LEGAL MEMORANDUM

concerning

DIRECTOR DUTIES AND LIABILITY FOR CLIMATE RISK UNDER SOUTH AFRICAN LAW

September 2024

prepared for

THE CENTRE FOR ENVIRONMENTAL RIGHTS (CER) AND
THE INSTITUTE OF DIRECTORS IN SOUTH AFRICA (IoDSA)

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This legal memorandum has been prepared for research and information purposes only and does not reflect the individual views or opinions of the Centre for Environmental Rights and the Institute of Directors South Africa. The views expressed in this memorandum should not be construed as providing legal advice for any particular director, company, sector or circumstance. The memorandum presents the status of South African law as of September 2024.

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INTRODUCTION AND OVERVIEW

1 As we were finalising this memorandum during the final week of September 2024, parts of the KwaZulu-Natal, Eastern Cape and Free State Provinces in South Africa were recovering from a weekend in which they experienced extremely unusual weather events.[1] Although we are in the middle of spring in South Africa, these Provinces were covered in snow and resembled parts of the Northern Hemisphere in winter.

2 Many companies that operate in those Provinces would no doubt have experienced disruptions to their operations of varying degrees, whether in the form of goods and services not arriving at their destinations on time, or workers not being able to arrive at work.

3 We are not weather experts, and it is not within our remit to say whether the recent extreme weather events are a result of climate change. We highlight the recent events simply to illustrate how any changes in weather patterns can affect industry and to demonstrate why businesses need to be prepared for, and take mitigation measures to guard against, such risks.

4 The events mentioned above have also highlighted that financial risk associated with climate change (referred to herein as “climate risk”), such as supply-chain

[1] The weekend of 20-22 September 2024.

disruptions caused by extreme weather, is a risk like any other risk that confronts companies. Like other risks, a company might consider climate risk material or immaterial depending on the size, location and industry in which the company operates, as well as its risk appetite. What cannot be gainsaid is that there is now more awareness around the issue of climate change and associated risks than in the past, so much so that the South African Parliament has recently taken the bold step of enacting climate change specific legislation.[2]

5 This memorandum explores the possible legal basis for company directors in South Africa to be held accountable under the Companies Act 71 of 2008 (**the Companies Act**), the common law, related legislation and good governance standards for their failure to address, disclose and adequately prepare for climate risks impacting the company's business.

6 Before moving to the substance of this memorandum, we highlight the following:

6.1 Our memorandum is prepared for those who instruct us and their stakeholders. It is not intended for use by, and should not be relied upon by, other third parties.

6.2 Our memorandum is not and does not purport to be an exhaustive study on the subject matter. It is confined to and limited to the topics we were expressly asked to cover.

[2] Climate Change Act 22 of 2024, assented to on 23 July 2024.

6.3 Our memorandum is limited to providing a summary of the position as we understand it under South African law as at the end of September 2024, and the way in which we anticipate that our Courts will approach issues of director liability for a failure to consider and manage climate risk. The views expressed herein should not be construed as providing legal advice for any particular director, company, sector or circumstance. The memorandum is by no means intended to provide a view on specific cases and should not be relied on as case specific legal advice. Its aim is, furthermore, not to express conclusive views on the prospects of success of any potential claim — an exercise that would require an assessment of the facts and available evidence relevant to that potential claim — but rather to set out, for those who instruct us and their stakeholders, the types of claims that directors can most readily anticipate should they fail to adopt climate-specific risk mitigation measures.

6.4 We are alive to the fact that some South African companies operate in multiple jurisdictions. Our memorandum does not address the legal position in other jurisdictions, but is instead limited to the law in force in South Africa, which binds all entities and individuals incorporated and operating in South Africa.

7 As a general matter, a company incorporated in terms of South African law is a legal person in its own right and has separate juristic personality from its directors and

shareholders, with its own rights and legal duties.[3] Directors owe common law and statutory duties to companies — including the duties to act in the best interests of the company through exercising loyalty, good faith, due care and diligence — and when directors fail to fulfil those duties, the company (and sometimes other interested and affected parties) is entitled to hold those directors liable for any loss sustained as a result of their actions.

8 Furthermore, while the debts of a company are not regarded as debts of its shareholders or directors, where a director has misused a company's separate legal personality to engage in a wrongful act, our Courts may, in appropriate circumstances, hold such a person personally liable by 'piercing the corporate veil'.[4]

9 Some of the instances where directors may be held personally liable include the following:

9.1 where a director has breached his or her fiduciary duties, his or her duties of reasonable care and skill, or any other statutory duty imposed on such a director;

9.2 where a director has acquiesced in the carrying on of the company's business recklessly, with gross negligence, with intent to defraud any person or for fraudulent purpose;

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[3] The Supreme Court of Appeal held in *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA) that the separate personality of a company is *"no mere technicality"* but is *"foundational to company law"* (para 42).

[4] See, *Venator Africa (Pty) Ltd v Watts and Another* 2024 (4) SA 539 (SCA) paras 23-24; *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO and Others* 2018 (4) SA 71 (SCA) paras 27-29.

9.3 where a director was a party to the publication of a false or misleading financial statement or prospectus; and

9.4 where a director has acted negligently, except if such negligence can be justified on the basis of an error in an honest and considered business decision.

10 Climate change is increasingly causing significant, negative impacts to companies,[5] rendering directors the targets of potential legal action for their failure to adequately shield the company from climate risk.

11 Climate risk is a material financial risk to a company that arises as a result of climate change. It is made up of the following:

11.1 Transition risks – the risks associated with the transition to a lower-carbon economy, which may result in varying levels of financial and reputational risk to companies.[6]

11.2 Physical risks – the risks associated with the physical impacts of climate change that may have financial implications for companies, such as the impacts of extreme temperature changes and weather events on a

[5] On 18 April 2022, President Cyril Ramaphosa declared a national state of disaster when heavy rainfall led to severe flooding and landslides in KwaZulu-Natal, causing death, destruction of property and displacement of people. Many businesses also suffered from the damage, including a leading car manufacturer which has its main factory in the province.

[6] Financial Stability Board (FSB), *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures*, June 2017, p 5, available at: https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf.

company's premises, operations, supply chain, transport needs, and employee safety.[7]

11.3 Liability risks (sometimes included under the definition of transition risks) – the litigation or legal risks posed to companies or their directors for a breach of statutory or fiduciary duties in relation to climate change, including both liability for the company's contribution to climate change and liability for losses of corporate value attributable to a failure to adequately and accurately assess, manage, and disclose physical or transition risks.[8]

12 The severity of each type of risk will vary from industry to industry.[9] The standard of conduct expected of directors will also vary, as certain industries have adopted industry-specific codes. This memorandum provides only a general overview of director liability for the failure to adequately address (which includes, for our purposes, to assess, manage, and disclose) climate risk.

13 While South Africa has not yet seen litigation that seeks to hold directors liable for a company's failure to address climate risk, dozens of such cases are pending in

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7 Ibid at 6. South African Reserve Bank, *Transition and systemic risk in the South African banking sector: assessment and macroprudential options*, Working Paper Series WP/24/12, 22 July 2024, available at: https://www.resbank.co.za/content/dam/sarb/publications/working-papers/2024/transition-and-systemic-risk-in-the-south-african-banking-sector-assessment-and-macroprudential-options.pdf.

8 Bank of England Prudential Regulation Authority, *The Impact of Climate Change on the UK Insurance Sect*or, September 2015, pp 61-62. available at: https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/publication/impact-of-climate-change-on-the-uk-insurance-sector.pdf.

9 See, for example, the legal opinion by Fasken on the duty of boards of South African pension funds to take climate change into account when making investment decisions. Fasken, *Pension Funds and Climate Risk*, July 2019, available at: https://juststhare.org.za/wp-content/uploads/2019/04/2019_Pension-fund-legal-opinion-by-Fasken.pdf. A summary of different industry-specific requirements is also available at: Commonwealth Climate and Law Initiative (CCLI), *Directors' Liability and Climate Risk: South Africa – Country Paper*, April 2018, p 21, available at: https://cer.org.za/news/legal-analysis-climate-change-brings-new-risks-and-obligations-for-sa-directors.

foreign jurisdictions.[10] It is now widely contended that the foreseeability[11] of the financial impact of climate change on companies requires directors of companies to take steps to assess, manage and disclose these risks, as they would be required to do for any other foreseeable material financial risk to the company.

14 Our memorandum considers this argument in the South African legal context. Our analysis is provided in three parts:

14.1 **Part I** provides context to understand the global push for directors to consider climate risk, as well as the likely approach of South African Courts to litigation on this issue.

14.2 **Part II** provides a brief explanation of the various directors' duties before assessing whether the consideration of climate risk forms part of:

14.2.1 directors' fiduciary duties of loyalty, honesty and good faith;

14.2.2 directors' duty of care and due diligence;

14.2.3 directors' disclosure and reporting duties; and

[10] The Sabin Centre for Climate Change Law's *Global Climate Change Litigation Database* lists 213 cases against corporations internationally, not including the dozens more in the United States, some of which have been finalised but many of which are still pending. They relate to misleading advertising (68 cases), climate damage (37 cases), environmental assessment and permitting (37 cases), greenhouse gas emissions (33 cases), disclosures (17 cases), carbon credits (8 cases), financing and investment (4 cases), just transition (3 cases) and pollution (1 case). The database is available at: https://climatecasechart.com/non-us-case-category/corporations/.

[11] Given the scientific consensus on climate change and its effects, it is likely that many risks associated with climate change would be considered "foreseeable" by a Court. See N Hutley SC and S Hartford-Davis, *Climate Change and Directors Duties, Memorandum of Opinion to Minter Ellison for the Centre for Policy Development and Future Business Council*, 7 October 2016, available at: https://cpd.org.au/wpcontent/uploads/2016/10/Legal-Opinion-on-Climate-Change-and-Directors-Duties.pdf.

14.2.4 directors' duties under environmental and climate change legislation and policy.

14.3 **Part III** explores the avenues available to potential litigants to hold directors liable for a failure to address climate risk, as well as the challenges inherent in some of those avenues.

PART I - CONTEXT FOR THE BOARD

The impact of climate change globally

> *"The climate crisis poses enormous financial risk to investment managers, asset owners and businesses. These risks should be measured, disclosed and mitigated."*[12]

15 It is now generally accepted that climate change poses foreseeable financial risks across short, medium and long-term horizons.

16 In terms of physical risks, floods, freezes, and fires are already leading to disruptions in supply chains[13] and increased exposure for insurers.[14]

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[12] UN Secretary-General, *Statement on the Intergovernmental Panel on Climate Change (IPCC) Working Group 1 report*, August 2021, available at: https://www.un.org/press/en/2021/sgsm20847.doc.htm.

[13] Yale Environment 360, *How Climate Change Is Disrupting the Global Supply Chain,* 10 March 2022, available at: https://e360.yale.edu/features/how-climate-change-is-disrupting-the-global-supply-chain#:~:text=Scientists%20say%20that%20such%20climate,and%20perhaps%20more%20%E2%80%94%20by%202100.

Furthermore, Automotive Logistics reported on 30 May 2022 that:

> *"South Africa's automotive industry has been badly affected by heavy rains and disastrous flooding in the KwaZulu-Natal (KZN) region. Operations are expected be disrupted to some extent for the rest of this year, with Toyota's plant in Prospecton badly hit."*

Available at: https://www.automotivelogistics.media/middle-east-and-africa/floods-hit-auto-production-and-supply-in-south-africa/43073.article.

[14] The European Insurance and Occupational Pensions Authority (EIOPA), *European Insurers' Exposure to Physical Climate Change Risk,* 20 May 2022, available at: https://www.eiopa.europa.eu/document-library/discussion-paper/discussion-paper-physical-climate-change-risks_en.

17 The South African insurance sector has already borne the brunt of the physical risks associated with climate change. Speaking on the impact of the flash floods that devastated parts of the KwaZulu-Natal Province (**KZN**) in 2022, Old Mutual Insure reported that it had received claims nearing a quarter of a billion Rand (~R250 million) by the start of the second quarter of that year. It acknowledged that:

> *"We are seeing a significant increase in weather-related losses in recent times and expect changing weather patterns and climate change to continue to cause havoc."*[15]

18 Discussing the impact climate change will have on premiums, the chief actuary at Momentum Insure stated that insurance companies will hike their premiums for climate-related cover and claims.[16] These events prompted S&P Global Ratings to model the earnings capacity of South Africa's insurance sector to have downward pressure, in the long run, if the trend of extreme weather-related claims continues.[17]

19 It is evident that these occurrences have the potential to cause significant financial damage, prompting companies worldwide to explore ways to better anticipate and prepare for climate-related harm. A 2022 survey found that climate change is affecting the business of 68% of surveyed senior executives in companies and funds in Africa and Asia.[18]

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[15] L Buthelezi, *Old Mutual's R245m in flood-related claims the 'tip of the iceberg'*, news24, 19 April 2022, available at: https://www.news24.com/fin24/companies/old-mutuals-r245m-in-flood-related-claims-the-tip-of-the-iceberg-20220419.

[16] N Viljoen, *Insurers and Their Clients Count the Cost Of Extreme Weather*, Moonstone, 27 July 2023, available at: https://www.moonstone.co.za/insurers-and-their-clients-count-the-cost-of-extreme-weather/.

[17] S Mhlanga and T Grineva, *Extreme Weather Events Continue to Test South African Insurers' Readiness to Climate Change*, S&P Global, 6 June 2024, available at: https://www.spglobal.com/ratings/en/research/articles/240606-extreme-weather-events-continue-to-test-south-african-insurers-readiness-to-climate-change-13139819.

[18] British International Investment, *Emerging Economies Climate Report 2022*, October 2022, p 2, available at: https://assets.bii.co.uk/wp-content/uploads/2022/10/18093953/EmergingEconomiesClimateReport-2022-1.pdf.

20 In addition to physical risks, transition risks mean that, in order to obtain capital for continued operations, companies operating in industries facing structural decline because of climate change are already being made to prove their ability to remain resilient in the face of uncertainty regarding the pace of change.[19]

21 Liability risks have also proven to be significant.[20] The financial cost of corporate fines and settlements can be astronomical, and individual incidents and events can also have major impacts on corporate value. The United Nations Environment Programme (**UNEP**) Finance Initiative reports that the share price of mining company, Vale S.A., fell by almost a quarter in the immediate aftermath of the Brumadinho mine disaster in 2019, and the Volkswagen Group lost almost a quarter of its market value in 2015 after it admitted to cheating on US air pollution tests for years. In 2015, the share price of oil multinational, British Petroleum P.L.C, more than halved following the Deepwater Horizon spill.[21]

22 Managing risks associated with climate change is thus integral to value creation and it squarely engages directors' duties and disclosure and reporting obligations.

23 Recognising this, financial regulators have increasingly insisted on effective climate risk governance and disclosure.[22] For example, the European Union's Corporate

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[19] Climate Governance Initiative (CGI), "Climate Change as a Financial and Systemic Risk", *Primer on Climate Change: Directors' Duties and Disclosure Obligations,* available at: https://hub.climate-governance.org/Primer/General/general-1.

[20] United Nations Environment Programme (UNEP) Finance Initiative, *Fiduciary duty in the 21st century*, 2019, p 18, available at: http://www.unepfi.org/fileadmin/documents/fiduciary_duty_21st_century.pdf.

[21] UNEP Finance Initiative, *Fiduciary duty in the 21st century*, p 18.

[22] FSB, *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures*, pp 5-6; HM Treasury, *Fact Sheet: Net Zero-aligned Financial Centre*, November 2021, available at: https://www.gov.uk/government/publications/fact-sheet-net-zero-aligned-financial-centre/fact-sheet-net-zero-

Sustainability Due Diligence Directive (**CSDDD**),[23] which entered into force on 25 July 2024, requires that large companies adopt and put into effect, through best efforts, a transition plan for climate change mitigation to ensure that the company's business model and strategy is aligned with the Paris Agreement's goal of keeping the temperature increase to a limit of 1.5 degrees Celsius, as well as the intermediate and 2050 climate neutrality targets established under the European Climate Law.[24]

24 It is also clear from investors' voting and stewardship activities that investors expect this proactive approach from directors, whether prescribed by law or not. The Climate Governance Initiative (**CGI**) has traced how shareholders at large oil and gas companies are not only bringing resolutions requesting that these companies set and report on climate targets,[25] but are also voting to replace board members with alternative candidates who have experience in managing the transitions demanded by climate change.[26]

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aligned-financial-centre; Transition Plan Taskforce, *The Transition Plan Taskforce Disclosure Framework*, November 2022, available at: https://transitiontaskforce.net/wp-content/uploads/2022/11/TPT-Disclosure-Framework.pdf.

[23] European Commission, *Directive 2024/1760*, p 20, para 73, available at: https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en.

[24] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law), available at: https://eur-lex.europa.eu/eli/reg/2021/1119/oj.

[25] Fn. 20 of the CGI report offers examples of these resolutions, including, for example, a resolution proposing that Exxon Mobil evaluates and reports on the alignment of its lobbying activities with the objectives of the Paris Agreement, on the basis that *"corporate lobbying that is inconsistent with the goals of the Paris Agreement presents regulatory, reputational and legal risks to investors"* (passed with 63.8 % of the vote). CGI, "Climate Change as a Financial and Systemic Risk", *Primer on Climate Change*.

[26] See, for example, *ExxonMobil, ExxonMobil updates preliminary results on election of directors*, 2 June 2021, available at: https://corporate.exxonmobil.com/News/Newsroom/News-releases/2021/0602_ExxonMobil-updates-preliminary-results-on-election-of-directors.

25 The concept of directors' duties is also increasingly interpreted by international bodies and Courts to incorporate the management of climate risk. For example, UNEP, in a report on fiduciary duties, has concluded that *"[f]ailing to consider long-term investment value drivers, which include environmental, social and governance issues, in investment practice is a failure of the fiduciary duty*".[27]

26 The establishment of the industry-led Task Force on Climate-related Financial Disclosures (**TCFD**) by the Financial Stability Board (**FSB**),[28] and its publication of recommendations for voluntary disclosures of climate-related financial risks, is also strong evidence of a shifting approach in the international community.

South Africa's response to climate change

27 To the best of our knowledge, there is no statute in South Africa that expressly requires directors of companies to consider and prepare for the effects of climate change in their day-to-day operations. One has to look to the ordinary duties of directors in the Companies Act and the common law (as developed by the Courts from time to time) for the obligation.

28 Parliament's response to climate change is still in its infancy in South Africa.

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[27] UNEP Finance Initiative, *Fiduciary duty in the 21st century*, p 9.

[28] The FSB is an international body that monitors and promotes the stability of the global financial system. See: FSB, *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures*, p iii.

29 In its 2011 *National Climate Change Response White Paper*,[29] the South African Government noted that-

> *"Should multi-lateral international action not effectively limit the average global temperature increase to below 2°C above pre-industrial levels, the potential impacts on South Africa in the medium to long-term are significant and potentially catastrophic. Even under emission scenarios that are more conservative than current international emission trends, it has been predicted that by mid-century the South African coast will warm by around 1 to 2°C and the interior by around 2 to 3°C. By 2100, warming is projected to reach around 3 to 4°C along the coast, and 6 to 7°C in the interior. With such temperature increases, life as we know it will change completely: parts of the country will be much drier and increased evaporation will ensure an overall decrease in water availability. This will significantly affect human health, agriculture, other water-intensive economic sectors such as the mining and electricity-generation sectors as well as the environment in general. Increased occurrence and severity of veld and forest fires; extreme weather events; and floods and droughts will also have significant impacts. Sea-level rise will negatively impact the coast and coastal infrastructure. Mass extinctions of endemic plant and animal species will greatly reduce South Africa's biodiversity with consequent impacts on eco-system services."* (our emphasis)

30 South Africa's dependence on coal-fired power and other fossil fuels for electricity generation and supply leaves it particularly exposed to economic transition risks, due to the reliance of such a wide range of sectors on fossil fuels and the risk of stranded greenhouse gas (**GHG**) intensive assets.

31 The South African Government is in the process of enacting a range of policy and legislative developments relating to climate change. The most relevant of these are

[29] Published by the then Department of Environmental Affairs, available at: https://www.gov.za/sites/default/files/gcis_document/201409/nationalclimatechangeresponsewhitepaper0.pdf.

summarised in a later section of this memorandum. For the purpose of this overview, it is worth noting that the recently enacted Climate Change Act 22 of 2024 (**Climate Change Act**)[30] requires that:

> *"7(1) Every organ of state that exercises a power or performs a function that is affected by climate change, or is entrusted with powers and duties aimed at the achievement, promotion and protection of a sustainable environment, must review and if necessary revise, amend, coordinate and harmonise their policies, laws, measures, programmes and decisions in order to—*
>
> *(a) ensure that the risks of climate change impacts and associated vulnerabilities are taken into consideration; and*
>
> *(b) give effect to the principles and objects set out in this Act."*

32 The principles and objects of the Climate Change Act include the objective to "*provide for a coordinated and integrated response by the economy and society to climate change and its impacts in accordance with the principles of cooperative governance"*[31] and the objective *"to ensure a just transition towards a low carbon economy and society considering national circumstances"*.[32] There are also active efforts to align South Africa's reporting requirements with the recommendations of the TCFD.

[30] The date on which the Climate Change Act will come into operation has not yet been fixed by the President.

[31] Climate Change Act s 2(a).

[32] Climate Change Act s 2(d).

The approach of South African Courts

33 While South African Courts have not yet been asked to hold directors liable for their failure to address climate risk, four trends in South African jurisprudence suggest that our Courts might be open to making such a finding.

34 **First,** section 158 of the Companies Act requires that a court, when determining a matter brought before it in terms of the Companies Act, develop the common law as necessary to improve the realisation and enjoyment of rights established by the Companies Act;[33] promote the spirit, purpose and objects of the Companies Act;[34] and prefer an interpretation of a provision of the Companies Act that best promotes its spirit and purpose and will best improve the realisation and enjoyment of rights.[35]

35 Section 7 of the Companies Act expressly articulates the purposes of the Companies Act and Section 5 requires that the Companies Act be interpreted and applied "*in a manner that gives effect to the purposes set out in section 7*".

36 These purposes include to:

> *"(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;*
>
> *(b) promote the development of the South African economy by-*
>
> *(i) encouraging entrepreneurship and enterprise efficiency;*
>
> *(ii) creating flexibility and simplicity in the formation and maintenance of companies; and*

[33] Companies Act s 158(a).

[34] Companies Act s 158(b)(i).

[35] Companies Act s 158(b)(ii).

(iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;

…

(d) reaffirm the concept of the company as a means of achieving economic and social benefits;

…" (our emphasis)

37 Our Courts have proven willing to revert to these aims when determining procedural questions, such as who has standing to bring litigation in terms of the Companies Act, as well as when interpreting substantive provisions of the Companies Act.

38 In *Mbethe*,[36] the High Court interpreted the standing provisions in section 165(5) of the Companies Act (a derivative action):

> *"in line with the stated purpose of the Act set out in section 7, inter alia, to encourage high standards of corporate governance (section 7(b) (iii)) and to encourage the efficient and responsible management of companies, which the Court is obliged to have regard to in making an Order in terms of the Act (section 158 (b) (ii)).*"[37] (our emphasis)

39 In *Vantage Mezzanine Fund*,[38] when deciding whether a creditor fell under the extended standing afforded by section 157(1)(d) of the Companies Act, the Court also took the 'policy approach' of interpreting the statute under the lens of section 7(b)(*iii*) of the Companies Act and found the following:

> *"This reading of the policy approach in the 2008 Act suggests two things: that investors and third parties are to be provided with greater remedies in relation*

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[36] *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2016 (5) SA 414 (GJ). The appeal to the SCA was dismissed.

[37] *Mbethe* para 72.

[38] *Vantage Mezzanine Fund II Partnership and Another v Hopeson and Others* 2024 (2) SA 550 (GJ).

> *to companies; and that high standards of corporate governance are expected. Any reading of section 157(1)(d) read with section 162 which seeks to categorically deny a creditor these rights seems contrary to the spirit of the Act. I am not suggesting that a creditor always has this right. Only that per se, as a category of person, it cannot be denied this right without the further enquiry as to whether it acts in the public interest and that is an enquiry dependent on the facts in each case"*[39] (our emphasis)

40 It is noteworthy that the Courts have emphasised the *"high standards of corporate governance"* in both cases. Risk management, as set out in **Principle 11** of the King IV Report on Corporate Governance® for South Africa 2016 (**King IV**),[40] is an essential feature of sound corporate management.

41 Any reliance by a court on the aims of the Companies Act in order to interpret the ambit of other provisions therein would likely work in favour of a litigant seeking to expand the notion of directors' duties to incorporate the consideration and mitigation of climate risk.

42 **Second,** South African Courts are now readily relying on non-binding standards of good governance in order to give meaning to directors' duties as codified in the Companies Act, suggesting that they might be willing to do the same in respect of climate risks.

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[39] *Vantage Mezzanine Fund* para 36.

[40] The King Reports provide guidelines for the governance structures and operation of companies in South Africa. They contain a code of corporate practice and conduct for South African companies which is sometimes abbreviated as "the King Code". The King Reports are issued by the King Committee on Corporate Governance, a committee formed at the instance of the Institute of Directors in South Africa (IoDSA). Four reports have been issued: in 1994 (King I), 2002 (King II), in 2009 (King III) and in 2016 (King IV). Copyright and trademarks are owned by IoDSA. Access to the King IV Report as well as the previous versions can be obtained via the IoDSA website at www.iodsa.co.za.

43 In *Tailifts*,[41] when adjudicating a conflict of interest matter, the Gauteng Division of the High Court was clear about the applicability of the code of corporate practice and conduct for South African companies contained in the King Reports (as amended from time to time and currently reflected in King IV). In paragraph 7, the Court said:

> *"…As I hope to demonstrate later; however attractive such an apparently straight forward distinction may appear, it would reduce the purpose of the legislation to one requiring the simple ticking of boxes, an outcome which King IV in particular sought to discourage when compliance with the requirements of good corporate governance are considered."*[42]

44 In the footnote to the above paragraph, the Court justified its reliance on King IV as follows:

> *"The various King Reports and Code, culminating in the King IV Report on Corporate Governance in 2016 (effective from 2017) set out the standards of conduct which the corporate and financial world should reasonably expect of boards and directors of listed and unlisted companies as well as certain other entities. Where the underlying considerations meet the provisions of the Companies Act or the common law in matters concerning the relationship between shareholder and management in private unlisted companies these expectations may be of assistance in deciding the appropriate yardstick of reasonableness by which to measure the conduct of directors and shareholders. The reason is that these are guidelines commissioned and adopted by the Institute of Directors in South Africa which has gone through four iterations in order to provide guidelines on sound corporate governance. Irrespective of whether the company itself adopted the guidelines (as was the case in Organisation Undoing Tax Abuse and another v Myeni and others [2020] 3 All SA 578 (GP) at para [34]),* ***I am of the view that these are now***

[41] *Atlas Park Holdings (Pty) Ltd v Tailifts South Africa (Pty) Ltd* [2022] 4 All SA 28 (GJ).

[42] *Tailifts* para 7.

well established and accepted principles, which the Courts are entitled to look to as indicating the standard which the commercial and financial world consider is reasonably to be expected of a director. *It is for the other party to produce satisfactory testimony to gainsay it."*[43] (our emphasis)

45 In *Stilfontein,*[44] when assessing whether former directors of a company were to be held liable for the company's failure to follow a previous court order to prevent pollution of a valuable water resource, having instead resigned *en masse*, the High Court found the directors liable. In coming to its decision, the Court also explicitly referenced the King Code in effect at the time, contained in King II, despite its standards not being binding on the company. The judgment is worth quoting at length:

> *"16.7 Practising sound corporate governance is essential for the well-being of a company and is in the best interests of the growth of this country's economy especially in attracting new investments. To this end the corporate community within South Africa has widely and almost uniformly accepted the findings and recommendations of the King Committee on Corporate Governance – see King Report on Corporate Governance for South Africa – March 2002.*
>
> *Regarding the Board of directors the King Report states the following:*
>
> > *"The Board is the focal point of the corporate governance system. It is ultimately accountable and responsible for the performance and affairs of the company. Delegating authority to board committees or management does not in any way mitigate or dissipate the discharge by the board and its directors of their duties and responsibility."*
>
> *See King Report page 22 paragraph 2.1.1.*
>
> *The conduct of the second to fifth respondents fly in the face of everything recommended in the code of corporate practices and conduct recommended*

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43 *Tailifts* f.n. 3.

44 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and Others* 2006 (5) SA 333 (W).

by the King Committee. In my view the second to fifth respondents acted irresponsibly in merely abandoning the first respondent, a listed company of which they were the directors.

…

16.9 The King Committee, correctly in my view, stressed that one of the characteristics of good corporate governance is social responsibility. The Committee stated as follows:

> *"A well-managed company will be aware of, and respond to, social issues, placing a high priority on ethical standards. A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues. A company is likely to experience indirect economic benefits such as improved productivity and corporate reputation by taking those factors into consideration."*
>
> *See King Report March 2002 page 12 paragraph 18.7.*

The object of the directives is to prevent pollution of valuable water resources. To permit mining companies and their directors to flout environmental obligations is contrary to the Constitution, the Mineral Petroleum Development Act and to the National Environmental Management Act. Unless courts are prepared to assist the State by providing suitable mechanisms for the enforcement of statutory obligations an impression will be created that mining companies are free to exploit the mineral resources of the country for profit over the lifetime of the mine, thereafter they may simply walk away from their environmental obligations. This simply cannot be permitted in a constitutional democracy which recognises the right of all of its citizens to be protected from the effects of pollution and degradation.

For this reason too the second to fifth respondents cannot be permitted to merely walk away from the company conveniently turning their backs on their duties and obligations as directors."[45] (our emphasis)

[45] *Stilfontein* paras 16.7-16.9.

46 Therefore, good corporate governance, which encompasses a consideration of environmental and social factors such as climate change and its associated risks, is now clearly a hardening standard for companies to meet in their decision-making and governance.

47 **Third,** the Judiciary has not shied away from upholding international obligations.

48 A case in point is the Supreme Court of Appeal's (**SCA**) decision in the so called *Al Bashir*[46] case. In addressing the novel question of looking past the immunity of heads of state, Wallis JA, writing for the majority (although the two other Justices of Appeal concurred, but for separate reasons), said:

> *"… I accept, in the light of the earlier discussion of head of state immunity, that in doing so South Africa was taking a step that many other nations have not yet taken. If that puts this country in the vanguard of attempts to prevent international crimes and, when they occur, cause the perpetrators to be prosecuted, that seems to me a matter for national pride rather than concern. It is wholly consistent with our commitment to human rights both at a national and an international level. And it does not undermine customary international law, which as a country we are entitled to depart from by statute as stated in section 232 of the Constitution. What is commendable is that it is a departure in a progressive direction."*[47]

49 Section 233 of the Constitution provides that when interpreting any legislation every Court must prefer any reasonable interpretation of the legislation that is consistent with international law over an alternative interpretation which is inconsistent with

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[46] *Minister of Justice and Constitutional Development and others v Southern African Litigation Centre (Helen Suzman Foundation and others as amici curiae)* [2016] 2 All SA 365 (SCA) ("*Al Bashir*").

[47] *Al Bashir* para 103.

international law. Courts may therefore be willing to use South Africa's international law obligations to shape their interpretation of directors' duties in terms of the Companies Act.

50 In South Africa's first climate change lawsuit, the so-called *Thabametsi*[48] case, the High Court ordered the then Minister of Environmental Affairs to reconsider its decision to approve an environmental licence for the proposed Thabametsi coal-fired power station in Limpopo, this time taking into account a full climate change impact assessment, and all public comments received on it.[49]

51 The Court held that while South Africa's international obligations to reduce GHG emissions *"are broadly framed and do not prescribe particular measures"*[50] like climate change impact assessments, such assessments would nevertheless aid South Africa in meeting its Nationally Determined Contributions (**NDC**) under the Paris Agreement.

> *"The respondents further argued that the power station project is consistent with South Africa's NDC under the Paris Agreement, which envisages that South Africa's emissions will peak between 2020 and 2025. Again I agree with Earthlife that this contention misses the point. The argument is not whether new coal-fired power stations are permitted under the Paris Agreement and the NDC. The narrow question is whether a climate change impact assessment is required before authorising new coal-fired power stations. A climate change impact assessment is necessary and relevant to ensuring that the proposed coal-fired power station fits South Africa's peak, plateau and decline trajectory*

[48] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) ("*Thabametsi*").

[49] *Thabametsi* para 126.

[50] *Thabametsi* para 84.

as outlined in the NDC and its commitment to build cleaner and more efficient than existing power stations."[51] (our emphasis)

52 In this way, the Court was willing to rely on international obligations (in that case, the NDC) to formulate domestic obligations (a climate change impact assessment), even when the domestic obligations arguably go beyond what is required internationally.

53 **Finally,** the South African Legislature has demonstrated its commitment to legislating companies' obligations in relation to the environment and climate change, and to ensuring that there are accessible ways for affected parties to hold companies accountable for failing to fulfil those obligations. The Courts have, in turn, shown their willingness to hold companies accountable for failing to meet these obligations.

54 A recent conviction and a 53 million ZAR fine given to British Petroleum Southern Africa Pty Ltd for its contravention of the National Environmental Management Act 107 of 1998 (**NEMA**) suggest that comparable litigation can be anticipated in terms of the recently enacted Climate Change Act, which introduces similar, albeit far fewer, statutory offences.[52] NEMA also provides that a director may be held liable for an offence committed by a company in terms of NEMA,[53] but it appears that this provision has not yet been relied upon by litigants.

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51 *Thabametsi* para 90.

52 Climate Change Act s 35 c.f. NEMA s 33.

53 NEMA s 34(7).

PART II - THE BOARD'S ROLE IN CLIMATE RISK MANAGEMENT

An overview of directors' duties

55 Section 66(1) of the Companies Act provides that the business and affairs of a company must be managed by, or be under the direction of, its board of directors, which has the authority to exercise all the powers and perform any of the functions of the company, except to the extent that the Companies Act or the company's Memorandum of Incorporation provides otherwise.

56 In the exercise of its powers, the board must comply with its statutory and common law duties. It must also exercise its powers for the purposes for which they are conferred.[54]

57 In South Africa, the duties of directors traditionally fall into two categories — the fiduciary duties of loyalty, honesty and good faith (sections 76(3)(a) and (b) of the Companies Act) and the duty to exercise reasonable care, skill and diligence (section 76(3)(c) of the Companies Act).

58 The codification of these duties in the Companies Act has not resulted in an exhaustive list of duties, and the common law principles continue to apply and be subject to development.[55] Those common law duties that have not been codified

[54] The Companies Act s 76(3).

[55] *Volvo (Southern Africa) (Pty) Ltd v Yssel* (247/08) 2009 (6) SA 531 (SCA) para 16.

in the Companies Act[56] are not of direct relevance to the subject matter of this memorandum.

59 The King Reports give content to these duties and provide guidance on how they may be fulfilled in the form of a set of voluntary principles and practices for good corporate governance which apply to all companies.[57] Subsequent to the publication of King IV, the Johannesburg Stock Exchange (**JSE**) amended its listing requirements to make all King IV's principles and some of King IV's practices mandatory, from November 2017, for companies listed on the JSE.[58] JSE-listed companies must apply the King IV principles and explain which practices they enacted in respect of those principles, as well as how they comply with the principles and the practices. Failure to do so can result in suspension of a company's listing by the JSE.[59]

60 **Principle 11** of King IV deals with risk management and provides, in summary, that the governing body[60] — which is the board in the context of companies — must assume responsibility for the management of risk, treat risk as integral to its decision making and implement and execute an effective risk management strategy.

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[56] They are: The duty to exercise independent judgement, the duty to avoid conflicts of interest, and the duty to not accept benefits from third parties (the no-profit rules).

[57] King IV, Part 3: King IV Application and Disclosure, p 35.

[58] See JSE Limited Listings Requirements. Note: the JSE is currently undertaking a simplification project which will result in amended and simplified listing requirements. See https://clientportal.jse.co.za/communication/issuer-regulation-simplification-project.

[59] JSE Limited Listing Requirements s 1.6.

[60] Under King IV, the term "governing bodies" includes boards of directors, and the term "organisations" includes companies.

61 Other examples of obligations in relation to disclosure and reporting of financial risks can be found in:

61.1 the JSE Climate Disclosure Guidance[61] and its broader Sustainability Disclosure Guidance[62]; and

61.2 National Treasury's Principles and Guidance for Minimum Disclosure of Climate Related Risks and Opportunities (**NT Principles and Guidance**).[63]

62 Furthermore, as mentioned above, South Africa's environmental and climate change legislation creates directors' duties by introducing mechanisms to hold directors personally liable for a failure by a company in respect of climate change. The most relevant of these are:

62.1 NEMA; and

62.2 the Climate Change Act.

Fiduciary duties of loyalty, honesty and good faith

63 The fiduciary duties of directors are mandatory and apply to all companies. They have been partially codified in sections 76(3)(a) and (b) of the Companies Act, which provide that:

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[61] JSE, *Leading the way for a better tomorrow: JSE Climate Disclosure Guidance* June 2022, available at: https://www.jse.co.za/our-business/sustainability/jses-sustainability-and-climate-disclosure-guidance.

[62] JSE, *Leading the way for a better tomorrow: JSE Sustainability Disclosure Guidance* June 2022, available at: https://www.jse.co.za/our-business/sustainability/jses-sustainability-and-climate-disclosure-guidance.

[63] Climate Risk Forum Disclosure Working Group, *Principles and Guidance for Minimum Disclosure of Climate Related Risks and Opportunities*, 6 December 2021, available at: https://sustainablefinanceinitiative.org.za/wp-content/uploads/2022/01/Climate-Risk-Forum-Disclosure-Guidelines_6Dec2021.pdf.

"(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-

(a) in good faith and for a proper purpose; [and]

(b) in the best interests of the company;

…"

64 The obligations apply equally to all directors, prescribed officers and members of board committees.[64] The Companies Act does not distinguish between executive and non-executive directors.

65 The duty to act in good faith requires that a director act honestly and without intention to deceive. It is closely linked to acting in the best interests of the company and it requires that a director act in a manner that he/she genuinely believes is in the best interest of the company.[65]

66 Assessing compliance with the duty is largely on a subjective inquiry requiring subjective awareness of wrongdoing.[66] There are, however, limits to the subjective test: a court will ask what a reasonable person in the position of the director would do,[67] and the absence of reasonable grounds for believing that a director is acting in the interests of the company may form the basis for a finding of a lack of good faith.

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[64] Section 76 (1)(a)-(b) of the Companies Act states that "director" includes an alternate director and a prescribed officer or a person who is a member of a committee of a board of a company, or of the audit committee of a company irrespective of whether or not the person is also a member of the company's board.

[65] P Delport et al *Henochsberg on the Companies Act 71 of 2008*, p 298 (12P).

[66] Cassim et al, *Contemporary Company Law*, 2nd edition, p 524.

[67] Cassim et al, pp 524-525.

67 What exactly constitutes a proper purpose is not defined in the Companies Act, but at common law, it has been interpreted to mean that, measured objectively, directors must exercise their powers according to the objective purpose for which that power was given to them, and not for ulterior purposes. Since its codification in the Companies Act, the duty to act for a proper purpose has been interpreted to include a second element: that directors must not act beyond their powers.[68] In *Visser Sitrus*,[69] the High Court held that:

> *"The position in South African law has always been that directors occupy a fiduciary position and as a result must exercise powers conferred on them in what they bona fide consider to be the best interests of the company, for the purpose for which the power was conferred, and within any limits which may be imposed for the exercise of the power."*[70]

68 Unlike the duties to act in good faith, the duty to act for a proper purpose is measured objectively. A Court will first look for factual evidence which established the purpose of the director's appointment. This will involve, for example, a determination of the purpose of the company — which can be made by looking at its Memorandum of Incorporation, shareholders agreement and the historical decisions by shareholders and the board — and a determination of how the director's appointment was intended to further that purpose. Thereafter, a Court can test the director's actions against these standards. If the director's conduct does

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[68] S S Bidie "Director's Duty to Act for a Proper Purpose in the Context of Distribution under the Companies Act 71 of 2008" *PER / PELJ* 2019(22) p 8.

[69] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) para 80.

[70] *Visser Sitrus* para 58.

not have any rational relation to furthering the company's purpose, his or her actions may be considered to have been for an improper purpose.[71]

69 The objective 'proper purpose' duty is distinct from the subjective 'good faith' duty, but they operate cumulatively such that a director who may have acted in good faith can be found to have not exercised his powers for a proper purpose, and thus to have violated the duty in section 76(3)(a) of the Companies Act.[72]

70 This objective element of section 76(3)(a) also explains why the duty contained therein is not covered by the business judgement rule — a rule, discussed below, that excludes liability where a director took an informed decision that he/she rationally believed was in the best interests of the company.

71 The duty contained in section 76(3)(b) requires directors to act in the best interests of the company *as a whole*, which may include the company's present and future shareholders.[73] It is for the directors to decide what is in the best interests of the shareholders, but they must act fairly between the shareholders.[74]

72 In *Van Zyl*,[75] it was held that a "*breach of fiduciary duties entails something materially different from the negligent discharge*" of one's functions; a breach of

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71 *Visser Sitrus* para 77-80.

72 Delport et al, p 298 (12B) ; Cassim et al, p 526.

73 *De Bruyn v Steinhoff International Holdings NV and Others* 2022 (1) SA 442 (GJ); Cassim et al, p 515.

74 *Visser Sitrus* para 74.

75 *Master of the High Court, Western Cape Division, Cape Town v Van Zyl* [2019] JOL 41274 (WCC) para 108.

fiduciary duties "*connotes disloyalty or infidelity*" to the organisation one serves, and "*mere incompetence is not enough*".

Application of loyalty and good faith duties in the context of climate risk

73 Determining whether a fiduciary duty exists, and if so, whether it has been breached, requires applying the general principles to the facts in each particular case. In *Ghersi*,[76] the SCA recognised that *"the ambit of the duty can change from time to time"*, and that *"[t]he existence of…a [fiduciary] duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operations of that relationship".*[77]

74 In a later judgment, the SCA specifically acknowledged that there is no *"closed list"* of fiduciary duties, and that there is room for development of the law outside of established categories.[78]

75 The King Reports have been relied upon by South African Courts to embed an understanding of these duties. They recognise that environmental and social considerations must guide business decisions if these decisions are to *"create value in a sustainable manner".*[79]

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[76] *Ghersi and Others v Tiber Developments (Pty) Ltd and Others* 2007 (4) SA 536 (SCA).

[77] *Ghersi* para 9.

[78] *Volvo* para 16.

[79] King IV, Foreword, p 4.

76 This is especially the case when interpreted in light of the King IV Guidance Paper on Responsibilities of Governing Bodies in Responding to Climate Change (**King IV Guidance Paper on Climate Change**),[80] which is aimed at assisting governing bodies with responding to climate change.

77 The King IV Guidance Paper on Climate Change should be read in the context of King IV as a whole. The main principles contained in the King IV Guidance Paper on Climate Change, as summarised, include:

> *"Governing Bodies must ensure that business strategy and decision-making include a broader, integrated consideration of social, economic, and environmental (including climate change) performance and impacts. This incorporates an assessment of externalities (see below), as well as determining risks and opportunities for both the short and long term.*
>
> *Governing Bodies should make every effort to mitigate their organisations' contribution to climate change (reduce the organisation's impact on the drivers of climate change)."*[81]

78 The King IV Guidance Paper on Climate Change makes reference to the principles in King IV and indicates how those principles should be applied in relation to climate change considerations. For example, under the King IV topic of "leadership" (principles 1, 7 and 9), the Guidance Paper indicates the application of the principles as follows in relation to climate change:

> *"Governing Bodies must act in good faith and in the best interest of the organisation. Such actions must go beyond mere legal compliance. Developing a response to climate change should not be based only on requirements in*

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[80] King Committee, G*uidance Paper: Responsibilities Of Governing Bodies In Responding To Climate Change,* July 2021, available at: https://www.iodsa.co.za/page/king-iv-practice-and-guidance-notes.

[81] King IV Guidance Paper on Climate Change, pp 2-3.

applicable laws but should result from Governing Bodies ensuring that management strives to do the right thing for the organisation, society and the environment while promoting good governance."[82]

79 The Guidance Paper also includes examples and suggested practices under each of the King IV topics as it relates to climate change.

80 Another important factor in the South African context, which speaks to the proper interpretation of the nature and scope of fiduciary duties, is the Constitution and the Bill of Rights.[83]

81 Courts are required, when interpreting any legislation or when developing the common law, to promote the spirit, purport, and objects of the Bill of Rights.[84] Included in our Bill of Rights is the right "*to have the environment protected for the benefit of present and future generations…*".[85]

82 What constitutes a company's "best interests" is a general term which, if interpreted so as to promote the Bill of Rights, may arguably extend beyond shareholder profit maximisation, to embrace socially and environmentally responsible board decisions which will benefit the company and its shareholders in the long-term.[86]

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[82] King IV Guidance Paper on Climate Change, p 7.

[83] M Ramnath (2013), "Interpreting Directors' Fiduciary Duty to Act in the Company's Best Interests Through the Prism of the Bill of Rights: Taking Other Stakeholders into Consideration", *Speculum Juris* 27(2). Also see: Constitution of the Republic of South Africa, 1996, ss 8(2) and 39(2).

[84] The Constitution s 39(2).

[85] The Constitution s 24(b).

[86] Ramnath, p 113.

83 In this context, it is clearly conceivable that a director's failure to consider climate risks that pose a foreseeable and material financial risk to the business could constitute a failure to take reasonable steps to become informed about the matter, and hence a failure to act in good faith in the best interests of the company.

84 Each case will have to be judged on its own merits, based on its own specific facts, as there is no general standard for what would constitute a failure to act in the best interests of the company.

Possible defence

85 A director is protected from liability for breach of one of the fiduciary duties (that of acting in the best interest of the company, as contained in section 76(3)(b) of the Companies Act) by the 'business judgment rule' in section 76(4) of the Companies Act. In terms of the business judgment rule, a director is not considered to have breached his or her duty if that director:

85.1 took reasonably diligent steps to become informed about the matter;[87]

85.2 had no material personal financial interest in relation to the matter, had no reasonable basis to believe that any related person had such an interest, or complied with the rules on conflict of interest;[88] and

[87] The Companies Act s 76(4)(a)(i).

[88] The Companies Act s 76(4)(a)(ii).

85.3 had a rational basis for believing — and did believe — that the impugned decision was in the best interests of the company.[89]

86 If a director can show that he or she complied with the three requirements contained in section 76(4) — an informed decision; no self-dealing, alternatively, proper disclosure of any personal interest; and a rational basis for his or her belief — the decision of the director will fall outside of the scope of judicial challenge in respect of section 76(3)(b) of the Companies Act.[90]

87 As discussed above, the obligation contained in section 76(3)(a) of the Companies Act, the duty of a director to act in good faith and for a proper purpose, cannot be avoided by reference to the business judgement rule, as section 76(4) does not apply to it.

88 Guidance is not given in the Companies Act as to what constitutes reasonably diligent steps to become informed about the matter for the purposes of the business judgment rule, but it has been suggested that the matter should be considered in the context of the Aquilian Action (action for patrimonial loss), and that the matter can be addressed by asking what public policy would demand in each individual case.[91] This would require an application of the general principles of the South African law of delict, and by applying the wrongfulness test and asking whether, in light of the legal convictions of the community

89 The Companies Act s 76(4)(a)(iii).

90 Cassim et al, p 565.

91 L Muswaka (2013), "Shielding Directors against Liability Imputations: The Business Judgment Rule and Good Corporate Governance", *SPECJU* 2, p 29.

and the circumstances of the case, the director acted in a reasonable or unreasonable manner.

89 As to what constitutes a *"rational belief"* on the part of the director, there is once again no specific guidance in the Companies Act. It has been suggested that, in order to have a rational belief, directors must be independent with respect to their actions, and in a position to base their decisions on the merits of the matter rather than being governed by extraneous considerations or influences.[92]

90 Directors are also entitled to rely on the performance of a person to whom the board reasonably delegated, formally or informally by course of conduct, one of the board's delegable functions[93] and on the performance,[94] advice[95] or reports[96] of a suitably qualified employee,[97] professional expert retained by the company,[98] or committee of the board.[99]

91 In the climate risk context, if a director has obtained expert advice on climate risks, but then fails to adjust the operations of the business to incorporate the advice received or to explain why adjustments are not needed, because the director is driven by short-term profits or short-term commitments made by

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92 Muswaka, p 31.

93 The Companies Act s 76(4) (b)(i)(bb).

94 The Companies Act s 76(4) (b)(i)(aa).

95 The Companies Act s 76(4) (b)(ii).

96 The Companies Act s 76(4) (b)(ii).

97 The Companies Act s 76(5)(a).

98 The Companies Act s 76(5)(b).

99 The Companies Act s 76(5)(c).

the company, then the rationality of the director's belief that he or she was acting in the best interests of the company could be called into question.

92 Again, each case must be determined on its merits and the particular facts and circumstances of the matter will determine whether a director can escape liability by relying on the business judgment rule.

Duty of care and due diligence

93 The duty to exercise reasonable care, skill and diligence is a duty which speaks to the competence of a director. This duty has been formulated by the South African Courts in largely subjective terms, based on what a reasonably competent director in the position of the director would have done in the circumstances.[100] This duty has also been partially codified in section 76(3)(c) of the Companies Act:

> *"(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-*
> *…*
> *(c) with the 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."*

94 Sections 76(3)(c)(i) and (ii) of the Companies Act require a director to exercise the degree of skill and diligence that may reasonably be expected of a person "*having the general knowledge, skill and experience of that director*". If the

[100] *Durr V Absa Bank Ltd and Another* 1997 (3) SA 448 (SCA); Cassim et al, p 555.

director is more experienced or knowledgeable, his or her conduct will be judged against this higher subjective standard. While this does impose objective limits, the test is not entirely objective — it will be influenced by the size and nature of the company, and the position and responsibilities of the particular director.[101]

95 The duty, interpreted in light of the business judgement rule which also applies to it, permits a director of a company to act on advice in discharging his or her duties, but proscribes him or her from following such advice blindly, especially in the case of foreseeable risks.[102] In *Fisheries Development Corporation*,[103] Margo J held:

> *"Obviously, a director exercising reasonable care would not accept information and advice blindly. He would accept it, and he would be entitled to rely on it, but he would give it due consideration and exercise his own judgment in the light thereof. Gower (op cit [10] at 602 et seq) refers to the striking contrast between the directors' heavy duties of loyalty and good faith and their very light obligations of skill and diligence. Nevertheless, a director may not be indifferent or a mere dummy. Nor may he shelter behind culpable ignorance or failure to understand the company's affairs."*[104] (our emphasis)

96 Directors who lack the necessary knowledge and competence to carry out their duties and perform their obligations effectively must make the relevant inquiries. In *Durr*,[105] the Supreme Court of Appeal held that:

> *"One of the first requirements of a professional is to know when he may be getting out of his depth, so that I do not think that that is a sufficient excuse.*

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[101] Cassim et al, p 559.

[102] SS Bidie (2023), "'Foreseeable': Conceptualised in the Duty of Care, Skill, and Diligence?", *Spec Juris* 37.

[103] *Fisheries Development Corporation of South Africa Ltd v Jorgensen* 1980 4 SA 156 (W) at 116D-E.

[104] *Fisheries Development Corporation* at 116D-E.

[105] *Durr.*

> *I am not able to say exactly what Stuart should have done. But I would suggest that there was a point at which he should have walked down the passage or across the street, or lifted the telephone, or activated the fax, and said to a lawyer, or accountant, or banker, none of which he was, in the employ of ABSA something like this: 'Look, I have been introduced to some attractive debentures (preference shares) in a group called Supreme. Would you please tell me quite what debentures (preference shares) are, and how secure they are? And also, please tell me how I find out who and what Supreme is and what risk attaches to investing in it."*[106] (our emphasis)

97 **Principle 7** of King IV extends this duty so that directors should be cognisant of the make-up of the board on which they sit. It provides that "*[t]he Governing Body should comprise the appropriate balance of knowledge, skills, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively."*

98 In *President v Public Protector*,[107] where the President sought to challenge the Public Protector's direction to appoint a commission of inquiry into State Capture, a Full Bench of the High Court referred with authority to the findings of the Public Protector that "*it appears that the board at Eskom was improperly appointed and not in line with the spirit of the King III report on Good Corporate Governance.*"[108] Later on, the Court held:

> *"We make the point that the Public Protector's report has uncovered worrying levels of malfeasance and corruption in the form of utter disregard of good corporate governance principles, some bordering on fraud, in government departments and SOEs."*[109]

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[106] *Durr* para 54.

[107] *President of the Republic of South Africa v Public Protector and Others* 2018 (2) SA 100 (GP).

[108] *President v Public Protector* para 54.

[109] *President v Public Protector* para 190.

99 As is the case with the fiduciary duty discussed above, the Companies Act has imported the business judgment rule as a defence to be relied upon by directors in relation to delictual claims brought against them for an alleged failure to exercise care and due diligence.[110]

Application of care and due diligence duties in the climate risk context

100 One of the board's responsibilities, in terms of King IV's **Principle 11**, is to *"govern risk in a way that supports the organisation in setting and achieving its strategic objectives."*[111]

101 A breach of section 76(3)(c) of the Companies Act may occur where climate risk poses a foreseeable and material financial risk to the company, and its directors have not considered that risk or have failed to do so adequately. Alternatively, directors may be in breach of this duty if they have assessed climate risk but failed to exercise reasonable care, skill and diligence in managing it. The adequacy of the resources available to the company to deal with climate change risk should be objectively assessed, and external expertise sought, as appropriate.[112]

102 The Courts have noted[113] that while directors have a right to delegate their duties — and to rely upon the judgment, information and advice of others in

[110] The Companies Act s 76(4).

[111] King IV, p 65.

[112] Webber Wentzel, "Directors face potential liability for climate change risks", *Mining Weekly,* 8 February 2022, available at: https://www.miningweekly.com/article/directors-face-potential-liability-for-climate-change-risks-webber-wentzel-2022-02-08/rep_id:3650.

[113] See, for example, *Fisheries Development Corporation* at 165G-166E.

management — they must still supervise the delegate, give due consideration to the advice received, and exercise their own judgment on a matter. In other words, directors cannot blindly follow advice.[114] It has therefore been suggested that the duty of care and skill would also be breached where directors fail to adequately supervise any delegated duties relating to climate risk or where directors blindly accept the information and advice of others without exercising their own judgment or giving the advice their due consideration.[115]

103 The Courts have also drawn on the King Codes to give meaning to the requirement of acting with care and skill, even where compliance with the King Codes is not mandatory.[116]

104 **Principle 7** of King IV, on the make-up of boards, could in our view be relied upon to argue that boards must ensure that they have access to individuals who have the knowledge, skills and experience in respect of sustainability and environmental, social, and governance (**ESG**) matters, including climate change.

105 To this end, the King IV Guidance Paper on Climate Change also requires the following to ensure that boards are capacitated to fulfil their obligations in respect of climate change:

> *"In considering the appropriate balance of knowledge, skills, experience and diversity, it is critical that the Governing Body ensures that the organisation has access to individuals who have the knowledge, skills and experience in*

[114] R Stevens (2017), "The Legal Nature of the Duty of Care and Skill: Contract or Delict?", *Potchefstroom Electronic Journal* 20; M M Botha (2009), "The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective", *Obiter,* p 709.

[115] CCLI, *Directors' Liability and Climate Risk: South Africa – Country Paper*, p 14.

[116] *Stilfonteinn at* G-I.& 352 B-D.

> *respect of sustainability and ESG matters, including climate change. It would also be useful to start considering including individuals on the board who has [sic] an understanding of ESG matters.*
>
> *Climate change could expose the organization to substantial risk if not appropriately managed, and members of the Governing Body should have the experience and skills to understand these risks in order to develop an appropriate response thereto."*[117] (our emphasis)

106 These conditions are necessary so that boards can fulfil their care and due diligence duties in terms of King IV. For example, the King IV Guidance Paper on Climate Change includes the principles that *"Governing Bodies should make every effort to mitigate their organisations' contribution to climate change (reduce the organisation's impact on the drivers of climate change)"* and *"Governing Bodies should attempt to obtain assurance on the organisation's information regarding its response to Climate Change."*[118] Doing so requires subject-specific knowledge among the directors.

107 Given that the business judgment rule (as found in section 76(4) of the Companies Act) applies to both the fiduciary duty to act in the best interests of the company (section 76(3)(b)) and to the duty of care, skill and due diligence (section 76(3)(c)), there may be overlapping considerations that apply and thus a breach of both of these duties in the climate risk context may well occur in similar circumstances.[119] However, the limited availability of case law on the duty of care, skill and due diligence makes it difficult to predict how the Courts

[117] King IV Guidance Paper on Climate Change, p 7.

[118] King IV Guidance Paper on Climate Change, p 2.

[119] Botha, p 710.

might in the future measure directors' conduct in respect of this duty, and the possible defence, when responding to climate risk.

Disclosure and reporting duties

108 Companies' disclosure and reporting obligations, which are subject to separate legal requirements, also place additional duties on directors.

108.1 Section 29(2) of the Companies Act provides that financial statements must not be (a) false or misleading in any material respect or (b) incomplete in a material way.

108.2 Section 76(2)(b) of the Companies Act states that a director must communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless (i) the director reasonably believes that the information is immaterial to the company or is generally available to the public or known to the directors; or (ii) the information is confidential.

109 While King IV contains no express requirement to report on climate risk, other reporting requirements in King IV indirectly require the disclosure of climate risk where those risks pose a material financial risk to the company.

110 **Principle 5** of King IV requires that "*[t]he governing body should ensure that reports issued by the organisation enable stakeholders to make informed*

assessments of the organisation's performance, and its short, medium and long-term prospects."[120] (our emphasis)

111 The use of the term "stakeholders" as opposed to shareholders is significant as King IV defines that category broadly to include *"[t]hose groups or individuals that can reasonably be expected to be significantly affected by an organisation's business activities, outputs or outcomes, or whose actions can reasonably be expected to significantly affect the ability of the organisation to create value over time."*[121]

112 One of the practices recommended to comply with **Principle 5**[122] is that the governing body issues an integrated report at least annually, which is either:

> *"a) a standalone report which connects the more detailed information in other reports and addresses, at a high level and in a complete, concise way, the matters that could significantly affect the organisation's ability to create value; or*
>
> *b) a distinguishable, prominent and accessible part of another report which also includes the annual financial statements and other reports that must be issued in compliance with legal provisions."*[123] (Own emphasis)

113 King IV defines *"[v]alue creation or value creation process"* as *"[t]he process that results in increases, decreases or transformations of the capitals caused by the*

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[120] Principle 5 of King IV, p 48.

[121] King IV, p 18, quoting from the IFRS *Integrated Reporting Framework*, 13 December 2013, p 33, available at: https://integratedreporting.ifrs.org/resource/international-ir-framework/.

[122] The principles are mandatory for listed companies.

[123] Principle 5 of King IV, p 48.

organisation's business activities and outputs. The value creation process therefore has neutral, positive and negative outcomes".[124]

114 **Principle 6** provides that *"[t]he governing body should serve as the focal point and custodian of corporate governance in the organisation"* and contains as a recommended practice that *"[t]he governing body should exercise its leadership role by … ensuring accountability for organisational performance by means of, among others, reporting and disclosure."*[125]

115 **Principle 11** is of particular importance in relation to governing climate risk. It provides that "[*t]he governing body should govern risk in a way that supports the organisation in setting and achieving its strategic objectives"* and contains the following as its final recommended practice in relation to disclosure:

> "*In addition, the <u>following should be disclosed in relation to risk</u>:*
>
> *a. An overview of the arrangements for governing and managing risk.*
>
> *b. Key areas of focus during the reporting period, including objectives, the <u>key risks that the organisation faces, as well as undue, unexpected or unusual risks</u> and risks taken outside of risk tolerance levels.*
>
> *c. Actions taken to monitor the effectiveness of risk management and how the outcomes were addressed.*
>
> *d. <u>Planned areas of future focus</u>*."[126] (our emphasis)

[124] King IV, p 18, quoting from the IFRS *Integrated Reporting Framework*, p 33.

[125] King IV, p 49.

[126] King IV, p 62.

116 In addition to King IV, the King IV Climate Change Guidance Paper discussed above provides two other principles that are important in relation to the disclosure and reporting of climate risk:

> *"Insofar as environmental and climate change reporting and performance is concerned, Governing Bodies should consider the principle of 'externalities'. In simple terms, externalities refer to societal costs not included in the cost of production resulting in costs that do not reflect the true impact on society or the environment.*
>
> *The Governing Body should ensure that the organisation is transparent about its response to climate change and disclose quantitative and qualitative information which could affect a user's decisions, irrespective of whether a common reporting framework exists or not."* [127] (our emphasis)

117 The JSE Climate Disclosure Guidance aims to support JSE-listed companies in considering how they can approach climate disclosure in a manner that is aligned with the International Sustainability Standards Board (**ISSB**) IFRS standards for sustainability reporting, including on Sustainability-related Financial Information (**IFRS S1**) and Climate-related Disclosures (**IFRS S2**), as well as with the TCFD and the other most influential global initiatives on sustainability and climate change disclosure.

118 The JSE Climate Disclosure Guidance makes reference to carbon reporting, sets out principles for useful disclosure, and provides guidance on what climate-related information a company should disclose.

[127] King IV Guidance Paper on Climate Change, p 2.

119 In addition, a number of other guidelines are emerging. National Treasury's 2021 Technical Paper on Financing a Sustainable Economy (**NT Technical Paper**)[128] identified, as one of four *"immediate practical priorities and focus areas for the South African financial sector"*:

> *"The need to develop or adopt additional methodologies – beyond those typically covered by environmental impact assessment regulations, the National Environmental Management Act, or the IFC performance standards, to include specifically the identification, management and disclosure of climate-related risks."*[129]

120 The Paper recommended, among others, the following points of action for the financial services sector:

> *"…*
>
> *b) Regulators and industry to co-develop or adopt technical guidance, standards and norms for use across all financial sectors in identifying, monitoring and reporting and mitigating their environmental and social (E&S) risks, including climate-related risks, at portfolio and transaction level. These should include E&S risk management frameworks, the use of science-based methodologies, and the incorporation of the recommendations of the TCFD.*
>
> *…*
>
> *e) Include disclosure of progress in environmental and social risk management, including climate risks, in supervision activities carried out by the Prudential Authority and Financial Services Conduct Authority.*
>
> *f) Incorporate voluntary codes of principles, or acknowledged benchmarks for good practice, into regulatory regimes.*

[128] National Treasury, *Financing a Sustainable Economy: Technical Paper 2021,* 2021, available at: https://www.treasury.gov.za/comm_media/press/2021/2021101501%20Financing%20a%20Sustainable%20Economy.pdf.

[129] NT Technical Paper, p 17.

…"[130] (our emphasis)

121 In response to the NT Technical Paper, National Treasury established a Climate Risk Forum with five working groups, one of which was the Disclosure Working Group. The Disclosure Working Group published the NT Principles and Guidance in December 2021. They aim to guide and inform regulators and financial sector users of the minimum expectations of good financial disclosure of climate-related risks and opportunities. The Principles and Guidance explain the importance of disclosure as follows:

> *"Evidence suggests that poor disclosure of climate change related risks may result in mis-pricing in equity markets. In turn, more effective disclosure assists industries in managing risk and making better long term decisions. For these purposes, risks to the business model, risks of litigation, risks to reputation, risks of disruptive technology change or regulatory change should be assessed in financial terms alongside the costs of acute or chronic physical changes or events and resultant damage to infrastructure, adaption, or rebuilding. The outcome should be increased access to credible and comparable information for key stakeholders (regulators, shareholders and others). Disclosures related to climate change should reflect in both financial and non-financial reporting, with the former linking climate risks directly to an organization's balance sheet and the latter providing additional relevant information on climate-related risks and opportunities."*[131] (our emphasis)

122 Regarding the management of climate risk, the NT Principles and Guidance defines *"risk management"* as *"a set of processes that are carried out by an organization's board and management to support the achievement of the*

[130] NT Technical Paper, p 6.

[131] NT Principles and Guidance, p 9.

organization's objectives by addressing its risks and managing the combined potential impact of those risks."[132]

123 Furthermore, the Companies and Intellectual Property Commission (**CIPC**) has recently introduced ESG reporting on IFRS S1 and IFRS S2 for public and state-owned companies in South Africa. This reporting, which is currently voluntary, will become mandatory from the 2025/26 financial year.[133]

Application of disclosure and reporting standards in the context of climate risk

124 In terms of the disclosure and reporting requirements in the Companies Act, any failure to disclose material issues that could impact on a company's financial position would be considered a contravention of section 29(2) of the Companies Act.

125 Climate change impacts, such as those associated with rising global temperatures, or legislative and policy changes aimed at transitioning to a lower-carbon economy, can, depending on the industry and environment in which the company operates, materially affect the financial position of a company.[134]

126 Failure to disclose these likelihoods as material issues in a company's financial statements in circumstances where the impact is foreseen or ought to have been

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[132] NT Principles and Guidance, p 2.

[133] DataTracks, *Guide to CIPC ESG Reporting Preparation 2024*, 3 May 2024, available at: https://www.datatracks.com/za/blog/south-africas-roadmap-to-esg-reporting-preparedness-in-2024/#:~:text=Initially%20voluntary%2C%20these%20reports%20transition,to%20enhance%20transparency%20and%20accountability.

[134] For example, legal and policy changes, such as the coming into operation of Phase 2 of the Carbon Tax Act 15 of 2019 in January 2026, will likely lead to a marked increase in the tax liability of companies with high GHG emissions.

foreseen could, arguably, render the financial statements "incomplete" or "false and misleading".

127 The JSE itself has recommended that JSE-listed companies start grappling with climate-related financial disclosures that pertain to risk management and government when preparing their annual financial statements, in line with global best practices on disclosure in relation to sustainability, ESG and climate change issues.[135] Companies should be aware of the global trend of disclosures of non-financial information (such as sustainability and climate-change related information) becoming mandatory by law, as it is likely that this trend will also reach South Africa's legal frameworks.[136]

128 The duties emerging from King IV and the JSE Climate Disclosure Guidance, among others, are compulsory for some companies and, even where not compulsory, can and should inform the Courts' assessment of the content and scope of the reporting and disclosure duties listed in the Companies Act.

129 This interpretive approach could be well-suited for climate risk litigation. For example, when interpreting section 29(2) of the Companies Act — which prohibits the publication of false or misleading financial statements — Courts may elect to draw on **Principle 5** of King IV, which requires that a board ensures that reports enable stakeholders to make informed assessments of the organisation's

[135] JSE Climate Disclosure Guidance, p 19.

[136] Webber Wentzel, *ESG: Reporting & Disclosure in a New Era for Companies - JSE's Sustainability And Climate Disclosure Guidances 2022*, 2022, p 4, available at: https://www.webberwentzel.com/News/Documents/2022/summary-of-sustainability-climate-disclosure-standards-guidelines.pdf.

performance, and its short, medium- and long-term prospects. This obligation could, in our view, comfortably accommodate mandatory reporting on climate risk.

Directors' duties under environmental and climate change legislation and policy

The National Environmental Management Act (NEMA)

130 In addition to the directors' duties imposed by the Companies Act, there are also certain duties imposed in NEMA, South Africa's primary environmental legislation.

131 Section 49A of NEMA sets out various offences, including, that a person is guilty of an offence if that person –

> *"(e) unlawfully and intentionally or negligently commits any act or omission which causes significant pollution or degradation of the environment or is likely to cause significant pollution or degradation of the environment;*
>
> *(f) unlawfully and intentionally or negligently commits any act or omission which detrimentally affects or is likely to detrimentally affect the environment;"*

132 Section 49A(2) lists two defences to a charge in terms of a section 49A(1) offence: the one being a necessary and proportionate response to an incident that constitutes a threat to human life, property or environment; the other being a response to an emergency that complies with NEMA.

133 Read in the context of section 49A as a whole, this suggests that it is no defence to a charge in terms of section 49A(1)*(e)* and *(f)* to state that the conduct complained of otherwise complied with NEMA or any other legislation. In our law, compliance with a statute or regulation does not *per se* exclude negligence.[137]

134 Section 34(7) of NEMA sets out clearly that:

> *"[A]any person who is or was a director of a firm at the time of the commission by that firm of an offence under any provision in Schedule 3 [which includes section 49A of NEMA] shall himself or herself be guilty of the said offence and liable on conviction to the penalty specified in the relevant law…if the offence in question resulted from the failure of the director to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence: Provided that proof of the said offence by the firm shall constitute prima facie evidence that the director is guilty under this subsection".* (our emphasis)

135 These provisions in NEMA could apply in a climate risk context where a director's failure to assess and take steps to mitigate the company's contribution to climate change results in significant pollution or degradation of the environment, or detrimentally affects the environment. In this context, the director is liable for the harm to the environment, as opposed to the harm to the company.

136 To pursue a remedy in terms of section 34(7) of NEMA, wrongfulness will need to be established. Wrongfulness will be presumed where there is positive conduct causing damage to persons or property.[138]

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[137] *Geldenhuys v South African Railway and Harbours* 1964 (2) SA 230 (C).

[138] *AK v Minister of Police* 2023 (2) SA 321 (CC) para 155.

137 However, as set out in a recently published legal opinion concerning the Potential for Climate Loss and Damage Claims in South Africa[139], which dealt with Carbon Majors specifically:

> *"That is…a rebuttable presumption. A Carbon Major could seek to argue that that [sic] it would not be reasonable or justifiable on public policy grounds to impose liability. Likely arguments would involve the dangers of limitless liability (the "floodgates" argument), or arguments over the social benefits of fossil fuel use and consumption…The Carbon Major would, however, bear the evidential and argumentative burden to establish these defences."*[140]

138 When the harm-causing conduct consists of an omission or statements (such as misinformation or disinformation), wrongfulness will not be presumed, and a claimant would therefore be required to prove those facts from which wrongfulness can be inferred.[141] This will also be the case where the alleged loss involves "pure economic loss" (i.e. financial losses without underlying damage to person or property).[142]

The Climate Change Act

139 On 23 July 2024, President Ramaphosa signed the Climate Change Act into law. This pivotal legislation is designed to define, manage, monitor, and implement South Africa's response to climate change.

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[139] C McConnachie, Z Raqowa & D Mutemwa, *Opinion prepared for the Centre for Environmental Rights concerning the Potential for Climate Loss and Damage Claims in South Africa*, 29 February 2024, available at: https://cer.org.za/wp-content/uploads/2024/03/CER-Loss-and-Damage-Opinion-28.2.2024.pdf.

[140] Ibid para 113.

[141] *AK v Minister of Police* para 155; *Mashongwa v PRASA* 2016 (3) SA 528 (CC) para 19.

[142] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC).

140 Although not yet operational, the Climate Change Act incorporates the country's GHG emissions reduction trajectory into South African law, signalling a significant stride towards a sustainable future.

141 The Climate Change Act mandates all levels of government to map, plan for, and address climate adaptation needs, recognising the urgent nature of climate change.

142 For mitigation efforts, the Climate Change Act introduces carbon budgets, allocating an amount of GHG emissions to major emitters, and requires the submission of mitigation plans — in which companies affected thereby must set out how they intend to remain within their budgets. Furthermore, it establishes sectoral emissions targets (**SETs**), distributing available remaining carbon space across sectors.

143 Section 35 of the Climate Change Act states that a person commits an offence if that person:

143.1 fails to provide data, information, documents, samples or materials to the Minister in terms of section 23(1), which requires that any person so requested provide the Minister with data, information, documents, samples or materials that are reasonably required for the purposes of the fulfilment of the objectives of the Climate Change Act;

143.2 provides false and misleading data, information, documents, samples or materials to the Minister in terms of section 23(1);

143.3 fails to prepare and submit a GHG mitigation plan to the Minister in terms of section 27(4), which requires that a person to whom a carbon budget has been allocated must prepare and submit to the Minister, for approval, a GHG mitigation plan that meets the requirements set out in the subsection;

143.4 fails to comply with or contravenes the notice of the Minister in terms of section 28(1), which requires the Minister to prescribe thresholds for the use of synthetic GHG and timeframes for the phase-down or phase-out of the gases; and/or

143.5 fails to comply with the measures contemplated in section 28(3)(b), which requires that an affected party develop a plan that contains measures that facilitate the phase-down or phase-out of synthetic GHGs.

144 It remains to be seen how the Climate Change Act will be implemented and enforced, and whether it can be relied on at all by non-state actors to ensure compliance.

PART III – HOW DIRECTORS COULD BE HELD ACCOUNTABLE FOR THE FAILURE TO ADDRESS CLIMATE RISK

Standing under the Companies Act

145 Most of the provisions in the Companies Act state that the directors owe their duties and obligations to the relevant company, not to individual shareholders or other interested parties. Save to protect their rights under the Companies Act, a

shareholder or other interested party would rarely have legal grounds for a claim against directors under the Companies Act.[143]

Section 157 of the Companies Act

146 One way that an aggrieved party that is not the company may gain standing to bring litigation against directors is through section 157 of the Companies Act. Section 156 provides that:

> *"156. A person referred to in section 157(1) may seek to address an alleged contravention of this Act, or to enforce any provision of, or right in terms of this Act, a company's Memorandum of Incorporation or rules, or a transaction or agreement contemplated in this Act, the company's Memorandum of Incorporation or rules, by-*
>
> *(a) .. .*
>
> *(b) ...*
>
> *(c) applying for appropriate relief to the division of the High Court that has jurisdiction over the matter; or...*
>
> *(d) ... "*

147 Section 157(1) of the Companies Act then provides that:

> *"When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person-*
>
> *(a) directly contemplated in the particular provision of this Act;*
>
> *(b) acting on behalf of a person contemplated in paragraph (a), who cannot act in their own name;*

[143] See *De Bruyn*; *Hlumisa*.

> *(c) acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interest of its members; or*
>
> *(d) acting in the public interest, with leave of the court."* (our emphasis)

148 It is clarified in section 157(3), however, that section 157 does not create a right for any person to commence derivative action proceedings other than on behalf of a person entitled to make a demand in terms of section 165(2) of the Companies Act.[144]

149 Thus, where a provision of the Companies Act specifies that, in terms of that provision, an application can be made to a court, then section 157(1) can be relied upon by a third party to seek leave from a Court to bring the application in the public interest.

Section 218 of the Companies Act

150 Section 218(2) of the Companies Act provides that *"[a]ny person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention."*

151 This initially appears to be a significant provision in the context of establishing standing to sue for the failure to address climate risk, since it can be utilised by *"any person".*[145]

[144] For an example of the application of this section, see *Organisation Undoing Tax Abuse and another v Myeni* [2020] 3 All SA 578 (GP) para 9.

[145] Cassim et al, p 582.

152 However, the SCA has remarked that while "*this section creates a right to recovery if there has been a breach of a provision of the Act*,"[146] it "*does not itself create liability. It imposes liability in the event of a contravention of some other provision of the Act*."[147]

153 In *Venator*,[148] the appellant, Venator Africa (Pty) Ltd, sued the directors of Siyazi for breaches of sections 22(1)[149] and 218(2) of the Companies Act, alleging they were *"the guiding minds behind the fraud"*, or had been *"reckless"* or *"grossly negligent"* in controlling the activities of Siyazi.

153.1 The SCA held that section 22(1) plainly imposes a duty on the company, not its directors, to refrain from carrying on its business recklessly:

> *"To construe section 22(1) as being capable of infringement by the directors is to read into the section a prohibition that is not there"*[150]

153.2 The judgment referred to the duties of directors towards the company as contained in sections 76 and 77 of the Companies Act and quoted the SCA's decision in *Gihwala* where the court held that section 77(3):

> *"creates a statutory claim in favour of the company against a director, imposing liability on the latter for any loss, damages or costs incurred by the company in certain circumstances, including whether the director acquiesces in the company engaging in reckless trading. <u>It is not a provision that can be invoked to secure payment to a creditor or</u>*

[146] *Venator* para 26.

[147] *Venator* para 27.

[148] *Venator.*

[149] Section 22(1) of the Companies Act provides that *"a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose".*

[150] *Venator* para 28.

> *shareholder in respect of their claim against the company or a director."*[151] (our emphasis)

154 The court said the Companies Act *"abounds"* with provisions for the recovery of loss resulting from misconduct on the part of directors. However, there must be a clear link between the contravention and the loss allegedly suffered.[152]

155 Thus, a litigant relying on section 218 of the Companies Act for standing would need to source the basis of their claim in another provision of the Companies Act which was breached, such as the provisions relating to fiduciary duties outlined above.

Directors liable to the company

Section 77 of the Companies Act

156 Sections 77(1) to (10) of the Companies Act set out the requirements for establishing liability of directors and prescribed officers.

157 Section 77 of the Companies Act provides, in relevant part, that a director of a company may be held liable:

> *"(2)(a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76(2) or 76(3)(a) or (b); or*

[151] *Venator* para 30.

[152] *Venator* para 32.

(b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of-

(i) a duty contemplated in section 76(3)(c);

(ii) any provision of this Act not otherwise mentioned in this section; or

(iii)any provision of the company's Memorandum of Incorporation.

(3) A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having-

…

(d) signed, consented to, or authorised, the publication of-

(i) any financial statements that were false or misleading in a material respect;"

(our emphasis)

158 It is clear from the wording of section 77, and from both the common law relating to delict and to the breach of fiduciary duties, that a causal link must be established between the director's breach of duty and the actual loss sustained by the company.

159 In a climate risk context, this means that there must have been a foreseeable and material climate-related risk that the director foresaw or ought to have foreseen and failed to deal with (or failed to adequately address) in breach of his or her duties, which resulted in the loss complained of.

160 The liability of a person in terms of section 77 is joint and several with that of any other person who is liable for the same act (section 77(6)). Section 77(8) provides that a person who is liable under section 77 is also jointly and

severally liable to pay the costs of all parties incurred in court proceedings to enforce liability.

161 Proceedings to recover any loss, damages or costs for which a person may be liable in terms of section 77 (fiduciary duties and the duty of care, skill and due diligence) "*may not be commenced more than three years after the act or omission that gave rise to the liability*"[153] and this could present an issue given the long lead times between the actual breach of a fiduciary duty and the time at which the climate-related consequences of that breach become apparent. However, there has been a recent amendment to the Companies Act[154] which permits the court to extend the three year limit. The amended section 77(7) now provides that:

> *"(c) the court may, on good cause shown, extend the period referred to in paragraph (b) regardless of whether—*
>
> *(i) such period has expired or not; or*
>
> *(ii) the act or omission that resulted in the loss, damages or costs contemplated in this section, occurred prior to the promulgation of the Companies Second Amendment Act, 2023 (Act No. of 2023)."*[155]

162 Sections 77(2) and 77(3)(b) have been interpreted to mean that when a company has suffered the harm described in the subsections owing to the conduct of directors, it is the company that is clothed with a cause of action against the

[153] The Companies Act s 77(7).

[154] Companies Second Amendment Bill [B26B-2023], available at: https://www.gov.za/sites/default/files/gcis_document/202312/b26b-2023.pdf.

[155] Companies Second Amendment Bill s 1.

directors and that any relief obtained as a result of litigation must be for the benefit of the company.[156]

Section 165 of the Companies Act

163 One exception to the company being vested with a cause of action, and therefore *locus standi*, is the derivative action, contained in section 165 of the Companies Act, which provides for derivative actions brought by shareholders (or others) against directors (or others) in order to protect the interests *"of the company"*. This is distinct from cases in which shareholders seek to enforce their own rights.

164 The derivative action is an exception to the 'proper plaintiff rule', which provides that in any action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself. When discussing the rule, the SCA in *Gihwala*[157] held:

> *" …The rule has two components. The first recognises that a company is a separate legal entity from its shareholders and accordingly, in the ordinary course, any loss caused to the company must be recovered by the company, and not by its shareholders on the basis of the diminution in the value of their shares or the loss of dividends they had anticipated. The second recognises the need for exceptions to this principle in order to avoid oppression and permits a shareholder to recover loss caused to the company by way of what is termed a derivative action. In certain circumstances it also permits recovery of the shareholder's own loss."*[158]

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[156] *Hlumisa* para 51.

[157] *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA).

[158] *Gihwala* para 107

165 The derivative action under section 165 of the Companies Act is wider than its predecessor with regard to the cause of action, the identity of the wrongdoer, and persons who have legal standing to institute proceedings.[159] Legal standing is extended to shareholders, directors, trade unions, or any *"other person"* who has been granted permission from the court to bring a derivative action. Permission "*may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person*".[160] The approach that the Courts will take in this regard remains to be seen, and this could be a key opportunity in the climate risk space.

166 The derivative action has been described by our Courts as a *"fundamental tool to enforce good corporate governance"*[161] because it allows for the interests of the company to be pursued by other interested parties in circumstances where those who are harming the company (such a directors) would usually be the only people entitled to act on its behalf to recover damages for losses sustained by it.

167 As set out above, since these duties are owed to the company, the claim is for "*loss, damages or costs sustained by the company*". If a shareholder brings a derivative action in terms of section 165, any benefit from the proceedings accrues to the company, and not the shareholder directly, since a derivative action is brought on behalf of the company.

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[159] Cassim et al, p777.

[160] The Companies Act s 165(2)(d).

[161] *Mbethe* para 66.

168 The phrase *"to protect the legal interests of the company"*[162] is a wider concept than protection of merely the rights of a company.[163] Section 165 does not limit the scope of conduct that can be challenged this way, and the cause of action is not limited to any class of wrongdoer. As long as the applicant can demonstrate good faith,[164] a triable issue,[165] and that they act in the best interests of the company,[166] a court may grant leave to bring or continue proceedings with the aim of obtaining a remedy for the company.

169 As far as we can ascertain, South African Courts have not yet been faced with a derivate action application seeking to enforce a company's rights against directors who have failed to fulfil their duties.

170 In the United Kingdom in 2023, ClientEarth, an environmental activist group, together with other shareholders of Shell Plc, sought to bring a derivative action against the board of directors of Shell Plc, on the basis that Shell's directors had breached their legal duties.[167]

171 ClientEarth, as a minority shareholder, was not granted permission to bring the derivative action, *inter alia*, because it was challenging to prove breaches of directors' responsibilities in the context of the complex decision-making process

[162] The Companies Act s 165(2).

[163] Cassim et al, p 1064.

[164] *Mbethe* para 20.

[165] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1995 (4) BCLR 437 (W) at 449.

[166] *Mbethe* para 53.

[167] *ClientEarth v Shell Plc* [2023] EWHC 1897 (Ch), available at: https://www.judiciary.uk/wp-content/uploads/2023/07/ClientEarth-v-Shell-judgment-240723.pdf.

of a firm listed on the London Stock Exchange (**LSE**) and the absence of a universally acknowledged standard by which climate-related activity could be judged.

172 The judgment emphasised that the factors that directors must consider according to section 172 of the UK's Companies Act are primarily business judgements, which the Court is not well-suited to determine unless there is a clear-cut situation. Similar derivative action cases are pending in multiple jurisdictions across the world.[168]

Section 20(6) of the Companies Act

173 Section 20 of the Companies Act entitles shareholders to restrain the company from acting *ultra vires* or carrying out conduct inconsistent with the Companies Act, or to claim damages in response to such conduct.

174 Section 20(6) provides that:

> *"(6) Each shareholder of a company has a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with—*
>
> *(a) this Act; or*
>
> *(b) a limitation, restriction or qualification contemplated in this section, unless that action has been ratified by the shareholders in terms of subsection (2)."*

[168] See, for example, *Assad v. Seu,* a pending shareholder derivative action against the officers and directors of Hawaiian Electric Industries for failing to take actions to mitigate wildlife risks and for misleading public regarding company's readiness for severe weather, available at: https://climatecasechart.com/case/assad-v-seu/.

175 Section 20(6) sets a high bar for relief as it requires that an applicant prove that the conduct was intentional, fraudulent, or as a result of gross negligence.

176 A shareholder seeking relief under section 20(6) would need to bring a claim against persons who caused a loss to the company (such as persons charged with managing the business of the company, especially the directors) and not against the company itself, which merely acts as a result of what other persons caused it to do.

177 Like section 165, section 20(6) grants shareholders the right to claim damages for losses suffered by the company and not by the shareholders themselves.[169]

178 If directors were to carry on a business for an unlawful or unauthorised purpose, and the company suffers losses as a result, then section 20(6) could be used to hold the director personally liable for those losses, on behalf of the company.

Directors liable to the creditors

Section 20(9) of the Companies Act

179 Section 20(9) of the Companies Act provides the Courts with a statutory discretion to pierce the corporate veil. It states as follows:

> *"If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may –*

[169] *De Bruyn* paras 224-237.

(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and

(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a)".

180 A long line of cases[170] in relation to section 424 of the former Companies Act 61 of 1973 make clear that in respect of that provision, a creditor of a company who has sustained losses enjoys the right to claim compensation for such losses directly against a director of a company who had participated in, or was responsible for, the company conducting its business recklessly or fraudulently, which conduct had resulted in a loss to the creditor

181 The recent decision of *Kolisang*[171] demonstrates how a Court may apply section 20(9) to pierce the corporate veil and ensure that a wrongdoer who violates other sections of the Companies Act — principally those dealing with directors' duties — does not hide behind a company in order to avoid being brought to book.

182 The facts in *Kolisang* were briefly as follows:

182.1 In 2016, Ms Kolisang attended an auction arranged by Alegrand. Here, she purchased a vehicle described as a 2012 Golf GTI for R177 560. It later transpired that the vehicle was in fact a 2010 model. Ms Kolisang

[170] *Gordon N O and Rennie N O v Standard Merchant Bank Limited and others* 1984 (2) SA 519 (C); *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A); *Philotex (Pty) Limited and Others v Snyman and Others; Braitex (Proprietary) Limited and Others v Snyman and Others* 1998 (2) SA 138 (SCA).

[171] *Kolisang v Alegrand General Dealers and Auctioneers and Another* (31301 /2020) [2022] ZAGPJHC 431. See, also, *Weissensee v Stone-Bird Investments (PTY) Ltd and Others* [2022] 4 All SA 905 (GJ) paras 73-75.

subsequently returned the vehicle and requested a refund from Alegrand.

182.2 After obtaining default judgment against Alegrand, Ms Kolisang was unable to execute the judgment because the sole director of the company, Mr Jassat, had resigned from this position and sold the company. The company had ceased trading and was awaiting deregistration.

182.3 In these circumstances, the relief sought by Ms Kolisang was for the Court to hold Mr Jassat personally liable for the debts of the company.

182.4 The Court highlighted section 76(3) of the Companies Act, which lays out the fiduciary obligations of every director, and held that Mr Jassat breached his fiduciary obligations by deliberately misrepresenting the specifications of the vehicle in order to induce Ms Kolisang to purchase it. His conduct was deemed fraudulent, dishonest and improper.

182.5 The Court stated that in addition to committing fraud, Mr Jassat disregarded his duty to act in the company's best interests, stating:

> *"Additionally, as the director and owner, he acted with cavalier disregard for the interests of the company … Such conduct is manifestly not in the best interest of the company and may be considered reckless and dishonest. This conduct was indubitably with callous disregard for its effect on the company as a separate legal entity and at a time when he describes its financial situation as being parlous. Therefore, whilst a director is entitled to resign at any time, his resignation cannot be used as a means of evading his fiduciary duties as a director."*[172]

[172] *Kolisang* para 25.

182.6 The Court was therefore satisfied that Mr Jassat's conduct constituted an unconscionable abuse of the company's juristic personality as conceived of in section 20(9). The corporate veil was subsequently pierced, and Mr Jassat was held personally liable for the full amount.

Directors liable to the shareholders

183 As set out above, shareholders would be entitled to approach a Court for relief in terms of a derivate action and a claim in terms of section 20(6), but any relief obtained would be for the benefit of the company.

184 Shareholders also have at least one other avenue available to them for seeking relief.

Section 163 of the Companies Act

185 Section 163 of the Companies Act provides a remedy to a shareholder (or a director) who complains of *"oppressive or prejudicial conduct"*, or conduct that *"unfairly disregards"* his or her interests. It provides for relief in a number of forms. The Court has a discretion, under section 163(2) of the Companies Act, to make any interim or final order it thinks fit in relation to such a claim.

186 The oppression remedy typically operates to protect minority shareholders (though majority shareholders are not excluded from relying on section 163).

187 The ambit of the terms "oppressive", "unfairly prejudicial", and "unfairly disregards interests" are undefined. Since the emphasis is on the unfairness of the conduct, a minority shareholder cannot obtain relief merely on the basis

that he or she is outvoted — i.e. acts that prejudicially affect shareholders will not entitle them to relief, it must be shown that the conduct is not only prejudicial, but also unfair.[173] The emphasis on fairness requires that considerations such as the expectations of the shareholders are also taken into account. Rationality considerations are also embedded in the notion of fairness — and decisions which therefore ignore, without cause, the interests of certain shareholders, can be said to be unfairly prejudicial.[174]

188 In addition to oppressive conduct by the company, the new provision in the Companies Act *"expressly includes the manner in which the powers of a director or prescribed officer are being or have been exercised"*.[175] The unfair disregard of the 'interests' of the shareholder in section 163 of the Companies Act also did not previously form part of the oppression remedy. Since the term 'interests' is clearly wider than 'rights', it will arguably allow Courts to avoid a strict interpretation of the provision.[176]

189 These changes to the oppression remedy brought about in the Companies Act could be particularly relevant in the climate risk context, where the failure to adequately address climate risk may not always result in a direct, and immediate financial impact, but may affect the shareholders' interests more broadly — for instance, the shareholders may have an interest in forward planning to protect their rights in the future. This is also likely to affect certain shareholders

[173] *Visser Sitrus* para 55.

[174] *Visser* paras 55-63 ; Cassim et al, pp 770-771.

[175] *Visser Sitrus* para 53.

[176] *Peel & Others v J & C Hamon Engineering (Pty) Ltd & Others* 2013 (2) SA 331 (GSJ) para 53.1.

only — i.e. those shareholders expecting returns over the longer term (such as institutional investors).

Directors liable to other affected parties

Section 162(7)(ii) of the Companies Act

190 While the requirements for establishing the delinquency of a director in terms of section 162 of the Companies Act are likely to too onerous to meet in the context of failures to address climate risk, the section also provides for directors to be placed on probation.

191 The requirements for probation are easier to meet.

192 Section 162(7) provides:

> *(7) A court may make an order placing a person under probation, if-*
>
> *(a) while serving as a director, the person*
>
> *(i) was present at a meeting and failed to vote against a resolution despite the inability of the company to satisfy the solvency and liquidity test, contrary to this Act;*
>
> *(ii) otherwise acted in a manner materially inconsistent with the duties of a director; or*
>
> *(iii) acted in, or supported a decision of the company to act in, a manner contemplated in section 163(1) [oppressive conduct];*
>
> *…*
>
> *(9) A declaration placing a person under probation-*
>
> *(a) may be made subject to any conditions the court considers appropriate, including conditions limiting the application of the declaration to one or more particular categories of companies; and*

(b) subsists for a period not exceeding five years, as determined by the court at the time it makes the declaration, subject to subsections (11) and (12).

(10) Without limiting the powers of the court, a court may order, as conditions applicable or ancillary to a declaration of delinquency or probation, that the person concerned-

(a) undertake a designated programme of remedial education relevant to the nature of the person's conduct as director;

(b) carry out a designated programme of community service;

(c) pay compensation to any person adversely affected by the person's conduct as a director, to the extent that such a victim does not otherwise have a legal basis to claim compensation; or

(i) be supervised by a mentor in any future participation as a director while the order remains in force; or

(ii) be limited to serving as a director of a private company, or of a company of which that person is the sole shareholder." (our emphasis)

193 This relatively underexplored avenue for holding directors personally liable is promising for affected parties because:

193.1 First, while section 162(2) limits standing to *"a company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company"*, a Court would potentially grant an interested and affected party standing under the public interest provision of section 157(1)(d) of the Companies Act, as it did in *OUTA*.[177]

[177] *Organisation Undoing Tax Abuse NPC and Another v Myeni and Another* (15996/2017) [2019] ZAGPPHC 957.

193.2 Second, specific provision is made for compensation to be paid *"to any person adversely affected by the person's conduct as a director".*

193.3 Third, since the probation can apply *"to one or more particular categories of companies",* a litigation strategy that sought probation of a certain director in respect of companies in high polluting industries only, for example, could be an effective awareness building and advocacy tool (in that the director's disregard for climate risk would render him or her unfit, for a certain period, to serve on the board of companies operating in those industries).

Section 33(1) of NEMA

194 NEMA establishes criminal liability for companies who pollute or cause degradation of the environment. Specifically, NEMA allows for *"any person"* acting *"in the public interest"* or "*in the interest of the protection of the environment"* to privately prosecute a breach or threat of breach of any duty related to the protection of the environment where such a breach is an offence.[178]

195 The only example we have found of a private prosecution through NEMA is that of the prosecution of British Petroleum Southern Africa (**BP**) by an NGO, Uzani Environmental Advocacy CC (**Uzani**) in 2019. Uzani was able to obtain a conviction against BP despite attacks on its standing and *bona fides*. The Court held that:

[178] NEMA s 33(1).

> *"The legislature was concerned that there may not be sufficient resources, skilled or otherwise, or a willingness or capacity on the part of a prosecuting authority, which is already stretched just pursuing violent inter-personal crimes. Section 33(2) of NEMA is couched in terms that facilitate, if not encourage, interest groups who wish to protect the environment by compelling compliance with the environmental laws in a manner which makes it easy to fast track private prosecutions for offences under NEMA."*[179]

196 Unlike the typical private criminal prosecution, which can only commence after the state issues a certificate that they will not prosecute, a NEMA private prosecution may commence 30 days after giving notice to the state of the person's intention to prosecute. Should the private prosecution succeed, a court may order that the person pay *"the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence".*[180]

197 Textually, the offences under section 49A(1)(e) and (f) of NEMA, quoted in paragraph 131 above, appear to apply in the climate change context.

198 As discussed above, section 34(7) of NEMA provides that a person who was a director of the company at the time that the offence took place will also be guilty of the offence *"if the offence in question resulted from the failure of the director to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence: Provided that proof of the said offence by the firm shall constitute prima facie evidence that the director is guilty under this subsection".*

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[179] *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* 2019 (5) SA 275 (GP) para 88.

[180] NEMA s 33(3).

199 A person convicted of an s 49A(1)(e) or (f) offence may be liable for a fine not exceeding R10 million or imprisonment not exceeding 10 years, or to both such fine and such imprisonment.[181]

200 After a person is convicted, sections 34(1) and (2) empower a Court to *"inquire summarily and without pleadings into the amount of the loss or damage so caused"* to the state or any other person and – "*upon proof of such amount"* – to give judgment for these damages *"in favour of the organ of state or other person concerned against the convicted person, and such judgement shall be of the same force and effect and be executable in the same manner as if it had been given in a civil action duly instituted before a competent court."*

201 After the conviction of BP in *Uzani*, Uzani sought information from BP to make submissions on the quantum of the damages arising from BP's offences. The court ordered BP to disclose extensive confidential information to Uzani and also issued subpoenas against third parties.[182] On 6 September 2024, the High Court in Pretoria set the quantum of BP's fine at R 53 million.[183]

202 In addition, section 4(3) of NEMA empowers a Court to compel a convicted person to disgorge *"the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence".*

[181] NEMA s 49B(1).

[182] *Uzani.*

[183] See a news report discussing the fine at: https://www.news24.com/fin24/climate_future/bp-to-pay-r53m-fine-for-sa-eco-crimes-high-court-rules-20240906.

203 Thus, if a conviction is obtained, it could result in both damages being awarded for environmental harm and the disgorgement of any benefits gained from the criminal behaviour.

CONCLUSION

204 Climate change, and its associated risks, constitute a rapidly developing area in corporate law, both nationally and internationally.

205 In South Africa, parts of Southern Africa, and indeed around the world, there have been unseasonal weather patterns and natural disasters such as droughts, flooding and veld fires, which some studies have attributed to climate change.[184]

206 As highlighted in Part I of this memorandum, natural disasters have, in some instances, caused serious financial loss to companies. As far as we have been able to ascertain, the directors of those companies were not sued or held personally liable for those losses. This is a reflection of the fact that the law in this area is still in its infancy and shareholders are reluctant to impute foresight onto directors in respect of these natural disasters and losses caused thereby.

207 How long this will remain the position is anybody's guess. More and more, questions are being asked about what companies are doing to protect themselves and the general public from the impacts of climate change.

[184] In the South African context, see, for example, E M Zwane (2019) "Impact of climate change on primary agriculture, water sources and food security in Western Cape, South Africa" *Jamba: Journal or Disaster Risk Studies* 11. More generally, see S I Seneviratne et al (2021) "Chapter 11: Weather and Climate Extreme Events in a Changing Climate" in *Climate Change 2021: The Physical Science Basis*, *Contribution of Working Group I to the Sixth Assessment Report of the IPCC,* V. Masson-Delmotte et al (eds), available at: https://www.ipcc.ch/report/ar6/wg1/.

208 As far back as 2016, King IV identified financial instability and climate change as two of the drivers of fundamental changes in both business and society that has characterised the 21st Century.[185] It suggested that "*even those who are skeptical about the scientific evidence for climate change, or who question whether climate change is attributable to human agency or simply part of a longer-term cycle, have to acknowledge that the world has experienced extreme weather conditions that pose new risks in the last several years*" and that given the increasing pressure on our finite natural assets, "*continuing business as usual is no longer an option*." It furthermore acknowledged the greater expectations that stakeholders — especially civil society and shareholders — were already then starting to place on companies, particularly in relation to environmental concerns.

209 We have argued, in this memorandum, that the risks posed by climate change are risks like any other, although they may differ in size, scope and impact depending on the size, geography and industry in which each company operates. We have also argued that companies must, as part of their risk management, assess and manage climate risk as part of their day-to-day operations.

210 The legal obligation to manage the affairs of a company rests with the board of directors in terms of section 66 of the Companies Act. This means that the board has a primary obligation, as part of its fiduciary duties, to manage the risks posed by climate change to the company.

[185] King IV, Foreword, p 3.

211 Failure to adequately address climate risk may, depending on the particular facts of each case, result in directors being held personally liable for the loss suffered by the company as a result of such failure.

212 We emphasise that the law is still in its infancy when it comes to liability of directors in relation to climate-related issues. It is not yet clear where the law will go and how far it will be developed by our Courts.

213 It is, however, clear that South African law appears to be moving in the right direction. The legislature, regulatory and standard-setting bodies, and the Judiciary are boldly adapting the directors' duties highlighted in Part II of this memorandum to incorporate good governance principles that are not specifically legislated, as well as consideration of the interests of the public. It is only a matter of time before an appropriate case is brought before the Courts where directors' duties in respect of climate risk will very likely be recognised and enforced.

214 As we have pointed out above, where the company has caused a loss to a third party, generally, the third party's claim lies against the company itself and not the directors, unless the third party can bring its claim under section 20(9) of the Companies Act or the common law and ask the Court to pierce the corporate veil.

215 Where directors have caused a loss to the company through a breach of their fiduciary duties, the claim against the directors involved is usually that of the company.

216 The available avenues for shareholders or other interested parties to bring the claims that will lead to the development of the law are underexplored. In terms of the Companies Act, a shareholder can make use of the section 165 derivative action procedure to hold directors personally liable, while another interested party can apply to a court in terms to section 157 to bring a claim in the public interest. Alternatively, shareholders can, in terms of section 20(6) of the Companies Act, claim damages from any person who caused the company to act in contravention of the Companies Act, but in order to do so they will need to prove that the wrongdoer acted intentionally, fraudulently or due to gross negligence. In all three instances, the implicated director(s) will be held personally liable, but the remedy will be directed at the company, not the claimant.

217 The section 163 remedy for oppressive conduct can also be relied upon by shareholders, but it has never been used in a scenario resembling what we have imagined here. While this avenue may be harder to pursue, it at least provides for relief to be claimed by the shareholders themselves, as opposed to on behalf of the company.

218 An application to place a director on probation can be made by a shareholder or, through section 157(1)(d), by another interested party. It requires that the claimant prove that the director acted in a manner materially inconsistent with the duties of a director. The benefit of this route to liability is that it provides for compensation to be paid by the implicated director *"to any person adversely affected by the person's conduct as a director."*

219 Section 33(1) of NEMA provides standing to any person to prosecute a wrongdoer in the public interest, and section 34(7) then provides for directors to be held liable for the company's wrongdoing and to pay damages to the state or other affected persons. However, establishing wrongfulness in circumstances where there was no clear breach of a licensing or operating requirement in terms of NEMA may prove difficult.

220 Therefore, in so far as public interest litigants are comfortable litigating for the benefit of the companies themselves, there is ample scope for the conduct of directors to be challenged in relation to failures to adequately address climate risk.

221 Given the wide scope for litigation — which may be based on a variety of legislative provisions as highlighted in Part III of this memorandum, each with different requirements for bringing a case — boards of directors cannot presently anticipate the form that climate-related litigation will take and respond pointedly to that litigation risk. Instead, boards will need to approach their duties in respect of climate risk proactively. Given the eager and innovative approach of South African Courts highlighted in Part I of this memorandum and the likelihood that our legal and regulatory frameworks will follow global trends, there is, in our view, no time for complacency.

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26 September 2024