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1 General

> The 19th century saw the foundations being laid down for modern corporations: this was the century of the entrepreneur. The 20th century became the century of management: the phenomenal growth of management theories, management consultants and management teaching (and management gurus) all reflected this pre-occupation. As the focus swings to the legitimacy and the effectiveness of the wielding of power over corporate entities worldwide, the 21st century promises to be the century of governance.[1]

The trajectory outlined in the above quotation indicates a shift in focus:[2] The nineteenth-century entrepreneur owned his business which, in comparison to the twentieth-century corporation, was smaller, and as it had fewer employees, the relationship between employer and employee was more personal.[3] In the 20th century, the era of Fordism, economies of scale became the requirement for the enterprise to survive with numerous employees. Post Second World War Keynesian economic policy saw employees arranged in a hierarchy:[4] unskilled labour at the bottom, a number of levels of supervisors, followed by managers. Management was divided into different levels: lower, middle and top management. This was a structure typical of hierarchies such as armies.[5]

In large enterprises the relationship between the employer (now a company and no longer an individual) and the employee was no longer personal. In industrialised economies employees' interests were generally protected by trade unions and a process of collective bargaining regulated employer-employee relations:

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1 Institute of Directors *King Report II* para 24 14.
2 Vettori *Alternative Measures* 353.
3 Vettori *Alternative Measures* 353.
4 Vettori *Alternative Measures* 353.
5 Vettori *Alternative Measures* 353.

institutionalised conflict and the protection of employees from "arbitrary management action".[6] The need to remain competitive in a global economy resulted in a quest for flexibility and produced flatter management structures, "atypical" employees, centralised collective bargaining, the individualisation of the employment relationship, as well as a worldwide decline in union membership and power.[7] Corporate governance has become important, not only because employees need protection from exploitation as a result of the imbalance of power between employers (companies) and employees, but also because employees have become very important stakeholders in companies. Participation rights are newly granted by which companies are held accountable to act in a responsible and ethical manner.

In this scenario new corporate law and a corporate governance regime no longer focus on shareholder wealth creation and accountability to the company itself: in its decision-making process the board should take into account the legitimate interests and expectations of stakeholders in making decisions in the best interest of the company.[8] The emphasis is on inclusivity: the inclusive approach recognises the employees of the company, as well as other stakeholders such as customers and the community in which it operates.

The topic under investigation here is a multi-dimensional one. This article is a follow-up to an article entitled "*The Different Worlds of Labour and Company Law: Truth or Myth?*"[9] in which the different functions, theories and models of labour and company law were explored in order to examine how they accommodate and promote the interests of employees in corporations. In the previous contribution it was stated:[10]

> The purpose of this article is to investigate if and how contemporary South-African corporate law allows employees' interests into its realm, and to provide an overview of the different functions and/or models that apply in both labour and corporate law.
>
> The topic is a multi-dimensional one. However, this article will not investigate in detail the various provisions in the Companies Act with regard to how employees are accommodated and if they are accommodated differently from other stakeholders. It

6 Anstey 2004 *ILJ* 1829-1830; Vettori *Alternative Measures* 353.
7 Vettori *Alternative Measures* 354.
8 Institute of Directors *King Report III* 10.
9 Botha 2014 *PER* 2042-2103.
10 Botha 2014 *PER* 2043.

will also not look in detail at the duties of directors and how or if these duties have changed with the introduction of the Companies Act. Finally, this contribution won't consider the different board structures and the possibilities of the participation of employees in these structures, and will also not address the issue of workplace forums and the collective bargaining framework in detail. These matters will be addressed in subsequent contributions.

In this article the focus is on employees as an important category of stakeholders of the company. The new focus in corporate law and the corporate governance regime on employees' legitimate interests and expectations, *prima facie*, promises to allow the employee voice to be heard in the workplace. The question under investigation is whether the *Companies Act* goes far enough to protect employees as stakeholders? This article investigates this question by looking at corporate governance and corporate responsibility principles, as well as at the duties of directors and the regulation of employee interests in the realm of corporate law and governance, and provides suggestions as to how the interests of employees could better have been protected in the *Companies Act*.

2 Corporate law, governance and employees

2.1 The interaction between corporate governance and corporate social responsibility

Corporate governance is a broad concept and there is no general or universally accepted definition.[11] The concept is "ambiguous" and "depends on the historical and cultural background of the country defining it".[12] Not only is the concept dealt with in common law and the statutory duties of directors,[13] but it includes the structures and processes involved in the control, management and decision-making of organisations.[14] Corporate governance can also be said to be "the whole set of legal, cultural, and institutional arrangements that determine what publicly traded corporations can do, who controls them, how that control is exercised, and how the

11 Cohen, Krishnamoorthy and Wright 2010 *Am J Comp L* 757.
12 Flay 2008 *Waikato L Rev* 308.
13 Esser and Delport 2011 *THRHR* 449.
14 Cassim *et al Contemporary Company Law* 472.

risks and returns from the activities they undertake are allocated".[15] Another useful definition of corporate governance that is proposed is as follows:

> The system of regulating and overseeing corporate conduct and of balancing the interests of all stakeholders and other parties (external stakeholders, governments and local communities) who can be affected by the corporation's conduct, in order to ensure responsible behaviour by corporations and to achieve the maximum level of efficiency and profitability for a corporation.[16]

It is a long-established principle in company law that a company has a separate legal personality in that it exists separately from those who manage it and its shareholders.[17] The "separateness" of a company is also affirmed by section 19(a)(b) of the *Companies Act* of 2008, which states that from the date and time that the incorporation of a company is registered "the company has all of the legal powers and capacity of an individual, except to the extent that (i) a juristic person is incapable of exercising any such power, or having any such capacity; or (ii) the company's Memorandum of Incorporation provides otherwise".[18]

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15 Clarke 2011 *Am J Comp L* 78.

16 Du Plessis, Hargovan and Bagaric *Principles* 10.

17 *Salomon v Salomon and Co Ltd* 1897 AC 22 (HL). Also see *Dadoo v Krugersdorp Municipal Council* 1920 AD 530 550-551, where the court confirmed that a registered company is a legal persona distinct from the members who compose it and that separateness is not merely an artificial technical thing but a matter of substance, as property vested in the company cannot be regarded as being vested in all or any of its members.

18 In *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 2 SA 303 (C) the court confirmed the instances when the "separateness" of a company can be disregarded and the "corporate veil" be pierced. The court stated that "[i]n the sphere of companies, the directors and members of a company ordinarily enjoy extensive protection against personal liability. However, such protection is not absolute, as the court has the power – in certain exceptional circumstances – to 'pierce' or 'lift' or 'pull aside' 'the corporate veil' and to hold the directors personally liable for the debts of the company" (para 19). Also see *Shipping Corporation of India Ltd v Evdomon Corporation* 1994 1 SA 550 (A), where the court required proof of "an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs" before the corporate veil would be pierced (556e-f), as well as *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 4 SA 790 (A), where the court confirmed that misuse "to perpetuate fraud, or for a dishonest or improper purpose" would justify the piercing of the corporate veil. Also see *Botha v Van Niekerk* 1983 3 SA 513 (W) as well as *Manong & Associates v City of Cape Town* 2009 1 SA 644 (EqC) and *Consolidated News Agencies (Pty) Ltd (in Liquidation) v Mobile Telephone Networks (Pty) Ltd* 2012 2 All SA 9 (SCA) for more examples of where the corporate veil can be pierced. S 20(9) of the *Companies Act* incorporated the common-law principles of piercing the corporate veil to some extent and provides that the court can declare "on an application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity" that "the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a

From the various *King* reports,[19] as well as the *Companies Act,* the practice of adherence to good corporate governance principles, clearly, is not only good for business but is of great value to companies in terms of establishing themselves as corporate citizens and as an example of how business should be done. The *Companies Act* drastically changes the corporate law landscape in South Africa: changes evident in the introduction of new concepts into corporate law literature and resulting from the inclusion of provisions in the *Companies Act* that extend "new" rights to employees. New corporate law concepts have developed over the years, such as solvency and liquidity, disclosure and transparency, new standards of accountability, market manipulation, shareholder appraisal rights, corporate rescue as well as new approaches to mergers and acquisitions.[20]

The importance of corporate governance in the new corporate law framework cannot be overstated. *King II* lists seven principles of corporate governance, namely discipline, transparency, independence, accountability, responsibility, fairness and social responsibility; *King III* focuses on leadership, sustainability and corporate citizenship. Companies are integral to society: they create wealth and employment; they have access to the greatest pool of human capital as well as monetary resources which are applied "enterprisingly in the expectation of a return greater than a risk-free investment".[21] Thus it is important to take cognisance of the following points: business corporations "have an enduring impact on societies and economies",[22] and

> ... how corporations are *governed* – their ownership and control, the objectives they pursue, the rights they respect, the responsibilities they recognize, and how they distribute the value they create - has become a matter of the greatest significance,

member of the company, or of another person specified in the declaration." The court may make any further order the court considers appropriate to give effect to a declaration. S 22 of the *Companies Act* also provides that a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. This will also result in the personal liability of the directors of the company.

19 Institute of Directors *King Report I*; Institute of Directors *King Report II*; Institute of Directors *King Report III*.

20 See also s 4 of the *Companies Act*; Van der Linde 2009 *TSAR* 224-240; Cassim *et al Contemporary Company Law* 3.

21 Institute of Directors *King Report III* 10.

22 Clarke and Dela Rama "Fundamental Dimensions".

> not simply for their directors and shareholders, but for the wider communities they serve.[23]

An important question in company law today is still *in whose interest the company should be managed*.[24] In one view a company is best described as "a series of contracts concluded by self-interested economic actors":[25] equity investors (shareholders), managers, *employees*[26] and creditors. These contracts taken together make up the structure of the company and in the evaluation of the contracts the shareholders "hold sway" and the company ultimately operates to serve their interests.[27] The shareholders expect the company to be profitable and the company's directors and managers are tasked primarily with a duty of creating a corporate governance structure "which ensures that the company conducts its business so as to maximise the returns of these investors".[28] In contrast it can be said that a corporation "cannot be reduced to the sum of a series of contracts": [29] it is vital to take into account a wide range of stakeholders whose interests may overlap or be in conflict with each other.[30] The board and management of corporations should strike a balance between the interests of various stakeholders in their application of corporate governance principles.[31] It is necessary for a corporation to determine which groups will be regarded as "stakeholders".

However the concept of "stakeholder" has many definitions. The following is quite useful:

> The meanings of "stake" and "holder" are important within stakeholder thinking. Simply stated, the word "stake" means a right to do something in response to any act or attachment. Since "rights" are generally attached with liabilities, this word also denotes the liabilities a person possesses for enjoying a particular right. Hence, a stake could be a legal share of something. It could be, for instance, a financial involvement with something. From the organizational stakeholder perspective, Carroll identifies three sources of stakes: ownership at one extreme, interest in between, and legal and moral rights at the other extreme. The word "holder" is comparatively

23 Clarke and Dela Rama "Fundamental Dimensions".
24 Emphasis added.
25 Davis and Le Roux 2012 *Acta Juridica* 307.
26 Emphasis added.
27 Davis and Le Roux 2012 *Acta Juridica* 307.
28 Davis and Le Roux 2012 *Acta Juridica* 307.
29 Davis and Le Roux 2012 *Acta Juridica* 307.
30 Davis and Le Roux 2012 *Acta Juridica* 307.
31 Rossouw 2008 *Afr J Bus Ethics* 29.

> easy to understand. It denotes a person or entity that faces some consequences or needs to do something because of an act or to meet a certain need.[32]

According to one commentator, stakeholders include "any group or individual who can affect or is affected by the achievement of the organization's objectives".[33] Another states that it "can encompass a wide range of interests: it refers to any individual or group on which the activities of the company have an impact".[34] Whatever the definition, the importance of the notion cannot be over-emphasised. Therefore, corporate governance addresses the entire span of responsibilities to stakeholders of the company such as customers, *employees*, shareholders, suppliers, and the community at large.[35] Both internal as well as external stakeholders are important to organisations as multiple agreements are entered into between internal stakeholders, such as employees, managers and owners, and the corporation, as well as between the corporation and external stakeholders, such as customers, suppliers and competitors.[36] Additional stakeholders that are of importance include government and local communities who are responsible for setting legal and formal rules within which corporations operate.

If corporate governance "*is focused on the interests of shareholders only*",[37] internal as well as external corporate governance is regarded as being shareholder orientated.[38] As a result of the separation of ownership and control, the shareholder model increasingly is associated with agency theory, which holds that "managers are the agents of shareholders (or owners) and in their capacity as agents are obligated to act in the best financial interest of the shareholders of the corporation".[39]

It is submitted that this view is too narrow and is out-dated, because *shareholders are no longer the only primary stakeholders*[40] of a corporation, and that the corporation

32 Rahim 2011 *MqJBL* 306.
33 Freeman *Strategic Management* 46.
34 Mallin *Corporate Governance* 49.
35 Hurst 2004 http://goo.gl/GarxST. Also see Clarkson 1995 *Ac Man Rev* 106.
36 Freeman and Reed 1990 *JBE* 337.
37 Emphasis added.
38 Rossouw 2008 *Afr J Bus Ethics* 29.
39 Rossouw 2008 *Afr J Bus Ethics* 29.
40 Emphasis added.

takes the interests of all stakeholders into consideration, even of constituents such as pressure groups or non-governmental organisations, "public interest bodies that espouse social goals relevant to the activities of the company".[41] In balancing these interests the key to understanding and execution lies in the distinction between corporate law and corporate finance law. Three different groups are formally recognised in terms of corporate law, namely shareholders, directors and officers of a company, arising from which rights and obligations are obtained, imposed and distributed among the different role-players.[42] When money is raised by the company for utilisation in its business operations, corporate finance law is relevant. The law of corporate finance is important, especially in pre-incorporation contracts, the incorporation and commencement of business of the company, financing of shares, and share capital.[43]

To make a profit, however, is not the only function of a corporation. Corporations should be active members of the society and community in which they operate and, thus, should act in a socially responsible manner towards society at large: in other words, they should exercise corporate social responsibility.

The notion of "corporate social responsibility" (CSR) has gained prominence in the last decade. It relates to the relationship between organisations and society: as a part of society and the community, corporations are required to be socially responsible and to be more accountable to all stakeholders.[44] Socially responsible behaviour has been described as "action that goes beyond the legal or regulatory minimum standard with the end of some perceived social good rather than the maximisation of profits".[45] CSR is variously defined and no consensus can be reached on what exactly it entails. Arguably it also means something different in the context of developed and developing countries.[46] A starting point in considering socially responsible behaviour is the

41 See Du Plessis, Hargovan and Bagaric *Principles* 24.
42 Aka *NCJ Int'l L & Com Reg* 237.
43 Aka *NCJ Int'l L & Com Reg* 238.
44 Crowther and Jatana *International Dimensions* vi.
45 Slaughter 1997 *Company Lawyer* 321.
46 Horrigan *Corporate Social Responsibility* 37.

distinction between "relational responsibility" and "social activism".[47] "Relational responsibility" deals with the promotion of or assistance to groups such as employees, customers, suppliers or the community who are affected by the business activities of the company.[48] Important factors are the maintenance of the company's image as well as the application of fairness when dealing with these groups of stakeholders. Social activism, on the other hand, deals with beneficiaries who fall outside the scope of the company.[49] The company addresses social issues that exist independently from the way it conducts its business activities and social activism is an extension of corporate activity into non-commercial spheres: issues such as human rights and non-involvement in criminal activities.[50]

Problems exist with the appropriate taxonomy for CSR, as is explained below:

> Given the diversity of terms deployed to cover the various ethical issues relating to business, it is impossible to find a meaning that will accommodate even the majority of actual uses of the term, "CSR", let alone its increasingly popular surrogate "corporate responsibility" … CSR is drenched in alternate notions of "meeting societal preconditions for business", "building essential social infrastructure", "giving back to host communities", "managing business drivers and risks", "creating business value", "holding business accountable" and "sharing collective responsibility"… . Classic attempts to define CSR are packed with notions of voluntarism, social altruism and profit-sacrificing, as in its use "to denote the obligations and inclinations, if any, of corporations organized for profit, voluntarily to pursue social ends that conflict with the presumptive shareholder desire to maximize profit". Yet this risks making CSR marginal to core corporate concerns, and framing it in opposition to corporate profit-making and shareholder wealth-generation. Alternative formulations embrace the full gamut of CSR's profit-enhancing and profit-sacrificing forms. For example, Professor Campbell views CSR as encompassing "those obligations (social or legal) which concern the major actual and possible social impact of the activities of the corporation in question, whether or not these activities are intended or do in fact promote profitability of the particular corporation", in a way that distinguishes between "corporate philanthropy" (ie corporate humanitarianism that is not central to core business), "corporate business responsibility" towards shareholders and free-market competition, and "corporate social responsibility" (ie obligations arising from the consequences of business activity). This account of CSR includes the two limbs of "instrumental CSR" (which is pursued for business profitability) and "intrinsic CSR" (which is pursued regardless of its connection to business profitability). Such definitional nuances are the gateway to important questions in delineating corporate responsibilities towards groups and communities beyond shareholders justifying

47 Parkinson *Corporate Power* 267; Kayiket 2012 *Ank Bar Rev* 80.
48 Parkinson *Corporate Power* 267; Kayiket 2012 *Ank Bar Rev* 80.
49 Parkinson *Corporate Power* 267; Kayiket 2012 *Ank Bar Rev* 80.
50 Kayiket 2012 *Ank Bar Rev* 80.

> corporate profitability by reference to its underlying socio-ethical utility, and recognizing the limits of a conception of CSR solely in the norms and values of open market competition.[51]

The connotations of what CSR entails vary from "business ethics or philanthropy or environmental policy" to "corporate social performance and corporate citizenship" and to "social accounting or corporate accountability".[52] Two of the most frequently cited definitions are those of the European Commission and the World Business Council for Sustainable Development.[53] The European Commission defines CSR as "[a] concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a *voluntary basis*";[54] the World Business Council for Sustainable Development defines it as "the commitment to contribute to sustainable economic development working with *employees*, their families, the local community and society at large to improve their quality of life".[55] In the South African context a definition of CSR is:

> ... the responsibility of the company for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that: contributes to sustainable development, including health and the welfare of society; takes into account the legitimate interests and expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behaviour; and is integrated throughout the company and practiced in its relationships.[56]

It is submitted that (large) corporations are crucial to sustainable development: they possess considerable financial and political power. The CSR dimension gives rise "to an expectation that they will also participate in sustainable development activities, since CSR and sustainable development are closely linked":[57] frequently, they are treated as interchangeable concepts. It has been pointed out that the definitional problems surrounding CSR are compounded by the emergence of new concepts, such as corporate sustainability and corporate citizenship, "which cover the same or similar

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51 Horrigan *Corporate Social Responsibility* 34-35.
52 Young and Thyil 2013 *J Bus Ethics* 3.
53 Villiers "Corporate Social Responsibility" 171.
54 Emphasis added. European Commission 2002 https://goo.gl/auEuRf.
55 Emphasis added. WBCSD 2002 http://goo.gl/zgSFou.
56 Institute of Directors *King Report III* 118.
57 Villiers "Corporate Social Responsibility" 171. Also see Horrigan 2007 *MqJBL* 85-122 with regard to more detail on CSR trends and the regulation of corporate responsibility, governance and sustainability.

territory".[58] Other commentators regard CSR to be synonymous with sustainable business practices and responsible corporate governance.[59] It is claimed corporate citizenship, stakeholder engagement and sustainability reporting "are imperative to ensure the long-term success and continuing existence of an organisation, but they also bring immediate benefits such as increased investor interest, a better corporate reputation and, possibly, an increased customer base".[60] In terms of *King III,* sustainability is "the primary moral and economic imperative of the 21st century" and is "one of the most important sources of both opportunities and risks for businesses".[61] It is argued that decision-makers should note a fundamental shift in the way companies and directors act and organise themselves as the current incremental changes towards sustainability are insufficient.[62]

Zerk states that the term CSR refers to the notion

> ... that each business enterprise, as a member of society, has a responsibility *to operate ethically and in accordance with its legal obligations and to strive to minimise any adverse effects of its operations and activities on the environment, society and health*.[63]

Importantly, the "potential role of corporations through their CSR activities in sustainable development is significant for workers and trade unions because sustainable development is widely considered to include recognition of the need and relevance of labour".[64] Thus, CSR might be considered as "an open door for a more participatory role for workers and their representatives and for achieving better and stronger labour standards".[65] CSR amplifies the workers' voice in the workplace.

The conception of corporate responsibility and governance in corporate law faces 21st century pressures:

58 Zerk *Multinationals* 32.
59 Keith 2010 *Bus Law Int'l* 273.
60 Marx and Van Dyk 2011 *JEFS* 84.
61 Institute of Directors *King Report III* 11.
62 Institute of Directors *King Report III* 11.
63 Zerk *Multinationals* 32.
64 Villiers "Corporate Social Responsibility"171.
65 Villiers "Corporate Social Responsibility"171.

> In conventional corporate theory, a strong connection exists between corporate responsibility and governance according to law (as distinct from corporate amenability to other societal norms), the sets of interests regulated by corporate law (as distinct from other laws), and the social benefits of private interests using capital for private purposes (as distinct from the social benefits served by the pursuit of social goals). In other words, a common thread runs through the orthodox divide between public and private interests, corporate law and non-corporate law, and corporate and social responsibility. Given its overall grounding in underlying strands of political legitimacy, social efficiency and governance workability, this thread points towards *a* (if not *the*) major contemporary normative objection to CSR, which is that the pursuit of social goals is better justified by a mandate from the body politic through law than by a self-adopted and "open-minded internal social welfare instruction" for boards and other corporate actors.[66]

CSR and corporate governance are interrelated fields: a "growing convergence between corporate governance and corporate responsibility issues can be observed" in that codes and the advocates of corporate governance now include corporate responsibility issues in the domain of the fiduciary responsibility of boards and directors and of good risk management practices as well as recognition of" the fact that "without proper governance and management accountability, corporate responsibility will not be able to be effectively institutionalised within organisations".[67] In the context of corporate governance CSR has been defined as a "system of checks and balances, both internal and external to companies, which ensures that companies discharge their accountability to all of their stakeholders and act in a socially responsible way in all areas of their business activity".[68] CSR is also regarded as "extended corporate governance"; "CSR extends the concept of fiduciary from a mono-stakeholder setting (where the sole stakeholder with fiduciary duties is the owner of a firm), to a multi-stakeholder one in which the firm owes all its stakeholders fiduciary duties (the owners included) which cannot be achieved without corporate transparency and disclosure and is predicated on communication with and fair treatment of all stakeholder groups".[69]

Clearly CSR and corporate governance are mutually supportive and interrelated. Effective and responsible leadership is at the heart of good corporate governance:

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66 Horrigan *Corporate Social Responsibility* 10.
67 Da Piedade and Thomas 2006 *SAJHRM* 65.
68 Solomon *Corporate Governance* 7.
69 Young and Thyil 2013 *J Bus Ethics* 3.

four basic values, responsibility, transparency, fairness and accountability should be taken into account in decision-making and management.[70] These values are important not only for how corporations conduct business but also in regard to how they treat their stakeholders, including their employees. The ethics of governance place the following five moral duties on directors, namely[71] conscience,[72] the inclusivity of stakeholders,[73] competence,[74] commitment,[75] and courage.[76]

The role of the corporation has changed from the conventional view that the corporation primarily operates to advance the interests of its shareholders to a view that the corporation should operate to benefit a wider range of constituents.[77] The "triple bottom line"[78] is important when a corporation conducts business and decisions are made: a corporation and its responsible leaders not only balance but also integrate in their strategies and operations sustainable economic, social and environmental aspects and interests.[79] The drive towards achieving the goals of a triple bottom line approach is opposed to the view of Milton Friedman, who once commented that "there is but one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules

70 See Institute of Directors *King Report III* 10 as well as *South African Broadcasting Corporation Ltd v Mpofu* 2009 4 All SA 169 (GSJ) para 64, where the court stressed that "good corporate governance is based on a clear code of ethical behaviour and personal integrity exercised by the board, where communications are shared openly". *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 5 SA 333 (W) para 16.7.

71 Institute of Directors *King Report III* 21.

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

73 When achieving sustainability the inclusivity of stakeholders as well as their legitimate interests and expectations must be taken into account by directors for decision-making and strategy purposes (Institute of Directors *King Report III* 22).

74 Knowledge and skills are required for the effective governance of the company, which should be continuously, developed (Institute of Directors *King Report III* 22).

75 Diligence should be at the order of the day when performing directors' duties and sufficient time should be devoted to company affairs. Ensuring company performance and compliance is a primary concern (Institute of Directors *King Report III* 22).

76 Directors should have the courage to take the risks associated with directing and controlling a successful sustainable enterprise. In addition, directors should have the courage to act with integrity in all board decisions and activities (Institute of Directors *King Report III* 22).

77 Olson 2010 *Acta Juridica* 221-222.

78 The "triple bottom line" phrase was coined by John-Elton, who is a pioneer in the corporate responsibility movement (Olson 2010 *Acta Juridica* 222).

79 Institute of Directors *King Report III* 10-11.

of the game".[80] What corporations do matters to their shareholders, society (including employees) and the world at large.[81] Companies are expected to conduct themselves as good corporate citizens and it is expected that companies will adopt "the inclusive approach to corporate governance and that it will enlighten shareholders".[82]

CSR and corporate citizenship, in certain aspects, are two distinct terms in *King III*, specifically dealing with stakeholder protection and corporate citizenship, yet "these concepts and the inclusive and triple-bottom line approaches can be used interchangeably".[83] A strong nexus exists between CSR, corporate governance and sustainable business development. Responsible business practices are integral parts of corporate governance practices and the integration of governance, environmental and social governance issues into investment decisions aris critical to "valuing long-term investments".[84]

Thus, corporate activity should be guided and encouraged in a manner that requires corporate decisions to be based on ethical principles.[85] In this context the law could promote CSR:

> ... by pushing companies towards institutions of continuous internal inquiry and debate about how well their responsibility inducing processes and outcomes inculcate an "ethic of responsibility" and a '"corporate conscience" within a legal framework that is sensitized by CSR-friendly public policies and interests, as well as providing organs of government with the stimulus and material to become vehicles of public dialogue and action orientated around shaping laws and policies to reflect both of these institutional goals.[86]

80 See Friedman 1970 *New York Times Magazine* as quoted in Olson 2010 *Acta Juridica* 222.

81 Horrigan *Corporate Social Responsibility* 4.

82 Institute of Directors *King Report II* 452.

83 Esser 2009 *SA Merc LJ* 319.

84 Horrigan *Corporate Social Responsibility* 13.

85 Keith 2010 *Bus Law Int'l* 273. The meaning attributed to corporate citizenship in *King III* is as follows: "Responsible corporate citizenship implies an ethical relationship between the company and the society in which it operates. As responsible corporate citizens of the societies in which they do business, companies have, apart from rights, also legal and moral obligations in respect of their economic, social and natural environments. As a responsible corporate citizen, the company should protect, enhance and invest in the wellbeing of the economy, society and the natural environment" (Institute of Directors *King Report III* 117).

86 Horrigan *Corporate Social Responsibility* 27. The law and CSR interact in various ways: "(i) the corporate and non-corporate laws of many countries reflect at least some CSR concerns; (ii) law controls what business can and cannot do; (iii) law provides mechanisms to incorporate CSR standards (e.g. contractual adoption of codes); (iv) law provides the frame for CSR 'boundary' disputes about accountability for corporate irresponsibility (e.g. multinational corporate group

An underlying philosophy in *King III* is that companies can be regarded as good corporate citizens in that they subscribe to sustainability considerations that are rooted in the *Constitution*. It entails that they should adhere to the basic social contract which, as fellow South Africans, they have entered into, as well as that they should fulfil their responsibilities in order to promote the realisation of human rights.[87] A social contract carries an implication of altruistic behaviour, which in essence is "the converse of selfishness".[88] The *Companies Act*, in its purpose provision, *inter alia,* has a commitment to promoting compliance with the Bill of Rights in the application of company law, as well as to the development of the South African economy by "encouraging transparency and high standards of corporate governance".[89] These principles are furthered by the acknowledgement of the significant role of enterprises within the social and economic life of the nation,[90] as well as the aim to balance the "rights and obligations of shareholders and directors"[91] within companies and to encourage the efficient and responsible management of companies.[92]

Companies obtain certain benefits from society, such as the recognition of a separate legal personality as well as the regulatory framework within which it operates.[93] In return companies have obligations, such as to comply with human rights imperatives: the "social contract" requires, in exchange for these benefits, that the company has corresponding obligations towards society.[94] The first of these obligations is "to do no

liability for corporate harm); (v) 'soft law' standards influence the evolution of CSR (and vice versa); (vi) law informs whole-of-organization CSR approaches (e.g. corporate inculcation of internationally recognized human rights standards); (vii) international and regional agreements on trade, investment and the environment influence CSR actors towards CSR public policy goals; and (viii) even technically non-binding CSR standards can have a normative effect on corporate activity and influence the development of legal doctrines affecting corporations too" (Horrigan *Corporate Social Responsibility* 28).

87 Institute of Directors *King Report III* 11.

88 Crowther and Jatana *International Dimensions* viii.

89 Section 7(a)-(b) (iii) of the *Companies Act.*

90 Section 7(b) (iii) of the *Companies Act.*

91 Section 7(i) of the *Companies Act*.

92 Section 7(j) of the *Companies Act*. Katzew 2011 *SALJ* 691 points out the following with reference to aspects covered in s 7 of the *Companies Act* and the effect thereof: these ideals:"impact on the very core of the established understanding of a company as a vehicle to maximise shareholder profits. They express goals that are a departure from the traditional philosophical basis of South African company law, which has been concerned with much narrower interests, such as the advancement of shareholders' interests".

93 Katzew 2011 *SALJ* 695.

94 Katzew 2011 *SALJ* 695.

harm", yet it may also be required to take positive steps to improve the society in which it operates by achieving social benefits.[95] Companies do not operate in isolation, they are regarded as being members of a society and this view reinforces "the notion of a mutually beneficial relationship between the company and its community … alluded to in s 7 of the Companies Act".[96] Violations of the company's obligations include human rights abuses, such as abusive labour practices, environmental damage or violations of the fundamental rights to equality, dignity and freedom, and constitute an infringement of the negative duty not to cause harm.[97] The connection between business and human rights (in the context of the economic downturn, but not limited to it, as emphasised and recognised by the UNSRSG[98] in the 2009 report) can be summarised as follows:

> It is often mused that in every crisis there are opportunities. In operationalising the "protect, respect and remedy" framework, … to identify such opportunities in the business and human rights domain and demonstrate how they can be grasped and acted upon … In the face of what may say be the worst worldwide economic downturn in a century, however, some may be inclined to ask: with so many unprecedented challenges, is this the appropriate time to be addressing business and human rights? This report answers with a resounding "yes". It does so based on three grounds.
>
> First, human rights are most at risk in times of crisis, and economic crises pose a particular risk to economic and social rights … Second, the same types of governance gaps and failures that produces the current economic crisis also constitute … the permissive environment for corporate wrongdoing in relation to human rights …. Third, the "protect, respect and remedy" framework identifies specific ways to achieve these objectives.[99]

In order to conduct themselves as corporate citizens companies should prescribe to the following key principles: integrated and sustainable decision-making, stakeholder engagement, transparency, consistent business practices, accountability, community interest as well as the taking of precautionary measures.[100] Thus, it can be expected that "a more holistic and systematic approach to corporate responsibility and its

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95 Katzew 2011 *SALJ* 695.
96 Katzew 2011 *SALJ* 696.
97 Katzew 2011 *SALJ* 696.
98 United Nations Special Representative to the Secretary General.
99 Horrigan *Corporate Social Responsibility* 14, where he quotes from the UNSRSG's 2009 report to the UN Human Rights Council.
100 Keith 2010 *Bus Law Int'l* 274.

governance and regulation, signalled by heightened discussions amongst political, business and community leaders about responsible market and lending behaviour, fair business regulation, enhanced business ethics, and other features of truly sustainable businesses and economics" will be applied.[101]

The inward-looking and outward-looking dimensions of sustainable corporate success "are inextricably connected to sustainable societal well-being".[102] Therefore, companies should report on the triple bottom line and highlight issues such as social, environmental and economic issues.[103] A responsible business, for example, doing business in an emerging economy, such as South Africa, could add value by "building human capital by investing in education and transferring skills, encouraging good governance, assisting social cohesion, strengthening economies, protecting the environment, and addressing health related matters, in particular HIV/AIDS".[104] They could demonstrate that the society in which they operate matters to them and be good corporate citizens. Thus, it is important that integrated reporting addresses not only financial but also sustainability issues:[105] stakeholders are better able to assess the economic value of a company. Companies should report information that enables stakeholders to know how the company has "impacted positively and negatively on the economic life of the community in which it operated during the year under review" as well as how the company plans to approach the coming year "to enhance the positive aspects and eradicate or ameliorate the negative aspects that impacted on the economic life of the community in which it operated".[106] Integrated reporting satisfies the need of stakeholders for "forward-looking information" that, in return,

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101 Horrigan *Corporate Social Responsibility* 14.

102 Horrigan *Corporate Social Responsibility* 14.

103 It appears that major companies worldwide are making the transition from environmental reporting to "more expansive sustainability reporting" under a combination of regulatory initiatives. This includes trends such as such socially responsible investing (SRI) and environmental, social and governance (ESG) considerations in investment decision-making (Horrigan *Corporate Social Responsibility* 17). Corporate responsibility and sustainability reporting "is increasingly integrating financial and non-financial information as well as performance indicators that all link ESG, SRI and CSR concerns to company specific business drivers and risks" (Horrigan *Corporate Social Responsibility* 18).

104 Da Piedade and Thomas 2006 *SAJHRM* 66.

105 See Institute of Directors *King Report II* 453; Institute of Directors *King Report III* 13.

106 See Institute of Directors *King Report II* 453; Institute of Directors *King Report III* 13.

increases the trust and confidence of stakeholders and the legitimacy of the company's operations.[107]

The focus of the *Companies Act* is the disclosure of the financial aspect, but compliance with the *Companies Act* as well as *King III* "will result in South African companies being in the forefront with regard to holistic corporate reporting".[108] The duties of directors in the context of company law and the promotion of corporate governance with specific reference to the importance of a stakeholder inclusive approach will be addressed below.

2.2 Duties of directors

2.2.1 General

The duties of directors have been a contentious issue in company law jurisprudence. These duties play a role in ensuring the promotion of corporate governance principles.[109] In this context, the debate in company law around what constitutes "the best interests of the company"[110] must be re-evaluated. A critical issue that follows from it is:

> Should the directors, particularly of a public company, be required to run the company exclusively for the benefit of shareholders or should they be managed to take into account the interest of other stakeholders, such as employees, creditors, customers, suppliers, the environment and the local community in which the corporation is located?[111]

The 1973 *Companies Act*[112] did not contain clear rules regarding the duties and liabilities of directors and corporate governance.[113] The regulation of these aspects was left to *King II*[114] and the common law.[115] The common-law fiduciary duties of

107 Institute of Directors *King Report III* 13.
108 Institute of Directors *King Report II* 453.
109 Mongalo *Corporate Law* 158.
110 Davis and Le Roux 2012 *Acta Juridica* 309.
111 Davis and Le Roux 2012 *Acta Juridica* 309-310.
112 *Companies Act* 61 of 1973.
113 The *Companies Act* 61 of 1973 was repealed by the 2008 Act. The 1973 Act, however, did not deal with matters of corporate governance. These matters were dealt with exclusively as voluntary codes by *King I*, and its successor *King II*.
114 Davis *et al Companies* (2009) 101.
115 Davis *et al Companies* (2011) 110.

directors require them to exercise their powers *bona fide* and for the benefit of the company. In addition, they have the duty to display reasonable care and skill in carrying out their functions:[116] they should act in the best interests of the company,[117] avoid conflicts,[118] not take corporate opportunities or secret profits,[119] not fetter their

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[116] Benade *et al Entrepreneurial Law* 130.

[117] Benade *et al Entrepreneurial Law* 130; also see the English case of *Parke v Daily News Ltd* 1962 Ch 929. This case is a good illustration of this point because the company wanted to pay the balance of the purchase price to employees as remuneration for redundancy after the board decided to sell the newspaper. The court found that the payments were *ultra vires* because they were not to the benefit of the company as a whole.

[118] In *Cyberscene Ltd v i-Kiosk Internet and Information (Pty) Ltd* 2000 3 SA 806 (C) the court emphasised the fact that a fiduciary duty exists between a company and its directors. The court also stated that even non-executive directors have this fiduciary relationship towards the company. The court confirmed that "the fiduciary duty of directors can be remedied by means of an interdict. This duty has a more far-reaching effect on senior employees and directors than on junior employees because the latter group's duty only extends to confidential confirmation and trade secrets. The fiduciary duty is therefore owed by senior management and this common-law duty extends even after a director's appointment has come to an end" (820f-i). In *Howard v Herrigel* 1991 2 SA 660 (A) 678 the court held as follows: "In my opinion it is unhelpful and even misleading to classify company directors as 'executive' or 'non executive' for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them. No such distinction is to be found in statute. At common law, once a person accepts an appointment as director, he becomes fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. That is the general rule and its application to any particular incumbent of the office of director must necessarily depend on the facts and circumstances of each case ... However, it is not helpful to say of a particular director that, because he was not an 'executive director', his duties were less onerous than they would have been if he were an executive director. Whether the inquiry be one in relation to negligence, reckless conduct or fraud, the legal rules are the same for all directors". Also see *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* 2005 4 All SA 403 (SCA) 411; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 198d-h; *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 2 SA 54 (T); *Daewoo Heavy Industries (SA) Ltd v Banks* 2004 2 All SA 530 (C*)* 533c-e; and *Da Silva v CH Chemicals (Pty) Ltd* 2008 6 SA 620 (SCA) 628f-g in this regard.

[119] According to Delport *New Companies Act Manual* 60 the common-law principle is that "all contracts between a director and the company are voidable at the instance of the company, based on the principle that there shall be no conflict of interest and also, flowing from that, that a director cannot make a 'secret profit'". This is called the "no-profit" rule. Delport is also of the view that the summary in *Phillips v Fieldstone Africa (Pty) Ltd* 2004 1 All SA 150 (SCA) should suffice but it is uncertain whether this rule will still apply because the statutory provisions do not expressly exclude it. In this case the court held that the rule is strict and leaves little room for exceptions. It covers not only actual conflicts but also those that are possible in real terms. A fiduciary will have limited defences to his avail. Only the free consent of the principal after full disclosure will suffice. The court added: "Because the fiduciary who acquires for himself is deemed to have acquired for trust, once proof of a breach of a fiduciary duty is adduced it is of no relevance that (1) the trust has suffered no loss or damage; (2) the trust could not itself have made use of the information, opportunity etc or probably would not have done so; (3) the trust, although it could have used the information, opportunity etc has refused it or would do so; (4) there is no privity between the principal and the party with whom the agent or servant is employed to contract business and the money would not have gone into the principal's hands in the first instance; (5) it was no part of the fiduciary's duty to obtain the benefit for the trust; or (6) the fiduciary acted honestly and reasonably" (160-161).

votes, and use their powers for the purpose conferred and not for a collateral purpose.[120] The duty of care, skill and diligence entails that "directors must manage the business of the company as a reasonably prudent person would manage his own affairs".[121]

The *Companies Act* contains provisions dealing with directors' general duties that are comparable to the common-law duties of directors:[122] the *Companies Act*'s provisions pertaining to the duties of directors are a semi- or quasi-codification of their common-law duties.[123] Katz is of the view that this codification "does not in reality alter the common-law position ... [i]t is merely descriptive of the common law".[124]

King III specifically provides for the "apply or explain" principle that must be applied by directors when acting on behalf of the company. According to this principle directors must act in good faith, in that they must be honest, must act in the best interests of the company, must not receive secret profits and must promote the purpose for which the company was established. In an "apply or explain" regime the following issues should be addressed:

> … the board of directors, in its collective decision-making, could conclude that to follow a recommendation would not, in the particular circumstances, be in the best interests of the company. The board could decide to apply the recommendation differently or apply another practice and still achieve the objective of the overarching corporate governance principles of fairness, accountability, responsibility and transparency. Explaining how the principles and recommendations were applied, or if not applied, the reasons, results in compliance. In reality, the ultimate compliance officer is not the company's compliance officer or a bureaucrat ensuring compliance with statutory provisions, but the stakeholders. [125]

Hindsight is a perfect judge whether a board's determination in applying practice was justified as being in the best interests of the company.

A hybrid system exists in which corporate governance principles of fairness, accountability, responsibility and transparency principles override a specific

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120 Institute of Directors *King Report III* 12.
121 Institute of Directors *King Report III* 11; Benade *et al Entrepreneurial Law* 131.
122 Esser and Du Plessis 2007 *SA Merc LJ* 347.
123 McClennan 2009 *TSAR* 184.
124 Katz 2010 *Acta Juridica* 261.
125 Institute of Directors *King Report III* 7.

recommended practice, subject to the fact that some principles and recommended practices have been legislated. Thus, there must be compliance with the letter of the law, which leaves no room for interpretation.[126] The "apply and explain" principle can be seen as a refinement of the "comply and explain" principle that applied in *King II*.[127] However, it is unclear what should be explained and complied with. Also, it is unclear whether *King II* suggested or created an expectation.[128] The *King III* committee found "apply" to be more appropriate than "comply" for the following reasons:[129]

> The "comply or explain" approach could denote a mindless response to the King Code and its recommendations whereas the "apply or explain" regime shows an appreciation for the fact that it is often not a case of whether to comply or not, but rather to consider how the principles and recommendations can be applied.[130]

The standards of directors' conduct are covered by section 76 of the *Companies Act*. Section 76(3), which provides as follows:

> [A] director of a company, when acting in that capacity, must exercise the powers and perform the functions of director _
> (a) in good faith and for a proper purpose;
> (b) in the best interests of the company; and
> (c) with the degree of care, skill and diligence that may reasonably be expected of a person;
> (i) carrying out the same functions in relation to the company as those carried out by that director; and
> (ii) having the general knowledge, skill and experience of that director.

In dealing with the duty of care, skill and diligence in terms of section 76(3) of the *Companies Act*, the guidelines in *King III* are useful in order to determine whether a

126 Institute of Directors *King Report III* 8.
127 See Esser and Delport 2011 *THRHR* 450.
128 Esser *Recognition of Various Stakeholder Interests* 295.
129 See Esser and Delport 2011 *THRHR* 450. Institute of Directors *King Report II* 454 notes that in formulating the code of governance for the United Nations, the words "'comply or explain' led to some observers at the United Nations believing that the word 'comply' connoted regulation and consequently that the Code was based on the principle 'adopt or explain'. The Netherlands has gone even further and its Code is based on 'apply or explain'. It has been commented in the United Kingdom that perhaps they 'missed a trick' in continuing with 'comply or explain'. King III had adopted 'apply or explain'".
130 Institute of Directors *King Report III* 7.

director acted with the necessary care and skill.[131] The guidelines regarding the duty of care, skill and diligence explain:

> As far as the body of legislation that applies to a company is concerned, corporate governance mainly involves the establishment of structures and processes, with appropriate checks and balances that enable directors to discharge their legal responsibilities, and oversee compliance with legislation. In addition to compliance with legislation, the criteria of good governance, governance codes and guidelines will be relevant to determine what is regarded as an appropriate standard of conduct for directors. The more established certain governance practices become, the more likely a court would regard conduct that conforms with these practices as meeting the required standard of care. Corporate governance practices, codes and guidelines lift the bar of what are regarded as appropriate standards of conduct. Consequently, any failure to meet a recognised standard of governance, albeit not legislated, may render a board or individual director liable at law.[132]

Fisheries Development Corporation of SA Ltd v Jorgensen is an illustration of this duty. The court stated:[133]

> A considerable degree of the nature of the company's business and of any particular obligations assumed by or assigned to a director must be taken into account when dealing with a director's duty of care and skill. A distinction must also be drawn between the so-called full-time or executive director, and the non-executive director. An executive director participates in the day-to-day management of the company's affairs or of a portion thereof whereas a non-executive director has not undertaken any special obligation and is not bound to give constant consideration to the affairs of the company. The latter's duties are of an irregular nature in that he can be required to attend periodic board meetings, and any other meetings which may require his attention. He is not, however, bound to attend all such meetings, though he ought to whenever he is reasonably able to do so. He can also call for further meetings if he believes that they are reasonably necessary.[134]
>
> The duties and qualifications of a director are not listed as being equal to those of an auditor or accountant nor is he required to have special business acumen or expertise, or ability or intelligence, or experience in the business of the company. He is nevertheless expected to exercise the care, which can reasonably be expected of a person with his knowledge and experience. He is not liable for mere errors of judgment.

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131 See also Esser and Delport 2011 *THRHR* 450.

132 Institute of Directors *King Report III* 8.

133 *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 4 SA 156 (W) 165g-166e.

134 *King III* makes provision for the composition of the board of directors and clearly provides that it must be independent. *King III* provides "the board should ensure an appropriate balance of power and authority on the board" and the majority of the board should be non-executive directors (Institute of Directors *King Report III* 38 paras 62-64). It draws a distinction between executive and non-executive directors. An executive director is involved in the day-to-day management of the company or is in the full-time salaried employment of the company whereas non-executive directors are not involved in the management of the company (Annex 2.2 and 2.3 of Institute of Directors *King Report III* 53). This distinction, however, is not made in the *Companies Act.*

> A director can delegate any duty that may properly be left to some other official. When doing so a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. He is entitled to rely upon and accept the judgment, information and advice of the management, unless he has proper reasons for querying it. He is also not bound to examine entries in the company's books; however, he should not accept information and advice blindly. When he accepts information and advice, he is entitled to rely on it, but he should give due consideration and exercise his own judgment in the light thereof.

The standard of care as set out by section 76 is "precisely descriptive of the common law-position",[135] which is reinforced in the Act in relation to the determination of liability in the event of a breach of a director's duties. If a director is in breach of his duty of care, skill and diligence he is liable to the company in delict[136] for damages and, in addition, if a contract exists between the director and his company, he is also guilty of breach of contract.[137] The duty of care, skill and diligence in section 76(3) can be regarded as the "statutory equivalent of the common law duty of care and skill, but goes beyond the common law, not only in respect of the content of the duties, but also as to the level of compliance".[138] The common law duties "were determined with a subjective/objective test, but the minimum was always the lower of the two".[139] The standard of care is a "mixed objective and subjective test": it is objective in the sense that it considers as a minimum standard what a reasonably prudent person would have done in the same circumstances faced by a director, and it is subjective in that the skills, knowledge or experience of that particular director should be taken into account.[140] It has been argued that there is not a clear line between the fiduciary duty and the duty of care and skill and that an overlap exists. If such overlapping indeed exists it is known as the "business judgment rule".[141] The objective-subjective test can be found in sections 76(3)(c)(i) and (ii) of the *Companies Act*.[142] Subsection (c)(i) contains the objective test and (c)(ii) the subjective. The objective-subjective test is compatible with the so-called "business judgment rule".[143] The subjective

135 Katz 2010 *Acta Juridica* 261.
136 Katz 2010 *Acta Juridica* 261.
137 Cilliers and Benade *Corporate Law* 148.
138 Also see Esser and Delport 2011 *THRHR* 450.
139 Also see Esser and Delport 2011 *THRHR* 450.
140 McClennan 2009 *TSAR* 186; Cassim *et al Contemporary Company Law* 559.
141 See Mongalo *Corporate Law* 170; Havenga 2000 *SA Merc LJ* 25.
142 McClennan 2009 *TSAR* 186; Meskin *et al Henochsberg* 462.
143 Also see Delport *New Companies Act Manual* 59 in this regard.

standards of "the general knowledge, skill and experience of that director" may overshadow the objective standards and might confuse the courts in the interpretation of the director's duties.[144] The solution to this conundrum is that the objective test is a base-line standard before the subjective elements are considered.[145] The statutory "business judgment rule" can be found in section 76(4) of the *Companies Act*.

As is illustrated by *Fisheries Development Corporation of SA Ltd v Jorgensen*,[146] directors cannot be held liable for mere errors in judgment. Directors should act in the best interest of the company and with the required care and skill: they must take reasonably diligent steps to be informed about the matter at hand, and although they are allowed to take risks they cannot do so in a reckless fashion. The directors of a company should promote the interests and success of the company in the collective best interest of stakeholders (the employees, customers and suppliers) as the circumstances require. It should be noted that the common-law "enlightened shareholder value" approach has not been changed by the *Companies Act* and that the statutory "business judgment rule" caters for the interests of the company. The company as an entity does not consist of stakeholders: however, cognisance is required of the so-called "stakeholder-inclusive approach" in *King III*, which recognises the various stakeholders of a company as important role players in the promotion of corporate governance principles. In this light it is submitted that the existence of a "new concept of a company" must be acknowledged. This new concept of a company has been expressed in the following terms:

> There was a time when business success in the interests of shareholders was thought to be in conflict with society's aspirations for people who work in the company or in supply chain companies, for the long-term well-being of the community and for the protection of the environment. The law is now based on a new approach. *Pursuing the interests of shareholders and embracing wider responsibilities are complementary purposes, not contradictory ones*.[147]

Section 77(2)(a) of the *Companies Act* provides that a director of a company may be

144 Bekink 2008 *SA Merc LJ* 111.
145 Bekink 2008 *SA Merc LJ* 111.
146 *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 4 SA 156 (W).
147 Emphasis added. Margaret Hodge, Minister of State for Industry and Regions (UK Department of Trade and Industry 2007 2), as quoted in Brammer, Jackson and Matten 2012 *Socio-Economic Review* 12.

held liable in accordance with the common law principles of a breach of a fiduciary duty. This liability is for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty by him (i) to disclose a personal financial interest;[148] (ii) to avoid a conflict of interest;[149] and (iii) to act in good and for a proper purpose, or in the best interests of the company.[150] According to Delport[151] the liability of the director "for any benefit irrespective of the damage to the company" is apparently not covered by section 77(2)(a) *of the Companies Act* and it is "not clear whether the common law will apply in this regard".[152] Section 77(2)(b) further provides that the liability of a director can take place in accordance with the common-law principles relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of (i) a duty to act with the required degree of care, skill and diligence;[153] (ii) any provision of the Act not otherwise mentioned in that section; or (iii) any provision of the company's Memorandum of Incorporation.[154]

Section 218(2) is important in that it provides that any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention. Although the statutory fiduciary duties apply between the directors and the company and not, for example, with regard to employees, employees can hold directors liable for breaches of their duties provided that they have suffered losses as a result of such breaches. Section 218(2) imposes strict liability[155] and is available to employees and their trade unions. By contrast, section 20(6) of the *Companies Act* is available only to shareholders.[156] If a director fails to maintain his/her unfettered discretion the common law applies, since the

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148 Section 75 of the *Companies Act.*
149 Section 76(2) of the *Companies Act*.
150 Section 76(3)(a)-(b). This provision will be applicable except where the business judgment rule in terms of s 76(4)(a) is applicable.
151 Delport *New Companies Act Manual* 63
152 See *Regal (Hastings) Ltd v Gulliver* 1967 2 AC 134 (HL); and *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* 2005 4 All SA 403 (SCA).
153 See 76(3)(c) of the *Companies Act.*
154 This provision will be applicable except where the "business judgment" rule in terms of s 76(4)(a) is applicable.
155 Cassim *et al Contemporary Company Law* 832
156 Wiese 2013 *ILJ* 2477.

Companies Act does not contain a provision to this effect - section 218(2) is not applicable. The cause of action in this instance will be *sui generis* based on a breach of trust in terms of common law. Employees can hold the directors accountable if they act in breach of their duties.

2.2.2 Achieving a balancing act?

The stakeholder debate (as illustrated above) as well as the debate over CSR and corporate citizenship are integral and prominent issues in the field of corporate governance.[157] It has been established that the role that stakeholders play cannot be overemphasised: its importance is summarised below:

> A key aspect of corporate governance is concerned with ensuring the flow of external capital to companies both in the form of equity and credit. Corporate governance is also concerned with finding ways to encourage various stakeholders in the firm to undertake economically optimal levels of investment in firm-specific human and physical capital. The competitiveness and ultimate success of a corporation is the result of teamwork that embodies contributions from a range of different resource providers including investors, employees, creditors and suppliers. Corporations should recognise that the contributions of stakeholders constitute a valuable resource for building competitive and profitable companies. It is, therefore, in the long-term interest of corporations to foster wealth-creating co-operation among stakeholders. The governance framework should recognise that the interests of the corporation are served by recognising the interest of stakeholders and their contribution to the long-term success of the corporation.[158]

The board of directors as the custodians of the company's corporate reputation should accept that stakeholder interests and expectations, even unwarranted or illegitimate ones, must be dealt with and cannot be ignored.[159] The company's reputation is important for long-term growth and stability, so it is important to note stakeholders' overall assessments, which represent its corporate reputation measured by the company's performance against the legitimate interests and expectations of stakeholders.[160]

157 Du Plessis, Hargovan and Bagaric *Principles* 8.
158 See Du Plessis, Hargovan and Bagaric *Principles* 9, where they refer to the OECD 2004 http://goo.gl/U1molJ 12.
159 Institute of Directors *King Report III* 100.
160 Institute of Directors *King Report III* 100.

The company's reputation impacts on the economic value of the company, therefore the board should take account of and respond to the legitimate interests and expectations of its stakeholders, including its employees, in its decision-making. Legitimate interests or expectations are those "a reasonable and informed outsider would conclude it to be valid and justifiable on a legal, moral or ethical basis in the circumstances".[161] The board is not only responsible for the management of stakeholder relationships but is also directed by law to act in the best interests of the company. *King III* states that "within these confines" the board should strive to "achieve an appropriate balance between the interests of various stakeholders" and, in so doing, "should take account, as far as possible, of the legitimate interests and expectations of its stakeholders in its decision-making".[162] A complicated balancing act can be achieved:

> Board decisions on *how* to balance interests of stakeholders should be guided by the aim of ultimately advancing the best interests of the company. This applies equally to the achievement of the "triple context" and the notion of good corporate citizenship … This does not mean that a company should and could always treat all stakeholders fairly. Some may be more significant to the company in particular circumstances and it is not always possible to promote the interests of all stakeholders in all corporate decisions. It is important, however, that stakeholders have confidence that the board will consider their legitimate interests and expectations in an appropriate manner and be guided by what is the best interests of the company.[163]

The *Companies Act* focuses on more than increasing the wealth of shareholders.[164] Directors must act in the best interests of shareholders, but collectively they must also consider the interests of other stakeholders. Because section 76(3)(b) of the *Companies Act*, in terms of which directors should act "in the best interests of the company" does not define "company", it has been pointed out that "it follows that the common-law meaning attributed to this word must apply".[165] The term "company" is defined in section 1 of the *Companies Act* as a "juristic person incorporated in terms of the Act", however, the definition is regarded as being of little relevance when

161 Institute of Directors *King Report III* 100.
162 Institute of Directors *King Report III* 102.
163 Institute of Directors *King Report III* 102.
164 Olson 2010 *Acta Juridica* 225.
165 Cassim *et al Contemporary Company Law* 515.

dealing with section 76(3)(b).[166] In accordance with this line of thought the concept "company" refers to "the interests of the collective body of present and future *shareholders"*,[167] and the provision in section 7(d) of the *Companies Act* must be taken note of. Section 7(d) of the *Companies Act* provides that directors would manage a company in such a manner that promotes economic and social benefits. Delport *et al*[168] point out that it "is doubtful that s 7(d) establishes a new, *sui generis,* duty on directors": instead the interpretation attached to section 7(d) should be one that entails that directors must pay attention to the interests of stakeholders. However, it does not provide stakeholders with direct rights.[169] It is claimed that if the "legislator wanted to create a new duty applicable to directors it would have been done so explicitly (maybe by listing it in s 76 with the other duties) and not by merely incorporating it into the 'purpose' provision". [170] Thus, it is submitted, enlightened-shareholder value is the preferred purpose by which directors have to consider stakeholder interests, "but only in so far as this will promote long-term profit maximisation".[171]

The *Companies Act* strives to create a balance between creating a flexible business environment and regulation which is designed to hold the company and its office bearers accountable to the stakeholders of the company.[172] Directors, traditionally, were mandated to take account of the interests of present and future shareholders "but could not exercise their powers for the benefit of the company as a legal or commercial entity *distinct* from that of the shareholders".[173] Although this view supports an interpretation of the word "company" to equate to "the shareholders of the company",[174] academic writers and the courts have argued differently: "a glaring

166 Cassim *et al Contemporary Company Law* 515.
167 Davis and Le Roux 2012 *Acta Juridica* 313.
168 Delport *et al Henochsberg* 46(5).
169 Delport *et al Henochsberg* 46(5).
170 Delport *et al Henochsberg* 46(5).
171 Delport *et al Henochsberg* 46(5).
172 Delport *et al Henochsberg* 46(5).
173 Davis and Le Roux 2012 *Acta Juridica* 314.
174 See Cassim *et al Contemporary Company Law* 515; Davis and Le Roux 2012 *Acta Juridica* 314 in this regard.

corporate law anomaly in modern times [is] to insist that the interests of employees do not form part of the interests of the company".[175]

2.3 Employees as stakeholders of companies

2.3.1 General

The provisions of the *Companies Act* highlight that employees play an important role in the structures and processes that deal with control by management and decision-making in corporations. The principles of governance underpin the participation of employees: they ensure that companies (and organisations in general) are partially governed by their employees. Three approaches to employee governance can be distinguished, namely employee share ownership, the election of employee representatives to the board of directors, and employee involvement,[176] such as in works councils or quality circles.[177] Employee governance and stakeholder governance are "complementary and mutually beneficial" in that their goals are to "protect their firm-specific assets and to satisfy their risk preferences".[178] Employees are involved in the governance of the corporation by taking part in the process of collective bargaining, making representations in decision-making and by becoming shareholders of the company. If companies maintain poor employee relations this can result not

175 See Cassim *et al Contemporary Company Law* 521. Also see *Teck Corp Ltd v Millar* 1972 33 DLR (3rd) 288 BCSC 313, where Berger J said that traditional legal principles should yield to the facts of modern life in that "[i]f today directors of a company were to consider the interest of employees no one would argue that in so doing they were not acting *bona fide* in the interest of the company itself" but it would be a breach of their duty if they discharged "entirely the interests of a company's shareholders in order to confer a benefit on its employees". If the directors "observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not in my view, leave directors open to discharge that they have failed in their fiduciary duty to the company".

176 Webster and Macun 1998 *LDD* 66 draws a distinction between employee involvement and workplace participation as follows: "Employee involvement is a much broader phenomenon than that of workplace representation and incorporates a variety of schemes aimed at enhancing quality, productivity and motivation amongst the workforce. It is a form of direct involvement in the immediate work environment and constitutes an example of what Pateman calls 'pseudo participation', or techniques which persuade employees to accept decisions that have already been made by management. … Workplace representation, on the other hand, involves formal mechanisms of management-worker interaction that seek to 'institutionalise rights of collective worker participation, including rights to information and consultation on the organisation of production and, in some cases formal co-determination in decision-making".

177 McDonnell 2003 http://ssrn.com/abstract=424681 13.

178 Boatright 2004 *Bus Ethics Quart* 16.

only in a decline in morale but can also cause problems with the recruitment and retention of staff, as well as with productivity, creativity and loyalty.[179] Some form of workplace governance is necessitated by the requirement of a structure for making rules and the decisions regarding conditions of employment, as well as a structure of rights and reciprocal obligations in the employment relationship.[180] Examples of workplace governance rules and decisions can include aspects regarding standards of work that must be performed, the termination of employment contracts and compensation systems.[181] Mahoney and Watson identify three models of workplace governance, namely:[182]

- The authoritarian form of governance where the principal employs subordinates to further its objectives. Adversarial relationships and divergent interests are assumed whereby decision-making is centralised and there is a lack of trust. This form is also characterised by the fact that no performance takes place beyond the contract and in extreme cases employees have no voice and the only option for an unhappy employee is to exit the workplace.
- Collective bargaining, which emphasises the exchange between the employer and the collective workforce, where economic exchange as well as the negotiation of other aspects is fundamental.
- Employee involvement, which has direct participation as a central element. Here a social exchange of obligations is extended beyond the employment contract and economic exchange because of a reciprocal extension of trust and discretion.

In addition to being stakeholders of the company, employees contribute to a company's prosperity. A company that employs and retains talented and hardworking employees will reap the benefit. Employees are more than valuable "assets" of the company; they play an important role in the sustainability and long-term growth and prosperity of the company. Intellectual capital rather than resources, for example

179 Institute of Directors *King Report III* 115 para 45.
180 Metcalf 1995 *Employee Relations* 8.
181 Metcalf 1995 *Employee Relations* 8.
182 Metcalf 1995 *Employee Relations* 9.

natural resources, machinery and financial capital, have become an indispensable "asset" of corporations.[183] The welfare of employees and customers[184] contributes to the long-term increase of the profits: a social responsibility commitment and attention to the needs of employees and consumers ultimately benefit shareholders.[185] The satisfaction of employees "will lead to greater productivity and thus to increased profits, in this way maximising the interests of both employees and shareholders".[186] Employee interests extend beyond financial well-being and financial reward/participation in companies.

A company typically responds to pressure from employees threatening industrial action by negotiating with trade union representatives. Or, in the event of price increases by suppliers, a company responds by entering into an agreement that the company will buy in bulk to curb price increases or conclude an exclusivity agreement with a specific supplier.

The decisions affect the interests of employees: the role of employees as stakeholders in a corporation is summarised as follows:

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

183 Summers and Hyman 2005 http://goo.gl/RKtXpP.
184 Dodd 1931-1932 *Harv L Rev* 1156.
185 Dodd 1931-1932 *Harv L Rev* 1156.
186 Davis and Le Roux 2012 *Acta Juridica* 310.

> they can "blow the whistle" on these activities whilst minimizing the risk of adverse consequences for themselves as a result of this action.[187]

Companies have cognisance of the *Constitution* as well as labour legislation with regard to the protection provided by the law and the recognition of employees as stakeholders. The *Constitution* recognises core labour rights[188] and fair labour practices[189] as being fundamental, in that "social justice is a necessary precondition for creating a durable economy and society, and places obvious limitations on the policy choices open to those who seek to regulate the labour market".[190] Labour policy is not purely a question of economics: the requirements of the *Constitution* need to be taken into account when choices are made, as well as to justify any limitation of the rights.[191] The *Constitution,* as well as the enabling legislation such as the *Labour Relations Act*,[192] *Basic Conditions of Employment Act*[193] and *Employment Equity Act,*[194] plays an important role in the protection of the right to fair labour practices, as with the rights to freedom of association, freedom of expression, privacy and equality. A social justice obligation is provided for in the LRA and the BCEA. The LRA in its objectives aims to "advance economic development, social justice, labour peace and the democratisation of the workplace".[195]

Statutory rights, their nature and scope and how they are implemented and enforced are important in the protection of workers' rights. However, they are not absolute and need to be balanced against the competing rights of employers and other third

187 Du Plessis, Hargovan and Bagaric *Principles* 26 referring to Mallin *Corporate Governance* 51. Emphasis added.

188 Section 1 of the *Constitution*. Also see *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 1 as well as *Minister of Finance v Van Heerden* 2004 12 BLLR 1181 (CC) para 25, where the court held as follows: "Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework".

189 Section 23(1)(a) of the *Constitution*. See *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) paras 33, 39 in this regard.

190 Van Niekerk and Smit *Law@work* 8.

191 Van Niekerk and Smit *Law@work* 8-9.

192 *Labour Relations Act* 66 of 1995 (the LRA).

193 *Basic Conditions of Employment Act* 75 of 1997 (the BCEA).

194 *Employment Equity Act* 55 of 1998 (the EEA).

195 Section 1 of the LRA.

parties.[196] Dispute resolution institutions such as the Commission for Conciliation, Mediation and Arbitration (CCMA) and labour courts (as well as other courts) play a fundamental role as labour rights are enforced, assessed and, if necessary, balanced with competing rights.[197]

The incorporation of human rights (including fundamental labour rights) is an important corporate responsibility issue for companies in South Africa as well as for multi-national companies. Corporate governance and social responsibility programmes play a significant role in the establishment and enforcement of basic labour rights, "especially in host countries that have little in the way of labour market regulation, or where to attract investment or for want of resources, minimum labour standards are not enforced".[198] Developments in corporate governance may serve to promote collective bargaining (to the extent that basic labour rights include the rights to organise and to bargain collectively), especially in a legislative environment hostile to labour rights.[199] Labour law originally focused on employment relations in order to regulate the conditions of tangible labour and to extend protection to workers' physical bodies.[200] It evolved to protect "employment" and to organise workers collectively within the enterprise (which is the economic locus of decision-making) to the point where workers' interests are taken into account as well as their level of input in decision-making.[201] The role of employees has been neglected within company law: they "tend to be regarded as outsiders rather than as insiders within the company and so are forced to rely on labour law protections rather than be integrated into the corporate law system".[202] Workers are not given priority over other stakeholder groups in CSR initiatives and they compete with other stakeholder interests, yet they play an important role in the success of any organisation.

196 Van Niekerk and Smit *Law@work* 10.
197 Van Niekerk and Smit *Law@work* 10.
198 Van Niekerk and Smit *Law@work* 10.
199 Van Niekerk and Smit *Law@work* 10.
200 Morin 2005 *Int'l Lab Rev* 11.
201 Morin 2005 *Int'l Lab Rev* 11.
202 Villiers "Corporate Social Responsibility" 178.

CSR has a role in the advancement of employee interests. CSR is regarded as a form of corporate investment characterised by a dual orientation towards "the improvement of *social welfare* and of *stakeholder relations*".[203] The focus on stakeholder relations reveals that employees impact on CSR policy in three ways, namely, (i) employees can act as agents for social change when they "push corporations to adopt socially responsible behaviour"; (ii) environmental policy demonstrates that the support of employees is necessary to secure effective CSR programmes and policies; and (iii) employees, as stakeholders, not only perceive CSR programmes and actions but also evaluate, judge and react to them. When CSR is seen as voluntary this is problematic to trade unions on two levels.[204] First, "there is no guarantee of what corporations will do in order to meet their CSR aspirations" as they will treat CSR initiatives not as obligations but as good behaviour, "almost as charity, philanthropy, or even kindness, all of which companies are under no legal duty to offer".[205] If CSR is not mandatory, competing demands on a corporation affect how it regards its CSR requirements and workers have no guarantee that their interests will be accommodated.[206] Second, the voluntary nature of CSR "renders it a subject for managerial discretion"; although trade unions might try to influence the exercise of managerial discretion, corporate managers in reality are able to take CSR decisions with or without the input of the trade unions. This probability limits the potential effect of CSR and, most likely, lessens the practical impact of CSR initiatives.[207]

Companies should offer an opportunity for stakeholders to align their expectations, ideas and opinions on certain issues with those of the company.[208] The legitimate interests of employees (with reference to *King III*) as stakeholders should be considered by companies. Sustainable development is important for the protection of employment. An underlying philosophy of *King III* is that companies should be good corporate citizens and subscribe to sustainability considerations. Sustainability[209]

203 Gond et al 2010 http://goo.gl/hjs9Le 7.
204 Villiers "Corporate Social Responsibility" 176.
205 Villiers "Corporate Social Responsibility" 176.
206 Villiers "Corporate Social Responsibility" 176.
207 Villiers "Corporate Social Responsibility" 177.
208 Institute of Directors *King Report II* 110–111.
209 Institute of Directors *King Report III* 13.

encompasses the inclusivity of stakeholders, innovation,[210] fairness and collaboration[211] as well as social transformation and redress.[212] The manner in which corporations treat employees is important. Fairness is an underlying principle that is applied in labour law (and also in corporate law). The LRA provides for the protection of employees against unfair labour practices and unfair dismissal.[213] Fairness[214] is a means of addressing social injustice,[215] which is unsustainable and counter-productive. Fairness plays an important role in that society is not exclusively concerned with the maximisation of aggregate wealth but also with equality in its distribution.[216]

Economic justice is largely ignored in mainstream corporate law. When "people use bargained-for exchange to distribute goods, the weaker bargainer will be less able to extract concessions from the other".[217] Although the less-well-off party is marginally better off, the more powerful party to the contract will tend to be much better off; unless there is "*some explicit constraint on the ability of corporations to pass along the lion's share of profit to shareholders, the nation's inequality will worsen over time*".[218]

Nevertheless, it appears that corporate law is well suited and an efficient means to promote fairness and to redistribute wealth and income; more than other areas of regulation.[219] A stakeholder-oriented corporate law "would work at the initial distribution of the corporate surplus and would benefit stakeholders up and down the

210 Innovation will include new ways in which companies are doing things and will include, for example, profitable responses to sustainability (Institute of Directors *King Report III* 13).
211 Collaboration should not amount to "anti-competitiveness" (Institute of Directors *King Report III* 13).
212 Social transformation and redress from the policies of "apartheid" are important and should be integrated within the broader transition to sustainability because integrating sustainability and social transformation "in a strategic and coherent manner will give rise to greater opportunities, efficiencies, and benefits, for both the company and society" (Institute of Directors *King Report III* 13).
213 Section 186(2) of the LRA contains the definition of an unfair labour practice whereas s 186(1) contains the definition of dismissal. Also see *National Entitled Workers' Union v CCMA* 2003 24 ILJ 2335 (LC) 2339 in this regard.
214 See paras 2.1 and 2.3 of this contribution for a discussion on fairness.
215 Institute of Directors *King Report III* 13.
216 Greenfield 2005 *Hastings Bus LJ* 109-110.
217 Greenfield 2005 *Hastings Bus LJ* 111.
218 Greenfield 2005 *Hastings Bus LJ* 111. Emphasis added.
219 Greenfield 2005 *Hastings Bus LJ* 111.

economic hierarchy".[220] If fairness is valued, then a corporate law framework that does not promote fairness cannot be acceptable.[221] Corporate governance should focus on procedural fairness (rather than trying to reach agreement *ex ante* about substantive fairness). Its crucial objective is "*to create methods of decision-making*"[222] that offer procedural fairness among the various stakeholders. In order for a corporation to serve its stakeholders by creating wealth in a sustainable way and to share the wealth in an equitable way, management needs to be subjected to constraints. Good corporate governance in which the advancement of sustainability is a fundamental component has the potential to benefit the owners of the corporation as well as those they employ.[223] At a very basic level employees would like corporations (as employers) to fulfil their basic needs, such as the payment of a fair wage, the provision of safe working conditions, job security and future career opportunities.

In order to properly balance the interests of stakeholders, directors (as pointed out earlier) should be aware of the interests of various stakeholders as afforded by legislation.[224] The interests of employees as stakeholders of the company may, for example, receive preference over the interests of shareholders collectively.[225] Davies poses the question: are there good arguments for privileging employees over other stakeholders (suppliers, customers, creditors) in the company in respect to corporate governance? To which he responds:[226]

> Although stakeholder theories of corporate governance appear to give the case for worker representation a way of breaking down the supremacy of shareholders, in some ways stakeholder theories go too far from the point of view of employee representation. Stakeholding, at least in the economic form of the argument, suggests that governance protections are needed for all those who make firm specific investments against the expropriation of which by the controllers of the firm contractual protections are ineffective. Employees may be the paradigm example of such a group, but they are not the only example ... Modern stakeholding theories have thus generated a problem for labor lawyers, which, it seems to me, they have

220 Greenfield 2005 *Hastings Bus LJ* 112.
221 Greenfield 2005 *Hastings Bus LJ* 112.
222 Emphasis added. Greenfield 2005 *Hastings Bus LJ* 113.
223 Le Roux "Purpose of Labour Law" 242.
224 Esser 2009 *SA Merc LJ* 324.
225 Esser 2007 *THRHR* 411.
226 Davies 2000 *Comp Lab L & Pol'y J* 138-139.

> not yet squarely addressed. Talk of "the two sides of industry" or of "labour and capital" or, even "the social partners" does not fit well within the pluralism of stakeholding, which embraces all those contracting with the company who cannot specify in advance a complete set of contractual terms to govern their relationship. It may be possible to distinguish workers from other stakeholders, not on the basis that other stakeholders can effectively rely on other bodies of law, insolvency law or commercial law, for example, to protect them. However, it is a matter for further analysis whether insolvency and commercial law contain effective mechanisms, which labor law lacks and cannot develop.

2.3.2 The participation of employees in companies

The legal structure of authority within corporations is important in dealing with the participation of employees in decision making as well as the appropriate level of decision making. Performance-enhancing mechanisms that are conducive to employee participation in corporate governance may, directly as well as indirectly, be beneficial to companies. These benefits obviously will be achieved by means of the readiness of employees to invest in firm-specific skills. Examples of mechanisms for employee participation vary from employee participation on company/supervision boards to governance processes such as work councils, where the viewpoints of employees with regard to key decisions are considered. Employee stock ownership plans or other profit sharing mechanisms serve as examples of performance-enhancing mechanisms.[227] These and other issues in the context of corporate law will be explored below.

2.3.2.1 The advancement of employee rights in corporate law

The *Companies Act* brought major changes to governance with regard to employee participation: it "entrenched certain rights of employees to a point which extends their labour rights".[228] Employees are "given significant rights of participation in the governance of companies as a matter of company law, as opposed to industrial or labour relations law".[229] A company assumes a specific role and place in society. " '*How, a company treats its people'*;[230] may be seen as a litmus test of corporate values,

227 OECD 2004 http://goo.gl/U1molJ 47.
228 Davis and Le Roux 2012 *Acta Juridica* 312.
229 Katz 2010 *Acta Juridica* 261.
230 Emphasis added.

pivotal to and emblematic of an enterprise's engagement with its socio-economic environment".[231]

Section 13 of the *Companies Act* makes provision for any person or a number of persons to incorporate a company by completing and signing a memorandum of incorporation (MOI) and filing a notice of incorporation (NOI). A "person" in the definition includes a juristic person,[232] thus, trade unions,[233] as representatives of employees, can be parties to the formation of companies,[234] for example, where a new venture or a subsidiary is formed together with the employer. The amendment of the MOI by means of special resolution is left to the board of the company or shareholders entitled to exercise at least 10% of the voting rights that may be exercised on such a resolution.[235] An alternative arrangement is provided for in section 16(2), whereby the MOI requirements regarding proposals for amendments "seem to suggest that a MOI can allow for a trade union or worker representative to propose such an amendment".[236] The *Companies Act* does not allow employees to vote for such a proposal unless they are also shareholders.[237]

The board of directors is also entitled to issue shares subject to authorisation by or in terms of the MOI[238] and, similarly, to obtain the right to increase or decrease the authorised share capital, except to the extent that the MOI provides otherwise.[239] In

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231 Du Toit 2009 *ILJ* 2227.

232 Section 1 of the *Companies Act*.

233 The *Companies Act* does not define the concept "trade union" but a representative trade union is defined by s 1 to mean a trade union registered in terms of s 96 of the LRA. However, there are inconsistencies that exist in the *Companies Act,* as it does not consistently refer to a registered trade union and often refers only to a "trade union representing employees of the company" (Schoeman 2012 *PER* 238). Schoeman adds that it "is unfortunate that the *Companies Amendment Act* 3 of 2011 does not rectify the situation despite one of the aims of the *Companies Amendment Act* being to correct certain errors resulting in inconsistency, disharmony and ambiguity in the principal Act" (Schoeman 2012 *PER* 238). The LRA affords rights only to registered trade unions, but also distinguishes between majority representative, sufficiently representative as well as minority trade unions. The organisational rights afforded (or not afforded) to different trade unions will depend on their representivity in the workplace of such a company or employer.

234 Wiese 2013 *ILJ* 2471.

235 Section 16(1)(c) of the *Companies Act*.

236 Wiese 2013 *ILJ* 2471.

237 Section 16(1)(c)(ii) of the *Companies Act*. Wiese 2013 *ILJ* 2471.

238 Section 38 of the *Companies Act.*

239 Section 36(3) of the *Companies Act.* Ss 41(1) and (3) of the *Companies Act* places some limits on the board's authority and provides as follows: "(1) Subject to subsection (2), an issue of shares or securities convertible into shares, or a grant of options contemplated in section 42, or a grant of

this regard Wiese points out that the provisions of the *Companies Act* authorise the board to issue shares without shareholder approval (which is contrary to the position under the 1973 *Companies Act,* where shareholder approval was required). These provisions facilitate both worker participation and black economic empowerment transactions in terms of the *Broad-Based Black Economic Empowerment Act* (BBBEE Act)[240] by "allowing the board to bypass recalcitrant shareholders",[241] and are therefore powerful tools in the hands of the board of directors, as they can effectively enhance worker participation through share ownership. In terms of section 40(1) of the *Companies Act,* the board can issue authorised shares only for adequate consideration to the company (as determined by the board) or in terms of conversion rights associated with previously issued securities of the company, or as a capitalisation share as contemplated in section 47. A consideration in this regard means anything of value given and accepted in exchange for any property, service, act, omission or forbearance or any other thing of value. Thus, it will include any money, property, negotiable instrument, securities, investment credit facility, token or ticket; or any labour, barter or similar exchange of one thing for another; or any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly.[242] These provisions also facilitate economic participation by unions or workers.[243] In terms of section 44 the board is authorised to provide financial assistance pursuant to an employee share scheme that satisfies the requirements of section 97. Shareholder approval is not required in such an instance.

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any other rights exercisable for securities, must be approved by a special resolution of the shareholders of a company, if the shares, securities, options or rights are issued to a- director, future director, prescribed officer, or future prescribed officer of the company; person related or inter-related to the company, or to a director or prescribed officer of the company; or nominee of a person contemplated in paragraph *(a)* or *(b)*. … (3) An issue of shares, securities convertible into shares, or rights exercisable for shares in a transaction, or a series of integrated transactions, requires approval of the shareholders by special resolution if the voting power of the class of shares that are issued or issuable as a result of the transaction or series of integrated transactions will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction or series of transactions".

240 *Broad-Based Black Economic Empowerment Act* 53 of 2003.

241 Wiese 2013 *ILJ* 2478.

242 Section 1 of the *Companies Act.*

243 Wiese 2013 *ILJ* 2478.

The provision in the *Companies Act* regarding business-rescue proceedings (in chapter 6) is a fundamental change to employee participation. Sections 129 and 131 provide that the business-rescue procedure can be initiated by means of a resolution of the board of directors or by court order applied for by an affected person. An affected person includes any registered trade union representing employees of the company, and if there is no such trade union representing employees, the employees themselves or their representatives.[244] A trade union must be given access to a company's financial statements for the purposes of initiating a business-rescue process.[245] The trade union representing employees or employees who are not represented may apply to a court to place a company under supervision and commence business-rescue proceedings. The business-rescue provisions in the *Companies Act* describe business rescue not only as a job-security measure but also acknowledge the fact that employees, as stakeholders, have an interest to be informed and to participate in the formulation of the business-rescue plan.[246] However, employees cannot vote on the approval of the business-rescue plan, except to the extent that they are also creditors,[247] and thus are "treated as lesser stakeholders than creditors".[248] Employees remain employees of the company during the company's business-rescue proceedings on the same terms and conditions unless changes occur in the ordinary course of attrition or the employees and the company, in accordance with the applicable labour laws, agree different terms and conditions.[249] Any retrenchments of employees contemplated in the company's

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244 Section 128(1)(a) of the *Companies Act*.

245 Section 31(3) of the *Companies Act.* The right to access to information contained in the *Companies Act* is in addition to the rights in terms of the *Constitution* and the *Promotion to Access to Information Act* 2 of 2000 (PAIA) (also see Wiese 2013 *ILJ* 2472 in this regard). Also see the type of information that a trade union is entitled to in terms of the LRA. S 16 of the LRA provides that only relevant information that will allow a trade union representative to perform his or her functions referred to in s 14(4) of the LRA must be disclosed and not information that is legally privileged or information that the employer is by law or order of court not allowed to disclose or is confidential and, if disclosed, may cause substantial harm to an employee or the employer or is private personal information relating to an employee, unless that employee consents to the disclosure of that information. Wiese points out that when trade unions negotiate with private companies they are at a disadvantage as private companies are not subject to an audit. Wiese points out that the lack of information available to such a trade union will mean that it is likely that it is not even aware that the company is in financial distress (Wiese 2013 *ILJ* 2472).

246 Wiese 2013 *ILJ* 2475.

247 Section 144(3)(f) of the *Companies Act.*

248 Wiese 2013 *ILJ* 2475.

249 Section 136(1)(a) of the *Companies Act.*

business rescue plan are subject to the provisions of section 189 or 189A of the LRA and other applicable labour legislation.[250]

If a sale of business occurs or in case of a merger, no worker involvement is contemplated by the *Companies Act.*[251] Sections 197 and 197A of the LRA contain the provisions regarding a transfer of business and the automatic transfer of employment contracts. The transferee's right to retrench employees due to a transfer as a going concern would be regarded as a dismissal in terms of section 186 of the LRA and automatically as an unfair dismissal in terms of section 187. An employer may retrench the transferred employees later, however, if it can prove an operational reason, in which case consultation must take place with the trade union representatives or other worker representatives.

The *Companies Act* contains a number of other rights. A registered trade union or another representative of employees may apply to a court for an order declaring a director delinquent or under probation in the circumstances provided by the statute.[252] Instances covered here include the following:

(i) where a director grossly abused the position of director;
(ii) where a director took personal advantage of information or an opportunity, contrary to section 76(2)(a);
(iii) where a director intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76(2)(a);
(iv) where a director acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or contemplated in section 77(3)(a), (b) or (c).[253]

Section 20(4) of the *Companies Act* provides that shareholders, directors, prescribed officers or a trade union representing employees of the company "may apply to the

250 Section 136(1)(b) of the *Companies Act.*
251 Wiese 2013 *ILJ* 2475.
252 Section 162(2) of the *Companies Act*.
253 Section 162(5)(c) of the *Companies Act.*

High Court for an appropriate order to restrain the company from doing anything inconsistent with this Act". If the board of a company adopts a resolution in favour of granting financial assistance in terms of section 45, the company must provide written notice of that resolution *inter alia* to any trade union representing the company's employees "within 10 days after the board adopts the resolution, if the total value of the loans, debts, obligations or assistance contemplated in that resolution, together with any previous resolution during the financial year, exceeds one-tenth of 1% of the company's net worth at the time of the resolution" or "within 30 days after the end of the financial year, in any other case".[254]

The Act abolishes the common-law derivative action and substitutes a statutory derivative action. Thus, it empowers a registered trade union that represents the employees of the company or another representative of employees of the company to bring a statutory derivative action.[255] As part of the promotion of good corporate governance principles the Act grants employees whistle-blower protection.[256] The *Companies Act* provides for alternative dispute resolution mechanisms, in that a dispute can be referred for conciliation, mediation or arbitration to the tribunal, accredited entity or any other person.[257] For example, disputes between a trade union and the company can be referred for alternative dispute resolution if the union is entitled to apply for relief or file a complaint in terms of the *Companies Act.*[258] Wage disputes, however, are not covered and will have to be resolved in terms of the LRA.[259]

2.3.2.2 Participation at board level

The legal structure of authority within corporations is effectively three-tiered: shareholders are at the one end of the spectrum, followed by the board of directors

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254 Section 45(5) of the *Companies Act*.
255 Section 165(2)(c) of the *Companies Act*.
256 Section 159 of the *Companies Act*. This type of protection is already granted to employees by the *Protected Disclosures Act* 26 of 2000 (PDA) and is merely an extension of the protection already granted. S 159 of the *Companies Act* protects other stakeholders, such as shareholders, directors, company secretaries, prescribed officers, registered trade union representatives of the employees, suppliers of goods and services to the company or even employees of a supplier.
257 Section 166(1) of the *Companies Act.*
258 Section 166(1) of the *Companies Act.*
259 Wiese 2013 *ILJ* 2476.

and the management.[260] In general terms, companies have a choice between a unitary board and a two-tier board structure, but the distinction is not always clear-cut, especially when it comes to large public companies.[261] The traditional unitary board structure consists of a board of directors and managing directors where the board of directors oversees and guides the managing directors who are responsible for the day-to-day affairs of the company. A two-tier board system, on the other hand, is a system best suited to facilitate employee participation in decision-making because it helps to manage the information flow and improve board efficiency.[262] The two-tier system, typically, is followed in Germany;[263] the unitary board structure is typical in South Africa.[264]

Section 66(2) of the *Companies Act* provides that the board of a company, in the case of a private company or a personal liability company, must comprise at least one director; in the case of a public company or a non-profit company, it must comprise at least three directors. In addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of this Act or its Memorandum of Incorporation, the company must appoint an audit committee or a social and ethics committee as contemplated in section 72(4). The board of directors should be comprised of a majority of non-executive directors, who should be independent.[265]

The *Companies Act* provides for two primary organs,[266] namely the board of directors

260 O'Regan 1990 *Acta Juridica* 122.
261 Esser 2007 *THRHR* 415.
262 Mintz 2006 *Corporate Ownership & Control* 33. The supervisory board oversees the management board. Worker representatives are elected on the supervisory board. The management board is responsible for the day-to-day management of the company.
263 Du Plessis 1996 *TSAR* 21; Esser 2007 *THRHR* 415; Mintz 2006 *Corporate Ownership & Control* 33.
264 Esser 2007 *THRHR* 415.
265 Institute of Directors *King Report III* discussed earlier regarding non-executive directors.
266 In *John Shaw and Sons (Salford) Ltd v Shaw* 1935 2 KB 113 (CA) 134 the court stated that "[a] company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of shareholders can control the exercise of powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the

and the shareholders in a general meeting. Section 66(1) of the *Companies Act* provides that:

> [t]he business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

In consequence of which Delport points out that

> ... the effect is now that the ultimate power in the company is not with the shareholders in meeting but with the directors, "… except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise"[267] and … therefore, where the Act states that "the company can…", the organ that can act for the company will be the Board.[268]

It has been argued that the fiduciary duty of directors and management should be changed, that it should be owed to the firm as a whole, and that it should empower stakeholders with some enforcement mechanisms.[269] Such changes could be accompanied, for example, by empowering non-shareholder stakeholders to bring a civil action against a breach of duties of care or by providing for the election of their own representatives to the board:[270] for example, employees could elect a portion of the board.[271] In German co-determination, half of the supervisory board of major companies consists of worker representatives.[272] This type of composition establishes the board as "pluralistic" and could "retard those selfish impulses because any behaviour that benefits one stakeholder at the expense of the firm must be done in the view of the others".[273] The probable effect of such a broadening would be that non-shareholder stakeholders would speak for other stakeholders and, in effect, they would get a "larger share of the pie that they now get".[274] Boards stand to benefit

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directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders".

267 Delport *New Companies Act Manual* 67.
268 Delport *New Companies Act Manual* 67.
269 Greenfield 2005 *Hastings Bus LJ* 114-115.
270 Greenfield 2005 *Hastings Bus LJ* 115.
271 Greenfield 2005 *Hastings Bus LJ* 115.
272 Greenfield 2005 *Hastings Bus LJ* 115.
273 Greenfield 2005 *Hastings Bus LJ* 116-117.
274 Greenfield 2005 *Hastings Bus LJ* 116-117.

from "a greater openness and diversity", as such "openness would not only make for better decision-making but likely *fairer* decision-making as well".[275]

2.3.2.3 The Social and Ethics Committee

Section 72(1) of the *Companies Act* provides, except to the extent that the MOI provides otherwise, that the board of a company may appoint any number of committees of directors and delegate to any committee with any of the authority of the board. An example of such a committee provided for by the *Companies Act* is the social and ethics committee. It has been established earlier that a company's governance structure should encompass CSR matters. There are different ways of achieving this result, and although in the:

> ... comprehensive changes brought about by the [Companies] Act no express reference is made to the companies' social responsibility … and as long as no legal requirement is set to integrate CSR issues into their decision-making and governance structures businesses will not be obliged to act in a socially responsible manner. The legislature has taken cognisance of the fact that the public is increasingly paying attention to social issues, and has through section 72 of the Act without specifically referring to CSR made an attempt to ensure that CSR becomes infused and embedded in a company's governance structures.[276]

Before the enactment of the *Companies Act* an array of labour and other statutes provided "a much more detailed and specific set of criteria for assessing the impact of CSR codes".[277] The LRA regulates, *inter alia,* organisational rights, centralised and non-centralised bargaining as well as strikes and lock-outs, dispute resolution, dismissal, unfair labour practices and business transfers. The BCEA regulates issues such as work hours, leave, the termination of employment, and wage regulating measures in non-organised sectors. The EEA regulates *inter alia* issues such as the prohibition of unfair discrimination and the implementation of employment equity plans, including action measures. Other legislation of relevance includes the *Occupational Health and Safety Act* 85 of 1993, the *Compensation for Occupational*

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275 Greenfield 2005 *Hastings Bus LJ* 118.
276 Kloppers 2013 *PER* 166-167.
277 Du Toit 2009 *ILJ* 2236.

Injuries and Diseases Act 130 of 1993, the *Skills Development Act* 97 of 1998, the *Unemployment Insurance Act* 63 of 2001,[278] and the *BBBEE Act*.

Although the *Companies Act* does not specifically refer to CSR, a CSR perspective can be found in section 72(4)(a).[279] The Minister of Trade and Industry is authorised to prescribe through the use of regulations that companies must have a social and ethics committee if deemed desirable having regard to the annual turnover, workforce size or the nature and extent of the activities of such companies. Regulation 43(1) of the Companies Regulations[280] requires state-owned companies as well as listed public companies to appoint such a committee. Any other company that in any two of the previous five years scored above 500 points (in terms of Regulation 26(2))[281] in the calculation of its public interest score is required to appoint such a committee. The committee must comprise at least three directors or prescribed officers of the company. At least one of them must be a non-executive director who was not involved during the three previous financial years in the day-to-day management of the company's business.[282] It is not specifically stated that each member of the committee must be a director but merely that at least three must be directors. Thus it seems, in view of the non-director requirement, that employees, for example, can be members of the committee.[283] The committee is not a board committee and is appointed by the company (the shareholders).[284] The committee as such is a separate organ of the

278 Du Toit 2009 *ILJ* 2236.
279 Also see Kloppers 2013 *PER* 167; Esser 2007 *THRHR* 325 in this regard.
280 GN 351 in GG 34239 of 26 April 2011.
281 Reg 26(2) of the Companies Regulations provides the method to be used to determine a company's "public interest score" for the purposes of reg 43. It requires every company to calculate its public interest score at the end of each financial year. This should be the sum of (i) a number of points equal to the average number of employees of the company during the financial year, and (ii) one point for every R1 million (or portion thereof) in third-party liability of the company, and (iii) one point for every R1 million (or portion thereof) in turnover during the financial year, and (iv) one point for every individual who at the end of the financial year is known by the company to directly or indirectly have a beneficial interest in any of the company's issued securities or in the case of a non-profit company to be a member of the company or a member of an association that is a member of the company.
282 Reg 43(4) of the Companies Regulations.
283 Esser 2007 *THRHR* 326.
284 Delport *New Companies Act Manual* 88.

company. It has been suggested, therefore, that the existence of the social and ethics committee amounts to splitting the South African board into a two-tier board.[285]

The functions[286] of the social and ethics committee include the monitoring of the company's activities having regard to any relevant legislation, other legal requirements or prevailing codes of best practice relating to matters such as:

(i) social and economic development;[287]
(ii) good corporate citizenship;[288]
(iii) the environment, health and public safety, including the impact of the company's activities and its products and services;
(iv) consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws, as well as
(v) labour and employment.[289]

It is unclear whether or not the board may refuse an instruction from this committee. The functions of the committee are limited to those in the Regulations and, therefore, it plays only a supervisory role and is not be concerned with strategic matters.[290] That employees are not represented on the social and ethics committee can be seen as a lost opportunity by the drafters of the *Companies Act,* as representation would have provided employees with the opportunity to input on issues such as health and safety and labour and employment. It would also have provided an opportunity for employees to have a louder voice in a structure in the company, and would thus have extended their participation rights within the company.

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285 Esser 2007 *THRHR* 326.
286 Reg 43(5)(a) of the Companies Regulations.
287 This includes the company's standing in terms of the 10 principles set out in the United Nations Global Compact Principles; the OECD recommendations regarding corruption; the EEA; and the BBBEE Act.
288 The promotion of equality, the prevention of unfair discrimination, and the reduction of corruption; the extent of its contribution to the development of communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and its record of sponsorship, donations and charitable giving are included here.
289 This includes the company's standing in terms of the ILO Protocol on decent work and working conditions, the company's employment relationships, and its contribution toward the educational development of its employees. Also see Reg 43(5) of the Companies Regulations.
290 Esser 2007 *THRHR* 325.

2.3.2.4 Access to information, consultation and collective bargaining

Although trade unions have access to information in terms of the *Companies Act,* this information is limited to relevant information as described in sections 16 and 89 of the LRA. A company is under no obligation to provide, for example, financial information to trade unions. A trade union must be given access to a company's financial statements for the purpose of initiating a business-rescue process only (as referenced by section 31(3) of the *Companies Act*), in which event it is too late for the trade union to become aware of the fact that the company is financially distressed. With reference to section 31(3) of the *Companies Act,* the trade union will be granted access to the financial statements of the company. This financial information is regarded as relevant under these circumstances. The right to information-sharing is similar to that found in the LRA: legally privileged or information that the employer is by law or order of court not allowed to disclose or is confidential and, if disclosed, may cause substantial harm to an employee or the employer or is private personal information relating to an employee, unless that employee consents to the disclosure of that information, is excluded from the information-sharing obligation.

The rights to be consulted and to collective bargaining appear, also, to fall outside the ambit of the *Companies Act* and are confined to labour law. An ideal opportunity was on offer to extend and enhance socially responsible obligations such as information-sharing, consultation and collective bargaining, under the labour and employment issues covered by the social and ethics committee, but the opportunity to do so was not taken.

3 Conclusion

The changing role of companies as members of society cannot be over stated. Traditionally, corporate law focused on shareholder wealth creation. As a result of developments in corporate law and corporate governance, jurisprudence articulates the view that shareholder primacy is an out-dated concept and that shareholders no longer are recognised as the only or even the most important stakeholder in companies. The *Companies Act* empowers employees as stakeholders of the company by granting them access to information under certain circumstances and by giving them access to a statutory derivative action.

Companies must be cognisant of the triple-bottom line, communicate with stakeholders, and take note of their legitimate interests and expectations. These are important factors in the new corporate law regime. Company law to some extent addresses the social component of the relationship between employees and companies. The fact that companies are to take note not only of economic but also of social benefits indicates the importance of CSR in corporate governance. Society demands that corporates act in a responsible manner and be good corporate citizens. Issues such as integrity, accountability and sustainability are fundamental components of the new corporate law regime and are additional determinants of how directors are to exercise their duties. The obligations placed on companies and directors have the purpose *inter alia* of benefitting the company's employees. The management of stakeholder relationships is an important duty of the board of directors if they are to act in the best interests of the company. In being cognisant of the legitimate interests and expectations of its stakeholders in its decision-making, the board should strike an appropriate balance between the interests of its various stakeholders, for example, employees and shareholders. If the company finds itself in a financially distressed situation, the disclosure of relevant information to the trade unions could lead to a consultation process which might help the board to find a solution to its problems. Or if the company wants to reduce the size of the workforce due to its unprofitability or to expand its business operations, consultation with its employee representatives might be of vital importance when decisions are made.

The *Companies Act* grants new rights to employees, which are to their benefit. Previously, employees were not recognised by company law as stakeholders and they had to utilise the protection conferred by labour law to enforce any rights against companies (in the capacity of their employers). Although these developments are good and employees now participate in different ways by exercising various rights and enforcing various duties imposed on the company, the *Companies Act* fails to grant employees a real voice when it comes to decision-making. Nevertheless, employee governance includes employee share ownership schemes, the election of employee representatives to the board of directors, and employee involvement. Employee share ownership schemes have limitations, as they focus only on the financial aspect and provide only a short-term monetary solution to employee concerns. Representation by employees on the boards or other structures such as the social and ethics committee could be more beneficial as such representation grants employees direct consultation and decision-making rights by means of which they may be seen as partners in decision-making. Employee involvement which has direct participation as a central element is an option which extends to the social as well as the economic exchange of obligations beyond the employment contract. A reciprocal extension of trust and discretion takes place.

The *Companies Act* introduced significant changes into the corporate law landscape in South Africa. Employees are now more visible in corporate law, and issues such as human rights are now recognised as being important. The *Companies Act* addresses the issue of worker participation, for example, in the formulation of a business rescue plan, but it fails to involve employees in the approval of the plan, as employees cannot vote on this issue. It is submitted that the provision would have been more meaningful if the *Companies Act* actually granted trade unions substantive participation rights regarding the approval of the business rescue plan. The same problem applies to the social and ethics committee: the failure to grant employees' representation rights on the social and ethics committee is a lost opportunity on the part of the drafters of the *Companies Act* to enable input on issues such as health and safety and labour and employment, as well as other issues relating to employees (see the list above).

These matters affect employees directly. If they had been attended to they could have given companies, as employers, the opportunity to split so-called wage issues from non-wage issues, as well as providing employees with the opportunity to have a greater voice in the governance of a company by expanding their participation rights in the decision-making processes within the company. Although a more inclusive approach and a recognition of stakeholder rights is evident in the *Companies Act*, the enlightened shareholder approach is still preferred. The issue of representation on company boards is contentious. There are calls that South Africa should introduce representation at board level (as in Germany) or that the board should have a direct obligation to take the views of employees into account (as in England). At the same time, it has been pointed out that the German two-tier structure cannot simply be copied in South Africa due to the major social, economic and political differences between the two countries.

The one-tier board structure in South Africa can work if the provisions of the *Companies Act,* especially regarding issues directly affecting employees, are noted. Employees will have a meaningful voice if they have a seat on the social and ethics committee, granting which would require an amendment of the *Companies Act.* The committee should be given more meaningful authority and powers in decision-making to ensure that establishing it is not just another tick-box exercise for companies. The *Companies Act* has failed employees, for example in imposing a direct obligation on the board to take employees into account (as in England). Further consideration of the issue is required, and it should be noted that cutting and pasting from the English system would not achieve much.

Companies in South Africa can and should be more accountable and responsible to their employees, for example, if they want to implement changes in strategy that directly and indirectly affect employees, as well as impact on the community (and society at large) within which they operate. For example, if a company wants to utilise more cost-effective machinery, the installation of which would result in job losses, the company could consider alternatives such as utilising the employees differently within the organisation or retraining them to operate the new machinery. Retrenching employees suggests that a corporation is not acting responsibly, as does paying huge bonuses to executives in economically distressed times and after retrenchments. Other legislation, like the LRA, offers employees a greater voice and participation. The LRA makes provision for workplace forums, a form of worker participation that has proved to be unsuccessful in South Africa, however. It is suggested that the provisions regarding workplace forums should be reworked in order to bring them in line with the provisions of the *Companies Act,* especially regarding non-distributive or production issues. A synergy between the issues identified in the LRA regarding consultation and joint decision-making powers in the workplace forum and the work of the social and ethics committee is possible if there is an overlap between the issues that fall within the ambit of the social and ethics committee and those granted by the LRA to workplace forums. These suggestions address the problems relating to the adversarial nature of collective bargaining, as non-distributive or production issues would be removed from the collective bargaining process and would be dealt with by the social and ethics committee, which possibly could enhance efficiency in the workplace. Such issues could include the restructuring of the workplace, changes in the organisation of work, the promotion of exports, job grading, or education and training, in so far as they impact employees.

The purpose of CSR initiatives, as well as corporate governance frameworks, is to make employees feel that they are insiders. CSR, for example, should not be merely voluntary. There is no guarantee for trade unions (and employees) that the company will regard CSR aspirations as not obligatory and subject to managerial discretion. CSR initiatives which fall within the ambit of the social and ethics committee call for trade union involvement to ensure that companies meet their obligations and to guarantee that companies report on these issues.

Employees are dependent almost exclusively on labour law to exercise their right to participation and to make their voice heard. Collective bargaining, an adversarial system, remains employees' primary and, perhaps, default means of having a say in companies. To this effect employees are empowered by a right to strike. However, this right should be exercised as the last resort, as it is exercised at considerable cost to employees, their families and the greater society (including the employer). Therefore, the position remains unsatisfactory. Effective mechanisms should be provided for insolvency and employees should be recognised as stakeholders, as they are still vulnerable and find themselves last in the spectrum of stakeholders. These mechanisms could provide protection. Labour law falls short, for example, in instances such as insolvency or business rescue, where the status of employees as creditors and stakeholders could be expanded beyond what is currently provided for by the LRA, BCEA and other labour legislation. Additional remedies could be provided, such as the liability of the board of directors specifically to employees, especially if the company finds itself in a financially distressed situation and the directors fail to inform the trade unions of the fact or to engage with them, or if the operations of the company are conducted in a reckless manner, or if employees are retrenched but the directors are paid performance bonuses in financially distressed times.

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LIST OF ABBREVIATIONS

Ac Man Rev	Academy of Management Review
Afr J Bus Ethics	African Journal of Business Ethics
Ank Bar Rev	Ankara Bar Review
Am J Comp L	American Journal of Comparative Law
BBBEE Act	Broad-Based Black Economic Empowerment Act
BCEA	Basic Conditions of Employment Act
Bus Ethics Quart	Business Ethics Quarterly
Bus Law Int'l	Business Law International
CCMA	Commission for Conciliation Mediation and Arbitration
Comp Lab L & Pol'y J	Comparative Labour Law and Policy Journal
CSR	Corporate social responsibility
EEA	Employment Equity Act
ESG	Environmental social governance
Harv L Rev	Harvard Law Review
Hastings Bus LJ	Hastings Business Law Journal
ILO	International Labour Organisation
ILJ	Industrial Law Journal
Int'l Lab Rev	International Labour Review
JBE	Journal of Behavioural Economics

J Bus Ethics	Journal of Business Ethics
JEFS	Journal of Economic and Financial Sciences
LDD	Law Democracy and Development
LRA	Labour Relations Act
MOI	Memorandum of incorporation
MqJBL	Macquarie Journal of Business Law
NCJ Int'l L & Com Reg	North Carolina Journal of International Law and Commercial Regulation
NOI	Notice of incorporation
OECD	Organisation for Economic Co-operation and Development
PAIA	Promotion to Access to Information Act
PDA	Protected Disclosures Act
PER	Potchefstroom Elektroniese Regstydskrif / Potchefstroom Electronic Law Journal
SAJHRM	South African Journal of Human Resource Management
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
SRI	Socially responsible investing
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch-Law
TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law
UNSRSG	United Nations Special Representative to the Secretary Genera
Waikato L Rev	Waikato Law Review
WBCSD	World Business Council for Sustainable Development

RESPONSIBILITIES OF COMPANIES TOWARDS EMPLOYEES

MM Botha*

SUMMARY

Central to company law is the promotion of corporate governance. An important question in company law still today is in whose interest the company should be managed. Corporate governance needs to address the entire span of responsibilities to stakeholders of the company such as customers, employees, shareholders, suppliers and the community at large. The promotion of human rights in the application of company law must also take place. This is extremely important given the significant role of enterprises within the social and economic life of the nation. The interests of various stakeholder groups in the context of the corporation as a "social institution" should be enhanced and protected. Because corporations are part of society and the community, like all of us, it is required of them to be socially responsible and have greater accountability to all stakeholders of the company. Although directors must act in the best interests of shareholders collectively they must also consider the interests of other stakeholders. Sustainable relationships with all the relevant stakeholders are thus important. The advancement of social justice is thus important to corporations in that they should take note of the *Constitution*, labour legislation and company law legislation when social justice issues are dealt with. Employees have become very important stakeholders of companies and their needs should be taken into account in the bigger corporate governance and social responsibility framework.

KEYWORDS: Corporate governance, corporate law, corporate social responsibility, sustainability, corporate citizenship, employee participation, decision-making, stakeholders, shareholders, managerial prerogative, social justice

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