SOCIAL AND ETHICS COMMITTEES: NICE IN THEORY BUT HAS THE COMPANIES ACT 71 OF 2008 PROVIDED SUFFICIENT GUIDANCE TO ENCOURAGE MEANINGFUL CORPORATE SOCIAL RESPONSIBILITY?

by

PENELOPE ANNE BEZUIDENHOUT

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LIST OF ABBREVIATIONS

CSR	Corporate Social Responsibility
DP	Deputy President
EPL	Eastern Platinum Limited
EY	Ernst & Young
IODSA	Institute of Directors
J	Judge
JA	Acting Judge
JSE	Johannesburg Securities Exchange
MOI	Memorandum of Incorporation
MPRDA	The Mineral and Petroleum Resources Development Act 28 of 2002
TRC	Truth and Reconciliation Commission
SABC	South African Broadcasting Corporation
UAE	United Arab Emirates
UK	United Kingdom
USD	United Stated Dollar
WPL	Western Platinum Limited

ABSTRACT

The impact of the Constitution on company law is evident from section 7 of the 2008 Companies Act, which states that the purpose of applying company law is to promote compliance with the Bill of Rights. Consistent with the democratic values and human rights as set out in the Constitution and the Bill of Rights, the 2008 Companies Act introduced the establishment of social and ethics committees as a mandatory requirement for specific companies. The heartbreaking events that occurred at Marikana in 2012 are discussed in order to support the argument that a social and ethics committee has an important role to oversee company activities. This also supports the board of directors so that compliance with the Bill of Rights is promoted. An analysis of sections 72(4) to (10) and regulation 43 of the 2008 Companies Act, illustrates that the Act has not provided sufficient guidance for the effective functioning of social and ethics committees. Various amendments to the 2008 Companies Act are recommended, in order for these committees to effectively support boards of directors. These recommendations, if implemented, will ensure that a social and ethics committee fulfils the fundamental role of supporting boards of directors in the oversight of stakeholder relationships and company activities and will ensure that the company carries on business in a responsible manner in order to promote compliance with the Bill of Rights. This dissertation highlights the shortfalls of the 2008 Act and makes recommendations that may provide a more balanced and equitable platform that will ensure that all company stakeholders are protected by the company.

Contents

CHAPTER 1: INTRODUCTION TO SOCIAL AND ETHICS COMMITTEES IN SOUTH AFRICA

1.1 *Introduction and background*

The new Companies Act[1] ("hereinafter interchangeably referred to as the Companies Act or the Act") introduced the establishment of social and ethics committees for certain South African companies.[2] The aim of a social and ethics committee is to provide a corporate governance mechanism that oversees the management of a company's organisational ethics, stakeholder relationships, fraud and corruption for the long-term sustainability of the company.[3] However, research conducted in 2015 by industry commentators, Trialogue and Ernst & Young (EY), assessed the impact of social and ethics committees and concluded that the new Act has not provided sufficient clarity on the mandate and role of these committees.[4] The impact of social and ethics committees on socio-economic development in South Africa requires more research, due to the fact that there are a limited number of academic sources that deal with the problematic provisions of the Act that relate to these types of committees.[5]

1.2 *Problem statement*

It cannot be denied that globally there is a need for improved accountability among corporations, due to the perpetration of large-scale corporate fraud which has undermined public confidence in corporations.[6] Since 1994, and the issue of the various King reports, there have been a series of corporate failures in both the private and public sectors in South Africa.[7] In 2014, a report by the Public Protector described a lack of effective corporate governance practices, ethical leadership and control of the board of directors at the South African

[1] 71 of 2008.
[2] Section 72(4) and regulation 43(1) Companies Act (n 1).
[3] Institute of Directors (IODSA) *King IV Report on Corporate Governance for South Africa* (2016) 57.
[4] Rockey and Boshoff "The status of social and ethics committees trialogue" 2015 *Annual Sustainability Review* http://trialogue.co.za/the-status-of-social-and-ethics-committees-a-trialogue-survey/ (16-5-2017). Trialogue/EY survey was completed by participants representing mining, financial services, manufacturing, building and construction, retail and wholesale and IT and telecommunications.
[5] Botha "Evaluating the social and ethics committee: is labour the missing link?" 2016 *THRHR* 583.
[6] Mlambo *The Influence of Corporate Failures and Foreign Law on South African Corporate Governance* (2016 thesis UP) 3. Accountability is defined in King IV (n 3) 9 as "the obligation to answer for the execution of responsibilities. Accountability cannot be delegated, whereas responsibility can be delegated without abdicating accountability for that delegated responsibility".
[7] Institute of Directors in Southern Africa (IoDSA) *King Report on Corporate Governance and the King Codes of Corporate Governance* (1994), (2002), (2009) and (2016).

Broadcasting Corporation (SABC), a state owned company, as "symptomatic of pathological corporate governance deficiencies".[8]

This trend is not only noticeable in South Africa but also abroad.[9] For example, the United States of America has also seen a major loss in the profits of corporations due to fraud and general corporate failure.[10] The financial crises in the United States, which occurred in 2007 and 2008, was estimated to cost these corporations approximately $22 trillion.[11] Nelson also refers to the more recent cost of fraud at Volkswagen in 2015 to 2016 which has been estimated at a loss of approximately $87 billion.[12]

The examples mentioned above indicate that the relentless pursuit of profit maximisation and focus on shareholder value has undermined the best interests of other stakeholders, such as the employees of the companies and the public in general.[13] Subsequently, it is evident that there is a worldwide need for leaders to realise the importance of implementing effective corporate governance practices and ethical leadership in companies, as these issues directly affect individuals within and around the business.[14]

1.3 *The importance of the concept of corporate governance*

For purposes of this dissertation, it is necessary to provide a brief overview of the meaning of corporate governance, since a key function and advantage of the establishment of a social and ethics committee, is that it acts as a corporate governance mechanism that aims to improve oversight and accountability within the company.[15] There is no universal definition of corporate governance.[16] Many definitions exist in different countries' governance codes. For example, in the United Arab Emirates Code corporate governance is defined as follows:

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[8] Report submitted by the office of the Public Protector in 2014, available at http://www.pprotect.org/sites/default/files/Legislation_report/SABC%20FINAL%20REPORT%2017%20FEBRUARY%202014.pdf20 cited in Thabane and Van Deventer "Pathological corporate governance in South Africa's state-owned companies: a critical reflection" *PER/PELJ* 2018 http://dx.doi.org/10.17159/1727-3781/2018v21i0a2345 2 (14-05-2018).

[9] Shichor "Thinking about punishment (or the lack of it): the case of the economic meltdown" *J Bus Ethics* 2018 185 provides a description of the impact of companies' mortgage lending and securitisation practices which had an adverse impact on the economy causing significant unemployment in the United States of America and adverse economic impacts globally.

[10] Nelson "Paper dragon thieves" 2017 *The Georgetown Law Journal* 875.

[11] Nelson (n 10) 874.

[12] Nelson (n 10) 875.

[13] Schicor (n 9) 186.

[14] King IV (n 3) 20.

[15] Gwanyanya "The South African Companies Act and the realization of corporate human responsibilities" 2015 *PER/PELJ* http://DX.DOI/ORG/10.4314 3113 (18-06-2017).

[16] Corporate governance definition https://corporate.laws.com/corporate-governance-definition (25-06-2018).

> "A set of controls and rules that ensure institutional discipline in relationships and management in the company in accordance with international standards and methods, through identifying the responsibilities and duties of the members of the board of directors and the senior executive management of the company, taking into account the protection of the rights of shareholders and stakeholders."[17]

In South Africa the new Companies Act mentions the term "corporate governance" but does not provide a definition.[18] This may be viewed as a deficiency of the new Act since a definition in the Act would provide clarity on the actual meaning behind this concept. In 1994, the first King Report and Code initially adopted a rather broad definition, which was originally adopted by the Cadbury Report in the United Kingdom, which defined corporate governance as, "the system by which companies are directed and controlled".[19]

In 2016, the King IV report's definition of corporate governance emphasised the importance of ethical leadership, corporate citizenship and the importance of corporate governance outcomes to achieve "an ethical culture, good performance, effective control and legitimacy" in the society where business is conducted. [20]

South Africa generally follows a hybrid model of corporate governance where the Constitution, and legislation, including its various regulations, provide mandatory rules and requirements, for corporate governance.[21] These provisions coexist along with the best practices which are set out in the King Reports and Codes of governance.[22] For purposes of this dissertation, it is necessary to briefly consider the various King Reports on Corporate Governance and the distinction between hard and soft law. [23]

Although the King reports do not have force of law, principles and recommended practices are described in these reports and codes, to provide practical guidance for application to ensure that there is effective leadership and management of a company.[24] The King reports have

[17] The Chairman of Authority's Board of directors' Resolution No. (7 R.M) of 2016 concerning the standards of institutional discipline and governance of public shareholding companies article 1.
[18] See (n 1) above Companies Act.
[19] Institute of Directors (IODSA) *King I Report on Corporate Governance for South Africa* (1994) and Rossouw "Balancing corporate and social interests: corporate governance theory and practice" 2008 *African Journal of Business Ethics* 28.
[20] King IV (n 3) 36. The application of King IV is effective for company financial years on or after 1 April 2017.
[21] Botha (n 5) 581.
[22] Botha (n 5) 581. See (n 7) various King Codes.
[23] Pietrancosta "Enforcement of corporate governance codes: a legal perspective" 2014, available from Research gate at https:www.reserachgate.net/publication/262186175 29 (12-11-2017).
[24] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited and Others* 2006 (5) SA 333 (W).

emphasised "the ethical values of responsibility, accountability, fairness and transparency".[25] These principles and recommended practices have set the standard for business management, to ensure that leaders act ethically, are held accountable and that the company acts as a responsible corporate citizen.[26] The purpose of corporate governance may, therefore, be described as "holding the balance between economic and social goals and between individual and communal goals".[27]

It is worth noting that in South Africa, the application of the King Code principles have been on a voluntary basis, meaning that corporations elect to adopt and/or explain principles as set out in the Codes.[28] However, King Code principles have been absorbed into binding rules through the mandatory disclosure requirements of the Johannesburg Securities Exchange (JSE) Listing Rules where listed public companies are required to disclose compliance with certain mandatory principles set out in the King Codes.[29] South African courts have also adopted the King Reports and Codes and in so doing have elevated these principles into binding standards by which the conduct of directors will be assessed in order to determine their liability.[30]

1.4 *Aim and objectives*

The aim of this dissertation is to address the question of whether regulation 43 of the Companies Act, read together with sections 72(4) to (10) of the Act, is adequately formulated in order to provide sufficient powers to social and ethics committees so as to effectively oversee and ensure that the company is managed in a responsible manner. This duty is extended further, in that the companies' activities must also promote compliance with the Constitution's Bill of Rights.[31] This will, therefore, also require an assessment of the new Companies Act in order to determine whether it has properly enabled social and ethics committees, to effectively oversee

[25] Botha (n 5) 582.
[26] Botha (n 5) 582.
[27] Rossouw "Balancing corporate and social interests: corporate governance theory and practice" (2008) *African Journal of Business Ethics* 30.
[28] The test for application is based on disclosure where companies disclose where principles are applied and explain instances where a decision is made not to apply the principle i.e. on an "apply or explain" basis as required in King III (2009). Recently King IV (n 3) 37 replaced this standard with "apply and explain" which assumes application and explanation is required both when the principles are applied and when not applied.
[29] JSE Rules par 384.
[30] See (n 24) above 47.
[31] The Constitution of the Republic of South Africa, 1996 (hereafter the Constitution) and s 7 of the Companies Act 71 of 2008.

a company's activities and further, to ensure that companies fulfil a meaningful socially responsible role within the communities where the business is conducted. [32]

1.5 *Research question*

A key question for consideration is whether the new Companies Act has properly equipped social and ethics committees to play a meaningful role in guiding companies to achieve improved accountability, corporate governance and corporate social responsibility. This will require discussion of the role of the company in general, and whether companies have moved beyond the pursuit of profits to shareholders, at the expense of other stakeholders such as employees.[33]

1.6 *Limitations of research*

The discussion and interface between public and private law and the debate around horizontal application, that is whether the courts should apply section 8(2) or section 39(2) of the Constitution, to these matters although relevant falls outside the scope of this dissertation.[34]

The role of the board of directors and the debate about the merits of a single unitary Board structure versus the two-tiered board structure is important, but outside the scope of this dissertation.[35] The recommendations made for the role of social and ethics committees in this dissertation will require further research into the two-tier model which will lead to consideration of having a separate board of independent directors for improved oversight and monitoring of business activities and impact within the society. [36] The role and contribution of board committees is also not sufficiently researched and should also be the subject of further academic research. [37] The Farlam Commission of Inquiry Report is not discussed in detail and only key aspects deemed relevant for purposes of this dissertation have been included.[38]

[32] Esser "The protection of stakeholders: the South African social and ethics committee and the United Kingdom's enlightened shareholder value approach" (part 2) 2017 *De Jure* 232.
[33] Botha "Responsibilities of companies towards employees" 2015 *PER* http://dx.doi.org/104314/pelj.v18i2.013 15 (12-11-2017).
[34] Moseneke "Transformative constitutionalism: its implications for the law of contract" 2009 *Stell LR* 4.
[35] OECD (2015) G20/OECD "Principles of corporate governance" OECD Publishing Paris 45 http://dx.doi.org/10.1787/97892642368882 provides a description for the types of board structures (10-01-2018).
[36] OECD (2015) G20/OECD "Principles of corporate governance" (n 35) 39.
[37] Dixon-Fowler, Ellstrand and Johnson "The role of board environmental committees in corporate environmental performance" 2017 *J Bus Ethics* 426.
[38] Marikana Commission of Inquiry "Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin mine in Marikana North West Province" GN 35680 in *GG* 50 (2012).

1.7 *Structure of the dissertation*

Chapter one of this study introduced the research question and the general idea of corporate governance in South Africa.[39] Chapter two sets out the supremacy of the Constitution and the political changes in South Africa, which have impacted business practices and influenced the introduction and content of the new Companies Act.[40] The legal framework, which consists of the Constitution, the 2008 Companies Act and the application of the stakeholder model, is set out in chapter two of this study, including the role and meaning of the company and the stakeholder model. Chapter three of this study consists of a brief discussion of the events that occurred at the Marikana Mine in August 2012, as well as the Farlam Commission of Inquiry, to illustrate the importance of corporate social responsibility and the pertinent role that a social and ethics committee should play in supporting a board of directors in overseeing the protection of human rights across a company.[41] Chapter four of the study provides an analysis of section 72(4) to (10) read with regulation 43 of the Companies Act to identify deficiencies in the current law. Chapter five of the study sets out the recommendations of this dissertation as well as the conclusion.

Before focusing on the statutory role of the social and ethics committee and its relationship within the company, it is important to consider the impact of the legal framework in South Africa, which will take into account the impact of the Constitution and the recommended corporate governance practices as set out in the various King Reports and Codes issued since 1994.[42]

[39] Companies Act (n 1) Part IV of the Companies Act n 1 above, introduced a new section of corporate governance without a definition.
[40] Moseneke (n 34) 4.
[41] See Marikana Commission of Inquiry (n 38).
[42] King IV (n 3) and (n 7).

CHAPTER 2: THE LEGAL FRAMEWORK [43]

2.1 The Constitution

2.1.1 Introduction

In 1994, following the previous legacy of inequality and apartheid in South Africa, the country became a non-racial democratic state.[44] Initially the country was governed by the Interim Constitution of the Republic of South Africa,[45] which contained an Interim Bill of Rights (hereinafter referred to as "the Interim Constitution"). This Interim Bill of Rights was aimed at the protection of the fundamental rights to be enjoyed by all persons and groups within the country.[46] The inclusion of the Interim Bill of Rights was consistent with global trends, where bills of rights generally were traditionally designed to protect individual citizens against the abuse of state power and authority.[47]

The Interim Constitution was subsequently replaced by the Constitution of the Republic of South Africa ("the Constitution").[48] The Constitution is based on the democratic values of human dignity, equality and freedom.[49] The preamble to the Constitution describes the radical impact and outcomes envisaged to transform South Africa into a constitutional democracy.[50] The Bill of Rights entrenches the rights to equality, privacy, property, freedom of expression and freedom of association as well as a number of socio-economic rights.[51] Section 7(1) of the Constitution states that "the Bill of Rights is the cornerstone of democracy in South Africa,

[43] The legal framework for purposes of this chapter 2 refers to the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), the Constitution (n 31), South African legislation and in particular the Companies Act (n 1) and case law.
[44] Interim Constitution (n 43).
[45] Chetty *The Horizontal Application of the South African Bill of Rights* (1998 dissertation SA) 3.
[46] Chetty (n 45) 3.
[47] Chetty (n 45) 3.
[48] The Constitution, including chapter two, which contains the Bill of Rights (n 31).
[49] Chetty (n 45) 3.
[50] The Preamble of the Constitution, includes the following outcomes to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of all citizens and free the potential of each person and… nations.
[51] Liebenberg "The value of human dignity in interpreting socio-economic rights" 2005 *SAJHR* 464. The socio-economic rights are social, cultural and economic rights found in the Constitution are as follows s 22 (freedom of trade, occupation and profession), s 23 (labour relations), s 24 (environment), s 25 (property and land), s 26 (housing), s 27 (health care, food, water and social security), s 28 (children's rights), s 29 (education), s 30 (language and culture), s 31 (the rights of cultural, religious and linguistic communities) and s 35(2) (the socio-economic rights of persons deprived of their liberty).

enshrining the rights of all people in our country and affirming the democratic values of human dignity, equality and freedom".[52]

2.1.2 Supremacy of the Constitution

The Constitution is the supreme law of the land and no law, whether it be legislation or the common law, may be inconsistent with the Bill of Rights.[53] If it is inconsistent with the Constitution, it will be considered invalid.[54] The effect of the Bill of Rights is described as reinforcing "the supremacy of the Constitution to demand that all law and conduct must be consistent with its provisions".[55]

2.1.3 Application of the Constitution

Traditionally in other parts of the world, bills of rights are applied vertically. This means that they only apply between the state and the individual.[56] Horizontal application means that a bill of rights is applied to the private sphere and relationships between private persons *inter se.*[57]

In South Africa during the drafting of the Constitution, there was much debate about whether the Constitution should have horizontal application.[58] Chetty refers to the drafting process and to the different types of application and interpretations on whether or not the Bill of Rights may be applied either horizontally, vertically, or both.[59] The Interim Constitution had created uncertainty as to whether or not the Constitution could be interpreted to have horizontal application.[60] In *Du Plessis and Others v De Klerk and Another* [61] the Constitutional Court was required to consider a defamation claim, where the defendant sought to rely on the fundamental

[52] Liebenberg (n 51) 464. Liebenberg indicates that "the inclusion of socio-economic rights as justiciable in the South African Bill of Rights makes the redress of poverty a matter of fundamental importance". In terms of s 38 of the Constitution anyone alleging a violation of any socio-economic rights set out in the Bill of Rights, may approach a competent court for appropriate relief including a declaratory order.
[53] Moseneke (n 34) 5 and s 2 of the Constitution.
[54] *Pharmaceutical Manufacturers of South Africa: In re ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44 cited in Bhana "The horizontal application of the Bill of Rights: a reconciliation of sections 8 and 39 of the Constitution" 2013 *SAJHR* 351, where the court stated that "[t]here is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control".
[55] Moseneke "Transformative adjudication in post-apartheid South Africa – taking stock after a decade" (2007) *Speculum Juris* 2.
[56] For example in the Canadian Charter of Rights and freedoms, referred to in *Dolphin Delivery Ltd v Retail Wholesale and Department Store Union Local* [1986] 2 SCR 573, the court stated that "[l]ike most written constitutions was set up to the regulate the relationship between the individual and the government" at 693 cited in Chetty (n 45) 75.
[57] Chetty (n 45) 6.
[58] Chetty (n 45) 6.
[59] Chetty (n 45) 4.
[60] Chetty (n 45) 6.
[61] 1996 3 SA 850 (CC).

right to freedom of speech in the Interim Constitution.[62] The majority of the Constitutional Court recognised that section 35(3) of the Interim Constitution provided for the development of the common law in accordance with the fundamental rights set out in the Bill of Rights.[63] However, the majority of the Constitutional Court did not affirm a horizontal application of the Interim Constitution to the defamation dispute involving private parties.[64]

The application debate was finally settled in the 1996 Constitution, where section 8(2) provides for a horizontal application and states as follows:

> "A provision of the Bill of Rights binds natural and juristic persons if and to the extent that, it is applicable taking into account the nature of the right and any duty imposed by the right." [65]

The effect of section 8(2) is that corporations have binding obligations to comply with the Bill of Rights.[66] In 1998 the Truth and Reconciliation Commission (TRC) referred to the fact that South African companies supported the apartheid government as follows:

> "[N]ot all businesses profited equally from apartheid. It is however, difficult not to conclude that, between 1910 and 1994, government and business (despite periodic differences and conflicts between them) co-operated in the building of an economy that benefited whites. On the one hand, they promoted and maintained the structures of white power, privilege and wealth and on the other, the structures of black (mainly African) deprivation, discrimination, exploitation and poverty. To this extent, business was part of the mind-set of white South Africa. Many businesses, including subsidiaries of leading corporations, became willing collaborators in the creation of this war machine, which was responsible for many deaths and violations of human rights, both inside and outside the borders of our country. In addition, a variety of businesses collaborated with the state in the national security system."[67]

The horizontal application and the interpretation of the Constitution and common law, is fundamental to ensuring that socio-economic conditions and systemic inequalities caused by the apartheid government are addressed.[68]

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[62] *Du Plessis* case (n 61) cited and discussed above in Chetty (n 45) 6.
[63] *Du Plessis case* (n 61) cited and discussed above in Chetty (n 45) 18.
[64] Chetty (n 45) 1.
[65] The Constitution.
[66] Bilchitz "Corporate law and the Constitution towards binding human rights responsibilities for corporations" 2008 *SALJ* 754.
[67] The Truth and Reconciliation Commission Report, volume 4, chapter 2 at para 97 cited in Nyembe and CALS Centre for Applied Legal Studies *Submission to the Institute of Directors Southern Africa on the Draft King IV Report on Corporate Governance for South Africa* (2016) 7.
[68] Moseneke (n 34) 5, here Moseneke explains that "by parity of reasoning, private power cannot he held to be immune from constitutional scrutiny".

2.1.4 Interpretation of the Constitution

Prior to 1994, the doctrine of parliamentary sovereignty prevailed in South Africa and the law-making role of judges was constrained "to apply the law, not to make it", since the creation of law was the sole function of the legislature.[69] This resulted in the apartheid government using the role of the judiciary to advance the goals of apartheid laws, since the function of the judiciary was to analyse and interpret the will of Parliament "but not to reason why".[70] In the *Du Plessis* case,[71] Mahomed DP indicated that the real question for the Court, was not merely whether the rights are capable of "horizontal" application but the effect that this type of application would have on interpretation.[72] This comment of Mahomed DP is still relevant even though it related to the Interim Constitution, since an effective horizontal application of the Constitution requires that the Court should ensure that the private law should be interpreted in accordance with the Bill of Rights.[73]

The Constitution has introduced a fundamental shift in the application and interpretation of South African law.[74] Although it has been accepted by the courts that the Bill of Rights applies horizontally, there has been "considerable ambivalence about the precise interplay between the Bill of Rights and the private law".[75] Section 39(2) of the Constitution provides that, "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of Rights".[76]

In *Khumalo v Holomisa*[77] the Constitutional Court, recognised the direct horizontal application of the Bill of Rights and indicated that factors such as, the importance and nature of the right

[69] Botha "Statutory Interpretation" 160 (Juta Cape Town 2005) cited in Singh and Bhero "Judicial law-making: unlocking the creative powers of judges in terms of section 39(2) of the Constitution" 2016 *PER/PELJ* 6 htttp://dx.doi.org/10.17159/1727-3781/2016/v19n0a1504 (3-4-2018).
[70] Friedman "Legal philosophy and judicial law-making" 1961 *Colum LRev* 823 cited in Singh "Judicial law-making: unlocking the creative powers of judges section 39 (2) of Constitution" 2016 *PER/PELJ* 7.
[71] *Du Plessis* case (n 61).
[72] *Du Plessis* case (n 61) par 909-910 cited in Chetty (n 45) above.
[73] Bhana "The horizontal application of the Bill of Rights: a reconciliation of sections 8 and 39 of the Constitution" 2013 *SAJHR* 351.
[74] Sutherland "Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) (part 1) 2008 *Stell LR* 390, 396 cited in Bhana (n 73) 353, Sutherland argued that "[t]he Constitution makes a clear break with the preceding legal order. It is impossible to think that this break should not also have profound consequences for horizontal relationships. Many of the abuses of the apartheid system and much of the exploitation occurred on a horizontal level. Private law assisted in creating the values of apartheid South Africa against which the Constitution turns its face: equality must replace inequality, dignity, repression and transparency suppression of information. A restrictive approach would rely on the public-private divide to an extent that simply does not account with the basic tenets of our Constitution and society".
[75] Bhana (n 73) 351.
[76] The Constitution.
[77] 2002 (5) SA 401 (CC).

and the potential for invasion of the right by parties other than the state, will determine the interpretation of the rights and the content of the private law.[78]

Singh and Bhero describe the required change in the approach introduced by section 39(2) of the Constitution, as having empowered the role of the judiciary to actively influence the creation of law and "social justice", through the process of interpretation in accordance with the Constitution and the values set out in the Bill of Rights.[79]

A process of constitutionalising the private law and contractual relations, is required for the Constitution to have the envisaged transformative power on the South African society, which should extend beyond merely changing social and political institutions.[80] The impact of the horizontal application of the Bill of Rights is that the common law and legislation must provide the textual context to enable the courts to balance considerations relevant to the application of the limitation clause in section 36 of the Constitution.[81]

Section 36(1) of the Constitution provides that:

> "The rights in the Bill of Rights may be limited only in terms of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose." [82]

All laws are required to align with the Bill of Rights as it mandates parliament to develop legislation and policies to advance social justice.[83] This is especially important for the regulation and restriction of corporate power since, "companies are bound by Constitutional duties to respect fundamental rights in the course of conducting business".[84] This means that

[78] *Khumalo* case (n 77) cited and discussed in Moseneke (n34) 8.
[79] Singh and Bhero "Judicial law-making: unlocking the creative powers of judges in terms of section 39(2) of the Constitution" 2016 *PER/PELJ* 17 htttp://dx.doi.org/10.17159/1727-3781/2016/v19n0a1504 (14-03-2018).
[80] Moseneke (n 34) 13 where he states that "transformative constitutionalism is certainly not an event. It is a process that all wielders of public and private power are duty-bound to advance".
[81] Moseneke (n 34) 11 – 13.
[82] The Constitution.
[83] Moseneke (n 34) 5, where it is argued that to give effect to a right in the Bill of Rights and to develop the common law to the extent that the legislation does not give effect to that right and the court has the power to develop rules of the common law to limit the right in accordance with s 36(1) of the Constitution.
[84] Moseneke (n 34) 12.

the alignment of South African law with the Bill of Rights will require effort from both the state and the private sector, since companies and business play a significant role in the South African economy.[85] Both the legislature and the courts are required to, "weed out constitutionally recalcitrant laws" and to develop and interpret the law in alignment with the Bill of Rights.[86] The legislature has promulgated various pieces of legislation to give effect to principles set out in the Constitution.[87]

The impact of the Bill of Rights in the Constitution is also evident in the process and development of the Companies Act 71 of 2008.[88] Social and ethics committees have been described as an "invention" of the new Companies Act, and a "corporate governance mechanism" with the potential to improve corporate accountability, oversight and responsibility.[89] The social and ethics committee functions must not be considered in isolation but should be read within the context of the Bill of Rights and the Companies Act. [90]

For the purposes of this study, the development of the Companies Act is discussed in order to illustrate the impact of constitutional supremacy on company law and also on the general purposes of the new Companies Act.[91] Before considering the current law and shortfalls of the Act relating to social and ethics committees, it is necessary to discuss certain key aspects of the Companies Act which are foundational, to the effective functioning and the statutory mandate of the social and ethics committee.[92]

Consideration of the role of the company in South African society is necessary to provide a contextual background to the discussion in order to suggest improvements to the Companies Act, which will assist to clarify the mandate of the social and ethics committee as a statutory board committee within companies.

[85] Singh and Bhero (n 79) 2 where it is said that the process of constitutionalisation is a duty that "has to be regarded as a shared responsibility amongst legal academics, scholars, practitioners and ordinary citizens who must participate in constructive dialogue with the courts, other persons and institutions".
[86] Moseneke (n 34) 5.
[87] Moseneke (n 55) 263, for example the Promotion of Equality and Prevention of Unfair Discrimination Act, the Prevention of Illegal Evictions Act and the Promotion and Protection of Investment Bill.
[88] The Department of Trade and Industry ("the dti") "South African company law for the 21st century: guidelines for corporate law reform" 2004 in *Government Gazette* 26493 at 15 and which came into effect on 1 May 2011.
[89] Botha (n 5) above 583.
[90] Gwanyanya (n 15) 3111.
[91] s 7 of the Companies Act (n 1) discussed below.
[92] reg 43 of the Companies Act (n 1).

2.2 The Companies Act 71 of 2008

2.2.1 Introduction

In 2004, in response to the Constitution, international developments and the changes in the political and business environment in South Africa, guidelines for the reform of corporate law were developed in order to reform South African company law.[93] The reform process involved a review of the 1973 Companies Act.[94] As a result, the 1973 Companies Act was largely repealed by the 2008 Companies Act, except for the insolvency provisions in the 1973 Companies Act, which are still applicable.[95]

2.2.2 Section 7 of the Companies Act 71 of 2008

The purposes of the Companies Act are set out in section 7 and demonstrate that the intention of the legislature is to ensure that company law is applied subject to the Bill of Rights in the Constitution.[96] This was a significant change compared to the previous Companies Act[97], which did not incorporate any constitutional provisions or principles. This resulted in a separation between the Constitution and company law.[98]

Key aspects identified in section 7 highlights various changes in the way that companies are required to operate within a constitutional dispensation, where transparency and high standards of corporate governance are required.[99]

Section 7 of the Companies Act provides that the purposes of the Companies Act are to:

(a) "Promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;

(b) Promote the development of the South African economy by-

  (i) Encouraging entrepreneurship and enterprise efficiency;

  (ii) Creating flexibility and simplicity in the formation and maintenance of companies and

  (iii) Encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;

[93] The dti (n 88) 15.
[94] Mongalo "An overview of company law reform in South Africa: from the guidelines to the Companies Act 2008" 2010 *Acta Juridica* xiii.
[95] The dti (n 88) 44.
[96] Katzew "Crossing the divide between the business of the corporation and the imperatives of human rights – the impact of section 7 of the Companies Act 71 of 2008" 2011 *SALJ* 686.
[97] 61 of 1973.
[98] Gwanyanya (n 15) 3107.
[99] Katzew (n 96) 686.

(c) Promote innovation and investment in the South African markets;

(d) Reaffirm the concept of the company as a means of achieving economic and social benefits;

(e) Continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;

(f) Promote the development of companies within all sectors of the economy, and encourage active participation in economic organization, management productivity;

(g) Create optimum conditions for the aggregation of capital for productive purposes and for the investment of that capital;

(h) Provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;

(i) Balance the rights and obligations of shareholders and directors within companies;

(j) Encourage the efficient and responsible management of companies;

(k) Provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all stakeholders and

(l) Provide a predictable and effective environment for the efficient regulation of companies." [100]

Section 7 of the Companies Act provides the context to understand the value of the social and ethics committee as a corporate governance mechanism in a company. In terms of the new provisions these committees would be responsible to promote compliance with the Bill of Rights, to assist in balancing the obligations of directors within the company, and in so doing the Act aims to encourage the efficient and responsible management of the company.[101] Section 7(d) of the Act, demonstrates that it is the intention of the legislature that the company should be integral to society as "a means to achieving both economic and social benefits."[102] In addition, section 7(f) of the Companies Act also affirms the concept of the company as not only established to generate profits, but also to benefit the society in which it operates.[103] Section 7 is designed to be applied with section 5(1) and section 158 of the Act, requiring a court to ensure that all decisions and interpretation regarding company law are done in accordance with section 7.[104] Academic writers have emphasised the importance of section 7 as having the effect of incorporating the Bill of Rights into the Companies Act, for example,

[100] Companies Act (n 1) and Katzew (n 96) 689.
[101] s 7 (a), (b) (iii), (d), (i), (j), and (l) of the Companies Act (n 1).
[102] Companies Act (n 1).
[103] Companies Act (n 1).
[104] s 5(1) provides that the Companies Act (n 1) must be interpreted and applied in a manner that gives effect to the purposes set out in section 7 of the Act. Section 158(a) of the Act provides that the court must develop the common law as necessary to improve the realisation and enjoyment of rights established by the Act. Katzew (n 96) 689 and 690.

Katzew argues that these sections, "narrow the gap between doing business for its own sake and doing it in an environment hospitable to human rights".[105]

Effective enforcement of constitutional rights is an ongoing process and will require legislation and common law to be developed and aligned with the Bill of Rights.[106] The courts will need to develop guidelines and principles regarding the provisions of the Act in order to clarify its meaning and application with regard to the Bill of Rights. This is because section 7 is quite vague and more guidance is required in order to apply its provisions relating to the Bill of Rights.[107]

It is also necessary to address the inequalities that exist in South African society. Since presiding officers are restricted to considering the pleadings before the court, the members of the legal profession therefore need to prepare their pleadings in accordance with the provisions of the Constitution and the Bill of Rights and bring these inequalities to the court's attention.[108] Consequently, improved public awareness, knowledge and constitutional literacy is required, without which the majority of South Africans will not enjoy access to courts in order to exercise their constitutional rights.[109]

2.2.3 The importance of an inclusive stakeholder approach

The next question that needs to be considered is whether corporations are genuinely committed to social investment, or whether the goal of South African companies is still primarily to increase profits for shareholders.[110] Academic writers have commented on the difficulty and the need to clarify in whose best interests the company should be managed.[111] This is important since, post 1994, both the government and the private sector have worked on addressing inequality and continuous efforts by both spheres are required in order to ensure that wider stakeholder interests are included in managing company interests.[112]

[105] Katzew (n 96) 690.
[106] Moseneke (n 34) 13.
[107] Cassim *Contemporary Company Law* (2012) 4.
[108] Moseneke (n 34) 13.
[109] Satgar *Capitalism's crises class struggles in South Africa and the world* (2015) 263.
[110] Cassim (n 107) 517.
[111] Cassim (n 107) 518, here Cassim refers to the "famous debate" between Berle and Dodd and their views, which are set out in Berle "Corporate powers as powers in trust" 1931 *Harv LR* 1049 and Dodd "For whom are corporate managers trustees?" 1931-32 *Harv LR* 1145 at 1147 – 8.
[112] Ramnath "Interpreting directors' fiduciary duty in the company's best interests through the prism of the Bill of Rights: taking other stakeholders into consideration" 2013 *Speculum Juris* 105.

The traditional approach to achieve success in companies, was to focus on profit maximisation in the best interest of the company shareholders.[113] Based on this philosophy, Milton Friedman expressed the purpose of corporate responsibility as follows:

> "There is but one and only one social responsibility of business, to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game."[114]

In terms of section 19(b) of the Act, from the date of incorporation or registration, a company exists as a separate legal personality, acquiring the capacity to have rights and duties, to the extent that it is able to exercise such rights and duties.[115]

Although the company is a separate legal person, it also represents interests other than those of the shareholders. These may include interests of employees, investors, consumers, the community and the environment.[116] The general focus on the company as a responsible corporate citizen has shifted the purpose of business from providing value solely for shareholders, to incorporating interests of wider stakeholders, such as employees and the general public.[117]

2.2.4 Enlightened shareholder value approach versus pluralism

The interdependent relationship between the company and its stakeholders, requires company law to clarify the question as to in whose best interests the company is managed, is conducting business and is pursuing profit maximisation.[118]

Academic writers indicate that there are "two main schools of thought, relating to the question as to in whose benefit the company should be managed," these are "enlightened shareholder value" and "pluralism".[119] The Companies Act demonstrates an enlightened shareholder value approach, in terms of which the board of directors is required to prioritise the long-term

[113] Cassim (n 107) 517.
[114] Olson "South Africa moves to a global model of corporate governance but with important national variables" 2010 *Acta Juridica* 222 quoted from Friedman, New York Times Magazine, 13 September 1970.
[115] s 19(1)(*b*) of the Act (n 1), Cassim (n 107) 31 and *Saloman v Salomon & Co Ltd* cited to refer to meaning of separate legal personality, which may be seen as: "The liabilities and assets belong to the company, and the rights and the duties of the company are separated from the directors and shareholders and consequently the shareholders have limited liability." This means that the company has capacity in terms of the MOI and in terms of s 19(1)(*b*) of the Companies Act is incapable of exercising any such powers unless provided otherwise in the MOI.
[116] Esser "The protection of stakeholders: the South African social and ethics committee and the United Kingdom's enlightened shareholder value approach (part 1) 2017 *De Jure* 106.
[117] Miles "The prospects for corporate governance operating as a vehicle for social change in South Africa" 2009 *Deakin LR* 63 refers to this approach typically described as the "enlightened shareholder value approach".
[118] Ramnath (n 112) 100.
[119] Cassim (n 107) 495 and *AP Smith Manufacturing Co Ltd v Barlow* 98 A 2d 581 (NJ 1953) at 586 cited in Ramnath (n 112) 106.

sustainability of the company and shareholder interests and, in so doing, considers the interest of other stakeholders.[120] The difference in this stakeholder approach may be explained with the following example. Where a board of directors was required to decide whether to sell the business in circumstances where the return on investment which, although advantageous to shareholders, would result in job losses.[121] If an enlightened shareholder value approach is adopted, the protection of employee interests would be considered, and the decision would only be made in the favour of employees, if the consideration of their interests aligned with the best interests of shareholders.[122] Alternatively, according to the pluralist approach, the board of directors may elect to prioritise the protection of employees, even though this may not be in the best interests of the shareholders.[123]

2.2.5 Stakeholder interests and the Companies Act

Although the 2008 Companies Act confers powers to other stakeholders, such as employees and trade unions, the Act does not provide sufficient clarification for the effective management of stakeholder interests in accordance with the purposes set out in section 7(d) and (f) of the Act.[124] The terminology used in the Act reflects shareholder superiority bias, which is also evident in the fact that the Act, whilst providing different definitions for the term "shareholder", does not provide a definition for "stakeholder".[125] In addition, other stakeholders were not included or referred to in the definition of "profit company".[126] The definition of a profit company in the Act also demonstrates a shareholder centric bias, which is inconsistent with an

[120] Cassim (n 107) 521 and *Teck Corp Ltd v Millar* (1972) 33 DLR (3d) 288 (BCSC) 313-14.
[121] Cassim (n 107) 521.
[122] Cassim (n 107) 521.
[123] Cassim (n 107) 521.
[124] Cassim (n 107) 4, describes the limitations of s 7 as follows: "A closer examination of these purposes shows that they are prefatory in nature and ought to have remained so." Also see Esser "The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach" (part 1) 2017 *De Jure* 108.
[125] Esser (n 116) 108. S 1 of the Companies Act (n 1) defines shareholder to mean the "holder of a share issued by a company and who is entered as such in certified or uncertified securities register the certified or uncertified securities register" And in addition, part F of ch 2 of the Act, s 57(1) provides that "a shareholder is a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which voting rights are attached. In addition, part F of ch 2 of the Act relating to governance specifically provides in s 57(1) "that a shareholder is a person who is entitled to exercise any voting rights in relation to a company".
[126] Companies Act (n 1) the definition of a profit company in s 1 of the Companies Act (n 1) provides that a profit company is a company incorporated for gain for its shareholders. Esser (n 116) 108, s 7(f) of the Companies Act also affirms the concept of the company as not only established to generate profits but also to benefit the society in which it operates. This approach in the Companies Act is aligned to the approach adopted in the various King Reports (n 7), which have stressed the triple bottom line, "people, profits and planet".

inclusive stakeholder model of governance and should be revised so as to include other stakeholders.[127]

2.3 Other legislation and stakeholder protection

Prior to the promulgation of the Companies Act, the Policy Guidelines stressed the importance of an inclusive stakeholder approach as follows:

> "A company should have as its object the conduct of business activities with a view to enhancing the economic success of the corporation taking into account, as appropriate, the legitimate interests of other stakeholder constituencies."[128]

Although the importance of stakeholder interest management was recognised, the legislature decided that the protection of other specific stakeholder interests should not be included in the Act, but should be provided for in separate legislation and in codes of best practice.[129] This means that stakeholder interests, other than shareholders, have not received formal recognition in terms of the Act and in South Africa are therefore primarily regulated by the application of the King Code principles and recommendations on a voluntary basis – meaning that companies may elect to adopt and/or explain principles as set out in the Codes.[130] Botha is critical of the separation and provision of different stakeholder interests in separate pieces of legislation since this has resulted in fragmentation and has undermined the importance of including stakeholder interests as a necessary part of the day to day management of the company.[131]

South Africa should learn from the UK Companies Act, which requires boards of directors to adopt an enlightened shareholder approach.[132] Esser and Delport refer to the UK model of stakeholder management in section 172 (1) of the Companies Act of 2006, which provides that the board of directors is required to consider other stakeholder interests such as employees,

[127] Esser (n 116) 108 and King IV (n 3) 17 where "stakeholder inclusivity" is defined to mean: "[A]n approach in which the governing body takes into account the legitimate and reasonable needs, interests and expectations of all material stakeholders in the execution of its duties in the best interests of the organization over time. By following this approach, instead of prioritizing the interests of the providers of financial capital, the governing body gives parity to all sources of value creation, including, amongst others, social and relationship capital as embodied by stakeholders. Consequently, this is an inclusive, stakeholder-centric approach which stands in contrast with a shareholder-centric approach."

[128] The dti (n 88) 20.

[129] The dti (n 88) 27.

[130] King IV (n 3) 71 Principle 16 of King IV advocates that the board should manage the company by adopting an inclusive stakeholder approach "to balance the needs, interests and expectations of material stakeholders"

[131] Botha "The different worlds of labour and company law: truth or myth?" 2014 *PER* http://dx.doi.org/10.4314/pelj.v17i5.06 2043 (21-05-2018). Botha refers to the relationship between labour law and corporate governance and states that "while labour law and corporate governance could once have been thought of as discreet areas for analysis, it is clear that this is no longer the case as integration is required since "both are complex and paradoxical".

[132] Esser (n 32) 239.

when making decisions affecting the long-term success and benefit of the company and its shareholders. [133]

The enlightened shareholder value approach is considered to be realistic to the economic realities of business, and emphasis on shareholder interests is necessary for the economic survival of the company.[134] The reason for this is that it ultimately provides social benefits for other stakeholders such as employees and the community at large.[135] Academic writers recommend that a balanced, integrated or "symbiotic" approach should be adopted, since the profit motive, shareholder interests and other stakeholder interests are intertwined.[136] Companies are required to recognise that it is a ubiquitous business risk for stakeholder interests to cause conflict, especially in large companies with complex business models and multiple stakeholders.[137] The importance of stakeholder inclusivity is consistent with the enlightened shareholder value approach, as well as the so-called "triple bottom line" approach, and has been emphasised in the various King Reports.[138] The triple bottom line approach, which refers to "people, profits and planet", does not discount the importance of profits, but rather indicates that, although the profit motive is fundamental, it should not be pursued without regard to the interests of other stakeholders such as employees and the environment.[139]

The board of directors of the company is ultimately responsible for the management of the various stakeholders in the company.[140] In South Africa, companies are obliged to adopt an inclusive approach to protect stakeholder interests that have been affected by the company's

[133] Esser (n 32) 238.
[134] Cassim (n 107) 519 where Cassim explains that this approach is adopted in both the USA and the UK and Ramnath (n 112) 109.
[135] Ramnath (n 112) 109.
[136] Ramnath (n 112) 112, advocates this approach "since stakeholders and shareholders often are required to rely on each other and balancing of stakeholder interests is consistent with the approach required when interpreting and balancing competing rights interests in the Bill of Rights". Additionally see Du Plessis *Principles of Contemporary Corporate Governance* 2005 xxi where it is stated that "[t]he majority of corporate governance codes expressly recognize that corporate success, shareholder profit, employee security and well-being and the interests of other stakeholders are intertwined and co-dependent".
[137] Esser (n 32) 239, s 172 of the UK Companies Act has been understood by academic writers as offering the best approach to balance management decision-making.
[138] See (n 7) for the various King Reports and Codes, more recently King IV (n 3) principle 16.
[139] Botha (n 33) 30, where he describes the importance of the participation of employees in the company. *Teck Corp Ltd v Millar* (1972) 33 DLR (3d) 288 (BCSC) at 313-4. Berger J stated as follows: "if today directors of a company were to consider the interests of the employees no one would argue that in so doing they were not acting bona fide in the interests of the company itself."
[140] King IV (n 3) 71 principle 16 and recommended practice 1 - 5. Principle 16 provides that "in the execution of its governance role and responsibilities the governing body should adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interest of the organization over time".

activities and to promote compliance with the Bill of Rights. Ramnath describes this approach as follows:[141]

> "stakeholders and shareholders often are required to rely on each other and balancing of stakeholder interests is consistent with the approach required when interpreting and balancing competing rights interests in the Bill of Rights."[142]

The integration of inclusive stakeholder relationships into day to day business is important in order to demonstrate that the company is socially responsible and manages the impact of company activities on its employees and the community.[143] This was highlighted by the Supreme Court of Appeal in *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance*.[144] In this case the court interpreted section 24(b) of the Constitution within the context of environmental legislation.[145] This required the court to consider and balance two competing concerns, namely the protection of the environment and the need for social and economic development. The court referred to the fact that, in accordance with international trends and constitutional values, the protection of environmental rights requires "collaborative corporate governance", which includes consultation and dialogue with a wider range of stakeholders, including the public. This is necessary since the destruction of the environment is a public matter, affecting all members of society including future generations.[146]

This case demonstrates that companies require an effective internal mechanism to oversee consultation and engagement when stakeholder interests and expectations collide, in order to balance competing considerations and to ensure effective decision-making. Social and ethics committees are well placed to support boards of directors in overseeing effective stakeholder relationship management across the company.[147]

[141] Gwanyanya (n 15) 3103.
[142] Ramnath (n 112) 112.
[143] Du Plessis "New trends sustainability and integrated reporting for companies: what protection do directors have?" 2015 *The Company Lawyer* 52. Reference made to Professor Mervyn King "The board of directors, in discharging its duty of care and diligence, can no longer ignore the impact which the company's business model and its product has on society and natural assets. Strategically the board has to ensure that the company's business model and its product enhances positive impacts and eradicates or ameliorates negative impacts on society and natural assets. This creates total value -also called sustainable capitalism. And this is good hard-nosed business in the changed world of the 21st century".
[144] [2015] 1 All SA 261 (SCA) 29.
[145] National Environmental Management Act 107 of 1998.
[146] *Company Secretary of Arcelormittal South Africa* (n 144) 23.
[147] As discussed below in ch 5.

A case study of the Marikana incident is discussed below in chapter three in order to highlight the role of boards of directors and their legal duties in relation to "potential social harms" that may arise from company activities.[148] The Marikana case illustrates the importance of considering the interests of stakeholders such as employees who are directly affected by company activities and decisions.[149]

[148] Weitzner "Corporate governance as part of the strategic process: rethinking the role of the board" 2011 *J Bus Ethics* 33.
[149] Discussed below in ch 3.

CHAPTER 3: CASE STUDY: THE EVENTS AT MARIKANA MINE

3.1 Introduction

The tragic events that unfolded at the Marikana mine in August 2012 are briefly described to motivate and highlight the importance of the role of boards of directors, to manage stakeholder interests and corporate social responsibility within a company.[150] The question that was triggered by these events is whether the board of directors of the company should be held responsible for failing to adequately oversee the decisions made by the company's management on that fateful day. This study submits that social and ethics committees should play a role in supporting the board of directors to monitor stakeholder relationships more effectively in order to prevent similar incidents. Before briefly describing the facts of the events that transpired at the Marikana mine in August 2012, it is necessary to briefly consider the role and responsibilities of the board of directors and its relevant board committees in terms of the Companies Act and the King Reports and Codes, which have been adopted by South African courts.[151]

3.2 *The role of the board of directors*

In terms of section 66(1) of the Act, the board of directors of the company are responsible for the business and affairs of the company and must exercise all its powers and authority in order to perform the functions of the company subject to the Memorandum of Incorporation.[152] The legal relationship between directors and the company is described as *sui generis* and must therefore be assessed according to the specific facts of each case.[153]

[150] Kloppers "Driving corporate social responsibility (CSR) through the Companies Act: an overview of the role of the social and ethics committee" 2013 *PER* 1 http://dx.doi.org/10.4314/pelj.v16i1.6 166, refers to the definition provided by the International Organisation for Standardisation (ISO) Guidance on Social responsibility 26000. The ISO provides the following definition for corporate social responsibility, which is used for the purposes of this dissertation and provides as follows: "the responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behavior that contributes to sustainable development, health and welfare of society; takes into account the expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behavior; and is integrated throughout the organization and practiced in its relationships." A similar definition of corporate social responsibility explained in a 2013 Consultation paper by the UK Department by the UK Department for business innovation & skills cited in Du Plessis (n 144) 52.

[151] In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited and Others* (n 24) briefly discussed below.

[152] Cassim (n 107) 403. In terms of section 15(6) of the Companies Act a company's Memorandum of Incorporation and any company rules are binding between the company and each shareholder, amongst the shareholders; between the company and each director or prescribed director, in the exercise of his or her functions and between the company and any other person serving the company as a member of a committee of the board, in the exercise of their functions in the company.

[153] Cassim (n 107) 414 refers to *Cohen v Segal* 1970 3 SA702 (W) where the court described the legal relationship as follows: "[d]irectors are from time to time spoken of as agents, trustees or managing partners of a company,

3.2.1 Fiduciary duties

Director responsibilities in terms of the Act originate from their power to make decisions to manage the company in the best interests of the company itself.[154] Standards of conduct required of directors and other prescribed officers are described in the Act. This may be seen as a partial codification of the common law duties of directors, and has also extended these fiduciary duties to both directors and to other prescribed officers.[155] The meaning of "fiduciary duty" has been defined in case law and is applied in situations where a person acts in good faith, is in a position of trust to the company and acts in the best interests of the company.[156] In terms of the common law, as well as section 76(3)(*b*) of the Act, a director is required to act in the best interests of the "company". This means that directors should act in the collective interest of present and future shareholders, which essentially entails the maximisation of the wealth of shareholders.[157] The enlightened shareholder value approach and the question as to whether the company should be managed in the best interests of a wider set of stakeholders, such as employees and public, is discussed above.[158]

3.2.2 The duty of care, skill and diligence

The director owes a duty of care and skill to the company.[159] This means that the director must perform the functions of director with a degree of care, skill and diligence that may reasonably

but such expressions are not used as exhaustive of the powers and responsibilities of those persons, but only as indicating useful points of view from which they may before the moment, they seem to be falling within the category, but that it is useful for the purpose of the moment to observe that they fall *pro tanto,* within the principles which govern that particular class".

[154] Cassim (n 107) 403 reference is made to the shift in the Act where, in the previous Companies Act 61 of 1973 the board's power to manage the company was delegated by the members in general meeting. Cassim explains that the effect of s 66(1) has been to shift the ultimate power from the shareholders to the board of directors since the Companies Act provides in s 66(1) that the board has been conferred original powers to manage the company. Also Esser "The protection of stakeholders: the South African social and ethics committee and the United Kingdom's enlightened shareholder value approach" (part 2) 2017 *De Jure* (n 32) 225.

[155] S 76(3)(*b*) refers to s 1 which defines "prescribed officer" to mean "a person, who within the company performs any function that has been designated by the Minister in terms of s 66(10) of the Act. Regulation 38(a) provides further that a prescribed officer exercises general executive control over and management of the whole, or a significant portion of the business and activities of the company; or (b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion of the business and activities of the company.

[156] Cassim (n 107) 512 with reference to *Bristol and West Building Society v Mothew* [1998] Ch1 at 18.

[157] See chapter 2.

[158] See chapter 2.

[159] S 76(3)(*c*) of the Act and Cassim (n 107) 555 where it is explained that "the duty of care is not a fiduciary duty, but is based on delictual or Aquilian liability".

be expected of a person carrying out the functions of director and having the general knowledge, skill and experience of that director.[160]

The principle of delegation was accepted by the court in *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd.*[161] The duty of care is subject to section 76(4)(*b*) and (5) of the Act which allows the director to rely on the performance of reliable, competent employees, legal counsel and other professionals and a committee of the board, in which the director is not a member, unless there is reason to believe that the actions of the committee do not merit confidence.[162] The principle of delegation may be relied upon to allow directors to delegate functions to officers or board committees, however the board remains accountable or legally responsible for all functions.[163] The board is entitled to appoint board committees to support it in its functioning, except to the extent that the Memorandum of Incorporation provides otherwise.[164]

In terms of section 72(3) a board committee has the full authority of the board, but since directors owe fiduciary duties to the company, these duties cannot be evaded through the establishment of a board committee.[165] The functions of the board may be delegated, but not "abrogated", which means that the board is required to oversee and monitor management decisions and actions taken by management.[166] The court In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company* [167] adopted the King II principles and in so doing elevated these principles into binding standards, by which the conduct of directors and prescribed officers will be assessed to determine liability.[168] Hussain J referred to King II to

[160] Cassim (n 107) 555. In terms of s 76(5) of the Act the director should believe that the employees are reliable and competent. In addition, the director is entitled to take the advice of technical specialists subject to the advice falling in line with their expertise and the director may accept the advice of a committee if he believes that the advice has merit.
[161] 1980 4 SA 156 (W) 166 cited in Cassim (n 107) 561 where the court said: "[i]n respect of all duties that may properly be left to some official, a director is in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. He is entitled to accept and rely on the judgment, information and advice of the management unless there are proper reasons for querying such. Obviously, a director exercising reasonable care would not accept information and advice blindly".
[162] s 76(5) of the Companies Act.
[163] In *Re Barings PLC (No 5)* [1999] 1 BCLC 433 (ChD) cited in Cassim (n 107) 561.
[164] s 72(1)(*a*) and (*b*) of the Companies Act (n 1).
[165] S 72(3) of the Companies Act (n 1) provides that the creation of a committee, delegation of any power to a committee, or action taken by a committee, does not alone satisfy or constitute compliance by a director with the required duty of a director to the company, as set out in s 76 of the Act.
[166] In *Re Barings PLC (No 5)* [1999] 1 BCLC 433 (ChD) cited in Cassim (n 107) 561 where the court stated that "if directors delegate particular functions to those below them in the management chain, the exercise of the power of management does not absolve the director from the duty to supervise the discharge of the delegated functions".
[167] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited and Others* (n 24).
[168] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited and Others* (n 24) 9.

consider the duty of the directors to act in the best interests of the company. He indicated that King II set the standard for corporate governance and stated the following:

> "Practising sound corporate governance is essential for the well-being of a company and is in the best interests of the growth of this country's economy especially in attracting new investments. To this end the corporate community within South Africa has widely and almost uniformly accepted the findings and recommendations of the King Committee on Corporate Governance."[169]

Hussain J concluded that the directors had acted irresponsibly. The learned judge reached this conclusion by comparing the conduct of the respondent directors to the principles and recommended practices in King II. More recently in *South African Broadcasting Corporation Ltd v Mpofu*.[170] The court referred to the King II report in order to emphasise the importance of good corporate governance and the importance of values, such as integrity and constructive dialogue, for the board of directors to make effective decisions.[171]

It is evident that the Companies Act places significant duties on directors and the fact that directors have the power to appoint committees in order to lessen the burden on the board is noteworthy. However, in light of the incidents which occurred at the Marikana mine in 2012, it is necessary to briefly outline the facts, and ask whose responsibility it was to protect those affected by the incident. The facts of the Marikana incident, highlighted below, demonstrate poor delegation, a lack of board oversight (which was highlighted by the Farlam Commission report), which all points toward the need for improving corporate governance practices and ethical leadership in South Africa. The events at Marikana, and certain aspects of the Farlam Commission investigation, will be discussed below in order to illustrate the important role of a board of directors in managing and overseeing a company responsibly.

3.3 *The events at Marikana mine in August 2012*

3.3.1 Brief overview

Lonmin LLC is a mining company involved in mining activities at Western Platinum Limited (WPL) and Eastern Platinum Limited (EPL) within various mines owned by it, specifically

[169] (n 24) 9.
[170] [2009] 4 ALL SA 169 (GSJ).
[171] See (n 170) 31 where, Jajbhay J described the importance of integrity and good governance as follows: "[I]ntegrity is a key principle underpinning good corporate governance. Put clearly, good corporate governance is based on a clear code of ethical behavior and personal integrity exercised by the board."

including the mine at Marikana.[172] On 12 August 2012, thirty-six striking miners were killed at Marikana mine, while approximately eighty miners were injured in the violence which ensued between the South African Police Services and the striking mine workers.[173] The violence arose due to unresolved labour and trade union disputes which escalated and resulted in the intervention by the South African Police Services.[174]

For the purposes of this study, only limited aspects of the scope of the Commission terms of reference related to Lonmin's conduct and its housing obligations (as set out in the social and labour plan) will be discussed, in order to consider the role of the board of directors in this instance.[175] It is important to acknowledge that the Farlam Commission was not established as a court of law, but as a quasi-judicial body authorised to assess and investigate the factual issues that occurred.[176] Consequently, the Commission did not analyse the facts from a company law perspective in terms of the Companies Act. [177]

3.4 *The Farlam Commission report*

3.4.1 Introduction

The events at Marikana attracted a great deal of attention and outrage, both in South Africa and abroad.[178] In response to this public outrage the President of South Africa appointed a Commission of Inquiry in terms of section 84(2)(*f*) of the Constitution to investigate the events that took place at the Marikana mine.[179]

Judge Farlam was appointed as the Chairperson and consequently the Commission was known as the Farlam Commission (hereafter referred to as "The Commission").[180] The mandate of the Commission was extensive and included conducting an inquiry and the power to make findings and recommendations about the conduct of Lonmin and various role players, such as the South

[172] Bruce "Summary and analysis of the report of the Marikana Commission of Inquiry" 2015 prepared for the Council for the advancement of the South African Constitution (CASAC) 5. https://www.google.ae/search?q=david+bruce+Summary+and+analysis+of+the+report+of+the+Marikana&oq=david+bruce+Summary+and+analysis+of+the+report+of+the+Marikana&aqs=chrome..69i57.117789j0j8&sourceid=chrome&ie=UTF-8 (12-12-2017).
[173] Bruce (n 173) 10, describes the fact that recruitment practices to obtain cheap labour to work in the mines led to exploitation of the workers and massive job losses, "the use of tear gas and finally real bullets".
[174] The facts are well described in Bruce (n 173). Only certain key aspects are highlighted for purposes of this study.
[175] See Marikana Commission of Inquiry (n 38) ch 19 and 24 of the Farlam Commission Report 522.
[176] Marikana Commission of Inquiry (n 38) 23.
[177] Marikana Commission of Inquiry (n 38) 20.
[178] Bruce (n 173) above 8.
[179] Bruce (n 173) above 8.
[180] Marikana Commission of Inquiry (n 38) 3.

African Police services, in the tragic events that occurred.[181] For purposes of this study, the discussion will be limited to considering the findings related to Lonmin's conduct.[182]

The Commission was required to investigate, make findings, report on and make recommendations concerning the following issues:

> "The conduct of Lonmin in particular: Whether it by act or omission, created an environment which was conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct."[183]

3.4.2 The Commission's findings

This discussion will only highlight two findings within the Commission's report: namely, findings two and three.

Finding two of the Commission's report discovered that Lonmin had failed to comply with housing obligations indicated in the Social and Labour Plan, and in so doing, created "an environment conducive to tension, labour unrest, disunity amongst its employees".[184] The report also stated that the "economic and social conditions in which the workers at Lonmin and other mines lived also need to be understood as important 'background' factors to the conflict and violence".[185]

The Commission revealed that the living conditions surrounding the Lonmin mine shafts were "appalling and squalid" since Lonmin had failed to provide the basic services which would have made the environment habitable.[186]

Finding three of the Commission's report discovered that Lonmin had failed to provide housing and, consequently, the poor living conditions of the workers had played a role in the violent strike. The Commission concluded that:

> "Lonmin created an environment conducive to the creation of tension and labour unrest by failing to comply with its housing obligations as required by its Social and Labour Plans on the strength of which it converted its rights."[187]

[181] Bruce (n 173) 8 and Marikana Commission of Inquiry (n 38).
[182] Marikana Commission of Inquiry (n 38) 2 .
[183] Marikana Commission of Inquiry (n 38) chapter 24 522-542.
[184] Marikana Commission of Inquiry (n 38) 522.
[185] Bruce (n 173) 13.
[186] Marikana Commission of Inquiry (n 38) 528.
[187] Marikana Commission of Inquiry (n 38) 557.

During the investigation, a Lonmin representative conceded that the company "would not easily build a relationship of trust with its workers as long as they were forced to live in squalid conditions on its doorstep".[188]

In accordance with the requirements of the Mineral and Petroleum Resources Development Act,[189] Lonmin had submitted a joint social and labour plan for WPL and EPL to the Department of Mineral Resources to have its old order rights converted into mining rights.[190]

In the social and labour plan, Lonmin had committed itself to phasing out all existing single sex hostels and to replace them with improved bachelor or family units and that an additional 5500 houses would be built to provide improved worker accommodation.[191]

In the Commission's report, it was stated that Lonmin's housing obligation as described in the social and labour plan was, in fact, a financing arrangement in terms of which Lonmin merely arranged mortgage bonds with financial institutions to enable workers to borrow funds from the commercial banks to finance the building of their houses.[192] Instead of building the agreed 5500 houses at Western Platinum Mine (WPL) and Eastern Platinum Mine (EPL), Lonmin only built three houses.[193] During the Commission's investigation, evidence was submitted that, for the period 2007 to 2011, Lonmin had failed to allocate the R665 million budget for housing and instead had declared and paid dividends of USD 607 million.[194] Over and above that, more than R1.3 billion was paid in marketing commission payments to Lonmin PLC.[195]

3.5 *The role of the Lonmin board of directors*

The Commission was required to investigate whether Mr Cyril Rhamaphosa was responsible for authorising the deaths of the striking workers.[196] At the time of the Marikana incident he

[188] Marikana Commission of Inquiry (n 38) 528.
[189] The Mineral and Petroleum Resources Development Act 28 of 2002. (MPRDA) For purposes of this study, this discussion is limited to a consideration of relevant legislation in order to provide context for the discussion of the Marikana events that transpired in August 2012.
[190] S 23(1) and s 25 (2)(*f*) and (*h*) of The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) requires mining companies to develop and submit social and labour plans to the Department of Minerals Resources and an annual report. In accordance with the MPRDA, the Department of Mineral Resources requires mining companies to submit annual social and labour plans for the approval and granting of mining rights. Reg 42 of the MPRDA states that a social and labour plan must accompany an application for mining or production rights and is supported by the provisions of the annual industry Mining Charter.
[191] Marikana Commission of Inquiry (n 38) 526 to 534.
[192] Marikana Commission of Inquiry (n 38) 529.
[193] Marikana Commission of Inquiry (n 38) 527.
[194] Marikana Commission of Inquiry (n 38) 532.
[195] Marikana Commission of Inquiry (n 38) 538.
[196] Marikana Commission of Inquiry (n 38) 411.

was appointed as a non-executive director of the Lonmin board.[197] The Commission was required to investigate the allegation that Mr Rhamaphosa was responsible for authorising the massacre.[198] The Commission rejected the allegation that Mr Rhamaphosa was responsible for the authorisation of the violent police action. However, the Commission made some useful observations relating to the standard of duty and care expected of a non-executive director.[199] The Commission concluded that the Lonmin management "did not respond adequately to the violent conflictual situation, which had arisen".[200] The Commission's findings makes it necessary to consider whether the Lonmin directors may have breached the duty of care and skill and fiduciary duties required by the Companies Act.[201]

The Commission did not, however, focus on director liability, common law principles of company law or the Act itself. The events at Marikana mine in 2012 triggers the question, how a court would have interpreted the facts described above. A brief discussion is set out below, in order to consider the conduct of Lonmin's board of directors and its management, based only on the information set out in the Commission's report. A detailed discussion of director liability, however, is a complex issue and is beyond the scope of this dissertation.

As discussed above, the court would have considered all the facts to assess the standard of conduct of the board of directors and the other prescribed officers. The factors that would be worthy of consideration in the Marikana mine scenario would include, for example, the failure of the board of directors to oversee its management in order to ensure that steps were taken to comply with the commitments made by the company in the social and labour plan, as is required by the MPRDA. Other factors could include the squalid working conditions of the workers, as well as the experience of the directors and any specialised knowledge and skills they may possess. Traditionally, courts do not lightly interfere with the decisions made by the

[197] Marikana Commission of Inquiry (n 38) 430.
[198] Marikana Commission of Inquiry (n 38) 431.
[199] Marikana Commission of Inquiry (n 38) 431.The Commission agreed with the submission made in the heads of argument that Mr Rhamaphosa, in his capacity as a non-executive director, was "insufficiently attentive" especially given his specialised knowledge, qualifications and experience in trade union and labour law matters. Accordingly, the Commission stated that, in his capacity as a non-executive director, he should have "appreciated the need for urgent action to address the underlying labour dispute and he should have intervened actively to ensure that management took such action". Also see *Fisheries Development Corporation of SA Ltd v Jorgensen Fisheries development of SA Ltd v AWJ Investments (Pty) Ltd* 1980 4 SA 156 (W) 165 for the distinction between non-executive and executive directors cited in Cassim see (n 107) 478 above, where mention is made of the disadvantages faced by non-executive directors, including capabilities to monitor the actions and decisions of management since they are only connected to the company on a part time basis.
[200] Marikana Commission of Inquiry (n 38) 431.
[201] s 76 of the Companies Act (n 1).

board of directors of a company.[202] This traditional approach, laid down in *Re Smith & Fawcett Ltd*[203], is based on the fact that it is the duty of the directors to make honest decisions, in good faith and in the best interests of the company.[204] This means that courts will not "try to act as a supervisory board over directors' decisions that are honestly arrived at within the powers of their management".[205] However, given some recent judgments that have been discussed above, wherein directors did not exhibit ethical leadership with regard to the company, the courts have stated that boards of directors are required to be accountable and responsible in order to ensure that good corporate governance is implemented across the company. The importance of corporate social responsibility was stressed by Hussain J in *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company*[206] where he referred to King II to emphasise that:

> "a well-managed company will be aware of and respond to social issues by placing a high priority on ethical standards. A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environment and human rights issues."[207]

As argued above in chapter two, a company should always conduct its business to promote compliance with the Bill of Rights. The Lonmin board was legally bound to comply with the commitments previously made by the company regarding housing, and the board of directors therefore had the obligation to respect the rights of the workers and to improve their work and housing conditions.[208] As discussed above, the court would measure the conduct of directors and prescribed officers, according to the requirements of the Bill of Rights, applicable legislation and standards of good governance set out in the King Codes. Legislation that incorporates corporate social responsibility, specifically applicable to the mining industry, is briefly discussed below.

3.6 *The importance of corporate social responsibility*

In South Africa, laws and policies consistent with the Constitution and Bill of Rights have been adopted "to shield communities against the heft of mining companies".[209] Researchers have

[202] *Re Smith & Fawcett Ltd* [1942] Ch 304 at 306 cited in Cassim (n 107) 524.
[203] [1942] Ch 304 at 306 cited in Cassim (n 107) at 306.
[204] [1942] Ch 304 at 306 cited in Cassim (n 107) at 306.
[205] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832 cited in Cassim (n 107) 524.
[206] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited and Others* (n 24).
[207] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited and Others* (n 24) 9.
[208] Marikana Commission of Inquiry (n 38) 527 and 534.
[209] Kamga "Reflections on how to address the violations of human rights by extractive industries in Africa: a comparative analysis of Nigeria and South Africa" 2014 *PER* http://dx.org/10.4314/pelj.v17iv1.11 474 (06-05-2018).

highlighted business practices in the mining industry in South Africa which illustrates the need for corporate social responsibility.[210] The purpose of adopting the Broad-Based Socio Economic Empowerment Charter (Mining Charter) is to ensure that the historical racial inequalities of the past, specifically in the context of the mining industry, are addressed in order to facilitate equitable access to, and sustainable development of, South Africa's mineral resources.[211] This was explained in 2004 in the Mining Charter as requiring mining companies:

> "to implement measures to improve the standards of housing and living conditions for mineworkers, prevent or mitigate adverse environmental impacts, and provide for the safe storage and disposal of residual waste and process residues."[212]

In 2010, the Department of Mineral Resources issued guidelines for the development and implementation of social and labour plans, supported by the provisions of an annual Mining Charter.[213] The Guidelines set out the objectives of social and labour plans, which are to promote economic growth, employment and to expand the existing skills of the workforce to advance the social and economic welfare of all South Africans.[214] According to the Guidelines, it is a key objective that mining companies contribute toward socio-economic development in the areas where they conduct mining activities and where labour is sourced.[215]

The events that occurred at Marikana, and the subsequent findings of the Farlam Commission report, highlight the importance of accountability and the role of the board of directors in a company. In addition, it also highlights the need for corporate social responsibility to ensure that company directors promote compliance with the Bill of Rights.[216] These events therefore serve to illustrate the importance of effective corporate governance structures and inclusive stakeholder management by a board of directors. The Marikana tragedy demonstrates that human rights violations and unfair labour practices need to be managed and monitored by the board of directors. This case study demonstrates the important role in "human rights realisation" required of social and ethics committees. However, in order for the social and ethics committees' optimal functioning, the Companies Act should be amended to ensure that the focus of the mandate of these committees is corporate social responsibility, which primarily

[210] Kamga (n 207) 489, Kamga refers to Benchmark Foundation research which focuses on business practices in the mining industry in South Africa which "create and/or exacerbate poverty and degrade the environment and constitute violations of human rights and safety resulting in poor living conditions and human rights violations".
[211] Kamga (n 207) 489.
[212] clauses 2.7 and 2.8 of the Mining Charter of 2004 cited in Kamga (n 206) 474.
[213] Kamga (n 207) 474 and Department of Mineral Resources *Revised Social and Labour Guidelines* (2010).
[214] Kamga (n 207) 474.
[215] Kamga (n 207) 478.
[216] Reference to Bilchitz (n 66) discussed in ch 5.

involves supporting the board in overseeing that company activities do not violate the Bill of Rights.[217] This is necessary since companies in South Africa are required to comply with the obligations created in terms of the Constitution and section 7 of the Companies Act.[218]

Social and ethics committees should play an imperative role in monitoring the ethical nature of company culture in order to ensure that the company meets societal expectations by demonstrating ethical leadership and a "social conscience" in the manner in which business is conducted.[219] The manner in which the Act provides for the functioning of social and ethics committees will now be discussed below.

[217] Gwanyanya (n 15) 3103 where Gwanyanya explains the meaning of the "realisation of human rights responsibilities" as "referring to the need for companies to become conscious of or aware of the need to protect against human rights violations in all their activities".
[218] Gwanyanya (n 15) 3103.
[219] Havenga "The social and ethics committee in South African law" 2015 *THRHR* 285.

CHAPTER 4: SOCIAL AND ETHICS COMMITTEES IN TERMS OF THE COMPANIES ACT 71 OF 2008

4.1 The role of social and ethics committees

As was mentioned previously, the Companies Act introduced key changes to ensure that company law adapted to the Constitution and the Bill of Rights and the requirements of modern corporate law trends.[220] Changes made to South African corporate law in terms of the Act include the requirement that certain South African companies must establish a social and ethics committee.[221] Social and ethics committees have been described as a "corporate governance mechanism" and as an important "invention" of the new Act, with the potential to improve corporate accountability, oversight and responsibility in South African companies.[222]

The Companies Act contains specific provisions relating to Social and Ethics Committees.[223] Section 72(4) - (10) of the Act, as well as regulation 43, set out the provisions regarding social and ethics committees (hereafter "the committee(s)"), including the mandatory requirements to establish the committee, its composition and powers and functions. An overview of these provisions is provided below, before delving into the shortfalls of the Act.[224]

4.2 Provisions of the 2008 Companies Act

4.2.1 Section 72(4) - (10)

In terms of section 72(4) of the Act, the Minster has the power to issue regulations in terms of which companies are mandated to establish social and ethics committees.[225] The fact that the Minister of Trade and Industry has the power to prescribe that certain companies must establish a social and ethics committee is an indication of the importance of corporate social responsibility.[226] In addition, the Act provides that the Minister may prescribe the functions to be performed by the committee, as well as the rules governing the composition and conduct of social and ethics committees.[227]

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[220] Cassim (n 107) 3-4.
[221] Companies Act (n 1) the Companies Act where reg 43(1) states that social and ethics committees are required by (a) every state owned company; (b) every listed company and (c) any other company that has in any two of the previous five years, scored above 500 points in terms of reg 26(2).
[222] Botha (n 5) 583.
[223] See s 72(4) - (10) of the Act; Companies Act (n 1).
[224] Companies Act (n 1) reg 43(1).
[225] Companies Act (n 1) s 72(4).
[226] Kloppers (n 151) 168.
[227] s 72(4)(*b*) and (*c*) in the Companies Act (n 1).

Section 72(5) provides that the Companies Tribunal may exercise its discretion to exempt the establishment of a social and ethics committee where it is shown that other structures within the company exist to perform the same social and ethics committee functions. A subsidiary company may, may for example, elect not to establish a social and ethics committee where it has been established at the Group level.[228] When exercising the power to grant such exemptions, the Companies Tribunal must establish:

> "if it is not reasonably necessary in the public interest to require the company, to have a social and ethics committee having regard to the nature and extent of the activities of the company."[229]

Therefore, it is evident that there are exceptions to the rule and this must be exercised with caution when exempting certain companies from such committees.

Furthermore, section 72(8) of the Act confers specific powers on the committee to ensure that the committee has access to information that is held by directors, prescribed officers, or any employee of the company, which is necessary for the committee to perform its mandatory functions.[230] Section 72(9) also allows the committee to seek professional advice – the costs or fees of any required consultant must be paid by the company.[231]

4.2.2 Regulation 43 of the Act

Academic writers have welcomed the requirements of the Act for companies to appoint a social and ethics committee, describing it as evidence of the application of the enlightened shareholder value approach and corporate social responsibility.[232] In 2011, the Minister promulgated regulation 43 to identify the categories of companies required to establish social and ethics committees.[233]

[228] Companies Act (n 1) s 72(5).
[229] Companies Act (n 1) s 72(5).
[230] s 72(8) of the Companies Act (n 1) provides that social and ethics committees are entitled to (a) require from any director or prescribed officer of the company any information or explanation necessary for the performance of the committee's functions; (b) request from any employee of the company any information or explanation necessary for the performance of the committee functions; (c) attend , receive all notices and other shareholder meeting related communications (d) and (e) be heard at any general shareholders meeting on any part of the business meeting that concerns the committee functions.
[231] Companies Act (n 1) s 72(9).
[232] Cassim (n 107) 517, for a discussion and refer to ch 2 above.
[233] Cassim (n 107) 459. Reg 26(2) of the Act (n1) sets out the requirement that every company must calculate its public interest score for purposes of regulation 43(1), which will depend on factors such as annual turnover and workforce size.

Regulation 43(1) of the Act, states that the appointment of a social and ethics committee is a mandatory requirement for all publicly listed companies, state-owned companies and any other company that has a public interest score that exceeds 500 points, in any two year period.[234] Regulation 26 sets out the calculation of the public interest score to determine "whether a company must comply with enhanced accountability requirements based on its social and economic impact".[235]

As far as the composition of these committees are concerned, regulation 43(4) provides that the social and ethics committee should comprise of not less than three directors, prescribed officers of the company at least one of whom must be a director who is not involved in the day-to-day affairs of the company's business and must not have been so involved for the previous three financial years.[236]

With regard to the functions of these committees, regulation 43(5) provides that the social and ethics committee has compliance monitoring functions and, in addition, the committee has reporting functions to both shareholders and the board of directors.[237] Furthermore, in terms of regulation 43(5)(*a*), the social and ethics committee is required to monitor whether a company's activities comply with legislation, other legal rules or best practice codes pertaining to five focus areas namely, social and economic development,[238] good corporate citizenship,[239]

[234] Cassim (n 107) 460. The Minister may exercise discretion to require any category of company to establish a social and ethics committee if "it is desirable in the public interest, having regard to either annual turnover and workforce size of the companies or to the nature and extent of the activities of such companies".
[235] In addition to reg 26 and reg 43 of the Companies Act (n 1), the calculation of public interest scores is required in various other unrelated contexts such as to determine the applicable financial reporting standards to apply for both profit and non-profit companies and regulation 127 to distinguish large, medium and small companies for purposes of initiating business rescue proceedings.
[236] Companies Act (n 1) reg 43(4).
[237] Companies Act (n 1) reg 43(5) (*a*), (*b*) and (*c*).
[238] Reg 43(5)(*a*)(i) social and economic development includes the company's standing in terms of goals of (aa) the 10 principles set out in the United Nations Global Compact Principles; (bb) the OECD recommendations regarding corruption (cc) the Employment Equity Act and (dd) the Broad Based Black Economic Empowerment Act.
[239] Reg 43(5)(*a*)(ii) good corporate citizenship including the company's (aa) promotion of equality, prevention of unfair discrimination and reduction of corruption; (bb) contribution to the development of communities in which its activities are predominantly conducted or within its products or services are predominantly marketed and (cc) record of sponsorship, donations and charitable giving.

environment, health and public safety,[240] consumer relationships[241] and labour and employment.[242]

The social and ethics committee reporting function to the board requires that it brings matters within its mandate to the attention of the board as the occasion requires.[243] Finally, the committee has a reporting function to shareholders in that the committee is required to report, through one of its members, to the shareholders at the company's annual general meeting on matters within its mandate.[244]

It is evident that these provisions of the 2008 Act provide social and ethics committees with wide-ranging powers. The role of these committees is thus vital to the proper functioning of any large company. However, these provisions are not proving to be effective in practice.[245] The deficiencies of the Act will now be discussed.

4.3 *The deficiencies of the provisions relating to social and ethics committees*

In light of the discussion of the Marikana events in chapter three of this study, it is evident that the provisions relating to social and ethics committees may not be as far reaching as one would have hoped. In 2015, the Trialogue/ EY Survey was conducted and this survey highlighted how South African companies have responded to the Companies Act requirement of establishing social and ethics committees.[246] This survey illustrated some useful observations regarding the deficiencies identified in the Act, which will be discussed below.[247]

4.3.1 The 2015 Trialogue/ EY Survey

As was mentioned above, the Trialogue/ EY Survey was conducted in 2015 with a sample of twelve companies listed on the Johannesburg Securities Exchange (JSE).[248] These companies all have social and ethics committees and are carrying on business across various sectors in

[240] Reg 43(5)(*a*)(iii) the environment, health and public safety, including the impact of the company's activities and of its products or services.
[241] Reg 43(5)(*a*)(iv) consumer relationships, including the company's advertising, public relations, and compliance with consumer protection laws.
[242] Reg 43(5)(*a*) labour and employment including (aa) the company's standing in terms of the International Labour Organisation Protocol on decent work and working condition; and (bb) the company's employment relationships and its contribution toward the educational development of its employees.
[243] Reg 43(5)(*b*) of the Companies Act (n 1).
[244] Reg 43(5)(*c*) of the Companies Act (n 1).
[245] Esser (n 32) 227 remark that the functions of the social and ethics committee are very wide and the Act has not provided clear guidance, "no specific terms of reference are provided in the Act (n 1).
[246] Rockey and Boshoff (n 4).
[247] It is recognised that further research in this regard is required, especially since the mandatory establishment of social and ethics committees is a new development.
[248] Rockey and Boshoff (n 4).

South Africa.[249] The data was obtained through interviews that were conducted with the chairpersons of the respective social and ethics committees or company secretaries.[250] Many of the observations made by the respondents in the survey, echo some of the deficiencies of the Act which have been identified by various academic writers.[251] These deficiencies are discussed below. The results of the survey indicated that the establishment of social and ethics committees raise awareness of sustainability and non-financial issues in the companies concerned.[252] A few of the key observations of the survey were that the management of environmental, social and governance (ESG) matters within the company were important in order to "develop sustainable business practices" and that stakeholder relationships were increasingly becoming critical to a company's image.[253] In addition, respondents in the survey indicated that stakeholder communication is an important aspect which needs to be managed within the company.[254] Respondents also recognised that independent committee members are important in adding value to and ensuring effective committee functioning.[255]

The specific issues identified by the companies which undermine the effectiveness of social and ethics committees are discussed below.

4.3.2 Specific deficiencies identified in the survey

The survey showed that the companies found a few deficiencies in the application of the relevant sections relating to social and ethics committees. Consequently, it is necessary to identify some of the Act's shortcomings (which have been highlighted by various academic writers) which undermine the effectiveness of social and ethics committees. The first issue concerns the lack of conceptual meanings and ambiguity of concepts in the Act itself. The

[249] Rocky and Boshoff (n 4).

[250] Rocky and Boshoff (n 4), where it is recognised that the generalisation of these results is limited by the size of the sample and further research is required. Accordingly, the results may have varied if a quantitative study is performed with a large sample and the survey was completed by the members of the committee.

[251] For example Cassim above (n 107); Kloppers (n 150); Esser (n 116) and (n 125).

[252] See Rockey and Boshoff (n 4).

[253] See King IV (n 3) 18, for a definition of sustainable development, which includes the definitionn of the United Nations, set out in the "Report of the World Commission on environment and Development : Our Common Future (1987)as "In general, development that meets the needs of the present without compromising the ability of future generations to meet their needs". In addition King IV (n 3) 18 continues as follows: "[A]t the level of organisations' participation in sustainable development, it means organisations intentionally interacting with, and responding to, the opportunities and challenges presented by the dynamic system of the triple context in which the organisation operates and the capitals that the organization uses and affects, with the aim to achieve the creation of value over time. Sustainable development is not confined to individual matters, such as the economic viability of the organization, the natural environment or corporate social responsibility. Rather, it refers to an integrated approach that includes these and other considerations as represented by the triple context (see "triple context") and the capitals (see also capitals)".

[254] Rockey and Boshoff (n 4).

[255] Rockey and Boshoff (n 4).

second issue relates to the legal status of social and ethics committees in a company. Thirdly, there appears to be concerns in terms of the composition of these committees and finally, problems exist concerning the compliance driven approach of these committees. These will now be discussed below.

4.3.2.1 Lack of defined terminology

The drafters of the Act attempted to rely on the usage of plain English to make the meaning of the Act accessible to all.[256] Certain terminology used in the 2008 Act, specifically in regulation 43, lacks certainty and it may be useful to provide definitions of certain concepts for purposes of clarity. For example, the phrase "social and economic development" is not defined in the Act.[257] The only indicator of the meaning intended by the legislature is from the specific legislation mentioned in regulation 43, namely the Employment Equity Act[258] and the Broad Based Black Economic Empowerment Act.[259]

The phrase "in the public interest" has not been specifically defined in the 2008 Act, but is used throughout the Act in different contexts, also with reference to the public interest score.[260] For purposes of social and ethics committees, the Act has applied the term "in the public interest" as a discretionary criterion in the following two separate circumstances: firstly, to assist the Minister to exercise discretion as to whether or not to proclaim that a specific category of company is required to establish social and ethics committees.[261] Secondly, the term is also applied by the Companies Tribunal, to exercise discretion to assess whether a company should be exempted from establishing a social and ethics committee.[262]

The lack of a definition of the phrase "in the public interest" creates uncertainty and may have an impact on the mandate and purpose of the committee.[263] The court considered the meaning of the concept "in the public interest" in the case of *Ex parte President of the Conference of the Methodist Church of Southern Africa NO in re William Marsh Will Trust*[264] and acknowledged that the term "public interest" is difficult to define. Furthermore, the court

[256] See Mongalo (n 94) with reference to the chief drafter of the Act's aim to use plain English in the Act.
[257] Esser (n 32) 228.
[258] Employment Equity Act 55 of 1998.
[259] For example Broad Based Black Economic Empowerment Act 53 of 2003 refers to "corporate social investment" whereas regulation 43(5)(*a*) includes "record of sponsorship, donations and charitable giving".
[260] s 72(4)(*b*) of the Companies Act (n 1).
[261] s 72(4)(*a*) of the Companies Act (n 1).
[262] Grounds for exemption in s 72 (5) of the Act extent of company activities or the company has a formal mechanism that performs the functions required of the social and ethics committee.
[263] Delport and Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) 285.
[264] 1993 2 SA 697 (C) cited in Delport and Vorster (n 264) 285.

indicated that a "broad common sense view" should be adopted.[265] Regulation 43 is modelled on the Bill of Rights and may be compared with the socio-economic rights entrenched in the Bill of Rights, such as labour fairness.[266] Delport is of the view that regulation 43(5) indicates that the intention of the legislature was to include the interests of the public in the mandate of social and ethics committees.[267]

4.3.2.2 Legal status of the committee within the company

Another deficiency is that the Companies Act has not sufficiently clarified the status of the social and ethics committee in relation to the company, the board and the interests of the public.[268] The opinions of academic writers differ on the interpretation of regulation 43 and the position and legal status of the social and ethics committee in general.[269]

In terms of section 72(1)(*a*) and (*b*) of the Act, the board may delegate any of its powers and authority to various board committees. The purpose of delegation is to provide support to the directors in managing the company, that is, unless the Memorandum of Incorporation provides otherwise.[270] Currently there is uncertainty as to whether the social and ethics committee is a statutory (company) committee, deriving its powers from the Companies Act, or whether it is a board committee acting on delegated authority from the board.[271] Delport and Vorster, for example, therefore rightly point out that "the question remains whether the social and ethics committee is a board committee or a company committee?"[272] This is significant as the purpose and mandate of social and ethics committees will vary depending on whether it is classified as a board committee or a separate statutory committee. In addition, the liability of the members of the committee in terms of section 76 of the Act will also differ.[273]

[265] See (n 265) cited and discussed in Delport and Vorster (n 264) 285.
[266] Delport and Vorster (n 264) 285.
[267] Delport and Vorster (n 264) 285.
[268] Esser (n 32) 223 and 224.
[269] Delport and Vorster (n 264) 285, where it is argued that the social and ethics committee is a company committee. For a different view, see Esser (n 116) 224, where reference is made to Joubert's interpretation that the social and ethics committee is a board committee "or at best a hybrid committee". He makes reference to reg 43(2) and (3) which he asserts should be read together to mean that the board must have the power to appoint members of the social and ethics committee.
[270] s 72 of the Companies Act (n 1) provides that, to the extent that the MOI provides otherwise, the board of a company may appoint any number of committees of directors and delegate to any committee with any of the authority of the board.
[271] Esser (n 32) 224.
[272] Delport and Vorster (n 264) 284.
[273] Esser (n 32) 224, where it is explained that, if the committee is a board committee the board may delegate duties to the committee not mentioned in reg 43, whereas if the committee is a company committee, then its functions are restricted to the duties set out in reg 43(5) of the Act.

The board is ultimately responsible for corporate governance in terms of section 66(1) of the Act, and is responsible for managing the business and affairs of the company.[274] Section 72(3) to (5) of the Act states that the board may delegate certain functions to committees but it is the board that is still ultimately accountable.[275] The significance of this distinction is that, if the social and ethics committee is a board committee it acts on the authority delegated by the board. In such a case, committee members would be bound by the standards of conduct in section 76(1)(*a*) and (*b*) of the Act and would not be in a position to undermine the decisions of the board of directors.[276]

4.3.2.3 Composition of the committee: independence and skill requirements

When contrasted with the membership requirements of the audit committee, the social and ethics committee has less strict membership requirements.[277] Only one independence criterion is applied to the social and ethics committee membership.[278] The social and ethics committee is only required to have at least one director who is independent, in that he or she is not involved in the day-to day management of the company's business, and must not have been for the previous three financial years prior to his/her appointment to the committee.[279] The importance of employee representation and membership should also be considered in order to provide the committee with information about the workplace from the perspective of the employees.[280]

The importance of independence for composition and effective functioning of the committee, is discussed and motivated below under "improvement recommendations" in chapter five of the study.

[274] Esser (n 32) 224 and 225, reference is made to the shift of power from the shareholders to the board of directors and the effect of section 66(1) of the Act, where the board of directors has the ultimate powers in the company, and represent "the company" subject to the provisions of the MOI.
[275] s 72(3) of the Companies Act (n1) discussed above which provides that the delegation of any power or action taken by any committee, does not alone satisfy the conduct standards for directors to comply with the provision in s 76. If the social and ethics committee is a company committee, it would operate in a way than undermines the implementation of a combined assurance model, where all assurance providers collaborate to manage risk across the company. Combined assurance is defined in King IV (n 3) as follows it is a model that: "that incorporates and optimises all assurance services and functions, so that taken as a whole, these enable an effective control environment; support the integrity of information used for internal decision making by management, the governing body and its committees; and support the integrity of the organisation's external reports."
[276] In terms of s 76 of the Companies Act (n 1), directors, prescribed officers and members of board committee have fiduciary duties and duty of care to act in good faith and in the best interests of the company.
[277] s 94 Companies Act (n 1).
[278] s 72(4) of the Companies Act (n 1) provides that at least one of the three directors, who is not involved in the day-to-day management of the company's business, and must not have been so involved during the previous three financial years.
[279] s 72(4) of the Companies Act (n 1).
[280] Botha (n 33) 48 where Botha describes the fact that employees are not represented as members of the committee as: "a lost opportunity by the drafters of the Companies Act, as representation would have provided employees with the opportunity to input on issues such as health and safety and labour and employment".

4.3.2.4 Compliance driven approach

The Constitution, and specifically the Bill of Rights, is the foundation for companies to conduct business in South Africa. Consequently, it is surprising that regulation 43 does not make reference to the Constitution and the Bill of Rights which enshrines binding obligations for companies.[281] Katzew refers to various human rights violations in terms of which companies could have certain obligations, which she refers to as "negative obligations". [282]These "negative obligations" can arise through the infringement of fundamental human rights in the form of "abusive labour practices or material environmental damage".[283] In addition, Liebenberg indicates that companies have positive obligations relating to their impact on the socio-economic rights of the community.[284] Academic writers have also commented on the lack of clarity of regulation 43 and the fact that the Act has failed to clarify the committee's mandate, while also not linking its mandate to the Bill of Rights.[285]

In addition, it is an oversight that regulation 43 does not refer to King IV and other "more suitable national instruments which are aligned to international instruments such as the Guidance on Social Responsibility and the King Reports".[286] This is a noteworthy omission since South African courts have already adopted the King Reports and Codes in its judgments and, in so doing, have therefore elevated these principles into binding standards by which the conduct of directors will be assessed to determine their liability.[287]

The Broad-Based Black Economic Empowerment Act[288] (B-BBEE) is discussed below in order to demonstrate that the focus of the committee mandate should be corporate social responsibility, while the B-BBEE Act evidences the intention of the legislature to implement "mandatory corporate social responsibility in South Africa".[289]

4.3.2.5 B-BBEE Act

The B-BBEE Act [290] demonstrates the intention of the legislature to implement corporate social responsibility and to adopt "an all-inclusive approach whereby the important actors in

[281] Discussed in more detail in ch 2 of this study.
[282] Katzew (n 96) 696.
[283] Katzew (n 96) 696.
[284] Katzew (n 96) 696; Liebenberg "The application of socio-economic rights to private law" 2008 *TSAR* 464.
[285] Kloppers (n 151) 173.
[286] Kloppers (n 150) 173.
[287] In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited and Others* (n 24) 47.
[288] 53 of 1998.
[289] Sibanda "Weighing the cost of "BEE fronting on Best Practices of corporate governance in South Africa" 2015 *Speculum Juris* 28.
[290] BBBEE Act (n 289).

corporate governance, namely directors, stakeholders and shareholders assume different responsibilities and act collectively to discourage the practice of fronting".[291] The lack of any reference to the role of the committee with regard to ethical oversight was identified in King IV as a deficiency which should be addressed.[292] This is so because ethical leadership and management is a major underlying component of corporate governance. In light of the name of the committee it could reasonably be expected that oversight of ethics would be included in the mandate of the committee.

The compliance monitoring function of the committee requires diverse skills – given the committee's extensive mandate in terms of regulation 43. [293]Unfortunately, the legislature has not provided any guidance with regard to a skills requirement for committee members, similar to regulation 42 in the Act. This regulation, for example, provides skills requirements for members of audit committees.[294] Rockey and Boshoff correctly state that oversight of compliance within a company is important and should be linked to a strategy to manage regulatory risks arising in the company's day-to-day business.[295] They also caution against an approach where the entire Acts are reviewed according to a checklist (which gives rise to a risk of cosmetic compliance) and a "tick box outcome" where the goal is to meet minimum requirements.[296]

[291] Sibanda (n 290) 25.
[292] Botha (n 5) 590 where he makes reference to Joubert's observation that reg 43 omitted to refer to "sustainable development" and "that the word "ethics" has only been used in the name of the committee, but that reg 43 (5) (a) is broad enough to include the oversight and management of ethics across the company.
[293] Kloppers (n 151) 183 where Kloppers considers the wide statutory mandate and knowledge required of the members of social and ethics committees and questions whether the "regulation does not overburden members".
[294] Companies Act (n 1) 458, reg 42 prescribes minimum qualification requirements and requires at least one-third of the members of a company's audit committee at any particular time to have academic qualifications, or experience in economics, law, corporate governance, finance, accounting, commerce, industry, public affairs or human resource management.
[295] Rockey and Boshoff (n 4) 23 where they describe that the social and ethics committee has an opportunity to explore how changes in the external environment translate into risks and opportunities for the business."
[296] King IV Report (n 3) 23, where it states that "[t]he importance of compliance oversight should not be discounted". See also Havenga (n 219) 290 Havenga cautions, that there is an "inherent danger to a mere 'box-ticking' approach which should be avoided.

CHAPTER 5: LEGISLATIVE REFORMS FOR SOCIAL AND ETHICS COMMITTEES

5.1 *Introduction*

The chapters above alluded to the fact that there is definitely a need for legislative reforms in terms of the existing provisions on social and ethics committees. As discussed above in chapter four, it is necessary to review the Act in order to address unclear terminology and the omission of important concepts such as "corporate social responsibility" and the meaning of public interest.[297] As was stated previously, the purpose of social and ethics committees should be linked to section 7 of the Act and the Bill of Rights. Based on the principles and recommended practices set out in King IV, the mandate of the committee needs to be reworked to clarify the role and relationship between the committee and the board, and specifically, the status of these committees as board committees.[298] Therefore, the current provisions of the 2008 Act need to be reformulated taking into account the supremacy of the Constitution and the Bill of Rights.[299] The first recommendation is to clarify the legal status of the committee and its relationship to the board of directors. Secondly, it is necessary to make corporate social responsibility the main focus of the committee's mandate. Thirdly, it may be useful for the legislature to consider the King IV reports and finally, the composition of the committee should include employee participation, while the independence of its members will play a vital role in the functioning of the committee.

5.2 *Legal status of the social and ethics committee*

As discussed, the oversight role of the board in relation to the social and ethics committees, as well as the joint reporting duties of the committee, needs to be clarified.[300] The Act should classify the social and ethics committee as a board committee, to enable it to support the board of directors, since it is accountable for ensuring that good governance is implemented across

[297] Delport and Vorster (n 264) 285, where for example, Delport mentions the contribution of the company as qualitative criteria and the economic development of the community in which it operates as demonstrating the public interest element.
[298] King IV (n 3) principle 8, which provides that 'the governing body should ensure that its arrangements for delegation within its own structures promote independent judgement, and assist with balance of power and the effective discharge of its duties" and recommended practice 69 "The responsibilities of the social and ethics committee should include its statutory duties and any other responsibilities delegated to it by the governing body"
[299] Ramnath (n 112) 106 describes the importance of the Bill of rights as, the "standard against which the company's private responsibilities (to its shareholders) are balanced with its social responsibilities to its stakeholders".
[300] Esser (n 116) 227, explain that having annual reporting responsibilities to shareholders, may indicate that the committee is actually a company committee.

the company.[301] Social and ethics committees have dual reporting responsibilities to both the board of directors and shareholders. The power of the shareholders to override any decisions made by the board is undermined by the fact that the shareholders are no longer the highest authority.[302] The effectiveness of the current dual reporting mechanism of the committee to both the board of directors and the shareholders in annual general meetings, still remains to be tested and will be determined by the willingness of the shareholders to exercise this oversight role.[303]

5.3 *Corporate social responsibility: the focus of the committee mandate*

The principal focus of the social and ethics committee mandate should be the oversight of the implementation of corporate social responsibility (CSR) across the company in order to ensure that the company acts as a responsible corporate citizen.[304] There is no universal definition for CSR since the concept is influenced by the unique historical, political and economic factors specific to a particular society.[305] Botha states that there are various meanings of CSR. These meanings differ depending on the context – especially whether CSR is used within the context of a developed or developing economy.[306] In addition, the concept of "corporate citizenship" is used with reference to companies because they operate in a particular society and consequently affect, and are affected by, the society where they conduct business.[307]

This study agrees with Kloppers that the Act should include a definition of CSR based on the definition referred to above in chapter three. This definition, however, should be adapted to incorporate the Bill of Rights.[308] Such a definition will set standards for the assessment of director fiduciary duties in order to balances the company's responsibilities toward shareholders, with respect for the socio-economic rights of other stakeholders such as employees.[309] The board of directors and prescribed officers should have the duty to ensure that the company operates in a responsible manner and should therefore also ensure that

[301] Esser (n 116) 224 and 225.
[302] Delport and Vorster (n 264) 284 and reg 43(5)(*c*).
[303] Delport and Vorster (n 264) 284 and reg 43(5)(*c*).
[304] King IV (n 3) and King II describe the characteristics of a good corporate citizen as "non-discriminatory, non-exploitative and responsible with regard to environmental and human rights".
[305] Kloppers *Improving land reform through CSR: a legal framework analysis* (2012 thesis NWU) 138.
[306] Kloppers (n 306) 138.
[307] King IV (n 3) 11 defined in King IV as: "[t]he recognition that the organisation is an integral part of the broader society in which it operates, affording the organization standing as a juristic person in that society with rights but also responsibilities and obligations. It is also the recognition that the broader society is the licensor of the organization".
[308] Kloppers (n 151) 167.
[309] Ramnath (n 112) 23 and also Botha (n 33) 13.

company activities are aligned with the Bill of Rights.[310] Bilchitz recommends that fiduciary duties, and the duty of care required of directors, prescribed officers and members of board committees set out in section 76(3)(*b*) of the Act, should be extended to protect against company activities that violate any human rights set out in the Bill of Rights.[311] In addition, Bilchitz recommends that section 15(6) of the Act be amended to ensure that the MOI binds the company to comply with the provisions of the Bill of Rights. These recommendations assist in addressing the risk of a board failing to take the necessary action and decisions in circumstances where company activities could result in human rights violations.[312] This risk may be addressed by ensuring that the focus of the committee mandate is on CSR in order to promote the Bill of Rights and responsible corporate citizenship.[313]

The Act should define CSR, as discussed above in chapter three.[314] It is important to distinguish CSR from corporate social investment or "charitable giving", as it is only these aspects which are included in the existing social and ethics committee mandate in the Act.[315] CSR is therefore clearly distinguishable from "corporate social investment" (CSI).[316] It is submitted that the legislature should provide a definition of CSR, as this study has set out above or as has been defined in King III, and this concept should be clearly distinguished from CSI.[317] Both of these definitions are necessary for legal certainty and to properly clarify the difference between CSR and CSI. As explained above, CSR is mandatory, whereas CSI is more flexible – companies may voluntarily elect any amount deemed appropriate for purposes of CSI.[318]

5.4 *King IV based committee mandate*

Academic writers recognise that effective corporate governance mechanisms are critical to ensuring effective CSR and accountability within the company. King IV is a useful point of reference for the legislature to consider when amending the Act and reworking the mandate of

[310] Bilchitz (n 66) 754.
[311] Bilchitz (n 66) 770.
[312] See ch 3 above for the discussion of the events at Marikana and the role of the board to illustrate that social and ethics committees should play an important role in "realizing corporate responsibilities".
[313] Miles and Jones "The prospects for corporate governance operating as a vehicle for social change in South Africa" 2009 *Deakin* LR 53.
[314] Kloppers (n 151) 167.
[315] Reg 43(5)(ii)(cc) provides that the committee has the function of monitoring "good corporate citizenship" and the company's "record of sponsorship, donations and charitable giving"..
[316] Kloppers (n 306) 138 where CSR is distinguished from CSI as follows: "CSR is used to refer to business responsibility towards its stakeholders and CSI will be viewed as the manifestation of CSR through CSI initiatives".
[317] King III defined corporate social responsibility in a similar manner as "the responsibility of the company for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that contributes to sustainable development, including health and welfare of society.
[318] Kloppers (n 306) 182.

the social and ethics committee. It is submitted that the legal status of the committee should be clarified as being a board committee, which will affect its role and relationship with the board of directors.[319]

The mandate of the social and ethics committee should be to support the board by monitoring the consequences of company activities and the extent to which these adversely affect the company's status as a responsible corporate citizen.[320] King IV requires that the monitoring function should be conducted against measurable targets in four key areas namely the workplace, the economy, society and the environment.[321] The functions of the social and ethics committee, which are set out in King IV, indicate clear functions for stakeholder management which could be incorporated into the reworked committee mandate. This could include identification and management of stakeholder risk as an integral aspect of risk management.[322] The success of the company requires its management to include stakeholder interests in company decision-making in order to ensure that the company demonstrates "corporate responsibility".[323] This "new" articulation of company management, sets up stakeholder management as a key function of the board. Furthermore, the social and ethics committee is well placed to support the board in identifying and managing the company's impact on the affected stakeholders, which will include the public, "the community" and "the environment".[324]

5.4 *The importance of the independence criteria*

The effective functioning of the social and ethics committee requires that its composition include members that are competent and contribute independent thinking to the deliberations of the committee. The committee composition requirements should be consistent with the audit

[319] King IV (n 3) 43, principle 3 "the organisation's responsible corporate citizenship efforts include compliance with the Constitution of South Africa (including the Bill of Rights), the law, leading standards and adherence to its own codes of conduct".
[320] King IV (n 3) 44.
[321] King IV (n 3) principle 3, recommended practice 14 (a) Workplace (including employment equity, fair remuneration and the safety, health, dignity and development of employees; (b) Economy (including economic transformation; prevention, detection and responses to fraud and corruption and responsible tax policy). (c) Society (including public health and safety; consumer protection; community development and protection of human rights) (d) Environment (including responsibilities in respect of pollution and waste disposal and protection of biodiversity.
[322] King IV (n 3) principle 16.
[323] Du Plessis (n 143) 52 refers to a consultation paper by the UK Department for business innovation and skills "Corporate responsibility: consultation paper (June 2013) 3" to explain the wider impact of corporate responsibility–" [t]he increasingly more acknowledged term for corporate social responsibility – is the responsibility of an organization for the impacts of its decisions and activities on society and the environment through transparent ethical behavior above and beyond its statutory requirements".
[324] Du Plessis (n 143) 52. Discussed above in ch 2.

committee requirements in terms of the Act.[325] Section 94(4)(*b*) of the Act, for example, prescribes independence criteria for members of the audit committee, which clearly indicates the importance of ensuring that the audit committee functions independently. These requirements include that at least three members of the committee should be independent non-executive directors.[326] Research conducted on audit committee effectiveness indicates that independent membership is positively correlated with the financial reporting process and audit committee effectiveness.[327] This is due to improved oversight by the committee, since independent directors from outside the company may provide greater objectivity and impartiality than existing management who often have vested personal interests which may affect their decision-making.[328] There is limited research as to the extent that independence would contribute to effective performance of an audit committee.[329] The inclusion of prescribed officers as members of committees assists in providing the committee with an "insider perspective" from within the business.[330] In order to improve stakeholder communication across the company, employees should be considered for committee membership.[331] The Farlam Commission report provides an example of poor stakeholder communication between management and employees, where employees returned to work after receiving a message from management that it was safe to do so.[332] However, this message was based on incorrect facts about the extent of the violence at the mine, endangering the lives of employees who returned to work when it was unsafe to do so. [333] In the light of this serious miscommunication, it may be argued that employee membership of committees would add value and improve stakeholder communication – providing a platform to voice the concerns of employees in the social and ethics committee. [334]

[325] s 94 of the Companies Act (n 1).
[326] s 94(2)(*b*) describes the independence criteria required for audit committee members as (i) not be involved in the day-to-day management of the company's business or have been so involved at any time during the previous financial year; (ii) a prescribed officer, or full time employee of the company or another related or inter-related, or have been such an officer or employee of the company or another related or inter-related company, or have been such an officer or employee at any time during the previous three financial years; (iii) a material supplier or customer of the company, such that a reasonable and informed third party would conclude in the circumstances that the integrity, impartiality or objectivity of that director is compromised by that relationship; or (iv) related to any person who falls within the criteria set out in (i), (ii) or (iii) above.
[327] Bronson "Are fully independent audit committees really necessary?" 2009 *J.Account.Public Policy* 268-269.
[328] Dixon-Fowler "The role of board environmental committees in corporate environmental performance" 2017 *Jbus* 423 -425.
[329] Bronson (n 328) 266.
[330] Bronson (n 328) 266.
[331] Botha (n 33) 48.
[332] Marikana Commission Inquiry (n 38) 475.
[333] Marikana Commission Inquiry (n 38) 475.
[334] Botha (n 33) 48.

Consistent with the provisions in the Companies Act regarding audit committees, the legislature should consider amending regulation 43(4) to increase the number of non-executive independent directors and introducing skill requirements to improve the effectiveness of the oversight function. Regulation 42, for example, prescribes that the members of audit committees have specific skills, qualifications and experience.[335] Ensuring that the members of the social and ethics committee have the required skills and experience is important and would assist the committee in its functions and carrying out its mandate in terms of regulation 43(5).

5.5 *Conclusion*

Social and ethics committees play a vital role in any large company and they assist the board of directors in useful ways. However, what is evident is that these committees can do far more in protecting the rights of various stakeholders within the company than is the case in terms of the current provisions. The current legislative provisions on social and ethics committees therefore require reform in light of the supremacy of the South African Constitution.

It is therefore submitted, that the social and ethics committee should be an effective corporate governance mechanism, responsible for the realisation of human rights and overseeing corporate social responsibility. The mandate of the social and ethics committee should focus on corporate social responsibility in order to support the board in a valuable manner. The tragic events that occurred at the Marikana Mine in 2012, demonstrate that social and ethics committees have an important role to play in supporting the board of directors in order to ensure that the company complies with the Bill of Rights and the Constitution. This support will lead to greater protection of the vulnerable.

[335] Havenga (n 119) 287.

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