Zenas Digest

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The impact of the Companies and Other Business Entities Act on Corporate Governance in Zimbabwe

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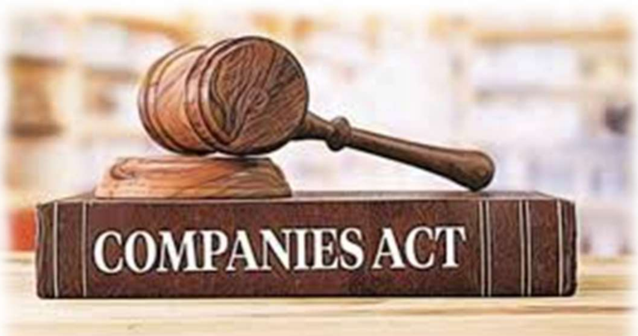
Business, both public and private, has been riddled by governance scandals that have strongly inferred weak to non-existent corporate governance frameworks. Excessive executive salaries and benefits, multiple directorships and direct conflicts of interest; amongst other governance shortfalls; have been a tumultuous cancer that has seemingly spread across the business landscape in Zimbabwe. Indeed many business entities have downscaled , some have even ceased operating, however governance issues like unconscionable executive perks have negatively affected the sustainability of business entities hence it is widely accepted corporate governance frameworks should be developed and abided with. It is against the backdrop of such issues the recently promulgated Companies and Other Business Entities Act (herein after referred to as COBE) has sought to introduce a number of issues to deal reinforce the importance of corporate governance to the sustainable operation of companies. This part of the article will review the good business judgment rule a part of a series that will review other aspects of COBE in relation to corporate governance, such as the newly introduced beneficial interest register, and director's disclosure of financial interests.

Section 54 COBE dictates that directors are required to exercise their duties in good faith and in the best interest of the registered business entity. Such duties entail directors demonstrate and perform their duties with due skill, care and attention expected of any reasonable business person in such position would exercise. This provision of COBE is therefore an attempt to codify the fiduciary duties of directors at common law. It is submitted the statutory business judgment rule is not a wholesome codification of the common law position, as such directors would be advised to not only abide by the duty of care and business judgment rule under section 54 COBE but to also pay due regard to the duties directors are enjoined to perform in respect of the companies or business entities they represent. Directors are permitted under s54 to also make reliance upon information, reports statements or opinions from experts where such director reasonably believes the expert is a reliable and competent to issue such information, report or opinion. Section 54(3) limits the director's reliance on information, statement and reports of experts to circumstance only where the director is unaware that such knowledge is not required. It follows that it is not mandatory that a director makes reliance on information from experts unless the circumstances warrant such inquiry and the director has no knowledge that such knowledge is unwarranted.

It is submitted for directors to promote and abide by the corporate governance frameworks they are reasonably expected make reliance on information, reports or statements from experts to ensure to promote the duty of care and business judgment rule as encapsulated under s54(1) COBE It is however important and pertinent to note s54 (5) COBE which prohibits the exclusion of the duty of care and business judgment rule from its application by any provision of the memorandum of articles of a company or the by-laws of a private business corporation may provide. It follows that directors may not be indemnified by any such provision that allows a director not to apply the business judgment rule and perform such duties with due care. Under s54 (4) COBE, the statute lays down three provisions that satisfy and form the concept of the business judgment rule. These include the director not having any personal interest in the subject of the judgment , whether the director was fully informed on the subject to the extent that is was appropriate in the circumstances, and that he director honestly believed they were acting in the best interest of the business entity or business corporation.

The board of directors in a business entity are the custodians of



strategy; however it is governance which ultimately dictates the risk, compliance and operational strategy to be employed. Governance by the board of directors is therefore not limited to procedural issues such as board size, member attendances, and director selection amongst other formalities. Governance therefore informs the whole strategy of a company and determines the overall risk, compliance and operational strategy of the company. Corporate governance therefore devolves throughout the company and ensures apportionment of authority decision making, accountability along with resources. For the purposes of corporate governance it is therefore imperative that directors and or managers of companies and private business corporations root their conduct in reasonable business practices and weigh their decisions against the dictates of the duty of care and business judgment rule under s54 of COBE. Viewed in this light s54 of COBE is an indispensable founding block to corporate governance. Members of the body that is mandated to implement strategy on risk, compliance and operational issues; collectively viewed as governance issues; should therefore collectively and individually abide by corporate governance frameworks which starts by diligently performing their duties with due care and fulfilling the business judgment rule under s54 COBE.