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2021
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Beja, Xolisa (2024). The extent of protection provided by section 76(4)(a) of the companies act, 2008 to directors against personal liability for breaches of sections 76(3)(b) and (c) of that act [Master's dissertation , University of the Witwatersrand, Johannesburg].https://hdl.handle.net/10539/38595

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THE EXTENT OF PROTECTION PROVIDED BY SECTION 76(4)(a) OF THE COMPANIES ACT, 2008 TO DIRECTORS AGAINST PERSONAL LIABILITY FOR BREACHES OF SECTIONS 76(3)(b) AND (c) OF THAT ACT

(Student Number 554710)

(submitted in partial fulfilment of the requirements for a degree of Master of Laws by Coursework and Research Report at the University of the Witwatersrand, Johannesburg)

30 April 2021

DECLARATION

I, Xolisa Beja, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements of the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the TurnItIn report to my submission.

WORD COUNT: 10235

STUDENT NUMBER: 554710

ABSTRACT

This research report examines the extent to which section 76(4)*(a)* of the Companies Act, 71 of 2008 protects directors against personal liability for breaches of their duties to act in the best interests of the company and with due care, skill and diligence. The essential substantive elements of *s* 76(4)*(a)* create (as a minimum) a *business judgment rule*. Generally, that rule provides a director with a defence against liability for a breach of his duty of care, skill and diligence if, when he acted (or omitted to act), he did so reasonably, honestly, with no self-interest and in the interests of the company. In conducting an analysis of *s* 76(4)*(a)* as an embodiment of features of a traditional business judgment rule, this report considers (among other things) the legal nature of the protection created by *s* 76(4)*(a)*, the requirements which a defendant director must meet in order to enjoy the protection of *s* 76(4)*(a)*, the allocation of the burden of proof for the application of the provisions of *s* 76(4)*(a)*, and a brief consideration of how a similar rule in Australia is drafted and has been applied in practice by courts there. The report concludes that, unlike the Australian counterpart, the provisions of *s* 76(4)*(a)* create a protection for directors that is more than the protection that is provided by a traditional business judgment rule. This conclusion is based on the extensive nature and scope of authority and powers which *s* 66(1) of the Act grants to directors. The substantive configuration and extensive ambit of *s* 76(4)*(a)* are thus anchored in, and justified by, *s* 66(1) of the Act and the *carte blanche* which the latter section grants to directors. Consequently, the protection given by *s* 76(4)*(a)* to directors is unusually wide, inasmuch as it shields directors against personal liability for breaches of a myriad of their duties and against liability risks arising from or created by the extensive powers and authority which *s* 66(1) of the Act gives SA directors. In the same breath, however, *s* 76(4)*(a)* manages to make directors appropriately accountable to the company's stakeholders, in keeping with some of the fundamental objectives and purposes of the Act.

TABLE OF CONTENTS

DECLARATION …… 2

ABSTRACT …… 3

I. INTRODUCTION…… 5

II. THE SA DUTY OF CARE AND SKILL……..… 8

(a) *Common law*…… 8

(b) Section 76(3)(c) of the Act…… 10

III. THE SA BUSINESS JUDGMENT RULE..…… 12

(a) SA Statutory BJR - Introduction and Overview……. 14

(b) Analysis of Elements of BJR……..… 18

(i) To be reasonably informed……..… 18

(ii) No conflict of interests……..…... 19

(iii) Decision……..……. 20

(iv) Rational belief……..…… 21

IV. THE AUSTRALIAN POSITION……..... 22

(a) Duty of Care and Skill – a Brief Overview...……..… 22

(b) The Australian BJR…..……...……..…. 23

V. CONCLUSION….……...……..…. 31

BIBLIOGRAPHY…….……...……..…. 34

I. INTRODUCTION

Section 66(1) of the Companies Act 71 of 2008 (the Act)[1] grants South African directors a wide (original) authority and powers to conduct the business and other affairs of a company. This is a necessary and justifiable statutory invention as it promotes and facilitates directorial entrepreneurship and risk-taking in the pursuit of corporate profit-making. This is in line with one of the purposes and objectives behind our company law reform and the promulgation of the Act.[2] The exercise of this wide power and authority can, however, inadvertently encourage directors to be reckless and take undue risks, which may cause harm to the company and its stakeholders. To guard against such potential abuse and resultant harm, apart from enabling shareholders to contractually limit the *s* 66(1) powers in a Memorandum of Incorporation, the Act puts in place appropriate checks and balances. These include imposing certain (fiduciary and non-fiduciary) duties on directors, which, if breached, will make directors personally liable for their wrong-doing arising from an impugnable exercise of their powers. Two such duties are the duties to act in the best interests of the company (a fiduciary duty) and with reasonable care, skill and diligence (a non-fiduciary duty). Thus, in conducting the business and other affairs of the company pursuant to *s* 66(1), the directors must act within the parameters of their legislative and common law duties. Those duties create and reinforce directorial accountability to company stakeholders because should a director, in exercising his extensive *s* 66(1) authority, be adjudged to have breached either or both duties, he stands to incur personal liability under *s* 77(2) of the Act.

However, if such personal liability is left unmitigated, the perennial risk of such liability would potentially impoverish corporate governance and retard economic growth as it would not only create risk-aversion on the part of directors (which would, in turn, stifle much-needed innovation and entrepreneurship that are aimed at profit optimisation);[3] it would also

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[1] *'The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise'.*

[2] One of the purposes and objectives of the Act is to promote the development of the South African economy by (among other things) encouraging entrepreneurship and enterprise efficiency (section 7(b)*(i)* of the Act). See also generally John F Olson 'South Africa moves to a global model of corporate governance but with important national variations' in Mongalo T (ed) *Modern Company Law for a Competitive South African Economy* (2010) 219-47.

[3] *'Business growth requires directors at times to take risks. Directors should not be inhibited from taking desirable risks because the merits of their decisions may be subject to judicial review. Neither should they spend too much of the company's money on expert opinions and other measures designed to protect themselves when they do not take decisions.'* (Havenga M 'The Business Judgment Rule – Should We Follow the Australian Example?' (2000) 12 *SA Merc LJ* 25-37 at 29).

discourage potential directors from taking up directorship. This is, in part, why company law recognises that directors should not be liable for business judgments that, although made honestly and in good faith, turn out to have been made erroneously.[4] In addition, if a directorial decision turns out to be injurious to the company, a director can defensively argue that, in making such unfortunate decision, he acted honestly, in what he considered was in the best interests of the company and without self-interest in the subject-matter of that decision. This defence is generally known as the business judgment rule (BJR) and is contained in *s* 76(4)*(a)* of the Act. The purposes and other features of a traditional BJR are discussed briefly in this report. It is, however, apposite to mention at this early juncture that *s* 76(4)*(a)* of the Act has no explicit reference to the term 'BJR'.[5] Despite this, however, *s* 76(4)*(a)* (in substance) contains all the essential or salient elements of a BJR.[6] For this reason and for convenience, this report sometimes refers to the provisions of *s* 76(4)*(a)* as 'the BJR' or 'the SA BJR'.

This report examines the extent of protection provided by *s* 76(4)*(a)* of the Act to directors when they are alleged to have breached their duties to act in the best interest of the company and with due care and skill as contained in *ss* 76(3)*(b)* and *(c)* of the Act.[7] Although the BJR is generally considered to apply only to the duty of care, *s* 76(4)*(a)* expressly extends its ambit to the fiduciary duty that is specified in *s* 76(3)*(b)*, namely to act in the best interests of the company. The report observes that whilst *s* 76(4)*(a)* contains a BJR (in a configuration and effect substantially similar to (among others) its Australian counterpart), *s* 76(4)*(a)*, however, applies to more than just *business judgments* to which a traditional BJR (such as is the case in the Australian BJR) is generally limited and applied. Section 76(4)*(a)* is, on the contrary, wider in its phrasing and scope, for it applies to matters arising from not only directors' business judgments but also the exercise of directorial powers or performance of any of the directorial functions in relation to the company. The conclusion is that this type and extent of protection and defence are sufficiently wide and elastic, having regard (on the one hand) to the extensive powers and authority which *s* 66(1) of the Act confers on directors in relation to the running of the business and other affairs of the company – as already indicated

[4] Du Plessis JJ 'Open Sea or Safe Harbour? American, Australian and South African Business Judgment Rules Compared (Part 2)' (2011) 32(11) *The Company Lawyer* 377-83 at 380.
[5] Naidoo R *Corporate Governance: An Essential Guide for South African Companies* 2 ed (2009) 171.
[6] Mupangavanhu BM, 'Directors' Standards of Care, Skill, Diligence, and the Business Judgment Rule In View of South Africa's Companies Act 71 of 2008: Future Implications for Corporate Governance (PhD Dissertation, University of Cape Town, 2016) 142 (Mupangavanhu 2016). This is discussed further below in this report.
[7] An effort has been in this report to deliberately refer specifically to *s* 76(4)*(a)* of the Act, rather than *s* 76(4) in its holistic or general sense, as subsec *(b)* of *s* 76(4) deals with a slightly different subject-matter to that with which *s* 76(4)*(a)* (and this report) deals.

above. That conclusion is also based on the concomitant risk of personal liability for breaches of *s* 76(3) that lurks for directors if *s* 76(4)*(a)* is not configured and applied in the wide and extensive terms in which it is.

In examining the nature and scope of *s* 76(4)*(a)*'s protection, this report briefly considers a similar (BJR) provision in the Australian Corporations Act, 2001 (Corporations Act), and concludes that the Australian BJR has fundamental limitations and flaws in both its phrasing and judicial interpretation – not least because that BJR applies to only business judgments (as defined).[8] The reasons for the consideration of Australian law are that some of the provisions and underlying principles of *s* 76(4)*(a)* resemble those found in *s* 180(2) of the Corporations Act.[9] Although there are some significant differences between the two sections,[10] it is thought that the drafting and configuration of portions of *s* 76(3) were influenced by (among others) Australian law,[11] and our courts are consequently likely to seek interpretive assistance from (among others) their Australian counterparts when they become charged with the interpretation and application of *s* 76(4)*(a)*.[12] This is because Australian courts have already grappled with the interpretation and application of the Australian BJR; and such interpretation and application has already been subjected to some extensive analysis and critique – and South Africa stands to benefit from that pre-existing Australian experience (whether by way of mere consideration, adoption, rejection and/or refinement).[13]

This report is structured in various parts as follows: part II analyses the SA common law and statutory duty of care, skill and diligence, for it is mainly against an allegation of a breach of that duty (as now contained in *s* 76(3) of the Act) that the *s* 76(4)*(a)* defence gets

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[8] The paper is, however, not a comparative analysis of the SA and Australian laws on the BRJ; rather, in its examination of *s* 76(4)*(a)*, the paper considers the Australian equivalent section, as the manner in which that section is drafted and has been interpreted and applied by courts there may provide some interpretive assistance to our own courts in relation to what to adopt or avoid from there when seized with an opportunity to interpret and apply *s* 76(4)*(a)*.

[9] Du Plessis JJ and Mathiopoulos J 'Defences and Relief from Liability for Company Directors: Widening Protection to Stimulate Innovation' (2016) 31 *Australian Journal of Corporate Law* 287-318 at 305.

[10] Havenga op cit note 3 at 25.

[11] Jean J Du Plessis 'A Comparative analysis of directors' duty of care, skill and diligence in South Africa and in Australia' in Mongalo op cit note 2 at 268 (*Comparative analysis*).

[12] In the context of Australia law in this report, references to 'directors' are to Australian directors *and other officers* and *de facto* directors contemplated in *s* 9 of the Corporations Act. For SA law, references to a 'director' include an alternate director, a prescribed officer or a person who is a member of a committee of a board or of the audit committee of a company, irrespective of whether or not the person is also a member of the company's board (*s* 76(1) of the Act. See also Mupangavanhu 2016 op cit note 6 at 21-2).

[13] Mupangavanhu 2016 op cit note 6 at 15. See also *s* 5(2) of the Act, which provides that '[t]o the extent appropriate, a court interpreting or applying this Act may consider foreign company law'. Similarly, *s* 39(2) of the Constitution requires that, when interpreting the Bill of Rights, a court, tribunal or forum, must consider international law; and may consider foreign law.

triggered – the former being a standard of conduct, whilst the latter a standard of review. What this means is that in *s* 76(3) prescribes how directors should conduct themselves, whilst *s* 76(4) regulates how courts are to determine directors' culpability by assessing the extent to which they have complied with or deviated from the behavioural standard or duties set by *s* 76(3).[14] Part III analyses and discusses *s* 76(4)*(a)*, with a brief synoptic analysis of the common law background to that section. Part IV contains a brief analysis of the Australian BJR by reference, where appropriate, to some of the (similar or different) features of the provisions of the SA *s* 76(4)*(a)*. Finally, part V presents the conclusion by giving a definitive reply to the central question of the report, namely the examination of the extent to which *s* 76(4)*(a)* protects SA directors against personal liability for alleged breaches of their duties to act in the best interests of the company and with care and skill as contained in *ss* 76(3)*(b)* and *(c)* of the Act. That conclusion is that, given the wide ambit of the *s* 66(1) directorial powers, the *s* 76(4)*(a)* protection is justifiably and appropriately wide, whilst subject to appropriate checks and balances in the form of directorial duties and liabilities, which create accountability to shareholders and other stakeholders of the company.

II. THE SA DUTY OF CARE AND SKILL

(a) Common law

As already alluded to in the introductory paragraphs above, one of the limitations placed on the directors' powers and authority are various duties, which include the duty to exercise such powers and authority with reasonable care, skill and diligence. This particular duty has its origins in our common law, and therefore pre-dates the Act.[15] The essential requirement of this duty is for a director to manage the business and other affairs of the company in the same way as a reasonably prudent person in a similar position as the director would do in relation to the company.[16] Notably, it is not a fiduciary duty, inasmuch as it is in addition to directors' fiduciary duties (e.g. good faith, honesty and loyalty or avoidance of a conflict of interest) - it is *not* itself a fiduciary duty.[17] Instead, the duty of care is delictual in nature as liability for its breach is predicated on (among others) the requirement of negligence. Historically, our courts

[14] See generally, Mupangavanhu BM 'Standard of Conduct or Standard of Review? Examination of an African Business Judgment Rule under South Africa's Companies Act 71 of 2008' (2019) 63 (1) Journal of African Law 127-50 (Mupangavanhu 2019).
[15] Cassim FHI, Cassim MF, Cassim R et al *Contemporary Company Law* 2 ed (2012) 507.
[16] Michael Katz 'Governance under the Companies Act 71 of 2008: Flexibility is the keyword' in Mongalo op cit note 2 at 261.
[17] Cassim op cit note 15 at 507.

have prescribed a subjective test for liability for a breach of the duty of care and skill. They did this by focusing on a director's skill, experience and ability.[18] This subjective determination of a director's level of competence and potential personal liability under our common law lowered the standard or threshold by reference to which directors' liability for a breach of their duty of care and skill was determined. Thus, under the common law, it was a director's ignorance or inexperience that protected him from liability, as the more ignorant a director was, the less the law required and expected of him.[19] Conversely, the more experienced a director, the higher such requirement and expectation (and the concomitant risk of liability for a breach of the duty) were. By contrast, a less experienced director was treated leniently because of his lack of experience.[20] Our courts emphasised that mere errors of directorial judgment were excusable and exonerated directors from liability for resultant wrongdoing.[21] This reflected our courts' traditional deference to executive commercial decision-making,[22] which, broadly speaking, at least in practice, was a manifestation of some of the key features of a traditional BJR[23] - inasmuch as the courts' stance was protective of directors and refused to interfere in business decisions made honestly and in good faith, unless foul play (such as fraud or bad faith) was proved.

This pre-May 2011 common law approach to the duty of care and skill was considered inadequate in modern times to protect shareholders from the breaches of that duty by directors.[24] The realization of such inadequacy was largely consistent with international developments and trends on directors' duties - for instance, as far back as 1995, an Australian court observed and ruled that it was no longer appropriate to apply a subjective test to the conduct of directors, and that a more objective approach to the director's duty to exercise care and skill is appropriate.[25] It has thus been remarked that the drafting of the Act on the duty of care and skill was influenced, in part, by that thinking in that jurisdiction,[26] as well as changes

[18] Cassim op cit note 15 at 554-5.
[19] Ibid at 555.
[20] Ibid.
[21] Blackman M, Jooste R, Everingham GK *et al* '*Commentary on the Companies Act'* (2010) 192.
[22] *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W). In *Howard v Herrigel* 1991 (2) SA 660 (A), the court remarked that 'the knowledge of hindsight can be misleading and give rise to unfair criticism' (para51).
[23] It is noteworthy, however, that our courts never actually called this approach the 'business judgment rule' in so many words (Du Plessis JJ 'Open Sea or Safe Harbour? American, Australian and South African Business Judgment Rules Compared (Part 1) (2011) 32(11) *The Company Lawyer* 345-50 346 (*Open Sea (Part 1) 2011*). Instead, there was *'a business judgment doctrine, a watered down version of BJR'* (Mupangavanhu 2016 op cit note 6 at 161).
[24] Cassim op cit note 15 at 558.
[25] *Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson* (1995) 16 ACSR 607 (NSW).
[26] Du Plessis *Comparative analysis* op cit note 11 at 268-9.

in the same vein in other modern laws that are applicable in other areas of SA law.[27] It is apposite at this juncture to turn attention to the current statutory configuration of the duty of care and skill.

(b) Section 76(3)(c) of the Act

The SA duty of care and skill is now codified in *s* 76(3)*(c)* of the Act,[28] which provides that, subject to *ss* 76(4) and (5), a director must exercise the powers and perform the functions of a director with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director, and having the general knowledge, skill and experience of that director. Section 76(3)*(c)* raises the bar in respect of directors' erstwhile (common law) duty of care and skill by, among other things, rendering the applicable test less subjective and more objective than was the case under the common law as discussed above.[29] In this way, the Act conforms to modern commercial developments, trends and corporate governance practices.[30]

The objectivity element to the duty of care and skill which *s* 76(3) introduces results in there being a hybrid of both subjective and objective legs to the liability test applicable to the duty[31] – with the objective standard being said to be the minimum.[32] On the one hand, the objective leg requires a director to exercise such degree of care and skill as may reasonably be expected of a person carrying out the same functions as the director.[33] In this connection, it has been said that the standard is that of a reasonable person, rather than that of a reasonable director.[34] This objective leg is the minimum standard with which all directors are expected to

[27] For example, *ss* 40(c) and (d) of the Banks Amendment Act, 19 of 2003 and *s* 43 of the Close Corporations Act, 69 of 1984. (Cassim op cit note 15 at 558 and Du Plessis *Comparative analysis* op cit note 11 at 265-7).
[28] It must, however, be born in mind that, notwithstanding the Act's codification of most of the directorial duties, the Act does not replace, supplant or exclude established common law principles. Instead, '… the description of directors' duties summarises the existing position, the determination of liability is based on common-law principles, and the common-law position has not been substituted by the new Act' (Michael Katz op cit note 16 at 248). It is thus not surprising that *s* 158(a) of the Act enjoins a court, when determining a matter or making an order under the Act the Act, to 'develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act'. See also *Modise and Another v Tladi Holdings (Pty) Ltd* [2020] 4 All SA 670 (SCA) 35.
[29] Cassim op cit note 15 at 558-9.
[30] Ibid at 558.
[31] '… the standard of directors' conduct was changed in terms of section 76(3)(c)(i) and (ii) from purely subjective to what is known as a "two limbs" approach or objective-subjective test, since one limb is objective while the other is subjective. It is important to note that the two limbs work in tandem.' Khathutshelo Nethavhani *'Yakhe Kwinana was required to show more than minimum care, skill and diligence' Business Day* 10 November 2020.
[32] Delport P '*Henochsberg on the Companies Act 71 of 2008'* 1(4) (2012) 295; and Cassim op cit note 15 at 559.
[33] Section 76(3)*(c)*(i).
[34] Cassim op cit note 15 at 559.

comply, as it is not limited by a particular director's lack of ignorance or lack of knowledge or experience.[35] On the other hand, the subjective leg of the test (which is contained in *s* 76(3)*(c)*(ii)) requires us to also have regard to a particular director's *own* knowledge, skill and experience when applying the test. Consequently, if a director possesses any special skill or more experience or knowledge, his conduct will be measured against this higher subjective standard.[36] Importantly, however, a director is not allowed to hide behind his ignorance, as the subjective standard is considered only when it increases or improves the objective standard expected of a reasonable director.[37] This blended approach is a welcome development in our law as it introduces a nuanced 'horses for courses' way of judging directors by reference to not only a general objective standard that applies to all directors, but also to an individual director's own subjective idiosyncrasies and personal attributes.

Generally, the duty of care and skill applies to both executive and non-executive directors equally and indiscriminately, as was held in *Howard v Herrigel.*[38] However, it has been argued that *s* 76(3)*(c)* may, in practice, be interpreted to require a different degree and manner of discharging such duty between such categories of directors. This, so the argument goes, is because a different standard of care, skill and diligence is to be expected of a non-executive director, as *s* 76(3)*(c)*(i) uses the words 'carrying out the same functions … as those carried out by that director'.[39] In other words, the argument is that the Act recognises that since directors do not belong to a homogenous group like lawyers or accountants, the dual objective/subjective approach allows the courts to take into account the circumstances of each company and the context and capacity (whether as executive or non-executive) in which a director acted in relation to the breach complained of.[40] Sections 77(2)*(a)* and *(b)*(i) of the Act provide that a director who breaches the respective duties to act in the best interests of the company and with care, skill and diligence will attract personal liability for a breach of trust

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[35] Ibid.
[36] Ibid.
[37] Reddell C '*Directors' Liability and Climate Risk: South Africa - Country Paper'* (April 2018 Commonwealth Climate and Law Initiative) available at https://www.smithschool.ox.ac.uk/research/sustainable-finance/publications/CCLI-South-Africa-Paper-Final.pdf, accessed on 8 June 2020.
[38] Supra note 22. See also *OUTA v Myeni & Others* [2020] 3 All SA 578 32, where it was confirmed that the fact that a board member is non-executive 'does not absolve her of any legal responsibility. The legal duties of all directors are the same*'*.
[39] Mupangavanhu 2016 op cit note 6 at 133-5, with the learned author concluding that 'one cannot expect a non-executive director to apply a similar standard of skill for example, as would be expected of a specially-skilled full-time director' [sic] (at 135).
[40] Ibid. However, a more in-depth exploration of this argument (and its concomitant conceptual and technical nuances) falls beyond the scope of this report.

and delict, respectively.[41] To avoid such liability, a defendant director is entitled to invoke the BJR as a defence, provide that he meets the eligibility requirements for the application of such rule. This is why *s* 76(3) is expressly subject to the provisions of (among others) *s* 76(4). Accordingly, this report now turns to consider the specific provisions of *s* 76(4)*(a)* of the Act, which (as already indicated in part II above) embody a SA version of the BJR.

III. THE SA BUSINESS JUDGMENT RULE

The directorial duty of care and skill and the BJR are inter-related, as the latter acts as a defence against personal liability for a breach of the former.[42] BJR essentially entails that if a director made a decision in good faith, honestly, on an informed basis, and in the interest of the company (in the opinion of the director, rather than the courts), the director will not incur liability in respect of that decision.[43] For a director to avoid incurring liability for a breach of his duties on the basis of the BJR, he must have acted with due care, skill and diligence, rationally, having taken steps to become informed in relation to the decision concerned, and without undisclosed self-interest. Accordingly, he will fail to avoid liability where he is proved to have committed fraud or acted in bad faith or recklessly.[44]

The BJR is predicated on, and necessitated by, the risks and other vagaries of directorial decision-making, which often require directors to be entrepreneurial, enterprising, innovative and somewhat brave in their decision-making in order to seize business opportunities that arise for the company and/or to grow the business of the company.[45] The purposes of BJR can thus be summarised as being to: protect honest and disinterested directors whose decisions turn out to be wrong – and the BJR is thereby conducive to, and promotes, innovation and reasonable risk-taking;[46] persuade competent persons to become directors; avoid shareholders' interference in the operational running of companies; and prevent courts from second-guessing

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[41] Cilliers HS, Benade ML, Henning JJ et al *Corporate Law* 3 ed (2000) 141 & 148. For more in this regard, see the discussion to which notes 74-77 below relate.

[42] In other words, a defendant director will escape liability for breaching the *ss* 76(3)*(b)* and/or *(c)* duties if he successfully invokes the 'safe harbour' provisions of *s* 76(4)*(a)* of the Act.

[43] Kennedy-Good S & Coetzee L 'The Business Judgment Rule (Part I)' (2006) *Obiter* 62 64. See also *Levin v Felt and Tweeds* 1951 (2) SA 401 (A) 414-5.

[44] Ibid.

[45] 'Being a director requires calculated risk-taking, "entrepreneurial flair" or even "aggressive entrepreneurship"… It requires making very complex decisions on the run as a matter of course, or, namely, taking calculated risks' (Du Plessis *Open Sea (Part 2) 2011* op cit note 4 at 382).

[46] Havenga op cit note 3 at 28.

board judgments or decisions[47] - and thereby limits litigation and judicial scrutiny in respect of board decisions that are taken honestly and in good faith.[48]

Before the Act came into force in 2011, the SA legal position on directorial liability for breaches of the duty of care and skill was, in effect, akin to a BJR – see the discussion in the introduction paragraph above. In practical terms, this position was manifested by the fact that *ss* 248 and 424 of the Companies Act 61 of 1973 entitled a director to be excused from liability for a decision or action taken honestly and reasonably. In addition, our common law prescribed a low (subjective) standard of assessment of directors' liability for a breach of the duty of care and skill – hence the courts' emphasis that mere errors of directorial judgments were excusable and exonerated directors from liability for resultant wrongdoing.[49] Closely related to that factor is our courts' traditional deference to executive commercial decision-making.[50] That deference resembled, broadly and at least in practice, some of the key features of a traditional BJR, inasmuch as our courts protected directors by refusing to interfere in business decisions made honestly and in good faith – unless foul play (such as fraud or bad faith) was proved. This judicial approach is said to have created a 'business judgment doctrine', rather than (strictly speaking) a BJR jurisprudence.[51]

The King I Report[52] (as read with the King II Report)[53] recommended that a BJR be adopted into our law. This recommendation was vociferously opposed by various legal commentators[54] - in a 'crusade against statutory adoption of the BJR'.[55] The bases for such opposition included (without limitation) that the test applied by our courts to directors' duty of

[47] Kennedy-Good *(Part I)* op cit note 43 at 65-6.
[48] Kennedy-Good S & Coetzee L 'The Business Judgment Rule (Part II)' (2006) *Obiter* 277 at 278.
[49] See *Fisheries* and *Howard* supra note 22. See also Blackman op cit note 21; Botha D & Jooste R 'A Critique of the Recommendations in the King Report Regarding a Director's Duty of Care and Skill' (1997) 4 *SALJ* 65 74 and Jones E 'Directors' Duties: Negligence and the Business Judgement Rule' (2007) 19(3) *SA Merc LJ* 326-336 333.
[50] *Fisheries* supra note 22.
[51] Du Plessis *Open Sea (Part 1) 2011* op cit note 23 at 345-8.
[52] The King Report on Corporate Governance for South Africa (The Institute of Directors in Southern Africa), King I, 1994.
[53] The King Report on Corporate Governance for South Africa (The Institute of Directors in Southern Africa), King II, 2002.
[54] For example: Botha & Jooste op cit note 49; Havenga op cit note 3; Jones op cit note 49; McLennan JS 'Duties of Care and Skill of Company Directors and their Liability for Negligence' (1996) 8 *SA Merc LJ* 94; Hippert G 'The King Report's Recommended 'Business Judgment Test' 1997 (5)(i) *Jutas' Business Law* 19; Bouwman N 'An appraisal of the Modification of the Director's Duty of Care and Skill' (2009) 21(4) *SA Merc LJ* 509-34; and Lee A 'Business Judgment Rule: Should South African Corporate Law Follow the King Reports Recommendation?*'* (2005) 1 *University of Botswana Law Journal* 51.
[55] Mupangavanhu BM 'Fiduciary Duty and Duty of Care under the Companies Act 2008: Does South African Law Insist on the Two Duties Being Kept Separate?' (2017) 28(1) *Stell LR* 148-63 155 (Mupangavanhu 2017).

care and skill was already significantly low, hence there has historically been only one case in which a director was ever found liable for a breach of that duty,[56] as well as our courts' traditional reluctance to interfere in board decisions.[57] In addition, it was argued that the SA law on the directorial duty of care and skill was relatively clear enough and that the introduction of a BJR defence was likely to not only create confusion regarding that duty, but would ultimately also enable errant directors to escape liability for their breaches of such duty.[58] Despite all such opposition, however, the SA Department of Trade and Industry (Dti) introduced a SA version of the BJR into our statute books in 2011. This report now turns to that codified BJR.

(a) SA Statutory BJR - Introduction and Overview

Section 76(4)*(a)* of the Act reads as follows:

> 'In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company -
>
> (a) will have satisfied the obligations of subsection (3)(b) and (c) if -
>
> (i) the director has taken reasonably diligent steps to become informed about the matter;
>
> (ii) either -
>
> (aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or
>
> (bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and
>
> (iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company.'

As already indicated above, there is a symbiotic relationship and interface between *s* 76(4)*(a)* and *s* 66(1) of the Act. The latter section renders the board the company's organ

[56] *Niagara Ltd (in liquidation) v Langerman* 1913 WLD 188.
[57] See *Philotex (Pty) Ltd v Snyman* 1998 2 SA 138 (SCA). See also Blackman op cit note 21 at 192 and Bouwman op cit note 54 at 531.
[58] Jones op cit note 49 at 336.

that runs all the affairs and makes all the strategic decisions of the company[59] – subject, of course, to such restrictions to such wide powers and authority as may be imposed in the company's Memorandum of Incorporation. It has been argued that *s* 66(1) is cast in the widely permissive terms in which it is because of the recognition that directors, rather than courts, are better placed to make business decisions – hence the use of the subjective elements of rationality in relation to the director's belief that the decision made was in the best interests of the company.[60] Thus, the directors' determination that a decision is in the best interests of the company is to be protected by the BJR if it is made rationally - so as 'to protect and promote the full and free exercise of managerial powers by directors'.[61] Consequently, the full implications of *s* 66(1) and its relationship with *s* 76(4)*(a)* are important in the interpretation and application of *s* 76(4).[62]

It has been said that whilst *s* 76(4)*(a)* contains a BJR (in a configuration and effect substantially similar to its US and Australian counterparts), it, however, applies to more than just *business judgments* to which a traditional BJR statutory codification (such as is the case in the Australian BJR) is generally limited and applied. Section 76(4)*(a)* is, on the contrary, wider in its phrasing and scope, for it applies to matters arising various from directors' decisions, including (but not limited to) business judgments. In line with (and justified by) the broad directorial powers in *s* 66(1), *s* 76(4)*(a)* is broader than the Australian *s* 180(2),[63] as *s* 76(4)*(a)* applies to *all* decisions (including business judgments) that a director may take in the exercise of his powers and performance of his functions. The statutory widening of the protection typically afforded by a traditional BJR is justified by (for example) the fact that there could be an overlap between directors' duty of care, skill and diligence and their fiduciary duties when it concerns the question of whether they acted in the best interests of the company.[64] It is submitted that the wide protection afforded by *s* 76(4)*(a)* against liability for board decisions that turn out to be wrong constitutes an appropriate balance between that protection and the

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[59] *'The phrase "affairs of a company" straightforwardly implies the internal relations of the company; in other words, the day-to-day resolutions relevant to the company, such as the daily administrative management of the company. On the other hand, the "business of the company" implies those relationships with third parties or the external relations of the company, for example concluding contracts with third parties.'* (Kilian, Neels 'Legal Implications relating to being" Entitled to Serve" as a Director: A South African-Australian Perspective' (2020) 23(1) *PER: Potchefstroomse Elektroniese Regsblad* 1-27).

[60] Mupangavanhu 2016 op cit note 6 at 182.

[61] Mupangavanhu 2019 op cit note 14 at 133.

[62] Mupangavanhu 2016 op cit note 6 at 183.

[63] Du Plessis *Open Sea (Part 2) 2011* op cit note 4 at 381.

[64] Ibid.

potential vulnerability of directors to personal liability under (among others) *ss* 77 and 218 for breaches of their extensive duties and responsibilities.

Unlike the Australian Act, our Act neither defines nor refers to a 'business judgment rule' in any express terms – whether in *s* 1, *s* 76 or elsewhere. However, Mupangavanhu concludes (inferentially) that, despite that fact, *s* 76(4)*(a)* has all the fundamental elements of a (US-styled) BJR.[65] The learned author posits that this is one of the commendable and innovative features of our Act, as the lack of a definition reinforces the wide nature and scope of the protection that is provided by *s* 76(4)*(a)*.[66] This ensures that *s* 76(4)*(a)* avoids the confusion associated with typical definitions of what a business judgment or business decision is or is not – unlike in Australia, where a definition of '*business judgment* raises more questions than the answers that it attempts to provide'.[67] This, it has been opined, is because, among other things, there is lack of clarity on the nature and scope of a company's business; even the rationale to make the BJR apply to 'business operations' and not to any other business of the company is unclear;[68] and there is an inherent difficulty in trying to write bright lines for actions that are judgments, taking into account a wide range of facts, circumstances, experience and expertise.[69]

Section 76(4)*(a)* affects and qualifies two of the three common law duties of directors that have been codified in *s* 76(3), namely the duty to act in the best interests of the company in *s* 76(3)*(b)* (being a fiduciary duty) and the duty of care, skill and diligence in *s* 76(3)*(c)* (being a delictual duty). Section 76(4)*(a)* notably excludes a reference to the duty to act in good faith and for a proper purpose, which is codified in *ss* 76(3)*(a)*.[70] As a result of such qualification, *s* 76(4)*(a)* is fundamentally predicated on, and derives its character from, a clear and symbiotic interface and link between *s* 76(4)*(a)* (on the one hand) and *ss* 76(3)*(b)* and *(c)* and *s* 75 (on the other hand). A closely related point is that *ss* 76(3)*(b)* and (c) contain a standard of conduct, whilst *s* 76(4)*(a)* contains a standard of review. In other words, the BJR

[65] Mupangavanhu 2016 op cit note 6 at 142. Similarly, another author argues that, although the Act 'does not incorporate the business judgment rule by name into our law, *s* 76(4) effectively does so' (Naidoo op cit note 5 at 171).
[66] Mupangavanhu 2019 op cit note 14 at 142.
[67] Ibid.
[68] Ibid.
[69] Du Plessis *Open Sea (Part 2) 2011* op cit note 4 at 382.
[70] It falls outside of the scope of this report to consider: (a) the correctness, utility or prudence (if any) of *s* 76(4)*(a)*'s exclusion of a reference to *s* 76(3)*(a)*, and *(b)* whether or not *s* 77(9)*(a)*, which entitles a court to excuse from liability a director who has acted honestly and reasonably, will have the same effect in practice as would have been the case had *s* 76(4)*(a)* expressly included a good faith requirement by referring to *s* 76(3)*(a)*.

defence contained in *s* 76(4)*(a)* will, when invoked, be utilised as a yardstick or standard by reference to which a court will review or adjudicate whether or not a director's impugned conduct meets the standard of directorial conduct that is prescribed in *ss* 76(3)*(b)* and *(c)* in the form of (fiduciary and non-fiduciary) duties.[71] In this regard, it is noteworthy that s 76(3) itself expressly provides that its provisions are subject to, among others, s 76(4).

Section 76(4)*(a)* is drafted in such a manner that, axiomatically, a defendant director bears the onus of proving the exculpatory application of the section. This is so because *s* 76(4)*(a)* states that a director will have satisfied his duties to act in the best interests of the company and with due care, skill and diligence, if he (as defendant) satisfies the requirements set out in *s* 76(4)*(a)*(i)-(iii). Thus, for a defendant director to successfully invoke *s* 76(4)*(a)* as a defence, it is that director (rather than the plaintiff) who must adduce evidence demonstrating that the requirements on which the provisions of *s* 76(4)*(a)* are predicated are present or met. This renders the *s* 76(4)*(a)* a defence (or '*safe-habour*'), rather than a presumption, in favour of the director. As discussed further below, our courts are likely to hold (as did an Australian court in *ASIC v Rich*[72] on *s* 180(2)) that, in any event, the factors that are set out in *ss* 76(4)*(a)*(i)-(iii) fall squarely within the knowledge of the defendant director, rather than a non-director plaintiff. Accordingly, once a defendant director has discharged his onus of proving the satisfaction of the *s* 76(4)*(a)*(i)-(iii) requirements, a court will exonerate such director from any liability for a breach of the duties contained in *ss* 76(3)*(b)* and/or *(c)*.[73]

It is somewhat tempting to argue that *s* 76(4)*(a)* muddles the distinction between fiduciary duties and the duty of care and skill by referring (on the one hand) to *s* 76(3)*(b)*, which is a fiduciary duty, and (on the other hand) *s* 76(3)*(c)*, which is a delictual duty.[74] Our courts have long been acutely aware of the fundamental conceptual distinction between fiduciary duties and delictual duties, and the disparate manner in which such duties are to be treated.[75] A claim for a breach of a fiduciary duty is a *sui generis* claim that is founded in trust (rather than in contract or delict) and originates from Roman Dutch law.[76] By contrast, the duty

[71] Mupangavanhu 2019 op cit note 14 at 143 and Mupangavanhu 2016 op cit note 6 at 165-7. See also an intriguing argument by the same author to the effect that it is not correct to, as is currently the case in respect of s76, classify both s76(3) and 76(4)*(a)* under one and the same rubric of '[s]tandards of directors conduct'; he submits that *s* 76's title or heading should rather be amended to read 'Standards of conduct *and review*' (Mupangavanhu 2016 op cit note 6 at 177-8 and 186).
[72] [2009] NSWSC 1229 (*Rich*).
[73] Mupangavanhu 2016 op cit note 6 at 184.
[74] See Cassim op cit note 15 at 564; McLennan op cit note 54 at 95; and Bouwman op cit note 54 at 529.
[75] Mupangavanhu 2017 op cit note 55 at 160-2.
[76] Bouwman op cit note 54 at 510.

of care is delictual in nature and originates from English law.[77] Evidence of the legislature's awareness and retention of this critical distinction is to be found in *s* 77(2) of the Act. There is a fundamental (if nuanced) conceptual distinction in the manner in which *s* 77(2) (by design) dovetails with *s* 76 (in general) and *s* 76(4)*(a)* (in particular). On the one hand, *s* 77(2)*(a)* makes a guilty director liable for a breach of a fiduciary duty contemplated in (for example) *s* 76(3)*(b)* 'in accordance with the principles of the common law relating to breach of a *fiduciary duty*' – which axiomatically excludes principles applicable to liability for delictual wrongdoing. On the other hand, *s* 77(2)*(b)*(i) makes a guilty director similarly liable but 'in accordance with the principles of the common law relating to *delict*' – which correspondingly excludes the application of principles that relate to liability for breaches of fiduciary duties.[78] In the result, it is submitted that in codifying the BJR in *s* 76(4)*(a)* (as read, perforce, with *s* 77(2)), the Act deftly and commendably entrenches the critical traditional (common law) distinction between fiduciary duties and the duty of care and skill.

(b) Analysis of Elements of BJR

Generally, for a director to successfully enjoy the protection afforded to him by *s* 76(4)*(a)* against liability for a breach of the duties contained in *ss* 76(3)*(b)* and/or *(c)*, he must prove that they: took reasonably diligent steps to become informed about the subject-matter of the impugned decision; did not have a (direct or indirect) conflict of interests in the relevant subject-matter (or if they did, they complied with the requirements of *s* 75); made a decision; and had a rational (rather than a *reasonable*) basis to believe (and did believe) that the decision was in the best interests of the company. I will now elaborate on these constituent elements below, in turn.

(i) To be reasonably informed

Section 76(4)*(a)*(i) prescribes that, before making a decision, a director must have taken reasonably diligent steps to become informed about the matter to which the relevant decision relates. This entails and includes gathering relevant information and consulting with (and following guidance, opinions and recommendations of) the company's employees, experts and other reasonably reliable third party professional advisors – as contemplated in *ss* 76(4)*(b)* and (5) – all in order to make an informed decision. If no reasonable person in the shoes of the

[77] Ibid at 510-1.
[78] Ian Cox '*The Standard of Directors Conduct. Unpacking section 76 of the Companies Act 71 of 2008*' available at http://coxattorneys.co.za/assets/the-standards-of-directors-conduct.pdf, accessed on 15 July 2020.

director could have omitted the information which the director whose conduct is impugned omitted, then the director would have failed the test. The director should, as a result of this due care process, subjectively have believed that their decision was in the best interests of the company.[79]

The standard set by *s* 76(4)*(a)*(i) is an objective one as it is not based on the director's reasonable belief that he informed himself properly up to the required level.[80] This inference arises axiomatically from *s* 76(4)*(a)*(i)'s reference to the directors having taken 'reasonably' diligent steps to become informed about the relevant subject-matter. Consequently, the standard of liability under *s* 76(4)*(a)* is negligence, rather than gross negligence.[81] Therefore, the question whether or not a director has taken reasonably diligent steps to become informed about the matter should be in line with the general principles of the SA law of delict, and should be answered by applying the wrongfulness test, which essentially considers the criterion of reasonableness and the legal convictions of the community (or the *boni mores*).[82] By contrast, as will be discussed below, the Australian equivalent section has a lower standard than that set in *s* 76(4)*(a)*(i), as it creates a subjective requirement that a director must inform themselves about the subject-matter of the judgement to the extent they reasonably believe to be appropriate.[83]

(ii) No conflicts of interests

In our common law, one of the central and principal fiduciary duties of directors is the duty to avoid conflicts of interests. It is therefore not surprising that one of the requirements of *s* 76(4)*(a)* is that a director must not have a material personal financial interest in the subject-matter of the impugned decision, or know that any related person had such interest.[84] Alternatively, if the director did have such interest or knowledge, the director must have complied with the (disclosure and recusal) requirements of *s* 75 of the Act, which requires such a director (as a fiduciary) to disclose such interest or knowledge (as the case may be) and then recuse himself from the meeting at which the decision is to be considered, and not vote thereon.

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[79] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) 74.
[80] Mupangavanhu 2019 op cit note 14 at 144.
[81] Ibid.
[82] Muswaka L 'Shielding Directors against Liability Imputations: The Business Judgment Rule and Good Corporate Governance' (2013) 2 *SPECJU* 29.
[83] Section 180(2)*(c)* of the Corporations Act.
[84] Section 76(4)*(a)*(ii).

The no conflict rule does not require an actual conflict to be established; only that a reasonable person would think that there was 'a real sensible possibility of conflict'.[85]

(iii) Decision

As already pointed out above, the intent and scope of application of *s* 76(4)*(a)* extends beyond mere business judgments. In that connection, *ss* 76(4)*(a)*(ii)(aa) and (iii) specifically refer to 'the subject matter of the decision', 'a decision' and 'the decision', respectively. In particular, the reference is to a director having made a decision or supported the decision of a committee or the board. It is that decision that the director should have a rational basis for believing, and did believe, was in the best interests of the company. The language of *s* 76(4)*(a)*(iii) (to the effect that the director made a decision, or supported a decision) suggests that the consequences of the decision are not relevant; only the process of (and the director's belief in) taking the decision is.[86] In addition, it is currently unclear whether, by default, a decision *not* to make a decision constitutes a decision under *s* 76(4)*(a)*. It is submitted, however, that it is. The decision to abstain from deciding (or from taking a stance or a position) on a matter is itself a decision. Should such abstaining amount to a breach of the duty of care and skill (in circumstances where a decision or action, rather than indecision or inertia, was reasonably necessary or required), there should be a breach of potentially both *ss* 76(3)*(b)* and *(c)*. Section 76(4)*(a)* is not meant to protect directors who fail to make conscious decisions.[87] This much has already been enunciated in Australia in the *Centro* case[88] (see below) and it is submitted that SA courts ought to follow suit in this particular judicial stance.

Du Plessis and Mupangavanhu are, respectively, of the view that the Act's reference to a 'decision*'* does not only encapsulate business judgments that arise from a director's discharge of his duty of care and skill under *s* 76(3)*(c)*, but also goes beyond decisions made pursuant to a discharge of such duty.[89] Consequently, these learned authors respectively conclude that the SA BJR provides a broader protection to directors against liability for a myriad of decisions than just business judgments, as prevails in Australia.[90]

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[85] *Modise* supra 28 para35-6.
[86] Mupangavanhu 2019 op cit note 14 at 156.
[87] Mupangavanhu 2016 op cit note 6 at 172.
[88] *ASIC v Healey & Ors* [2011] FCA 717 (*Centro*).
[89] Du Plessis *Open Sea (Part 2) 2011* op cit note 4 at 381 and Mupangavanhu 2016 op cit note 6 at 171-2.
[90] Ibid.

(iv) Rational belief

For a director to enjoy the *s* 76(4)*(a)* protection, he must have had a rational basis for believing, and did believe, that an impugned decision was in the best interests of the company.[91] This requirement dovetails with the fiduciary duty to exercise the powers and perform the functions of a director in the best interests of the company.[92] Thus, a decision that is tainted or infected by conflict of interests will not meet the requirement that the director must employ the powers he has to promote the company's best interests. The best interests of the company, however, fall to be determined by the company's board, rather than a court of law.[93]

The liability test envisaged in *s* 76(4)*(a)*(iii) is a subjective one, as the requisite rational belief is that of the director concerned. This was confirmed in *Visser*,[94] which is the only judgment to have dealt with *s* 76(4)*(a)* to-date, where the court held that what is required is that the directors should take reasonably diligent steps to become informed and should subjectively have believed that their decision was in the best interests of the company, and this belief must have (or have had) a rational basis.[95] Thus, although the determination of the rationality of the director's belief that the decision taken was in the best interests of the company is subjective, the test is upward-looking inasmuch as the director's belief must be supported by a diligent search for information, with the final product being informed decision-making.[96] This legal position is substantively similar to the Australian one on the requirement of rationality of a decision (as discussed below). There, it is required that there be some arguable reasoning supporting the decision,[97] and a director's belief that a judgment is in the best interests of a corporation is a rational one unless the belief is one that no reasonable person in their position would hold.[98]

The rational belief requirement in *s* 76(4)*(a)*(iii) creates a rationality test, which is to be distinguished from the reasonableness test prescribed in *ss* 76(4)*(a)*(i) and (ii), 'where the legislature carefully employed the reasonableness' requirement before intentionally shifting to the rationality requirement in *s* 76 (4) (a) (iii)'.[99] Section 76(4)*(a)*(i) requires a director to have

[91] Section 76(4)*(a)*(iii).
[92] Section 76(3)*(b)*.
[93] Mupangavanhu 2016 op cit note 6 at 165.
[94] Supra note 79.
[95] *Visser* supra note 79 para 74.
[96] Mupangavanhu 2016 op cit note 6 at 167-9.
[97] *Rich* supra note 72 para 154 [7289].
[98] Section 180(2).
[99] Mupangavanhu 2016 op cit note 6 at 173-4.

taken 'reasonably diligent steps' to become informed, and *s* 76(4)*(a)*(ii) requires the director to have had no 'reasonable basis' to know that a related person had a personal interest in the subject-matter of a decision. It bears mentioning here that the rational belief and some of the other factors and requirements that are discussed here and in preceding paragraphs have already been analysed and judicially applied in Australia in relation to *ss* 180 (2) and (3) of the Corporations Act. It is therefore appropriate to discuss such (and other) factors in relation to the Australian BJR below.

IV. THE AUSTRALIAN POSITION

(a) Duty of Care and Skill – a Brief Overview

Prior to the codification of certain elements of Australian directors' duties, insofar as the duty of care and skill was concerned, Australian common law (like SA law before 2011) treated directors leniently as it applied a largely subjective test in determining director's liability for breaches of that duty.[100] In addition, directors were not required to have any special skills or qualifications, and a director's compliance or non-compliance with his duty of care depended on the nature of a corporation's business and on any particular obligations assumed by (or assigned to) that director.[101] The statutory and jurisprudential evolution of Australian law on the duty of care (and, in particular, the test for determining liability for a breach thereof) evolved over the years[102] – almost similarly to SA law on that duty, as discussed in part II above. There was a realisation and acknowledgement in Australia that an objective (rather than a subjective) standard to evaluate directors' actions was required. This gradual change (which followed concerns engendered by the (1995) *Daniels* judgment)[103] culminated in the codification of the duty of care and skill, followed by various amendments thereto.[104] Today, that duty is contained in *s* 180(1) of the Corporations Act, which requires a director to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director of a corporation in the corporation's circumstances, and occupied the office held by, and had the same responsibilities within the corporation as, that director. It is noteworthy, however, that such codification was originally

[100] Havenga op cit note 3 at 30.
[101] Ibid at 31.
[102] Ibid.
[103] Supra note 25.
[104] Du Plessis *Open Sea (Part 2) 2011* op cit note 4 at 379.

effected without simultaneously codifying the BJR,[105] and the Australian BJR consequently remained in the historical common law incarnation that is described below. It was the far-reaching and ground-breaking import and effect of the *Daniels*[106] judgment that provided the impetus for introducing a statutory BJR in Australia.[107]

(b) The Australian BJR

Like SA courts, Australian courts have historically deferred to boards of Australian corporations in relation to business decisions made honestly and in good faith – essentially a manifestation of a principle of judicial restraint.[108] Directors were required and expected to exercise their discretion *bona fide* in what they (rather than courts) considered to be in the interests of the corporation.[109] Du Plessis concludes that the Australian jurisprudence previously evidenced the reluctance of Australian courts to interfere in board decisions,[110] and this effectively created a common law BJR in the sense that the term '*business judgment rule*' had never been used in any of the cases generally quoted as authority in Australia, England or South Africa for the existence of a common law BJR.[111] Courts found directors liable for a breach of their duty of care and skill only if they acted with gross negligence. This was not ideal or appropriate as it set the bar for directors' liability for breaches of their duty of care and diligence significantly high.[112] The eventual lowering of this bar as discussed above had to be counter-balanced, however, against some form of defence against director's personal liability – so as to strike some reasonable balance between directors' perennial compliance with their duty of care and diligence in the process of taking reasonable commercial risks (on the one hand) and their accountability and potential personal liability to stakeholders for breaches of such duty in certain circumstances (on the other hand). It is in this connection that the BJR becomes critical and necessary.

After *s* 180(1) had been enacted to create a statutory duty of care and diligence, there was a need to afford directors a defence in the form of the BJR. Thus, although there was, like

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[105] Du Plessis *Open Sea (Part 1) 2011* op cit note 23 at 349.
[106] Supra note 25.
[107] Du Plessis *Open Sea (Part 1) 2011* op cit note 23 at 350. That decision marked the pinnacle of the development of Australian directors' duty of care and, by extension and necessity, the BJR (Du Plessis *Comparative analysis* op cit note 11 at 285).
[108] Du Plessis *Open Sea (Part 1) 2011* op cit note 23 at 345.
[109] McLennan op cit note 54 at 94 and Du Plessis *Open Sea (Part 1) 2011* op cit note 23 at 345.
[110] Du Plessis *Open Sea (Part 1) 2011* op cit note 23 at 346-9.
[111] Ibid.
[112] Ibid at 345-6.

in SA,[113] some fervent resistance against the introduction of a statutory BJR, *s* 180(2) was ultimately inserted in the Corporations Act.[114] Section 180(2) is closely linked with *s* 180(1), which contains the duty of care and diligence, in roughly much the same way as SA's *s* 76(4)*(a)* is closely linked and interfaces with *ss* 76(3)*(b)* and *(c)*. Section 180(2) reads as follows:

> 'A director or officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
>
> (a) make the judgment in good faith and for a proper purpose; and
>
> (b) do not have a material personal interest in the subject matter of the judgment; and
>
> (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
>
> (d) rationally believe that the judgment is in the best interest of the corporation.
>
> The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.'

The stated policy and legislative objectives behind the codification of *s* 180(2) included to provide a 'safe harbour' in the form of a rebuttable presumption in favour of a defendant director. Similarly to SA, a director would (absent fraud or bad faith) be presumed to have discharged his duty of care and diligence if he made a business decision on an informed basis, in good faith and in the honest belief that that decision was in the best interests of the corporation. The net result of the operation of such presumption would be that (theoretically at least) once the defendant director has met the requirements of *ss* 180(2)*(a)-(d)* of the Corporations Act: (i) he would be shielded from liability for a breach of his duty of care and diligence, (ii) the merits of his business judgment would be insulated from judicial review, and (iii) the plaintiff would then have to establish that the defendant has breached his duty of care and diligence.[115] However, it would appear that, in practice, *s* 180(2) has failed to live up to this critical policy objective due to the manner in which courts have interpreted and applied the section – see, for example, the discussion of the *Rich* judgement[116] below on the judicial allocation of the burden of proof. I submit that the SA *s* 76(4)*(a)* meets most, if not all, of the

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[113] See a discussion on this in part II above.

[114] Du Plessis *Open Sea (Part 2) 2011* op cit note 4 at 378. The size limitation of this report paper prevents a discussion of the debate and various reasons that were advanced for the resistance to the introduction of a BJR in Australia.

[115] Du Plessis *Open Sea (Part 2) 2011* op cit note 4 at 379 and Legg M & Jordan D 'The Australian Business Judgment Rule After ASIC v Rich: Balancing Director Authority And Accountability' (2014) 34 *Adelaide Law Review* 403 406.

[116] Supra note 72.

lofty objectives of *s* 7 of the Act that are relevant to corporate governance in general and board decision-making and accountability in particular – see the conclusion of this report in part V below.

A 'Note' to *s* 180(2) makes it abundantly clear that the Australian BJR is limited in its intent and scope of application to only the duty of care as set out in *s* 180(1); *s* 180(2) does not apply to duties contained in any other provision of the Corporations Act or other laws. This is principally why the legislative intent and practical scope of application of the *s* 180(2) protection are currently viewed as being unduly circumscribed and myopic,[117] as they render Australian directors vulnerable to liability for breaches of directorial duties that are contained in other provisions of the Corporations Act or other laws. Consequently, such directors are currently vulnerable to liability for breaches of, for example, their fiduciary duties, the duty to prevent insolvent trading under that Act,[118] the duties to monitor a corporation's financial position and general business activities, as well as to ensure a corporation's compliance with the law.[119] By contrast, in SA, as pointed out in parts I and IV of this report, since *s* 66(1) confers wide-ranging powers and 'original authority'[120] on SA directors, *s* 76(4)*(a)* is available to SA directors as a potential defence against liability for a breach of not only the duty of care but virtually any other duty to which the exercise of any of such powers and authority relate.[121]

In addition, the application of *s* 180(2) is limited to a *business judgment* only. Section 180(3) defines such a judgement as any decision to take or not take action in respect of a matter relevant to the business operations of a corporation. For a business decision to qualify as a business judgment, there must be a decision to take or not take action in respect of a corporation's business operations – the critical factor being a conscious decision. This requires that the director must, in fact, have applied his mind to the relevant subject-matter.[122] Consequently, *s* 180(2) does not apply where a director deliberately refrained from participating in board deliberations and decision-making because he did not want to 'rock the boat'; such abstention is, itself, a dereliction of responsibility that cannot be countenanced or

[117] Du Plessis & Mathiopoulos op cit note 9 at 287.
[118] Du Plessis *Open Sea (Part 2) 2011* op cit note 4 at 379.
[119] Australian Institute of Company Directors (AICD) '*Proposal for Reform: The Honest and Reasonable Director Defence (AICD Proposal)*', available at http://www.companydirectors.com.au/-/media/resources/director-resource-centre/policy-on-director-issues/2014/the-honest--reasonable-director-defence-a-proposal-for-reform_august-2014_f.ashx, accessed on 5 May 2021.
[120] Mupangavanhu 2017 op cit note 55 at 153-4.
[121] Du Plessis & Mathiopoulos op cit note 9 at 306.
[122] *Rich* supra note 72 para 7277.

clothed with the character of a business judgment.[123] As already argued, SA courts are likely to take a similar approach in respect of indecision.[124] In *Rich*, the court held that decisions that constitute '*business judgments*' and are therefore protected by the BJR are those that relate to the preparation for the making of a business decision; corporate personnel; termination of litigation; setting of policy goals; apportionment of responsibilities between the board and senior management; and planning, budgeting and forecasting.[125] In *Mariner*,[126] it was held that announcing a takeover bid (as obtained in that case) constitutes such a judgment. It is noteworthy that this list of factors as enunciated in *Rich* (as read with *Mariner*) does not cure *s* 180(2)'s shortcomings or expand the limited scope of its application to only business judgments. The result of this is crucially that *s* 180(2) nevertheless fails to capture even those directorial decisions that, notwithstanding the fact that they meet the stringent requirements stipulated in *s* 180(2)*(a)-(d)*, do not fall within the definition of business judgments as defined in *s* 180(3).[127]

An Australian court will not bother to examine the applicability or satisfaction of any of the *s* 180(2) eligibility criteria if a business judgment (as defined) is adjudged to have been absent.[128] Du Plessis and Mathiopoulos submit that the scope and application of the Australian BJR is 'complex and uncertain' – in part because of how narrowly a business judgment is defined, which has resulted in an unduly narrow and technical interpretation of that definition.[129] By contrast, *s* 76(4)*(a)* has no definition of (or express reference to) BJR; instead, *s* 76(4)*(a)* is elastic, wider in application ambit and consequently available as a defence against liability for breaches of potentially any provision of the Act.[130] This is so because the *s* 661(1) powers and authority relate to all the business activities, affairs and functions of the company – virtually all of which may include, but are certainly not limited to, business judgments in the narrow Australian legal sense that is discussed in the immediately preceding paragraph.

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[123] *Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers* [2006] QCA 335.
[124] See discussion around notes 87 and 88 in part II above.
[125] *Rich* supra note 72 para 7273–7274.
[126] *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502.
[127] Legg & Jordan op cit note 115 at 419.
[128] *Great Southern Finance Pty Ltd (In Liq) v Rhodes* [2014] WASC 431 48. See also *ASIC v Adler* (2002) 41 ACSR 72, where the court found that the defendant director had not acted in good faith and for a proper purpose as required by *s* 180(2)*(b)*, and had a material personal interest in the subject-matter of the impugned decision.
[129] Du Plessis & Mathiopoulos op cit note 9 at 299.
[130] Justice Geoffrey Nettle 'The Changing Positions and Duties of Company Directors' (2018) 41(3) *Melbourne University Law Review* 1402 1417 1402.

For *s* 180(2) to apply to a directorial decision, the decision must not only be a business judgment as defined but must also have been made in good faith and for a proper purpose.[131] This is another material difference from the SA *s* 76(4)*(a)*, which (as already discussed in part III above) cross-refers to *s* 76(3)*(b)* and *(c)* only but conspicuously omits referring to *s* 76(3)*(a)*. Such omission effectively excludes from the ambit of *s* 76(4)*(a)* decisions made in breach of a director's fiduciary duty to act 'in good faith and for a proper purpose', which is contained in *s* 76(3)*(a)*. This should not be surprising (and is, in fact, preferable to the Australian position) as *s* 76(4)*(a)* is specifically and expressly aimed at protecting directors against liability for breaches of only the duties to act in the best interests of the company and with care, skill and diligence,[132] rather than any of the (other) fiduciary duties (which include the duty to act in good faith and for a proper purpose).[133] In Australia, the legislative intention is self-evidently the opposite. There, it has been remarked that the good faith and proper purpose precondition in *s* 180(2) amounts to somewhat of a 'double jeopardy' since it requires the defendants to prove a lack of a more serious contravention of the law.[134]

The Australian BJR was codified, and is predicated (theoretically at least), on a policy objective of protecting directors in the manner and circumstances already discussed in this report by, among other things, creating a clear presumption in favour of directors. This hinges on the critical issue of the incidence of proof, which is critical in the invocation and application of the BJR.[135] In *Rich*, being one of the significant and influential judgments on *s* 180(2), the court found that the drafting of *s* 180(2) on this aspect is ambiguous, which ambiguity 'will eventually need to be resolved at the appellate level'.[136] However, the court held that (in the meantime) a defendant director should bear such burden, because to successfully invoke *s* 180(2), he must prove that he has exercised a business judgment, which must satisfy the requirements of *ss* 180(2)*(a)-(d)*. The court was swayed in this regard by the fact that such requirements are facts that are, in any event, within the knowledge of mainly the defendant

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[131] Section 180(2)*(a)*.
[132] Section 76(4)*(a)* refers specifically to 'the obligations of subsection (3)(b) and (c)'.
[133] Mupangavanhu 2017 op cit note 55. An analysis of the correctness, utility or prudence (if any) of *s* 76(4)*(a)*'s palpable exclusion of a reference to *s* 76(3)*(a)* falls outside the scope of this report.
[134] Ricci SAG & Miyairi J '*From Enactment To Mariner: Does The Statutory Business Judgment Rule Change The 'Acoustic Separation' Between Conduct Rules And Decision Rules In Australia?*' Available at https://www.business.unsw.edu.au/About-Site/Schools-Site/Taxation-Business-Law-Site/Documents/Gramitto-Ricci-Miyairi_CLTA-Conference-Paper.pdf at 32.
[135] Legg & Jordan op cit note 115.
[136] *Rich* supra note 72 paras 1229 and 7269. This has resulted in there being some lingering uncertainty that is crying out for legislative intervention and clarification or amendment to the incidence of burden of proof for future cases (Du Plessis *Open Sea (Part 2) 2011* op cit note 4 at 380).

director or officer. Consequently, *s* 180(2) is currently (for all practical purposes) being treated and utilised as a safe harbour or defence, rather than the presumption that the legislature had intended.[137] By contradistinction, as has already been argued in paragraph (a) of part III above, a similar judicial or interpretive controversy or uncertainty on the incidence of proof is not likely to arise as an issue in SA because of the decisive clarity with which *s* 76(4)*(a)* is drafted in that regard. The particular words of *s* 76(4)*(a)* that saddle the onus squarely on the defendant director are that *he* 'will have satisfied the obligations of subsection (3)(b) and (c) if' he meets the *ss* 76(4)*(a)*(i)-(iii) requirements discussed above. Section 76(4)*(a)* is therefore axiomatically designed and intended to serve practically as a defence, rather than a presumption,[138] such that once the director has discharged his onus, he will be excused from liability for a breach of *ss* 76(3)*(b)* and/or *(c)*.[139]

Once a business judgment is found to have been made, then compliance with the requirements of *ss* 180(2)*(a)-(d)* must be considered.[140] Those requirements are: a decision made in good faith for a proper purpose; after the director has informed himself as to the subject-matter thereof to the extent he reasonably believes to be appropriate; in circumstances where the director does not have a material personal interest therein; and rationally believes that the judgment is in the best interests of the corporation. Factors that are germane to a determination of whether the requirement that directors must inform themselves about the subject-matter of the judgment has been met are the importance of the judgment to be made; the time available for obtaining information; the costs related to obtaining information; the director or officer's confidence in those exploring the matter; the state of the company's business at that time and the nature of competing demands on the board's attention; and whether or not material information is reasonably available to the director.[141] It has been argued that although *s* 180(2)*(c)* refers to the director's belief, which suggests a subjective element, the requirement of reasonableness suggests that there is an objective element as well, which is necessary and justified as it engenders better directorial accountability.[142] This argument dovetails with the SA (subjective and objective) hybrid approach discussed in paragraph (b) of

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[137] Harris J and Hargovan A '*Still a Sleepy Hollow? Directors' Liability and the Business Judgment Rule* (2016) 31 *Australian Journal of Corporate Law* 319.
[138] Mupangavanhu 2016 op cit note 6 at 183-6.
[139] If the defendant director fails to so discharge, there is of course a possible recourse to, and application of, *s* 77(9) – depending on the particular facts of the director's case.
[140] *Great Southern Finance Pty Ltd (In Liq) v Rhodes* [2014] WASC 431 46 and *Deangrove Pty Ltd v Buckby* (2006) 56 ACSR 630.
[141] *Rich* supra note 72 at 152 [7283].
[142] Legg & Jordan op cit note 115 421-2.

part II of this report. In *Centro,*[143] the court found that directors failed to exercise due care and diligence when they omitted to notice some serious monetary deficiencies that were contained in the corporation's financial statements, which the directors failed to scrutinise diligently. One can predict that SA courts are likely to be persuaded to import the type of judicial reasoning and stringent behavioural standard setting enunciated in the *Centro* judgment in the interpretation and application of the provisions of *s* 76(4)*(a)*(i), which require a director to have taken steps to become informed about a decision.

It was held in *Rich* that the requirement that a director must rationally believe that the judgment is in the best interests of the corporation does not require reasonableness, as a decision will be rational if the director can explain how they got to it. The decision need not necessarily be the correct one; it just needs to make sense, based on what the director knew at the relevant time – i.e. there must be some arguable reasoning supporting the decision.[144] This effectively makes the test that is applicable to the interpretation and application of *s* 180(2)*(c)* to be subjective. Given the Australian jurisprudential evolution from a subjective standard for directors' liability to a more objective standard as discussed above, the *Rich* judgment has been criticized for unduly emphasising a director's subjectivity.[145] It thereby incorrectly lowers the liability bar for directors, as the lack of an objective element may be contrary to the balance between director authority and accountability that the legislature sought.[146] It has furthermore been stated that to have both *s* 180(2)*(c)* and *(d)* tested on a subjective standard creates a risk of insulating directors from oversight.[147] This is to be contrasted with the nuanced and blended (subjective/objective) approach of SA law that has already been discussed in part II above.

The shortcomings arising from the formulation and judicial interpretation and application of *s* 180(2) as discussed above have resulted in some proposals being made for a better drafted and wider protection against personal liability for breaches of directors' duties in Australia.[148] For instance, Du Plessis and Mathiopoulos propose that *ss* 180(2) and (3) be repealed and replaced so as to protect directors against liability for not only business judgments

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[143] Supra note 88. The case is generally known as the '*Centro case*', deriving from the name of the company, Centro Property Group, to which the directors' conduct related.
[144] Para 7289. See also *MacDonald v ASIC* (2007) 73 NSWLR 612 14, where the court ruled that the reference to 'rationality' in *s* 180(2)*(d)* 'constitutes a requirement going beyond mere grounds for a belief and could require identification of the facts and matters upon which any such belief was based'.
[145] Legg & Jordan op cit note 115 424.
[146] Ibid.
[147] Ibid at 425.
[148] Du Plessis & Mathiopoulos op cit note 9 at 287-8.

and breaches of the duty of care, but also breaches of other directorial duties.[149] In addition, the Australian Institute of Company Directors has published a '*Proposal for Reform: The Honest and Reasonable Director Defence (AICD Proposal)*',[150] in which that institute set out various reasons why Australian directors needed a defence that is broader than the BJR.[151] Generally, the proposal propagates for a broader and overarching '*Honest and Reasonable Director Defence*' that would supplement (rather than supplant) *s* 180(2), and would relate to all types of directors' acts and judgments, rather than merely business judgments, as is currently the case.[152] By contrast, this issue has already been taken care of in SA, as *s* 76(4)*(a)* applies to all that *s* 66(1) applies to; *s* 66(i) posits the board 'the legitimate organ to run the affairs of the company and to make strategic decisions affecting the business of the company'.[153]

From a SA legal perspective, the calls for reform to the Australian protection of directors inevitably beg the question as to the extent of interpretive value of the Australian BJR and jurisprudence thereon. There are some Australian courts' *ratios* on, and interpretations of, portions of *s* 180(2) that are likely to be of some persuasive interpretive utility to our courts. For example, in relation to a lack of material personal interest (*Adler* case);[154] informing oneself about the subject-matter of a decision (*Centro* case);[155] and rational belief (*Rich* case, particularly in respect of a director's subjective state of mind). There is, however in the same breath, a possibility that such interpretive utility may well prove to be limited. Commentators have remarked that this possibility exists because there has not yet been a satisfactory and in-depth analysis and interpretation of *s* 180(2) – despite the jurisprudence that has emerged to-date.[156] For example, Du Plessis and Mathiopoulos' observation is that there have been at least two cases in Australia where the court showed reluctance to second-guess board decisions, and instead considered whether or not an impugned decision fitted the definition of a *business judgement*.[157] This is, of course, in addition to the marked paucity of more litigation on *s* 180(2)

[149] Ibid 287.
[150] Op cit note 119.
[151] Ibid at 299.
[152] Du Plessis & Mathiopoulos op cit note 9 at 299-300.
[153] Mupangavanhu 2016 op cit note 6 at 182.
[154] Supra note 128.
[155] Supra note 88.
[156] See the judgments already discussed above, as well as *ASIC v Fortescue Metals Group Ltd* [2011] FCAFC 19, *Global Advanced Metals Pty Ltd* [2019] NSWSC 1804 and *Kupang Resources Ltd (Subject to Deed of Company Arrangement)* [2018] NSWSC 1872.
[157] Du Plessis & Mathiopoulos op cit note 9 at 395.

- despite the weight of expectation to the contrary.[158] Comparatively, *s* 76(4)*(a)* is relatively new; the Act came into force only in 2011 – hence *Visser* being the only judgment on it to-date.[159] Thus, the utility, strengths and weaknesses of *s* 76(4)*(a)* are all still to be tested and scrutinised by our courts (by reference to, and with the assistance of (among others) the Australian law on, and experience with, its own rule). By contrast, *s* 180(2) has been in place for a lot longer and has already been subjected to judicial and academic scrutiny. However, *s* 180(2) is under attack, as a number of stakeholders (e.g. Justice Nettle)[160] find its drafting, scope, purpose, judicial interpretation and application unduly myopic and unsatisfactory. For this reason, *s* 180(2) in its current configuration may be altered in the future, although the possibility and/or timing of such alteration remain/s uncertain at this juncture.[161] Since the Australian BJR has long been subjected to judicial scrutiny and application by Australian courts and commentators, and since our courts are permitted to have regard to foreign law when interpreting the Act, SA courts are likely to have regard to how the Australian *s* 180(2) has been interpreted and applied there. It is, however, hoped that whilst so doing, our courts will be mindful of, and eschew, the pitfalls or shortcomings that are inherent in *s* 180(2) as already pointed out above.

V. CONCLUSION

The introduction of *s* 76(4)*(a)* in SA is one of the commendable innovations of the Act; it serves to align our law with 'the best practice jurisdictions internationally',[162] thereby fulfilling some of the fundamental objectives of the Dti behind reforming our company law. These include to provide for the creation and use of companies in a manner that enhances the economic welfare of SA as a partner within the global economy;[163] to encourage high standards of corporate governance; to balance the respective rights and obligations of shareholders and directors; to encourage the efficient and responsible management of companies; and to provide

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[158] Ibid. In this regard, it has been said that *'following the introduction of s180(2) in March 2000, the provision was not considered in any reported decision of an Australia court until 2003. The greatest number of decisions in which it was considered took place between 2006 and 2010 - the end of that period corresponding to the effects of the global financial crisis. In the 10 years following the enactment of the statutory business judgment rule, there was only one case in which the defence was successfully invoked, and that was by a receiver, not a director… s180(2) has provided neither business confidence nor legal certainty'.* (Nettle op cit note 130 at 1417.)

[159] *Visser* supra note 79.

[160] Nettle op cit note 130 at 1433.

[161] Harris & Hargovan op cit note 137 at 1-2.

[162] Mupangavanhu 2019 op cit note 14 at 5. Section 76(4)*(a)* is consequently said to compare favourably with formulations of similar rules in other jurisdictions (Mupangavanhu 2016 op cit note 6 at 186).

[163] Section 7(e) of the Act and para 1.2 of *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* GN 1183 in GG 2004-06-23.

a predictable and effective environment for the efficient regulation of SA companies.[164] Section 76(4)*(a)* appropriately strikes an ideal and much-needed balance (precarious as it can sometimes be) between granting directors extensive authority and powers under *s* 66(1), on the one hand, and holding the directors accountable and potentially liable for an impugnable exercise of such authority and powers under (among others) *s* 77, on the other hand.[165] Section 76(4)*(a)* strikes an appropriate and satisfactory balance between shareholders' often competing interests of profit maximisation and the inevitable imperative to give directors freedom to manage business as contemplated in *s* 66(1).

Section 76(4)*(a)* is not a 'low-hanging fruit' type of defence that is available to all directors and for all forms of conduct. It prescribes stringent requirements which a defendant director (being the bearer of the burden of proof under *s* 76(4)*(a)*) needs to meet in order to successfully invoke such defence. For instance, *s* 76(4)*(a)* has a nuanced hybrid of subjective and objective elements, inasmuch as *ss* 76(4)*(a)*(i) and (ii) prescribe an (onerous) objective test of reasonableness, whilst *s* 76(4)*(a)*(iii) prescribes a (less onerous) subjective test of rationality. In addition, the BJR protects only those directors who have taken reasonable diligent steps to become informed; it does not protect those who act with dishonest, wilful misconduct or recklessness.[166] The fact that directors bear the burden of proof also demonstrates to would-be offenders that the availability of the *s* 76(4)*(a)* defence is conditional on that onus being discharged first. Consequently, *s* 76(4)*(a)* does not incentivise or encourage undue and unreasonable risk-taking or negligence on the part of directors. It can, and should, be interpreted purposively and applied flexibly in such a manner as to encourage informed decision-making and honest risk-taking without unnecessarily stifling innovation and efficiency,[167] whilst simultaneously ensuring that good corporate governance[168] and directorial accountability are promoted and achieved.[169]

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[164] See *ss* 7(b)*(iii), (i), (j)* and *(k)*.
[165] Davis D & Geach W (eds) *Companies and other Business Structures in South Africa* 2 ed (2011) 16.
[166] *Myeni* supra note 38 para 26.
[167] Mupangavanhu 2016 op cit note 6 at 187.
[168] For instance, since a defendant director bears the onus of proof, this should encourage boards and executives to embark on responsible risk-taking and this will make directors keep accurate records to support governance processes that inform their decision-making (Ibid at 185).
[169] This is engendered by the ever-lingering risk of personal liability under *s* 77, *s* 218 and other relevant provisions of the Act – if an errant defendant director fails to discharge his onus of proof in respect of eligibility for the *s* 76(4)*(a)* 'safe harbour'.

Unlike its Australian counterpart, *s* 76(4)*(a)* provides directors with a wide scope of protection,[170] which accords with, and is necessitated and justified by, the wide powers and authority which *s* 66(1) of the Act confers on SA directors and also the high risks of personal liability for directors under (for example) *ss* 77, 22, 214 or 218 of the Act.[171] There is thus a rational, cogent, understandable and necessary correlation and symbiosis between *ss* 76(4)*(a)* and 66(1), for the former applies to any directorial decision made pursuant to the exercise of the wide powers and authority conferred on them by the latter.[172] In the result, I believe and submit that *s* 76(4)*(a)* justifiably provides directors with an appropriately and sufficiently wide protection against personal liability for breaches of their duties. This is justified by the directors' wide powers and authority, the exercise of which may unconscionably render directors vulnerable to various forms of personal liability, and retard the much-needed entrepreneurship, innovation, risk-taking and economic growth that are aptly contemplated in *s* 7 of the Act.

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[170] Du Plessis *Open Sea (Part 2) 2011* op cit note 4 at 381.
[171] Ibid at 382.
[172] *'Thus s66 (1) recognises directors, and not the court, as experts in deciding on the best course of action when directing the business and affairs of a corporation. Hence the use of the subjective elements of rationality in relation to the director's belief that the decision made was in the best interests of the company'* (Mupangavanhu 2016 op cit note 6 at 182).

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