

A Critical and Comparative Analysis of the Regulation of the Office of the Chairman in Contemporary South African Companies

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Abstract

The role of chairman of the board of directors of a contemporary company has evolved from procedural and ceremonial to complex and demanding. This article examines the appointment, tenure, functions, and liabilities of this position, as regulated by the Companies Act 71 of 2008, the JSE Limited Listings Requirements, and the King IV Report on Corporate Governance for South Africa 2016. The aim is to ascertain whether the guidance provided to chairmen on their appointment, tenure, functions, and liabilities is clear and adequate to guide them on what is expected of them in contemporary companies. Company law in the United Kingdom and Australia is compared because this area of law has been extensively developed in these jurisdictions and may offer guidance on the regulation of the office of the chairman of South African companies. The article contends that the guidance provided to a chairman by South African legal instruments is neither clear nor adequate. It identifies several shortcomings in the regulation of the chairman and makes recommendations to enhance the South African statutory and corporate governance provisions regulating the chairman.

Keywords: Chairman of companies; appointment of chairman; tenure of chairman; functions and liabilities of chairman; fiduciary duties; duty of care, skill and diligence; contemporary community expectations

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Introduction

The chairman¹ of the board of directors has traditionally filled a procedural and ceremonial role.² This was a fairly low bar that focused on the chairman's role during board meetings.³ However, the chairman's role in contemporary companies has now evolved into the most important role in the company, and the foremost role in the delivery of effective corporate governance.⁴ The 2016 Global Board Culture Survey identified the effectiveness of the chairman as the 'single biggest differentiator' between the most and least effective boards: the chairman is 'clearly instrumental in establishing the overall culture of the board and encouraging the directors to behave in ways that will increase the board's effectiveness.'⁵ It is therefore imperative for chairmen of South African companies to fulfil their complex and demanding roles effectively, since a failure to do so may result in an ineffective board and a poorly performing company.

This article examines the appointment, tenure, functions, and liabilities of the chairman of the board of directors of South African companies, as regulated by the Companies Act 71 of 2008 (the Companies Act), the JSE Limited Listings Requirements (the JSE Listings Requirements) regulating companies listed on the Johannesburg Securities Exchange, and the King IV Report on Corporate Governance for South Africa 2016 (the King IV Report or the Report) setting out corporate governance best practices.⁶ The objective is to ascertain whether the guidance provided to chairmen on their appointment, tenure, functions and liabilities by these South African legal instruments is clear and adequate to guide them on what is expected of them in contemporary companies. Recommendations are made to enhance the South African statutory and corporate governance provisions regulating the chairman.

Where relevant, this article examines the provisions of the United Kingdom (UK) Companies Act, 2006 (the UK Companies Act), UK common law on the chairman and

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- 1 The term 'chairman' is not gender specific. The chairman is a functionary at a meeting and may be male or female. In this article, a reference to the term 'chairman' includes 'chairperson' and 'chair.'
 - 2 J Warde and A Byrne, 'Special Responsibilities of the Chairman: ASIC v Rich & Ors' (2003) 8(1) Deakin LR 193; A Clarke, 'The Lacuna in Corporate Law: The Unwritten Role of the Chair' (2018) 33 Australian Journal of Corporate Law 136.
 - 3 Clarke (n 2) 136.
 - 4 See Jack O'Kelley and Anthony Goodman 'Global Board Culture Survey 2016' (Harvard Law School Forum on Corporate Governance 26 October 2016) <<https://corpgov.law.harvard.edu/2016/10/26/global-board-culture-survey-2016/>> accessed 10 May 2023.
 - 5 *ibid.*
 - 6 The legal status of the King IV Report is that of a set of voluntary principles and practices (King IV Report 35). Its practices and recommendations are persuasive and not binding for boards of directors, except for listed companies which must comply with certain corporate governance practices under para 3.84 of the JSE Listings Requirements. The application regime of the King IV Report is 'apply and explain' (King IV Report 37).

the UK Corporate Governance Code of 2018 (UK Corporate Governance Code)⁷ on the regulation of the chairman. It also examines the relevant provisions of the Corporations Act 2001 (Cth) of Australia ‘Australian Corporations Act), together with Australian common law on the chairman and the Australian Stock Exchange Corporate Governance Principles and Recommendations (ASX Corporate Governance Principles).⁸ The UK and Australia have been specifically selected because the chairman’s functions and liabilities in these jurisdictions have been extensively developed, not only in statutes and corporate governance instruments, but also in the common law. This development may therefore provide an understanding of the functions and liabilities of the chairman in contemporary South African companies. It is especially apt to examine the development of the chairman’s functions and liabilities in the UK since South African company law derives from the UK company law system, and the UK Companies Act has strongly influenced South Africa’s Companies Act. This was acknowledged by the court in *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa v Bestvest 153 (Pty) Ltd*⁹ which stated that

South African company law has for many decades closely tracked the English system and has often taken its lead from the relevant English Companies Acts and the judicial pronouncements thereon.

The Australian Corporations Act also has a strong influence on the South African Companies Act, making it a suitable comparative jurisdiction. This comparative law methodology is reinforced by section 5(2) of the Companies Act, which provides that a court, when interpreting or applying the Companies Act, may consider foreign law to the extent appropriate.¹⁰

Appointment and Tenure of the Chairman

Appointment of the Chairman

The Companies Act fails to address the issue of appointment or election of the chairman of board meetings and shareholders’ meetings. Strangely, neither is this issue dealt with in the model Memorandum of Incorporation¹¹ (the MoI) for companies incorporated

7 The UK Corporate Governance Code is based on a ‘comply or explain’ approach and applies to companies with a premium listing (UK Corporate Governance Code 1 and 3).

8 ASX Corporate Governance Council, Corporate Governance Principles and Recommendations (4th edn, February 2019).

9 2012 (5) SA 497 (WCC) para 26.

10 See further *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa v Bestvest 153 (Pty) Ltd* 2012 5 SA 497 (WCC) para 26 and *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd* 2017 4 SA 51 (WCC) para 46.

11 A company may be incorporated either under the model Memorandum of Incorporation or in a form unique to the company (s 13(1)(a) of the Companies Act). See CoR 15.1 A-E for the model (‘short standard form MoI’) and unique (‘long standard form MoI’) MoI for companies registered under the Companies Act (see further reg 15(1) of the Companies Regulations, 2011, published under Government Notice R351 (26 April 2011) GG 34239). The short standard form MoI may not be

under the Companies Act, even though the former Companies Act 61 of 1973¹² and its former model articles of association for public companies and private companies did expressly attend to the appointment and election of the chairman.¹³ The King IV Report deals with the appointment of the board chairman by recommending that the board should elect an independent non-executive director as the chairman to lead the board in discharging its governance role and responsibilities objectively and effectively.¹⁴ While this is merely a recommendation by the King IV Report, under paragraph 3.84(b) of the JSE Listings Requirements, listed companies must appoint an independent non-executive director as the chairman. Thus, for companies that are not listed, it is not mandatory for the chairman to be a director.

By contrast, the appointment of the chairman of shareholders' meetings is statutorily addressed in the UK Companies Act. Section 319 lays down the default rule that a shareholder may be elected at a shareholders' meeting to be its chairman by a company following a resolution passed at the meeting, subject to any provisions in the company's articles on how the chairman is to be chosen. Moreover, the UK's Companies Act model articles for public companies and private companies limited by shares deal with the appointment of the chairman of both board and shareholders' meetings. These articles adopt the view that the board chairman should be a director, and state that the directors may appoint a director to chair board meetings.¹⁵ If the board chairman does not participate in the meeting within ten minutes of its commencement time, the directors must appoint one of them as the chairman.¹⁶ Under the model articles, a chairman appointed by the directors must chair the shareholders' meeting if present (within ten minutes of the commencement time of the meeting) and willing to do so.¹⁷ If not, the

altered while the long standard form MoI may be altered to suit the company or to cater for unique requirements applicable to that company.

- 12 Under s 191 of the former Companies Act 61 of 1973, the shareholders had a statutory right to elect any shareholder to be the chairman of the meeting, unless the articles of association provided otherwise.
- 13 The model articles of association for public and private companies under the Companies Act 61 of 1973 provided that the board chairman would preside as the chairman of shareholders' meetings, and if they were not present within fifteen minutes after the time scheduled for the meeting or was unwilling to act as the chairman, the shareholders present could elect one of their number as the chairman. See art 40 of Table A (Articles for a public company having a share capital) and arts 39 and 40 of Table B (Articles for a private company having a share capital).
- 14 King IV Report, principle 7, recommendation 31.
- 15 See the Companies (Model Articles) Regulations 2008, SI 2008/3229, reg 4, Sch 3, art 12 of the model articles for public companies ('model articles for public companies') and reg 2, Sch 1, art 12 of the model articles for private companies limited by shares ('model articles for private companies').
- 16 Article 12 of the model articles for public companies and of the model articles for private companies.
- 17 Articles 12(1) and 31(1) of the model articles for public companies and arts 12(1) and 39(1) of the model articles for private companies.

directors present, or if none are present then the meeting, may appoint any director or shareholder to chair the shareholders' meeting.¹⁸

The Australian Corporations Act usefully attends to the appointment of the chairman of both board meetings and shareholders' meetings. The Act obliges the directors or the shareholders (as applicable) to appoint a chairman of meetings. In terms of section 248E(1), the directors may elect a director to chair board meetings and determine the duration of the chairman's term of office. The directors must elect a director to chair a board meeting if one has not been previously elected, is unavailable or refuses to act.¹⁹ Under section 249U, the directors may elect an individual to chair shareholders meetings and must do so if a chairman has not already been elected, is unavailable or refuses to act. The shareholders must elect a shareholder to chair the shareholders' meeting if a chairman has not been elected by the directors or is unavailable or declines to act.²⁰ Both sections 248E and 249U are replaceable rules, meaning that they may be ousted or modified by the company's constitution.²¹

It is submitted that the failure of the Companies Act to deal with the appointment or election of the chairman of board meetings and shareholders' meetings is an omission which must be rectified for both public and private companies. The benefits of doing so are that it will avoid any ambiguity on the appointment of the chairman, and will result in consistency in the appointment of the chairman in public and private companies. Addressing the appointment or election of the chairman in the Companies Act would also clarify that the chairman should be a director of the company, as has been recommended by the King IV Report and made mandatory for listed companies by the JSE Listings Requirements, as discussed earlier. A further benefit of doing this is that it would provide transparency in the appointment of the chairman, since ethical and effective leadership as highlighted by the King IV Report, is exemplified by transparency.²²

This improvement could be achieved by amending the Companies Act or the short standard form MoI. Until then, companies incorporated with a long standard form MoI (instead of the short standard form MoI which may not be amended, as mentioned earlier) should include provisions therein on attending to the appointment or election of the chairman of the board and of shareholders' meetings. Alternatively, companies may enact rules under section 15(3) of the Companies Act²³ to deal with the appointment or

18 Article 31(2) of the model articles for public companies and art 39(2) of the model articles for private companies.

19 Section 248E(2).

20 Section 249U(3).

21 See s 135 of the Australian Corporations Act on replaceable rules.

22 King IV Report at 20.

23 Under s 15(3) of the Companies Act, the board may make any necessary or incidental rules relating to the company's governance with regard to matters that are not addressed in the Companies Act or the MoI (unless the MoI does not allow this). The rules must be consistent with the Companies Act and the company's MoI, failing which they will be void to the extent of the inconsistency (s 15(4)(a)).

election of the chairman. Three important considerations regarding the appointment of the chairman are discussed below.

The Independence of the Chairman

The King IV Report and the JSE Listings Requirements emphasise the need for the chairman to be independent.²⁴ ‘Independence’ in this regard, is described as the exercise of objective, unfettered judgment.²⁵ Appointing an independent chairman contributes to creating a culture of openness allowing the board to consider diverse views.²⁶ In the event that a non-executive director is considered for the position of chairman, the King IV Report provides factors to be considered on a substance-over-form basis to determine whether a non-executive director is independent. These include whether the director:

- is a significant provider of capital to the company;
- owns shares in the company to a value which is material to their personal wealth;
- takes part in the company’s share incentive scheme or is entitled to remuneration that depends on the company’s performance;
- has been employed by the company as an executive manager or as the external auditor in the previous three years;
- is a significant professional adviser to the company other than as a board member; or
- is a director of the company’s significant customer or supplier.²⁷

It follows that the non-executive director appointed as the chairman should meet the relevant criteria for independence on a substance-over-form basis. The board is required to disclose whether the chairman is considered independent.²⁸

The Report further recommends that the board appoints a non-executive director as the lead independent director.²⁹ The functions of this director include leading in the chairman’s absence; being a sounding board for the chairman; acting as an intermediary between the chairman and other board members if necessary; addressing shareholders’ concerns where contact through the ordinary channels fails to resolve these concerns or

24 See principle 7, recommendation 31 of the King IV Report and para 3.84(b) of the JSE Listings Requirements.

25 King IV Report 13.

26 ASX Corporate Governance Principles, commentary to recommendation 2.5.

27 See King IV Report, principle 7, recommended practice 28 for the full list of factors to be considered when assessing the independence of a director.

28 King IV Report, principle 7, recommended practice 38a.

29 *ibid*, recommended practice 32.

is inappropriate; chairing discussions when the chairman has a conflict of interest; and leading the chairman's performance appraisal.³⁰ Although a lead independent director is tasked with strengthening the board's independence if the chairman is not an independent non-executive director,³¹ the King IV Report recommends that the board should appoint one routinely, regardless of whether the chairman is an independent non-executive director or not.³² By contrast, the JSE Listings Requirements oblige listed companies to appoint a lead independent director only if the chairman is not an independent non-executive director.³³

Separation of the Role of the Chief Executive Officer and Chairman

The King IV Report recommends that one person should not hold both the positions of Chief Executive Officer (CEO) and chairman.³⁴ It further recommends a cooling-off period of three years before a retired CEO may be appointed as a board chairman.³⁵ In terms of paragraph 3.84(b) of the JSE Listings Requirements, the separation of the roles of chairman and CEO is mandatory for listed companies. The recommendations of the UK Corporate Governance Code³⁶ and ASX Corporate Governance Principles³⁷ are similar to those of the King IV Report.

Combining the roles of the CEO and chairman will probably not help the board perform its oversight role effectively and hold management to account.³⁸ The chairman manages the board's business, while the CEO manages the company's business.³⁹ Good corporate governance demands separating those responsible for managing a company from those responsible for overseeing its managers.⁴⁰ In smaller companies, however, the roles of

30 *ibid* 32a–g.

31 *ibid* 32e.

32 *ibid*.

33 JSE Listings Requirements, para 3.84(b).

34 King IV Report, principle 7, recommended practice 34.

35 *ibid*.

36 UK Corporate Governance Code, provision 9. The UK Corporate Governance Code states that in exceptional circumstances the board may propose that the CEO be appointed the company chairman provided it first consults with major shareholders on this appointment, provides its reasons for it, and publishes them on the company's website (UK Corporate Governance Code, provision 9).

37 ASX Corporate Governance Principles, recommendation 2.5.

38 ASX Corporate Governance Principles, commentary to recommendation 2.5. In January 2018 Eskom Holdings SOC Limited appointed Jabu Mabuza as the chairman of the company, and in July 2019 he was also appointed the acting group CEO. The National Union of Metalworks (NUMSA) strongly objected to the appointment of the same person as the chairman and the acting CEO because it would have the effect that he would be reporting to, and would be accountable to, himself. Despite its objections, Mabuza served in both positions until January 2020, when Andre de Ruyter was appointed as the new group CEO (see Irvin Jim, 'Remove Jabu Mabuza from Eskom–NUMSA' (*PoliticsWeb*, 5 August 2019) <<https://www.politicsweb.co.za/politics/remove-jabu-mabuza-from-eskom--numsa>> accessed 4 May 2023).

39 Ramani Naidoo, *Corporate Governance—An Essential Guide for South African Companies* (3rd edn, LexisNexis 2016) 171.

40 ASX Corporate Governance Principles, commentary to recommendation 2.5.

the chairman and CEO are often combined, but this overlap is not recommended for larger private companies and public companies, which must guard against concentrating power⁴¹ in the hands of a single individual.⁴²

Professional Qualifications of the Chairman

The South African legal instruments, being the Companies Act, the JSE Listings Requirements and the King IV Report, do not require the chairman to have any professional qualifications. If the chairman is a director of the company (which is not mandatory save for listed companies, as discussed earlier), the grounds of ineligibility of directors as set out in section 69(7) of the Companies Act apply in this regard. Accordingly, as is the case with all directors, the chairman may not be a juristic person, or an unemancipated minor or a person under a similar legal disability.⁴³

Notably, section 69(6) of the Companies Act permits the MoI to impose minimum qualifications that directors of the particular company must meet. A company may therefore choose to require its chairman who is a director to meet specific minimum qualifications in order to be eligible for appointment as chairman.

The chairman's role requires knowing the general procedures and principles of board and shareholders' meetings and an understanding of general company law and corporate governance principles. Since this role requires a complex set of skills, it is submitted that companies should incorporate minimum qualifications in their MoI that a director should meet before becoming eligible for appointment as chairman. Companies should also ensure that the chairman is carefully selected and appropriately qualified for this demanding and complex role.

Tenure of the Chairman

The Companies Act and the short standard form MoI are silent on the chairman's tenure. The King IV Report recommends that the chairman's term of office be documented in the board charter or elsewhere,⁴⁴ but it does not cap that term. Still, the Report links a non-executive director's tenure, who may be appointed as chairman, as indicated, to their independence, by stating:

41 The King IV Report (principle 7, recommendation 36) recommends that when the board determines the board committees on which the chairman may serve, it should consider how this affects the overall concentration and balance of power on the board (King IV Report, principle 7, recommendation 36).

42 Naidoo (n 39) 173.

43 See s 69(7) of the Companies Act, setting out the grounds under which a person is ineligible to be a director of the company. For a detailed discussion of these grounds, see R Cassim, 'A Critical Analysis of the Grounds of Removal of a Director by the Board of Directors under the Companies Act' (2019) 136(3) SALJ 517–528.

44 King IV Report, principle 7, recommended practice 33.

A non-executive member of the governing body [the board] may continue to serve, in an independent capacity, for longer than nine years if, upon an assessment by the governing body [the board] conducted every year after nine years, it is concluded that the member exercises an objective judgement and there is no interest, position, association or relationship which, when judged from the perspective of a reasonable and informed third party, is likely to influence unduly or cause bias in decision-making.⁴⁵

As the King IV Report recommends that the chairman should be a non-executive director, it follows from the quotation above that the chairman's independence must be reviewed after nine years. It is submitted that it is implied from this quotation that there is scope for the chairman who is a non-executive director to continue in this role for longer than nine years if the board concludes that the chairman exercises an objective judgment and there is no interest, position, association or relationship which, when judged from the perspective of a reasonable and informed third party, is likely to influence unduly or cause bias in decision-making.⁴⁶ In this event, the board may simply disclose a summary of its views on the chairman's independence (as with any other non-executive director). It may then retain the chairman (or any other non-executive director) in their post for longer than nine years.⁴⁷ For example, the chairman of Comair Limited served for a period of forty-six years until shareholder activists publicly questioned his independence at an annual general meeting.⁴⁸ Following pressure from shareholders, the chairman resigned, and Comair Limited was forced to replace him with an independent chairman.⁴⁹

Although the Australian Corporations Act and ASX Corporate Governance Principles are similarly silent on the chairman's term of office, provision 19 of the UK Corporate Governance Code recommends capping the term to nine years.⁵⁰ This period may be extended for a limited time to assist in achieving a diverse board and effective succession planning, subject to the board clearly justifying the extension.⁵¹

While the King IV Report impliedly recommends that the chairman's independence should be reviewed after nine years, it does not cap the chairman's tenure at nine years. Instead, it provides much scope for the chairman who is a non-executive director to continue in this role for longer than nine years. It is submitted that the chairman's tenure in South African companies must be capped in order to ensure that the chairman remains

45 *ibid*, recommended practice 29.

46 *ibid*.

47 *ibid*, recommended practice 30d.

48 'Under-fire Comair Massacres Board' *The Citizen* (8 January 2020) <<https://www.citizen.co.za/business/2225566/under-fire-comair-massacres-board/>> accessed 5 May 2023.

49 *ibid*. For a detailed discussion of this incident and a critical analysis of the tenure of non-executive directors see R Cassim, 'A Comparative Analysis of Director Tenure in South Africa and Selected International Jurisdictions' (2021) 54(1) CILSA 1–37.

50 UK Corporate Governance Code, provision 19.

51 *ibid*.

independent—a requirement emphasised by both the King IV Report and the JSE Listings Requirements, as discussed earlier. The question arises as to what the appropriate cap should be.

Too short an office term may prevent the chairman from developing an effective relationship with the board and extract the best value from the board members' experience and skills.⁵² Too long a term may well result in the chairman losing their independence. It is submitted that the optimum balance would be struck at nine years as this period would give the chairman sufficient time to develop a relationship with the board and still enable the chairman to retain their independence. It is submitted further that the period of nine years should be extendable in limited circumstances to assist in achieving a diverse board and effective succession planning. But, if the board were to recommend that the chairman's tenure be so extended beyond nine years, it should be required to justify this clearly, and to do more than simply disclose a summary of its views on the chairman's independence, as is currently required under the King IV Report, as previously discussed. In this regard, it is submitted that a provision like provision 19 of the UK Corporate Governance Code should be incorporated in the King IV Report capping the chairman's tenure to a period of nine years, which should be extendable in limited circumstances. The chairman's independence should also be monitored by the board or the nominations committee regularly throughout this term.⁵³

Functions and Powers of the Chairman

Guidance Under the South African Legal Instruments

The Companies Act provides little guidance on what exactly the functions and powers of the chairman are. It refers to four functions or powers. First, in relation to board minutes and board resolutions section 73(8) provides that any minutes and resolutions signed by the chairman or by the chairman of the next board meeting are evidence of the proceedings of that meeting or adoption of that resolution, as the case may be.

Secondly, the chairman has the power to break deadlocks. Section 73(5)(e) of the Companies Act provides that, if a vote is tied, unless the MoI provides otherwise, the chairman has a casting vote only if they did not have or cast a vote, failing which the matter being voted on fails. This rule means that unless the company's MoI gives the chairman a casting vote, they will have a single vote only. So if the chairman has already voted on a matter before the board and a deadlock results, the chairman will not be entitled to vote again, and the resolution will fail. By contrast, under section 248G(2) (board meetings) and section 250E(3) (shareholders' meetings) of the Australian Corporations Act (which are replaceable rules), the chairman has a casting vote if necessary, besides any vote as a director or shareholder. Similarly, the model articles for public companies and the model articles for private companies under the UK

52 Clarke (n 2) 140.

53 See Naidoo (n 39) 172.

Companies Act provide that the chairman has a casting vote in a deadlock.⁵⁴ Arguably, there is merit in not conferring a casting vote on the chairman where they have already voted, as this may contravene the corporate governance requirement about the chairman's impartiality.⁵⁵

Thirdly, the chairman has the power to postpone and adjourn meetings, which is dealt with indirectly in section 64(5) of the Companies Act, by the statutory provision referring to the 'person intended to preside at a meeting.'⁵⁶ Fourthly, in terms of section 63(1)(b) of the Companies Act, the chairman is responsible for ascertaining that a shareholder's or proxy's right to vote has been reasonably verified.

Similarly, South African courts have not provided much guidance on the chairman's functions and powers, making it difficult to understand the responsibilities of the chairman. In *Berman v Chairman, Cape Provincial Council*,⁵⁷ for example, the court held that the chairman must preserve order at meetings without which the transaction of the business of the meeting would be impossible. This ruling was affirmed in *Jonker v Ackerman*,⁵⁸ where the court added that the chairman must ensure that meetings are conducted properly.⁵⁹ In *Organisation Undoing Tax Abuse v Myeni*⁶⁰ the court remarked that the chairman is expected to provide leadership to the board,⁶¹ call board meetings and urgent board meetings when necessary;⁶² ensure that unfinished business is carried over to the next board meeting,⁶³ and set the company's ethical tone.⁶⁴

54 Article 14 of the model articles for public companies and of the model articles for private companies. This does not apply if, under the articles, the chairman is not to be counted as taking part in the decision-making process for quorum or voting purposes (art 14(2)).

55 Pat Mahony, 'Procedural Aspects relating to Meetings' in A Loubser and DP Mahony (eds) *Company Secretarial Practice* (Juta 2016) 18-6.

56 Under the common law, the chairman does not have the power to adjourn a meeting at their own will and pleasure, and if they purport to do so, the meeting may resolve to go on with the business for which it has been convened, and appoint another chairman for this purpose (*National Dwellings Society v Sykes* [1894] 3 Ch 159-162; *Jonker v Ackerman* 1979 3 SA 575 (O) 576; *Byng v London Life Association Ltd* [1989] 1 All ER 560 (CA) 567; *Kaye v Oxford House (Wimbledon) Management Co Ltd* [2020] BCC 117 para 106. The chairman may adjourn a meeting when it is so disorderly that business cannot be transacted (*Jonker* (n 56) 576; *Byng* (n 56) 567; *Kaye* (n 56) para 108). A court may overturn the chairman's decision to adjourn a meeting if it was unreasonable, with the consequence that all business conducted at the adjourned meeting will be invalid (*Byng* (n 56) 571).

57 1961 (2) SA 412 (C) 416B.

58 *Jonker* (n 56) 584.

59 *ibid* 583. See further *Sykes* (n 56) 162; *The Second Consolidated Trust Ltd v Ceylon Amalgamated Tea & Rubber Estates Ltd* [1943] 2 All ER 567 569; *Australian Olives Limited (ACN 078 885 042) Ltd v Livadaras* [2008] FCA 1407 para 67; *Kaye* (n 56) para 106.

60 [2020] 3 All SA 578 (GP).

61 *ibid* para 126.

62 *ibid*.

63 *ibid* para 100.

64 *ibid* para 37.

Under the common law, the chairman of a shareholders' meeting is also tasked with determining the validity of a proxy appointment and voting on behalf of shareholders as a proxy, unless otherwise specified in the company's constitution.⁶⁵ The chairman's failure to fulfil this role correctly may affect the validity of the meeting's resolutions, as shown in *SA Mohair Brokers Ltd v Louw*,⁶⁶ where some proxies had been lodged with the company before a shareholders' meeting. In this case, the chairman, acting on legal advice (which turned out to be incorrect), ruled that the proxy forms were invalid. He refused proxy holders the right to speak or vote at the meeting and removed them from the meeting.⁶⁷ The Supreme Court of Appeal held that his rejection of the proxies was unlawful and set aside the resolutions passed at the meeting without the relevant proxy holders.⁶⁸

The King IV Report recommends that, to determine whether the chairman is able to perform their duties effectively, the chairman and the board should determine the number of outside professional positions that the chairman may hold, considering the relative size and complexity of the companies involved.⁶⁹ Apart from this recommendation which impliedly suggests that the chairman's role is demanding, the King IV Report does not clarify the functions or powers of the chairman as expected,⁷⁰ given the limited guidance provided in the Companies Act and the common law. Instead, the Report recommends that the chairman's role and responsibilities should be documented in the board charter or 'elsewhere.'⁷¹

Shortly after the King IV Report came into force in 2016, the Institute of Directors in South Africa NPC tried to fill in the gaps in the King IV Report on the chairman's functions by publishing a Practice Note (the Chairman Practice Note).⁷² The Chairman Practice Note highlights the chairman's core functions regarding the company, the

65 *Louw v SA Mohair Brokers Ltd* [2011] 1 All SA 328 (ECP); *SA Mohair Brokers Ltd v Louw* 2011 JDR 0535 (SCA).

66 *SA Mohair* (n 65).

67 *ibid* para 4.

68 *ibid* para 10.

69 King IV Report, principle 7, recommendation 35.

70 The former King Report on Corporate Governance for South Africa 2002 ('the King II Report') usefully provided detailed guidance on the chairman's functions, but this was not updated in the King IV Report. See chapter 2 of the King II Report, titled 'Role and Function of the Chairperson'.

71 King IV Report, principle 7, recommended practice 33.

72 See Institute of Directors South Africa, 'The Role of the Chair and Lead Independent' (Practice Notes, 22 September 2017) <https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/562ED5CF-02E8-4957-97C8-D3F0C66A7245/King_IV_Practice_Note_on_Role_of_Chair_and_LID.pdf> at 2 accessed 10 May 2023. The Practice Notes intend to provide high-level guidance and clarification on the intention or interpretation of a specific recommendation in the King IV Report (see Institute of Directors South Africa 'King IV Practice Notes' <<https://www.iodsa.co.za/page/KIVPracticeNotes>> accessed 10 May 2023). According to the Chairman Practice Note (at 2), it was necessary to issue the practice note providing guidance on the role of the chairman because the approach of the King IV Report was more succinct.

board, management and board meetings. For example, as to the company, the chairman is expected to represent the company at meetings and engagements with key stakeholders.⁷³ As to the board, the chairman is expected to provide overall leadership to the board, oversee the board's leading ethically and effectively, participate in the board members selection process, encourage collaboration among board members without inhibiting candid debate, and oversee the appropriate addressing of conflicts of interest.⁷⁴ As regards management, the chairman is expected to link the board to the CEO.⁷⁵ Several duties are listed in relation to board meetings, including exercising judgment as to when additional interventions or board meetings are required, upholding rigorous standards of preparation for board meetings, determining when independent professional advice may be necessary and ensuring that it is obtained within the scope of the approved protocol.⁷⁶

Guidance under UK and Australian Legal Instruments

The UK Companies Act does not deal with the functions or powers of the chairman (save for addressing the chairman's role when shareholders vote on a show of hands),⁷⁷ but this is lucidly covered by the UK Corporate Governance Code. Principle F of the Governance Code provides that the chairman should:

- lead the board and is responsible for its overall effectiveness in directing the company;
- demonstrate objective judgment at all times;
- promote a culture of openness and debate;
- facilitate constructive relations between board members and the effective contribution of all non-executive directors; and
- ensure that directors receive accurate and timely information. Principle F also recommends that the chairman's responsibilities should be clear, set out in writing, agreed to by the board and made publicly available.⁷⁸

73 Annexure A of the Chairman Practice Note at 4.

74 *ibid.*

75 Annexure A of the Chairman Practice Note at 5.

76 *ibid.*

77 Section 320 of the UK Companies Act states that where a resolution is voted on a show of hands, the chairman's declaration that the resolution has been passed or not with a particular majority is conclusive evidence of this fact without proof of the number of votes recorded in favour of or against the resolution, unless a poll is demanded on the resolution and is not withdrawn.

78 Provision 14 of the UK Corporate Governance Code.

Besides recommending that the board charter should set out the chairman's responsibilities,⁷⁹ the ASX Corporate Governance Principles provides some guidance on the chairman's functions. It stipulates that the chairman is responsible for leading the board, facilitating the effective contribution of all directors, promoting constructive and respectful relations between directors and between the board and management, approving board agendas, and ensuring that sufficient time is available for discussing all strategic issues and agenda items.⁸⁰

Australian courts have provided considerable guidance on the chairman's functions and powers. In *AWA Ltd v Daniels (trading as Deloitte Haskins & Sells)*,⁸¹ the Supreme Court of New South Wales said that the chairman is primarily responsible for choosing issues and documents to bring to the board's attention; developing board policy; and promoting the company's position.⁸² In *Australian Securities and Investments Commission v Mitchell (No 2)*⁸³ the Australian Federal Court added that the additional primary functions of the chairman are to preside at board meetings and exercise procedural control. It stated that the chairman has these responsibilities:

- ensuring that enough time is allowed to discuss complicated or controversial matters;
- ensuring that the board members work together effectively and that their personalities and skill sets complement each other;
- ensuring harmonious relations between the board and executive management;
- defining and ensuring that the board sets and implements the appropriate corporate structure within the company; and
- monitoring the performance of the board, board members and board committees.⁸⁴

Furthermore, in *Link Agricultural Pty Ltd v Shanahan*⁸⁵ the Victoria Court of Appeal stated that the chairman has the responsibility to facilitate the conducting of a poll if one is demanded and must facilitate voting and counting of the votes.⁸⁶ The chairman's ruling in respect of a poll will be invalid if made in bad faith or for an ulterior or impermissible purpose.⁸⁷

79 See ASX Corporate Governance Principles commentary to recommendation 1.1.

80 *ibid.*

81 (1992) 10 ACLC 933 at 1015.

82 *ibid.*

83 [2020] FCA 1098 para 1409.

84 *ibid* paras 1412–1418.

85 [1998] VSCA 3 para 40.

86 *ibid.*

87 *ibid.*

In the seminal case of *Australian Securities and Investments Commission v Rich*,⁸⁸ the New South Wales Supreme Court stated that the modern legal standard of the chairman's functions and liabilities reflects 'contemporary community expectations.' In other words, the contemporary practice will determine the chairman's duties. The term 'contemporary community expectations' (also referred to as modern community expectations)⁸⁹ is an extended version of the objective test of the reasonable person and conjures a large group of many people for whom the wisdom of the group is extracted and extrapolated.⁹⁰

It is evident from the above discussion that South African legal instruments lag behind with regard to providing guidance on the chairman's functions and powers compared to the guidance provided in legal instruments in the UK and Australia. Without mandatory statutory provisions on the chairman's functions in the Companies Act and the short standard form MoI, or detailed guidance in the King IV Report on the chairman's functions and powers, it is submitted that chairmen of South African companies are not guided adequately on what is expected of them by contemporary community expectations. In the light of the evolving functions and expectations of the chairman, comprehensive guidance must be provided in the Companies Act, the short standard form MoI or the King IV Report so that chairmen of South African companies will know what is expected of them under current community expectations before stepping into this significant role. Although the Chairman Practice Note helps explain the chairman's functions, as stated in the Practice Note, the Institute of Directors in South Africa NPC does not guarantee that the guidance will remain accurate in the future.⁹¹ An updated best practice guide reflecting the standard of contemporary community expectations of the chairman of South African companies is urgently needed.

Liabilities of the Chairman

When dealing with outsiders, without specific provisions in the company's constitution, the chairman does not have additional powers to manage the company merely because of their position as chairman, and has no greater authority than an ordinary director.⁹² As the Australian Federal Court declared in *Australian Securities and Investments Commission v Mitchell (No 2)*,⁹³ the chairman is not 'some sort of directorial overlord.' The question arises whether, internally, the position differs, and the chairman is subject

88 [2003] NSWSC 85 para 71.

89 Clarke (n 2) 136. See further *Australian Securities and Investments Commission v Healey* [2011] FCA 717 paras 192–193 on the contemporary community expectations of the chairman and JJ du Plessis 'Corporate Social Responsibility and "Contemporary Community Expectations"' (2017) 35 Company and Securities Law Journal 30–46 for a general discussion of the phrase 'contemporary community expectations.'

90 Clarke (n 2).

91 See the disclaimer to the Chairman Practice Note.

92 *Wolpert v Uitzigt Properties (Pty) Ltd* 1961 (2) SA 257 (W) 266; *Mitchell* (n 83) para 1409; M Havenga, 'Duties of the Company Chairman' (2005) 17(2) SA Merc LJ 148.

93 *Mitchell* (n 83) para 1409.

to higher standards and more onerous liabilities than that attributed to the ordinary directors. The Australian Federal Court stated further that the chairman's power and authority to manage board meetings may result in the chairman having a greater responsibility for the board's performance as a whole.⁹⁴ How far this greater responsibility results in an enhanced fiduciary duty and an enhanced duty of care, skill and diligence is canvassed below.

Fiduciary Duty

To Whom does the Chairman Owe Their Fiduciary Duty?

Directors' fiduciary duties are partially codified in section 76 of the Companies Act, which does not exclude directors' common-law fiduciary duties. So the common-law fiduciary duties still apply if not amended by section 76 or not conflicting with section 76.⁹⁵ Under section 76(3)(a), directors must exercise their powers and perform their functions in good faith⁹⁶ and for a proper purpose.⁹⁷ Under section 76(3)(b), directors have a duty to exercise their powers and perform their functions in the company's best interests. The directors' duty to exercise their powers in good faith and in the company's best interests is the overarching fiduciary duty accommodating all the other fiduciary duties.⁹⁸ Section 76(2)(a) of the Companies Act encompasses the duty to avoid a conflict of interest. It provides that directors must not use their position of director or any information obtained while acting in the capacity of director to gain an advantage for themselves or another person other than the company or a wholly-owned subsidiary of the company or to knowingly harm the company or a subsidiary of the company.⁹⁹

94 *ibid.*

95 *CDH Invest NV v Petrotank South Africa (Pty) Ltd* 2018 1 All SA 450 (GJ) para 61; *Modise v Tladi Holdings (Pty) Ltd* [2020] 4 All SA 670 (SCA) para 35.

96 The duty of good faith is a subjective duty, but there must nevertheless be reasonable grounds for the directors' belief that they were acting in the best interests of the company (*Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598 ChD 618–619; *Liwszyc v Smolarek* (2005) 55 ACSR 38 at 46–47; *Visser Sirus (Pty) Ltd v Goede Hoop Sirus (Pty) Ltd* 2014 5 SA 179 (WCC) para 74.

97 The test for proper purpose is objective (*Visser* (n 96) para 80; *CDH* (n 95) para 67).

98 *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 4 SA 156 (W) 163; *Da Silva v CH Chemicals (Pty) Ltd* 2008 6 SA 620 (SCA) para 18.

99 See further on the duty to avoid a conflict of interest *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 and *Da Silva* (n 98). A detailed discussion of the fiduciary duties of directors is beyond the scope of this article but see further M Havenga, 'Directors' Exploitation of Corporate Opportunities and the Companies Act 71 of 2008' (2013) 2 TSAR 257–268; Farouk HI Cassim, 'The Duties and the Liability of Directors' in FHI Cassim and others, *Contemporary Company Law* (3 edn, Juta 2021) 706–746; Paul Davies, Sarah Worthington and Christopher Hare Gower, *Principles of Modern Company Law* (11th edn, Sweet & Maxwell 2021) 263–348 and Piet Delpont, *Henochsberg on the Companies Act 71 of 2008* (Revision Service 33 November 2023, LexisNexis 2011) 298(9)–298(28).

Directors owe their fiduciary duties to the company as a whole—the collective body of shareholders—and not to individual shareholders.¹⁰⁰

The chairman is subject to the above fiduciary duties in their capacity as a director. The chairman does not stop being a director because they chair a shareholders' meeting or a board meeting.¹⁰¹ If the chairman is also a director of the company, the chairman's duties are additional to the director's duties.¹⁰² In *Might SA v Redbus Interhouse plc*,¹⁰³ the Chancery Division held that the fact that the chairman of the meeting might have a conflict of interest is insufficient to make calling a shareholders' meeting impractical, as there is no general requirement for a chairman to be neutral. Despite this ruling, as stated in *South African Broadcasting Corporation Ltd v Mpofu*¹⁰⁴ the chairman has a fiduciary duty to act objectively.

The chairman's fiduciary duty lies with the meeting, not the board, even if they are a director.¹⁰⁵ In *Kaye v Oxford House (Wimbledon) Management Co Ltd*,¹⁰⁶ the Chancery Division emphasised that the chairman runs shareholders' meetings not for personal benefit but for the benefit of the company as a whole and must thus act always in good faith and for proper purposes, 'remembering at all times that the authority to preside over the meeting does not confer dictatorial power.'¹⁰⁷ In other words, the powers exercisable by the chairman are not unfettered.¹⁰⁸

But, with regard to a proxy appointment, the chairman's fiduciary duty is to the shareholder who appointed the chairman as a proxy and not to the company. This was the New South Wales Court of Appeal ruling in *Whitlam v Australian Securities & Investment Commission*.¹⁰⁹ It held that a director who accepts a proxy appointment has an agent's fiduciary duties towards the shareholder as principal, and that these duties are owed not to the company but to the particular shareholder who appointed the director

100 *Parke v The Daily News Ltd* [1962] 2 All ER 929 at 948; *South African Fabrics Ltd v Millman* 1972 (4) SA 592 (A); *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W) para 16.6.

101 *Whitlam v Australian Securities & Investment Commission* [2003] NSWCA 183 para 150.

102 Delpont (n 99) 240(2).

103 [2004] 2 BCLC 449 para 12.

104 [2009] 4 All SA 169 (GSJ) para 51.

105 *Ceylon* (n 59) 569.

106 *Kaye* (n 56) para 106.

107 See further on the chairman's duty to act in good faith, honestly and without ulterior motives, *Link* (n 85) para 39 and *Livadaras* (n 59) para 68. In *Livadaras* (n 59) para 70, the court held that a decision of a chairman will be subject to judicial review if it was made in bad faith or was based on an error of law. See further on the judicial review of decisions of the chairman Robert P Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporation Law* (17th edn, LexisNexis Butterworths 2018) 370–371.

108 *Ceylon* (n 59) 569; *Link* (n 85) para 39; *Livadaras* (n 59) para 68.

109 *Whitlam* (n 101) para 152. For a discussion of this decision see D Arsalidou, 'An Examination into the Recent Approach of the Courts in Articulating a Standard of Care for Company Chairpersons in Australia' (2005) 26(5) *Company Lawyer* 158–159.

as a proxy.¹¹⁰ The court ruled further that if a shareholder instructs a director (or a chairman who is a director) to vote in a way that the director believes is not in the best interests of the company, the director will be required to vote in that manner as the shareholder's fiduciary, and, in general, this conduct will not breach the director's fiduciary duties to the company.¹¹¹ When the chairman votes as a proxy, they exercise someone else's voting rights and therefore need not be convinced that the vote is cast correctly.¹¹²

Is the Chairman Subject to More Onerous Fiduciary Duties?

South African courts have not ruled on whether the chairman is subject to a more onerous fiduciary duty than that attributed to ordinary directors. It is arguable that in *South African Broadcasting Corporation Ltd v Mpofo*¹¹³ the court, in its critical findings against the chairman, implied that a higher standard was indeed expected of the chairman. The court had to rule on whether a meeting convened by the chairman of the board of directors was legitimate. The group CEO was given one minute's notice of the board meeting. He was called in to the meeting for a short time, asked to speak, and then asked to leave. In his absence, the board passed a resolution to suspend him. The court ruled that the notice period of one minute was insufficient and improper notice and that the business transacted at the meeting was therefore invalid.¹¹⁴ It held that the chairman had unilaterally and without proper deliberation with all the board members decided to exclude the group CEO from much of the meeting, based on a perceived conflict of interest,¹¹⁵ and the chairman could not have overlooked the importance of the deliberation by all board members.¹¹⁶ The court found that the chairman had 'clearly got caught up in an emotional response' to the director's suspension and had not upheld her fiduciary duty to act objectively.¹¹⁷ In admonishing the chairman's conduct, the court held that her leadership qualities were 'wanting,'¹¹⁸ indicated 'a degree of imperiousness which is not to be condoned in corporate governance',¹¹⁹ and fell short of a director 'who should act independently, without fear or favour, openly with integrity and honesty',¹²⁰ and that when assessed against the background facts and corporate governance principles, 'the conduct of the chairperson ... [was] not to be encouraged.'¹²¹

110 *Whitlam* (n 101) para 152.

111 *ibid* para 153.

112 *Havenga* (n 92) 141.

113 *Mpofo* (n 104).

114 *ibid* para 41.

115 *ibid* para 32.

116 *ibid* para 31.

117 *ibid* para 51.

118 *ibid* para 58.

119 *ibid* para 51.

120 *ibid* para 63.

121 *Mpofo* (n 104) para 51.

The question of the chairman's fiduciary duties was expressly dealt with in *Woolworths Ltd v Kelly*¹²² by the New South Wales Court of Appeal, which held that the chairman may be held to a higher standard than ordinary directors. The court considered the fiduciary duties of a chairman who also serves as a director. It pointed out that the nature of directors' fiduciary duties to their company stems from their office as directors but the content of these duties may be affected by the opportunities and powers they have as directors.¹²³ It stated that the board chairman has 'additional rights and duties and additional opportunities.'¹²⁴ The court found that ordinarily, the chairman settles the agenda of board meetings and influences it considerably.¹²⁵ The chairman can therefore ensure that proposals are brought forward for the board to consider at its meetings.¹²⁶ This, the court said, 'may affect the content of fiduciary duties which he owes to his company.'¹²⁷ Thus, according to the New South Wales Court of Appeal, the board chairman may have broader obligations than an ordinary board member, which may impact on their fiduciary duties.

Duty of Care, Skill and Diligence

Section 76(3)(c) of the Companies Act requires directors to exercise their powers and perform their functions with the degree of care, skill and diligence that may reasonably be expected of a person: carrying out the same functions in relation to the company as that director; and having the general knowledge, skill and experience of that director. This duty is not fiduciary but is based on delictual liability for negligence.¹²⁸ The first part of the test is objective because it requires a director to exercise the degree of care, skill, and diligence that would be reasonably expected of someone performing the same functions as that director. The second part of the test is subjective in the sense that if the director is more knowledgeable, experienced, or possesses a special skill, their performance will be evaluated against this higher subjective standard.¹²⁹

Although South African courts have not ruled on whether the chairman has a higher duty of care, skill and diligence than ordinary directors, in *Organisation Undoing Tax Abuse v Myeni*¹³⁰ the court ruled that a chairman who assumes more responsibilities and becomes more involved in the company's daily operations owes a greater duty of care, skill, and diligence. In this event, the chairman's duties would not change, the court

122 (1991) 9 ACLC 539.

123 *Kelly* (n 122) 566.

124 *ibid.*

125 *ibid.*

126 *ibid.*

127 *ibid.*

128 *Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T).

129 See further on the duty of care, skill and diligence Cassim (n 99) 747–755 and Delport (n 99) 298(10).

130 *Myeni* (n 60) para 33. For an analysis of this case see R Cassim, 'Declaring Directors of State-Owned Entities Delinquent: Organisation Undoing Tax Abuse v Myeni' (2021) 138(1) SALJ 1–20.

said, but their conduct might be judged more stringently, as reinforced by the duty of care, skill and diligence as stated in section 76(3)(c) of the Companies Act.¹³¹

Since 1901 English courts have indicated the possibility that the chairman may have duties of care and skill beyond those of ordinary directors.¹³² The statutory duty of care and skill in the UK Companies Act embodies both an objective and a subjective standard, with the objective standard raisable (but not lowerable) considering the director's specific attributes.¹³³ In *Dovey v Cory*,¹³⁴ the House of Lords held that directors were not bound to examine entries in the company's books, but it was the duty of the chairman and the general manager to peruse the books thoroughly and bring to the board's attention any matter requiring its consideration. In *Re Barings plc (No 5), Secretary of State for Trade and Industry v Baker (No 5)*,¹³⁵ the Chancery Division stressed that a court would evaluate the directors' competence according to which role in corporate management they had been assigned or had assumed, and according to their duties and responsibilities in that role. The UK Court of Appeal affirmed this ruling.¹³⁶

Australian courts have held that the chairman generally has a higher duty of care than ordinary directors have. For example, in the landmark *Daniels* case,¹³⁷ the Supreme Court of New South Wales considered the chairman's duties in the context of the duty of care. It stated that the company chairman is 'responsible to a greater extent than any other director for the performance of the board as a whole and each member of it.'¹³⁸ So the court took the view that the chairman has all the responsibilities held by other board members, but to a greater extent than any other director.¹³⁹

In the seminal case of *Australian Securities and Investments Commission v Rich*,¹⁴⁰ the New South Wales Supreme Court further recognised that the board chairman's liabilities may exceed those of other non-executive directors in particular circumstances. It stated that just as statutory provisions over the last century have raised the common-law standard of care expected of directors, so too have the standards for company

131 *ibid.*

132 See Havenga (n 92) 142.

133 Section 174 of the UK Companies Act states that a director must exercise the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skills and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and the general knowledge, skills and experience that the director has. See further on the objective and subjective standard of the duty of care, skill and diligence under the UK Companies Act Davies, Worthington and Hare (n 99) 294–295.

134 [1901] AC 477 (HL) 493.

135 [1999] 1 BCLC 433 484.

136 *Re Barings plc (No 5), Secretary of State for Trade and Industry v Baker (No 5)* [2000] 1 BCLC 523 536. See also *Sharp v Blank* [2019] EWHC 3096 (Ch) paras 624–626.

137 *Daniels* (n 81) 1015.

138 *ibid.* This observation was not questioned by the Court of Appeal in the appeal judgment of *Daniels v Anderson* (1995) 37 NSWLR 438.

139 See further *Rich* (n 88) para 68.

140 *ibid* para 64. This case is discussed in detail in Austin and Ramsay (n 107) 562–565.

chairmen been raised.¹⁴¹ In this case, the chairman of a failed listed telecommunications company placed in liquidation sought an order striking out a claim against him for breaching his statutory duty of care and diligence in section 180(1) of the Australian Corporations Act¹⁴² brought by the Australian Securities and Investment Commission (ASIC). ASIC argued that he was expected to be more vigilant about the company's finances.¹⁴³ He, in turn, argued that although he chaired the board, the finance and the audit committee, his position was essentially the same as that of the company's three other non-executive directors, whom ASIC had not sued.¹⁴⁴ Dismissing his application, the court held that ASIC had a reasonable cause of action allowing the case to proceed to trial.¹⁴⁵ The court held that the word 'responsibilities' in section 180(1)(b) of the Australian Corporations Act is not limited to specific tasks delegated to the chairman but also includes responsibilities acquired 'through the way in which work is distributed within the corporation in fact, and the expectations placed by those arrangements on the shoulders of the individual director.'¹⁴⁶ It ruled that the chairman's qualifications, experience, expertise and position as the chairman of the board and of the finance and audit committee are all matters that may add to the chairman's responsibilities within the corporation.¹⁴⁷ Thus the actual responsibilities of the chairman may result in additional legal duties.¹⁴⁸

Section 76(3)(c)(i) of the Companies Act and section 180(1)(b) of the Australian Corporations Act are similarly worded, but instead of the phrase 'same responsibilities within the corporation', the Companies Act uses the phrase 'same functions in relation to the company.' Arguably, the broad interpretation of the word 'responsibilities' as including the specific tasks delegated to the director, how work is distributed in the corporation, and the expectations placed on the individual director by those arrangements would also apply the interpretation of the word 'functions' in section 76(3)(c)(i) of the Companies Act. Furthermore, because section 76(3)(c)(ii) adds a subjective element to the duty of care, skill, and diligence, the chairman's qualifications, experience and expertise are relevant to determining their duty of care, skill and

141 *ibid* para 71.

142 Section 180(1) of the Australian Corporations Act states as follows:

(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

(a) were a director or officer of a corporation in the corporation's circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

143 *Rich* (n 88) para 27.

144 *ibid*, para 5.

145 *ibid*, para 85.

146 *ibid*, para 50. The Federal Court of Australia agreed with this statement (*Mitchell* (n 83) para 1407).

147 *Rich* (n 88) para 50. See further *Mitchell* (n 83) para 1397; *Australian Securities and Investments Commission v Mariner Corporation Limited* [2015] FCA 589 paras 440–441; and Austin and Ramsay (n 107) 530–532.

148 *Arsalidou* (n 109) 157.

diligence. Certainly, *Australian Securities and Investments Commission v Rich*¹⁴⁹ has persuasive authority in South African law.

Even though the chairman has a duty of care, skill and diligence higher than that of ordinary directors, it has its limits. For example, in *Australian Securities and Investments Commission v Mitchell (No 2)*¹⁵⁰ the Federal Court of Australia held that the chairman's duty does not require them to countermand the CEO's judgment about the information to be put to the board in board meetings and how this information is disclosed. They are entitled to rely on the CEO's judgment on what should be disclosed to the board.¹⁵¹

Conclusion

This article examined the appointment, tenure, functions and liabilities of the chairman of a board of directors of a South African company, as regulated by the Companies Act, the JSE Listings Requirements and the King IV Report, with the objective of determining whether the guidance provided to chairmen on these matters by these legal instruments is clear and adequate to inform them on what is expected of the chairman of a contemporary company. It has been argued that they fail to provide clear and adequate guidance in this regard. This article identified some shortcomings in the regulation of the office of a chairman.

One of the identified shortcomings is that, unlike the UK Companies Act and the Australian Companies Act, the South African Companies Act does not deal with the appointment or election of the chairman of board meetings and shareholders' meetings. It is submitted that this omission must be rectified for both public and private companies, as doing so will avoid any ambiguity regarding the appointment of the chairman, ensure that there is consistency and transparency in the appointment process, and clarify that the chairman should be a director of the company. This could be achieved by amending either the Companies Act or the short standard form MoI. Until then, companies incorporated with a long standard form MoI (which may be amended) should include provisions on attending to the appointment or election of the chairman of the board and of shareholders' meetings, or enact rules under section 15(3) of the Companies Act to deal with the appointment or election of the chairman.

Another shortcoming is that, despite the chairman's role requiring a complex set of skills, South African legal instruments do not require the chairman to possess any professional qualifications. As the chairman's role is no longer ceremonial but has evolved into a complex and demanding one, companies should include minimum qualifications in their MoI for a director to meet before becoming eligible for

149 *Rich* (n 88).

150 *Mitchell* (n 83) para 1446.

151 *ibid* para 1447. See further *Healey* (n 89) para 167.

appointment as the chairman. Companies should also ensure that the chairman is carefully selected and appropriately qualified for this role.

A further shortcoming is that South African legal instruments are silent on the chairman's tenure, and they also fail to cap the chairman's term—a shortcoming which may affect the chairman's independence. To ensure that the chairman remains independent throughout their term, the King IV Report should cap the chairman's tenure at nine years. It is submitted that nine years would strike the optimum balance as this period would give the chairman sufficient time to develop a relationship with the board and would still enable them to retain their independence. The period of nine years should be extendable in limited circumstances to assist in achieving a diverse board and effective succession planning. If the board were to recommend that the chairman's tenure be extended beyond nine years, it should be required to justify this clearly, and to do more than simply disclose a summary of its views on the chairman's independence, as is currently required under the King IV Report. Further, the chairman's independence should be monitored by the board or the nominations committee regularly throughout their tenure.

Another shortcoming is that South African legal instruments provide limited guidance when it comes to the functions and powers of the chairman. Furthermore, it is not clear whether, under South African law, the chairman is subject to a more onerous fiduciary duty than that attributed to ordinary directors, or whether the chairman has a higher duty of care, skill and diligence than ordinary directors, since South African courts have not ruled on these matters. Arguably, in South Africa, as in the UK and Australia, where the jurisprudence is of persuasive authority, chairmen have a higher standard of conduct and a higher duty of care, skill and diligence than ordinary directors, having regard to their experience and expertise. The jurisprudence in the UK and Australia guides and warns chairmen of South African companies to be aware of the enhanced fiduciary duties and duty of care, skill and diligence which the law may place on them, beyond the duties of the ordinary directors. It is submitted that a higher, more exacting and appropriate standard expected of the contemporary chairman should be urgently delineated in the Companies Act, the short standard form MoI, the JSE Listings Requirements and the King IV Report, which must all be enhanced in this regard.

As the chairman must lead the board in discharging its governance role and responsibilities,¹⁵² the lack of guidance for the chairman carries severe potential consequences for chairmen of South African companies, who must be made properly aware of their enhanced responsibilities and liabilities before stepping into what is regarded as the most important role of the company and the foremost role in the delivery of effective corporate governance. It is hoped that the above recommendations will serve to enhance the regulation of the chairmen of South African companies.

152 King IV Report, principle 7, recommendation 31.

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