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Advantages and disadvantages of partial codification of directors' duties in the *South African Companies Act 71 of 2008*

Abstract

This article offers a critical examination of partial codification and its effect on the interpretation of the directors' standard of conduct provision. Previously, the fiduciary duties and the duty of care and skill were regulated by the common law and case law. In May 2004, the Department of Trade and Industry released a policy document entitled *South African company law for the 21st century: Guidelines for corporate law reform*. The policy document acknowledged that South Africa had no extensive statutory dispensation that covered the duties of directors. The policy document recognised the need to bring South African company law in line with international trends and to reflect and accommodate the changing environment for businesses locally and internationally. For the first time in South Africa's corporate law history, the *Companies Act 71 of 2008* partially codifies the fiduciary duties of directors, the duty of care and skill, and introduces the business judgement rule (also referred to as the 'safe-harbour provisions') into South African company law. The *Companies Act 71 of 2008* prescribes certain duties and its extent, but the content of those duties, such as *bona fides*, is still determined by the common law.

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1. Introduction

It has been said, apparently by the late Bobby Hahlo, that an Act is but a ship sailing on the sea of the common law. Nowhere is it more true than in company law and, be it said, nowhere is the sea more tempestuous.¹

In *Ex Parte NBSA Centre Ltd*,² a judgement that concerned the *Companies Act 61 of 1973*,³ the court stated that "one's general approach to company law may exercise a subtle influence on one's perception of many of its concepts and the meaning of much of its well-worn phraseology". Coetzee DJP believes that "[c]ompany law is much more than the current statute which applies at any particular point in time".⁴ "Company law, like other statutes that

1 Delpont *et al.* 2015:Preface.

2 [1987] 4 All SA 33 (T):34.

3 Hereinafter referred to as "the 1973 Act".

4 *Ex Parte NBSA Centre Ltd*:34.

regulate some field of human activity, ha[s] its own inner logic that must be identified and mastered.⁵ In addition to the former, company law has developed, in a number of areas, what might be termed its own inner common law, which is not found in any specifically identifiable provision, for example, the director-company relationship and resultant fiduciary duties.⁶ The *Companies Act* 71 of 2008⁷ partially codifies⁸ the duties of directors⁹ and introduces the United States-style business judgement rule into South African company law.¹⁰ Prior to the 2008 *Act*, there has never been an attempt to prescribe duties of directors in legislation.¹¹ Section 158 of the 2008 *Act* provides that the courts, when determining a matter in terms of the *Companies Act*, must develop the common law as is necessary to improve the realisation and enjoyment of the rights established in the 2008 *Act*.¹² The intention of partial codification is not to “unreasonably jettison the common law”.¹³ The benefits of the statutory provision will need to be evaluated against the constraints it may place on the development of the common law.¹⁴ One of the arguments in favour

5 *Ex Parte NBSA Centre Ltd*:34.

6 *Ex Parte NBSA Centre Ltd*:34.

7 Hereinafter referred to as “the 2008 *Act*”. The 2008 *Act* was signed into law by the State President on 8 April 2009 and was gazetted on 9 April 2009 in *Government Gazette* 32121 (Notice No. 421) as the *Companies Act* 71/2008. The *Act* was proclaimed into operation by *Government Gazette* 34239 (Notice No. R. 32) on 1 May 2011.

8 Delpoit 2015:290(3); Van der Merwe *et al.* 2015:par. 15.12.1; Cassim *et al.* 2012(a):507; Davis *et al.* 2010:115; Cassim *et al.* 2012(b):285.

9 See secs. 76, 77(2) and 158(a) of the 2008 *Act*. Sec. 76 is titled the “standards of directors’ conduct”. Previously, South African company law consisted of the *Companies Act* 61/1973 and the common law. Directors’ fiduciary duties and the duty of care and skill were regulated by the common law and case law. Delpoit *et al.* 2015:290(3); Davis *et al.* 2012:110-111; Cilliers *et al.* 2000:139; Pretorius *et al.* 1999:278; Cassim *et al.* 2012(a):507; Cassim *et al.* 2012(b):284; Stein & Everingham 2011:18; Blackman *et al.* 2002:8-29; *LAWSA Companies* 4(2) First Reissue Volume Duties of Directors and Officers. The fiduciary duty of directors originates from Roman Dutch law, while the common law duty of care originates from English law – Jones 2007:327; Bouwman 2009:510; Bekink 2008:97 – indicating that “[t]he notion of care and skill and the rules governing the standards required of directors were laid down in early English decisions”; *LAWSA Companies* 4(2) par. [116] fn. 2 – indicating that “our courts have for most part relied on English decisions when developing our law of fiduciary duties, our fiduciary doctrine is of Roman Dutch origin”.

10 Sec. 76(4)(a) of the 2008 *Act*. The partial codification of directors’ duties has also taken place in various other common-law jurisdictions, for example Australia and New Zealand. Cassim *et al.* 2012(a):508. Secs. 179(1) and 185 of the *Australian Corporations* 2001 provide that the statutory duties in the *Act* do not exclude the operation of other laws, including the general law.

11 Du Plessis 2010:263-289; Cassim *et al.* 2012(a):507.

12 Delpoit 2014:140.

13 The Department of Trade and Industry 2004:7, published in *Government Gazette* 26493, General Notice 1183 of 2004, dated 23 June 2004; hereinafter referred to as “the policy document”.

14 The Department of Trade and Industry 2004:7.

of introducing the statutory standard is that it will provide directors with a degree of certainty and accessibility.¹⁵

This article discusses the meaning, advantages and disadvantages of partial codification. It examines whether the partial codification of directors' prescribed standards of conduct can be considered an advantage or disadvantage. A discussion of complete codification will not be undertaken in this article.

2. Meaning of partial codification

Traditionally, the directors' fiduciary duties, common law duties and the law relating to delegation and reliance on third parties were regulated by the common law and case law.¹⁶ These duties are now constructed on the foundation of partial codification.¹⁷

According to Sir Courtenay Ilbert, partial codification means "an orderly and authoritative statement of the leading rules of law on a given subject, whether the rules are found in statutes or in common law".¹⁸ Partial codification entails adopting the general principles of law in the form of a statutory statement, while allowing some room for the development of the common law by the application of legal principles.¹⁹ This does not entail a rigid fixation of the law, but a proposed code with provisions that, if used correctly by the courts, can ultimately lead to the development of the law by the courts.²⁰ The legislation does not cover all of the duties of directors and neither does it replace all the case law. A clear relationship must be maintained between the partial code and the common law.²¹

Partial codification of the standards of directors' conduct entails a statement consisting of a restatement of the common law fiduciary duties and the duty of skill and care.²² It does not constitute an exhaustive statement of all the common law duties of directors.²³ The common law will continue to apply in the areas not covered by the statement.²⁴ It will, however, be superseded by the duties provided for in the statement.²⁵ This indicates that an interaction between the statutory statement and the common law will exist. First, partial codification leaves room for the

15 The Department of Trade and Industry 2004:38.

16 Delpont *et al.* 2015:290(3); Davis *et al.* 2012:110-111; Cilliers *et al.* 2000:139; Pretorius *et al.* 1999:278; Cassim *et al.* 2012(a):507; Cassim *et al.* 2012(b):284; Stein & Everingham 2011:18; Blackman *et al.* 2002:8-29; *LAWSA Companies 4(2) First Reissue Volume Duties of Directors and Officers.*

17 See secs. 76, 77(2) and 158(a) of the 2008 Act.

18 Lyman 1903:348.

19 Sec. 77(2)(a) and (b) of the 2008 Act. See also Davis *et al.* 2012:111.

20 Davis *et al.* 2010:115.

21 Esser 2008:289; Delpont *et al.* 2015:290(4).

22 The Law Commission and Scottish Law Commission 1999:par. 4.6.

23 The Law Commission and Scottish Law Commission 1999:par. 4.6.

24 The Law Commission and Scottish Law Commission 1999:par. 4.6.

25 The Law Commission and Scottish Law Commission 1999:par. 4.6.

judiciary to fill in the gaps, with which the statutory statement does not expressly deal²⁶ and, secondly, the common law must be developed as necessary to improve the realisation and enjoyment of rights established by the 2008 Act.²⁷ Recently, the relationship with the common law was confirmed in *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited and Another*²⁸ where the court acknowledged that, if section 75 had to be interpreted, recourse may be had to the common law.

3. Advantages and disadvantages of partial codification

The partial codification of directors' duties²⁹ is an attempt to provide access and certainty³⁰ to directors without compromising their flexibility.³¹

3.1 Advantages

Partial codification is a means of attaining uniformity in an area of the law.³² A statutory statement containing the standards of directors' conduct will make the law more accessible to others and will result in a level of clarity, simplicity and legal certainty that circumvents complexity.³³ In deliberating whether partial codification of directors' duties is construed to be an advantage or disadvantage, Henochsberg,³⁴ Esser and Coetzee,³⁵ Bekink³⁶ and Bouwman³⁷ prefer partial codification, because it will provide directors with clear and efficient guidelines of their duties by providing them with an accessible statutory statement containing their duties.³⁸ A statutory statement can save directors time, effort and money in establishing, advising on, and complying with the law.³⁹

26 Veasey 2011:95.

27 Sec. 158(a) of the 2008 Act.

28 (12476/2015) [2015] ZAWCHC 113; 2015 (6) SA 338 (WCC) (4 August 2015) paras. 15-25.

29 Sec. 76 of the 2008 Act.

30 The Department of Trade and Industry 2004:38.

31 The Department of Trade and Industry 2004:38, indicating that "the benefits of such a statutory standard for conduct will need to be evaluated against the constraints it will place on the development of common law".

32 Lyman 1903:348.

33 Delpont *et al.* 2015:290(3); Esser & Coetzee 2004:29; Cassim *et al.* 2012(b):285; The Department of Trade and Industry 2004:38.

34 Delpont *et al.* (2015:290(4)) submits that "the codification of directors' duties (or the statement of directors' duties) is welcomed".

35 Esser & Coetzee (2004:30) submit that "[w]e argue in favour of part regulation as the way forward".

36 Bekink (2008:115) submits that "[p]ersonally I favour the modernist view".

37 Bouwman (2009:534) submits that "[t]he potential disadvantages of total codification far outweigh the potential advantages. This makes partial codification the preferred route in South African law".

38 Esser 2008:291; Delpont *et al.* 2015:290(4).

39 Esser 2013:290(4); Havenga 2013:267.

Partial codification will not stifle the common law development of directors' duties to the extent that it is not in conflict with the statutory standard.⁴⁰ It attempts to embrace a reflection of the common law principles that have developed through judicial determination.⁴¹ Through this, it allows the common law principles to govern situations where the legislature has not included a statutory provision.⁴² According to Cassim, the partial codification of the duties allowed the legislature the opportunity to clarify some conflicting court decisions on fiduciary duties, which sadly the legislature failed to do.⁴³ According to Bouwman,⁴⁴ Bekink,⁴⁵ Havenga,⁴⁶ Botha,⁴⁷ McLennan⁴⁸ and Cassim,⁴⁹ the inclusion of the fiduciary duties and the duty of care and skill in a statutory statement should be considered an advantage. It reflects the standards required of directors in a modern economic environment and is deemed to be fair.⁵⁰ Du Plessis argues that sec. 76(3) can be defended in its entirety, because the legislature must have known that, if the standard of care, skill and diligence was set too high, ordinary citizens would be dissuaded from taking up positions as directors of companies.⁵¹ According to Du Plessis, the introduction of the business judgement rule acknowledges that directors are expected to take risks and the courts are not equipped to second-guess business decisions.⁵² Many companies are global and operate in many economies and jurisdictions, not only in South Africa.⁵³ Partial codification provides for an international advantage in that it can facilitate international transactions,

40 Havenga 2013:263; Botha 2009:712-713; Esser & Coetzee 2004:30; Cassim *et al.* 2012(a):508-509; Davis *et al.* 2012:18, 110-111; Delpont *et al.* 2015:290(3)-290(4); Bouwman 2009:533; Bekink 2008:115-116.

41 Havenga 2013:263; Botha 2009:712-713; Esser & Coetzee 2004:30; Cassim *et al.* 2012(a):508-509; Davis *et al.* 2012:18, 110-111; Delpont *et al.* 2015:290(3)-290(4); Bouwman 2009:533; Bekink 2008:115-116.

42 Bouwman 2009:523.

43 Cassim *et al.* 2012(a):508-509.

44 Bouwman (2009:533) submits "that the partial codification of directors' duty of care and skill that coexists with the valuable common-law decisions does strike the perfect balance".

45 Bekink (2008:116) submits that "any development that would modernise South African law and bring it more in line with current global commercial expectations, should be supported".

46 Havenga (2005:620) states that "[a]t most there should, it is submitted, be a statement confirming directors' obligations to act in good faith and with the care and skill that could reasonably be expected of a person with their knowledge and experience". See also Havenga 2000:37.

47 Botha (2009:714-715) submits that "[t]he fact that these duties are now legislated and that a code of conduct has been created are welcome moves in the right direction".

48 McLennan (2009:186) submits that "[s]ubsection (3)(c) is especially to be welcomed".

49 Cassim *et al.* (2012(a):558) submits that "[t]he Act tightens up and upgrades the director's duty of care and skill".

50 Sec. 76(3)(c) of the 2008 Act.

51 Du Plessis 2010:263-289.

52 Du Plessis 2010:263-275.

53 Sec. 76(3)(c) of the 2008 Act.

reduce the costs of applying the 2008 Act, increase general welfare, promote the diffusion of culture, and lead to international understanding.⁵⁴ Bouwman⁵⁵ submits that one of the advantages of partial codification is that “[m]ost of the disadvantages of total codification are avoided”.⁵⁶ Flexibility is not compromised and the common law principles may be consulted in complex cases.⁵⁷ Cassim submits that “[t]he advantages of codification are intended to apply in full force to the partial codification of directors’ duties”.⁵⁸

3.2 Disadvantages

The co-existence of a statutory standard and the common law will not necessarily provide certainty, clarity or accessibility to directors, shareholders, officers and other stakeholders.⁵⁹ Cassim⁶⁰ submits that “there will be more, not less complexity”, because the common law duties as well as the extensive body of case law on directors’ duties are preserved.⁶¹ The common law duties of directors will now be derived from two sources instead of one.⁶² Although it may be easier to access the statutory standard, clarity, simplicity and legal certainty are only provided for to the extent that one reads the statutory provision. A statutory statement of directors’ duties can only provide for a limited amount of clarity, simplicity and legal certainty.⁶³ McLennan,⁶⁴ Havenga⁶⁵ and Botha⁶⁶ submit that the provisions may over-legislate the

54 Merryman 1981:357. See also Davis *et al.* (2012:110), stating that “directors need to be aware of what is expected of them, because the standards of director’s conduct can influence the profitability of a company, determine the extent of foreign and domestic investments and ultimately determine the success of the company”. See also Kiggundu & Havenga 2004:272.

55 Bouwman 2009:523.

56 Bouwman (2009:522) provides the following disadvantages to a statutory codification: codification of a vast collection of developed common law is not practically achievable; complete codification could oversimplify the common law principles which will not enable the codification of oversimplified principles to assist in complex cases; codification will constrain the development of the aspect of law that has been codified; codification can open the statute to possible loopholes, and flexibility will be compromised.

57 Bouwman 2009:523.

58 Cassim *et al.* (2012(a):508) provide that the advantages of codification are certainty and accessibility.

59 Bouwman 2009:523; Cassim *et al.* 2012(a):20.

60 Cassim *et al.* 2012(a):20.

61 Cassim *et al.* 2012(a):20.

62 Cassim *et al.* 2012(a):20.

63 Havenga 2013:263; Botha 2009:712-713; Esser & Coetzee 2004:30; Cassim *et al.* 2012(a):508-509; Davis *et al.* 2012:18, 110-111; Delpont *et al.* 2015:290(3)-290(4); Bouwman 2009:533; Bekink 2008:115-116.

64 McLennan (2009:190) submits that “[i]n my view, the provisions over legislate the issues”.

65 Havenga (2005:621) submits that “over-regulation is not beneficial and can confuse rather than clarify”.

66 Botha (2009:715) submits that “[i]t might seem that the legislator is trying to over-legislate the issues concerning the duties of directors and their accountability,

issues, creating confusion rather than clarity, preferring a case-by-case approach when the duties need to be judicially determined. Veasey⁶⁷ points out that decisions made in the boardroom are not always black or white; directors make decisions in “shades of grey all the time”.⁶⁸ He submits that no viable corporate governance system can be found on a “one size fits all” notion.⁶⁹ Perhaps more importantly then, flexibility is not compromised.⁷⁰ The common law principles are both inherently and usefully non-prescriptive; this will allow for business practices and expectations of director conduct to evolve and enable courts to review compliance with those evolving practices and expectations in each unique factual setting.⁷¹ A statutory statement of the main duties of directors may also create unnecessary brevity. For example, if one considers the duty to act in the best interests of the “company” or the duty that directors must exercise their powers for “a proper purpose”, it is unclear what is meant by “a proper purpose” and uncertain what is meant by the term “company” without having knowledge of how the courts have previously interpreted these phrases.⁷² Without this knowledge or information, laymen directors may assume that the statutory statement is a complete list of their duties unbeknown to the complexity of the common law principles that are still relevant.⁷³ The law relating to directors' duties is simply too complex to be reduced to a singular statutory statement and consequently contradicts the factor that a statutory statement is intended to provide a clear guideline.⁷⁴ According to Cassim,⁷⁵ Havenga⁷⁶ and Davis,⁷⁷ the aim of the partial codification is to make directors more aware of their duties. In this regard, the 2008 Act places a duty on a company secretary to guide and inform directors of their duties and responsibilities.⁷⁸ However, directors

but it must be remembered that this is a necessary measure especially taking into account that the stakeholder-inclusive approach provides a much wider protection than what was provided for under the previous dispensation”.

67 Veasey 2011:96.

68 Veasey 2011:96.

69 Veasey 2011:96.

70 Delpont *et al.* (2015:290(4)) indicate that “[o]ne of the main disadvantages of [complete] codification is therefore the lack of flexibility” and submits further with regards to partial codification “[t]he common law will, however, still be applicable and will ensure that directors' duties are still flexible and capable of development”.

71 Veasey 2011:96.

72 Esser 2008:291.

73 Esser 2008:291-292.

74 Esser 2008:292.

75 Cassim *et al.* (2012(a):19) indicate that “[t]he object of this partial codification of the fiduciary duties of directors was to ensure that directors are easily made aware of their fiduciary duties”.

76 Havenga (2005:263) indicates that “[t]he aim of the partial codification of directors' duties was to create greater awareness of them”; Havenga (2005:620) indicates that “directors should be aware of their duties”. See also Kiggundu & Havenga 2004:290.

77 Davis *et al.* (2012:110) indicate that “in practice, directors need to know what their duties are and directors must be aware of what is expected of them”.

78 Sec. 88(2) of the 2008 Act.

of companies that are not required to appoint a company secretary⁷⁹ may not derive the same benefit from a statutory statement that is based on two sources of the law as would the directors of companies that are compelled to appoint a company secretary. The underlying common law principles still need to be consulted in order to determine the exact contours of the duties.⁸⁰ This contradicts the first advantage in that it should be construed to be a statement providing accessibility and certainty, but this is not achieved if a company secretary is required to guide and inform directors of their duties and responsibilities. This amounts to a disadvantage, especially so for laymen directors and for directors of companies that are not required to appoint a company secretary.

The co-existence of a statutory standard and the common law will not resolve or reduce the issue of time, effort or costs in ascertaining the exact meaning, extent or content of a particular principle.⁸¹ This is especially so in complex cases where judicial determination is necessary to provide clarity.⁸² A further possible disadvantage of the statutory statement of directors' duties is the incorporation of the business judgement rule.⁸³ According to Du Plessis, the business judgement rule in South Africa is not limited to business judgements and includes "the exercise of the powers or the performance of directors in general".⁸⁴ The business judgement rule could result in accepting a standard of conduct below an acceptable standard that ought to be required of directors.⁸⁵ The introduction of the business judgement rule also raises the issue of legal transplanting of concepts that may be foreign to a South African economic environment.⁸⁶ The precise content of the business judgement rule is difficult to define and the difficulty in the codification thereof is evident in the attempts undertaken in the United States of America.⁸⁷ Legal certainty regarding the business judgement rule's content and function, in a South African environment, will only be achieved through continuous and regular judicial interpretation.⁸⁸

4. Analysis

For the first time in South Africa's corporate law history, the 2008 Act partially codifies the fiduciary duties of directors and the duty of care and

79 See sec. 84(1) of the 2008 Act.

80 Sec. 77(2) of the 2008 Act. See also Delpont 2011:90.

81 Bouwman 2009:523; Veasey 2011:97.

82 Veasey 2011:97.

83 Kennedy-Good & Coetzee 2006:291; Havenga 2000:36.

84 Du Plessis 2012:46-68.

85 Kennedy-Good & Coetzee 2006:280.

86 Kennedy-Good & Coetzee 2006:291; Havenga 2000:36.

87 Kennedy-Good & Coetzee 2006:291; Davis *et al.* 2012:110.

88 Hahlo & Gower 1967:249.

skill.⁸⁹ Under partial codification, the common law is still applicable to the extent that it does not conflict with the statutory statement.⁹⁰

If the standards of directors' conduct provision was intended to be a complete codification of directors' duties, the 2008 Act must either explicitly state that it is the intention of the legislature to supersede the common law, or the inference from the 2008 Act must be such that one can come to no other conclusion than that the legislature did have such an intention.⁹¹ An opportunity for the courts to decide on the question of codification of directors' fiduciary duties was lost in *Kensal Rise Investments (Pty) Ltd v Marcus William Marchant*.⁹² Olsen J remarked that counsel raised codification of directors' duties, but failed to refer the court to any authority that the provisions of the 2008 Act codified the law relating to the fiduciary relationship between directors and their companies.⁹³

It is not the intention of the prescribed standards of directors' conduct provision to supersede the common law relating to directors' duties. This was made clear by the policy document⁹⁴ and is supported by the 2008 Act.⁹⁵ Sec. 158 of the 2008 Act authorises the courts to develop the common law where necessary, in order to improve the realisation and enjoyment of the rights established by the Act.⁹⁶ This effectively provides the courts with the ability to develop the duties further in a South African context.⁹⁷ In *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited and Another*,⁹⁸ Davis J held that the "common

89 Delpont *et al.* 2015:290(3); Cassim *et al.* 2012(a):507; Davis *et al.* 2012:110; Delpont (2011:90) indicate that "[t]he statutory duties are not an exclusive or even proper codification of the common law duties"; Cassim *et al.* 2012(b):285; Stein & Everingham 2011:244; Bouwman 2009:512; Esser & Du Plessis 2007:347.

90 Delpont *et al.* 2015:290(4).

91 *Casserley v Stubbs* 1916 TPD 310: 312; *Rand Bank Bpk v Regering van die Republiek van Suid-Afrika* 1974 4 All SA 552 (T); 1974 (4) SA 764 (T); 767D-F; *S v Khumbisa* 1984 (2) SA 670 (N): 680. See also the earlier case of *Johannesburg Municipality v Cohen's Trustees*:823 where Solomon, J quoted the rule laid down in an English case by Byles, J in *Reg. v Morris* (1 CCR 95): "It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law". For examples of express modifications, see sec. 170(3) of the UK *Companies Act* 2006 and sec. 165(1) of the 2008 Act which provide that, in respect of derivative actions, any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.

92 (1523/2013) [2014] ZAKZDHC 47 par. 12.

93 (1523/2013) [2014] ZAKZDHC 47 par. 12.

94 The Department of Trade and Industry 2004:7.

95 See secs. 5(2), 7, 77(2) and 158(a) of the 2008 Act.

96 See secs. 5(2), 76, 77(2) and 158(a) of the 2008 Act.

97 Cassim *et al.* 2012(a):509.

98 (12476/2015) [2015] ZAWCHC 113; 2015 (6) SA 338 (WCC) (4 August 2015) paras. 15-25.

law remains the structure upon which the superstructure of the Companies Act rests.”

An understanding of the common law principles relating to directors’ duties is still necessary to determine the interaction between the common law duties and sec. 76, and especially to determine the content of the duties.⁹⁹ The content of certain of the duties, e.g. *bona fides*, will still be determined by the common law.

The burden of the negative factors of the statutory statement, a limited amount of certainty and accessibility, may be eased by providing directors with non-binding, educative, authoritative material outlining areas of the statutory statement, of which they should be aware.¹⁰⁰ It is suggested that certainty can be improved by the issue of non-binding practice notes by the Companies and Intellectual Property Commission.

5. Conclusion

The 2008 *Act* achieves partial codification by providing for the general principles relating to the duties of directors in the standards of directors’ conduct provision. The principles of the common law relating to a breach of a fiduciary duty as well as the principles of the common law relating to a breach of the duty of care, skill and diligence are preserved by the 2008 *Act* to the extent that they are not in conflict with the statutory standards of directors’ conduct provision. In *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited and Another*, the court acknowledged the relationship between the common law and the *Act*. A thorough understanding of the common law principles relating to directors’ duties is essential when determining the interaction between the common law duties and sec. 76, and especially to determine the content of the duties.¹⁰¹ However, the partial codification of directors’ duties is merely a restatement of the common law duties of directors and does not include all the common law duties. The legislature failed to use the opportunity to clarify the legal position where there were conflicting court decisions. Although the *Act* does not list and explain every possible detail for directors, it does provide a guide to directors and prescribed officers who have to abide by the law. The inclusion of prescribed standards of conduct reflects the standards of behaviour required of directors in modern South African company law. Many companies conduct business on an international level. Partial codification provides for an international advantage in that it can facilitate international transactions, reduce the costs of applying the

99 Delpont 2011:90; Delpont *et al.* 2015:290(4); Davis *et al.* 2012:111; Cassim *et al.* 2012(a):509; Cassim *et al.* 2012(b):284-285; Stein & Everingham 2011:244; *LAWSA Companies* 4(1) par. [238] fn. 5.

100 The Law Commission and Scottish Law Commission 1999:part 4.

101 Delpont 2011:90; Delpont *et al.* 2015:290(4); Davis *et al.* 2012:111; Cassim *et al.* 2012(a):509; Cassim *et al.* 2012(b):284-285; Stein & Everingham 2011:244; *LAWSA Companies* 4(1) par. [238] fn. 5.

2008 Act, increase general welfare, promote the diffusion of culture, and lead to international understanding.¹⁰²

The main advantage of partial codification is that flexibility is not compromised.¹⁰³ The common law principles are both inherently and usefully non-prescriptive. This will allow for business practices and expectations of director conduct to evolve and enable courts to review compliance with those evolving practices and expectations in each unique factual setting.¹⁰⁴

The relationship between the statutory provision and the common law must be clear.¹⁰⁵ This will facilitate a balance between certainty and flexibility.¹⁰⁶ The statutory duties provide a general guideline to directors. It is acknowledged that no statute can provide for all eventualities. If needed, the Companies and Intellectual Property Commission may issue non-binding practice notes to provide further details to directors.

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