

# ZIMBABWE



## Law and Practice

### Contributed by:

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## Contents

### 1. Introductory p.4

- 1.1 Forms of Corporate/Business Organisations p.4
- 1.2 Sources of Corporate Governance Requirements p.4
- 1.3 Corporate Governance Requirements for Companies With Publicly Traded Shares p.4

### 2. Corporate Governance Context p.5

- 2.1 Hot Topics in Corporate Governance p.5
- 2.2 Environmental, Social and Governance (ESG) Considerations p.5

### 3. Management of the Company p.6

- 3.1 Bodies or Functions Involved in Governance and Management p.6
- 3.2 Decisions Made by Particular Bodies p.6
- 3.3 Decision-Making Processes p.7

### 4. Directors and Officers p.8

- 4.1 Board Structure p.8
- 4.2 Roles of Board Members p.8
- 4.3 Board Composition Requirements/Recommendations p.9
- 4.4 Appointment and Removal of Directors/Officers p.9
- 4.5 Rules/Requirements Concerning Independence of Directors p.9
- 4.6 Legal Duties of Directors/Officers p.10
- 4.7 Responsibility/Accountability of Directors p.11
- 4.8 Consequences and Enforcement of Breach of Directors' Duties p.11
- 4.9 Other Bases for Claims/Enforcement Against Directors/Officers p.11
- 4.10 Approvals and Restrictions Concerning Payments to Directors/Officers p.11
- 4.11 Disclosure of Payments to Directors/Officers p.11

### 5. Shareholders p.12

- 5.1 Relationship Between Companies and Shareholders p.12
- 5.2 Role of Shareholders in Company Management p.13
- 5.3 Shareholder Meetings p.13
- 5.4 Shareholder Claims p.13
- 5.5 Disclosure by Shareholders in Publicly Traded Companies p.14

## **6. Corporate Reporting and Other Disclosures** p.15

6.1 Financial Reporting p.15

6.2 Disclosure of Corporate Governance Arrangements p.15

6.3 Companies Registry Filings p.15

## **7. Audit, Risk and Internal Controls** p.16

7.1 Appointment of External Auditors p.16

7.2 Requirements for Directors Concerning Management Risk and Internal Controls p.16

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**ChimukaMafunga Commercial Attorneys** (CMCA) is a full service commercial law firm in Zimbabwe which is in the process of expanding into the region. CMCA renders legal advice that is practical, relevant, and individually tailored to meet the specific needs of each client. It believes that the best advice is achieved by working in close co-operation with its clients and developing a thorough knowledge of each of our client's business. Its expertise includes corporate and institutional compliance, mergers

and acquisitions, business rescue, energy law, mining law, real estate, and intellectual property law. Notably, the firm has handled transactions involving public listed companies and cross border transactions. CMCA takes pride in providing its clients with value-adding solutions that are based on a thorough knowledge of their business. Its co-operation with clients is characterised by commitment and attentiveness, and it continually strives to remain a reliable and responsible partner in all respects.

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## 1. Introductory

### 1.1 Forms of Corporate/Business Organisations

The principal forms of corporate/business organisations in Zimbabwe are limited liability companies and private business corporations.

There are two types of limited liability companies, namely: private limited companies and public limited companies.

### 1.2 Sources of Corporate Governance Requirements

The principal sources of corporate governance requirements are as follows:

- the Companies and Other Business Entities Act [Chapter 24:31] (“COBE Act”);
- the Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules SI 134 of 2019 (“ZSE Listing Rules”) and Securities and Exchange (Victoria Falls Exchange Listings Requirements), 2020 (“VFEX Listing Rules”) (both the “Listing Rules”);

- the National Code of Corporate Governance, 2014 (“National Code on Corporate Governance”);
- the Public Procurement and Disposal of Public Assets Act [Chapter 22:23];
- the Public Finance Management Act [Chapter 22:19];
- the Constitution of Zimbabwe;
- the Banking Act [Chapter 24:20] – for banking institutions;
- the Insurance and Pension Commission Act [Chapter 24:21] – for insurance companies and pension funds;
- the Public Entities and Corporate Governance Act [Chapter 10:31] – for Government controlled entities whether private or public; and
- the Insolvency Act [Chapter 6:07] – for insolvent entities.

### 1.3 Corporate Governance Requirements for Companies With Publicly Traded Shares

Companies with shares that are publicly traded are required to comply with the COBE Act and the applicable Listing Rules which are the rules of the exchange on which the entity is listed.

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The corporate governance requirements that exist include:

- appointment of directors;
- constitution of the board of directors;
- establishment of board committees and their compositions;
- mandatory disclosure requirements in respect of related party transactions;
- establishment of corporate governance code of conduct; and
- publication of audit results and annual reports.

These requirements are generally mandatory, unless specific provisions provide otherwise.

In Practice Note No. 5, which was issued by the Zimbabwe Stock Exchange (ZSE) on 17 January 2020, the ZSE advised issuers that the basic minimum acceptable corporate governance code will be the adoption of the National Code of Corporate Governance. Issuers are required to state in their Audited Annual Financial Statements which code of corporate governance they adopted and if they adopt any other code other than the National Code of Corporate Governance, they must send a copy of the code to the ZSE for approval. The ZSE reserves the right to reject an issuers' selected code if it falls below the minimum standard set by the National Code of Corporate Governance.

## 2. Corporate Governance Context

### 2.1 Hot Topics in Corporate Governance

The hot topics in corporate governance to be drawn out in Zimbabwe for 2023 include the following:

- The efficacy of the shareholder eccentric theory and the stakeholder theory – whose interests must be promoted in running the daily business of the company?
- The eco-social responsibilities of a company and sustainability reporting.
- The need for prescriptive guidelines relating to the remuneration and disclosure requirements for non-executive and executive directors.
- Owner-management problem, a situation where the dominant shareholder is the managing director of the entity.
- Abuse of the separate juristic personality of a company in related party transactions.
- Protection of minority shareholders and their appraisal rights.

### 2.2 Environmental, Social and Governance (ESG) Considerations

Environmental, Social and Governance (ESG) issues have recently become a global language for measuring a company's impact beyond just the bottom line. Investors are increasingly looking for companies committed to responsible practices, while consumers are choosing brands that align with social and environmental values.

The key considerations given by corporate entities regarding ESG include the following:

- the need to attract foreign investment as some investors seek sustainability-focused assets;
- enhancement of brand reputation – through ESG reporting, companies gain trust and loyalty from stakeholders; and
- driving sustainable development – aligning business goals with ESG can contribute to national progress on critical issues like poverty, education and climate change.

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Sections 399-404 of the ZSE Listing Rules regulate sustainability reporting and disclosure for public entities. Listed entities are required to disclose their sustainability policy, including mitigation of risks, sustainability performance data and other material information which deepens stakeholders' understanding of corporate performance. In its report, a listed company is required to provide a balanced and objective view of its performance by including both positive and negative impacts on environment and society, how it relates to its stakeholders and contribute to sustainable development.

The Zimbabwe Stock Exchange (ZSE) and Victoria Falls Stock Exchange (VFEX) are now mandating ESG reporting in annual reports. The sustainability information must be provided in an annual report or standalone sustainability report. Listed entities are encouraged to apply international accepted reporting frameworks such as the Global Reporting Initiatives (GRI) Sustainability Reporting Guidelines or Standards.

Though there are no specific regulations for private companies, ESG issues and sustainability reporting and transparency have lately become a priority to most private companies in order to enhance their visibility to the investor community as they have become a determinant factor in the investors' choice of investments.

## 3. Management of the Company

### 3.1 Bodies or Functions Involved in Governance and Management

The principal bodies or functions involved in the governance and management of a company are:

- the board of directors;

- company officers or management personnel, such as chief executive officer or managing director; and
- shareholders.

### 3.2 Decisions Made by Particular Bodies

The types of decisions that each body makes are summarised hereunder.

#### Board of Directors

The board of directors is responsible for the overall management of corporate entities. According to section 218 of the COBE Act, the board of directors is responsible for decisions on all matters except those reserved to the shareholders by the COBE Act or by the company's constitutive documents.

The board of directors is primarily responsible for the oversight and decision-making related to strategic direction, financial planning and setting of core policies that outline the company's purpose, values and structure.

#### Management

A company's officers or management personnel comprises of chief executive officer or managing director and departmental managers such as finance manager, operations manager, human resources manager and other managers.

These are responsible for the day-to-day operation of the company. Their day-to-day decisions should support or implement strategies and goals which are set by the board of directors.

#### Shareholders

Shareholders/members of the company are not involved in the day-to-day management of business operations of an entity. They do not have direct management power over an entity. Shareholders have the right and responsibility

to ensure that an entity is properly run and managed and thus provide checks and balances to the directors.

According to section 167(5) of the COBE Act, some of the matters reserved for shareholders include the following:

- electing the members of the board of directors;
- setting or approving the compensation of directors including emoluments, salaries and pensions;
- reviewing the report of the board and board committees with respect to their responsibilities and activities;
- in the case of a public company, reviewing the board's "comply or explain" report on the company's corporate governance guidelines;
- reviewing the external auditor's report;
- appointing the company's external auditor and setting its compensation; and
- reviewing the board's recommendations and actions authorising any distributions or relating to issuance of bonds or other borrowing by the company.

Other matters reserved for shareholders in terms of the COBE Act include amending the company's constitutive documents, rights issues, approving mergers and acquisitions and approving major asset transactions. A company's articles of association or a shareholders' agreement may also specify additional matters reserved for shareholders.

### 3.3 Decision-Making Processes

The process by which each body makes decisions is as follows:

#### Directors

As a general rule directors of a company can only act validly when assembled at a board meeting. As an exception to this rule is where a company has only one director who can perform all judicial acts without holding a full meeting. This position was confirmed by the Supreme Court in the case of *Madzivire & Ors v Zvarivadza & Ors* 2006(1) ZLR 514 (S).

A resolution adopted by a majority of the total number of directors fixed in a company's articles of association as constituting a quorum for decision making and the transaction of business becomes the collective decision of the board of directors.

A resolution may also be adopted outside of a board meeting provided that all of the directors have signed the resolution. This is known as a written resolution.

#### Management

Management is responsible for implementing the goals and strategic decisions of the board of directors. There are no specific laws that regulate the process of their decision making. The powers, duties and functions of management are determined by the board of directors and a company's policies.

#### Shareholders

Shareholders generally exercise their power in relation to the strategic direction of a company when acting in a general meeting of members. In this regard, they must participate in general meetings and exercise their voting rights in the best interests of the company.

Pursuant to a general meeting, the resolutions by the shareholders will be recorded in writing. In the case of a private limited company,

shareholders may also adopt a written resolution signed by all the members in the absence of a general meeting and such a resolution will be valid and effective for all purposes as if it had been passed at a general meeting of members – section 176 of the COBE Act.

## 4. Directors and Officers

### 4.1 Board Structure

The structure of a board of a company is generally determined in terms of the COBE Act and the articles of association. In addition to the aforesaid, public companies are required to comply with the Listing Rules regarding structure and constitution of the board.

Section 195 of the COBE Act outlines the following guidelines:

- in respect of both private and public companies, at least one director must be ordinarily resident in Zimbabwe; and
- any director who is the chief executive officer of the company shall not be the chairperson of the board.

The ZSE and VFEX Listing Rules provide further regulations regarding the constitution of the boards of public companies, as follows:

- independent directors must be the majority on the board of directors of a public company;
- the board chairperson must be an independent director; and
- the board chairperson and the chief executive officer must be appointed by the board.

### 4.2 Roles of Board Members

The roles of different members of boards of directors are usually provided for in a company's articles of association or a board charter.

Two types of directors typically serve on the board, namely:

- executive directors – directors who are part of the executive management team; and
- non-executive directors – directors who are not involved in the day-to-day management of the business and these may be independent or non-independent.

A board chairman appointed by the directors is usually vested with the overall responsibility of running the board. He/she presides over all board, shareholder and other strategic stakeholder meetings and sets the ethical tone for the board and across the company. In a public company, the board chairman must be an independent non-executive director.

The board may also appoint a deputy board chairman who assumes all the duties and responsibilities of the chairman in the absence of the chairman and subject to the approval of the board.

In the event that the elected deputy chairman is not independent, unavailable or is conflicted, a lead independent non-executive director (LID) appointed by the board assumes the responsibility of chairing and leading the board. The LID is appointed to call meetings of the independent directors where necessary and to serve as principal liaison between the independent directors and the chairman.

The board exercises its functions jointly and no director has any authority to severally perform



any act on behalf of the company or the business unless specifically authorised or requested by the board or authorised nominees of the board. Directors are jointly accountable for the decisions of the board.

### 4.3 Board Composition Requirements/Recommendations

The following requirements specified in the COBE Act and Listing Rules govern board composition:

- a private company with more than one and fewer than ten shareholders must have two or more directors;
- a private company with ten or more shareholders must have not less than three directors;
- a public company must have not less than seven and not more than fifteen directors;
- independent directors must be the majority on the board of directors of a public company; and
- no more than 40% of the directors may be appointed as executive directors of a public company.

### 4.4 Appointment and Removal of Directors/Officers

The appointment and removal of the board of directors is primarily governed by the COBE Act, a company's articles of association, the VFEX and ZSE listing requirements, and a contract of employment in the case of an executive director. Generally, directors are appointed and/or removed by the members at a general meeting or by a written resolution of members. Where there is a vacancy, a company's articles of association may provide that the directors may fill such vacancy until the next general meeting where the appointment will have to be ratified

or rejected by the members. See sections 201-203 of the COBE Act.

In addition to the above, a shareholders' agreement may provide that a shareholder has power to appoint and remove a particular number of directors. Thus, the shareholders have significant control and influence over the appointment and removal of directors.

According to section 200 of the COBE Act, the following persons are disqualified from holding the office of a director:

- a body corporate;
- a minor (that is, any person below the age of eighteen) or any person under legal disability;
- a person who is removed by the court from any office of trust on account of misconduct save with the leave of the court;
- a person who has at any time been convicted whether in Zimbabwe or elsewhere, of theft, fraud, forgery or perjury and has been sentenced therefor to serve a term of imprisonment without the option of a fine or to a fine exceeding level five; or
- any person who is adjudged or otherwise declared insolvent or bankrupt under a law in force in Zimbabwe or any other country.

### 4.5 Rules/Requirements Concerning Independence of Directors

In terms of section 206(2) of the COBE Act, public companies must have at least three non-executive or independent directors on its board of directors. An independent director is defined as a director of the company who has not or whose family members have not received any payment or held any share or interest, or any post in the company.

There is no requirement for director independence in respect of private companies.

## Potential Conflicts of Interest

A conflict of interest arises where a director has a personal financial interest, which competes with that of the company at which he or she is a director. A personal financial interest is a direct material interest of a financial nature or to which a monetary value may be attributed.

According to section 56-57 of the COBE Act, where a director has a personal financial interest or knows that a director has a personal financial interest, he/she:

- must disclose the interest and its general nature before the matter is considered at the meeting;
- must disclose to the meeting any material information relating to the matter, and known to the person;
- may disclose any observations or pertinent insights relating to the matter if requested to do so by the other persons;
- if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in points two and three above;
- must not take part in the consideration of the matter, except to the extent contemplated in points two and three above; and
- while absent from the meeting in terms of this provision:
  - (a) is to be regarded as being present at the meeting for the purpose of determining whether sufficient directors or members are present to constitute the meeting; and
  - (b) is not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted; and

- must not execute any document on behalf of the registered business entity in relation to the matter unless specifically requested or directed to do so by the board or meeting of members.

The duty of disclosure extends to a situation where, after the approval of an agreement or matter, a director acquires a financial interest in any agreement or other matter in which the company has a material interest or knows that a related person has acquired a personal financial interest.

In the event of non-compliance, the potential legal consequences are as follows:

- the director may be found guilty of a criminal offence;
- the director may be liable to a civil penalty order;
- the transaction is voidable at the option of the company;
- a director may face possible claims for damages from the shareholders, the company or even third parties for any losses or damage sustained as a result of his/her conduct; or
- the director may also be liable to account for and transfer to the company any gain which he or she has made from the act or transaction and to indemnify the company for any loss or damage suffered by it as a result of the act or transaction.

## 4.6 Legal Duties of Directors/Officers

Directors, and by extension officers of a company, have various fiduciary duties to the company which are broadly summarised as follows:

- a duty to act with care, skill and attention;
- a duty of loyalty; and
- a duty to disclose conflicts of interest.

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## 4.7 Responsibility/Accountability of Directors

Directors owe their fiduciary duties to the company as a whole.

According to section 195(5) of the COBE Act, in making decisions, the board and management body are obliged to consider the interests of all of the company's constituencies, including stakeholders such as employees, customers, suppliers and the community in which the company does business.

## 4.8 Consequences and Enforcement of Breach of Directors' Duties

A company and/or its shareholders may enforce a breach of fiduciary duties by the directors.

The potential consequences of a breach of fiduciary duties include the following:

- personal liability for damages suffered by either the company or shareholders;
- removal from office of a director; and/or
- criminal liability, for example, in cases of fraud or misappropriation.

## 4.9 Other Bases for Claims/Enforcement Against Directors/Officers

Apart from the legal consequences highlighted hereinabove, the other basis for claims or enforcement against directors or officers for breaches of corporate governance requirements is the common law.

Section 56 of the COBE Act provides for what is known as the business judgement rule. In terms of the rule, an honest director cannot be held liable for a decision that was made in good faith, with due care, in the absence of conflict of interest and on an informed basis. The liability of directors is therefore limited to this extent.

In addition to the above, a company may also procure a directors' liability insurance to cover its directors from potential liability risks.

## 4.10 Approvals and Restrictions Concerning Payments to Directors/Officers

In terms of section 207 of the COBE Act, a company may pay "reasonable" emoluments to directors. The use of the word "may" indicates an exercise of discretion on the part of the company. Thus, payment of emoluments is not, per se, mandatory.

The emoluments of directors of public companies must be approved by the shareholders at an annual general meeting. There is no requirement for shareholder approval in respect of private companies unless the articles of association provide otherwise.

In terms of section 214 of the COBE Act, a company is prohibited from allotting shares to directors save on same terms and conditions offered to other members, without the approval of the company in general meeting.

There is no set standard or scale of directors' fees at law. The COBE Act only requires the emoluments to be reasonable. What is reasonable differs with circumstances.

## 4.11 Disclosure of Payments to Directors/Officers

In terms of section 215 of the COBE Act, a company has the right to obtain the following information relating to accounts which are laid before it in a general meeting:

- the aggregate amount of the directors' emoluments;

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- the aggregate amount of directors' or past directors' pensions; and
- the aggregate amount of any compensation to directors or past directors in respect of loss of office.

Further, according to section 184 of the ZSE Listing Rules, directors, managers and advisors of a company are required to disclose the following information regarding the remuneration, fees or benefits payable to directors and officers of a company in the Listing Particulars:

- the provisions of the articles of association with regard to remuneration of directors and any power enabling the directors to vote on remuneration to themselves;
- an analysis of the emoluments which were paid or payable, or were proposed to be paid, by the company's group, to the board of directors as a whole and to each individual director or proposed director, during the last two financial periods;
- the analysis must distinguish between emoluments paid or payable to executive directors and those paid or payable to non-executive directors;
- emoluments to be covered in the analysis include:
  - (a) emoluments paid to the directors in their capacities as such;
  - (b) fees for services as a director;
  - (c) management, consulting, technical or other fees paid for such services rendered;
  - (d) basic salary;
  - (e) bonuses and performance-related payments;
  - (f) sums paid by way of expense allowance;
  - (g) any other material benefits received;
  - (h) contributions paid under any pension scheme;

- (i) any commission, gain or profit-sharing arrangements; and
  - (j) share options; and
- if the remuneration receivable by any of the directors of the company will be varied in consequence of any transaction, full particulars of the aggregate variation in the remuneration of the directors concerned must be stated, and if there is no variation, there must be a statement to that effect.

Further, in terms of section 219(1)(h) of the ZSE Listing Rules copies or summaries of service agreements with the directors, managers and secretaries of the company of its subsidiaries must be available for inspection at the company's registered office or any other place in Zimbabwe for a reasonable time of at least 14 calendar days. However, the copies or summaries need not specify individual directors' remuneration but must state the aggregate remuneration of the directors.

There are no disclosure requirements for private limited companies.

## 5. Shareholders

### 5.1 Relationship Between Companies and Shareholders

The relationship between a company and its shareholders is one of ownership and control. The shareholders are the owners of the company and have the following bundle of rights: the right to vote, the right to receive dividends, the right to receive information and the right to sue for wrongful acts. Shareholders can also be considered as investors who invest capital into the company in expectation of a return of investment.

In return, the company has certain responsibilities against the shareholders. In terms of section 195 of the COBE Act, the directors must promote the success of the company for the benefit of its shareholders as a whole and must act fairly as between shareholders of the company.

The relationship between the company and its shareholders is primarily regulated by the following:

- the COBE Act;
- the applicable Listing Rules;
- the company's constitutive documents;
- shareholders agreement (if any); and
- the common law.

## 5.2 Role of Shareholders in Company Management

Shareholders of a public limited company are, by the rules of securities exchanges of Zimbabwe, prohibited from interfering in the day-to-day management of the company.

However, such is not the case with private limited companies which in most instances are owner managed unless restricted by shareholders agreements or by restrictions in financing agreements.

Shareholders are able to direct the management of a company to take, or refrain from taking, certain actions in the business through the exercise of their voting rights.

## 5.3 Shareholder Meetings

There are three types of shareholder meetings, which are summarised below:

### *Annual general meeting (AGM)*

- This is regulated in terms of section 167 of the COBE Act.

- This is a mandatory meeting held once in every period of twelve months.
- The AGM must deal with and dispose of all matters required in terms of the COBE Act to be dealt with and disposed of at such meeting and may deal with and dispose of such further matters as are provided for in the articles of the company and any matters capable of being dealt with by any general meeting of the company.

### *Extraordinary general meeting*

- This is regulated in terms of section 168 of the COBE Act.
- This meeting can be held at any time on requisition by members holding not less than 5% of the paid-up capital of the company.

### *Statutory meeting*

- This is regulated in terms of section 166 of the COBE Act.
- This is a general meeting which is held by public companies not less than one month nor more than three months from the date at which the company is entitled to commence business.
- The members of the company present at the meeting may discuss any matter relating to the formation of the company or arising out of the company's statutory report.

## 5.4 Shareholder Claims

In terms of sections 60 and 61 of the COBE Act, members may bring direct or derivative actions against directors for their failure to observe their fiduciary duties, especially where there is fraud or misappropriation. Shareholders may bring an action in court against any manager, officer, or director of the entity in two ways:

- Direct action – a member or members may bring a direct action in court in their name to

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enforce or recover damages caused to him or her by violation of a duty incumbent upon such an officer, manager or director. Members may also bring a direct action against the entity seeking any relief that is not prohibited by the law.

- Derivative action – a member or members may bring an action in court in their names and on the entity's behalf against any manager, officer or director to enforce or recover damages caused to the company by violation of the duties owed by that manager, officer or director to the company.

In addition to the above, the other bases for claims by shareholders are as follows:

- instituting criminal proceedings against the company or its directors and officers;
- section 223 as read with section 225 of the COBE Act permits a shareholder to apply to court for an appropriate order against another shareholder on the grounds that the company's affairs are being or have been conducted in a manner which is oppressive or unfairly prejudicial to the interests of some parts of members;
- section 233 of the COBE Act provides an exit remedy to minority shareholders who may be against some major corporate actions; and
- enforcement of certain disclosure and transparency requirements.

## 5.5 Disclosure by Shareholders in Publicly Traded Companies

Shareholders of publicly traded companies have certain disclosure obligations, which include the following:

- in terms of section 235(1) of the COBE Act, if a shareholder acquires more than 20% of the ordinary shares of a public company, they

shall send written notice of the acquisition to the company within 15 days;

- in terms of section 236(1) of the COBE Act, if a shareholder intends to acquire a control block of shares in a public company (35% or more), they must within 30 days prior to the date of acquisition send written notice to the company stating their intention to acquire a control block of shares;
- in terms of section 237(1) of the COBE Act, if a shareholder has acquired a control block of shares in a public company (35% or more), they must on the date of acquisition give notice to other shareholders of the acquisition;
- in terms of section 237(1) and (2) of the COBE Act, if a shareholder has acquired a control block of shares in a public company (35% or more), they must within 60 days of the acquisition offer to purchase all the company's shares at a price not less than the weighted average price of the shares; and
- in terms of section 15B of the Banking Act [Chapter 24:20], a shareholder that intends to acquire a significant interest in a banking institution (5% or more) must disclose their intention to the banking institution and first obtain approval from the Registrar of Banking Institutions.

There are disclosure obligations in relation to the ultimate beneficial owner of publicly traded companies.

- According to section 72 of the COBE Act, every company is required to maintain an accurate and up-to-date register of the beneficial owner or owners of the company.
- Section 72 of the ZSE Listing Rules further provides that publicly listed companies must publish the beneficial interests of directors and major shareholders in their annual finan-



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cial statements as required by Part IX of the ZSE Listing Rules.

## 6. Corporate Reporting and Other Disclosures

### 6.1 Financial Reporting

In terms of the Listing Rules, publicly listed companies are mandated to publish the following financial information:

- announcements of dividends or interest payments;
- half-year financial report;
- annual financial reports; and
- audited annual financial statements not more than three months after the end of every issuer's financial year (both abridged and full statements).

According to Practice Note No. 35 which was issued by the ZSE on 1 June 2020, publication must be made in at least two national newspapers and on the ZSE Data Portal.

In terms of section 186 of the COBE Act, financial statements and accounts of subsidiaries must be laid before the holding company in general meeting together with the holding company's own financial statements. These are known as group accounts.

Further, a directors' report and auditor's report must be annexed to the financial statements. Every statement of financial position of a company shall be signed on behalf of the board by two of the directors of the company. See section 188-189 of the COBE Act.

Private limited companies are not required to report or disclose their financial statements.

### 6.2 Disclosure of Corporate Governance Arrangements

There are requirements for public limited companies to disclose their corporate governance arrangements.

According to section 220(3) as read with section 167(5)(e) of the COBE Act, at each annual general meeting of a public company, the board of directors shall report to the meeting on the company's compliance with its corporate governance guidelines and their conformity to the principles set forth in the National Code on Corporate Governance, and explain the extent if any to which it has varied them or believes that any noncompliance therewith is justified. This is known as the board's "comply or explain" report.

### 6.3 Companies Registry Filings

Regarding corporate governance matters, companies are required to lodge with the Companies Registry the following filings:

- CR6 – containing information which is in the Register of Directors and Secretaries;
- CR11 – return of allotments of shares;
- CR16 – declaration of ultimate beneficial owners;
- CR23 – Statutory Report; and
- Annual Return – containing all such particulars directors, secretaries, auditors and share capital.

All the above filings except CR16 (declaration of ultimate beneficial owners) are publicly available.

A company may be liable for a civil penalty for failing to make the filings.

## 7. Audit, Risk and Internal Controls

### 7.1 Appointment of External Auditors

Public limited companies are legally mandated to publish audited financial statements together with their annual reports. An external auditor must therefore be appointed by a company in connection with a public company's financial statements.

According to section 191(2) of the COBE Act every company shall, at each annual general meeting, appoint an auditor to hold office from the conclusion of that annual general meeting until the conclusion of the next annual general meeting. Section 188 of the COBE Act further provides that an auditor's report must be annexed to the statement of financial position.

The relationship between the company and the external auditor is governed by the COBE Act, Listing Rules, Public Accountants and Auditors Act [Chapter 27:12] and the contractual terms. The key requirements governing their relationship are as follows:

- Terms – among other terms, the company and the auditor must agree on remuneration, provision of information, scope of work and communication lines.
- Independence – the auditor must be independent of the company, which means that they should not have any financial, personal or business connections to the company that could affect their judgement.
- Reporting -the auditor must provide a true and accurate report of the company including whether there have been violations of the COBE Act and the company's constitutive documents during the financial year which affect the company's activities or financial position.

- Professional standards – financial statements prepared shall comply with international financial accounting standards adopted by the Public Accountants Auditors Board constituted under the Public Accountants and Auditors Act [Chapter 27:12], International Financial Reporting Standards (IFRS), and any other appropriate accounting rules and standards.

### 7.2 Requirements for Directors Concerning Management Risk and Internal Controls

There are requirements governing directors of public companies regarding management of risk and internal controls in the company. The board is accountable for the oversight of the company's internal controls and risk management framework, systems, policies and strategies.

In terms of section 73(5) of the ZSE Listing Rules, a publicly listed company must appoint the following board committees and also disclose their composition in the annual financial statements: an audit committee, a nomination committee, a remuneration committee and a risk committee.

The appointment of the above committees is mandatory and it is purely designed to manage risk and for internal controls. They are generally chaired by independent non-executive directors.

The roles of the board committees are summarised below:

- Audit committee – according to section 219 of COBE Act the roles of an audit committee include appointment of an external auditor, reviewing the company's compliance with legal and regulatory requirements and reviewing the adequacy of the company's internal



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auditing personnel and procedures and its internal controls and compliance procedures.

- Nomination committee and remuneration committee – these committees are responsible, inter alia, for advising and ensuring that the company has the necessary balance of skills, experience, availability, independence and knowledge and developing an overall remuneration policy.
- Risk committee – the committee is responsible, inter alia, for advising the board on the potential significant risks and proposed methods of mitigation of risks, risk assessments and establishing and maintaining appropriate internal controls designed to ensure compliance with applicable legal and regulatory requirements.

There are generally no specific requirements governing directors of private companies regarding management of risk and internal controls in the company. However, good practice demands that they do so.

## Trends and Developments

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**ChimukaMafunga Commercial Attorneys** (CMCA) is a full service commercial law firm in Zimbabwe which is in the process of expanding into the region. CMCA renders legal advice that is practical, relevant, and individually tailored to meet the specific needs of each client. It believes that the best advice is achieved by working in close co-operation with its clients and developing a thorough knowledge of each of our client's business. Its expertise includes corporate and institutional compliance, mergers

and acquisitions, business rescue, energy law, mining law, real estate, and intellectual property law. Notably, the firm has handled transactions involving public listed companies and cross border transactions. CMCA takes pride in providing its clients with value-adding solutions that are based on a thorough knowledge of their business. Its co-operation with clients is characterised by commitment and attentiveness, and it continually strives to remain a reliable and responsible partner in all respects.

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### Development of the Corporate Governance Legislative Framework

For over two decades after independence in 1980, Zimbabwe did not have a single, all-encompassing and legislated national code of corporate governance akin to the South Africa King Code, the United Kingdom Cadbury Code or the United States Sarbanes Oxley Act of 2002. Instead, corporate governance was regulated by various enactments.

Currently, corporate governance is regulated primarily by the following statutes:

- the Companies and Other Business Entities Act [Chapter 24:31];
- the Securities and Exchange (Zimbabwe Stock Exchange Listings Requirements) Rules SI 134 of 2019;
- the Securities and Exchange (Victoria Falls Exchange Listings Requirements), 2020;
- the Public Procurement and Disposal of Public Assets Act [Chapter 22:23];
- the Public Finance Management Act [Chapter 22:19];
- the Constitution of Zimbabwe;
- the Banking Act [Chapter 24:20] – for banking institutions;

- the Insurance and Pension Commission Act [Chapter 24:21] – for insurance companies and pension funds;
- the Public Entities and Corporate Governance Act [Chapter 10:31] – for Government controlled entities whether private or public; and
- the Insolvency Act [Chapter 6:07] – for insolvent entities.

The above enactments are designed to foster transparency, accountability and ethical conduct in corporate governance practices in organisations. Some of the statutes are industry specific.

Regulating corporate governance through various statutes instead of a single comprehensive statute is not without its shortcomings. For instance, companies may have compliance challenges as they have to invest additional time, resources and expertise to understand and adhere to different sets of regulations. In addition, compliance costs may increase due to the need for specialised legal counsel, training and monitoring systems. Consequently, this may create a significant compliance burden on companies, especially small to medium enterprises.

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In 2014, Quality Corporate Governance Centre (Private) Limited, trading as Zimbabwe Leadership Forum (“Zimlef”), together with the Institute of Directors (IODZ) and the Standards Association of Zimbabwe (“SAZ”), took the initiative to address the problems of corporate failures and operational challenges in companies by developing the National Code on Corporate Governance (“the National Code”).

The development of the National Code was a welcome development, and it was sponsored by various corporates, including but not limited to Old Mutual, CBZ Holdings Limited, Deloitte & Touche, Dairibord Holdings, Zimplats, Barclays Bank (now First Capital Bank), Rainbow Tourism Group Limited and British American Tobacco, just to mention a few.

A notable and inherent disadvantage of the National Code is that it does not, on its own, possess the force of law. While the code provides valuable guidance and sets out best practices for corporate governance, its non-binding nature limits its effectiveness in enforcing compliance, especially in private limited companies.

Public limited companies are, however, obliged to comply with the minimum standards set by the National Code (see Section 220(3) as read with Section 167(5)(e) of the Companies and Other Business Entities Act [Chapter 24:31] and the Zimbabwe Stock Exchange Practice Note No 5).

It goes without saying that many jurisdictions around the world adopted a hybrid system of corporate governance where some practices are legislated whilst some are regulated by a code. The National Code therefore represents a positive step towards enhancing corporate governance practices. It is a strong indicator regarding

Zimbabwe’s continued position and role as one of the countries with the strongest corporate governance system in Africa.

## Training and Workshops

There have been several training and workshops in Zimbabwe designed to enhance corporate governance practices in companies. The Institute of Directors of Zimbabwe (“IODZ”) has been largely responsible for these training and workshops in accordance with its main objective laid out in Section 3 of its constitution, which is to raise standards of corporate governance in Zimbabwe.

The training and workshops have proven to be a valuable initiative. The workshops have focused on enhancing the effectiveness of boards of directors in Zimbabwean companies. Participants receive training on their roles and responsibilities, effective decision-making processes and strategies to mitigate conflicts of interest. For instance, company managers are taught real-life corporate governance challenges. This practical approach enables participants to apply their learning to real-world situations, ultimately leading to more effective and accountable boards.

Further, these corporate governance workshops emphasise the importance of transparency, accountability and ethical practices within organisations. Participants are educated about the significance of accurate financial reporting, disclosure requirements and the importance of independent audits. By implementing the knowledge gained from these workshops, companies can foster a culture of transparency and accountability.

Additionally, these workshops in Zimbabwe emphasise the need for companies to estab-

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lish mechanisms for stakeholder dialogue and participation. Practical examples could include interactive sessions where participants work on stakeholder mapping exercises, develop strategies to address stakeholder concerns and explore ways to incorporate stakeholder perspectives in decision-making processes. These workshops encourage organisations to build trust and maintain positive relationships with their stakeholders.

## The Rise of Corporate Governance Consultancy Firms

Since 2000, Zimbabwe has experienced numerous high-profile cases of corporate failure in various sectors, including government entities, parastatals, non-governmental organisations, private enterprises and local authorities, most of which, reportedly resulted from corporate governance deficiencies. Examples of such institutions include Interfin Bank, Kingdom Bank Limited and Air Zimbabwe.

This has resulted in the rise of corporate governance consultancy firms which are corporate advisory firms designed to tackle corporate governance issues and assist in the development of proper internal systems in companies. Examples of consultancy companies in corporate governance are Corporate Governance Centre t/a Zimbabwe Leadership Forum (ZIMLEF), Palladium, Chiro Consultants Registered Public Accountants Zimbabwe and KFM Consultants.

KFM Consultants is a Zimbabwean leading corporate governance advisory firm. It was approved by the USAID Regional Inspector General's Pretoria Office to carry out audits of USAID projects and programmes in Zimbabwe. Part of the assignments which they have carried out in Zimbabwe include: a Corporate Governance review of the Zimbabwe Union of Journalists

(ZUJ) (2007), a Corporate Governance review of the Zimbabwe Human Rights Association (ZIMRIGHTS) (2007), Education and training (CACET) (2008), Development of Constitution for the Media Centre Zimbabwe (2010), Corporate Governance Training for MISA Board in Zimbabwe (2012) and an Organisational Development Assessment of the Center for AIDS Care. For more information: visit [www.kfmconsultants.com/assignments.php](http://www.kfmconsultants.com/assignments.php).

## The Rights of Minority Shareholders

The old Companies Act [Chapter 24:03] did not contain adequate provisions protecting the minority shareholders. Instead, such matters were governed by the common law. The recourse for aggrieved minority shareholders was to initiate legal proceedings either personal or derivative actions, depending on the circumstances. The personal action offered sufficient protection to shareholders who had suffered harm individually due to actions or omissions by the company. The derivative action, on the other hand, permitted shareholders to bring legal proceedings on behalf of the company, but only in specific circumstances and subject to certain limitations.

The Companies and Other Business Entities Act [Chapter 24:31] ("COBE Act") was enacted in 2019 and it repealed the Companies Act [Chapter 24:03].

The COBE Act codified and broadened the scope of shareholder remedies, which indirectly enhances the protection of minority shareholders. The remedies available to minority shareholders are summarised below:

- direct personal action by a shareholder for damages caused to them (Section 60 of the COBE Act);

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- derivative action by a shareholder for damages caused to the company (Section 61 of the COBE Act);
- application for piercing of the corporate veil in deadlock, fraud, oppression and other situations (Section 62 of the COBE Act);
- application for an appropriate order against another shareholder on the grounds that the company's affairs are being or have been conducted in a manner which is oppressive or unfairly prejudicial to the interests of some parts of members (Section 223 as read with Section 225 of the COBE Act); and
- minority shareholder appraisal rights which provide an exit remedy to minority shareholders who may be against some major corporate actions (Section 233 of the COBE Act).

In addition to the above remedies provided by the COBE Act, shareholders may also utilise the following remedies to voice their concerns and enforce compliance with corporate governance requirements:

- enforcement of the Zimbabwe Stock Exchange and Victoria Falls Stock Exchange disclosure and transparency requirements; and
- instituting criminal proceedings against the company or its directors and officers.

## The Eco-social Responsibilities of a Company and Sustainability Reporting

It is generally accepted worldwide that companies are not only accountable to their shareholders, but also to other stakeholders across the economic, cultural, environmental and social spectrums. According to Section 195(5) of the COBE Act, the board and management body of companies are obliged to consider the interests of all of the company's constituencies, including stakeholders such as employees, customers, suppliers and the community.

Institutional investors are increasingly looking for companies that are responsible to their community and the environment. Companies now take serious consideration to their eco-social responsibilities in light of the need to attract investment, protect their brand and to drive sustainable development.

Public listed companies, in particular, are now mandated by the Zimbabwe Stock Exchange (ZSE) and Victoria Falls Stock Exchange (VFEX) to include sustainability reports in their annual reports (see Sections 399-404 of the ZSE Listing Rules). In their reporting they are expected to benchmark the international accepted reporting frameworks such as the Global Reporting Initiatives (GRI) Sustainability Reporting Guidelines or Standards. The mandatory disclosures include sustainability policies, mitigation of risks and sustainability performance data.

Corporates such as Econet Wireless Zimbabwe Limited, Zimplats and CBZ Holdings Limited exemplify the principle of eco-social responsibility. This is evident in their diverse community initiatives, including granting scholarships to disadvantaged individuals, community-based workshops and organising marathons and other fitness programmes.