Evaluating the social and ethics committee: Is labour the missing link? (1)

Monray Marsellus Botha
BLC LLB LLM BCom (Hons) MCom LLD, Advanced Diploma in Insolvency and Practice, Advanced Diploma in Corporate Law, Advanced Diploma in Alternative Dispute Resolution
Associate Professor and Head: Department of Mercantile Law, University of Pretoria

OPSOMMING

Evaluasie van die sosiale- en etiekkomitee: Is arbeid die verlore skakel?

Die Maatskappywet 71 van 2008 het groot veranderinge in die Suid-Afrikaanse korporatiewe landskap teweeggebring. Hierdie veranderinge het nie net te doen met korporatiewe bestuur nie maar ook met korporatiewe sosiale verantwoordbaarheid. Die rol van maatskappye in die gemeenskap het verander. Hulle moet nie slegs aandeelhouers se belange in ag neem nie, maar ook die belange van ander belangegroepe soos werknemers. Werknemers se stem en deelname in maatskappye is belangrike aspekte wat veral tans onder die vergrootglas is. Die Maatskappywet verleen aan werknemers spesifieke regte rakende deelname in maatskappye. Hierdie regte is duidelik vervat in en spruit voort uit verskeie bepalings in die Wet. Die Maatskappywet bevat ook ander innovasies wat die sosiale- en etiekkomitee insluit. Die funksies van hierdie komitee sluit nie net aangeleenthede soos sosiale en ekonomiese ontwikkeling in nie maar ook arbeids- en diensaangeleenthede. Die vraag is dus of die verlore skakel in die komitee nie die stem en deelname van werknemers is nie. Hierdie bydrae ondersoek die aspekte wat deur hierdie komitee gemonitor word en ondersoek die vraag of werkersdeelname op hierdie komitee versterk behoort te word ten einde ŉ effektiewe stem aan hulle te verleen in aangeleenthede wat hulle ten nouste raak.

1 INTRODUCTION

The Companies Act[1] brought about an overhaul of the corporate law landscape in South Africa as it not only deals with corporate governance issues, but also highlights a contemporary approach[2] where not only the interests of shareholders must be taken into account but also that of other stakeholders in the company.[3]

Many writings have seen the light on the shareholder primacy, enlightened shareholder and stakeholder theories and there are various opposing views on the question in whose interest a company should be managed.[4] If one considers how

1 71 of 2008.
2 Havenga "The social and ethics committee in South African company law" 2015 *THRHR* 285.
3 *Ibid.*
4 See, eg, Esser "The protection of stakeholder interests in terms of the South African King III Report on corporate governance: An improvement to King II?" 2009 *SA Merc LJ* 188; Esser and Delport "Shareholder protection philosophy in terms of the Companies Act 71

continued on next page

corporate law has progressed and the impact of globalisation on how businesses conduct themselves, it is clear that the developments in the South African corporate law landscape had to keep abreast of international developments in the field. Issues such as what constitutes a company, the separateness of a company and "to whom does the corporation account"[5] are important when regard is had to such a contemporary approach of company law. In this context, the role companies play can be summarised as follows:

> "In modern society, companies are no longer role players in the private business sector. They feature in all aspects of social, political and economic life . . . They are expected to have a social conscience. The debate about corporate regulation is largely dominated by references to 'corporate governance' and corporate social responsibility', with the need for economic analysis of corporate law issues having been largely accepted . . . It is widely accepted that modern companies have obligations that stretch beyond their primary duty of profitmaking in the interests of shareholders and other stakeholders when circumstances so demand."[6]

A hybrid corporate governance system is followed in South Africa. It is partly legislated and partly voluntary[7] which is evident from the fact that the duties of directors are not only regulated in terms of the common law but also by legislation.[8] The Companies Act brought about various changes to the corporate law landscape in South Africa. This is evident from section 7, in terms of which the purposes of the Act are to:

> "(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;
> (b) promote the development of the South African economy by –
> (i) encouraging entrepreneurship and enterprise efficiency;
> (ii) creating flexibility and simplicity in the formation and maintenance of companies; and
> (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
> (c) promote innovation and investment in the South African markets;
> (d) reaffirm the concept of the company as a means of achieving economic and social benefits;
> (e) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;
> (f) promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;
> (g) create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;

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of 2008" 2016 *THRHR* 1 15; Miles "Company stakeholding" 2004 *Company Lawyer* 56; Dine "Company law developments in the European Union and the United Kingdom: Confronting diversity" 1998 *TSAR* 248; Bone "Legal perspectives on corporate responsibility: Contractarian or communitarian thought?" 2011 *CJLJ* 277 286; Millon "Theories of the corporation" 1990 *Duke LJ* 201 220 and Elkin "A review of the stakeholder theory" 2007 *Ot Man Grad R* 25.

5 Bone 2011 *CJLJ* 284.

6 *Ibid.*

7 Esser and Delport 2016 *THRHR* 1.

8 *Idem* 1–2.

(h) provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;

(i) balance the rights and obligations of shareholders and directors within companies;

(j) encourage the efficient and responsible management of companies;

(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and

(l) provide a predictable and effective environment for the efficient regulation of companies."

It is clear from the purposes of the Act that good governance is essential to the business of corporations and that good governance[9] is "essentially about effective leadership", that is to say, the "ethical values of responsibility,[10] accountability,[11] fairness[12] and transparency"[13] are the foundations of such leadership, as well as "moral duties that find expression in the concept of Ubuntu".[14]

The Companies Act contains provisions dealing with directors' general duties that are comparable to the common-law duties of directors and, in essence, creates a semi- or *quasi*-codification of their common-law duties.[15] Directors should promote the interests of shareholders and embrace wider responsibilities: the process should be complementary, not contradictory. The legislature follows the enlightened shareholder approach in which the interests of shareholders remain central, but other stakeholders' interests must be taken into account.[16] The Companies Act is interpreted to be inclusive of other interests and thus enhances a

9 Institute of Directors in Southern Africa *King report on Governance for South Africa – 2009* (2009) 10.

10 Responsibility entails that the board "should assume responsibility for the assets and actions of the company and be willing to take corrective actions to keep the company on a strategic path, that is ethical and sustainable" (Institute of Directors *King report III* 21).

11 Accountability entails that the board "should justify its decisions and actions to shareholders and other stakeholders" (*ibid*).

12 Fairness entails that the board "should ensure that it gives fair consideration to the legitimate interests and expectations of all stakeholders of the company" (*ibid*).

13 Transparency entails that the board "should disclose information in a manner that enables stakeholders to make an informed analysis of the company's performance, and sustainability" (*ibid*).

14 *Idem* 10. Ubuntu can be defined as "that condition which goes beyond mere friendship and proceeds to a willing and unselfish cooperation between individuals in society, with due regard for the feelings of others and not taking into account incidental social differences. Ubuntu exhibits the following discernible components: (i) individual-centered – (a) internal, namely human dignity, steadfastness; (b) external, namely compassion, honesty, humaneness, respectfulness; (ii) community-centred, namely adhering to familial obligations, charitableness, cooperation, group solidarity, social consciousness" (De Kock and Labuschagne "Ubuntu as a conceptual directive in realising a culture of effective human Rights" 1996 *THRHR* 114 120). See also *King report III* 60 where Ubuntu is defined as follows: "A concept which is captured in the expression 'uMuntu ngumuntu ngabantu', 'I am because you are; you are because we are'. Ubuntu means humaneness and the philosophy of ubuntu includes mutual support and respect, interdependence, unity, collective work and responsibility."

15 McClennan "Directors' fiduciary duties and the 2008 Companies Bill" 2009 *TSAR* 184. See also Esser and Delport 2016 *THRHR* 1–2.

16 *King report II* 452. Delport *Henochsberg on the Companies Act 71 of 2008* (2011) 46(5).

pluralist approach.[17] The legitimate interests and expectations of various stakeholders being taken into account in the decision-making process requires a balancing act to be achieved by the board of directors.[18] Therefore, companies must also consider and comply with employee/labour legislation, amongst other things, that deals with health and safety at work, equal opportunities, and so forth.

The changing role of companies as members of society cannot be overstated. Corporate law traditionally focused on shareholder wealth creation, but developments in corporate law and corporate governance jurisprudence indicate that the policy of shareholder primacy is questioned: shareholders are no longer regarded as the only stakeholders, or even the most important stakeholders in companies. Recent theories and models of companies indicate that shareholder primacy is no longer the preferred or appropriate model.[19] The pluralist approach maintains that, as stakeholders, employees have an important role to play in advancing the interests of the company as a whole, which is demonstrated in the various reports on corporate governance in South Africa and the Companies Act. Companies, in making decisions, should take note of the protection and rights granted to employees by other enactments, including the rights afforded to employees by the Companies Act itself.

One of the inventions of the Companies Act is the so-called social and ethics committee. This committee is quite controversial and problematic and, thus far, not many academic writings have appeared on this topic. It therefore requires a study of its own. Due cognisance must be taken of the role that companies play not only in the social and economic spheres of society in which they operate, but also when taking other stakeholders such as employees into consideration when conducting their business. It has been argued that companies should provide more participation rights to employees. One of the arguments (which emerges from the discussion below) is that the legislator should have granted employees a "voice" on the social and ethics committee. Botha articulates the importance of employee participation rights as follows:

> "Corporate governance has become important, not only because employees need protection from exploitation as a result of the imbalance of power between employers (companies) and employees, but also because employees have become very important stakeholders in companies. Participation rights are newly granted by which companies are held accountable to act in a responsible and ethical manner.

17 Esser and Delport 2016 *THRHR* 17 proposes that when s 76(3)(b) [a director acts in the best interests of the company] is interpreted, an inclusive approach should be followed where the interests of various stakeholders are considered on a case-by-case basis. They add that "[i]n the end, the decision must be in the best interests of the company, even if it is to the detriment of the shareholders" (*ibid*).

18 Balancing is a complicated bargaining process involving all the stakeholders in the corporation (Stiglitz "Quis custodiet ipsos custodes?" 1999 *Challenge* 26 44). If this process is successful, trust can be created between the company and all its internal and external stakeholders. This is also true in organisations other than companies. Because communication is important, companies (and other organisations) should stimulate dialogue with all the stakeholders to enable them to enhance or restore confidence with stakeholders, remove tension between the company (organisation) and stakeholders or relieve pressure. This can be achieved by means of formal processes such as annual general meetings and cooperation with trade union representatives. The role of informal processes, such as direct contact, websites, press releases or advertising, should also be considered (Rossouw "Balancing corporate and social interests: Corporate governance theory and practice" 2008 *Afr J Bus Ethics* 28 29).

19 Esser and Delport 2016 *THRHR* 15.

> In this scenario new corporate law and a corporate governance regime no longer focuses on shareholder wealth creation and accountability to the company itself: in its decision-making process the board should take into account the legitimate interests and expectations of stakeholders in making decisions in the best interest of the company. The emphasis is on inclusivity: the inclusive approach recognises employees of the company, as well as other stakeholders such as customers and the community in which it operates . . . The new focus in corporate law and the corporate governance regime on employees' legitimate interests and expectations, *prima facie*, is promising for employee voice to be heard in the workplace."[20]

The case was made even prior to the present Companies Act that the need existed for a model of statutory-supported employee participation, which would give employees a greater say in organisations. It was evident from international experience that there are benefits for employees as well as employers stemming from such a system, in that increased access to information and participation in decisions could "empower workers and democratise workplace relations, while employers would gain from improved industrial relations and more efficient and flexible workplaces".[21] It is evident from the Companies Act (at least at face value) that employees are granted a greater voice by means of employee participation. It is also important to note that before the enactment of the Companies Act, company law, to a large extent, was unconcerned with employees: the reason was in support of the principle that directors owe their duty to the company. Labour law and company law have, over centuries, been considered and applied as separate fields of the law. However, this is not a true reflection of the contemporary state of affairs. Each field of law directly and indirectly impacts on the other and, although they are separate disciplines, they are relevant to each other: there is some overlap as far as subject matter and the stated goals of each area of the law are concerned.

A closer look at the Companies Act reveals that new rights are created by the Act with regard to employee participation (see discussion below). Previously, employees were not recognised in company law as stakeholders and had to utilise the protection conferred by labour law to (indirectly) enforce any rights against companies (in their capacity as employers). Although these developments are positive and enable employees to participate in diverse ways by exercising different rights and enforcing various duties on the company, the Companies Act fails to grant employees a real voice when it comes to decision-making. The Companies Act introduced significant changes to the corporate law landscape in South Africa (employees are more visible in corporate law and issues such as human rights are now recognised as important and relevant for companies) but it does not go far enough in the realisation of a true industrial democracy. For example, the Companies Act addresses the issue of worker participation in the instance of the formulation of a business rescue plan, but it fails to extend this participation to the approval of the plan as employees cannot vote on the issue. It would be more meaningful if the Companies Act were to grant trade unions sufficient participation rights regarding the approval of the business rescue plan. Similarly, the social and ethics committee (see discussion below), could be made more effective as its functions and scope could be expanded. It appears at least on face value when the functions of the social and ethics committee are taken

20 "Responsibilities of companies towards employees" 2015 *PER* 1 3–4.
21 Du Toit *et al Labour relations law* (2006) 22.

into account (see discussion below) with regard to social and sustainability issues that it could have been valuable to include employees as relevant stakeholders when these matters are addressed. Although the main objective of listed companies on the Johannesburg Stock Exchange (JSE) is "to maximise profit and not primarily to achieve social or sustainability objectives", entrenched interests and process do, however, drive listed companies to maximise profit and thus other society values should, in addition to profit maximisation, also be considered.[22] Issues such as human dignity and the environment are relevant here because as "a minimum, civil society increasingly expects responsible, value-based, and socially and environmentally aware corporate conduct that eliminates, or limits, the adverse impact of business activities on society and the environment".[23] The new focus in corporate law and the corporate governance regime on employees' legitimate interests and expectations, *prima facie*, is promising for employee voices to be heard in the workplace (and organisations including companies). It is argued that when the legislature considered the introduction of the social and ethics committee into the domain of company law, it should have at least considered the role of employees in corporations and the input they could have given regarding the issues that is covered by this committee (see discussion below). In this regard, it is important before a detailed discussion is embarked upon to summarise the role of employees as stakeholders in corporations:

> "The employees of a company have an interest in the company as it provides their livelihood in the present day and at some future point, employees would often also be in the receipt of a pension provided by the company's pension scheme. In terms of present day employment, employees will be concerned with their pay and working conditions, and how the company's strategy will impact on these. Of course the long-term growth and prosperity of the company is important for the longer term view of the employees, particularly as concerns pension benefits in the future . . . Many companies have employee share schemes which give the employees the opportunity to own shares in the company, and feel more part of it; the theory being that the better the company does (through employees' efforts, etc), the more the employees themselves will benefit as their shares increase in price . . . Companies need also consider and comply with employee legislation whether related to equal opportunities, health and safety at work, or any other aspect. Companies should also have in place appropriate whistle-blowing procedures for helping to ensure that if employees feel that there is inappropriate behaviour in the company, they can 'blow the whistle' on these activities whilst minimizing the risk of adverse consequences for themselves as a result of this action."[24]

Although real concerns exist regarding whether or not the social and ethics committee ought to have been legislated at all and whether it should be retained at all, it is still important to consider whether the legislator should have considered employees in the provisions pertaining to the social and ethics committee when it drafted the Companies Act. It should be noted that the realisation of sustainability is an integral business risk that forms part of all the governance functions of the board of directors and it is not argued that all the issues pertaining to

22 Joubert "Reigniting the corporate conscience: Reflections on some aspects of social and ethics committees of companies listed on the Johannesburg Stock Exchange" in Visser and Pretorius (eds) *Essays in honour of Frans Malan* (2014) 183–184 (hereafter Joubert "Reigniting").

23 *Idem* 184.

24 Du Plessis *et al Principles of contemporary corporate governance* (2011) 26 referring to Mallin *Corporate governance* 51.

sustainability and corporate social responsibility should be diverted into one committee. It is, however, not argued in this article that all these functions should be diverted into one committee. A closer look at the *Draft King IV report on corporate governance in South Africa 2016* supports the view that issues such as social transformation and sustainable development are important issues that companies need to consider. From this view, employees as major role-players are therefore central in achieving sustainable development initiatives as well as social transformation. The *Draft King IV report* emphasises this as follows:

> "In South Africa, social transformation and redress from apartheid is a sustainable development matter and an example of the importance of enhancing human, social and relational capitals. Integrating sustainable development and social transformation will give rise to greater opportunities, efficiencies and benefits, for both the organisation and the broader society. If the connection between sustainable development and transformation is not fully understood, it leads to a dissociation between the two."[25]

In addition to being stakeholders of the company, employees contribute to a company's prosperity. A company that employs and retains talented and hardworking employees will reap the benefit: employees are more than valuable "assets" of the company; they play an important role in the sustainability and long-term growth and prosperity of the company. Intellectual capital rather than resources, for example natural resources, machinery and financial capital, have become an indispensable "asset" of corporations. The welfare of employees and customers contribute to the long-term increase of the profits: a social responsibility commitment and attention to the needs of employees and consumers ultimately benefit shareholders. The satisfaction of employees "will lead to greater productivity and thus to increased profits, in this way maximising the interests of both employees and shareholders". Employee interests extend beyond financial well-being and financial reward or participation in companies.

The aim of the article is to consider whether the Companies Act can go further in order to address the question whether employees should be provided with participation rights on the social and ethics committee and what impact such participation rights would have on the monitoring function of the social and ethics committee.

2 THE SOCIAL AND ETHICS COMMITTEE

2 1 Basis for and functions of the social and ethics committee

One of the innovations in the Companies Act is the introduction of a social and ethics committee. Section 72(1) of the Act provides, except to the extent that the memorandum of incorporation (MOI) provides otherwise, that the board[26] of a

25 Institute of Directors *Draft King IV report on corporate governance in South Africa – 2016* (2016) 8.

26 The legal structure of authority within corporations is effectively three-tiered: shareholders are at the one end of the spectrum followed by the board of directors and management (O'Regan "Possibilities for worker participation in corporate decision-making" 1990 *Acta Juridica* 122). In general terms, companies have a choice between a unitary board and a two-tier board structure, but the distinction is not always clear-cut, especially when it comes to large public companies (Esser "Stakeholder protection: The position of employees" 2007 *THRHR* 407 415). The traditional unitary board structure consists of a board of directors and managing directors where the board of directors oversees and guides the managing directors who are responsible for the day-to-day affairs of the company. A two-tier board system, on the other hand, is a system best suited to facilitate employee participation in decision-making because it helps to manage the information flow and improve board

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company may appoint any number of committees of directors and delegate to any committee any of the authority of the board. It has been said before that the Companies Act goes further than the traditional function of company law in that it "crosses the corporate Rubicon"[27] by extending the company's obligations beyond the parameters of traditional South African company law and expressly recognises the significant societal role of enterprises. The Companies Act acknowledges an existing principle in that it makes provision for the fact that companies must reaffirm the concept of the company as a means of achieving economic and social benefits and enhance the welfare of South Africa as a partner in the global economy.[28] It evident from this that a company's governance structure should encompass corporate social responsibility (CSR) matters.[29] In this context, the importance of CSR initiatives can be summarised as follows:

"The notion of "corporate social responsibility" (CSR)[30] has gained prominence in

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efficiency (Mintz "A comparison of corporate governance systems in the US, UK and Germany" 2006 *Corporate Ownership & Control* 33. The supervisory board oversees the management board. Worker representatives are elected on the supervisory board. The management board is responsible for the day-to-day management of the company.

27 Katzew "Crossing the divide between the business of the corporation and the imperatives of human rights – The impact of section 7 of the Companies Act 71 of 2008" 2011 *SALJ* 686 691. The author refers to Mervin King's comment made at a workshop at the University of Witwatersrand on 8 March 2010.

28 S 7*(*d) of the Companies Act.

29 See, in this regard, Kloppers "Driving corporate social responsibility (CSR) through the Companies Act: An overview of the role of the social and ethics committee" 2013 *PER* 165 166–167 where he points out that "comprehensive changes brought about by the [Companies] Act no express reference is made to the companies' social responsibility . . . and as long as no legal requirement is set to integrate CSR issues into their decision-making and governance structures businesses will not be obliged to act in a socially responsible manner. The legislature has taken cognisance of the fact that the public is increasingly paying attention to social issues, and has through section 72 of the Act without specifically referring to CSR made an attempt to ensure that CSR becomes infused and embedded in a company's governance structures."

30 Hodes "The social responsibility of a company" 1983 *SALJ* 468 is of the view that a company should be socially responsible when the directors of the company can manage the company in a way that the company "voluntarily expends its resources to do something not required by law and without immediate economic benefits". According to Hodes, various theories relating to social responsibility exist: the functional, pragmatic and social theories. The functional theory holds that the function of business is to provide goods and services to consumers, which they sell at a reasonable profit. Society will benefit if these tasks are performed well. The pragmatic theory holds that the bigger the company's profits the bigger the dividends shareholders would receive. The community will ultimately benefit when the company improves its commercial services when they render goods and services and maintain high profits. According to the social theory, companies need not concern themselves with social responsibility issues as it is the government's responsibility (*idem* 486–492). Welling "Corporate social responsibility – A well-meaning but unworkable concept" *Corporate Governance eJournal* 1-7 holds a different view regarding CSR: "I've been told that the Corporate Social Responsibility movement began some 25 years ago. It appears to be based on some assumptions. First, it asserts that shareholders are 'corporate owners'. Second, it describes the traditional view of a corporation as a 'shareholder focused entity'. Having made those assumptions, CSR proponents then urge a change to a 'stakeholder' model. I don't share those assumptions. Corporations either (i) are people in law, or (ii) have the legal rights and liberties of humans. People, and anyone with humans' rights and liberties, can't be owned. Nor is a corporation a 'shareholder focused entity': it is just a legal person, focused on its own self interests. Having rejected those assumptions, I see no reason to adopt a 'stakeholder' model . . . We digressed from our review of corporate social responsibility with one point left to consider. That point involved the possibility that, as a general legal proposition, a director owes a

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> the last decade. It relates to the relationship between organisations and society: as a part of society and the community, corporations are required to be socially responsible and to be more accountable to all stakeholders. Socially responsible behaviour has been described as 'action that goes beyond the legal or regulatory minimum standard with the end of some perceived social good rather than the maximisation of profits'. CSR is variously defined and no consensus can be reached on what exactly it entails: arguably, it also means something different in the context of developed and developing countries. A starting point in considering socially responsible behaviour is the distinction between 'relational responsibility' and 'social activism'. 'Relational responsibility' deals with the promotion of or assistance to groups such as employees, customers, suppliers or the community who are affected by the business activities of the company. Important factors are the maintenance of the company's image as well as the application of fairness when dealing with these groups of stakeholders. Social activism, on the other hand, deals with beneficiaries who fall outside the scope of the company. The company addresses social issues that exist independently from the way it conducts its business activities and social activism is an extension of corporate activity into non-commercial spheres: issues such as human rights and non-involvement in criminal activities."[31]

It should, however, be noted that although the Companies Act does not specifically refer to CSR, a CSR perspective can be found in section 72(4)(a).[32] The Minister of Trade and Industry is authorised to prescribe, through the use of regulations, that companies have a social and ethics committee if deemed desirable having regard to the annual turnover, workforce size or the nature and extent of the activities of such companies. Regulation 43(1) of the Companies Regulations[33] requires state-owned companies as well as listed public companies to appoint such a committee. Any other company that in any two of the previous five years scored above 500 points[34] in the calculation of its public interest score is required to appoint such a committee. It is thus evident that the Companies Act requires these companies through social and ethics committees to "give prominence to the value attached to concerns beyond profit-making".[35]

The committee must comprise at least three directors or prescribed officers of the company.[36] At least one of them must be a non-executive director who was

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legal duty to consider the interests of 'stakeholders'. I said that must be incorrect."

31 Botha 2015 *PER* 9–10.

32 See also Kloppers 2013 *PER* 167 and Esser 2007 *THRHR* 425 in this regard.

33 GN 351 in *GG* 34239 of 26 April 2011.

34 Reg 26(2) of the Companies Regulations provides the method to be used to determine a company's "public interest score" for the purposes of reg 43. It requires every company to calculate its public interest score at the end of each financial year. This should be the sum of (i) a number of points equal to the average number of employees of the company during the financial year, and (ii) one point for every R1 million (or portion thereof) in third-party liability of the company, and (iii) one point for every R1 million (or portion thereof) in turnover during the financial year, and (iv) one point for every individual who at the end of the financial year is known by the company to directly or indirectly have a beneficial interest in any of the company's issued securities, or in the case of a non-profit company, to be a member of the company or a member of an association that is a member of the company.

35 Havenga 2015 *THRHR* 285.

36 *Idem* 287 points out, regarding the difference between the social and ethics committee and the audit committee: "It is interesting to compare the membership of this committee with the audit committee, the other board committee prescribed in the Act in respect of certain companies (s 94). The membership of the audit committee is prescribed by the Act itself, not by regulation. A member of the audit committee must be a non-executive director, may not be a prescribed officer, and may not be a material supplier or customer of the company, such that a reasonable and informed outsider would conclude in the circumstances that the integrity, impartiality of that director is compromised by that relationship, and may not be

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not involved during the three previous financial years in the day-to-day management of the company's business.[37] It is not specifically stated that each member of the committee must be a director but at least one of them must be a director; thus, it seems, in view of the non-director requirement, that employees, for example, can be members of the committee.[38] The committee is not a board committee and is appointed by the company (shareholders).[39] The committee as such is a separate organ of the company. It has been suggested, therefore, that the social and ethics committee will split the South African board into a two-tier board.[40]

The functions[41] of the social and ethics committee include the monitoring of

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related to any of the abovementioned parties (s 94(4)). The Minister may prescribe minimum qualification requirements for audit committee members to ensure that the committee, as a whole, comprises members with adequate experience and knowledge for the committee to perform its functions (s 94(5)) and provision is made in the Act for filling of any vacancy that arises (s 94(6)). There are no comparable provisions in respect of the social and ethics committee." See also Stoop "Towards greener companies – Sustainability and the social ethics committee" 2013 *Stell LR* 562 579 who states that the social and ethics committee's "remit will overlap" with committees such as the audit and risk committee and that companies should ensure that this overlap is planned efficiently and that they should share information and follow integrated process and strategies where it is necessary.

37 Reg 43(4) of the Companies Regulations.

38 Esser 2007 *THRHR* 426.

39 Delport *The new Companies Act manual* (2011) 88.

40 Esser 2007 *THRHR* 426.

41 Reg 43(5)(a) of the Companies Regulations. Delport *Henochsberg* 277–278 points out the following regarding the functions of the social and ethics committee: "It is submitted that the proposed functions of the social and ethics committee as in reg 43(5) are the factors that must be taken into account to determine whether it is reasonably necessary and in the public interest to have such a committee. However, if the quantitative criterium (ie the public interest score) has already determined that a social and ethics committee is required, the question is, what should be taken into account to determine whether if it is not reasonably necessary in the public interest to have such a committee as neither the Act nor the regulations provides for different levels of such a score for purposes of determining the public interest, and there is no qualitative criteria in the elements that are used to calculate that score which can be used to determine that although the quantitative criterium has been met, it is not reasonably necessary in the public interest to have the social and ethics committee . . . Subsection (5)(b) does not prescribe or define either the *nature* or the *extent* of the activities, but it is submitted that reg 43(5) can be used to determine the public interest, as well as the qualitative criteria as discussed above. Therefore, the quantitative criteria (extent of the activities, although it also includes elements of the qualitative criteria) is determined by the public interest score, but it is submitted that the qualitative criteria, and also the public interest element, must be determined with reference to reg 43(5). It may therefore be applied in practice as follows – (a) the contribution of the company (qualitative criterium) to social and economic development *of the community in which it operates* (public interest) (reg 43(5)(a)(i)); (b) the effect of the company as a corporate citizen (qualitative criterium) *in the particular community* (public interest) (reg 43(5)(a)(ii)); (c) the effect (qualitative criterium) that the company's activities and products has on *environment, health and public safety* (public interest) (reg 43(5)(a) (iii)); (d) the actions of the company (qualitative criterium) *in respect of consumers*, including advertising, public relations and consumer protection (public interest) (reg 43(5)(a)(iv)); (e) the company's actions (qualitative criterium) *in respect of its employees and its employment practices*, which obviously includes compliance with labour relations but which should also encompass general employee "well-being" (public interest) (reg 43(5)(a)(v)).There is, however, still a mismatch between the criteria that determine the appointment of the social and ethics committee, apparently based on requirements for the financial disclosure for public interest companies as initially in clause 9 of the 2007 Companies Bill, and the criteria that must be applied to determine whether there should be an exemption from the appointment of the committee."

the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice relating to matters such as[42] (i) social and economic development; (ii) good corporate citizenship; (iii) the environment, health and public safety, including the impact of the company's activities and its products and services; (iv) consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws; and (v) labour and employment.

The social and ethics committee is a troublesome "organ" in/of the company and especially the relationship between the social and ethics committee and the board has been subject to much debate and academic comment.[43] It is unclear whether the board may refuse to comply with an instruction from this committee. The functions of the committee are limited to those in the regulations and, therefore, it plays only a supervisory role and is not concerned with strategic matters.[44] It is evident from the name of a social and ethics committee that two components stem from it: (a) social issues and (b) ethical concerns. Joubert points out that the spectrum of matters of relevance to this committee (as referred to in regulation 43(5)(a)) "is very broad and covers most of the dimensions of social responsibility, sustainability, and corporate citizenship, in addition to transformation issues of particular relevance to South Africa and consumer protection".[45] He further points out that "sustainability" does not appear in regulation 43(5) and that the word "ethics" is only used in the name of the committee, but that "the terminology used in regulation 43 is sufficiently wide to cover all aspects of sustainability, corporate citizenship, corporate social responsibility, and ethics".[46] First, when we consider the context of "social" it should be noted that an underlying philosophy in the *King report III* is that companies should be regarded as

42 These functions are discussed and broken down in para 2 2 below.

43 Delport *Henochsberg* 277–278 raises the following concern: "The question remains whether the social and ethics committee is a board committee or a company committee. Although s 72 provides for 'board committees' in the short title, it is submitted that this is not conclusive to categorise the social and ethics committee, and in respect of the social and ethics committee, the references are that the 'company' must appoint the committee, which is clearly different from, eg, sub-s (1) which provides that the 'board' may appoint committees ([t]o categorise the social and ethics committee as a 'hybrid' committee does not solve the uncertainty). Also, the social and ethics committee has a responsibility to report directly to the shareholders (reg 43(5)(c)) but must only draw the attention of the board to certain matters (reg 43(5)(b)) . . . The distinction between a board committee and a company committee is important because if the social and ethics committee is a board committee, the board can delegate powers and authority to the committee, in addition to those expressly provided for in the Act (sub-s (8)) and regulations (reg 43(5)). However, if it is a company committee with its powers and authority based on the Act and regulations, it only has the powers and authority as provided in the Act and regulations. Section 94(7)(i) empowers the board to delegate additional functions to the audit committee, a provision that is however not present in respect of the social and ethics committee. Subsection (8) contains an exhaustive list of powers (ie the 'social and ethics committee is entitled to'), which does not include the power of appointment of eg any consultant or specialist as provided for in sub-s (9), although such power of appointment may be implied in sub-s (9) . . . An interesting consequence of classifying the social and ethics committee as a company committee, is that eg s 76 will not apply to the members of the committee."

44 Esser 2007 *THRHR* 425.

45 Joubert "Reigniting" 188.

46 *Ibid*.

good corporate citizens if they subscribe to the sustainability considerations that are rooted in the Constitution. This assessment of worth entails that they should adhere to the basic social contract which they have entered into and their responsibility to promote the realisation of human rights.[47] The social contract implies some form of altruistic behaviour, which, in essence, is "the converse of selfishness", in a view which equates self-interest with selfishness.[48] Because stakeholder theory specifically includes shareholders, creditors and other groups such as employees who contribute towards corporate profitability, it acknowledges "a moral obligation" to these stakeholders in the form of a "social contract".[49] The social contract "reduces the corporation to an entity of relations between corporate constituents" and the corporation can be seen as "a nexus of associations that imports stakeholder rights and social obligations under the banner of a business enterprise".[50] The "social contract", in exchange for these benefits, requires that companies, for example, "do no harm"; they may be required to take positive steps to improve the society in which they operate by facilitating social benefits. Joubert with reference to the Global Reporting Initiative[51] points out that the guideline provides "excellent guidance" of, *inter alia*, the dimensions of the social elements of sustainability. In this context, the following sub-categories of the social dimension of sustainability are identified for reporting:

(a) Labour practices and decent work (including employment, labour relations, occupational health and safety, training and education, diversity and equal opportunity, equal remuneration for women and men, supplier assessment for labour practices, and labour practices grievance mechanisms);

(b) human rights (including investment, non-discrimination, freedom of association and collective bargaining, child labour, forced or compulsory labour, security practices, indigenous rights assessment, supplier human rights assessments, and human rights grievance mechanisms);

(c) society (including local communities, anti-corruption, public policy, anti-competitive behaviour, compliance, supplier assessment for impacts on society, and grievance mechanisms for impacts on society); and

(d) product responsibility (including customer health and safety, product and service labelling, marketing communications, customer privacy compliance).[52]

It is submitted that the existence of a "new concept of a company" must be acknowledged. This has been expressed in the following terms:

> "There was a time when business success in the interests of shareholders was thought to be in conflict with society's aspirations for people who work in the company or in supply chain companies, for the long-term well-being of the community

47 *King report III* 11.

48 Crowther and Jatana *International dimensions of corporate social responsibility* Vol 1 (2005) viii.

49 Bone 2011 *CJLJ* 288.

50 *Ibid.* See also Davies "Employee representation and corporate law reform: A comment from the United Kingdom" 2000 *Comp Lab L & Pol'y J* 135 138.

51 Global Reporting Initiative "G4 Sustianibility Reporting Guidelines: Reporting principles and standard disclosures" (2013) available at www.globalreporting.org (accessed 11 May 2016). See also Joubert "Reigniting" 189 in this regard.

52 Global Reporting Initiative 9. See also Joubert "Reigniting" 189.

> and for the protection of the environment. The law is now based on a new approach. *Pursuing the interests of shareholders and embracing wider responsibilities are complementary purposes, not contradictory ones*."[53]

Secondly, in context of the use of the word "ethics" it should be noted that corporate activity should not only be guided and encouraged in a manner that requires corporate decisions to be based on ethical principles,[54] but also that effective and responsible leadership values should be embraced. The meaning attributed to corporate citizenship in the *King report III* is as follows:

> "Responsible corporate citizenship implies an ethical relationship between the company and the society in which it operates. As responsible corporate citizens of the societies in which they do business, companies have, apart from rights, also legal and moral obligations in respect of their economic, social and natural environments. As a responsible corporate citizen, the company should protect, enhance and invest in the wellbeing of the economy, society and the natural environment."[55]

Effective and responsible leadership is at the heart of good corporate governance. Four basic values, namely responsibility, transparency, fairness and accountability, should be taken into account in decision-making and management.[56] For example, in *South African Broadcasting Corporation Ltd v Mpofu*[57] the court emphasised that "good corporate governance is based on a clear code of ethical behaviour and personal integrity exercised by the board, where communications are shared openly".[58] These values are important not only for the manner in which corporations conduct business but also in regard to how they treat their stakeholders, including employees. The ethics of governance place the following five moral duties on directors, namely, (i) conscience,[59] inclusivity of stakeholders,[60] (iii) competence,[61] (iv) commitment,[62] and (v) courage.[63] In the context

53 My emphasis. Margaret Hodge, Minister of State for Industry and Regions (UK Dept of Trade and Industry (2007) 2), as quoted in Brammer, Jackson and Matten "Corporate social responsibility and institutional theory: New perspectives on private governance" 2012 *Socio-Economic R* 3 12.

54 Keith "Evolution of corporate accountability: From moral panic to corporate social responsibility" 2010 *Bus Law Int'l* 247 273.

55 *King report III* 117.

56 See *King report III* 10 and *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 5 SA 333 (W) para 16.7.

57 [2009] 4 All SA 169 (GSJ).

58 Para 64.

59 Directors should avoid conflict of interests by acting with intellectual honesty in the best interest of the company and all its stakeholders in accordance with the inclusive shareholder value approach. They should also apply independence of mind to ensure that the best interest of the company and its stakeholders is served (*King report III* 21).

60 When achieving sustainability, the inclusivity of stakeholders as well as their legitimate interests and expectations must be taken into account by directors for decision-making and strategy purposes (*idem* 22).

61 Knowledge and skills are required for the effective governance of the company, which should be developed continuously (*ibid*).

62 Diligence should be the order of the day when performing directors' duties and sufficient time should be devoted to company affairs. Ensuring company performance and compliance is a primary concern (*ibid*).

63 Directors should have the courage to take the risks associated with directing and controlling a successful sustainable enterprise. In addition, directors should have the courage to act with integrity in all board decisions and activities (*ibid*).

of the role that the social and ethics committee plays in the promotion of ethical values, the following can be highlighted:

> "A company's board can through the social and ethics committee, further demonstrate its commitment to the company's ethics programme by overseeing its operation, for example, by monitoring and/or recording the number and nature of complaints to the company's 'ethics hotline'; adapting its ethics code; reviewing the resources allocated to ethics training; conducting an ethical survey involving employees, suppliers and investors that tests the level of awareness of the company's ethical code and its whistle-blowing policy as well of the level of confidence in the code . . . The committee should also ensure that company's standards and ethical values are understood and adhered to by all its suppliers . . . who suggest that a requirement for ethics should be included in contracts with suppliers and business partners and should be enforced."[64]

It is evident from the above that the social and ethics committee plays an important role not only in reigniting social conscience of South African corporations by raising corporate citizenship and sustainability issues. It is therefore important before commencing with the next section on whether labour should be involved on the social and ethics committee, also to summarise as a point of departure some concerns raised by Joubert:

> "The social and ethics committee requirements of the Act and regulations were initially not uniformly welcomed by companies listed on the JSE. This lack of enthusiasm can probably be ascribed to a number of difficulties companies have in implementing these requirements rather than to a lack of support for the policy considerations underlying the requirements. The following are some of the main implementation difficulties. (*a*) The functions of the social and ethics committee overlap to varying degrees with the functions of other board committees. (*b*) The flexibility of companies to configure their board committees optimally has been constrained by increased mandatory and voluntary requirements for board committees. (*c*) The ambiguities and uncertainties created about the institutional nature of audit committees and social and ethics committees. (*d*) Corporate compliance fatigue as a result of the exponential proliferation of laws and codes, the complexity of some of the laws, and the overlapping nature of some of the codes."[65]

(to be continued)

64 Havenga 2015 *THRHR* 291.
65 Joubert "Reigniting" 194–195.