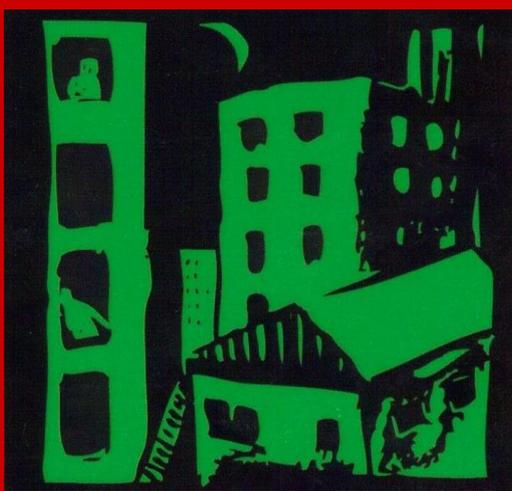


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# A critical analysis of Zimbabwe's codified business judgment rule and its place in the corporate governance landscape

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## ABSTRACT

*The business judgment rule (BJR or the Rule) is an American legal export which has become a key corporate governance tool in most leading common law jurisdictions, such as, Australia, Canada and South Africa. However, the Rule has not been formally embraced in the United Kingdom. In Zimbabwe, the Rule has traditionally been treated as a common law feature. However, section 54 of*

*Zimbabwe's new Companies and Other Business Entities Act represents one of the significant advances in strengthening the jurisdiction's corporate governance principles by codifying the Rule. The BJR originated together with the directors' duty of care and skill. There are two main formulations of the BJR. The first one is by the Delaware Chancery Court and the second one derives from the American Law Institute's Principles of Corporate Governance. The Rule mostly applies in determining the procedural aspects of the directors' decision or the decision-making process and only in exceptional cases is it invoked to review the merits of their decision. This article seeks to critically analyse the major elements of Zimbabwe's codified BJR and to ascertain its place in the corporate governance framework. As will become clear, it will also be argued that the statutory BJR is intended for the enhancement of directorial accountability.*

**Keywords:** business judgment rule; codification; corporate governance; enhanced directorial accountability.

## 1 INTRODUCTION

It is trite that the business judgment rule (BJR or the Rule) was originally developed as a common law principle<sup>1</sup> by American judges of the State of Delaware.<sup>2</sup> Corporate law scholars are unanimous that the Rule is an American legal export.<sup>3</sup> The BJR originated together with the directors' duty of care and skill.<sup>4</sup> Cassim *et al* point out that the rule is a "cornerstone of corporate law in the [United States of America (USA)] that was adopted in Australia [and] Hong Kong but rejected in the United Kingdom<sup>5</sup> and New

<sup>1</sup> Triem FW "Judicial schizophrenia in corporate law: confusing the standard of care with the business judgment rule" (2007) 24 *Alaska Law Review* 23 at 27.

<sup>2</sup> Gurrea-Martinez A "Re-examining the law and economics of the business judgment rule: notes for its implementation in non-US jurisdictions" (2018) 18 *Journal of Corporate Law Studies* 418 at 418; Morales SB "Modernizing Colombian corporate law: the judicial transplant of the business judgement rule" (2018) 5 *Indonesian Journal of International & Comparative Law* 147 at 148; Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J & Yeats JL *Contemporary company law* 2<sup>nd</sup> ed Claremont: Juta & Company Ltd (2012) at 563; Havenga MK "The business judgment rule - should we follow the Australian example" (2000) 12 *SA Merc LJ* 25 at 27; Schoeman N "How the Companies Act impacts on directors" (2013) 13 *Without Prejudice* 10 at 11.

<sup>3</sup> Mupangavanhu BM "Standard of conduct or standard of review? Examination of an African business judgment rule under South Africa's Companies Act 71 of 2008" (2019) 63 *Journal of African Law* 1 at 2; Hamadziripi F & Osode PC "The nature and evolution of the business judgment rule and its transplantation to South Africa under the Companies Act of 2008" (2019) 33 *Speculum Juris* 27 at 27; Gurrea-Martinez (2018) at 418; Cassim *et al* (2012) at 563 and Schoeman (2013) at 11.

<sup>4</sup> Bouwman N "An appraisal of the modification of the director's duty of care and skill" (2009) 21 *SA Merc LJ* 509 at 523.

<sup>5</sup> See Cassim *et al* (2012) at 563. See also Stoop HH "The derivative provisions in the Companies Act 71 of 2008" (2012) 129 *S African LJ* 527 at 548. However, Gurrea-Martinez (2018) at 419 argues that England has adopted a soft application of the Rule.

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Zealand".<sup>6</sup> Canada has also adopted the BJR as a rule of deference "to managerial decision-making".<sup>7</sup> In the South African Companies Act,<sup>8</sup> the Rule is couched as a rebuttable presumption<sup>9</sup> that a director acts in the best interests of a company if certain preconditions are met.<sup>10</sup> Section 54 of Zimbabwe's new Companies and Other Business Entities Act<sup>11</sup> (COBE Act or the new Act) codifies the BJR.

There are two main formulations of the BJR. The first one is by the Delaware Chancery Court<sup>12</sup> and the second one derives from the American Law Institute's (ALI) Principles of Corporate Governance.<sup>13</sup> The Rule mostly applies in determining the procedural aspects of the directors' decision or the decision-making process<sup>14</sup> and only in exceptional cases is it invoked to review the merits of their decision.<sup>15</sup> Schoeman

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<sup>6</sup> Cassim *et al* (2012) at 563. Watson S "Almost codified almost 20 years on: the effect of the Companies Act 1993 on the development of directors duties in New Zealand" in Paolini (ed) *Research handbook on directors' duties: research handbooks in corporate law and governance* Cheltenham: Edward Elgar Publishing (2016) 117 argues that although New Zealand does not have a formal BJR, there is a "business judgment principle" according to which courts are hesitant to review directors' decisions unless it is clear that they were arrived at *mala fide*. However, in practice, the difference between a "rule" and a "principle" may be a matter of semantics.

<sup>7</sup> MacIntosh J "Directors' duties in Canada: paintings in a stream?" in Paolini A (ed) *Research handbook on directors' duties: research handbooks in corporate law and governance* Cheltenham: Edward Elgar Publishing (2016) at 61. See also *Pente Investment Management Ltd v Schneider Corp* (1998) 42 OR (3d) 177 and *BCE Inc v 1976 Debentureholders* 2008 SCJ No 37.

<sup>8</sup> Companies Act 71 of 2008.

<sup>9</sup> Cassim MF *The new derivative action under the Companies Act : guidelines for judicial discretion* Claremont: Juta & Company Ltd (2016) at 102-103; Cassim MF "When companies are harmed by their own directors: the defects in the statutory derivative action and the cures (part 1)" (2013) 25 *South African Mercantile Law Journal* 168 at 172 & 174; Stoop (2012) at 547.

<sup>10</sup> Section 76(4) of the South African Companies Act 71 of 2008; Davis D, Geach W, Mongalo T, Butler D, Loubser A, Coetzee L & Burdette D *Companies and other business structures in South Africa* 3<sup>rd</sup> ed Cape Town: Oxford University Press (2013) at 124; Cassim (2016) at 105.

<sup>11</sup> 4 of 2019 [Chap 24:31] which only came into effect on 13 February 2020.

<sup>12</sup> According to this formulation, the Court in *Aronson v Lewis* 473 A 2d 805 (Del 1984) at 812 held that the BJR is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company". See also Gurrea-Martinez (2018) at 420; Yaru C "The business of judging directors' business judgments in Singapore courts" (2016) 28 *SACLJ* 428 at 442; Triem (2007) at 26.

<sup>13</sup> Unlike the Delaware formulation, the ALI construction is not a presumption in favour of the directors. In fact, it is the corporate decision-makers that bear the burden to prove that they made an informed decision before they can enjoy the Rule's protections. See *Cuker v Mikalauskas* 692 A 2d 1042 (Pa 1997) at 1045-1046; Yaru (2016) at 441 & 451.

<sup>14</sup> *Smith v Van Gorkom* (The Trans Union Case) 488 A 2d 858 (Del 1985); Bainbridge SM "The business judgment rule as abstention doctrine" (2004) 57 *Vanderbilt Law Review* 83 at 101; Schoeman (2013) at 12.

<sup>15</sup> Arsht SS "The business judgment rule revisited" (1979) 8 *Hofstra Law Review* 93 at 126.

asserts that the BJR is a “legal defence for directors challenged with exercising their duties of care and skill”.<sup>16</sup> As a jurisdiction that has codified a legal transplant, it is imperative that judges, legal academics and practitioners are well informed of the relevant model of the BJR which is compatible with local constitutional imperatives and that best resonates with the legislative intent to strengthen Zimbabwe’s corporate governance regime.<sup>17</sup>

This article seeks to critically analyse the major elements of Zimbabwe’s codified BJR and to ascertain its place in that jurisdiction’s corporate governance framework. As will become clear, it will also be argued that the statutory BJR is intended for the enhancement of directorial accountability in Zimbabwe. This conclusion is reached after a reflective consideration of overarching factors ranging from constitutional imperatives to economic justifications. The article proceeds as follows: immediately after this Introduction there follows a brief synopsis of the concept of corporate governance. Thereafter, an assessment of the place and importance of the BJR follows. A critical examination of the Zimbabwean BJR is then undertaken before the article concludes.

## 2 BRIEF SYNOPSIS OF THE CONCEPT OF CORPORATE GOVERNANCE

Corporate governance is an elusive concept.<sup>18</sup> However, it can be described as “the system by which an entity is directed and controlled with a view to ensuring the achievement of its objectives in a sustainable manner within an environment of accountability to its stakeholders”.<sup>19</sup> The preamble to the Organisation for Economic Co-operation and Development (OECD) Principles of Corporate Governance states that “corporate governance involves a set of relationships between a company’s management, its board, its shareholders and other stakeholders”.<sup>20</sup> The King IV Report on Corporate Governance for South Africa, 2016. The Institute of Directors in Southern Africa (King IV) defines the concept as “the exercise of ethical and effective leadership by the governing body towards the achievement of ... ethical culture, good performance, effective control and legitimacy”.<sup>21</sup>

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<sup>16</sup> See Schoeman (2013) at 11.

<sup>17</sup> Section 9(1) of the Constitution of Zimbabwe 2013.

<sup>18</sup> McLaughlin S *Unlocking company law* 2<sup>nd</sup> ed Oxford: Routledge (2013) at 5; Wiese T *Corporate governance in South Africa with international comparisons* 2<sup>nd</sup> ed Claremont: Juta and Company Limited (2016) at 2-3.

<sup>19</sup> See Davis *et al* (2013) at 171. See also the discussion by Larcker D & Tayan B *Corporate governance matters: a closer look at organizational choices and their consequences* 2 ed New Jersey: Pearson Education (2016) at 7-8.

<sup>20</sup> Preamble The OECD Principles of Corporate Governance 2004 at 11.

<sup>21</sup> At 11.

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In the words of Cassim *et al*, corporate governance “is concerned with the structures and processes associated with management, decision-making and control in [incorporated legal entities]”.<sup>22</sup> One of the most commonly cited definitions<sup>23</sup> of corporate governance is derived from the Cadbury Report<sup>24</sup> wherein it was described as “the system by which companies are directed and controlled”.<sup>25</sup> However, although various academics, commentators and organisations have formulated their “own” definitions of corporate governance, it is an undeniable fact that the underlying common denominator is the exercise of decision-making power by a legitimate leadership structure within a company, usually the board of directors, for the achievement of set objectives.

Before 2014, the principles of Zimbabwe’s hybrid corporate governance regime could be gleaned from the old Companies Act,<sup>26</sup> the Public Finance Management Act<sup>27</sup> and the Zimbabwe Stock Exchange Listing Requirements.<sup>28</sup> To a certain extent, the rules of some professional bodies, such as the Institute of Corporate Directors of Zimbabwe, also influenced corporate governance in Zimbabwe.<sup>29</sup> However, in 2014 Zimbabwe introduced the National Code on Corporate Governance (the Code) which consolidated its country-specific corporate governance principles in a single document.<sup>30</sup> In an effort to create and place legislative force behind the requirements and standards of corporate governance, the Code was inserted as the First Schedule to the Public Entities Corporate Governance Act.<sup>31</sup> With the old Companies Act<sup>32</sup> being more than six decades old, albeit with some amendments along the way, the Code became Zimbabwe’s overarching source of contemporary corporate governance principles for both public and private companies.<sup>33</sup>

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<sup>22</sup> See Cassim *et al* (2012) at 472.

<sup>23</sup> See Cassim *et al* (2012) at 472-473.

<sup>24</sup> Cadbury Report (The Financial Aspects of Corporate Governance) 1992 (Cadbury Report).

<sup>25</sup> Cadbury Report 25.

<sup>26</sup> 47 of 1951 [Chapter 24:03].

<sup>27</sup> 11 of 2009 [Chapter 22:19].

<sup>28</sup> Maune A “Corporate governance in Zimbabwe: an overview of Its current state” (2015) 5 *Asian Economic and Financial Review* 167 at 168.

<sup>29</sup> See Maune (2015) at 168.

<sup>30</sup> The Code is accessible at <http://zimcode.net/Governance-code> (accessed 15 June 2020).

<sup>31</sup> 4 of 2018 [Chapter 10:31].

<sup>32</sup> 47 of 1951[Chapter 24:03].

<sup>33</sup> The Code para 1.

Clearly, the drafters of the Code were animated by the intention to address the corporate failures that had plagued Zimbabwe.<sup>34</sup> For example, the Code provides that minority shareholders' interests should be respected and that the shareholders, the board and the management of a company must promote and protect the interests of the company and its stakeholders.<sup>35</sup> Accordingly, it is submitted that the Code has advanced corporate governance in Zimbabwe by introducing a stakeholder or pluralistic approach contrary to the common law which was shareholder centred.<sup>36</sup> Like its peers in the Commonwealth, the old Companies Act<sup>37</sup> contained no explicit statement on directors' duties. On the other hand, the COBE Act in section 195(5), amongst others, imposes a duty on company directors to have regard for the interests of employees, the community, the environment, customers, suppliers and the long-term consequences of any decision. Accordingly, the Act has made a credible attempt to entrench the stakeholder inclusivity approach to corporate governance in Zimbabwe.

### 3 THE PLACE AND IMPORTANCE OF A BJR

As has been alluded to above, the BJR is usually invoked in the context of a directorial decision-making exercise. This makes it a pertinent aspect of any jurisdiction's corporate governance framework. The BJR serves various corporate governance purposes. It can be properly applied as an effective tool to thwart frivolous litigation. Bainbridge argues that the rule is the panacea for the universal tension between directorial authority and accountability.<sup>38</sup> It has been argued that the BJR exists because of information asymmetry.<sup>39</sup> Directors are presumed to possess better knowledge of the day-to-day operations of the company and to possess superior experience of the economic and business world relative to judges.<sup>40</sup> The courts are simply "ill-equipped to

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<sup>34</sup> Preface to the Code at 7.

<sup>35</sup> The Code paras 13 & 17.

<sup>36</sup> *Matanda v CMC Packaging (Pvt) Ltd* HC 8916/01 2003.

<sup>37</sup> 47 of 1951 [Chapter 24:03].

<sup>38</sup> See Bainbridge (2004) at 105.

<sup>39</sup> See Hamadziripi & Osode (2019) at 28; McMillan L "The business judgment rule as an immunity doctrine" (2013) 4 *William & Mary Business Law Review* 521 at 529; Giraldo CAL "Factors affecting the Application of the Business Judgment Rule: An Empirical Study of the US, UK, Australia and the EU" (2006) at 121 available at <https://pdfs.semanticscholar.org/2ce2/04f94edd5a80e1bfe794c56122f7ddc58ebc.pdf> (accessed 26 July 2020).

<sup>40</sup> See Gurrea-Martinez (2018) at 423. See also Monroe-Sheridan AR "Substance overload: a comparative examination of Japanese corporate governance law through the lens of the *Daiwa Bank Case*" (2015) 24 *Washington International Law Journal* 315 at 345.

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make business decisions and should not second-guess directors or substitute its judgment for that of the directors".<sup>41</sup>

Bainbridge adds that the Rule exists to protect directors and to encourage them to fully exercise their powers.<sup>42</sup> It is the responsibility of directors to manage the affairs of their companies.<sup>43</sup> In similar fashion to other contemporary company law statutes, section 218(1) of the COBE Act explicitly confers this function upon directors.<sup>44</sup> In practice, the BJR defines the roles of directors and shareholders by enforcing the principle that decision-making is the directors' prerogative.<sup>45</sup> Centralised decision-making is key to a sound system of corporate governance.<sup>46</sup> The rule ensures that the decision-making power is reserved for directors and "prevents the judiciary from meddling in managerial decisions".<sup>47</sup> In addition, McMillan points out that the BJR seeks to protect directors who act in good faith even though their decisions might *ex post facto* prove to be illogical.<sup>48</sup> Mongalo asserts that the purpose of the rule is to prevent courts

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<sup>41</sup> See Giraldo (2006) at 121-122. The same scholar further argued that "the law supposes that it is the board [of directors] that is in charge of running the company. Justices are lawyers and not business managers and thus are incompetent to manage human and physical resources, financial portfolios or specific commercial transactions". See also *Dodge v Ford Motor Co* 1919 170 NW 668; Hamadziripi & Osode (2019) at 28; Branson DM "The rule that isn't a rule- the business judgment rule" (2002) 36 *Valparaiso University Law Review* 631 at 637; Bouwman (2009) at 524.

<sup>42</sup> See Bainbridge (2004) at 111; Neri-Castracane G "Does the business judgment rule help promote corporate social responsibility" (2015) 10 *Frontiers L. China* 8 at 11.

<sup>43</sup> Sharfman BS "The importance of the business judgment rule" (2017) 14 *New York University JL & Bus* 27 at 55; Cassim R "The power to remove company directors from office: historical and philosophical roots" (2019) 25 *Fundamina* 37 at 62.

<sup>44</sup> The Memorandum to the Companies and Other Business Entities Bill 2018 provides, among other things, that the Bill sought "to define in greater detail the corporate responsibilities of directors and boards of companies to encourage good corporate governance". To that end, s 218(1) of the COBE Act provides that "the board of directors shall be responsible for decisions on all matters except those reserved to the shareholders by this Act or by the company's constitutive documents". See also, s 66(1) of the South African Companies Act 71 of 2008 which provides that "[t]he business and affairs of a company must be managed by or under the direction of its board ...". In a similar vein, art 348(1) of the Japanese Companies Act 86 of July 26 2005 provides that "directors shall execute the operations of the Stock Company unless otherwise provided in the articles of incorporation".

<sup>45</sup> Weng CX "Assessing the applicability of the business judgment rule and the 'defensive' business judgment rule in the Chinese judiciary: a perspective on takeover dispute adjudication" (2010) 34 *Fordham International Law Journal* 123 at 129.

<sup>46</sup> Ponta A "The business judgement rule – approach and application" (2015) 5 *Juridical Tribune* 25 at 29.

<sup>47</sup> See Weng (2010) at 129.

<sup>48</sup> See McMillan (2013) at 527-528. See also Rose AM "Cutting Class Action Agency Costs: Lessons from the Public Company" (2019) available at <https://ssrn.com/abstract=3460585> (accessed 26 February 2020) at 30.

from second-guessing directors' decisions.<sup>49</sup> Cassim FHI *et al* opine that the Rule was created "to protect directors from hindsight bias".<sup>50</sup> Given the nature of the role they must play within the corporate structure, it is indeed important to protect directors from the risk of hindsight bias.<sup>51</sup> Similarly, but in more general terms, Havenga submits that the Rule is there "to protect honest directors".<sup>52</sup>

It is also argued that the Rule has something to do with "respecting shareholders' will".<sup>53</sup> In other words, there is a need to prevent shareholders from becoming managers of their company.<sup>54</sup> Also, directors' decisions need to be respected due to the principle of bounded rationality.<sup>55</sup> Furthermore, "[a]ll humans have inherently limited memories, computational skills, and other mental tools ...".<sup>56</sup> Human fallibility, therefore, forms one of the core values underlying the BJR.<sup>57</sup> Additionally, there is a need to avoid "the risk of stifling innovation and venturesome business activity".<sup>58</sup> Risk-taking is an indispensable ingredient in wealth creation which is central to the mission of every company.<sup>59</sup>

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<sup>49</sup> Mongalo T *Corporate law and corporate governance: a global picture of business undertakings in South Africa* Pretoria: Van Schaik Publishers (2003) at 159; Mongalo T, Lumina C & Kader F *Forms of business enterprise: theory, structure and operation* Pretoria: Van Schaik Publishers (2004) at 217. See also Gurrea-Martinez (2018) at 418; Neri-Castracane (2015) at 11.

<sup>50</sup> See Cassim *et al* (2012) at 565. See also Lee A "Business judgment rule: should South African corporate law follow the King Report's recommendation" (2005) 1 *University of Botswana LJ* 50 at 52; Gurrea-Martinez (2018) at 423; Rose (2019) at 30.

<sup>51</sup> Rosenberg D "Supplying the adverb: the future of corporate risk-taking and the business judgment rule" (2009) 6 *Berkeley Bus LJ* 216 at 223. According to Hornby AS *et al Oxford advanced learner's dictionary* 7<sup>th</sup> ed Oxford : Oxford University Press (2006) at 706 "hindsight" refers to " the understanding that you have of a situation only after it has happened and that means you would have done things in a different way".

<sup>52</sup> See Havenga (2000) at 28. See also Cassim *et al* (2012) at 566; Klauberg T "General case on directors' duties" in Siems M & Cabrelli D (eds) *Comparative company law: a case-based approach* 2<sup>nd</sup> ed Oxford: Hart Publishing (2018) at 57; Ponta (2015) at 27; Lee (2005) at 52; Yaru (2016) at 437.

<sup>53</sup> See Neri-Castracane (2015) at 11; Giraldo (2006) at 123.

<sup>54</sup> See Bouwman (2009) at 524.

<sup>55</sup> See Giraldo (2006) at 123. This concept is defined by Bainbridge (2004) at 121 to mean "the natural limits on the ability of decision-makers to gather and process information".

<sup>56</sup> See Bainbridge (2004) at 121; See also Yaru (2016) at 439.

<sup>57</sup> *Percy v Millaudon* 8 Mart (ns) 68 (La 1829).

<sup>58</sup> Morales (2018) at 176 argues that "the liability regime should not result in discouragement to entrepreneurial activity". See also *Joy v North* 692 F 2d 880 (1982); Bainbridge (2004) at 112; Branson (2002) at 637; Havenga (2000) at 29; Bouwman (2009) at 524; Rosenberg (2009) at 217; Davis *et al* (2013) at 125; and Cassim *et al* (2012) at 565.

<sup>59</sup> See s 7(b)(i) of the Companies Act 71 of 2008; Gurrea-Martinez (2018) at 420; Ruohonen J "Company directors' key duties and business judgment rule" in Kangas *et al* (eds) *Leading change in a complex*

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### 4 A CRITICAL ANALYSIS OF THE ZIMBABWEAN BJR

*Section 54 of the COBE Act provides :*

*“(1) Every manager of a private business corporation and every director or officer of a company has a duty to perform as such in good faith, in the best interests of the registered business entity, and with the care, skill, and attention that a diligent business person would exercise in the same circumstances.*

*(2) In performing that duty, the manager, officer or director as the case may be referred to in subsection (1) may rely on information, opinions, reports or statements (including financial statements) of independent auditors or legal practitioners or of experts or employees of the registered business entity whom [sic] the person reasonably believes are reliable and competent to issue such information, opinions, reports or statements.*

*(3) Subsection (2) applies only if the person makes proper inquiry where the need for inquiry is indicated by the circumstances, and has no knowledge that such reliance is unwarranted.*

*(4) A person who makes a business judgment acting as stated in subsection (1), (2) and (3) fulfils the duty under this section with respect to that judgment if that person—*

*(a) does not have a personal interest as defined in section 56 in the subject of the judgment; and*

*(b) is fully informed on the subject to the extent appropriate under the circumstances; and*

*(c) honestly believes when the judgment is made that it is in the best interests of the company or corporation.*

*(5) No provision, whether contained in a company's articles or a private business corporation's by-laws or otherwise, shall relieve a director or member from the duty to act in accordance with this Part or relieve him or her from any liability incurred as a result of any breach of such duty”.*

As can be seen above, in terms of section 54(4) of the COBE Act,<sup>60</sup> there are four elements of the BJR that must be complied with before a director can enjoy the

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*world - transdisciplinary perspectives* Tampere: Tampere University Press (2019) at 245; Davis *et al* (2013) at 124; Rosenberg (2009) at 221; Neri-Castracane (2015) at 11.

<sup>60</sup> Section 54(4) of the COBE provides that “a person who makes a business judgment acting as stated in subsection (1), (2) and (3) fulfils the duty under this section with respect to that judgment if that person (a) does not have a personal interest as defined in section 56 in the subject of the judgment; and (b) is fully informed on the subject to the extent appropriate under the circumstances; and (c)

protection of the Rule. Before an examination of the current regime, it is pertinent to reflect on Zimbabwe's position before the COBE Act. There was no provision for a statutory BJR in the old Companies Act.<sup>61</sup> However, as can be seen in case law, both a BJR which was usually invoked in instances of allegations of directorial oppressive conduct and derivative litigation existed under the common law. Zimbabwe's common law BJR manifested mostly as an abstention doctrine.<sup>62</sup> In *Stalap Investments (Pvt) Ltd v Willoughby's Investments (Pvt) Ltd*<sup>63</sup> it was held that at common law, the courts would not generally interfere with the domestic affairs of a company on account of a disgruntled shareholder.<sup>64</sup>

Some of the exceptional instances that warranted judicial intervention at common law include occasions where there was a deadlock in the affairs of the company or where a resolution or proposed resolution or act by the directors was illegal or unconstitutional or constituted a fraud on the minority.<sup>65</sup> In *Matanda v CMC Packaging (Pvt) Ltd*<sup>66</sup> it was emphasised that "before a member invites the Court to interfere in the internal arrangement of a private company that member must ... [remember that it] is not part of the business of a Court of Justice to determine the wisdom of a course adopted by a company in the management of its own affairs".<sup>67</sup> In *Zvandasara v Saungweme & others*<sup>68</sup> Makoni J reiterated that the courts should not be quick to usurp managerial responsibilities.<sup>69</sup> Whilst quoting Dowling J in *Yende v Orlando Coal Distributors (Pty) Ltd*<sup>70</sup> Makoni J further held that "in general, the policy of the courts has been not to interfere in the internal domestic affairs of a company, where the company ought to be able to adjust its affairs itself by appropriate resolutions of a majority of shareholders".<sup>71</sup>

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honestly believes when the judgment is made that it is in the best interests of the company or corporation".

<sup>61</sup> 47 of 1951 [Chapter 24:03].

<sup>62</sup> The abstention doctrine dictates that the judiciary must exercise deference to managerial decisions. See Hamadziripi & Osode (2019) at 30.

<sup>63</sup> *Stalap Investments (Pvt) Ltd & 3 others v Willoughby's Investments (Pvt) Ltd & 2 others* (HH 726-19, HC 11164/17) [2019] ZWHHC 726-19 (07 November 2019).

<sup>64</sup> See *Stalap* (2019) at para 4.

<sup>65</sup> See *Stalap* (2019) at para 4.

<sup>66</sup> *Matanda* (2003).

<sup>67</sup> See *Matanda* (2003) at paras 3-4.

<sup>68</sup> *Zvandasara v Saungweme & 5 Others* (HC 108-18, HC 11342/14 [2018] ZWHHC 108 (28 February 2018).

<sup>69</sup> See *Zvandasara* (2018) at para 8.

<sup>70</sup> 1961 (3) SA 314 (W).

<sup>71</sup> See *Zvandasara* (2018) at para 8.

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However, it is submitted that a wholesale adoption of the BJR in the form of an abstention doctrine may produce the unintended consequence of denial of justice to well-meaning applicants.<sup>72</sup> The said doctrine effectively short-circuits the litigation proceedings by preventing the courts from reviewing the merits of decisions made by boards of directors.<sup>73</sup>

### 4.1 What constitutes a business judgment?

The first element of Zimbabwe's BJR as manifest in the COBE Act is that a director or officer must consciously<sup>74</sup> make a business judgment.<sup>75</sup> This implies positive conduct<sup>76</sup> on the part of the decision-maker which involves the board's commitment to properly evaluate the risks involved.<sup>77</sup> Australia is currently the only leading jurisdiction that has managed to provide a statutory definition of the concept of business judgment.<sup>78</sup> Failure to act is not covered by the BJR because it is regarded as an omission<sup>79</sup>, but a decision not to act falls within the ambit of the rule.<sup>80</sup> Automatic or mere approval of a decision, especially when it comes from a controlling shareholder, without proper consideration does not suffice.<sup>81</sup>

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<sup>72</sup> See Rosenberg (2009) at 217.

<sup>73</sup> See Yaru (2016) at 432.

<sup>74</sup> Scarlett AM "Confusion and unpredictability in shareholder derivative litigation: the Delaware courts' response to recent corporate scandals" (2008) 60 *Florida L Rev* 589 at 623.

<sup>75</sup> Section 54(4) of the COBE. See also Delpont PA & Vorster Q *Henochsberg on the Companies Act 71 of 2008* vol 1 service issue 2 Durban : LexisNexis (2012) at 298; Gurrea-Martinez (2018) at 418; Weng (2010) at 129.

<sup>76</sup> Lombard S "Importation of a statutory business judgment rule into South African company law: yes or no" (2005) 68 *THRHR* 614 at 617.

<sup>77</sup> Smit I *The application of the business judgment rule in fundamental transactions and insolvent trading in South Africa: foreign precedents and local choices* (unpublished LLM thesis, University of the Western Cape, 2016) at 29.

<sup>78</sup> Section 180(3) of the Australian Corporations Act 50 of 2001 (Cth). See also Mupangavanhu (2019) at 8.

<sup>79</sup> Harner MM "Navigating financial turbulence: directors' duties in the face of insolvency" in Paolini A (ed) *Research handbook on directors' duties: research handbooks in corporate law and governance* Cheltenham: Edward Elgar Publishing (2016) at 275; Arsht (1979) at 112; Branson DM "A business judgment rule for incorporating jurisdictions in Asia" (2011) 23 *SAC LJ* 687 at 696; Triem (2007) at 26; Lombard (2005) at 619.

<sup>80</sup> Bouwman (2009) at 525; Scarlett (2008) at 622 referring to *Aronson v Lewis* 473 A 2d 805 (Del 1984) at 813 where it was held that the Rule does not apply "where directors have either abdicated their functions, or absent a conscious decision, failed to act". See also Branson (2011) at 696 who argues that "[a] decision to make no decision is a decision for purposes of the [R]ule's application".

<sup>81</sup> See Branson (2011) at 696.

## 4.2 The requirement of a material personal interest

The decision-maker must not have a personal interest in the subject matter of the judgment<sup>82</sup> as defined in section 56(1)(a) of the COBE Act.<sup>83</sup> Although this section does not unequivocally provide for directorial independence, it is submitted that by virtue of section 195(4) of the COBE Act,<sup>84</sup> directors are obliged to be independent always. Fears that section 54 of the COBE Act may be vulnerable to abuse since it does not require the interest to be of a “material” nature are allayed by the reference to section 56(1)(a) which incorporates this element. However, since section 56 specifically applies to material personal interest of a direct nature, it is submitted that directors’ indirect interest in the subject matter of their decision-making is not prohibited.<sup>85</sup> This legislative oversight may be exploited by directors who, though they may not “appear on both sides of a transaction”, may connive with their associates or relatives.<sup>86</sup>

A consideration of the approach followed in other common law jurisdictions may be helpful. Under South African law, a director or her/his related persons must not have a direct pecuniary interest in the impugned transaction.<sup>87</sup> Although the United Kingdom (UK) rejected a formal BJR, it adopted what one company law commentator has described as “a soft business judgment rule”.<sup>88</sup> This informal or “soft” BJR contains an inherent inescapable review mechanism that allows for partial judicial interference with directors’ decision making prerogative.<sup>89</sup> In the UK, “a director must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company”.<sup>90</sup> Even though the UK legislature preferred the phrase “connected persons”,<sup>91</sup> it is submitted that the UK

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<sup>82</sup> Section 54(4)(a) of the COBE.

<sup>83</sup> Section 56(1)(a) of the COBE provides that “in this section ‘personal financial interest’, when used with respect to any person means a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed”.

<sup>84</sup> This section provides that “[e]ach or every director (as the case may be) shall exercise independent judgment...”.

<sup>85</sup> Indirect interest may be manifest when a person associated with or related to the decision-maker is interested in the outcome.

<sup>86</sup> Zimbabwe may draw some lessons from South Africa. Although the statute in South Africa does not explicitly prohibit directors who are indirectly interested, s 76(4)(a)(ii)(aa) of the Companies Act 71 of 2008 addresses this problem by requiring that the director should have had “no reasonable basis to know that any related person had a personal financial interest in the matter”.

<sup>87</sup> Cassim et al (2012) at 564. See s 1 read together with ss 2(1)(a) and (b) of the Companies Act 71 of 2008 for the definition of a “related person”.

<sup>88</sup> See Gurrea-Martinez (2018) at 419.

<sup>89</sup> Section 170 of the UK Companies Act 2006.

<sup>90</sup> Section 175(1) of the UK Companies Act 2006.

<sup>91</sup> Section 252 of the UK Companies Act 2006.

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position is akin to the equivalent South African statutory prescription since the director's family members<sup>92</sup> or legal entity with which s/he is connected<sup>93</sup> are regarded as interested parties. In this respect, it is submitted that section 54 of the COBE Act is vulnerable to abuse.

Traditionally, the plaintiff bears the burden of proving that the defendant had a material personal interest in the transactions and that s/he was not independent.<sup>94</sup> This is a necessary presumption which encourages the exercise of directorial authority through venturesome risk taking and maintains the internal group dynamics within the board of directors.<sup>95</sup> It is submitted that section 54(4) is couched as a presumption to the effect that if a director satisfies the requirements of section 54(4)(a)-(c) s/he will be presumed to have fulfilled the "duty under this section" which includes directorial financial disinterestedness. As such it is argued that the Zimbabwean legislature commendably followed the traditional approach that plaintiffs have the onus to prove the defendant's personal interest in the impugned transaction.<sup>96</sup>

### 4.3 What does an informed decision consist of?

A director must make an informed decision on the subject to the extent appropriate under the circumstances.<sup>97</sup> In performing that duty, the decision-maker "may rely on information, opinions, reports or statements of independent auditors or legal practitioners or of experts or employees" appointed by the company.<sup>98</sup> However, a director or officer must reasonably believe that such people are reliable and competent to issue such information, opinions, reports or statements in order to enjoy protection under the BJR.<sup>99</sup> Clearly, the reference to 'reasonable belief' implies an objective standard.<sup>100</sup> As such, a director satisfies this requirement if a reasonable person placed

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<sup>92</sup> Section 253(2) of the UK Companies Act 2006 defines members of a director's family as "(a) her/his spouse or civil partner, (b) any other person (whether of a different sex or the same sex) with whom the director lives as partner in an enduring family relationship, (c) the director's children or step-children; (d) any children or step-children of a person within paragraph (b) (and who are not children or step-children of the director) who live with the director and have not attained the age of 18; and (e) the director's parents".

<sup>93</sup> Section 252(2)(b) read together with s 254 of the UK Companies Act 2006.

<sup>94</sup> See Yaru (2016) at 442; Lombard (2005) at 617.

<sup>95</sup> See Bainbridge (2004) at 128.

<sup>96</sup> See ss 54(4)(a)-(c) of the COBE Act.

<sup>97</sup> Section 54(4)(b) of the COBE Act.

<sup>98</sup> Section 54(2) of the COBE Act.

<sup>99</sup> Section 54(2) of the COBE Act.

<sup>100</sup> *ASIC v Rich* 2009 NSWSC 1229 at para 7205 and *Brehm v Eisner* 746 A 2d 244 (Del 2000).

in his position would have made the same decision as her/him.<sup>101</sup> Further, a director should make a proper inquiry where the need for inquiry is suggested by the circumstances and s/he had no knowledge that such reliance is unwarranted.<sup>102</sup> The term “proper inquiry” is not defined in the COBE Act. It is hoped that this would be treated on a case by case basis as circumstances present.

It is one thing to make a decision but it is another to make an informed decision.<sup>103</sup> The latter implies that one commits herself to diligently seek out relevant information before making a decision.<sup>104</sup> It is this type of conduct with which the rule is concerned. Generally, this requirement does not imply that the board must be reasonably informed of every fact.<sup>105</sup> It is submitted that the COBE Act is defective in this regard as it specifically requires directors to be “fully informed”. In South Africa, a director must be reasonably informed about the matter.<sup>106</sup> Some of the factors considered by the courts in determining whether directors were reasonably informed before they made a decision include the quality of the decision, whether the directors had enough time to acquire information about the impugned decision, and the advice considered by the directors.<sup>107</sup> It is submitted that the Zimbabwean legislature set a very lofty standard which may be impossible to meet in practice. Such a restrictive provision is not good law as it may discourage competent people from taking the office of a director, or incumbent directors may be reluctant to engage in a risk-taking enterprise.<sup>108</sup> Further, unlike the South African provision on the same subject, it is not clear whether the requirement of a decision-maker being “fully informed” requires a subjective or an objective standard.<sup>109</sup>

An objective standard “is based on conduct and perceptions external to a particular person”.<sup>110</sup> A subjective standard is “peculiar to a particular person and based on the

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<sup>101</sup> See Mupangavanhu (2019) at 18.

<sup>102</sup> Section 54(3) of the COBE Act.

<sup>103</sup> See Gurrea-Martinez (2018) at 418; Harner (2016) at 274; Cassim *et al* (2012) at 564; Davis *et al* (2013) at 124; Arshat (1979) at 120; Havenga (2000) at 28.

<sup>104</sup> See Lombard (2005) at 617.

<sup>105</sup> See Smit (2016) at 30.

<sup>106</sup> Section 76(4)(a)(i) of the Companies Act 71 of 2008.

<sup>107</sup> See Smit (2016) at 30.

<sup>108</sup> The Code para 53 provides that the board should provide effective corporate and entrepreneurial leadership.

<sup>109</sup> According to Mupangavanhu (2019) at 18, the standard under s 76(4)(a) of the South African Companies Act 71 of 2008 is a general “objective standard, which applies an objective test when reviewing the standard of conduct expected”.

<sup>110</sup> *Black’s Law Dictionary* 8<sup>th</sup> ed (2004) at 4398 available at <https://epdf.pub/queue/blacks-law-dictionary-8th-edition.html> (accessed 23 March 2020).

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person's individual views and experiences".<sup>111</sup> It considers a person's mental state at the time the conduct or transaction in question took place. In practice, an objective standard is a test for reasonableness.<sup>112</sup> In *ASIC v Rich*,<sup>113</sup> Australia's Supreme Court of New South Wales accepted the applicant's argument that the Court should adopt an objective approach when considering the information required for decision-making.<sup>114</sup> An objective standard may take different forms ranging from a rather relaxed Australian approach to a much stricter Delaware approach which requires an incorporation of the concepts of gross negligence when determining reasonableness.<sup>115</sup> It is submitted that the Australian objective standard is preferable when determining the objectivity of a decision-maker's decision. The board should only consider material facts that are reasonably available.<sup>116</sup>

#### **4.4 The requirement of an honest belief that a decision is in the best interests of the company**

Finally, a director or officer, when making the business judgment, must honestly believe that the decision made is in the best interests of the company.<sup>117</sup> There are two aspects to this, namely: the decision-maker must have an honest belief and the decision itself must be in the best interests of the company. An honest belief relates to what the decision-maker accepted in his mind to be the company's best interests.<sup>118</sup> It calls for a subjective test.<sup>119</sup> On the other hand, a rational belief, which is what is required in South Africa, refers to reasonable grounds for decision-making.<sup>120</sup> Eventually, this translates into an objective test.<sup>121</sup> The meaning of "the best interests of the company" depends on the definition of "the company". An understanding of what constitutes the "company" for present purposes requires knowledge of whether the jurisdiction concerned adopts the shareholder primacy approach, the enlightened shareholder value (ESV) approach

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<sup>111</sup> Black's Law Dictionary 8<sup>th</sup> ed (2004) at 4398.

<sup>112</sup> *ASIC* (2009) at para 7205 & *Brehm* (2000).

<sup>113</sup> See *ASIC* (2009) at para 7206.

<sup>114</sup> However, Mupangavanhu (2019) at 18 concedes that the position is unclear.

<sup>115</sup> *Brehm* (2000).

<sup>116</sup> See *Brehm* (2000).

<sup>117</sup> Section 54(4)(c) of the COBE Act.

<sup>118</sup> See *Black's Law Dictionary* 8<sup>th</sup> ed (2004) at 701.

<sup>119</sup> See Mupangavanhu (2019) at 19-20.

<sup>120</sup> See Mupangavanhu (2019) at 19-20.

<sup>121</sup> Ramnath M & Nmehielle VO "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 Juris* 98 at 112.

or the pluralist or stakeholder approach.<sup>122</sup> The shareholder primacy approach is founded on the traditional view that “the company” means the shareholders as a collective and therefore the company’s best interests must necessarily translate to the shareholders’ best interests.<sup>123</sup> This traditional view practically equates or replaces “the company” with shareholders.<sup>124</sup>

Esser asserts that the ESV approach dictates that “the primary role of the directors should be to promote the success of the company for the benefit of the shareholders”.<sup>125</sup> According to the stakeholder/pluralist theory, shareholders are just one group among the many stakeholder constituencies whose interests need to be considered in company decision-making.<sup>126</sup> The pluralist approach allows directors to consider all stakeholders’ interests by placing them on the same footing.<sup>127</sup> It is argued that this approach is in sync with the contemporary needs of corporate governance.<sup>128</sup> It also takes into consideration both short term and long term goals of a company.<sup>129</sup>

It is submitted that the COBE Act adopted a pluralist approach.<sup>130</sup> Section 195(5) thereof provides that for the purpose of subsection (4),<sup>131</sup> every director shall have regard, inter alia, to

“the long-term consequences of any decision; the interests of the company’s employees; the need to foster the company’s relationships with suppliers,

<sup>122</sup> Hamadziripi F *Derivative actions in contemporary company law: a comparative assessment from an enhanced accountability perspective* (unpublished LLD thesis, University of Fort Hare, 2020) at 255.

<sup>123</sup> *Greenhalgh v Ardenne Cinemas Ltd* [1951] Ch 291; Nwafor AO “The shifting responsibilities of company directors – how desirable in modern times” (2012) *Macquarie J Bus L* 158 at 160.

<sup>124</sup> In the Australian case of *Kinsela v Russell Kinsela (Pty) Ltd* (1986) 4 NSWLR 722 at 730, it was held that “the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise”. See also *Percival v Wright* [1902] 2 Ch 421; and Nwafor AO “A commentary on the derivative action under the Lesotho Draft Companies Bill” (2007) 6 *U Botswana LJ* 79 at 85.

<sup>125</sup> Esser IM “The enlightened shareholder value approach versus pluralism in the management of companies” (2005) 26 *Obiter* 719 at 720.

<sup>126</sup> See Nwafor (2012) at 174 and Esser (2005) at 720-721.

<sup>127</sup> See Ramnath & Nmehielle (2013) at 106-107.

<sup>128</sup> King IV Report at 24-26.

<sup>129</sup> See Ramnath & Nmehielle (2013) at 106-107.

<sup>130</sup> Further support for this position is to be found in the Code which was inserted as the First Schedule to the Public Entities Corporate Governance Act 4 of 2018. The Code inter alia states that directors should adopt an inclusive stakeholder approach to corporate governance.

<sup>131</sup> Section 195(4) of the COBE Act provides that “[e]ach or every director (as the case may be) shall exercise independent judgment and shall act within the powers of the company in a way that he or she considers, in good faith, to promote the success of the company for the benefit of its shareholders as a whole”. This section is a carbon copy of s 172(1) of the UK Companies Act 2006.

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customers and others; the impact of the company's operations on the community and the environment; the desirability of the company maintaining a reputation for high standard of business conduct; the need to act fairly as between shareholders of the company”.

Section 195(5) of the COBE Act obliges directors to have regard to, inter alia, the interests of customers, employees, suppliers and customers. This perfectly resonates with the basic tenets of the pluralist theory highlighted above.

The argument advanced here that directors' decision-making should be informed by a consideration of all stakeholders' interests is reinforced by some of the principles contained in the Code. This Code is Zimbabwe's leading corporate governance soft law instrument.<sup>132</sup> It is directly aligned with the spirit of the Constitution of the Republic of Zimbabwe, 2013 (Constitution).<sup>133</sup> Also, the Constitution created a mandatory rule for the adoption and implementation of policies and legislation “to develop efficiency, competence, accountability, transparency, personal integrity in all institutions...”.<sup>134</sup> Some of the key problems that the Code sought to address are “owner management of businesses” and “corporate power concentration” which undermine directorial accountability and lead to the violation of minority shareholders' and other stakeholders' rights.<sup>135</sup> The Code also sought to be an elixir for opaque decision-making processes.<sup>136</sup> The principles enshrined in the Code apply to both public and private entities.<sup>137</sup> To this end, the Code provides that directors must be accountable to all stakeholders whom they should treat equally<sup>138</sup> in addition to adopting an inclusive stakeholder approach to governance.<sup>139</sup>

### 4.5 Enhanced directorial accountability

It is submitted that another important aspect of the new Zimbabwean BJR is section 197(2)(a)(i) of the COBE Act which provides that “[a] director of a company may be held liable ... [for] breach by the director of a duty contemplated in section 54” which

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<sup>132</sup> The Independent “The role of corporate governance in leadership” available at <https://www.theindependent.co.zw/2016/04/22/role-corporate-governance-leadership/> (accessed 13 March 2020).

<sup>133</sup> See the Foreword to the Code available at <http://zimcode.net/Governance-code> (accessed 15 June 2020) 4.

<sup>134</sup> Section 9(1) of the Constitution of Zimbabwe 2013.

<sup>135</sup> Preface to the Code at 7.

<sup>136</sup> Preface to the Code at 7.

<sup>137</sup> The Code para 1.

<sup>138</sup> The Code para 55(f).

<sup>139</sup> The Code para 65.

enshrines both the duty of care and the BJR.<sup>140</sup> This is a vital provision which seeks to create directorial awareness of the threat of incurring personal liability in the event of their failure to make proper business judgments. It is further submitted that this provision is aimed at embedding directorial accountability into Zimbabwe's BJR. This legislative attempt to bolster directorial accountability is justifiable on a number of premises.

First, regard will be had to constitutional imperatives. The Constitution is "the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency".<sup>141</sup> The obligations imposed by the Constitution are binding on every legal person, including companies, and must be fulfilled by them.<sup>142</sup> One of the purposes of the Constitution is to foster the spirit of accountability.<sup>143</sup> Boards of directors must always comply with the Declaration of Rights contained in the Constitution and adhere to pertinent codes and best practice standards.<sup>144</sup> Section 331 of the Constitution, which provides for general principles of interpretation of the Constitution, states that when seeking to interpret the constitutional provisions, reference must be made to section 46. According to section 46(2) of the Constitution, "[w]hen interpreting an enactment, and when developing the common law ... every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter". Among the founding values and principles is the principle of good governance which, inter alia, includes concepts, such as, justice and accountability.<sup>145</sup> Furthermore, the Constitution implores the State to "adopt and implement policies and legislation to develop efficiency [and] accountability ... in all institutions...".<sup>146</sup> Therefore, just as with South Africa, it is also submitted that the Zimbabwean Constitution has "changed the context of all legal thought and decision-making"<sup>147</sup> as the COBE Act's provisions have to be interpreted and applied through the prism of the constitutional values including accountability.<sup>148</sup>

Secondly, the enhancement of directorial accountability is justifiable on economic grounds. A consideration of the underlying reasons behind the global corporate debacles to which Zimbabwe was not an exception, further buttresses the argument for

<sup>140</sup> Section 197(2)(a)(i) of the COBE Act.

<sup>141</sup> Section 2(1) of the Constitution of Zimbabwe 2013. Compare s 2 of the Constitution of the Republic of South Africa, 1996.

<sup>142</sup> Section 2(2) of the Constitution of Zimbabwe 2013.

<sup>143</sup> The Preamble to the Constitution recognises the need to entrench accountable governance.

<sup>144</sup> The Code para 54(d).

<sup>145</sup> See ss 3(1)(h) and (2)(g) of the Constitution of Zimbabwe 2013.

<sup>146</sup> Section 9(1) of the Constitution of Zimbabwe 2013.

<sup>147</sup> Mupangavanhu BM "Impact of the Constitution's normative framework on the interpretation of provisions of the Companies Act 71 of 2008" (2019) 22 *PELJ* 7 at 7.

<sup>148</sup> Sections 2 and 3(1) of the Constitution of Zimbabwe 2013.

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the adoption of an accountability enhancing BJR in the Sub-Saharan African State. Whilst the courts' hesitancy to replace directors' business judgment with theirs may be understandable,<sup>149</sup> such a stance may also effectively mean that "a valid claim remains [unaddressed]".<sup>150</sup> An indiscriminate application of the abstention doctrine<sup>151</sup> that is merely based on the justification that directors are more knowledgeable than the courts potentially makes the BJR vulnerable to abuse by ill-willed directors. An experienced and influential director may deceitfully commit prohibited acts knowing that the courts will exercise deference<sup>152</sup> to her/his decision unless the plaintiff successfully rebuts the pro-director presumption.

While it is appreciated that a myriad of factors led to the 2008 Global Financial Crisis (GFC), it cannot be denied that the "mishandling of risk" was the most prominent one.<sup>153</sup> The GFC related disaster left more questions than answers; one of those questions is: whether, in light of the global director misfeasance revealed by the GFC, the principle of director liability should be revisited? Against the backdrop of the GFC<sup>154</sup> and other modern corporate debacles,<sup>155</sup> it is submitted that the validity of the BJR in

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<sup>149</sup> When discharging their day-to-day duties, company directors need to exercise unfettered discretion. See also Nwafor AO "Directors' standard of duties of care and skill in company management - Nigerian and Ethiopian positions - an appraisal" (2007) *Jimma UJL* 15 at 15.

<sup>150</sup> Cooksey CL & Hutchins M "Offensive application of the business judgment rule to terminate non-frivolous derivative actions: should the courts guard the guards" (1981) 12 *Texas Tech L Rev* 636 at 636.

<sup>151</sup> According to this view, the judiciary should refrain or be precluded from making business decisions as the BJR does not delineate the scope of directors' liability. As a result, Cassim *et al* (2012) at 563 call it a rule of restraint. See also Morales (2018) at 148.

<sup>152</sup> McNulty T & Stewart A "Making and regulating business judgment: judicial practice, logics, and orders" in Reay T, Zilber T, Langley A & Tsoukas H (eds) *Perspectives on process organisation studies: institutions and organisations - a process view* Oxford : Oxford University Press (2019) at 174 - 175 argue that judicial deference to directorial decisions has been the most contentious issue regarding directorial accountability and authority.

<sup>153</sup> See Rosenberg (2009) at 217.

<sup>154</sup> An in-depth discussion of the GFC falls outside the ambit of this study, but for more on the subject, see Dullien S, Kotte D, Priewe J & Marquez-Velazquez A *The financial and economic crisis of 2008-2009 and developing countries* New York : United Nations (2010); Ramskogler P "Tracing the origins of the financial crisis" (2015) 2014 *OECD Journal: Financial Market Trends* 47 at 47-59; Reserve Bank of Australia "The Global Financial Crisis" available at <https://www.rba.gov.au/education/resources/explainers/pdf/the-global-financial-crisis.pdf> (accessed 06 March 2020).

<sup>155</sup> Hill JG "Evolving directors' duties in the common law world" in Paolini A (ed) *Research handbook on directors' duties: research handbooks in corporate law and governance* Cheltenham: Edward Elgar Publishing (2016) at 32 acknowledges that in the post-Enron era the issue of stakeholder interests has become topical. It should be noted here that one of the aims of the Sarbanes-Oxley Act of 2002 as expressed in its Preamble is "[t]o protect investors by improving the accuracy and reliability of corporate disclosures".

the form of the abstention doctrine, as evident from the cases discussed above, is unsustainable. Furthermore, there is a risk that if the abstention doctrine is followed, the BJR may ultimately become useful only as a mere determinant of which party bears the evidentiary burden of proof.<sup>156</sup>

Finally, it is submitted that an examination of some of the objectives of the COBE Act, as revealed in the Memorandum to the Companies and Other Business Entities Bill (Memorandum),<sup>157</sup> suggests legislative preference for a BJR that upholds and strengthens the principle of accountability. In this regard it is noteworthy that the COBE Act sought to provide additional measures to protect shareholders and investors, especially minority shareholders and investors.<sup>158</sup> Minority shareholder interests cannot be effectively protected if the courts are arbitrarily precluded from interfering with directors' decisions whenever the plaintiff fails to rebut the presumption or satisfy the burden of proof as envisaged by the abstention doctrine.<sup>159</sup> It is submitted that fostering directorial accountability protects shareholders and investors, especially minority shareholders by allowing the courts to determine whether a decision-maker complied with her/his duty of care and to assign liability to the offender where appropriate.

This also acts as a deterrent to future would-be miscreant directors, which further safeguards shareholder interests and boosts investor confidence<sup>160</sup> without arbitrarily undermining entrepreneurial risk taking by directors.<sup>161</sup> Eventually, this fulfils other vital purposes of the new Act, namely, encouraging good corporate governance and combatting the use of the company form for criminal purposes.<sup>162</sup> It is submitted that, in this way, the BJR becomes an effective corporate governance tool that balances directorial authority through the presumption of good faith, and directorial accountability through the real threat of personal liability.

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<sup>156</sup> This is nothing more than a repetition of the general rule that when the plaintiff fails to prove a prima facie case the defendant will be entitled to summary judgment. However, it can be argued that the allocation of the burden of proof is just a consequence of the BJR's operation and should not be regarded as its main purpose. See Ponta (2015) at 34.

<sup>157</sup> [HB 8 2018].

<sup>158</sup> Memorandum.

<sup>159</sup> It is submitted that in its quest to enhance directorial accountability, Zimbabwean courts should adopt a BJR in the form of a standard of liability. According to this form or manifestation of the BJR, the Rule will not apply if the decision-maker violated her/his duty of care.<sup>159</sup> Such a standard of liability dictates how one should conduct herself or how one is expected to play an assigned role. See Yaru (2016) at 431; McMillan (2013) at 529.

<sup>160</sup> See Stoop (2012) at 528; Branson DM "The American Law Institute principles of corporate governance and the derivative action: a view from the other side" (1986) *Wash. & Lee L. Rev.* 399 at 413.

<sup>161</sup> The Code para 53.

<sup>162</sup> Memorandum.

## 5 CONCLUSION

A functional BJR is one of the chief cornerstones of a progressive corporate governance regime. The deliberate incorporation of the concept of directorial accountability into Zimbabwe's statutory BJR is a welcome development towards entrenching good corporate governance. The relevant constitutional imperatives and self-regulatory principles examined above are further foundational premises for an effective corporate governance regime. However, for Zimbabwe to realise the full benefits of its statutory BJR, there is need for a shift in judicial perception when interpreting BJR related provisions, and a couple of legislative amendments have to be implemented.

The judiciary should, it is submitted, abandon the abstention doctrine based BJR under the common law and embrace an enhanced accountability approach consistent with the constitutional imperatives and a purpose driven interpretation of the pertinent COBE Act provisions. Unrestrained judicial deference to directors' decisions leads to abuse of corporate assets and managerial power, as was the case with most global corporate governance debacles in the last two decades. Such a shift in judicial disposition does not entail interference with the directors' prerogatives, and appropriately leaves "a certain degree of freedom or scope for making mistakes" by directors as fallible human beings.<sup>163</sup> In this way Zimbabwe's BJR will manifest as a standard of liability by which courts will be able to assign and impose liability for abuse of power without usurping the decision-making power of company directors.

With respect to the suggested legislative amendments, first, as has been alluded to above, the requirement that directors have to be fully informed when exercising a business judgment is far too restrictive. Also, the term "fully informed" offers little practical help when it comes to the question of whether the judiciary should apply a subjective or an objective standard. It is submitted that this defect can be cured through an amendment to the text of section 54(4)(b) of the new Act by replacing the phrase "fully informed" with "reasonably informed". The suggested amendment is also consistent with international best practice as envisaged by the Code.<sup>164</sup>

Secondly, Zimbabwe's BJR does not explicitly forbid directors from being indirectly interested in any decision they have to make. This is a regrettable omission as it can be exploited by unscrupulous directors who may connive with their associates and related persons to abuse company resources. It is submitted that legislative amendment should be effected to cure this oversight. The shortcomings in the manner in which the BJR has been incorporated into the COBE Act mainly result from Zimbabwe's legislature borrowing foreign concepts from New Zealand, Australia and South Africa without

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<sup>163</sup> See Hamadziripi & Osode (2019) at 33.

<sup>164</sup> The Code para 54(d). See for example Australia's New South Wales Supreme Court's approach in *ASIC* (2009).

giving due regard to the Zimbabwean company law context. It is submitted that those concepts should be refined or adapted to ensure a better fit with the Zimbabwean legal milieu.

### **Authors' contributions**

The lead author did the research and developed the draft article. The co-author provided guidance and oversight in addition to assisting with the scholarly, language and technical writing aspects.

# A CRITICAL ANALYSIS OF ZIMBABWE'S CODIFIED BUSINESS JUDGMENT RULE

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