

UNIVERSITY OF KWAZULU-NATAL

The Autonomy of Directors of Black Economic Empowerment Companies

By

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Abstract

This study focused on the conflicts that are faced by directors appointed by BEE-shareholders to the board of directors of a company. The focus of the study was on the conflict that arises when the expectations of the BEE-shareholder that appoints these directors are not in line with the duties imposed upon these directors by law. The study considered whether these directors are there to act as agents of the BEE-shareholder that had appointed them and how autonomous are these directors in the performance of their duties. The main aim of this study was to establish a standard prescribed by law that is expected of these directors and to consider the expectations of the general public as to what is expected of these directors. The purpose of the study was to establish whether a conflict does exist and to get an understanding of the nature of the conflict. The outcome of the study would be to develop recommendations as to how to best address the conflict. The research study contained both quantitative and qualitative enquires. Data was collected by means of a questionnaire. The sampling technique that was used was “accidental or availability non-probability sampling”. Due to time constraints and limited resources, the study could not be conducted on a representative sample as the respondents were predominantly from the Durban Metropolitan area and Bizana in the Eastern Cape Province. The study revealed that predominantly the respondents agree with the prescriptions of law that BEE-representative directors owe a fiduciary duty to the company. The study revealed that the respondents also agreed with the legal standpoint that these directors should prioritise the interests of the company before any other interests including the interests of the BEE shareholders whom they represent. However, the majority of the respondents also believed that BEE shareholders had the right to instruct these directors how they must discharge their duties as directors and these directors were accountable to the BEE shareholders. The study revealed that there was a disparity between the expectations of BEE shareholders and the provisions of law, as most of the respondents were BEE Beneficiaries thus being part of a BEE shareholder. From the findings of the study, a corporate governance policy on this issue was formulated as part of the objectives of the study. Another recommendation was for a further study to be conducted to better understand the disparities identified in this study in order to formulate a solution for that problem.

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CHAPTER ONE

INTRODUCTION

1.1 Introduction

Even though the issue of corporate governance had already come under consideration in the 1990s, the emphasis has significantly increased since 2001. The collapse of international conglomerates such as Enron and Arthur Anderson has brought about a climate of extreme consciousness regarding the governance of companies from a variety of commentating perspectives.

The establishment of a decent level of governance ethic, themed on integrity, accountability and transparency of company board of directors has become the area of concern for policy makers all over the world. Apart from the general corporate governance issues mentioned that are of concern in all markets, each country has its own dynamics that contribute to its own economic culture, and which are unique to its environment. South Africa has an additional unique dimension to corporate governance shaped by the country's past. In an attempt to establish the corporate governance standards applicable in South Africa, one has to take into account the country's history within the context of the corporate governance direction followed today.

The introduction of Black Economic Empowerment (BEE) in South Africa has added another dimension to the corporate governance standards observed in the country. This study will focus on directors who are appointed by BEE shareholders to be members of a board in a representative capacity. The study will also seek to establish to whom these directors owe allegiance in terms of performing their duties and responsibilities.

This study will also consider the factors to which these directors might be exposed, and the expectations of the BEE shareholders they represent. In order for this to be established, all the sources and factors that might dictate the duties and responsibilities of

these directors and any other factors that might influence them in this regard, need to be understood.

This study aims to establish whether it is possible for directors who represent these BEE shareholders to discharge their duties as directors to the company in an unfettered manner in accordance with applicable laws and practice standards observed in South Africa. The aim is to establish the prescriptions of our laws, policies and practices and establish their application in practice within the context of the South African dynamics. The study also aims to establish whether there is any diversion from these prescriptions and hopefully make recommendations to move forward.

1.2 Background

The introduction of Apartheid in South Africa when the National Party came into power in 1948 brought about a series of legislations and policies that resulted in the segregation of the South African population on racial grounds. Given that the National Party was exclusively a party for people of European (white) descent, Apartheid favoured the white minority of the South Africa population.

Apartheid systematically led to the economic marginalisation of South Africa's black population, which constitutes the majority of the country's population, by placing restrictions on the participation of the black majority of South Africans in the economy.

When the first all-inclusive democratic elections were held in 1994, the African National Congress (ANC) - the organisation mainly accredited with the liberation of black South Africans - won the elections falling just short of a two-thirds majority.

One of the priorities of the ANC-led government was to redress the injustices of the previous regime and to eliminate the legacy of Apartheid. With regard to the country's economy, this was first witnessed by the introduction of initiatives such as the "Reconstruction and Development Programme" in 1994 and subsequently policies like

“Affirmative Action” which gave preference to previously disadvantaged individuals (PDI) when organisations were recruiting employees.

Over time the ANC-led government adopted a broad systematic approach known as Black Economic Empowerment (BEE), later codified into statute in the form of the Broad Base Black Economic Empowerment Act 5 of 2003, with the intention of transforming the South African economy into a better representation of the population.

Over the years BEE has exhibited a number of shortcomings, the main one being the enrichment of a handful of individuals. Commentators have argued that as government policy BEE should be abandoned, but government is yet to make that proclamation. Even if this did occur, there would still be a need to address the economic disparities created by Apartheid in an inclusive manner which would require PDIs to be organised and grouped together. In an attempt to address the issue of the enrichment of a handful of individuals, government has recently shifted towards placing an emphasis on community-based co-operative structures as being the appropriate vehicles to be utilised for BEE initiatives. Regardless of the vehicle being used, the result is always that there are groups to deal with and these groups are the subject of this study.

1.3 Problem Statement

Our common laws and statutes impose a fiduciary duty upon all directors of companies to always act in a bona fide manner in pursuit of the best interests of that company. This is referred to as a director’s fiduciary duty to a company and is owed by each director to the company as a separate entity from its shareholders. The directors are obliged to discharge their duties at all times pursuing what would be in the best interests of the company. The question that then arises is: What informs the best interest of the company in the perspective of directors?

Can a director, representing the interests of the BEE shareholders, discharge his obligations to the company independently of the interests of the BEE shareholders who had appointed him? In practice, can these directors continue to pursue what is in the best

interests of the company, even if the outcome is not in the best interests of those BEE shareholders? Can this director perform his duties to the company in an unfettered manner despite the possibility that non-conformance to the wishes of those BEE shareholders might result in replacement of their representative function? All of these questions are aimed at establishing how autonomous directors that represent BEE shareholders are and the nature of their relationship with the BEE shareholder they represent.

1.3.1 Sub-Problem

In resolving these questions, the primary issues to consider are the following

- How informed are people in business of the duties of directors in general?
- Do people in business perceive directors to serve the interests of shareholders and indirectly the interests of the majority shareholders?
- Are BEE representative directors there to serve the interests of the BEE shareholders they represent?
- Are BEE representative directors agents of the BEE shareholders they represent?
- Are BEE representative directors accountable to the company and other shareholders?

1.4 Research Objectives

- To define the duties and responsibilities of directors of a company according to our laws and policies;
- To establish the expectations of investor shareholders in general, as to how directors who are representatives of BEE shareholders should perform their duties to the company;

- To establish the expectations of BEE shareholders as to how directors who are their representatives should perform their duties to the company;
- To establish the nature of the relationship between BEE shareholders and the directors who represent them;
- To formulate corporate governance practices and policies and the standards which are to be observed by a director (who is a representative of a BEE shareholder) in the performance of his duties to the company?

1.5 Research Design

The research design of this study is quantitative with a qualitative element. The aim of the study is to observe the respondents' responses to questions regarding the duties of BEE representative directors, and to numerically analyse those observations in order to determine whether BEE representative directors are autonomous. The data was collected by means of a structured questionnaire.

1.5.1 Literature Review

This research study covered various sources of literature. The first source consulted was the South Africa Common Law which is a combination of Roman and Dutch Law and one of the foundations upon which many South African Laws are based. Also consulted were: Statutory law, with an emphasis being placed on the Companies Act 71 of 2008; Case law which is a record of how courts interpret our laws in practice; The King Reports on Corporate Governance as relevant policy documents that are referred to by many companies in practice; Books, articles and journals on corporate governance and BEE, including news articles and also past research papers.

1.5.2 Sample and Sampling Technique

The sampling technique used in this research study was that of non-probability sampling. Accidental or availability sampling was used as questionnaires which were distributed by

hand delivery and email and were self administered by the researcher. The respondents constituting the sample size were identified in Durban, Pietermaritzburg, Johannesburg and Bizana.

Due to time constraints and the limitation of resources, the sample was only made up of clients and business associates of Ntshebe & Associates, a law firm operating in the Durban Metropolitan area. The respondents were selected on the grounds that they were directors of companies or had been involved in a BEE transaction in the past. The size of the sample was determined by the number of individuals approached from Ntshebe & Associates' database and who were available to complete the questionnaire.

1.5.3 Data Collection

The research instruments used to collect the research data were structured questionnaires, which were distributed by email and by hand. The questionnaire was designed to be both quantitative and qualitative. The respondents in this study completed the questionnaires electronically or by hand, scanned and emailed them back or hand delivered them.

1.5.4 Questionnaire Design

The questionnaire comprised two parts, the first part being demographic questions to allow the investigator to better understand the respondents. The second part comprised 22 research questions, which were aimed at understanding the respondents' perceptions of duties of a director within the context of research objectives. The questionnaire was comprised of quantitative and qualitative components. These questions dealt with understanding how well-informed the respondents were of the duties and responsibilities of directors of a company according to our laws and policies. For the purposes of this study, shareholders were classified into two groups, the majority shareholders and the minority BEE shareholders.

The first four questions dealt with the duties of directors in general. Questions 5-8 were aimed at understanding whether the respondents could distinguish between the company and the shareholders. The purpose was to establish whether the respondents perceive

directors to be there to serve the interests of shareholders in general. Questions 8-14 were aimed at understanding how the respondents perceived the directors' duties with regard to BEE shareholders. Questions 14-19 were aimed at understanding the respondents' perceptions of the duties of BEE representative directors, and to whom those directors owed their services.

Apart from question 19, all the research questions in the questionnaire were classified using the Likert Scale to evaluate the responses of the respondents. The Likert Scale consists of 5 evaluative statements, and respondents were asked to select one as their response to the questions which constituted the quantitative aspect to the study. Space was also provided for the respondents to comment which constituted the qualitative portion of the study.

1.5.5 Ethical Requirements

For this research study, gatekeeper ethical clearance was not required as the respondents were approached in their personal capacities and not in the capacity of the positions they occupied. The only clearance that was required was from the University of KwaZulu-Natal in order to commence the study.

1.5.6 Data Analysis

All the data collected in the questionnaires was captured on MS Excel spreadsheets, and was subsequently coded into the SPSS database. The data was analysed by using statistical software SPSS 17.0. The information was presented in frequency tables and bar charts for all variables in order to determine the distribution of variables. Cross-tabulation was also done to determine the relationship between the predictor variables and the responses. Moreover, logistic regression analysis was employed to control the possible confounding effect and assess the separate effects of the variables.

1.6 Importance of the Study

The study aimed to clarify the nature and extent of the duties and responsibilities of the directors of a company within the context of directors that are representatives of BEE

shareholders and the standards to be observed by such directors. The study was intended to clarify the expectations of investors, BEE shareholders and what the directors understand to be expected of them in the performance of their duties to the company. The study will make recommendations as to the standards that are to be observed by such directors.

1.7 Organisation of the Study

This study was organised into six chapters; Chapter Two details the literature review in relation to the research questions; Chapter Three details the research methodology that was used in the implementation of this study; Chapter Four presents the data analysis and presentation of the collected data; Chapter Five is a discussion on the data that was collected and the findings that came from that data and Chapter Six contains the recommendations and conclusion to this research study.

1.8 Limitation of the Study

The foreseeable limitation of this study was that the outcome will be determined by feedback from the directors who will be interviewed during the study, therefore making the study only as accurate as the degree of the honesty of the directors interviewed. In the event of the directors only giving responses that are merely appropriate as opposed to being honest, the outcome of the study will only reflect what is appropriate.

Also the size of sample presents another limitation as it is not reflective of the population of directors in South Africa or people in South Africa that have been involved in BEE transactions. There are also geographical limitations as the study was conducted mainly in the eThekweni Metropolitan and Bizana.

1.9 Conclusion

This chapter contains a brief outline of this research study. First it deals with the background to Black Economic Empowerment and the objectives BEE was intended to achieve. Then the problem statement defines the research objectives of the study which inform the design of the research. The research design outlines how the research study

was to be carried out, the nature of the literature that had to be reviewed, the sampling technique and sample size, the collection of the data and the design of the questionnaire. The ethical clearance required was determined by the nature of the sample and the internal processes of the institution on behalf of which the research was being conducted. All of these factors determine how the study was organised and presented, and had a direct bearing on the success of the study and whether it achieves the objectives that have been established. Chapter Two dealt with the literature review and how various commentators have dealt with directors and their duties, Black Economic Empowerment and representative directors.

CHAPTER 2

LITERATURE REVIEW

2.1 Introduction

South African company law is derived from various sources. These include common law and statutory law, and one would have to consider these and their provisions regarding directors. Another area of law that had to be considered was case law. Case law reflects the interpretation of South African laws by the courts. Case law can be considered as the implementation of laws and how these laws are applied in practice. Reported cases provide a record of how common law and statutes are applied in practice. Even though case law is not always accurate, it provides a good source of reference and guidance in this study.

The development of the King Report by the Commission on Corporate Governance (led by Mervin King and initiated by the Institute of Directors) signalled a new progressive era in South African corporate governance practices. The initial King Report was followed by two subsequent reports with the current applicable report being the 2009 report commonly referred to as the King III report. The King Reports have in the past resulted in the development of the King Code of Good Conduct, which provides the guidelines to assist directors in understanding what is required of them in order to practice good governance. Even though these reports are not law and are implemented by companies on a voluntary basis, the recognition they are afforded by the Johannesburg Stock Exchange and the number of companies that have adopted the provisions of these codes provide these reports with some authoritative credibility as a view to be taken into account when conducting a study on corporate governance.

In this chapter a review of the literature available on this subject was conducted. In order to be able to fully address the issue of the autonomy of company directors appointed by Black Economic Empowerment shareholders, a holistic approach needs to be taken, and

consideration given to these directors within the context of a company and their relationship to other components of a company. Given the focus of the research on directors' autonomy in relation to the pressures of shareholders, the nature of a company and the roles of directors and shareholders within the company had to be considered. How these two components relate to each other also needed to be considered, to establish the extent of the influence one might enjoy over another.

When considering the relationship between BEE representative directors and the shareholders who nominated them, BEE and the disparities of the historic background being addressed had to be considered in detail. The development of BEE policies, the projected direction for BEE and the impact on directors and their duties within the context of BEE also had to be considered in order to assess how autonomous these directors are when performing their duties.

2.2 Companies

2.2.1 Definition of a Company

Various definitions of a company have been submitted by numerous commentators on different sources which serve as references when one is attempting to compile a definition of a company. In Cilliers & Benade (2000, P 5) a company is defined as an association of persons for the common object of the acquisition of gain, with companies not for gain being an exception. However, this definition was based on the requirement that there must be more than one person who is a member of a company, which requirement is no longer applicable as it has become common practice for companies to have sole members. The Companies Act 71 of 2008 (Companies Act) defines a company as a juristic person incorporated in terms of the Companies Act, or who was created or recognised as a company in terms of the Companies Act of 1973, Close Corporations Act of 1984 .

According to Sec 19(i)(a) of the Companies Act at the time of the incorporation of a company, a company is a juristic person that has all the legal powers and capacity of an individual as limited by the company's founding documents. A juristic person is

described as a body or association other than a natural person, which is endowed by law with the capacity to have rights and duties apart from its members (Pretorius 1999, P7). This existence of the company as a juristic person affords the company the ability to be able to engage in business of its own accord as a natural person. A company can acquire assets and those assets are the exclusive property of that company (Davies 2011 P 23). It can generate income and incur liabilities like any natural person.

This interpretation of the company being a separate juristic person has been confirmed by the court, as they have continuously recognised companies as juristic persons that are separate from their members and are capable of owning assets apart from their members. In *Dadoo v. Krugersdorp Municipal Council* 1920 AD 530 (P550), the court held that a legal company is a legal persona distinct from the members who compose it. Property vested in the company is not, and cannot be regarded as vested in all or any of its members [551]. In the case of *Solomon v. Solomon* 1897 AC 22 (HL) and *Co Ltd* the courts recognised that a company was a separate juristic person to its members to the extent that a company is capable of entering into contracts with its members in their personal capacity.

The primary reason for the existence of business enterprise is to create value. Traditionally, the notion of value was viewed narrowly as financial value for shareholders. This has evolved into the notion of value in terms of the triple bottom line: social, economic and environmental performance. Today, commentators talk of the triple context in which companies operate, or simply ‘the context’, which embraces all three aspects – people, profit and planet as contained in the King Report.

2.2.2 Organs of a Company

Companies have two main internal organs, being the shareholders as a collective and represented at shareholders’ meetings, and the directors of a company as a collective in the form of the board of directors. Section 1 of the Companies Act of 2008 describes a shareholder as a holder of a share issued by a company and who is entered as such in the securities register. Each shareholder is bound by the company’s Memorandum of

Incorporation and by any rules of the company. According to section 15(6)(i)(a) & (b) of the Companies Act of 2008 the obligations and rights that stem from the Memorandum of Incorporation are binding between all shareholders and also between each shareholder and the company.

One of the rights that a shareholder inherits by virtue of being a shareholder is the right to participate in the activities of the company during the shareholders' meetings which are held in accordance with the provisions of the Companies Act and the company's Memorandum of Incorporation. Section 65 of the Companies Act of 2008 states that shareholders participate in the company's activities by voting during the shareholders' meetings and passing shareholder resolutions in accordance with the provisions of the Companies Act of 2008.

The Companies Act prescribes that the business and affairs of the company are managed by or under the direction of the board of directors. Section 66 of the Companies Act of 2008 prescribes the manner in which directors of a company are to be appointed, and these directors are not appointed to be stand-alone directors but rather as members of a company's board of directors. Upon each director's appointment that director becomes a member of the organ of a company which is the board of directors, and they are to contribute in enabling that organ perform its function within the structure of a company.

The status of the shareholders as a group and the board of directors is that they are both important organs of a company. Without these organs performing their roles, the company could not function. There are certain decisions that have to be taken or endorsed by shareholders at shareholders' meetings which may include the appointment of directors. The management of the business dealings of a company has to be undertaken by the board of directors. When these organs act, their actions are considered to be acts of the company (Cilliers 2000, P84). When resolutions of shareholders have been passed, such resolutions are considered to be decisions of the company. Resolutions of the company's board of directors are also considered decisions of the company. When

dealing with third parties, authorised actions of directors are also considered to be acts of the company.

2.2.3 *Directors*

2.2.3.1 *Functions of the Board of Directors.* As previously stated, the Companies Act stipulates that the management of the business affairs of the company is undertaken by the company's board of directors. According to section 66 of the Companies Act of 2008, this right cannot be removed from the board of directors but can only be limited by the shareholders in the company's Memorandum of Incorporation. This is also echoed in the King III Report, where it is stated that companies should be headed by a board that directs, governs and is in effective control of the company. The King III Report describes the board as being responsible for corporate governance and having two main functions: to determine the strategic direction of the company and to have control over the company in order to manage the implementation of that strategic direction and bring about the sustainability of the company.

The management of the affairs of the company by the board can be classified into two categories; the internal and external actions of the board (Cilliers 2000, P 84). The internal actions of the board are those that the board performs as an organ within the structure of a company. An example of an internal act is the management of the company's finances and keeping of financial records as prescribed by law and the company's constitution. External actions of a company are actions by the board when dealing with third parties. As a company is not a natural person and therefore cannot act on its own, it acts through its board of directors and any other duly authorised representatives.

As a company is an artificial person that cannot read a written representation or hear a spoken representation, it reads and hears representations through the eyes and ears of its directors acting in the course of their duties, and "board" is the collective term used to designate the directors when they act together in the course of their duties to the company (R v Kritznier 1971).

2.2.3.2 Legal Standing of Directors

The legal position of a director is best determined within the framework of the facts of each case (Cilliers 2000, P 118). It has already been established that when dealing with the internal functions of a company, the board of directors is an autonomous organ of the company (Pretorius 1999, P 7). Some commentators suggest that the best way to describe the legal position of a director or the board of directors when they are dealing with third parties is the law of agency (Cilliers 2000, P 117). The fact that they occupy positions as directors of the company imposes certain duties upon them.

2.2.3.3 Rights of Directors

As a director is a member of the company's board, each director has a statutory obligation to participate in the management of the company. In the event of a director failing to perform according to the standards expected of him as a director, a director becomes liable for neglecting his duties to the company. It is this reason directors have a right to the exercise their office in order to participate in the management of the company.

In order for directors to be able to perform their duties, they have a right to expect to be placed in a position that will enable them to discharge their duties. This includes having the right to have access to company information in the possession of the company, such as financial statements and other company documents. Directors have the right to be reimbursed by the company for any costs they incur in the performance of their duties. They also have a right to be reimbursed for the service they perform for the company.

The King Report (P 25) prescribes that in order for directors to be able to fulfill their legal duties, directors should have unrestricted access to all the company's information, records, documents, property, management and staff, subject to a process established by the board.

2.2.3.4 Duties of Directors

Duties can be imposed on a director by the company contractually and in the company's memorandum of incorporation. Duties of directors are also imposed by common law and statutes. The focus for this research shall only be limited to the duties pertaining to governance as imposed by common law and the Companies Act. Common law principles can be found in various sources but one of the best sources for these principles is case law as this reflects how our courts have interpreted these principles. These interpretations serve as a guide as court interpretations continuously evolve with society standards of equity and fairness as reflected in society's laws. Some of the duties of directors have been partially codified in the form of the Companies Act. The implication of partial codification is that the common law principles are still applicable but those that have been included in the Companies Act have been varied or limited. For the purposes of this research, focus will be limited to those duties pertaining to the governance of the company.

According to our common law, a director owes fiduciary duties requiring him to exercise his powers in a bona fide manner for the benefit of the company. Our common law further imposes an obligation on the director to display reasonable care and skills in carrying out his duties as a director. This fiduciary duty is owed by the director to the company to which the director has been appointed as a member of the board. In the event of that company being part of a group of companies, or being a wholly-owned subsidiary of another company, the director owes this duty exclusively to the company board to which that director has been appointed as a member.

This fiduciary duty involves the director acting in good faith towards the company in pursuit of the best interests of the company. Section 76(3)(b) of the Companies Act of 2008 states that a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director in good faith and in the best interests of the company. The board must always act in the best interests of the company. The challenge is in determining what the best interests of the company are, and what directors should

take into consideration when attempting to determine what the best interests of the company are.

Some commentators have interpreted the best interests of the company as the best interests of the body of shareholders. When one is attempting to establish what is in the best interests of the company, one is attempting to establish what is in the best interests of the shareholders as a body, and a resolution of the board can be relied upon to establish what is in the best interests of the shareholders. According to this approach, when a director is attempting to establish what is in the best interests of the company, he/she should limit consideration to what is in the best interests of the shareholders.

The Companies Act of 2008 states that its purpose is to promote compliance with the Bill of Rights as stated in the Constitution. This constitutes a departure from the traditional narrow interpretation of the best interests of the company (King Report 2009, P 24). The implication of this purpose is that directors should take into account the objectives of the constitution in their interpretation of the best interests of the company. Section 217 of the Constitution enables the legislature to enact any laws and policies that will bring about and enforce the objectives of the constitution. One of the rights enshrined in the constitution is the right to equality. BEE is one of the means employed by government to bring about equality by redressing the imbalances of the past. According to the above, the implication is that a director should also take into account broader societal considerations such as BEE when defining the best interests of the company.

In Andrew West's *Theorising South Africa's Corporate Governance* (2006, P 433) two models are submitted to explain the approaches of directors when discharging their duties and indirectly defining the best interests of a company. These are the "Shareholder" and "Stakeholder" models. The Shareholder model is the model that focuses on the shareholders of the company and on the interests of the shareholders when considering the interests of the company. According to this model, the paramount consideration is how any decision would impact upon the shareholders.

In contrast, the stakeholder model is based on the view that a company is a social entity that has responsibility (and accountability) to a variety of stakeholders in its widest sense, including all those that may influence or be influenced by the company, including shareholders, suppliers, customers, employees, management, government and local communities. Shareholders are to be considered as one of a number of stakeholders, with their own particular interests just like any other stakeholder (West 2006, P 436).

The King III report refers to the enlightened shareholder approach and the stakeholder-inclusive approach. According to the enlightened shareholder approach, the legitimate interests and expectations of stakeholders are taken into account only as far as it would be in the best interest of shareholders to do so. According to the stakeholder-inclusive approach, the legitimate expectations of the stakeholders are taken into account during decision-making on the basis that it is in the best interests of the company to do so, and not merely as an instrument to serve the interests of the shareholder (King Report 2009, P 10).

With the stakeholder-inclusive approach, the shareholders do not enjoy predetermined precedence over other stakeholders and precedence is determined by what is perceived to be in the best interests of the company at that time. The best interests of the company should be interpreted within the parameters of the company both as a sustainable enterprise and as a responsible corporate citizen. This approach gives effect to the notion of redefining success in terms of lasting positive effects for all stakeholders, as explained above (King Report 2009, P 10).

The King III Report promotes an approach to which it refers as the “stakeholder-inclusive approach”, which considers, weighs and promotes the interests of all the company’s stakeholders, thus ensuring the cooperation of all stakeholders the company depends on for its sustainable success. The board’s paramount responsibility is the positive performance of the company in creating value. In doing so, it should appropriately

consider the legitimate interests and expectations of all its stakeholders (King Report 2009, P 22).

In this way, the company creates trust between itself and its internal and external stakeholders, without whom no company can operate sustainably (King Report 2009, P 15). However, the report reserves accountability for the company and only reserves responsibility to the stakeholders. The result is that the report appears to promote the good corporate governance principle of accountability with regard to shareholders only (West 2006, P 436-437).

This approach can be viewed as a compromise between an exclusive narrow shareholder approach and an all-inclusive stakeholder approach. Even though the directors are not accountable to the stakeholders according to the “stakeholder-inclusive approach”, directors still have to take into consideration the interests of other stakeholders. With this approach, the best interests of the company are defined in a broader context than the traditional narrow approach which only considers the shareholders.

Another common law duty of a director is that he/she is to exercise a reasonable standard of care and skill. Section 76 (3)(c) of the Companies Act of 2008 describes this duty as a duty to exercise a degree of care, skill and diligence that may be reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director and having the general knowledge, skill and experience of that director.

Section 76 (2)(a) of the Companies Act of 2008 states that a director of a company must not use the position of director, or any information obtained while acting in the capacity of a director, to gain an advantage for the director or for another person other than the company or a wholly-owned subsidiary of the company. The director is obligated to exercise his power as a director for the exclusive benefit of the company, and is to avoid a conflict between his own interests and those of the company. A direct consequence of this duty is that a director cannot use his position in a company for the purposes of

personal enrichment by generating additional benefits which are secret profits apart from the authorised remuneration for his services.

When a director does get additional benefits apart from the agreed upon remuneration that accrue to him by virtue of being a director (which can be considered secret profits), this amounts to a breach of the director's fiduciary duty. The company does not have to suffer a loss in order for secret profits to constitute a breach of the director's fiduciary duty. Even if the company did not suffer a loss, as part of the director's fiduciary duty, a director is supposed to employ all of his efforts as director in good faith for the benefit of the company. The breach occurs when the director fails to observe this standard. Also when a director generates a secret profit, this has the potential of the director having a conflict of interests.

In the case of *Robinson v. Randfontein Estate Gold Mining Co Ltd* 1921 AD 168 the court held that a director should not place himself in a position whereby his personal interest conflicts with the duties arising from his fiduciary position as a director. A director is not justified in making a secret profit from his office as a director. The reasoning is that the information these directors receive because they are directors of the company, is not supposed to be used except within the scope of their activities as directors and for the benefit of the company. This even applies in situations whereby the company was not in line to take that business opportunity and a director takes advantage of that opportunity. *Industrial Development Consultants Ltd v. Cooley* 1972 (2) All ER 162 confirmed this, and the director was made to account for the proceeds he had received by taking advantage of an opportunity for which the company did not qualify.

The personal interests of a director, or of people closely associated with that director, should not take precedence over the interests of the company (King Report 2009, P 25). Sections 75 and 76 of the Companies Act of 2008 deal with director's personal financial interests and the standard of conduct expected of directors, including conflict of interests. Section 1 of the Act defines "material" (when used as an adjective) to mean "significant in the circumstances" of a particular matter, to a degree that is of consequence in

determining the matter or reasonably affecting a person's judgment or decision in the matter.

Section 76 (4)(a)(aa) of the Companies Act of 2008 states that a director must have no material personal financial interest in the subject matter of the decision. Section 75 (4) and (5) of the Companies Act further imposes an obligation upon a director with a personal financial interest to disclose to the company such interest. Section 75(5)(e) states that a director who has a conflict of interests must not take part in the consideration of a matter in which he has a material financial interest, except to the extent of disclosing any material information relating to the matter to other directors. A director with a personal financial interest is not to execute any document on behalf of a company in relation to that matter, unless specifically requested or directed to do so by the board.

Section 77 (2)(a) of the Companies Act of 2008 states that a director may be held liable in accordance with the principles of common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach of his duty to act in good faith and for the best interests of the company as contemplated under Section 76(a)(b). Failure of the director to observe a reasonable standard of care and skill amounts to the director neglecting his duties, and thus breaching his fiduciary duty, which can expose that director to a delictual claim for any damages that the company might suffer as a consequence of such neglect.

A company cannot waive or undertake not to hold a director liable for breach of fiduciary duties (King Report 2009, P 120). A director cannot contract out of this duty by structuring his employment contract to exclude this duty. This duty of the directors cannot be excluded by the company's founding documents, and any attempt to evade this duty amounts to a breach of this duty (Cilliers 2000, P 140).

2.3 Relationship between a Company, shareholders and Directors

We have established three bodies that can be identified regarding companies and their functioning; the company itself as a juristic person, the board of directors and the

shareholders as a collective. Even though we have established that two of these bodies are organs within the company, what is important is that they are all autonomous structures. This autonomous nature of each structure ensures that there is a separation of powers between the roles played by these separate organs of a company, and this is to ensure the continuity and functionality of the company.

When the organs of a company are acting in sync with each other and dealing with third parties, together they act as and represent the company. However, when dealing with the functions of a single organ of the company, the other organs of the company represent the company. When considering a single member of an organ, the rest of the members of that organ and the other organs represent the company. When dealing with a group of members of an organ of a company, if that group constitutes a majority of that organ, that their actions would be considered as the actions of that organ. When dealing with a minority group of members within an organ of a company, the majority and the other organs represent the company.

2.3.1 Relationship between a company and shareholders

Some commentators have traditionally considered the term company itself to refer to the members as a body (Cilliers 2000, P 85). However our law has developed over the years to establish that there is a distinction between a shareholder and the company. This distinction was stated clearly in the case of *Solomon v. Solomon*, when the court held that a company is a separate legal person from its shareholders, thus making it possible for a company to enter into a contract with its shareholders. In *Solomon v. Solomon* the court also stated that the company is not in law the agent of the subscribers or a trustee for them.

In the relationship between the company and shareholders, the other organs of the company, including the board, will represent the company in the dealing with the shareholders. Regarding matters that refer to shareholders, the board can act on behalf of the company. During a shareholders' meeting, the members of the board who are present at that meeting would represent the company. As it is not precluded for shareholders to

also be appointed as directors, there is the potential for an individual who is both a shareholder and a director having a conflict of interest. However this can be addressed by the presence of non-executive independent directors to ensure that the board remains objective and free from conflict of interest.

A company has the right to expect shareholders to perform their role within the company. This is expected of shareholders as a body. A shareholders' resolution is a formal decision of a company in a general meeting to act in a certain way (Cilliers 2000, P 87). However, the company cannot compel a single shareholder to participate if they do not desire to do so.

In their personal capacity, shareholders are like strangers in the business dealings of a company with third parties (Davies 2011, P 27). A single shareholder of a company has no legal standing to have any dealings with a third party on behalf of the company just because they are shareholders in a company. According to common law, shareholders do not even have locus standi to institute legal proceedings on behalf of a company, on the grounds that they are shareholders according to the "proper plaintiff doctrine". A diversion from the proper plaintiff principle has been offered through statutory intervention as shareholders are empowered by provisions of various statutes to institute legal proceedings on behalf of a company.

2.3.2 Relationship between a Company and Directors

As stated above, directors act on behalf of the company when the company deals with third parties. However within the internal functioning of the company, when dealing with matters regarding the board of directors as a whole, other organs of the company, including shareholders as a body, would represent the company. The company has the right to expect that directors will perform their function within the internal functioning of the company. Shareholders have a legitimate expectation that directors will perform their function within the company.

The company has a right to expect directors to keep company affairs confidential, and to expect directors not to use the powers conferred upon them as directors to manage the company for a purpose other than the purpose for which they were conferred. The company has legal recourse available should the directors fail to discharge their duties owed to the company, and in such a situation the company has a delictual claim for damages against that director.

2.3.3 Relationship between Shareholders and Directors

Directors owe their duties to the company and not the shareholders and the shareholders of a company as a group derive their benefit from the well-being of the company (Cilliers 2000, P 149). Directors can only be held accountable for their duties by shareholders as a group acting on behalf of the company. As it has been pointed out before, the company is a separate legal person which is distinct from its shareholders. Directors are not agents or trustees of shareholders, but act on behalf of the company and have an obligation to prioritise the interests of the company above those of the shareholders.

As stated above, the resolutions of shareholders at shareholders' meetings constitute an act of an organ of the company, which act can be construed by outsiders as an act of the company. The implementation of those resolutions is for the board but to the extent to which those resolutions are in line with the best interest of the company. A complication can arise when a director is also a shareholder of the company, and there is a possibility of that director's decision-making process being influenced by his personal interest. This would constitute a material financial interest as envisaged by Section 75 of the Companies Act of 2008. According to the Companies Act of 2008 such a director should disclose this conflict of interest and not take part in the board's decision-making process, save when expressed consent has been furnished in accordance with the provisions of the Companies Act.

As discussed above, there is no law that prescribes what directors should take into account when considering what is in the best interests of the company. There are prescriptions that recommend various approaches ranging from the exclusive shareholder

approach to the stakeholder approach. Regardless of the approach chosen by the directors, currently the board is still accountable to the shareholders as a body. In the event of directors failing to implement the resolutions of the shareholders they have to account to the shareholders, and the shareholders can compel directors to adhere to and implement shareholder resolutions but only to the extent that such resolutions are in accordance with the best interest of the company.

In the event of the directors failing to discharge their duties to the company, and the other members of the board failing to act on behalf of the company in enforcing the company's rights against that director, such failure to act constitutes a separate failure to perform the duties owed to the company by the board. In the event of this failure by the board, the shareholders as a group have the right to enforce the company's rights against the board and the individual director that had initially failed to discharge this duty. In the event of the shareholders as a group failing to enforce the rights of the company against the directors, any individual director can enforce the company's rights against the board and an individual director.

2.4 Relationship between a Nominee Director and the Nominating Shareholder

2.4.1 Black Economic Empowerment

Section 9 (1)(2) of the Constitution of the Republic of South Africa read together can be interpreted to imply that Black Economic Empowerment (BEE) is a constitutional imperative, as the constitution provides that everyone is equal before the law. Section 217 of the said Constitution states that to bring about such equity, legislative and other measures can be employed to promote or to advance persons, or categories of persons, who have been disadvantaged by unfair discrimination.

As it has been previously stated, BEE is a set of government policies aimed to bring about the inclusion of black people into the first economy. Empowerment is defined by government as an integrated and coherent socio-economic process that directly contributes to the economic transformation of South Africa and brings about significance

in the number of black people who manage, own and control the country's economy as well as a significant decrease in economic disparities (Wooley 2005).

The Reconstruction and Development Programme (R.D.P) includes in its objectives the creation of jobs, human resource development, and provision of infrastructure, changes in ownership and the reduction of inequality in society (Wooley 2005, P 21). The purpose of BEE is to promote the effective participation of black people in the economy. This would be achieved firstly by the increasing the portion of ownership and management of economic activities vested in communities, workers, collective enterprises and co-operatives. Secondly there should be a development of rural communities and the empowerment of local communities by enabling access to economic activities (Paradzi 2009, P 1).

In the 1990s empowerment was characterised by ownership. This mainly revolved around the acquisition of shares in established companies (Wooley 2005, P 22). Due to the poor performance of black-owned companies, the BEE commission was formed to re-evaluate the path of transformation. In 1997 the Black Economic Empowerment Commission was established to review the development of empowerment and to make recommendations to the government (Erasmus 2008, P 101).

The commission report indentified problems in the approach taken to BEE by the public and the private sectors, and recommended the adoption of an integrated national BEE strategy and the enactment of the legislation dealing specifically with BEE. The commission moved away from a narrow definition of BEE, which focused on ownership, to an integrated and coherent socio-economic process which also included the management and control of those businesses. These recommendations formed the basis for the Broad Base Black Economic Empowerment Act (BBBEE Act).

The BEE strategy preceding the BBBEE Act lists as some of its objectives an increasing proportion of the ownership and management of economic activities vested in communal and broad-based enterprises, including trade unions, employees, trusts and other

collective enterprises. According to the new approach, as reflected in the BBBEE Act, BEE ownership transcends transferring assets from one group of people to another, by the transfer of skills and wealth creation (Paradzi 2009, P 10).

The indicators of ownership transformation are control-represented by voting rights, economic interest and realisation of unencumbered interests represented by net value. The BEE code defines board members as people appointed by the respondents, normally shareholders (Paradzi 2009). This has resulted in the increase of broad base black empowerment deals over the past decade.

The Wild Coast Sun empowerment deal resulted in the Mbizana Development Trust acquiring 30% of all issued shares in Transun (Pty) Ltd, a wholly-owned subsidiary of Sun International Limited, the Mbizana Development Trust being a community for the benefit of the Mbizana Community (Sun International in R25m BEE deal, 2010). Other examples of broad base black economic empowerment deals include the Khumba Iron Ore Workers empowerment deal, whereby the Khumba Resources Group issued Exxaro with 20% of all issued shares, the Sishen Iron Ore Company (S.I.O.C.) Community Development Trust with 3%, and a S.I.O.C. empowerment partner with another 3% (Weavind 2011). Other examples include the Sasol Inzalo Share Deal worth R 12 Billion, the MTN Zakhele deal worth R8.1 Billion, Vodacom's YeboYethu deal (R7.5-billion) and SAB's Zenzele deal (R7.2-billion) (Mashego 2011).

These deals are characterised by the BBBEE groups being constituted in a number of ways, and thus becoming the beneficiaries of the empowerment deal. These groups can be constituted by means of geographical communities, people living within the jurisdiction of a particular community in the area where the company to be empowered carries on business. An example of this grouping is the Wild Coast Sun empowerment deal which resulted in the Mbizana community becoming beneficiaries.

This group can also be constituted by means of the employees of the company to be empowered being grouped together. An example is the Khumba Iron Ore Empowerment

deal, where the employees of the Khumba Sishen operation were the beneficiaries through SIOC. A BBBEE empowerment grouping can also be constituted by means of a public offer, but limited to people who fit the criteria for empowerment as defined in the BBBEE Act. Examples of this type of deal are the Sasol Inzalo, MTN Zakhele, Vodacom's YeboYethu and the SAB Zenzele deals.

These deals are also characterised by the BBBEE group being grouped together utilising a company specifically created to acquire shares in the company to be empowered. These companies used by the BBBEE group in empowerment deals are usually referred to as Special Purpose Vehicles (SPVs). Another characteristic of the empowerment deal is that the SPV would enter into a sale agreement with the company to be empowered, whereby the SPV would acquire a number of shares in that company. Members of the BBBEE group are usually the subscribers to the majority if not all of the shares issued by the SPV. The SPV acquires the shares in the company to be empowered on their own or as part of a consortium with other strategic partners.

Another characteristic of BBBEE empowerment deals is that the BBBEE group usually has a right to appoint directors to represent the BBBEE empowerment group on the board of directors of the company to be empowered. An example of this can be seen in the Wild Coast Sun empowerment deal whereby one of the terms of the agreement was that the Wild Coast Development Trust was entitled to appoint two directors to the Transun (Pty) Ltd's board of directors in order for the Mbizana Community to have some representation on the board and to participate in the management of the company to be empowered.

A complication comes into play when one considers the role of these nominee directors appointed by respondents, within the context of a director's duties to the company. The general belief of the constituents of the BBBEE group is that the nominee directors they appoint to the board of the company to be empowered are the group's representatives. The belief is usually that these directors are there to safeguard the interest of the group by doing the group's bidding, and are accountable to the BBBEE group. This belief was the

focus of the dispute in the case of *PPWAWU National Provident Fund v. Chemical Energy Paper Printing, Wood and Allied Workers Union* 2008 (2) SA 351 (W), whereby the court had to address the issue of nominee directors being compelled to take instructions from the BBBEE group.

2.4.2 Black Economic Empowerment Nominated Directors

The practice of a shareholder appointing a nominee or representative director is common practice in business. This is an accepted practice and can be intrepid for a numerous reasons. Nominee directors can be appointed by majority shareholders, major creditors and, in the case of Black Economic Empowerment, by minority empowerment shareholders. In the case of *Boulting v Association of Cinematograph Television & Allied Technicians* 1963 (2) QB 606 there is nothing wrong with this practice as long as the director is left free to exercise his best judgment in the interests of the company which he serves.

The King Report states that any director who is appointed to the board as the representative of a party with a substantial interest in the company, such as a major shareholder or a substantial creditor, should recognise the potential for conflict. However, that director must understand that the duty to act in the best interests of the company remains paramount. The board's greatest responsibility is the positive performance of the company in creating value. In doing so, it should appropriately consider the legitimate interests and expectations of all its stakeholders.

At all times a director is to consider the affairs of the company objectively and to exercise his discretion in the best interest of the company in an unfettered manner. A director cannot contract to act in a certain manner or to vote in certain way. An attempt by a director to enter into such a contract amounts to a breach of that director's fiduciary duties to the company. Even upon the director entering into such a contract, such a contract would not be enforceable against that director, as it is contrary to public policy and is prohibited by law. In the *Fisheries Development Corporation of SA Ltd v. Jurgensen (Pty) Ltd* 1980 (4) SA 156 (W) case the courts recognised the right of a

nominee director to observe the wishes of his nominator as long as it was in accord with the interests of the company.

In the case of *Coronation Syndicate Ltd v Lillienfield and New Fortuna Co Ltd* 1903 TS 489 the court held that courts could not compel a director to perform in accordance with an undertaking to perform his duties as a director in a particular manner, which that the director had agreed in a contract with a third party. If the courts compelled a director to honour an undertaking they had made, this would amount to the courts compelling that director not to exercise their unfettered discretion in pursuit of what was in the best interest of the company.

In the case of *Fisheries Development Corporation of SA Ltd v. Jorgensen; Fisheries Development Corporation of SA Ltd v A W J Investments (Pty) Ltd* 1980 (4) SA 156 (W) the court referred to an Australian high court decision which upheld the need for a director to exercise unfettered discretion while discharging his duties as a director. However, the court drew a distinction between a director entering into a contract to discharge his duties in a particular manner (thus depriving that director of the ability to exercise unfettered discretion), and when the directors exercise their unfettered discretion and in a bona fide manner to arrive at the conclusion that would be in the best interests of the company for the directors to discharge their duties to the company in a particular manner.

The difference between these two scenarios is that in the first scenario there is an absence of the directors in an unfettered manner acting bona fide to bring about what is in the best interests of the company, whereas in the second scenario the contract comes about as a consequence of the directors exercising their unfettered discretion, with the aim of bringing about what is in the best interests of the company. In the second scenario, the subsequent conduct of a director that follows the conclusion of the contract is merely the implementation of what is in the best interests of the company. This was also confirmed in the case of *Fisheries Development Corporation of SA Ltd v. Jurgensen* when the court

held that directors cannot fetter their vote as directors save in so far as there may be a contract for the board to vote in that way in the interests of the company.

In *Fisheries Development Corporation of SA Ltd v. Jurgensen* the court held that a nominee director may in fact be representing the interests of the person who nominated him, and he may even be the servant or agent of that person, but in carrying out his duties and functions as a director, he is in law obliged to serve the interests of the company to the exclusion of the interests of any such nominator, employer or principle. He may in fact be representing the interests of the person who nominated him, and he may even be the servant or agent of that person, but, in carrying out his duties and functions as a director, he is in law obliged to serve the interests of the company to the exclusion of the interests of any such nominator, employer or principal.

Regardless of the manner in which that director is appointed to the board of the company, upon that person accepting that appointment, he becomes a director of the company like any other director, and has a duty to prioritise the best interests of the company before any other interest. The BBBEE group that appointed that nominee director to the board can be viewed in one of two ways; either as an individual shareholder of the company or a stakeholder. If viewed as a shareholder, that group is nothing more than any other individual shareholder of the company and according to law, that single shareholder, outside the ambit of the shareholders as a group, is a stranger to the board, a third party who should be dealt with like any other third party who approaches a company. The same applies to the nominee director who, in his capacity as a director, should treat that BBBEE group as a third party. The alternative is for that BBBEE group to be treated as a stakeholder. This can be the case when dealing with a community or with the employees as the BBBEE group.

The interest of the BBBEE group that had appointed that director can be viewed as part of the collective interest of the shareholders as a body, which interest should be referred by the directors to the shareholders meeting. The reality is that these groups in empowerment deals are usually minority shareholders and their minority status translates

to their interest being advanced by the shareholders as a group only if its interest is not in conflict with the interests of the majority shareholders. Using the Wild Coast Sun empowerment deal, the interests of the Mbizana community would only be passed as a resolution of the shareholders of Transun only if that interest does not conflict with the interest of Sun International.

In the event of the said Mbizana Community interests conflicting with the interests of Sun International, the end result will be the interests of the community where Transun operates not being met. Despite the fact that the Mbizana Community is the beneficiary of the Wild Coast Development Trust, the result is that Transun will be operating in an environment with an unhappy stakeholder which might not be co-operative. In a deal whereby that BBBEE group is comprised of the employees, those employees would also translate into unhappy stakeholders who are employees and such unhappiness could translate into mass action which could have an impact on the company's profitability.

Another aspect to be considered is that of some of these nominee directors might be members of the BBBEE group they represent. In such a situation, the result is that as a member of the group, such a director is indirectly a shareholder of the company. The welfare of the BBBEE group translates into the welfare of that nominee director personally.

In the Australian case of *Mills v. Mills* (1938) 60 CLR 150 (Australia HC) (163) the court dealt with the issue of a director being a shareholder. When a director is a shareholder and is promoting the interest of the company, he is also promoting his own interest. Latham CJ held that it would be ignoring reality and creating impossibilities in the administration of companies to require that directors should not consider in any way the effect of a particular decision upon their own interest as a shareholder. In situations where directors have to make decisions which will have the consequence of benefiting one class of shareholders while adversely affecting another class, it is difficult to determine the interest of the company. It becomes complicated when a director is a

member of the group to be adversely affected. The court suggested that in this case the test should be what is fair between the classes of shareholders.

In another Australian case, *Harlowe's Nominees (PTY) Ltd v. Woodside (Lake Entrance) Oil Company* (1968) 42 Australia LJR 123; 121 CLR 483 (125), it was stated that it would be a serious mistake to lay down narrow lines within which the concept of a company's interest must necessarily fall. Directors have some discretion to determine where the interests of the Company lie and how they may be served using a wide range of practical considerations. The court held that a decision of a director who also serves his interest as a shareholder is not necessarily reviewable unless it was at the expense of the company or the other shareholders. A decision of the directors which was made in the best interests of the company and was also agreeable to their wishes would not be open for review by courts.

The above judgment attempts to consider an individual director's decision-making process. It acknowledges that when a decision of a director (who is also a shareholder) is being considered, it is almost impossible for a director to remain objective and to prioritise the interest of the company when that interest of the company might be at the expense of his own personal interest. It would be impossible to monitor each director's decision-making process and how that director had arrived at a particular decision, except when it was obvious that the conclusion reached would have been impossible to reach had the director prioritised the interest of the company.

The problem arises when the BBEE group of which that director is a member attempts to dictate or give instructions to that nominee director on how that director should discharge his duties as a director. In the case of *PPWAWU National Provident Fund v. Chemical Energy Paper Printing, Wood and Allied Workers Union* 2008 (2) SA 351 (W) the court had to deal with the issue of a member group trying to dictate to Trustees who owed a fiduciary duty to the fund of which they were board members. The court held that directors should act independently regardless of the views or decisions of those who appointed them. The court held that a director is not a servant or an agent of a shareholder

who votes for or otherwise procures his appointment to the board, and in carrying out his duties and functions as a director, he is in law obliged to serve the interest of the company to the exclusion of the interest of any such nominator, employer or principal.

In this case, the court had to deal with the issue of Trustees of a fund who had been appointed by the Chemical Energy Paper Printing, Wood and Allied Workers Union (Union) to sit on the board of Trustees of the Fund. Most of the members of the fund are members of the union. The Union had passed a resolution reflecting its position on a particular issue of the Fund, and that resolution would be binding on the members of the Union. The Union expected the Trustees they had appointed to implement the union's resolutions and failure to do so would result in such members of the Union being subjected to disciplinary hearings. The union also expected the Trustees to account to the union and to inform the union of the issues of the Fund.

Even though in this case the court dealt with Trustees of a fund, the court considered the duties of these Trustees who owed a fiduciary duty to the fund they managed within the context that they had been appointed by a group, the Union which was a member of the fund. The court held that none of the trustees represented the party which appointed them when they took decisions regarding the fund's affairs, nor could they place the views or interests of such party above the interests of the fund or its members (as a general body).

The court went on to hold that the obligation of members' trustees in terms of clause 10, if given effect, require them not only to ascertain the views of the Union but also to implement such views insofar as these lie within their power as trustees. The court went on further to state that the resolution required trustees who belonged to the Union to carry out the mandate of the Union, which amounted to the executing instructions given by the Union and this was irreconcilable with the trustees' fiduciary obligation to exercise independent judgement.

The Trustees did not represent the Union that appointed them when they took decisions regarding the fund. These Trustees were not to place the views or interests of such party

above the interests of the fund. If the Trustees gave effect to the resolutions of the Union, this would be acting in breach of their fiduciary duty, as these Trustees would not be able to exercise their unfettered judgement. The court held that it was not unlawful for the Union to seek to persuade the trustees to accept the Union's views. However, the court held that it would be illegal for the Union to threaten disciplinary measures against Trustees who were members who failed to acknowledge that they were accountable to the Union rather than the Fund. The Union was not entitled to compel Trustees to carry out its instructions when contrary to public policy or unlawful to do so. This amounted to interfere with the rights of pension fund trustees to exercise their fiduciary duties in accordance with their own independent judgment.

In the event of a director being compelled to carry out an order from the group he/she represents or face some sanction, there is a possibility of that director having a material financial interest as envisaged by Section 75 of the Companies Act of 2008. That director could stand to be removed from his/her position as director, be suspended as a member of the group they represent or be subjected to any sanction that might have an impact on that director's financial interest. That director has a material financial interest. According to the Companies Act, that director should disclose the said material financial interest and not participate in the decision-making process in which they have a material financial interest save when they have been furnished with the necessary consent in accordance with the recommendations of the Act. Any director who fails to disclose this material financial interest and participates in the decision-making process could be liable of for damages.

2.5 Overview

A company is a juristic person that is separate from its shareholders, and can acquire rights and have obligations like a natural person. A company can enter into contracts and undertake business transactions. Given that companies are not natural persons, they act through different components of the company which components are constituted by natural people. The actions of these people within the scope of their activities as members of those components are considered to be actions of the company.

The board of directors is one of the components of a company. Various components perform different functions within the company, and also serve as control measures on each other. Properly sanctioned actions of these components are considered to be acts of the company. The management of a company is the function of a company's board of directors. When directors are interacting with third parties within the authorised scope of their functions as directors, they are considered to be acting on behalf of the company and their actions are considered to be acts of the company.

Certain duties and obligations are imposed on directors by law by virtue of them being members of a company's board of directors. These duties are owed to the company as a separate legal person, separate from its shareholders. Shareholders benefit from the duties of directors indirectly by virtue of being part of the company that is owed those duties. Some commentators have argued that the most crucial duty of directors is the common law fiduciary duty they owe to the company, namely that they will act in the best interests of the company at all times.

In the event of a conflict arising between the interests of a company (which the director represents) and any third party, that director should prioritise the best interests of the company. This principle has been confirmed by statute in the form of the Companies Act and by case law. Individual shareholders, as individuals outside the ambit of a shareholders' meeting or as shareholders as a group, are third parties to the company. The director should prioritise the interests of the company before the interests of any third party. In the event of the director's interest conflicting with the interest of the company, the director is to prioritise the interest of the company before his own interest.

In the event of any individual is faced with a conflict of interest, there might be temptation for that individual to seek the option that ensures self preservation. According to the Companies Act, when a director is faced with a conflict of interest, he/she should declare that conflict to the board of directors or shareholders of the company, depending on the circumstances of that conflict. The company should decide on the future

participation of that director in that matter, if any, as the company has the option of electing to prevent that the director from participating in the conflicting matter.

Regarding the issue of Black Economic Empowerment, BEE shareholders as a group constitute an individual shareholder. The platform upon which they can influence the actions of the company is in their capacity as members of the company's shareholders as a group which is inclusive of all shareholders. Outside the ambit of a shareholders' meeting or as a member of the shareholders of the company as an inclusive group, BEE shareholders are third parties to the company. Directors should deal with these shareholders as any other third party. In the event of the BEE shareholder being a group that is primarily a stakeholder to the company, such as employees or the community, the interests of that shareholder - apart from the platforms available to shareholders as a group - such should be regarded as a stakeholder issue. These interests should be treated by all directors in a manner consistent with company policies on how to deal with stakeholder interests.

2.6 Conclusion

This Chapter considered the literature that was covered sources from various commentators. The chapter described the company, the various components and the functions of these components within the company. The chapter also considers how these components relate to each other and how the effect they have on each other. BEE is also considered and how it relates to the nature of companies. Representative directors that represent BEE groups that are beneficiaries in BEE deals and the expectation that are imposed on these directors by the groups they represent were also considered. The following chapter dealt with the research methodology employed in this study.

CHAPTER THREE

RESEARCH METHODOLOGY

3.1 Introduction

This chapter describes the research methodology that was employed in this research study. The foundation for the study was the research problem which translated into the research objective. The research purpose was based on the research problem and objective. The research purpose informed the type of research study that was undertaken, and the research study was designed in order to implement the type of research to be undertaken in order to bring about the research objective.

As the research problem is aimed at studying the autonomy of BEE representative directors, the research population was defined so as to reflect all of the groups that might have an impact on BEE representative director's autonomy which included other directors of companies, BEE groups they would be representing and any other company stakeholder that would have an expectation on any director of a company. The original intention was to draw an appropriate population sample that was representative of this population but time constraints and the limitation of resources, the study was conducted on a limited sample. The sampling technique, sample size and method of administering the study was informed and dictated to by these limitations.

The selection of the research instrument was influenced by the nature of this study. The research problems as specified under the research questions were the basis upon which the research instrument was designed. The process of designing the research instrument included the preliminary design, conducting a pilot study and thus arriving at the final draft. The manner in which the research instrument was administered was largely dependent upon the resources that were available to investigators. Once the research data had been collected, a statistical analysis and reliability test were conducted to determine how reliable the data was.

3.2 Research Purpose

Kumar (2005, P 2) describes research as the questioning of things that are done, and a systematic examination of the observed information to find answers, with a view to instituting appropriate changes for a more effective service. The purpose of this research was to study people's opinions and beliefs as to how BEE representative directors should discharge their duties. The study is aimed at learning the expectations of various company stakeholders as to how these directors should discharge their duties and whether these expectations are in line with what applicable laws expect from these directors.

3.3 Research Type

According to Kumar (2005, P 10-12) research studies can be described as being descriptive, correlational, explanatory or exploratory:

- *Descriptive Research study*

The aim of this study is to describe systematically a situation or a problem. The objective of this study is to better understand the situation or problem and thus be able to improve the situation or to solve the problem.

- *Correlation Research Study*

The aim of this study is to establish whether a relationship does exist between two or more aspects of a situation and if such a relationship does exist, to better understand its nature and extent. The objective of this study is to gain a better understanding and to formulate how to best manage those relationships.

- *Explanatory Research Study*

The aim of this research is to clarify why and how there is a relationship between two aspects of a situation. The objective of this study would include gaining a better understanding of the relationship and to formulate how to best manage those relationships.

- *Exploratory Research Study*

This study is undertaken with the objective of exploring an area where little is known or to investigate the possibilities of undertaking a particular research study.

A research study can involve aspects of one or more of these research types. This study was both descriptive and explorative in nature. The study aims to describe the standard expected as prescribed by law and also to explore whether the expectations of the BEE shareholders make it possible for these directors to meet this standard.

3.4 Research Design

When conducting a research, the research can undertake research in an approach that is structured or unstructured. In a structured approach, the research method is implemented to study a situation or a problem in a predetermined manner, with the aim of making observations regarding the effect of variables on the situation or problem. The study is conducted by means of administering the same questions in the same order to the respondents. In this approach, questions are close-ended. This is to ensure that the responses can be reliably aggregated. An unstructured research study relies upon a modifiable research approach that affords the ability to modify the study and to tailor it for the respondents in relation to the situation or problem being studied. This approach is also characterised by open-ended questions that afford the respondents room to submit their response in any manner they deem necessary. The aim of the enquiry and the use of the findings, are what dictate whether research will be structured or unstructured.

When a structured approach is employed, the study is either qualitative or quantitative research. Van Maaneem (Marriam 2009, P 19) described qualitative research as an umbrella term covering an array of interpretive techniques which seek to describe, decode, translate and otherwise come to terms with the meaning, not the frequency, of certain more or less naturally occurring phenomena in the social world. The drive behind qualitative research studies is that there is a lack of theory or an existing theory fails to adequately explain the situation or the problem. Qualitative research is inductive by

nature meaning that the researcher gathers data to build concepts, hypothesis or theories and is not aimed at testing hypotheses. This is done by collecting information which is combined to form a larger theme (Marriam 2009, P 15). Qualitative researches are subjective, meaning their observations are informed by the personal circumstances of the respondent and that respondent's opinion and beliefs are taken into account. This allows room for the respondents to express their emotions about the research problem.

Qualitative research focuses on people's experiences, perceptions and opinions of situations or problems and mainly provides an explanation as to the nature of the situation or problem and why things happen. The aim is to understand the situations or problems in their uniqueness in a particular context. The understanding attained from this study is an end in itself as it explains what it means for the respondents in those situations or faced with those problems.

Quantitative research aims to test or evaluate numerically data in support of or against a particular theory or research hypothesis, and provide numerical evidence to support or oppose a particular research hypothesis or theory. Quantitative researches are objective in nature; they are mainly characterised by close-ended questions with the respondents having limited options of response, and are not given room to express opinions and beliefs regarding the research problem. The purpose of the study is to numerically analyse the data collected with the purpose of supporting a particular hypothesis.

The approach used in this study was a structured one using a quantitative research study with a qualitative element. The aim of the study was to observe the respondents' responses to the questions posed regarding the duties of BEE representative directors, and to numerically analyse those observations in order to determine whether BEE representative directors are autonomous. The observations were to be made in a uniform predetermined manner. The study was to test the level of understanding of the respondents of the prescriptions of the applicable laws regarding duties of directors by observing the responses of the respondents. Those observations would be computed in order to have an idea of the prevailing opinion regarding the research problem. That

prevailing opinion was to be established by means of numerically analysing the responses of the respondents.

3.5 Population and Sample

3.5.1 Sampling Technique

The purpose of the study was to access the opinion of people who would generally be invested in the manner in which a BEE representative director discharged his duties. However this population would be too wide as it would encompass the general population and had to be narrowed and focused on the people within that group that would not only be invested but also have an expectation and close proximity to BEE representative to have some influence in how these directors discharged their duties.

Research sampling techniques are broken into two groups being probability or Random Sampling and Non-probability sampling. In probability or random sampling a sample is randomly selected when each member of the population has an equal chance of being selected into the sample (Bless 2006, P 100). The disadvantage of this sampling method is that it could prove to be expensive and time-consuming, but the advantage is that this sampling method is reliable and the findings are more representative of the population. Probability sampling is broken down into Simple random sampling, Interval or systematic sampling, Stratified sampling and Cluster or multi-stage sampling.

Non-probability sampling is when the probability of including each element of the population in a sample is unknown. Types of Non-probability sampling methods include availability sampling, Purposive or judgmental sampling and Quota sampling. The advantage of using this sampling method is that it is faster and cheaper to conduct the study. However the disadvantage of this sampling method is that it is difficult to estimate how well the sample represents the population, and this makes the possibility of generalisation highly questionable. Accidental or availability sampling is characterised by the researcher collecting all cases on hand until the sample reaches a desired size. It is convenient in terms of time and money. However this sampling method makes generalising extremely risky (Bless 2006 P 105).

The sampling method used in this study has been that of a non-probability sample. This was due to the limitation of resources and time constraints. Availability sampling was used as questionnaires were distributed by hand delivery and email and collected from the respondents that were available to participate. Due to the limitations already mentioned sampling was to be limited geographically to the area that could be covered by the researcher on the available resources and within the available time period. Even though emails were used to conduct the study as an unrestricted email facility was within the available resources, the number of participants beyond the accessible geographical area was dictated to by the database that the researcher could access.

Initially samples were to be drawn from the database of the Durban Business Chamber (D.B.C.) as it fell within the targeted geographical area, the database of the Institute of Directors as it would afford access to the directors that fall within the targeted sample population, the database of the beneficiaries of the Mbizana Development Trust as it would afford access to beneficiaries of BEE transactions and the database of Ntshebe & Associates for the targeting of those individuals that would also fall within the population.

According to the Institute of Directors (I.O.D.) website I.O.D is a membership institute for directors and leaders in the private and public sectors. It is a platform established to enable its affiliates to improve their expertise, professionalism and status on an on-going basis. The mission statement of the Institute of Directors states that it aims to promote sound corporate governance to influence the conduct of business and public affairs for the common good.

According to the D.B.C. website, D.B.C. represents a platform for its affiliates in the eThekweni Metropolitan area to interact and approach business as a collective. D.B.C. is a recognized platform upon which various stakeholders including government, consumer groups and employee groups can engage the business community under the eThekweni region. D.B.C. exposes its affiliates to all various stakeholders and makes

recommendations as to corporate governance practices while taking into account the various stakeholder interests its affiliates might be exposed to. D.B.C provided a platform to access an adequate number of individuals who are affiliated to it who sit on the boards of directors of companies operating within the Durban metropolitan area.

The above mentioned organizations were approached but for various reasons, consent to conduct the study was only secured from Ntshebe & Associates. Due to litigation, the Trustees of the Mbizana Development Trust were suspended from functioning as such at the time the study was conducted thus meaning there was no recognisable structure to consent to the study. Consent could not be secured from the Durban Business Chamber could not be secured during the study as the researcher was advised by the Durban Business Chamber that the platform to conduct such studies on the members of the DBC was only reserved for members of the DBC and the researcher did not have the resources to become a member at the time of the study. The researcher did not receive any response to the correspondence that was sent to the Institute of Directors prior to the commencement of the study.

From the Ntshebe & Associates database the respondents constituting the sample size were in Durban, Pietermaritzburg, Johannesburg and Bizana. The majority of the respondents were from the Durban area and Bizana. The study respondents that were approached were selected according to the researcher's belief of their ability to have an insight into the subject matter and their availability to participate.

3.5.2 Description of Sample

A representative sample was drawn from directors and shareholders of companies. Questionnaires were distributed to randomly selected directors operating as such in various areas in South Africa. The sample was made up of clients and business associates of Ntshebe & Associates, a law firm operating in the Durban Metropolitan area. The respondents were selected on the grounds that they were directors of companies or had been involved in a BEE transaction in the past.

The size of the sample was determined by the number of individuals approached from this database, and who were available and completed the questionnaire. Since at the time of the study, time constraints did not allow for institutional consent to be secured, Questionnaires were distributed to individuals that had been involved in BEE transactions as directors of companies, or on behalf of a company that they worked for, or as members of groups that were beneficiaries in a BEE transactions. A total of 50 potential respondents were approached personally by the researcher or by email but only a total 36 were returned constituting the sample size.

The majority of those questionnaires that were returned were from those individuals that had been approached by the researcher personally and completed in the presence of the researcher. There were delays with those questionnaires that were to be completed by the respondent and sent back to the researcher. For the questionnaires that were not returned there were undertakings that the questionnaire would be completed and sent back to the researcher which questionnaires were never returned.

From those who responded, the majority were from KwaZulu-Natal. The 36 respondents were broken down as follows: 18 from KwaZulu-Natal, 11 from The Eastern Cape, 6 from the Gauteng Province and 1 from the Western Cape. From the directors who participated in the study, 53% were from the Durban Metropolitan area.

From those who responded and were shareholders, 61% were from the town of Bizana in the Eastern Cape Province. The Wild Coast Sun located in Bizana, which is a holiday resort with a hotel and a casino and part of the Sun International group, concluded a BEE transaction with the Mbizana Development Trust for the benefit of the community of Bizana. The Mbizana Development Trust was created to hold the 30% of all issued shares in the Transkei Sun International Limited, which shares were allocated to the community. The beneficiary of this trust is the community of Bizana.

A sample study of the clients of Ntshebe and Associates (who are from Bizana) was conducted, as they are beneficiaries of this BEE shareholder Trust. The aim was to

determine their expectations and perceptions as to how directors who represent them should discharge their duties. The other respondents who were shareholders responded as follows: 19% from Durban and 20% from the Gauteng Province.

3.6 Research Instrument

3.6.1 Questionnaire and Pilot Study

The research instrument used in this study was a questionnaire. Given the limitation on the resources necessary to conduct the said study the questionnaire proved to most appropriate research instrument as it could be easily distributed. Given the time needed in order for a respondent to respond to the questions, the questionnaire afforded the respondent with the ability to answer the questions as and when it was convenient for them to do so.

A draft questionnaire was prepared and a random sample of random business people was used to assess the questionnaire. Based on the responses modifications were made to the original draft questionnaire. Some questions were deleted or amended as they had given the respondents in the pilot problems. These included one ambiguous question and one question that some of the respondents regarded as being vague.

3.6.2 Construction of the Questionnaire

The questionnaire began by describing the study and the purpose of the questionnaire. The questionnaire was accompanied by a covering letter with an attached informed consent form attached. The questions in the questionnaire were broken into two parts, part 1 and part 2. Part 1 was comprised of 12 demographic questions and Part 2 was comprised of 22 research questions.

3.6.2.1 Covering Letter

The covering letter from was a letter from the investigator detailing the purpose and nature of the study. This letter also informed the respondents that their participation was voluntary. The letter also served as an undertaking by the investigator to keep

confidential the data provided by the respondent and the terms of the said confidentiality undertaking.

The purpose of this letter was to provide the respondents with an undertaking that has been reduced to writing which undertaking binds the investigator to adhere to terms of confidentiality undertaken. The other consent form is an informed consent letter to be completed and signed by the respondent consenting to the use of the data they furnished

3.6.2.2 Part 1 Demographic Questions

The first part of the questionnaire was comprised of 12 demographic questions. These questions included:

- Age group
- Gender
- Race
- Academic/professional qualification
- Occupation
- Occupational experience
- Capacity the respondent has been in business
- Number of years in business
- Questions relating to a previous experience with a company involved in a BEE Transaction
- Respondent's classification in a BEE transaction

These questions were designed for the purposes of grouping respondents in accordance with the above listed variables so as to be able to identify whether there are any trends. The questions relating to previous experience with a company involved in a BEE

transaction were designed to qualify the respondents and to establish some insight into their previous experience with BEE

3.6.2.3 Part 2 Research Questions

The research questions could be grouped into four clusters. Each cluster being one of the four research questions stipulated in Chapter 1 as being part of the objectives of this research study.

Under Part 2 of the questionnaire, the questions were aimed at understanding the respondent's perception of duties of a director within the context of research objectives. These questions dealt with understanding how informed were the respondents of the duties and responsibilities of directors of a company according to our laws and policies. For the purposes of this study, shareholders were classified into two groups, the majority shareholder and the minority BEE shareholder. The first four questions dealt with the duties of directors in general. This was to address the first research objective which was aimed at defining the duties of directors of a company according to South African laws and policies.

Questions 5-8 were aimed at understanding whether the respondents could distinguish between the company and the shareholders. The purpose was to establish whether the respondents perceive directors to be there to serve the interest of shareholders in general. This cluster was aimed at addressing the second research objective and to establish the expectations of shareholders in general as to how directors that are representatives of BEE shareholders should perform their duties.

Questions 8-11 were aimed at understanding how the respondents perceive the directors duties with regards to BEE Shareholders. This cluster was aimed assessing the participant's opinion as to the expectations of BEE shareholders as to how directors who are their representatives should perform their duties to the company. The aim was basically to assess how BEE representative directors should prioritise the interests of the company as against the interests of the BEE shareholder they represent.

Questions 12-19 were aimed at understanding the respondent's perception of the relationship between the BEE representative director and the BEE Shareholder they represent. This was to evaluate the participants' opinion regarding the influence BEE shareholder might have over the directors that are appointed as their representatives. This cluster deals with the fourth research objective which was to assess the nature of the relationship between BEE shareholder and the directors that represent them.

All of the questions in a cluster have the same theme but have slight variations. The questions were designed so as to compel the respondent to apply themselves to that particular dimension of the duties of directors within the context of the research study. The questions in a cluster were structured so as enable the investigator to compile a summarised statement of the respondent's perception of the duties of directors regarding that cluster.

A provision was made under each question to enable the respondents to elaborate on any issue they felt the question did not fully cover and also to state their reasoning as to how they responded in the manner they did to the question. The respondents were not required to comment on all questions but the option was provided for the respondents that desired to elaborate or comment. This was to assist the investigator to get an opinion on the reasoning behind the participant's responses. The comments section also served as a control measure to establish that the participants did apply themselves to the questions.

Even though steps had been taken to ensure that the questions were not ambiguous, the provision made for comments below every question allowed the respondent room to respond to the question in a manner they were comfortable with. The questionnaire did not contain any ambiguous, vague or leading questions.

Save for question 19, all of the research questions in the questionnaire were classified using the Likert Scale which was to evaluate the responses of the respondents. The Likert Scale consists of 5 evaluative statements which statements were prescribed for the

respondents to elect one as their response to the questions. These Likert Scale evaluative statements contained two favorable and two unfavorable statements and one neutral response. The use of the even number in favorable and unfavorable responses was so to minimize the likelihood of bias as having more response options in favor or against would be suggestive to the respondents.

3.6.3 Administration of the Questionnaire

About 50 questionnaires were distributed by hand delivery and email to particular individual targeted for participation in this study. Those that were distributed by email were completed by the respondents at the convenience of the respondent. The respondents completed the questionnaire on their own and sent them back by email. The questionnaires that had been distributed by hand some were left with respondents to complete on their own.

Problems were experienced with most of the respondents not completing and returning the questionnaire timeously. The inclusion of the comment section below every question also contributed to the delay in the completion of the questionnaires as some participants believed they had to comment for every question and considered the exercise strenuous. Several reminders were sent to the respondents requesting them to complete the questionnaires. For some of the respondent that the investigators could visit, the investigator had to visit the respondents and request them to complete the questionnaire in the investigator's presence. For expediency purposes whenever time allowed, some questionnaires were completed by the respondents in the presence of the investigator with the administration of the questionnaire being oral and resembling an interview.

For this study the only ethical clearance that was required was clearance from the University of KwaZulu-Natal in order to commence the study. No clearance was required with regards to the respondents apart from the consent of each individual respondent as the respondents were participating in their personal capacity and the views they expressed were expressed in their personal capacity.

3.7 Statistical Analysis of the Data

All of the data collected with the questionnaires was captured on MS excel spreadsheets. This data was subsequently coded into the SPSS database. The data was analysed by using statistical software SPSS 17.0. The information was presented in frequency tables and bar charts for all variables in order to determine the distribution of variables. Cross tabulation was also done to determine the relationship between the predictor variables and the response. Moreover, logistic regression analysis was employed to control the possible confounding effect and assessed the separate effects of the variables.

3.8 Reliability

A reliability test was undertaken on the data collected during this research study. This was done by the administering Chronbach's alpha coefficient test. The Cronbach's alpha coefficient is a measure of the internal consistency of the data collected in the study. This is the most frequently used Cronbach's alpha coefficient.

3.9 Limitation of the Study

One of the limitations of the study was that due to the constraints, the sampling method utilised was accidental or availability sampling. The first limitation is that the sample is not reflective of the population of directors and shareholders in business in South Africa and thus making generalizing the findings of this study impossible.

3.10 Conclusion

This chapter described the decisions taken in the research methodology that was employed in this study. The research problem which translated into the research objective formed the theme that applied in this study as a whole. The type of research that was employed was both descriptive and explorative in nature. The approach used to conduct this study was that of a structured quantitative study with qualitative characteristics.

The sampling technique used was accidental or availability sampling which is a form of non-probability sampling. The sample was drawn from the database of Ntshebe &

Associates a law firm based in Durban. Due to the limitations of this type of sampling was limited and the result was that the findings of the study could not be used to generalize on the entire population. The sample size was comprised of 36 responses from directors and shareholders in various areas of South Africa. The sample size was to a large extent dictated by the willingness of the individuals that had been approached to participants' willingness to respond.

The appropriate research instrument for this type of research was the questionnaire. A preliminary draft of the questionnaire was made and a pilot study was conducted. From the findings of the pilot study, modifications were affected to the original questionnaire draft. Questionnaires were distributed by hand and by email. Some of the questionnaires distributed by hand, the investigators had to assist the respondents to complete questionnaire in certain instances. The data was analysed by using statistical software SPSS 17.0. The Chronbach's alpha coefficient test was used to test the reliability of the data collected in this study.

Chapter Four dealt with the analysis of the data collected during the study. The chapter considered the various tests that were conducted on the data.

CHAPTER FOUR

DATA ANALYSIS

4.1 Introduction

This chapter dealt with the analysis of the data that was collected during this study. The data has been broken down into three sections, Sections A, B and C. Section A deals with the presentation of Part 1 of the questionnaire, i.e. the demographic questions. Section B deals with the findings of the research questions contained under Part B of the questionnaire. Section C covers cross-tabulation analysis conducted on the data. Due to the number of questions for this study, cross-tabulation analysis was only conducted on a few core questions. These included correlation analysis, chi square tests and a reliability test.

4.2 Section A

In this chapter the results were analysed using statistical software SPSS 17.0. The information was presented in frequency tables and bar charts for all variables in order to determine the distribution of variables. Cross-tabulation was also done to determine the relationship between the predictor variables and the response. Moreover, logistic regression analysis will be employed to control the possible confounding effect and assess the separate effects of the variables. A 'P' value less than 0.05 will be considered significant.

4.2.1 *Background of Respondents (n=36).*

A total of 36 respondents took part in the survey. The backgrounds of all respondents are shown in Table 1 and in Figures 1, 2, 3 and 4. The age group distribution of respondents shows that the majority of 19 (52.8%) belong to the age group 33–43 years. Most of the respondents are more than 32 years, and thus they are more mature. The disparity in gender can be attributed to the fact that this was a once male dominated position. In the past very few women used to hold supervisory roles. However, nowadays the disparity in gender is one of the issues being addressed (Beijing conference) and thus it can be noted

that the female composition is improving compared to the past. Almost half of the respondents (61.1%) were males.

The majority (30 respondents, i.e. 83.3%) were African. Almost 50% of the respondents attained a PG Degree/Diploma, whilst 25% a degree and 16.7% matriculation. However, one can deduce that the majority of respondents have a degree. The majority of the respondents (29, i.e. 80.6%) confirmed, when asked, that they had been involved with a company that concluded a B.E.E transaction.

About 24 (66.7%) respondents disagreed when asked whether the company was a wholly-owned subsidiary of another company, and approximately 90% of the respondents denied that they had been involved with a company that concluded a B.E.E transaction before that transaction. Of the respondents, 29 (80.6%) who have been involved in a B.E.E transaction, describe their role as being a representative or a member of B.E.E beneficiary

VARIABLE	NUMBER	PERCENTAGE
Age-group in years		
<21	1	2.8
22-32	7	19.4
33-43	19	52.8
44-54	3	8.3
55+	6	16.7
Gender		
Male	22	61.1
Female	14	38.9
Race		
African	30	83.3
White	6	16.7
Highest level of education		
Matric	6	16.7
Post matric Certificate	3	8.3
Degree	9	25.0
PG Degree/Diploma	18	50.0

Have you been involved with a company that concluded a B.E.E Transaction?		
Yes	29	80.6
No	7	19.4
Was the company wholly-owned subsidiary of another company?		
Yes	12	33.3
No	24	66.7
Were you been involved with that company that concluded a B.E.E transaction before that transaction?		
Yes	4	11.1
No	32	88.9
In a B.E.E transaction, you would describe your role as being a representative/member of:		
B.E.E Beneficiary	29	80.6
Company Issuing shares	5	13.9
Financer	2	5.6

Table 4.1: Demographic distribution

Figure 1 below shows that a relatively smaller number of respondents (2.8%) were recorded as ‘other’ in each of the following categories: businesswoman, surveyor, strategist, financial advisor, retired diplomat, pensioner, architect, banker, director, managing director, IT technician, business consultant, auditor, researcher or HR manager. The majority of 6 (16.7%) were attorneys, followed by 3 (8.3%) who were employees and self-employed.

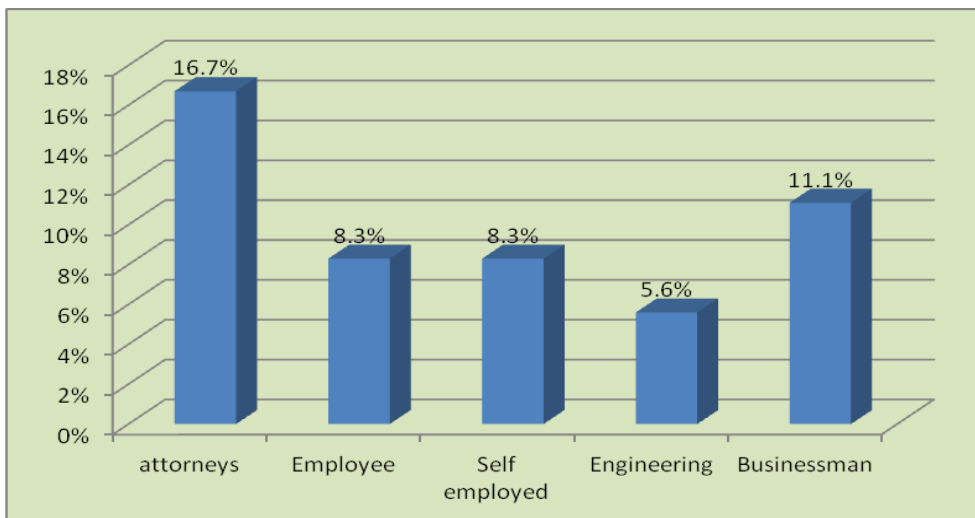


Figure 4.1: Distribution of occupation

When the respondents were asked how many years they had been in this profession, 11 (30.6%) recorded 1–5 years, followed by 10 (27.8%) and 7 (19.04%) recording 6–10 years. One can conclude that most of the respondents have been in this profession for more than 5 years. Thus, the respondents are in a better position as indicated in the figure below:

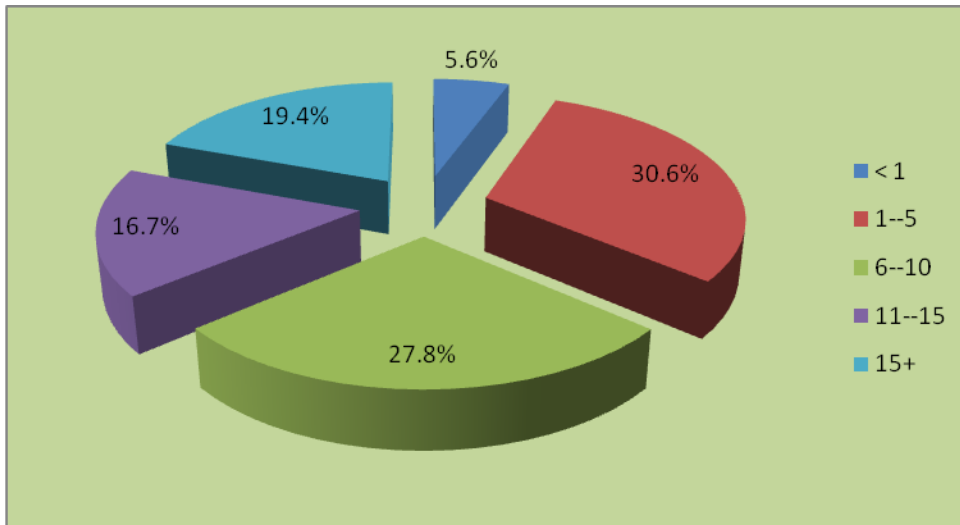


Figure 4. 2: Distribution of the number of years being at this profession.

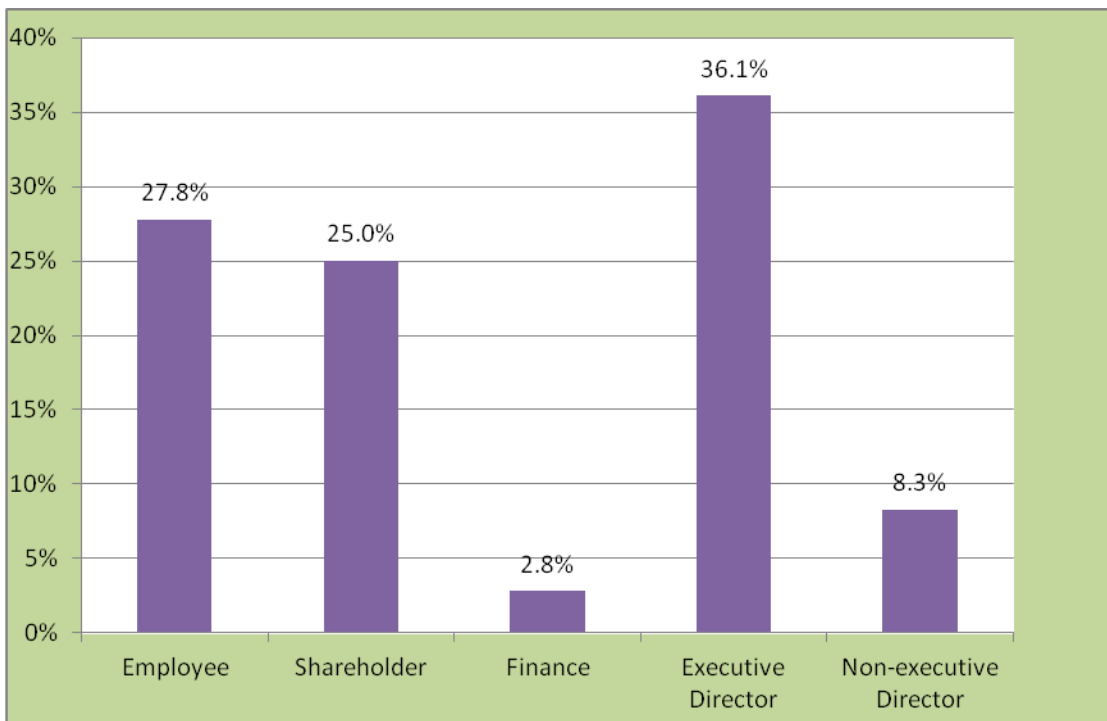


Figure 4.3: Distribution of the capacity being in business.

The results in Figure 3 above show that the capacity in which the respondents had been in business was made up as follows: 13 (36.1%) were executive directors, followed by 10 (27.08%) employees and 9 (25%) shareholders. This means that the respondents are well experienced.

Of the respondents, 18 (50%) were in this relationship for 1–5 years, 8 (22.2%) for 6–10 years and 5 (13.9%) for 11–15 years as indicated in the figure below:

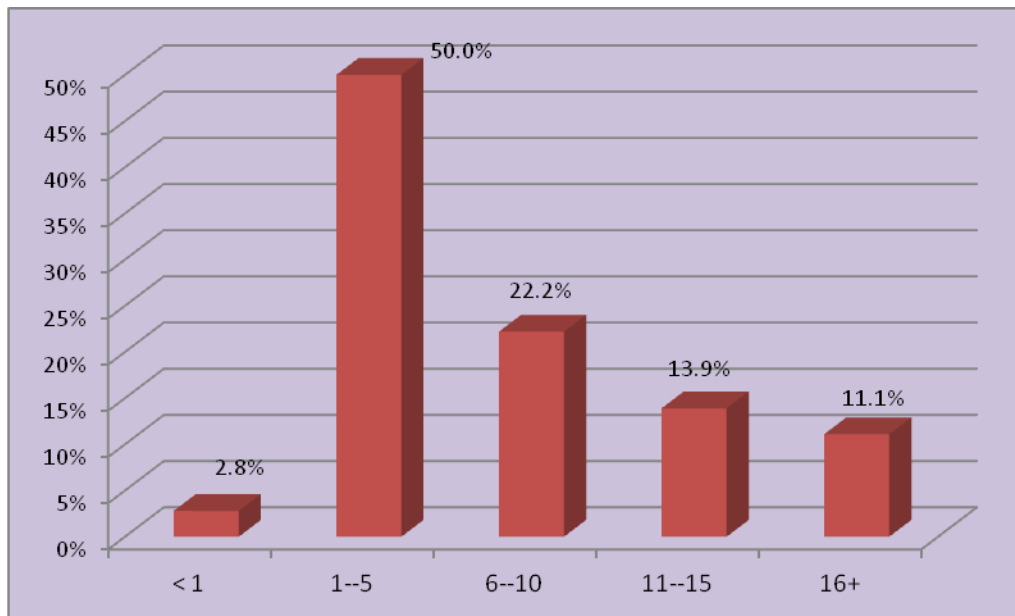


Figure 4.4: Distribution of the number of years this relationship had been in existence.

4.3 Section B

In the view of the respondents, approximately 92% strongly agreed about the decision-making process, and that a director should always strive to achieve what is in the best interests of the company.

Almost 44.4% and 16.7% respectively strongly agreed and somewhat agreed that in their decision-making process, a director should always consider what is in the best interests of the company as also being in the best interest of the majority of the shareholders. There are instances where a director can consider that what is in the best interests of the

company would also be in the best interests of the majority of the shareholders. Of the respondents, 47.2% strongly agreed and 25% somewhat agreed, as indicated in the table below.

1. In his/her decision-making process, a director should always strive to achieve what is in the best interests of the company.		
	FREQUENCY	PERCENT
Strongly Disagree	1	2.8
Somewhat Agree	2	5.6
Strongly agree	33	91.7
2. In his/her decision-making process, a director should always consider what is in the best interests of the company as being what is in the best interests of the majority of the shareholders.		
Strongly Disagree	6	16.7
Somewhat Disagree	7	19.4
Undecided	1	2.8
Somewhat Agree	6	16.7
Strongly agree	16	44.4
3. In his/her decision-making process, there are instances where a director can consider what is in the best interests of the company as being what is in the best interests of the majority of the shareholders.		
Strongly Disagree	6	16.7
Somewhat Disagree	4	11.1
Somewhat Agree	9	25.0
Strongly agree	17	47.2
4. The best interests of the company should always be defined according to what is in the interests of the majority of shareholders.		
Strongly Disagree	14	38.9
Somewhat Disagree	7	19.4
Somewhat Agree	6	16.7
Strongly agree	9	25.0
5. The best interests of the majority of the shareholders should always be defined by what is in the interests of the company.		
Strongly Disagree	5	13.9
Somewhat Disagree	3	8.3
Undecided	2	5.6
Somewhat Agree	5	13.9

Strongly agree	21	58.3
6. In his/her decision-making process, a director should always strive to achieve what is in the best interests of the majority of shareholders.		
	FREQUENCY	PERCENT
Strongly Disagree	6	16.7
Somewhat Disagree	9	25.0
Undecided	2	5.6
Somewhat Agree	8	22.2
Strongly agree	11	30.6
7. In his/her decision-making process, a director should always strive to achieve what is in the best interests of the company even if at the expense of minority shareholders.		
Strongly Disagree	3	8.3
Somewhat Disagree	1	2.8
Undecided	2	5.6
Somewhat Agree	13	36.1
Strongly agree	17	47.2
8. In the director's decision-making process, a director is compelled to always strive to achieve what is in the best interests of the majority of shareholders, even if it is at the expense of the minority shareholders.		
Strongly Disagree	12	33.3
Somewhat Disagree	6	16.7
Undecided	3	8.3
Somewhat Agree	10	27.8
Strongly agree	5	13.9
9. In the decision-making process, a director of a company should consider, in addition to the interests of the majority of shareholders, the interests of the BEE shareholders.		
Strongly Disagree	3	8.3
Somewhat Disagree	4	11.1
Undecided	3	8.3
Somewhat Agree	12	33.3
Strongly agree	14	38.9
10. In his/her decision-making process, a director should accommodate the interests of majority BEE shareholders only to the extent that they are not in conflict with the interests of the majority of shareholders.		
Strongly Disagree	10	27.8
Somewhat Disagree	10	27.8

Undecided	1	2.8
Somewhat Agree	8	22.2
Strongly agree	7	19.4
11.1 The interests of the majority of shareholders first then the interest of B.E.E shareholders.		
Strongly Disagree	15	41.7
Somewhat Disagree	9	25.0
Undecided	5	13.9
Somewhat Agree	5	13.9
Strongly agree	2	5.6
11.2. The interests of the majority of shareholders first, then the interests of B.E.E shareholders are to given equal priority.		
Strongly Disagree	7	19.4
Somewhat Disagree	6	16.7
Undecided	5	13.9
Somewhat Agree	6	16.7
Strongly agree	12	33.3
11.3 The interests of the B.E.E shareholders should get priority, followed by the interests of the majority of shareholders		
Strongly Disagree	16	44.4
Somewhat Disagree	11	30.6
Undecided	2	5.6
Somewhat Agree	2	5.6
Strongly agree	5	13.9
12. In the event of a director serving as a representative of a BEE shareholder group, that director should specifically limit his/her responsibility to the best interests of the B.E.E shareholder she/he represents.		
Strongly Disagree	15	41.7
Somewhat Disagree	7	19.4
Undecided	1	2.8
Somewhat Agree	4	11.1
Strongly agree	9	25.0
13. A director who is a representative of a BEE shareholder should prioritise decisions in terms of what is in the best interests of the company, even if it is in conflict with the best interests of the B.E.E shareholders that he/she represent.		
Strongly Disagree	8	22.2
Somewhat Disagree	8	22.2
Undecided	4	11.1

Somewhat Agree	7	19.4
Strongly agree	9	25.0
14. The BEE shareholder should be entitled to instruct a director who is their representative on how to discharge his/her duties as a director or how to vote on a particular issue.		
Strongly Disagree	9	25.0
Somewhat Disagree	7	19.4
Undecided	1	2.8
Somewhat Agree	11	30.6
Strongly agree	8	22.2
15. A director who is a representative of a BEE shareholder should consider the interest of the company, to the extent that what is in the best interests of the company does not conflict that which is the best interests of the B.E.E shareholders he/she represents.		
Strongly Disagree	9	25.0
Somewhat Disagree	8	22.2
Undecided	3	8.3
Somewhat Agree	6	16.7
Strongly agree	10	27.8
16. A director who is a representative of a BEE shareholder should exclusively account to the BEE shareholder who had appointed that director as its representative.		
Strongly Disagree	16	44.4
Somewhat Disagree	5	13.9
Somewhat Agree	6	16.7
Strongly agree	9	25.0
17. The B.E.E shareholder who appoints a director to represent him/her should be entitled to replace that representative director in the event of that director failing to give preference to the interests of that B.E.E shareholder.		
Strongly Disagree	9	25.0
Somewhat Disagree	5	13.9
Undecided	1	2.8
Somewhat Agree	7	19.4
Strongly agree	14	38.9

18. A director who is a representative of a BEE shareholder and who fails to prioritise the best interests of the BEE shareholder should be replaced by a B.E.E shareholder unless he/she can show that the decision was in the best interest of the company.		
Strongly Disagree	4	11.1
Somewhat Disagree	1	2.8
Undecided	5	13.9
Somewhat Agree	9	25.0
Strongly agree	17	47.2
19. To whom do you believe a director who is a representative of a shareholder is accountable?		
Company	9	25.0
B.E.E Shareholder	22	61.1
Majority of Shareholders	5	13.9

Table 4.2: Questionnaire Part 2 Findings

The table above also indicates that 38.9% of respondents strongly disagree and 19.4% somewhat disagree about the best interests of the company, which should always be defined according to what is in the interests of the majority of shareholders.

Of the respondents, 58% strongly agreed and 13.9% somewhat agreed that the best interests of the majority of shareholders should always be defined by what is in the interests of the company.

However, 30.6% of the respondents strongly agreed, followed by 25% who somewhat disagreed, 16.7% who strongly disagreed and 5.6% who were undecided. Almost 47.2% strongly agreed and 36.1% somewhat disagree when asked about the decision-making process, and that a director should always strive to achieve what is in the best interests of the company, even if it is at the expense of minority shareholders. Regarding the notion that “in the director's decision-making process, a director is compelled to always strive to achieve what is in the best interests of the majority of shareholders even if it is at the expense of the minority shareholders”, 33.3% of respondents strongly disagreed, 27.8%

somewhat agreed and 16.7% somewhat disagreed. When respondents asked whether in the decision-making process, a director of a company should consider, in addition to the interests of the majority of shareholders, the interests of the BEE shareholders, 38.9% strongly agreed and 33.3% somewhat agreed.

When considering the question that in decision-making processes, a director should accommodate the interests of majority BEE shareholders only to the extent that they are not in conflict with the interests of the majority of shareholders, 27.8% of the respondents strongly disagreed, followed by 27.8% somewhat disagreeing and 22.2% somewhat agreeing.

When asked whether the interests of the majority of shareholders should be prioritised above the interests of B.E.E shareholders, about 41.7% respondents strongly disagreed and 25% somewhat disagreed. When respondents were asked to comment about the interests of the majority of shareholders and whether the interests of B.E.E shareholders are to be given equal priority, 33.3% strongly agreed, followed by 19.4% who strongly disagreed and 16.7% who both somewhat disagreed and agreed.

Approximately 45% of the respondents strongly disagreed and 31% somewhat disagreed when asked whether the interests of the B.E.E shareholders should get priority, with the interests of the majority of shareholders coming second. When the respondents were asked whether, in the event of a director serving as a representative of a BEE shareholder group, that director should specifically limit his/her responsibility to the best interests of the BEE shareholder, 41.7% respondents strongly disagreed and 19.4% somewhat disagreed, but only 25% strongly agreed. The table above also indicates that 22.2% of respondents strongly disagreed and 22.2% somewhat disagreed when asked whether a director who is a representative of a BEE shareholder should prioritise decisions in terms of what is in the best interests of the company, even if that is in conflict with the best.

When the respondents were asked whether the BEE shareholder should be entitled to instruct a director who is their representative on how to discharge their duties as a

director or how to vote, 30.6% respondents somewhat agreed, followed by 25% who strongly disagreed and 22.2% who strongly agreed. When respondents were asked whether a director who is a representative of a BEE shareholder should consider the interests of the company to the extent that what is in the best interests of the company is not conflicting, 25% and 22.2% strongly disagreed and somewhat disagreed but only 27.8% and 16.7% strongly agreed and somewhat agreed.

Almost 44.4% strongly disagreed followed by 25% who strongly agreed as to whether a director who is a representative of a BEE shareholder should exclusively account to the BEE shareholder who had appointed that director as its representative. A total of 39% strongly agreed and 19.4% somewhat agreed that the B.E.E shareholder who appoints a director to represent him/her should be entitled to replace that representative director in the event of that director failing to give preference to his/her interests. When the respondents were asked whether a director who is a representative of a BEE shareholder and who fails to prioritise his/her best interests, should be replaced by a B.E.E shareholder unless he/she can show that the decision was in the best interests of the company majority, 47.2% strongly agreed and 25% somewhat agreed. Approximately 61% believed that a director who is a representative of a shareholder is accountable to the BEE shareholder.

4.4 Section C

4.4.1 Cross-tabulation

Statistically significant means that something is probably true; i.e. when something is highly significant it means the probability of that fact being true is very high. The most common level used to mean something is good enough to be believed is .95, which equates a 95% chance of being true.

Correlation is a statistical technique that tests whether two variables are related and have any effect on each other. Correlation tests also test the nature of the effect as to whether one variable affects the other positively or negatively. When these variables are positively related, and one variable increases, the effect is that the other variable

increases as well. When they are negatively related, and when one variable increases, the effect on the other is a decrease. The closer this coefficient is to -1, the more negatively the two variables affect each other.

Correlation tests also measure the strength of the relationship. Correlation is measured by means of calculating the correlation coefficient (r), which ranges from -1.0 to +1.0. The closer the correlation coefficient is to +1 or -1, the more closely related the two variables are.

Cross-tabulation was done to determine the relationship between the predictor variables and the responses. It is highly significant with the formula ($P\text{-value} = 0.04$ and $\text{Chi-Square} = 4.345^a$); respondents were involved with a company that concluded a B.E.E transaction but the company was not a wholly-owned subsidiary of another company.

Was the company a wholly-owned subsidiary of another company? * Have you been involved with a company that concluded a B.E.E transaction cross-tabulation?

		Have you been involved with a company that concluded a B.E.E transaction?		Total
		Yes	No	
Was the company a wholly-owned subsidiary of another company?	Yes	12	0	12
	No	17	7	24
Total		29	7	36

Table 4.3: Cross Tabulation Table 1

Chi-Square Tests

	Value	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	P-Value
Pearson Chi-Square	4.345 ^a	.037		0.041
Continuity Correction ^b	2.682	.101		
N of Valid Cases	36			

Table 4.4: Chi-Square Test results

A Spearman's rank correlation was obtained. A correlation coefficient of $r = .119$ with the (mean = 4.83 and SD = 0.697) was obtained. It shows that the respondents were positively involved with a company that concluded a B.E.E transaction and it is highly significant that in a decision-making process, a director should always strive to achieve what is in the best interests of the company with the formula: ($P = 0.000$ and $CI = 3.381 - 3.897$).

	Mean	N	Std. Deviation	Std. Error Mean
In his/her decision-making process, a director should always strive to achieve what is in the best interests of the company	4.83	36	.697	.116
Have you been involved with a company that concluded a B.E.E transaction?	1.19	36	.401	.067

Table 4.5: Cross Tabulation table 2

Correlations

	N	Correlation
Pair 1 In his/her decision-making process, a director should always strive to achieve what is in the best interests of the company. Have you been involved with a company that concluded a B.E.E transaction?	36	.119

Table 4.6: Correlation Table 1

					T		
	Mean	SD	Std. Error Mean	95% Confidence Interval			
				Lower			Upper
In his/her decision-making process, a director should always strive to achieve what is in the best interests of the company - Have you been involved with a company that concluded a B.E.E transaction?	3.639	.762	.127	3.381	3.897	28.665	.000

Table 4.7: Cross Tabulation Table 3

A Spearman's rank correlation was obtained. A correlation coefficient of $r = -.328$ with the (mean = 3.28 and SD = 1.560) and $P = 0.008$ and $CI = 0.317 - 0.960$ was obtained which is highly significant.

	Mean	N	SD	Std. Error Mean
The interests of the majority of shareholders first, then the interests of B.E.E shareholders are to given equal priority.	3.28	36	1.560	.260
The interests of the B.E.E shareholders should get priority, and then the interests of the majority of shareholders.	2.14	36	1.417	.236

Table 4.8: Cross Tabulation Table 4

Correlations

	N	Correlation
The interests of the majority of shareholders first, then the interest of B.E.E shareholders are to given equal priority & The interest of the B.E.E shareholders should get priority and then interest of the majority of shareholders	36	-.328

Table 4.9: Correlation Table 2

	Mean	SD	Std. Error Mean	95% Confidence Interval		T	P - Value
				Lower	Upper		
				The interests of the majority of shareholders first, then the interests of B.E.E shareholders are to given equal priority - The interest of the B.E.E shareholders should get priority and then interests of the majority of shareholders.	1.139		

Table 4.10: Cross Tabulation Table 5

Reliability Statistics

Cronbach's Alpha	Cronbach's Alpha Based on Standardised Items	N of Items
.688	.679	21

Table 4.11: Reliability Statistic

A reliability test was undertaken on the data collected during this research study. This was done by administering the Chronbach's alpha coefficient test. Cronbach's alpha coefficient is a measure of the internal consistency of the data collected in the study. This is the most frequently used Cronbach's alpha coefficient. From the above findings, Cronbach's α (Alpha = 0.688), indicates that the overall reliability of a questionnaire is good for the number of items examined and therefore they are all positively contributing to the overall reliability.

4.5 Conclusion

This chapter dealt with the analysis of the data that was collected during this study. Tests were conducted to evaluate significance and correlation. The tests revealed high significance levels. The correlation tests revealed that there was no correlation relationship between the variables that were tested. A reliability test was conducted measuring the internal consistency of the data collected, and this test revealed that the data was reliable.

Chapter Five dealt with a detailed analysis of the data and the findings of the study. The meaning of the findings was discussed for each question in Part 2 of the questionnaire and the findings of different questions were compared and an overall all conclusion of the findings.

CHAPTER FIVE

DISCUSSION ON DATA

5.1 Introduction

The purpose of this chapter was to discuss the findings of the data collected in this research study. The responses provided by the respondents in this study have been presented as per the questions that were asked. There was a brief discussion on the findings of each question and the comments submitted by the respondents. For some core questions, the responses of the respondents have been presented in four groups, being;

- All Responses;
- BEE Beneficiary;
- Company Issuing Shares;
- Financer.

The last three groupings are based on the information provided by the respondents as to how they would classify themselves in a BEE transaction. All Responses represents all of the responses provided combined. The purpose of grouping these responses in this manner was to enable one to get a more comprehensive idea of how different groups responded to the questions. This was to enable one to get a better understanding of what the expectations of these different groups were, with more of an emphasis on those respondents who are or would be BEE Beneficiaries. A comparative discussion was also presented, and this considered how the respondents responded to related questions for the purpose of formulating a more holistic picture of the opinions of the respondents. The comments submitted by the participants were considered to establish the reasoning behind the decisions of the participants and also to establish trends.

5.2 Questions 1–4

These questions were designed to evaluate what the respondents understand the law to prescribe as the duties of directors and what informs the duties of the directors.

1. In his/her decision-making process, a director should always strive to achieve what is in the best interests of the company.

	DISAGREE %	UNDECIDED %	AGREE %
All responses	2.8	0	97.2
B.E.E Beneficiary	3	0	97
Company Issuing shares	0	0	100
Financer	0	0	100

TABLE 5.1: Part 2 Question 1 Responses Table

This question was aimed at assessing the respondents’ perceptions of the duties of a director. From the responses submitted by respondents for this question, 97.2% agreed that directors should always strive to achieve what is in the best interests of the company. Only 2.8% disagreed with this statement. When considering just BEE Beneficiaries, 97% agreed with this statement and only 3% disagreed. Every respondent who would be part of the company issuing shares during a BEE transaction agreed with this statement as did all the financers.

2. In his/her decision-making process, a director should always consider what is in the best interests of the company as being what is in the best interests of the majority of the shareholders.

DISSAGREE: 36.1% UNDECIDED: 2.8% AGREE: 61.1%

This question was aimed at assessing how the respondents understood the best interests of the company. Of the respondents, 61% agreed that what is in the best interests of the company should always be considered as being in the best interests of the majority of shareholders. However, 36% disagreed and 2.8% were undecided. Of those who were undecided, one respondent commented that he was not sure of the meaning of the question as he found the question to be ambiguous. However, that respondent went on to comment “What is in the best interests of the majority shareholder is not always in the best

interests of the company. What is in the best interests of the company is in the best interests of the shareholders.” This comment means that this respondent agreed with this statement thus bringing the number of those agreeing with this statement to 63.9% of all respondents.

Another respondent commented that: “The success of the business is in the common interest of the shareholders and other stakeholders.” From those respondents who disagreed with this statement, one commented that “Shareholder activism illustrates discontent within the shareholders of the company so the interest of the shareholders might not be in line with the interest of the company.”

3. In his/her decision-making process, there are instances where a director can consider what is in the best interests of the company as being separate from what is in the best interests of the majority of shareholders.

DISSAGREE: 27.8% UNDECIDED: 0 AGREE: 72.2%

This question was aimed at assessing whether the respondents could distinguish between the best interests of the company and the interests of the shareholders as represented by the majority of the shareholders. Of the respondents, 72.2% agreed with this statement and with the comments exhibited that “Company interests should be treated separate from the interests of the shareholders as majority shareholders can change and their interests can be different”.

4. The best interests of the company should always be defined according to what is in the best interests of the majority of shareholders.

DISSAGREE: 58.3% UNDECIDED: 0 AGREE: 41.7%

This question was aimed at assessing what the respondents consider directors should take into account when attempting to identify what is in the best interests of the company. Should the directors perceive what was in the best interests of the shareholders, represented by the majority of shareholders as being what is in the best interests of the

company? Of all respondents, 58.3% disagreed with this statement and 41.7% agreed. One of the reasons put forward by those who agreed with this statement was that “the interests of the majority of shareholders might be detrimental to the company”. One of the respondents who agreed with this statement submitted that “the company should serve the interest of the shareholders”.

5.3 Questions 5–8

Questions 5-8 were aimed at assessing the influence that shareholders have on directors in general and how directors in general should consider BEE shareholders. The purpose was to assess whether the respondents view directors as agents acting on behalf of shareholders in general, and more particularly, the majority shareholders. In the event of the respondents agreeing that directors are there to serve the shareholders, these questions are aimed at evaluating how the respondents believe directors in general should treat BEE shareholders.

5. The best interests of the majority of shareholders should always be defined by what is in the best interests of the company.

DISSAGREE: 22.2% UNDECIDED: 5.6% AGREE: 72.2%

This question was aimed at evaluating whether the respondents view the best interests of the company to be in the best interests of the shareholders, and in particular the major shareholders. Of all respondents, 72.2% agreed that the majority of all shareholders should always be defined by what is in the best interests of the company. From the 22.2% who disagreed with this statement, one respondent commented that the best interests of the majority of shareholders should always be defined by what was in the best interests of the company, only if the best interests of the company were not in conflict with the interests of the majority of shareholders.

Another respondent who disagreed commented that majority shareholders always change; therefore their interests are also bound to continuously change. Another respondent cited that the interests of the majority shareholders might be to strip the company’s assets and

to sell them, which would not be in the interests of the company. From these comments one can deduce that the respondents who disagreed with this statement were mainly concerned with the fact that there could be differences between the two interests, but not necessarily that what was in the best interests of the company was indeed in the best interests of the shareholders.

The reasoning for this question was that even if the interests of the shareholder might differ from the interests of the company, which would mean the interests of the shareholders might be misguided, as whatever is in the best interests of the shareholder always means that is in the best interests of the shareholder. One respondent in support of the statement in this question commented that shareholders might not know what is in their best interests, the implication being that the shareholders' interests might be wrongly informed and if we are to assume that what is in the best interests of the company is indeed in the best interest of the company, that should automatically translate into the best interests of the shareholders.

6. In his/her decision-making process, a director should always strive to achieve what is in the best interests of the majority of shareholders.

DISSAGREE: 41.7% UNDECIDED: 5.6% AGREE: 52.8%

This question was aimed at assessing whether the respondents viewed directors to be there to serve the best interests of the company. Of the respondents, 52.8% agreed with this statement, with one respondent citing that democratically the majority rule, thus implying that the will of the majority of shareholders should prevail. One respondent commented that he agreed with this statement “as long as they focus on the mission of the company”, meaning his support was conditional upon the interest of the majority shareholders not being against the best interests of the company.

Of the respondents, 41.7% respondents disagreed with this statement. All of the respondents who cited reasons for disagreeing with this statement cited that directors should serve the best interests of the company. One of the respondents disagreed with this

statement on the grounds that directors are obliged by their fiduciary duty to serve the interests of the company. Another respondent who had agreed that directors should strive to achieve what was in the best interests of the company, disagreed with this statement and commented that shareholders and company interests should be treated differently. The implication of this statement was that a director that is serving the company does not mean that director is serving the interest of the majority shareholders.

Those who were undecided about this question totaled 5.6% of respondents. One respondent who was undecided commented that “the interest of the shareholders and those of the company might be different and to serve the interests of the majority shareholders might be to the detriment of the company”, thus disagreeing with the statement in this question.

7. In his/her decision-making process, a director should always strive to achieve what is in the best interests of the company, even if it is at the expense of minority shareholders.

DISSAGREE: 11.1%

UNDECIDED: 5.6%

AGREE: 83.3%

Of the respondents, 83.3% agreed with this statement, the prevailing sentiment being that the interests of the company should prevail. One respondent cited that this was to ensure that “the company remains on a good footing and financially sound”. Another respondent stated that: “If it has been voted so it should be implemented”, meaning that as long as that particular decision was a decision of the company and had been taken in accordance with proper procedure, that decision should be implemented. Another respondent commented that the interest of the company cannot be compromised for the benefit of the minority shareholders, as the existence of the minority shareholders depended upon the existence of the company. However one respondent, even though he agreed with the statement, advised that “some compromise should be reached”. No comments were submitted by the 11.1% who disagreed with this statement or the 5.6% who were undecided.

8. In the director's decision-making process, a director is compelled to always strive to achieve what is in the best interests of the majority of shareholders even if it is at the expense of the minority shareholders.

DISSAGREE: 50%

UNDECIDED: 8.3%

AGREE: 41.7%

This question was aimed at assessing whether the respondents could distinguish between the company and the shareholders, and whether they should serve one block of shareholder above another. The purpose was to establish whether, in the opinion of the respondents, the directors should look towards the best interests of the majority of shareholders when trying to determine the best interests of the company.

Regarding this question, 50% of the respondents disagreed that a director should strive to achieve what is in the best interests of the majority of shareholders, even if it is at the expense of the minority shareholders. The prevailing sentiment was that directors should serve the company. Another respondent who disagreed stated that what is in the best interests of the majority of shareholders might not be in the best interests of the company. One respondent who disagreed with this statement suggested that the motives of majority shareholders might be self-serving and cannot be accepted and implemented without being assessed first.

On this issue, 8.3% were undecided. Of the 41.7% who agreed, the prevailing sentiment was that they considered the will of the majority of shareholders to be representative of the prevailing view of the shareholders as a group. The implications of this comment are that directors serve the interests of the shareholders. For those respondents who had agreed that directors are to strive to achieve the best interests of the company but also agreed with this statement, the meaning of this is that these respondents perceive the best interests of the company to be informed by the best interests of the shareholders, and that the majority shareholders decide on what the best interests of the company are. One respondent who somewhat agreed with the statement in this question cautioned that the interests of the majority shareholders may be ethically questionable.

5.4 Questions 9–11

Questions 9-14 were aimed at understanding how the respondents perceive that BEE representative directors should discharge their duties as directors. These questions are aimed at establishing whether there is any difference between the duties of these directors.

9. In the decision-making process, a director of a company should consider, in addition to the interests of the majority of shareholders, the interests of BEE shareholders.

DISAGREE: 19.4%

UNDECIDED: 8.3%

AGREE: 72.2%

This question was aimed at assessing what the respondents believed directors should take into consideration in their decision-making process while executing their duties as directors. This was done by splitting the interests of shareholders into the interests of the majority shareholders and those of the minority shareholders. It transpired that 72.2% of the respondents agreed that directors should consider not just the interests of the majority shareholders, but the interests of the BEE shareholders as well.

The prevailing sentiment of those who agreed with this statement was that directors cannot limit their consideration to the interests of the majority shareholders, but should consider other factors including the interests of the BEE shareholders. One respondent who agreed commented that directors should strive to strike a balance between the legal obligations imposed on them and ethical considerations.

Another respondent who agreed with this statement commented that this approach would help to ensure that there will be maximum support for the company by the shareholders. Another argument submitted by a respondent was that to consider something does not mean one has to follow it.

One respondent of the 8.3%, who were undecided on this question, commented that democratically a director should prioritise the interests of the majority, but should not ignore the minority shareholders. One can assume from this comment that the consideration of the interests of shareholders should be on a democratic basis, with the interests of the majority enjoying priority, but without the interests of the minority being ignored.

While 19.4% of the respondents disagreed with this statement, one respondent commented that directors should only be concerned about the interests of the company and consequently there is no need to consider the interests of the shareholders.

10. In his/her decision-making process, a director should accommodate the interests of minority BEE shareholders only to the extent that they are not in conflict with the interests of the majority of shareholders.

DISAGREE: 55.6%

UNDECIDED: 2.8%

AGREE: 41.6%

Of the respondents, 55.6% disagreed with this, and one respondent commented that the interests of the BEE shareholders should always be taken into account, save when it is in conflict with the interests of the company. Another respondent commented that directors should only be concerned with the interests of the company. Another respondent, who is a director, commented that this would be an unfair and unbalanced practice.

Another respondent who disagreed with this statement commented; “Majority decisions are not always in the best interests of the company and in most cases they are concerned with the profits and dividends even if the future of the company is prejudiced. At the same time BEE shareholders are normally concerned with the future of the Company because in most cases they do not receive dividends for a considerable period depending on the model of financing the deal. The initial payments go to servicing the debt in the financing model and hence, they always look forward to the future of the Company when they will be able to reap from the profits as well.”

Of the 41.6% of respondents who agreed with this statement, the prevailing sentiment was that the interest of the majority should prevail. One respondent agreed that the interests of BEE shareholders should be considered, but the interests of the majority should always prevail.

11. When making decisions as a director of a company, directors representing BEE shareholders should prioritise in favour of BEE interests.

Questions 11.1-11.3 were aimed at assessing whether it was the belief that a director representing BEE shareholders should prioritise interests within a company differently in light of the fact that this director was appointed as a representative director.

11.1. The interests of the majority of shareholders first, then the interests of BEE shareholders.

DISAGREE: 66.7%

UNDECIDED: 13.9%

AGREE: 19.5%

	DISAGREE %	UNDECIDED %	AGREE %
All Responses	66.7	13.9	19.5
B.E.E Beneficiary	68.9	13.8	17.2
Company Issuing shares	80	20	0
Financer	0	0	100

TABLE 5.2: Part 2 Question 11.1 Responses Table

Some of the 66.7% of respondents who disagreed with this statement believed that BEE representative directors should not prioritise either the interests of the majority shareholder, nor the interests of BEE shareholders, but rather the interests of the company. Another respondent commented that all directors should be concerned with the best interests of the company as a whole and not just a segment of the company. One respondent disagreed on the grounds that these directors should prioritise the best interests of the company and then the interests of the shareholder they represent. One respondent disagreed on the basis that these directors should be loyal to their principal. Of the BEE Beneficiary respondents, 68.9% disagreed with the statement and only 17.2%

agreed. None of the respondents representing Companies Issuing shares agreed with this statement and 80% of these respondents disagreed with the statement. The only majority in favour of this statement were Financers.

11.2 *The interests of the majority of shareholders and the interests of the BEE shareholders are to be given equal priority.*

	DISAGREE %	UNDECIDED %	AGREE %
All Responses	36.1	13.9	50
B.E.E Beneficiary	45	14	41
Company Issuing shares	0	0	100
Financer	50	0	50

TABLE 5.3: Part 2 Question 11.2 Responses Table

Overall, the respondents were divided on this question, and only 50% agreed that the interests of the majority shareholders and the BEE shareholders should be given equal priority. Even from the BEE Beneficiaries there was no clear majority on this question. Only respondents that represented companies issuing shares were unanimous, as all of these respondents agreed with this statement.

11.3 *The interests of the BEE shareholder should get priority and then the interests of the majority of shareholders.*

	DISAGREE %	UNDECIDED %	AGREE %
All Responses	75	5.6	19.5
B.E.E Beneficiary	68	10.3	24.1
Company Issuing shares	100	0	0
Financer	100	0	0

TABLE 5.4: Part 2 Question 11.3 Responses Table

Overall, 75% of respondents believe that the interests of BEE shareholders should not be prioritised before those of majority shareholders. Amongst BEE Beneficiaries who participated, 68% disagreed with this statement and only 24.1% of these respondents agreed. These findings were surprising, as one would expect that BEE Beneficiaries

would be more inclined to agree with this statement. Some BEE Beneficiary respondents commented that the interests of the company should be a priority. Some respondents disagreed on the grounds that the interests of the majority shareholders cannot be ignored. Respondents from Companies Issuing shares were unanimously opposed to this statement, probably for the reason that this statement excludes their interest.

When one considered the responses by BEE Beneficiaries from the questions listed under question 11, one noticed that the majority disagreed with the statement that majority shareholders should be prioritised, and 68% disagreed that BEE shareholder interest should be prioritised. There was also no clear majority on the question of both BEE Shareholder interests and majority shareholder interest being afforded equal priority. This suggests that BEE Beneficiaries do not support any approach that suggests prioritising shareholders. Given that an overwhelming 97% agreed that directors should strive to bring about the best interests of the company, this indicates that BEE Beneficiaries are more in favour of BEE representative directors prioritising the interests of the company in their decision making process.

5.5 Questions 12–19

These questions were aimed at understanding the respondent’s perception of the relationship between the BEE representative director and the BEE Shareholder they represent. These questions were aimed at establishing the authority that the BEE Shareholder has over these directors to establish how autonomous are these directors.

12. In the event of a director serving as a representative of a BEE Shareholder group, that director should specifically limit his/her responsibility to the best interests of the B.E.E Shareholder s/he represents.

	DISAGREE %	UNDECIDED %	AGREE %
All Responses	61.1	2.8	36.1
B.E.E Beneficiary	62	20	34
Company Issuing shares	60	0	20
Financer	50	0	50

TABLE 5.5: Part 2 Question 12 Responses Table

The responses on this question supported the observations made above regarding BEE Beneficiaries supporting the notion of the best interest of the company being prioritised as 62% disagreed that BEE representative directors should not just limit their responsibility to the best interest of the BEE Shareholder they represent. None of the respondent groups as listed above agreed with this statement.

13. A director who is a representative of a BEE Shareholder should prioritise decisions in terms of what is in the best interest of the company, even if that, is in conflict with the best interest of the BEE Shareholders that he/she represents.

	DISAGREE %	UNDECIDED %	AGREE %
All Responses	44.4	11.2	44.4
B.E.E Beneficiary	51	13.8	34.5
Company Issuing shares	20	0	80
Financer	0	0	100

TABLE 5.6: Part 2 Question 13 Responses Table

This statement was only supported by respondents that represented Companies Issuing Shares and Financers as they agree with this statement by 80% and 100% respectively. When all of the responses were considered, there was an equal amount of respondents that agreed with this statement and those that disagreed. Since these were both 44.4% and 11.2% being undecided, one cannot make a reach any overall conclusion on this question. When considering just the BEE Beneficiary respondents, they disagreed with this statement by a slight majority of 1%. As they had agreed by an overwhelming majority that directors should strive to achieve the best interest of the company it appeared a slight majority believed that B.E.E shareholders should strive to achieve the best interest of the company save for when the interest of the company conflicts with the best interest of the BEE shareholder they represent.

14. The BEE Shareholder should be entitled to instruct a director who is their representative on how to discharge their duties as a director or how to vote on a particular issue

	DISAGREE %	UNDECIDED %	AGREE %
All Responses	44.4	2.8	52.8
B.E.E Beneficiary	45	3	52
Company Issuing shares	20	0	80
Financer	100	0	0

TABLE 5.7: Part 2 Question 14 Responses Table

Overall the respondents agreed that a BEE shareholder should be entitled to instruct a director that is their representative on how to discharge their duties and how to vote on a particular issue. 45% of BEE Beneficiaries disagreed with this statement whereas 3% was undecided thus meaning this statement was supported by a slight majority of 2%. The prevailing sentiment from those BEE Beneficiaries that disagreed with this statement was that a directors have to be given enough room to exercise their free discretion when making decisions.

Even 80% of all Companies Issuing shares agreed with this statement with one respondent commenting that “provided that the company had provided for this. Financers were unanimous in their opposition to this statement. Those that supported this statement commented that such a director was appointed by the BEE shareholder and thus represents and accounts to the BEE shareholder. The implication was that this director is an agent of the BEE shareholder. One respondent that was undecided on this statement commented that they agreed with these directors being told how to vote but not the other aspects of discharging their duties.

15. A director who is a representative of a BEE Shareholder should only consider the best interest of the company to the extent that what is in the best interest of the company is not in conflict with the best interest of the BEE Shareholders that he/she represents.

	DISAGREE %	UNDECIDED %	AGREE %
All Responses	47.2	8.3	44.5
B.E.E Beneficiary	48.3	10.3	41.4
Company Issuing shares	40	0	60
Financer	50	0	50

TABLE 5.8: Part 2 Question 15 Responses Table

This question was aimed at evaluating the stand point of the respondents in the event of the respondents being inclined towards BEE Representative Directors prioritizing the best interest of the BEE shareholder they represent. Should these directors consider the interest of the company only when that company interest is not against the interest of the BEE shareholder? This statement in this question is to some extent the opposite of the statement under question 13 so also serves to verify the stand point of the respondents on how BEE representative directors should consider the best interest of the company.

Like in question 13, for this question overall the respondents failed to register a majority. The respondents were divided with 47.2% disagreeing and 44.5% agreeing. The B.E.E Beneficiaries also failed to register a majority as 48.3% and 41.4% agreed as opposed to the 51% disagreeing with this statement. One respondent that agreed with this statement cited that there would not be a conflict if the interest of the company catered for the interest of the BEE shareholder. Another respondent also in support also commented that the interest of the company should be collective and include everyone.

The statement only received majority support with the respondents that represented Companies Issuing shares who agree with 60% agreeing and 40% of the respondents disagreeing. Financers were also divided on this question. Question 13 and 15 read

together suggest that the respondents do not support any that suggests that BEE representative directors should prioritise the interest of the BEE shareholder or that of the company suggesting that a balance should be reached. One respondent that was undecided commented that “this is a catch 22 situation” with the law prescribing that the director should prioritise the interest of the company but the BEE shareholder reserves the right to replace the director.

16. A director who is a representative of a BEE Shareholder should exclusively account to the BEE shareholder that had appointed that director as its representative

DISSAGREE: 58.3%

UNDECIDED

AGREE: 41.7%

58.3% of the respondents disagreed with this statement whereas 41.7% agreed. From those respondents that disagreed with the statement one suggested that to limit these directors in this way was too restrictive for a director. From those that supported the statement, the prevailing sentiment was that these directors are accountable to the BEE shareholder that appointed them. One respondent that somewhat agree cited that these directors should also be accountable to the company.

17. The BEE Shareholder who appoints a director to represent it should be entitled to replace that representative director in the event of that director failing to give preference to the interests of that BEE shareholder.

	DISAGREE %	UNDECIDED %	AGREE %
All Responses	38.9	2.8	58.3
B.E.E Beneficiary	30	0	63
Company Issuing shares	40	20	40
Financer	0	0	100

TABLE 5.9: Part 2 Question 17 Responses Table

58.3% of all respondents agreed that the BEE shareholders should be entitled to replace a representative director should that director not giving preference to the interest of the BEE shareholder. 63% of BEE Beneficiaries agreed with this statement. The respondents representing the Company Issuing Shares were divided on this issue as there was a 40% in favour and against the statement with 20% being undecided.

18. A director who is a representative of a BEE Shareholder and who fails to prioritise the best interest of the BEE Shareholder, should be replaced by the BEE Shareholder unless s/he can show that the decision was in the best interest of the company?

	DISAGREE %	UNDECIDED %	AGREE %
All Responses	13.9	13.9	72.2
B.E.E Beneficiary	17.2	14	69
Company Issuing shares	0	0	100
Financer	50	0	50

TABLE 5.10: Part 2 Question 18 Responses Table

72.2% of all respondents agreed with this statement and 69% of BEE Beneficiaries also agreed. The responses of the respondents to this question show that the respondents do support that the best interest of the company should be considered by these directors and have not been able to reach an agreement on how BEE directors should prioritise between the interests of the company and the interests of the BEE shareholders. However they seemed to appreciate that the BEE has the right to replace these directors should they not prioritise the interests of the BEE shareholders with the only exception being when they fail to prioritise the interests of the BEE shareholders on the grounds that it was in the best interest of the company. This shows that the respondents accepted that the BEE shareholder should be entitled to replace these directors but they do not exactly support the practice.

19. To whom do you believe a director who is a representative of a BEE shareholder is accountable?

	COMPANY %	BEE SHAREHOLDER %	MAJORITY SHAREHOLDER %
All Responses	25	61.1	13.9
B.E.E Beneficiary	14	69	17
Company Issuing shares	60	40	0
Financer	100	0	0

TABLE 5.11: Part 2 Question 19 Responses Table

Overall the respondents believed that the BEE shareholder is accountable to the BEE shareholder they represent. 69% of BEE Beneficiaries also agreed. Even though 60% of the representatives of the representatives of Companies Issuing shares believe that these directors are accountable to the company whereas 40% of these representatives believed that these directors are accountable to the BEE shareholder they represent.

5.6 CONCLUSION

This chapter reflected a discussion on the responses that were given by the respondents. The findings were presented in groups based on how the respondent would be classified in a BEE transaction. The findings revealed that the respondents were consistent on the supremacy of the best interest of the company. The respondents believed the best interest of the company prevailed above the interests of all shareholders. The majority of the respondents supported that BEE shareholder should enjoy authority over BEE representatives directors including the right to dictate to that director how that director should discharge their duties and vote on issues and also the authority to replace these directors. However the respondents believed that the authority of the B.E.E shareholder over the BEE representative directors should not be at the expense of the interest of the company. Chapter Six deals with the investigator’s conclusions from the findings of the data analysed in this chapter.

CHAPTER SIX

RECOMMENDATIONS AND CONCLUSION

6.1 Introduction

The problem statement of this study was primarily to identify the duties of directors within the context of BEE and determine the sentiments of the stakeholders to a BEE transaction. These findings would be used to identify if there were any disparities between what is prescribed by law and the expectations of the relevant stakeholders in a BEE transaction. The enquiry was whether a director appointed by a BEE shareholder discharges his obligations to the company independently from the interests of the BEE shareholder who had appointed him?

This problem statement was addressed by means of formulating research objectives which reflected the desired outcomes of this study. These research objectives were the foundations upon which this study was based and went on to inform every aspect of this study.

Each research objective has been addressed separately even though they might overlap on some aspects. The findings of each research objective were addressed by considering the findings of the literature review and then the findings of the data analysed. The findings of the literature review outlined the standard of conduct to be observed by directors in the performance of their duties. The findings of the data analysed reflected the understanding of the respondents of these duties of directors. From the findings of this study, recommendations were formulated which can assist with future studies.

6.2 Research Objective One

6.2.1 *Research Objective and Question*

The first objective of this research study was to define the duties and responsibilities of directors of a company according to South African laws and policies. The purpose of this

objective was to set a standard which would be used to measure people's understanding of these duties.

6.2.2 Conclusion on literature review

A company was described as a juristic person, which in turn was described as a body or association other than a natural person having a capacity to have rights and duties apart from its members. Since companies are not natural persons and cannot talk, listen or act in their own behalf, companies have natural persons performing certain acts on their behalf.

Companies have people who perform various functions on their behalf, and these people form part of the different components of a company. One of those components is the company's board of directors. In addition to performing functions within the company, the board of directors performs external functions in representing the company when the company interacts with third parties.

The management of the company is the function of the board of directors. South African Common Law imposes a fiduciary duty upon all company directors. The fiduciary duty comprises the duty to act in the best interests of the company at all times and to exercise reasonable care and skill in the performance of duties. The duty to act in the best interests of the company involves directors prioritising the best interests of the company at all times. These duties are owed to the company as a separate juristic person, separate from its shareholders.

This fiduciary duty has been partially codified in various provisions of the Companies Act of 2008. An example of this is Section 76(3) (b) of this Act which states that directors must act in good faith and in the best interests of the company. Section 75 deals with director conflict of interests in the form of personal financial interests. Section 76 deals with the standard of director's conduct.

In light of the above, directors are legally obliged to comply with the law and act in the best interest of the company at all times without pandering any other interest.

6.2.3 Conclusion on findings of Objective One

The study revealed that a total of 97% of the respondents agreed that directors should always strive to achieve what is in the best interests of the company. Only 3% of the respondents disagreed with this statement, but no explanation was submitted why they disagreed with this statement. Overall, the sentiment of the respondents regarding this statement was in line with the prescribed duties of directors that they should act in good faith and in the best interests of the company. The majority of the respondents in this study agreed that there was a difference between the best interests of the company and the best interests of the majority shareholders. A total of 58.3% of the respondents to this research study disagreed with the notion that the best interests of the company should always be defined according to the best interests of the majority of shareholders. The fact that almost 42% of the respondents agreed showed a significant disparity and recommendations for addressing this have been included in the recommendations below.

6.3 Research Objective Two

6.3.1 Research Objective and Question

The second objective was to establish the expectations of investor shareholders in general as to how directors who are representatives of BEE shareholders should perform their duties to the company. The first question to consider was whether people in business perceived directors to serve the interests of shareholders and indirectly the interests of the majority shareholders. The second enquiry was whether the same applied to directors who are representatives of BEE shareholders.

6.3.2 Conclusion on literature review

In *Daddoo v. Krugersdorp Municipal Council*, the court held that a legal company is a legal persona distinct from its shareholders. In the case of *Solomon v. Solomon and Co Ltd* the courts recognised that a company was a separate juristic person to its members to

the extent that a company is capable of entering into contracts with its members in their personal capacity.

Various approaches have been submitted as to what directors should take into account when discharging their duties to the company. These include the shareholder approach, the stakeholder approach, the enlightened shareholder approach and the stakeholder-inclusive approach.

Merely controlling a majority shareholding in a company does not entitle a shareholder to unilaterally decide company policy. The requirements as prescribed by the Act must be met first, and such variation must be done following proper procedures. In the absence of resolutions being passed to this effect and internal company procedures being followed, directors are not compelled to consider the best interests of the majority of shareholders as being the best interests of the company. Even when a shareholder does meet the required quota to vary the company's policy, directors are still compelled to consider what is in the best interests of the company and should not just limit their view to the wishes of the shareholders as reflected by resolutions passed by the majority of shareholders.

An alternative approach is the stakeholder approach. In this approach, the directors treat the shareholders as one of the stakeholders who need to be considered in decision making. The King III Report promotes an approach which it refers to as the "stakeholder inclusive approach" which considers, weighs and promotes the interests of all the company's stakeholders, thus ensuring the cooperation of all stakeholders the company depends on for its sustainable success. The King Report recommends that the board's paramount responsibility is the positive performance of the company in creating value. In doing so, it should appropriately consider the legitimate interests and expectations of all its stakeholders.

From the above, it is clear that directors should consider the interests of shareholders when they discharge their duties to the company. As to what other factors directors

should take into account when making decisions, there is no prescribed formula. Given that the JSE recognises the King Report and its recommendations for listed companies, the stakeholder inclusive approach might be the best option, especially for directors of listed companies as this approach instills confidence that the company is managed in a responsible manner that is not just driven by profits but is also sensitive to the impact it has in society.

In *PPWAWU National Provident Fund v. Chemical Energy Paper Printing, Wood and Allied Workers Union* 2008 (2) SA 351 (W) the court held that a director is not a servant or an agent of a shareholder who votes for or otherwise procures his appointment to the board. In the *Fisheries Development Corporation of SA Ltd v. Jurgensen* case the courts recognised the right of a nominee director to observe the wishes of his nominator as long as they agreed with the interests of the company.

In the Australian case *Harlowe's Nominees (PTY) Ltd v. Woodside (Lake Entrance) Oil Company* it was held that would be a serious mistake to lay down narrow lines within which the concept of a company's interests must necessarily fall. Directors have some discretion to determine where the interests of the Company lie and how they may be served may involve a wide range of practical considerations.

6.3.3 Conclusion on findings of the Objective Two

The majority of respondents in this study felt that the interests of the majority of shareholders did not inform the interests of the company. The respondents agreed by a slight majority of 2.8% that directors should strive to achieve the best interests of the majority of shareholders. This might signal a lack of knowledge on the part of the respondents of how companies function, and suggests that the majority shareholders might by virtue of being majority shareholders dictate to the directors how the directors should discharge their duties. Another possibility might be that even though the respondents understand the difference between the interests of the company and the interests of the majority shareholders, some respondents might consider that the directors cannot divorce themselves from the will of the majority shareholders and must implement

the will of the majority, who could have a direct bearing on whether those directors should retain their positions as a directors or not.

A total of 83% of respondents agreed that the directors should aim to achieve the best interests of the company even at the expense of the minority shareholders. However, the respondents failed to agree by any majority as to whether directors should strive to achieve the best interests of the majority shareholders even if at the expense of the minority shareholders, with the highest percentage registered being 50% disagreeing with this view.

What this showed was that the respondents were not opposed to directors striving to achieve the best interests of the majority of shareholders, but no conclusive support could be gained that this should be done at the expense of the minority shareholders. Even though it might be fine to strive to realise the best interests of the company at the expense of the minority shareholders, the minority shareholders should not be subjected to the interests of the majority shareholders.

6.4 Research Objective Three

6.4.1 Research Objective and Question

This objective aimed to establish the expectations of BEE shareholders as to how directors who are their representatives should perform their duties to the company. The questions focusing on this objective were aimed at establishing whether the respondents considered BEE representative directors there to serve the interests of the BEE shareholders that they represent?

6.4.2 Conclusion on Literature Review

Section 7 of the Companies Act states that the purpose of this Act is to promote compliance with the Bill of Rights provided for in the Constitution. Section 217 of the Constitution enables the legislature to enact any laws and policies that will bring about and enforce the objectives of the constitution. One of the rights enshrined in the constitution is the right to equality. BEE is one of the means employed by government to

bring about equality by redressing the imbalances of the past. According to the above, the implication is that a director should also take into account broader societal considerations such as BEE when defining what would be in the best interests of the company.

BEE can be considered to be a constitutional imperative as the constitution provides that everyone is equal before the law. To bring about such equity legislature, other measures can be employed to promote or to advance persons or categories of persons disadvantaged by unfair discrimination. The fact that a BEE representative director might be a member of the BEE group they represent does not render that director's consideration of the interests of the BEE shareholders they represent inappropriate. The courts have previously held that a decision of a director which also serves his interests as a shareholder is not necessarily reviewable unless it was at the expense of the company or the other shareholders. A decision of the directors made in the best interests of the company and also agreeable to their wishes would not be open for review by courts. If a company has a bad BEE transformation record and BEE is a priority for that company, the skilling of the members of the BEE shareholder group and affirmative action appointment might be what is in the best interest of the company and should be prioritised. The reasoning behind this is that whatever is in the best interest of the company will translate into the best interest of the shareholders.

6.4.3 Conclusion of findings of Objective Three

A total of 66% of the respondents believed that the interests of the majority shareholders should be prioritised before the interests of the BEE shareholders, and 75% disagreed with the proposition that the interests of the BEE shareholders should be prioritised before the interests of the majority shareholder. No majority view could be reached by the respondents on whether a balance should be reached, and both the interests of BEE shareholders and majority shareholders given equal priority. When one considered the findings of Objective One above it was clear that the respondents supported that directors should strive to achieve what was in the best interest of the company and to prioritise that interest above all other interests. From the findings of Objective Three it is clear that the issue of how the different interests of the groupings within the company should be

prioritized when attempting to determine what is in the best interest of the company is a cause of conflict as the respondents differed. The lack of uniformity in this regard indicates lack of understanding from the participants as to the obligations imposed on directors. Recommendations of how to address this issue have been included below.

6.5 Research Objective Four

6.5.1 Research Objective and Question

This objective was aimed at establishing the nature of the relationship between BEE shareholders and the directors who represent them. The question arising from this objective is whether BEE representative directors are merely representatives of the BEE shareholders they represent, and only there to advance the interests of the BEE shareholders they represent.

6.5.2 Conclusion on Literature Review

When a BEE representative director interacts with the BEE shareholders who nominated him/her, one has to consider the relationship between that representative director and the shareholders. The BEE shareholder who appointed that nominee director to the board can be viewed in one of two ways; either as an individual shareholder of the company or a stakeholder. If viewed as a shareholder, that group is nothing more than any other individual shareholder of the company, and according to law that single shareholder, outside the ambit of the shareholders as a group, is a stranger to the board, a third party who should be dealt with as any other third party approaching the company. The same applies to the nominee director and that director in his capacity as a director should treat the BEE shareholder as a third party, or alternatively should treat that shareholder as a stakeholder.

The King Report states that any director, who is appointed to the board as the representative of a party with substantial interests in the company, has a duty to act in the best interests of the company. The board's paramount responsibility is the positive performance of the company in creating value. In doing so, it should appropriately consider the legitimate interests and expectations of all its stakeholders.

At all times a director is to consider the affairs of the company in an objective manner and to exercise his discretion in an unfettered manner. A director cannot contract to act in a certain manner or to vote in certain way. An attempt by a director to enter into such a contract amounts to a breach of that director's fiduciary duties to the company. Even upon the director entering into such a contract, such a contract would not be enforceable against that director as it is contrary to public policy. This is prohibited by law as that would amount to interfering with that director's ability to exercise his unfettered discretion in the performance of his/her duties as a director.

Courts have recognised the right of a nominee director to observe the wishes of his nominator as long as it accords with the interests of the company. That director is in law obliged to serve the interests of the company to the exclusion of the interests of any such nominator, employer or principle.

In *PPWAWU National Provident Fund v. Chemical Energy Paper Printing, Wood and Allied Workers Union* 2008 (2) SA 351 (W) the court held that a director who is a nominee director is in law obliged to serve the interests of the company to the exclusion of the interests of any such nominator, employer or principal. It would be unlawful to threaten directors with a sanction should they fail to implement the wishes of the member who appointed them, as this would amount to interfering with the right of directors to exercise unfettered discretion and discharge their fiduciary duty to the company

In the event of a director being compelled to carry out an order of the group they represent or face some sanction, there is a possibility of that director having a material financial interest as envisaged by Section 75 of the Companies Act. The possibility that the said director could stand to be removed from his/her position as a representative director, or be suspended as a member of the group they represent or be subjected to any sanction might have an impact on that director's financial interests. That director would have a material financial interests on the matter, and, according to the Companies Act, he/she should disclose the said material financial interests to the company and not

participate in the decision making-process of the matter they have material financial interests, save for when they have been furnished with the necessary consent of the company in accordance with the recommendations of the Act. Any director who fails to disclose these material financial interests and participates in the decision-making process could be personally liable of for any damages that might be suffered by the company.

6.5.3 Conclusion on findings of Objective Four

A total of 61.1% of respondents disagreed with the suggestion that BEE representative directors should limit their responsibility to the interests of the BEE shareholders. The respondents could not register any majority on whether the BEE representative director should prioritise the interests of the company before the interests of the BEE shareholders they represent. A total of 52.8% of respondents agreed that BEE shareholders should be entitled to instruct a director who is their representative on how to discharge their duties as a director or how to vote on a particular issue. The respondents failed to register a majority when asked whether directors should prioritise the best interests of the company only to the extent that it was not in conflict with the best interests of the BEE shareholders they represent.

A total of 58% agreed that a BEE shareholder should be entitled to replace a director who represents that shareholder, but agreed by a bigger majority of 72.2% that such a director should not be replaced by the BEE shareholder they represent if they can show that their failure to prioritise that shareholder's interests was in the best interests of the company. Again the respondents were consistent on the notion that the best interests of the company should be prioritised. However the fact that the respondents believed that the BEE shareholder is entitled to instruct their representative director on how to discharge their duties is also a cause for concern and recommendations in this regard have been listed below.

6.6 Research Objective Five

6.6.1 Research Objective and Conclusion

This objective aimed to formulate corporate governance practices and policies and the standards to be observed by a director who is a representative of a BEE shareholder in the performance of his duties to the company. The primary question to establish is whether BEE representative directors are accountable to the company and other shareholders.

6.6.2 Conclusion on Literature Review

The review of the literature revealed that our laws and policies prescribe the following corporate governance practices and policies applicable to BEE representative directors:

Every director of a company, as part of the company's board of directors, is part of a crucial component of a company. Directors undertake the management of the company and act on behalf of the company in dealings with external third parties to the company. These functions are performed on behalf of the company. Decisions taken by the board of directors are considered to be decisions of the company.

South African laws impose certain duties on directors by virtue of their being directors of a company for the purpose of ensuring that these directors discharge their duties to the company accordingly. A shareholder, creditor or stakeholder with substantial interests in the company may commonly have the right to appoint directors to the board of a company. In the case of BEE, BEE shareholders are sometimes given the right to appoint directors to the board, and these directors are considered to be representative of the BEE shareholder to the board of the company.

These BEE representative directors are directors like any other directors of the company. Like any other director they are subjected to the same principles and standards. They owe a fiduciary duty to the company to always act in the best interests of the company. They are obliged to prioritise the interests of the company above all other interests, including those of the majority shareholder and the BEE shareholder who appointed them.

What they should take into account when they are attempting to establish the best interests of the company is dependent upon company policy, and in the absence of any clear company prescriptions in this regard such a decision becomes a matter of personal orientation. When discharging their duties to the company, these directors like any other director, are at liberty to elect the approach they believe is in the best interests of the company.

They can take into account the interest of all the relevant stakeholders they believe have a bearing on the long-term sustainability of the company. The emphasis they place on the consideration of the interests of a particular stakeholder or shareholder is also a matter of personal orientation as long as at all times they act in a manner they bona fide believe is in the best interests of the company.

The fact that some of these BEE representative directors can be members of the BEE shareholder group does not render every decision that these directors make to benefit the BEE shareholder they represent automatically reviewable. Such decisions are only reviewable in the event of that director's decision benefitting the BEE shareholder they represent at the expense of the other shareholders.

BEE representative directors are not obliged by law to account to the BEE shareholder who appointed them. Any obligations on the BEE representative director to account to the BEE shareholder would be self-imposed by the director or a contractual obligation. Any such obligation would be enforceable only to the extent that it does not contravene any applicable laws.

The Companies Act of 2008 stipulates that any information that the director learns by virtue of him being a director should only be used for the benefit of the company and should not be shared with third parties. Even though the BEE shareholder is a member of the company, such information that the director has learned can only be shared with the BEE shareholder in a manner that is consistent with how information is shared by the board with other shareholders or any other party.

BEE shareholders are not allowed to dictate to the director who represents them how that director should discharge his duties and how to vote, as directors are required to exercise their unfettered discretion to bring about the best interests of the company. A BEE representative director can consult and note the opinions of the BEE shareholder on a particular as a matter of reference but only in a manner that is in accordance with the law and company policy. Any attempt by representative directors to bind themselves into being compelled to vote or exercise their duties in a particular way amounts to a breach of those directors' fiduciary duties. Such agreements are not enforceable by law because to do so would amount to compelling those directors to breach their fiduciary duties to the company and not to exercise their unfettered discretion.

In the event of a BEE representative director being instructed how to perform his/her duties to the company by the BEE shareholders, with a possibility of some sanction being imposed upon the director should he/she fail to comply with that instruction, that director has conflict of interests at that point. If the sanction that might be imposed on that director is likened to a BEE representative director being replaced as director, that director would have personal financial interests in that matter which should be acted upon. He/she would stand to lose financially should he/she be replaced, and according to the Companies Act that director should declare those personal financial interests to the board and follow the recommendations of the board on any future participation on that issue.

BEE shareholders are not allowed to interfere with the manner in which the BEE representative director they appointed performs his/her duties as a director. BEE representative directors are not agents of the BEE shareholder who appointed them to the company's board. These directors are only representatives of the BEE shareholder in the form of representing the ideology and perspective of the members of that BEE shareholder group and not are there to act on behalf of that BEE shareholder. When the BEE shareholder is afforded the right to appoint a director to the board, that shareholder is afforded the right to appoint a director they believe can identify with their needs and

would be more inclined to bring about the objectives that BEE shareholder is aiming to achieve. BEE shareholders should exercise better care when appointing representative directors in order to avoid complications.

6.6.3 Conclusion on Findings of Objective Five

A total of 58.3% of the respondents disagreed with the suggestion that BEE directors should exclusively account to the BEE shareholder they represent. This showed that the respondents were consistent on the point that directors, including BEE representative directors, should prioritise the best interests of the company at all times even though a slight majority agreed that BEE shareholders should be able to dictate to their representative directors on how they must discharge their duties. However, 61% of the respondents believed that a BEE director is accountable to the BEE shareholders. This notion was also shared by 40% of the respondents representing Companies Issuing shares.

From the above, a clear disparity can be identified as a majority of the respondents believed that unlike other directors, BEE representative directors are accountable to the BEE shareholder they represent and that BEE shareholder is entitled to instruct how that BEE representative director should discharge his duties as a director. These are inconsistent with the prescriptions of law and recommendations have been made below as to how to address this issue.

6.7 Recommendations

The following recommendations were reached based on the outcomes of this research study:

1. Companies need to develop a culture of stakeholder participation as a norm when dealing with BEE. In circumstances whereby a company stakeholder becomes a shareholder like in the case of the Bizana community and Transun (Pty) Ltd, community participation would allow the company to address the problems revealed by this study. It would

allow the stakeholder a platform to address issues directly with the company and not isolate the BEE representative director. This practice would also allow the company to continuously monitor prevailing sentiments within that stakeholder. The most important consequence would be that the stakeholder would be part of the decision making process and would understand why a particular decision was taken as opposed to focusing on the BEE representative director.

2. Companies need to invest in skills development of their directors. This would assist those directors that are not fully informed of their duties to the company. Also this would assist BEE representative directors to fully understand the nature of their duties to the company and how to best deal with conflicts that might arise.
3. There might be a need for the development of a regulated director accreditation system. Currently there is no director accreditation system that is regulated, uniform and applicable nationally. The study revealed that some directors were not informed of their duties. The concern is that currently there are no requirements or any qualifications that are required in order for a person to qualify as a director. The Companies Act only prescribes in a broad sense that a person must have the necessary skills to perform their duties as a director;
4. When concluding a BEE transaction, companies should consider sponsoring consultants or legal advisors to advise the potential BEE shareholder on the prescriptions of the law and what the transaction they are about to enter into entails. Agreements should be used to address the problems that arise, or have the potential of arising, after the agreement has been concluded. These can include an undertaking by the BEE shareholder not to interfere with the representative director's ability to perform his/her duties. Another example would for the appointment of the

BEE representative director being for fixed periods and replacement of directors being subject to approval by the board of directors of the company.

6.8 Limitation of the Study

One of the limitations of the study was that due to the constraints, the sampling method utilised was accidental or availability sampling. The first limitation was that the sample was not reflective of the population of directors and shareholders in business in South Africa, and making generalising the findings of this study impossible.

6.9 Recommendation for Future Studies

This study revealed that some directors were not well-informed of the duties and obligations imposed upon them by law. The extent of the problem was not clear from this study, but what was clear was that this problem did exist. A further study in this regard should be commissioned to better understand the problem and hopefully recommendations can be made as to how to best address it.

Given the limitations of this study, a further study on a better representative sample should be conducted. Hopefully that would lead to a better understanding of the nature and extent of the problem regarding the Autonomy of directors that represent BEE shareholders. A better understanding would be used to assist for better remedial initiatives to be undertaken.

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Appendix 1 Questionnaire

UNIVERSITY OF KWAZULU-NATAL GRADUATE SCHOOL OF BUSINESS

MBA Research Project

Researcher: Sibusiso Ntshebe 0312018968

Supervisor: Alec Bozas 082 33 444 77

The Autonomy of Directors of Black Economic Empowerment Companies

The purpose of this survey is to solicit information from company investors, company directors and other stakeholders regarding their expectations and understanding as to the nature and extent of the duties imposed on directors that are representatives of B.E.E. shareholders that are minority shareholders. The information and ratings you provide us will go a long way in helping us better understand South Africa's corporate governance standards. The questionnaire should only take you about 30 minutes to complete. In this questionnaire, you are asked to indicate what is true for you, so there are no "right" or "wrong" answers to any question. If you wish to make a comment please write it directly on the booklet itself. Please do not omit any questions. Thank you for participating.

Please mark your choice by an "X"

PART 1: Background Information

1. Your age-group is < 21 22 - 32 33 - 43 44 - 54 55+ years.
2. Are you male _____ or female_____?
3. Race African White Indian Coloured Other Specify _____
4. What is your highest academic/professional qualification? Below Matric Matric PostMatric Cert Degree PGDegree/Diploma Other, specify _____
5. What is your occupation? _____

6. For how many years have you been at this profession? < 1 1 - 5 6 -10 11-15 15+ years.
7. In what capacity have you been in business Employee Shareholder Financier Executive Director Non-Executive Director
8. For how many years has this relationship been in existence? < 1 1 - 5 6 -10 11-15 16+ years.
9. Have you been involved with a company that concluded a B.E.E. Transaction? YES NO
10. Was the company referred to in 9 above a wholly owned subsidiary of another company? Yes NO
11. Were you involved with that company that concluded a B.E.E. Transaction before that transaction? YES NO
12. In a B.E.E. Transaction, you would describe your role as being a representative/member of the B.E.E Beneficiary Company Issuing shares Financier

PART 2:

1. In his/her decision making process, a director should always strive to achieve what is in the best interest of the company

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

2. In his/her decision making process, a director should always consider what is in the best interest of the company as being what is in the best interest of the majority of the shareholders

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

3. In his/her decision making process, there instances where a director can consider what is in the best interest of the company as being separate from what is in the best interest of the majority of shareholders

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

4. The best interest of the company should always be defined according to what is in the best interest of the majority of shareholders

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

5. The best interest of the majority of shareholders should always be defined by what is in the best interest of the company.

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

6. In his/her decision making process, a director should always strive to achieve what is in the best interest of the majority of shareholders

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

7. In his/her decision making process, a director should always strive to achieve what is in the best interest of the company even if it is at the expense of minority shareholders

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
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Comment

8. In the director's decision making process, a director is compelled to always strive to achieve what is in the best interest of the majority of shareholders even if it is at the expense of the minority shareholders

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

9. In the decision making process, a director of a company should consider, in addition to the interest of the majority of shareholders, the interest of B.E.E. Shareholders

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

10. In his/her decision making process, a director, should only accommodate the interest of minority B.E.E. Shareholders only to the extent that they are not in conflict with the interest of the majority of shareholders

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

11. When making decisions as a director of a company, directors representing a B.E.E Shareholder should prioritise in favour of B.E.E. interests

11.1 The interest of the majority of shareholders first then the interest of B.E.E Shareholders.

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

11.2 The interest of the majority of shareholders and the interest of the B.E.E. Shareholder are to be given equal priority?

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

11.3 The interest of the B.E.E. Shareholder should get priority and then the interest of the majority of shareholders

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

12. In the event of a director serving as a representative of a B.E.E. Shareholder group, that director should specifically limit his/her responsibility to the best interests of the B.E.E Shareholder s/he represents.

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

13. A director who is a representative of a B.E.E. Shareholder should prioritise decisions in terms of what is in the best interest of the company, even if that, is in conflict with the best interest of the B.E.E. Shareholders that he/she represents

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

14. The B.E.E. Shareholder should be entitled to instruct a director who is their representative on how to discharge their duties as a director or how to vote on a particular issue

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

15. A director who is a representative of a B.E.E. Shareholder should only consider the best interest of the company to the extent that what is in the best interest of the company is not in conflict with the best interest of the B.E.E. Shareholders that he/she represents

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

16. A director who is a representative of a B.E.E. Shareholder should exclusively account to the B.E.E. Shareholder that had appointed that director as its representative

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

17. The B.E.E. Shareholder who appoints a director to represent it should be entitled to replace that representative director in the event of that director failing to give preference to the interests of that B.E.E. Shareholder

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

18. A director who is a representative of a B.E.E. Shareholder and who fails to prioritise the best interest of the B.E.E. Shareholder, should be replaced by the B.E.E. Shareholder unless s/he can show that the decision was in the best interest of the company?

Strongly Disagree	Somewhat Disagree	Undecided	Somewhat Agree	Strongly Agree
-------------------	-------------------	-----------	----------------	----------------

Comment

19. Who do you believe a director that is a representative of a B.E.E. Shareholder is accountable to?

Unsure	Company	B.E.E. Shareholder	Majority of Shareholders	Other
--------	---------	-----------------------	-----------------------------	-------

Comment

Thank you for your participation in this research. Rest assured that none of the comments made during this interview will be disclosed to any person and your identity will not be revealed in any way to any person.

End of the Questionnaire

Appendix 2 Informed Consent Letter to Participants

Informed Consent Letter 3C

UNIVERSITY OF KWAZULU-NATAL
SCHOOL OF MANAGEMENT STUDIES

Dear Respondent,

MBA Research Project
Researcher: SIBUSISO SIZILA SIBULELO NTSHEBE (0835886333)
Supervisor: Alec Bozas (08323344477)
Research Office: Ms P Ximba 031-2603587

I, **SIBUSISO SIZILA SIBULELO NTSHEBE** an MBA student, at the **School of Management Studies**, of the **University of Kwazulu Natal**. You are invited to participate in a research project entitled **The Autonomy of Directors of Black Economic Empowerment Companies**. The aim of this study is to solicit information from company investors, company directors and other stakeholders regarding their expectations and understanding as to the nature and extent of the duties imposed on directors that are representatives of B.E.E. shareholders that are minority shareholders.

Through your participation I hope to understand the information and ratings you provide us will go a long way in helping us better understand the practical implementation of South Africa's corporate governance standards and whether there are any deviations from applicable laws and policies. The results of the focus group are intended to contribute towards identifying any shortcomings of the current practices and recommending possible solutions to address the said shortcomings.

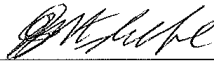
Your participation in this project is voluntary. You may refuse to participate or withdraw from the project at any time with no negative consequence. There will be no monetary gain from participating in this survey/focus group. Confidentiality and anonymity of records identifying you as a participant will be maintained by the School Of Management Studies, UKZN.

If you have any questions or concerns about completing the questionnaire or about participating in this study, you may contact me or my supervisor at the numbers listed above.

The survey should take you about 30 minutes to complete. I hope you will take the time to complete this survey.

Sincerely

Investigator's signature



Date

21/10/2011

This page is to be retained by participant

Appendix 3 Respondent's Informed Consent Letter

Informed Consent Letter 3C

**UNIVERSITY OF KWAZULU-NATAL
SCHOOL OF MANAGEMENT STUDIES**

MBA Research Project

Researcher: SIBUSISO SIZILA SIBULELO NTSHEBE (0835886333)

Supervisor: Alec Bozas (08323344477)

Research Office: Ms P Ximba 031-2603587

The Autonomy of Directors of Black Economic Empowerment Companies

CONSENT

I.....(full names of participant) hereby confirm that I understand the contents of this document and the nature of the research project, and I consent to participating in the research project.

I understand that I am at liberty to withdraw from the project at any time, should I so desire.

SIGNATURE OF PARTICIPANT

DATE

.....

This page is to be retained by researcher

Appendix 4 Ethical Clearance Approval



Research Office, Govan Mbeki Centre
Westville Campus
Private Bag x54001
DURBAN, 4000
Tel No: +27 31 260 8350
Fax No: +27 31 260 4609
snymanm@ukzn.ac.za

18 October 2011

Mr SS Ntshebe (961049323)
Graduate School of Business

Dear Mr Ntshebe

PROTOCOL REFERENCE NUMBER: HSS/0906/011MBA
PROJECT TITLE: The Responsibility of Directors who Represent Black Economic Empowerment Investors

In response to your application dated 12 September 2011, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.
PLEASE NOTE: Research data should be securely stored in the school/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....
Professor Steven Collings (Chair)
HUMANITIES & SOCIAL SCIENCES RESEARCH ETHICS COMMITTEE

cc. Supervisor – Mr A Bozas
cc. Mrs. C Haddon

Appendix 5 Change of Title Request

Message Print View

Subject: Change of Title
To: <ntshebes@webmail.co.za>
Cc: <mwbozas@mweb.co.za>
From: "Wendy Clarke" <Clarkew@ukzn.ac.za>
Date: Wed, 12 Oct 2011 12:22:35 +0200 (110 days, 3 hours ago)

Dear Sibusiso

Higher Degrees have requested a change of title of your dissertation as follows:

The Autonomy of Directors of Black Economic Empowerment Companies

Kindly complete the attached 'change of title form' and return to me as soon as possible.

Regards
Wendy

Please find our Email Disclaimer here-->: <http://www.ukzn.ac.za/disclaimer>