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security (par 14). Although not directly relevant to the facts in the *SA Bank of Athens* case, I believe that the important distinction between a pledged article which is in the possession of the debtor, on the one hand, and one which is in the possession of the creditor, on the other hand, should have been emphasised by the court in *SA Bank of Athens*.

Finally, *SA Bank of Athens* provides an example of a further type of documentary instrument (movable) (here: investment policies) that creditors, and especially bankers, may rely on as security held by the bank subject to a *parate executie* clause. Other types of securities held by banks and for which there exist judicial precedent, include shares, bills of exchange and bills of lading (see Scott and Scott 123 and the authorities with examples of securities referred to there). It is important here to point out that the security held by the creditor is the right embodied in the document (*eg*, a bill of exchange, share certificate or a policy document), and not the document itself. Destruction or loss of the document would therefore not result in a loss of the security held by the creditor.

4 Conclusion

After the decisions in *Juglal, Bock* and *SA Bank of Athens*, read with the principles of our common law, the position under South African law regarding the validity of a summary execution clause (*parate executie*) is as follows: A *parate executie* clause in a mortgage bond permitting the creditor (bondholder) to execute without recourse to the debtor (mortgagor) or the court by taking possession of the immovable property and selling it, is illegal and thus void.

A *parate executie* clause in the case of movable property is in principle valid. But where the movable thing is seized and removed from the lawful possession of the debtor against his will, *parate executie* will not be valid and the debtor will be able to rely on the *mandament van spolie* to restore his possession.

Where the movable thing is in the lawful possession of the creditor, he may validly take *parate executie* where the parties have agreed on that. In the latter case the debtor may still seek the protection of the court if, on any just ground, he can show that, in carrying out the *parate executie* agreement and so effecting a sale, the creditor acted in a manner which prejudiced the debtor in his rights. For this reason, it would therefore be incorrect to say that *parate executie* allows the creditor to be the judge in his own case (see *Bock* par 13).

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THE ENLIGHTENED-SHAREHOLDER-VALUE APPROACH VERSUS PLURISM IN THE MANAGEMENT OF COMPANIES*

Introduction

Social, safety, health and environmental factors have recently been considered in the managing of a company. The so-called triple bottom line is the buzzphrase, embracing not only financial performance but also social and environmental responsibility of companies (Crook "The Good Company" January 2005 *The Economist* 1-18; and Freemantle and Rockey *The Good Corporate Citizen* (2004) 7).

Executive and non-executive directors are the people responsible for monitoring and controlling companies. The issue is, however, in whose interests this should be done? (Havenga *Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities* (1998) 1; Mongalo "The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa" 2003 *SALJ* 176-177, and generally Du Plessis "Direkteure se Pligte Teenoor Partye Anders as die Maatskappy" 1992 *De Jure* 378-392). The generally accepted viewpoint is that the paramount fiduciary duty of directors, individually and collectively, is to exercise their powers in good faith and in the best interest of the company as a whole (see generally Du Plessis 1992 *De Jure* 378-392; Havenga "The Company, the Constitution, and the Stakeholders" 1997 *Juta Business Law Journal* 134, 136; and Sealy "Directors' 'Wider' Responsibilities – Problems Conceptual, Practical and Procedural" 1989 *Monash University Law Review* 164-188).

This note focuses on arguments for and against exclusive shareholder protection. The current company law reform process in South Africa and the recent reform process in the United Kingdom are discussed and evaluated. The consideration of matters affecting stakeholders and whether they are subordinate to that of the directors' primary goal to promote the success of the company in the best interest of the shareholders is discussed.

The Enlightened-Shareholder-Value Approach versus Plurism

A company is a legal entity separate from its management and shareholders. The directors have various duties and responsibilities when managing the company. Directors are allowed a measure of discretion when exercising their duties. These duties include the onerous fiduciary duties and

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obligations of care and skill in terms of the common law, various statutory duties in terms of the Companies Act 61 of 1973 (hereafter "Companies Act") and the duties imposed by the articles of association or a separate agreement. Directors must act in good faith and in the best interest of the company as a whole (Havenga 1997 *Juta Business Law Journal* 134; Havenga *Fiduciary Duties of Directors* 1; and generally Department of Trade and Industry in South Africa *South African Company Law Reform for a 21st Century: The Guidelines for Corporate Law Reform* GN 1183 in *GG* 26493 of 23 June 2004, which confirmed this viewpoint, available at www.polity.org.za/pdf/notice (visited on 6 June 2005) (hereinafter "the policy document") (see par 4 below for a discussion on the policy document).

Currently shareholders' interests are granted primacy in the managing of a company. Thus, the function of directors is, for all intents and purposes, that of profit-maximisation for the shareholders. The reason for this is the *too many masters* argument: all the various stakeholder groups would have to be identified and the nature and the extent of the directors' responsibilities to them determined. The result would be that the directors would not effectively be accountable to anyone since there would be no clear yardstick for judging their actions (Miles "Duty, Accountability and the Company Law Review" 1999 *Company Lawyer* 1).

There is, however, a shift in public opinion with regards to consideration of a wider variety of interests than only those of the shareholders. The wider variety of interests include, *inter alia*, those of the following stakeholders: investors, outside creditors, employees, consumers, the general public and environmental concerns (Sealy 1989 *Monash University Law Review* 173, 187). These stakeholders also have an interest in the way the company is managed by the directors. The interests of the various stakeholders may differ. Shareholders, for instance, have a permanent stake in the profits of the business. Investors provide share or loan capital to the company. They usually have a fixed income and invest for a limited period. Their interests are often secured. Outside creditors are primarily trade creditors and they are usually unsecured and concerned with the company as a credit risk. Employees have an interest in the company due to job security. Consumers and the general public are concerned with the company as a source of products and services. Lastly, environmental concerns demand that the impact of the activities of the company on the environment be taken into consideration (Miles 1999 *Company Lawyer* 1).

There are two schools of thought on the issue of whose interests must be granted primacy when directors manage companies. In the enlightened-shareholder-value approach, the primary role of the directors should be to promote the success of the company for the benefit of the shareholders as a whole and to generate maximum value for shareholders (Cheffins "Teaching Corporate Governance" 1999 *Legal Studies* 515-525; Havenga 1997 *Juta Business Law Journal* 135 where she refers to the Berle-Dodd debate as summarized in Hodes "The Social Responsibility of a Company" 1983 *SALJ* 471; Sheikh "Introduction to the Corporate Governance Themed Issues" 1998 *International Company and Commercial Law Review* 267, 268; and the policy document 11).

The second school is that of plurism, which sees shareholders as one constituency among many and the interests of a number of groups are recognised (Miles "Company Stakeholding" 2003 *Company Lawyer* 56; Dean "Stakeholding and the Company Law" 2001 *Company Lawyer* 66; and Sealy 1989 *Monash University Law Review* 173). Thus, a company's existence and success are seen as inextricably intertwined with the consideration of the interests of its employees and other potentially qualifying stakeholders in the business, such as suppliers and customers (Havenga 1997 *Juta Business Law Journal* 136-137; and the policy document 19).

The main question is, therefore, whether directors should use their powers to promote the welfare of the legal entity or whether broader interests should be promoted.

3 Arguments for and against exclusive shareholder protection

A number of arguments support exclusive shareholder protection, or the enlightened-shareholder-value approach. According to the first argument, the shareholders own the company and its assets and accordingly have a legitimate claim to have the company managed in their own best interest. There is, however, a flaw in this argument: from the date of incorporation the company is a separate legal person with a separate legal personality (*Salomon v Salomon & Co Ltd* 1897 CA 22) and thus it cannot be owned. Despite its obvious flaws, this contention has proved to be extremely resistant to change. A possible reason is the narrow definition given to *assets*. This ownership argument seems to be based on the premise that assets only relate to capital assets. Assets do, however, include anything useful or valuable and the *financial* definition of an asset is therefore too narrow. For example, employees contribute labour to the company. It may, therefore, be stated that as the company benefits from these assets, those who contribute to it should also benefit (Roach "The Paradox of the Traditional Justifications for Exclusive Shareholder Governance Protection: Expanding the Plurist Approach" 2001 *Company Lawyer* 13).

The second argument in favour of exclusive shareholder protection concerns risk. As the shareholders bear the risk of poor corporate performance, they should hold the right to the firm's residual income. The counter-argument is that shareholders can substantially reduce their overall risk via a policy of diversification. Therefore, if the risk they face can be minimised, then surely the claim for exclusive protection weakens too (Roach 2001 *Company Lawyer* 12).

The last argument, and probably the most legitimate of the three, relates to contracts. Shareholders should get exclusive protection due to the fact that they cannot protect themselves by way of a contract. They may rely on the articles of association, but the management lays down the conditions unilaterally. Employees and creditors can protect themselves by way of a contract, but this option is not open to the shareholders (Roach 2001 *Company Lawyer* 9-15).

4 The position in South Africa

In 1994 the *King Report on Corporate Governance* (hereafter "King I") was released. It dealt with a number of corporate governance issues. It resulted in a code of corporate practices and conduct, being a set of principles recommended as integral to good governance. Compliance with the code is, however, voluntary (Armstrong "The King Report on Corporate Governance" 1995 *Juta Business Law Journal* 65; and Botha "Confusion in the King Report" 1996 *South African Mercantile Law Journal* 26). In 2002 *The King Report on Corporate Governance for South Africa* (2002) (hereafter "King II") was released, replacing King I. King II mainly deals with principles of good governance relating to boards and directors, risk management, internal audits, integrated sustainability reporting and accounting. It also has a code of corporate practices and conduct (Loubser "Does the King II Report Solve Anything? 2002 *Juta Business Law Journal* 135. The executive summary of King II is accessible at *http://www.eccg.org/codes/country_document/south_africa/executive_summary.pdf* (visited on 6 June 2005)). According to King II there is a move from the single to the triple bottom line, which embraces economic, environmental and social aspects of a company's activities (Executive Summary of King II 5). In other words, directors are responsible for relations with stakeholders, but they are accountable to the shareholders. The concept that the company should be accountable to all legitimate stakeholders is therefore rejected for the simple reason that to ask boards to be accountable to everyone would result in them being accountable to no one (Mongalo 2003 *SALJ* 177; and King II 10-11).

The review of South African corporate laws has been given priority in South Africa. South Africa has changed fundamentally over the past few years. The most important change was the adoption of the Constitution of 1996 (hereinafter "the Constitution"). The current company law is built on foundations which originated from the middle of the nineteenth century in England. The Companies Act is therefore still based on the framework and general principles of the English Law. This framework was, however, questioned in the land of its origin. A major review of the United Kingdom's company law took place in 2002 and 2003.

In light of the above, a policy document was issued by the Corporate Regulation Division of the Department of Trade and Industry of South Africa in June 2004 on the guidelines for corporate law review (see reference to the policy document *supra*). The review process includes an overall review of corporate laws in South Africa, comprising the Companies Act, the Close Corporation Act 69 of 1984 and the common law relating to these corporate entities. The review does not include partnership law. The review process aims to identify the fundamental rules regarding procedures for company formation, corporate finance law, corporate governance, mergers and acquisitions, the cessation of the existence of a company and the administration and enforcement of the law (policy document 1; and Pretorius "The Future of South African Company Law" 2004 *Juta Business Law Journal* 66 for a concise synopsis of the Policy Document).

The policy document (19) also put forward several arguments in favour of the enlightened-shareholder-value approach. Firstly, it is the shareholders who invested their capital in the company, and they are entitled to its profits after other claims are satisfied. The shareholders, as residual claimants of whatever is left over after all other claims have been paid, are best positioned to police the efficiency of the company. Lastly, the survival and economic success of a company will deliver social benefits to many stakeholder constituencies, which will not be delivered if the company is a financial failure.

The policy document therefore (20) proposes the following model:

> "[A] company should have as its objective the conduct of business activities with a view to enriching economic success of the corporation, taking into account, as appropriate, the legitimate interests of other stakeholder constituencies ..."

In other words, the directors should take the interests of other stakeholders into account when managing the company as and when directed by the Constitution or related legislation. The interests of stakeholders may, in certain instances, have independent value to those of the shareholders. For example, the directors may find themselves compelled to provide the employees with certain information as envisaged in their right to access of information as contained in the Constitution (s 32) and in the Promotion of Access to Information Act 2 of 2000, even though it might be to the shareholders' detriment (see *Clutchco (Pty) Ltd v A C Davis* 2005 3 SA 164 (SCA) in this regard where it was stated that the shareholders cannot rely on the above mentioned Act in the specific circumstances).

5 The position in the United Kingdom

The company law review process of the United Kingdom began in 1998. The review process was conducted by an independent steering group. This process was more or less completed in 2001 with the publication of the group's final report. In July 2002 the Government responded to the final report in the form of a white paper (see *Modern Company for a Competitive Economy, Final Report*, URN 01/942 July 2001 (www.dti.gov.uk); and generally Goddard "Modernising Company Law: The Government's White Paper" 2003 *The Modern Law Review* 402-424; and De Lacy *The Reform of United Kingdom Company Law* (2002) 3-43, 43-57, 149-178).

One of the issues the drafters of the review process had to deal with was that of the consideration of stakeholders' interests. The reviewers rejected the plurist approach, preferring the enlightened-shareholder-value approach. The drafters of the review did, however, have two qualifications, namely that directors should have regard to (i) all relationships on which the company depends, and (ii) to long- and short-term considerations. Directors' duties should therefore be framed inclusively, requiring that the company be managed in the collective best interests of the shareholders, which can only be achieved by also taking into account the interests of other stakeholders (Goddard 2003 *The Modern Law Review* 405). It may, therefore, be concluded that there is no general duty on directors to take the interests of stakeholders into account, although they should do so where circumstances require them to. In other words, consideration of matters affecting

stakeholders is subordinate to the directors' primary goal, namely to promote the success of the company. The company law reviewers did, however, consider how the position of the company stakeholders could be protected. Their suggestions focus on disclosure by means of an operating and financial review. They indicated that all companies should produce such a review, which will provide key information on the company, thereby ensuring that directors provide explanations to shareholders and other stakeholders as to how they have looked after their social responsibilities, employees, the environment and the wider community (Miles 1999 *Company Lawyer* 1; and Arden "Reforming the Companies Act – The Way Ahead" 2002 *Journal of Business Law* 587).

According to the approach indicated in the United Kingdom, there is thus no specific duty on directors to take the interests of stakeholders into account, but there is nothing preventing them from doing so and circumstances may indicate a need to do so. In the end, the function of directors is profit-maximisation for the benefit of the shareholders (Miles 2003 *Company Lawyer* 58).

6 Appraisal

The current system of an enlightened-shareholder-value approach strikes the necessary balance between the interests of the shareholders and the wider community. A company will still be managed in the best interest of the shareholders, but the interests of other stakeholders may also be considered when required by the Constitution or relevant legislation (see par 4 above). Companies should, therefore, be allowed to take account of the interests of other stakeholders but should not be obliged to do so in all circumstances. Companies will suffer adverse consequences in any event if they do not observe good governance and act in a socially responsible manner. The stakeholders' interests are, therefore, not necessarily subordinate to those of the shareholders in circumstances where there is a direct obligation on directors.

One of the detrimental consequences of the plurist approach is that it could deter investors and have a negative effect on sorely needed investments. It can also serve as a disincentive for competent persons to serve as directors, due to possible personal liability.

Another issue is whether the advancement of stakeholder issues should be done in terms of the Companies Act, which is already very complex. Inclusion in the Companies Act may have a negative impact on small businesses as well as foreign investments. Statutory protection of company stakeholders does not have to be incorporated in the Companies Act. For example, employees' interests are mainly regulated in terms of labour law (see s 28 in the Labour Relations Act 66 of 1996 regarding the establishment of workplace forums, to protect the interests of employees in the workplace through compulsory consultation and joint decision-making (Havenga 1997 *Juta Business Law Journal* 138)).

In a survey, Crook (2005 *The Economist* 4) states that firms are still mainly interested in making money, whatever the Chief Executive Officer may say in the annual general report. Most companies still give lip-service to corporate social responsibility. If commercial interests and the broader social welfare collide, profit-maximisation still comes first (Crook 2005 *The Economist* 4). The issue, however, is whether this should really give cause for concern and whether capitalism needs the fundamental reform that many advocate. A company in pursuit of profit is merely seeking private gain. It is the tension between private profit and public interest that pervades the corporate social responsibility debate. It can be argued that the consideration of the interests of other stakeholders is merely an add-on responsibility that companies can follow if they choose to, depending, of course, on the relevant legislation and the Constitution. In the end, it is important to distinguish between the goals of government, protecting the public, and the underlying philosophy of companies and the reason for their formation. The goals of government can surely be achieved in other ways, and not necessarily by broadening the range of stakeholders who must be considered by directors when managing a company.

Government is accountable to the public and directors to their shareholders. This certainly does not mean that directors may ignore the interests of other stakeholders or business ethics. The interests of other stakeholders are obviously important and must be taken into account in order to be a successful company (see Loubser 2002 *Juta Business Law Journal* 140 regarding surveys on the positive effect of good governance on companies). But taking their interest into account is not the same as being accountable to them.

7 Conclusion

It seems as if the enlightened-shareholder-value approach is still the preferred one. Ultimately, as stated by Crook (2005 *The Economist* 18): "the proper business of business is business". Directors must still manage a company in the best interest of the company as a whole. By acting in the best interest of the shareholders, and thus acting ethically, the public interest will usually be served in any event. This does not mean that stakeholders' interests may be disregarded. In South Africa, their interests will be protected under the Constitution and related legislation.

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