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Section 130 of the Companies Act: Director Duties and ESG Considerations

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Introduction:

In recent years, the term "ESG" has gained significant traction across various industries. ESG encompasses a range of critical environmental, social and governance factors which collectively shape the approach a company takes toward its shareholders, significant stakeholders, employees, local community, and the natural environment.

Embracing and prioritising ESG factors has proven to enhance a company's access to capital, strengthen its profitability and growth, improve its compliance and

risk management, nurture investor relations and engagement, and elevate holistic performance management.

Ultimately, integrating ESG factors into operations invariably contributes to a company's long-term financial success.

Understanding the S 130 Duty:

Section 130 of the Companies Act of Botswana [Cap 44:01] places a fundamental obligation on directors of companies in Botswana to act in good faith and in the best interest of the company.

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The term "best interest" within a commercial context can be understood to mean that directors must exercise their powers in a manner that prioritises the company's long-term financial success.

ESG Impact in Botswana:

Botswana has seen the influence of ESG factors in legislative processes. A few notable examples include the Mines and Minerals Act of Botswana [Cap 44:01] and the regulations promulgated therein, which aim to promote progressive reform in the mining industry, emphasising environmental preservation and sustainability. Social welfare considerations are also apparent in legislation such as the Mines, Quarries, Works, and Machinery Act [Cap 44:02], which prioritizes the health and safety of individuals involved in mining and quarrying operations. Additionally, the introduction of the Sugar Tax in April 2021 serves as an example of the government's commitment to addressing health concerns related to obesity and diabetes in Botswana.

Possible Liability?

If a director fails to consider ESG factors when exercising their powers and carrying out their duties, they may be in breach of their director duties under s130 of the Companies Act.

Section 166 of the Companies Act enables shareholders, entitled persons, or directors to approach the court, on behalf of the company or its subsidiaries by way of a derivative action.

Insights from the English High Court:

In February 2023, ClientEarth, an environmental non-governmental organisation (NGO), approached the English High Court for permission to pursue a derivative action against Shell's board of directors. ClientEarth alleges that the board of directors of Shell have neglected to adopt a sufficient energy transition strategy, consequently jeopardizing Shell's long-term value. ClientEarth further asserts that this mismanagement of Shell's material and foreseeable climate risks

amounts to a violation of the Board's obligations under sections 172 and 174 of the Companies Act of the United Kingdom; these sections mandate directors to act in good faith to "promote the success of the company for the benefit of its members as a whole" and to exercise reasonable care, skill, and diligence in discharging their duties.

In assessing whether ClientEarth had prima facie claim with reasonable prospects of success, the court had to consider the merits of the application taking into consideration the following factors:

1. Whether a person acting in line with their duty to promote the company's success would proceed with the claim.
2. Whether the act or omission in question was authorized or sanctioned by the company.
3. The views of other shareholders who have no personal interest in the matter.

The English High Court ultimately ruled that ClientEarth had not met the required threshold, citing several factors. Firstly, the court noted that ClientEarth's ownership of only 27 shares, in addition to the support from 0.17% of Shell's shareholders, represented a negligible portion of the overall shareholder constituency. Furthermore, Shell had obtained 88.4% shareholder approval for its Energy Transition Strategy at its Annual General Meeting in 2021, with this approval remaining at 80% during the last year's AGM when a progress report on the Strategy was being considered, Shell argued that this demonstrated strong support for the Directors' strategic approach, a contention that the Court was bound to consider. Finally, the Court concluded that ClientEarth's motivations in initiating the claim were not aligned with the purpose for which a derivative action could justifiably be pursued. The Court suggested that ClientEarth's actions appeared to serve its own broader objectives rather than primarily aiming to promote the

success of Shell for the benefit of its members as a whole.

The decision of the English High Court highlights two critical points. Firstly, the prospect of success of ClientEarth's application for authority to initiate a derivative action could have been strengthened by obtaining substantial support from a significant proportion of the shareholders. Secondly, the court's decision emphasises the significance of maintaining a mutually beneficial coexistence between shareholders, directors, and other key stakeholders as a fundamental element of good corporate governance. Particularly in the current climate, where companies are under heightened scrutiny concerning ESG factors, preserving such a symbiotic relationship is of utmost importance for a company's long-term success.

Concluding Remarks:

Considering the evolving landscape of ESG discourse, the possibility of the introduction of ESG reporting framework in Botswana, and the heightened risk of legal action;

directors must carefully deliberate on these considerations when exercising their powers and making decisions. The consideration of ESG factors into their decision-making process becomes pivotal in safeguarding the long-term success and sustainability of the company.

If you have interest in an in-depth discussion on this subject matter feel free to contact us at info@gobhozalegalpractice.co.bw
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