

# Impact of the Constitution's Normative Framework on the Interpretation of Provisions of the *Companies Act* 71 of 2008

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## Abstract

Given the intention of section 7(a) of the *Companies Act* 71 of 2008 (the Act) to promote compliance with the Bill of Rights in the interpretation and application of company law in SA, this article assesses the extent to which the Act actually does this. The article thus seeks to showcase evidence of the Act's intentional alignment with the normative framework of the *Constitution of the Republic of South Africa*, 1996 (the Constitution). The paper does this by answering the question: what are the implications of the Constitution's normative framework on the interpretation and application of the Act? The term "normative framework" is defined, and a distinction is drawn between the descriptive and explanatory social science research questions and the legal research questions which are evaluative and normative in nature. The article provides examples of the contexts in which the intentional alignment of the Act with the Constitution's normative framework is evident. To this extent, commentary is made on the following selected issues: remedies to facilitate the realisation and enjoyment of rights established by company law; the direct and indirect horizontal application of the Bill of Rights to provisions of the Act; and a discernible court's duty to develop the common law as necessary to improve the realisation of the rights established by the Act. A point is made in the article that judicial decisions involving the application of company law must be justified by reference to a cohesive set of values from the Bill of Rights. This is part of transformative constitutionalism. It demands that even commercial law principles should no longer be blindly accepted simply because precedent says so, or for the reason that it is expedient for the purposes of commercial certainty. The article argues that the Act permits the direct horizontal application of the Bill of Rights on its provisions in two stated ways. It is also argued that the Act permits the indirect application of the Bill of Rights through the development of the common law where it is deficient in promoting the spirit, purport and objects of the Bill of Rights. The development of the common law, it is argued, is vital for producing an incremental and cohesive body of constitutionalised common law in the company law context.

## Keywords

Normative framework; interpretation; company law; transformative constitutionalism; direct horizontal application; indirect horizontal application; Bill of Rights.

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## 1 Introduction

The *Companies Act* 71 of 2008 (hereafter, the Act) makes clear its intention to be aligned to overarching constitutional values in the interpretation and application of its provisions. The Act sets as one of its many purposes the promotion of "compliance with the Bill of Rights as provided for in the Constitution"<sup>1</sup> in the interpretation and application of company law.<sup>2</sup> While the now repealed *Companies Act* 61 of 1973 (hereafter the 1973 Act) was not intentionally harmonised with constitutional values, judging by its provisions, the current Act is. Evolving South African case law acknowledges that the Act must be interpreted in such a way that ensures that the founding values of the Constitution are advanced.<sup>3</sup> In a number of recent cases the courts have confirmed that the interpretation of provisions of the Act has to comply with the normative framework of the Constitution. For example, in *Lazarus Mbethe v United Manganese of Kalahari* (hereafter *Lazarus Mbethe* 2017)<sup>4</sup> the court affirmed the position that "compliance with the Bill of Rights" *inter alia* has "to be considered when interpreting the Act".<sup>5</sup> In *Mouritzen v Greystones Enterprises (Pty) Ltd*<sup>6</sup> (hereafter *Mouritzen*) the court recognised that the Act<sup>7</sup> seeks to enforce rights of litigants such as the right to access to information.<sup>8</sup>

The question that this article attempts to answer is: what are the implications of the Constitution's normative framework<sup>9</sup> on the interpretation and application of the Act? This question presupposes two other questions. The

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<sup>1</sup> This is the first among the listed twelve purposes of the *Companies Act* 71 of 2008 (the Act) in s 7. See s 7(a) of the Act.

<sup>2</sup> Reference to "Constitution" in this article is reference to *Constitution of the Republic of South Africa*, 1996, unless otherwise specified.

<sup>3</sup> See *Nedbank Ltd v Bidvest 153 (Pty) Ltd* 2012 5 SA 497 (WCC).

<sup>4</sup> *Lazarus Mbethe v United Manganese of Kalahari* 2017 ZASCA 67 (30 May 2017) (*Lazarus Mbethe* 2017) para 12.

<sup>5</sup> Also see *Nedbank Ltd v Bidvest 153 (Pty) Ltd* 2012 5 SA 497 (WCC) for the assertion that courts are charged with the duty to interpret the Act in such a manner that the founding values of the Constitution are respected and advanced.

<sup>6</sup> *Mouritzen v Greystones Enterprises (Pty) Ltd* 2012 5 SA 74 (KZD) (*Mouritzen*).

<sup>7</sup> In line with the principle of transparency in the management and governance of companies.

<sup>8</sup> *Mouritzen* para 21. The right that the court was specifically referring to in this part of the case was the right to access to company records, financial statements or related information held by "any person who holds or has a beneficial interest in any securities issued by a company ..." This right is provided for in s 26 of the Act. S 26(7)(a) states that the "rights of access to information set out in this section are in addition to, and not in substitution for, any rights a person may have to access information in terms of section 32 of the Constitution."

<sup>9</sup> See section 2 below for the meaning of the phrase "normative framework".

first is: how is the Act to be interpreted? The second question is: what is the framework of standards used to evaluate the correctness of an interpretation of provisions of the Act? This article thus proposes to provide a commentary on the impact that the Constitution has had thus far, should have and will have in the future, on the interpretation and application of provisions of the Act. The article seeks to showcase evidence of the Act's intentional alignment with the Constitution's normative framework. It is not, however, proposed that this article will comment on all available evidence of the Act's alignment with the Constitution. The article will also briefly highlight what the Act itself says about the method to be used for interpreting its provisions.<sup>10</sup> It will be vital in this article to provide examples of the contexts in which the intentional alignment of the Act with the Constitution's normative framework is evident. To this extent, the article provides commentary on the following selected issues: remedies to facilitate the realisation and enjoyment of rights established by company law; the direct and indirect horizontal application of the Bill of Rights to provisions of the Act; and a discernible court's duty to develop the common law as necessary to improve the realisation of the rights established by the Act.<sup>11</sup>

One of the theses of this article is that the Act, just like the Constitution, mandates courts to develop the common law as necessary in order to promote the enjoyment of the rights established by the Act. A related argument is that where a common law principle clearly clashes with public policy as represented by values which underlie the Bill of Rights, courts have an obligation to develop the common law as per their constitutional mandate.

## 2 Normative framework of the Constitution and the Act<sup>12</sup>

It is considered important as a foundation to briefly establish a working understanding of the term "normative framework" in legal research. While social science research questions are descriptive and explanatory<sup>13</sup> in nature, legal research is said to attempt to answer evaluative and normative questions.<sup>14</sup> Normative questions seek to provide answers which go beyond an explanation as to why the law is what it is. For example, a question that asks whether an interpretation of the Act's provisions is properly aligned to

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<sup>10</sup> As stated in s 5(1) of the Act.

<sup>11</sup> See s 158(a) of the Act.

<sup>12</sup> The *Companies Act* 71 of 2008.

<sup>13</sup> It is said that the theoretical framework provides the support for a descriptive or explanatory question, advancing possible explanations or causes that need to be investigated in empirical work. It has been said that in legal research doing empirical work, in the sense of gathering data about social reality, is not the common approach. See Taekema 2018 *Law and Method* 1.

<sup>14</sup> Taekema 2018 *Law and Method* 3.

the section 39(2) objectives of the Constitution is an evaluative question.<sup>15</sup> The alignment of the interpretation of the provisions of any legislation with the "spirit, purport and objects of the Bill of Rights" is the objective which section 39(2) of the Constitution seeks to attain. An evaluative question needs to be answered on the basis of overarching standards against which a legal system or rather a law can be assessed. For the reason that legal research questions are evaluative and normative, they require a normative framework. Unlike in the social sciences, where an explanatory framework may be appropriate, in legal research a normative framework is relevant to providing a justification for a judgment as to why the law is good or bad in context.<sup>16</sup> The normative framework to be utilised in interpreting the provisions of the Act is easy to identify through the purposes which the Act seeks to achieve.<sup>17</sup>

Section 3 below deals with the role of the normative framework in the interpretation and application of the provisions of the Act.

### 3 Interpretation of the Act

In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,<sup>18</sup> Wallis JA of the Supreme Court of Appeal (SCA) gave a fitting definition of interpretation as follows:

Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective.

The Act provides for its provisions to be interpreted and applied in a manner which reflects the views expressed by Wallis JA. It provides that the interpretation and application of the provisions of the Act must be done in a manner that gives effect to the purposes set out in section 7.<sup>19</sup> Of greater relevance to this article is the first purpose in section 7, in which the Act

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<sup>15</sup> Section 39(2) of the Constitution states that "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

<sup>16</sup> Taekema 2018 *Law and Method* 13.

<sup>17</sup> See s 7 of the Act.

<sup>18</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) para 18.

<sup>19</sup> See s 5(1) of the Act.

seeks to promote compliance with the Bill of Rights in the interpretation process.<sup>20</sup> According to Mupangavanhu,<sup>21</sup> while the 1973 Act was not harmonised with constitutional values for the reason that it predated the constitutional era, the current Act (the Companies Act 2008) has to be aligned to the constitutional founding values.<sup>22</sup> It is necessary to unpack what is meant by the requirement to promote compliance with the Bill of Rights in the interpretation of the Act, as per section 7(a). What does it mean, exactly? Is it even possible for a court to give effect to all the rights contained in the Bill of Rights in a given case? Quite clearly, this is not possible. Clarifying the exact meaning of this purpose of the Act is vital.

It can be discerned that section 7(a) appears to echo the call in section 39(2) of the Constitution for the court and any other adjudicating tribunal to have regard to what is referred to in this interpretation clause as "the spirit, purport and objects of the Bill of Rights" during statutory interpretation. The phrase "spirit, purport and objects of the Bill of Rights" itself also requires decoding. While the phrase is catchy and interesting, its true import may not be obvious. Below, the author attempts to give meaning to the phrase while establishing what the Act means by the purpose of promoting compliance with the Bill of Rights in the application of company law. The answer is to be found in providing meaning to the phrases "spirit, purport and objects of the Bill of Rights"<sup>23</sup> and the phrase "spirit, purposes and objects of this Act" as employed by the Act.<sup>24</sup> This article will show how these two phrases create a generic normative framework for statutory interpretation in South Africa and a subordinate normative framework for the Act itself.

### **3.1 Promoting the spirit, purport and objects of the Bill of Rights**

Section 39(2) is South Africa's statutory interpretation clause.<sup>25</sup> This clause applies to interpretation of the Bill of Rights and is relevant "when interpreting any legislation, and when developing the common law or customary law". Courts of law, any tribunal or forum that interprets and applies legislation when settling disputes brought before it by litigants should seek to achieve the objectives of section 39(2). In interpreting the Act and applying company law, the objectives of section 39(2) find expression through the purpose to "promote compliance with the Bill of

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<sup>20</sup> See s 7(a) of the Act.

<sup>21</sup> Mupangavanhu 2017 *Speculum Juris* 197.

<sup>22</sup> The founding values of the Constitution are to be found in s 1. These values include *inter alia*: human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; the supremacy of the Constitution and the rule of law.

<sup>23</sup> See s 39(2) of the Constitution.

<sup>24</sup> See s 158(b)(i) of the Act.

<sup>25</sup> See Botha *Statutory Interpretation* 101.

Rights as provided for in the Constitution in the application of company law."<sup>26</sup>

Case law supports the argument in this article that section 39(2) provides the general normative framework for the interpretation and application of provisions of the Act, and indeed any legislation. The Constitutional Court confirmed this in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,<sup>27</sup> where Ngcobo J remarked that section 39(2) provides "the starting point in interpreting any legislation"<sup>28</sup> in South Africa. It is important to note that section 39(2) employs a peremptory word "must" when referring to how courts or tribunals are to do statutory interpretation. It has been argued that whether a provision in a statute appears clear and unambiguous or not, the section 39(2) mandate finds application and must be fulfilled.<sup>29</sup> Where the Bill of Rights imposes an obligation, as is the case with section 39(2), such a constitutional obligation must be performed diligently and without delay.<sup>30</sup>

The best way to fulfil the mandate in section 39(2) is to ensure that the adjudication of disputes and the interpretation of statutes is done "through the prism of the Bill of Rights", as held in case law.<sup>31</sup> It is not only case law that provides so. The Bill of Rights itself clearly provides that it applies to "all law" and binds the legislature, the executive, the judiciary and all organs of state.<sup>32</sup> This implies that courts must be alive to the section 39(2) objectives and to their mandate in this regard before and during the process of interpreting statutory provisions. The interpretation must thus be informed by or done through the lens of the spirit, purport and objects of the Bill of Rights,<sup>33</sup> and this should illuminate the entire statutory interpretation process. In other words, what is required is a "teleological" interpretation of the provisions of the Act. This is a type of interpretation where constitutional values as represented by section 39(2) provide a normative value system<sup>34</sup> (a context) against which all law, all actions, including decision-making

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<sup>26</sup> Section 7(a) of the Act.

<sup>27</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC).

<sup>28</sup> See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) paras 70, 80 and 90.

<sup>29</sup> Mupangavanhu *Directors' Standards of Care* 199.

<sup>30</sup> See s 237 of the Constitution, which provides that "all constitutional obligations must be performed diligently and without delay."

<sup>31</sup> See the remarks by Langa DP in *Investigating Directorate: Serious Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 21.

<sup>32</sup> See s 8(1) of the Constitution.

<sup>33</sup> For a similar view, see Maswazi 2017 *De Rebus* 28.

<sup>34</sup> Note that even retired Deputy Chief Justice Digkang Moseneke refers to a "normative value system" provided by the Constitution through s 39(2). See Moseneke 2007 *Speculum Juris* 2.

processes are to be measured and evaluated.<sup>35</sup> Thus, the Constitution is said to have changed the context of all legal thought and decision-making in South Africa through section 39(2).<sup>36</sup> Now decision-making by judges "can only be done by reference to a system of values ... a cohesive set of values, ideal to an open and democratic society."<sup>37</sup>

The point needs to be emphasised that the normative value-laden framework provided by section 39(2) does not become relevant only when the interpretation involves a clear right provided in the Bill of Rights. Some courts seem to understand that section 39(2) is relevant only to the interpretation and application of the Bill of Rights. In the very recent *Makate v Vodacom Ltd*<sup>38</sup> case, the Constitutional Court correctly observed that "the Constitution in plain terms mandates courts to invoke section 39(2) when discharging their judicial function of interpreting legislation."<sup>39</sup> The court remarked that this duty is "triggered as soon as the provision under interpretation affects the rights in the Bill of Rights."<sup>40</sup> The duty is triggered not only in cases of the interpretation of the provisions of the Bill of Rights, but in every instance where the overarching or normative standards of the Bill of Rights are implicated. The time has come for the Constitutional Court to lay down a criterion or rather confirm the status of the normative value-laden framework which section 39(2) should provide to statutory interpretation in South Africa. Some courts including the SCA seem to be unsure as to when section 39(2) is relevant as an interpretation clause.<sup>41</sup> A proper reading of section 39(2) should reveal that section 39(2) is relevant even when the matter to be decided by the court, tribunal or any forum is not purely a right in the Bill of Rights – since section 8(1) of the Constitution, as already observed, provides that the Bill of Rights applies to "all law". This duty falls upon the court whenever it has a task of adjudication, which process involves statutory interpretation and whenever the court has a duty to develop the common law or customary law. Every judge of a court in

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<sup>35</sup> See Mupangavanhu *Directors' Standards of Care* 197. Also see Botha *Statutory Interpretation* 108.

<sup>36</sup> See *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 618.

<sup>37</sup> This important remark was made by Mokgoro J in her concurring judgment (to the judgment of Chaskalson P) in the famous case of *S v Makwanyane* 1995 3 SA 391 (CC) para 302.

<sup>38</sup> *Makate v Vodacom Ltd* 2016 4 SA 121 (CC).

<sup>39</sup> *Makate v Vodacom Ltd* 2016 4 SA 121 (CC) para 90.

<sup>40</sup> *Makate v Vodacom Ltd* 2016 4 SA 121 (CC) para 90.

<sup>41</sup> In a number of cases, it seems as if the SCA has carefully avoided giving clear guidance on the role of s 39(2) when deciding on the constitutionality of some provisions of the *Criminal Procedure Act* 51 of 1977 (CPA) such as s 49. In *S v Walters* 2001 10 BCLR 1088 (Tk) the SCA overruled a precedent in *Govender v Minister of Safety and Security* 2001 4 SA 273 (SCA) without commenting on the very relevant s 39(2). In *Minister of Safety and Security v Sekhoto* 2011 5 SA 367 (SCA) the SCA seemed unsure of how s 40 of the CPA was to be interpreted in order to promote the spirit, purport and objects of the Bill of Rights.

South Africa, when taking an oath of office, is required to swear/affirm that he/she "will uphold and protect the Constitution and the human rights entrenched in it ..."<sup>42</sup> A judge is also expected to commit to administering justice to "all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law."<sup>43</sup> In other words the outcome of an adjudication process should be a product of the infusion of values which underlie "an open and democratic society based on freedom, human dignity and equality" into decision-making.<sup>44</sup>

In this constitutional dispensation, it has been argued, judges are no longer only referees whose task during statutory interpretation is limited to a "mere mechanical reiteration of what was supposedly intended by Parliament as was the case during the days of parliamentary sovereignty."<sup>45</sup> What section 39(2) in fact requires of courts as custodians of the Constitution is to demonstrate awareness that the subsection is shot through with overarching normative standards which impose an obligation on judges as decision-makers to apply such values during decision-making and the interpretation process.<sup>46</sup> Thus, it must be reiterated, statutory interpretation should begin with section 39(2) – as a starting point.<sup>47</sup> Even before beginning the interpretation process, a judge must be alert to the values expressed in the Bill of Rights and must allow him/herself to be informed by the power of the founding values of the Constitution.<sup>48</sup> Judges are thus expected to ensure that the final outcome of the adjudication process and statutory interpretation bears evidence that the process has been imbued with the normative framework of values as represented by section 39(2) of the Constitution and as reflected in section 7(a) of the Act.<sup>49</sup>

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<sup>42</sup> See Schedule 2 item 6(1) of the Constitution.

<sup>43</sup> See Schedule 2 item 6(1) of the Constitution.

<sup>44</sup> See the phrase employed in s 36(1) of the Constitution. The values referred to in this section are core values on which the Constitution rests – see s 1 of the Constitution.

<sup>45</sup> See Botha *Statutory Interpretation* 108. Also see Mupangavanhu *Directors' Standards of Care* 197-199.

<sup>46</sup> In this regard, the warning in s 237 of the Constitution that all constitutional obligations must be performed diligently and without delay must be carefully heeded.

<sup>47</sup> See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 72. Also see paras 80 and 90.

<sup>48</sup> See *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 618.

<sup>49</sup> For the foundational principles, see s 1 of the Constitution.

### 3.2 *Spirit, purposes and objects of the Act*

In a manner reminiscent of section 39(2) of the Constitution, section 158(b) of the Act mandates the commission,<sup>50</sup> panel,<sup>51</sup> tribunal<sup>52</sup> or court to "promote the spirit, purposes and objects of this Act."<sup>53</sup> This must be done whenever these forums have an occasion to determine a matter brought before them or when making a relevant order. This refers to the adjudication and interpretation processes involving provisions of the Act. As already observed, section 158(b)(i) is part of what has been described as a specific normative framework for interpretation of the Act, which is subordinate to the generic normative framework established by section 39(2) of the Constitution. Reading section 158(b)(i) together with the Act's purpose to promote compliance with the Bill of Rights provided for in section 7(a) leaves no doubt that the Act is intentionally aligned to the section 39(2) objectives. The aim is to infuse statutory interpretation and the development of common law with the foundational values of the Constitution. For this reason, the Act<sup>54</sup> requires adjudicating forums<sup>55</sup> to interpret and apply its provisions in a manner that promotes "the spirit, purport and objects of the Bill of Rights" as well as that promotes "the spirit, purposes and objects" of the Act.

The "spirit, purposes and objects" of the Act imply the "context" in which the provisions of the Act must be understood and applied. This has been correctly understood to mean the text-in-context approach or a purposive approach to the interpretation of the provisions of the Act.<sup>56</sup> This is distinguishable from the time-honoured and now out-dated orthodox text-based/literal approach. In terms of the text-based approach, the interpreter concentrates on the literal meaning of the provision to be interpreted.<sup>57</sup> The primary rule in statutory interpretation is that if the meaning of the text is clear, such a plain meaning, it is said, should be applied and it is equated with the intention of the legislature.<sup>58</sup> The golden rule<sup>59</sup> is that courts can

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<sup>50</sup> The reference to the "Commission" is a reference to the Companies and Intellectual Property Commission, also known under the acronym CIPC. The Companies Commission or simply the Commission's role includes the enforcement of the Act, ensuring compliance with the Act, and administering investigations of complaints. This is in keeping with the system of administrative enforcement of the Act driven by the Commission. See ss 186(d)-(e) of the Act for the main goals of the Commission.

<sup>51</sup> According to s 1 of the Act, "Panel" means the Takeover Regulation Panel established in terms of s 196.

<sup>52</sup> "Tribunal", as per s 1 refers to the "Companies Tribunal" established in terms of s 193 of the Act.

<sup>53</sup> See s 158(b)(i) of the Act.

<sup>54</sup> See s 5(1) of the Act.

<sup>55</sup> This includes the court and other forums.

<sup>56</sup> Mupangavanhu *Directors' Standards of Care* 194.

<sup>57</sup> Botha *Statutory Interpretation* 91.

<sup>58</sup> See *Principal Immigration Officer v Hawabu* 1936 AD 26.

<sup>59</sup> Botha *Statutory Interpretation* 91.

deviate from the text only where there is ambiguity in words.<sup>60</sup> Will the golden rule apply to the interpretation of the Act? The Act appears clear on this. The application of the golden rule is not unqualified. Interpretation should seek to advance the spirit, purposes and objects of the Act.<sup>61</sup> If any provision of the Act, read in its context, can be reasonably construed to have more than one meaning, the meaning that best promotes the spirit, purport and objects of the Act must be preferred – that is, a contextual interpretation.<sup>62</sup> Thus, the provisions of the Act are not to be interpreted in isolation but in the context of the entire Act as guided by its objects (the entire legislative scheme approach). In the words of Schreiner JA, context is:

... not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.<sup>63</sup>

The context of the Act includes the history of the legislation;<sup>64</sup> the common law prior to the enactment of the Act;<sup>65</sup> law reform or policy objectives; defects in the law not provided for by the common law, and new remedies provided for in the Act.<sup>66</sup>

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<sup>60</sup> See *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 1 SA 925 (A) paras 943C-H.

<sup>61</sup> As per s 158(b)(i) of the Act.

<sup>62</sup> Section 158(b)(ii) of the Act.

<sup>63</sup> *Jaga v Donges; Bhana Donges* 1950 4 SA 653 (A) 662.

<sup>64</sup> The *Companies Act* 61 of 1973 (the 1973 Act) had been amended 42 times in its 37 years of existence. It was now out of alignment with important national and global developments and some of its concepts were becoming archaic in a rapidly transforming world of business and regulation. See Cassim *et al. Contemporary Company Law* 3-5.

<sup>65</sup> Some common law positions were unclear and the common law needed to be developed in keeping with changes at national and international level. For example, some issues regarding concepts such as piercing the veil at common law and the turquand rule needed to be clarified and to be brought in sync with international developments as well as with the spirit, purport and objects of the Bill of Rights as provided for in s 7(a) of the Act.

<sup>66</sup> The Act has made various interventions with regard to providing means to improve remedies in order to promote the realisation of the rights of parties who approach the Act with the aim of enforcing their rights. For example s 157 has the title "Extended standing to apply for remedies"; s 158 provides for "Remedies to promote purposes of the Act"; s 161 provides for "Application to protect rights of securities holders"; s 163 provides for "Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of a company", and s 164 makes provision for "Dissenting shareholders' appraisal rights", *inter alia*.

### **3.3 Transformative constitutionalism – changing the legal culture of interpretation**

For the purposes of adjudication and interpretation, I would define transformative constitutionalism as denoting the influence of the overarching values of the Constitution on the legal culture of interpretation to align it with the normative value system. As demonstrated above, the Act's mandate on the courts and other adjudicating forums to promote the spirit, purposes and objects of the Act<sup>67</sup> is an expression of the intent to align interpretation with the generic normative framework. It is hereby observed that while the ideal of a normative framework based on the founding values of the Constitution and aligning interpretation to such an ideal remains a possibility, making the ideal a reality still requires concerted efforts. Probably the biggest impediment to realising the dream of interpreting the provisions of any legislation<sup>68</sup> through the prism of the Bill of Rights is the stubborn legal culture.

In Karl Klare's words, one of the biggest challenges to transformative constitutionalism<sup>69</sup> is "the inherent conservatism of South African legal culture."<sup>70</sup> Conservatism in Klare's perspective denotes a formalistic or technical approach to law.<sup>71</sup> Legal culture in this sense can be understood to mean "the professional sensibilities, habits of mind and intellectual reflexes of lawyers or those ingrained ideas about how the law works and what arguments are and are not convincing."<sup>72</sup> A formalistic approach to law thus entrenches mind-sets<sup>73</sup> which condition law users to blindly accept/follow certain legal principles as they are without question, because of the existence of authority or precedent.<sup>74</sup> The late Chief Justice Langa intimated, and correctly so in my view, that private and commercial law seem not to easily lend themselves to transformation<sup>75</sup> and can thus be considered to be conservative. Judge Langa bemoaned the fact that this branch of law traditionally teaches law students and rewards them for the "rational deduction of inevitable conclusions from unquestionable

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<sup>67</sup> When determining a matter brought before them, courts are required to promote the spirit, purposes and objects of the Act. See s 158(b)(i) of the Act.

<sup>68</sup> Especially legislation of a private or commercial law nature.

<sup>69</sup> As complex as "transformative constitutionalism" is to define, Klare defines it to mean "a long term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction." Klare 1998 *SAJHR* 150. That is, admittedly, a complex definition.

<sup>70</sup> Klare 1998 *SAJHR* 146.

<sup>71</sup> Klare 1998 *SAJHR* 168.

<sup>72</sup> Langa 2006 *Stell LR* 356.

<sup>73</sup> In law students, lawyers and also in judges.

<sup>74</sup> Langa 2006 *Stell LR* 353.

<sup>75</sup> Langa 2006 *Stell LR* 355.

principles."<sup>76</sup> He states that such a legal education is now out of step with the ideal of transformative constitutionalism and needs to be transformed if the constitutional dream is to be realised. Judge Langa thus emphatically adds:

We can no longer teach the lawyers of tomorrow that they must blindly accept legal principles because of authority. No longer can we responsibly turn out law graduates who are unable to critically engage with the values of the Constitution and who are unwilling to implement those values in all corners of their practices. A truly transformative South Africa requires a new approach that places the Constitutional dream at the very heart of legal education. It requires that we regard law as part of the social fabric and teach law students to see it as such. They [*the students as future lawyers*] should see law for what it is, as an instrument that was used to oppress in the past, but that has that immense power and capacity to transform society.<sup>77</sup>

Mureinik<sup>78</sup> observed that transformative constitutionalism represents a true shift from apartheid's culture of authority to a post-apartheid culture of justification. A formalistic and conservative approach to law frustrates this goal of transformative constitutionalism. Formalism runs counter to the liberating legal tradition of analytical argument and critical thinking, which should result in substantive reasoning as opposed to formal legal reasoning. Judge Langa observes that under a transformative Constitution like South Africa's, now "judges bear the ultimate responsibility to justify their decisions not only by reference to authority [precedent], but by reference to ideas and values [a normative value system]".<sup>79</sup> Formal legal reasoning unfortunately tends to discourage such an inquiry into the true motivation for judicial decisions and impedes on the discharge of the judicial responsibility to demonstrate that a decision is aligned with the overarching values of the Constitution as reflected in section 39(2).

Transformative constitutionalism<sup>80</sup> demands that even private and commercial law principles should no longer be blindly accepted simply because precedent says so, or for the reason that it is expedient for the purposes of commercial certainty. The exercise of public and private power which impinges on entrenched rights or which is inconsistent with the foundational principles of the Constitution<sup>81</sup> "may very well attract constitutional consequences".<sup>82</sup> In *Du Plessis v De Klerk*,<sup>83</sup> a case decided

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<sup>76</sup> Langa 2006 *Stell LR* 355.

<sup>77</sup> Langa 2006 *Stell LR* 356. Words and emphasis added.

<sup>78</sup> Mureinik 1994 *SAJHR* 32.

<sup>79</sup> Langa 2006 *Stell LR* 353. Words and emphasis added.

<sup>80</sup> Which encompasses transformative adjudication.

<sup>81</sup> Principles such as the democratic values of human dignity, equality and freedom.

<sup>82</sup> Moseneke 2009 *Stell LR* 4-5.

<sup>83</sup> *Du Plessis v De Klerk* 1996 3 SA 859 (CC).

in terms of the interim Constitution,<sup>84</sup> the majority ruling recognised that the Bill of Rights has horizontal application – that is, it applies albeit indirectly to purely private disputes. In other words, the court reckoned that the Bill of Rights should have an influence on the development of the common law as it governs horizontal relations.<sup>85</sup> While that judgment acknowledged that fundamental rights would not directly found a claim against a private party, it held that the Bill of Rights would serve as a normative standard that would guide the adaptation of common law.<sup>86</sup> I have deliberately chosen to cite *Du Plessis v De Klerk* in this regard for the reason that it demonstrates that the formalistic approach can be dangerous to constitutional interpretation. If the court had paid closer attention to section 7(1) and (2) of the interim Constitution,<sup>87</sup> it may have found that direct horizontal application of the Bill of Rights was possible.<sup>88</sup> Moseneke correctly argues that the rejection of direct horizontality<sup>89</sup> is "at odds with the transformative project of the new democratic order with overt pursuit of human dignity and equality ...".<sup>90</sup>

#### **4 Evidence of the Act's alignment with the normative value system**

In section 3, I made the point that the Act demonstrates a commitment to be aligned with the generic normative value system established by the Bill of Rights<sup>91</sup> and that it has a subordinate normative framework in sync with the generic framework.<sup>92</sup> In section 4 this article endeavours to present evidence of the said intentional alignment. As promised in section 1, this section will briefly provide commentary on examples of evidence of the alignment. To this end, this section considers the remedies to facilitate the realisation and enjoyment of the rights established by company law; whether the Act permits indirect horizontal application of the Bill of Rights only or whether it also permits the direct horizontal application of the Bill of

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<sup>84</sup> Section 35(3) of the *Constitution of the Republic of South Africa* 200 of 1993 (the interim Constitution).

<sup>85</sup> *Du Plessis v De Klerk* 1996 3 SA 859 (CC) para 62.

<sup>86</sup> Moseneke 2009 *Stell LR* 6.

<sup>87</sup> This is the equivalent of s 8(1) of the Constitution.

<sup>88</sup> The decision in *Du Plessis v De Klerk* 1996 3 SA 859 (CC) was correctly criticised for the reason that if there is no direct horizontal application of the Bill of Rights, a private party whose rights have been violated by another private party will be without effective remedy. See Woolman and Davis 1996 *SAJHR* 361.

<sup>89</sup> In a historically unequal society like SA where private individuals and institutions wield so much social and financial power vis-à-vis those disadvantaged and marginalised by colonialism and apartheid – per Moseneke's words.

<sup>90</sup> Moseneke 2009 *Stell LR* 7.

<sup>91</sup> See section 3.1.

<sup>92</sup> See section 3.2.

Rights. To a limited extent, this section considers a court's mandate to develop the common law.

#### **4.1 Remedies to promote the realisation and enjoyment of the rights established by the Act**

Section 158 is, as already stated in section 3.2, aptly entitled "Remedies to promote the purpose of the Act". Despite the title's referring to "purpose", it is surely meant to be read in the plural, namely as referring to "purposes". The sense conveyed by the section is that its purpose is to promote the enjoyment of the rights of parties as established by the Act. A court, a tribunal or any forum adjudicating on the basis of the Act or common law is required by this section to do three related things. Firstly, the courts are mandated to develop the common law as necessary in order to improve and facilitate the enjoyment of rights.<sup>93</sup> Section 4.2 below will provide a succinct examination of this aspect. Secondly, the courts and other adjudicating forums are mandated to promote the spirit, purpose and objects of the Act during the adjudication process.<sup>94</sup> In section 3.2 I have already attempted to provide meaning to the phrase "spirit, purpose and objects of the Act".<sup>95</sup> Thirdly, if provisions of the Act are found to be capable of more than one meaning, courts are required by the Act to prefer a meaning that best promotes the spirit, purpose(s) and objects of the Act, and an interpretation that best improves the realisation and enjoyment of rights.<sup>96</sup>

Needless to say, every interpretation of any provision of a statute in South Africa has to be done through the "prism of the Bill of Rights"<sup>97</sup> since the Bill of Rights applies to "all law".<sup>98</sup> For the reason that the Bill of Rights can potentially bind natural or juristic persons,<sup>99</sup> it applies in appropriate circumstances and to the extent possible, in the private sphere involving private individuals or juristic persons such as companies. Thus, the remedies to promote the realisation and enjoyment of rights in terms of the Act can easily assume a constitutional flavour. As already alluded to in this article,<sup>100</sup> the Bill of Rights may have both direct and indirect horizontal

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<sup>93</sup> See s 158(a) of the Act.

<sup>94</sup> Section 158(b)(i) of the Act. See section 3.2.

<sup>95</sup> As provided in s 158(b) of the Act.

<sup>96</sup> See s 158(b)(ii) of the Act.

<sup>97</sup> See *Investigating Directorate: Serious Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 21.

<sup>98</sup> As clearly provided in s 8(1) of the Constitution.

<sup>99</sup> Section 8(2) of the Constitution provides that: "A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

<sup>100</sup> See section 3.3.

application – that is, it applies to private disputes governed by private or corporate/company law.

#### **4.2 Direct or indirect horizontal application of the Bill of Rights on the Act?**

A question that seems natural to ask in the light of section 7(a) is whether the Act permits the direct or only the indirect horizontal application of the Bill of Rights on its provisions. In answering this question, it is important to note that the confusion regarding the direct and indirect application of the Bill of Rights in a private sphere under the interim Constitution has to a certain extent been resolved under the current Constitution. For example, in *Du Plessis v De Klerk* the Constitutional Court ruled that the entrenched fundamental rights in the interim Constitution did not have "general direct horizontal application" and could be invoked against an organ of state only.<sup>101</sup> Impliedly, fundamental rights such as freedom of speech and of the press<sup>102</sup> could not be invoked by one private party against another private party. As a general principle, this ruling can no longer be correct and is generally irrelevant under the current Constitution. Granted, there are certain rights under the Bill of Rights such as the socio-economic rights which the Constitution imposes on the state only. However, the current Constitution has now clarified that fundamental rights are no longer restricted to vertical application. Not only does the Bill of Rights under the Constitution apply to "all law", bind the legislature, the executive, the judiciary and organs of state,<sup>103</sup> but it also binds natural as well as juristic persons.<sup>104</sup> It can therefore be argued that the new constitutional order "does not limit its reach to the classical liberal divide between private and state action".<sup>105</sup>

It appears in the light of its provisions in section 8(1) and 8(2) that the Constitution now permits direct horizontal application of the Bill of Rights to private disputes. A perfect example of this shift is to be seen in *Khumalo v Holomisa*,<sup>106</sup> a case decided in terms of the present Constitution. Unlike in its decision in *Du Plessis v De Klerk*, the court in *Khumalo v Holomisa* decided that the right to freedom of expression is of direct horizontal application. *Khumalo v Holomisa* was the first case, and it has been said, the only case in which the Constitutional Court upheld a direct application

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<sup>101</sup> *Du Plessis v De Klerk* 1996 3 SA 859 (CC) para 62.

<sup>102</sup> Guaranteed by s 15 of the interim Constitution.

<sup>103</sup> See s 8(1) of the Constitution.

<sup>104</sup> Section 8(2) of the Constitution provides that: "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

<sup>105</sup> Moseneke 2009 *Stell LR* 6

<sup>106</sup> *Khumalo v Holomisa* 2002 5 SA 401 (CC).

of a provision in the Bill of Rights to alter a common law rule.<sup>107</sup> After this case, courts appear to have preferred indirect horizontal application of the Bill of Rights either to a challenged common law rule or a statute through the mechanism in section 39(2) of the Constitution. I will very briefly comment below on the direct and indirect application of the Bill of Rights on the Act.

#### *4.2.1 Direct horizontal application of the Bill of Rights on the Act*

In assessing whether or not the Act permits the direct application of the provisions of the Bill of Rights in the private sphere, it is important to bear in mind the caveat in section 8(2) of the Constitution, read together with section 8(1). The Bill of Rights, as already said, applies to "all law".<sup>108</sup> The caveat is that the application of the Bill of Rights to natural and/or juristic persons is possible only if and to the extent that it is applicable, taking into account the nature of the right and any duty imposed.<sup>109</sup> Thus, courts will not countenance the application of provisions of the Bill of Rights with reckless abandon despite the importance of transformative constitutionalism to the adjudication process. Direct horizontal application will be permitted only where this is relevant. Litigants (and their legal representatives) who seek to rely on the horizontal application of fundamental rights have a duty to effectively plead their cases before the courts. Judges have bemoaned the fact that litigants' reliance on constitutional provisions is at times half-hearted and only an afterthought.<sup>110</sup> Having said the above, caveat or no caveat, the Constitution has opened the door to direct horizontal application, even though the caveat sounded in section 8(2) needs to be heeded.

The Act bears evidence of its attempt to align its provisions to the normative framework of the Constitution and in the light of the purpose to promote compliance with the Bill of Rights in the application of company law.<sup>111</sup> In some instances, the Act permits the direct application of the provisions of the Bill of Rights to promote the realisation and enjoyment of the rights which it has established. A good example is to be found in the rights of certain individuals such as beneficial interest holders to access company records<sup>112</sup> for the purposes of exercising their rights. Section 26, for example, clearly links the right to access to information to a relevant constitutionally

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<sup>107</sup> Moseneke 2009 *Stell LR* 8.

<sup>108</sup> As provided in s 8(1) of the Constitution.

<sup>109</sup> See s 8(2) of the Constitution.

<sup>110</sup> Moseneke 2009 *Stell LR* 13.

<sup>111</sup> See s 7(a) of the Act.

<sup>112</sup> See s 26(1) of the Act.

guaranteed right, and this is buttressed by reference to the legislation promulgated to give effect to this right.<sup>113</sup>

While it may be axiomatic from the provisions of the Act that the direct horizontal application of the Bill of Rights to the provisions of the Act is possible, whether or not the direct horizontal application of the Bill of Rights to company law is possible may not be as clear. It requires some interpretation to arrive at the correct answer. It can be argued in this regard that the call in section 7(a) to promote compliance with the Bill of Rights in the application of company law opens the door for the possible direct horizontal application of the Bill of Rights to common law. The *Khumalo v Holomisa* case is fitting authority to support the direct application of a provision of the Bill of Rights to a common law rule in the context of company law.<sup>114</sup> Thus, for example, if the enjoyment of a fundamental right under the Bill of Rights is frustrated by a common law rule which directly impinges on such a right, then a claim or remedy should be founded on a relevant fundamental right in the Bill of Rights. As per the constitutionally sound precedent in *Khumalo v Holomisa* a court should allow the direct application of a provision of the Bill of Rights to a common law rule.

#### 4.2.2 *Indirect horizontal application and the courts' duty to develop the common law*

In private disputes where a common law rule or statute is challenged for the alleged infringement of an affected party's fundamental right, courts have interpreted the statute or developed the common law in a manner that advances the spirit, purport and objects of the Bill of Rights.<sup>115</sup> In other words, courts have sought to interpret the statute or develop the common law in a manner which advances values such as human dignity, equality and freedom.<sup>116</sup> After the ground-breaking case of *Khumalo v Holomisa*, Moseneke pointed out that courts have retreated from the direct application of the Bill of Rights in a private sphere and now "resort to indirect horizontality facilitated by section 39(2)".<sup>117</sup> In *Barkhuizen v Napier*<sup>118</sup> Ngcobo J stated that the preferred method of applying fundamental rights

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<sup>113</sup> Section 26(7) of the Act in this regard provides that: "The rights of access to information set out in this section are in addition to, and not in substitution for, any rights a person may have to access information in terms of – section 32 of the Constitution; the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) or any other public regulation."

<sup>114</sup> *Khumalo v Holomisa* 2002 5 SA 401 (CC) applied to a private dispute and is thus relevant to the direct horizontal application in a commercial law/company law context.

<sup>115</sup> As required by s 39(2) of the Constitution.

<sup>116</sup> Moseneke 2009 *Stell LR* 8.

<sup>117</sup> Moseneke 2009 *Stell LR* 8.

<sup>118</sup> *Barkhuizen v Napier* 2007 5 SA 323 (CC).

to constitutional challenges to contractual terms (private disputes) is the indirect horizontal application of the Bill of Rights achieved via the development of the common law.<sup>119</sup> In regard to constitutional challenges in private disputes, the courts need to determine if a contractual term, a statutory provision or a common law rule challenged is contrary to public policy. Public policy is reflective of the fundamental and indeed the foundational values upon which the Constitution is founded. Thus public policy is in line with the normative value system which section 39(2) of the Constitution represents. In short, the indirect horizontal application of the Bill of Rights involves the development of the common law in order to improve the realisation and enjoyment of rights.

The Act recognises the importance of the indirect horizontal application of the Bill of Rights in order to constitutionalise the common law in the company law context. For this reason, the Act has imposed a duty on the courts to develop the common law. The duty is relevant where the said development is necessary to facilitate, improve or promote the realisation and enjoyment of the rights established by the Act. The exact words used by the Act are as follows:

When determining a matter brought before it in terms of this Act, or making an order contemplated in this Act –

- (a) a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act.<sup>120</sup>

It is important to note that the duty imposed by the Act is reminiscent of the section 39(2) duty on courts. For ease of comparison with section 158(a) of the Act, section 39(2) provides that:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

It is to be noted that section 158(a) imposes a duty only on courts, and not on any other adjudicating forums to develop the common law during the adjudicating process whenever it is found that the common law is deficient to facilitate the realisation and enjoyment of the rights established by the Act. This duty to develop the common law does not fall upon say a commission or a tribunal for the reason that these other forums do not have the inherent power to develop common law. The Constitution recognises

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<sup>119</sup> *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 23-30.

<sup>120</sup> See s 158(a) of the Act. The underlining of the word "must" is my own addition and it is for the purposes of emphasis only.

only the Constitutional Court, the SCA and the high courts as adjudicating forums with competence to develop the common law.<sup>121</sup>

Case law holds that the Constitution imposes a general mandate on courts to develop the common law. In *Carmichele v Minister of Safety and Security* the court stated that this obligation is relevant "where the common law as it stands is deficient in promoting the section 39(2) objectives."<sup>122</sup> The mandate is said to be peremptory. It "is not purely discretionary" and is "implicit in section 39(2) read together with section 173."<sup>123</sup> Other than through section 39(2) and section 173, courts' duty to develop the common law is also evident in section 8(3) of the Constitution.<sup>124</sup> The peremptory nature of the duty to develop the common law is evident in use of the word "must", especially in sections 8(3), and it is also implied in 39(2) and 173 of the Constitution. In section 158 (a) of the Act the word "must" is also used with reference to courts' duty to "develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act".

When fulfilling the mandate or obligation to develop the common law, courts of law do not have to wait for a perfect opportunity or a moment when "some startling development of the common law is in issue, but in all cases where the incremental development of a common law rule is in issue."<sup>125</sup> It is even said that the obligation is of such a nature that the court may, in exceptional circumstances I suppose, intervene of its own accord if it recognises the need to develop the common law in the interests of justice, without having to wait for litigants.<sup>126</sup> This is how serious the obligation to develop the common law is, as conveyed by case law. Thus, it is evident, even absent section 158(a) of the Act, that courts have the duty to develop the common law where the common law rule is deficient in promoting the spirit, purport and objects of the Bill of Rights. Does this in any way then make section 158(a) superfluous? By no means! The fact that the Act has its own

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<sup>121</sup> Section 173 of the Constitution provides that: "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice".

<sup>122</sup> *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) paras 54-56.

<sup>123</sup> *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) para 39.

<sup>124</sup> Section 8(3) of the Constitution provides that: "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – in order to give effect to a right in the Bill of Rights, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

<sup>125</sup> See *K v Minister of Safety and Security* 2005 6 SA 419 (CC) para 17.

<sup>126</sup> *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) para 39.

provision which further imposes a duty on courts to develop the common law where necessary to promote the enjoyment and realisation of the rights established by the Act is evidence of how seriously the Act takes the matter of alignment with the normative value system of the Bill of Rights. The seriousness of the matter of the indirect horizontal application of the Bill of Rights to the provisions of the Act cannot be underestimated. This serves as additional emphasis of courts' duty to develop the common law by adapting, modifying or supplementing its rules where necessary to fill a gap in the law so as to promote the realisation of rights through their adjudication.

In a nutshell, through section 158 the Act permits and promotes the indirect horizontal application of the Bill of Rights to its provisions. Indirect horizontality is best achieved through the development of the common law primarily via the section 39(2) mechanism and as permitted under the Act, by section 158 read together with section 7(a). The development of the common law is vital for producing an incremental and cohesive body of constitutionalised common law as is the apparent mission of the Act.<sup>127</sup>

## 5 Conclusion

The South African Constitution declares itself to be the supreme law of the land,<sup>128</sup> and for that reason, it sets normative standards with which all conduct, decision-making, and law should comply, and the obligations it imposes must be fulfilled. The Constitution provides a normative framework for the interpretation of statutes through section 39(2), as established in this article.<sup>129</sup> The main question this article set out to answer is: what are the implications of the normative framework for the interpretation and application of the Act? By ousting a rule by a sovereign parliament, the Constitution negotiated a shift from apartheid's culture of authority to a post-apartheid culture of justification,<sup>130</sup> where even judicial decisions have to be justified by reference to a cohesive set of values. This article has established that this is a part of transformative constitutionalism which demands that even commercial law principles should no longer be blindly accepted simply because precedent says so, or for the reason that it is expedient to do so for the purposes of commercial certainty. The impact of the normative framework on the Act is seen in the manner in which the Act was drafted. It appears that the drafters were mindful of the Bill of Rights when they drafted the Act. The Act reveals evidence of its intentional

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<sup>127</sup> As seen through the window of s 158(a) as read together with s 7(a) of the Act.

<sup>128</sup> See s 2 of the Constitution.

<sup>129</sup> As established in section 3.1, to "promote the spirit, purport and objects of the Bill of Rights" refers to developing the common law in a manner that advances foundational values such as human dignity, equality and freedom.

<sup>130</sup> Mureinik 1994 *SAJHR* 32.

alignment to what has been termed a generic normative framework based on the section 39(2) objectives.<sup>131</sup> It also reveals a subordinate normative framework,<sup>132</sup> specific to the Act, based on section 158(b) of the Act,<sup>133</sup> whose approach to interpretation has been described in this article as being a purposive or text-in-context approach.<sup>134</sup>

This article has showcased evidence of the Act's alignment with the normative value system. Firstly, the article explored the remedies to facilitate the realisation and enjoyment of the rights established by the Act.<sup>135</sup> Secondly, it has been demonstrated that the Act permits the direct horizontal application of the Bill of Rights on the provisions of the Act in two ways, namely through a possible invocation of a provision of the Bill of Rights and through the direct application of a provision of the Bill of Rights to a common law rule.<sup>136</sup> Thirdly, it has been argued and demonstrated that the Act permits the indirect horizontal application of the Bill of Rights through mandating courts to develop the common law where the common law, as it stands, is deficient in promoting the section 39(2) objectives.<sup>137</sup> The Act requires courts to develop the common law in a manner that advances the foundational values of the Constitution such as human dignity, equality and freedom.<sup>138</sup> A point has been made that the development of common law is vital to producing an incremental and cohesive body of constitutionalised common law in the company law context.<sup>139</sup>

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<sup>131</sup> See section 3.1.

<sup>132</sup> See section 3.2.

<sup>133</sup> Read together with ss 7(a), 5(1), 158(a) of the Act relevant to the interpretation of the Act's provisions.

<sup>134</sup> Section 3.2.

<sup>135</sup> See section 4.1.

<sup>136</sup> See section 4.2.1.

<sup>137</sup> See section 4.2.2.

<sup>138</sup> See s 1 of the Constitution.

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**List of Abbreviations**

CPA	Criminal Procedure Act 51 of 1977
SAJHR	South African Journal on Human Rights
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review