

Delegation and Directors' Reliance on the Performance of Others – A Companies Act 2008 Analysis in the Light of International Best Practices

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Online ISSN
1727-3781

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Date Submitted

11 January 2021

Date Revised

24 August 2023

Date Accepted

24 August 2023

Date Published

29 September 2023

Editor Prof O Fuo

How to cite this article

Mupangavanhu BM "Delegation and Directors' Reliance on the Performance of Others – A Companies Act 2008 Analysis in the Light of International Best Practices" *PER / PELJ* 2023(26) - DOI

<http://dx.doi.org/10.17159/1727-3781/2023/v26i0a8994>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2023/v26i0a8994>

Abstract

South Africa has included in the *Companies Act* 71 of 2008 (the Act), provisions dealing with directors' delegation and reliance on the performance of others for their (the directors') own performance. In keeping with their role of managing the affairs of the company in terms of section 66(1) of the Act, directors must make decisions in the best interests of the company. Given the company board's strategic role in the company governance, as opposed to the day-to-day management done by the executive management, directors must rely on the performance of others to fulfil their role. These "others" include professional experts and company employees who can either provide guidance/specialist advice or to whom the board may delegate certain powers and authority to perform certain functions geared towards providing the board with a basis for decision-making. This article in the main interrogates the question whether South Africa has now established globally competitive legal standards of directors' delegation and reliance on the performance of others in line with company law reform objectives prior to 2008. One such objective is ensuring compatibility and harmonisation of the new company law with the best practice jurisdictions internationally as a way of promoting the global competitiveness of the South African economy. In this respect this article examines relevant laws in two foreign jurisdictions to provide a comparative aspect to the relevant South African company law aspects. First the article very briefly examines English law, which provides South Africa with its common law heritage of the duty of care, and it is argued that reliance and delegation relate to the irreducible minimum standard of care and the standard to exercise independent judgment. An examination of Australian statutory provisions on reliance and delegation is followed by a critical evaluation of reliance and delegation in section 76(4)(b)-(5) of the *Companies Act* 2008. It is concluded that South Africa has established globally competitive principles of reliance and delegation. Nonetheless, there are gaps in statutory reliance and delegation provisions under the Act, and lessons can be drawn from the best practices in Australian statutory and case law. Firm suggestions are made on how the gaps can be plugged and how the legal standards can be further tightened to enhance the global competitiveness of South African company law.

Keywords

Directors; delegation; reliance; company employees; professional advisors; decision-making; irreducible minimum standard of care; exercise of independent judgment.

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1 Introduction and background

In order to effectively discharge the obligations associated with their office, including decision-making, directors need to rely on the performance of other people who are in a position to provide the required information or to carry out certain tasks. Common law acknowledges that the business of corporate life cannot go on if directors cannot trust those placed in positions to carry out certain details of management.¹ The quality of board decision-making depends on the quality of the information available to members of the board.² For this reason directors have to rely on those who possess expert knowledge and wisdom which the directors themselves do not possess yet which they require to enrich their corporate decision-making. Directors must delegate the task of gathering information to officers in the company and also to delegate other tasks to those who are in a position to perform these functions. Thereafter the directors must rely on the information supplied and the performance rendered in order to be able to exercise their leadership role³ and to arrive at the decisions they have to make. It is probably proper to briefly define delegation and reliance. To delegate means to transfer some powers/authority which a director is given by law to another person, a prescribed officer for example, to enable the delegatee⁴ to perform a task for the benefit of the delegator.⁵ Reliance has been defined to mean acting upon information supplied, performance rendered or guidance given by a person who is considered to be in a position to render performance, give quality information or to offer advice/guidance as a basis for decision-making.⁶

1.2 Background and purpose of the article

Before the *Companies Act 71* of 2008 (hereafter *Companies Act 2008* or the Act), delegation and reliance in South Africa were regulated only by the common law. Reliance and delegation are now also provided for under the *Companies Act 2008*.⁷ It is the new legal standards under the Act that this article seeks to analyse and evaluate, to gauge the quality of the standards

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¹ See the remarks of the Earl of Halsbury LC in *Dovey v Cory* 1901 AC 477 486.

² Mupangavanhu *Directors' Standards of Care* 135.

³ Cassim *et al Contemporary Company Law* 561.

⁴ The person to whom delegation is done.

⁵ The fiduciary (director) who does the delegation. See Mupangavanhu *Directors' Standards of Care* 135.

⁶ Mupangavanhu *Directors' Standards of Care* 135.

⁷ See s 76(4)(b) and (5) of the *Companies Act 71* of 2008 (the *Companies Act 2008* or the Act), to which we shall return later.

in the light of the legislated irreducible standards of care, skill and diligence,⁸ and the common law standards to exercise independent judgment. This review of the fairly new legal standards pertaining to delegation and reliance under the Act is also necessary in the light of recent developments at international level with respect to directors' reliance on others for their performance.⁹

1.2.1 Purpose and focus of the article

It is important to point out that this is a study of delegation and reliance that focusses on South African law with international perspectives.¹⁰ The purpose of this article is to analyse the law pertaining to directors' reliance on others for their own performance – in the context of their role in the strategic management of the company.¹¹ The *Companies Act* 2008 of South Africa recognises this leadership or oversight/supervisory management role of the board. Section 66 of the Act provides that the business and affairs of the company shall be managed by the board of directors, and confirms that the board has the authority to exercise all the powers and to perform all the functions of the company.¹² This section further provides that the limitations to the powers of the board in this regard are to be specifically determined by the provisions of the Act or they are to be specifically provided in the company's constitutive document – the memorandum of incorporation (the MOI).¹³

The *Companies Act* 2008 now includes statutory provisions on delegation and reliance. This article aims to analyse the relevant provisions in section 76(4)(b) and (5) to establish the quality of the standards introduced into South African law vis-à-vis the irreducible minimum standards of care, skill and diligence. The central research question which this article intends to answer is whether South Africa has established globally competitive legal standards of directors' delegation and reliance on the performance of others in line with company law reform objectives prior to 2008.¹⁴ The sub-inquiries

⁸ The duty of care, skill and diligence is now reflected in s 76(3)(c) of the Act.

⁹ See part 1.2.3 below.

¹⁰ Reference is made to the English law influence on the development of legal principles pertaining to reliance and delegation as potential defences to liability claims for breaching standards of conduct such as the duty of care, skill and diligence, for example. For the statutory reliance and delegation defences in South Africa, comparisons are made with Australian law.

¹¹ For an elucidation of the strategic management role of the company board, see Part 2 of IoDSA *King IV Report on Corporate Governance* (hereafter *King IV Report*) 21.

¹² Section 66(1) of the *Companies Act* 2008.

¹³ Section 66(1) of the *Companies Act* 2008.

¹³ Section 66(1) of the *Companies Act* 2008.

¹⁴ Issues of providing for the protection of directors against liability through the defences of delegation and reliance are comprehended in part 4.4.2 in a document entitled *South African Company Law for the 21st Century Guidelines for Corporate Law Reform* (Gen N 1183 in GG 26493 of 23 June 2004).

or co-research questions which this article intends to interrogate are as follows:

- (a) To what extent in terms of the statutory delegation and reliance provisions may South African directors delegate to others and/or rely on others for their own performance?
- (b) Does the *Companies Act* 2008 impose non-delegable duties of care on directors?
- (c) A question related to (b) above is: if section 76(4)(b)(i)(bb) refers to functions "delegable under applicable law" that directors are permitted to delegate, which functions then are considered non-delegable under the law?
- (d) Another inquiry related to (b) above is whether the assumption in this article that section 76(3)(c) of the *Companies Act* 2008 imposes irreducible minimum standards of care is correct.
- (e) May directors use reliance on professional advice as a defence to a claim for breach of duty to exercise reasonable care, skill and diligence?
- (f) How do the statutory legal standards pertaining to delegation and reliance in South Africa compare with standards in some best practice jurisdictions? Are there possible lessons that South Africa could learn from best practice jurisdictions such as Australia and from recent developments in the UK?

The article begins by laying the foundations for South African company law's English and common law heritage with respect to reliance and delegation. In particular I note the sequence of developments regarding the standards of care, skill and diligence and the concomitant development of standards of reliance and delegation in English law which were assimilated into South African law with the passage of time. The international trends in the 1990s regarding the evolution of legal standards of care, reliance and delegation (in the UK and in Australia) receive brief attention in the introductory parts of the article. I further briefly consider the signs of the further tightening-up of standards in the UK evidenced by the 2018 consultation article seeking public opinion on whether company directors are becoming over-reliant on professional advice. It is suggested that these developments in the UK are influenced by the principles that have been developed in Australian case law through rigorous enforcement of the statutory standards of care, reliance and delegation in that jurisdiction (Australia). The article briefly examines the current practices in a best practice jurisdiction, Australia, and considers what lessons South Africa could learn from this jurisdiction. This

is then followed by an analysis of section 76(4)(b) and (5) of the *Companies Act* 2008. The article concludes with findings and possible recommendations.

1.2.2 *The common law*

It is trite that South African company law has a rich English law heritage, and even the now repealed *Companies Act* 61 of 1973 was said to have been "based on the framework and general principles of the English law".¹⁵ Like the old company law statute, the principles governing reliance and delegation too were influenced by English common law. Margo J in *Fisheries Development Corporations of SA Ltd v Jorgensen*¹⁶ adapted into South African common law the English law principles on delegation and reliance. He ruled that in the absence of suspicion, directors are entitled to trust in and rely on the information supplied by relevant company officers.¹⁷ Margo J added that a director's reliance on the defences of delegation and reliance ought to be reasonable¹⁸ – in other words, they should meet the requirement of rationality if such defences are to avail the directors. The learned judge relied on *Re City Equitable Fire Insurance Co Ltd*¹⁹ in formulating these principles for South African law.

Concerns were expressed over the English common law standards which had influenced South African case law before the 1990s, especially the position as espoused by Margo J in *Fisheries Development Corporations of SA Ltd v Jorgensen*. The standards of reliance and delegation, just like the related standards of care, were described as having been lax and far too lenient to be appropriate in a modern world.²⁰ The seemingly lax attitude of the courts towards the enforcement of the duty of care during the early 1900s led some commentators to argue that the common law of the day operated to give directors a remarkable freedom to run companies incompetently.²¹ While on the surface the standards espoused by Margo J appeared competent, on closer examination the requirement that there be an "absence of grounds for suspicion"²² was criticised for paying little

¹⁵ As was said by the then Minister of Trade and Industry, Mandisi Mpahlwa, in a foreword to the Department of Trade and Industry policy document, *South African Company Law for the 21st Century Guidelines for Corporate Law Reform* (Gen N 1183 in GG 26493 of 23 June 2004).

¹⁶ *Fisheries Development Corporations of SA Ltd v Jorgensen; Fisheries Development Corporations of SA Ltd v AWJ Investments (Pty) Ltd* 1980 4 SA 156 (W) (hereafter *Fisheries Development Corporation*).

¹⁷ See generally *Fisheries Development Corporation* paras 160-166.

¹⁸ *Fisheries Development Corporation* paras 160-166.

¹⁹ *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 (CA).

²⁰ See Cassidy 2009 *Stell LR* 394.

²¹ Finch 1992 *MLR* 179. Also see Mupangavanhu *Directors' Standards of Care* 65.

²² A test adapted from *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 (CA) decided in 1925.

attention to the competence and trustworthiness of the person receiving the delegation.²³ Even more importantly, the standards were criticised for lacking safeguards in the monitoring of the delegation by the fiduciary.²⁴ The standards developed by the courts of Chancery in England in the early 1900s might have been suitable for those times. It has been said²⁵ that company boards of the time apparently consisted of part-time, non-executive directors who were considered mere figureheads,²⁶ or even well-meaning amateurs.²⁷ However, directors' standards of conduct had surely evolved by the 1990s, and there was a shift towards more objective standards expected of directors. By the 1990s directors fulfilled critical corporate governance and strategic decision-making roles in companies.

International trends in the 1990s leaned more towards the tightening-up of standards of reliance and delegation. For example, in Australia Clarke JA, in *Daniels v Anderson*,²⁸ rejected Romer J's "absence of grounds for suspicion"²⁹ test as being outdated and unsuited to modern commercial realities and requirements. Where directors have delegated authority to company officers, they are required in Australian common law to supervise the performance of such delegated authority.³⁰ In the USA during the same period it was held in *Federal Deposit Insurance Corporation v Stanley*³¹ that a director's duty to exercise care in overseeing the affairs of the company cannot be met solely by relying on other persons. In the UK directors' standards of care had already begun to tighten up just before the 1990s. Two very important developments which took place in 1986 in the UK should be partly credited for this. The first was the passing of the *Company Directors Disqualification Act 1986*, in terms of which a court could rule on the disqualification of a director for incompetence, that is, if the court adjudged that the director's conduct made him/her unfit for office and to be involved in management.³² The second and very important development was the passing of an important provision in the *Insolvency Act 1986*: section 214(4).³³ That section imposes both an objective element which all

²³ Cassidy 2009 *Stell LR* 394.

²⁴ Mupangavanhu *Directors' Standards of Care* 136.

²⁵ See Mupangavanhu *Directors' Standards of Care* 65.

²⁶ See Havenga 2000 *SA Merc LJ* 26.

²⁷ See Finch 1992 *MLR* 200.

²⁸ *Daniels (Formerly Practising as Deloitte Haskins & Sells) v Anderson* (1995) 37 NSWLR 438 (hereafter *Daniels v Anderson*).

²⁹ See *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 (CA) 407.

³⁰ *Daniels v Anderson* 663.

³¹ See the remark by Lee J in *Federal Deposit Insurance Corporation v Stanley* 770 F Supp 1281 ND Ind (1991). Also see Mupangavanhu *Directors' Standards of Care* 136.

³² Wan 2015 *CLWR* 73.

³³ The standard required by s 214(4) of the *Insolvency Act 1986* is that of a reasonably diligent person having both "(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried

directors must meet and a subjective element which sets the standard of the relevant director who possesses the relevant skill³⁴ in circumstances when the company trades in the zone of insolvency.³⁵ Dual objective and subjective standards of the duty of care, skill and diligence thus became part of English law through interpretation and application by the English courts.

Hoffman J made a huge contribution in applying improved standards of care in the UK in the two decisions he made in the early 1990s, that is in *Norman v Theodore Goddard*³⁶ and in *Re D'Jan of London Ltd*.³⁷ In those two judgments Hoffman J ruled that the directors' duty of care at common law was consistent with the tortious duty of care at common law, which was accurately encapsulated in section 214 of the *Insolvency Act 1986*.³⁸ While section 214(4) was framed to apply to wrongful trading, it should be clarified, as Hoffman J made sure to emphasise in *Norman v Theodore Goddard*, that the correct position is that the standard of care owed by a director is the same, whether or not a company is trading in the zone of insolvency.³⁹ The dual standards of care, skill and diligence which became part of the English common law through the interpretation and application of section 214(4) of the *Insolvency Act* by the courts, were then transposed into the *Companies Act 2006*.⁴⁰ Section 174 of that statute imposes on English or UK directors an irreducible objective minimum standard of conduct, which minimum standard may be raised if the director possesses any special knowledge, skill and experience.⁴¹ While standards of care were improved during the 1990s in the UK, as outlined above, to the best of my knowledge there is no evidence to indicate that the standards of reliance and delegation in the UK improved to the same level during the same period until the time of the *Companies Act 2006*, and beyond the level introduced into law by Romer J in *Re City Equitable Fire Insurance Co Ltd*.

It is important to note that consistent with the improving standards of care in some best practice international jurisdictions like Australia, the UK and

out by that director in relation to the company, and (b) the general knowledge, skill and experience that that director has."

³⁴ Wan 2015 *CLWR* 73.

³⁵ Arguably, s 214 of the *Companies Act 2006* leaves little room for the protection of a director who raises the defence of reliance on expert advice, merely because he based a decision on the professional advice received.

³⁶ *Norman v Theodore Goddard* [1991] BCLC 1028.

³⁷ *Re D'Jan of London Ltd* [1994] 1 BCLC 561 563.

³⁸ In *Re D'Jan of London Ltd* [1994] 1 BCLC 561 563 Hoffmann J's exact words were: "In my view, the duty of care owed by a director at common law is accurately stated in s 214(4) of the *Insolvency Act 1986*."

³⁹ *Norman v Theodore Goddard* [1991] BCLC 1028 1030. Also see Mupangavanhu *Directors' Standards of Care* 69.

⁴⁰ See Dignam *Hicks and Goo's Company Law* 395.

⁴¹ See Wan 2015 *CLWR* 73.

the USA, South African courts began to tighten-up standards pertaining to reliance and delegation. In 1990 Conradie J, in *Barlows Manufacturing Co Ltd v RN Barrie (Pty) Ltd*,⁴² considered it a fundamental principle of South African company law that a director may delegate some or even all of his powers to others. However, Conradie J ruled that a director may not delegate his duty or abdicate his/her ultimate responsibility towards the company.⁴³ The implication of this common law principle is that directors remain fiduciaries even after delegating authority to sub-committees of the company board or to some servants of the company.⁴⁴ This ruling, it can be noted, was a departure from the 1980 ruling by Margo J in *Fisheries Development Corporation of SA Ltd v Jorgensen*, which did no more than affirm the much criticised subjective standards in the "absence of grounds for suspicion" test formulated by Romer J in *Re City Equitable Fire Insurance Co Ltd*.⁴⁵ So it can be safely stated that the position in *Barlows Manufacturing Co Ltd v RN Barrie (Pty) Ltd* was the position obtaining in South African common law at the time of the passing of subsections 76(4)(b) and (5) of the *Companies Act 2008*, and should remain the current position.

1.2.3 Recent international developments on reliance on professional advice

What we have learnt from the global acute respiratory disease popularly known by the acronym COVID-19 is that we must never ignore developments in one part of the world because they will sooner or later have an impact throughout the world. For this reason, and also with the knowledge that English company law developments have often influenced South African law, developments in the UK are important to follow especially for South African jurisprudence. In the UK it is reckoned that many companies, particularly larger and more complex ones, will often seek professional advice, for example on financial, legal or competition matters, so that directors have access to the expertise needed to help them make important decisions for the company. The legal position that obtains in the UK is that the *Companies Act 2006* imposes on directors the duty to exercise independent judgment⁴⁶ when making corporate decisions. That principle does not prevent directors seeking and acting on advice from others, but the board cannot treat such advice as if it were an instruction.⁴⁷ In addition, as Popplewell J remarked in *Madoff Securities International Ltd*

⁴² *Barlows Manufacturing Co Ltd v RN Barrie (Pty) Ltd* 1990 4 SA 608 (C) (hereafter *Barlows Manufacturing Co Ltd*).

⁴³ *Barlows Manufacturing Co Ltd* 610-611.

⁴⁴ Mupangavanhu *Directors' Standards of Care* 137.

⁴⁵ See *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 (CA) 407.

⁴⁶ The duty is provided for in s 173 of the *Companies Act 2006*.

⁴⁷ Davies, Worthington and Hare *Principles of Modern Company Law* 289.

v Raven,⁴⁸ in the same way that the duty of care does not prevent directors from delegating their functions to non-board employees, so the duty to exercise independent judgment does not prohibit such delegation.⁴⁹

While the use of professional advice by company directors is recognised in the UK, concerns began to be raised as recently as 2018 on the suspected over-reliance of directors on professional advice.⁵⁰ This led the government to commission a consultation article to seek input into the matter. The consultation sought public opinion on: "whether, when commissioning and using professional advice, company directors did so with an adequate awareness of their legal duties under the Companies Act 2006, specifically the duties in sections 172-177 which include the requirement to exercise independent judgement."⁵¹ The English public expressed confidence that the directors understand their duties generally, and also reckoned that it is important for directors to seek professional advice without being hindered, and for advisers to give frank and honest advice. Respondents noted, however, that problems can occur when directors shop around for the advice or the opinion they want, or when advisers fail to exercise robust independence and flex their advice in the direction the client wants.⁵²

The recent developments in the UK, touched on above, are a continuation of an international trend towards reviewing upwards the standards of reliance and delegation, as is evident in recent Australian case law. For example, in Australia company directors have failed on a number of occasions to rely on delegation and their reliance on others as a defence against claims for breaching the statutory duty of care.⁵³ Whereas directors are permitted by the law to delegate to others and/or to rely on information and advice from others for their own performance such as their decision-making, the law requires the reliance and delegation to be reasonable.⁵⁴ Australian courts have recently not only confirmed that reliance and

⁴⁸ *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm).

⁴⁹ *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm) [191]. Also see Davies, Worthington and Hare *Principles of Modern Company Law* 289.

⁵⁰ While Worthington and Agnew *Sealy and Worthington's Company Law* 378 generally hold the view that the duty to exercise independent judgement is not breached if directors merely take advice, over-reliance on advice has begun to be questioned by others in the UK. See Kean 2018 <https://www.willistowerswatson.com/en-GB/Insights/2018/08/can-you-rely-too-much-on-professional-advice-as-a-director>.

⁵¹ See the UK government's consultation article *Insolvency and Corporate Governance: Government Response* (UK Department for Business, Energy and Industrial Strategy 2018 <https://www.bl.uk/collection-items/beisc-insolvency-and-corporate-governance-government-response-2018>).

⁵² UK Department for Business, Energy and Industrial Strategy 2018 <https://www.bl.uk/collection-items/beisc-insolvency-and-corporate-governance-government-response-2018> 24.

⁵³ The Australian statutory duty is found in s 180 of the *Corporations Act* 50 of 2001 (hereafter *Corporations Act* 2001).

⁵⁴ See generally s 189 read together with s 190 of the *Corporations Act* 2001.

delegation must be reasonable, but that directors of companies must independently assess the professional advice that they receive from advisers and/or experts.⁵⁵ This is in keeping with the ruling by Australian courts that directors as fiduciaries given the mandate to run the affairs of corporations have strict monitoring and oversight duties.⁵⁶

2 International best practices: the Australian approach

2.1 Why a comparison with best practice jurisdictions matters

A comparative approach is considered important to this article. Reference has been made above to developments in the UK as recently as in 2018,⁵⁷ and such developments will continue to inspire legal developments in other jurisdictions like South Africa. The reform of company law in South Africa was preceded by and arguably also influenced by legal developments in countries such as Australia⁵⁸ and the UK⁵⁹ which resulted in company law statutes in 2001 and 2006 respectively. One of the objectives of law reform in South Africa was to promote the global competitiveness of South African companies.⁶⁰ One way of achieving this was by ensuring compatibility and harmonisation of the new company law then with the best practice jurisdictions internationally.⁶¹ South Africa has now stated the defences of reliance and delegation in statute, just as it followed a common trend in the Commonwealth legal systems (that is, Australia, the UK and the USA) towards stating in statute the directors' duties which incrementally developed through case law.⁶²

It is important to point out that the *Companies Act 2008* permits or even encourages a court when applying the Act to consider foreign company law.⁶³ This is borne out of the realisation that the *Companies Act 2008* was enriched by principles of law from the best practice jurisdictions. In fact it was by intentional design that the Act is reflective of the best international

⁵⁵ See generally *Australian Securities and Investments Commission v Healey [No 1]* [2011] FCA 717; 196 FCR 291; 278 ALR 618; 83 ACSR 484 (hereafter *ASIC v Healey [No 1]*) paras 16-17.

⁵⁶ See *Australian Securities and Investments Commission v Macdonald [No 11]* (2009) 256 ALR (hereafter *ASIC v Macdonald*) paras 248-249, where the court ruled that directors cannot substitute reliance upon the advice of management in place of their own attention and examination of a strategic matter that falls within the board's responsibility.

⁵⁷ See part 1.2.3 above.

⁵⁸ In Australia the *Corporations Act 2001* was passed in 2001 (effective as of 15 July 2001).

⁵⁹ The UK *Companies Act 2006* was passed in November 2006.

⁶⁰ This objective is partly reflected in s 7(e) of the *Companies Act 2008*.

⁶¹ See the relevant objective in the *Explanatory Memorandum to the Companies Bill [B61-2007]* 3.

⁶² Mupangavanhu *Directors' Standards of Care* 61.

⁶³ See s 5(2) of the *Companies Act 2008*.

practice in company law as confirmed by the law reform objective to harmonise South African company law with the best practice jurisdictions in order to enhance the global competitiveness of the South African economy and companies.⁶⁴ As per section 5(2) of the *Companies Act 2008*, foreign company law such as principles that can be distilled from Australian statutory and case law as well as UK law, for example, have already proven to be and will continue to be a rich source of comparative studies and enrich the interpretation of provisions of the *Companies Act 2008*.⁶⁵

2.2 Australian approach to reliance and delegation

In Australia⁶⁶ reliance and delegation are provided in law as statutory defences available to directors against liability claims for the breach of standards of conduct, especially the breach of the duty of care and diligence provided for in section 180 of the *Corporations Act 2001*.⁶⁷ It is correct to state that the provisions in sections 189, 190 and 198D⁶⁸ provide guidelines on the considerations which directors must make when relying on company officers and external experts for their own performance.

2.2.1 Reliance on information from employees and professional/specialist advice

The *Corporations Act 2001* allows directors to rely on information or advice provided by others.⁶⁹ In *ASIC v Macdonald* the court acknowledged that directors are entitled to rely on others for performance where there is no cause for suspicion or circumstances demanding detailed attention.⁷⁰ It is important to note the kind of reliance on information and advice that is permitted by statutory law in Australia and the categories of persons that directors can rely on. The four clear categories of persons that Australian directors can rely on for information or specialist advice and the circumstances in which reliance is permitted are as follows:

⁶⁴ See s 7(e) of the *Companies Act 2008*.

⁶⁵ Just one example of the influence of jurisprudence from Australian law is to be seen in the area of derivative actions where a South African court imported a good faith criterion developed in *Swansson v Pratt* [2002] NSWSC 583 (3 July 2002).

⁶⁶ Probably as is the case elsewhere; in South Africa for example, as will be demonstrated later.

⁶⁷ The duty in s 180(1) of the *Corporations Act 2001* provides that: "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."

⁶⁸ Besides providing the bases for directors' defence against liability claims for breach of the duty of care and diligence.

⁶⁹ See s 189 of the *Corporations Act 2001*.

⁷⁰ *ASIC v Macdonald* 251. Also see *Vines v Australian Securities and Investments Commission* (2007) 62 ACSR 1, 149.

- (a) information provided by an employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;⁷¹
- (b) professional advice or expert opinion in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence;⁷²
- (c) reliance on another director's or officer's performance in relation to matters within the director's or officer's authority;⁷³ and
- (d) a committee of the board of directors.⁷⁴

The *Corporations Act* sets legal standards which a director's reliance on information and professional advice must comply with. The first requirement is that the reliance on information and professional advice must be done in good faith.⁷⁵ In other words, there should not be any other motive for relying on the information or advice other than to enable a director to discharge his/her obligations as a director of a company. In an era where the risks of the liability of directors have increased, some directors may be tempted to use reliance on information and professional advice as a way of either avoiding taking decisions or as a way of justifying taking risky decisions which their own judgment would have prevented them from taking but for the advice. Reliance on professional advice is susceptible to abuse because directors can shop around for the professional advice or the opinion they want, or the advisers may fail to exercise robust independence and flex their advice in the direction the client wants.⁷⁶ In some instances, directors may not disclose the full facts to their professional advisors and may thus receive incorrect advice, which could be the advice they would be hoping to get. This is contrary to the requirement to act in good faith.⁷⁷

In a couple of cases where directors were less than candid in disclosing facts to professional advisers, they were adjudged to have acted in bad faith and their defence premised on their reliance on professional advice was

⁷¹ See s 189(a)(i) of the *Corporations Act* 2001.

⁷² See s 189(a)(ii) of the *Corporations Act* 2001.

⁷³ See s 189(a)(iii) of the *Corporations Act* 2001.

⁷⁴ See s 189(a)(iv) of the *Corporations Act* 2001.

⁷⁵ See s 189(b)(i) of the *Corporations Act* 2001.

⁷⁶ These are the exact fears and sentiments expressed in the public opinion during the public response to the recent consultation conducted by the UK government. The government sought to establish whether the use of professional advice by directors of companies was done in a manner that enabled the directors to be conscious of their statutory duties, and in a manner that enabled them to still exercise independent judgment. See UK Department for Business, Energy and Industrial Strategy 2018 <https://www.bl.uk/collection-items/beisc-insolvency-and-corporate-governance-government-response-2018> 24.

⁷⁷ As required by s 189(b)(i) of the *Corporations Act* 2001.

rejected by the courts. For example, in *Australian Securities and Investments Commission v Adler*⁷⁸ proceedings were brought against two directors for breach of care and diligence under section 180 of the *Corporations Act 2001*. The two directors failed to disclose several important facts to the solicitors, including the fact that the purchases had been made prior to any trust structure's being set up. For this reason the directors argued unsuccessfully that they had relied on the solicitors' advice that the scheme was lawful – in other words the court rejected their reliance defence.⁷⁹ Another case of bad faith on the part of directors is to be seen in the *Australian Securities and Investments Commission v Hobbs*.⁸⁰ In proceedings brought in terms of section 180 of the *Corporations Act* for breach of the duty of care, the directors raised the defence that they had relied on solicitors' advice that registration was not required for wholly off-shore investment schemes. It then turned out that the directors had failed to give the actual scope of activities to the solicitors, implying that the directors had acted in bad faith in that they had concealed certain material facts to the solicitors before receiving legal advice. The Australian Securities and Investment Commission (ASIC) was able to rebut the presumption in the directors' favour that their reliance on professional advice was reasonable, and the court rejected their reliance defence.⁸¹

The good faith requirement also implies that the reliance must be on a rational basis (reasonable) and must be made in the best interests of the company. Australian courts have demonstrated their strict adherence to the requirement that reliance ought to be reasonable and have rejected directors' reliance defence where the reliance was unreasonable. In the famous *ASIC v Healey* case⁸² the court reasoned that while directors are entitled in terms of section 189 to rely on the advice of specialist professionals,⁸³ reliance cannot be said to be reasonable when a director is or ought to be aware of circumstances which would cause a reasonable person to question what the director was being told – even by professional advisors. The court adjudged the errors of classification found in the reports to have been "obvious" because the errors concerned a basic classification of liabilities.⁸⁴ Middleton J held that each of the directors had breached the

⁷⁸ *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 (hereafter *ASIC v Adler*).

⁷⁹ *ASIC v Adler* 307.

⁸⁰ *Australian Securities and Investments Commission v Hobbs* [2012] NSWSC 1276 (hereafter *ASIC v Hobbs*).

⁸¹ *ASIC v Hobbs* [2473]-[2475].

⁸² *ASIC v Healey* [No 1] 175.

⁸³ Such as auditors, lawyers, accountants, board audit and risk management committees, senior management, *inter alia*. Also see Wan 2015 *CLWR* 78.

⁸⁴ The errors in the report were not just a question of mere technical oversight. There were fundamental errors in the reports. The 2007 annual reports of Centro Properties Group (CNP) and Centro Retail Group (CER) failed to disclose significant matters.

statutory duty of care and diligence towards the Centro entities by failing to have apparent errors in the financial report and financial statements corrected.⁸⁵

The *Corporations Act*, it appears, proceeds from the presumption that the director's reliance on information and/or professional advice was in good faith and on a reasonable basis unless the contrary is proven.⁸⁶ Thus, if the reasonableness of the director's reliance on the information or advice arises in proceedings brought to determine whether a director has performed a statutory duty or any equivalent duty in law, the person alleging a breach of duty must rebut the presumption that the reliance was reasonable.⁸⁷

The second requirement is that the director must exercise independent assessment/judgment of the information received or professional/expert advice/opinion received, using the director's knowledge of the company and taking into account the complexity of the company's structure and operations.⁸⁸ A director is therefore not allowed to simply accept information given to him by officers of the company. To begin with, a director must believe on reasonable grounds that the company employee whose information/advice the director relies on say for decision-making is an employee who is, objectively speaking, reliable and competent, not only in general terms, but is one that merits confidence placed upon him/her with respect to the specific matters concerned.⁸⁹ In addition, a director must not simply accept information given by an employee or professional/specialist without independently assessing the information in the light of the director's knowledge of the company and other relevant circumstances of the company in his knowledge. The bottom line is that any reliance on information and advice must be reasonable. Lack of reasonableness in the reliance renders the director open to liability for breach of duty as alleged. Directors cannot substitute reliance upon the advice of management in place of their own attention and examination of a strategic matter that falls within the board's responsibility.⁹⁰ In *ASIC v Macdonald* Gzell J rejected the directors' defence premised on reliance on experts. It was Gzell J's strong view that once management referred the draft Australian Stock Exchange

In the case of CNP, the report failed to disclose some \$1.5 billion of short-term liabilities by classifying them as non-current liabilities, and failed to disclose guarantees of short-term liabilities of an associated company of about US\$1.75 billion that had been given after the balance date. In the case of CER, the 2007 annual reports failed to disclose some \$500 million of short-term liabilities that had been classified as non-current. *ASIC v Healey [No 1]* [9]-[10].

⁸⁵ *ASIC v Healey [No 1]* [9]-[10].

⁸⁶ See s 189(c) of the *Corporations Act* 2001.

⁸⁷ See s 189(c) of the *Corporations Act* 2001. See how Middleton J applied this provision in *ASIC v Healey [No 1]* [130]-[134].

⁸⁸ See s 189(b)(ii) of the *Corporations Act* 2001.

⁸⁹ See s 189(a)(i) of the *Corporations Act* 2001.

⁹⁰ *ASIC v Macdonald* 248-249.

(ASX) statement to the board members for approval, it was the duty of each director to independently assess the information at his/her disposal, and none of them was entitled to abdicate responsibility by delegating his/her duty to a fellow director.⁹¹ The matter of approving a statement referred to the directors, per Gzell J, was the sole strategic responsibility of the board, and not a matter of reliance upon the management or outside experts.⁹²

2.2.2 Delegation

In terms of section 198D of the *Corporations Act 2001*⁹³ a director (a member of the company board) may, unless a company's constitution provides otherwise, delegate any of his/her powers to the following categories of persons:

- (a) a committee of directors;
- (b) a single director of the company;
- (c) an employee of the company; or
- (d) any other person (it is not clear who "any other person" refers to in this context, and admittedly this part is a little ambiguous).

When a director delegates some of his powers to any of the persons identified in section 198D(1)(a) or the categories provided in the paragraph above, the exercise of the power by the delegatee is as effective as if the director who delegated had performed.⁹⁴ Impliedly, the "performer" or delegatee replaces the delegator and the delegator performs through the delegatee. The delegator logically assumes responsibility for the actions of the delegatee and remains accountable for the exercise of delegated authority. The common law principle in Australia in this regard is that the board of directors is required by law to supervise those who have received delegated powers, and it is expected to continually appraise the effectiveness of the checks and balances put in place by companies to enable it to fulfil its monitoring role.⁹⁵

The *Corporations Act 2001* seems to suggest that the responsibility of the delegating director for the performance of the delegatee depends on who the delegatee is. Section 190(2) provides that the directors are not liable if they believed, on reasonable grounds, that the delegatee would perform in conformity with the duties imposed on directors by law,⁹⁶ or where the directors believed in good faith, on reasonable grounds, having made

⁹¹ *ASIC v Macdonald* 251.

⁹² *ASIC v Macdonald* 259.

⁹³ See s 198D(1)(a)-(d) of the *Corporations Act 2001*.

⁹⁴ See s 190(1) of the *Corporations Act 2001*.

⁹⁵ *Daniels v Anderson* 663-664.

⁹⁶ See s 190(2)(a) of the *Corporations Act 2001*.

relevant inquiries and established that the delegatee was reliable and competent in relation to the power delegated.⁹⁷ The statutory text (in section 90(2)(a)) appears ambiguous when read in the light of recent decisions in Australia against directors of listed companies. For example, the reading of the text raises questions regarding whether there are powers and functions which are non-delegable. Nowhere in the relevant provisions pertaining to delegation⁹⁸ and reliance⁹⁹ or financial reporting requirements¹⁰⁰ does the *Corporations Act* shed light on this question and clearly provide that the Act imposes non-delegable duties.

While the position in the *Corporations Act* may not be crystal clear, Australian courts have ruled that there are certain responsibilities of the board which are non-delegable and have restricted the directors' ability to delegate these functions or to rely on professional advisors or experts.¹⁰¹ As already established above, in *ASIC v Macdonald* the court rejected the defence of delegation raised by the directors and ruled that it was the duty of each director to independently assess the information at his/her disposal, and none of them was entitled to abdicate responsibility by delegating his/her duty to a fellow director.¹⁰² The directors in *ASIC v Macdonald* had approved the publishing of a defective, false, misleading or deceiving draft ASX announcement to the effect that the James Hardie Industries Limited (JHIL) had sufficient funds to meet all legitimate asbestos compensation claims, when they knew or ought to have known that this was not true. In *ASIC v Healey* the directors could not rely on the defences of delegation and reliance on professional advisors because their breach of duty involved a failure to have apparent errors in the financial report and financial statements corrected.¹⁰³ From recent Australian case law it appears therefore that it is considered that the preparation, approval, publication of financial statements and public disclosures to the securities markets are non-delegable duties or responsibilities of directors.¹⁰⁴ Because directors

⁹⁷ See s 190(2)(b)(i)-(iii) of the *Corporations Act* 2001.

⁹⁸ See ss 190 and 198D of the *Corporations Act* 2001.

⁹⁹ Section 189 of the *Corporations Act* 2001.

¹⁰⁰ See Part 2M.3 of the *Corporations Act* 2001, from ss 292-344.

¹⁰¹ See Wan 2015 *CLWR* 84.

¹⁰² *ASIC v Macdonald* 251.

¹⁰³ *ASIC v Healey [No 1]* [9]-[10].

¹⁰⁴ In *ASIC v Macdonald* 251 for e.g. Gzell J ruled that directors cannot substitute reliance upon the advice of management in place of their own attention to and examination of a strategic matter that falls within the board's responsibility. It was Gzell J's strong view that once management referred the draft ASX statement to the board members for approval, none of the directors was entitled to abdicate responsibility by delegating his or her duty to a fellow director. Thus, Gzell J rejected the directors' defence premised on reliance on others like experts and company officers. In *ASIC v Healey [No 1]* [9]-[10] and [175] Middleton J held that each of the directors had breached the statutory duty of care and diligence towards the Centro entities by failing to have apparent errors in the financial report and financial

have to apply themselves¹⁰⁵ to the task of scrutinising and approving financial statements and public disclosures, the law imposes on them a positive duty to have the basic financial literacy to read and understand financial statements.¹⁰⁶ In addition, directors must discharge their monitoring role to the company,¹⁰⁷ which "duty" includes a responsibility to become familiar with fundamentals of the company's business, coupled with a continuing obligation to ensure that they are informed about the company's activities.¹⁰⁸

3 South Africa's statutory approach to reliance and delegation

Through the *Companies Act 2008* South Africa has now followed a similar trend to that which was followed by Australia in expressing in statute reliance and delegation, which can be used as defences against liability for breaching a standard of conduct. It is vital to reiterate here that the reliance and delegation provisions in section 76(4)(b) and (5) provide more than defences against liability claims. Beyond being defences, they provide standards to guide directors on how to delegate functions and on how to rely on information provided by others, including professional advice from experts. To be more specific, the approach under the *Companies Act 2008* is to express this as directors' reliance on the performance of specific persons listed under section 76(4)(b) and (5) of the Act.

There is no doubt that South Africa has taken a leaf from the statutory provisions on reliance and delegation under the *Corporations Act 2001* of Australia, as will be demonstrated shortly below. However, it can be observed that there is a slight difference in the manner the *Companies Act 2008* expresses the same principles, although it must be admitted that in the final scheme of things, the slight differences in expressions are not material. The clarity in the Australian statutory provisions assists in giving meaning to comparable provisions under the *Companies Act 2008*.

3.1 Reliance and delegation vis-à-vis irreducible standards to exercise care and independent judgment

Reliance and delegation in practice¹⁰⁹ serve as defences used by directors when they face liability claims for breaching the duty of care obligation, even

statements corrected, which is a non-delegable duty which could not be passed onto anyone else. For this reason, the directors' defences of reliance were rejected by the court.

¹⁰⁵ Without abdicating this responsibility by delegating it to fellow directors, company employees or professional advisors.

¹⁰⁶ *ASIC v Healey [No 1]* [16]-[17].

¹⁰⁷ *ASIC v Macdonald* 261.

¹⁰⁸ *ASIC v Adler* 347.

¹⁰⁹ See the examples from the Australian cases examined in 2.2.1 and 2.2.2 above.

though the role of reliance and delegation goes beyond being mere legal defences, as intimated above. A closer look at the principles on reliance and delegation as distilled from statutes and case law shows that they provide guidelines to directors on the standards expected by the law when directors delegate their powers or rely on others for their performance. When the directors have complied with these standards as set out in law, they can then slip into some kind of a safe harbour and are protected from liability for alleged breaches of duty. For these reasons therefore, reliance and delegation relate to the standards of directors' conduct. It is very clear from the study of Australian law in part 2 above that reliance and delegation¹¹⁰ specifically relate to the statutory duty of care and diligence.¹¹¹ In the UK, reliance and delegation relate not only to the duty of care, skill and diligence,¹¹² but to other standards of directors' conduct such as the duty to exercise independent judgment.¹¹³ Similarly, in South Africa, reliance and delegation have a symbiotic relationship with the duty to exercise care, skill and diligence.¹¹⁴ It is also my opinion that reliance and delegation relate to the duty to exercise an independent judgment, even though this duty has not been independently captured in statute in South African company law, as is the case with other standards of conduct.¹¹⁵ For these reasons, it is important to consider in the paragraphs which follow whether there are irreducible standards to exercise care and independent judgment in South African law.

3.1.1 Irreducible minimum standards of care?

It can be argued that section 76(3)(c) of the *Companies Act 2008* is comparable to and was modelled along the lines of the UK statutory duty of care, skill and diligence found in section 174 of the *Companies Act 2006*.¹¹⁶ In terms of section 76(3)(c) a director is expected to exercise a duty of care, skill and diligence that is to be expected of a director in a similar position, who also possesses similar general knowledge, skill and experience.¹¹⁷ The best way to interpret section 76(3)(c)(i)-(ii) is to break the subsection into

¹¹⁰ See ss 189, 190 and 198D of the *Corporations Act 2001*.

¹¹¹ The Australian statutory duty of care is found in s 180 of the *Corporations Act 2001*.

¹¹² See s 174 of the *Companies Act 2006*.

¹¹³ See s 173 of the *Companies Act 2006*.

¹¹⁴ See s 76(3)(c) of South Africa's *Companies Act 2008*.

¹¹⁵ The duty to exercise an independent judgment is not part of the statement of directors' duties found in s 76(3) of the *Companies Act 2008*.

¹¹⁶ The duty in s 76(3) reads like the similar duty under s 174 of the *Companies Act 2006*. For more elucidation of this point and a comparison of the two positions, see Mupangavanhu *Directors' Standards of Care 70-78*.

¹¹⁷ Section 76(3)(c) of the *Companies Act 2008* specifically provides that the director should operate/function: "with a degree of care, skill and diligence that may reasonably be expected of a person—(i) carrying out the same functions in relation to the company as those carried out by that director; and (ii) having the general knowledge, skill and experience of that director."

what leading English company law writers Davies, Worthington and Hare call limbs, with respect to the comparable English statutory duty.¹¹⁸ Thus section 76(3)(c)(i) can be referred to as Limb 1, while section 76(3)(c)(ii) can be referred to as Limb 2. So, Limb 1 sets a standard which all directors must meet. That is the implication of the phrase – "carrying out the same functions in relation to the company as those carried out by that director".

The standard in Limb 1, unlike the common law standard inherited from the subjective standards applied by the courts of Chancery in England in the nineteenth century, is not dependent on the capabilities of the particular director.¹¹⁹ Arguably, this is the minimum irreducible objective standard of care which all company directors are reasonably expected to meet in terms of subsection 76(3)(c)(i) of the *Companies Act* 2008. Limb 2 adds a subjective standard which can operate to allow reference to be made to the particular characteristics of the director whose conduct may be under scrutiny. These characteristics could relate to the skill, experience, and knowledge of the particular director. The subjective elements do not operate to lower the minimum objective standard, but could in fact operate to enhance the minimum irreducible objective standards in Limb 1 by requiring a director to utilise such skill, knowledge and experience as he has, for the benefit of the company.¹²⁰ One of the inquiries or research questions asked at the beginning of this article¹²¹ which this article has just attempted to answer, is whether section 76(3)(c) of the *Companies Act* 2008 imposes irreducible minimum standards of care. In the light of the above brief analysis of the subsection, it has been established therefore that the reliance and delegation legal standards found in section 76(4)(b) and (5) relate to an irreducible minimum standard of care, skill and diligence found in the Act.

3.1.2 Irreducible standard to exercise an independent judgment?

As highlighted in the paragraphs above, South Africa may not have a statutory duty to exercise independent judgment as the UK has,¹²² but this duty is recognised in South African common law. South African common law acknowledges that directors are required to exercise an independent judgment and to make decisions according to the best interests of the

¹¹⁸ This is how the authors refer to the similar formulation of s 174 of the *Companies Act* 2006. See Davies, Worthington and Hare *Principles of Modern Company Law* 294.

¹¹⁹ Mupangavanhu *Directors' Standards of Care* 71. Also see Davies *Principles of Modern Company Law* 435.

¹²⁰ Mupangavanhu *Directors' Standards of Care* 71.

¹²¹ See the list of research questions to be answered in this article as outlined in part 1.2 above.

¹²² The UK has demonstrated the premium it places on this common law duty by codifying it in a statute as s 173 of the *Companies Act* 2006.

company.¹²³ This duty is important for a fiduciary in South African company law as he/she is expected to be influenced only by what is in the best interests of the company when making business decisions. For this reason, in *Robinson v Randfontein Estates Gold Mining Co Ltd*¹²⁴ the principle was established that a director should never place him/herself in a situation or position where his/her interests conflict with his/her duty as a fiduciary.¹²⁵ A situation that places a director in a conflict of interest potentially disables the ability of such a fiduciary to exercise independent judgment during decision-making. Even nominee directors are strongly discouraged from allowing themselves to be in situations that lead them to fail to exercise independent thinking and to act independently, and such conduct is punishable under South African law.¹²⁶ There is therefore scope to argue that there should be a minimum irreducible standard to exercise independent judgment for directors in terms of South African common law.¹²⁷

As already established in part 2.2.1 above, a minimum irreducible standard to exercise independent judgment is important in the light of the international trends that indicate that elsewhere directors are required to exercise independent assessment/judgment of the information received or professional/expert advice/opinion received. In Australia, for example, directors cannot simply take the advice of company officers or professional/specialised advice without taking into account their own knowledge of the company and taking into account the complexity of the company's structure and operations.¹²⁸ In the UK the new trend appears to be shifting towards the need to ensure that directors must not utilise professional advice without exercising an independent judgment with respect to the advice given.¹²⁹ However, this does not appear to align with the attitude of UK courts prior to 2018. It can be deciphered that English case law, when compared to Australian law, appears to have been more permissive to directors' reliance especially on professional advice even when it is apparent that directors might not have fully applied their independent judgment to the professional advice given. The weight of English case law suggests that a director is considered to have discharged his/her duty of care obligations if he has acted on the advice provided by the appointed professional adviser having the appropriate qualification in

¹²³ *Fisheries Development Corporations* 163D-F.

¹²⁴ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.

¹²⁵ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 178-179.

¹²⁶ See *S v Shaban* 1965 4 SA 646 (W) 652-653.

¹²⁷ In a separate article soon to be published in an international journal, this author has made a case for the codification of the director's duty to exercise independent judgment in a manner reminiscent of the developments in English law.

¹²⁸ This is the position established in Australian statutory law and as confirmed in case law too. See s 189(b)(ii) of the *Corporations Act* 2001. Also see *ASIC v Macdonald* 248-249.

¹²⁹ See part 1.2.3 above.

specialist areas.¹³⁰ Nonetheless, English law insists on the requirement that the professional advisors must not only be qualified to provide the advice, but importantly that they must be independent.¹³¹ Thus, the global trend is that there should be a minimum irreducible standard to exercise independent judgment for directors, as should be the case for South Africa too.

3.2 Interpretation of the relevant provisions of the Act

Before embarking on the process of interpreting the meaning of the words used in subsections 76(4)(b) and (5), it is important to briefly give insight into the approach relevant to the interpretation of provisions of the *Companies Act 2008*. The Act itself provides that the interpretation of its provisions is to take place *ex visceribus actus* (from the bowels of the Act) or as part of the more encompassing legislative instrument in which it has been included.¹³² The Act specifically provides that its provisions "must be interpreted and applied in a manner that gives effect to the purposes set out in section 7."¹³³ This is a text-in-context approach or a contextual/purposive approach in terms of which a statutory provision is viewed through the lens of the purpose of the legislation (the entire legislative scheme), and should not be construed on its own. In other words, the "intra-textual and extra-textual factors" referred to by Botha¹³⁴ form part of the process of constructing meaning of a statutory provision. Section 7, referred to in section 5(1), refers to about twelve purposes of the Act.

There are several purposes of the *Companies Act 2008* which are relevant to this article and which an interpretation must give effect to, and most of these purposes have been examined in part 2.1 above. One such relevant purpose of the Act is to promote the global competitiveness of South African companies by ensuring the harmonisation of company law with standards in best practice jurisdictions such as Australia and the UK.¹³⁵ The Act also

¹³⁰ Sometimes it does not matter whether a different professional advisor would have given a different opinion – a director is excused from liability if s/he can demonstrate that s/he relied on the professional advice given. See Wan 2015 *CLWR* 76. Also see *Re Continental Assurance Co of London plc (No 4)* [2007] 2 BCLC 287; *Iesini v Westrip Holdings Ltd* [2011] 1 BCLC 498; *Green v Walkling* [2008] 2 BCLC 332; *Re Stephenson Cobbold Ltd* [2001] BCC 38.

¹³¹ See *Iesini v Westrip Holdings Ltd* [2011] 1 BCLC 498 498. Also see Wan 2015 *CLWR* 76.

¹³² See the relevant views expressed in Mupangavanhu *Directors' Standards of Care* 194. Mupangavanhu writes specifically on the approach to interpretation adopted by the *Companies Act 2008* and cites De Ville *Constitutional and Statutory Interpretation* 142, who writes on the general approach to statutory interpretation in South Africa.

¹³³ See s 5(1) of the Act.

¹³⁴ See Botha *Statutory Interpretation* 97-98.

¹³⁵ See part 2.1 above for more details.

allows courts and by implication litigants to refer to legal standards in foreign company law when applying and interpreting its provisions.¹³⁶

It needs to be highlighted that the *King IV Code*¹³⁷ provides one of the important aids to the interpretation of the provisions of the *Companies Act* 2008 and corporate governance generally in South Africa. The *King Codes* admittedly have assumed great importance in the country given the manner they have espoused and developed corporate governance principles over the years, which has led to the codes becoming widely applied by different entities/organisations in South Africa.¹³⁸ It needs to be noted, however, that *King IV* or any other code before it, though compulsory to certain companies, especially the listed companies by virtue of, for example, the JSE Listing requirements, is not law and cannot be equated to the Act.¹³⁹ Despite their being voluntary in nature, some courts refer to the King Reports in their judgments. For example, in *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited*¹⁴⁰ Hussain J, in interpreting the directors of a listed company's breach of the duties to act in the best interests of the company and the duty to act with due care, referred to relevant principles of the *King II Report*.¹⁴¹ In *South African Broadcasting Corporation Limited v Mpofu*¹⁴² the High Court considered the principles from a *King Code* to be applicable to state owned companies. In *Mthimunye-*

¹³⁶ See s 5(2) of the Act.

¹³⁷ *King IV Report*.

¹³⁸ In a foreword to the *King IV Report*, Mervyn King underscores this point by revealing that for this reason, the *King IV Report* now contains sector supplements which apply to different sectors. See the *King IV Report* 6.

¹³⁹ Some colleagues in academia and other users of company law seem to have the mistaken belief/conviction that the King Codes, especially the *King IV Report*, have become compulsory to all companies and are generally binding. A distinction should be drawn between, for example, those companies that have opted to be bound by *King IV* plus those required to apply *King IV* in terms of the JSE Listing Rules on the one hand, and those who have not chosen to comply with and apply *King IV* on the other hand. The correct position is that while the *King IV Report* is a very important set of corporate governance principles and leading practices in South Africa, it is, however, not generally binding on all companies. The *King IV Report* 35 puts the matter to rest by clarifying that "the legal status of the King IV as with its predecessors, is that of a set of voluntary principles and leading practices." South Africa thus follows a hybrid system of corporate governance, with some practices being voluntary, as with the codes of corporate governance, while other aspects are legislated. It can happen in practice that a conflict arises in this hybrid system of corporate governance. The *King IV Report* is careful enough to provide clarity in such situations, and emphatically provides that "if there is a conflict between legislation and King IV, now or in the future, the law prevails" – see the *King IV Report* 35.

¹⁴⁰ *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 5 SA 333 (W).

¹⁴¹ See *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 5 SA 333 (W) paras 16.7 and 16.9.

¹⁴² *South African Broadcasting Corporation Limited v Mpofu* 2009 4 All SA 169 (GSJ).

*Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd*¹⁴³ the court made use of the *King Code* as a tool to identify a breach of duties by the directors.

Principles 8 and 10 of *King IV*, which propose recommended practices on delegation, could be useful in interpreting the principle of delegation in terms of both the common law and statutory law. Principle 8 importantly recommends that a company board¹⁴⁴ should ensure that its arrangements for delegation in its own structures promote independent judgment and assist with the balance of power and the effective discharge of its duties. Principle 10 broadly provides that the governing body (which includes the board of directors in a company context) should ensure that the appointment of and delegation to management contributes to role clarity, the effective exercise of authority and the discharge of responsibilities. In addition, principle 10 contains a recommended practice that advocates that a company develop a delegation of authority framework that articulates a set direction on the delegation of power.¹⁴⁵ These two principles will provide good aids for interpreting section 76(4)(b) and (5) now and in the future.

3.3 A critical analysis of the reliance provisions in section 76(4)(b)-(5) of the Act

It is important to point out that unlike Australia's *Corporations Act* which separates reliance and delegation,¹⁴⁶ the *Companies Act 2008* combines the two. Section 76(4)(b) and (5) describes or presents the standards as reliance on the performance of others, and these "others" as I call them, are persons identified and listed in the two subsections. In this respect, section 76(4)(b) provides specifically as follows:

- a particular director of a company—
- (b) is entitled to rely on—
 - (i) the performance by any of the persons—
 - (aa) referred to in subsection (5); or
 - (bb) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and

¹⁴³ *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* 2015 6 SA 338 (WCC).

¹⁴⁴ In the context of corporate governance.

¹⁴⁵ See in this regard Recommended Practice 84 located under Principle 10 of the *King IV Report*.

¹⁴⁶ Under the *Corporations Act 2001*, standards on reliance are to be found in s 189, while standards on delegation are to be found in ss 190 and 198D.

- (ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

To paraphrase, a director is entitled to rely, for his/her own performance, on the performance of any of the persons listed in subsection (5) and on any information contained in any document,¹⁴⁷ advice by officers and/or professional advice received from experts or specialists as specified in subsection (5). The persons who qualify for delegation are listed in subsection (5), and include some of the persons to whom the board may delegate "formally or informally by course of conduct" to exercise some delegated powers or perform some "delegable" functions in terms of "applicable law".¹⁴⁸ The term "applicable law" refers amongst other things to relevant standards of reliance and delegation, and the only way to establish what these standards are is through the interpretation of the section 76(4)(b) and (5) provisions. Australian statutory law and case law to a greater extent, and English law to a lesser extent, will prove to be invaluable in helping us establish what the exact standards in law are, given the paucity of cases on reliance/delegation under the *Companies Act 2008* era.

Some of the relevant research questions posed in part 1.2.1 which are yet to be answered in this article include the following:

- (a) To what extent in terms of the statutory delegation and reliance provisions may South African directors delegate to others and/or rely on others for their own performance?
- (b) Does the *Companies Act 2008* impose non-delegable duties of care on directors?
- (c) A question related to (b) above is: if section 76(4)(b)(i)(bb) refers to functions that are "delegable under applicable law", which directors are permitted to delegate, and which functions are considered non-delegable under the law?
- (d) May directors may use reliance on professional advice as a defence to a claim for breach of duty to exercise reasonable care, skill and diligence?

These important inquiries/research questions are relevant to South African standards pertaining to directors' reliance on the performance of others, and will have to be answered in this part of the article. The statutory text in sections 76(4)(b) and 76(5) read on its own cannot provide answers to these

¹⁴⁷ Documents such as reports, financial statements or other financial data, presumably prepared and supplied by company officers to directors upon their request.

¹⁴⁸ See s 76(4)(b)(i)(bb) of the *Companies Act 2008*.

inquiries. The only way to find answers to the research questions is through the interpretation of section 76(4)(b) read together with section 76(5). For this reason, the method of interpretation of the statutory text adopted by the Act, the contextual or purposive approach,¹⁴⁹ becomes very important. Through this approach to the interpretation of reliance and delegation statutory standards, the meaning of the text in section 76(4)(b)-(5) will be constructed through the lens of the relevant purposes of the Act,¹⁵⁰ which reflect the company law reform objectives prior to 2008. Such relevant company law reform objectives related to the purposes of the Act include the role of company law in promoting the global competitiveness of the South African economy¹⁵¹ in a number of ways. These include "making company law compatible and harmonious with best practice jurisdictions internationally",¹⁵² encouraging transparency and high standards of corporate governance¹⁵³ and promoting the efficiency of the companies and their management.¹⁵⁴

3.3.1 *Who and what may directors rely on for their performance in terms of the Act?*

Just like Australia's *Corporations Act*, the *Companies Act 2008* provides answers to the question: who and what may South African directors rely on for their performance. The Act allows directors to rely on the following:

- (a) Any persons to whom the board may reasonably delegate formally or informally by course of conduct the authority or duty to perform one or more of the board's functions.¹⁵⁵ It is not clear who is included or excluded in the ambit of "any persons". Could "any person" be restricted to only company insiders such as company officers, or does this refer to outsiders such as specialists? This is not entirely clear as section 76 does not contain any definitions which are helpful in this regard. The Act also curiously provides that directors may delegate a "duty",¹⁵⁶ and this appears to contradict sharply the common law

¹⁴⁹ See part 2 above.

¹⁵⁰ See s 5(1) of the *Companies Act 2008*. The purposes of the Act are listed in s 7.

¹⁵¹ See *Explanatory Memorandum to the Companies Bill* [B61-2007] 3; Gen N 166 in GG 29630 of 12 February 2007 (*Notice of Intention to Introduce the Draft Companies Bill, 2007 into Parliament*). Also see s 7(e) of the *Companies Act 2008*.

¹⁵² See the *Explanatory Memorandum to the Companies Bill* [B61-2007] 3.

¹⁵³ See s 7(b)(iii) of the *Companies Act 2008*.

¹⁵⁴ See the *Explanatory Memorandum to the Companies Bill* [B61-2007] 3.

¹⁵⁵ See s 76(4)(b)(i)(bb) of the *Companies Act 2008*.

¹⁵⁶ Subsection 76(4)(b)(i)(bb) of the *Companies Act 2008* makes an awkward reference to a "duty" which the board may presumably delegate. The drafters could perhaps make the technical argument that the duty referred to is the delegated authority to perform some of the functions of the board. However, a counter argument could therefore be: why include the word "duty" in the same sentence where the terms "powers" and "authority" are used, if the intention was to use the word "duty" as a

position as laid down in the *Barlows Manufacturing Co Ltd* case. As already reflected in part 1.2.2 above, Conradie J in that case considered it a fundamental principle of South African company law that a director may delegate some or even all of his powers to others, but may not delegate his duty or abdicate his/her ultimate responsibility towards the company;¹⁵⁷

- (b) Company employees or officers who are reliable and competent in their line of work;¹⁵⁸
- (c) Professional experts or specialist advisors who provide specialist advice or skills. Examples of such professional experts or specialists include lawyers (legal counsel), accountants, actuaries or any professional persons who can provide professional and specialist advice or opinions to the company and are paid for their services;¹⁵⁹
- (d) A company board committee of which the director is not a member;¹⁶⁰
- (e) Information, opinions, recommendations, reports, financial data, statements including financial statements prepared by categories of persons mentioned in (b), (c) and (d) above.

3.3.2 *What are the legal standards for directors' delegation and reliance on others for performance?*

Subsection 76(4)(b) and (5) provides some legal requirements or standards that the directors' reliance on the performance of others must meet, but it can be seen that there are some gaps or questionable formulations of standards, as will be noted below.

- a) *Directors can only delegate powers or authority to perform functions that are "delegable under applicable law".* The first requirement that can be noted in section 76(4)(b) is that when the board of directors delegates some of its functions formally or informally by course of conduct, the delegated authority or powers should be what is "delegable under applicable law".¹⁶¹ This is, in a nutshell the extent to which directors can delegate to others. The verbal formula "delegable under applicable law" is a catchy phrase, but in context

synonym of either of the latter words? Quite clearly the inclusion of the word "duty" could be seen as being a little clumsy.

¹⁵⁷ *Barlows Manufacturing Co Ltd* 611.

¹⁵⁸ See s 76(5)(a) of the Act. There must not be any red flags that warn a director of the incompetence of the person to whom a task is delegated. See Cassim *et al Law of Business Structures* 373.

¹⁵⁹ See s 76(5)(b) of the Act.

¹⁶⁰ See s 76(5)(c) of the Act.

¹⁶¹ See s 76(4)(i)(bb) of the Act.

what does it mean? Admittedly the requirement that directors can only delegate powers and authority to perform functions that are "delegable under applicable law" has the potential to be interpreted in such a way as to result in the development of important relevant case law principles when courts get the opportunity to do so. Unfortunately for now, the phrase "delegable under applicable law" raises some questions for which answers must be found. In section 76(1) or even section 1, which provisions provide limited definition of key terms, the Act does not yet provide guidance as to the meaning of what is "delegable under applicable law".¹⁶² If there are functions or powers or authority of the board of directors that are "delegable",¹⁶³ this implies that there should be authority, powers and functions of the board that are non-delegable. Which functions are those? This is one of the issues to be interrogated by this article. The *Companies Act 2008* has not provided a hint on what authority, power or functions of the board are delegable and those which are not to be delegated. As noted above, this was potentially a challenge with the statutory standards of delegation in Australia too.¹⁶⁴ Luckily for Australia, the courts intervened and through case law were able to formulate standards pertaining to what is non-delegable in terms of the duty of care and diligence.¹⁶⁵ For a jurisdiction like South Africa, where the statutory provisions on reliance on others for the directors' performance have not yet been tested, when the occasion to apply and interpret the provisions arrives the courts can utilise section 5(2) of the *Companies Act 2008* to borrow from Australian company law to determine the functions, powers or authority of the board which are non-delegable. Courts in Australia were able to rule that functions such as the preparation, approval, publication of financial statements and public disclosures to the securities markets

¹⁶² It is not difficult, however, to decipher that the term "applicable law" is a reference to any provision of the Act and corresponding common law principles relevant to reliance on information and the delegation of powers and authority of the board. This includes common law principles and standards of care, skill and diligence in s 76(3)(c) of the Act.

¹⁶³ If authority, powers and functions are said to be "delegable", this means that the directors are permitted by the law to delegate to categories of persons identified under applicable law.

¹⁶⁴ See part 2.2.2 above for examples.

¹⁶⁵ Case law in Australia has been able to delineate between functions or aspects of the directors' duty of care that are delegable and those that are non-delegable. To this effect the preparation, approval, publication of financial statements and public disclosures to the securities markets are non-delegable duties or responsibilities of directors. See part 2.2.2 where relevant cases, namely *ASIC v Macdonald* 251 and *ASIC v Healey [No 1]* [9]-[10] and [175] are referred to.

are non-delegable duties or responsibilities of directors.¹⁶⁶ I see no reason why South African courts should not follow a similar approach given the numerous challenges experienced recently with respect to directors' approval of misleading financial statements. In any case, as already noted, section 5(2) of the *Companies Act 2008* allows courts to refer to foreign company law principles to supplement any deficiencies in law when applying and interpreting provisions of the Act. Subsection 76(4)(b)(i)(bb) implies that there should be non-delegable responsibilities of the board. This agrees with the argument presented in this article that the *Companies Act 2008* envisages a minimum irreducible standard of care in section 76(3)(c), which is related to reliance and delegation standards.¹⁶⁷

- b) *If a director is to rely on the performance of any company employee, the director should reasonably believe that the employee is reliable and competent in the functions performed or the information supplied.* This requirement that an employee relied upon should merit confidence is comparable to requirements under the equivalent provision of Australia's *Corporations Act 2001*.¹⁶⁸ The belief that the employee is competent and reliable must not be unreasonable. A reasonable person's test is to be applied, which implies that a director cannot negligently rely on the performance of an employee or information supplied by an employee. The director must first investigate and be satisfied on reasonable grounds that the employee is one whose performance or whose information provided can be relied upon for the director's own performance. If for example a director knows that an employee is incompetent or dishonest, that director's reliance on such an employee would be unreasonable and would probably expose the director to liability for any wrongdoing or incompetent performance of the delegate.¹⁶⁹ In Australian law, for example, a director will be held responsible for the performance of delegated authority unless he can show that he made proper inquiries regarding the competence and dependability of the employee.¹⁷⁰ Thus an unreasonable reliance on an employee's performance can be seen to be a breach of the duty of care.¹⁷¹ A

¹⁶⁶ See part 2.2.2 above.

¹⁶⁷ See part 3.1.1 above.

¹⁶⁸ See s 189(a)(i) of the *Corporations Act 2001* discussed in part 2.2.1 above.

¹⁶⁹ See Cassim *et al Law of Business Structures* 373. Also see Davis and Geach *Companies and Other Business Structures* 163.

¹⁷⁰ See s 190(2)(b)(iii) of the *Corporations Act 2001*.

¹⁷¹ In terms of applicable law; that is in terms of s 76(3)(c) of the *Companies Act 2008* and any relevant or equivalent common law principles.

director could be held responsible for an irrational reliance on information supplied by or performance rendered by an incompetent and unreliable employee. The *Companies Act* 2008,¹⁷² unlike Australia's *Corporations Act*,¹⁷³ omits to emphasise the requirement that the reliance on information must be done in good faith. Despite this unfortunate omission, it may be possible for a court, depending on the facts of each case, to find that lack of rationality in the conduct of the director in relying on performance of an employee who does not merit confidence is indicative of bad faith.

- c) *Directors can use professional advice provided they believe on reasonable grounds that the expertise or opinion from a specialist professional is within that person's professional or expert competence.* Section 76(5) places a responsibility on the director seeking to use professional advice to ensure that the matters for which the director seeks specialist advice are within that professional's competence and that the professional merits confidence.¹⁷⁴ The Australian *Corporations Act* 2001, as stated previously, makes good faith a very important requirement for the use of professional advice, and links good faith to the requirement of the reasonableness of the director's belief that the professional advisor merits confidence. In fact, the *Corporations Act* presumes that the director's reliance on professional advice was in good faith and on a reasonable basis unless the contrary is proven.¹⁷⁵ Good faith, which is provided for in section 76(3)(a), is not as emphasised in relevant provisions on reliance and delegation under the *Companies Act* 2008¹⁷⁶ as is done for example under Australia's *Corporations Act*.¹⁷⁷ Good faith is an important standard/requirement for the reason that the use of professional advice is susceptible to abuse, as directors can seek for it with wrong motives. For example, directors can seek a professional opinion for the purposes of supporting a decision which might not necessarily be in the best interests of the company. The good faith requirement is also vital for the reason that, as has been seen in other jurisdictions, directors could act in bad faith by

¹⁷² See s 76(5)(a) of the Act.

¹⁷³ Section 189(b)(i) of the *Corporations Act* 2001 specifically requires that reliance on information must be done in good faith.

¹⁷⁴ See s 76(5)(b)(i)-(ii) of the *Companies Act* 2008. Also see Cassim *et al* *Law of Business Structures* 373; Davis and Geach *Companies and Other Business Structures* 163.

¹⁷⁵ See s 189(c) of the *Corporations Act* 2001.

¹⁷⁶ There is no good faith requirement in either s 76(4)(b) or (5) of the Act.

¹⁷⁷ See s 189(b)(i) of the *Corporations Act* 2001.

failing to disclose material facts to professional advisors such as solicitors/lawyers, accountants or auditors, for ulterior motives.¹⁷⁸ Even in the absence of the emphasis on good faith, though, a contextual approach to interpretation could consider all the standards of conduct contained in section 76(3) of the *Companies Act* 2008.

The important requirement that the director must exercise independent assessment/judgment of the information and professional/expert advice/opinion received is also missing from the *Companies Act* 2008 or alternatively put it is muted in comparison with Australian law, where this aspect is clearly specified. In the absence of a specific reference to this important requirement in section 76(4) and (5), the *King IV Code* could be useful as an aid to the interpretation of the provisions of the *Companies Act* 2008, as already suggested.¹⁷⁹ When interpreting and applying standards on delegation and reliance courts of law or a relevant adjudicating panel could rely on *King IV* as an aid in interpreting what the thinking should be in the corporate governance approach in South Africa.¹⁸⁰ The thinking, as clearly recommended in *King IV*,¹⁸¹ is that a board of directors should put in place a system. I suppose the arrangements or system referred to would be a combination of minimum standards and procedures which promote independent judgment in the decision-making processes of sub-committees of the board. Even though principles 8 and 10 apply mostly to "delegation", I have no doubt that the principle of the independent judgment and independent decision-making of a committee or of directors applies to both delegation and reliance contexts.

- d) *A director can rely on the performance of a committee of the board of directors, provided that the director is not a member of that committee.* By implication, a director may not rely on the performance of a committee which he/she is a part of because that would be tantamount to relying on his/her own performance.

¹⁷⁸ See part 2.2.1 above, which considers two cases where directors failed to disclose material facts to solicitors when seeking professional advice and the courts in both cases refused to accept the directors' defence of reliance against liability claims for breaching their duty of care obligations. See *ASIC v Hobbs* [2473]-[2475]; *ASIC v Adler* 307.

¹⁷⁹ See part 3.2 above.

¹⁸⁰ See principles 8 and 10 of the *King IV Report*, which lists recommended practices to support each of the principles.

¹⁸¹ See principle 8 of the *King IV Report* 54.

3.3.3 Summary of the comparison between the Australian and South African approaches

It has already been noted, for comparative purposes, that there are both slight differences and some similarities between the approach of the Australian *Corporations Act* to reliance/delegation and South Africa's statutory approach.

With regard to similarities, it is clear that most of the categories of the persons on whom Australian directors can rely for information or advice and to whom they can delegate are similar to the categories of persons that directors can rely on for their own performance in terms of the *Companies Act 2008*. For example, in terms of both the Australian and South African statutes directors are permitted to rely on or delegate some of their powers and authority to these categories of persons: a company employee, a committee of directors, "any other person",¹⁸² and a professional expert or specialist advisor. In the *Corporations Act 2001*, another category that is included but that is not to be found in the *Companies Act 2008* is that of a "single director".¹⁸³ Another similarity between the two statutes pertains to some requirements for reliance on information and delegation. For example, in terms of reliance on the performance of or on information provided by employees, both statutes require that the director should believe on reasonable grounds that the employee relied upon is competent, reliable and should merit confidence.¹⁸⁴ With respect to reliance on professional advice, both statutes agree that the director should consult the professional in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence.¹⁸⁵

There are important differences in the way Australia's *Corporations Act 2001* emphasises the requirements/standards for reliance and delegation that could provide important lessons for improving standards under the South African *Companies Act*. One of the differences includes, as already noted, that the *Corporations Act* (Australia) emphasises and presents reliance on information from employees and professional or specialist advice as separate from directors' delegation of their powers to designated persons.¹⁸⁶ Presenting reliance and delegation separately allows the

¹⁸² Interestingly, in neither piece of legislation, that is, neither in the *Corporations Act 2001* nor in the *Companies Act 2008*, is the term "any other person" defined.

¹⁸³ See s 198D(1)(d) of the *Corporations Act 2001*.

¹⁸⁴ See parts 2.2.1 and 3.3.2 above.

¹⁸⁵ See parts 2.2.1 and 3.3.2 above.

¹⁸⁶ See parts 2.2.1 and 2.2.2 above. Reliance, including categories of persons directors can rely on and the requirements or standards for reliance are in terms of s 189 of the *Corporations Act 2001*. Delegation, including the categories of persons directors can delegate to are found in s 198D, while the requirements or standards for delegation are to be found in s 190 of the *Corporations Act 2001*.

Corporations Act to emphasise the important principles/standards relating to directors' reliance on employees and professional/specialist advice.¹⁸⁷ It also allows the *Corporations Act* to emphasise the standards of delegation separately.

A main difference, as already noted in this article, is that whereas the Australian *Corporations Act* emphasises the requirement that the reliance on information and professional advice must be done in good faith,¹⁸⁸ the *Companies Act 2008* is mute on this requirement. Specifying such a requirement in statute¹⁸⁹ has allowed Australian courts to develop valuable case law principles which could prove to be instructive to the interpretation of South Africa's reliance provisions under the *Companies Act 2008*.¹⁹⁰

Another important and related standard emphasised by the *Corporations Act 2001* but missing from the *Companies Act 2008* is the requirement that the director must exercise independent assessment/judgment of the information received or professional/expert advice/opinion received, using the director's own knowledge of the company and taking into account the complexity of the company's structure and operations.¹⁹¹ It is important to note that as established in part 3.1.1 above, the *Companies Act 2008* provides for a director's minimum irreducible duty of care, which is related to the director's reliance on the performance of others in terms of section 76(4)-(5). It has already been established in this article that Australian and English law are clear that directors must not utilise professional advice without exercising an independent judgment with respect to the advice given.¹⁹² These jurisdictions recognise the importance of the director's duty to exercise an independent judgment, and as already pointed out, English law even decided to strengthen this common law duty by codifying it in statute.¹⁹³ Though the *Companies Act 2008* has not yet codified this common law duty, South African common law acknowledges that directors are required to exercise an independent judgment and to make decisions according to the best interests of the company.¹⁹⁴ In addition to this, South African common law relevant to reliance and delegation emphasises that a director may delegate some or even all of his/her powers to others, but may not delegate his/her duty or abdicate his/her ultimate responsibility towards the company.¹⁹⁵ It is in line with these principles to argue that even if a

¹⁸⁷ See ss 189(b) and 190 of the *Corporations Act 2001* for important principles pertaining to reliance and delegation respectively.

¹⁸⁸ See part 2.2.1 above.

¹⁸⁹ See s 189(b)(i) of the *Corporations Act 2001*.

¹⁹⁰ See such principles considered in 2.2.1 above.

¹⁹¹ See s 189(b)(ii) of the *Corporations Act 2001*.

¹⁹² See part 3.1.2 above.

¹⁹³ See s 173 of the UK's *Companies Act 2006*.

¹⁹⁴ *Fisheries Development Corporations* 163D-F.

¹⁹⁵ See *Barlows Manufacturing Co Ltd* 611.

director seeks the advice of a professional advisor or receives information from employees, it remains his/her ultimate responsibility to make a decision that advances the best interests of the company. The law for this reason should assist directors by emphasising principles which ensure that directors do not become so dependent on any advice to the extent that they stop applying their minds adequately in the misguided hope that specialists will make decisions for them to simply rubberstamp.

4 Conclusion

The central research question which this article sought to answer is whether South Africa has established globally competitive legal standards of directors' delegation and reliance on the performance of others in line with the objectives of company law reform prior to 2008.¹⁹⁶ Some sub-inquiries or sub-research questions which provided building blocks towards answering the central research question were also clearly spelt out in part 1.2.1 above. South Africa has reliance and delegation provisions in the *Companies Act 2008* – namely section 76(4)(b) and (5), which are related to some codified standards of directors conduct such as the duty of care¹⁹⁷ and the uncodified director's common law duty to exercise independent judgment.¹⁹⁸ The key research question was answered in the light of some company law reforms which resulted in the passing of the *Companies Act 2008*. The most relevant law reform objective was to ensure that company law promotes global competitiveness of the South African economy in a number of ways.¹⁹⁹ The most relevant of such ways is the objective of "making company law compatible and harmonious with best practice jurisdictions internationally".²⁰⁰ It is for this reason that this article analysed key legal principles pertaining to reliance and delegation standards in some of the best practice jurisdictions in the world such as Australia²⁰¹ and the UK.²⁰²

The comparative legal analysis enabled me to answer the important central and secondary research questions in various parts of the article. To begin with, a comparative analysis of English law²⁰³ and South African law led to the conclusion that the reliance and delegation provisions under the

¹⁹⁶ See part 1.2.1 for key research questions.

¹⁹⁷ See part 3.1.1 above.

¹⁹⁸ See part 3.1.2 above.

¹⁹⁹ See *Explanatory Memorandum to the Companies Bill [B61-2007]* 3 referred to in part 3.3 above.

²⁰⁰ See part 3.3 above.

²⁰¹ See part 2 above for a detailed analysis of Australian statutory standards reliance and delegation.

²⁰² See parts 1.2.2 and 1.2.3 above for reference to English law principles.

²⁰³ See part 1.2.2 and 1.2.3 for examination of relevant English common law and statutory law principles and very recent developments in English law.

Companies Act 2008 relate to the minimum irreducible standards of care and the minimum irreducible standard of exercising independent judgment.²⁰⁴ Australian statutory reliance and delegation principles as well as the case law principles developed through the application of the relevant statutory provisions under the *Corporations Act 2001* were critically analysed in part 2 of this article.²⁰⁵ The comparative analysis with the South African *Companies Act 2008* which followed established that some principles in the reliance/delegation provisions under section 76(4)(b)-(5) of the Act compare favourably with some globally competitive principles found in Australian law.²⁰⁶ About four standards from the reliance provisions in section 76(4)(b)-(5) were identified and it was established that most of these standards are comparable to Australian standards.²⁰⁷

It is concluded, in the light of the arguments presented in this article that the statutory reliance provisions of the *Companies Act 2008* reflect some globally competitive standards. Nonetheless, as has already been noted, South Africa can learn from certain standards under Australia's *Corporations Act* and the related case law principles in order to close some gaps in law which have been identified in this article. For example, as noted above, the reliance and delegation provisions under section 76(4)(b)-(5) do not articulate the important standards such as the requirement of good faith and the requirement that directors must exercise independent judgment when dealing with information from employees or advice from professional experts. The way in which other jurisdictions such as Australia and the UK emphasise these standards in both the directors' duties provisions and the reliance and delegation provisions in their statutes is preferable.

In the light of the critical analysis of the section 76(4)(b)-(5) provisions and in the light of the comparative analysis done in this article, the following suggestions for improving the standards of directors' reliance on the performance of others in South Africa are made:

- a) It is proposed that the *Companies Act 2008*, for the reasons articulated in this article,²⁰⁸ be amended or alternatively be interpreted in the light of international best practices as permitted by section 5(2) of the *Companies Act 2008* to include a "good faith" requirement under section 76(5) with respect to directors' reliance on information supplied by company employees for their own decision-

²⁰⁴ See parts 3.1.1 and 3.1.2 above for the relevant conclusions.

²⁰⁵ See in particular an analysis done on reliance and delegation statutory provisions in parts 2.2.1 and 2.2.2 respectively.

²⁰⁶ See generally part 3.

²⁰⁷ See part 3.3.2 in particular.

²⁰⁸ See parts 3.3.2 and 3.3.3 above in this regard.

making and any other director's reliance on performance of such employees or any other person.

- b) The good faith requirement referred to in point (a) above should also extend to directors' reliance on professional advice, for the reasons articulated in this article.
- c) It is recommended that section 76(5) of the *Companies Act* 2008 be amended to include the requirement that a director must exercise independent assessment/judgment of the information received or professional/expert advice/opinion received, using the director's knowledge of the company and taking into account the complexity of the company's structure and operations.
- d) That section 76(4)(b)(i)(bb) be amended to remove the awkward reference to the fact that the board may delegate a "duty".²⁰⁹ Reference should be to the delegation of powers and authority only.

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²⁰⁹ Awkward in the sense that it contradicts even South African common law principles, as already highlighted in this article; see e.g. part 3.3.1(a) above.

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List of Abbreviations

ASIC	Australian Securities and Investment Commission
ASX	Australian Stock Exchange
CLWR	Common Law World Review

IoDSA	Institute of Directors South Africa
MLR	Modern Law Review
SA Merc LJ	South African Mercantile Law Journal
Stell LR	Stellenbosch Law Review
UK	United Kingdom
USA	United States of America