

Institute of directors in new zealand law company business partnership essay

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4. 0 Introduction.

The fact that the "Mauritian CA 2001 and the Securities Act have been enthused from that of New Zealand"[1], and the Mauritian CCG has been implemented after the king Report of South Africa, a comparative analysis of the laws governing company directors and ethical ethos between those countries urges. New Zealand and South Africa being two divergent countries have been chosen due to the fact that ethical practices and laws regulating companies between these two countries differ. New Zealand which has a strong legal system governing company directors, is said to have a clean record in issues relating to corruption as compared to South Africa which is fraught with corruption and has a rather lenient legal system. According to the "CPI 2012, New Zealand is ranked 1st as the least corrupt country"[2] as compared to "South Africa where corruption is quite high." [3] In order to have an indication about the Mauritian legal system and its ethical base, comparison as to contributing factors of ethical issues relating to company director between those 2 countries will be carried out. This will in turn be followed with recommendations to improve the legal framework and ethos of Mauritius in the following chapter. Since Mauritian CA has not been subject to major amendments since its implementation, the Mauritian CCG has been introduced to add a considerable dose to the roles and responsibilities of company directors. The laws regulating company directors on ethical perspective in Mauritius has already been put forward in previous chapters, thus this chapter will straightforward start with the laws and regulators that exist in New Zealand followed by that in South Africa. Thus, this chapter

focuses on different legislations, codes and commission and programmes in matters relating to ethics and company directors.

4. 1 New Zealand Legal framework

After a careful examination, it is found that New Zealand has a strong legal framework in issues regulating directors which makes the ethos of business practices in New Zealand quite healthy. Just like the Mauritian CA, the New Zealand CA 1993 provides for duties of directors under S131. It is to be noted that "unlisted companies in New Zealand is not backed with a code of corporate governance"[4]but its CA however compensate this vacuum in the sense that the "New Zealand CA provides the basic corporate governance structure for companies by covering areas of director's duties and shareholders' rights under common law extensively." It has also been mentioned that to further strengthen its legal and ethical framework, "New Zealand is backed up with legislations such as the Securities Act 1978, Insolvency Act 2006, the Financial Reporting Act 1993, Fair Trading Act 1986, Commerce Act 1986."[5]

4. 2 NZX LISTING RULES and the securities commission

One of the reason as to why New Zealand has come out with flying colours as the least corrupt country is because it has taken the initiative of reviewing its legal system after International corporate scandals. "Significant changes such as the code that the NZX drafted (Corporate Governance Best Practice Code) and the amendments made to the listing rules to bring them in line with the corporate governance principles were noticeable." It has been further mentioned that "core amendments such as ensuring independence

of the board and establishing audit committee were highlighted among other amendments made to the listing rules.”[6]These amendments were mandatory for New Zealand to adapt to international changes. The clean record regarding corruption that New Zealand gained, can be due to the “codes of ethics that the NZX code incorporated.” It has also been stated that “the New Zealand’s Securities Commission published its corporate governance in New Zealand- Principles and Guidelines, of which nine principles were issued with the belief that when company directors abide to, it will help in promoting best practices of corporate governance in New Zealand.”[7]The first principle that the Securities Commission set out is, directors should uphold high ethical standards while exercising their function in the company. As such a code of ethics should be developed in order to tackle unethical behaviours among corporate individuals. Moreover, it also provides that “issuers should disclose how they have achieved the principles in their annual reports and if the principles are not compatible with those of the NZX code, reasons should be provided.”[8]Other principles that the commission set out are board composition, board committees, remuneration, risk management, auditors, shareholder relations and stakeholder interests. However, just like the Mauritian CCG, the Principles and Guidelines set out by the New Zealand Commission Securities is not binding.

4. 3 New Zealand Centre for Business Ethics and sustainable development

“This institution promotes ethical business by placing research and education at the core centre of the organisation.” Moreover, “it aims at safeguarding interests of stakeholders and upholding the principles and

guidelines of corporate governance set by Securities Commission by making sure that directors promote ethical standards.”[9]

4. Institute of Directors in New Zealand (Inc)

“This institute aims at providing directors with knowledge of governance in order to uphold highest level of best business practices.”[10]“It has adopted a code of practice for directors as well as other best-practice statements which enclosed guidelines of corporate governance for directors uphold high integrity in exercising their duties.”[11]The code however recommends independent and non-executive directors so as to ensure independence and transparency in the company.

4. New Zealand Serious Fraud Office (SFO)

Unlike Mauritius, “New Zealand does not have an Independent Commission Against Corruption.” “However, New Zealand has other bodies such as the SFO to deal with matters of frauds.”[12]Issues such as bribery, corruption, gratifications are covered by the SFO. If a director is guilty of such offences, the latter would be subject to the SFO.

4. measures to combat bribery in New Zealand

In an attempt to fight corruption, “New Zealand became party to the OECD convention Against Bribery of Foreign Public Officials in International Business Transactions.” It has further been mentioned that “New Zealand has signed the United Nations Convention Against Corruption.”[13]In addition, laws such as the Crime Act 1961and the Secret Commissions Act 1910 further strengthen the notion of combating corruption. It should be

noted that community contribution plays an important role in combating unethical behaviours and corruption in New Zealand.

South Africa Legislations

Coming on to South Africa, "South African companies have been more prone to unethical practices due to the lack of well defined ethical principles regulating corporate activities." [14] In line with such issues, "amendments such as the South African's company Act 1973 were established, where later the legislators came up with the latest version of the company's act namely the Company Act 2008." [15]

The Companies Act

"The South African CA 2008, provides for novelty such as classification of companies, accountability and transparency, director's conduct, business rescue, solvency and liquidity" [16] "The CA 2008 under its chapter 2, part F, provides for governance of companies." It has been further mentioned that this section not only "provides for a standard of directors' duties and liabilities but also encompasses a partial codification of common law duties." [17] Section 76 of CA 2008 provides for standards of directors conduct. S 7 of CA 2008 provides for validation of the Act while S 20(4) provides for validity of company's actions. S162(2) deals with the application to declare director delinquent or under probation. S165(2) provides for derivative actions. These sections show that the enactment of the new CA can prove costly to the directors since it attaches greater weight in relation to their duties. Moreover, chapter 9 of the Act, more precisely S213-S217 provides for criminal liability of which directors can be held responsible. It is

to be noted that "the new CA provides for criminal liability in more detail than the previous CA." [18] However, "the South African CA incorporated the doctrine of "Business Judgement Rule" whereby directors can be exempted from liability under specific instances." [19]

South Africa Code of Corporate Governance:

In order to keep on with the changing pace of business environment, South Africa has revised its code several times as compared to Mauritius whereby the Mauritian CCG has not been revised after its implementation. "The first South African code of corporate practices and conduct (King Code I) was implemented by Mervyn King in 1994 which was revised in 2002" [20] and the King Code II was brought forward. "Recommendations covering areas of transparency, discipline, fairness, independence, social responsibility, and accountability were made in order to strengthen corporate governance in South Africa." [21] It should be noted that "corporate governance and business ethics were of issue when drafting the king code II." [22] The second report highlights the concept of governance of ethics under 5. 2. "A third review of the king report was mandatory due to the enactment of the new CA 2008 and also due to major challenges in international business." [23] This brought about the King Code III which came into operation in 2010. "The new code added a new concept of ' Practice Note' whereby duties and responsibilities of directors are provided in times of mergers, acquisition, and amalgamations." [24] Moreover, "the King Code III proposes a stakeholder inclusive approach whereby directors' duties are extended to a larger audience including shareholders and stakeholders interests." [25] Similar to the Mauritian CCG, the King Code in South Africa does not have a binding

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character. However, failure to abide by the provisions of the code would translate in breaching the duties of skill and care.

Institute of Directors in Southern Africa (IoDSA)

Just like in Mauritius, we have the MIOD, South Africa has institution such as the IoDSA to strengthen the link of corporate governance and ethics. The IoDSA is a non-profit institution which help business endeavours to uphold their duties with high level of effectiveness and integrity.

Ethics Institute of South Africa

It is a non-profit organisation whereby its prime objective is to foster ethics and to eliminate unethical practices. "It offers training, advisory services on ethics management, corruption prevention, professional ethics and ethics committee to combat corruption." [26]

Business Unity South Africa (BUSA)

BUSA is an institution which ensures that businesses are operating effectively in order to promote the economic development of South Africa. "BUSA which emphasises on integrity, responsibility, respect, and fairness, strives at eliminating corruption and provides for e-training courses." [27]

National Anti-Corruption Forum (NACF)

The NACF is a forum set up to fight corruption, to foster integrity and to raise awareness in South Africa. "The NACT is a fusion of three sectors; namely the civil society, business and government of which it advises the three sectors on matters of corruption." [28]