

Evaluating the social and ethics committee: Is labour the missing link? (2)*

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2.2 The social and ethics committee: Is labour the missing link?

Before the enactment of the Companies Act, an array of labour and other statutes provided “a much more detailed and specific set of criteria for assessing the impact of CSR codes”.¹ This framework may be summarised as follows:

“The LRA² regulates, *inter alia*, organisational rights, centralised and non-centralised bargaining as well as strikes and lock-outs, dispute resolution, dismissal, unfair labour practices and business transfers. The BCEA³ regulates issues such as work hours, leave, termination of employment, wage regulating measures in non-organised sectors. The EEA⁴ regulates, *inter alia*, issues such as the prohibition of unfair discrimination and the implementation of employment equity plans including action measures. Other legislation of relevance includes the *Occupational Health and Safety Act* 85 of 1993, COIDA,⁵ SDA,⁶ UIA,⁷ as well as the BBBEE Act⁸.”⁹

The Companies Act brought about major changes to governance with regard to employee participation and “entrenched certain rights of employees to a point which extends their labour rights”.¹⁰ Employees are “given significant rights of participation in the governance of companies as a matter of company law, as

* See 2016 *THRHR* 580 for part 1.

1 Du Toit “Self-regulated corporate social responsibility: The impact on employment relations at European corporations in South and Southern Africa: A preliminary overview” 2009 *ILJ* 2227–2236. In this regard, see also *King report III* ch 1, 8 and 9 that respectively deal with ethical leadership and corporate citizenship, stakeholder relationships and integrated reporting and disclosure. See also, in this regard, the Johannesburg Stock Exchange Responsible Investment Index which ranks companies according to their incorporation of sustainability issues into their business strategies as well as the Code on Responsible Investing in South Africa (CRISA) which aims to promote sustainability issues especially when institutional investors make investment decisions (see, in this regard, Stoop 2013 *Stell LR* 571–572; Esser and Delpont 2016 *THRHR* 6).

2 Labour Relations Act 66 of 1995.

3 Basic Conditions of Employment Act 75 of 1997.

4 Employment Equity Act 55 of 1998.

5 Compensation for Occupational Injuries and Diseases Act 130 of 1993.

6 Skills Development Act 97 of 1998.

7 Unemployment Insurance Act 63 of 2001.

8 Broad-Based Black Economic Empowerment Act 53 of 2003.

9 Botha 2015 *PER* 46–47.

10 Davis and Le Roux 2012 *Acta Juridica* 312.

opposed to industrial or labour relations law”.¹¹ A company assumes a specific role and place in society and “‘*how, a company treats its people*’,¹² may be seen as a litmus test of corporate values, pivotal to and emblematic of an enterprise’s engagement with its socio-economic environment”.¹³ These provisions in the Companies Act are highlighted briefly in context of the various functions of the social and ethics committee and the role that employees can play on this committee.

2.2.1 Social and economic development

Due to their large scale, some companies’ decisions may have adverse effects on socio-economic issues, such as mass retrenchments due to the closing down of an unprofitable facility which an entire town or region depends on for survival, or if cost-cutting initiatives are initiated in order to improve competitiveness and/or profitability.¹⁴ The impact of moving a research and development facility to benefit from tax incentives or for other reasons or the refusal to invest in the infrastructure of the community it is active in could also have adverse effects on the advancement of socio-economic rights in such a society.¹⁵

It is clear that social and economic development are important for companies and include the company’s standing in terms of the goals and purposes of the ten principles set out in the United Nations Global Compact (UNGC) Principles; the Organisation for Economic Cooperation and Development (OECD) recommendations regarding corruption; the EEA; and the BBBEE Act. The UNGC principles demand that companies “embrace, support and enact, within their sphere of influence certain core values in the areas of human rights, labour and the environment”.¹⁶ Kloppers suggests that when companies report on social and economic issues, such reporting should lean toward social development and not economic issues as these issues are dealt with by other committees such as the audit committee.¹⁷ In this context, it is important to note the important role of employment equity:

“The underlying principle of employment equity is redress of the social and economic effects of historic discrimination that, for decades, saw the baseless, inefficient underutilisation of large sections of the South African population. King II suggested that the empowerment and advancement of previously disadvantaged individuals, including women, should be based on their being equal, value-adding partners in the corporate sphere. Although legislation such as the Broad Based Black Economic Empowerment Act, 2003 and the laws dealing with employment equity have made considerable progress in redressing the historical imbalances and black people are being appointed to corporate leadership positions in increasing numbers, the figures are still some way away from being demographically representative.”¹⁸

11 Katz “Governance under the Companies Act 2008: Flexibility is the keyword” 2010 *Acta Juridica* 248 261.

12 My emphasis.

13 Du Toit 2009 *ILJ* 2227.

14 Joubert “Reigniting” in Visser and Pretorius (eds) *Essays in honour of Frans Malan* (2014) 192.

15 *Ibid.*

16 See, in this regard, Bilchitz “Corporate law and the Constitution: Towards binding human rights responsibilities for corporations” 2008 *SALJ* 754 777–778 and Havenga 2015 *THRHR* 291.

17 Kloppers 2013 *PER* 172.

18 Naidoo *Corporate governance: An essential guide for South African companies* (2009) 260.

Social and economic development issues, especially the EEA and the BBBEE Act, affect employees and their input could be of value: the legitimacy of decisions relating to such development issues could be improved considerably through their input. Equality issues in employment still play a big role in labour relations in South Africa, where affirmative action and inherent job requirements are taken into account to fairly differentiate between employees. The achievement of equality to address imbalances created by the previous dispensation is still an important agenda that both labour and management must consider when they want to advance previously-disadvantaged employees in the workplace. An employer may not, for example, unfairly discriminate in an employment policy or practice¹⁹ in its employment practices, advertising and selection criteria, promotion, the working environment and facilities, dismissal and so forth. An employer may also not unfairly discriminate on the 19 grounds of human identity which include family responsibility, HIV status and political opinion.²⁰ Employers who qualify as designated employers²¹ in terms of the EEA must prepare and implement an employment equity plan (EEP) "which will achieve reasonable progress towards employment equity in that employer's workforce".²² A designated employer must consult with a representative union or, in the absence of such a union, the nominated representatives of the employees on the preparation and implementation of an EEP.²³ The same can be said about BBBEE. The rationale behind BBBEE is to advance black people and workers through the promotion of economic transformation in order to enable meaningful participation of black people in the economy.²⁴ One way to achieve economic transformation is through employee share ownership schemes.²⁵ Negotiations regarding such schemes normally fall within the scope of collective bargaining and it could have been useful to include employee representatives on the committee, especially when it comes to such an important issue (similar to employment equity issues). Employment equity issues, thus, could be enhanced further if employees had input on the social and ethics committee as the responsibility for employment equity matters and the employment equity report could become a reporting function of the committee and not merely an oversight function as the plan as well as the implementation of the plan have been negotiated and agreed upon between management and labour. The committee will therefore monitor whether the company had in fact adhered to this plan.

19 S 1 of the EEA.

20 S 6(1) of the EEA. See Van Niekerk and Smit (eds) *Law@work* (2015) 127.

21 In terms of s 1 of the EEA "designated employer" means (i) an employer who employs 50 or more employees; (ii) an employer who employs fewer than 50 employees but whose annual turnover exceeds the relevant amount stipulated in Sch 4 to the EEA; (iii) a municipality; (iv) an organ of state other than the South African National Defence Force, the National Intelligence Agency and the South African Secret Service; and (v) an employer appointed a designated employer in terms of a collective agreement in terms of s 23 or 31 of the LRA to the extent provided for in the agreement. The affirmative-action provisions may apply to an employer who employs fewer than 50 employees if the business of the employer has a total annual turnover equal to or greater than the prescribed turnover.

22 S 20(1) of the EEA.

23 S 20 of the EEA.

24 S 2 of the BBBEE Act.

25 See ss 38, 40, 44, 96 and 97 of the Companies Act.

2.2.2 Good corporate citizenship

The promotion of equality, prevention of unfair discrimination, and reduction of corruption;²⁶ contribution to the development of communities²⁷ in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and record of sponsorship, donations and charitable giving are included here. Issues, such as good corporate citizenship relating to the promotion of equality, prevention of unfair discrimination, and the reduction of corruption, as well as a contribution to the development of communities in which the corporation predominantly conducts its business activities, should be dealt with in the same way. Responsible leadership is key here. It will thus identify the role employees play in the promotion of values such as transparency, fairness and accountability, to mention but a few. Employees play an important role in the promotion of corporate governance as they can, for example, blow the whistle on corrupt activities and thus monitor the disclosure of information relating to criminal and other irregular conduct which they encounter in the workplace and the company. In an effort to promote good corporate governance principles, the Act affords protection to employees who blow the whistle. This type of protection is granted to employees by the Protected Disclosures Act²⁸ and, thus, is merely an extension of existing protection. Section 159 of the Companies Act protects other stakeholders, such as shareholders, directors, company secretaries, prescribed officers, registered trade union representatives of the employees, suppliers of goods and services to the company or employees of a supplier. The involvement of employees in the committee can enhance the company's commitment to principles of good corporate governance, especially relating to issues pertaining to the EEA, Bill of Rights, Competition Act²⁹ and Prevention and Combating of Corrupt Activities Act,³⁰ as well as the PDA and the Companies Act. Lastly, it is important to note that regulation 43(5)(a)(ii)(cc) provides that the social and ethics committee should also consider the company's record-keeping regarding donations, charitable giving and sponsorship and should thus invest in a socially-responsible manner in the community. Again, here the presence of employees would have provided the committee with valuable input and ideas in terms of exactly where the company can use its money to invest in the improvement of the lives of not only workers, but also that of the community in which they live.

2.2.3 Environment, health and public safety

Regulation 43(5)(a)(iii) further provides that the social and ethics committee should monitor the company's activities regarding matters concerning the environment,

²⁶ See reg 43(5)(a)(ii)(aa) of the Companies Regulations 2011.

²⁷ See reg 43(5)(a)(ii)(bb). In this regard, Kloppers 2013 *PER* 177 points out the following: "The issue of community development is central to CSR. The ISO *Guidance on Social Responsibility* identifies community involvement and development as one of its core CSR topics . . . while community development is one of the outcomes of enterprise development in terms of black economic empowerment. Community involvement not only strengthens the relationship of trust between a business and the community but also serves as a tool through the use of which development can take place – development that empowers the community and improves its quality of life."

²⁸ 26 of 2000 (PDA).

²⁹ 89 of 1998.

³⁰ 12 of 2004.

health and public safety as well as the impact of the company's activities, products and services. Employees are knowledgeable about what goes on in the production line and which processes were complied with or not and, thus, employee involvement in issues such as the environment, health and public safety cannot be overstated. If employees are knowledgeable about issues such as public safety and the impact that a product may have if it is unsafe for general public use, they can share this information with the committee. If employees are knowledgeable about environmental laws which the company must adhere to as well as the importance of implementing health and safety regulations in the workplace, potential liability concerns can be avoided. Legislation such as the Consumer Protection Act,³¹ the National Environmental Management Act,³² the Environment Conservation Act,³³ the Occupational Health and Safety Act,³⁴ the Occupational Diseases in Mines and Works Act³⁵ and the Mine Health and Safety Act³⁶ (to mention but a few) may be applicable.

2 2 4 *Consumer relationships*

Section 3(1) of the CPA provides that the purpose of the CPA is to promote and advance the social welfare of consumers through the establishment of a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally. Employees (as consumers) can provide valuable input regarding practices that might be regarded as unconscionable and deceptive to consumers. Employees are aware what goes on in their communities and could report directly to the committee regarding unhappiness with a product or service that the company is offering or perceived unfairness or discrimination, especially regarding vulnerable and low-income consumers. Reputational risk can be effectively measured through the involvement of employees. Issues such as empowerment, consumer education and activism³⁷ could also be driven effectively when a company utilises employees' voices more effectively and efficiently where issues such as equality, privacy, disclosure of information and the consumer's right to choose are addressed.

2 2 5 *Labour and employment*

Regulation 43(5) requires the social and ethics committee to monitor and report on the company's standing in terms of the International Labour Organisation (ILO) Protocol on decent work³⁸ and working conditions. This includes the company's standing in terms of the ILO Protocol on decent work and working conditions and the company's employment relationships, as well as its contribution

31 68 of 2008 (CPA).

32 107 of 1998.

33 73 of 1989.

34 85 of 1993.

35 78 of 1973.

36 85 of 1993.

37 See s 3(1)(f) of the CPA.

38 The concept "decent work" "is based on the understanding that work is not only a source of income but more importantly a source of personal dignity, family stability, peace in community, and economic growth that expands opportunities for productive jobs and employment" (ILO 2010 www.ilo.org). See also, in this regard, Cohen and Moodley "Achieving 'decent work' in South Africa" 2012 *PER* 320–569.

toward the educational development of its employees.³⁹ In this regard, Botha argues as follows:

“It can, at a basic level, be argued that employees would like corporations (as employers) to fulfil their basic needs, such as the payment of a fair wage, the provision of safe working conditions, job security, future career opportunities, *et cetera*. A decent work agenda should be promoted: Four core values, namely, the opportunity to work, the right to freedom of association, social protection, and ‘voice’ are important.”⁴⁰

It is thus clear that jobs should not only be decent, but also sustainable. The welfare of employees which relates not only to the social impact that corporations have on the welfare of their employees as human beings, but also the long-term interests of their employees, are important. In this regard, it is important to mention the ILO’s thinking on the relationship between decent work and sustainability:

“The world needs more and better jobs, especially in societies suffering from widespread poverty, and these jobs must have the quality of sustainability. Decent work for sustainable development means that in social terms, such jobs must be open to all equally and the related rewards have to be equitable. Inequality and discrimination provoke frustration and anger, and they are a recipe for social dislocation and political instability. Extending opportunities for decent work to more people is a crucial element in making globalization more inclusive and fair. In economic terms, jobs have to be productive and able to compete in a competitive market. And environmentally, they must involve the use of natural resources in ways that conserve the planet for future generations, while being safe for working women and men and for the community.”⁴¹

Another omission concerns input with reference to labour and employment issues such as the company’s standing in terms of the ILO Protocol on decent work and working conditions, the company’s employment relationships and its contribution toward the educational development of its employees. These all underscore the need to give a greater voice to employees. Against this backdrop, the following should be noted regarding the importance of employment practices and responsible companies:

“[I]n addition to meeting its legal obligations in this area, the company should foster employee development, diversity, empowerment, fair labour practices, competitive remuneration and benefits, and a safe, harassment-free, family-friendly work environment in all its operations, wherever they may be located.”⁴²

The workings of the social and ethics committee would be meaningful if the latter not only considered the welfare of employees, but if they participated in decision-making by the committee: such a reimagined committee would grant employees a meaningful voice in the company. Here issues such as skills development in terms of the SDA and the protection of workers in terms of the LRA, BCEA and other labour laws could be enhanced further. The SDA creates a framework for the development, training and education of the workforce.⁴³

³⁹ See also reg 43(5) of the Companies Regulations.

⁴⁰ Botha “Responsible unionism during collective bargaining and industrial action: Are we ready yet?” 2015 *De Jure* 328 339.

⁴¹ ILO “Toolkit for mainstreaming employment and decent work” (2008) available at <http://www.ilo.org>.

⁴² Naidoo *Corporate governance* 245.

⁴³ The vision of the *National skills development strategy document* is (i) the development of skills by empowering and enabling persons through the acquisition of certain competencies in demand; (ii) the establishment of a productive citizenship in that employees are able to

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Through skills development, the competencies of black employees may be addressed and measured by employers.⁴⁴ The following is highlighted in the context of the importance of skills development and its role in empowerment:

“Skills development and business education lie at the core of the notion of empowerment – the higher the skill level of the national workforce, the greater the benefit would be not only to the economy but also to the beneficiaries of Black economic empowerment. A skilled workforce is a central element of sustainable economic and social development and is essential to achieving global economic competitiveness. Achieving a skilled workforce should consequently be included as a distinct aim in any programme aimed at empowering previously disadvantaged South Africans.”⁴⁵

The SDA is relevant when dealing with empowerment because it creates a framework for the development, training and education of the workforce. Through skills development, previously-disadvantaged workers gain access to opportunities that enable them to attain new and improved skills levels and may result in further transformation of their role in organisations. The argument that workplace democracy “allows skills and values to develop, which then have a role in broader society”⁴⁶ is consequently relevant here.

It is clear from the above discussion that non-shareholder stakeholders such as employees are important as they form part of the broader society and their “judgment and penalties of the ‘court of opinion’ might be harsh, costly, and swift”.⁴⁷ This is evident from what happened recently at Marikana or the recent insourcing movement at various universities where employees exercised their voice in various ways by exercising pressure on institutions to change the way they treat employees. It is evident that employees’ interests as stakeholders should be “properly considered and respected” when decisions are made that may “materially be detrimental” to them and could also result in “new insights on how to balance conflicting societal and stakeholder interests, which may, in

engage in workplace decisions relating to such things as productivity, entrepreneurship, sustainability *et cetera* and (iii) the creation of opportunities for the employed, unemployed, and for persons who have for a long periods not been valued for their capabilities (available at <http://www.skillsportal.co.za/features>). Another example of empowerment legislation is The Preferential Procurement Policy Framework Act 5 of 2000, which makes provision for a procurement policy of state organs based on preferential treatment. The framework requires contracts to be awarded by rating tenders on a preference point in accordance with the racial composition in order to ensure that previously disadvantaged persons are granted preference in this process. The National Empowerment Fund Act 105 of 1998’s purpose is to establish a trust for the promotion and facilitation of ownership of income-generating assets by historically disadvantaged people. It will provide this category of persons with opportunities to directly or indirectly acquire shares or interests in state owned commercial enterprises. For a detailed discussion on the BBBEE Act and the Preferential Procurement Policy Framework Act, see Marais and Coetzee “The determination of black ownership in companies for the purpose of black economic empowerment” 2006 *Obiter* (part 1) 111–127 and 2006 *Obiter* (part 2) 503–538.

44 Kloppers “Driving corporate social responsibility through black economic empowerment” 2014 *LDD* 58 67.

45 *Ibid.*

46 Wilkinson and Fay “New times for employee voice?” 2011 *Hum Res Man* 65 67.

47 Joubert (fn 14 above) 190.

turn influence the outcome of a decision, or the timing or implementation methodology of a decision".⁴⁸ The argument is, therefore, that as employees are one of the most valuable "assets" of the company and also due to the fact that they are members of society, the legislator should have considered them when enacting the provision and regulations pertaining to the monitoring functions of the social and ethics committee.

Against these omissions and in the context of granting employees more participation rights on the social and ethics committee, it should be noted that the Companies Act goes somewhat further in enhancing employee participation in companies, albeit to a limited extent. It is suggested that there is a need for better synergy between company and labour law, especially regarding employee participation in companies. It therefore requires better enhancement of the rights currently granted to employees by the Companies Act or the amendment of certain provisions. Some amendments and enhancements are required, especially regarding labour and employment issues that either directly affect employees, which would facilitate a much smoother monitoring function when employees are granted a voice on the social and ethics committee.

The participation rights provided for by the Companies Act are briefly highlighted below.

2.2.5.1 Formation of a company

Section 13 of the Companies Act, for example, allows trade unions as representatives of the employees to be a party to the formation of a company. By this innovation, employees are viewed as important stakeholders.

2.2.5.2 Amendment of the MOI

Section 16 of the Companies Act deals with the amendment of the MOI by means of special resolution. It is left to the board of the company, or shareholders entitled to exercise at least 10 per cent of the voting rights that may be exercised on such a resolution, to introduce an amendment. It appears that a MOI can allow a trade union or worker representatives (which will include a workplace forum⁴⁹) to propose an amendment, but the Companies Act does not allow employees to vote on such a proposal unless they are shareholders. It is proposed that workers should be able to vote on an amendment and not merely make proposals for an amendment. This change will show serious commitment by the legislator and enhance the significance of the role that employees play in companies. Not only will the participation of employees be ensured, but transparency is promoted and will ensure that companies take not only their economic partners into consideration, but also their social partners. Therefore, it is suggested that if workers are granted voting rights, a formula must be applied: if a company employs, for example, more than 500 employees, one worker representative should be allowed to vote in favour or against the amendment of the MOI; if a company

⁴⁸ *Ibid.* Although the words of Joubert are applied in a general sense to stakeholders, they are used here in context of employees as they can be easily applied to them in this context.

⁴⁹ See Botha "In search of alternatives or enhancements to collective bargaining in South Africa: Are workplace forums a viable option?" 2015 *PER* 1812 1816–1817.

employs more than 2 000 employees, workers are allowed to have two representatives present, and so on. The workplace composition provides the threshold for worker representivity and voting rights.

2 2 5 3 Business rescue

Part 6 of the Companies Act deals with business rescue proceedings. Trade unions or, if there is no trade union in place, the employees themselves, are regarded as affected persons and, for example, may initiate business-rescue proceedings.⁵⁰ Trade unions now also gain access to the company's financial statements for purposes of initiating a business-rescue process.⁵¹ In terms of sections 31(3), 128, 129 and 131 of the Companies Act, (1) a trade union must be given access to a company's financial statements for purposes of initiating a business rescue process. The trade union representing employees, or employees who are not represented, (2) may apply to court to place a company under supervision and commence business rescue proceedings. The interests of employees to be informed and to participate in the formulation of the business rescue plan are recognised here.

A closer look at the section on business-rescue provisions in the Companies Act regarding affected persons provides guidance. An affected person includes any registered trade union representing employees of the company and, if there is no such trade union representing employees, the employees themselves or their representatives.⁵² A workplace forum therefore falls within the definition of an "affected person" as they represent *all employees, not just trade union members*.⁵³

Employees are recognised as unsecured creditors for any wages owed to them by the company prior to the commencement of business rescue proceedings. Employees, however, cannot vote on the approval of a business rescue plan, except to the extent that they are also creditors.⁵⁴ Thus, employees are ranked lower than other stakeholders, such as creditors. This omission is a shortcoming in that employees would have real participation rights if they could vote on the approval of a business rescue plan and they would have greater voice. This goal could be achieved by either gaining a weighted vote in accordance with the number of employees in the company, or by providing a veto right to employee representatives with the result that the matter is resolved by adjudication or by means of alternative dispute resolution. Employees remain employees of the company during the company's business rescue proceedings on the same terms and conditions

50 See, eg, ss 128(1)(a), 129 and 131 of the Companies Act.

51 S 31(3) of the Companies Act.

52 S 128(1)(a) of the Companies Act.

53 My emphasis.

54 As creditors of the company, employees have the following rights: (i) the right to form a creditors' committee which is entitled to be consulted by the business rescue practitioner during the development of the business rescue plan; (ii) attend and vote at creditor meetings and (iii) vote on the proposed business rescue plan; and (iv) if the business rescue plan is rejected also propose and vote on the amendment of the business rescue plan or apply to court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on grounds that it was inappropriate or make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan. See, in this regard, ss 128(1)(g), 128(2), 145(2)(b)(i) and (ii), 145(3), 147(3), 152(2), 153(1)(b)(i)(aa) and (bb) and 153(1)(b)(ii) of the Companies Act.

unless changes occur in the ordinary course of attrition or the employees and the company, in accordance with the applicable labour laws, agree to different terms and conditions. Any retrenchment of employees contemplated in the company's business rescue plan is subject to the provisions of section 189 or 189A of the LRA and other applicable labour legislation.

2.2.5.4 Sale of business and mergers

In the case of a sale of a business or of a merger, worker involvement is not contemplated in the Companies Act; rather it is left to the process of consultation in terms of the LRA. Sections 197 and 197A of the LRA contain the provisions regarding the transfer of a business as a going concern and the automatic transfer of employment contracts in these circumstances. The transferee's right to retrench employees due to a transfer as a going concern is regarded as a dismissal in terms of section 186 of the LRA, and an automatic unfair dismissal in terms of section 187. An employer, however, may retrench the transferred employees later if an operational reason can be advanced, in which case consultation must take place with the trade union representatives or other worker representatives (including workplace forums).

Neither section 197 nor section 197A provides for disclosure of information or consultation regarding the envisaged transfer of an undertaking. This omission should be addressed as a matter of urgency. Further, it is recommended that a section be included in the Companies Act to make provision for consultation and disclosure of information in the event of the transfer of an undertaking as a going concern or merger. Such a provision not only adheres to the current solvency and liquidity requirements that must be met in the case of a merger, which primarily protect creditors, but would extend protection to workers and provide them with an opportunity to access the information relating to a merger and give input prior to the merger. It is suggested that provision should be made for a notice period to be given to trade unions or worker representatives, as well as allowing workers to vote or make known their opinion (on the approval) of the transaction.⁵⁵

Similar conditions apply in cases of a scheme or arrangement or when takeovers and offers (in parts B and C of Chapter 5 dealing with fundamental transactions, takeovers and offers) are proposed in terms of the Companies Act. It is recommended that workers be provided with information, a right to consultation and voting rights in instances which affect not only their job security, but also

⁵⁵ However, trade unions or worker representatives would not be able to void such a transaction as the right to trade, the managerial prerogative, as well as the right to property, do not prevent an employer/company from merging or selling its business. In this regard, the following is noted: the decision-making power of employers (and thus, corporations who are employers) is upheld in the free market economy by four notions: (i) the right to property, which enables the owner to dispose of his property as he wishes in order to obtain benefit from it; (ii) freedom of commerce and industry, by which every citizen obtains the freedom to engage in commerce, profession, craft or industry; (iii) freedom of association, which enables an individual to combine his resources in a trade or industry with that of others and form a corporation in order to share profits; and (iv) obtaining power over people: a worker has the freedom to enter into an individual labour contract with an employer he selects and the employer has the power to command the employee (Blanpain "The influence of labour on management decision making: A comparative legal survey" 1974 *ILJ* 6). See also *BTR Dunlop Ltd v National Union of Metalworkers (2)* 1989 10 *ILJ* 701 (IC) regarding the "managerial prerogative".

the business operations and direction of the company. The extent of the voting rights should be as follows: the trade union or employee representatives, after they have been provided access to relevant information and been consulted by the company, should vote on whether they support a merger, sale of business, scheme, arrangement or takeover. By allowing such a vote, the company grants employees the opportunity to make a contribution prior to the vote taking place and if the workers do not agree with the direction the company intends taking, they can make their voice heard. Their input could be a consideration put forward at the general meeting of shareholders which decides whether the company should go forward with a merger, sale of business, scheme, arrangement or takeover.

It must be noted, however, that the 1973 Companies Act⁵⁶ also placed restrictions on the decision-making powers of directors.⁵⁷ Section 228 of the 1973 Act, for example, provided that directors may not dispose of the whole, or substantially the whole, of the undertaking of the company or its assets without the approval of the members in a general meeting.⁵⁸ Section 112 of the present Companies Act (in a similar vein to section 228 of the 1973 Act) provides that a company may not dispose of all or the greater part of its assets or undertaking unless (a) the disposal has been approved by a special resolution of the shareholders, in accordance with section 115, and (b) the company has satisfied all other requirements in section 115, to the extent those requirements are applicable to such a disposal. Section 112(4) of the Companies Act further provides that “[a]ny part of the undertaking or assets of a company to be disposed of, as contemplated in this section, must be fairly valued, as calculated in the prescribed manner, as at the date of the proposal, which date must be determined in the prescribed manner”. Section 115 of the Companies Act provides – despite section 65, any contrary provision of the company’s MOI or any board resolution or resolution of security holders – that a company may not dispose of, or give effect to an agreement or series of agreements to dispose of all or the greater part of its assets or undertaking, implement an amalgamation or a merger, or implement a scheme or arrangement unless the disposal has been approved in terms of section 115 by means of shareholder approval. Reading section 112(2) together with section 115(1) reveals that, unless the transaction receives the requisite shareholder approval, the company may not dispose of or give effect to an agreement to dispose of all or the greater part of its assets.⁵⁹ The provisions contained in section 112 of the Companies Act (similar to that of section 228 of the 1973 Act) place directors under a duty to seek consensus with a workplace forum⁶⁰ on these matters, which could lead to difficulties in deciding whether terms acceptable to the workplace forum, indeed, are acceptable to the shareholders and *vice versa*.⁶¹ In terms of section 84 of the LRA, issues on which a workplace forum must be consulted are mergers and transfers of ownership in so far as they have an impact on the employees. The consequence thus attached to section 112 of the Companies Act, namely, that directors are bound by the decision of the shareholders, could

56 Act 61 of 1973.

57 Du Toit *et al Labour relations law* (2006) 345.

58 *Ibid.*

59 Cassim *et al Contemporary company law* (2012) 719.

60 See fn 97.

61 See also Du Toit *et al Labour relations law* (2006) 345 and (2015) 391 in this regard.

frustrate the objectives of the LRA and “create a dilemma that may ultimately have constitutional implications”.⁶² In terms of section 84 of the LRA, a consensus reached at/with the workplace forum is binding on the employer.⁶³ If such a consensus-seeking exercise were not binding, it would be to disregard the spirit of the LRA and would make such a provision senseless.

2 2 5 6 Associated rights

The Companies Act contains a number of associated rights: a registered trade union or another representative of employees may apply to court for an order declaring a director delinquent or under probation in the circumstances provided by the statute.

Section 20(4) of the Companies Act provides that a trade union representing employees of the company may apply to the High Court for an appropriate order to restrain the company from doing anything inconsistent with the Act. The Act abolishes the common-law derivative action; section 165(2)(c) of the Companies Act substitutes it with a statutory derivative action. Thus, a registered trade union that represents the employees of the company or another representative of employees of the company is empowered to bring the statutory derivative action.

2 2 5 7 Alternative dispute resolution

The Companies Act provides for alternative dispute resolution mechanisms in that a dispute can be referred to conciliation, mediation or arbitration to the tribunal, accredited entity or any other person⁶⁴ stipulated in the Act.⁶⁵ The concept “dispute” is not defined by the Companies Act. Disputes between, for example, a trade union or workplace forum and the company can be referred for alternative dispute resolution if the trade union or workplace forum is entitled to apply for relief or file a complaint in terms of the Companies Act.⁶⁶

Wage disputes, however, are not covered and have to be resolved in terms of the LRA. It would be useful if the Companies Act provided for specific disputes between the company and worker representatives or trade unions to be dealt with in terms of the Act itself. There is no specific provision in the Companies Act regulating the position as to how to deal with disputes regarding the formation

62 *Idem* (2006) 345 and (2015) 391.

63 In terms of s 84(1) of the LRA an employer must consult on the following matters: (i) restructuring of the workplace (including the introduction of new technology and work methods); (ii) changes in the organisation of work; (iii) export promotion; (iv) job grading; (v) education and training; (vi) product development plans; (vii) partial or total plant closures; and (viii) mergers and transfers of ownership in so far as they have an impact on the employees. S 86(1) of the LRA provides that the following matters require joint decision-making: (i) disciplinary codes and procedures, (ii) measures designed to protect and advance persons disadvantaged by unfair discrimination, (iii) rules for the proper regulation of the workplace other than work-related conduct and (iv) changes to rules of employer-controlled social benefit schemes by the employer or employer-representatives on the trusts or boards governing such schemes.

64 In terms of s 156(a) of the Companies Act, a person with standing may attempt to resolve any dispute with or within a company through alternative dispute resolution. This includes disputes regarding an alleged contravention of the Companies Act, or enforcement of any provision of the Act, or rights in terms of the Companies Act, a company’s MOI or rules, or a transaction or agreement contemplated in the Companies Act, MOI or rules.

65 S 166(1) of the Companies Act.

66 *Ibid.*

and amendment to a MOI; access to information related to directors' remuneration; financial statements of the company, especially in cases of financial distress or to institute business rescue proceedings; and corporate restructuring such as sale of business, mergers, schemes of arrangement and takeovers and offers. It is proposed that the Companies Act be amended in this regard and that disputes dealing with these issues be dealt with under the auspices of the Companies Act. An amendment would avoid a scenario such as a trade union or workers' representatives declaring a dispute in terms of the LRA, which, potentially, could land in the Labour Court for determination, thus placing the dispute in the domain of a labour dispute. Potentially, it addresses the issue of determining jurisdiction between the Labour Court and High Court or other tribunals.

However, it is important to point out that these issues affect, in particular, job security, as well as preferent payments to employees during business rescues or dismissals in terms of sections 189, 189A, 197 and 197A of the LRA. Wage disputes are specifically excluded from the ambit of the Companies Act, as well as dismissals in terms of sections 189, 189A, 197 and 197A of the LRA, which specifically are linked to a sale of a business or a merger. In this regard, cognisance must be taken of section 210 of the LRA, especially in cases where the application of the LRA is in conflict with other laws.⁶⁷

3 CONCLUDING REMARKS

Co-determination at supervisory level is not evident in South Africa. It is not suggested that the two-tier system should be copied into the South African milieu. It could be useful to consider how the characteristics of supervisory co-determination may be utilised in South Africa, especially in the context of the possible role and functions of the social and ethics committee (if worker representation were to be allowed on such a committee). A compromise (see below) should be reached between corporate and labour law on the matters to be referred to workplace forums and to collective bargaining. South Africa could achieve a form of "dualism", which will promote employee decision-making at corporate level, by means other than workplace forums, for example, the reimagined social and ethics committee. If, at the same time, the separation between workplace forums and collective bargaining is effected, it could result in a similar separation (as is the case in Germany) between the functioning of trade unions and works councils and in a system in which both (that is, a "workplace forum" and/or the social and ethics committee and collective bargaining) co-exist and mutually support and strengthen worker participation. Social and personnel matters, for instance, that fall within the domain of works councils could easily be incorporated into the agenda of the social and ethics committee or even be extended to workplace forums. The same can be said of operational or economic matters that include issues such as restructuring of the establishment, partial or total plant closure, mergers, transfers and so forth. These matters are already regulated by section 84 of the LRA.

It has been argued that the role of companies as members of society has changed. Shareholder wealth creation no longer is the only concern of companies,

⁶⁷ S 210 of the LRA provides as follows: "If any conflict, relating to matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail."

which is evident from developments in corporate law and corporate governance jurisprudence. These developments clearly articulate that shareholder primacy is out-dated and that note should be taken of other stakeholders of companies. The Companies Act empowers employees, as stakeholders in the company by not only granting them access to information under certain circumstances, but by giving them access to the statutory derivative action.

Companies *must* take due cognisance of the triple bottom line (social, economic and environmental aspects), as well as communicate with stakeholders noting their legitimate interests and expectations. These are vital issues in the new corporate law regime. Corporate reputation has become important for companies, in particular, its treatment of employees, its footprint in the environment, and similar reputational issues.

Company law, at least to an extent, addresses the social component of the relationship between employees and companies. These principles are further enhanced in that the Companies Act acknowledges the significant role of enterprises within the social and economic life of the nation. The Companies Act aims to balance the rights and obligations of shareholders and directors within companies and it encourages the efficient and responsible management of companies. Moreover, companies obtain certain benefits, such as the recognition of a separate legal personality, as well as the regulatory framework within which they operate. Companies have access to a customer base that enables them to sell their products and become profitable. In return, companies have corresponding obligations towards society, such as to comply with human rights imperatives. 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.

The social benefits include refraining from human rights abuses, including abusive labour practices, environmental damage or violations of the fundamental rights to equality, dignity and freedom. Such transgressions constitute an infringement of the negative duty not to cause harm. They also infringe the positive duty to improve the socio-economic conditions not only of workers, but of the larger community. The latter duty includes investment in education, access to clean water, payment of fair wages, and so forth.

That companies must note not only economic but also social benefits indicates the importance of CSR in corporate governance. Corporate governance and social responsibility programmes play a significant role in the establishment and enforcement of basic labour rights: enhancing labour market regulation; establishing minimum labour standards, and promoting collective-bargaining to the extent that basic labour rights, such as freedom of association, the rights to organise and to bargain collectively, are included in a legislative framework. The benefits of CSR extend to employees and to the community in general in which corporations operate. The demand by society that corporates must act in a responsible manner and be good corporate citizens is evident in the new corporate law regime. Issues such as integrity, accountability and sustainability are fundamental components of this new regime and the manner in which directors exercise their duties. These obligations on companies and directors clearly benefit employees and increase the participatory role of employees in the company.

It is proposed that the Companies Act be amended as follows with regard to the social and ethics committee:

- (a) Currently, the committee comprises at least three directors or prescribed officers of the company. At least one of them must be a non-executive director who was not involved during the previous three financial years in the day-to-day management of the company's business.⁶⁸ 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; it seems in view of the non-director requirement, that employees, for example, can be members of the committee.⁶⁹ It is recommended that the provision pertaining to the composition of the directors is maintained, but that the committee should be expanded to include employee representatives in the same ratio as directors or prescribed officers. It is proposed that half of the committee should comprise employee representatives and the other half directors or prescribed officers. This system is similar to the "quasi-parity co-determination" in Germany which can be found in certain industries: shareholders and employees can appoint an equal number of representatives on the supervisory board.⁷⁰
- (b) Currently, the committee is not a board committee and its members are appointed by the company (shareholders).⁷¹ The committee, as such, is a separate organ of the company. It is proposed that the committee should maintain its monitoring function with regard to the issues mentioned earlier, but that the committee be given more authority: the board must take the recommendations of the committee seriously. This will result in the committee not merely supervising or monitoring the activities of the board regarding the issues listed above, but also that it approves a decision made by the board regarding these issues. The impact would be that the committee could intervene in cases where the company's interests are seriously affected or where non-compliance with legislation has taken place (see above).
- (c) As mentioned, the existence of a workplace forum could create an overlap, especially relating to labour and employment issues, educational development of its employees, social and economic development (issues covered here include the EEA and the BBBEE Act), promotion of equality, prevention of unfair discrimination, and so forth. In these instances, the powers of a social and ethics committee should be limited. It is possible (depending on the size of the company) that a workplace forum is best suited to deal with these issues. The committee (as pointed out above) would have reporting, supervisory and enforcement functions, especially in cases where there is overlap between topics of decision-making and collective bargaining. It is conceivable in small establishments that neither a workplace forum nor a social and ethics committee is appropriate.

68 Reg 43(4) of the Companies Regulations.

69 Esser 2007 *THRHR* 426.

70 *Quasi* co-determination refers to the arrangement whereby "shareholders and employees can appoint an equal number of representatives on the supervisory board, but the right to appoint the chair belongs to the shareholders – thus tilting the power balance slightly in favour of shareholder representatives" (Du Plessis *et al Principles of contemporary corporate governance* (2011) 349–350. See also Wooldridge "Dual board system under German company law" 2005 *Amicus Curiae* 17 21 and Addison and Schnabel "Worker directors: A German product that did not export?" 2011 *Industrial Relations* 354 356–357 regarding parity and *quasi*-parity).

71 Delpont *The new Companies Act manual* 88.

- (d) It is proposed that a social and ethics committee's functions (if a workplace forum is not in place) cover issues of consultation and joint decision-making in terms of sections 84 and 86 of the LRA. Matters included for consultation (with a workplace forum) in section 84 of the LRA include: restructuring of the workplace (including the introduction of new technology and work methods); changes in the organisation of work, export promotion, job grading, education and training; product development plans; partial or total plant closures; mergers and transfers of ownership in so far as they have an impact on the employees; the dismissal of employees for reasons based on operational requirements; exemptions from any collective agreement or any law; and criteria for merit increases or the payment of discretionary bonuses. It is possible to include some of these non-distributive issues in the work of the social and ethics committee as it already covers many of these matters. Matters that require joint decision-making include disciplinary codes and procedures; measures designed to protect and advance persons disadvantaged by unfair discrimination; rules for the proper regulation of the workplace, other than work-related conduct; and changes to rules of employer-controlled social benefit schemes by the employer or employer-representatives on the trusts or boards governing such schemes.⁷² Different options are possible: employee representatives, workplace forum representatives, or both workplace forums and trade unions could represent employees on the social and ethics committee. Such a committee should complement and enhance the functions of a statutory workplace forum. A provision, included in the LRA and the Companies Act, should be to the effect that if a workplace forum is in existence, the ethics and social committee cannot make decisions concerning those issues and their role is limited to the reporting, supervision and enforcement of decisions made by the workplace forum. The result would be to establish a complementary system to workplace forums. Such a committee (in the absence of a workplace forum) can exist in conjunction with a trade union as the trade union's functions would be limited to wage issues and non-wage issues would be dealt with by the social and ethics committee.

The pluralist approach (although the enlightened shareholder approach is preferred in the Companies Act) emphasises that employees, as stakeholders, have an important role to play in advancing the interests of the company as a whole. A reading of various reports on corporate governance in South Africa, as well as the Companies Act, supports this approach. From a social and economic perspective, it is in the interest of employees to further the interests of the corporation they work for because it not only benefits them economically, but also results in social betterment if a corporation invests in social upliftment programmes, training, infrastructure, and so forth, as a result of increased efficiency and profits. If the interests of employees are enhanced, for example, by allowing them to be represented on the social and ethics committee, or other rights, such as voting rights, are expanded, then the application of the enlightened shareholder approach by means of "judicial activism in the interpretation" of the Companies Act would be less favoured than the pluralist approach. It follows that if the Companies Act is amended in a way that will facilitate meaningful worker participation, the enlightened shareholder approach to corporate governance would

⁷² S 86(1) of the LRA.

no longer be the favoured approach followed in interpreting the Companies Act.⁷³ Participation by employees on the committee will give legitimacy and authority to its activities and decisions, as the committee will not have a mere monitoring and administrative function. By granting it greater authority, the social and ethics committee can play a supervisory role (similar to that of the supervisory board in Germany) and, thus, force companies to take the decisions of the committee seriously and promote compliance with its decisions and directions. The supervisory function of the social and ethics committee could evaluate management decisions with regard to non-compliance with the EEA or the BBBEE Act or the company's actions in promoting equality. The powers of the committee would be enhanced to make representations to the general meeting of shareholders at which they vote on decisions made by the board of directors, especially if the board did not have access to information from a director or prescribed officer, or did not receive an explanation as to why the board did not follow through on recommendations made by the committee. The social and ethics committee, thus, has reporting, supervisory and enforcement functions, especially in cases where there is an overlap between topics of decision-making and collective bargaining. Against this backdrop it should also be noted that, although implementation difficulties regarding the social and ethics committee exist, the social and ethics committee does provide companies "with a forum where *integrated* focused governance can be applied to sustainability, corporate social responsibility, and corporate citizenship matters in a way that could assist companies in their attempts to convert a corporate credibility or legitimacy deficit into a surplus".⁷⁴ This supports the argument that employees are valuable to companies, and if they were granted real participation rights to obtain a "voice" or input on the social and ethics committee, it could enhance and further such an integrated focused governance approach.

In short, companies no longer reach decisions without taking note of the protection and rights granted to employees by legislation, including the rights afforded to employees by the Companies Act itself. It is submitted that if the living conditions of employees are appalling, the company or employer should intervene as a social partner and act more responsibly. Companies in South Africa, unlike employees, are hugely powerful and thus they have direct access to political leaders and other business people that could assist these employees.

73 See also Wiese "Worker participation and the Companies Act of 2008: An overview" 2013 *ILJ* 2467 2485 in this regard.

74 Joubert (fn 14 above) 195.