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**The role of the directors and the social and ethics committee in the promotion of
environmental justice.**

by

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Abstract

In a world where corporate strategies must seamlessly incorporate environmental concerns into all stages of their operations, this research underscores the imperative need for integrating environmental factors into corporate activities. Growing international and domestic environmental laws significantly influence the corporate arena, with environmental degradation emerging as a paramount concern. The study highlights how vital it is for companies to evaluate the environmental impact before investing in a project and consider the environmental consequences when making decisions. In South Africa, despite environmental regulations, the Companies Act of 2008 (the 2008 Act) which governs corporate operations, remains silent on environmental matters. The central focus of this study revolves around exploring the potential roles of the board of directors and the social and ethics committee in addressing environmental challenges. Presently, it appears that this role is underutilised, which motivates the purpose of this study. Ultimately, this research underscores the need for corporate laws to address environmental concerns better and to encourage the board of directors, and the social and ethics committee to give greater attention and weight to these concerns. This can be achieved through developing the duties of the board of directors and the social and ethics committee in the 2008 Act, to ensure that directors adhere to environmental concerns. Section 7 of the 2008 Act reaffirms that a company serves as a vehicle for achieving both economic and social advantages. Ultimately, the study aims to contribute to a refined legal framework that fosters a more environmentally conscious and responsible corporate sector in South Africa.

Table of Abbreviations

EPA	Environmental Protection Act of 1990
EIA	Environmental Impact Assessment
NEMA	National Environmental Management Act 107 of 1998
RF	Ring Fenced
UK	United Kingdom

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1. Chapter 1

1.1 Introduction.

We live in a world where corporate strategies must integrate environmental concerns at all stages of their operations.¹ These stages can include the innovation, raw material extraction, product fabrication, distribution, marketing, or disposal stage.² The degradation of the environment is a defining concern of our day as this poses significant financial risks to humanity and companies from physical causes such as catastrophic weather events and transition risks associated with the transition to a carbon-neutral economy.³ Companies ought to weigh the repercussions of environmental factors on their business decisions while concurrently assessing and endeavouring to reduce the company's negative impact on the environment.

This chapter will provide an exposition of the research problem. It will discuss the purpose of the research to be conducted and the methodological approach to be undertaken. To best contextualise the matter at hand, this chapter will critically investigate the meaning of environmental justice and its relevance in the corporate world.

1.2 Motivation/rationale

1.2.1 Environmental justice.

Society is gradually becoming more aware of its environmental rights and the consequences of failing to protect the environment. Corporations have been the most significant contributors to environmental injustices, such as mining, which results in water and air pollution. The *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy, (the Wild Coast)*⁴ matter shows that corporations are primarily interested in abusing the environment for financial advantage without considering the community which is likely to be affected by their operations. Therefore, it is submitted that the current interaction between companies and the environment is inadequate. Whilst it

¹ Ong "The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives" 2001 *EJIL* 685.

² *Ibid.*

³ *Ibid.*, 719.

⁴ 2022 (2) SA 585 (ECG) para 3, see para 1.21. below where the case is discussed.

is not being suggested that companies should not make profit, company law should ensure that directors' duties are better aligned with environmental laws such as section 28 of the National Environmental Management Act 107 of 1998 (NEMA).⁵ Moreover, section 24 of the Constitution of the Republic of South Africa 1996 (Constitution), states that environmental protection is a priority. The environment is an integral part of us, and how we preserve it determines its long-term viability,⁶ it has an impact on our health and welfare.⁷ Therefore, it is critical for corporate law to ensure that the operations of companies are cautious and environmentally friendly.

The NEMA contains measures that apply to corporate obligations but do not go far enough to protect the environment against powerful corporate interests.⁸ In a world where people are more environmentally conscious, reforms are needed in the corporate world that caters for both the company and its stakeholders,⁹ therefore it is important to understand what the environment is. The environment is defined as—

“The surrounding in which human beings exist and is composed of land, water, of the earth: microorganisms, plant and animal life: any portion or combination of (i) and (ii) and the relationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the preceding that influence human health and well-being”.¹⁰

Environmental justice is a major topic in today's world.¹¹ It is defined as “equitable treatment and meaningful participation of all people in creating, implementing, and enforcing environmental laws, regulations, and policies, regardless of their race, colour, country of origin, or level of income”.¹² Environmental justice aims to stop the misuse of power that makes poor people pay for environmental damage done by companies.¹³ This abuse of power takes place by way of communities and workers being exposed to harmful

⁵ Para 1.2.3 of Ch1 below.

⁶ WHO “Biodiversity and Health” 3 June 2015 <https://www.who.int/news-room/fact-sheets/detail/biodiversity-and-health>. (Accessed on 09 October 2023).

⁷ Ibid.

⁸ Section 2 and 28 of the NEMA.

⁹ Ong “The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives” 2001 *EJIL* 686.

¹⁰ Section 1 of NEMA.

¹¹ Jacklyn C “How the environmental justice movement is gathering momentum in South Africa” 2015, <https://theconversation.com/how-the-environmental-justice-movement-is-gathering-momentum-in-south-africa-49819>. (Accessed 10-03-2023)

¹² Redd, Julius and others “Addressing Environmental Justice as Part of ESG Initiatives” 2021 *Law360* 2.

¹³ Murcott “The role of environmental justice in socio-economic rights litigation” 2015 *SALJ* 883.

chemical pollutants by companies.¹⁴ Coal mining activities by companies is an excellent example of corporate ventures leading to environmental degradation, pollution, environmental injustices and health issues.¹⁵

Murcott submits that environmental justice is the complete antithesis.¹⁶ Hence, it requires the equitable distribution of environmental benefits and liabilities while accounting for past systemic race and class discrimination.¹⁷ Thus, as an "all-encompassing notion that upholds the use-value of life, all forms of life, against the interests of wealth, power, and technology," environmental justice strives to address unjust living conditions and the unjust distribution of environmental benefits and costs in a society.¹⁸ It is, therefore, an inherently transformative and redistributive concept. According to Dine, powerful corporations play a key role in worsening inequality and poverty.¹⁹ Therefore, there is need to examine all institutions, companies and corporate governances, in light of the complex environmental injustices, which include pollution and climate change.²⁰ Additionally, Murcott is of the view that society suffers the brunt of environmental injustices, not the perpetrators.²¹

The *Wild Coast* case is a notable environmental case that demonstrates environmental injustice. In this case, the applicants contested the decision of the Minister of Mineral Resources and Energy to grant exploration rights to Shell which is an energy company.²² The applicants claimed that the granting of mining rights would have major negative effects on the Wild Coast's social and environmental conditions, including the eradication of environmentally sensitive regions, the uprooting of local populations, and risks to the traditional fishing communities' means of subsistence.²³ The court held that the Minister's decision to give mining rights to the company was illegal.²⁴ According to the court findings

¹⁴ Ibid, 904.

¹⁵ Ibid, 893.

¹⁶ Ibid, 867.

¹⁷ Ibid.

¹⁸ Alcaro "Let's work together: Environmental and socio-economic rights in the courts" 2013 *SAJHR* 18.

¹⁹ Dine "Corporate Regulations, Climate Change and Corporate Law: Challenges and Balance in an International and Global World" 2015 *EBLR* 174.

²⁰ Ibid at 175.

²¹ Murcott "The role of environmental justice in socio-economic rights litigation" 2015 *SALJ* 883.

²² *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy* 2022 (2) SA 585 (ECG) para 18.

²³ Ibid, para 3.

²⁴ Ibid, para 32.

there was a failure to appropriately assess the environmental and social implications of the proposed mining activities, as required by NEMA and a failure to consult with impacted communities.²⁵ In the context of the exploitation of mineral resources, the case presents several crucial questions including community rights and environmental preservation. The court's ruling emphasises the significance of carrying out rigorous environmental and social impact evaluations before granting mining rights and making sure that meaningful engagement with impacted communities is ensured. Also, the case highlights the requirement for strong legal frameworks and efficient enforcement procedures to safeguard the environment and local populations' rights in the face of large mining interests.²⁶ Additionally, the *Wild Coast* case represents an important victory for South Africa's environmental and social justice movements.

1.2.2 Section 24 of the Constitution and section 7 of the 2008 Act

The environment is protected in the Constitution.²⁷ In this regard, section 24(b) of the Constitution states that: "everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation [and] encourage conservation".²⁸ According to Murcott, section 24 of the Constitution recognises environmental justice.²⁹ Arguably, environmental justice seeks to uphold the values of the Constitution through its rule for social transformation, which is focused on meeting people's basic needs and enhancing their quality of life.³⁰ These needs include "economic well-being, access to healthcare, a decent place to live, protection of human rights, and democracy".³¹ The purpose of promoting "compliance with the Bill of Rights as provided for in the Constitution, in the application of company law" is stated specifically in section 7 of the 2008 Act, which can be read as reflecting the necessity of taking into account social and environmental rights as embodied in the Bill of Rights.³² Section 7 of the 2008

²⁵ Ibid.

²⁶ Ibid, para 3.

²⁷ Section 24 of the Constitution.

²⁸ Ibid.

²⁹ Murcott "The role of environmental justice in socio-economic rights litigation" 2015 SALJ 877.

³⁰ Ibid.

³¹ Ibid.

³² Section 7 of the 2008 Act.

Act also aims to "reaffirm the concept of the company as a means of achieving economic and social benefits".³³ This illustrates the 2008 Act's widening beyond its narrowly defined conventional objectives of protecting shareholders and maximising profits, to a certain extent.³⁴

1.2.3 The relevant provisions of NEMA in the context of environmental justice.

Section 28 of the NEMA imposes the duty of care "on every person who causes, has caused, or may cause significant pollution or degradation of the environment to take reasonable measures to prevent such pollution or degradation".³⁵ The word "every person" in the NEMA refers to both juristic and natural persons, a company is a juristic person.³⁶ Furthermore, the legal personality of a company has the effect that a company acquires legal rights and obligations.³⁷ Therefore, a company should adhere to the provisions of the NEMA's since it is a legal entity with rights and obligations which should be observed.

1.3 Research problem.

Matters relating to the environment are regulated primarily in NEMA and affirmed by section 24 of the Constitution, there is a role that can be fulfilled by the board and the social and ethics committee in promoting environmental justice. At present, it does not appear as if this role is being optimized. Accordingly, this study aims to investigate the utilisation of the social and ethics committee and board of directors to reduce environmental challenges in South Africa.

³³ Ibid.

³⁴ 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 *THRHR* 691.

³⁵ Section 28 (1) of the NEMA "Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment".

³⁶ Section 1 of the NEMA, Section 1 of the 2008 Act.

³⁷ Cassim FHI *et al Contemporary Company Law* (2021) 625.

1.4 Research Methodology.

This research is conducted by way of desktop research. It will look at primary and secondary sources in the Republic of South Africa and in the United Kingdom. The approach of this research is critical, analytical, and comparative. Including a comparative approach in researching the role of directors and the social and ethics committee in the promotion of environmental justice is crucial for several reasons. A comparison between South African law and the United Kingdom (UK) law will help formulate a broader perspective which can be gained on corporate governance practices and regulatory frameworks related to environmental justice and lessons may be drawn. The historical connection between South Africa and the UK, along with the influence of British legal principles, adds depth to the analysis.³⁸ Through the use of a comparative approach, it is possible to evaluate effective modifications, identify areas that still need work, and identify best practices to strengthen the role of directors and the social and ethics committee in furthering environmental justice goals in South Africa.

1.5 Limitations and Delineations.

This dissertation will examine the topic using the 2008 Act, regulation 43 of the Companies Regulations, 2011 (Regulations), the King IV Report on Corporate Governance for South Africa, 2016 (King IV), section 28 of NEMA, domestic and foreign case law, and the United Kingdom Companies Act 2006. The director's duties that are pertinent to this research under common law and statute will be examined. King IV will also only be discussed in context of director duties at common law and in terms of the 2008 Act. Moreover, the role that the social and ethics committee can play in terms of the 2008 Act, regulations and the proposed amendments to the Companies Amendment Bill will be examined. The scope of foreign law is limited to the United Kingdom Companies Act 2006.

³⁸ Du Bois, F *Wille's Principles of South African Law* (2007) 67.

1.6 Proposed Structure.

The first chapter serves as an introduction to the study. The second chapter will discuss the common law and statutory duties of the board of directors, which align with the research. The social and ethics committee's role will be the focus of chapter three. An international comparison will be made in chapter four of the UK Companies Act and the South African 2008 Act. Finally, chapter five will discuss the recommended reforms to ensure that the 2008 Act contributes to environmental sustainability or justice more proactively.

2. Chapter 2: The role of the board of Directors

2.1 Chapter Introduction

This chapter discusses the board of directors and its mandate and duties in terms of sections 66, 75 and 76 of the Companies Act. The directors' obligations pertinent to the research are then critically examined, along with how they could be utilized to ameliorate the environment. Due to South Africa's partial codification of company law, several common law director duties have been incorporated into the law through the 2008 Act, which adopts general legal principles and presents them in a statutory statement, thereby enabling the preservation of existing law and allowing potential future development.³⁹ There are several duties of directors under the common law and the 2008 Act. These duties include unfettered discretion/proper purpose, conflict of interest, a director not exceeding the limit of his authority, duty of care, skill and diligence personal financial interest and standards of director conduct. The duties of directors fall broadly on the fiduciary duty and duties of care and skill.⁴⁰ In this chapter, the focus will be on the common law position and statutory position concerning the duty to act in good faith, duty to act in the company's best interests and the duty of care and skill. Therefore, the other common law and statutory duties will not be explored due to their limited relevance to this research.

2.2 What is a director?

Section 1 of the 2008 Act states that a "director" is—

"a member of the board of a company, as contemplated in section 66 of the 2008 Act, or an alternate director of a company and includes any person assuming the position of a director or alternate director, by whatever name designated".⁴¹

As is evident from the abovementioned definition, a person's status as a director is not solely based on their title.⁴² An individual who occupies the post of a director of a certain company is said to be a director of it if he has been appointed or elected and has delivered

³⁹ Hayath "A case for excluding foreign companies from the application of the Companies Act of 2008 is unconvincing" 2022 *THRHR* 43.

⁴⁰ *Ibid.*

⁴¹ Section 1 of the 2008 Act.

⁴² *Ibid.*

a written consent to serve as director to it.⁴³ A director may be executive, non-executive, *de facto*, *de jure*, alternate, *ex officio*, or a "shadow" director, among other varieties.⁴⁴ A broad and non-exhaustive definition of a director is provided in the 2008 Act. Therefore, with such a broad definition, anyone who meets the criteria is eligible to be a director. In addition, directors are authorized to exercise all corporate rights and duties unless the 2008 Act or the company's MOI explicitly states otherwise.⁴⁵

2.3 An overview of the director duties under common law.

Directors were expected to uphold several duties under the common law. As mentioned above,⁴⁶ this research will discuss the fiduciary duties to act in good faith and in the best interests of a company, as well as the duty of care and skill. These obligations do not mandate that the ordinary director acts in any way; rather, they serve to outline the parameters within which he or she must act, should they choose to do so.⁴⁷

2.3.1 Common law duty to act in good faith and in the best interests of a company.

The common law states that a director has a fiduciary duty to act in good faith.⁴⁸ Honesty is a key component of good faith.⁴⁹ Cassim also stipulates that honesty is a personal choice.⁵⁰ A violation of good faith necessitates subjective wrongdoing.⁵¹ Since the issue is whether the director genuinely felt that he or she was acting in the best interests of the company, the test of "good faith" can then be regarded as subjective.⁵² The demand that the director act for the "proper purpose" tempers the subjectively assessed duty to act in good faith.⁵³ A director may have acted without good faith if there is no ground to believe

⁴³Section 66(7)(a) -(b) of the 2008 Act.

⁴⁴ Cassim FHI et al *Contemporary Company Law* (2021) 687.

⁴⁵ Section 1 of the 2008 Act.

⁴⁶ Para 2.1 of Ch2 above.

⁴⁷ Beuthin et al *Basic Company Law* (1999) 223.

⁴⁸ Cassim FHI et al *Contemporary Company Law* (2021) 706.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, 707.

⁵² *Ibid.*

⁵³ *Ibid.*

that he did so in the company's best interests.⁵⁴ The criteria is whether a reasonable person would have believed that the director acted in the corporate's best interests.⁵⁵

In *Charterbridge Corporation Ltd v Lloyd's Bank*,⁵⁶ the court determined that "the standard for determining whether a director is acting in the best interests of the company is whether a reasonable, intelligent, and honest person in that position could do so under the circumstances".⁵⁷ As stated by van Tonder, the "test for determining whether a director behaved in good faith and the best interests of the company is subjective in terms of what needs to be done to advance the company's interests but objective in terms of the company's interests".⁵⁸ Based on the common law, the courts will look at both subjective and objective factors when evaluating the director's actions.⁵⁹

The phrase "best interests of the company" has generated numerous arguments.⁶⁰ However, in common law, the phrase "best interests of the company" relates to both the interests of the company as well as the company's shareholders interests.⁶¹ Thus, if the director must consider the impact of his decision on the environment, it must be in the company's best interest. This interpretation appears problematic since it disregards the rights and interests of other stakeholders. The rights and interests of society concerning the environment are not acknowledged. This idea is contested by Botha, who argues that the definition is "too restrictive and out of date because shareholders are no longer the only primary stakeholders of a corporation".⁶² It is important to recognise that society also contributes significantly to the company's ability to generate profit and carry out its operations.⁶³ In addition, other stakeholders such as employees are also invested in the company in the form of human capital, and they bear the risk of loss if it is futile.⁶⁴

⁵⁴ *Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd* [1927] 2 KB 9 at 23.

⁵⁵ *Ibid.*

⁵⁶ [1970] Ch 62 at 74.

⁵⁷ *Charterbridge Corporation Ltd v Lloyd's Bank* [1970] Ch 62 at 74.

⁵⁸ van Tonder, "An analysis of the directors' duty to act in the best interests of the company, through the lens of the business judgment rule" 2015 *THRHR* 702-720.

⁵⁹ *Ibid.*

⁶⁰ Gwanyanya, "The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities", 2015 *PRLJ* 3109.

⁶¹ Ramnath M "Interpreting Directors' Fiduciary Duty to Act in the Company's Best Interests through the Prism of the Bill of Rights: Taking Other Stakeholders into Consideration", 2013 *THRHR* 102.

⁶² Botha, "Responsibilities of Companies towards Employees", 2015 *SPECULUM JURIS* 7.

⁶³ *Ibid.*

⁶⁴ Ramnath M, "Interpreting Directors' Fiduciary Duty to Act in the Company's Best Interests through the Prism of the Bill of Rights: Taking Other Stakeholders into Consideration", 2013 *SPECULUM JURIS* 104.

Therefore, the decisions made by the directors have an effect beyond only the corporation; any poor choice could have a detrimental effect on environmental rights. For instance, a building company might want to develop a specific plot of land in a specific location, and that development might result in violations of the fundamental rights of the local populace, like the right to access water or to a healthy environment.⁶⁵ If this is not stopped, the company could face serious financial repercussions as a result of any ensuing litigation.⁶⁶

2.3.2 Common law perspective on the duty of care and skill.

Courts have taken a lenient stance toward the duty of a director to exercise reasonable care, skill, and diligence in the performance of his or her duties.⁶⁷ Thus, courts formerly took the position that the shareholders were ultimately accountable for the poor appointment of the company's directors.⁶⁸ The obligation of care and skill is founded in delict and not common law fiduciary duties.⁶⁹ Directors were expected to use the utmost care and skill that they were capable of.⁷⁰ Consequently, a lower level of care and skill was expected from a director if they lacked experience or competence.⁷¹ The inexperience of the director shields him or her from accountability.⁷² The idea that directors are not required to have any special credentials for their posts is one that both English and South African law have adopted. However, English law has imposed a stricter duty of care on the company directors than South African law does.⁷³ In the cases of *Fisheries Development Corporation of SA Ltd v. Jorgensen and Fisheries Development Corporation of SA Ltd v. AWJ Investments (Pty) Ltd (Fisheries Development)*,⁷⁴ the scope of a director's duty of care and skill is significantly influenced by the business the company is in and any specific obligations that have been given to or assumed by him. In that

⁶⁵ Gwanyanya, "The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities", 2015 PRLJ 3112.

⁶⁶ Ibid.

⁶⁷ Cassim FHI et al *Contemporary Company Law* (2021) 747.

⁶⁸ Ibid.

⁶⁹ Du Plessis *NO v Phelps* 1995 (4) SA 165 (C) at 170 B-D.

⁷⁰ Cassim et al *Contemporary Company Law* (2021) 747.

⁷¹ Ibid.

⁷² FH Cassim "Fraudulent or Reckless Trading and s 424 of the Companies Act of 1973" 1981 SALJ 162.

⁷³ Further discussion in chapter 4.

⁷⁴ 1980(4) SA 156 (W) at 166.

regard, there is a distinction between a non-executive director who has no specific responsibilities and an executive director who takes part in the day-to-day management of the company's operations or a portion thereof.⁷⁵ The former is not required to pay constant attention to the operations of the company.⁷⁶ Thus, his responsibilities are erratic and are to be carried out at regular board meetings and any additional meetings that may need his attention.⁷⁷ However, a director must exercise the degree of care that is reasonable for someone with their expertise and experience.⁷⁸ He is not accountable for trivial mistakes in judgment.⁷⁹ A director is reasonable in believing that any official entrusted with specific duties will carry them out with integrity as long as there is no cause to doubt their honesty.⁸⁰ He must, however, use caution and not hide behind culpable ignorance of the company's activities.⁸¹ A director must also exercise caution when accepting information or advice, even if it is offered by someone who appears to be appropriately competent.⁸²

2.4 An overview of the statutory duties of a director.

The discussion to follow analyses the statutory duties of the directors and to whom those obligations are owed. In order to determine whether directors are required to ensure environmental justice, it is necessary to examine to whom the director duties are owed. The partial codification of common law fiduciary duties in section 76(3) of the 2008 Act is the subject of attention. The court stated in *Gheri and Others v Tiber Developments (Pty) Ltd and Others*,⁸³ that the ambit of the fiduciary duty can change from time to time. Moreover, a fiduciary obligation, as well as its characteristics and scope, are factual matters to be determined by a comprehensive examination of the essence of the relationship and any pertinent factors that influence how that relationship operates.⁸⁴ The

⁷⁵FH Cassim "Fraudulent or Reckless Trading and s 424 of the Companies Act of 1973" 1981 SALJ 165.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ 2007 (4) SA 536 (SCA) para 9.

⁸⁴ *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) para 27.

obligation owed by parties must be interpreted considering "modern conditions," not in a vacuum.⁸⁵

2.4.1 The statutory duty to act in good faith, for proper purpose and in the company's best interests.

According to Horney, the duty of good faith, loyalty and honesty play an important role in the progression of the corporate system.⁸⁶ He further stipulates that companies must now comply with the 2008 Act's obligations, which have become mandatory, prospective, and unchangeable.⁸⁷ However, it might be argued that the obligations could be altered or interpreted in a way that is consistent with the Bill of Rights.

Section 76(3) of the 2008 Act provides that, "a company director, while acting in his role, is required to utilise his authority and carry out duties in good faith, for a proper purpose and in the best interests of the company". Cassim argues that section 76(3)(a) of the 2008 Act is only a declaration of the common law and has no impact on this component of the common law fiduciary duty.⁸⁸ However, rather than treating it as a component of the director's duty of good faith, as some authorities do, the section dispels any lingering doubt about the existence of this fiduciary duty.⁸⁹ Also, directors must use their discretion while performing their duty of good faith but exercise it within the confines of their authority.⁹⁰

The phrase "proper purpose" is not defined in the 2008 Act. However, in terms of the common law, it has been understood to mean that directors must use their authority for the specific goal for which it was granted.⁹¹ That is why the purpose should not be for ulterior motives.⁹² Therefore, directors who exercise their authority for a purpose for which it was not granted do so as an abuse of authority.⁹³

⁸⁵ Ibid, para 30.

⁸⁶ Horney, "Is directors' liability under the Companies Act of 2008 a potentially dangerous trap in comparison to other jurisdictions?" 2022 *THRHR* 55.

⁸⁷ Ibid.

⁸⁸ Cassim FHI et al *Contemporary Company Law* (2021) 709.

⁸⁹ *Teck Corp Ltd v Millar* 1972 33 DLR (3d) 288 (BCSC) at 313-314.

⁹⁰ Cassim FHI et al *Contemporary Company Law* (2021) 709-714.

⁹¹ Ibid

⁹² Ibid.

⁹³ Ibid.

A director may objectively violate the responsibility to exercise their powers for a proper purpose even if they subjectively behave honestly in the company's best interests since the duties of "good faith and proper purpose" are separate yet cumulative.⁹⁴ The reason for this is that the proper purpose test is objective, unlike the subjective good faith test.⁹⁵ It is objective in that after establishing the true intent behind using the authority, it is essential to decide if this intent aligns with the authorised purpose, which involves interpreting the empowering provision within the broader context of the instrument.⁹⁶ However, in *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others*⁹⁷ the concept of "best interest" was determined to be subjective. This meant that directors were expected, after making reasonably diligent efforts to gather information, to personally believe that their decision was in the company's best interests.⁹⁸ The director's belief had to be well-founded in reason, despite the rationality requirement being objective, it was found to be less stringent.⁹⁹

A director's assessment of whether something is in the "best interest of the company" is fair if the director has exercised reasonable care to learn about the issue and does not personally stand to gain or lose financially from the decision.¹⁰⁰ The best interest of the company is now recognised in company law to include an inclusive strategy that considers the legitimate expectations and interests of important stakeholders rather than just the interests of the shareholders.¹⁰¹ This entails making judgments that are in the company's best interests, which would also likely encompass the interests of its customers, employees, community, and, the environment.¹⁰² Since a company is an artificial entity, as stated in the *Gaiman v National Association for Mental Health*,¹⁰³ it can be challenging to determine what is best for it without considering all of its existing and potential members.¹⁰⁴ Additionally, South African courts have not demonstrated much

⁹⁴ Cassim FHI et al *Contemporary Company Law* (2021) 709.

⁹⁵ Ibid.

⁹⁶ *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) para 80.

⁹⁷ Ibid, para 74.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Kopel et al *Guide to Business Law* 5 ed (2017) 420.

¹⁰¹ Ibid.

¹⁰² Botha "Responsibilities of Companies towards Employees" 2015 *THRHR* 3.

¹⁰³ (1971) Ch 317 at 330.

¹⁰⁴ *Gaiman v national Association for Mental Health* (1971) Ch 317 at 330.

inclination to get involved with directors violating their duties.¹⁰⁵ The assumption that they are not involved in the day-to-day operations of the companies leads to these conclusions.¹⁰⁶ To support this claim, the court's ruling in *Levin v Feld and Tweeds Ltd*,¹⁰⁷ found that it is not the court's duty to judge the wisdom of a route taken by the corporation in the administration of its affairs.

However, globally and in South Africa, the legal system has undergone significant change. It is evident that community "legal convictions" are becoming more and more influenced by environmental risk factors.¹⁰⁸ Arguably the interpretation of fiduciary obligations will be significantly impacted by this. Acting in "good faith" and in the "best interests" of the company are legal notions that evolve throughout time.¹⁰⁹ The 2008 Act also provides the duties a company has to society. Section 7 of the 2008 Act, declares that one of its goals is to "promote compliance with the Bill of Rights as guaranteed by the Constitution" and that it "reaffirms the concept of the company as a means of achieving economic and social benefits".¹¹⁰ Directors must therefore adhere to the Bill of Rights when performing their duties in the company's best interest. It could be claimed that section 7 of the 2008 Act requires directors to consider stakeholders when performing their obligations. Keeping stakeholders in mind entails considering the company's effect on environmental stability. Delpont asserts that it is unlikely that section 7(d) of the 2008 Act creates a brand-new, sui generis responsibility for directors.¹¹¹ Instead, it appears that section 7(d) of the 2008 Act should be read to mean that directors must consider the interests of stakeholders, but that it does not give stakeholders any direct rights, in light of the policy paper and the conventional interpretation.¹¹² Additionally, rather than simply incorporating a new duty applicable to directors into the "purpose" provision, the legislator would have done so if they had intended to do so possibly by listing it in section 76 of the 2008 Act with the other duties.¹¹³ This is problematic because section 76 does not

¹⁰⁵ Mongalo T and Scott T *Corporate Law and Corporate Governance: An overview of business undertakings in South Africa* (, 2023) 201.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid, 1951 (2) SA 401 (A) at 414.

¹⁰⁸ Reddell, "Directors' Liability and Climate Risk: South Africa" 2018 *CCLI-South-Africa-Paper* 6.

¹⁰⁹ Ibid.

¹¹⁰ Section 7 of the 2008 Act.

¹¹¹ Delpont *Henochsberg commentary on section 7(d) of the 2008 Act*.

¹¹² Ibid.

¹¹³ Ibid.

explicitly require directors to take stakeholder needs and the environment into account, it is only through the interpretation of section 7 of the 2008 Act. Although it could be argued that the 2008 Act's general philosophy, as stated above, is to consider the interests of all stakeholders, this philosophy is not consistently applied in the more specific provisions, which leads to uncertainty.¹¹⁴ Comparing the 2008 Act to the common law, it can be said that progress has been made in that the Act mandates conformity with the Bill of Rights and takes the societal needs of the company into account.

2.4.2 Statutory Duty of Care and Skill.

A director must comply with the requirements of section 76(3)(c)(i) and (ii) by; exercising the level of competence and diligence that may be reasonably expected of a person "carrying out the same functions" as those performed by the director and "having the general knowledge, skill and experience of that director".¹¹⁵ While this imposes objective limits, the test is not entirely objective because it will be affected by the size and nature of the company, the role and responsibilities of the particular director, and other factors.¹¹⁶ In *Organisation Undoing Tax Abuse and Another v Myeni and Others*,¹¹⁷ the duty was suggested to consist both a subjective and objective standard. However, in comparison to the common law, section 76(3)(c) of the 2008 Act places a less subjective standard of care on directors.¹¹⁸ The director's expertise, experience, and knowledge must also be considered.¹¹⁹ A higher subjective criterion will be used to evaluate the demeanour of the director if they have more expertise or experience.¹²⁰ The language of section 76(3)(c)(i) and (ii) of the 2008 Act makes it clear that there is a prescribed minimum standard with which all directors are required to comply, so a director cannot claim ignorance as an excuse. Only when the subjective criterion raises or elevates the objective standard anticipated of a reasonable director is it taken into consideration.¹²¹ If a director breaches their duty of care and skill, they may be held accountable in delict for the resulting losses.

¹¹⁴ Ibid.

¹¹⁵ Section 76(3)(c)(i) and (ii) of the Companies Act.

¹¹⁶ Cassim FHI et al *Contemporary Company Law* (2021) 683-686.

¹¹⁷ [2020] 3 All SA 578 para 16.

¹¹⁸ Cassim FHI et al *Contemporary Company Law* (2021) 683-686.

¹¹⁹ Reddell, "Directors' Liability and Climate Risk: South Africa" 2018 *THRHR* 13.

¹²⁰ Ibid.

¹²¹ Cassim FHI et al *Contemporary Company Law* (2021) 753.

The "business judgment rule" has been brought into the 2008 Act as a defence that directors may employ in response to such accusations, as is the case with fiduciary obligations.¹²² The standard used to determine a director's duty of care and expertise has drawn criticism in academic circles for having a relatively low threshold.¹²³ As was already indicated, the 2008 Act has attempted to address this to some extent by setting a less subjective and more stringent criterion than the common law.¹²⁴ The newly added business judgment rule, however, essentially relaxes the responsibility of care and expertise.¹²⁵ Moreover, given that the business judgment rule applies to both the fiduciary duty and the duty of care and skill, it is obvious that overlapping considerations exist.¹²⁶ *Fisheries Development* case is the most important case in South Africa regarding the duties of care and skill.¹²⁷ In this instance, the court outlined the distinction between the duties expected of executive and non-executive directors.¹²⁸ Although the court acknowledged the variations, it made no recommendations regarding how to use various tests.¹²⁹ According to Reddel, the court stressed that the nature of the company's operation and any specific obligations assumed or delegated to the specific director are given significant weight.¹³⁰ The court also took into account the delegation of responsibilities, saying that directors are justified in believing that company employees uphold their obligations honestly in the absence of any cause for doubt.¹³¹ Directors have the right to depend on management's knowledge and counsel, but they should not take it at face value.¹³²

A violation of section 76(3)(c) of the 2008 Act may therefore occur under identical conditions to those mentioned in sections 76(3)(a) and (b) of the 2008 Act when considering environmental risk.¹³³ When directors fail to take action in respect of a

¹²² Section 76(4) of the Companies Act.

¹²³ Reddell, "Directors' Liability and Climate Risk: South Africa" 2018 *CCLI-South-Africa-Paper* 13.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Botha, "The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective" 2009 *Obiter* 710.

¹²⁷ 1980 4 SA 156 (W).

¹²⁸ *Ibid* at 165H-166B.

¹²⁹ Stevens, "The Legal Nature of the Duty of Care and Skill: Contract or Delict?" 2017 *PER / PELJ* 4.

¹³⁰ Reddell, "Directors' Liability and Climate Risk: South Africa" 2018 *CCLI-South-Africa-Paper* 13.

¹³¹ *Ibid.*

¹³² *Fisheries Development Corporation of South Africa Ltd v Jorgensen* 1980 4 SA 156 (W).

¹³³ Reddell, "Directors' Liability and Climate Risk: South Africa" 2018 *CCLI-South-Africa-Paper* 13.

company which is faced with foreseeable environmental risk and significant financial hazards or when directors makes an assessment and fail to manage that risk with appropriate care and skill,¹³⁴ this can be a violation of the directors duty of care and skill. For instance, the scientific community generally agrees that environmental change will increase the frequency of extreme weather events.¹³⁵ Such as where the company is situated in a floodplain or a location with limited water resources yet is heavily dependent on water.¹³⁶ In this instance, directors may need to take proactive planning to deal with extreme weather events, if the company is likely to be affected by them. Similarly, directors may be deemed to have violated their duty of care and skill, if they fail to adequately supervise delegated tasks related to environmental risks or if they rely blindly on advice without using their judgement.¹³⁷

2.5 The Interplay between director duties and the promotion of environmental justice.

Directors must make sure that the business practices of their organisation are environmentally responsible.¹³⁸ This entails cutting back on waste, lowering greenhouse gas emissions, protecting natural resources, and fostering biodiversity.¹³⁹ Also, directors need to ensure that the company complies with all applicable environmental laws and regulations and responsibly manages environmental risks. Firstly, environmental issues can significantly impact a company's financial performance.¹⁴⁰ For instance, a company that neglects to handle its environmental liabilities may be subject to pollution fines, legal action, or reputational harm. Secondly, companies that fail to take environmental issues seriously run the danger of losing business and harming their long-term prospects considering that environmental sustainability is becoming more and more essential to stakeholders including investors, customers, and other stakeholders.¹⁴¹ Finally, there is a

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid, 14.

¹³⁷ Ibid.

¹³⁸ Andreas and Ohlsson "STAKEHOLDERS' INFLUENCE ON THE ENVIRONMENTAL STRATEGY OF THE FIRM" 2011 *THRHR* 7-10.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

growing understanding that corporations must contribute to efforts to solve major environmental issues like climate change, deforestation, and biodiversity loss.¹⁴² Therefore, Directors who actively promote environmental sustainability can give their company a competitive edge by positioning it as a leader in these initiatives.¹⁴³

In brief, a director's fiduciary obligation to act in the best interests of the company and its stakeholders includes protecting the environment as a key component.¹⁴⁴ It is submitted that directors must give environmental sustainability a high priority and incorporate it into the overall strategy and decision-making procedures of the company. Directors must take proactive measures to ensure that the company's actions are sustainable, minimise environmental harm, and adhere to environmental laws and regulations to uphold their responsibility of care and skill towards the company. This can involve actions like putting environmental management systems into place, performing environmental impact analyses, and creating plans to cut back on greenhouse gas emissions and other pollutants.

Environmental Impact Assessments (EIA) play a significant role in achieving environmental justice. It is a decision-making tool that is used to identify and assess the likely environmental effects of some planned development initiatives to support wise decision-making and responsible environmental management.¹⁴⁵ An EIA's purpose is to guarantee that choices on suggested projects and activities are made in an ecologically-friendly manner.¹⁴⁶ It directs decision-makers in government agencies, directors and stakeholders, to make environmentally sustainable decisions.¹⁴⁷ A proponent is required by the EIA procedure to get the opinions of people who could be impacted by a company project.¹⁴⁸ Thus, involving the parties who may be impacted by the directors' environmental decision.

¹⁴² Ibid.

¹⁴³ Ibid

¹⁴⁴ Ibid.

¹⁴⁵ Bond and others, "The interminable issue of effectiveness: substantive purposes, outcomes, and research challenges in the advancement of environmental impact assessment theory" 2004 *Impact Assessment and Project Appraisal* 295.

¹⁴⁶ THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

Environmental impact assessment is a recognised legal procedure that controls how socioeconomic development requirements and environmental considerations are incorporated into the decision-making process both domestically and internationally.¹⁴⁹ Therefore, conducting an EIA before the project's commencement is required by law.¹⁵⁰ When deciding on a course of action that can have a detrimental effect on the environment, this tool might help directors and the social ethics committee. As a result, it implies good environmental management based on the soundness of the judgements drawn from the EIA. Arguably, this is a tool directors should be highly knowledgeable of. Moreover, *Eloff Landgoed v Minister of Forestry, Fisheries and Environment* [2023] ZAGPPHC 434 (*Eloff* case) also serves as a compelling example of why directors should be well-informed about the EIA to safeguard companies from investing in projects with potential legal implications. This case centres on Section 24 of NEMA, which “creates the concept of an environmental authorisation, which must be granted before any activity that might have environmental impact may be approved”.¹⁵¹ The core question in the *Eloff* case was whether the authorization decision was lawfully and rationally based on an adequate assessment of the mining project likely impact.¹⁵² The court found insufficient consideration of social, economic, and environmental aspects, partly due to flawed agronomic assessment conditions.¹⁵³ Consequently, the court set aside both decisions and highlighted the importance of thorough environmental assessments and compliance with legal requirements before granting such authorizations.¹⁵⁴ Thus, the *Eloff* case underscores the significance of informed decision-making to balance development, environmental concerns and emphasises the need for comprehensive evaluations to avoid potential legal challenges for companies investing in projects.¹⁵⁵

Every person who causes, has caused, or may cause significant pollution or environmental degradation has a responsibility to take reasonable steps to prevent such pollution or environmental degradation, according to section 28 of the NEMA, which is in

¹⁴⁹Peel et al *Principles of international environmental law*, 3rd ed. Cambridge University Press: New York (2012) 601.

¹⁵⁰ THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003.

¹⁵¹ Section 24 of NEMA.

¹⁵² *Eloff Landgoed v Minister of Forestry, Fisheries and Environment* [2023] ZAGPPHC 434 para 5- 40.

¹⁵³ Ibid.

¹⁵⁴ Ibid

¹⁵⁵ Ibid.

line with section 24 of the Constitution.¹⁵⁶ Due to its legal identity, a company can acquire legal rights and liabilities.¹⁵⁷ As a result, since the company is a legal entity, it must abide by section 28 of the NEMA. There are additional director responsibilities in NEMA in addition to those mandated by the 2008 Act. According to section 34(7) of NEMA:

“Any person who is or was a director of a company at the time of the commission by that company of an offence under any provision listed in Schedule 3 shall himself or herself be guilty of the said offence and liable on conviction to the penalty specified in the relevant law, including an order under subsection (2), (3) and (4), if the offence in question resulted from the failure of the director to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence: Provided that proof of the said offence by the company shall constitute prima facie evidence that the director is guilty under this subsection”.

The above section 34(7) of NEMA shows the provision can be applicable in cases when the board of directors fails to acknowledge and address the company's role in environmental deterioration.¹⁵⁸ Therefore, directors ought to avoid committing an offence that will lead to a penalty as stated in section 34(7) of NEMA.

It could be argued that the directors' duty of care under the 2008 Act should include the obligation to protect the environment as mandated by NEMA. If companies fail to address environmental problems, stakeholders will be able to hold them accountable under the 2008 Act. Director accountability to the environment would be made explicit in this way. The viability and responsibility towards the environment will increase once the directors recognise the necessity of environmental justice.

2.6 The Interplay between director duties under King IV Report and the promotion of environmental justice.

The focus is on the King IV principles that are relevant to the study and the interaction between director duties with the principles concerning environmental issues. The governing bodies are the directors in this study. King IV describes the governing body as accountable for strategy, ethics, and performance, overseeing risk, stakeholders, and

¹⁵⁶ Section 28 of NEMA.

¹⁵⁷ Cassim et al *Contemporary Company Law* (2021) 625.

¹⁵⁸ Reddell, “Directors’ Liability and Climate Risk: South Africa” 2018 *CCLI-South-Africa-Paper* 16.

compliance.¹⁵⁹ King IV promotes sustainability and transparency while guiding the organisation with responsible leadership.¹⁶⁰ Also, it describes and explains the critical values and guiding concepts needed to further the objectives of the Constitution.¹⁶¹ Moreover, the King IV acknowledges the 2008 Act's primacy and embraces that the Report's contents are only aspirational and not legislative.¹⁶² In the event of a dispute between the law and King IV, either now or in the future, the law takes precedence.¹⁶³ On the other hand, the King IV provisions have already received judicial recognition.¹⁶⁴ Thus, in *South African Broadcasting Corporation Ltd v Mpofu*,¹⁶⁵ the court ruled that the suspension of a director by a state-owned corporation fell short of the King Code's standards for good governance. Victor asserts that the King Code has the following significance for corporate governance:

“Companies and their Boards are expected to adhere to the Code's fundamental principles. King advises public enterprises to try and implement the proper principles outlined in the Code. The Code sets out principles and does not determine detailed conduct. The Code controls directors and their behaviour to ensure that they uphold not only the minimum statutory standard but also the best practice that may apply to the company given its specific circumstances”.¹⁶⁶

Moreover, in *Minister of Water Affairs and Forestry v. Stilfontein Gold Mining Co. Ltd*,¹⁶⁷ the court once more relied on the King Report to support its verdict rather than establishing rights for the stakeholders or putting obligations on the company. The main finding of the court was that the actions taken by the mining companies and their directors constituted a flagrant violation of the Constitution, the Mineral Petroleum Development Act, and the National Environmental Management Act concerning their environmental responsibilities.¹⁶⁸ The court emphasised that if judges are unwilling to help the State by offering appropriate enforcement mechanisms for statutory obligations, the impression

¹⁵⁹ King IV.

¹⁶⁰ Ibid.

¹⁶¹ Jebe, “Fostering Corporate Sustainability through Directors’ Duties” South Africa’s Attempt to Align Corporate Governance with its Constitution” 2018 *ILSA Journal of International and Comparative Law* 135.

¹⁶² Nwafor, “The protection of environmental interests through corporate governance: A SOUTH African Company law perspective” Corporate Board: Role, Duties & Composition 2015 *THRHR* 14.

¹⁶³ Ibid.

¹⁶⁴ *South African Broadcasting Corporation Ltd v Mpofu* 2009 4 All SA 169 (GSJ).

¹⁶⁵ Ibid para 29.

¹⁶⁶ Ibid.

¹⁶⁷ *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and Others* 2006 (5) SA 333 (W).

¹⁶⁸ Ibid para 16.9.

will be created that mining companies are free to exploit the nation's mineral resources for profit throughout the mine and can ignore their environmental obligations.¹⁶⁹ The court ruled that this is not acceptable in a constitutional democracy that upholds everyone's right to protection from the negative impacts of pollution and environmental deterioration.¹⁷⁰

A framework for corporate governance that offers guidelines and principles for the moral as well as effective leadership of organisations is provided by the King IV.¹⁷¹ The term "corporate governance" is defined as the governing body's exercise of ethical and effective leadership, which includes anticipating and mitigating, or otherwise minimising, the adverse impacts of the organisation's activities and outputs on the economy, society, and environment.¹⁷² King IV encourages integrated thinking, which considers the connections and interdependence among the variety of elements that affect an organisation's capacity to generate value across time.¹⁷³ The stakeholder-inclusive approach, sustainable development, integrated reporting, and perceiving the organisation as an essential part of society and thus as a corporate citizen are all fuelled by integrated thinking.¹⁷⁴

2.6.1 Principle 1: The governing body should lead ethically and effectively.

The first King IV principle requires that the board members run the company with integrity and effectiveness. It is submitted that values encourage moral behaviours towards people and the environment, discouraging businesses from taking part in activities that harm the environment or adversely affect disadvantaged groups. Characteristics like honesty, competency, responsibility, accountability, impartiality, and clarity serve as examples of ethical and effective leadership.¹⁷⁵

The recommended practices outlined in principle one state that the directors should work to cultivate these traits within themselves and demonstrate them through their

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ King IV 20.

¹⁷² King IV 11-20.

¹⁷³ Ibid.

¹⁷⁴ King IV 24.

¹⁷⁵ King IV principle 1, recommended practice 1.

behaviour.¹⁷⁶ According to this principle, a director must have integrity, which is the attribute of being trustworthy and maintaining the company's moral values.¹⁷⁷ It includes the alignment of stated moral and ethical principles with actions. Therefore, the directors must behave honestly and, in the organisation's, best interests.¹⁷⁸ As a result, the organisation must model an ethical organisational culture and should act ethically rather than focusing on mere compliance. By adopting this strategy, the director ensures that all sources of value creation, such as environmental concerns as represented by stakeholders, are treated equally rather than prioritising the interests of financial capital suppliers.¹⁷⁹

Directors must be competent and ensure that they are familiar with the organisation, its industry, the "triple context" in which it operates, the capital it uses and affects, as well as the major laws, rules, codes, and standards that are relevant to the organisation.¹⁸⁰ It is now widely acknowledged that companies function within a triple context, encompassing the "economy, society, and the environment".¹⁸¹ Therefore, the directors should be aware of any environmental laws that might impact the company's operations. This was confirmed in the case of the *Wild Coast*¹⁸² which demonstrated the need for directors to consider environmental legislation when mining titanium from the sands along South Africa's Wild Coast. The recommendations made by the King IV are in line with the legislative duties that directors are obligated to perform by the 2008 Act, including the fiduciary duties and the duty of care.¹⁸³

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid, King IV 4, The triple context refers to the "economy, society and the environment". Companies operate within the triple context.

¹⁸¹ King IV 4.

¹⁸² 2022 (2) SA 585 (ECG) para 33.

¹⁸³ Section 76 of the Companies Act.

2.6.2 Principle 3: The governing body should ensure that the company is and is seen to be a responsible corporate citizen.

Companies are required to act responsibly, uphold their duties to society and the environment on which society depends, and be good corporate citizens.¹⁸⁴ This idea of responsible citizenship aligns with the Constitution and Bill of Rights, recognizing the right to a healthy environment for all South Africans.¹⁸⁵ Companies, as significant societal entities, must consider environmental concerns and practice sustainability, beyond just financial matters.¹⁸⁶ The concept of corporate citizenship signifies that a company's role extends beyond profit-making to encompass its impact on society and the environment, necessitating adherence to regulations, codes of conduct, and the law, as outlined in guiding principles.¹⁸⁷

Furthermore, principle three of the King IV underscores corporate citizenship and social responsibility, which can play a crucial role in promoting environmental justice.¹⁸⁸ This approach encourages corporations to act responsibly, support sustainability, and address environmental inequalities.¹⁸⁹ As good corporate citizens, organisations are obliged to protect the environment and champion sustainability, lessening their negative impact and promoting environmental protection.¹⁹⁰ Thus, through preserving resources, and engaging with marginalized communities, companies can address environmental injustices. The King IV defines corporate citizenship as an organisation's integral role in the broader community, involving rights, responsibilities, and obligations.¹⁹¹ This necessitates accountability for environmental impacts, including interaction with marginalized communities disproportionately affected by environmental degradation, ensuring responsible corporate behaviour and supporting environmental justice. Directors have a vital role in overseeing the organisation's image as a responsible corporate citizen, involving continuous monitoring of its impact on various environmental aspects, such as

¹⁸⁴ Jebe, "Fostering Corporate Sustainability through Directors' Duties" South Africa's Attempt to Align Corporate Governance with its Constitution" 2018 *ILSA Journal of International and Comparative Law* 136.

¹⁸⁵ Section 24 of the Constitution.

¹⁸⁶ Ibid.

¹⁸⁷ King IV 25.

¹⁸⁸ Ibid.

¹⁸⁹ King IV principle 3, recommendation 4-10.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

pollution, waste disposal, and biodiversity protection.¹⁹² Thus, the principle emphasises proactive management beyond regulatory compliance, setting a higher standard for directors' decision-making and accountability.¹⁹³

Additionally, corporate citizenship mandates companies to support programmes that advance environmental justice and sustainability. Companies can aid in promoting environmental justice and building a more sustainable future by sponsoring projects like renewable energy initiatives, conservation efforts, and environmental education programmes. This principle calls for environmental monitoring, which is consistent with NEMA's definition of sustainable development. NEMA aims to foster sustainable development and guarantee that environmental factors are considered in all development initiatives.¹⁹⁴ This aim relates to the principles in the King IV, which emphasise the value of social responsibility and responsible corporate citizenship in company governance.¹⁹⁵ In particular, the NEMA principles for sustainable development and principle three of the King IV are inextricably linked. Sustainable development, according to NEMA, is the process of incorporating social, economic, and environmental considerations into development planning, implementation, and decision-making to ensure that it benefits both current and future generations.¹⁹⁶ There are also eight additional sustainable development sub-principles included in NEMA. The following are NEMA principles for achieving sustainable development:

- “(i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
- (ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
- (iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;
- (iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of responsibly;
- (v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and considers the consequences of the depletion of the resource;

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Section 2(4)(i)-(viii) of NEMA.

¹⁹⁵ King IV 25.

¹⁹⁶ Section 2(4)(i)-(viii) of NEMA.

(vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised; (vii) that a risk-averse and cautious approach is applied, which considers the limits of current knowledge about the consequences of decisions and actions; and (viii) that negative impacts on the environment and people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied".¹⁹⁷

Bearing the provisions of NEMA in mind, it is prudent to examine the potential interactions between NEMA and principle three of the King IV. Firstly, environmental management is emphasised by both NEMA and principle three. NEMA mandates that environmental protection be upheld during development activities,¹⁹⁸ while principle three urges corporations to prioritise environmental protection as responsible corporate citizens.¹⁹⁹ Secondly, stakeholder engagement is emphasised by both NEMA and principle three. While principle three encourages organisations to engage with stakeholders, including marginalised communities, to promote environmental justice, NEMA mandates that stakeholders be consulted, and their concerns be considered in development activities.²⁰⁰ Thirdly, NEMA's underlying principles revolve around sustainable development, intending to strike a balance between economic growth, environmental preservation, and social justice.²⁰¹ The principles in NEMA are rooted in the notion of sustainable development.²⁰² Sustainable development is defined as "the integration of social, economic, and environmental factors into the planning, implementation, and decision-making to ensure that the development serves present and future generations".²⁰³ This also fulfils the requirements of section 24 of the Constitution.²⁰⁴ The combination of the "social, economic, and environmental aspects" involves a process of reconciliation aimed at achieving a suitable equilibrium among them, although this equilibrium is not always

¹⁹⁷ Ibid.

¹⁹⁸ Section 2(4)(i)-(viii) of NEMA.

¹⁹⁹ King IV 25 45.

²⁰⁰ Section 2(4)(i) -(viii) of NEMA and King IV 25 45.

²⁰¹ Section 2(4)(i)-(viii) of NEMA.

²⁰² Lemine "Wading into the debate on section 2(4) (r) of the National Environmental Management Act 107/1998 and its impact on policy formulation for the protection of South African wetlands" 2022 *Journal for Juridical Science* 81.

²⁰³ Section 1 of NEMA.

²⁰⁴ Ibid.

achieved in practice.²⁰⁵ Section 2(3) of the NEMA emphasises the need to balance these pillars by proposing the establishment of thresholds that define the acceptable boundaries for both environmental protection and development, as outlined in section 24 of the Constitution.²⁰⁶ By setting these thresholds, section 24(a) of the Constitution, which safeguards the right to a non-hazardous environment for people's health and well-being, is given practical effect.²⁰⁷ In a similar vein, principle three underscores the significance of sustainable development, urging entities to undertake measures that support sustainability and mitigate environmental harm.²⁰⁸

Finally, both NEMA and principle three of the King IV prioritize social responsibility. NEMA necessitates those developmental project factors in the social and economic consequences on surrounding communities, while principle three urges organisations to act as conscientious corporate citizens and prioritize the welfare of all stakeholders.²⁰⁹ Arguably, they both highlight the significance of managing the environment, engaging stakeholders, pursuing sustainable development, and fulfilling social responsibilities. Entities can advance environmental justice, safeguard the environment, and play a role in fostering a more sustainable future if they adhere to these principles.

2.7 Chapter conclusion

As previously mentioned, the 2008 Act partially codified the fiduciary duties of directors and the duty to exercise reasonable care and skill, both which were previously governed by common law. A breach of these duties can result in personal liability under s77 of the 2008 Act. Thus, if the duty towards the environment is made part of the 2008 Act directors will be able to be held personally liable in the case of failing to account for the environment in running the company. Although the common law developments on fiduciary duties continue to be applicable, the 2008 Act adds that the court "must", when interpreting the 2008 Act or deciding a case, update the common law as necessary to enhance the

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Section 24 of the Constitution.

²⁰⁸ King IV 25-45.

²⁰⁹ Section 2(4)(i) -(viii) of NEMA and King IV 25 45.

realization and enjoyment of rights.²¹⁰ The court must also advance the purpose, intent, and goals of the 2008 Act.²¹¹ The interpretation of the duty to act in the company's best interests must now be guided by the Bill of Rights. Directors should take proactive measures to ensure that the company's actions are sustainable, minimise environmental harm, and adhere to environmental laws and regulations to uphold their responsibility of care and skill towards the environment.

²¹⁰ Mupangavanhu BM "Impact of the Constitution's Normative Framework on the Interpretation of Provisions of the Companies Act 71 of 2008" 2019 *PER / PELJ* 1-5.

²¹¹ *Ibid.*

3. Chapter 3: The role of the social and ethics committee.

3.1 Chapter Introduction.

The first part of this chapter sets out the composition and function of the social and ethics committee. It also explains the accountability aspect of the social and ethics committee towards the environment. Additionally, it examines whether the social and ethics committee is a corporate or board committee. Knowing whether the social and ethics committee is a board committee is crucial and discussed in further detail in this chapter. Although regulation 43 (1) of the Companies Regulations provides that the committee must address environmental issues, the 2008 Act and Regulations contain very little about dealing with environmental concerns. The 2008 Act and the Companies Regulations are filled with inconsistencies, as they use broad language to describe the committee's responsibilities while failing to offer clear guidance on the committee's authority, tasks, goals, and reason for existence.²¹² Thus, since the Companies Regulation 43 of the 2008 Act does not specify the primary environmental obligations of the social and ethics committee, the research will also touch on other aspects of laws that require corporations to be active in environmental issues.

3.2 Composition of the social and ethics committee.

The social and ethics committee supports the 2008 Act's goals and ensures that the company upholds the highest ethical standards.²¹³ This also entails keeping an eye on the company's environmental impact.²¹⁴ Section 72(4) of the 2008 Act empowers the Minister to mandate certain companies to establish a social and ethics committee. A state-owned company and a listed company are required to appoint a social and ethics committee under regulation 43(1) of the Companies Regulation.²¹⁵ Additionally, any other company that in any two of the previous five years had a public interest score which was greater than 500 points is required to appoint a social and ethics committee.²¹⁶ It is

²¹² Nanyemba, T and Maphiri, M "The social and ethics committee and the protection of non-shareholder constituencies: teething problems or no teeth at all?" (2022) 33.3 *SLR* 376.

²¹³ Cassim et al *Contemporary Company Law* (2021) 625.

²¹⁴ Regulation 43 (1) of the Companies Regulation.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

questioned whether the general requirement in regulation 43 of the Companies Regulation regarding all state-owned companies and public companies that are listed falls within the purview of the authority granted in section 72(4) of the 2008 Act. The three criteria must be met namely the size of the company's workforce, the annual turnover, or the nature and scope of its activities, in evaluating the public interest.²¹⁷ Delport submits that it does not make sense that all publicly traded enterprises and state-owned companies automatically meet one or more of the requirements.²¹⁸ The annual turnover and workforce size are the two elements in the public interest score calculation, and they can satisfy the first part of section 72(4) of the 2008 Act's requirements and some of its second part requirements.²¹⁹ Moreover, Delport submits that the calculation of the public interest score is purely "mechanical" and subject to errors.²²⁰ For instance, if a private company is just a holding company for real estate, but the debt used to finance the real estate is such that the public interest score is greater than 500.²²¹ This speaks to the necessity of providing the Companies Tribunal with the discretion to provide an exemption in certain instances.²²² Nevertheless, the Companies Amendment Bill 2023 proposes a new provision for companies seeking exemption from the obligation to establish a social and ethics committee. The Tribunal can grant this exemption when it deems that the company either possesses an internal mechanism performing the committee's functions or that having a social and ethics committee is unnecessary, considering the company's characteristics and activities.²²³ It could be asserted that this limits the ability to ensure environmental sustainability because certain companies that are not required to establish a social and ethics council might cause environmental harm.

The first members of the social and ethics committee must be appointed by a company that is required to do so and that already exists as of the effective date of the Act taking effect on May 1, 2011, or, if applicable, within 12 months of the Companies Tribunal rejecting the company's request for an exemption from the requirement to appoint a social

²¹⁷ Delport *Henochsberg commentary on section 72 of the 2008 Act*, 280.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ Companies Amendment Bill, 2023.

and ethics committee.²²⁴ In the case of a state-owned company, it must appoint the first committee members within a year of the date of incorporation, within a year of the date on which it first becomes a listed public company, or within a year of the date on which it first satisfies the requirements outlined in the Companies regulation 43(1)(c) read with Companies Regulation 26(2).²²⁵ The committee must comprise a minimum of three directors or designated officers from the company, with a requirement that at least one of them should be a director not engaged in the company's daily management and not having held such a position in the preceding three financial years.²²⁶ The Companies Amendment Bill of 2023 proposes for public and state-owned companies, that all members must be directors not involved in day-to-day management. While other companies, the committee must consist of at least three directors or prescribed officers, with at least one director involved in day-to-day management.²²⁷

Furthermore, the Bill grants authority to the Minister to define and prescribe the minimum qualifications, skills, and experience requirements for members of the social and ethics committee.²²⁸ This is crucial because it guarantees that the people chosen to be on the committee have the skills and knowledge required to perform their duties well.²²⁹ In the context of environmental sustainability, this is an opportunity to ensure that the social and ethics committee overseeing environmental matters may consist of qualified individuals with the necessary expertise of the environment laws. Therefore, ensuring well-informed decisions by the committee that may safeguard the company from adverse environmental consequences.

3.3 Functions of the social and ethics committee

The committee has several different roles to play. The committee's primary responsibility is to monitor the company's operations under any “applicable laws, other legal requirements, and established codes of best practice concerning social and economic development, good corporate citizenship, the environment, health, and public safety,

²²⁴ Regulation 43(3)(a) of the Companies Regulation.

²²⁵ Ibid.

²²⁶ Regulation 43(4) of the Companies Regulation.

²²⁷ Companies Amendment Bill of 2023.

²²⁸ Ibid.

²²⁹ Ibid.

including the impact of the company's operations and the use of its products or services, and consumer relationships, including the company's advertising, public relations, and compliance activities".²³⁰ This study centres on the committee's responsibility to the environment. According to Kloppers, regulation 43(5) broadens the scope of the committee's monitoring responsibilities beyond just social issues.²³¹ The regulation effectively mandates that each member of the committee be conversant of environmental laws.²³²

The social and ethics committee is obliged to bring issues under its mandate to the board of directors' notice when the situation calls for it, and it must present an annual report to shareholders at the annual general meeting of the company through one of its members regarding matters under its mandate.²³³ The reporting role is crucial since it is meant to guarantee that the board and shareholders will recommend and execute any necessary remedial action in light of the report.²³⁴ The social and ethics committee has the authority to ask any director, designated officer, or employee of the company for any information regarding a shareholders' meeting.²³⁵ The committee is also authorised to request all notices and other communications required for the performance of its duties, as well as the right to attend any such meeting.²³⁶ At any shareholders' meeting, the committee is entitled to speak on any item of business that pertains to its duties.²³⁷ As long as the duties of a social and ethics committee are carried out by current directors of a company who are elected to serve on the committee, their performance will be held to the same standards as every other director of a company.²³⁸

²³⁰ Regulation 43 (5) of the Companies Regulations.

²³¹ Kloppers, "Driving Corporate Social Responsibility (CSR) through the Companies Act: An Overview of the Role of the Social and Ethics Committee" 2013 *PELJ* 178.

²³² Ibid 178. Legislation such as the National Environmental Management Act 107 of 1998; the National Environmental Management: Protected Areas Act 57 of 2003; the National Environmental Management: Air Quality Management Act 39 of 2004; the National Water Act 36 of 1998. the National Environmental Management: Biodiversity Act 10 of 2004.

²³³ Ibid.

²³⁴ *Ex parte Links Golf Club (RF) Limited* (CT00550ADJ2020) para 2021. Cassim et al *Contemporary Company Law* (2021) 631.

²³⁵ Regulation 43 (5) of the Companies Regulations.

²³⁶ Section 72(8) of the 2008 Act.

²³⁷ Section 72(9) of the 2008 Act.

²³⁸ Kloppers, "Driving Corporate Social Responsibility (CSR) through the Companies Act: An Overview of the Role of the Social and Ethics Committee" 2013 *PELJ* 136.

3.4 The status of the social and ethics committee.

Whether the social and ethics committee is a board committee, or a company body is unclear.²³⁹ The determination of whether the social and ethics committee is considered a board or a company committee holds significant importance due to the implications it has on the committee roles and responsibilities. Cassim asserts that the discrepancy occurs because regulation 43(2) specifies that the company appoints this committee, yet regulation 43(3) specifies that the board appoints the committee's initial members.²⁴⁰ Although section 72 mentions "board committees" in the short title, Delport argues that this does not categorically classify the social and ethics committees.²⁴¹ Instead, it refers to the "company" being required to appoint the committee in this case. If it is a board committee, the board may grant it authority and powers as opposed to those listed in the 2008 Act and the Companies Regulations.²⁴² However, it could be argued that the social and ethics committee is a board committee because it is listed under "board committees" in section 72 of the 2008 Act, this suggestion is not conclusive in Cassim's opinion.²⁴³ The fact that the social and ethics committee is only required to bring concerns within its mandate to the board's notice as and when necessary, rather than reporting on those matters to the shareholders at the company's annual general meeting, furthers the confusion.²⁴⁴ Furthermore, board committee members share identical responsibilities as directors, including the same duties and liabilities, as mentioned, irrespective of their dual role as company board members.²⁴⁵ Therefore, the classification of the social and ethics committee as a board or company committee has an impact on the liability of its members.²⁴⁶ If the social and ethics committee became a board committee, it would be liable to the same obligations as directors, as well as having to perform its duties in line with the duties of directors in terms of the 2008 Act.

²³⁹ Cassim et al *Contemporary Company Law* (2021) 625.

²⁴⁰ Havenga, "The social and ethics committee in South African company law" 2015 *THRHR* 285-287.

²⁴¹ Delport *Henochsberg commentary on section 72 of the Companies Act 71 of 2008*.

²⁴² Cassim et al *Contemporary Company Law* (2021) 625.

²⁴³ *Ibid*.

²⁴⁴ Regulation 43(5)(b) and (c) of the Companies Regulation.

²⁴⁵ Section 76(1) (b) and 77(1)(b) of the Companies Act.

²⁴⁶ *Ibid*.

On the other hand, the Companies Tribunal ruled in *Ex parte Nitro Securitisation 6 (RF) Ltd*²⁴⁷ that the social and ethics committee is a "statutory company committee established to monitor and ensure that companies act in a responsible manner and contribute to the economic and social development of communities within which they operate". Delpont also argues that the social and ethics committee is a distinct corporate entity rather than a board committee.²⁴⁸ The committee has the authority to report back to the shareholders at its discretion, it is a company committee rather than a board committee.²⁴⁹ This extends beyond the committee's simple obligation to bring specific issues to the board of directors' attention.²⁵⁰ It matters how one categorises this committee, if it is a company committee, it means the members are solely obligated to perform the duties and exercise the authority outlined in the 2008 Act and the Regulations.²⁵¹ Also, the significance of this distinction is that a committee that is not a board committee may report to shareholders and make recommendations to the board regarding matters contrary to the interests of the company and without any fiduciary obligations to the company as directors and/or prescribed officers under the 2008 Act.²⁵² This is important to note because a company's best interests may not always coincide with environmental concerns. Thus, environmental concerns frequently force companies to alter their methods or make costly or disruptive investments in new technologies.²⁵³ For instance, cutting greenhouse gas emissions may necessitate a company making a short-term investment in new machinery.²⁵⁴ To maximise profit, companies may reject environmental restrictions because they perceive them as a burden. Thus, companies may also incur additional costs as a result of noncompliance environmental laws, such as penalties.²⁵⁵ Therefore, if the social and ethics committee is not a board committee it may make recommendations on environmental issues that are required by environmental

²⁴⁷ (C00478ADJ2020) para 14.

²⁴⁸ Delpont *Henochsberg commentary on section 72 of the Companies Act 71 of 2008*.

²⁴⁹ Ibid 276; Company Regulation 43(5)(b).

²⁵⁰ Esser & Delpont, "The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2" 2017 *De Jure* 224.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Clarke, "The Challenge of Going Green" 1994 *THRHR* <https://hbr.org/1994/07/the-challenge-of-going-green> (accessed on 10:04:2023).

²⁵⁴ Ibid.

²⁵⁵ NEMA.

legislation or that may not be in the company's best interest but are in the interests of stakeholders. If the social and ethics committee is a company committee, it is in the same position as the shareholders, it is an organisational unit of the company, and has no fiduciary obligations to the company.²⁵⁶

It could be submitted that the social and ethics committee's role is a company committee because its primary obligation is to bring concerns within its mandate to the board, when necessary, rather than being tasked with reporting on these matters.²⁵⁷ Additionally, the committee holds the authority to report directly to shareholders.²⁵⁸ This approach ensures a focus on fulfilling its mandated duties and aligning its actions with the best interests of the company. To alleviate this ambiguity, legislation should be amended to clearly define the status and purpose of social and ethics committees, either as board committees or company committees. This would help determine their responsibilities, obligations, and reporting mechanisms, thereby providing clarity and consistency.

3.5 The role of the social and ethics Committee in the promotion of environmental justice.

The social and ethics committee's main goal is to make sure that a company raises its ethical bar.²⁵⁹ It is tasked to uphold business ethics and advance society.²⁶⁰ It can be argued that considering the impacts of a company's actions on the environment represents a positive move toward ensuring environmental justice. Additionally, the Companies Regulation mandates that the social and ethics committee oversee the company's operations that is following all applicable laws, other legal requirements, and established codes of best practice concerning social and economic development, and the environment.²⁶¹ Thus, the objectives of section 7 of the 2008 Act, therefore, support a company's responsibility to take into account the social and environmental effects of its

²⁵⁶ Esser & Delport, "The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2" 2017 *De Jure* 229.

²⁵⁷ *Ibid.*, 224.

²⁵⁸ *Ibid.*

²⁵⁹ Cassim et al *Contemporary Company Law* (2021) 625.

²⁶⁰ *Ibid.*

²⁶¹ Regulation 43(4) of the Companies Regulation.

activities, making it mandatory rather than optional and reaffirming that the pursuit of profit at the expense of environmental rights is no longer permissible from a legal standpoint.²⁶²

However, the Company Regulation does not define the term 'environment' and there is no additional instruction on how much monitoring is necessary. As a result, the regulations are insufficient for purposes of promoting environmental justice, and it is doubtful that committee members understand the level of their responsibilities, or how much they should monitor the company's environmental activities.²⁶³ The legal matter of the *Wild Coast* case is a notable environmental case that demonstrates the obligation of directors and the social and ethics committee to consider environmental legislation related to mining titanium from the coastal sands of South Africa's Wild Coast.²⁶⁴ The court's decision underlines the necessity for ongoing vigilance in the face of strong mining interests and offers crucial advice on the duties of mining companies and government regulators to protect the environment and the rights of local communities.²⁶⁵ The social and ethics committee should conduct thorough environmental impact assessments on the company's behalf to prevent getting involved in legal disputes that could harm the company's reputation or result in the company having to pay costs for breaking environmental laws.

3.6 Chapter Conclusion.

Within a company, the social and ethics committee plays a crucial role. Therefore, it is submitted that the 2008 Act must be amended to clearly define whether it is a board committee or a company committee. The fact that the 2008 Act makes provision for this committee, provides South Africa with some protection from corporate failure to adhere to environmental responsibilities.²⁶⁶ A committee, like the social and ethics committee, is an excellent approach to preserving environmental interests and helping directors consider these interests when they make business choices. Whatever the case, directors

²⁶² Section 7 of the Companies Act.

²⁶³ Kloppers, "Driving Corporate Social Responsibility (CSR) through the Companies Act: An Overview of the Role of the Social and Ethics Committee" 2013 *PELJ* 180.

²⁶⁴ *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy* 2022 (2) SA 585 (ECG) para32.

²⁶⁵ Para 1.2.1 of Ch1 above.

²⁶⁶ Para 3.2 of Ch3 above.

should be aware of this committee and understand its makeup, purposes, and potential use in the promotion of environmental justice. Additionally, the social and ethics committee is crucial for the environment because it is tasked with making sure the business operates in an ethical and socially responsible manner.²⁶⁷ Therefore, the social and ethics committee is supposed to keep track of the company's activities which affects the environment and to ensure that the company's operations are in line with environmental laws.²⁶⁸

²⁶⁷ Ibid.

²⁶⁸ Ibid, para 3.5.

4. Chapter 4: Comparative analysis.

4.1 Chapter Introduction

The focus of this chapter is to compare the approaches taken by foreign legal systems, particularly the British legal system, in handling environmental concerns. The comparison will centre on the fiduciary duty to act in good faith and the duty to act in the company's best interests, the duty to exercise due skill and care and this will be done considering both common law and statutory provisions. The other common law and statutory duties will not be explored due to their limited relevance to this research. The South African 2008 Act and the United Kingdom Companies Act 2006 (the 2006 UK Act) will be compared to identify their strengths and potential weaknesses in regulating environmental concerns between companies and society.

4.2 UK Common law duties

4.2.1 Fiduciary duty to act in good faith and in the company's best interest.

Before the 2006 UK Act introduced statutory duties, directors' general obligations were rooted in common law, meaning they were developed through court decisions.²⁶⁹ The fundamental fiduciary duty to act in loyalty emerged from the principle that directors act as trustees of the company and its assets.²⁷⁰ This duty was established to prevent any misuse of legal authority and position.²⁷¹ The various obligations of a fiduciary encompass different aspects of directors' fundamental duties of loyalty and faithfulness.²⁷² As a result, mere incompetence was inadequate and a breach of fiduciary duty implied disloyalty or unfaithfulness.²⁷³ Under the United Kingdom common law, directors were obligated to act in good faith, genuinely considering what they believed to be in the best interests of the company.²⁷⁴ This interpretation typically referred to the interests of the shareholders.²⁷⁵

²⁶⁹ Omotola OT “*Directors' Duties: Section 172 of the UK Companies Act*” (2021) (unpublished Dissertation, LLM University of Portsmouth, May 2021) 3.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² *Bristol & West Building Society v Mothew* [1998] Ch 1 at 3-18.

²⁷³ *Hogg v Cramphorn Ltd* [1967] Ch.D 254.

²⁷⁴ *Re Smith & Fawcett Ltd* [1942] Ch 304 (CA).

²⁷⁵ *Gaiman v National Association for Mental Health* [1971] Ch. 317, 330.

The company is perceived as an entity with its distinct interests, separate from those of its members.²⁷⁶ Conversely, in *Brady v Brady*,²⁷⁷ it was argued that the interests of the company, being an artificial entity, cannot be distinguished from the interests of its stakeholders. Consequently, determining what truly serves the company's interests, such as assessing appropriate risk levels or considering the interests of both current and future shareholders, can be challenging. Therefore, the interpretation of acting in the “company's interests” is a matter of contention and has been construed as promoting shareholder value and not stakeholders or the environment.²⁷⁸ The United Kingdom's common law fiduciary duty, like its South African counterpart, did not prioritize environmental and stakeholder interests. Thus, the best interest of a company was interlinked with the only shareholder interest. This position started to change decades later.

*AP Smith Manufacturing Co v. Barlow*²⁷⁹ noted that “modern circumstances require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate”. However, the English court ruled in *Parke v. Daily News Ltd*²⁸⁰ that the directors were not allowed to offer voluntary redundancy compensation to workers of a company that was closing since doing so was not in the company's long-term or short-term interests. Also, the court stated in *Teck Corp Ltd v Millar*²⁸¹ that “if the directors of a company were to consider the interests of employees today, no one would argue that they were not acting bona fide in the interests of the company itself”. These rulings implied that, in the event of a disagreement between shareholder and stakeholder interests, shareholder interests would take precedence.²⁸² Moreover, in *Hutton v West Cork Railway firm*,²⁸³ it was decided that directors only have obligations to the company and not to its employees or the general public. The court also agreed that “the law does not say that there are to be no cakes and ale, but there are to

²⁷⁶ *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HL).

²⁷⁷ [1988] BCLC 20 Nourse LJ CA.

²⁷⁸ Ferran E, *Company Law and Corporate Governance* (1999) 134.

²⁷⁹ 98 A2d 581 (NJ 1953) at 586.

²⁸⁰ [1962] 2 All ER 929 (ChD).

²⁸¹ (1972) 33 DLR (3d) 288 (BCSC) at 313-314.

²⁸² Cassim FHI et al *Contemporary Company Law* (2021) 683-684.

²⁸³ (1883) 23 Ch. D 654 (Court of Appeal).

be no cakes and ale except such as are required for the advantage of the company".²⁸⁴ This means that directors must prioritise advancing the interests of the company. As a result, it may also be argued that under common law, even if a company's interests' conflict with environmental justice, its interests would take preference at the expense of stakeholders and the environment.²⁸⁵

However, the imposition of fiduciary obligations toward society has advanced in the United Kingdom but South African law has not yet made this apparent.²⁸⁶ It can be claimed that holding directors to the duty of serving the company and the ultimate benefit of the shareholders, rather than the company's stakeholders, is no longer appropriate.

4.2.2 The duty to exercise skill and care.

A director was required to perform his duties with the reasonable knowledge, skills, and experience relevant to the director's role and the company's operations would exercise.²⁸⁷ The level of skill and care required of directors was established by English courts.²⁸⁸ Romer J. stated that the "skill to be expected" was simply what a person with the director's knowledge and experience "could reasonably be expected to display; (ii) a director was not required to give constant attention to the affairs of the company; and (iii) a director could trust others entrusted with specific duties to carry them out honestly in the absence of grounds for suspicion".²⁸⁹ The *Re D'Jan of London Ltd*²⁹⁰ is another case that signalled a departure from the earlier common law position and established the framework for the current standard under the section 174 of the 2006 UK Act. The judge held that section 214(4) of the United Kingdom Insolvency Act 1986 concerning wrongful trading, properly expressed the standard to be expected of directors.²⁹¹ The section is applicable where a company has entered insolvent liquidation and a director knew or should have known that there was no realistic chance of avoiding insolvent liquidation before the start of the

²⁸⁴ Ibid.

²⁸⁵ *Re Smith & Fawcett Ltd* [1942] Ch 304 (CA).

²⁸⁶ Coetzee and van Tonder "The fiduciary relationship between a company and its directors" 2014 35 *Obiter* 300.

²⁸⁷ *Re City Equitable Fire Insurance Co* (1925) Ch. 428.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ (1993) BCC 646 34.

²⁹¹ Ibid,

winding up.²⁹² A personal contribution to the assets of the company may be mandated if the director cannot persuade the court that he took all the necessary precautions to minimize the potential loss to creditors.²⁹³ The United Kingdom Insolvency Act of 1986, Section 214(4), uses both objective and arbitrary standards to evaluate the actions to be taken or judgments to be made. The director's conduct and decisions are judged against the standard of a reasonably diligent person with the director's level of knowledge, skills, and experience, as well as the typical knowledge, skills, and experience expected from someone in a similar role.²⁹⁴

Consequently, it can be inferred that the common law obligation of skill and care enforced both "subjective" and "objective" criteria.²⁹⁵ As a result, a director must apply the care, skill, and diligence that may be reasonably expected of a person performing the tasks of a director thus objective, as well as their general knowledge, skill, and experience which is thus subjective.²⁹⁶ In *Re D'Jan of London Ltd*,²⁹⁷ the court determined that a director who signed an insurance proposal form without verifying its contents was deemed negligent. Hence, considering his higher level of expertise, a director with extensive experience should demonstrate the appropriate diligence when fulfilling his duties.

4.3 Statutory duties

4.3.1 An examination of section 172 (1) and section 174 United Kingdom Companies Act 2006 with a focus on the environment.

The foundation of South African company law is based on English legal ideas, many of which are still relevant today.²⁹⁸ English company law was antiquated before the 2006 UK Act.²⁹⁹ While South African company law was heavily influenced by these English laws, it

²⁹² Section 214(4) of the United Kingdom Insolvency Act 1986.

²⁹³ *Re D'Jan of London Ltd* (1993) BCC 646 at 34.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ (1993) BCC 646 at 164.

²⁹⁸ South African Company Law for the 21st Century: Guidelines for Corporate Law Reform *GOVERNMENT GAZETTE*, 23 JUNE 2004 14.

²⁹⁹ FHI Cassim "The Companies Act 2008: An overview of a few of its core provisions" 2010 *SAMJ* 157.

underwent reform not long after the UK laws did.³⁰⁰ However, South African company law makes no mention of the environment, while the UK Companies Act includes the directors' obligation to protect the environment. A detailed list of directors' responsibilities is provided by the 2006 UK Act as compared to the South African company law. Common law rules and equitable principles form the foundation of general obligations.³⁰¹ This study gives credence to section 172 of the Companies Act of 2006 since it highlights the environment.

The 2006 UK Act, which is the primary law regulating companies in the UK, has rules concerning environmental reporting, the responsibilities of directors, and engagement with stakeholders. These rules may have an impact on environmental justice.³⁰²

According to section 172(1) of the 2006 UK Act:

“(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company's employees, the need to foster the company's business relationships with suppliers, customers, and others,
- (d) the impact of the company's operations on the community and the environment,
- (e) the desirability of the company to maintain a reputation for high standards of business conduct, and
- (f) the need to act fairly between members of the company”.

As a practical matter, taking environmental impacts into account in corporate decisions is likely to be even more emphasised due to the phrasing of section 172 of the 2006 UK Act.³⁰³ However, it seems as if the UK parliament intentionally avoided an outcome-based approach and did not assign any presumptive weight to any of the non-exhaustive factors listed in section 172(1)(a)-(f).³⁰⁴ Moreover, the explanatory notes to section 172 state that a director has to act in good faith while establishing the “enlightened shareholder value”

³⁰⁰ South African Company Law for the 21st Century: Guidelines for Corporate Law Reform *GOVERNMENT GAZETTE*, 23 JUNE 2004 15-16.

³⁰¹ Esser & Delport, “The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2” 2017 *De Jure* 233.

³⁰² Section 172(1) of the UK Companies Act 2006.

³⁰³ Sydney Lord Sales, “Directors' duties and climate change: Keeping pace with environmental challenges” *Anglo-Australasian Law Society*, 2019 *Anglo-Australasian Law Society*4.

³⁰⁴ *Ibid*.

principle, which retains shareholder primacy.³⁰⁵ In other words, shareholder priority still exists. Since the obligation calls on a director to behave in good faith, it is most likely to advance the company's success for the benefit of its members.

Notably, directors must, still consider the factors stated in section 172 of the UK 2006 Act. Thus, the interests of the company's employees and the effects of its activities on the community and the environment are only a few examples of the areas of particular relevance that represent broader expectations of responsible corporate behaviour.³⁰⁶ Esser and Delport argue that the list in section 172(1) is perhaps the most extensive list of things directors should take into account when running a company in any current company regulation.³⁰⁷ Additionally, it acknowledges the significance of interests other than those of shareholders, including those of consumers, suppliers, and the environment.³⁰⁸

According to Esser and Delport, there are some ambiguities in section 172 of the 2006 UK Act. In other words, directors direct the company in a way that promotes its success for the benefit of its members.³⁰⁹ However, there is no objective standard for how this important discretion should be exercised.³¹⁰ The decision about what actions would promote the success of the company is left to the directors' judgment, provided that it is done in good faith.³¹¹ This ensures that company decisions, such as strategy and tactics, are reserved to the directors, not subject to court judgment, and are managed in good faith.³¹² Additionally, the duty to exercise reasonable care, skill, and diligence applies when considering the listed factors in section 172.³¹³ Addressing the factors verbally is not enough and directors are often required to take action to comply with this aspect of their obligations. However, a director is not required to take any further action apart from acting in good faith and using reasonable care, skill, and diligence. Additionally, it is not

³⁰⁵ Explanatory Notes on Section 170 of the Companies Act 2006 para 325–332.

³⁰⁶ Ibid.

³⁰⁷ Esser & Delport, "The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2" 2017 *De Jure* 236.

³⁰⁸ Ibid.

³⁰⁹ Section 176 of the 2006 UK Act.

³¹⁰ Esser & Delport, "The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2" 2017 *De Jure* 236.

³¹¹ Explanatory Notes on Section 170 of the 2006 UK Act para 325–332.

³¹² Ibid.

³¹³ Section 176 of the 2006 UK Act.

possible to hold a director who acted in good faith accountable for failure that had no bearing on his choice of action.³¹⁴ Furthermore, directors may have the option to consider environmental issues at their discretion, along with their fiduciary duties and obligation to exhibit due care in managing a company's operations.³¹⁵ Then, when exercising their management abilities, the law might require them to "have regard" for such matters.³¹⁶ However, if they are bound by a duty to "have regard" they could often determine that other relevant factors, such as the maximization of shareholder wealth, may outweigh concerns regarding climate change.³¹⁷ Nevertheless, in certain circumstances, the impact of climate change on their companies may be so severe that their general fiduciary and duty of care responsibilities would oblige them to urge their companies to take measures to reduce their contribution to environmental harm.³¹⁸

The GC100 guidance also emphasises that the section 172 duty requires both judgment and process.³¹⁹ Furthermore, it states that directors are not required to strike a balance between the interests of the company and other stakeholders, but rather to assess all pertinent information and choose the course of action that is most likely to advance the company's success.³²⁰ The guidance also explains that the section 172 duty and the duty of due care under section 174 are interconnected. Section 174 of the 2006 UK Act outlines the duty of directors to exercise reasonable care, skill, and diligence. Directors are held to an objective standard of a reasonably diligent person and a subjective standard based on their abilities, care, skill, and diligence in both sections.³²¹ For example, the guidance suggests identifying strategic factors for the company's success, offering appropriate training, reviewing information-gathering procedures, and fostering a culture of using these factors in policy-making and board papers as well as other helpful suggestions for

³¹⁴ Paragraph 325–332 of the Explanatory Notes on section 170 of the 2006 UK Act.

³¹⁵ Sydney Lord Sales, "Directors' duties and climate change: Keeping pace with environmental challenges" Anglo-Australasian Law Society, 2019 *Anglo-Australasian Law Society* 4.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ GC100, Guidance on Directors' Duties: section 172 and Stakeholder Considerations (October 2018). This GC100 provides guidance and recommendations regarding directors' duties in the context of section 172 of the Companies Act 2006 in the United Kingdom. <https://uk.practicallaw.thomsonreuters.com> (Accessed 10:04:23).

³²⁰ *Ibid.*

³²¹ *Ibid.*

directors to fulfil their section 172 duty.³²² This highlights that the environmental impact assessment obligations on directors are mainly procedural.³²³ In the UK, the regulatory and legislative approach has been to let directors use their discretion to make decisions for their companies and try to incorporate environmental consideration into their decision-making processes in a variety of ways,³²⁴ either by imposing reporting obligations on them, by providing financial incentives for their companies, or by operating a "have regard" obligation when acting as directors.³²⁵

4.4 Interplay between the 2006 and the environmental legislation.

The Environmental Protection Act of 1990 (EPA) regulates the environmental laws in the UK. The Companies Act of 2006 and the EPA cross paths in several ways, notably when it comes to corporate environmental reporting and responsibilities.³²⁶ As part of their responsibility to advance the company's success, companies are expected to consider environmental impact under section 172 of the 2006 UK Act. On the other hand, the Environmental Protection Act of 1990 outlines rules and guidelines for pollution prevention, waste management, and other related issues.³²⁷ To reduce their environmental impact and guarantee compliance with environmental standards, companies must abide by these requirements.

The UK Act requires major companies to address environmental issues in their yearly strategic reports in terms of reporting.³²⁸ This covers details on environmental concerns, regulations, and effectiveness. Increased transparency regarding a company's environmental operations is the goal of these reporting standards.³²⁹ The interaction of these laws highlights the necessity for companies to coordinate their activities with environmental preservation objectives while also upholding their legal obligations under

³²² Ibid.

³²³ Sydney Lord Sales, "Directors' duties and climate change: Keeping pace with environmental challenges" *Anglo-Australasian Law Society*, 2019 *Anglo-Australasian Law Society* 1-4.

³²⁴ Danha, "Personal liability of non-executive directors in South Africa: A global comparative analysis" 2022 *THRHR* 30.

³²⁵ Ibid.

³²⁶ Section 176 of the 2006 UK Act.

³²⁷ Section 1 of the Environmental Protection Act 1990.

³²⁸ Section 172 of the 2006 UK Act.

³²⁹ Ibid.

the 2006 UK Act. This junction demonstrates how sustainable and ethical corporate practices are increasingly valued in the current legal and regulatory environment.

4.5 A comparison between the stakeholder approach and environmental provisions of the 2008 Act and the 2006 UK Act.

The two Acts are cut from the same branch which is the common law.³³⁰ It can be asserted that the two Acts do, however, differ in some ways. Danha argues that the 2006 UK Act bears a strong resemblance to the 2008 Act, making it susceptible to being labelled as plagiarized if incorporated into an academic piece.³³¹ However, there is a supplementary obligation on directors to consider the environment and the broader criteria specified in sections 172(1)(a) -(f) and 174 of the 2006 UK Act. In contrast, there is no equivalent specific provision in the 2008 Act. The primary need to operate responsibly and diligently, however, is outlined in section 76 of the 2008 Act. Additionally, it appears that South African regulation 43 adequately permits consideration of environmental problems through the duty of the social and ethics committee.³³² This would seem to be particularly crucial in circumstances when a company faces a financial loss from inadequate environmental practices. In a broader sense, there is a rising understanding of the reality that, in addition to being admirable from a corporate social responsibility or ethical perspective, excellent environmental practices will frequently be financially prudent, at least over the long term.³³³

If the stakeholder approach in South Africa and the UK are compared, it can be claimed that South Africa adopts a hybrid strategy that combines shareholder primacy with a stakeholder-inclusive approach.³³⁴ The decision to take stakeholder interests into account, as long as it is advantageous to the company, rests with the directors.³³⁵ Delport notes that although there is some ambiguity in the South African 2008 Act regarding

³³⁰ Danha MD "Personal liability of non-executive directors in South Africa: A global comparative analysis" (2022) 8.1 *THRHR* 21-34

³³¹ *Ibid*, 21-34.

³³² Para 3.1-3.2 of Ch3 above.

³³³ *Ibid*.

³³⁴ Esser & Delport, "The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2" 2017 *De Jure* 221-241.

³³⁵ *Ibid*.

stakeholders, there is a definite shift away from pure shareholder primacy.³³⁶ The 2006 UK Act, on the other hand, makes explicit reference to the interests of other stakeholders and the fact that directors should consider their interests while promoting the success of the company for the benefit of its members.³³⁷ The 2006 UK Act is therefore quite clear about the recommended strategy for safeguarding stakeholders. According to Esser and Delport, the UK approach is rule-based.³³⁸ This implies that the directors have the discretion to determine which factors to take into account when deciding what is likely to promote the company's success for the welfare of its members.³³⁹ While inclining towards a shareholder value strategy.³⁴⁰ The UK Act appears to offer a theoretical solution to stakeholder consideration and environmental concerns, that is why Delport argues that its actual applicability is far from evident.³⁴¹ One could make the argument that this issue is similar to regulation 43 of the Companies Act, where the social and ethics committee is tasked with considering environmental issues.³⁴² The problem is that while the regulation provides a theoretical solution, there is little evidence of how the social and ethics committee addresses these concerns in practice. However, the practical aspect of considering these concerns is uncertain.

Section 76 of the 2008 Act does not grant stakeholders direct rights and remedies in the event of an environmental dispute. Consequently, if directors do not consider the impact of the company on the environment, it can affect the stakeholders. Stakeholders will not have direct legal recourse and it can be submitted that stakeholders will always subject to the decisions of the directors without any means of redress. Only the company can directly hold directors accountable for any misdeeds.³⁴³ While there is a direct right for stakeholders under section 172 of the 2006 UK Act, there is no direct remedy in the 2008 Act.

³³⁶ Ibid.

³³⁷ Section 172(1) of the Companies Act of 2006.

³³⁸ Esser & Delport, "The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2" 2017 *De Jure* 240.

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² Regulation 43 of the Companies Act.

³⁴³ Esser & Delport, "The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2" 2017 *De Jure* 221-241.

The 2006 UK Act's section 414C, mandates that larger companies report on the execution of the section 172 of the 2006 Act duties.³⁴⁴ Section 414C(7)(b)(i) of the 2006 UK Act mandates that a "strategic report" must contain details about environmental concerns, as far as it is essential for comprehending the progress, performance, or status of the company's business.³⁴⁵ Furthermore, a new obligation has been introduced under section 414CZA for strategic reports to incorporate a "section 172(1) of the 2006 UK Act statement" that explains how directors have taken into account the matters outlined in section 172(1)(a)-(f) of the 2006 UK Act.³⁴⁶ According to section 414CZA of the 2006 UK Act, "A strategic report for a financial year of a company must include a statement which describes how the directors have had regard to the matters set out in section 172(1)(a) to (f) when performing their duty under section 172". The directors' report and the strategic report are equally essential components of the annual report.³⁴⁷ The purpose of the strategic report's is to inform shareholders and assist them in evaluating how well directors have upheld their obligations under section 172 of the 2006 UK Act.³⁴⁸ However, the 2008 Act does not mention reporting, but the social and ethics committee is nonetheless required to monitor and report on the company's actions while taking into account any applicable laws, other legal requirements, or current guidelines of best practice.³⁴⁹ These concerns range from customer connections to labour and employment issues to social and economic development, good corporate citizenship, the environment, health and public safety.³⁵⁰ To comply with its mandate, the committee may report to the shareholders at the company's annual general meeting through one of its members.³⁵¹ The board must make a decision based on its obligations to the corporation if the committee presents an issue for discussion to the board.³⁵² In other words, they need to

³⁴⁴ Section 414C of the UK Act.

³⁴⁵ section 414C(7)(b)(i) of the UK Act.

³⁴⁶ section 414CZA of the UK Act.

³⁴⁷ Esser & Delpont, "The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2" 2017 *De Jure* 238.

³⁴⁸ Ibid.

³⁴⁹ Regulation 43 of the Companies Act.

³⁵⁰ Ibid.

³⁵¹ Regulation 43(5)(c) of the Companies Act.

³⁵² Esser & Delpont, "The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2" 2017 *De Jure* 225-241.

act in the organisation's best interests.³⁵³ It can be argued that even if the committee reports the environmental worries of stakeholders, the board's judgment will be swayed by its obligation to the company. In most cases, the company's interests do not align with those of the stakeholders.³⁵⁴ Moreover, King IV's report suggests strategic reporting of the company's operations. It was demonstrated in chapter three of this study that South African courts have likewise acknowledged the King IV. Thus, South African companies can use the King IV as a roadmap to ensure that they are considering the demands of stakeholders and the environment. However, keeping in mind that the 2008 Act supersedes the King IV, the need for a clear commitment to stakeholders and the environment should be added to section 76 of the 2008 Act as is the case in section 172 of the UK Act.

4.6 Chapter Conclusion.

Environmental impact is considered under section 172 of the 2006 Act. In contrast, the 2008 Act does not directly impose a duty on directors to consider environmental impact.³⁵⁵ It may be claimed that this is because directors are not directly required to evaluate their actions toward the environment in the 2008 Act, they might be reluctant to do so. Esser and Delport argues that it is also unclear how the 2006 UK Act would be applied in terms of the environment.³⁵⁶ Furthermore, shareholder primacy still forms a significant part of the stakeholder position in the United Kingdom.³⁵⁷ Since it does not alter the common law, but merely affirms it, it is argued that the interests of stakeholders will only actually be taken into consideration if they align with those of the shareholders.³⁵⁸ Although South Africa's legislative approach to the protection of stakeholders is not always explicit, it is undeniable that there is a shift away from shareholder primacy.³⁵⁹ Therefore, a body like the social and ethics committee is, in theory, a positive step. Moreover, it seems that the social and ethics committee is an attempt to make sure that the company and the board

³⁵³ Ibid.

³⁵⁴ Ibid.

³⁵⁵ Para 4.5 of Ch4 above.

³⁵⁶ Para 4.4 of Ch4 above.

³⁵⁷ Para 4.2 of Ch4 above.

³⁵⁸ Esser & Delport, "The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2" 2017 *De Jure* 236-240

³⁵⁹ Ibid, 241.

explicitly recognise the interests of other stakeholders, but without altering the relevant common law principles, which influences how effective it is.³⁶⁰ Both in UK and South Africa, the application of company law to the novel and expanding problems caused by broader environmental difficulties is still in its infancy. The applicable laws in both jurisdictions need to be refined to better address the various stakeholders' environmental concerns and offer a way to hold directors liable for ignoring environmental issues. As discussed in the chapters above,³⁶¹ the absence of mechanisms for liability in such circumstances could have a detrimental effect on the company. Currently, these difficulties are mostly addressed within the general framework of broad and open-textured director tasks, with certain statutory overlays.³⁶² In both jurisdictions, those overlays mostly take the form of additional procedural disclosure and reporting responsibilities in primary and secondary legislation as well as at the regulatory level, as well as the duty to consider environmental impact under section 172(1)(d) of the 2006 Act in the case of UK.³⁶³ There is a strong need for existing corporate laws through legislation to provide boards, individual directors and the social and ethics committee more encouragement to give environmental concerns more attention and weight than has previously been thought suitable.

³⁶⁰ Ibid.

³⁶¹ Para 2.6.2 of Ch2 above.

³⁶² Esser & Delport, "The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2" 2017 *De Jure* 240-241.

³⁶³ Ibid.

5. Chapter 5: Recommendations and Conclusion.

5.1 Chapter Introduction

The evolution of society is often thought to be positively impacted by corporations. The detrimental consequences of corporate operations on the environment are very important and cannot be ignored. The existing legal framework on environmental matters which is primarily established by NEMA and established by section 24 of the Constitution, holds a significant influence over environmental matters.³⁶⁴ However, it becomes evident that directors and the social and ethics committee hold an untapped potential in preserving the environment. Thus, the South African legislature must refine the statutory duties of directors outlined in the 2008 Act, as well as the responsibilities of the social and ethics committee. This reform should be oriented towards corresponding directors' functions with the overarching goal of promoting environmental justice. This will thereby foster a more sustainable ecological landscape. The central objective of this research was to delve into the effective utilization of the board of directors and the social and ethics committee as vital to mitigate environmental challenges within the context of South Africa.

5.2 Key Findings

Firstly, directors are entrusted with a critical task of ensuring their organisation business practices prioritise environmental responsibility.³⁶⁵ Additionally, directors must ensure compliance with environmental regulations and manage associated risks of not adhering to environmental laws.³⁶⁶ The financial implications of environmental neglect, the growing significance of sustainability to stakeholders, and the need for corporate contributions to environmental solutions underscore the duty of good faith and the duty of skill and care.³⁶⁷ Directors are urged to prioritise environmental sustainability within business strategies, integrating it into decision-making processes, and implementing environmental management systems.³⁶⁸

³⁶⁴ Para 2.5 of Ch2 above.

³⁶⁵ Ibid.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Para 2.5 of Ch2 above.

EIA emerged as a pivotal tool for achieving environmental justice, guiding ecologically sound decisions and involving stakeholders in the process.³⁶⁹ Accountability for preventing pollution and environmental degradation is mandated by NEMA, and directors must avoid offences which leads to penalties.

Connecting the 2008 Act with NEMA's environmental obligations enhances director accountability.³⁷⁰ The research further highlights that the 2008 Act codified directors' common law fiduciary duties and the duty of care and skill.³⁷¹ However, courts are mandated to align common law interpretations with the 2008 Act's spirit and objectives, and directors are instructed to consider stakeholder interests and environmental impacts within the realm of the company's best interest.³⁷²

In so far as the social and ethics committee is concerned, important findings were made in relation to its composition, functions, and its role in promoting environmental justice within companies. The functions of the social and ethics committee encompass monitoring a company's adherence to legal requirements, ethical codes, and environmental practices.³⁷³ Thus, the committee's duty to report its findings to shareholders ensures accountability and potential remediation. The initial segment addresses the committee's composition and role, emphasising the need for clarification on whether it operates as a corporate or board committee.³⁷⁴ This distinction holds significance in determining the committee's authority and jurisdiction beyond those specified by the 2008 Act and regulation 43.³⁷⁵ Although regulation 43(1) emphasises the committee's duty to handle environmental matters, the 2008 Act does not provide explicit instructions on how the committee should secure the company's adherence to strong ethical principles regarding environmental conservation. The study advocates for clear definitions, responsibilities, and obligations of the social and ethics committee.

In so far as the comparative analysis was concerned, it is noted that the 2006 UK Act includes provisions that emphasise the consideration of environmental impacts, while the

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ Para 2.3 of Ch3 above.

³⁷² Ibid.

³⁷³ Para 3.3 of Ch3 above.

³⁷⁴ Para 3.4 of Ch3 above.

³⁷⁵ Ibid.

2008 Act lacks a direct requirement for directors to consider environmental concerns.³⁷⁶ The 2006 UK Act's section 172(1) emphasises the need for directors to consider long-term consequences, the interests of employees, business relationships, community and environmental impacts, high standards of conduct, and fairness among members.³⁷⁷ However, there are ambiguities in the interpretation and application of the UK provisions.³⁷⁸

Moving to the shortcomings of the South African position, the absence in the 2008 Act of a direct duty for directors to consider environmental matters could potentially lead to a lack of attention to such matters. Additionally, the social and ethics committee's role in South Africa, while theoretically positive, might not effectively address stakeholder and environmental interests due to its limited impact on overriding common law norms. Furthermore, it is suggested that the common law duty to act in the company's best interests, both in the UK and South Africa, may not adequately prioritize environmental and stakeholder interests. The practical application of these legal obligations remains uncertain, and there is a call for legislative intervention to encourage greater attention to environmental concerns within corporate decision-making.³⁷⁹ In comparison, the UK Act seems to incorporate a more explicit consideration of environmental matters in the 2006 Act, but the practical application is still uncertain. The analysis also indicates that both legal systems are still in the early stages of addressing environmental issues within company law.³⁸⁰ Therefore, there is a need for legislative improvements to ensure that environmental concerns and stakeholder interests are given more substantial weight within corporate decision-making processes. This could potentially involve amending existing company laws to provide clear guidance to directors and committees in addressing environmental concerns more effectively.

³⁷⁶ Para 4.3 of Ch4 above.

³⁷⁷ Ibid.

³⁷⁸ Ibid.

³⁷⁹ Ibid.

³⁸⁰ Ibid.

5.3 Recommendations and conclusion

Given the far-reaching impact of environmental degradation on business sustainability and community welfare, it is imperative for companies and stakeholders to jointly prioritize environmental concerns. Embracing sustainable development becomes crucial to ensure long-term benefits for companies while safeguarding the environment.³⁸¹ Judicial precedents, such as *Fuel Retailers Association of Southern Africa v. Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*,³⁸² underscore the significance of considering community impact and maintaining a clean environment for sustainable business growth. There is a need to integrate environmental factors into the duties of directors. Legislative reform is necessary to expand the responsibilities of directors regarding environmental matters. Thus, including the environment in section 76(3) of the 2008 Act's list of duties for directors. This extension would subject directors to a duty towards the environment for the interest of the company. The argument for legal adaptation is to ensure environmental justice and it has a strong basis in section 7 of the 2008 Act, which explicitly articulates one of the Act's objectives as promoting adherence to the Bill of Rights, encompassing the realm of company law.³⁸³ This provision not only emphasises the interconnectedness of company law with fundamental rights but also highlights the importance of aligning legal principles with constitutional values. Section 7 of the Constitution safeguards the rights of every individual in the nation but also underscores democratic principles such as human dignity, equality, and freedom. The Bill of Rights is particularly relevant in the context of environmental justice, as it underscores the principle of equality which is parallel to fair and equitable treatment in environmental matters for all members of society. Society is usually at the receiving end of the consequences of environmental harm caused by companies, such as water and air pollution.³⁸⁴ It is submitted that achieving a balance between a company's activities and ensuring that the society is not deprived of a clean environment is essential. Thus, the link between the

³⁸¹ Ibid.

³⁸² 2007 (6) SA 4 (CC) para 44.

³⁸³ Section 7 of the Companies Act.

³⁸⁴ Para 1.2.1 of Ch1 above.

Constitution and the 2008 Act is important in the context of environmental justice. Furthermore, section 24 of the Constitution extends the right to a protected environment, emphasising the necessity of reasonable legislative measures for pollution prevention, ecological preservation, and conservation. By adapting the 2008 Act to fully encompass these principles, the legal framework can better serve environmental justice and reflect the values enshrined in the Bill of Rights. This can be done by incorporating a duty of care towards the environment under the duties of directors in section 76 of the 2008 Act. Moreover, this signifies the critical role of law in addressing evolving societal concerns related to the environment while upholding the democratic values and rights that underpin South Africa's legal system.

Although the common law has historically limited the meaning of "interest of the company" to shareholder interests, section 158(a) of the 2008 Act now permits it to be extended to cover environmental interests in that it allows for the development of the common law.³⁸⁵ This development will tally with section 39(2) of the Constitution which requires that all legal interpretations and developments advance the goals of the Bill of Rights.³⁸⁶ The 2008 Act qualifies as "any legislation" outlined in section 39(2) of the Constitution. Therefore, in addition to section 158(a) of the 2008 Act, section 76(3)(b)'s definition of the phrase "interests of the company" could also be broadened considering the Bill of Rights' fundamental obligations. This will improve the provision to reflect the changing dynamics of company operations rather than harm them. Additionally, judges should interpret company law to reflect the nation's shifting social, ethical, and economic conditions. This should also extend to altering the law gradually to keep up with modern advancements rather than clinging to antiquated principles that no longer reflect society's beliefs. As society's values and concerns shift towards a greater emphasis on environmental sustainability, the law must evolve accordingly. To promote environmental justice effectively, it is essential for both the legislatures and the judiciary to recognise the dynamic nature of society and its evolving environmental concerns.

In addition, there is a need to foster meaningful community engagement and transparency. The Constitution declares that everyone, including companies, must

³⁸⁵ Para 2.1 of Ch2 above.

³⁸⁶ Section 39(2) of the Constitution.

safeguard the environment.³⁸⁷ Thus, companies must prioritize environmental sustainability to draw foreign investment and prevent the detrimental effects of mining on communities.³⁸⁸ Site-specific reports should incorporate feedback from affected communities and stakeholders in addition to corporate reporting.³⁸⁹ Meaningful and ongoing community engagement is crucial for embedding sustainability and social development considerations into decision-making processes. Working cooperatively with groups of individuals connected by proximity to one another, a shared interest, a community concern, or other circumstances to address issues that impact them is known as community engagement.³⁹⁰ Companies would engage with communities through community engagement to ensure that their operations do not violate those communities' environmental rights. It is a potent tool for changing social, behavioural, and environmental factors to enhance overall well-being.³⁹¹ Community engagement may also function as a tool to enhance trust or as a substitute for genuine confidence,³⁹² as well as to promote environmental justice or serve as part of a corporate governance system. Community engagement aligns with principle 16 of King IV, in that it advocates for a stakeholder-inclusive governance approach that balances the needs, interests, and expectations of stakeholders and that of the company.³⁹³ This approach acknowledges the vital role stakeholders play in an organisation's success, encompassing both internal and external parties.³⁹⁴ Furthermore, it emphasizes equitable consideration of stakeholder concerns, promoting sustainable success by harmonizing diverse interests.³⁹⁵ Importantly, this inclusive strategy extends beyond a shareholder-centric perspective, recognizing that the best interests of the company may diverge from shareholder priorities.³⁹⁶ Thus, a stakeholder-inclusive approach is recommended to effectively

³⁸⁷ Section 24 of the Constitution.

³⁸⁸ Mushayavanhu D, Traquino F and Ruwodo A, "Community Engagement on Human Rights Due Diligence in Mining and Renewable Energy Value Chains" 2022 <https://zela.org/download/model> (Accessed 10:04:23).

³⁸⁹ Ibid.

³⁹⁰ Ibid.

³⁹¹ Ibid.

³⁹² Ibid.

³⁹³ Kind IV Report on principle 16.

³⁹⁴ Ibid.

³⁹⁵ Ibid

³⁹⁶ Ibid

balance interests, enhance sustainability, and promote environmental justice in corporate governance. Finally, companies can enhance transparency and accountability by regularly sharing EIAs, action plans, and updates with communities on their progress in relation to the environment where they conduct their operations.

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