

Directors' Duties and Climate Change in Africa: Evidence from Kenya, Nigeria and South Africa

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ABSTRACT: This paper investigates the extent to which, if at all, corporation law in select African jurisdictions obligates company directors to take into account climate-related risks and commit to mitigation and adaptation actions. The paper analyses provisions of the law relating to corporations law (Company Law) in select Commonwealth common law jurisdictions namely Kenya, Nigeria and South Africa within the new and varied context of emergent knowledge and climate attribution science, with a view to distilling any legal duties and potential liability of company directors. Applying the shareholder value approach of corporate governance, the paper argues that while corporate law has for the most part been concerned with governance of a company as a vehicle for profit making, largely informed by the shareholder primacy theory, this narrow construction of the company and directors' duties is no longer tenable in light of actual and potential climate-related risks posed to companies and society alike.

I. Introduction

Increasingly, there has been growing acknowledgement of and recognition that climate change poses financial risk to companies.¹ Companies operating in climate-sensitive sectors, in particular, and those that are invested in climate-sensitive sectors or in other companies that are vulnerable to climate-related risks are of particular concern. These risks may manifest either in the form of actual physical risks,² transition risks³ or liability risks.⁴ The Af-

rican continent in general is especially vulnerable to variability in climate and to climate-related risks.⁵ For companies operating within the different African jurisdictions, they are faced with financial risks arising from climate change. There has also been a marked increase in climate attribution science, with science more readily linking climate change to various material risks.⁶

This paper considers potential legal duties of company directors in select African jurisdictions to assess and

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¹ R.-H. Weber and A. Hösl, »Corporate Climate Responsibility – the Rise of a New Governance Issue« [2021] *sui generis* 83.
² Physical risks in this context would mean risks posed to the operations, premises, supply chain, safety of employees and transport needs of a company owing to climate variability.
³ Transition risks refer to financial and reputational risks associated with shifting from the current high carbon economy to a low carbon economy.
⁴ Liability risks are those that arise out exposure to legal liability as a result of a company's contribution to climate change, failure to manage physical and transition risks, or misleading reporting.

⁵ I. Niang, O.C. Ruppel, M.A. Abdrabo, A. Essel, C. Lennard, J. Padgham, and P. Urquhart, 2014: Africa. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Barros, V.R., C.B. Field, D.J. Dokken, M.D. Mastrandrea, K.J. Mach, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L. White (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 1199–1265 https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap22_FINAL.pdf accessed 20 January 2023.

⁶ F. Otto, R. James and M. Allen, 'The Science of Attributing Extreme Weather Events and Its Potential Contribution to Assessing Loss and Damage Associated with Climate Change Impacts the Science of Attributing Extreme Events' https://unfccc.int/files/adaptation/workstreams/loss_and_damage/application/pdf/attributingextremeevents.pdf accessed 7 March 2022.

manage climate-related financial risks. Under company law, directors owe legal duties to a company and it is the company acting through its directors that is bound to take action. Directors' duties are an offshoot of common law but which have since been codified in statute.⁷ While there are no express provisions in company law requiring directors to take account of climate concerns in the select jurisdictions discussed in this paper, the directors' duties are usually reinterpreted and considered within the context of the issues of the day.⁸ To the extent that climate change and climate-related financial risks are live issues in modern day, the legal duties of company directors will likely be construed as encompassing the need to consider, assess, manage and report on climate-related financial risks.

In this paper, we study the company law of three select jurisdictions namely Kenya, Nigeria and South Africa. These jurisdictions were selected on the basis that they are all commonwealth common law jurisdictions sharing a common heritage of English law courtesy of their colonial histories. Accordingly, judicial decisions accorded in each of the countries can be easily transferable to another. The three jurisdictions were also selected on the basis of the strength of their economies: Nigeria and South Africa are the two largest economies in Sub-Saharan Africa, with Kenya being the largest economy in the East African region with many multinational corporations headquartered in its capital. As such, the three jurisdictions play host to big corporations that makes them deserving of study. Finally, the three countries have recently revised their company law: South Africa (2008), Kenya (2015) and Nigeria (2020); thereby making it useful to study the implications of the relatively recently enacted laws.

The paper is organised as follows: following this introduction, Part 2 is the conceptual framework which contrasts the shareholder primacy against the stakeholder approach of corporate governance. Part 3 is an analysis of the legal duties of directors as reflected in the company law of the three jurisdictions. Part 4 briefly considers the procedural barriers that may militate against enforcement actions against company directors. Part 5 concludes.

⁷ J. Lowry, 'The Codification of Directors' Duties: Capturing the Essence of the Corporate Opportunity Doctrine' (2006) 2(2) *Corporate Board: role, duties & composition* 22.

⁸ For more insights on this line of thinking, see H. Korine & M. Hilb, 'Reinterpreting the role of the board of directors' *London Business School think*, 02 August 2022 <https://www.london.edu/think/reinterpreting-the-role-of-the-board-of-directors> accessed 25 August 2022.

II. Conceptual Framework: Shareholder Versus Stakeholder Value Approach

A. Shareholder Primacy Theory

The shareholder primacy theory, which stipulates that the primary purpose of a corporation and its directors is to maximise the welfare of shareholders, has long defined the manner in which corporations are managed.⁹ The theory may be traced to the attempt to cure the agency cost whereby potential conflict of interest between shareholders and management of a corporation was likely to lead to a neglect of shareholders' interests by corporate managers as they maximised their own. To cure this potentially destructive agency cost, there was emphasized a separation between ownership of a corporation from management. But it was not always so. During the emergence of the public corporation in the 20th century, shareholders of corporations were largely passive and dispersed, exercising little to no influence over corporate management. This state of affairs is well documented by Berle and Means who demonstrate that corporate boards during this period largely operated in an autonomous fashion without privileging shareholders' interests over other stakeholders.¹⁰ In addition, the share price was not viewed as a key indicator of corporate performance during this epoch, as is currently the case.¹¹ This kind of managerial philosophy came to be known as managerialism.¹² However, managerialism came under attack beginning in academia,¹³ and this paved the way for the shareholder primacy theory which came to be dominant and entrenched within corporation law.

The fall of managerialism and rise of shareholder primacy in academia was fuelled by or coincided with the rise of the 'law and economics movement'.¹⁴ Milton Friedman,

⁹ L.A. Stout, 'New Thinking on 'Shareholder Primacy' (2012) 2 *Accounting, Economics, and Law*.

¹⁰ A.A. Berle & G.C. Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1933).

¹¹ Alfred Rappaport, 'Stock Market Signals to Managers' (*Harvard Business Review* 1 November 1987) <https://hbr.org/1987/11/stock-market-signals-to-managers> accessed 10 May 2022.

¹² L.A. Stout, 'The Toxic Side Effects of Shareholder Primacy' (2013) 161 *University of Pennsylvania Law Review* 2003.

¹³ H.G. Manne, 'The Higher Criticism of the Modern Corporation' (1962) 62 *Columbia Law Review* 399–432. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/clr62&div=32&id=&page=> accessed 10 May 2022.

¹⁴ See generally, L.A. Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler Publishers 2012).

a well-known economist, published an article in the *New York Times* in 1970 where he argued that the only proper purpose of business (corporation) is to pursue profits for its owners.¹⁵ A few years later, Michael Jensen and William Meckling published their influential article where they argued that the main problem facing corporations (firms) was aligning the interests of managers who serve as agents with the interests of shareholders who serve as principal within a corporation.¹⁶ It was deemed that this principal-agent problem, also known as agency cost, could be solved by aligning the interests of these two separate categories of stakeholders within a corporation so as to prevent exploitation of shareholders by management.

Accordingly, by the 1990s, shareholder primacy theory had become dogma in academia, business and policy circles. Yet, the shareholder primacy idea that seeks to maximise the welfare of shareholders is potentially at odds with other stakeholders of a corporation such as creditors, suppliers, employees, customers, government and the wider society. It is entirely possible that these stakeholders and shareholders of a corporation will differ on how they would like management to run a corporation, given their varying interests within the corporation.¹⁷ For instance, a corporation's management may choose to raise or reduce employees' salaries; engage in tax avoidance strategies, declare dividends to shareholders, retain earnings to help creditors recover their debt, treat suppliers more generously by paying them promptly, engage in corporate social responsibility, improve the quality of products or services to its customers, among other measures.

In principle, increased shareholder influence that seeks to maximise shareholder wealth by raising the share price of corporations, to the exclusion of other considerations, is inimical to society.¹⁸ Under a regime where shareholder primacy theory reigns supreme, a corporation will likely adopt particular business strategies that seek to shore up the share price even where the same may be harmful to

society and the environment. Within the context of environmental concerns, the shareholder primacy theory serves to encourage environmental pollution and creates disincentives to corporations working toward environmental protection. More particularly, directors of corporations consider climate change considerations as falling outside their domain or legal duties given the absence of express provisions mandating environmental protection in the law of corporations.¹⁹ This is despite the fiduciary responsibility and the duty to act in the best interests of a company that are enshrined in virtually all corporation law either as common law or through codification in statute. The question of whether corporations, through their directors, have any climate change duties is largely dependent on the legal construction afforded to the relevant provisions of corporation law in light of the prevailing knowledge at any particular point in time. It is entirely possible that the nature and extent of directors' duties vary over time depending on changes in other sectors, especially where such changes affect the performance of a particular corporation.

B. Stakeholder Value Approach

But there has since developed another line of thinking or approach to corporate governance, to wit, the stakeholder value approach. The stakeholder approach regards the purpose of the corporation as broader than the shareholder with directors required to consider the interests of other stakeholder constituencies in society. This shift in philosophy has been in accord with arguments around reinvention of the corporation.²⁰ In particular, the British Academy released its final Report of the Future of the Corporation Programme, entitled 'Policy and Practice for Purposeful Business' in 2021.²¹ This report principally argues why the shareholder primacy and the enlightened shareholder value theories need to give way to

¹⁵ M. Friedman, 'A Friedman Doctrine – the Social Responsibility of Business Is to Increase Its Profits' *The New York Times*, 13 September 1970 <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> accessed 20 January 2023.

¹⁶ M.C. Jensen and W.H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305.

¹⁷ B. Adler and M. Kahan, 'The Technology of Creditor Protection' (2013) 161(7) *University of Pennsylvania Law Review* 1773.

¹⁸ J.F. Snerison, 'The History of Shareholder Primacy: from Adam Smith through the Rise of Financialism' in B.K. Sjaafjell & C.M. Bruner (eds) *Cambridge Handbook on Corporate Law, Corporate Governance & Sustainability* (2019) 73.

¹⁹ P.E. Wallace, 'Climate Change, Fiduciary Duty, and Corporate Disclosure: Are Things Heating up in the Boardroom?' (2008) 26 *Virginia Environmental Law Journal* 293–334; See also, B. McDonnell and others, 'Green Boardrooms?' (2021) 53(2) *Connecticut Law Review* 335.

²⁰ C. Mayer, 'Reinventing the Corporation' (2016) 4 *Journal of the British Academy* 53; K.V. Jackson, 'Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis' (2011) 7 *Hastings Business Law Journal* 309.

²¹ British Academy, 'Policy & Practice of Purposeful Business 1' (2021) <https://www.thebritishacademy.ac.uk/documents/3462/Policy-and-Practice-for-Purposeful-Business-The-British-Academy.pdf> accessed 20 January 2023.

the standard of ‘purposeful companies,’ which consider non-shareholder factors such as the environment.²²

The stakeholder value approach/theory suggests that businesses or companies should be viewed from a stakeholder perspective as a set of relationships with many stakeholders which include shareholders, society, government, environment, consumers, suppliers, employees and financiers.²³ According to this theory, it is the duty of company executives to manage and shape these relationships of the various stakeholders so as to create value for the said stakeholders.²⁴ In the event of conflict of stakeholders’ interests, the theory holds that the company executive must think of how to address the conflict in a manner that addresses the needs of the broad majority of the stakeholders.²⁵ And where trade-offs are made in resolving such conflicts, the executives must work to improve the trade-offs for all stakeholders.²⁶ In addition, the stakeholder theory is also considered as a moral theory which specifies obligations of a company towards its stakeholders.²⁷ So much so that questions revolving value judgments, choices, potential benefits and harms to be visited on a particular stakeholder constituency by a decision of the company ought to be considered.²⁸

The above notwithstanding, critics have also identified problems associated with the stakeholder theory. They argue that the stakeholder theory risks reinforcing the shareholder primacy drive and therefore assuming its own set of problems.²⁹ To them, asking company directors to defer to the interests and concerns of a broad range of stakeholders still risks entrenching inequalities and power-grabbing by strong and powerful stakeholder constituencies. As a result, the stakeholder theory can end up privileging a certain class of powerful and strategic stakeholders, thus perpetuating unsustainability. In line with this perspective, critics of shareholder and stakeholder primacy theories argue that there is need to transcend the

shareholder-stakeholder dichotomy and focus on sustainable value creation as a legitimate corporate purpose.

III. Analysis of Directors’ Duties in Select Jurisdictions

A. Kenya

1. Introduction

Kenya’s corporations are governed by statute, the Companies Act, No. 17 of 2015.³⁰ The objects of the Act are to facilitate commerce, industry and other *socio-economic activities* and to provide for regulation of those entities in the *public interest*. Based on this provision, the object of Kenya’s company law includes serving public interest and facilitating socio-economic activities, which transcend pure economic benefit for shareholders to include service to society. In addition, to the extent that taking into account climate-related financial risks leads to improved economic outcomes for the company, consideration of these environmental concerns then becomes an imperative.

2. Statutory Duties of Company Directors

In this section, we discuss a number of statutory provisions that relate to duties of company directors in Kenya and their relation to climate change concerns. These statutory duties, which are largely a codification of common law duties, are: the duty to promote the success of the company; the duty to exercise independent judgment; duty to foster relationships of the company with its stakeholders; to exercise same care, diligence and skill that would be exercisable by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person acting in such office; and the duty to prepare financial statements of the company for each financial year. These duties of company directors are critical as they determine the legal responsibilities of directors and therefore determine the (in) actions that they have to undertake.

Section 140 of the Act, which enacts general duties of directors, provides that these general duties are based on common law rules and equitable principles that apply in relation to directors and are to be applied in the same way

²² Ibid 21.

²³ See, generally, R.E Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman Publishing Inc, 1984) Part I.

²⁴ Ibid.

²⁵ J.S. Harrison, D.A. Bosse, & R.A. Phillips, ‘Managing for stakeholders, stakeholder utility functions and competitive advantage’ (2010) *Strategic Management Journal* 58–74, 58.

²⁶ Ibid.

²⁷ L.E. Preston, ‘The stakeholder theory of the corporation: Concepts, evidence, and implications’ (1995) 20 *Academy of Management Review* 65.

²⁸ R. Phillips, *Stakeholder theory and organizational ethics* (San Francisco: Berrett-Koehler Publishers, 2003).

²⁹ B. Sjäffjell & J. Mähönen, ‘Corporate purpose and the misleading shareholder vs stakeholder dichotomy’ (2022) *University of Oslo Faculty of Law Research Paper* No. 2022–43.

³⁰ Companies Act, No. 17 of 2015 *TheCompaniesAct_No17of2015_RevisedCompressed.pdf* (kenyalaw.org) accessed 20 January 2023.

as common law rules and equitable principles.³¹ This in effect means that reliance may be placed on past judicial decisions as regards directors' duties, at least in so far as the same duties are codified in the Act.

Section 143 of the Act stipulates that a director shall act in a way that they consider, in good faith, would promote the success of the company for the benefit of its members as a whole. The provision further proceeds to particularize the various factors that a director ought to have regard to while fulfilling this duty as follows: 'the long term consequences of their decision; interests of employees of the company; need to foster relationships of the company with suppliers, customers and others; the impact of the operations of the company on the community and the environment; desirability of the company to maintain a reputation for high standards of business conduct; and the need to act fairly as between the directors and members of the company.' It is immediately apparent that in executing the duty of promoting the success of the company for its members, a director is obligated to, *inter alia*, take a long-term horizon and shun short-termism. Borrowing from Mark Carney's 'tragedy of the horizon'³² in reference to climate-related financial risks where he argued that these risks are a long-term issue that will affect future generations, a company's directors are under an obligation to assess the potential climate risks both in the short, medium and long term and direct their actions and decision making accordingly.

Besides, there is an obligation on directors to foster relationships of the company with various stakeholders (phrased as *others*). The '*others*' is admittedly broad enough to encompass creditors, society and the environment which are not explicitly mentioned in the said provision. This provision at once ousts the argument that Kenyan company's law only incorporates the shareholder primacy role, whatever understanding of the provision that a company should be 'run for the benefit of its members as a whole' may be had. Even more explicit in terms of the expected *modus operandi* of directors in promoting the success of the company is the one obligating directors to have regard to the impact of the operations of a company on the community and the environment. In no uncertain terms, there is an obligation enshrined in Kenyan company law on directors to ensure they consider the impact of the company's activities on the environment. It would therefore be remiss for a director to ignore or be in-

different to a company which is harming the environment even where stemming such environmental harm results in an overall reduction in benefit of the company membership as a whole. The proper interpretation of these statutory provisions is that while it is clear that a company is to be run for the benefits of its members as a whole, the means of achieving this end must not violate the various factors as enumerated herein.

A director of a company is legally expected to exercise independent judgment when running the company.³³ This provision is not idle. It simply means that when assessment is being made by other third parties as to whether the actions or inactions of a director with regard to certain affairs of the company were proper, questions will be asked as to whether such director exercised and exhibited independent judgment. Independent judgment in this sense would mean exercise of discretion without undue influence, affiliation or influence by other concerns or individuals, and absent any conflict of interest. This duty to exercise independent judgment goes beyond mere honesty and delves into the realm of assessing prevailing facts, materials, views and opinions and then making a decision as to what is in the best interests of the company. It will not be adequate for a director to simply state that they were acting under the instructions of particular shareholders or to cater for the interests of a particular category of shareholders or other stakeholders. Evidence of independent judgment will be needed to support a particular course of action. This means that even where undue pressure arises on directors from a particular stakeholder, such as shareholder, either to invest in a climate-sensitive sector or not to divest from a particular sector or to take actions that are inimical to the environment, a director will be required to exercise independent judgment and, if unpersuaded, take a different course of action so as to escape potential legal liability. It also needs to be emphasized that the net effect of this duty to exercise independent judgment is that a director will be directly responsible and accountable for their decision, since the same is attributable to own exercise of discretion. Therefore, where management of the company makes any untoward development such as failing to take into account environment concerns, a director must bring the same to the attention of management. Put bluntly, all directors of a company under Kenyan law may now be deemed to be *independent directors*.

Another common law duty that has since been codified is the duty of a director to exercise same care, diligence and skill that would be exercisable by a reasonably dili-

³¹ Companies Act 2015, Section 140(3) & (4).

³² M. Carney, 'Breaking the Tragedy of the Horizon – Climate Change and Financial Stability' (29 September 2015) <https://www.bis.org/review/r151009a.pdf> accessed 20 January 2023.

³³ Companies Act 2015, Section 144(1) of the Act.

gent person with the general knowledge, skill and experience that may reasonably be expected of a person acting in such office; and with the general knowledge, skill and experience that such director has, in performing the functions of a director.³⁴ The statutory provision is arguably a codification of the business judgment rule, which is a judicial rule that assumes that directors and responsible officials have exercised reasonable diligence and care in their dealings and may well found a defence to a company director against legal action on account of their dealing.³⁵ This provision on duty to exercise reasonable care, skill and diligence imposes a twin test: an *objective* test and a *subjective* test. The first objective test looks to whether a director has exhibited care, skill and diligence that may reasonably be expected of a director. This provision implies that there is a conduct and standard reasonably expected of any director, whatever their skill, knowledge or experience. Performing below this objective standard would amount to a breach of this duty. As knowledge on climate risks and other environmental concerns grows by the day, especially with the rise of climate attribution science,³⁶ directors will have to concern themselves with and confront these issues if they are to meet this objective test of reasonably exercising care, skill and diligence expected of *any* director.³⁷ The other test is more subjective, as it looks to the skill, knowledge and experience of the particular person serving as director. Here, liability would vary depending on a director's exposure, with the better educated, better experienced and more skilful carrying a heavier burden than their less endowed counterparts.³⁸

As regards liabilities on the part of directors for breach of the various duties, the Companies Act 2015 provides that a provision or agreement purporting to exempt a director from liability that would otherwise attach in

connection with any negligence, breach of duty or trust in relation to the company is void.³⁹ Similarly void is any provision by which a company seeks to provide indemnity to a director against liability.⁴⁰ The implication of this provision is that liability on the part of a director may not be excused, indicating the seriousness with which their (in) actions are treated.

Under section 635 of the Act, directors are required to prepare financial statements of the company for each financial year. Directors may only approve financial statements only if they are satisfied that the same are a true and fair view of the assets, liability and profit or loss of the company.⁴¹ There is a further obligation on directors where compliance with the applicable financial accounting standards and the Act are not sufficient to provide a true and fair view of the financial affairs of the company to provide such necessary additional information in the statement or in a note.⁴² It further provides that where, owing to special circumstances, compliance with the requirements of the Act on financial statements is inconsistent with the requirement to provide a true and fair view, the directors must depart from such provisions of the Act so as to provide a true and fair view of the status of the company.⁴³ It is therefore evident that the overriding consideration for directors should be availing a true and fair view of the affairs of the company, whatever the rules of financial reporting may be. Climate-related financial risks especially in the short term or near medium term can constitute the special circumstances and have a bearing on what is reflected in financial statements.

Accordingly, company directors ought to bear the above in mind. Directors of companies not falling under the 'small companies' regime' are also required to prepare directors' report which contains a business review that assists members of a company in assessing the performance of directors. Within the meaning of section 655(3) of the Act, the business review contains, inter alia, a description of the principal risks and uncertainties facing the company. Further, and in case of quoted companies, directors are required to specify the following in the business review: the main trends and factors likely to affect the future development, performance and position of the business of the company; information about environmental matters including the impact of the business of the company on the environment and social and community issues. There

³⁴ Section 145 of the Act.

³⁵ In *Isaiah Waweru Ngumi & 2 others v Muturi Ndung'u* [2016] eKLR, High Court Civil Case No. 6 of 2016 at para 17, the High Court of Kenya recognized the business judgment rule as part of Kenyan company law.

³⁶ C. Hodgson, 'The Rise of »Extreme Weather Attribution' *Financial Times*, 19 March 2022 <https://www.ft.com/content/fe51a803-7ece-4652-bce4-23ba7ed21a12> accessed 10 May 2022. See also, <https://climateattribution.org/accessed> 10 May 2022.

³⁷ See, J Sarra, 'Fiduciary Obligations in Business and Investment: Implications of Climate Change' (2017) University of British Columbia, Peter A Allard School of Law Working Paper Series <https://hennickcentre.ca/wp-content/uploads/2017/11/Janis-Sarra-Fiduciary-Obligation-and-Climate-Change-October-14-2017-1.pdf> accessed 20 January 2023.

³⁸ Josh Lerner and Alexey Tuzikov, 'The Carlyle Group and Axalta ^ 818040' *HBR Store*, 24 September 2017 <https://store.hbr.org/product/the-carlyle-group-and-axalta/818040> accessed 10 May 2022.

³⁹ Companies Act No. 17 of 2015, Section 194(2) of the Act.

⁴⁰ Section 194(3) of Act.

⁴¹ Section 636 of Act.

⁴² Section 638(3) b of Act.

⁴³ Section 638(4) & (5) of the Act.

is both civil and criminal liability against a director who provides any false statements in either the financial statement, directors' report or the business review.⁴⁴

B. Nigeria

1. Introduction

Nigeria's corporation law is to be found in the Companies and Allied Matters Act 2020⁴⁵ which repealed the earlier 2004 statute. With respect to governance of corporations, section 87 of the Act divides the powers of managing the company between directors and shareholders. A company may thus act through its directors or other officers and agents so appointed, or through its members in a general meeting, with the remit of the powers as stipulated in the articles of association of the particular company. However, the management of companies is vested on directors who may exercise various powers as permitted them, and have even the liberty to refuse to take instructions from members in a general meeting so long as they are acting in good faith.⁴⁶ It would thus appear that directors are afforded the requisite authority and discretion to manage the company without undue influence from shareholders. This means that directors will be held accountable for their acts or omissions even with respect to environmental issues and climate-related risks that may affect the company. It will be no defence for a director to argue that the members (shareholders) instructed or wanted otherwise, as the law provides that it is not mandatory for directors to take instructions from them.

In the immediately succeeding section, we examine various statutory duties of directors and demonstrate the extent to which they are relevant for purposes of climate change. In particular, we consider the fiduciary relationship of directors in relation to the company and what the same means with respect to dealing with climate change imperatives. We also analyse the duty of directors to act in the best interests of the company and in good faith while exercising care, diligence and skill; and duty to prepare accurate financial statements.

2. Statutory Duties of Company Directors

Regarding duties of directors, section 305 of the Act provides that a director stands in a fiduciary relationship to-

wards the company and is obligated to act with utmost good faith in any dealings. A person standing in a fiduciary relationship relative to another means that such a person is in a position of mutual trust and confidence with respect to whom they relate. Such a relationship is one of dependability and unique trust requiring a director to exercise utmost integrity and honesty to ensure they do not take decisions that hurt the company as an entity. Directors therefore occupy the same position that a trustee⁴⁷ occupies in relation to a beneficiary. It would therefore follow that failing to take account of climate-related risks that would hurt a company in any sense can be interpreted to mean a breach of this fiduciary duty.

Section 305(3) of the Act stipulates that a director shall at all times act in a manner that they believe is in the best interests of the company as a whole so as to preserve the company's assets and further its business as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances. While the law seems to offer some respite to directors in making their decisions and taking actions by providing that they will act in a manner they believe is in the best interests of the company, the same is not a fool proof defence for any actions, however reckless, so long as one claims they *believed* it. Such kind of discretion is necessary and afforded to directors in virtually all jurisdictions. It may indeed be said to be a codification of the business judgment rule,⁴⁸ under which directors are entitled to exercise their own discretion in managing the affairs of a company. But even then, such discretion or 'business judgment' is never exercised capriciously, injudiciously or recklessly. Further, the said discretion to act is not exercisable independently of other duties and obligations which provide a stringent standard of conduct and skill. In any case, the same provision proceeds to state that the director in acting in a manner they believe to be in the best interests of the company must seek to preserve the assets of the company and act as ordinarily skilful, faithful, diligent and careful director. There is a particular level of care, skill, diligence and honesty that is required of a director when dealing with the affairs of a company. In addition, section 305(3) of the Act proceeds to state that while doing this, the director shall have regard to the impact of the company's operations on the environment in the community where it carries its operations. This is an express provision obligating directors to take account

⁴⁴ Section 703 of the Act.

⁴⁵ Companies and Allied Matters Act 2020, <https://pwcnigeria.typepad.com/files/cama-2020.pdf> accessed 20 January 2023.

⁴⁶ Section 87 (3) & (4) of the Act.

⁴⁷ See section 309(1) of the Act.

⁴⁸ B.S. Sharfman, 'The Importance of the Business Judgment Rule', *Harvard.edu*, 19 January 2017 <https://corpgov.law.harvard.edu/2017/01/19/the-importance-of-the-business-judgment-rule/> accessed 20 January 2023.

of the impact of the company's operations on the environment. The implication being that a failure to take account of the impact of the company on the environment amounts to a breach of the director's duty in Nigeria, and attracts potential legal liability.

Directors in Nigeria are liable against the company for any breach of their duties, with companies retaining the right to enforce against them.⁴⁹ In addition, no provision either in the articles of association of the company or in the resolutions, may relieve any director of their duty or relieve them of any liability arising from a breach of their duties.⁵⁰ Under section 308 of the Act, every director of a company is required to exercise their powers and discharge their duties honestly, in good faith and in the best interests of the company exercising that degree of care, skill and diligence that may reasonably be expected of a prudent reasonable director in comparable circumstances. It further provides that failure to take such reasonable care can found a legal action for negligence and breach of duty. The standard expected of directors is therefore not that of any ordinary person, but of a reasonable prudent person serving as a director faced with similar or comparable circumstances. This means that in assessing whether the decision taken (not taken) by a director meets the standard in this section, regard will be had to what other directors (considered reasonable and prudent) may have or have actually done in comparable circumstances.

Given the global momentum toward dealing with environmental issues and climate-related risks, it is possible that foresighted and prudent directors will take decisions that take account of such ecological and climate concerns. Accordingly, if a director in another company fails to take similar measures, such a director may be construed to have fallen foul of this provision, upon juxtaposition with the other prudent directors. Of note is that a similar standard of care is expected for both executive and non-executive directors.⁵¹ This means that even non-executive directors who are not involved in the daily running of the affairs of a company are required to be diligent and exercise a similar standard of care as those who are invested in the company on a daily basis.

Section 377 of the Act requires company directors to prepare annual financial statements which contains a directors' report, among others. Section 4 of the Fourth Schedule to the Act further specifies some of the contents of a directors' report including an indication of likely developments in the business of the company and its sub-

sidaries. Developments in the environmental and climate space that are likely to affect the operations and performance of a company must therefore be included in the directors' report that also forms part of a company's financial statement as prepared and approved by company directors.

C. South Africa

1. Introduction

South Africa's principal law regulating corporations is the Companies Act, No. 71 of 2008 (hereinafter 'Act').⁵² This Act partially codified the common law duties of directors under section 76 of the Act. These duties include fiduciary duty and duty of reasonable care, over and above the common law duties. The duty of a director to act in the best interests of the *company*,⁵³ in our view, suggests that South African company law adopts an inclusive stakeholder approach as opposed to a shareholder primacy approach that merely looks to the interests of shareholders.⁵⁴ This is apparent from the requirement on directors to act in the best interests of the *company*. Such statutory construction would obtain where the phrase '*company*' is considered in its truest sense, as it indeed should. A company does not only refer to the general body of shareholders; rather it is a juristic and legal person in and of itself, with a nexus of contracts with various stakeholders including government, employees, suppliers, creditors, customers and the wider society. To the extent therefore that a particular decision may be in the interests of one stakeholder constituency, say shareholder or supplier, but not in the interests of creditors, government and wider society; it cannot necessarily be said to be in the best interests of the company.⁵⁵

In the section that immediately follows, we analyse the various statutory duties of company directors in South Africa as they relate to dealing with climate change concerns. For a start, we examine the implications of various provisions that attempt to offer an interpretive guide of

⁴⁹ Section 305(9) of Act.

⁵⁰ Section 305(8) of Act.

⁵¹ Section 308(4) of Act.

⁵² This Act repealed the 1973 Companies Act.

⁵³ Section 76(3).

⁵⁴ This view is in contradistinction to the one urged here: I.-M. Esser and P.A. Delpont, 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *Tydskrif vir Hedensdaagse Romeins-Hollandse Reg* 1–30, 29.

⁵⁵ For an account of how South African courts have attempted to balance the interests of various company stakeholders particularly shareholders and creditors in insolvency proceedings, see *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 5 SA 422 (GNP). Employees also find statutory protection under various provisions of the Act including sections 20(4), 45(5), 136, and 144.

the statute. We also examine directors' statutory duty to: act in good faith and in the best interests of the company; to exercise a degree of care, skill and experience; to prepare and publish accurate financial statements; the original power to make decisions reposed in the board of directors; the fiduciary relationship that directors hold relative to the company and consequences for breach of fiduciary duty.

2. Statutory Duties of Company Directors

Section 5(1) of the Act provides an interpretative guide by providing that the Act ought to be interpreted in a manner most compatible with the purposes enumerated under section 7. Section 7 (a) of the Act provides that the purpose of the Act is to promote compliance with the Bill of Rights as provided for in Chapter 2 of the Constitution in application of company law. In effect, this provision to realise the Bill of Rights through company law, in as far as the same is possible and practicable. Article 24 of the South African Constitution under the Bill of Rights provides that everyone has the right to an environment that is not harmful to their health or wellbeing and to have the environment protected through measures that prevent pollution, promotes conservation and secures ecologically sustainable development while promoting justifiable economic and social development.⁵⁶ There is therefore, arguably, an obligation on companies acting through their responsible officers, directors, to promote compliance with this constitutional obligation. The constitutional obligation would be binding on companies and their directors given that the constitution is usually the supreme law in any country, which ranks above statutes such as the respective company law. Further, under section 7(d) of the Act, directors are required to manage a company in a way that promotes both *economic* and *social* benefits. This statutory provision affords an interpretative guide and incorporates the stakeholder value approach. This is because in order for directors to manage the company so as to conduce to *economic* and *social* benefits, regard must be had to other stakeholder constituencies including society and the environment.

Section 76(3) of the Act sets out that a director performing the duties of a director of a company must do so in good faith and for a proper purpose; in the best interests of the company; and with the degree of care, skill and experience that may reasonably be expected of a person

carrying out the same functions as those carried out by the director, and having the general knowledge, skill and experience of that director. The import of the foregoing section is further clarified under section 76(4) where it is provided that a director's duty to act in the best interests of the company and to exercise a degree of care, skill and experience of a director will be deemed to have been performed if: the director has taken reasonably diligent steps to become informed about the matter; the director had no personal financial interest in the matter or had dealt accordingly with such interest through disclosure; and the director made a decision or supported the decision of a committee of the board with regard to the matter having rational basis for believing, and so believing, that the decision was in the best interests of the company. A reading of the particular provision indicates that the same is to be applied in a conjunctive rather than a disjunctive fashion, which means that all the three elements set out in the immediately foregoing statement as being required of directors, have to be present. The implication of the provision is that directors are required to show they have taken reasonably diligent steps to inform themselves on various matters. Within the meaning of climate change and associated financial risks, a director will not be excused if they are not well informed of and take necessary action and decisions, based on available knowledge on the various physical, transition and litigation risks that a company may be exposed to depending on its investments and the sector in which it operates. The subjective test of what is expected of a director, based on such director's knowledge and experience, has been retained. However, this may not necessarily protect a director from legal liability especially as climate attribution science and knowledge continues to accumulate.⁵⁷ This is because the expectation, while subjective, would be dependent on the available knowledge at the particular point in time.⁵⁸

Directors are however entitled to rely either on the performance of other employees or professionals contracted by the company or on information, opinion and recommendations of other employees or professionals within a company on a particular matter, so long as the director reasonably believes such employees or professionals to be reliable and competent in the said matters.⁵⁹ While this provision may appear to offer some respite at least in so

⁵⁶ The Constitution of the Republic of South Africa, 1996 SA-Constitution-web-eng.pdf (justice.gov.za) accessed 20 January 2023.

⁵⁷ G. Ganguly, J. Setzer & V. Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford Journal of Legal Studies* 841.

⁵⁸ E.A. Lloyd & T.G. Shepherd, 'Climate change attribution and legal contexts: evidence and the role of storylines' (2021) 167(3–4) *Climatic Change* 28.

⁵⁹ Companies Act No. 71 of 2008, Section 77(4) and (5).

far as it may allow directors to avoid making particular decisions or place reliance for their decisions on other officers or professionals within the company, there is still the expectation that the director must have a reasonable basis for placing confidence on such persons.⁶⁰

In terms of governance of corporations in South Africa, the original decision-making power in a company now appears to be in the hands of directors as opposed to the general body of shareholders. This appears to be the import of section 66(1) of the Act which now 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 (...)’ It would seem that the ultimate power of decision-making no longer rests with shareholders in a general meeting given the wording of the specific provision, unless where the same is otherwise provided in the Memorandum of Incorporation. The 2008 Act has shifted levers of power with the powers of the board now being granted by the Act (statute) as opposed to an agreement between shareholders and directors or by delegation from shareholders.⁶¹ What this means is that being non-delegated power, the same may not be lawfully abridged or subject to control of shareholders, except as may be expressly provided for in the Act. It would follow that in the event of a deadlock in decision making on the part of the board, shareholders have no legal basis or inherent power to make a decision. The inevitable consequence of this legal position is that it is the responsibility of the board of directors to ensure good corporate governance. And with the original and elevated power of the board, comes additional legal responsibilities. Within the context of climate change duties, it follows that decisions made by corporations in South Africa, save for where the

Memorandum of Incorporation suggests otherwise, will solely be the responsibility of directors and may attract the requisite legal liability from shareholders and other third parties.

With respect to legal liability of directors within the meaning of the Act, section 77 of the Act provides that a director may be held liable under the common law principles on breach of fiduciary duty for any loss, damage or costs incurred by a company arising from a breach of the director’s duties. In addition, a director may be held liable under the common law principles relating to delict for any loss, damage or costs incurred by the company arising from a director’s failure to act with the degree of care, skill and diligence that may reasonably be expected of them given their general knowledge, skill and experience and a person carrying out such functions within a company. In addition, such liability may arise from a contravention of any other provisions of the Act or Memorandum of Incorporation. Another relevant provision relating to liability is to be found under section 77(3) d which provides that a director may be held liable for any loss sustained by the company arising directly or indirectly from the director having signed, authorised or consented to the publication of financial statements that are false or misleading in a material sense. Given the evidence of climate risks and the increasing financial risks posed to corporation which are invested in climate-sensitive sectors, it means that where directors either fail to take into account, underestimate or overemphasize the risks posed by climate change; they run the risk of being held legally liable under this section at least to the extent that the financial statements they authorise are either false or misleading.

Even more significant is section 78(2) of the Act which provides that provisions of any agreement, rules or Memorandum of Incorporation seeking to relieve a director of any statutory duty or liability under the Act or to negate, limit or restrict any legal consequences arising from wilful misconduct or wilful breach of trust is void to such extent. Section 104 of the Act speaks to liability for untrue statements in a prospectus by providing that where a director authorises or consents to issuance of a prospectus containing untrue statements, such a director is liable to compensate those who suffer loss following reliance on such prospectus, over and above the liability arising from a breach of director’s duties as discussed above. Statements contained in prospectuses are especially important given that companies seeking to raise capital from the public (investors) issue prospectuses which gives the affairs and prospects of the company. Where directors are either uninformed or indifferent to potential climate-related financial risks, they may ignore or downplay the said

⁶⁰ N. Maharaj, ‘A discussion on the duty of care, skill and diligence to be exercised by a director in light of the Companies Act 71 of 2008, as well as the common law and an overview of the business judgement rule: A company law perspective’ Masters Thesis, University of KwaZulu-Natal (2015), p. 17. https://ukzn-dspace.ukzn.ac.za/bitstream/handle/10413/13130/Maharaj_Nithen_2015.pdf?sequence=1&isAllowed=y accessed 20 January 2023.

⁶¹ Traditionally, and borrowing from English law, the power of the board of directors was delegated by shareholders or delineated through an agreement between shareholders and directors (articles of association), see *John Shaw & Sons (Salford) Ltd v Shaw* 1935 2 KB 113 (CA) and *Scott v Scott* 1943 1 All ER 582 (Ch). In shifting this arrangement, the South Africa’s Companies Act 2008 was moving away from the English law position and following in the footsteps of Canadian corporation law, see e.g. section 102(1) of the Canadian Business Corporations Act RSC 1985 c C-44, available at Canada Business Corporations Act (justice.gc.ca) accessed 20 January 2023.

risks hence authorising false or misleading statements in the prospectus, thereby incurring legal liability.

In addition, section 30 of the Act requires companies to prepare annual financial statements for approval by directors before their presentation at the shareholders' meeting. These annual financial statements must include 'a report by the directors with respect to the state of affairs, the business and profit or loss of the company, or of the group of companies, if the company is part of a group, including any matter material for the shareholders to appreciate the company's state of affairs.'⁶² Further, section 29(2) of the Act stipulates that the financial statements must not be false and misleading in any material respect or incomplete in any material particular. Increasingly, companies and financial institutions have started incorporating environmental and social governance elements as well as climate risks in their financial reporting. Accordingly, it would follow that given the pre-eminence of climate issues and climate-related financial risks faced by virtually all companies, a failure to provide and account for these risks in financial statements approved by board of directors would qualify as incomplete, false or misleading in material respects within the meaning of this provision.

IV. Procedural Barriers to Enforcement Actions Against Company Directors

The assessment of the company law in Kenya, Nigeria and South Africa as detailed in the foregoing sections indicates that company directors in these jurisdictions have an obligation to deal with climate-related risks and other environmental concerns. This is because there are both express and implied legal obligations requiring directors to do so, especially in this age where such risks are becoming more apparent with the rise of climate attribution science. Indeed, the analysis revealed that there are a number of common and shared statutory duties of company directors in the three select jurisdictions relevant in the context of climate change. These are: the fiduciary relationship that directors have in relation to a company; the duty to act in good faith and in the best interests of the company; the duty to exercise reasonable, care, diligence and skill expected of such director; the duty to prepare and publish accurate financial statements; and duty to promote the success of the company. There are some differences however, with respect to the Constitutional provisions as well as the interpretive guide provided in some

of the statutes, which have a bearing on the meaning accorded to the various statutory provisions.

While there may be potential liability for directors as demonstrated in the analysis in the foregoing sections, successfully lodging liability claims against company directors may not be as easy. This is partly because of the manner in which company law in various jurisdictions around the globe (including the three select jurisdictions) is structured. In the main, directors' duties are owed to the company as a whole. Given that companies are separate legal entities independent of its members, the law is that a breach of directors' duties or other forms of malfeasance may only be remedied through an action by the company itself.⁶³ Yet, companies act through their duly appointed or prescribed officers, *viz*, directors. In practical terms, it is unlikely that a director who has breached their duty or whose fellow director has breached their duty will resolve to take action either against self or against their fellow directors, in the name of the company. The tendency for self-preservation that is usually all too common among human beings is likely to work against taking legal action. In this sense therefore, the liability risks may be significantly reduced. However, newly appointed directors may also take action against former directors who breached their duty while serving in their executive positions. This may serve as a mechanism against the aforementioned tendency for self-preservation. Accordingly, directors must always be alive to the fact that where they breach their duty, directors who come after them may take action on behalf of the company.

In addition, the legal position of directors not being held to account owing to their own self-preservation may not necessarily obtain in cases where other stakeholder constituencies such as creditors wish to bring action against a company's directors. This would be the case where interests of such stakeholders such as creditors in the company have been negatively affected by directors' actions, if a stakeholder approach were to be adopted. While other stakeholders such as creditors are not legally mandated to bring action on behalf of a company as they are not the prescribed officers nor even shareholders, there is growing case law in other jurisdictions such as Canada which appear to recognise other legitimate stakeholders including creditors as those that can lawfully bring an action where company directors breach the duty

⁶² Companies Act No. 71 of 2008, Section 30(3) of the Act.

⁶³ This is famously known as the 'Rule in *Foss v Harbottle*' as enunciated in *Foss -v- Harbottle* (1843) 2 Hare 46. The principle has since been codified in statutes in most jurisdictions.

of care owed to them.⁶⁴ It is possible that such an interpretation may spread in other common law jurisdictions and become the mainstream view, thus according other stakeholders the legal standing to lodge claims against directors for breach of their duties.

Other instances where other stakeholders may bring claims against directors under company law is in derivative actions by aggrieved shareholders; private action by shareholders in a claim of unfair prejudice;⁶⁵ or claims lodged by the liquidator or administrator of a company against former directors for breach of their duties. Derivative action claims are usually quite onerous as they require stringent permissions before it may be lodged.⁶⁶ A claim of unfair prejudice may be maintained by a minority shareholder where they argue that a director's actions were unfairly prejudicial to them. For instance, one may

argue that by failing to take into account climate risks, a director was in breach of their duties, with the consequence of registering less than optimal financial returns in a company.

V. Conclusion

This paper has assessed the company law of three commonwealth common law jurisdictions namely Kenya, Nigeria and South Africa with a view to assessing any climate change duties for company directors. While noting that there have been no legal claims founded on climate risk against directors as of yet, the spectre of litigation hangs even as climate attribution science and climate litigation grows globally. The paper has argued that management of climate risk will soon be a frontier of litigation and directors' duties enshrined in company law of most jurisdictions will be deemed to have been breached by directors where they ignore, downplay or fail to take into account such risks. The paper has nonetheless noted some practical difficulties of lodging such claims arising principally on the legal principle that directors' duties are owed to a company and only a company acting through directors may lodge a legal claim, of course with very limited exceptions. On the whole however, it may safely be stated that company directors will be held to a higher standard than has been the case with respect to climate change issues to the extent they affect corporations. Accordingly, prudent directors need to be conscious of this increased risk of legal liability and adjust as need arises. In short, as regards climate risks, company directors beware!

⁶⁴ See e.g. the Canadian Supreme Court in *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 at para 44 where the Court stated: 'A second remedy lies against the directors in a civil action for breach of duty of care.' As noted, s. 122(1)(b) of the CBCA requires directors and officers of a corporation to 'exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.' This duty, unlike the s. 122(1)(a) fiduciary duty, is not owed solely to the corporation, and thus may be the basis for liability to other stakeholders in accordance with principles governing the law of tort and extracontractual liability: Peoples Department Stores. Section 122(1)(b) does not provide an independent foundation for claims.'

⁶⁵ P. Koh, 'The Oppression Remedy – Clarifications on Boundaries' (2015) 15 *Journal of Corporate Law Studies* 407.

⁶⁶ C. Stanley, 'The Personal Liability of Directors to Third Parties and Shareholders' (2013) 19 *Trusts & Trustees* 388.