



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

FACULTY OF LAW

**THE CORPORATE SOCIAL RESPONSIBILITY OF COMPANIES AND ITS EFFECTS
ON COMPETITIVE ADVANTAGE – A COMPARATIVE ANALYSIS OF BOTSWANA
AND SOUTH AFRICA**

By

Namie Mosa Modiri

12144780

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The undersigned certify that they have supervised the student dissertation entitled 'The corporate social responsibility of companies and its effects on competitive advantage – a comparative analysis of Botswana and South Africa' submitted in partial fulfilment of the requirements of the Master of Laws (LLM) in Mercantile Law (Coursework) at the University of Pretoria

SUPERVISOR

DATE

CHAIRPERSON

DATE



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

RELEASE FORM

NAME OF AUTHOR

NAMIE MOSA MODIRI

DISSERTATION TITLE

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With the signature below I, Namie Mosa Modiri, hereby declare that the work I present in this dissertation is based on my own research, and that I have not submitted this dissertation to any other institution of higher education to obtain academic qualification.

MS. N.M. MODIRI 12144780

DATE

ABSTRACT

South Africa and Botswana, as developing countries, continue to face various challenges in relation to a respectable and sustainable corporate governance. The multi-faceted objectives of both countries' competition regimes appear to pose grave challenges for the competition authorities, who ought to balance contending public interest considerations in developing a competition friendly character. The essential foundation of competition law, both in South Africa as well as Botswana, lies in the suggestion that competition produces social benefits which are misplaced in a monopoly, and that an effective form of legal regulation ought to decrease, or abolish, any patent injury thus far and improve the wellbeing of society. This suggestion puts forth an amount of intricate difficulties which ought to be tackled if competition law is to be evaluated and understood. These include: what exactly is meant by the word 'competition'? What are the types of societal harm that occur as a result of competition? What legal mechanisms ought to be adopted to reduce such societal harm and ensure sustainable development within competition?

Competition is vital to an efficiently functioning market economy. Companies are essentially economic representatives and, tentatively, their decisions are made with competitive factors in mind, but it is also a fact that companies also play a role in society in that their activities have a bearing on environmental and social circumstances. Based on the assumption that the competitive advantage of CSR has been exploited by various companies, I consider whether competition laws are widespread enough to include the regulation of CSR as a competitive tool, I essentially inquire into whether competition and CSR are compatible enough to be linked together.

It is apparent that companies aiming to integrate sustainable development goals in their plans and policies essentially face a Catch-22 between the risks tangled in global competition and their wish to behave in socially responsible ways. The analysis of the connection between competition and CSR shines a light on the restrictions of the dominant theoretic agenda regarding CSR.

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Chapter 1

Introduction

South Africa and Botswana, as developing countries, continue to face various challenges in relation to a respectable and sustainable corporate governance. The multi-faceted objectives of both countries' competition regimes appear to pose grave challenges for the competition authorities, who ought to balance contending public interest considerations in developing a competition friendly character.¹

Although South Africa has had some method of competition regulation since the 1950s, not much came from it until the end of apartheid and the arrival of democracy which brought about a different perspective, essential changes to the political structure and compelled a new economic guideline.² With the introduction of democracy, South Africa implemented a novel constitutional framework that is favorable to the idea of mandatory obligations upon companies. Despite this, ever since 1994 South Africa has been led by a voluntary agenda concerning corporate social responsibility which has had an impact on the competitiveness of companies within the country. Botswana, on the other hand, only implemented the regulation of competition efficiently in 2009 through the enactment of the Competition Act.³

In the brief period since the South African Competition Act came into operation in 1998, it can be said that the accomplishments of the South African competition authorities have implanted a view within the public described as a 'competition culture' which is respected by all.⁴ However, Lewis argues that this does not imply that we live and work in an environment in which competition is recognized as one of society's fundamental values.⁵ With the announcement of its macro-economic policy framework in 2010, The New Growth Plan, the government of South Africa reiterated its pledge to using competition

¹ J Bleazard 'Pigeon-holed by precedent: versus substance in the application of South African competition law' Building New Competition Law Regimes: Selected Essays 2013 85.

² P Sutherland 'Chapter 12: South Africa: the Ansac Saga and the Enforcement of Per Se Prohibited Horizontal Restrictive Practices in South Africa' 2013, 255.

³ Act 17 of 2009.

⁴ D Lewis 'Enforcing Competition Rules in South Africa: Thieves at the dinner table' 2013 264.

⁵ D Lewis (note 4 above) 264.

law and policy to further public interest objectives.⁶ Identifying that anti-competitive practice ‘ultimately implies lower output, investment and employment’, the policy document highlights promoting competitiveness in vital sectors such as agriculture, mining and tourism as a method of promoting a wide range of development within the private sector resulting in job creation.⁷

The South African Competition Act essentially provides for an assessment of competition in relation to various values and socio-economic objectives relative to South Africa, however it must be noted that the Act must comply with those values enshrined in the Constitution and which are absolute and the application of these rights must also be secured against other, equally important foundational social values.⁸

The essential foundation of competition law, both in South Africa as well as Botswana, lies in the suggestion that competition produces social benefits which are misplaced in a monopoly, and that an effective form of legal regulation ought to decrease, or abolish, any patent injury thus far and improve the wellbeing of society.⁹ This suggestion puts forth an amount of intricate difficulties which ought to be tackled if competition law is to be evaluated and understood. These include: what exactly is meant by the word ‘competition’? What are the types of societal harm that occur as a result of competition? What legal mechanisms ought to be adopted to reduce such societal harm and ensure sustainable development within competition?

The customary understanding of the main aim of business, and of companies, involves the maximization of profit. Milton Friedman famously argued that ‘there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud’.¹⁰ Companies tend to believe that their duty in respect of public interest merely consists of complying

⁶ Available at: <http://www.economic.gov.za/communications/51-publications/151-the-new-growth-path-framework> (Accessed 22 June 2016).

⁷ J Bleazard (note 1 above) 81-82.

⁸ D Lewis (note 4 above) 265.

⁹ J Agnew ‘Competition Law’ 1985 1.

¹⁰ D Lewis (note 4 above) 266.

with the law. Complying with the law is thus purely a cost for companies. Directors and compliance officers give little consideration to the fact that their deeds may harm the public interest.¹¹

Business in the present century does not exist in isolation and forms part of a larger system that needs to learn to achieve its objectives in a style that not only indicates compliance with legal frameworks but further ensures sustainable development within the society in which it exists. This, I believe, is the individuality of decent businesses and companies namely those that offer the finest in goods and services to the society and more so do it with honour. The proper regulation of Corporate Social Responsibility (hereinafter referred to as 'CSR') as a competitive tool could thus set Africa, and more particularly Botswana and South Africa, above the rest of the world in respect of the distinctiveness of their businesses and companies and their development of larger societal goals.

At its most basic level, CSR 'involves a company going beyond its strict legal obligations to take into account the impact its business has on stakeholders other than its shareholders'.¹² However, apart from settlement on what CSR might necessitate there remains very little harmony on how to define it mainly due to the fact that CSR is a concept that is persistently developing. Although CSR is already a rising field in South Africa and Botswana with companies committing considerable monetary and human resources to societal, financial and environmental development, if a company's sustainability intentions are to ensure lifelong worth to both the company as well as the community, sustainability ought to be enforced into a company's mission in a manner that balances with the company's aims and in a manner that is competently regulated.¹³ I therefore consider in this paper that regulation ought to be contained in a country's Competition Act to ensure accountability for statements by companies. The compulsory incorporation of sustainability provisions in company policies is expected to gain an advantage of

¹¹ R Hinckley 'How Corporate Law Inhibits Social Responsibility: A Corporate Attorney Proposes a 'Code for Corporate Citizenship' in State Law' 2002.

¹² J Howard 'Half-Hearted Regulation: Corporate Social Responsibility in the mining industry' *The South African Law Journal* 131 2014 at 13.

¹³ T Galpin, J Whittington & G Bell 'Is your sustainability strategy sustainable? Creating a culture of sustainability' (2015) *Corporate Governance* Volume 15 Issue 1 at 7.

providing worth to the general public as well as holding companies responsible for their competitive tactics.

Competition laws relate directly to companies and their economic engagements, it is therefore questionable that CSR has not been directly recognized as a form of competition and regulated efficiently in terms of the Competition Act in both Botswana and South Africa.¹⁴ Noting this, in this paper I consider whether and to what extent CSR gives effect to the demands of a competitive advantage in Botswana as well as in South Africa. I further analyze the current regulation of CSR as a practice of competition in both South Africa and Botswana taking into consideration the various practices and marketing activities that companies engage in, to boost their competitive advantage, that amount to a possible exploitation of the concept of CSR.

I thus begin, in Chapter 2, by exploring what CSR is. This entails a thorough discussion of the conceptualization of CSR as a competitive tool as well as a view into how CSR ought to be defined in an African context. Building on my discussion of CSR in Chapter 2, in Chapter 3 I discuss the constitutional and overarching legislative framework within which competition is required to occur in South Africa and Botswana with specific regard to the Competition Acts of both countries.

Performance differences between companies can be attributable to the unique competitive resources, competitive capabilities and core competencies owned, developed, protected and deployed by each individual company. In Chapter 4, I evaluate the current state of accommodation of CSR in competition in South Africa and Botswana focusing particularly, on the larger scale companies who have the greatest impact on the society and its prospects of successful sustainability.

Based on the assumption that the competitive advantage of CSR has been exploited by various companies, I conclude, in Chapter 5 by considering whether competition laws are widespread enough to include the regulation of CSR as a competitive tool, I essentially inquire into whether competition and CSR are compatible enough to be linked together.

¹⁴ I Rogers & N MacKenzie 'Hitting up head office' *Without Prejudice* March 2015 at 28.

Chapter 2

What is CSR? The conceptualization of the concept of CSR as a competitive tool

Corporations are not responsible for the world's problems but if companies identify the social problems they are equipped to resolve and from which they can gain competitive benefit; addressing these issues by creating shared value will lead to self-sustaining solutions.¹⁵

Introduction

CSR is a rising field in South Africa as well as Botswana with companies committing considerable amounts of monetary and human resources to societal development.¹⁶ Despite the rising importance of CSR internationally, inadequate research in Africa has been led on CSR as an evolving field of investigation in companies and their impact on societal and sustainable development.¹⁷

CSR is increasingly seen as a matter of importance in numerous countries, communities, and businesses all over the world with various employees, government representatives, academics and non-governmental organizations anticipating which role they have to play in regard to CSR.¹⁸ Over the recent years, there have been various initiatives internationally that place emphasis on the improvement, growth and abuse of CSR. Although CSR initiatives may vary in their aims and intentions, the general purpose is to inspire businesses, governments and people to have a more socially responsible attitude to the way they operate in order to help them handle environmental as well as social change.¹⁹ Companies have consequently implemented CSR motivated mission

¹⁵ K Demetriades & C Auret 'Corporate social responsibility and firm performance in South Africa' *South African Journal for Business Management* 2014 45(1) at 3.

¹⁶ L Patel & H Mushonga 'Corporate Social Responsibility and development: a study of stakeholder perspectives of listed South African companies' *Africanus* 44 (2) 2014 at 50.

¹⁷ L Patel & H Mushonga (note 16 above) 51.

¹⁸ T Lambooy, 'Legal Aspects of Corporate Social Responsibility' (2014) 30(78) *Utrecht Journal of International and European Law* 1 at 1.

¹⁹ R Tench, B Jones & W Sun, eds. *Critical Studies on Corporate Responsibility, Governance and Sustainability, Volume 6: Communicating Corporate Social Responsibility: Perspectives and Practice*. Bradford, GBR: Emerald Group Publishing Ltd, 2014 page 1.

statements and plans, and are exposing their efforts through sustainability reports, which however, are not verified by any regulatory authority.²⁰

What is CSR?

In understanding the role of CSR in competition law, it is important that we clearly define this concept of CSR. I therefore begin in this chapter by exploring what CSR is. This entails a thorough discussion of the conceptualization of CSR as a competitive tool as well as a view into how CSR ought to be defined in a context relative to Africa.

When considering the potential of CSR to society as a whole today and the resilient role that CSR plays for companies, it is imperative to appreciate what drives CSR, the foundations of the concept and the methods relevant to companies and participants in implementing the contents of the notion of CSR.²¹ An appreciation of the relationship between CSR and the law is also of great importance to states in supervising developments and responsibilities of companies.²²

Despite the fact that there is no definition of the concept of CSR, it is generally understood by many companies to simply mean “doing more than what is required by the law”, therefore going above and beyond mere submission to legal rules and principles in order to achieve the support of consumers under the pretense of the company playing its part in making the world a better place.²³ With this in mind, one could then conclude that standards and customs of a legal personality are broadly used to lead various acts and the broadcasting of such acts in the name of CSR. Companies tend to use international and national law to uphold their CSR-led deeds and society as a whole tends to observe the activities of companies with human rights as entrenched in their respective Constitutions in mind.²⁴

²⁰ T Lambooy (note 18 above) at 1.

²¹ K Buhmann ‘Corporate social responsibility: what role for law? Some aspects of law and CSR’ *Corporate Governance: The international journal of business in society* 2006 Vol. 6 Iss 2 at 189.

²² K Buhmann (note 21 above) 189.

²³ K Buhmann (note 21 above) 189.

²⁴ K Buhmann (note 21 above) 189.

Various views have surfaced in the attempt to define CSR. As stated by Frederick,

'social responsibility in the final analysis implies a public posture toward society's economic and human resources and a willingness to see that those resources are used for broad social ends and not simply for the narrowly circumscribed interests of private persons and firms'.²⁵

In keeping with this view, Carroll further opined that 'for CSR to be accepted by the conscientious business person, it should be framed in such a way that the entire range of business responsibilities is embraced'.²⁶ Another elaborate opinion for CSR came from Porter & Kramer who recommended that CSR ought to be cast as a chance for the success of a company.²⁷ In their view, companies have to examine projections for CSR in a manner comparable to their main business decisions in order for CSR to be novel as well as for it to provide a competitive advantage.²⁸

Principally, companies ought to relieve the stiffness between the corporate world and the general public by ascertaining relevant social issues that can be addressed and adding a social aspect to the significance of the company.²⁹ Demetriades and Auret sternly believe that the most considered CSR arises when a company includes this social aspect, thus centralizing social influence in their strategy.³⁰ This is necessary to ensure that CSR is not used to merely ease the conscience of directors and decrease the profit margins of a company. At the end of the day, what must always be borne in mind is the fact that the business of companies is commerce, and exhausting the pretense of CSR for otherwise profit driven actions is equivalent to fraud.³¹

²⁵ W Frederick, J Post & K Davis 'Business and Society: Corporate Strategy, Public policy, Ethics' (1992) at 60.

²⁶ A Carroll 'Corporate Social Responsibility: Evolution of Definitional Construct' *Business & Society* 28(3) at 289.

²⁷ M Porter & M Kramer 'Strategy & Society' *Harvard Business Review* December 2006 at 88.

²⁸ K Demetriades & C Auret (note 15 above) 3.

²⁹ K Demetriades & C Auret (note 15 above) 3.

³⁰ K Demetriades & C Auret (note 15 above) 3.

³¹ K Demetriades & C Auret (note 15 above) 2.

Sustainability has become the tactical authoritative of the current time.³² Although CSR and sustainability have developed into two vital slogans in the organization of companies today, the rationalization behind them is not clearly understood by all.³³ Various commerce leaders as well as academics identify that sustainability is imperative to the long-term victory of companies as well as the public at large in which they operate. However, the methods in which companies can situate themselves to be more sustainable has remained ambiguous.³⁴ As a result, the increasing consciousness in the significance of sustainability frequently interprets into a clutter of irrational sustainability-centered events that tend to be detached from the company's policy and do not make a significant social impact nor reinforce the company's lasting competitiveness.³⁵ Companies today need universal tactics to sustainability if they are to be competitive for a lasting duration.³⁶

CSR in South Africa

The basis of CSR in South Africa mainly stems from its history of apartheid, injustices and inequality.³⁷ With this in mind, it does not come as a surprise that in South Africa, there is largely a cry for a major transformative attitude to CSR in that there is a necessity to grow organizations and associations that give toward social fairness, environmental safety and poverty mitigation. There is generally a distressed need for CSR in South Africa to go further than offering the usual sustainable development ideal and for the reflection of corporate liability through guideline.³⁸

³² T Galpin, J Whittington & G Bell 'Is your sustainability strategy sustainable? Creating a culture of sustainability' (2015) *Corporate Governance* Volume 15 Issue 1 at 1. Furthermore, a recent global survey of more than 1 500 corporate executives found that a majority of respondents believe sustainability is becoming increasingly important to business strategy, and that the risks of failing to act on sustainability are growing.

³³ K Demetriades & C Auret (note 15 above) 1.

³⁴ T Galpin, J Whittington & G Bell (note 32 above) 2.

³⁵ T Galpin, J Whittington & G Bell (note 32 above) 7.

³⁶ T Galpin, J Whittington & G Bell (note 32 above) 2.

³⁷ Corporate Social Responsibility in Africa: Definition, Issues and Processes - Royal Holloway – 28th November 2012.

³⁸ Royal Holloway (note 37 above).

The government, in South Africa, acts as the leading driver of CSR. This can be determined from its expressed national aim to redress poverty as well as the progress log jam that was created by the apartheid administration.³⁹ The notion of a democratic developmental state considers the government to be the front-runner in financial and societal development with the engagement of residents as well as other communal participants such as the private sector.⁴⁰ The government has shaped CSR in the South African context through facilitating the growth of a CSR policy framework, enabling CSR through enticements for instance tax reimbursements, the distribution of resources, the distribution of relevant information and providing guiding principles on content of various policies.⁴¹ The government additionally has the onus to validate CSR through accolades which inspire accountable business and implement responsible business practice by punishing corporate recklessness.⁴²

Regardless of the rising impact of CSR in South Africa and internationally, an inadequate amount of research has been led on CSR as an evolving area of analysis and its involvement in societal and sustainable conservational development consequently leading to difficulty in its presentation and operation.⁴³ When dealing with CSR in a South African context, the point of departure guiding its interpretation is found in *The King Report on Corporate Governance for South Africa 2009* (hereinafter referred to as '*The King Report*').⁴⁴ One principle contained in *The King Report* particularly condenses the essence of CSR in South Africa as follows:

"In the African context these moral duties find expression in the concept of *Ubuntu* which is captured in the expression '*uMuntu ngumuntu ngabantu*', 'I am because you are; you are because we are'. Simply put, *Ubuntu* means humaneness and the philosophy of *Ubuntu* includes mutual support and

³⁹ Constitution of the Republic of South Africa Act 108 of 1996.

⁴⁰ L Patel & H Mushonga (note 16 above) 58.

⁴¹ Royal Holloway (note 37 above).

⁴² Royal Holloway (note 37 above).

⁴³ L Patel & H Mushonga (note 16 above) 50.

⁴⁴ Available at: <http://www.iodsa.co.za/?kingIII> (Accessed 9 August 2016).

respect, interdependence, unity, collective work and responsibility. It involves a common purpose in all human endeavor and is based on service to humanity (servant leadership).⁴⁵

Oddly, in a South African context, CSR remains knowledgeable through ideologies of duty and not doctrines of law. Although compliance with the law is compulsory and a responsibility that cannot be ignored by any citizen, Kirby remarks that the duty to safeguard that a company is conducting itself in a socially and ethically responsible manner is an onus that goes beyond the law into the territory of what is considered to be adequate action by that company with regard to its social background.⁴⁶

In the world we live in, consumers primarily exert pressure on businesses to show their honourable commitment to worldly issues ranging from climate control to human rights harms across their resource network as well as in their supply channels. In South Africa, one of the prevalent stores, Woolworths, has been in trouble with the Boycott, Disinvestment and Sanctions campaign due to their supply channel associations to Israel in light of the violations of human rights in Palestine.⁴⁷ It is also interesting that Woolworths had to retract a statement in 2010 as a result of consumer stress when they deal with the demonstration of Christian consumers troubled by the exclusion of religious magazines in their stores.⁴⁸

The concept of CSR in South Africa is yet to develop and this will require the government's preparedness to face trials and deal with them in a style that makes provision for CSR to be valuable to the economy.⁴⁹ CSR developments in the country have moved beyond simply manufacturing quality goods to the improvement of education in functioning areas, the making of jobs, financial aid as well as the creation of health care services.⁵⁰ Large

⁴⁵ N Kirby 'What's really right? Corporate Social Responsibility as a legal obligation in South Africa' Werksmans Available at: <http://www.werksmans.com/legal-briefs-view/whats-really-right-corporate-social-responsibility-legal-obligation-south-africa/> (Accessed 8 May 2016).

⁴⁶ N Kirby (note 45 above).

⁴⁷ McWilliams A & Siegel D 'Creating and Capturing Value: Strategic Corporate Social Responsibility, Resource-Based Theory, and Sustainable Competitive Advantage' *Journal of Management* vol 37 No. 5, September 2011 at 1491.

⁴⁸ McWilliams A & Siegel D (note 47 above) 1491.

⁴⁹ G Essop 'perceptions of target communities regarding corporate social responsibility in South Africa' *Commonwealth Youth and Development* Vol 10 no 2 2012 at 49.

⁵⁰ G Essop (note 49 above) 50.

companies tend to run near residential areas and thus the business waste harshly affects the inhabitants of these areas. Companies therefore tend to desire to assist the societies in terms of schooling, conservational upliftment and clinics to pay damages for the undesirable effects experienced by the inhabitants.⁵¹

CSR in Botswana

In Botswana the notion of CSR is better encapsulated in the concept of '*botho*' which is understood to infiltrate human life as a whole. This concept is therefore of great significance in the analysis of the company background in Botswana. In general terms, a person is considered to have *botho* when they behave in a fit, proper and moral manner towards others in the community.⁵²

In 2010, Botswana saw it fit to implement a Vision 2016 policy established by the Presidential Task Force with the aim of ensuring a better Botswana by 2016, the year Botswana celebrates its 50 years of Independence from Britain.⁵³ In this Vision 2016 document, the task force formally identified the importance of the concept of *Botho* not only in relation to societal life but also with regards to the economy as well as companies. The document particularly states in its preamble that economic growth ought to exemplify *botho* in all its plans, strategies and agendas. It further states that growth ought to exemplify the principles which are implied by *botho* namely that Botswana has a duty to circumvent what it describes as "jobless growth", "voiceless growth", "ruthless growth", "futureless growth".⁵⁴ From this, what can be ascertained is that growth ought to produce employment providing all individuals within the community with a protected means of support, it must further be accompanied by the involvement, liberation and equality of all relevant and affected parties.⁵⁵ Botswana further ought to ensure that growth incorporates

⁵¹ G Essop (note 49 above) 50.

⁵² J Gaier 'Social Responsibility of Corporations and Business Ethics: The role of moral theory and *Botho*' *Botswana Institute of Administration and Commerce* 40.

⁵³ This Policy is available at: http://www.vision2016.co.bw/tempimg/media/mediac_102.pdf (Accessed: 15 July 2016).

⁵⁴ J Gaier (note 52 above) 42.

⁵⁵ Botswana Government 1997:59-60.

all racial clusters, is supplemented by reduced salary inequalities as well as a decline in poverty and is sustainable in the long term.⁵⁶

CSR and *botho* refers to the fact that a company has an ethical obligation towards society. It refers to viewing the corporate sphere in a different manner than merely as crooks that target society by extracting profits from the community and putting nothing back.⁵⁷ Companies should rather be viewed being in partnership with the community whereby they reap and sow back into the communities.⁵⁸ Companies are a vital aspect of the development and upliftment of the lives of the communities that they work in. This therefore implies that where a company does not endeavor to fulfil its moral duty within a community, they have committed a moral injustice against that particular community.⁵⁹

The utilitarian theory is one that is essential in discussing the CSR of companies in Botswana. The main motivation for this theory is the community or society which can be seen in different versions.⁶⁰ Under the heading of utilitarianism we can find the notion of 'act utilitarianism' which determines the moral appropriateness of a deed on the foundation of whether its consequences result in good for the community. The same is applicable in relation to companies in that a deed by a company is deemed to be right or wrong on the basis of the penalties of that particular deed.⁶¹

When relating this utilitarian theory to the CSR of companies in Botswana, the crucial inquiry is how the commerce of companies ought to be engaged in as opposed to the commerce of companies currently. In terms of this theory one would say that commerce should be pursued in a manner in which the laws and rules that safeguard the interests of interested parties are observed. Therefore meaning that commerce is considered to be morally correct when it is implemented in a manner whereby its results benefit the majority of the people interested.⁶²

⁵⁶ J Gaier (note 52 above) 42.

⁵⁷ J Gaier (note 52 above) 44.

⁵⁸ J Gaier (note 52 above) 44.

⁵⁹ J Gaier (note 52 above) 44.

⁶⁰ J Gaier (note 52 above) 48.

⁶¹ J Gaier (note 52 above) 48.

⁶² J Gaier (note 52 above) 49.

Conclusion

Various theories of CSR have managed to develop together with the increasing power of globalized business for the past decades. Consumers around the world have acknowledged business consciences as a means of avoiding the negative profitmaking activities that aggravate conflict in the evolving world.⁶³ The prospective of CSR is principally maximized by companies where they identify that these CSR initiatives will add to their revenues as well as their image. In this regard, Husted and Allen argue that CSR should therefore be seen as somewhat more affiliated to ‘Corporate Social Strategy’ due to the fact that companies will generally be more improved by producing economic and social value if they take account of social action agendas in their tactical decision-making procedures.⁶⁴ The victory of CSR company strategy is placed upon the concurrent shareholder and interested party advantages.⁶⁵

More likely than not, the objective of success tends to contrast with the social liabilities of a company and the features of a company likely show that it would rather focus on the comforts of its shareholders as opposed to those of the society at large. CSR could play an important role in development in an altering global background where there is a large amount of increasing pressure from consumers for companies to be more reactive to development tasks and to be more responsible to society at large. A more subtle tactic is needed that echoes the realities of the societies in which companies function and the connection between the objectives of companies and communities.⁶⁶ Despite this, the reality is that several companies see CSR for the purpose of a respectable annual report as opposed to the purpose of making a positive impression on society. Patel and Mushonga remark in this regard that as long they profit more and use the most minimal finances to illustrate their humanity on their reports, they are not concerned.⁶⁷

⁶³ M McCartin ‘Complex conflict in the Democratic Republic of Congo: Good governance a prerequisite of Corporate Social Responsibility peace building’ 59.

⁶⁴ M McCartin (note 63 above) 62.

⁶⁵ M McCartin (note 63 above) 62.

⁶⁶ L Patel & H Mushonga (note 16 above) 61.

⁶⁷ L Patel & H Mushonga (note 16 above) 51.

Chapter 3

The legislative framework within which competition is required to occur in South Africa and Botswana

Introduction

Competition law is a topic that always draws debate and disagreement. In addition to the proceedings that take place before the courts and tribunals, the differences of opinion within the competition law realm tend to include a broad collection of topics.⁶⁸ Most popular of these topics being the recurrent opinions on the relevance, application and content in the economic development of a specific country.⁶⁹ Although there are people who appreciate an economic view and tend to view competence and consumer welfare as the ideal goals of competition law in any jurisdiction, another point of view is that competition law ought to be used to avoid the unforgivable attainment and abuse of economic power.⁷⁰ I am of the opinion that the primary aim of competition law ought to be to safeguard and encourage productivity as well as accountability in the business environment.

The internationalization of markets and the unsettled business atmosphere have amplified the level of competition in the business industry, this places pressure on all companies to acquire and increase their competitive advantages.⁷¹ Similarly, due to international competition, industrial developments as well as the varying needs of consumers across the world, competitive standards are endlessly changing. In order to continue being viable, companies ought to be capable of adjusting to fresh burdens from the market and the society they work around. Intrinsically, I am of the opinion that CSR can be used as tactical means of improving the competitiveness of companies.⁷²

⁶⁸ P Brooks 'Redefining the objectives of south African competition law' XXXIV CILSA 2001 295.

⁶⁹ P Brooks (note 68 above) 295.

⁷⁰ P Brooks (note 68 above) 295.

⁷¹ E Venter, P Turyakira & E Smith 'The influence of potential outcomes of corporate social responsibility engagement factors on SME competitiveness' *South African Journal of Business management* 2014 45(4) 33.

⁷² E Venter, P Turyakira & E Smith (note 71 above) 33.

The elementary objective of competition law is to capitalize on social wellbeing by avoiding or rectifying specific market mistakes. Competition law thus tries to accomplish this by eradicating activities that confine competition and would then result in ineffective consequences. Competition law is used to fight anticompetitive and exploitative activities in order to expand the markets and keep them open and broad.⁷³ In this regard, it is essential that competition laws develop in line with the growing demands of the market. Competition laws generally police the independent behavior of dominant firms which results in leading firms abusing their position in order to gain advantages they would not have otherwise gained in a more competitive market and in the opinions of many, the drafters of numerous Competition Acts have unintentionally failed to provide for a feature of regulation that has encountered growing attention universally; the concept of CSR.⁷⁴

Before discussing the role of CSR in competition law it is imperative that we identify and analyze the constitutional and overarching legislative framework within which competition is required to occur both in South Africa as well as Botswana.

Legislative Framework in South Africa

The Competition Act⁷⁵ came into effect in 1999 and essentially introduced the prohibition of several activities by companies, namely restrictive horizontal practices, restrictive vertical practices, and abuses of a dominant position by a firm or company. The Act provides that any allegation or suspicion of engagement in these prohibited activities by a company is to be scrutinized by the Competition Commission,⁷⁶ a self-regulating and neutral body tasked with the duty to, *inter alia*, investigate and assess alleged prohibited activities⁷⁷ and adjudicated by the Competition Tribunal, a body empowered to adjudicate in relation to any conduct prohibited in terms of Chapter 2 or 3 of the Competition Act⁷⁸

⁷³ G Robb & S Roberts 'Guest editorial: understanding economic regulation and competition in a developing economy: introduction to special issue' *Journal of Economic and Financial Sciences* | JEF | September 2014 7(S) 501.

⁷⁴ D Blitchitz 'Corporate law and the Constitution: towards binding human rights responsibilities for corporations' *South African Law Journal* 780.

⁷⁵ Act 89 of 1998.

⁷⁶ Section 19 of the Competition Act 89 of 1998.

⁷⁷ Section 21 of the Competition Act 89 of 1998.

⁷⁸ Section 27 of the Competition Act 89 of 1998.

by determining whether prohibited conduct has occurred and if so impose a remedy provided for in Chapter 6 of the Competition Act.⁷⁹

South Africa's history of Apartheid directly opposed the essential principles of a market focused economy. This was due to the fact that a large amount of the apartheid laws prevented a majority of the citizens in South Africa from participating in the country's economy by placing limitations on commercial proprietorship as well as the free association of persons. The reservations of jobs for a certain kind and class of people as well as the involuntary exclusion of certain business people from the dominant commercial spheres was also a justifying factor for a market-oriented economy. These apartheid laws contributed worryingly to the development of a partial and characteristically non-competitive corporate setting.⁸⁰

The Competition Act was therefore introduced 'to promote and maintain competition in the Republic order, to promote the efficiency, adaptability and development of the economy,⁸¹ to provide consumers with competitive prices and product choices,⁸² to promote employment and advance the social and economic welfare of the people,⁸³ to expand opportunities for South African participation in world markets and recognize the role of foreign competition⁸⁴ and to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.⁸⁵

The Competition Act in South Africa follows an outline which is comparable to that of other countries. An understanding of the Act ought to be in a method that is relative to the Constitution,⁸⁶ and that gives weight to the Act's specified purposes while also obeying and fulfilling South Africa's international law responsibilities.⁸⁷ Even though those construing and applying the Act are allowed to appreciate it with regards to foreign and

⁷⁹ D Prins & P Koornhof 'Assessing the nature of competition law enforcement in South Africa' VOLUME 18 (2014) DOI: <http://dx.doi.org/10.4314/idd.v18i1.7> 140.

⁸⁰ P Brooks (note 69 above) 297.

⁸¹ Section 2(a) of the Competition Act 89 of 1998.

⁸² Section 2(b) of the Competition Act 89 of 1998.

⁸³ Section 2(c) of the Competition Act 89 of 1998.

⁸⁴ Section 2(d) of the Competition Act 89 of 1998.

⁸⁵ Chapters 1 & 2 of the Competition Act of the Republic of South Africa Act 89 of 1998.

⁸⁶ Section 1 of the Competition Act

⁸⁷ Section 1(2) of the Competition Act 89 of 1998.

international law,⁸⁸ the Act further places an obligation to adhere to a specific interpretative practice which is proposed to safeguard that the Act assumes a fundamentally South African emphasis and taste. This can be determined since there is an amount of precisely recognized policy objects which the Act is envisioned to accomplish. This attitude is particularly fixed by the introduction to the Act in which it is stated, amongst other things, that the economy ought to be available to bigger ownership by a larger amount of South Africans, that a well-organized, competitive economic sphere necessitates matching the benefits of labors, bosses and customers as well as an emphasis on growth and expansion, that all South Africans ought to be granted a comparable chance to partake impartially in the general economy, that customers ought to have the freedom to access marketplaces where they can without restrictions choose the worth and diversity of various goods and services, that all South Africans ought to be capable of contending efficiently and successfully in worldwide markets and finally that the allocation of commercial ownership ought to keep within the realms of public interest.⁸⁹

Brooks submits that in addition to the goals recognized in section 2 of the Act, the authoritative language contained in section 1(2) validly instructs the competition authorities to consider commercial, social justice, progressive and revolutionary matters when evaluating the matters that come before them.⁹⁰ The Act further provides for supplementary concerns which operate as probable exculpatory elements as the basis on which exclusions can be allowed as well as separate public interest concerns that necessitate attention in the specific instance of mergers.⁹¹

Upon finding a company to have been involved in the restricted practices by the Competition Tribunal, an administrative fine may be enforced on that specific company subject to various circumstances.⁹² This fine may be determined and imposed either one-sidedly by the Competition Tribunal or through the use of a consent settlement

⁸⁸ Section 1(2) & Section 1(3) of the Competition Act 89 of 1998.

⁸⁹ Section 2 of the Competition Act 89 of 1998. See further P Brooks (note 69 above) 301.

⁹⁰ Section 1(2) of the Competition Act 89 of 1998. See further P Brooks (note 69 above) 305.

⁹¹ Sections 4(1) (a), 5(1), 8(d) and 12A of the Competition Act.

⁹² Section 59 of the Competition Act.

determined between the accused company in question and the Competition Commission and subsequently permitted and imposed by the Competition Tribunal.⁹³ A number of elements ought to be engaged with when shaping the severity of the punishment including, the nature, duration, gravity and extent of the contravention, any loss or damage suffered as a result of the contravention, the behavior of the respondent, the market circumstances in which the contravention took place, the level of profit derived from the contravention, the degree to which the respondent has co-operated with the Competition Commission and Competition Tribunal and finally whether the respondent has previously been found in contravention of the Competition Act.⁹⁴

Prins & Koornhof correctly yield to the view that the landscape of the Competition Act is conspicuously socio-economic. In light of this the remedies available to the competition regulators should also be regarded in a similar manner, and consequently be viewed for the provision of evenhanded relief as opposed to harshly punishing wrongdoers of the Act.⁹⁵

Regardless of one's opinion to competition law, it ought to be accepted that laws of each jurisdiction are a phenomenon whose importance and context is subjective to that particular jurisdiction or country with specific regard to prevalent political privileges and socio-economic partialities and constraints. The progression of competition law in South Africa and, more predominantly, the goals it is envisioned to accomplish, reveals this.⁹⁶

Legislative Framework in Botswana

Compared to South Africa, Botswana only managed to enforce some form of regulation of competition law in 2009 when it implemented its Competition Act.⁹⁷ The Act essentially creates a Competition Authority which is in charge of the deterrence of, and restoration

⁹³ Section 58 of the Competition Act.

⁹⁴ Section 52 of the Competition Act. See also D Prins & P Koornhof (note 79 above) 140.

⁹⁵ D Prins & P Koornhof (note 79 above) 142.

⁹⁶ P Brooks (note 69 above) 296.

⁹⁷ Competition Act 17 of 2009.

for, anti-competitive activities in the economy as well as the elimination of restrictions of open play of competition in the marketplace.⁹⁸

The Act also establishes a governing body for the Competition Authority, namely the Competition Commission, who is responsible for the direction of the affairs of the Competition Authority and whose judgments may be taken on appeal to the High Court by a distressed individual or party.⁹⁹ Similar to South Africa's Competition Act, the Act presents the notion of 'market inquiries' which implies that the Competition Authority may conduct a market review to conclude whether any aspect of the applicable area or a contract avoids, confines or misrepresents competition for the resource or attainment of goods or services in Botswana.¹⁰⁰ Should the Competition Authority subsequently find that hostile effects for competition are apparent in an area or contract, it may strive to rectify these problems through its authority as enclosed in the Act.¹⁰¹ Should it find that the effects cannot be rectified in terms of the Competition Act, or that the effects are the consequence of alternative law or governing methods, the Competition Authority then has the obligation to make suggestions to the Minister for additional action to offer an operative remedy.¹⁰²

The Act, like that of South Africa, affords for the absolute prevention of specific activities and practices which may be remedied after inquiry by the Competition Authority. The Act specifically prevents specific agreements amongst contending companies particularly those concerning activities to the effect of price fixing, market distribution, bid engineering, limits on manufacturing or trade and rigorous activities such as the formation of horizontal and vertical agreements to the level that the arrangements involve resale price preservation.¹⁰³

⁹⁸ Section 4 of the Competition Act.

⁹⁹ Section 67 of the Competition Act.

¹⁰⁰ Section 49 of the Competition Act.

¹⁰¹ Section 51 of the Competition Act.

¹⁰² Section 51 of the Competition Act. See also E Mugabo 'New Competition Regime Launched in Botswana' *Without Prejudice* May 2011 47.

¹⁰³ E Mugabo (note 102 above) 48.

Conclusion

Competition laws relate directly to economic doings, it is therefore questionable that CSR has not been recognized as a form of competition and regulated in terms of the Competition Act as well as the Companies Act in both Botswana and South Africa.¹⁰⁴ Sustainability has become the tactical authoritative of the current time.¹⁰⁵ Although CSR and sustainability have developed into two vital slogans in the organization of companies today, the rationalization behind them is not clearly understood by all.¹⁰⁶ Various commerce leaders as well as academics identify that sustainability is imperative to the long-term victory of companies as well as the public at large in which they operate. However, the methods in which companies can situate themselves to be more sustainable has remained ambiguous.¹⁰⁷ As a result, the increasing consciousness in the significance of sustainability frequently interprets into a clutter of irrational sustainability-centered events that tend to be detached from the company's policy and do not make a significant social impact nor reinforce the company's lasting competitiveness.¹⁰⁸ It is clear that companies today need universal tactics to sustainability if they are to be competitive for a lasting duration.¹⁰⁹

¹⁰⁴ I Rogers & N MacKenzie (note 14 above) 28.

¹⁰⁵ T Galpin, J Whittington & G Bell (note 13 above) 1. Furthermore, a recent global survey of more than 1 500 corporate executives found that a majority of respondents believe sustainability is becoming increasingly important to business strategy, and that the risks of failing to act on sustainability are growing.

¹⁰⁶ K Demetriades & C Auret (note 15 above) 1.

¹⁰⁷ T Galpin, J Whittington & G Bell (note 13 above) 2.

¹⁰⁸ T Galpin, J Whittington & G Bell (note 13 above) 7.

¹⁰⁹ L Patel & H Mushonga (note 16 above) 50.

Chapter 4

The current state of accommodation of CSR in competition in South Africa and Botswana

Introduction

The mounting appreciation of evolving socio-economic and conservational emergencies threatening humanity has led to the appeal for all sectors, particularly companies, to partake in safeguarding a maintainable future for all.¹¹⁰ In the outlook of a company, these cries have steered to the progression of CSR, corporate citizenship and additional associated notions which demand that companies, as juristic entities, conduct themselves in a manner similar to that of any respectable resident functioning towards the improvement of the society through involvement in various activities to better the lives of all.¹¹¹

It is my contention that for companies to endure the hard-hitting competition brought by internationalisation and free markets, they have to clasp CSR as a tactic for sustainable lucrativeness. A company cannot merely be steered by the battle to yield the greatest funds and assets, instead it ought to take into consideration matters of the environment and humanity in addition to revenue. In this manner, companies will have social responsibilities despite the fact that CSR is not formally constituted by the competition laws of various countries.

Although there is a variance of opinion with regards to the foundation of CSR, currently there is an existing necessity for socially accountable exercises by companies due to the fact that the anthropological drive to survive has obligated the social order to pay intense attention to the activities of companies.¹¹² Companies are no longer at liberty to come to resolutions of their liking as the daily resolutions of a company director are expected to be swayed by the demands and desires of the community. Company activities and

¹¹⁰ UN WCED 1987.

¹¹¹ N Eccles, V Pillay & D de Jongh 'Correlates of corporate accountability among South Africa's largest listed companies' Southern African Business Review Volume 13 Number 1 2009 22.

¹¹² W Wankie 'Corporate Purposes Beyond Shareholders' Interests: The Social and Ethical Dimension' at 78.

practises that are not aligned with the community's benchmark of decent and respectable are expected to be robustly challenged by the public. This simply means that companies cannot disregard the effect of their activities on the environment to any further extent.¹¹³

A company is viewed as a commercial anxiety that is possessed by several people doing commerce in various nations and continents and thus having a number of trading licenses.¹¹⁴ The company thus has an obligation to the public in its totality. This poses a number of questions including how companies and the assortment of stakeholders they engross define the notion of CSR as well as what part the view point of an improvement of a nation plays in endorsing CSR.

Against the current background of financial globalisation and the evolution of intercontinental dealings and events, companies are often condemned for chasing profits at the cost of societies, extending disproportions, generating riches to the advantage a small segment of the population, and conveying the ecological damage which occurs as a result of their undertakings on prospective generations.¹¹⁵ Performance differences between companies can essentially be attributable to the unique competitive resources, competitive capabilities and core competencies owned, developed, protected and deployed by each individual company. In this chapter, I evaluate the current state of accommodation of CSR in competition in South Africa and Botswana focusing particularly, on the larger scale companies who have the greatest impact on the society and its prospects of successful sustainability.

CSR in SA Companies

In the face of the mounting importance of CSR in South Africa, inadequate inquiry has been steered on CSR as an evolving ground of analysis in improvement education and its impact on communal and sustainable ecological development.¹¹⁶

¹¹³ W Wankie (note 112 above) 80.

¹¹⁴ J Gaier 'Social Responsibility of Corporations and Business ethics: The Role of Moral Theory and Botho' *Botswana Institute of Administration and Commerce Journal* 48.

¹¹⁵ L Patel & H Mushonga (note 16 above) 51.

¹¹⁶ L Patel & H Mushonga (note 16 above) 51.

In South Africa, the history of apartheid regrettably set the foundation for the public and financial segregation of black persons. Certain trades were the primary leaders of economic expansion within the country, however they were assembled on a drifting labour structure and the extreme manipulation as well as misuse of the manual labour of black people.¹¹⁷ It was not until a later time that the economy expanded however economic proprietorship and governing stayed in the hands of white people, thus ensuring the stark criticism of South African companies for their part in producing and preserving an unreasonable social imperative.¹¹⁸

In the South African context, CSR is demarcated as:

‘a heterogeneous practice which is auctioned by an enterprise to integrate social, environmental, ethical and human rights concerns in their companies’ operations and core strategy in close collaboration with their stakeholders with the aim to improve community well-being whilst meeting the companies’ economic objective’.¹¹⁹

This therefore means that receivers of CSR observed CSR as moving in when government was incapable of meeting the needs of those in the communities.¹²⁰ There are principally three different attitudes to CSR in this regard. First, an old-fashioned conventional attitude is offered which is in support of open market entrepreneurship with a partial part for companies in social and ecological development. This attitude relies solely on moral precepts and is customarily associated with benevolence.¹²¹ A second attitude is more similar to a statist attitude to development which is of the opinion that CSR is purely an endeavour by the entrepreneurial class to designate the waged class. In this regard, even though the assistances of CSR are recognised, the key apprehension is to bring about transformation to the existing state of affairs and thus making CSR a place of struggle.¹²² Finally, many interested parties and company agents slant in the direction of a more practical and rational attitude that perceives CSR as vital to realising

¹¹⁷ L Patel & H Mushonga (note 16 above) 51.

¹¹⁸ L Patel & H Mushonga (note 16 above) 51.

¹¹⁹ L Patel & H Mushonga (note 16 above) 51.

¹²⁰ L Patel & H Mushonga (note 16 above) 54.

¹²¹ L Patel & H Mushonga (note 16 above) 60.

¹²² L Patel & H Mushonga (note 16 above) 60.

the broader communal, economic and ecological development objectives of the society.¹²³

CSR in the South African setting has mainly been moulded by the attitude of a progressive state and the several plans and statutory tools that were produced to, *inter alia*, encourage employment impartiality, Broad-based Black Economic Empowerment, ecological supervision and mineral source expansion.¹²⁴ Even with the development of CSR wits in South Africa, the findings of a study led by Patel and Mushonga proposes that there is an absence of precision about the description of the term as a range of attitudes arose from the study findings with diverse participants taking dissimilar viewpoints based on their thoughts. However notwithstanding these opposing views, there was agreement that companies have a crucial part to play in encouraging communal, economic and ecological development.¹²⁵

CSR in Companies in Botswana

In the case of Botswana the old-fashioned notion of “*Botho*” can be adopted in dialogs on CSR. Batswana comprehend *botho* to be infiltrating the entire human lifecycle. This thus suggests the significance and applicability of the notion to the corporate setting in Botswana.¹²⁶ Luckily, the Botswana's Vision 2016 committee has appreciated the prominence of this notion not only to communal life but also in respect of the economy and commerce. This policy document particularly and essentially states that economic development ought to exemplify *Botho* in its plans, guidelines and programmes. It further states that growth ought to follow those doctrines within the notion of *Botho* namely that all companies must evade "jobless growth" in that development ought to generate work and provide all citizens with a protected means of support, all companies must evade "voiceless growth" in that development ought to be supplemented by full involvement, enablement and democracy, all companies must evade "ruthless growth" in that development ought to be supplemented by reduced income disproportions as well as a

¹²³ L Patel & H Mushonga (note 16 above) 60.

¹²⁴ L Patel & H Mushonga (note 16 above) 60.

¹²⁵ L Patel & H Mushonga (note 16 above) 61.

¹²⁶ J Gaier (note 114 above) 40.

decrease in poverty, companies must evade "rootless growth" in that development ought to be all-encompassing of all cultural groups and finally, all companies must evade "futureless growth" in that development ought to be maintainable in the long term.¹²⁷

Botswana is regularly presented as an illustration of good authority in administrative and commercial terms and its post-colonial commercial act is usually viewed as a marvel.¹²⁸ Despite the fact that there are a number of optimistic things to state about Botswana, a cut underneath the exterior of this desirable record divulges substantial poverty, an weakened parliament, and a presiding party that has leaned towards designing a political empire so as to subsist politically.¹²⁹

Conclusion

It is unmistakable that there is an agreement that companies do have social accountabilities, however one comes to at this universal agreement, the actual concern is how these widespread accountabilities can be lodged within the current legal competitive framework.¹³⁰

Economic aims cannot be chased in segregation from added objects and ideals. The setting that gives meaning and urgency to company purposes is constantly fluctuating therefore conditions will give directive as to which value must be the main concern at any particular time. Nonetheless, it must also be recognised that competition does not inevitably necessitate exceptionality.¹³¹ Wankie argues that if we view a company as based on a continually fluctuating plane with socio-economic issues as ranking issues, we can come to the conclusion that profit expansion can exist in synchronisation with added socially advantageous goals. Directors of companies will thus, have selections in

¹²⁷ Botswana Government 1997:59-60. See also J Gaier (note 114 above) 42.

¹²⁸ M Mogalakwe 'Botswana Exploding the Myth of Exceptionality' *Africa Insight* Vol 38 (1) – June 2008 105.

¹²⁹ M Mogalakwe (note 128 above) 105.

¹³⁰ W Wankie (note 112 above) 80

¹³¹ W Wankie (note 112 above) 82.

the confines of the prevalent socio-economic circumstances as to which issue necessitates urgent attention.¹³²

Commerce in the current age functions in a time of transformation and it therefore needs to prove that it is proficient to the level of growth and self-reform required to survive professionally in the novel conditions. Despite the fact it is commonly acknowledged that revenue is the primary measure by which to measure the victory or failure of a company, it ought to be known that lucrativeness is not the lone measure. Profitability ought to be chased in the confines modelled by other duties and responsibilities.¹³³ Prosperous companies are thus, those that go further than the legally delegated duties, to stabilise the short term concern alongside the long term concerns. This harmonising is better implemented within an assisting atmosphere in which there is a suitably articulated structure for companies and major company procedure resolutions echo the visions of this structure.¹³⁴

If a company's sustainability resolves are to provide long-lasting value to the company as well as the social order, sustainability ought to be enforced into a company's tactic in a manner that provides a sense of balance with the company's goals and general action. Business in the current century is part of a greater structure and needs to learn to perform in a manner that not only indicates compliance. This, I believe, is the uniqueness of good businesses and companies: those that bring the best in products and services to the market and further do it with a fresh and honourable integrity. The proper regulation of CSR as a competitive tool could thus set Africa, and more particularly Botswana and South Africa, above the rest of the world in respect of the distinctiveness of their businesses and companies and their development of larger societal goals.

¹³² W Wankie (note 112 above) 82.

¹³³ W Wankie (note 112 above) 86.

¹³⁴ W Wankie (note 112 above) 86.

Chapter 5

Are CSR and Competition Compatible?

Competition is vital to an efficiently functioning market economy.¹³⁵ Companies are essentially economic representatives and, tentatively, their decisions are made with competitive factors in mind, but it is also a fact that companies also play a role in society in that their activities have a bearing on environmental and social circumstances.¹³⁶ Based on the assumption that the competitive advantage of CSR has been exploited by various companies, I conclude, in Chapter 5 by considering whether competition laws are widespread enough to include the regulation of CSR as a competitive tool, I essentially inquire into whether competition and CSR are compatible enough to be linked together.

From the perspective of a company, the content of CSR communication is inclusively of four aspects.¹³⁷ Firstly, that companies ought to make it known to the public at large what CSR viewpoints they have, this could include CSR values, views, cultures, traditions, perceptions and formations. Secondly, companies ought to inform the public at large about their CSR programmes and advantages thus meaning they ought to clarify the motivations and purposes of those programmes and justify their actions. The importance of their actions needs to be conveyed to the correct onlookers. Thirdly, companies further need to ensure that the CSR programmes and initiatives are represented and executed and that the effects of those actions are determined and documented. It is also vital that this process is shared and should be conveyed to the public or stakeholders. Finally, companies ought to predominantly address known stakeholder and public worries and issues in relation to structural behavior, activities or performance in that they need to identify the issues of these concerns and keep investors and the public informed of how those issues are tackled.¹³⁸

¹³⁵ Quairel-Lanoizelee 'Are competition and corporate social responsibility compatible? The myth of sustainable competitive advantage' *Society and Business Review* vol 6, No 1, 2011 at 77.

¹³⁶ Quairel-Lanoizelee (note 135 above) 77.

¹³⁷ Ralph T *et al* 'Critical Studies on Corporate Responsibility, Governance and Sustainability, Volume 6: Communicating Corporate Social Responsibility: Perspectives and Practice' 2014 at 6.

¹³⁸ Ralph T *et al* (note 137 above) 6.

Despite CSR becoming an important tactic for firms to use in proceeding on a sustainable path, the role of CSR for firm performance is still poorly understood.¹³⁹ CSR activities in highly competitive commerce likely have a larger effect on the relationship between marketing competencies and firm performance than similar actions in commerce with less competitive concentration.¹⁴⁰ In this regard, it has been concluded that while CSR can enhance product variation and also create a barrier to entry, it ought to have an impartial effect on profit, thus signifying that the firm cannot produce an “abnormal return” or sustainable competitive advantage from this activity.¹⁴¹

Robert Hinkley proposes that competition law be changed in a manner so as to create individual responsibility for ensuring that the quest for profit does not injure the public interest.¹⁴² In order to pave the way for such an amendment, we ought to contest the myth that making profits and shielding the public interest are commonly exclusive goals. Hinkley suggests that if companies are forced to respect the public interest while they make money, business people will determine how to ensure that both factors are achievable.¹⁴³

In order to determine whether competition and CSR are even compatible, it is vital to examine the benefits and shortcomings of CSR. With regard to the benefits of CSR, it can be noted that CSR ensures the improved financial performance of companies that practice it thus meaning there is a connection between social responsibility practices and performance due to the fact that the notion in relation to CSR is that companies can be lucrative at the same time reducing their negative impacts on the public.¹⁴⁴ CSR also boosts brand image and reputation in that customers are habitually drawn to brands and

¹³⁹ Kemper J *et al* ‘Competition-motivated Corporate Social Responsibility’ *Journal of Business Research* 66 (2013) at 1954

¹⁴⁰ Kemper J *et al* (note 139 above) 1955.

¹⁴¹ McWilliams A & Siegel D ‘Creating and Capturing Value: Strategic Corporate Social Responsibility, Resource-Based Theory, and Sustainable Competitive Advantage’ *Journal of Management* vol 37 No. 5, September 2011 at 1491.

¹⁴² Hinkley R ‘How Corporate Law Inhibits Social Responsibility: A Corporate Attorney Proposes a ‘Code for Corporate Citizenship’ in State Law’ *Published on Saturday, January 19, 2002 by [Business Ethics: Corporate Social Responsibility Report](#)*.

¹⁴³ Hinkley R (note 142 above).

¹⁴⁴ A Waiweru ‘Corporate Responsibility in Cross-Border Businesses’ *Journal of Contemporary Management Volume 3* 2006 90.

companies with good statuses in CSR associated areas.¹⁴⁵ CSR further ensures increased efficiency and quality as company determinations to improve working environments, decrease environmental impacts or intensify employee participation in decision making would lead to increased productivity as well as a lessened rate of errors.¹⁴⁶ Studies have shown that there is a rising market for goods and services of companies observed to be socially responsible and accountable, though companies must principally fulfil customers crucial buying norms such as price, value, protection and suitability, studies have shown a mounting interest in buying due to other criteria such as 'child labour free' clothing, lower environmental effect and a lack of genetically modified ingredients.¹⁴⁷ CSR provides for the better capacity to draw and retain employees due to the fact that, along with salaries and promotions, people aspire to work for a company that is in harmony with their own values and principles.

Various arguments have been advanced when dealing with the shortcomings of CSR. Some have argued that it disturbs the policy of profit maximization and this will affect investors and further argued that society will be at an advantage if it requested companies to only make the most of their competences and thus lower costs.¹⁴⁸ CSR additionally has the prospective to upsurge the price of the finished item due to the fact that businesses escalate prices as a method of obtaining back some of the sum spent on CSR and as a result consumers of the item in the end suffer amplified prices. It can further be argued that many company managers and directors lack the understanding, insight, abilities and patience to deal with and decipher society's problems particularly since social actions cannot be measured. Some also argue that businesses at present have an excessive amount of supremacy and increased action in the social field will further increase their powers to remold society to their way of thinking.¹⁴⁹

A small amount of attention is afforded to the restrictions and predicaments postured by the clash between CSR and competition.¹⁵⁰ Large global companies may act in a socially

¹⁴⁵ A Waiweru (note 144 above) 90.

¹⁴⁶ A Waiweru (note 144 above) 91.

¹⁴⁷ A Waiweru (note 144 above) 93.

¹⁴⁸ A Waiweru (note 144 above) 94.

¹⁴⁹ A Waiweru (note 144 above) 94.

¹⁵⁰ F Quairel-Lanoizelee (note 136 above) 78.

irresponsible way and consequently not only disrepute discourse but also dishonor the concept of CSR while they preclude competition, which is a vital element for efficient CSR execution.¹⁵¹

With the progressively strong competition, it is unexpected that administration discourse and CSR writings do not consider the trials modelled by the competitive atmosphere.¹⁵² Strong competition amongst large global companies utilizes strong burden on costs, resulting in strategies of externalization, containing subcontracting to countries with less constricting social and environmental laws. Companies therefore play on the disparities between diverse economic areas to benefit from countries and regions where local political authorities are frail and, therefore, where the companies can enforce their own terms and conditions.¹⁵³

It is apparent that companies aiming to integrate sustainable development goals in their plans and policies essentially face a Catch-22 between the risks tangled in global competition and their wish to behave in socially responsible ways.¹⁵⁴ The analysis of the connection between competition and CSR shines a light on the restrictions of the dominant theoretic agenda regarding CSR.

In a setting of strong global competition, Francoise Quairel-Lanoizelee remarks that CSR strategy is in fact a simple “traditional enlightened strategy” which either answers to the market predicted demands or can alter this demand through novelties in goods or services.¹⁵⁵ The investors’ prospects on matters of public interest hardly ever lead to a straight plea from customers, but these prospects interrogate the sincerity of companies.¹⁵⁶

In this context I believe that there is a very thin line with regards to whether competition and CSR are in fact compatible and whether CSR can be regulated in the Competition Acts of both Botswana as well as South Africa. CSR is already a rising field in South Africa

¹⁵¹ Quairel-Lanoizelee F (note 136 above) 78.

¹⁵² Quairel-Lanoizelee F (note 136 above) 78.

¹⁵³ Quairel-Lanoizelee F (note 136 above) 79.

¹⁵⁴ Quairel-Lanoizelee F (note 136 above) 80.

¹⁵⁵ Quairel-Lanoizelee F (note 135 above) 95.

¹⁵⁶ Quairel-Lanoizelee F (note 135 above) 95.

as well as Botswana with companies committing considerable monetary and human resources to societal, financial and environmental development.¹⁵⁷ If a company's sustainability determinations are to afford lasting worth to both the company and society, sustainability must be imposed into a company's strategy in a manner that balances with the company's objectives and overall operation.¹⁵⁸ I am of the opinion that this therefore needs to be regulated by the Competition Act as accountability for statements by companies is required. I believe provisions such as the prohibition against the abuse of dominance as well as the prohibited horizontal and vertical practices slightly encourage a culture of CSR however a stricter implementation of CSR is necessary and has a role to play in all aspects of competition and could be included in merger evaluations, as a further public interest ground, and could have a role to play in the context of administrative fines as a mitigating factor. The compulsory incorporation of sustainability in company policies is expected to gain an advantage of providing worth to the general public as well as holding companies responsible for their competitive tactics.

¹⁵⁷ L Patel & H Mushonga (note 16 above) 50

¹⁵⁸ T Galpin, J Whittington & G Bell (note 13 above) 7.

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