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Surname, Initial(s). (2012). Title of the thesis or dissertation (Doctoral Thesis / Master's Dissertation). Johannesburg: University of Johannesburg. Available from:
<http://hdl.handle.net/102000/0002> (Accessed: 22 August 2017).

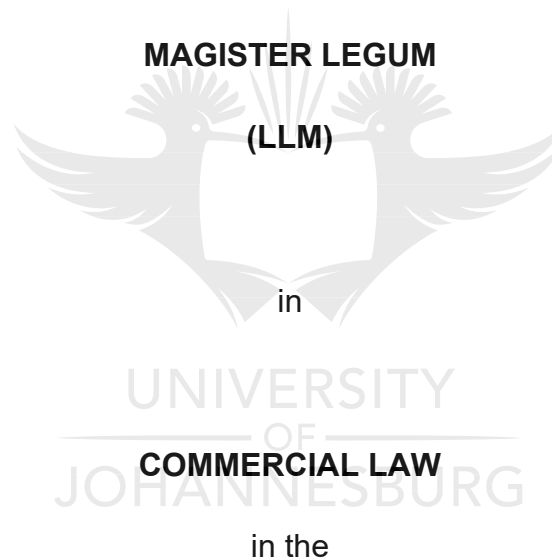
**A CRITICAL EVALUATION OF THE POWERS, FUNCTIONS AND
EFFECTIVENESS OF THE SOCIAL AND ETHICS COMMITTEE**

by

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A dissertation submitted in partial fulfilment of the requirements for the degree of



FACULTY OF LAW

at the

UNIVERSITY OF JOHANNESBURG

2018

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TABLE OF CONTENTS

ACKNOWLEDGEMENTS	3
LIST OF ABBREVIATIONS	4
ABSTRACT	5
1. Introduction	6
2. Compulsory appointment of the social and ethics committee	9
2.1 Exemption from requirement	10
2.2 Changes proposed by the Companies Amendment Bill 2018	12
3. The appointment of the social and ethics committee	13
4. The composition of the social and ethics committee	15
5. Non-compliance with the requirement to form a social and ethics committee.....	18
6. The functions of the social and ethics committee	19
6.1 The monitoring responsibility of the social and ethics committee	19
6.1.1 Social and economic development	19
6.1.2 Good corporate citizenship	24
6.1.3 The environment, health and public safety	26
6.1.4 Consumer relationship	28
6.1.5 Labour and employment	29
6.2 The reporting responsibility of the social and ethics committee	30
7. The powers of the social and ethics committee	32
8. Potential liability of members of the social and ethics committee	32
9. Final analysis and conclusion	34
10. Bibliography	36

ACKNOWLEDGEMENTS

1. I dedicate this dissertation to Jesus Christ, my Lord God and Saviour. It serves to show that what you think you cannot do, God can do. Truly "I can do all things through Christ who strengthens me"- *Philippians 4 v 13*.

It is not by my own wisdom or knowledge that I wrote this dissertation, but it is the Spirit of God Himself that inspired every word written. Glory be to God forever Amen!

2. I would also like to thank my family that has been so supportive throughout my years of studying.

3. A word of thanks to my supervisor who has shown great patience with me and has given me such great criticism and guidance throughout this journey.



LIST OF ABBREVIATIONS

THE ADVERTISING STANDARDS AUTHORITY OF SOUTH AFRICA (**ASA**)

BROAD-BASED BLACK ECONOMIC EMPOWERMENT (**BBBEE**)

CORPORATE SOCIAL RESPONSIBILITY (**CSR**)

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION (**CIPC**)

DEPARTMENT OF TRADE AND INDUSTRY (**DTI**)

EMPLOYMENT EQUITY ACT (**EEA**)

INTERNATIONAL ORGANISATION FOR STANDARDISATION (**ISO**)

MEMORANDUM OF INCORPORATION (**MOI**)

NATIONAL ENVIRONMENTAL MANAGEMENT ACT (**NEMA**)

ORGANISATION FOR ECONOMIC CO-OPERATION DEVELOPMENT (**OECD**)

SOCIAL AND ETHICS COMMITTEE (**SEC**)

SKILLS DEVELOPMENT ACT (**SDA**)

THE INTERNATIONAL LABOUR ORGANISATION (**ILO**)

THE OCCUPATIONAL HEALTH AND SAFETY ACT (**OHASA**)

UNITED NATIONS GLOBAL COMPACT PRINCIPLES (**UNGCP**)

ABSTRACT

The social and ethics committee is a statutory board committee, elected to monitor and report on a company's social and economic contribution towards society, by measuring its compliance with codes of best practice and relevant legislation. The committee is to ensure that a company conducts itself as a good corporate citizen. The concept of being a good corporate citizen is globally recognised and has now been made mandatory in South African corporate law by way of introducing the social and ethics committee. The committee is given vast powers in order to perform its functions; however, the functions of the committee remain an issue of concern as they are not sufficiently clear. It is for this reason that the question of the effectiveness of the social and ethics committee is explored, to establish whether the introduction of such a committee has been a progressive development or a burdensome task on qualifying companies.



1 Introduction

The social and ethics committee (hereafter referred to as the SEC) was introduced into South African corporate law for the first time by the Companies Act¹ in section 72 that provides for the appointment of board committees by the board of a company. Initially, the Act merely provided that the Minister could prescribe by regulation that a company or category of companies must have a social and ethics committee if found to be desirable in the public interest, when considering its annual turnover, the size of its workforce or its activities.²

The Act had no provisions that stipulated how the establishment of the SEC would come about and furthermore the Act gave no indication of the powers and functions of the said SEC. It was only later that the Companies Amendment Act,³ elaborated more on the required SEC in additional sub-subsections found in section 72 (5) to section 72 (10) of the Act, and as a final stamp the Companies Regulations,⁴ (Regulation) provided more guidance on the sections in Regulation 43.⁵

Section 7 (d) of the Act states that one of the purposes of the Act is to “reaffirm the concept of the company as a means to achieve economic and social benefit”. It can thus be said that the SEC was established in order to give effect to this purpose, to ensure that a company’s focus is not merely profit maximisation but is also the promotion of social and economic benefits which the current South African society is in dire need of.⁶

The government has in many ways tried to meet the social and economic needs of South Africans. It has done so through incentives such as the social grant that has greatly improved the lives of many who live in utmost poverty, and has also increased the number of children that go to school, families that are progressive and individuals who are active in the labour market.⁷ The introduction of a compulsory

¹ 71 of 2008 (hereafter referred to as the Act).

² section 72(4) of the Companies Act.

³ 3 of 2011.

⁴ Companies Regulations 2011.

⁵ See page 10 of the dissertation for an elaborated discussion on the details of the relevant sections of the act and regulations.

⁶ Mohlapamawi and Rachidi “South Africa’s challenges of realising her socio-economic rights” 2014 *Mediterranean Journal of Social Sciences* 900 905.

⁷ The social and economic impact of South Africa’s social security system final report commissioned in September 2004 by the directorate of finance and economics 1-4.

SEC board through the Act places pressure by the government on companies to contribute to the social and economic needs of their communities by acting as responsible corporate citizens.⁸ This is necessary because large corporations possess great power and influence in the communities' in which they operate.⁹ To a certain extent they are capable of determining what we eat, watch, wear, do and where we work.¹⁰ It is therefore expected of them to play a role in advancing social and economic benefits, as this is a task which requires the involvement of all sectors of society such as both the government and companies.¹¹

The importance of having companies play a role in not only providing an economic benefit but also a social benefit, stems from the King III concept of corporate citizenship.¹² King IV endorses this concept and defines corporate citizenship as a status that confers rights, obligations and responsibilities on the company towards society and the natural environment on which society depends.¹³

The concept of corporate citizenship can be used interchangeably with the globally recognised concept of corporate social responsibility, which is defined in the International Organisation for Standardisation (ISO) and explained by Esser¹⁴ as:

“the responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that contributes to the sustainable development, health and the welfare of society; takes into account the expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behaviour; and is intergraded throughout the organisation and practised in its relationships”.

For the purposes of this dissertation I will refer to the concept of corporate citizenship as defined in King IV.

<https://allafrica.com/download/resource/main/main/idatcs/00010352:3ca37b223f2ad1b0dc6479ccca726034.pdf> (2018-10-16).

⁸ Kloppers “Driving corporate social responsibility (csr) through the companies act: An overview of the role of the social and ethics committee” 2013 *PELJ* 166 168.

⁹ Esser “Corporate social responsibility: A company law perspective” 2011 *MERC LJ* 317 317.

¹⁰ Bakan *The corporation: The Pathological Pursuit of Profit and Power* (2005) 1.

¹¹ Netshitenzhe “Inequality matters: South African trends and interventions” 2014 *South African Journal of Social and Economic Policy* 8 13.

¹² The King III Report on Corporate Governance for South Africa 2016 51.

¹³ The King Report IV on Corporate Governance for South Africa 2016 11.

¹⁴ Esser (n 9) 319.

Like its predecessor, King IV supports the stakeholder-inclusive approach which provides that the board in execution of its duties should take into account the reasonable needs, interests and expectations of all stakeholders.¹⁵ This approach not only takes the interest of the capital providers into account but also the interest of all stakeholders who provide social and relationship capital as well.¹⁶

In contrast to the above, the policy document,¹⁷ published by the Department of Trade and Industry (DTI) in 2004, preferred the enlightened shareholder approach, which was further adopted in the Act. This approach provides that directors can take into account the interest of other stakeholders but only if it promotes the success of the company for the benefit of the shareholders.¹⁸

The establishment of the SEC has been said by many to have been a move in the right direction for South African corporate law, yet it has not come without challenges and loopholes in its regulation and functioning. Furthermore the efforts of government to enforce corporate citizenship through the establishment of the SEC will “simply sound hollow” without proper and efficient monitoring.¹⁹ It is for this reason that this dissertation aims to provide an overview and a critical analysis of the SEC, analysing its functions and powers in order to determine its effectiveness.

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¹⁵ The King IV Report on Corporate Governance for South Africa 2016 25.

¹⁶The King IV Report on Corporate Governance for South Africa 2016 25.

¹⁷The South African company law for 21st century guideline for corporate law reform policy document, GG 1183 (23-06-2004).

¹⁸ Davis, Geach, Mongalo, Butler, Loubser, Coetzee and Burdette *Companies and Other Business Structure* (2013) 12.

¹⁹ Cronje and Reyneke “Social responsibility in the South African mining sector: Functional or dysfunctional?” in Valjpeyi, Dhirendak and Oberoi (ed) *Corporate Social Responsibility and Sustainability Development in Emerging economics* (2015) 3 115.

2 Compulsory appointment of the Social and Ethics Committee

Section 72 (4) of the Act provides that the Minister,²⁰ may by regulation prescribe a category of companies that will be compelled to appoint a SEC if it is regarded as being in the public interest, taking into account their annual turnover, the size of their workforce and lastly the nature and extent of their activities. The Minister also has the power to prescribe regulations regarding the functions to be performed by this committee,²¹ and the rules that will govern the composition and conduct of the SEC.²²

In accordance with regulation 43 (1) it is every state-owned company, every listed public company and any other company that has in any two of the previous five years scored above 500 points in terms of regulation 26 (2), that falls into the above category and is required to appoint a SEC.²³

Regulation 26 (2) contains the formula according to which a company must calculate what is referred to as its public interest score. This score is also used for other purposes in the Act such as the determination of financial reporting standards,²⁴ the categories of companies to be audited,²⁵ the independent review of annual financial statements,²⁶ company annual returns,²⁷ the classification of groups of companies that undergo business rescue,²⁸ and the limitation on the tariff of fees for business rescue practitioners.²⁹

The public interest score is calculated at the end of each financial year as the sum of the following: (a) a number of points equal to the average number of employees of the company during the financial year, (b) one point for every one million rand (or portion thereof) in third party liability of the company, at the financial year end, (c) one point for every one million rand (or portion thereof) in turnover during the financial year and, (d) one point for every individual who, at the end of the financial

²⁰ section 1 of the Companies Act. Currently it is the Minister of Trade and Industry.

²¹ section 72(4)(b) of the Companies Act.

²² section 72(4)(c) of the Companies Act.

²³ regulation 26(2) of the Companies Regulations.

²⁴ regulation 27 of the Companies Regulations.

²⁵ regulation 28 of the Companies Regulations.

²⁶ regulation 29 of the Companies Regulations.

²⁷ regulation 30 of the Companies Regulations.

²⁸ regulation 127(1)(b) of the Companies Regulations.

²⁹ regulation 128 of the Companies Regulations.

year is known by the company- (i) in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities, or (ii) 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.³⁰

It is from this formula that Rossouw summarised the three factors that need to be taken into consideration when calculating the public interest score, namely: (i) the number of employees working for the company, (ii) the amount of debt that the company had at the end of its financial year and (iv) the amount of turnover that the company (or members in the case of a non-profit company) has at the end of its financial year.³¹

In view of the fact that each member of a non-profit company counts one point, many non-profit companies who have members may find that they meet the public interest score of 500 and therefore have to appoint a SEC, making it more desirable to incorporate non-profit companies without members.

2.1 Exemption from the requirement

A company may apply to the Tribunal for an exemption from the requirement to establish a SEC and the Tribunal may grant the exemption only on the grounds that (i) the company is required in terms of other legislation to have and does a formal mechanism within its structures, that performs the function that would otherwise be performed by the SEC in terms of section 72 (4) and regulation 43;³² or (ii) it is not reasonably necessary in the public interest for the company to have a SEC, considering the nature and extent of the activities of the company.³³

Section 72 (6) of the Act further provides in essence that, an exemption granted in terms of section 72 (5) of the Act is valid for five years or such shorter period as the Tribunal may determine at the time of granting the exemption. An exemption can be set aside by way of application made by either the shareholder or a person who was

³⁰ regulation 26(2) of the Companies Regulations.

³¹ Rossouw *The Social and Ethics Committee Handbook* (2018) 19.

³² section 72(5)(a) of the Companies Act.

³³ section 72(5)(b) of the Companies Act.

granted standing by the Tribunal, on the ground that the basis on which the exemption was granted no longer applies.³⁴

Furthermore, if a company is a subsidiary of another company that has a SEC and the SEC of the holding company will perform the function required by the Act then regulation 43 (2)(a) provides that a SEC is not required. De Lange submits that such an exemption is an automatic exemption and a subsidiary need not apply for it.³⁵

Applications for the exemption of companies from this requirement have remained relatively low in the year 2017/18 with an increase of 26% when compared to the year 2016/17.³⁶ The Tribunal has stated that the considerable number of refusals to grant such exemptions reflects the serious manner in which they regard the establishment of SEC.³⁷ However, according to De Lange; exemptions are often not strictly applied to the facts of the applications.³⁸

He illustrates this by referring to the *Sabfin (Pty) Ltd* case,³⁹ where the Tribunal granted an exemption to the applicant company in terms of section 72 (5)(a) where another subsidiary of the holding company of the applicant had a SEC in place performing the SEC functions of the applicant as well.⁴⁰ The Tribunal in this case, in relation to section 72 (5)(a) interpreted the phrase “in terms of other legislation” to also include the Act, to which De Lange submits that it is a misplaced reliance on section 72 (5)(a) as the section does not refer to the Act itself, but only to other legislation, alluding to the fact that a mechanism provided for by the Act such as the SEC is excluded.⁴¹ Furthermore that if the phrase “its structures” were to be interpreted narrowly as being those of the applicant company itself and not “its wider group structures” then the applicant does not have a formal mechanism.⁴²

³⁴ section 72(7) of the Companies Act.

³⁵ De Lange “The social and ethics committee in terms of the 2008 companies act: Some observations regarding the exemption and the role of the companies tribunal” 2015 *Merc LJ* 507 514.

³⁶ Companies Tribunal Annual Report 2017/18

http://www.companiestribunal.org.za/wp-content/uploads/2018/09/CT_Annual_Report_2017_18.pdf 5-6 (26-11-2018).

³⁷ De Lange (n 35) 538.

³⁸ De Lange (n 35) 538.

³⁹ Companies Tribunal of the Republic of South Africa Application by *Sabfin (Pty) Ltd* Case number CTR 002/08/2012 of 10 December 2012.

⁴⁰ De Lange (n 35) 517.

⁴¹ De Lange (n 35) 518.

⁴² De Lange (n 35) 518.

However, it is my submission that although the Tribunal is accused of not strictly applying the exemptions to the facts of the applications, the reason for this is that the exemptions provided by the Act are not wide enough to cover the different types of companies and company structures in existence. It is therefore suggested that the exemptions are extended to provide for a wider group exemption (including other company structures), which will require the applicant to prove that the subsidiary or the other company will be able to fulfil the committee's duties in respect of the applicant company.⁴³

2.2 Changes proposed by the Companies Amendment Bill 2018

The Companies Amendment Bill 2018 (Amendment Bill),⁴⁴ proposes to amend section 72 by substituting subsection (5) with a provision that states that companies required to appoint SEC's must first publish their intention to lodge an application for exemption with the Tribunal in the prescribed manner and then apply to the Tribunal for an exemption from the requirement.

It is not clear why companies would be required to first publish their intention to lodge an application for an exemption, but it might be as a result of the numerous applications that were made to the Tribunal that did not provide enough facts for the Tribunal to grant proper judgement.⁴⁵ An additional step may provide the Tribunal with enough information in order to make well-informed decisions. This will only occur if the prescribed manner or form will require detailed reasons as to why a company intends to apply for exemption. If not, it is my submission that this additional step will unnecessarily add on to the workload of the Tribunal without making a meaningful contribution.

⁴³ De Lange (n 35) 520.

⁴⁴ GG 41913 (21-09-2018) 419-420.

⁴⁵ Comment by a member of the Companies Tribunal Mr Khashane Manamela at the SEC seminar hosted by the Department of Trade and Industry and the Companies Tribunal in Midrand on the 9 February 2017 <http://www.companiestribunal.org.za/events/ary-the-dti-to-propose-amendments-to-companies-act-to-provide-clarity-on-compliance-with-social-and-ethics-committees/> (26-11-2018).

3 The appointment of the Social and Ethics Committee

In terms of Regulation 43 (3)(a), a company that existed on the effective date (1 May 2011) and was required to appoint a SEC had to appoint the first members of the committee within twelve months after the effective date or the refusal by the Tribunal to grant the company's application for an exemption from the requirement of appointing a SEC.⁴⁶ A company incorporated on or after the effective date must appoint its first members within one year after the date when it first becomes a listed public company or within one year after the date when it first meets the criteria set out in sub-regulation 1(c) that provides for companies which have scored above 500 points in terms of regulation 26 (2).⁴⁷

There is some uncertainty about the appointment of the SEC by the board because regulation 43 (2) states that it is the "company" that should elect a SEC but regulation 43 (3) states that it is the "board" of a company that exists on the effective date or is incorporated on or after the effective date, that must appoint the first members of the committee.

It is the submission of Henochsberg that the SEC is not a board committee even though it falls under the short title of section 72 of the Act which provides for board committees.⁴⁸ The reason for his submission is that in section 72 (1) (when referring to the appointment of board committees) the Act refers to the "board of a company" as the organ which must appoint a board committee yet when reference is being made to the SEC in regulation 43 (2) it is "the company" (which he interprets as referring to the company in general meeting, i.e. the shareholders) that must appoint the committee.⁴⁹ However, regulation 43 (3) refers to the appointment of the SEC by the board and considering the fact that section 66 of the Act provides that the "business and affairs of a company must be managed by or under the direction of its board", it is my opinion that the SEC is indeed a board committee appointed by the board, because it is not by mere coincidence that it was placed in section 72 that specifically deals with board committees as also evidenced by its heading. Locke is also of the view that the SEC is appointed by the board and that the two sub-

⁴⁶ regulation 43(3)(a)(i)-(ii) of the Companies Regulations.

⁴⁷ regulation 43(3)(b)(i)-(iii) of the Companies Regulations.

⁴⁸ Vorster and Delpont *Henochsberg on The Companies Act 71 of 2008* 283.

⁴⁹ Havenga "The social and ethic committee in South African company law" 2015 *THRHR* 285 283.

regulations must be read together to mean that the board has the power to appoint the SEC.⁵⁰

It is because of the above uncertainty that Esser points out that if the committee is appointed by the shareholders then it can be argued that the establishment of the SEC creates a separate organ within the company, resulting in a two-tier board.⁵¹ A two-tier board provides for an opportunity for stakeholder representation on the second level of the board. However, because of the costs to restructure the South African unitary board into a two-tier board and the perceived inefficiency of such boards in Europe, the policy document issued prior to the commencement of the company law reform process decided to keep the unitary board.⁵²

Rossouw proposes that the best way to deal with this uncertainty is that the company (at its first annual general meeting following the appointment by the board of the first members of the SEC), should appoint the SEC as a permanent statutory committee and as a standing committee of the board.⁵³

It is of great importance that the legislature brings clarity on the above-mentioned issue because the implication is that, if the SEC is appointed by the company (shareholders), a company faces the creation of a new organ within it, resulting in the undesirable two-tier board, and it is uncertain whether the board may refuse an instruction from this committee.⁵⁴ This is because of the vast powers afforded to the SEC in terms of section 72 (8) of the Act.⁵⁵

In the meantime it is notable that in whatever manner companies may decide to interpret the Act, the Act must be interpreted and applied in a manner that gives effect to the purpose in section 7 of the Act (which is to achieve social and economic benefit).⁵⁶ Therefore if the appointment of the SEC by the “board” will result in great social benefit, then that interpretation should be followed and vice versa.

It is however my submission that the interpretation in favour of the election of the SEC by the board should be followed because the board already has greater power

⁵⁰ Locke “Enhanced accountability” Havenga and Esser *Corporate Governance Review* (2012) 109.

⁵¹ Esser (n 9) above 326.

⁵² GG 26493 (23-06-2004) 37.

⁵³ Rossouw (n 31) 22.

⁵⁴ Esser (n 9) 326.

⁵⁵ See page 30 of the dissertation that discusses the powers of the sec in depth.

⁵⁶ section 5 of the Companies Act.

in terms of section 66 of the Act which designates the board as the organ responsible for the running of the company. Furthermore, the board is in a better position to know where exactly it requires assistance within the company. Therefore, allowing the board to elect the SEC gives it the opportunity to delegate further responsibilities to the SEC as may be required.

The board will do a better job at appointing members who have the necessary skills and expertise because they have a duty to act in the best interest of the company,⁵⁷ and a duty to act with care, skill and diligence when performing their functions,⁵⁸ unlike shareholders who do not have such a fiduciary duty towards the company.⁵⁹ It is therefore more likely for the directors to act in the best interest of the company by complying with the Act, than it is for shareholders.

4 The composition of the Social and Ethics Committee

Regulation 43 (4) stipulates that a SEC must comprise of not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company's business, and must not have been so involved within the previous three financial years. According to the King III report such a director who is not involved in the day-to-day management of a company, and has not been so involved within three previous financial years is an independent non-executive director.⁶⁰

King IV and its predecessor (King III) support the approach of having a majority of non-executive directors as well as non-executive directors who are independent instead of executive directors in a committee.⁶¹ The reason for this approach is to ensure that independent judgement is brought to bear.⁶² Therefore, although not expressly stated in Regulation 43 (4), the director referred to therein is an independent non-executive director. It is further evident that the prescribed composition of the SEC is not in accordance with King III or King IV.

⁵⁷ section 76(3)(b) of the Companies Act.

⁵⁸ section 76(3)(c) of the Companies Act.

⁵⁹ *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* 1990 3 ALL ER 404 at 424.

⁶⁰ The King III Report on Corporate Governance for South Africa 2009 50.

⁶¹ The King III Report on Corporate Governance for South Africa 2009 30.

⁶² The King IV Report on Corporate Governance for South Africa 2016 30.

It is for this reason that I submit that the independence which is envisioned in King III and IV may be trampled on because the same directors who form part of the SEC are the same directors that commit or allow the committing of acts which harm or hinder social benefits and this will as a result lead to ineffective SECs.

When one looks closely at regulation 43 (4) and the King III report, it is evident that they both make allowance for the involvement of non-executive directors in the composition of the SEC, but they do so to different degrees. The King III report obviously advocating for a greater degree of non-executive directorship than the Regulation, but now the question which arises is that of stakeholder participation in the SEC. The involvements of stakeholder representatives can add value to the functioning of the SEC.⁶³ Such stakeholders include persons such as employees, customers, local communities and suppliers. Nevertheless such stakeholders, and specifically employees in this regard have been excluded from the composition of the SEC because regulation 43 (4) only mentions directors and prescribed officers as persons who can be appointed as members of the SEC.

This is not necessarily a bad thing considering the suggestions being put forth by Rossouw, that the SEC should have members of other committees represented as ex officio members of the SEC so that when the committee needs certain information in order to fulfil their monitoring and reporting duties, such information is available.⁶⁴ Furthermore should the SEC lack expertise in specific areas, outside experts can be invited to guide the committee.⁶⁵

It is therefore seen that although employees are not involved as members of the SEC, their concerns as stakeholders will be addressed by consulting committees that are familiar with their needs as stakeholders. Another concern in having employees as members of the SEC is that certain matters will be difficult to report on should they involve wrongdoing by the directors of the company, employees might fear losing their employment. It is for this reason that I submit that it is better suited to follow the King III approach which calls for a majority of independent non-executive directors in the SEC.

⁶³ Kloppers (n 8) 170.

⁶⁴ Rossouw (n 31) 42.

⁶⁵ Rossouw (n 31) 42.

If one were to look at the audit committee, its members are only non-executive directors,⁶⁶ who meet the necessary minimum qualifications.⁶⁷ The Act provides that the audit committee must comprise of persons with adequate relevant knowledge and experience to equip the committee to perform its functions.⁶⁸ When comparing the requirements for election of the members of the SEC to the election of the members of the audit committee, it can be seen that there is a higher threshold used in the appointment of the audit committee than there is for the SEC.⁶⁹ There are currently no minimum requirements that have to be set for members of the SEC besides the fact that they must not be ineligible or disqualified to be directors in terms of section 69 of the Act.⁷⁰ This means that any person who is not the director of the company can be a member as long as the above requirement is met and the Memorandum of Incorporation (MOI) allows it.⁷¹

It is therefore my submission that part of the reason that it is difficult to have effective SECs is that not a lot of effort is put into the appointment of its members, whether one is skilled in the area of social governance or not it matters not when it comes to the election of members for the SEC. The skills possessed in the SEC have the possibility of determining the difference between it being an efficient tool to enhance sustainability and even boost profitability or it simply being a decorative accessory in an already crowded field of corporate governance.⁷²

Stoop suggests that companies with nomination committees should avail such committees to provide assistance when selecting members for the SEC, and further that the set of skills possessed within such committees should be assessed regularly in order to keep up with the relevant functions performed by the SEC.⁷³

The Amendment Bill has proposed in clause 15 (b) to insert after section 72 (5), subsection (5A) that allows the Minister to prescribe qualification requirements for

⁶⁶ section 94(4)(a)-(c) of the Companies Act.

⁶⁷ section 94(5) of the Companies Act.

⁶⁸ section 94(5) of the Companies Act.

⁶⁹ Havenga (n 49) 287.

⁷⁰ section 72(2)(a)(i) of the Companies Act.

⁷¹ section 72(2)(a) of the Companies Act.

⁷² Stoop "Towards greener companies – sustainability and the social and ethics committee" 2013 *STELL LR* 562 579.

⁷³ De Lange (n 35) 580.

members of the SEC.⁷⁴ This is a move in the right direction that will contribute to the effectiveness of the SEC.

5 Non-compliance with the requirement to form a Social and Ethics Committee

A company that does not comply with the requirement to form a SEC is met with section 84 (6) and (7) of the Act, that provides for actions that can be taken against such a company. The Act provides that if the board fails to make the appointment, the Companies and Intellectual Property Commission (CIPC) can issue the non-compliant company with a notice to constitute a SEC within a prescribed period. The CIPC can further give notice to the shareholders of a meeting to appoint a SEC and then convene the meeting to appoint one. Lastly the CIPC can apportion to each director on a pro-rata basis the cost of convening a meeting to appoint the SEC if a director knowingly permitted the failure to appoint one.

It is my submission that personal liability for the cost of the meeting convened for the appointment of the SEC is a good deterrent which will stress the duty given to directors to act quickly with the appointment of the SEC. Moreover the combination of monetary penalties and the naming and shaming of companies who are not compliant, would be a step in the right direction in order to enforce compliance because the share price and profitability of a corporation appears to be linked to its reputation.

⁷⁴ GG 41913 (21-09-2018) 421.

6 The functions of the Social and Ethics Committee

The SEC has three functions which are found in regulation 43 (5), one which relates to the monitoring responsibilities and two relating to the reporting responsibilities.⁷⁵

The Regulation states that the SEC is supposed to monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, with regard to matters relating to (i) social and economic development, (ii) good corporate citizenship, (iii) the environment, health and public safety, (iv) consumer relationships and (v) labour and employment.⁷⁶ These matters mentioned do not form a closed list as the board may add any other matter that it feels should also be taken into consideration.⁷⁷

The Regulations further provide that the SEC should draw matters within its mandate to the attention of the Board as occasion requires,⁷⁸ and also report through one of its members to the shareholders at the company's annual general meeting on matters within its mandate.⁷⁹

6.1 The monitoring responsibility of the Social and Ethics Committee

6.1.1 Social and economic development

The SEC is mandated to monitor the company's activities in the area of social and economic development.⁸⁰ The codes and laws that have to be taken into consideration in this area include, (i) the United Nations Global Compact Principles,⁸¹ (ii) the OECD recommendations regarding corruption,⁸² (iii) the Employment Equity Act,⁸³ and (iv) the Broad-Based Black Economic Empowerment Act.⁸⁴

⁷⁵ Rossouw (n 31) 23.

⁷⁶ regulation 43(5)(a) of the Companies Regulations.

⁷⁷ Locke (n 50) 110.

⁷⁸ regulation 43(5)(b) of the Companies Regulations.

⁷⁹ regulation 43(5)(c) of the Companies Regulations.

⁸⁰ regulation 43(5)(a)(i)(aa)-(dd) of the Companies Regulations.

⁸¹ UN Global Compact "The ten principles of the UN Global Compact

<https://www.unglobalcompact.org/what-is-gc/mission/principles> (12-11-2018).

⁸² There is no exact document with such a title available on the OECD website.

⁸³ 55 of 1998.

⁸⁴ 53 of 2003.

Although the Regulations do not provide a definition for social and economic development,⁸⁵ guidelines can be gathered from the codes and laws that need to be considered.

The ten United Nations Global Compact Principles (UNGCP) are principles which are derived from the Universal Declaration of Human Rights,⁸⁶ the International Labour Organization's Declaration on Fundamental Principles and Rights at Work,⁸⁷ the Rio Declaration on Environment and Development,⁸⁸ and the United Nations Convention Against Corruption.⁸⁹ The ten principles are placed under four categories namely, (i) human rights, (ii) labour, (iii) environment and (iv) anti-corruption.⁹⁰

Principles 1 and 2 under the human rights category provides that businesses should support and respect the protection of internationally proclaimed human rights and ensure that they are not complicit in human rights abuses.⁹¹

Principles 3, 4, 5 and 6 under the labour category further provide that businesses should uphold the right to freedom of association and the effective recognition of the right to collective bargaining.⁹² Eliminate all forms of forced, compulsory and child labour, as well as discrimination in respect of employment and occupation.⁹³

Principles 7, 8 and 9 under the environment category provide that businesses should support a precautionary approach to environmental challenges, undertake initiatives to promote greater environmental responsibility and encourage the development and diffusion of environmentally friendly technologies.⁹⁴

⁸⁵ Havenga (n 49) 288.

⁸⁶ UDHR <http://www.un.org/en/universal-declaration-human-rights/index.html> (30-08-2018).

⁸⁷ ILO "Declaration on fundamental principles and rights at work" <http://www.ilo.org/declaration/lang-en/index.htm> (30-08-2018).

⁸⁸ UN "The future we want – Outcome document"

<https://sustainabledevelopment.un.org/rio20/futurewewant> (30-08-2018).

⁸⁹ United Nations Convention against Corruption

<http://www.unodc.org/unodc/en/treaties/CAC/index.html> (30-08-2018).

⁹⁰ UN Global Compact n (81)

<https://www.unglobalcompact.org/what-is-gc/mission/principles> (27-11-2018).

⁹¹ UN Global Compact n (81) par 3-4.

<https://www.unglobalcompact.org/what-is-gc/mission/principles> (27-11-2018).

⁹² UN Global Compact n (81) par 5-8.

<https://www.unglobalcompact.org/what-is-gc/mission/principles> (27-11-2018).

⁹³ UN Global Compact n (81) par 8.

<https://www.unglobalcompact.org/what-is-gc/mission/principles> (27-11-2018).

⁹⁴ UN Global Compact n (81) par 9-11.

<https://www.unglobalcompact.org/what-is-gc/mission/principles> (27-11-2018).

Principle 10 which covers the anti-corruption category provides that businesses should work against corruption in all its forms, including extortion and bribery.⁹⁵

The aim of incorporating these principles into companies is to help companies uphold their basic responsibilities to both people and the planet and as a result set the stage for long-term success in corporate sustainability.⁹⁶

Many of the above principles are catered for in South African domestic legislation such as the Bill of Rights (which is found in chapter two of the South African Constitution),⁹⁷ the Promotion of Equality and Prevention of Unfair Discrimination Act,⁹⁸ and the National Environment Management Act,⁹⁹ just to name a few. The SEC must ensure that these principles are incorporated into their policies and that the company adheres to both local and international prevailing codes and laws in order to ensure that the company is compliant.

It has also been suggest that the compliance requirements should be heavily influenced and derived from the Bill of Rights,¹⁰⁰ since it addresses the issues covered by the UNGCP in clearer ways.¹⁰¹ However, it is my submission that the reliance on both domestic and international laws and codes might have a positive effect in that the standard applied internationally is the same standard applied here in South Africa as well, therefore making it easier and more reassuring for external companies and investors who have incorporated UNGCP into their company policies and further want to do business in South Africa.

The Regulations also refer to the Organisation for Economic Co-operation and Development (OECD) recommendations regarding corruption, as a code or law that

⁹⁵ UN Global Compact n (81) par 12.

<https://www.unglobalcompact.org/what-is-gc/mission/principles> (27-11-2018).

⁹⁶ UN Global Compact n (81) par 1.

<https://www.unglobalcompact.org/what-is-gc/mission/principles> (30-08-2018).

⁹⁷ The Constitution of the Republic of South Africa, 1996.

⁹⁸ 4 of 2000.

⁹⁹ 107 of 1998.

¹⁰⁰ Chapter two of the Constitution of the Republic of South African, 1996.

¹⁰¹ The executive summary of the social and ethics committee seminar hosted by the Department of Trade and Industry <http://www.companiestribunal.org.za/events/social-and-ethics-committees-seminar/> (12-06-2018). The seminar was structured to include presentations from different perspectives followed by discussions. An estimated 122 people from industry, policy makers, community representatives, non-governmental organisations/community based organisations (NGO/CBO), regulators, academics and other specialists in the field of corporate governance, ethics and community development attended. The executive summary is a summary of their opinions and discussions.

needs to be considered, yet there is no document with such a title. Instead the OECD website refers to six anti-corruption documents.¹⁰² Even though there is no exact document with such a title, it is in my opinion that the legislature intended to make reference to the OECD Recommendations for Further Combating Bribery of Foreign Public Officials in International Business Transaction,¹⁰³ which followed from the OECD Anti-Bribery Convention.¹⁰⁴ It is suggested by Locke that the SEC should when performing their monitoring duty consider all of the six documents available from the OECD that deal with corruption,¹⁰⁵ however it is my submission that such a task is onerous, the SEC should merely focus on the OECD Recommendations for Further Combating Bribery of Foreign Public Officials in International Business Transaction,¹⁰⁶ as they are recommendations that followed the Anti-Bribery Convention which is the only legally binding document among the many mentioned.

The Employment Equity Act (EEA),¹⁰⁷ aims to achieve equity in the workplace, by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and the implementation of affirmative action measures to redress the disadvantages in employment experienced by designated groups, this is done in order to ensure their equitable representation in all occupational categories and levels in the workforce.¹⁰⁸

The SEC has the duty to ensure that companies comply with the EEA. Section 20 of the EEA provides that a designated employer must prepare and implement a plan to achieve employment equity, furthermore the employer must submit a report on the plan to the Director-General within the prescribed time limits.¹⁰⁹ The function of the

¹⁰² These are the relevant instruments: OECD Guidelines for Managing Conflicts of Interests in the Public Service (2003); OECD Principles for Managing Ethics in Public Service (1998); OECD Principles for Transparency and Integrity in Lobbying (2010); OECD principles for Enhancing Integrity in Public Procurement (2008); OECD Recommendation on Bribery and Export Credits (2006); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction (1997); OECD Recommendations for Further Combating Bribery of Foreign Public Officials in International Business Transaction (2009).

¹⁰³ OECD "Recommendation of the council for further combating bribery of foreign public officials in international business transactions"
<http://www.oecd.org/daf/anti-bribery/44176910.pdf> (29-11-2018).

¹⁰⁴ The OECD Anti-Bribery Convention was ratified by South Africa 19 June 2007.

¹⁰⁵ Locke (n 51) 115.

¹⁰⁶ OECD "Recommendation of the council for further combating bribery of foreign public officials in international business transactions"
<http://www.oecd.org/daf/anti-bribery/44176910.pdf> (29-11-2018).

¹⁰⁷ 55 of 1998.

¹⁰⁸ section 2(a)(b) of the Employment Equity Act.

¹⁰⁹ section 21(1)-(2) of the Employment Equity Act.

SEC in this regard will involve monitoring whether the objectives listed in the plan have been achieved,¹¹⁰ and if the report has been submitted.

The Broad-Based Black Economic Empowerment Act (BBBEE Act)¹¹¹ is the last piece of law that needs to be considered under social and economic development. The idea behind the BBBEE Act is to promote economic transformation in order to enable meaningful participation of black people and workers in the economy.¹¹² In order to do this the act states that it aims to increase the extent to which, communities, workers, cooperatives and other enterprises own and manage existing and new enterprises, therefore, increasing their access to economic activities, infrastructure and skills training.¹¹³

In order to assess compliance with the BBBEE measures, Codes of Good Practice¹¹⁴ which include indicators are used.¹¹⁵ These indicators are afforded individual weighting,¹¹⁶ and amongst them is the “socio-economic development and consumer education” indicator which is accompanied by a mere 5% weighting (making it the lowest on the generic scorecard). Although this is very discouraging, the SEC has a duty in this regard to ensure that the company engages in activities that will contribute to socio-economic development. The company’s contribution can be monitored by making use of the generic scorecard.

Even though only 5% is afforded to socio-economic development, the “skills development” indicator that weights 20% on the generic scorecard is suggested by Kloppers to also be a means through which a company contributes to economic development.¹¹⁷ Therefore the increased percentage added to skills development makes up for the low percentage attributed to socio-economic development. This particular aspect of the BBBEE Act overlaps with the labour and employment area

¹¹⁰ section 20(2)(a) of the Employment Equity Act.

¹¹¹ 53 of 2003.

¹¹² section 2 of the Broad-Based Black Economic Empowerment Act.

¹¹³ section 2 Broad-Based Black Economic Empowerment Act.

¹¹⁴ GG 41287 (01-12- 2017).

¹¹⁵ section 9 of the Broad-Based Black Economic Empowerment Act.

¹¹⁶ GG 41287 (01-12-2017)13.

¹¹⁷ Kloppers, “Driving corporate social responsibility through black economic empowerment” (*Law and democracy & development*) 2014 66-67.

which the SEC is meant to monitor as well while taking into consideration the contribution towards the educational development of its employees.¹¹⁸

It is noted however, that the BBBEE Act is only mandatory in transactions between the state and the private sector,¹¹⁹ and will therefore not serve as an effective social and economic development tool between businesses in the private sector.

A suggestion has been made by Botha that the SEC should ensure that companies are opening opportunities for social and economic development through employee share schemes.¹²⁰ Consideration for such shares can be arranged for future payment as provided for in section 40 (5) of the Act.¹²¹ This will allow employees to make meaningful economic advancements. The function of the SEC in this regard will firstly be to ensure that such opportunities are made available in companies and that compliance officers are appointed and monitored when conducting their duties as required by section 97 of the Act.¹²² This will assist in making sure that employees are well informed about their shares, that their interests are being protected and that they are not merely used as a front to enhance the company's BBBEE status.

6.1.2 Good corporate citizenship

In the area of good corporate citizenship no specific codes of good practice or laws are mentioned. The Regulations only mention aspects such as the (i) promotion of equality and (ii) prevention of unfair discrimination (which are both advocated for in the EEA), the (iii) reduction of corruption, (iv) the company's contribution to the development of the communities in which its activities are predominately conducted and its product or service are predominately marketed and lastly (v) the company's record of sponsorship, donations and charitable giving, that can be taken into consideration.¹²³

¹¹⁸ regulation 43(5)(a)(v)(bb) of the Companies Regulations.

¹¹⁹ section 10 of Broad-Based Black Economic Empowerment Act.

¹²⁰ Botha "Evaluating the social and ethics committee: Is labour the missing link? (2)" 2017 *THRHR* 13.

¹²¹ See (n 1).

¹²² See (n 1).

¹²³ regulation 43(5)(a)(ii) of the Companies Act.

The omission of the King Reports,¹²⁴ as a code of good practice is rather alarming because they are considered to be one of “the strongest guides of sound corporate social responsibility in the South African context”, yet among other non-statutory instrument they have been left out.¹²⁵ Nevertheless, regulation 43 (5)(a) provides that the SEC should have regard to “any relevant ... prevailing codes of best practice” which thus includes the King Reports.

Although not defined in the Regulations, corporate citizenship can be defined as a status that confers rights, obligations and responsibilities on the organisation toward society and the natural environment on which society depends.¹²⁶ Accordingly, a company that adheres to their responsibility towards society and the natural environment can be said to be a one that is a good corporate citizen.

The King IV report states that the board should ensure that the company is and is seen to be a responsible corporate citizen and it recommends that the board should in doing so,¹²⁷ (i) assume responsibility for corporate citizenship by setting the direction for how it should be approached and addressed by the organisation, (ii) ensure that the organisation’s responsible corporate efforts include compliance with the Constitution of South Africa,¹²⁸ (including the Bill of Rights),¹²⁹ the law and leading standards, and adherence to it being a responsible corporate citizen, (iii) oversee and monitor on an ongoing basis, how the consequences of the organisation’s activities and outputs effect its status as a responsible corporate citizen.¹³⁰ This oversight and monitoring function should be performed against measures and targets agreed with management in areas such as the workplace, economy, society and the environment.¹³¹

Although the King Report states that it is the board that should do the above mentioned tasks, seeing that the SEC is a board committee and its mandate in terms of the Act is in line with the above, this task will be delegated to the SEC.

¹²⁴ The King III Report on Corporate Governance for South Africa 2009, The King IV Report on Corporate Governance for South Africa 2016.

¹²⁵ Havenga (n 49) 289.

¹²⁶ The King IV Report on Corporate Governance for South Africa 2016 11.

¹²⁷ The King IV Report on Corporate Governance for South Africa 2016 45.

¹²⁸ See (n 97).

¹²⁹ See (n 100).

¹³⁰ The King IV Report on Corporate Governance for South Africa 2016 45.

¹³¹ The King IV Report on Corporate Governance for South Africa 2016 45.

As seen from the Regulations a company that is a good corporate citizen is one that treats its employees equally and does not discriminate against them. To measure whether a company is such, the SEC can in this case refer back to the equity report required under the EEA as mentioned in the area of social and economic development.

Corruption in companies occurs as a result of a lack of ethical management. It is startling that there is no mention of how the SEC should monitor or regulate ethical behaviour. The King IV report states that the board of a company should lead in a manner that is ethical, responsible and that will ensure that a culture of ethics is promoted.¹³² King IV recommends that the board should give direction as to how ethics should be addressed and approached in the company.¹³³ This can be done by approving codes of conduct and ethics policies that will articulate and give effect to the direction the company is to follow.¹³⁴ Furthermore the board needs to oversee the management of the company's ethics.¹³⁵ The function of monitoring whether the ethics management is sufficient to prevent corruption should be given to the SEC. The OECD Anti-Corruption Recommendations for Further Combating Bribery of Foreign Public Officials in International Business Transaction,¹³⁶ should be taken into consideration as well in this area.

Monitoring the contributions made to communities and the record keeping of such other donations, charitable giving and sponsorship are functions that are closely related to each other and can easily be done by the SEC. Such records are good to keep as they also will serve to prove that companies are active within the communities which they operate. This will also contribute to companies BBBEE status.¹³⁷

6.1.3 The environment, health and public safety

The Regulations make no provision for any specific codes or laws that are to be taken into consideration by the SEC in this area.¹³⁸ Regulation 43 (5)(a)(iii) however,

¹³² The King IV Report on Corporate Governance for South Africa 2016 44-45.

¹³³ The King IV Report on Corporate Governance for South Africa 2016 44.

¹³⁴ The King IV Report on Corporate Governance for South Africa 2016 44.

¹³⁵ The King IV Report on Corporate Governance for South Africa 2016 45.

¹³⁶ See (n 102).

¹³⁷ Kloppers (n 117) 75.

¹³⁸ regulation 43(5)(a)(iii) of the Companies Regulations.

states that the SEC has to monitor the impact of the company's activities and products or services on the environment, health and public safety.¹³⁹

Section 28 of the National Environmental Management Act (NEMA),¹⁴⁰ states that:

“Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment”.¹⁴¹

Companies are to submit an application for environmental authorisation should the production of their products or the conducting of their services be considered as harmful to the environment.¹⁴² Such authorisation is subject to monitoring and managing for the ongoing impact of the activity in the area of business.¹⁴³ NEMA also has many other statutes falling under its regulatory framework,¹⁴⁴ therefore the SEC in conducting their monitoring function have to ensure that companies comply with the provisions under NEMA and its entire regulatory framework as far as it is applicable to the type of services or products offered by the companies. The UNGCP must also be taken into consideration in this area.

The Occupational Health and Safety Act (OHASA),¹⁴⁵ Safety Act,¹⁴⁶ National Health Act,¹⁴⁷ and the Mine Health and Safety Act,¹⁴⁸ are some of the domestic legislation that the SEC can look at when monitoring the impact of a company's activities and products or services on health and public safety. Section 7 of the OHASA makes provision for the implementation of a policy by the employer, concerning the protection of the health and safety of employees at work. Furthermore, there is a duty on the employer to ensure that persons other than those in his employment who

¹³⁹ regulation 43(5)(a)(iii) of the Companies Regulations.

¹⁴⁰ 107 of 1998.

¹⁴¹ section 28(1) of the National Environment Management Act.

¹⁴² section 24 of the National Environment Management Act.

¹⁴³ section 24E of the National Environment Management Act.

¹⁴⁴ Environment Conservation Act 73 of 1989; National Water Act 36 of 1998; National Environment Management: Air Quality Act 39 of 2004; National Environment Management: Protected Areas Act 57 of 2003; National Environment Management Biodiversity Act 10 of 2004; National Environment Management: Integrated Coastal Management Act 24 of 2008; National Environment Management: Waste Act 59 of 2008.

¹⁴⁵ 85 of 1993.

¹⁴⁶ 85 of 1993.

¹⁴⁷ 61 of 2003.

¹⁴⁸ 29 of 1996.

may be directly affected by his activities are not thereby exposed to hazards to their health or safety.¹⁴⁹

The SEC is required to go above and beyond the statutes and codes prescribed by the Regulations when performing their functions. In order to have effective SECs, other relevant codes and legislation not mentioned in the Act should be considered and the “relevance of legislation or codes in this context should be determined with reference to the nature of a company’s activities”.¹⁵⁰

6.1.4 Consumer relationship

The regulations state that the SEC has to make sure that it monitors the company’s advertising, public relations and its compliance with consumer protection laws.¹⁵¹ When advertising a company has to adhere to the standards set by the Consumer Protection Act,¹⁵² which promotes the advertising of products in a fair and responsible manner.¹⁵³ Additionally the Advertising Standards Authority of South Africa (ASA) makes provision for The Code of Advertising Practice which is the guiding document of ASA through which advertisers have to ensure through a self-regulatory system that their adverts adhere to the standards of the Code of Advertising Practice.¹⁵⁴ However depending on the type of products or services rendered, the SEC can still look at legislation like the Foodstuffs, Cosmetics and Disinfectants Act,¹⁵⁵ Medicines and Related Substances Act,¹⁵⁶ and the National Credit Act,¹⁵⁷ just to mention a few, in order to monitor the company’s advertising and compliance with consumer protection laws.

¹⁴⁹ section 8 of the Occupational Health and Safety Act.

¹⁵⁰ Joubert “Reigniting the corporate conscience: reflections on some aspects of social and ethics committees of companies listed on the Johannesburg Stock Exchange” Visser *Essays in honour of Frans Malan* (2014) 189.

¹⁵¹ regulation 43(5)(a)(iv) of the Companies Regulations.

¹⁵² 68 of 2008.

¹⁵³ section 29 of the Consumer Protection Act.

¹⁵⁴ The Advertising Standards Authority of South Africa has recently been issued with a notice for liquidation, however South African marketers and communicators have promised to set up a new regulator as soon as possible. <https://www.businessinsider.co.za/advertising-standards-authority-of-south-africa-asasa-served-with-notice-of-liquidation-2018-10> (29-11-2018); Without Prejudice November 2018 8 10. The new incoming regulatory body after the ASA is the ARB

(Advertising Regulatory Body) which will replace the ASA.

¹⁵⁵ 54 of 1972.

¹⁵⁶ 101 of 1965.

¹⁵⁷ 34 of 2005.

The monitoring of the company's public relations reflects the shareholder-inclusive approach advocated by the King Reports, and will therefore require the SEC to ensure that there is transparent and effective communication with all the stakeholders, that includes persons like consumers and customers.¹⁵⁸

6.1.5 Labour and employment

The SEC in the area of labour and employment is expected to monitor the company's standing in terms of the International Labour Organisation Protocol on decent work and working conditions.¹⁵⁹ It is also expected to monitor the company's employment relationships and its contribution toward the educational development of its employees.¹⁶⁰

The International Labour Organisation (ILO) does not have a document with the title "The International Labour Organisation Protocol on decent work and working conditions" but it does have a "Decent Work Agenda" which stands on four pillars that are employment creation, social protection, rights at work, and social dialogue.¹⁶¹ These four pillars have become integral elements of the recently published 2030 Agenda for Sustainable Development.¹⁶² The ILO has also published a guide titled "Decent Work and the Sustainable Development Goals: A Guidebook on SDG Labour Market Indicators" this guide gives "a detailed overview of the labour market indicators included in the Sustainable Development Goals Global Indicator Framework".¹⁶³ It is my submission that clarity as to which international instrument the SEC is called to consider is needed.

In monitoring the company's contribution towards its employee's educational development, the SEC can refer to the Skills Development Act (SDA).¹⁶⁴ The purpose of this act is to develop the skills of the South African workforce by increasing the levels of investment in education and training in the labour market, to

¹⁵⁸ Kloppers (n 8) 180.

¹⁵⁹ regulation 43(5)(a)(v)(aa) of the Companies Regulations.

¹⁶⁰ regulation 43(5)(a)(v)(bb) of the Companies Regulations.

¹⁶¹ ILO "Decent work agenda"

<https://www.ilo.org/global/topics/decent-work/lang--en/index.htm> (29-11-2018).

¹⁶² UN "Transforming our world: The 2030 agenda for sustainable development"

<https://sustainabledevelopment.un.org/post2015/transformingourworld> (29-11-2018).

¹⁶³ ILO "Decent work and the sustainable development goals: A guidebook on sdg labour market indicators"

https://www.ilo.org/stat/Publications/WCMS_647109/lang--en/index.htm (29-11-2018).

¹⁶⁴ 97 of 1998.

improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education.¹⁶⁵ The provisions of the SDA should be considered together with the BBBEE Act as it can contribute to the company's BBBEE status.

6.2 The reporting responsibility of the Social and Ethics Committee

The SEC is mandated with two reporting responsibilities. First, the SEC is mandated to draw to the attention of the company's board all matters within its mandate which the SEC deems to be necessary for the board to consider.¹⁶⁶ Second, the SEC has a reporting responsibility to the shareholders at the annual general meeting.¹⁶⁷ There is a common challenge that the SEC faces with both its reporting responsibilities. The challenge is that although it is known that they are supposed to report to both the board and the shareholders, it has not been stipulated as to which matters need to be brought to the attention of the board and when this should be done.

In practice currently the inclusion of the SEC report as a standard agenda item of regular board meetings has become a leading practice done by many companies.¹⁶⁸ Rossouw makes the suggestion that matters that would likely pose a material risk or opportunities to the company should be brought to the board by the SEC.¹⁶⁹ In doing so the representative of the SEC should at board meetings circulate minutes of the previous SEC meeting, and in submission to the board, merely mention non-material matters in passing and further table material matters for discussion and or decision making by the board.¹⁷⁰ It is my submission that this manner of reporting is suitable because it ensures that the SEC regularly informs the board of its findings, and although the non-material matters are not discussed, they are mentioned, in case the board has a different finding regarding the importance of those matters.

Joubert also points out that, in performing their duties the board normally requires more detailed reports than shareholders, and because shareholders and other stakeholders do not have fiduciary duties towards the company, the information

¹⁶⁵ section 2(1) of the Skills Development Act.

¹⁶⁶ regulation 43(3)(b) of the Companies Regulations.

¹⁶⁷ regulation 43(3)(b) of the Companies Regulations.

¹⁶⁸ Rossouw (n 31) 47.

¹⁶⁹ Rossouw (n 31) 25.

¹⁷⁰ Rossouw (n 31) 47.

released to them should be of a less detailed manner.¹⁷¹ In light of the above it my submission that the SEC report to the shareholders at the annual general meeting, should differ materially in order to protect the interest of the company, because the aim of reporting to the shareholders and the board is to enable the company to correct whatever mistake that has been made and not to cause loss to the company by way of exposing it to the public without giving it a chance to correct it faults.

Although there is no provision which requires the board to implement the findings of the SEC report, it is my recommendation that, the legislature should in future impose liability on the directors of the company should they not take steps to better their compliance with the Act even after reviewing the report of the SEC.



¹⁷¹ Joubert (n 150) 193.

7 The powers of the Social and Ethics Committee

In order for the SEC to fulfil the functions given to it, the Act in section 72 (8) affords the SEC with powers and entitlements.

The SEC is entitled to (i) require from any director or prescribed officer of the company any information or explanation necessary for the performance of the committee's functions,¹⁷² (ii) request from any employee of the company any information or explanation necessary for performance of the committee's function,¹⁷³ (iii) to attend any general shareholders meeting,¹⁷⁴ (iv) receive all notices of and other communications relating to any general shareholders meeting,¹⁷⁵ (v) be heard at any general shareholders meeting contemplated in this paragraph on any part of the business of the meeting that concerns the committee's function.¹⁷⁶

It is provided for in section 72(9) of the Act that a company must pay for all the expenses reasonably incurred by its SEC, including, if the SEC considers it appropriate, the cost or the fees of any consultant or specialist engaged by the SEC in the performance of its functions.

8 Potential liability of members of the Social and Ethics Committee

Members of board committees are defined to also be directors in section 76 (1)(b) and section 77 (1)(b) of the Act,¹⁷⁷ that provide respectively for "the standards of directors conduct" and the "liability of directors and prescribe officers".

Members of the SEC are expected to exercise their powers and perform their functions in good faith and for a proper purpose,¹⁷⁸ in the best interest of the company,¹⁷⁹ and with a degree of care, skill and diligence that may be expected of persons carrying out the same functions in relation to the company as those carried out by the members of the committee.¹⁸⁰

¹⁷² section 72(8)(a) of the Companies Act.

¹⁷³ section 72(8)(b) of the Companies Act .

¹⁷⁴ section 72(8)(c) of the Companies Act.

¹⁷⁵ section 72(8)(d) of the Companies Act.

¹⁷⁶ section 72(8)(e) of the Companies Act.

¹⁷⁷ section 77(1)(b) of the Companies Act.

¹⁷⁸ section 76(3)(a) of the Companies Act.

¹⁷⁹ section 76(3)(b) of the Companies Act.

¹⁸⁰ section 76(3)(c) of the Companies Act.

SEC members can face potential liability in accordance with the principles of the common law relating to the breach of a fiduciary duty, for any loss, damage or cost sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76 (2) or 76 (3) (a) or (b).¹⁸¹

Alternatively they may also face potential liability in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the member of (i) a duty contemplated in section 76 (3)(c), (ii) any provision of this Act not otherwise mentioned in this section; or (iii) any provision of the company's Memorandum of Incorporation.¹⁸²

It is important that members of the SEC are careful to draw all matters within their mandate to the attention of the board. Should anything urgent come to the attention of the SEC it should be communicated to the board at the earliest practicable opportunity.¹⁸³ Should this duty be neglected the members of the SEC can face potential liability in accordance to section 77 (2)(a) of the Act.

Potential liability relating to the duties to act in the best interest of the company and to act with the required degree of care, skill and diligence can be escaped by illustrating that reasonably diligent steps have been taken by the members to become informed on the matter or that such members had a rational basis for believing and did believe that the decision was taken in the best interest of the company.¹⁸⁴

¹⁸¹ section 77(2)(a) of the Companies Act .

¹⁸² section 77(2)(b) of the Companies Act.

¹⁸³ section 76(2)(b) of the Companies Act.

¹⁸⁴ section 76(4)(a)(i) and (iii) of the Companies Act.

9 Final analysis and conclusion

The effectiveness of the SEC is dependent on the proper and efficient performance of both their monitoring and reporting function. In order to properly perform their monitoring function the legislature needs to provide further guidance on the laws and codes of best practice that need to be considered under the areas of good corporate citizenship, environment, health and public safety, consumer relationships and labour and employment. Many of these areas overlap and the codes considered in areas can also be considered in other areas as well, consequently, this needs to be brought to the attention of the SEC.

Furthermore the reporting responsibility of the committee also needs to be addressed, the question of how and when the SEC is meant to report to the board and shareholders is important because it is the board that needs to be socially conscience of its effect on the environment and society at large. If not the company might suffer reputational damage and this will in turn affect the profitability of the company.

The SEC is given wide powers in terms of performing their functions and this should in turn result into having effective SECs, yet the problem also lies in the enforceability of the report once it is submitted to the board. There is a need for the enforcement of penalties against the board, should the board not comply with such a report and in turn neglect their responsibility to the society and environment. This will allow the SEC not only to be a committee that merely observes and reports but a committee that has the ability to influence the organisation positively.

Currently the SEC has the ability to interpret the legislation meant to be considered by the companies differently because of the SEC's vague functions and duties, this might be seen as a good thing because then each company's interpretation will be aligned with the nature and goals of its company. However, this will also allow many companies to slack in their application of the Act as some SEC may do the bare minimum.

Nonetheless, even with these few irregularities, the introduction of the SEC has indeed been a step in the right direction for South African corporate law because another sector has been called to contribute towards the advancement of the society

through social and economic benefits. The proposal to amend the Act is under way and the Amendment Bill has proposed a few changes to the SEC, however the proposed changes still need revision as many other irregularities have been left out. Hopefully, the final outcome will cater for most, if not all the loopholes mentioned in this dissertation.



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