] GJ Rossouw, A Van der Watt & DP Malan, 'Corporate Governance in South Africa' (2002) 37 (3) *Journal of Business Ethics* 289.

Noteworthy is that being the directing mind of the company does not confer on the board of directors the liberty to run the affairs of the company as they please. In *The Bell Group Limited v Westpac Banking Corporation (No. 9)*[11], Owen J made the following comments in relation to the role of directors in corporate governance:

> [D]irectors are in control of the assets of a corporation but they do not own those assets. They control the assets on behalf of the corporation and, through the corporation, others having an interest in the wellbeing of the entity. There are no hard and fast rules that constitute corporate governance. But there are some basic underlying principles that help to explain the guidelines and legal principles that have developed over time and now dictate how a director is expected to carry out her or his responsibilities.

To that end, there are specific duties assigned to directors and one of their fundamental duties is the duty to act in good faith in the best interests of the company. Section 76(3) of the new Act provides that a director of a company must exercise the powers and perform the functions of a director in the best interests of the company. A question which gave birth to great contention in the legal fraternity in this context is, what is the meaning of "best interests of the company?" Noteworthy is that this section does not clarify the meaning of "interests of the company" in this context.

It is important to note that, although the term "interests of the company" is not defined, at common law, interests of the company is construed as synonymous with the interests of the shareholders. Cassim *et al* state that "[a]t common law there is copious authority for the view that the words 'interests of the company' in this context refer not to the legal entity itself, but rather to the interests of the collective body of present and future shareholders."[12] In *Greenhalgh v Arderne Cinemas Ltd*[13] the court stated that the phrase 'company as a whole' does not mean the commercial entity as distinct from the shareholders. It means the shareholders or incorporators as a general body. In the Australian case of *Kinsela v Russel Kinsela (Pty) Ltd*[14] the court alluded to this where it stated that "the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duties of directors arise". Therefore, at common law, the expression 'best interests of a company' has generally been construed to mean interests of shareholders collectively.

[11] [2008] WASC 239 (28 October 2008) [4362].
[12] FHI Cassim 'The Duties and the Liability of Directors' in FHI Cassim, M Cassim, A Cassim, R Jooste, J Shev & J Yeats (eds) *Contemporary Company Law* 2nd ed (2012) p 515.
[13] 1951 Ch 286.
[14] (1986) 10 ACLR 395 CA NSW p 401.

Following the above proposition, it had been argued that the major objective of the company is to maximise profit for the benefit of shareholders, a group which has great financial interest in the company.[15] Traditionally, maximising profit for shareholders of the company was accepted as the director's ultimate goal. The only real concern for a company was maximisation of profits for shareholders. Any transaction which, at face value, did not yield financial gain to the company was considered to be outside the ambit of directors` duties and to be against the object of the company. This position was explicitly adopted in *Re Lee Behrens & Co Ltd*[16] where the court held that the issuing of pension funds to the director`s wife, according to the agreement among the directors, was *ultra vires*, not being to the benefit of the company. But it has never been denied that the shareholders are not the only ones that contribute to or are interested in the companies' success. There are others such as creditors, employees, consumers, the community and even the environment where the company operates that equally have a stake in the success of the company.[17]

The argument that the directors should manage the affairs of a company with the object of maximising profit for shareholders is often expressed in what is termed as the Shareholder Value Approach (SVA).[18] The SVA refers to the concept that the primary objective of a company is to increase the wealth of its shareholders by paying dividends and/or causing the share price to increase.[19] Arguable is that, having profit maximization as the ultimate and only goal leads to the neglect of interests which other persons may have in the company. Indeed, more often than not, profit maximisation is done at the very expense of stakeholders interests.

The disregard of the interests of stakeholders in pursuit of profit maximization for the benefit of the shareholders has given rise to an existing debate as to how best to run the corporations. Some scholars have advocated for the inclusion of stakeholders' interests in the management of a corporation`s affairs. Such an approach to corporate governance is referred to as the Enlightened Shareholder Value Approach (ESVA).[20] It is also argued that this approach does not best protect the interests of stakeholders in corporate governance hence other schools of thought,

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[15] AA Berle 'Corporate Powers as Powers in Trust' (1931) 44 (7) *Harvard Law Review* 1049.
[16] [1932] 2 Ch 46 (ChD).
[17] AO Nwafor 'Shareholders Profit Maximisation and Stakeholders Interests in Corporate Governance' (2014) 11 (4) *Corporate Ownership & Control* 670.
[18] A Keay 'Ascertaining the Corporate Objective: An Entity Maximization and Sustainability Model' (2008) 71 (5) *The Modern Law Review* 663.
[19] Keay (note 18 above) p 675.
[20] PL Davies 'Enlightened Shareholder Value and the New Responsibilities of Directors' available at *http://law.unimelb.edu.au/__data/assets/pdf_file/0014/1710014/94* (accessed on 02 August 2017).

which are discussed below, also emerged which advocates for more strict monitoring of corporations.

Arguments have been brought forward that companies should be mandated to consider the interests of stakeholders at equal length as those of the shareholders in the pursuit of their business objectives. This is the position adopted by the exponents of the pluralist theory who argue for the statutory imposition of enforceable obligation on directors to consider the interests of all stakeholders.[21] It is argued that without statutory imposition of some legal sanctions on corporations for them to consider the interests of stakeholders in the management of the corporations' affairs, stakeholders' interests will remain subservient to those of the shareholders.[22]

1.2 Statement of Problems

The ideal manner of corporate governance which would guarantee fairness to the competing interests in the corporate scheme is the equal treatment and recognition of the interests of stakeholders and shareholders. For such state of affairs to be achieved, there should be statutory imposition of enforceable obligation, which is lacking at the moment, on directors to consider the interests of all stakeholders. There are quite a number of methods (for example the use of unhealthy ingredients) used by corporations to maximize profit which have detrimental effects on stakeholders. When directors are making decisions which they deem to be in the best interests of the company, they must do so fully avoiding any measures which bring negative impact to stakeholders. In other words, profit should be maximized but not at the expense of the stakeholders` interests.

Unfortunately, at common law, it is held that corporations should be run in the best interests of the shareholders.[23] Section 76(3) (b) of the new Act states that a director of a company must exercise the powers and perform the functions in the best interest of the company. The words "interest of the company" in this context is a synonym for the interests of the shareholders of the company.[24] In other words, directors must act in the best interests of the shareholders. The King IV Report which lays the guidelines for corporate governance in South Africa has not made the desired impact in addressing issues relating to the stakeholders interests as it remains a self-regulatory instrument and does not have the force of a legislation.[25] The interests of the

[21] Nwafor (note 17 above).
[22] Nwafor (note 17 above).
[23] See note 14 above.
[24] FHI Cassim The Practitioner`s Guide to the Companies Act 71 of 2008 (2011) p 82.
[25] Cassim (see note 24 above).

stakeholders are still not being given the desired protection in the corporate sector. This is especially evident in manufacturing companies. Some products are manufactured using unhealthy ingredients, in a bid to reduce costs, and these ingredients are concealed from the consumers who use the products at their own peril.[26] The new Act does not provide for directors to take into account the interests of other stakeholders in their decision making. It only states that directors should manage the affairs of a company in the best interests of the company, a synonym for shareholders, and is silent on the interests of stakeholders.[27] The researcher is concerned that unless there is an explicit statutory provision in the company's statute which mandates the directors to consider the interests of stakeholders other than the shareholders in the corporate scheme, such interests will remain subservient to those of the shareholders and which is disadvantageous to the stakeholders.

The researcher proposes to examine the current mechanisms which advocate for the recognition of the stakeholders` interests and to establish their adequacy. The researcher will recommend procedures and measures which can be taken to fully protect the interests of stakeholders in corporate governance.

1.3 Aim

The aim of this research is to show that stakeholders other than the shareholders contribute equally to the success of the company and as such deserve equal protection as the shareholders in the corporate operation.

1.4 Objectives

Pursuant to the above aim, the researcher has the following objectives:

- To analyse the directors` duty to act in the best interests of the company.
- To examine the current theories on the exercise of director`s fiduciary duties.
- To identify the effects of non-compulsion of recognition of stakeholders` interests in corporate governance.
- To identify the company's stakeholders and analyse their contributions to the success of the company.
- To adduce reasons why all the stakeholders including shareholders should enjoy equal protection in the corporate scheme.

[26] V Goldschmidt '12 Dangerous And Hidden Food Ingredients In Seemingly Healthy Foods' available at *https://saveourbones.com/12-dangerous-ingredients/#* (accessed on 08 October 2017).
[27] Cassim (see note 24 above).

1.5 Research Question

The question which is germane to this study is: whether the phrase “interest of the company” as used in the company’s statute can be expanded to include interests of all the stakeholders in the corporate scheme and in such a manner as would confer rights on the stakeholders to seek personal reliefs against the company and/or directors for a breach thereof?

1.6 Scope of the study

The study examines the fiduciary duty of directors to act in the best interests of the company and to ascertain to whom this duty is owed. In other words, it seeks to explore the meaning of “interests of the company” in this context and to discover whether the meaning can significantly be expanded to cover the interests of all stakeholders in corporations. The study will expose the inadequacies inherent in adopting the common law narrow approach in defining that concept as seems to be presently the case under the new Act provisions. Arguments will be adduced for a more inclusive and broad approach which incorporates all the interests competing for recognition within the corporate scheme for an enhanced successful corporate operations in the society.

1.7 Justification of the Study

Corporations are the backbone of the global economy. It is, therefore, important that directors, when managing the affairs of the company, not only be profit making minded but should bear in mind the impact which corporations may have on all the stakeholders. To the extent that the interests of stakeholders are not considered in corporate governance, corporations should be monitored to ensure that the interests of stakeholders in corporate governance are not sidelined in a bid to maximize profits for shareholders. This study is relevant as it seeks to ensure that stakeholders’ interests in corporate governance are considered not as a means to an end but as an end themselves. In other words, it is important that stakeholders` interests be taken into account not only when doing so is to the benefit of shareholders.

More so, this study is relevant because negative impacts of companies on stakeholders are highly increasing in this generation and stakeholders are at peril. In food manufacturing companies, for example, some foods are being made with unhealthy ingredients which in some cases could result in fatal consequences. The research will, therefore, provide methods in which corporations can be run in such a way that both interests of shareholders and other stakeholders are equally protected in corporate operations.

1.8 Research Hypothesis

A hypothesis is defined as a "concise, falsifiable statement that is subjected to observational testing as part of a scientific investigation."[28] It is a "prediction of what will be found at the outcome of a research project and is typically focused on the relationship between two different variables studied in the research."[29] It is usually "based on both theoretical expectations about how things work and already existing scientific evidence". A hypothesis can take two forms. It can "predict that there is no relationship between two variables, in which case it is a null hypothesis, or it can predict the existence of a relationship between variables", which is known as an alternative hypothesis.[30]

A hypothesis is very pivotal in academic writing. It acts as a guide to the researcher by way of providing the direction, pointing to enquiry, enabling to select pertinent facts and helping to draw specific conclusions.[31] The function of a hypothesis is described as directing the researcher`s search for order among facts and without it the research is unfocussed and becomes "a random empirical wandering."[32]

This work proceeds from the hypothesis that stakeholders contribute to the success of corporate operations and bear the risk of corporate failure equally as the shareholders but that the interests of the stakeholders, other than the shareholders, are not given the deserved protection in the corporate scheme.

1.9 Research Methodology

There are several research methods such as the qualitative and quantitative methods. The quantitative method collects data in the form of numbers whereas the qualitative technique is in the form of words.[33] A legal research could take the form of empirical study, historical study, comparative study or doctrinal study. For the purposes of this research, the researcher adopted both doctrinal and empirical research approaches.

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[28] 'Hypothesis and Hypothesis Testing (Social Science)' available at *http://what-when-how.com/social-sciences/hypothesis-and-hypothesis-testing-social-science/* (accessed on 28 September 2017).
[29] A Crossman 'Definition of Hypothesis' available at *https://www.thoughtco.com/definition-and-types-of-hypothesis-3026350* (accessed on 28 September 2017).
[30] Crossman (note 29 above).
[31] A Choudhury 'Role of Hypothesis in Social Research' available at *http://www.yourarticlelibrary.com/social-research/hypothesis/role-of-hypothesis-in-social-research/64504/* (accessed on 28 September 2017).
[32] Choudhury (note 31 above).
[33] M McConville and W Hong Chui, *Research Method for Law 2nd ed* (2017) p 18.

1.9.1 Doctrinal Research

This research method entails the study of legal texts. It involves data collection from sources such as text books, newspapers, government documents, case law, legislation, legal periodicals, written records from published articles and the internet.[34] The doctrinal research method seemed to be the preferred method for this research as the researcher intended to extensively analyse the current law and pieces of work by other writers in order to justify the need for statutory compulsion of the recognition of stakeholders` interests in corporate governance. But the researcher intended to go beyond a mere doctrinal inquiry in the work. The researcher therefore sought to investigate the realities of corporate operations in given localities to ascertain the extent to which the interests of all the stakeholders other than shareholders are factored in in the corporate operations. In other words, the researcher also adopted an empirical approach in conducting this research.

1.9.2 Empirical Research

Cahoy explains empirical research as research "based on observed and measured phenomena and derives knowledge from actual experience rather than from theory or belief."[35] The empirical research method is employed in this research, on the other hand, to compliment the doctrinal research method. This method was used so as to get the actual experiences of stakeholders from corporate operations in order to draw meaningful conclusions and to fulfil the aim of this research.

1.9.2.1 Research Design

The research design refers to the overall strategy that a researcher chooses to integrate the different components of the study in a coherent and logical way, thereby, ensuring that the research problem is effectively addressed.[36] It constitutes the blueprint for the collection, measurement, and analysis of data. The function of a research design is to ensure that the evidence obtained enables the researcher to effectively address the research problem logically and as unambiguously as possible.[37]

[34] J Sanjeyvignesh 'Types of Legal Research needed for Law Reform' available at *http://www.academia.edu/7146989/TYPES_OF_LEGAL_RESEARCH_NEEDED_FOR_LAW_REFORM* (accessed on 27 July 2017).
[35] E Cahoy 'Empirical Research in Education and the Behavioral/Social Sciences' available at *http://guides.libraries.psu.edu/emp* (accessed on 21 September 2017).
[36] 'Organizing Your Social Sciences Research Paper: Types of Research Designs' available at *http://libguides.usc.edu/writingguide/researchdesigns* (accessed on 02 November 2017).
[37] See note 36 above.

In this research, a case study approach is adopted. Yin defines the case study research method "as an empirical inquiry that investigates a contemporary phenomenon within its real-life context; when the boundaries between phenomenon and context are not clearly evident; and in which multiple sources of evidence are used."[38] In most cases, a case study method selects a small geographical area or a very limited number of individuals as the subjects of study.[39] The researcher did a case study of the Western Cape Province. The Western Cape Province is one of the nine Provinces in the Republic of South Africa. The Province has a high concentration of corporate entities operating in the manufacturing and retail sectors of the South African economy. Data was collected from three different categories of selected companies, namely, manufacturing companies, service provider and retail companies. The case study approach provides basic information on the stakeholders` experiences in these corporations whose line of businesses are diverse and whose operations, therefore, have different impacts on the stakeholders, thereby enabling the researcher to address the research question and to fulfil the aim of this research.

1.9.2.2 Participants and Sampling

Sampling is the process of selecting units, for example, people or organization from a population of interests so that the results from the studied sample may be fairly generalized back to the population from which they were chosen.[40] For the purposes of this research, the method of sampling which is used is Purposive Sampling which is also known as judgmental sampling**.** Purposive sampling is a form of non-representative method of sampling which is used to serve a particular or specific purpose.[41] The researcher collected data from three diverse groups of participants. The first group comprises of different stakeholders such as employees, customers and members of the surrounding communities where the chosen companies operations are centred. The second group comprises of the directors of the selected companies in order to ascertain the extent to which they incorporate the stakeholders' interests in the corporate decision making as informed by their understanding of the phrase 'interests of the company' as embodied in the new Act. As far as directors of companies are concerned, the researcher used secondary data obtained in the public realm as it was difficult to get primary data from the directors. Forty-

[38] R Yin *Case study research: Design and methods* 2nd ed (1994) p 13.
[39] Z Zainal 'Case study as a research method' (2007) p 1 available at *http://psyking.net/htmlobj-3837/case_study_as_a_research_method.pdf* (accessed on 31 October 2017).
[40] 'Research Methods: Knowledge Base' available at *https://www.socialresearchmethods.net/kb/sampling.php* (accessed on 25 September 2017).
[41] See note 40 above.

five stakeholders were chosen for this sample, five employees per company, five customers per company and five members who reside in the vicinity of each of the companies.

These two groups of participants were purposively chosen to determine the level of divergences between the data collected from those running the affairs of the company on the one hand and those affected by the company's operations on the other hand. This enables the researcher to reach a firm conclusion on the extent to which the interests of the stakeholders other than shareholders are protected in the corporate scheme. The participants were purposively chosen according to the researcher`s discretion. The chosen participants namely, directors, customers, employees and members of the surrounding community were considered to be the typical group of people who have a direct link with corporations, therefore, they were able to provide the desired information. More so, the particular categories of companies were chosen on the understanding that the result from the collected data has a reflection of what is obtainable in the South African society and particularly in the Western Cape Province.

1.9.2.3 Research Instruments

The researcher made use of questionnaires for data collection. The questionnaires comprised of open- ended questions. The researcher believed that the use of open ended questions was the best method because of their flexibility, they encourage open-ended responses and therefore provide in depth and exhaustive experiences of the participants from the corporations` operations. There are two ways of administering questionnaires, namely, paper-and-pencil questionnaire administration and face-to-face questionnaire administration.[42] In this research, the researcher made use of only paper-and-pencil questionnaire administration, where the items were presented on paper as there was no need to present the items orally.

1.9.2.4 Data Analysis

In this research data is analysed thematically. Braun & Clarke define thematic analysis as "a method for identifying, analysing, and reporting patterns (themes) within data. It minimally organises and describes your data set in (rich) detail."[43] The collected data was grouped in to sections in order to build themes or codes. These themes or codes were built by compiling expressions, phrases or ideas that were common among the participants which showed their

[42] A Bowling 'Mode of Questionnaire Administration can have serious effects on Data Quality' (2005) 27 (3) *Journal of Public Health* 281.

[43] V Braun & V Clarke 'Using thematic analysis in psychology' (2006) p 6 available at *http://eprints.uwe.ac.uk/11735/2/thematic_analysis_revised* (accessed on 02 November 2017).

common experiences from the corporate operations. The researcher then evaluated and interpreted the themes generated from the questionnaires in order to ascertain the necessity for legal compulsion on the part of directors to consider the interests of stakeholders in corporate governance.

1.9.2.5 Validity and Reliability

Ascertaining the validity and reliability of a research is a major aspect which ought to be taken cognisant of by a researcher. This refers to the correctness or precision of the research reading.[44] The validity of any research is determined by the accuracy and truthfulness of the scientific findings through demonstrating what exists.[45] In other words it is concerned with the accurate reflection of the results.[46] To validate the findings of this study the researcher employed a triangulation data collection method. Cohen and Manion define triangulation as an "attempt to map out, or explain more fully, the richness and complexity of human behavior by studying it from more than one standpoint."[47] It is a "method of cross-checking data from multiple sources to search for regularities in the research data."[48] In this work data was collected from multiple sources which include documents such as case laws, journals, reports and also through questionnaires. This ensures the validity and reliability of the results.[49]

1.10 Literature Review

Literature review is an integral part of any academic writing. It is considered as the backbone of any proposal in academic writing as it shows the extent of the researcher`s study at the preliminary stage of the research. Literature reviews are designed to provide an overview of sources one has explored while researching a particular topic and to demonstrate how one`s research fits within a larger field of study.[50] The literature review helps the researcher to compare and contrast what he/she is writing about in the historical context of the research, analysing the existing literature as well as how the researcher`s dissertation is different or original from what others have done, thereby helping the researcher to rationalize and justify why they need to do

[44] J Ritchie & J Lewis *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (2003) p 273.
[45] HIL Brink 'Validity and Reliability in Qualitative Research' (1993) 16 (2) *Curationis* 35.
[46] M Saunders, P Lewis & A Thornhill *Research Methods for Business Students* 7th ed (2015) p 157.
[47] L Cohen & L Manion *Research methods in education* 5th ed (2000) p 254.
[48] T O'Donoghue & K Punch *Qualitative Educational Research in Action: Doing and Reflecting* (2003) p 78.
[49] 'Triangulation' available at *https://en.wikipedia.org/wiki/Triangulation_(social_science)#cite_note-3* (accessed on 31 October 2017).
[50] 'Organizing Your Social Sciences Research Paper: 5. The Literature Review' available at *http://libguides.usc.edu/writingguide/literaturereview* (accessed on 02 August 2017).

the particular research. This allows the researcher to demonstrate how his / her research is linked to prior efforts, the gaps that are there and how it extends to build on better understanding.[51]

Literature review helps the researcher to avoid duplication or plagiarism. By exploring previous literature, it helps the researcher to have an overview of what has already been written and avoid writing the same thing without acknowledging thereof. It also helps the researcher to support his/her arguments by referencing the current knowledge in the area under investigation, which gives meaning to the conclusions drawn and the recommendations to be given later in the course of the dissertation.[52]

It is not in dispute that corporations are the backbone of the global economy. They occupy a large part of the economic activities in most countries. Ramnath and Nmehielle stated that "[s]ome companies have grown to such an extent that they often wield power that is comparable to states."[53] It was estimated, as far back as 1996, that of the 100 largest economies in the world, companies occupy 51 positions with states occupying the remaining 49.[54] The social influence which companies have is so vast that it has given many academics the zeal to put their minds on paper concerning the issue under study in this research work. The effect of this state of affairs is that improper approach to corporate governance impacts on, not only the corporations, but almost everyone. This debate on corporate governance has drawn attention of a lot of academics from different disciplines and even the judiciary as cases are brought before the courts concerning this issue.

There are several schools of thought which have emerged over the years in a bid to address the issue of corporate governance. One of the first theories that emerged is the Concession Theory. This theory emerged around 1819 as it is attributed to the case of *Trustees of Dartmouth College v Woodward*[55], where the court stated as follows:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence….The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial

[51] AM Wanjohi 'Importance of Literature Review' available at *http://www.kenpro.org/importance-of-literature-review/* (accessed on 02 February 2017).
[52] Wanjohi (note 51 above).
[53] M Ramnath & VO Nmehielle 'Interpreting Directors' Fiduciary Duty to Act in the Company's Best Interests Through the Prism of the Bill of Rights: Taking Other Stakeholders into Consideration' 2013 (2) *Speculum Jurus* 98 p 99.
[54] RC Longworth "Large Companies Now Economically Bigger Than Some Countries" Chicago Tribune 15 Oct. 1996.
[55] 17 U.S. 518, (1819) p 636-637.

> to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant.

The court`s formulation has commonly been associated with the Concession Theory.[56] Due to the state`s dominant role in the formation of companies through statute, the company was viewed as a privilege from the state.[57] The concession theory views the corporation as simply a legal creation of the state therefore state`s intervention in corporate activity was more easily justified.[58] One notable weakness about the concession theory is that it said little about the issue of the private individuals behind the corporation.[59] It also lost grip around mid-19th century when incorporation of companies became a simple matter of registration rather than requiring a specific Act of Parliament which diminished the role of the state in corporate formation.[60] Other theories arose which sought to address the matters which the concession theory failed to address.

One of these theories which emerged after the Concession theory is the Aggregate Theory. In terms of the Aggregate Theory, the company is an aggregate of the individuals who contracted for its formation. Therefore, the private individuals behind the formed entity are the focus of the corporation`s rights and obligations.[61] In other words the corporation does not exist independent from its members. This theory justifies the primacy that company law gave to shareholders as the key contracting individuals behind the corporation.[62]

Another theory which emerged is the Corporate Realism which considered the company to have a real separate existence from its shareholders. Corporate Realists, therefore, held that the corporation has interests and objectives which are separate from those of its shareholders.[63] A loophole which this theory presents is the question that: what are the interests of this real person if its interests cannot be attributed to those of the shareholders?[64] In an attempt to answer the question which was left unanswered by the Corporate Realism Theory, Berle opined that managers are trustees for the shareholders and not the corporation.[65] Thus, managers are

[56] SJ Padfield ‘Corporate Social Responsibility & Concession Theory’ (2015) 6 (1) *William & Mary Business Law Review* 1 p 21.
[57] A Dignam & J Lowry *Company Law* 9th ed (2016) p 382.
[58] Digman & Lowry (note 57 above) p 383.
[59] Digman & Lowry (note 57 above).
[60] Digman & Lowry (note 57 above).
[61] Digman & Lowry (note 57 above).
[62] Digman & Lowry (note 57 above).
[63] Dignam & Lowry (note 57 above) p 384.
[64] Dignam & Lowry (note 57 above) p 384.
[65] Berle (note 15 above) p 1049.

accountable to the shareholders and shareholder wealth maximisation is the sole corporate interest.[66] This led to the formation of the SVA which was greatly embraced in the corporate realm.

The SVA refers to "the concept that the primary objective for a company is to increase the wealth of its shareholders by paying dividends and/or causing the share price to increase".[67] This was considered as the ideal goal of all businesses.[68] A proponent of the SVA, Friedman, argued that increasing profit is the social responsibility of business. He stated that a corporation is an artificial person therefore it cannot be said to have social responsibilities. He therefore concluded that "there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud".[69] This researcher`s work is intended to show that without some level of behavioural expectations from corporations, though being an artificial person, the prejudice suffered by the stakeholders as a result of the corporate operations shall never come to an end.

Berle in his work argued that the primary purpose of corporations is to maximise profits. He defends his argument by asserting that if corporate powers given to directors are confined to a single purpose of maximising profits for their principals, it will minimise the abuse of corporate powers.[70] This entails that directors can only transact where the outcome thereof is to bring profit to the corporation. He stated as follows:

> It is the thesis of this essay that all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the rateable benefit of all the shareholders as their interest appears.[71]

The above authors advocate for the disregard of the interests of other stakeholders in corporate management. It is their belief that only shareholders` interests deserve recognition and stakeholders have nothing to expect or benefit from corporations. The researcher seeks to address this issue and to show that this line of thought is primordial and does no good to the

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[66] Berle (note 15 above) p 1049.
[67] L Muswaka 'Shareholder Value versus Stakeholders' Interests-A Critical Analysis of Corporate Governance from a South African Perspective.' (2015) 43 (3) *Journal of Social Sciences* 217 p 218.
[68] VS Krishnan 'Stakeholders, Shareholders and Wealth Maximization' p 1 available at *https://www.researchgate.net/publication/267952785_Stakeholders_Shareholders_and_Wealth_Maximization* (accessed on 02 August 2017).
[69] M Friedman 'The Social Responsibility of Business Is to Increase Its Profits," New York Times Magazine, 13 September 1970 p 6 *available at http://www.umich.edu/~thecore/doc/Friedman.pdf* (accessed on 07 June 2017).
[70] Berle (note 15 above) p 1065.
[71] Berle (note 15 above) p 1049.

modern society. The consideration of stakeholders' interests is of great importance and it does in fact improve on the company's financial wellbeing in the long run.

Proponents of the SVA gave some economic justification to this approach arguing that the shareholders invested their capital in the company, therefore, they are entitled to its profit. They further contend that the shareholders as residual claimants of whatever is left over after all other claims have been paid are best positioned to police the efficiency of the company and that the survival and economic success of the company will deliver social benefits to many stakeholder constituency and these benefits would not be delivered if the company is a financial failure.[72] It is important to note that the above contention received recognition at common law as evidenced by the following case. The SVA was rigorously asserted in the classic American case of *Dodge v Ford Motor Company*.[73] In that case the directors resolved to reinvest funds into the company, for the benefit of its employees and the community, instead of paying special dividends to its shareholders. In invalidating this decision, the court stated as follows:

> The business corporation is organized and carried on primarily for the profit of stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to reduction of profits or to the non-distribution of profits among stockholders in order to devote them for other purposes.

This case clearly endorses the SVA and makes no provision for the inclusion of stakeholders` interests in corporate governance. This approach leaves a lot to be desired, it focusses solely on shareholders as if they are the only ones who have interests in the corporation and contribute to the success of the company.

Dodd challenged Berle`s contention that the primary purpose of corporations should be to maximise profits. He advocated for the recognition of stakeholders interests by directors in making corporate decisions.[74] He explained that being socially responsible in the sense of paying more attention to the needs of employees and consumers would ultimately benefit shareholders. He stated as follows:

> [T]here is in fact a growing feeling not only that business has responsibilities to the community but that our corporate managers who control business should voluntarily and without waiting for legal compulsion manage it in such a way as to fulfill those responsibilities.[75]

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[72] South African Company Law for the 21st century: Guidelines for corporate Law reform GN 1183 GG 26493 of 23 June 2004 (Guidelines) p 20.
[73] 170 N.W. 668 (Mich. 1919) p 684.
[74] EM Dodd Jr 'For Whom are Corporate Managers Trusties' (1932) 45 (7) *Harvard Law Review* 1145.
[75] Dodd (note 74 above) pp 1153-1154.

Davies holds a similar view. He advocates for a modernised version of the SVA which he dubbed ESVA.[76] He stated as follows:

> [T]he directors must take into account 'any need of the company' to have regard to the interests of its employees; business relationships with suppliers, customers and others; the impact of its operations on the community and the environment; and to maintain a reputation for high standards of business conduct. As far as directors' duties are concerned, this is the heart of the ESV approach.[77]

At face value, the above arguments from the two authors, Dodd and Davies, seems to have it all. However, a closer analysis of their arguments will show that suggesting that the interests of stakeholders should be taken into consideration does not go a long way in addressing the issue at hand.

The UK Companies Act of 2006 also embodies the ESVA. Section 172(1) of the said Act seems to be a saviour of stakeholders from the prejudicial corporate operations. This section requires the director to act "in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as whole." It goes on to list a number of stakeholders` interests the director must have regard to when discharging the said duty. The use of the word "must" gives an obligation on the directors to have regard to the interests of stakeholders. Though this may seem to promote the consideration of stakeholders` interests in corporate governance, this obligation is subordinate in that directors should consider the interests of stakeholders "only to the extent that it is desirable to do so in order to promote the success of the company."[78] The interests of the members are paramount, but directors should take into account the interests of stakeholders when determining the best way of promoting the interests of the members.[79] Of importance to note is that, even though section 172(1) obligates directors to consider the interests of stakeholders, it will be difficult to enforce the duty as the test used is mainly a subjective one.[80] Davies *et al* in relation to this section state that "litigation will be relatively uncommon and probably even less often successful."[81] This researcher`s position is that there is need for some level of punishment being extended to corporations should they fail to so

[76] Davies (note 20 above).
[77] Davies (note 20 above) p 5.
[78] PL Davies, S Worthington and E Micheler, *Gower`s Principles of Modern Company Law 10th ed* (2016) p 503.
[79] Davies *et al* (note 78 above).
[80] Davies *et al* (note 78 above) p 504.
[81] Davies *et al* (note 78 above).

consider the interests of stakeholders, to give the stakeholders enforceable interests in the corporate scheme.

Another aspect of the ESVA which is important to note is that, although it advocates for the recognition of the interests of stakeholders, shareholders` interests retain primacy. Deakin and Singh contend that directors have an obligation to pursue the interests of the company for the benefit of shareholders by taking due cognizance of all relevant factors including a proper balanced view of the short and long term benefits to the company, the need to sustain ongoing relationships with employees, customers, suppliers and others, the need to maintain the company`s reputation and to consider the impacts of its operations in the community and the environment.[82] In *Teck Corp Ltd v Millar*[83] Berger J observed that:

> If today directors of a company were to consider the interests of employees no one would argue that in so doing they were not acting bona fide in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of shareholders.

In *People`s Department Stores v Wise*[84] the court explained:

> We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment…At all times, directors and officers owe their fiduciary duties to the corporation. The interests of the corporation are not to be confused.

This means that stakeholders` interests are used as a means to an end and this is undesirable.

It is important to note another key aspect of the ESVA which makes this approach undesirable. Directors are at liberty to choose when to take into account the interests of stakeholders as they deem fit. In *Re Smith v Fawcett Ltd*[85], the court held that directors “must exercise their discretion bona fide in what they consider, not what a court may consider, is in the interests of the company.” From the court`s remark, it can be seen that the test used in this instance is a subjective test. In *Regentcrest plc v Cohen*[86] the court stated that “Rather the question is whether the director

[82] S Deakin & A Singh ‘Shareholder Value Reconsidered’ available at *http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/events/conference-2006-03-29-deakin-slides.*pdf (accessed on 02 August 2017).
[83] (1972) 33 DLR (3d) 288 (BCSC) p 313-4.
[84] [2004] 3 SCR p 461.
[85] [1942] Ch 304.
[86] [2001] 2 BCLC 319 ChD

honestly believed that his act or omission was in the interests of the company. The issue is as to the director`s state of mind." In *Visser Sitrus v Goede Hoop* Sitrus,[87] the court stated that "the duty to act in the best interests of the company is not an objective one, in the sense of entitling a court…to determine what is objectively speaking in the best interests of the company. What is required is that the directors…should subjectively have believed that their decision was in the best interest of the company and this belief must have had a rational basis." This means that a director may easily ignore the interests of stakeholders and argue that he did not believe it will be in the best interests of the company to so consider them. Due to the fact that it is the subjective test which is employed, no arguments to the contrary can be brought and this leaves stakeholders unprotected.

On another note, there are some instances where a director may take into account the interests of stakeholders but the decision may be overturned by a court, as seen in cases below. This is because is some instances a combination of the subjective and objective test are used. In *Charterbridge Ltd v Lloyd`s Bank Ltd*[88] the court stated that the test for determining whether the duty to act in the best interests of the company had been discharged "must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transaction were for the best interest of the company." Therefore, if a director embarks on a course of action without considering the interests of the company and there is no basis on which he or she could reasonably have come to the conclusion that it was in the interests of the company, the director will be in breach.[89] This leaves stakeholders unprotected in either of the instances.

The undesirability of the ESVA is especially seen in the following cases. In *Hutton v West Cork Railway Company*[90], the court dealt with an extra contractual payment to the employees of a company in liquidation. Describing the payment as "charity," the court stated:

> Charity has no business to sit at boards of directors qua charity. There is, however, a kind of charitable dealing, which is for the interest of those who practice it, and to that extent and in that garb charity may sit at the board, but for no other purpose… The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.

[87] 2014 (5) SA 179 (WCC) p 199.
[88] [1970] Ch 62.
[89] Dignam & Lowry (note 57 above) p 330.
[90] (1883) 23 ChD p 654.

In *Re Lee Behrens. & Co Ltd*[91] directors had voted that the wife of the company`s former managing director be given an allowance in the exercise of their powers as provided in the constitution of the company. The court ruled that such payment was not incidental to the carrying on of the company`s business and not to the benefit of the company. Consequently, the payment was struck down. The courts` decisions in the above cases show that directors are entitled to take a social decision favouring a stakeholder only if they believe this would also, for the long or short term, be for the shareholders' best interests. This position is flawed as it gives supremacy to shareholders and as a result the interests of stakeholders are side-lined, they are left unprotected.

Freeman in his book postulated that when managing the affairs of a company, stakeholders' interests must be taken into consideration because they determine the success or otherwise of a company. He advocates for the Stakeholder theory. His argument was that, shareholders are not the only group of people affected by the operations of a company but stakeholders are affected also, hence directors have to account to stakeholders.[92] He defines stakeholders as "any group or individual who can affect or is affected by the achievement of the firm's objectives."[93] The argument raised by the above writer holds water in the sense that for a company to continue running as a going concern, it needs stakeholders. If all stakeholders are to be removed from the picture, the company remains only on paper.

Corfield argues that, while it is true that shareholders "own" the company due to their financial investments, other stakeholders such as employees have also invested into the company in the form of human capital and they contribute significantly to the success of the company. They also bear a risk of loss if the company is unsuccessful.[94] Other stakeholders also bear a risk of loss, such as consumers, who have faith in the company's products, the community which is interested in the company's operations being safe and not harmful to its environment. It is therefore self-evident that, various stakeholders still have significant interests in the company, despite not being "owners".[95] It should be noted that, in as much as the above argument seems satisfactory, as it advocates for the equal treatment of shareholders and stakeholders, it does not play a significant role towards the protection of stakeholders` interests as the latter remain excluded in the

[91] [1932] 2 Ch 46 (ChD).
[92] RE Freeman *Strategic Management: A Stakeholder Approach* (1984) p 25.
[93] Freeman (note 92 above) p 46.
[94] A Corfield 'The stakeholder theory and its future in Australian corporate governance: A Preliminary Analysis' (1998) 10(2) *Bond Law Review* 213 p 216.
[95] Ramnath and Nmehielle (note 53 above).

consideration of issues of corporate governance. Therefore the researcher seeks to recommend ways in which stakeholders' interests can be fully protected just in the same manner as those of the shareholders.

Keay in his article analyses the two prominent theories namely the SVA and the Stakeholder Theory and came to the conclusion that none of them is good enough to be commended. He advocated for another theory which he called the Entity Maximisation and Sustainability Theory.[96] He argues that since a company is a separate entity which is capable of having rights and obligations, the directors should run a company with the objective of maximising the wealth of the entity for the entity and not for shareholders, directors should ensure that the company is financially sustained as a going concern. Keay further argues that a company should be run in such a way that all its investors such as shareholders and creditors benefit from it and this will be done to benefit the separate legal entity. It can be noted that his work is silent about corporations having to be environmentally responsible because the environment on its own cannot be said to invest in the company. But the environment has interest in the company as how a company is managed may affect the environment. It is important to note that, the fact that one does not have a financial interest in a particular company does not mean that one does not have any interest at all. The interests which can be drawn from a company varies from one group to another. The researcher therefore will incorporate all the aspects that need the attention of directors when they manage the company`s affairs.

Hollington advocates for a more radical approach to this interesting subject. He argued that so far the law has failed to bear fruits in addressing the challenging matter of the inclusion of stakeholders in corporate governance. He based his argument on the fact that the law does not impose statutory obligation on directors, which can be sanctioned upon breach, to consider the interests of all stakeholders.[97] His position supports the proponents of the Pluralist Theory which entails the imposition of enforceable statutory obligation on directors to consider the interests of stakeholders while managing the affairs of the company. This view is also supported by Worthington who commented as follows:

> It is now accepted that the claims of other interested groups commonly referred to as stakeholders…deserve recognition as much as those of the passive investors in the

[96] Keay (note 18 above) p 675.
[97] R Hollington 'Directors Duties Under The Companies Act 2006- Have the Lunatics Taken Over the Asylum?'(Lecture delivered on 22 April 2008) Ian Fairbairn Lecture Theatre University of Buckingham) p 8 available at *http://www.12newsquare.co.uk/files/Publications/Directors%20duties%20under%20the%20Companies%20Act%202006%20%28Robin%20Hollington%20QC%29.pdf* (accessed 14 June 2017).

> enterprise. Indeed it is possible to go further, and see the responsible company and its directors as necessarily having regard to wider considerations, such as the community, the environment, charitable and other good causes and even the national interest.[98]

Pluralists` view is that "corporate governance should be concerned with balancing economic and social goals. It should be seen as the system by which companies ought to be controlled for the benefit of all stakeholders, including shareholders, employees, creditors, suppliers and the community in which the company operates."[99] This approach is described as follows:

> The shareholder, on the premise of this approach, does not have a predetermined place of precedence over other stakeholders. However, the interests of the shareholder or any other stakeholder maybe afforded precedence based on what is believed to serve the best interests of the company at that point. The best interests of the company should be interpreted within the parameters of the company as a sustainable enterprise and the company as a responsible citizen.[100]

This approach therefore advocates for a recognition of stakeholders` interests and those of shareholders on an equal footing. Wiese states that "an integrated approach to corporate governance where directors consider not only the financial implications of their decisions but also the broader social political and economic impacts of the decision is the most effective way to ensure that companies are sustainable in the long term."[101]

Nwafor, in that line of thought, argues that there should be statutory imposition of enforceable obligation on the directors to consider the interests of all stakeholders. He pointed out that the only way the directors would accord equal and fair consideration to all stakeholders is by statutory compulsion attained by broadening the range of groups to whom the directors owe their duty.[102] He argued that although there have been theories brought forward on how corporations should be managed, cases have been coming before different courts concerning the harmful and unpleasant operations of companies, which suggest that in practise there is improper corporate governance. He concluded that "the recurrence of such cases cannot be divorced from the absence of any statutorily enforceable obligation on the director to consider the interests of stakeholders in the conduct of the company`s business."[103]

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[98] S Worthington, *Sealy and Worthington`s Text, Cases and Materials in Company Law* 11th ed (2016) p 337.
[99] South African Company Law for the 21st century: Guidelines for corporate Law reform GN 1183 GG 26493 of 23 June 2004 (Guidelines) p 21.
[100] See note 99 above.
[101] T Wiese *Corporate Governance in South Africa: With International Comparisons* (2014) p 9.
[102] Nwafor (note 17 above) p 679.
[103] Nwafor (note 17 above) p 679.

The researcher shares the same sentiments as those of Hollington and Nwafor. There are serious matters of statutory gaps in defining corporate governance issues which even stakeholders themselves cannot raise due to lack of knowledge of such issues. The researcher seeks to unveil some of these issues and to show that unless the directors' duties are statutorily expressed to include the stakeholders, the stakeholders` interests will remain subordinate to those of the shareholders with the attendant long term adverse effect on the success of corporate operations in the society.

The Pluralist Approach is not free of criticism. It is argued that although a legally enforceable right or remedy is a strong way to protect stakeholder interests, it is not the only remedy. Ramnath and Nmehielle state that there are recognised 'judicial' and 'non-judicial' remedies such as grievance mechanisms and encouraging dialogue, which may be effective remedies to protect human rights, depending on the circumstances. Therefore, even if there is no statutorily enforceable obligation on directors to consider the interests of stakeholders, this does not necessarily mean that their interests will necessarily be ignored.[104] This argument is flawed as there is substantial evidence that, despite all these other remedies that are put in place, stakeholders are still at the mercy of corporations` operations.

It has also been argued that the radical approach advocated by the Pluralists has a possibility of yielding negative results which can affect both the shareholders and other stakeholders. In supporting this argument, Ramnath and Nmehielle stated as follows:

> For example, to reconsider the facts of the Dodge case, it may be argued that the court was short sighted in not appreciating that investing in employees and the community may actually be better for shareholders in the long term. This decision may, for instance, result in happier (and more productive) workers as well as increase the community's (and potential consumer's) perception of the company which may in turn result in increased sales. The difficulty, however, is that the same facts could have easily backfired, such as if disgruntled shareholders abandoned the company, which ultimately leads to its bankruptcy and workers losing their jobs.[105]

It should however be noted that, shareholders in any event become disgruntled and abandon the company even with the inherent preference of shareholders over other stakeholders. If the pluralist approach is adopted, which puts shareholders and stakeholders at equal footing, the shareholders will be bound and would not threaten to leave the company because the directors would have acted within their powers.

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[104] Ramnath & Nmehielle (note 53 above) p 109.
[105] Ramnath & Nmehielle (note 53 above) p 112.

1.11 Definition of Key/Technical Terms

Shareholder:

A shareholder is defined as the owner of one or more shares or stock in a company commonly also called a "stockholder." [106]

Stakeholder:

A stakeholder is someone who can affect (impact) or is affected by the company's operations.[107] Post, Preston & Sachs define a stakeholder as follows: "stakeholders of a firm can be defined as individuals and constituencies that contribute either voluntarily or involuntarily to its wealth creating capacity and activities and who are therefore its potential beneficiaries and/or risk bearers."[108]

Board of directors:

Persons appointed or elected according to law, authorized to manage and direct the affairs of a company.[109]

1.12 Ethical Considerations

Ethical considerations are very important in academic writing. In academic writing "ethical standards guard against the falsifying of data and therefore, promote the pursuit of knowledge and truth which is the primary goal of research."[110] In other words, there are standards which are used to ensure that information is obtained in the proper way.

In order to address ethical considerations in academic writing the following aspects should be borne in mind: voluntary participation of respondents in the research, the use of offensive, discriminatory, or other unacceptable language needs to be avoided in the formulation of Questionnaire/Interview/Focus group questions, privacy and anonymity of respondents is of paramount importance, acknowledgement of works of other authors used in any part of the

[106] 'Shareholder' available at *http://legal-dictionary.thefreedictionary.com/shareholder* (accessed on 18 June 2017).
[107] Freeman (note 92 above) p 46.
[108] JE Post, LE Preston & S Sachs 'Managing the Extended Enterprise: The New Stakeholder View' (2002) 45 (1) *California Management Review* 6 p 8.
[109] 'Board of Directors' available at *http://legal-dictionary.thefreedictionary.com/Board+of+Directors* (accessed 18 June 2017).
[110] 'Ethical Considerations' available at *https://cirt.gcu.edu/research/developmentresources/tutorials/ethics* (accessed on 13 July 2017).

dissertation and the maintenance of the highest level of objectivity in discussions and analysis throughout the research.[111]

This research employs both empirical and doctrinal research methods. To that extent, the researcher has acknowledged all information obtained from other writers and other sources. The fabrication of information in order to support arguments was avoided. In order to adhere to ethical considerations in academic environment, the researcher did not coerce people to participate in the study and the identities of all who participated is kept anonymous. The researcher obtained an Ethical Clearance Form and an Informed Consent Form from the University and provided the participants with all the relevant information they needed before they participated in the study. The researcher complied fully with the University of Venda policy on ethics in research.

1.13 Limitations of Study

Limitations are the shortcomings, conditions or influences that cannot be controlled by the researcher that put restrictions on the researcher`s methodology and conclusions.[112] Of great importance to note is that this research is based on sources of information such as text books, internet, case laws and journals. It also involves primary data collection where there is use of questionnaires of stakeholders in order to get the exact problems which stakeholders face in corporations operations. Enormous inferences were therefore drawn from various sources which may in some cases fall short of expectations.

The other limitation to this study is lack of access to information which would have helped the researcher to draw proper conclusions. Some of the information needed was regarded as classified in the corporate sector with restricted access. This could have some impact on the conclusions of the researcher. More importantly in this context is that as a budding researcher, there are inherent limitations in analyzing some legal materials and drawing inferences and conclusions which are unavoidable.

1.14 Chapter Outline

Chapter One: Introduction

[111]'Ethical Considerations' available at *http://research-methodology.net/research-methodology/ethical-considerations/* (accessed on 13 July 2017).
[112] 'Develop a Research Proposal' available at *https://www.bcps.org/offices/lis/researchcourse/develop_writing_methodology_limitations.html* (accessed on 17 July 2017).

This is basically the introductory chapter in which the researcher endeavours to discuss the background and the general introduction of the whole study. Topics discussed in this chapter include: Background of study, Statement of problems, Aim, Objectives, Research Question, Research Methodology, Literature Review, Definition of Key terms, Ethical Considerations, Chapter Outline, Limitations of Study and Research Schedule.

Chapter Two: Theories on the Exercise of Director`s Fiduciary Powers

This chapter discusses and analyses various theories which have been brought forward by different scholars in a bid to address the intriguing issue in this study. In this chapter the merits and demerits of the theories are unmasked. An evaluation is done as to what extent the current theories do promote the protection of stakeholders' interests in corporate governance. This is be done by examining whether stakeholders are really protected and unmask the detrimental effects of corporation's activities on stakeholders.

Chapter Three: Director's Statutory duty to act in the best interest of the company

This chapter entails a thorough analysis of the directors` duty to act in the best interest of the company. Issues such as the meaning of the interests of the company in this context, to whom is this duty owed are discussed. More so, a thorough analysis of this duty and how it has been interpreted in cognate jurisdictions is done in order to reflect the legislative position on whose interests are the directors expected to manage the company. Inferences are drawn from these jurisdictions to suggest how the interests of stakeholders can be incorporated into the duties of company directors in the Companies Act.

Chapter Four: Data Analysis on Protection of Stakeholders` Interests in Corporate Governance.

In this chapter, the data collected from different chosen participants is analysed. Data was collected by use of questionnaires and the data was thematically analysed. This chapter also involves the interpretation of the data and the inferences are drawn which helped the researcher to support her arguments and conclusions.

Chapter Five: Conclusion and recommendations

This chapter embodies the researcher`s conclusion and recommendations on how stakeholders can be effectively protected against the detrimental effect of company's operations in the society.

CHAPTER 2

THEORIES ON THE EXERCISE OF DIRECTOR`S FIDUCIARY POWERS

This chapter evaluates corporate governance theories that have emerged over the years and ascertain to what extent, they have addressed the issue of stakeholders` interests in corporate governance. It analyses theories such as the concession theory, the aggregate theory, corporate realism, the shareholder value approach, stakeholder approach and the pluralist approach.

2.1 Introduction

From time immemorial corporate governance has been an issue of great importance. It has been a conundrum over the past decades to ascertain how best corporations can be managed. There has been a number of theories that have been brought forward by different scholars in a bid to address this issue. A theory of the corporation might be defined as "an attempt to abstractly define the firm's nature or essence."[113] Noteworthy is that, at the heart of this work is the grievous issue of stakeholders` interests in corporate governance being side-lined. This chapter, therefore, seeks to evaluate corporate governance theories that have emerged over the years and ascertain to what extent, they have addressed this matter.

2.2 Concession theory

The concession theory is generally linked and associated with the fiction theory. These two theories are interwoven hence they will be discussed together in this work. Phillips states that "[a]lthough the concession and fiction theories of the corporation sometimes are treated separately, they fit together to form a coherent whole."[114] In *Trustees of Dartmouth College v Woodward*[115], the court described a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law." The court stated the fiction theory of the corporation by declaring that corporations are artificial, invisible, intangible beings. According to the fiction theory, a corporation is a fictitious, artificial, legal person or entity with an existence distinct from the existences of the people who form it.[116] The concession theory, on the other hand, emphasizes the "existing only in contemplation of law" portion of the Court`s definition. It does so by asserting

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[113] MJ Phillips 'Reappraising the Real Entity Theory of the Corporation' (1994) 21 (4) *Florida State University Law Review* 1061 p 1063.
[114] Phillips (note 113 above) p 1064.
[115] 17 U.S. 518, (1819) p 636.
[116] Phillips (note 113 above) p 1064.

that the corporation derives its being by concession from the State.[117] For this reason, the concession theory appears to blend with the fiction theory.

The corporate entity was considered artificial, in the sense that the corporation owed its existence to the positive law of the state rather than to the private initiative of individual incorporators. This idea was most clearly evident in the practice of requiring a special Act of the state legislature for each instance of incorporation.[118] The concession theory has it that a "corporation derives its being by concession from the State." It views the corporation as a tremendous capital accumulation device that was only made possible by the state conveying certain privileges to incorporators for which they could not otherwise privately contract.[119]

The concession and fiction theories held sway in the early 1800s, when corporations were created by specific grants or charters "which usually limited them to public purposes,"[120] Corporations could only be incorporated based on a state legislature's award of a special concession, grant, or charter.[121] A 'concession' is defined as "a government grant for specific privileges."[122] The grant consists of a bundle of rights which include perpetual existence, free transferability of ownership rights and limited liability.[123] States granted charter to corporations because it was believed corporations had a unique ability to aggregate resources and accomplish tasks that could have been difficult or impossible otherwise.[124] In a bid to increase the number of corporations, states also granted the shareholders of corporations the privilege of limited liability, making corporations an extremely attractive vehicle for the aggregation and deployment of large amounts of invested resources.[125] In other words corporations were used as vehicles to pursue economic gain for the state.

During that time corporations would petition the state for a charter and would limit themselves to certain very specific activities in order to gain the approval of the state for their charter.[126] Special

[117] Phillips (note 113 above) p 1064.
[118] D Millon 'Theories of the Corporation' (1990) 39 (2) *Duke Law Journal* 201 p 206.
[119] SJ Padfield 'Rehabilitating Concession Theory' (2014) 66 *Oklahoma Law Review* 327 p 331.

[120] Phillips (note 113 above) p 1065.
[121] R Harris 'The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business' (2006) 63 (4) *Washington and Lee Law Review* 1421 p 1424.
[122] Black's Law Dictionary 9th ed (2009) p 328.
[123] Padfield (note 119 above) p 332.
[124] JF Morrissey 'A Contractarian Critique Of Citizens United' (2013) 15 (3) *Journal of Constitutional Law* 765 p 808.
[125] Morrissey (note 124 above).
[126] Morrissey (note 124 above).

charters generally contained specific limitations on the corporation's purposes and powers. Some states allowed incorporation only for a single purpose.[127] Any activity that went beyond the stated purpose was considered *ultra vires*, or beyond that corporation's power.[128]. The *ultra vires* doctrine provided that a corporation could not bind itself contractually concerning a matter that was beyond the objectives defined in its charter. Even unanimous shareholder approval could not validate an *ultra vires* act because the shareholders could not create powers not conferred by the state.[129]

Noteworthy is that, proponents of the concession theory believe that the state should have the ability to limit the rights and privileges it grants to corporations if doing so would advance the interests of the political community within which the corporation operates. While a state should not take over a corporation, it should, however, regulate the corporation.[130] It should however be noted that, although the theory advocates for the regulation of the corporations by states, it does not touch the intriguing issue of stakeholders` interests in corporate governance. The state could so regulate but without enacting legislation that protect the interests of stakeholders in corporate governance.

It is important to note that the concession theory does not address the issue of stakeholders` and shareholders` interests in corporate governance. This is because the theory places emphasis on the fictitious and artificial characteristics of the corporation and has little to say about persons behind the corporation. Dignam and Lowry also note that "[t]he weakness of the concession theory is that it has little to say on the subject of the private individuals behind the corporation."[131] As a result, this left the corporations free from accountability as they could not be found civilly or criminally liable. Padfield states that "some calls for a new theory were the result of actually wanting to hold corporations more accountable"[132] Petrin also states that "the increasing importance and prevalence of corporations led to growing dissatisfaction with the fiction theory's effects, including its hostility toward liability of legal entities."[133]

It is stated that the grants were given out to serve a public purpose and in a way that would protect stakeholders. As stated by Millon, "[c]harters for banking, transportation, and insurance

[127] Millon (note 118 above) p 209.
[128] Morrissey (note 124 above).
[129] Millon (note 118 above) p 209.
[130] Morrissey (note 124 above) p 809.
[131] Dignam & Lowry (note 57 above) p 383.
[132] Padfield (note 119 above) p 335.
[133] M Petrin 'Reconceptualizing the Theory of the Firm— From Nature to Function' (2013) 118 (1) *Penn State Law Review* 1 p 10.

companies contained special provisions designed to protect the public from abusive practices (like inadequate capital reserves or abusive rate structures) peculiar to each industry."[134] He further states that "the state conferred the privileges of incorporation not simply for the private benefit of the incorporators, but also to further the general welfare. The primary public policy justification was the business corporation's utility as a socially useful instrument of economic growth."[135] The rationale for granting these privileges was that the state could thereby achieve goals that might otherwise fail for lack of funding.[136] It should however be noted that, during that time, there was no separation of ownership and control, hence, shareholders could easily manipulate the corporation for their own benefit at the expense of stakeholders. Millon states that "[w]hile reflecting a belief in the social utility of the corporate form, the increasingly common use of incorporation to pursue private entrepreneurial objectives simultaneously generated suspicion and hostility."[137] This means that although corporations were meant to only pursue those purposes for which they were incorporated, manipulation of those corporations was not inevitable.

Proponents of the fiction theory contended that because legal persons could only have recognized rights and duties as a consequence of an Act of the State, they were nothing but artificial beings or fictions.[138] They insisted that due to its artificial personality, a firm could only have a very limited set of rights and duties, namely those pertaining to property.[139] Because of these limitations, the fiction theory also held that legal entities, apart from instances of strict liability, could not themselves be liable, either civilly or criminally.[140] This was due to the fact that a tort or crime was not necessary for exercising property rights and liability was conditioned upon a finding of culpability or *mens rea*.[141] *Mens rea*, however, was something that a legal person, if thought of as only an artificial being, could not possess.[142] Fiction theorists therefore argued that, a legal person could never be liable, but a legal person's representatives or agents who actually committed a tort or a crime could be.[143]. Bainbridge emphasize that individual human actors, namely those

[134] Millon (note 118 above) p 210.
[135] Millon (note 118 above) p 207.
[136] Padfield (note 119 above) p 332.
[137] Millon (note 118 above) p 207.
[138] Petrin (note 133 above) p 5.
[139] Petrin (note 133 above) p 5-6.
[140] Petrin (note 133 above) p 6.
[141] Petrin (note 133 above) p 6.
[142] Petrin (note 133 above) p 6.
[143] Petrin (note 133 above) p 6.

who make corporate decisions, as opposed to business entities themselves, are the actual bearers of moral obligations and legal duties.[144]

Following the position that a corporation is not real but rather a legal fiction and a nexus of contracts, these theorists conclude that the corporation is incapable of having social or moral obligations. Fischel expounded as follows:

> A corporation . . . is nothing more than a legal fiction that serves as a nexus for a mass of contracts which various individuals have voluntarily entered into for their mutual benefit. Since it is a legal fiction, a corporation is incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations.[145]

Therefore, Fischel argues that, due to the fact that corporations are artificial entities, which are incorporated through special grant for specific purposes, that is economic gain, they should and must not be expected to pursue activities other than seeking profit. He stated as follows:

> the issue is not one of public policy but of contract law. Viewed as a contract issue, the question can be analyzed in much more concrete terms. Do investors, as long as corporations lawfully may be formed for-profit, have any duty to sacrifice profitable opportunities to benefit some other parties? And do managers, acting as agents for investors, have any right or duty to sacrifice profitable opportunities to benefit some other party? Both questions have the same answer- managers should act to maximize the wealth of investors pursuant to the terms of the contract of their agency relationship.

He therefore concludes that, corporations cannot have moral or social obligations and corporations should only seek to maximize profit based on the purpose of its incorporation.

Due to these weaknesses of the concession theory, other schools of thought started to emerge and held traction. Changes in the structure of corporate law, namely the end of the special charter era of incorporation undermined that concession theory.[146] Increasingly during the latter half of the 19th century, states began to replace special chartering with general incorporation laws. These statutes dispensed with the need for a special Act of the legislature, instead making corporate charters available simply upon compliance with certain generally applicable filing requirements and submission to standardized substantive regulations.[147] More so, issues of corruption arose and some states sought to remove concerns about corruption of the legislators

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[144] SM Bainbridge 'Interpreting Nonshareholder Constituency Statutes' (1992) 19 (3) *Pepperdine Law Review* 971.
[145]DR Fischel 'The Corporate Governance Movement' (1982) 35 (6) *Vanderbilt Law Review* 1259 p 1273.
[146]Padfield (note 119 above) p 335.
[147] Millon (note 118 above) p 206.

by requiring a two-thirds legislative majority in favuor of the granting of a charter. Enactment of general incorporation laws was more widely favuored as a solution. By dispensing with the need for a special legislative Act and instead ordaining simple procedures that could be followed by anyone seeking to incorporate, these laws eliminated legislative discretion and thereby did away with the danger of monopolistic privilege gained through legislative favoritism.[148] As thinking shifted from an artificial to a natural explanation for the basis for corporate existence and thus from a regulatory to a private law perspective, these developments encouraged defenders of shareholder economic interests and opponents of regulation to reconceptualize the corporation in aggregate or "partnership" terms rather than as an entity.[149]

2.3 Aggregate theory

From the outset, it is important to note that the aggregate theory existed simultaneously with the concession theory, however, its rise to prominence is best viewed as coming after the dominant period of the concession theory.[150] Millon opines that, due to the fact that the concession theory justified state regulation, there arose an effort to free corporations from regulatory state restrictions by replacing the concession theory with another corporate theory that provided more protection for corporate interests.[151] These efforts sort to stress that corporate property rights were nothing more than individual property rights and therefore entitled to the same protections.[152] More so, the aggregate entity theory was also a product of the Jacksonian era classicism, this is the period when Andrew Jackson was the president of America, which strove to make the corporate entity available to all Americans through the general incorporation Acts.[153] It is worth noting that this was a deviation from the custom of chartering which was embedded in their system then. It also partly became prominent due to the corporate bar’s push to equate corporations with partnerships during the latter half of the nineteenth century.[154]

The Jacksonian era corporate theorists advocated for a pro-industrial economy. They believed that the market was self-regulating in terms of price-setting and that “a ‘just’ price, if it existed,

[148] Millon (note 118 above) p 208.
[149] Millon (note 118 above) p 213.
[150] Padfield (note 119 above) p 335.
[151] Millon (note 118 above) p 213.
[152] Millon (note 118 above) p 213-214.
[153] MD Rivard ‘Comment, Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species’ (1992) 39 *UCLA Law Review* 1425 p 1458.
[154] Rivard (note 153 above).

was nothing other than the price set by the market."[155] Recognizing the capability of the corporate entity as a market participant, the Jacksonian era corporate theorists began to advocate for the availability of the corporate entity to every citizen as a means of conducting business.[156] During Jackson's administration, states promulgated general incorporation Acts, which allowed individuals to incorporate their businesses without first seeking a special charter from the state legislature.[157] Notably, the general incorporation Acts altered the legal conception of the corporate entity by subverting the central premise of the artificial entity theory that corporations were created by the state and existed only for the purposes contained in the charter granted by the state.[158] Free incorporation made the corporate entity "available by a simple procedure on equal terms to all who saw use for them in ordinary business associations."[159]

With the coming into effect of general incorporation, "the process of chartering ceased to be a legislative matter and became an administrative and procedural one."[160] The immediate effect of the general incorporation Acts was to "move the predominant role in corporate organization from the state to the incorporators and shareholders."[161] Due to the general incorporation statutes, the corporate entity came to be seen "as merely one form of voluntary association, an aggregation of talent and resources, consciously entered into by individuals."[162] This concept of the corporate entity as a vessel for individual self-realization, coupled with the corporate bar's strong push for enhanced corporate rights, led to the adoption of the aggregate entity theory in corporate and constitutional jurisprudence.[163]

This theory, which emerged early in corporate jurisprudence and became a dominant theory in the Jacksonian era, viewed a corporation as "an association of individuals contracting with each other in organizing the corporation." [164]The aggregate theory asserted that corporations and other legal entities constituted aggregations of natural persons whose relationships were structured by

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155 HJ Hovenkamp 'The Classical Corporation in American Legal Thought' (1988) 76 (5) *Georgetown Law Journal* 1593 p 1634–35.
156 JM Krannich 'The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation' (2005) 37 (1) *Loyola University Chicago Law Journal* 61 p 75.
157 Hovenkamp (note 155 above) p 1634.
158 GA Mark 'The Personification of the Business Corporation in American Law' (1987) 54 (4) *University of Chicago Law Review* 1441 p 1444.
159 Krannich (note 156 above) p 75.
160 Mark (note 158 above) p 1454.
161 PI Blumberg 'The Corporate Entity in an Era of Multinational Corporations' (1990) 15 (2) *Delaware Journal of Corporate Law* 283 p 293.
162 HM Wasserman 'What's Good for General Motors: Corporate Speech and the Theory of Free Expression' (1998) 66 (2) *George Washington Law Review* 235 p 254.
163 Krannich (note 156 above) p 76.
164 Blumberg (note 161 above) p 293.

way of mutual agreements.[165] In *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*,[166] the court stated that "[c]orporations are merely associations of individuals united for a special purpose. . . . The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State." In *United States v. Dandridge*,[167] the court stated that a corporation could only sue on a bond if it spoke in "the aggregate voice. . . . These individuals must speak collectively to speak corporately, and must use a collective voice." In other words, in these two cases, the courts endorsed the aggregate theory.

The aggregate theory rejected the notion that was promoted by the concession theory which viewed the corporation as an artificial entity and instead focused on the property rights of the underlying shareholders to conceive of the corporation simply as an association of individuals.[168] Consequently, the rights and duties of a legal entity were often seen, in an indirect or derivative manner, as simply those of its shareholders or other individuals that made up the entity.[169] In other words, under the aggregate theory, rights and obligations held by individuals could be construed to reflect upon the legal entity itself.

This notion of the nature of the corporation and of shareholder property rights is credited to the court`s opinion in *The Railroad Tax Cases*[170] in which the circuit court pronounced as follows:

To deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value.... [T]he courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in its name.

The court adopted the position that corporations are mere aggregations of different persons by making no distinction between corporate property rights and shareholder property rights. Thus, the court credited the personhood of the individuals who had formed the corporation to the corporation itself.[171] It should however be noted that this position has limitations which will be discussed later.

Interesting to note is that the aggregate theory warrants the importance given to shareholders as the key contracting individuals behind the corporation by referencing everything to do with the

165 Petrin (note 133 above) p 9.
166 125 U.S. 181 (1888) p 189.
167 25 U.S. (12 Wheat.) 64 (1827) p 92.
168 Padfield (note 56 above) p 1.
169 Petrin (note 133 above) p 10.
170 13 F. 722, (C.C.D. Cal. 1882) p 747-748.
171 Krannich (note 156 above) p 77.

company to the contracting individuals behind it.[172] It also made state interference difficult to justify as it would be an interference with the individuals` freedom of contact in what was viewed as essentially a private arrangement.[173]

The relationship between shareholders and the company was as an analogy of a partnership. As time went by, the size of corporations grew and management was delegated to salaried employees. This resulted in what is now described as the separation of ownership and control.[174] As such, shareholders were transformed from entrepreneurs into passive investors who placed their economic interests in the hands of professional managers. The aggregate theory started to lose influence due to this shift where power was now vested in directors and not in shareholders. Reconceptualization of the source of management's power also contributed to the fall of the aggregate theory. Traditional principles which vested ultimate managerial power in the shareholders, with directors enjoying only such responsibility as actually delegated to them by the shareholders was altered.[175] For example in *Manson v. Curtis*,[176] the court described the board's power as "original and undelegated" and therefore not subject to the common law prohibition against an agent's power to appoint a subagent. In other words, the shareholders' legal status as passive investors in a corporation controlled by an omnipotent and distant board made it very difficult to think about the corporation as analogous to a general partnership, in which the right of control was vested in the partners.[177]

At this point it is important to note that the aggregate theory places shareholders at the center of corporations and hence as the focus of corporate management. It supports the primacy given to shareholders over other stakeholders. This approach leaves the interests of stakeholders aside and hence makes stakeholders to suffer from the adverse effects of corporations. It should however be noted that, attempts have been made, using the same theory, to involve the interests of stakeholders in corporate governance but this has not yielded the desired results. Petrin states that "[t]he main precondition under this approach is to define the aggregate broadly as being comprised not only of shareholders, but also of a variety of constituencies, including non-shareholders, that are also the beneficiaries of corporate duties."[178] This would be twisting the theory for it to achieve some desired results which originally could not be attained. In essence,

[172] Dignam and Lowry (note 57 above) p 383.
[173] Dignam and Lowry (note 57 above) p 383.
[174] Millon (note 118 above) p 215.
[175] Millon (note 118 above) p 215.
[176] 223 N.Y. 313, 322, 119 N.E. 559 (1918) p 562.
[177] Millon (note 118 above) p 215-216.
[178] Petrin (note 133 above) p 25.

the aggregate theory is shareholder oriented and therefore it leaves the issue of the interests of stakeholders in corporate governance unaddressed.

The aggregate entity theory also suffered several shortcomings which made it not to escape criticism. As argued by Mark, it did not recognize "that part of the value of corporate property was that corporations were ongoing operations premised on the ability to maintain property as a unit." [179] This was a key aspect of corporations which the aggregate theory ignored that a corporation is a functioning business entity and not a mere aggregate property of the shareholders. More so, shareholders, who were originally viewed as the owners of a corporation, did not have the common law rights of ownership.[180]

The other limitation for which the aggregate theory has been criticized is the fact that it failed to provide a plausible explanation for the adoption of limited liability for corporations and the separation of corporate and individual rights and duties in general.[181] Notably, the major theoretical justification for limited liability is the separation of ownership from control by way of the statutorily designated overseers of corporate activity found in the board of directors. This presents a problem to the aggregate theory which does not recognize the separation of the corporation from the individuals behind it but rather views the corporation as essentially a sum total of the incorporators. Padfield notes that "[i]f one ignores this separation and boils the corporation down to its shareholder owners, then one is essentially back to a form of general partnership where all the owners are personally liable for the debts of the business."[182] Dignam and Lowry also comment on the limitation presented by the aggregate theory and its demise as follows:

> The aggregate theory lost grip with the arrival of the managerial company as shares became increasingly transferable and shareholders became more like speculators than owners. The idea that a legally binding contract was behind the corporation started to lose its legitimacy. The separation of ownership from control itself raised questions about relating the company only to its shareholders. More so the aggregate theory has great difficulty explaining corporate personality especially the fact that the company owns its property and that fiduciary duties are owed to the company.[183]

This theory failed to satisfy the needs of the legal system then, thus, this lead to the need for another theory, and real entity theory filled that need by aligning the corporation with the board of directors.[184]

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[179] Mark (note 158 above) p 1464.
[180] Rivard (note 153 above) p 1460.
[181] Petrin (note 133 above) p 10.
[182] Padfield (note 119 above) p 337.
[183] Dignam and Lowry (note 57 above) p 383-384.
[184] Padfield (note 119 above) p 337.

2.4 Corporate Realism

In terms of the real entity theory a corporation is "an organic social reality with an existence independent of, and constituting something more than, its changing shareholders."[185] The real entity theory generally views the corporate entity as a natural creature, to be recognized apart from its owners, existing autonomously from the state.[186] It views a corporation as a being with attributes not found among the humans who are its components. This theory has it that the corporate being is a real thing and not the artificial entity of the fiction theory. Proponents of the real entity theory hold that the law does not create corporations but merely recognizes their independent existence.[187] Although the real entity theory acknowledges that it is through the law that legal entities gain their personality, its proponents still argue that the legal person exists prior to and separate from the state.[188] For instance, Ripken state that "[j]ust as the state may record the birth of every baby, or the sale of every land parcel, so does the state record the formation of every corporation-a formation that occurs by virtue of agreement of the parties who constitute the business, not by virtue of any state action….Rather than being a creature of the state the corporation is a naturally existent entity which has compelled the law to grant it official recognition."[189]

Corporate realism considers the company to have a real separate existence from its shareholders. Under this theory, a corporation is considered as a "juridical unit with its own claims, much like those of a natural person, that extend beyond both the circumstances of its legal creation by the state and the claims or interests of its shareholders."[190] The real entity theory emphasizes the initiative of the incorporators rather than state action as the key constitutive factor. However, it argues that once a collective is formed it takes on a life of its own which cannot be referenced back to its members. The sum of the individual`s interests does not in any way equate to the interests of the collective. The collective has interests and objectives which may not change even though the members of the collective may change many times over. The state is irrelevant to the existence of the collective. Its legitimacy is established by the coming together of its original

[185] Blumberg (note 161 above) p 295.
[186] Rivard (note 153 above) p 1459–61.
[187] Phillips (note 113 above) p 1069.
[188] Petrin (note 133 above) p 7.
[189] SK Ripken 'Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle' (2009) 15 *Fordham Journal of Corporate & Financial Law* 97 p 112-113.
[190] Blumberg (note 161 above) p 295.

members but once the collective is formed it continues on its own independent way without reference to individual members.[191]

Notably, under the real entity theory, a corporation is a real person with its own interests, hence, it can in no sense be owned by shareholders. Therefore, shareholders have no primacy within the realist model, rather the company`s interests and objectives are paramount as defined by managers.[192] This being so, corporate realism goes a long way to legitimizing the manager-dominated companies that arose at the beginning of the 20th century. This theory did not, however, deal with the issue of managerial accountability.[193] Hence, it had a major loophole which could have grievous consequences had it been ignored, that is, unaccountability of the managers.

Noteworthy is that, corporate realism has been criticized for its pliant nature as far as the state is concerned. Some proponents of corporate realism considers the corporate person subject to state regulation as any powerful person who could affect the community would be. On the other hand, others consider the corporate person as a purely private person and thus free from state control. This makes the real entity theory problematic as far as the issues of stakeholders` and shareholders` interests in corporate governance are concerned. This is so because it does not have a solid ground that can be relied upon to support how corporations should be run. Basing on this theory, some scholars have argued that, being a 'real person' as it is, a corporation is purely a private person hence it should not be expected to consider the interests of the public.[194] In other words, it is run for private purposes. Noteworthy is that, this approach encourages the disregard of the interests of stakeholders which is undesirable.

On the other hand, the same theory is used to argue for the consideration of stakeholders` interests in corporate governance. For instance, Dodd`s classic account of the corporate social responsibility, was inspired by the real entity theory. Rejecting the view that a corporation is merely an aggregate of stockholders and holding that a corporation is a distinct legal entity, he opined that, because the corporation is real and different from the individual shareholders behind it, the corporation as a separate institution could pursue interests that are different from those of its shareholders.[195] Viewed in this manner, corporations and/or corporate managers can pursue societal interests and have duties to other constituencies besides shareholders.[196] It should

[191] Dignam & Lowry (note 57 above) p 384.
[192] Dignam & Lowry (note 57 above) p 384.
[193] Dignam & Lowry (note 57 above) p 384.
[194] Dignam & Lowry (note 57 above) p 384.
[195] Dodd (note 74 above) p 1160.
[196] Petrin (note 133 above) p 24.

however be noted that, because the real entity theory is malleable with regards to issues of stakeholders` and shareholders` interests, other theories emerged which are discussed below.

The other problem faced by the real entity theorists was that, although thought to be “real” and likened to a living organism, a legal entity was not capable of acting by itself. It did not have the hands, mouth and the brain to perform its duties.[197] However, they sought to address this problem by providing the entity with “organs,” its metaphorical “hands and mouth.”[198] They viewed acts undertaken by these organs, generally high-ranking officials within the legal entity as fully and directly binding upon the legal entity. These organs were not viewed as agents rather they were considered to be part of, and reflected, the legal entity itself.[199] The deficiencies of corporate realism went largely unchallenged until the Great Depression in the 1930s.[200] Dignam and Lowry state that the first major challenge to the real entity theory was the work of Berle and Means, primarily their concern about unaccountable managers.[201]

2.5 The Shareholder Value Approach

2.5.1 What is Shareholder Value Approach?

The SVA is regarded as the traditional approach to corporate governance. This principle dates back to the 19th century.[202] There is general acceptance in financial economics that when making business decisions, directors should base their decisions on maximization of shareholder value. This is considered as the ideal goal of all businesses.[203]

The shareholder value approach refers to “the concept that the primary objective for a company is to increase the wealth of its shareholders by paying dividends and/or causing the share price to increase”.[204] This term is sometimes called shareholder value maximization or shareholder value model. It implies that a company's success is measured by its level of shareholder`s enrichment.[205] Shareholder value is also described as “the value delivered to shareholders because of management's ability to grow earnings, dividends and share price. In other words,

[197] Petrin (note 133 above) p 7.
[198] Petrin (note 133 above) p 7.
[199] Petrin (note 133 above) p 7.
[200] Dignam & Lowry (note 57 above) p 384.
[201] Dignam & Lowry (note 57 above) p 384.
[202]DG Smith ‘The Shareholder Primacy Norm’ (1998) 23 (2) *Journal of Corporation Law* 277 p 306.
[203] Krishnan (note 68 above) p 1.
[204] Muswaka (note 67 above) p 218.
[205] ‘Shareholder Value’ available at *https://en.wikipedia.org/wiki/Shareholder_value* (accessed on 12 November 2017).

shareholder value is the sum of all strategic decisions that affect the firm's ability to efficiently increase the amount of free cash flow over time".[206]

In terms of this approach therefore, maximising profit must be the primary purpose of the company and its managers. The directors are considered fiduciaries who should carry on the business solely for the interests of stockholders.[207] Dodd states that "the sole function of the corporation is conceived to be the making of profit for its stockholder members, so that they are the ultimate beneficiaries of the business and of the activities of the persons by whom it is carried on."[208]

This view is supported by Berle who stated that managerial powers are held in trust for stockholders and these are the sole beneficiaries of the corporate enterprise. [209] He observed as follows:

> It is the thesis of this essay that all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.[210]

It is therefore the gist of this principle that a corporation should benefit shareholders and no one else. It follows that a director of a company who is not a shareholder of that company should not seek to benefit from the company he or she is working so hard for, but seek to benefit the shareholders. This reveals the irrationality of this approach.

The SVA was rigorously asserted in the case of *Dodge v Ford Motor Company*[211] where the court stated as follows:

> The business corporation is organized and carried on primarily for the profit of stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to reduction of profits or to the non-distribution of profits among stockholders in order to devote them for other purposes.

In this case the court clearly endorsed the shareholder value approach. Dodd therefore, states, although he does not support, that "[i]t is undoubtedly the traditional view that a corporation is an

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[206] "Shareholder Value Definition" available at *http://www.investopedia.com/terms/s/shareholder-value.asp* (accessed on 12 November 2017).
[207] Dodd (note 74 above) pp 1146-1147.
[208] Dodd (note 74 above) p 1146.
[209] Berle (note 15 above).
[210] Berle (note 15 above).
[211] 170 N.W. 668 (Mich. 1919) p 684.

association of stockholders formed for their private gain and to be managed by its board of directors solely with that end in view."[212]

2.5.2 Justification of the Approach

The protagonists of this theory have expounded arguments for the SVA. It has been argued that:

> Under a legal system based on private property and freedom of contract, an individual who carries on business for himself has no duty to conduct his business to any extent for the benefit of a large number of persons who become either his customers or his creditors and owes to those with whom he deals only the duty of carrying out such bargains as he may make with them.[213]

It has also been argued that the business of corporations is to make money and not to administer the society`s social or moral development.[214] Proponents of the SVA believe that it is the responsibility of the state to solve social problems and that corporate philanthropic gifts and other activities that are not directed to generating wealth for shareholders are both a waste of shareholders' money and, probably immoral as this somewhat amounts to stealing from owners.[215] Friedman notes that the involvement of firms in social or public policy issues diverts wealth to issues that are not in the core expertise of their managers.[216]

Shareholder proponents are of the belief that there is an invisible hand which regulates the market and if all firms attempt to maximize profits, this will benefit the society at large, therefore they advocate for limited regulatory intervention in business on the part of the government.[217] Pfarrer also states that some shareholder proponents even believe that the illegal activities done by corporations are checked by the invisible hand and that the illegal or unethical behaviour engaged in by firms are punished by the market.[218] Shareholder primacy advocates contend that non-shareholders like creditors and employees receive adequate protection from contractual arrangements and/or statutory provisions, unlike shareholders, so managers should manage for the benefit of these shareholders who enjoy no legal protection.[219]

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212 Dodd (note 74 above) pp 1146-1147.
213 Dodd (note 74 above) p 1145.
214 Friedman (note 69 above) p 6.
215 MD Pfarrer 'What is the Purpose of the Firm?: Shareholder and Stakeholder Theories' p 87 available at *http://www.enterpriseethics.org/Portals/0/PDFs/good_business_chapter_07.pdf* (accessed on 05 December 2017).
216 Friedman (note 69 above) p 2.
217 Pfarrer (note 215 above) p 87.
218 Pfarrer (note 215 above) p 87.
219 H Hansmann & R Kraakman 'The End of History for Corporate Law' (2001) 89 (2) *Georgetown Law Journal* 439 p 442.

Corporations are not privileges; a corporation is no more than a convenient name for a nexus of contractual relationships among people. Only people have moral obligations; corporations can no more be said to have moral obligations than does a building, an organization chart, or a contract.[220]

2.5.3 Criticism of the Approach

The SVA has been greatly criticised by those who feel that shareholders are not the only ones that have interest in the success or otherwise of companies. Clearly, profit or wealth maximisation comes with a lot of implications on those that are non-shareholders. This approach is very irrational and it ignores the principle of fairness. The case of *Re Lee Brehens & Co Ltd*[221] illustrates the irrationality of this approach to corporate governance. In that case, directors had voted that the wife of the company`s former managing director be given an allowance in the exercise of their powers as provided in the constitution of the company. The court ruled that such payment was not incidental to the carrying on of the company`s business and not to the benefit of the company. Consequently the payment was struck down.

It is trite that where a person invests in something be it in form of labour or capital, benefits should flow thereof. If a person who invests so much in a company cannot enjoy some form of benefits thereof, solely because he or she is a non-shareholder, then it will be worthless to make such an investment. Needless to say that for a company to thrive, these directors who are entrusted with the powers to manage and control the affairs of the company need to be committed and even work extra hard, hence they should draw some benefits from the company. Refusal of payment in this case is not only irrational but it also discourages commitment on the part of directors and other stakeholders and this has indirect negative effect on the company itself.

Similarly, in *Re W & M Roith Ltd*[222] the director of the company secured the alteration of the company`s constitution in an endeavour to make provision for his wife to the effect that when he dies his widow would be entitled to receive pension for life. The court held that although made bona fide, the transaction was not for the benefit of the company and as such not binding on the company. The support of the SVA in this case is highly unfair and it perpetuates social inequality in that the wife was left without any source of financial support.

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[220] FH Easterbrook & DR Fischel, "Antitrust Suits by Targets of Tender Offers," (1982) 80 *Michigan Law Review* 1155 p 1177.
[221] [1932] 2 Ch 46 (ChD).
[222] [1967] 1 All ER 427 (ChD).

Notable is that, this theory disregards even the need to achieve long-term sustainability of a corporation. In as much as considering interests of other stakeholders may not bring immediate results to the corporation, it is important in that a company will gain a good name and this will improve its position in a competitive market. For example, while making donations, rewarding employees and taking care of the environment may not prove immediate contribution to the interests of shareholders, they serve as incentives and also builds the good will of the corporation which in the long run helps the corporation to keep thriving.

Due to the fact that the so called traditional approach to corporate governance has been so highly criticised, other theories have been brought forward from other schools of thought. One school of thought advocates for the inclusion of stakeholder's interest in corporate governance. The other school of thought contends that stakeholder`s interests must be taken into account and they should not be considered as means to attain the shareholder`s interest but as an end themselves. There should be imposition of statutory obligation on directors to consider the interest of stakeholders.[223] These two approaches are discussed below.

2.6 Stakeholder Theory

2.6.1 Background of the Stakeholder Theory

Conceivably not only shareholders contribute to the success of corporations. There are other contributors who are also affected by the activities of corporations.[224] These persons and groups who contribute to the corporation are referred to by scholars as "stakeholders, constituencies, contributors, or even investors".[225] As far as public corporations are concerned, there is a contention which is raised that the public corporation`s affairs broadly concern the public and that the lives and interests of so many are affected, so much so that the management of a corporation affairs can no longer be aimed at solely benefiting shareholders.[226]

The history of the stakeholder theory, in broader social terms can be traced back to Johannes Althusius, a seventeenth century German social theorist.[227] However, how the organised modern

[223] Nwafor (note 17 above) p 678.
[224] A Keay 'Stakeholder theory in Corporate Law: Has It Got What It Takes?' (2010) 9 (3) *Richmond Journal of Global Law and Business* 249 p 252.
[225] Keay (note 224 above) p 252.
[226] RS Karmel 'Implications of the Stakeholder Model' (1993) 61 *George Washington Law Review* 1156 pp 1171-1175.
[227] EW Orts 'A North American Legal Perspective on Stakeholder Management Theory' in E Orts & FM Patfield (eds) *Perspectives on Company Law* (1997) p 170.

form of the theory was developed is usually traced to R. Edward Freeman.[228] Freeman contended that the economic theories that had been preeminent in the 1970s were outdated therefore he called for a rethinking of business organisations.[229] Freeman was the first to articulate the Stakeholder theory in the form it is known today.[230]

2.6.2 What is Stakeholder Theory?

This theory was a direct response and attack on the SVA. It comprises of three aspects namely: normative, descriptive, and instrumental. The normative aspect assumes that it is moral and ethical for managers to value stakeholder groups and that stakeholders should be seen as "ends" and not "means" to an end.[231] The descriptive aspect of stakeholder theory is that it is used to explain specific corporate behaviour. The instrumental aspect provides a framework for examining the links between the practice of stakeholder management and a corporation's performance, and is concerned with looking at how the consideration of stakeholders can improve a corporation's efficiency and success.[232] In this paper, focus will be on the normative aspect which has been identified as being in clear disagreement with the shareholder primacy.[233] The normative aspect of this theory has also been identified as the core of the theory.[234]

The Stakeholder theory notes that shareholders are merely one of many competing and diverse groups that have an interest in the affairs of a corporation.[235] Keay explains that "[a] stakeholder approach, in general terms, is premised on the notion that an inclusive approach towards all contributors is— from a social, economic and political perspective—valuable. The theory focuses on fostering the full potential of all contributors."[236] He goes on to explain that the stakeholder theory adheres to the idea that the corporation works towards creation of value for all stakeholders. All those who contribute critical resources to the corporation should benefit.[237]

[228] Freeman (note 92 above) p 25.
[229] Freeman (note 92 above) p 25.
[230] Krishnan (note 68 above) p 3.
[231] SJ Reynolds, FC Schultz & DR Hekman 'Stakeholder Theory and Managerial Decision-Making: Constraints and Implications of Balancing Stakeholder Interests' (2006) 64 *Journal of Business Ethics* 285 p 293.
[232] Keay (note 224 above) p 255.
[233] BW Van de Ven 'Human Rights as a Normative Basis for Stakeholder Legitimacy' (2005) 5 (2) *Corporate Governance* 48 p 51.
[234] T Donaldson & L Preston 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications' (1995) 20 (1) *Academic of Management Review* 65 p 74.
[235] Keay (note 224 above) p 255.
[236] Keay (note 224 above) p 255-256.
[237] Keay (note 224 above) p 256.

The other fundamental feature to the Stakeholder theory is that organisations are managed for the benefit of, and accountable to all stakeholders.[238] The theory contends that the inclusion of stakeholder`s interests should not be done as a means to increase value for shareholders. Freeman argues that stakeholders have a right to be regarded as an end, and not a means to an end, that is, they are not used just to benefit the corporation in the long run, but their benefits are an end for the corporation.[239] It can be seen that this is a direct attack on the SVA in that it advocates for the directors to consider the interests of stakeholders not only when the company stands to benefit as stated in the English case of *Hutton v West Cork Railway Company*,[240] but that their interests have to be taken into consideration whether the company will manifestly benefit or not. Freeman`s contention therefore is that, whether the inclusion of stakeholders` interests in corporate decisions will have any impact, either positively or negatively, in the corporation or not, they should be considered. This however involves balancing the interests of stakeholders.[241]

Another crucial aspect of the Stakeholder theory is that shareholders and stakeholders should be treated equally. No group should be given preference over another. This theory rejects the idea of maximising a single objective, as is the case with shareholder primacy where the focus is all on maximising shareholder wealth.[242] This theory acknowledges the legitimacy of claims against the corporation by people or groups who have stakes in the corporation. A stake has been defined as "an asserted or real interest, claim or right, whether legal or moral, or an ownership of share in an undertaking."[243] It is where someone has something that is at risk due to corporate action.[244] It is therefore contended that it is legitimate for managers to spend time and resources on such persons.[245]

As an aspect of the Stakeholder theory, the ESVA has been brought forward. It is contended under this theory that directors have an obligation to pursue the interests of the company for the benefit of shareholders by taking due cognizance of all relevant factors including a proper balanced view of the short and long term benefits to the company, the need to sustain ongoing

[238] Freeman (note 92 above) p 53.
[239] Freeman (note 92 above) p 58.
[240] (1883) 23 ChD p 654. In this case the court held that "[t]he law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.
[241] Reynolds *et al* (note 231 above) p 286.
[242] Keay (note 224 above) p 258.
[243] LV Ryan 'The Evolution of Stakeholder Management: Challenges and Potential Conflicts' (1990) 3 (1) *International Journal of Value-Based Management* 105 p 108.
[244]Appendix: 'Principles of Stakeholder Management' (2002) 12 (2) *Business Ethics Quarterly* 257 p 258.
[245] Freeman (note 92 above) p 45.

relationships with employees, customers, suppliers and others, the need to maintain the company`s reputation and to consider the impacts of its operations in the community and the environment.[246]

As mentioned earlier, the SVA entails that the sole beneficiaries of the company are the shareholders, on the other hand, the ESVA is to the effect that, interests of other interested parties must be taken into account ,however, the shareholder`s interest, that is, profit maximisation must take precedent.[247] The other important feature of the ESVA is that these other interests can be pursued by directors only if the protection of those other interests promote the predominant interests of shareholders.[248] It follows that a company is to consider the ethical, charitable or environmental concerns only if their disregard could, at least in the long term, lead to loses for the shareholders.[249]

The ESVA is based on the premise that the long term success of the corporation and the well-being of the society are interdependent.[250] Nwafor noted that the proponents of this theory believe that for the long term interests of shareholders to be protected, it is important for the company to properly manage its relationships with all of its stakeholders.[251] Mauboussin explains that improper balance between the interests of stakeholders, in particular, customers and the financial obligations of a company will yield negative results on the company.[252] Martin, a proponent of this theory observed that "if you take care of customers, shareholders will be drawn along for a very nice ride. The opposite is simply not true: if you try to take care of shareholders, customers do not benefit and ironically, shareholders don`t get very far either."[253] Martin`s view emphasises the important feature of this theory that stakeholder's interests must be considered for the benefit of the shareholders.

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[246] Deakin & Singh (note 82 above).
[247] Nwafor (note 17 above) p 675.
[248]Davies (note 20 above) p 5
[249] 'What is Corporate Governance? - A definition' available at *http://www.worker-participation.eu/Company-Law-and-CG/Corporate-Governance/What-is-CG* (accessed on 19 December 2017).
[250] JL Yang 'Maximizing shareholder value: The goal that changed corporate America' available at *https://www.washingtonpost.com/business/economy/maximizing-shareholder-value-the-goal-that-changed-corporate-america/2013/08/26/26e9ca8e-ed74-11e2-9008-61e94a7ea20d_story.html* (accessed on 15 December 2017).
[251] Nwafor (note 17 above) p 676.
[252] MJ Mauboussin 'What Shareholder Value is Really About' available at *https://hbr.org/2011/10/ceos-must-understand-what-crea/* (accessed on 19 December 2017).
[253] RL Martin *Fixing the Game: Bubbles, Crashes and What Capitalism Can Learn from the NFL* (2011) p 62.

It is also an important feature of the ESVA that a company should take care of the community and the environment in which the company operates in order to ensure the long term sustainability of its operations.[254] Nwafor explains the effect of ignoring the stakeholders mentioned above as follows:

> The recurrent communal restiveness witnessed in those regions whose environment is vastly degraded by industrial activities of corporations which consider its immediate profit interests more important than long-term planning and caring for the community and the environment presents a good example. The impact of the degraded environment such as the destruction of farm land, fishing ponds, and contaminated water with the resultant health hazards to the inhabitants of the host community have in some cases given rise to armed resistance to the operations of the corporations leading to the destruction of company facilities, kidnapping of the workers and demanding of ransom and sometimes outright killing of the employees of such corporations. Those regions have become increasingly dangerous for the operations of corporations…which could have been avoided by factoring the stakeholders` interests into those companies operations.[255]

It has also been observed that, in this modern generation where people are greatly aware of their rights to decent living and unpolluted environment, corporations cannot afford to keep on ignoring the interests of the community and the environment where they operate.[256] In *Teck Corp. v Millar*[257] the court observed as follows:

> A classical theory that once was unchangeable must yield to the facts of modern life….If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting bona fide in the interests of the company itself. Similarly if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of shareholders.

This has therefore been the bases for the contention under the ESVA that the consideration of the interests of other stakeholders is important for the benefit of shareholders.

2.6.3 Justification of the Stakeholder Approach

Proponents of the Stakeholder theory have brought forward arguments for the theory. Some take the view that shareholder primacy damages the interests of non-shareholding stakeholders, and this forms the basis for a legitimate claim that these stakeholders warrant consideration and

[254] Nwafor (note 17 above) p 676.
[255] Nwafor (note 17 above) p 676.
[256] Nwafor (note 17 above) p 676.
[257] (1972), 33 D.L.R. (3d) 288 (B.C.S.C.) p 314.

protection in the management of a corporation's affairs.[258] Freeman expressed the rationale behind the theory in this way:

> Business is about putting together a deal so that suppliers, customers, employees, communities, managers and shareholders all win continuously over time. In short, at some level, stakeholder interests have to be joint—they must be traveling in the same direction—or else there will be exit, and a new collaboration formed.[259]

The point made by Freeman is that for a company to thrive it needs a lot of contributors and these people need to be considered so that they continue being committed and support the corporation.[260]

It is contended that it is wiser to carter for the interests of stakeholders as the company will benefit more than if shareholder wealth maximisation were practised.[261] However, many shareholder primacy theorists argue that shareholders' interests have to be the first priority or the corporation will not prosper. It should be noted that when the shareholder`s interests are prioritised, this is often done at the very expense of stakeholders. No blind eye should be turned to the interests of stakeholders because a company does not operate in a vacuum. For a company to function as an ongoing concern, there must be stakeholders. Without stakeholders the company will be existing but not functional and that is undesirable. This therefore means that stakeholder`s interests are equally important as those of the shareholders.

Another plausible argument which has been put forward in support of this approach is that a business is a public profession and not a private matter. In other words, as a going concern, it is devoted for public use and not for private use. In that regard Dodd states as follows:

> business is permitted and encouraged by the law primarily because it is of service to the community rather than because it is a source of profit to its owners. Accordingly, where it appears that unlimited private profit is incompatible with adequate service, the claim of those engaged therein that the business belongs to them in an unqualified sense and can be pursued in such manner as they choose need not be accepted by the legislature."[262]

Dodd`s point, therefore, is that stakeholder`s interests should be taken into account by directors when managing the affairs of corporations and not only focus on maximising profit for

[258] D Millon 'Communitarianism in Corporate Law : Foundations and Law Reform Strategies' in LE Mitchell, D Million, LL Dallas, GA Mark, T Gabaldon & WW Bratton (eds) *Progressive Corporate Law* (1995) p 3.
[259] RE Freeman; AC Wicks & B Parmar 'Stakeholder Theory and "The Corporate Objective Revisited"' (2004) 15 (3) *Organization Science* 364 p 365.
[260] Keay (note 224 above) p 265.
[261] K Greenfield & DG Smith 'Debate: Saving the World With Corporate Law?' (2008) 57 *Emory Law Journal* 947 p 975.
[262] Dodd (note 74 above) p 1149.

shareholders as this ignores the interests of the public to which the business was devoted in the first place. In other words, there should be a balance between the two interests and none should trump the other.

It is also argued that directors be stakeholder oriented when managing the affairs of corporations because once a corporation becomes a going concern, not only shareholders have interests in it but many other groups of people too, the interests of which should not be ignored. To explain this, Dodd cited the views of Owen D. Young, an officer of General Electric Co., who argued that:

> There are three groups of people who have an interest in that institution. One is the group of fifty-odd thousand people who have put their capital in the company, namely, its stockholders. Another is a group of well toward one hundred thousand people who are putting their labor and their lives into the business of the company. The third group is of customers and the general public.
>
> Customers have a right to demand that a concern so large shall not only do its business honestly and properly, but, further, that it shall meet its public obligations and perform its public duties-in a world, vast as it is, that it should be a good citizen. Now, I conceive my trust first to be to see to it that the capital which is put into this concern is safe, honestly and wisely used, and paid a fair rate of return. Otherwise we cannot get capital. The worker will have no tools.
>
> Second, that the people who put their labor and lives into this concern get fair wages, continuity of employment, and a recognition of their right to their jobs where they have educated themselves to highly skilled and specialized work. Third, that the customers get a product which is as represented and that the price is such as is consistent with the obligations to the people who put their capital and labor in. Last, that the public has a concern functioning in the public interest and performing its duties as a great and good citizen should.[263]

Indeed, many, besides shareholders, have interests which ought not to be ignored. Their interests are equally important with those of the shareholders and deserve equal recognition, the point which this approach does not really stress.

Another argument which has also been brought forward in support of the stakeholder theory is that a corporation as a legal person is equivalent to a citizen. Millon states as follows with regard to the concept of corporations being citizens:

> Applied to natural persons, the concept of citizenship refers to the individual's commitment to other-regarding goals that are valued without respect to self-interest or personal financial welfare. Corporate citizens likewise might disregard purely economic self-interest in circumstances in which social obligation dictates that they do so.[264]

[263] Dodd (note 74 above) p 1154.
[264] Millon (note 118 above) p 217.

This supports the view that corporations can act in the interests of stakeholders although it might not necessarily bring capital. Thus, it is argued that "[i]f the corporation is a real person in society, it should have the same sorts of moral and social responsibilities that individuals have."[265] To that end, stakeholder theorists view a corporation as:

> a moral organism with social and ethical responsibilities that extend far beyond the interests of shareholders to include other constituent groups such as employees, customers, suppliers, nongovernmental organizations, local communities, and even, in conjunction with issue-areas such as the environment, disease and corruption prevention, and human rights, the community of nations.[266]

Thus, the proponents of this theory support corporate social responsibility based on the understanding that it is a citizen and it should take into account the interests of other citizens just like natural persons are legally expected to.

It is important to note that the Stakeholder proponents are not arguing that directors should just spend money recklessly and without applying and weighing the consequences of their actions. As Keay noted, "the fact of the matter is that it is probably a matter of the degree to which stakeholder interests are taken into account, and what happens when there is a conflict between shareholder interests and the interests of other stakeholders that really matters".[267] If managed properly and if the theory is correctly applied and interpreted, indeed the company stands at a better position than when the SVA was followed.

In an endeavour to provide for an insight into how stakeholders can be protected under legislation, Muswaka recommended the amendment of section 76 (3) (b) of the South African Companies Act 71 of 2008 where she said:

> In this regard, it is recommended that the section be amended to read as follows: "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— … (b) in the best interests of the company and all key stakeholders; and …" The above proposed amendment will clarify the position of directors with regard to key stakeholders. It makes it clear that directors have a fiduciary duty to consider the interests of the company as well as those of all key stakeholders.[268]

A question which may arise is who are or what is meant by "key stakeholders"? This question has not found a unanimous definition by the proponents of the Stakeholder theory and this has been

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[265] Ripken (note 189 above) p 117.
[266]W Bradford 'Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights' (2012) 26 (1) *Notire Dame Journal of Law, Ethics & Public* Policy 141 p 148-149.
[267] Keay (note 224 above) p 265.
[268] Muswaka (note 67 above) p 221.

argued to be one of the weaknesses of the Stakeholder theory.[269] In fact many commentators have distinguished between primary (inside or internal) stakeholders, on the one hand, and secondary (outside or external) stakeholders.[270]

Another provision was recommended which, according to Dean, will best address the directors to include stakeholders` interests in corporate governance. Dean suggested the following as an appropriate legislative provision:

> A director of a public limited company shall in all his/her conduct and decision making so act as to advance the development of the company in the interests of its customers, its employees and its shareholders and with proper regard for the effect of its operations on the environment and on the community. The interests to which a director of a public company should give due consideration include:
>
> The provision for customers of safe and effective goods and services of good quality at fair prices;
>
> The provision for employees of fair remuneration and secure work with reasonable opportunity for their interests to be heard within the company and for their promotion and development of skills;
>
> The provision for shareholders of fair returns to remunerate past investment and encourage future investment in the company;
>
> The provision for key business associates including suppliers of goods and services of secure relationships and ongoing co-operation where such connections offer advantages to both parties;
>
> The provision for the community of programmes to monitor and minimise the environmental impact of the company's operations and advance responsible conduct towards the company's neighbours.[271]

This ideal provision, according to Dean, would extensively include and protect the interests of stakeholders. Importantly, however, this provision does not have strong impact as it lacks imposition of enforceable obligation on directors to consider the interests of all stakeholders. As stated by Millon "these statutes only permit balancing of interests rather than requiring it. Corporate boards would thus be free to pursue CSR policies but cannot be sanctioned for choosing not to do so."[272] Despite the other arguments that have been brought forward against this theory such as that it is unworkable and that it undercuts private property, denies agents' duties to principals, and destroys wealth, the most noted one in this paper is that brought about by pluralists that it makes no great difference if directors are not legally mandated to consider the

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[269] Keay (note 224 above) p 273.
[270] Keay (note 224 above) p 259.
[271] J Dean *Directing Public Companies* (2001) p 138.
[272] D Millon 'Two Models of Corporate Social Responsibility' (2011) 46 *Wake Forest Law Review* 523 p 526.

interest of stakeholders.[273] This has led other scholars to invoke what is called the Pluralist Approach which is discussed below.

2.7 Pluralist Approach

Generally, this approach shares the same view with the Stakeholder approach that directors of companies should consider the interests of stakeholders in corporate governance. However the Pluralist approach is more robust in that it argues for statutory imposition of enforceable obligation on the director to consider the interests of all stakeholders in their own rights in the performance of his duty.[274] It is argued that the shareholders` interests should not be given preference over those of stakeholders but that shareholders` interest should become merely one of the interests the director would weigh against others when making business decisions.[275]

Difference can be noted between the ESVA and the Pluralist Approach in that the former imposes unenforceable obligation on the directors as failure to comply does not attract any legal reproach. Hollington explains the difference between the Stakeholder Approach and the Pluralist Approach in the following words:

> The former is essentially the management mantra that it is good for business to take account of nice cuddly things like the community and the environment:…The Pluralist Approach was more radical: it required a different view of a director's duty as focused on the maximisation of value for the benefit of all contributors not just shareholders. This took away ultimate control of a company's destiny from the shareholders.[276]

The pluralists therefore are of the view that directors should focus on maximising value for all stakeholders and not just shareholders.

It is trite that the Stakeholder theory was formulated and accepted and entrenched in legislation of some jurisprudence, however the effects of the SVA are still prevalent. The Pluralist Approach addresses this problem by arguing that "the only way the director would accord equal and fair consideration to all stakeholders is by statutory compulsion attained by broadening the range of groups to whom directors owe a duty."[277]

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[273] E Sternberg 'The Defects of Stakeholder Theory' (1997) 5 (1) *Corporate Governance: An International Review* 3 p 9.
[274] Nwafor (note 17 above) p 678.
[275] Select Committee on Trade and Industry Sixth Report 'The Role of Directors' available at *http://www.publications.parliament.uk/pa/cm200203/cmselect/cmtrdind/439/43906.htm* (accessed on 15 December 2017).
[276] Hollington (note 97 above) p 5.
[277] Nwafor (note 17 above) p 679.

It is arguable that the absence of some form of sanction to corporations which ignore stakeholders` interests, encourages the directors to concentrate on profit maximisation for shareholders as if the company would function as an ongoing concern without stakeholders. Even in jurisdictions that have incorporated the need to take into consideration the stakeholders` interests, its practicability is still very low because there is no legal compulsion. Hollington explains this with regard to section 172 (1) of the UK Companies Act of 2006 which provides for the inclusion of stakeholders` interests in corporate governance as follows:

> Suppose the directors fail to take into account, as part of their thinking process, the listed factors – then what? What will the court do about it? The court will not make the business decision itself and so will send it back to the directors, who will in almost all cases reach the same decision, whilst paying lip-service to the listed factors.[278]

This implies that so long as there is no punishment, inclusion of stakeholder`s interests in corporate governance will be just on paper but not in practice.

Stakeholders have, in a bid to protect their interests against the adverse corporate operations, often relied on the general principles of common law and legislation to bring actions against such corporations. Nwafor argued that "the recurrence of such cases cannot be divorced from the absence of any statutorily enforceable obligation on the directors to consider the interests of stakeholders in the conduct of the company`s business."[279]

It has been argued that the Pluralist Approach is not workable and it was rejected in the UK. When deliberating on this matter it was stated that having directors' duties defined in:

> [T]erms of the stakeholders would mean identifying all the various stakeholder groups; and deciding the extent and nature of the directors' responsibility to each. The result would be that the directors were not effectively accountable to anyone since there would be no clear yardstick by which to judge their performance. This is a recipe neither for good governance nor for corporate success.[280]

Advocates of SVA have therefore propounded that the SVA is more workable than the Pluralist Approach.

It can however be argued that identifying stakeholders and their expectations on the company is not such a conundrum as it has been alleged to be. The community as one of the stakeholders is entitled to a clean and harmless environment. For example, the Constitution of South Africa provides that "everyone has the right to an environment that is not harmful to their health or well-

[278] Hollington (note 97 above) p 8.
[279] Nwafor (note 17 above) p 679.
[280] The Committee On Corporate Governance: Final Report (1998) p 12 available at *http://www.ecgi.org/codes/documents/hampel.pdf* (accessed on 15 December 2017).

being; and to have the environment protected, for the benefit of present and future generations."[281] Environmental protection has become an international concern and there are many international instruments addressing the issue of the environment. Nwafor, therefore, summarised the expectations of stakeholders as follows:

> The community would ordinarily expect that the company would in the course of its operations take necessary measures to avoid all incidences of harmful environmental degradation arising from industrial pollution, offer jobs to members of the community and provide them with the essential amenities of life within the company`s capacity. Customers would expect that goods which are of good standard would be provided for them by the company at competitive prices. Similarly, the employees would expect to be paid a living wage and provided safe and healthy work procedures.[282]

Arguable is that these are the groups of stakeholders that are most vulnerable to corporation`s adverse operations.

The Pluralists, therefore, argue that, so far the law has failed to address the challenging matter of the inclusion of stakeholders in corporate governance because of the application of the subjective test to the actions of the directors.[283] The lack of enforceable obligation on the directors makes the stakeholder inclusion to be just on paper but not in practice.

2.8 Chapter conclusion

The various theories that have emerged over the years in a bid to address the issue of stakeholders` interests in corporate governance have been examined. It has been shown that so far the law has failed to address this issue as there is lack of enforceable obligation on the directors to consider the interests of stakeholders. Although the ESVA seems to be provide solution to this problem, however its principles makes the interests of stakeholders to remain subordinate to those of shareholders. The Pluralist Approach is the approach which will bring the desired results however many jurisdictions are not ready to adopt this approach which makes stakeholder inclusion to be just on paper but not in practice.

In the following chapter, an analysis will be done on how different countries have tried to address this problem and to what extent have they managed to do so. Inferences will be drawn from the various jurisprudences in order to have proper review of the current position in South Africa as far as the matter under discussion is concerned.

[281] Section 24 (a) & (b) of the Constitution of South Africa 108 of 1996.
[282] Nwafor (note 17 above) p 680.
[283] Hollington (note 97 above) p 8.

CHAPTER 3

DIRECTOR'S STATUTORY DUTY TO ACT IN THE BEST INTEREST OF THE COMPANY

This chapter comprises of a comparative analysis of corporate governance in South Africa, United Kingdom (UK), Canada and India. It also discusses issues like who is a director, whom do directors owe their duties and meaning of "company" in terms of different statues of the said countries.

3.1 Introduction

It is trite law that a company is a separate legal entity and it functions through its directors. These directors, as a board, stand in a fiduciary relationship with the company, which imposes on them duties as stipulated under common law and legislation. In the exercise of their functions, the directors act as a board. The board is the focal point of the corporate governance system.[284] It is therefore important in this chapter to briefly discuss the appointment of directors and their duties. In the first part of this chapter a thorough discussion of director's duties shall be done, especially the fiduciary duties which have prompted the whole debate which the study seeks to address. The researcher will show how the director`s duties have impact in corporate governance. As the chapter proceeds, a comparative analysis shall be done on how different jurisdictions have attempted to address this intriguing issue and to what extent they have managed to achieve effective corporate governance system.

3.2 Who is a director?

The new Act in section 1 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."[285] This definition encompasses all directors irrespective of whether the director is a *de facto* or *de jure* director. Section 332 (10) of the Criminal Procedure Act defines a director as "any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body."[286] This definition gives further details on what a director does within the company which forms part of his core responsibilities.

[284] Muswaka (note 67 above).
[285] 71 of 2008.
[286] 51 of 1977.

A company as a separate legal entity, is distinct from its members.[287] A person who holds shares or any interest in the company is not entitled to claim ownership of the company. In *Short v Treasury Commissioners,*[288] it was stated that in the eyes of the law shareholders are not co-owners of the undertaking. In other words, a share in the share capital of a company does not imply ownership of a part of the assets or property of the company as the company's assets or properties belong to the company itself and not to its members.[289] .In *Dadoo Ltd v Krugersdorp Municipal Council,*[290] the court held that the property vests in the company and cannot be regarded as vesting in any or all of the members of the company. This decision confirms that the company is separate from its members and those who invest in the company.

The leading case regarding the legal standing of a company is the case of *Salomon v Salomon and Co Ltd.*[291] It is in this case that it was first pronounced that a company is a separate legal entity distinct from its members. In this case, Salomon at first ran a business as a sole trader and he later turned the business into an incorporated company. Soon after incorporation the company became insolvent and entered into liquidation. The liquidator claimed that Salomon should be responsible for satisfying the company`s debts just as he would if he had remained a sole trader. The court held that, as the company was duly incorporated, it was an independent person with its rights and liabilities appropriate to itself and that Salomon could not be found personally liable for the debts of the company. Thus, the legal fiction of "corporate veil" between the company and its owners/controllers was firmly created in this case.

In *Airport Cold Storage (Pty) Ltd v Ebrahim and Others,*[292] the court confirmed that one of the most fundamental consequences of incorporation is that a company is a juristic entity separate from its members. This common law position is reinforced by the new Act which provides that from the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company is a juristic person.[293]

It is against this backdrop that a company is mandated to have directors who will run the business of the company. Although a company is in law regarded as a legal person, it cannot function on its own, therefore, it needs some kind of mechanism which will enable it to function. In *R v*

[287] Section 19 of the Companies Act 71 of 2008.
[288] [1948] 1 KB 116 (CA) p122.
[289] Muswaka (note 67 above) p 218.
[290] 1920 AD 530.
[291] [1897] AC 22 (HL).
[292] 2008 (2) SA 303 (C).
[293] Section 19 (1).

Kritzinger[294], the court pointed out that a company is an artificial person that cannot read a written representation or hear a spoken representation. It reads or hears a representation through the eyes or ears of, *inter alia*, its directors acting in the course of their duty, and "board" is the collective term used to designate the directors when they act together in the course of their duty to the company. The board of directors is regarded as the directing mind and will of the company.[295] In *Tesco Supermarket Ltd v Nattras*,[296] it was held that the directors as agents of a company are not merely representatives of the entity but an embodiment of the company itself.

Each and every company is expected to have a board of directors. This board of directors acts as the functionary of the company. Section 66(1) of the new Act provides as follows:

> 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 this Act or the company`s Memorandum of Incorporation provides otherwise.[297]

The use of the word "must" shows that companies are mandated to have a board of directors through which the company exercises its functions. The minimum number of directors which each company must have depends on the type of the company.[298] For the purposes of this research, it is not necessary to delve into a discussion of the number of directors required and their quorum when seeking to make a resolution.

Noteworthy is that, although directors are the directing mind and will of the company, this does not confer on them the liberty to run the affairs of the company as they please. They stand in a fiduciary position to the company. In *Bristol and West Building Society v Mothew*,[299] the court stated as follows:

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith…he may not act for his benefit or the benefit of a third person without the informed consent of his principal.

To that end, there are specific duties assigned to directors and one of their fundamental duties is the duty to act in good faith in the best interests of the company.[300]

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294 1971 (2) SA 57 (A).
295 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705 (HL) p 713.*
296 1971 (1) All ER 127 (HL) p170.
297 71 of 2008.
298 Section 66(2) of the Companies Act 71 of 2008.
299 [1996] 4 ALL ER 698 (CA).
300 See s76 (3) of the Act.

The concept of good faith and the best interests of the company forms the next focal point of this chapter. Judicial interpretations of this concept in cognate jurisdictions are examined to suggest how the interests of stakeholders can be incorporated into the duties of company directors in the new Act.

An analysis of the various theories advanced regarding the exercise of director`s powers in corporate governance shows that quite a number of approaches to corporate governance can be adopted. However, it has also been shown that in the modern society, it is outmoded to manage the affairs of a company with a narrow perspective of maximising wealth for shareholders.[301] It is trite that shareholder value maximisation has been the norm in corporate governance, however, it has become necessary to impose enforceable obligations on directors to take into account the interests of stakeholders due to the apparent adverse effects of corporation operations on stakeholders. A company should therefore be socially, economically and environmentally responsible.[302] It is in that context that the duty of the directors to act in good faith and in the best interests of the company as applied in different jurisdictions will be analysed.

3.3 South Africa

3.3.1 Whom do directors owe their duties?

There are several types of directors, for example de jure directors, de facto directors and shadow directors. In this chapter, however, it is not necessary to distinguish these types of directors when discussing their duties. In *Howard v Herrigel*[303] the Court held as follows:

> it is unhelpful and even misleading to classify company directors as 'executive' or 'non-executive' for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them. No such distinction is to be found in any statute. At common law, once a person accepts an appointment as a director, that person becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf.

In *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd*[304] it was held that a director stands in a fiduciary relationship to the company of which he or she is a director, even if he or she is a non-executive director. This serves to confirm that once a person becomes a director or holds the position of a director they enter into a fiduciary relationship with the company.

[301] Nwafor (note 17 above) p 680.
[302] Nwafor (note 17 above) p 681.
[303] 1991 (2) SA 660 (A) p 678.
[304] 2000 (3) SA 806 (C).

As the board of directors are considered to be the directing mind and will of the company, there are duties assigned to them which they owe to the company. Before the new Act came into operation on 1 May 2011, the duties of directors were governed by the South African common law. Presently, the duties of directors in general are to be found in the new Act, common law, other statutes and the companies own constitution, that is, Memorandum of Incorporation (MOI). Both common law and the new Act point out that a director owes a duty to act *bona fide* in the best interests of the company in which he or she is involved.[305]

In the South Africa, company directors are under a number of duties. Some of them are governed by statutes such as the new Act and other pieces of legislation such as the Broad Based Black Economic Empowerment Act 53 of 2003, the Labour Relations Act 66 of 1995, the Promotion to Access of Information Act 2 of 2000, and the Constitution of the Republic of South Africa 108 of 1996. There are also common law duties which have now partly been codified in the new Act.[306] Some of the duties also emanate from the company's MOI or they may be specified in a separate agreement.[307]

The new Act provides for the fiduciary duties of directors in South Africa. Noteworthy is that, the new Act does not encapsulate these duties in their totality neither does it explain them in detail. It therefore means that, the common law has to be consulted where there are gaps in the new Act. In fact, in order to understand the new Act, one should have knowledge of the underlying common law.[308] Davis stated in that regard as follows:

> Although the Act imposes a fiduciary duty…on a director, the content of those duties cannot be understood or interpreted without knowledge of the common law principles pertaining to the range and scope of a director`s duties.[309]

These common law principles are to be found in court decisions.

Traditionally directors are said to be under a duty to manage the business of the company in the interests of its shareholders and to maximise profits for the benefit of the shareholders. The courts have insisted that directors must exercise their powers *bona fide* in what they believe and not what a court may consider to be in the best interests of the company.[310] The basic goal of the

[305] *Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168*.
[306] D Davis, W Geach, T Mongalo, D Butler, A Loubser, L Coetzee & D Burdette *Companies and Other Business Structures in South Africa* 3rd ed (2013) p 24.
[307] Muswaka (note 67 above) p 220.
[308] Davis *et al* (note 306 above) p 24.
[309] Davis *et al* (note 306 above) p 24.
[310] Cassim (note 12 above) p 514.

directors was seen as the success of the company and collective best interests of shareholders of the company. In *Cohen v Segal*[311], the court stated that “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.” This court`s position is cemented by section 76 (3) (b) of the new Act which provides that “a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director in the best interests of the company.” This provision leaves no doubt that the directors of the company owe their duty to the company and the company alone.

The duty to act in the best interests of the company is a common law principle developed by English courts. Common law stipulates that directors must act with utmost good faith and in the best interests of the company. These are the fiduciary duties of directors. The old Companies Act did not codified the fiduciary duties of directors.[312] The new Act codified the common law fiduciary duties of directors. Section 76 of the Act provides for some of the duties of directors. Section 76(3) (b) provides that “a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director in the best interests of the company.” The directors shall not use their position or information to, for example, gain advantage for anyone other than the company and/or cause harm to the company.[313]

3.3.2 Meaning of “company” in the context of section 76(3) of the Act

It is clear that the law mandates directors to perform their functions in the best interests of the company. The use of the word “must” in section 76 shows that it is peremptory for directors to act in the best interests of the company. However, the essential question that has been raised is: what is meant by the “best interests of the company?” The legislation is not clear as to what is referred to as the company in this section.

The problem which has contributed to the rise of the debate in corporate governance is the meaning of “the interests of the company” in the context of section 76(3). The meaning of the word company is not provided in this section therefore it follows that the common law meaning attributed to this word must apply. At common law there is copious authority for the view that the words ‘interests of the company’ in this context refers not to the legal entity itself but rather to the

[311] 1970 (3) SA 802 (W) 706.
[312] 61 of 1973.
[313] ‘Directors Duties and Liability under the (new) Companies Act’ available at *http://www.schoemanlaw.co.za/wp-content/uploads/2011/06/Directors-duties.pdf* (accessed on 25 April 2018).

interests of the collective body of present and future shareholders.[314] It is argued that a company as an artificial legal entity cannot have any interests. Parkinson states that "a requirement to benefit an artificial entity as an end in itself would be irrational and futile, since a non-real entity is incapable of experiencing wellbeing".[315]

Courts have often construed the best interests of the company to mean the best interests of shareholders. Case law has illustrated that in some circumstances, the 'company' as a whole may be construed to mean the collective body of shareholders. In *Miller v Brain Sub Nom Pantone*,[316] the court stated that it is trite that the directors owe their fiduciary duties to the company as a whole by which is meant the collective body of shareholders including future shareholders. To that effect, the word company is a synonym for shareholders of the company.[317]

In *Greenhalgh v Ardene Cinemas* Ltd,[318] the court held that: "the company as a whole ... does not …mean the company as a commercial entity distinct from the corporators: it means the corporators as a general body". In the Australian case of *Kinsela v Russel Kinsela (Pty) Ltd,*[319] the court held that "the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duties of directors arise". Cassim stated that the word 'company' in the context of section 76(3) (b) is merely a synonym for the shareholders of the company.[320] The *King Report on Corporate Governance*[321] highlights the fact that in terms of the common law, as developed through jurisprudence, the best interests of the company has been interpreted to equate to the best interests of the body of shareholders. Hannigan states that at common law, the directors are under a fiduciary duty to act bona fide in what they consider to be in the best interests of the company, interpreted as meaning in the interests of shareholders as a general body.[322]

In the South African case of *Coronation Syndicate Ltd v Lillienfield and The New Fortuna Company,*[323] the court held that "the directors are in a fiduciary position, and it is their duty to do what they consider will best serve the interests of the shareholders". It therefore means that at

[314] Cassim (note 12 above) p 515.
[315] JE Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (1995) pp 76-77.
[316] 485 Ltd [2002] BCLC 266 (ChD).
[317] Cassim (note 12 above) p 515.
[318] [1950] 2 All ER 1120 p 1126.
[319] (1986) 10 ACLR 395 CA NSW p 401.
[320] Cassim (note 12 above) p 468.
[321] King IV of 2017.
[322] B Hannigan *Company Law* 4th ed (2016) p 205.
[323] 1903 TS 489 p 497.

common law, the phrase 'the best interests of the company' has generally been interpreted to mean the interests of the shareholders collectively, that is, all the shareholders, present and future.[324] In terms of this view, therefore, a director does not have any duty to consider the interests of any stakeholder apart from shareholders and although sometimes good management may require the consideration of stakeholders` interests, their interests remain subordinate to those of the shareholders.

The interpretation of "best interest of the company" to mean the "best interest of shareholders" has yielded negative results in corporate governance. The best interests of shareholders would be to maximise shareholder value. Companies are, therefore, given a leeway to disregard the interests of stakeholders who also have interest in the company. In the United States of America (USA), in the classic case of *Dodge v Ford Motor Company*[325] the court stated as follows:

> The business corporation is organized and carried on primarily for the profit of stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to reduction of profits or to the non-distribution of profits among stockholders in order to devote them for other purposes.

It can be noted that in this case the court endorsed the shareholder value approach. Directors should only transact where at the end thereof, a financial benefit will be attained.

A further crucial implication of the principle that directors owe their fiduciary duties to the company is that since the directors owe their duties to the company, only the company is entitled to enforce these duties against the directors. [326]This therefore means that stakeholders who are affected by the adverse effects of corporate operations are not able to bring any legal action against the directors because it is only the company which can enforce these duties against directors who are in breach.

The duty of directors to act in the best interests of the company has colossally been misconstrued as evidenced by some court decisions. Even where some transactions or decisions by directors would indirectly or in the long run benefit the company, it was considered to be against the duty to act in the best interests of the company.[327] Where a transaction did not directly bring a financial

[324] Muswaka (note 67 above) p 220.
[325] 170 N.W. 668 (Mich. 1919).
[326] Cassim (note 12 above) p 516.
[327] See *Re Lee Behrens & Co Ltd [1932] 2 Ch 46 (ChD).*

gain to the company, courts have ruled such actions to be *ultra vires* and not in the best interests of the company.[328]

This extreme misconception of the role of directors can be seen in some earlier judicial decisions from different jurisdictions. Courts are of the view that directors must exercise their powers to promote the interests of the company and not any other purpose. In *Re Lee Brehens & Co Ltd*[329] directors had voted that the wife of the company`s former managing director be given an allowance in the exercise of their powers as provided in the constitution of the company. The court ruled that such payment was not incidental to the carrying on of the company`s business and not to the benefit of the company. Consequently, the payment was struck down. Similarly, in *Re W & M Roith Ltd*[330] the director of the company secured the alteration of the company`s constitution in a bid to make provision for his wife to the effect that, on his death his widow would be entitled to pension for life. The court ruled that although made *bona fide*, the transaction was not for the benefit of the company and as such not binding on the company. These decisions therefore reinforce the position that directors of companies must exercise their powers in a way that solely benefits the company.

The early manifestations of this shareholder value approach at common law can be seen in the English case of *Hutton v West Cork Railway Company*[331] where the court had to deal with an extra contractual payment to the employees of a company in liquidation. Describing the payment as "charity," the court stated:

> Charity has no business to sit at boards of directors *qua* charity. There is, however, a kind of charitable dealing, which is for the interest of those who practice it, and to that extent and in that garb charity may sit at the board, but for no other purpose… The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.

This case is a prototype case where the shareholder value approach was applied to the extreme. Employees are major stakeholders and they determine, to some extent, the success or otherwise of the company. For the business to flourish it needs dedicated employees. The more dedicated and skilful employees are, the more the business thrives. Conversely, if employees are not working efficiently and in the best of their capabilities the business of the company may be jeopardised. No matter how brilliant and artful directors can be, if employees do not cooperate

[328] See note 327 above.
[329] [1932] 2 Ch 46 (ChD).
[330] [1967] 1 All ER 427 (ChD).
[331] (1883) 23 ChD p 654.

and follow the instructions and directions from their superiors, all the efforts of directors will be in vain. Therefore, it can be argued that, employees need also benefit from the proceeds of the company.

Employees invest in the company in the form of human capital. Corfield stated as follows:

> This human capital revolves around the concept that firm specific skills are acquired by employees of a particular corporation and that these skills would not be as valuable if taken elsewhere outside of the corporation. It is estimated that approximately ten percent of the employees' salary is attributable to these firm specific skills. This percentage reflects the decrease in remuneration that an employee would take when he or she leaves a firm to which his or her skills are specifically applicable and is reemployed by a firm at which these skills cannot be equally utilised.[332]

The confinement of director`s exercise of power in a manner that promotes the prosperity of the company to the exclusion of stakeholders is therefore highly flawed.

Similarly, in the South African jurisprudence, a company is not allowed to make donations that do not directly benefit the company financially. In *Amalgamated Society of Woodworkers of SA v Die 1963 Ambagsaalvereniging*[333] the court stated:

> [it] seems … that the power of a corporate body to donate a major asset cannot be lightly inferred … donations should … be limited to such donations as are reasonably incidental to the carrying on of the activities of the donor or which are for the benefit of the donor.

This means that a company is not expected to or at least encouraged to give back part of its profits for the development of the communities in which their operations are centred.

This interpretation that has been given to section 76(3) (b) of the new Act and the common law duty to act in the best interests of the company has resulted in a massive debate among scholars. There is no unanimity among scholars as to what should be the approach to corporate governance. Should it be the shareholder value approach as advocated by courts in different jurisdictions, as shown earlier, or should it be something different? An analysis of the various theories advanced regarding the exercise of director`s powers in corporate governance has brought about the view that, quite a number of approaches to corporate governance can be adopted. However, it has also been shown that in the modern society it is outmoded to manage the affairs of a company with a narrow perspective of maximising wealth for shareholders.[334] The directors ought to take into account the interests of stakeholders who also contribute to the

[332] Corfield (note 94 above) p 216.
[333] 1967 (1) SA 586 (T) p 594.
[334] Nwafor (note 17 above) p 680.

success of the company and are adversely affected by the corporate operations. A company should be socially, economically and environmentally responsible.[335] The research shall proceed to discuss the extent to which the South African laws have attempted to address the issue of the interests of stakeholders in corporate governance.

3.3.3 Corporate Social Responsibility

As stated earlier, in the modern society, it can no longer be accepted that the affairs of a company be managed with a narrow perspective of maximising wealth for shareholders. It is of paramount importance that directors take cognisance of the interests of stakeholders in corporate governance. The consideration of stakeholders` interests in corporate governance has been described as Corporate Social Responsibility (CSR). There is no universally accepted definition for CSR. A widely cited definition of CSR in the business and social context has been given by the European Union (EU). It describes CSR as "the concept that an enterprise is accountable for its impact on all relevant stakeholders. It is the continuing commitment by business to behave fairly and responsibly, and contribute to economic development while improving the quality of life of the work force and their families as well as of the local community and society at large."[336]
CSR has also been described as a "management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders."[337] It entails that companies must focus on the triple bottom line of economic, social and environmental aspects for the benefit of their stakeholders.[338] To that effect, Grossman states as follows:

> In the modern business setting… a company`s core objective of profit maximization must be underpinned by a proactive approach to corporate social responsibility in order to manage and mitigate a broader array of risk factors. Managing risk via community engagement and the implementation of socially responsible strategies is increasingly linked to business success and stakeholder confidence.[339]

There are three types of CSR which have been brought forward and they are as follows:

[335] Nwafor (note 17 above) p 681.
[336] 'A renewed EU strategy 2011-14 for Corporate Social Responsibility, European Commission press release,' (2011) available at *http://ec.europa.eu/enterprise/ newsroom/cf/_getdocument.cfm?doc_id=7010* (accessed on 01 May 2018).
[337] Wiese (note 101 above) p 182.
[338] Wiese (note 101 above) p 182.
[339] HA Grossman 'Refining the role of the corporation: The impact of corporate social responsibility on shareholder primacy theory' (2005) 10 Deakin Law Review 572 p 572.

(a) Ethical CSR

This refers to the morally mandated duties of a company and goes beyond fulfilling economic and legal obligations. It implies a responsibility to avoid harm or social injury, even if the company might not benefit from this. It entails a negative duty to avoid and correct activities that injure others.[340]

(b) Altruistic CSR

This involves companies contributing to the common good at the possible expense of the business. It goes beyond the Ethical CSR to assuming liability for public welfare. It might even include actions that are beneficial to the company`s stakeholders, although not necessarily to the company.[341]

(c) Strategic CSR

This a term used by companies to accomplish strategic business goals. Companies give back to their stakeholders because they believe this to be in their best financial interests. It is philanthropy with profit motives, as the social goals of the company might be beneficial in the long-term by creating a more sustainable enterprise.[342]

As corporate citizens companies are expected to take into account the effects their activities have on the society which they operate. They must focus on sustainability. Horrigan notes that "a sustainable company is one that creates profit for its shareholders while protecting the environment and improving the lives of the community in which it operates so that its business interests and the interests of the environment and society intersect."[343] In South Africa the dominant conception of CSR was in terms of philanthropic initiatives called corporate social investment in education, health or welfare.[344] Since 1994 the Constitution and other laws have been enacted which influence the CSR obligations of companies. Section 24 of the Constitution provides that everyone has a right to an environment that is not harmful to their health or well-

[340] Wiese (note 101 above) p 184.
[341] Wiese (note 101 above) p 184.
[342] Wiese (note 101 above) p 184.
[343] B Horrigan ' Twenty-first century corporate social responsibility trends—An emerging comparative body of law and regulation on corporate responsibility, governance and sustainability' 2007 4 *Macquarie Journal of Business Law* 85 p 89.
[344] R Hamann, T Agbazue, P Kapelus & A Hein ' Universalizing corporate social responsibility? SA challenges to International organisation for standardization`s new social responsibility standard' (2005) 110 (1) *Business and Society Review* 1 p 7.

being and to have the environment protected to prevent ecological sustainable development and use of natural resources.[345]

Noteworthy is that, although there are laws which influence the CSR obligations of companies, these have not yielded the desired results. Section 76 (3) (b) of the new Act provides that "a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director in the best interests of the company." Unlike in Canada where the best interests of the company are not attached to any shareholder or stakeholder,[346] in South Africa, the best interests of the company are construed to mean the best interests of the shareholders collectively. This is seen in the South African case of *Coronation Syndicate Ltd v Lillienfield and The New Fortuna Company*[347], where the court held that "the directors are in a fiduciary position, and it is their duty to do what they consider will best serve the interests of the shareholders". In the English case of *Greenhalgh v Ardene Cinemas Ltd*[348], the court held that: "the company as a whole ... does not …mean the company as a commercial entity distinct from the corporators: it means the corporators as a general body". From the wording of this section and the interpretation that has been attached to it, it can be suggested that the South African jurisprudence on company law follows the traditional Shareholder Value Approach (SVA). This approach does not support CSR because it concentrates on maximising value for the benefit of shareholders to the exclusion of the interests of stakeholders in corporate governance.

Section 72 (4) of the new Act states that public and state owned companies may have a social and ethics committee. The committee must monitor the company`s activities with regards to social and economic development, good corporate citizenship, the environment, health and safety.[349] The committee must draw matters within its mandate to the attention of the board as occasion requires and report to the shareholders at the annual general meeting.[350] It could be argued that the legislature through this provision acknowledges the interests of other stakeholders in the activities of the company. It should however be noted that the new Act uses the word "may" which makes it mere directory and not peremptory for companies to have such social and ethics committee. More so, the new Act does not require the board to act upon the reports of the committee, nor does it provide for effective enforcement of the provision by stakeholders. [351]

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[345] The Constitution of 1994.
[346] As will be seen in later discussions.
[347] 1903 TS 489 p 497.
[348] [1950] 2 All ER 1120 p 1126.
[349] Wiese (note 101 above) p 133.
[350] Wiese (note 101 above) p 133.
[351] Wiese (note 101 above) p 133.

A different view is taken by some scholars from the one presented above and exceptions have been identified which tend to prove that South Africa rather follows the ESVA or that there is corporate social responsibility. There are other provisions in the new Act which have been cited to support the view that South Africa follows the ESVA. Section 20 (4) of the new Act provides that "[o]ne or more shareholders, directors or prescribed officers of a company, or a trade union representing employees of the company, may apply to the High Court for an appropriate order to restrain the company from doing anything inconsistent with this Act." It has been argued that this present an ESVA in that "trade unions representing employees now have rights in terms of the Act and can play an important part in the governance of companies"[352] It should however be noted that, the fact that trade unions can sue a company to compel it to comply with the provisions of the new Act does not in an way promote the interest of stakeholders. This is so because the new Act is silent on the interests of stakeholders. Therefore what will be protected by the enforcement of section 20(4) is not the interests of stakeholders but rather that of the company.[353] This section focuses on employees and employees are not the only stakeholders but only a minute part of them. It is far-fetched to link section 20(4) with the ESVA.

The other provision that has been invoked is section 165 (2) of the new Act. This section provides for a derivative action where a company has been prejudiced and certain people are given *locus standi* to sue on behalf of the company where directors are not willing to do so. Normally, when a company has been prejudiced, the directors are the ones who have to sue for the company as the company itself cannot sue being an artificial entity.[354] In a case where directors are the ones prejudicing the company and therefore cannot sue themselves or where they are not willing to sue when the company has been prejudiced by any other person, certain people are given the legal standing to sue for the company.[355]

There are suggestions based on this provision that it reveals the existence of the ESVA approach in that other persons other than directors are empowered "to commence or continue legal proceedings or to take related steps, to protect the legal interests of the company if the person is granted leave by the court."[356] It should however be noted that, the derivative action is used to

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352 Davis *et al* (note 306 above) p 12.
353 Muswaka (note 67 above) p 221.
354 D French, SW Mayson & CL Ryan, *Mayson, French & Ryan on Company Law* 30th ed (2013) p 470.
355 HS Cilliers, ML Benade, JJ Henning, JJ Du Plessis, PA Delport, L De Koker & JT Pretorius *Corporate Law* 3rd ed (2000) p 303.
356 Muswaka (note 67 above) p 222.

protect the company rather than stakeholders.[357] If any stakeholder is prejudiced or where the company makes no effort to be economically or socially responsible, section 165 (2) cannot be invoked. Therefore this section does not protect the interests of stakeholders but those of the company.

It has also been argued that the new Act is not the only authority as far as duties of directors are concerned in South Africa. There are also other authorities such as the King IV Report which acknowledges that companies should be economically, socially and environmentally responsible.[358] It adheres to the view that when directors are managing a company they should consider those three aspects. The King Report acknowledges a shift away from the single bottom line, meaning the approach of business focusing on generating profits for shareholders, to a triple bottom line which embraces the economic, environmental and social aspects of a company`s activities. The Report states that every company should report at least annually on the nature and extent of its social, transformation, ethical, safety, health and environmental management policies and practices.

Noteworthy is that, South Africa`s main guiding authority as far as director`s fiduciary duties are concerned is section 76 (3) of the new Act. If a determination is to be made whether directors have failed on their duties, such determination is done against this section.[359] The King Report does not have legal force therefore it does not have any binding authority. It can therefore be concluded that the South African jurisprudence follows the SVA, meaning that legally speaking, there is no mandate for companies to be socially responsible. There is need for corporate social responsibility values to be incorporated in the Companies Act in such a way that failure to comply attracts sanctions and stakeholders are able to seek personal reliefs against the company and/or directors for a breach thereof. It is argued that “creating value that is not only profitable to the business but sustainable in the long-term interests of all stakeholders necessarily means that businesses have to run—and be seen to be run— with a high degree of ethical conduct and good governance where compliance is not only in letter but also in spirit”.[360]

[357] See *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1979] 3 All ER 838; *Edwards v Halliwell* [1950] 2 All ER 1064; *Smith v Croft (No 2*) [1988] Ch 114; *Wallersteiner v Moir (No 2*) [1975] QB 373; *Lewis Group Ltd v Wollam and others* [2017] 1 All SA 192 (WCC).
[358] Cassim (note 12 above) p 449.
[359] Muswaka (note 67 above) p 221.
[360] P Rajharia & B Sharma ‘Corporate Governance In India Evolution, Issues And Challenges For The Future’ (2014) 2 (12) *International Journal of scientific research and management* 1815 p 1816.

3.4 Canada

3.4.1 Whom do directors owe their duties?

The major instrument which governs the Canadian company law is the Canada Business Corporations Act (CBCA) of 1985. Section 122 (1) of the CBCA provides as follows:

> Every director and officer of a corporation in exercising their powers and discharging their duties shall
> (a) Act honestly and in good faith with a view to the best interests of the corporation; and
> (b) Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

In terms of this section, just like under the South African law, directors are also required to act in the best interests of the corporation. The question however still remains as to what is the meaning of corporation in this context? It has been shown that at common law the phrase "best interests of the company" is construed to mean "best interests of shareholders collectively".[361] This follows that, from the reading of section 122(1) of the CBCA, the Canadian company law seems to favour the SVA as it provides that a director should act in good faith with a view to the "best interests of the corporation". However, it should be noted that the Canadian jurisprudence differs in its interpretation of the meaning of "best interests of the corporation" from the one that has been established under the South African common law.

3.4.2 Meaning of corporation in the context of section 122 (1)

It should be noted that, when the provision in section 122 (1) is construed by the Canadian courts, they emphasize that the duty is owed to the corporation itself.[362] In other words, the Canadian courts do not construe the best interest of the corporation to mean the best interest of shareholders. A distinction is made between these two. In *BCE Inc. v. 1976 Debenture Holders*[363]*,* the court stated that, this fiduciary duty is owed to the corporation as such, rather than to shareholders, creditors, employees or other stakeholders or constituencies of the corporation, or to any one of them. The Supreme Court of Canada noted in *Peoples Department Stores Inc. (Trustee of) v. Wise*[364] that the statutory fiduciary duty under the CBCA (and similar provincial statutes) requires that directors act honestly and in good faith vis-à-vis the corporation.

361Muswaka (note 67 above) p 220.
362 See *Peoples Department Stores Inc. (Trustee of) v. Wise* (2004), 244 D.L.R. (4th) 564 (S.C.C.).
363 [2008] 3 S.C.R. 560 para. 37.
364 (2004), 244 D.L.R. (4th) 564 (S.C.C.).

The Supreme Court of Canada has stated that directors owe their fiduciary duty to the corporation and that the best interests of the corporation must not be confused with the interests of the corporation's shareholders or any other stakeholders of the corporation. In *Peoples Department Stores Inc. (Trustee of) v. Wise,*[365] the court stated as follows:

> Insofar as the statutory fiduciary duty is concerned, it is clear that the phrase "best interests of the corporation" should be read not simply as the "best interests of shareholders"…At all times, directors and officers owe their obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders.

The court went further to state as follows:

> We accept as an accurate statement of law that in determining whether they are acting with a view to the best interest of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

The language that "it may be legitimate to consider" indicates that consideration of non-shareholder interests is permitted or justified but not mandatory. However the Supreme Court`s decision also suggests that "given all the circumstances" acting in the best interests of the corporation may on occasion necessitate the directors to take non-shareholder considerations into account even where these considerations may trump the immediate interests of shareholders such as short-term profit gains.[366]

The court`s decision was also important for its guidance on what constitutes the best interests of the corporation in an economic sense, interpreting this to mean the maximization of the value of the corporation.[367] It has been argued that it would be illogical to assume that the Court would want us to conceive the value of the corporation narrowly and aligned solely with short-term share value when in the very same paragraph of its judgment, the court was clear that the best interests of the corporation should be read "not simply as the best interests of shareholders." [368] It is opined that a look into the corporate sector would help in seeing how the maximizing value concept would be conceived.

In *BCE Inc. v. 1976 Debenture Holders*[369], the court discussed extensively the approach that the fiduciary duty is owed to the corporation. The court stated as follows:

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365 (2004), 244 D.L.R. (4th) 564 (S.C.C.).
366 M Kerr, R Janda & C Pitts, *Corporate Social Responsibility* (2009) p 120.
367 [2008] 3 S.C.R. 461 para. 42.
368 Kerr *et al* (note 366 above) p 122.
369 [2008] 3 S.C.R. 560 para. 42.

> Insofar as the statutory fiduciary duty is concerned, it is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders". From an economic perspective, the "best interests of the corporation" means the maximization of the value of the corporation… However, the courts have long recognized that various other factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation.

It is therefore clear from this case that the Canadian corporate governance focuses on managing the affairs of the corporation for its own sake and for its own benefit without putting much attention in any of the constituencies that may be affected by the operations of the corporation. It does not however ignore entirely the interests of any of those constituencies which may be affected.

Noteworthy also is that, although the wording of section 122 (1) of the CBCA seems to follow the SVA, it can be seen that, the interpretation of this section is far from the SVA as focus is not put on short-term profit which seems to be the gist of the shareholder value. In *BCE Inc. v. 1976 Debenture Holders*[370], the Supreme Court of Canada stated that the "best interests" of the corporation are not confined to short-term profit or share value but look instead to longer term interests as the corporation is viewed as an ongoing concern. On the same note, one could argue that the legislation which governs corporations is not clear as to whether stakeholders` interests should be considered as it is silent on stakeholders.

3.4.3 Corporate Social Responsibility

In the Canadian context CSR is generally understood to be:

> the way a company achieves a balance or integration of economic, environmentally and social imperatives while at the same time addressing shareholder and stakeholder expectations. It is generally accepted as applying to firms wherever they operate in the domestic and global economy. The way business engage or involve shareholders employees, customers, suppliers governments, non-governmental organisations, international organisations and other stakeholders is usually a key feature of the concept….CSR also overlaps and often synonymous with many features of other related concepts such as corporate sustainability, corporate accountability, corporate responsibility, corporate citizenship, corporate stewardship, etc.[371]

According to the Canadian Business for Social Responsibility CSR is "a company`s commitment to operating in an economically, socially and environmentally sustainable manner, while

[370] 2008] 3 S.C.R. 560 par. 38.
[371] 'Industry Canada, Corporate Social Responsibility' available at *https://www.ic.gc.ca/eic/site/693.nsf/eng/h_00020.html* (accessed on 25 April 2018).

recognizing the interests of its stakeholders, including investors, customers, employees, business partners, local communities, the environment and society at large."[372]

The Canadian corporate governance is different from many other jurisdictions in that it puts shareholders and stakeholders on the same footing. Although it does not explicitly follow the ESVA, it does not also prioritise making value for shareholders, neither does it give any preference to shareholders. In *Peoples Department Stores Inc. (Trustee of) v. Wise*[373], the Supreme Court of Canada held that, in determining the nature of the best interests of the corporation, the directors may be required, although not mandatory, to consider the interests of shareholders, bondholders, employees and other stakeholder groups. It therefore means that shareholders` interests are one of the factors which directors may consider when determining the best interests of the corporation, just as much as they should consider those of other stakeholders.

It is important to note that director`s duties to the corporations they serve in Canada are not only governed by the CBCA. There are other provisions from different pieces of legislation which provide guidance to directors on how to manage the affairs of corporations. One of the issues that is given much attention is the environmental aspect. In Canada, directors are mandated to manage the affairs of the company ensuring that they do not pollute or disturb the environment in any way.[374]

Certain provincial statutes impose an obligation on directors and officers to take all reasonable care to ensure that the companies they serve do not unlawfully discharge contaminants into the natural environment and that they do not contravene other environmental laws.[375] Under the Canadian jurisdiction, a director may incur liability for offences by the corporation if that director "directed, authorized, assented to, acquiesced in or participated in the commission of the offence."[376] Under this provision, directors will be subject to liability as directors for regulatory offences committed by the corporation only if they had knowledge of the actions which constituted

[372]Canadian Business for Social Responsibility (CBSR), 'What is CSR' available at *http://www.cbsr.ca/about/whatis.htm* (accessed on 25 April 2018).
[373] (2004), 244 D.L.R. (4th) 564 (S.C.C.) para 42.
[374] AS Emes 'Corporate Governance and Directors' Duties 2011: Canada' available at *http://www.torys.com/Publications/Documents/Publication%20PDFs/AR2011-21.pdf* (accessed on 23 April 2018).
[375] Emes (note 374 above).
[376] Section 180 (1) of the Environmental Protection Act of1999.

the offence.[377] This therefore means that directors are also mandated to consider the effects of the operations of the corporations they serve on the environment.

Upon conviction for a regulatory offence, directors may be subjected to substantial fines or imprisonment. Depending on the severity of the violation, fines may range up to $6 million per day for directors and up to $10 million per day for the corporation. Directors may also face imprisonment of up to five years less a day for more serious offences.[378] This is one of the powerful features of the regulations of directors` corporate powers as it ensures that directors do not disregard or act without diligence as penalties will be imposed for any contravention of the rules of law on the issue of the environment. It can therefore be concluded that corporate governance in Canada follows a Stakeholder Approach although the main legislation, which is the CBCA, does not explicitly bring out this approach.

3.5 United Kingdom

3.5.1 Whom do directors owe their duties?

The fiduciary duties of directors in the UK are provided for in section 172 of the UK Companies Act of 2006. Section 172 (1) provides that "[a] director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole." Section 170(1) of the 2006 Act provides that the general duties specified in sections 171-177 are owed by a director of a company to the company. A breach of duty is therefore a wrong done to the company and the proper claimant in proceedings in respect of the breach is the company itself.[379] In *Multinational Gas and Petrochemical Co Ltd v Multinational Gas and Petrochemical Services Ltd*[380] the court explained that "directors indeed stand in a fiduciary relationship to the company, as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to creditors, present or future, or to individual shareholders." From this section it can be seen that a director is also required to manage the affairs of the company in a way that promotes the success of the company. It remains vital to ascertain what is meant by company in this context.

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[377] J Dharamdial 'Directors' Responsibilities in Canada' p 70 available at *https://www.osler.com/uploadedfiles/News_AND_Resources/Publications/Guides/Directors/Osler-DirectorsResponsibilitiesInCanada.PDF* (accesses on 23 April 2018).
[378] Dharamdial (note 377 above) p 80.
[379] Foss v Harbottle (1843) 67 ER 189.
[380] [1983] Ch 258.

Section 172 of the UK Companies Act adopts the enlightened shareholder value approach to director's duties which is described by the Act as duty to promote the success of the company. It is believed that this will ensure that "regard has to be paid by directors to the long term as well as short term and to wider factors where relevant such as employees, effects on the environment, suppliers and consumers."[381]

3.5.2 Meaning of company in the context of section 172

Although it is clear that the law mandates directors to run the affairs of the company in a way that promotes the success of the company, it is important to seek the meaning attached to the word company in this context. Davies notes that "the company is an artificial legal person and it is impossible to assign interests to it unless one goes further and identifies with the company the interests of one or more groups of human persons."[382] There will inevitably be situations in which the interests of shareholders and other participants will clash, even when the interests of shareholders are viewed as short-term ones. In such circumstances the law must indicate whether shareholders' interests are to be regarded as overriding, or some other balance should be struck. This requires a choice… between the ESVA and pluralist approaches. An appeal to the interests of the company will not resolve the issue, unless it is first decided whether the company is to be equated with its shareholders alone (SVA) or the shareholders plus other participants (pluralism).[383]

The meaning of the phrase "for the benefit of a company" is to be found in common law where courts have decided that it means for the benefit of shareholders. In *Greenhalgh v Arderne Cinemas Ltd,*[384] the court identified the company`s interests with the shareholders as a general body. The interests of future shareholders should also be considered and not only focus on the interests of existing shareholders.[385] This provision would in principle suggest that the UK company law follows the SVA. The rest of the same provision however tend to reveal a different approach.

[381] 'Press Release on 17 March 2005, Draft Company Law Reform Bill Puts Small Business First 'available at *http://www.parliament.uk/documents/commons/lib/research/rp2006/rp06-030.pdf* (accessed on 23 April 2018).
[382] Davies *et al* (note 78 above) p 507-508.
[383] Du Plessis *at al* (note 2 above) p 45-46.
[384] [1950] 2 All ER 1120.
[385] Dignam & Lowry (note 57 above) p 315.

3.5.3 Corporate Social Responsibility

The UK company law views CSR as how business takes account of its economic, social and environmental impacts in the way it operates maximizing the benefits and minimizing the downsides. It is seen as the voluntary actions that business can take over and above compliance with minimum legal requirements, to address both its own competitive interests and the interests of the wider society.[386]

The UK government when explaining how section 172 will operate stated as follows:

> The words 'have regard to' mean 'think about'; they are absolutely not about just ticking boxes. If 'thinking about' leads to the conclusion, as we believe it will in many cases, that the proper course is to act positively to achieve the objectives of the clause, that will be what the director`s duty is. In other words have 'regard to' means 'give proper consideration to.'[387]

The UK legal system has high regard for the interests of stakeholders in corporate governance. In 2005 it introduced a type of company, through Companies (Audit, Investigations, and Community Enterprise) Act of 2004, called Community Interest Company (CIC). This is a type of company which is a limited liability business designed for enterprises that wish to use their profits and assets for the public good.[388] The UK government believed that social enterprises have a distinct and valuable role to play in helping create a strong, sustainable and socially inclusive economy. An important feature of this type of company is that although the UK common law continues to uphold the traditional principle that directors owe their duty to the company and that this requires directors to focus on maximizing profits, the recent introduction of the CIC has changed the landscape somewhat by enabling this form of company to give priority to social objectives with non-shareholder stakeholders being the principal beneficiaries. [389]

Noteworthy also is that the UK Companies Act gives a clear explanation of what directors should consider when they promote the success of the company. It gives an extensive list of stakeholders which directors should consider when exercising their duty mentioned in section 172 (1). The provision in that section continues as follows:

> [A]nd in doing so have regard (amongst other matters) to—
> (a) the likely consequences of any decision in the long term,
> (b) the interests of the company's employees,

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[386] Government of the United Kingdom, 'What is CSR', UK Government Gateway to Corporate Social Responsibility available at *http://www.berr.gov.uk/whatwedo/sectors/sustainability/corp-responsibility/page45192.html.* (Accessed on 25 April 2018).
[387] Dignam & Lowry (note 57 above) p 409.
[388] Du Plessis *et al* (note 2 above) p 47.
[389] Du Plessis *et al* (note 2 above) p 48-49).

(c) the need to foster the company's business relationships with suppliers, customers and others,
(d) the impact of the company's operations on the community and the environment,
(e) the desirability of the company maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company

This provision is a true reflection of the ESVA approach. Its detailed explanation of the stakeholders and their interest which should be considered by directors makes the provision worthy of note for the protection of stakeholders in corporate governance. It is appreciated that this provision shows an advanced level in stake holding in that it imposes a positive duty on directors to consider the interests of stakeholders, which is different from the common law position where considering stakeholders` interests was merely permissive.[390] It therefore means that any action taken by directors which is stakeholder oriented is now protected unlike in the past when such decisions or resolutions could be struck down. The ESVA is reflected by the fact that although directors have a positive duty to consider the interests of the listed stakeholders, it remains subordinate to their duty to act in a way that promotes the success of the company.[391]

In as much as this provision may seem attractive in protecting stakeholders` interests in corporate governance, loopholes have also been identified. It is noted that the duties mention in section 172 (1) are not owed to any of the stakeholders mentioned in that section but to the company.[392] Section 170 (1), which provides that "[t]he general duties specified in sections 171 to 177 are owed by a director of a company to the company", is often quoted to give effect to the fact that the directors are not accountable to any stakeholders hence this section brings no much change in corporate governance in the UK since the duties are not enforceable by any of the stakeholders.[393]

3.6 India

Great advancement in protecting stakeholder`s interests in corporate governance is displayed in the Indian Company law. This is evidenced by the obligation imposed on directors to act in the best interests of stakeholders when managing the affairs of the company. The Indian Companies Act of 2013 provides that "[a] director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the

[390] Davies (note 20 above) p 6.
[391] French *et al* (note 354 above) p 491.
[392] French *et al* (note 354 above) p 479.
[393] Nwafor (note 17 above) p 677.

company, its employees, the shareholders, the community and for the protection of environment."[394] It is important to note that shareholders and the company are listed together with other stakeholders as some of the constituencies which directors should act in the best interests of when managing the company. This means that under the Indian jurisprudence, the "best interest of the company" is not construed to mean the "best interest of shareholders" as seen in other jurisdictions. It is also seen that shareholders are not given any preference or any special recognition different from that given to stakeholders. This is a model provision and it reveals the Pluralist Approach as it places shareholders on the same footing with stakeholders in that directors are placed under an obligation to consider the best interests of the listed stakeholders. The consideration of stakeholders` interests is not left to the discretion of directors. India is the first country to require that some firms spend a percentage of their profits on socially responsible activities (as designated by law), or explain why they do not.[395] The Indian company law goes further to stipulate a specific amount of money a company should spend in fulfilling its corporate social responsibility. Section 135 (1) & (5) provides as follows:

> Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director. The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy.

This 2% rule only applies to firms that satisfy at least one of three thresholds in any financial year "either having net worth (the face value of shares originally issued by the corporation, adjusted for subsequent retained earnings and various reserves) exceeding INR 5 billion (~USD 77 Million), turnover (i.e., sales) exceeding INR 10 billion (~USD 154 Million), or net profits exceeding INR 50 million (~USD 770,000)."[396] Although the specified percentage is not huge, it is "a good starting point for a mandatory corporate involvement in the development of its operational zones and caring for its environment."[397]

[394] Section 166(2).
[395] D Dharmapala & VS Khanna, 'The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013', (2016) p 6 available at *https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.co.za/&httpsredir=1&article=2482&context=law_and_economics* (Accessed on 6 February 2018).
[396] Dharmapala & Khanna (note 395 above) p 6.
[397] Nwafor (note 17 above) p 680.

Noteworthy is that section 135 (5) provides that the Board should provide reasons for failing to spend at least 2% of the firm's average net profits (over the last 3 years) on activities listed in the firm's CSR Policy, that is a "comply-or-explain" rule. It is noteworthy that the "comply-or-explain" rule only applies to the amount spent on CSR (i.e., 2% of average net profits); the other requirements in subsections (2) to (4) are mandatory and failure to meet them would trigger liability regardless of what explanation was provided. Failure to meet the 2% spending requirement would not trigger liability if an acceptable explanation for failing to meet it was provided. [398] If such an explanation is not provided and the firm failed to spend at least 2% of average net profits on CSR activities then liability would be triggered here too. The penalty on the firm and every officer of the firm who violates section 135 is INR 10,000 for the first day of the violation plus an additional INR 1,000 a day if the violation continues.[399] More so, if the violation is repeated within a 3 year period the fine could be doubled.[400]
This provision is reasonable and worthy of acceptance in that it expects a company to be socially responsible to the areas of its operations.[401] As there are many companies around the country, if each company is to be socially responsible to its surroundings, the whole country would eventually benefit and at the same time the company would continue to be effective as an ongoing concern.

Companies in India have been engaging in different corporate activities which have proved to be of great benefit to the Indian government. It is stated that the term CSR can be referred as corporate initiative to assess and take responsibility for the company's operations effects on the environment and impact on social welfare. The term generally applies to companies efforts that go beyond what may be required by regulators or environmental protection groups.[402] Corporate social responsibility may also be referred to as "corporate citizenship" and can involve incurring short-term costs that do not provide an immediate financial benefit to the company, but instead promote positive social and environmental change.[403] Moreover, while proposing the Corporate Social Responsibility Rules under Section 135 of the Companies Act, 2013, the Chairman of the CSR Committee mentioned the Guiding Principle as follows:

> "CSR is the process by which an organization thinks about and evolves its relationships with stakeholders for the common good, and demonstrates its commitment in this regard by adoption of appropriate business processes and strategies. Thus CSR is not charity or mere donations. CSR is a way of conducting

[398] Dharmapala & Khanna (note 395 above) p 7.
[399] Section 450 of the Indian Companies Act of 2013.
[400] Section 451 of the Indian Companies Act 2013.
[401] Section 135 (5) of the Indian Companies Act of 2013.
[402] 'Corporate Social Responsibility (CSR) Policy' p 2 available at *http://finance.bih.nic.in/documents/csr-policy.pdf* (accessed on 6 February 2018).
[403] See note 402 above p 2.

> business, by which corporate entities visibly contribute to the social good. Socially responsible companies do not limit themselves to using resources to engage in activities that increase only their profits. They use CSR to integrate economic, environmental and social objectives with the company's operations and growth.[404]

Examples of the CSR activities expected of Indian companies include: Rural development projects, Slum area development, Eradicating hunger, poverty & malnutrition, promoting preventive health care & sanitation & making available safe drinking water; Promoting education, including special education & employment enhancing vocation skills especially among children, women, elderly & the differently unable & livelihood enhancement projects; Promoting gender equality, empowering women, setting up homes & hostels for women & orphans, setting up old age homes, day care centers & such other facilities for senior citizens & measures for reducing inequalities faced by socially & economically backward groups; Reducing child mortality and improving maternal health by providing good hospital facilities and low cost medicines, etc.[405]
It should be noted that, under Article 135(5), "the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities," This means that covered companies are expected to expend their CSR programs where they have operations. So the ultimate impact of the CSR "mandate" could be felt with particular strength in those areas with higher levels of economic activity.[406] Companies do not bring much desired results if they concentrate on areas they operate. Limiting the use of these funds to areas where companies have operations could limit the impact of this spending to places that already have relatively high levels of development.

The Indian company law, to the extent of the purposes of this research, is a model and a preferred stance in corporate governance in that directors are not only given specific percentages to spend for social goals but they are also accountable and are required to forward reasons for not spending the amount, in the event that they have failed to spend such money for stated purposes.[407] It is submitted, however, that although section 166(2) and section 135(1) & (5) of the Indian Companies Act have been acknowledged as the model provisions for expanding director`s duties to include stakeholders interests, they do not completely address this issue. There is therefore

[404] See note 402 above p 2.
[405] See note 402 above p 6.
[406] RM Rossow, Corporate Social Responsibility in India: How the Companies Act May Augment Regional Disparities (2015) p 3-4 available at *https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150330_corpresponsibility.pdf* (accessed on 5 February 2018).
[407] Section 135 (5) of the Indian Companies Act of 2013.

need to improve on the law and some recommendations on how the law can be advanced to best address this matter will be made in this work.

3.7 Conclusion

There is great need for the improvement of the new Act in order to incorporate the interests of stakeholders in it and to ensure that the interests of shareholders do not override those of stakeholders. As evidenced by the comparison from other jurisdictions, it is crucial and of great benefit to have the interests of stakeholders listed in the new Act thereby mandating directors to consider them as they manage the affairs of companies. Engaging in CSR initiatives and being socially responsible can have a host of benefits for companies such as the following: strengthening relationships with stakeholders, enabling continuous improvement and encouraging innovation, attracting the best industry talent as a socially responsible company, additional motivation to employees, risk mitigation because of an effective corporate governance framework, enhanced ability to manage stakeholder expectations, etc.[408] The next chapter will adopt an empirical approach in exploring the extent to which the companies in South Africa consider the interests of stakeholders in the corporate operations.

[408] 'Corporate Social Responsibility in India: Potential to contribute towards inclusive social development' p 15 available at *http://www.ey.com/Publication/vwLUAssets/EY-Government-and-Public-Sector-Corporate-Social-Responsibility-in-India/$File/EY-Corporate-Social-Responsibility-in-India.pdf* (accessed on 6 February 2018).

CHAPTER 4

DATA ANALYSIS ON PROTECTION OF STAKEHOLDERS` INTERESTS IN CORPORATE GOVERNANCE

This chapter analyses and interprets data obtained from different categories of participants. Both primary data and secondary data collection approaches were adopted to get information from all the targeted participants as some could not be accessed physically. The participants in this research were customers, employees and members of the surrounding communities of the chosen companies.

4.1 Introduction

The researcher made use of open ended questions in order to solicit adequate information from the participants. An open-ended question is a question which is designed to encourage a full, meaningful answer using the subject's own knowledge and/or feelings.[409] Open-ended questions also tend to be more objective and less leading than closed-ended questions.[410] Since these type of questions encourage the participants to express their feelings and opinions, these were chosen as they proved to be the best type of questioning in order for the researcher to get information which would help to draw meaningful conclusions.

Three different categories of companies were chosen namely; manufacturing, retail, and service provider. These diverse companies were purposively chosen in order to have a clear and objective picture of what is happening in the corporate realm compared with what corporations are legally expected to do. These companies affect different aspects of stakeholders' lives hence the need to analyse how they are run.

In relation to the first category, a food manufacturing company was chosen. It is important to ensure that consumers do not get substandard foods and that the interests of consumers are deemed to be paramount when running a food manufacturing company. This type of company was therefore, purposively chosen in order to get the experiences of those affected by its operations.

The second category was chosen based on the wide variety of products they make available to the public and the fact that retail companies generally market the products manufactured by the

[409] 'Open-Ended Questions' available at *https://www.mediacollege.com/journalism/interviews/open-ended-questions.html* (accessed on 14 June 2018).
[410] See note 409 above.

manufacturing companies and as such have direct contact with the consumers. Getting information on how the retail companies operate enables the researcher to understand whether in choosing which products to buy and sell, the companies consider the interests of the public or only profit maximisation is the motivation.

The third category was chosen in order to have an objective overall picture of how companies are run and how they affect their stakeholders. Under this category, a network service provider was randomly chosen as the interest of the researcher was not on the type of service provider in particular but service provider company in general.

The first category of participants comprises of customers of the mentioned categories of companies. This group of people was chosen for their daily experience with regards to the quality of goods or services offered by companies. Information from this group of stakeholders are vital in ascertaining the extent to which the companies consider the interests of the consumers when corporate decisions are taken. The second category comprises of members of the surrounding communities where the companies operate. This group was chosen so as to ascertain whether companies engage in corporate social activities or not. The third category of participants comprises of employees of these companies. Since employees play a great role in the success of companies, this group was chosen to ascertain the extent to which the companies appreciate and reward employees for the effort they put in ensuring the success of those companies.

In order to assess the clarity of the questionnaires, suitability to the participants and to reduce other weaknesses in the questionnaires a pre-test was done prior to giving it to the actual participants in this research. Volunteers were chosen which represented all the different categories of participants chosen. This helped the researcher to refine and add questions to the questionnaires prior to the implementation of the study. Questionnaires comprised of qualitative as the primary purpose of this study was to understand the research problem from the perspectives of individuals in their natural settings.

It is interesting to discover the corporate governance strategies in real terms especially that aspect that deals with corporate social responsibility. The preceding chapters have concentrated on theories, particularly the discussion of the different theories which have been brought forward by different scholars suggesting how best companies can be run. From there a comparative analysis has been done to check how other jurisdictions have dealt with this matter. This part of the research explores how companies are run in South Africa from the perspective and actual experiences of different stakeholders of the chosen companies.

The first part will interrogate what the chosen companies claim to be doing as far as the protection of the stakeholders` interests is concerned. It will mainly examine the responsibilities ascribed to directors within their companies and how they are expected to run the said companies. An analysis of the claims made by the companies will be done in comparison with the data collected from the different stakeholders of the companies. This will help to draw inferences on the extent to which companies protect the stakeholders` interests in corporate operations.

4.2 The corporate governance strategies

As mentioned above, three categories of companies were chosen for the purposes of this research. The researcher had some difficulties in obtaining primary information from the top management of the companies chosen for this study. Several requests for interviews were not granted and questionnaires were not answered. The researcher was as such compelled to rely on anecdotal evidence found in reports which are in the public domain.

The researcher shall first look at the retail company`s corporate governance strategies. Available report shows that the board of directors of a retail company asserts that it promotes and supports high standards of corporate governance, integrity and ethics that will contribute towards on-going sustainability and value creation for all the company`s stakeholders.[411] It can be seen from the report that the directors of the company claim to have the interests of all stakeholders in mind when they are managing the affairs of the company and ensure that all the stakeholders of the company equally benefit thereof. The veracity of the assertions in this report will later be tested against the data collected from the stakeholders.

The report goes further to state that it is the company`s objective to maintain a balance between the governance expectations of investors and other stakeholders, and the expectation to deliver increasing financial returns.[412] The directors endorse the King IV Report on governance which prescribes sound governance, best practice principles of accountability, integrity, fairness and transparency.[413] The directors confirm that the company applies the principles as set out in the King IV Report with explanations where practical and appropriate. It is interesting to note that this company strives to maintain a balance between the interests of shareholders and other stakeholders. It shall, however, later become clearer whether these claims are true and that the

[411] 'Corporate Governance Report' p 56 available at *https://www.shopriteholdings.co.za/content/dam/MediaPortal/LatestIntegrateReport/IR2017/17_5932_Shoprite_IR_2017E_Corporate_Governance.pdf* (accessed on 05 July 2018).
[412] See note 411 above.
[413] See note 411 above.

company really strikes a balance between the interests of the shareholders and other stakeholders.

In this retail company, the board of directors is reported to be collectively responsible to the shareholders of the company for its performance and the company`s overall strategic direction, values and governance.[414] It is important to note that directors of this company are said to be responsible to shareholders only as no mention is made of stakeholders who might have interests in the company. This makes it clear that when the directors are managing the affairs of the company, they seek to fulfil the expectations of the shareholders or at least to prioritise them because they are the ones they are responsible to. This position shall be confirmed later in this study.

In addition, the company claims to have skills and other development programs aimed at the educational development of employees.[415] Development of employees is very crucial as employees are expected to grow within the company which they are employed. This is an important aspect of corporate responsibility which many companies do not consider, hence employees are dissatisfied. As this retail company claims to be one of the companies which has the interests of its employees at heart, this claim shall be either affirmed or discredited as shall be seen later in the chapter.

Moving on to the manufacturing company, the researcher discovered a report from a food manufacturing company. The report suggests that the company`s aim is to maximise shareholder value by striving to compensate risk taking adequately and thus increase the company's financial strength in a manner that is sustainable over the intermediate term, in accordance with market rules and the principles of fairness and transparency.[416] It is clear from this report that the company`s objective and priority is to maximise profit for shareholders. As noted in the previous chapters, this profit maximisation is often done at the expense of other stakeholders. The later analysis will show whether this company maximises profits and at the same time balancing the interests of both shareholders and stakeholders on an equal footing or it is one of the companies

[414] See note 411 above.
[415] See note 411 above.
[416] 'Code of Ethics' available at *http://www.parmalat.net/attach/content/1097/Codice_di_Condotta%20CDA%2031.07.2012%20def%20x%20Sito%20ENG.pdf* (accessed on 06 July 2018).

which is perpetrating injustice in corporate governance by disregarding the interests of the stakeholders.

As a manufacturing company, this particular company claims to:

> use the utmost care in ensuring the quality, safety and cleanliness of its manufacturing processes and food ingredients, and pursues a path of continuous innovation, which it supports with a steady stream of significant investments in research and development, designed to steadily improve the quality and competitiveness of the products it offers to consumers, both nutritionally and in terms of taste, and through systematic controls of the quality and safety of the products it sells.[417]

It is claimed that the company considers the best interests of customers when the company is manufacturing its products and that all skill and care is taken in the process thereof. It is important to note that this is a food manufacturing company, therefore, diligence is required as the effects are more harmful. It shall be seen later whether this company indeed considers the best interests of consumers when they are manufacturing their products or that it considers profit maximization as its priority.

It is asserted further in the report that the company provides accurate, complete and truthful information that enable consumers to make rational and informed decisions.[418] The company has adopted a style of communication that is based on efficiency, collaboration, courtesy and dialog with consumers.[419] As a food manufacturing company, it is crucial that it fully provides consumers with sufficient information so that one can decide whether to buy its products or not. It has been a custom with the manufacturing companies to conceal some of the ingredients used or to write them in obscure terms which makes the consumers to buy products which they would have not bought had they had been aware of such ingredients. This is done in a bid to maximise profit at the expense of consumers. It is therefore claimed by this company that all its ingredients and manufacturing processes are transparent enough. An analysis shall be done later to confirm if such assertions are true or not.

The company further claims that it takes into account the needs of the community and that it contributes to the economic, social and civil development of the communities in which it operates.[420] Of interest in this statement is that the company claims to be developing the community in which it operates. Most of the companies engage in social activities but not in the

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[417] See note 416 above.
[418] See note 416 above.
[419] See note 416 above.
[420] See note 416 above.

communities they operate as shall be seen later. This is often done for other purposes which are intended to benefit the company and not with a mind to protect the interests of the stakeholders.

Moving on to the service provider company, the researcher found a published report on the operations of a telecommunications company. It is stated in that report that the practices underpinning the principles espoused in King IV Report are entrenched in many of the company`s internal controls, policies and procedures governing corporate conduct.[421] The directors of the company are satisfied that in the main, the company has applied the principles set out in the King IV Report. As seen earlier on, the King IV Report is not a binding law in South Africa, it is a self-regulatory code that operates on an apply and explain bases. This gives companies the leeway not to comply with some of its principles and to justify why they did not comply. There remains a problem as stakeholders still suffer prejudice from the effects of corporate operations without any effective remedies. As stated in the report, the directors are satisfied that the company has complied "in the main" and not "in full", which gives the impression that not all principles have been complied with. Had it been a matter of law, companies would be forced to comply with all the principles as any failure would attract legal sanctions.

The company`s board of directors, according to the report, takes overall responsibility for the company`s success and its role is to exercise leadership and sound judgment in directing the company to achieve sustainable growth and act in the best interests of shareholders.[422] More so, one of the duties ascribed to the board of this company is to approve the annual and interim financial results and shareholder communications.[423] It is fascinating to note that the company`s directors act in the best interests of shareholders. This is the crux of the debate in the previous chapters suggesting that in the modern era, it is not ideal for directors to act solely in the best interests of shareholders as this is often done at the expense of other stakeholders. The interests of shareholders and those of other stakeholders are diverse and once the company`s directors decide to act in the best interests of shareholders alone, it will be impossible to act in the best interests of other stakeholders at the same time.

The report further shows that this telecommunications service provider company has a social ethics committee as required by the Companies Act[424] and King IV Report, which oversees and

[421] 'Governance' available at *http://www.vodacom.com/company-structure.php* (accessed on 12 July 2018).
[422] 'Statement of Compliance' p 2 available at *http://vodacom-reports.co.za/integrated-reports/ir-2018/pdf/additional-docs/corporate-governance-statement.pdf* (accessed on 05 July 2018).
[423] See note 422 above.
[424] 71 of 2008.

monitors the company`s activities in relation to: good corporate citizenship which includes promotion of equality, prevention of unfair discrimination, corporate social responsibility, ethical behaviour and managing environmental impacts.[425] It shall be seen later whether this social ethics committee is effective and is fulfilling its mandates as stipulated in the Companies Act and the King IV Report.

The company recognises that its customers are central to the sustainability of its business and that to build trust among its customers it needs to manage its core operational risks around network performance and privacy.[426] It is interesting to note that the company realises how important its customers are and that without customers it cannot remain an ongoing concern as it rightly stated that "customers are central to the sustainability of our business".[427] The company realises that what is important to customers is "faster data networks and wider coverage; making it simpler and quicker to deal with us; converged solutions for business customers; feedback on service-related issues."[428] It would be expected of such a company which realises the importance of customers and knows their interests to also consider those interests and not to seek profit maximisation at their expense. The questions as to whether this company values the interests of its customers as much as it realises their importance shall be answered shortly with responses to the researcher's questionnaires by the customers.

One of the majour stakeholders of companies are employees. Concerning its employees, the telecommunications company states that "[o]ur people are the heart and soul of our business. Their skills and involvement determine our ability to realise our vision to provide the best network, best value and best service, and to fulfil our purpose of empowering everyone to be confidently connected."[429] The company also recognises the following as things that matter most to their employees: "career development; improved knowledge sharing across the group; simplicity and agility; engagement; building skills in line with the future business growth; and being fairly remunerated for their service."[430] These are good averments and if this company, in practice and not just on paper, acts according to these principles, it would be the ideal company. It is a problem that companies claim to be doing a lot of things but yet in practice it is not implemented. Whether this service provider company is one of such companies or not is discussed shortly.

[425] See note 422 above.
[426] See note 422 above.
[427] 'Stakeholder Report' p 1 available at *http://www.vodacom.com/pdf/additional-documents/social/stakeholder_report.pdf* (accessed on 11 July 2018).
[428] See note 427 above.
[429] See note 427 above.
[430] See note 427 above.

Another key stakeholder of companies which has been mentioned earlier are their surrounding communities. This telecommunications service provider company recognises that empowering local communities builds trust in the company. It is stated in the report as follows:

> It also adds to the longer term viability of our markets by strengthening the socioeconomic context in which we operate. Our communities also benefit from social and environmental innovations… access to mobile services; access to basic services such as finance, health and education; Investment in infrastructure; and responsible expansion of infrastructure.[431]

It is important for companies to be aware of what it means to consider the interests of the surrounding communities in which they operate. Issues such as providing its services to the communities cannot be classified as being socially responsible but simply as fulfilling the company's obligations to the stakeholders. It is therefore important to ascertain whether this company has engaged in corporate social activities which are solely aimed at benefiting the community in which it operates or not. Only this would ensure that this company is a good corporate citizen.

It is stated in the report that from 2012 to 2015, the company`s total Corporate Social Investment spending amounted to R243 million.[432] The company has provided R11 million in bursaries to 110 tertiary students in the fields of science and technology (94% of bursars) as well as business studies (6% of bursars).[433] The company has put in place the Independent Development Trust (IDT) to train young adults in basic computer skills, Information Technology essentials, enterprise development and business skills. It also helped the government in building of clinics.[434] It is ideal and expected of companies to develop the surrounding communities in which they operate as this will enhance the standards of peoples` lives. It is crucial to ascertain whether these claims by the company can be confirmed by members of the surrounding communities in which they operate, as will be done later.

The second part of the research now shifts to look at the primary data collected from different participants who are stakeholders of the companies under discussion. An analysis shall be done in comparison with what the companies claim in order to come up with meaningful conclusion.

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[431] See note 427 above p 2.
[432] See note 427 above p 2.
[433] 'Communities Report' p 2 available at *http://www.vodacom.com/pdf/additional-documents/social/communities_report.pdf* (accessed on 11 July 2028).
[434] See note 433 above.

4.3 Employees response to corporate governance

One of the expressed concerns from the employees for the retail company was the issue of the number of hours they spend at work. This was a major concern as employees who responded to the questionnaires showed great dissatisfaction with the long hours they spend at work as against the low wages they get. It was expressed that the management is concerned with making profit as they make the employees to work for very long hours yet being paid so little. It is interesting to note that, when the customers are happy that the shop opens for long hours which accommodates the working class, it is done at the expense of the employees who have to work for those long hours. A number of the employees mentioned the issue of shortage of staff always which makes them do a lot of work for long hours. It would be expected that the employees have shifts so that they work reasonable hours, at the same time the shop opening for long hours to maximise profit. In this instance, however, profit is being maximised at the expense of the employees. Noteworthy is that, the company is the one which benefits the most in the sense that, it has less employees yet ripping profits as though it had more employees. Less employees also means less salary expense, hence, profit maximisation at the expense of its stakeholders.

The employees also expressed dissatisfaction with their remunerations. The respondents stated with some emphasis that their wages are unfair compared with the company`s financial performance and compared with the effort they put in the company. As mentioned above, in this company, employees work for long hours which makes one expect high salaries to suit the long hours spent by the employees. The responses and expressions of the employees, however, showed otherwise. This shows that, indeed profit maximisation is done at the expense of stakeholders, thus, it is argued this position has to change. The employees even embarked on a strike in order to have their concerns addressed but this did not yield any significant results. Employees of the investigated retail company showed that they do not have any motivation from the company to keep on working for the company but many expressed that quitting the job would not be an option because most of the companies treat their employees in the same manner. This is interesting as it reflects widespread exploitation of employees by companies for the benefit of the companies. This is an unpleasant condition experienced by a number of employees in the corporate world.

It has been noted earlier that the retail company claims to have skills and other development programs aimed at the educational development of its employees. It is interesting to note that, most of the employees interviewed raised the concern that they do not grow in the company. Some are not promoted even when they are fit to be promoted. There is a contrast between the claims of the company and those of its employees which shows that in this company, employee development is just on paper but not in practice.

Moving on to the telecommunications service provider company, it was pleasing to note that some of the employees were happy with their working conditions and for the many benefits the company provides for its employees. Although not all the employees who participated in this research were that positive in their responses, it was thrilling to learn that at least some companies are doing their best to make their employees comfortable at work and not maximise profit at their expense. In the course of the research, it was also noted that this service provider company is one of the top telecommunications service providers in South Africa and has huge revenue at the end of each fiscal year. This shows that exploiting stakeholders is not the only way for companies to maximise profit but a balance can be struck between the interests of stakeholders and those of shareholders which leaves both groups satisfied. This also shows that, striking a balance between the interests of shareholders and those of stakeholders yields positive results to the company rather than making it less productive.

On the other hand, some of the employees expressed dissatisfaction with the company`s way of dealing with employees. It became apparent that the top and middle employees are the ones who enjoy most of the benefits which the company makes available for its employees. Those employees who occupy very low positions are still suffering from the company`s adverse management. One of the concerns raised was the issue that employees are sent to the streets to advertise the company`s products and they work until late and no transport is provided for them to go to their homes. This leaves the employees vulnerable and susceptible to environmental volatility. It was also noted that those who are sent to the streets work there for long hours and their wages are low. This shows that this company does not treat its employees fairly as some are satisfied and some are dissatisfied. This goes back to the issue of maximising profit at the expense of stakeholders. It might seem as if the employees who occupy low positions are not doing any significant work, however, the nature of the work they do and the hours they work prove that their work brings as much benefits to the company as those in the top employment cadre. It therefore, remains a concern and calls for statutory imposition of enforceable obligation on the directors to consider the interests of all stakeholders in their own rights in the performance of their duty. This will help eliminate such differences in the treatment of employees in the corporate operations.

The last category of the companies in which data was collected was a manufacturing company. Just like the telecommunications service provider company, a difference in the treatment of employees depending on their levels of work in the company was also shown. The top employees showed great satisfaction as they were receiving many benefits from the company and were treated with dignity at the work place and were satisfied with their salaries. However, some employees showed dissatisfaction as management does not treat employees equally. One of the concerns raised was lack of promotion. It was expressed that the company does not promote employees to managerial positions when they are fit to be promoted. This means that employees from this company do not grow but are left to occupy same positions for years which makes them remain paid low wages when they are supposed to develop. It can be argued that this is a strategy used by the company to maximise profit. Promoting employees means increase of salary expenses on the part of the company, hence keeping them in the same position means saving operational cost, but this is done at the expense of the employees who deserve to be moved to better positions. This shows lack of balance between the interests of shareholders and those of other stakeholders. Some of the employees stated that employee development is talked about but not executed. This shows that there is need to impose enforceable obligation on companies to consider the interests of stakeholders as their consideration only remains on paper. Claiming to have certain values and acting upon them are different. There is need to ensure that those values are respected and implemented.

On the other hand, it is important to note that the employees of this manufacturing company did not express much dissatisfaction as they commended the company for the good working environment and good working conditions. This means that this company is not at the extreme side but it does consider the interests of its employees to a certain extent. It is, however, the researcher`s argument that enforceable obligation on directors to consider the interests of stakeholders be put in place as some companies seem to do their best but still the interests of stakeholders are subordinated to those of shareholders.

4.4 Customers

It has been noted that as far as considering the interests of employees is concerned, the telecommunication service provider company is to a great extent successful. However, the customers of this company showed dissatisfaction with the company`s services. They mentioned concerns such as poor reception in some areas, poor customer service, no flexible data packages and incompatible devices. This shows that, as far as customers' needs are concerned, it is still lagging behind as the customer`s needs are not prioritized. This to a certain extent is used as a strategy to save costs on the part of the company therefore maximising profit at the expense of the customers. Noteworthy is that the company`s services also has benefits which makes the customers to keep on using it although their interests are not considered as much as they should.

Another aspect which shows that the company focuses more on profit maximisation rather than considering the interests of stakeholders is their pricing. It was a major concern raised by the participants that the company`s pricing is unfair. They stated that its services are too expensive. Although the services are comparatively good, the price is still too high. It is of great interest to note that the high pricing is done to maximise profit and to cover the costs incurred on trying to please the workers. There is therefore no equal consideration of the interests of the employees and those of customers. It is common cause that each company has its own strategies to keep flourishing but whatever strategy adopted by the company should reflect consideration of the interests of stakeholders on an equal footing with those of the shareholders.

The majority of the participants indicated that the company does not consider the interests of the customers. The high prices of its products and services show that the company is more after money than caring for its customers. They also mentioned that this company does not reward its customers unlike other service providers. Although companies are not obliged to reward customers for patronizing their products, doing so is to a certain extent being socially responsible and cultivates a good company/customer relationship. It builds the customers confidence and at the same time makes the company flourish as it encourages customers to keep on patronizing the company’s services. It is argued that the reason why companies do not reward customers is due to the belief that companies should only spend money when there is a direct short-term benefit to the company. However, it is important to note that although it might seem not be of any benefit to the company, a closer analysis will show that keeping customers happy yields long term benefits. It is therefore not only of benefit to the customers for companies to consider the interests of the customers, but also benefits the company. This is an aspect which the service provider company seem to have neglected in its operations.

Moving on to the retail company, the majority of the participants showed dissatisfaction with the products of this company. Although some of the participants did not raise any concern and some actually commended the company on the quality and pricing of its retail products, there were issues of poor quality of goods and selling of expired goods. It was a major concern raised by the participants that this company sells expired frozen foods. Since the food will be frozen one can never tell if it is stale or not until it has been thawed. It is argued that when products are put in the store, the management knows how fresh the products are and how long they will stay before they go bad. In a bid to avoid losses, such stale food are left in the shelves and customers can only see at a very late stage that they bought stale food. It is common cause that for one to return purchased item to a shop, they should have a receipt which shows that they bought the product in that particular shop. In instances of frozen food where one can stay with the product for a while before using it, high chances are that the customer would have lost the receipt and therefore cannot return the product to the shop. This shows that, this company has no interests of the customers at heart but is concerned with maximising profit. Noteworthy is that it is not maximising profit which is a problem but doing so at the expense of stakeholders. Instances of this nature leaves the customer with no help at all and this is undesirable. There should therefore be dire consequences for companies who act in such subtle manner to deceive customers.

The other issue that was of great concern among many of the participants was the issue of unhealthy foods and unhealthy ingredients in some of the foods. They raised the issue of ingredients such as Monosodium glutamate (MSG) in some foods which does not necessarily have immediate effects but certainly has long term effects. MSG is "a flavor enhancer commonly added to Chinese food, canned vegetables, soups and processed meats."[435] This is an ingredient which the members of the public might not be aware of its immediate effects, however, in the long run they are affected and cannot trace back to see the cause of the illness. The fact that some of the participants could not identify such issues and found all the products sold by this company to be good shows that some of the customers are unaware of the harmful foods they buy from this company. This is a pathetic situation as the majority of the public might not be able to identify such harmful foods and avoid buying them. It cannot be said that when the company selects which items to sell to the public they do not check what kind of products they are making available to the public which is serious negligence on their part. It is therefore reasonable to conclude that the management of the company would be aware of such issues but for the sake of making profit they go ahead to sell to the public unhealthy foods. This is done in a bid to maximise profit at the expense of consumers. This shows that this company considers the interests of shareholders more than it considers the interests of its stakeholders.

Another major concern was the issue of genetically modified foods. The participants mentioned that especially chicken sold by this company is very harmful and one can see even with a naked eye that the meat is genetically modified. This even led some of the customers of this company

[435] 'Nutrition and healthy eating' available at *https://www.mayoclinic.org/healthy-lifestyle/nutrition-and-healthy-eating/expert-answers/monosodium-glutamate/faq-20058196* (accessed on 17 July 2018).

to stop buying meat and meat products at all from this company. It is a cause for concern because whereas some of the participants are able to see the harmfulness of such foods, some are not able to as evidenced by their absolute positive responses with regard to this company`s products. This means that those consumers who are not aware of some of the harmful foods sold in the retail food shops remain susceptible to diseases as they are not aware of the root cause of their illnesses.

The participants also expressed their views on whether this retail company considers the interests of the customers or not. Some were of the view that it does consider the interests of the customers because of the low costs of goods which accommodate both the working and non-working people. On the other hand, it can be argued that the low costs are as a result of the poor quality of goods that this company provides to the public as identified by other participants. It is of great interest to the consumers that they consume healthy foods bought at a reasonable price than consuming unhealthy food bought at a low cost. Although the interests of the non-working people should also be considered, their health is, however, of more importance. It is argued that such issues of poor quality foods that are acquired at low prices are to a great extent the cause for a lot of illnesses and high death rates among the less privileged. It is argued that good quality foods are of more value compared with the low costs which are favourable to everyone, hence it is not in the interest of the consumers that they be sold poor quality foods at low costs. It is also important to note that the fact that this company provides goods at low prices compared to its competitors is of more advantage to the company than to the consumers. Low costs means that the majority of the people buy from that shop because that is where they can afford to buy. This is therefore a strategy used by this company to maximise profit at the expense of the health of the consumers.

Some of the participants were of the view that the company does not consider the interests of its customers, but is only concerned with making profits because it sells expired products or almost stale foods at a cheaper price. It was very interesting to find customers raising such an issue. This is a strategy of reducing losses on the part of the company at the expense of the customers. Although the reduced amount might seem attractive and of benefit to the customers, a close analysis will prove otherwise. It is important to note that the quantity of the goods in a package, for example, are not reduced but only the price is reduced. If a person buys a package which was supposed to last a month but now because it is almost stale, it will not last for that long before it goes bad within a short while and becomes completely impossible to consume. The company is the one which would have benefitted at the expense of the customer who cannot consume something bought, More so, they do not have a platform for customers to raise their concerns.

Concerns were also raised against the food manufacturing company. Some participants did not raise any concerns and were happy with the company. However, some raised concerns and one of the prevalent concerns was the issue of stale products. Customers buy products which have an expiry date which seems very far, yet on opening the good they find the product already stale and not fit to consume. Noteworthy is that this company produces products which stay in a fridge for a while without being used. By the time the customer realises that the product is stale, it will be too late to return it. Most of the participants were frustrated with this company and one expressed that they will never buy the products of this company again and will encourage others not to buy from there. It is important to ask why a particular product would go bad way before the written expiry date. There are two possible answers. It could be because the ingredients used were of poor quality and hence the product went bad before the expected expiry date or that the manufacturer intentionally put an expiry date which is far so as to ensure that all the products are sold out. Whichever it could be, it is a clear sign that the company`s objective is to ensure profit maximisation but at the expense of consumers. It is also interesting to note that, as stated above, the company claims to have the interests of consumers at heart and ensures that it is diligent in the manufacturing process, however, the responses of its customers have proven otherwise.

Another complain that was prevalent was the issue of poor customer care. Most of the participants stated that most of the time they could not get hold of anyone on the company`s care lines. The company has a customer care line, however, it is not in use most of the time. Customers are not able to raise their concerns to the company. This leaves the customers frustrated as they remain stuck with products which they cannot consume. Some raised the concern that in instances where their calls are answered and they raise their concerns they are never attended to. Only promises are made that they will look into the matter and that will be end of the story. The company`s way of dealing with its customers is very pathetic and this shows that it does not have the interests of its customers at heart. All these are contrary to the company`s claims that it has a style of communications that is based on efficiency, collaboration, courtesy and dialog with consumers.

4.5 Members of the community

It is fascinating to realise the gap between what the companies claim to be doing for their surrounding communities and what the members of such communities say about the companies. Most participants of the surrounding members of the communities showed that they knew no activity whatsoever done by the companies for the community which can be termed as being socially responsible. Some of them were speculating that possibly companies are doing something but they could not identify any activity themselves. Some of the things which were mentioned by a few of the participants which they considered as how the company benefits the community are wide variety of services such as food, bus and plane tickets, low costs, offers competitions, provides employment, proximity to the location and that it opens for long hours. It is clear that, this is not protecting the interests of the community but the company`s way of trying to attract as many customers as possible. Although this might be of benefit to the community, it is not done to benefit the community but to make more money. It is also important to note that whereas members of the community are happy with the fact that the company opens for long hours which accommodates the working class, its employees will be suffering as they have to work for those long hours and with low wages. This makes it clear that the aim is to make profits and not necessarily to be of benefit to the community. Such ways of management which prove to be of benefit to the community incidentally cannot be termed as corporate social responsibility. There is a need for companies to consider the interests of its stakeholders and act upon them. Doing so might not prove to be of immediate benefit to the company, although in the long run, the company stands to benefit.

It was interesting to note that for the telecommunication service provider company only one participant had the view that the company has the interests of the community at heart. However, the participant could not substantiate their view as they could not identify any activity done by the company for the community. The other participants showed that they were not sure if the company considers the interests of the community. This can be interpreted as a negative response which shows that they are not aware of any corporate social activities done by the company for its surrounding community. Some frankly stated that the company did not consider the interests of the community because they were not aware of any of its engagements within the community. This shows that there is a need for enforceable obligations upon companies to consider stakeholders interests. The company's claim of being socially responsible has not been practically demonstrated.

Moving on to the manufacturing company, none of the participants was able to identify any of the activities done by the company for the community. Some of the participants have stayed in the proximity of this company for more than ten years, yet they were not aware of any corporate social activities engaged in by the company. Some stated that companies engage in some social activities not in its surrounding community but on a wide scale in a bid to have their tax reduced. It was interesting to note that participants were able to identify such issues. It became clear that companies do not engage in corporate social activities per se but such activities are done to benefit the company. In instances where being socially responsible does not have any benefit to the company, companies do not engage in any such activities. Moreover, the claim that companies consider the interests of its surrounding community is not true as no member of the surrounding community of the manufacturing company could identify its engagements with the community.

As far as whether companies consider the welfare of the community is concerned, some responded in the negative and some in the positive. For the retail company they mentioned that it considers the welfare of the community because it is hygienic, canned foods are removed before expiry dates, the foods are free from bacteria, it has all needed items by the customer and it opens for long hours which accommodates working members of the community and it has good services. It is however important to note that this is not being socially responsible in its strict sense but simply the company`s way of making sure that it keeps attracting customers and therefore keep on flourishing. This is done with the interests of shareholders in mind and not those of the stakeholders. It is only incidental that customers benefit from such strategies.

Some participants also considered the company as not considering the welfare of the community because it underpays its employees who are also part of the community. It was, therefore, their view that one way a company can be said to have the interests of the community at heart is to have proper salaries for the employees. In that manner, it increases the standard of living in the community. This is an interesting aspect as it shows that companies are run with the mind to only maximise profit for shareholders. Just as much as companies fail to be socially responsible, they even fail to make better the standards of living of those who work for them. Underpaying employees is a clear sign that companies are not protecting the stakeholders` interests. No one expects the company to just dish out money to the community, but at least giving good salaries to its valuable employees would improve the standard of living in such community.

It was important to establish that in the strict sense of stakeholders` protection, none of the participants were able to identify any of the activities engaged in by companies to benefit their surrounding communities. Some of the participants raised the issue that companies should provide scholarships to the less privileged in the community. Engaging in activities such as providing scholarships for the less privileged in the surrounding community is very important as there are a number of children who need to go school. It is common cause that the government provides funds to ensure that children are educated, but noteworthy is that not all of them get such opportunities, especially, at tertiary level. Should companies provide scholarships as a way of being socially responsible, it would be of great benefit, not only to the individuals, but to the country at large. Of the three companies under this study, none of them engages in such activities in their surrounding communities as participants were not aware of any such activities. This gives an answer as to why communities surrounded by some good companies are still under developed. It is because companies are not faithful to their corporate social obligations. Claims are made by companies that they consider the interests of the stakeholders in their operations, but evidence on the ground has failed to substantiate such claims.

4.6 Chapter Conclusion

It has become clear that in practice, stakeholders` interests in corporate governance are not considered as much as they should. From the analysis above, it can be seen that there is a vast gap between what is written on paper and what is happening in practice. The companies claim to be following the principles enshrined in the King IV Report yet practically it is not so. Key stakeholders of companies are at a peril hence it is argued that the government has to intervene and impose enforceable obligation on directors to consider the interests of all stakeholders in their own rights in the performance of their duties. Stakeholders other than the shareholders contribute equally to the success of the company and as such deserve equal protection as the shareholders in the corporate operation. There is therefore need to improve on the law to ensure that the interests of both shareholders and stakeholders are equally protected. Recommendations on how the law can be advanced to best address this matter are made in the next chapter.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

The main purpose of this study is to show that stakeholders other than shareholders contribute equally to the success of the company and as such deserve equal protection as the shareholders in corporate operations. The study examined the extent to which company's directors are balancing the interests of shareholders and other stakeholders when managing the affairs of the company. The researcher having identified many problems or challenges faced by stakeholders from the negative effects of corporate operations, this chapter concludes the research and gives recommendations on how the law can be advanced in a manner that will better protect the interests of stakeholders through the instrumentality of corporate governance.

5.1 Conclusion

Both the doctrinal and empirical research methods were adopted in this research in order to have a clear perspective of what is happening in the corporate world. Throughout the research, it was noted that it is a matter of great interest in corporate governance to properly determine in whose interest corporations should be run. The Shareholder Value Approach which is based on increasing value for shareholders would seem to be increasingly prevalent as shareholders, being the real direct contributors and the ultimate risk bearers in the company, are accorded preeminent position in apportioning corporate benefits. This is often done at the expense of other stakeholders. For centuries this approach had been considered the traditional approach to corporate governance. However, there is also the enlightened shareholder value approach to corporate governance which advocates for the consideration of the other stakeholders` interests in corporate governance.

Some jurisdictions follow the traditional approach, that is, the SVA. This approach has been unmasked and a lot of negative effects which comes with this approach have been identified. It is undesirable that directors seek to maximise value for shareholders at the expense of stakeholders. It is important to note that corporations do not operate in a vacuum, for them to function profitably, there must be stakeholders, ie., the employees who carry on the daily affairs of the company, the consumers who patronise the company's products, a clean and healthy environment to sustain productivity, the community that provides labour, access and security to the company's facilities, etc, all these have interests and expectations on the company and should be considered when managing the affairs of the company.

The study shows that the company's legislation in some jurisdictions does not regulate corporate operations in a way that would effectively protect the interests of stakeholders other than shareholders. Although there are legislation imposing a duty on directors to consider the interests of stakeholders in some cases, this has not yielded the expected results as evidenced by cases which still come to courts with regard to the improper management of corporations to the detriment of stakeholders.[436] There is therefore the need for a more strict approach to corporate governance to ensure that the negative effects of the operations of corporations on stakeholders are minimised.

One aspect of corporate operations that has caused a cosmic problem is their effects on the environment. There are records showing that wastes and emissions from corporate operations are increasingly impacting negatively on the environment. Whether conditions have become unpredictable and strange ailments affecting humans and animals have become rampant. The issue of the environment as one of the stakeholders, is a very sensitive matter and it has required the world to come together in order to address this matter. A flexible approach of leaving to the discretion of directors to consider the interests of stakeholders has not yielded the desired result in curtailing the adverse impacts of corporate operations on the environment. An empirical study was done wherein certain group of stakeholders were chosen to be part of the study namely, customers, employees and members of the surrounding communities of the selected companies. Three categories of companies were chosen in order to get a clear picture of what is happening in the corporate world. These categories are manufacturer, retailer and service provider companies. The study showed that in these three categories of companies, the interests of stakeholders, in the main, are not being considered.

One of the groups of participants were customers of the said companies. It was established that the interests of customers are not being adequately considered as evidenced by grievances expressed by the customers of these companies. It also became clear that some of the customers of the food manufacturing company and the retail company consume unhealthy foods purchased from these companies and are not aware due to the concealment of certain ingredients or obscurity in the way they are written which poses healthy risks to such consumers.

The other group of participants were employees of the companies. The study showed that employees are not treated fairly in their work places in terms of salaries and other working conditions. A gap was also identified between what companies claim to be doing for their

[436] Nwafor (note 17 above) p 679.

employees and what actually happens in practice. Almost all the employees who participated in this study expressed dissatisfaction with their conditions of employment. It became clear that their interests are not considered by company directors but that these directors are concerned with profit maximisation. In as much as some companies, to some extent, do consider the interests of their employees, it was also established that the interests of shareholders are still dominant to those of other stakeholders.

The last group of participants were members of the surrounding communities in which the companies operate. Data collected from this group of participants could not substantiate claims made by companies that they are being socially responsible in their surrounding communities. It was established that companies seem to engage in corporate social activities but these are not done within the surrounding communities of the companies. As a result, it remained unascertained whether companies really consider the interests of their surrounding communities or not. In the main, it became clear that the issue of considering the interests of stakeholders in corporate governance is only on paper. The Pluralist Approach will ensure that directors are under a statutory obligation to take into account the interests of stakeholders and to be accountable for all their actions that have adverse effects on stakeholders. In the modern society it is now important to adopt an approach which places stakeholders and shareholders on the same level. This is a better approach as it has been established that stakeholders are equally affected by the impacts of corporate operations therefore their interests should be given as much attention.

5.2 Recommendations

In light of the plight of stakeholders from corporate operations, it is recommended that an enforceable obligation be imposed on directors to consider the interests of all stakeholders when performing their duties. As a company is a juristic person, it follows that it can have duties and obligations. Failure to follow all its obligations should be met with matching consequences. Companies should be compelled to dedicate certain percentage of their annual profits to address the needs of the community in their areas of operation. The Indian Companies Act of 2013 has shown that this could be done, and South Africa should follow that example. This will benefit the surrounding community where the company operates and it will improve the standard of living of such people. This is important as eradication of poverty is one of the major goals, especially in the developing countries.

It has been seen that for centuries the issue of corporate governance has been a problem as directors have continued to manage the affairs of corporations with profit maximisation as their primary concern. A different stance should therefore be taken. It is recommended that consideration of stakeholders` interests be made a statutory duty on directors the breach of which could be enforceable by stakeholders against directors and the company. It is believed that this approach will alleviate the plight of the stakeholders from the operations of many corporations as directors will be more diligent and careful to consider the interests of stakeholders in corporate governance.

It is further recommended that the government ensures that companies also spend outside their operational footprint. In India, for example, it was found that communities that fall within the operational zones of companies were more developed than those which were outside.[437] It also found that many of India's most serious problems including the majority of those covered under the set of social, health, and development issues listed in the Indian Companies Act are far more prevalent in parts of India that have a lower level of economic development.[438] This is also true in South Africa as some parts of the country are still underdeveloped compared to others. It is, therefore, argued that there is need to ensure that companies spend outside their operational zones to avoid regional development disparities.

It might seem to be a burden on companies to consider the interests of the communities outside their areas of operation, but this is ideal and in other countries some companies are doing it. For example, in a research done in India it was discovered that:

> In rural development, 68% of all researched companies have been working toward betterment of rural areas by providing infrastructure support such as building of check dams, revamping of water pumps and laying down of roads to improve connectivity. Companies have also been working for rural development through organizing awareness generation camps for issues such as domestic violence, female feticide, and importance of education among others initiatives.[439]

It is, therefore, recommended that the government incorporates in legislation that corporate interests should not be restricted to a company's operational areas. This could help alleviate some of the country`s most striking social problems.

5.3 Recommendations for future research

The focus of this study is mainly on the need for companies to consider the stakeholders interests at the same level as those of the shareholders in corporate operations. It is significant that this research is conducted in South Africa, and basically by focusing on the existing legislation.

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[437] Rossow (note 406 above) p 20.
[438] Rossow (note 406 above) p 9.
[439] See note 408 above p 19.

References were not made to the African cultural setting. The legislation referred to is Eurocentric in nature just as the idea of the company as a juristic person. The study has revealed that the legislation has not adequately provided protection for the interests of all who have expectations on the corporate operations. The question then is; can the African customary practices of communality fill the gap? This could be a subject of a future research especially in South Africa where the idea of decolonization of laws seems to be gaining currency in contemporary times.

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APPENDIX A: INFORMED CONSENT FORM

Research Topic: 'The making of right choices between shareholders and stakeholders in corporate operations in South Africa'

Introduction

Thank you very much for your time. My name is Ophellia Kimbini. I am a Master of Laws (LL.M) student (11633456) at the University of Venda, South Africa and I am conducting this research for academic purposes. This document serves to provide you with all the relevant information that you might need in order for you to make an informed decision on whether you would want to participate in the study or not.

Purpose of the Study

The aim of this research is to show that stakeholders other than the shareholders contribute equally to the success of the company and as such deserve equal protection as the shareholders in the corporate operation.

Type of Research Intervention

The researcher will make use of questionnaires for data collection. The questionnaires shall comprise of open- ended questions as this will give you flexibility to give open-ended responses and therefore provide in depth and exhaustive experiences of the participants from the corporations` operations. The researcher shall make use of paper-and-pencil questionnaire administration, where the items are presented on paper, and also face-to-face questionnaire administration, where an interviewer presents the items orally where fit and necessary.

Participant Selection

The aim of this research is to show that stakeholders other than the shareholders contribute equally to the success of the company and as such deserve equal protection as the shareholders in the corporate operation. As a result of your relevant experiences with the companies you engage with, you have been purposively selected to provide an in-depth experience on this phenomena being studied.

Potential Risks

There are no evident underlying risks to you which may be occasioned by your direct participation in the study. Regardless, the researcher undertakes to not put you in situations where you might be at risk of harm physically or psychologically.

Confidentiality

All data and confidential communications between us will be protected. To that end, you will be allocated either a coded name or a number so as to ensure your anonymity. If ever there is need to reveal identifying information, such information will not be made available to anyone not directly involved in the study.

Compensation for Participation

The research is being undertaken for academic purposes, for the fulfilment of an LLM degree and therefore there will be no compensation and/or incentive for your participation in this research. Your participation in this study is however greatly appreciated as it will help offer a better understanding on the extent of the protection of stakeholders` interests and how far companies are considering the interests of stakeholders when managing the affairs of corporations.

Participation and Withdrawal

While your full participation is highly valuable and appreciated, please note that you need not provide any information that you do not want to and you should feel free to withdraw your participation at any point in the process without any adverse consequences. Also note that you will not be required to furnish reasons for your withdrawal.

If this information and consent form contains any words or phrases that you do not understand please feel free to stop me at any stage of the process and I will provide you with the meanings of such words or phrases. In addition, I will also provide you, upon request, with any other information about my research and answer any questions about my studies, my research methods and myself.

Further Questions and Concerns

Should you have any questions after the process you can contact me by phone on 061 717 5369 or + 081 300 0870 (South Africa), or e-mail ophelliak@gmail.com. You can also contact my supervisors, Professor AO Nwafor and Ms C Simbo, should you have any further questions regarding the approval of this research dissertation, at:

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I, ________________________________ the undersigned, understand the nature and objectives of the research project of Ophellia Kimbini, as well as my potential role in it and my right to withdraw from it at any stage. I voluntarily consent to participate in this study.

Signature ____________________ Date ________________
(Researcher: Ophellia Kimbini)

Signature ____________________ Date ________________
(Participant)

APPENDIX B: CUSTOMER QUESTIONNAIRE FOR MANUFACTURING COMPANY

1. How long have you been buying from this company?
2. Have you ever been dissatisfied with any of the products which this company manufactures or found any of them to be defective?

   If yes, please explain
3. Do you think this company`s pricing is fair compared with the quality of products it produces?

   If not, please explain
4. Is their customer care line/method effective?
5. If you ever raised a concern to them, did they resolve it satisfactorily?

   If you were not satisfied please explain
6. Do you think this company considers your interests as a customer?

APPENDIX C: CUSTOMER QUESTIONNAIRE FOR RETAIL COMPANY

1. How long have you been buying from this company?
2. Have you ever bought products that are not satisfactory from this company?
   If yes, please explain
3. Do you find the ingredients of all the company`s products healthy?
   If not how have you been affected?
4. Do you think this company considers your interests as a customer?

APPENDIX D: CUSTOMER QUESTIONNAIRE FOR SERVICE PROVIDER COMPANY

1. How long have you been using the services of this company?
2. Have you ever been dissatisfied with any of this company`s services?
   If yes, please explain
3. In all your experience with the services provided by this company, do you think its pricing is fair?
   If not, please explain?
4. Do you think this company considers your interests as a customer?

APPENDIX E: QUESTIONNAIRE FOR MEMBERS OF THE COMMUNITY

1. For how long have you been in this community?
2. For how long have you known this company?
3. Would you say this company is beneficial to the community, besides providing its services to the community? Please explain your answer
4. Do you think the company management is considerate of the welfare of the community in which it operates? Please explain your answer
5. Have ever heard or seen any of the activities that it engages in that are meant to benefit the community?

   If yes, please mention the activities and how they have helped the community

APPENDIX F: EMPLOYEE QUESTIONNAIRE

1. For how long have you been working for this company?
2. What motivates you to keep working for this company?
3. Is the company providing you with good working conditions? Please explain your answer
4. As employees do you have a platform or an outlined procedure where you can raise concerns and be head by your employer?
5. When there is a decision to be made which affects your interests in the company are you consulted before the decision is made?
6. Do you think your salary is fair compared with the company`s financial performance? Please explain
7. Do you think your salary is fair compared with what your job entails, the effort and time you spend fulfilling your obligations?
   Please explain your answer
8. How often do you receive salary increment?
9. Would you say your interests as an employee are fully considered by the management? Please explain your answer
10. How often does the company review your positions as employees in terms of promotions?