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THE IMPACT OF THE PRIORITISATION OF SHAREHOLDER INTERESTS UNDER THE ENLIGHTENED SHAREHOLDER VALUE APPROACH ON INEQUALITY OF CORPORATE STAKEHOLDERS IN SOUTH AFRICA

by

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DECLARATION OF ORIGINALITY

I, the undersigned, **1381978** declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before any degree or examination in this or any other university.

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ABSTRACT

Poverty, inequality, and despair are the unfortunate truths for many South Africans. Industrial action seems to be the outlet of frustration, which has always been an expressional tool of exasperated South Africans to air their displeasure with social, economic, and political living conditions. Does the enlightened shareholder value approach share in the blame for such conditions? Does the Companies Act 71 of 2008 sufficiently provide for non-shareholder interests? Or are old company law beliefs and theories still ever-present?

This article will dare to uncover exactly that, to illustrate that the common law and by extension statutory law require companies to primarily consider shareholder interests in corporate decision-making. How although the enlightened shareholder value approach adopted by South Africa is a step forward, there is still preservation of the conventional corporate legal enforcement framework. The impact of enriching those who are already financially secure under this original framework has led to the continued impoverishment of other stakeholders i.e. employees, customers, and the communities in which companies operate in as a matter of corporate law. Additionally, an investigation into the practicality of the two-tier corporate system used in Germany and its applicability in South Africa will be conducted. The aim being to extract lessons from this system that could lead to corporate law reform locally. Finally, benefit corporation statutes will be scrutinized, predominantly their application and lack of in South Africa, where same could be a source of enforcement for non-shareholder constituencies.

From the outset, the author wishes to explain that the ambit of inequality, in so far as it is mentioned in the title of this piece, is reference to corporate stakeholders' inequality, rather than the general inequality that, although is a serious issue in South Africa, is not the main focus of this piece.

I. HISTORICAL AND CURRENT UNDERSTANDING OF THE CORPORATE LAW FRAMEWORK MODELS

"The principle that shareholders own the companies in which they invest—and are the ultimate bosses of those running them—is central to modern capitalism."[1]

- Arthur Levitt Jr

This is the conventional view still held by modern organizations, that the organisation operates chiefly to advance the interests of the group of shareholders, currently and in the future.[2] This stands in stark contrast to sustainability, where it is articulated that the company stands to serve greater means: shareholder profits, obviously, but also the environment and greater society at large. This approach is what has come to be known as shareholder primacy, and it continues to dominant even the modern corporate environment, and more specifically its perseverance lends to a difficulty faced for corporate law frameworks to take a sustainable route. It seems that sustainability and shareholder primacy are incompatible, and the interests of the relative parties largely collide over the long term.[3]

(a) The linkage between directorial duties and shareholder primacy originally

Under the shareholder primacy theory, directors ought to place shareholders and their potential returns first, striving to maximise share values and in doing so eschewing the interests of other corporate constituencies.[4] This assumption sets shareholders as the rightful beneficiaries of such directorial duties. Professor *Tshepo Mongalo* has asserted

[1] Arthur Levitt Jr, 'How to Boost Shareholder Democracy' WALL ST July (2008).
[2] Judd F. Sneirson, 'The History of Shareholder Primacy, from Adam Smith through the Rise of Financialism' in Beate Sjåfjell & Christopher M. Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (2019), 73 – 85. Cambridge University Press.
[3] D. Millon, "Two Models of Corporate Social Responsibility" (2011) 46 Wake Forest Law Review, 523.
[4] D. G. Smith, "The Shareholder Primacy Norm" (1988) 23 *Journal of Corporation Law*, 277.

that 'this unquestioned connection between the corporate legal enforcement framework and the conventional role of directorial duties is out of date and needs to change to reflect the reality of modern business'.[5] This is unsurprising when there has been a mistaken belief at common law that the group of capital providers were the possessors of the company.[6] This is especially prevalent in Anglo-American jurisdictions, where the term 'company', as it fits into the context of the 'best interests of the company' is in the exclusive prevalence of the group of shareholders.

Corporate laws acceptance of this perspective has led to an expectation on the part of shareholders to pressure directors to promote their short-term interests under the context of 'the best interests of the company'.[7] The peculiar aspect of this acceptance is the point provided by *Judd Sneirson* where 'shareholder primacy is not so much a legal obligation as it is a powerful social norm'.[8] *Judd* goes on to explain that there is no piece of legislation, in Delaware or elsewhere in America, requires directors to maximise shareholder profits exclusively. Therefore, regardless of law, directors feel it's their obligation to maximize shareholder returns and that this is an integral aspect of their duties. Market indicators have historically reinforced the norm, where robust stock prices usually translate into raising capital.[9] Additionally, a strong stock price also prevents the corporation from becoming vulnerable to unwelcome takeover attempts.[10] These realities, especially in a market as wobbly as the current, gives real incentives to directors to maximise shareholder returns and avoid anything that could weaken this position like the plague. The 2008 market crash, as discussed, meant in the words of *Greenfield* that we 'find ourselves in an unusual and potentially pivotal moment in the intellectual history of corporate law theory and doctrine'.[11] This was especially prominent within the South African boarder, where it was promulgating the Companies Act 71 of 2008 ('The Act').[12]

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[5] Tshepo Mongalo, 'Supervision of the use of corporate power as the ultimate purpose of directorial duties and the advisability of corporate law enforcement in the public interest' (2017) 3(1*) Journal of Corporate and Commercial Law & Practice* 17 – 26.
[6] Sneirson op cit note 2 at 74.
[7] Mongalo op cit note 5 at 20.
[8] Ibid at 76.
[9] Ibid
[10] Ibid
[11] K. Greenfield, "The Third Way: Beyond Shareholder or Board Primacy" (2014) 37 *Seattle University Law Review*, 749.
[12] The Companies Act 71 of 2008.

(b) Birth of the Companies Act and the Enlightened Shareholder Value Approach

The genuine birthplace of the enlightened shareholder value approach is the United Kingdom. The committee known as the Company Law Review Steering Group ("CLRSG") enacted the enlightened shareholder value approach in Section 172(1) of the United Kingdom's Company Act, 2006.[13] It is said that the committee rejected the stakeholder approach based on the reason that its adaptation into law would require significant reform of directorial duties, with a specific focus on who fiduciary duties are owed.[14] An avoidance of non-shareholder interests on the basis of significant change already draws red flags. Red flags which will be apparent in a South African context as well. If history has taught humanity anything, is that for revolutionary change to occur, substantial reform occurs first. The real difference the enlightened shareholder value approach brings is that it involves 'striking a balance between the competing interests of different stakeholders in order to benefit the shareholders in the long run'.[15] This "enlightened" view made it way to the corporate environment in South Africa.

Michele Havenga, indicated before the promulgation of the Act, that there needed to be greater accountability on the part of directors – and which such accountability would extend further than the confines on shareholder interests and profit maximization.[16] The overhaul of South African company law originally began with the emergence of the South African Law for the 21st century – Guidelines for Corporate Law Reform policy paper in 2004. This document illustrated a real focus on social awareness objectives and a need for more inclusive corporate legislation that aligns with these objectives. This can be illustrated by the following quotations: 'companies are central to a country's economy and it's prosperity – for wealth creation and social renewal' and that when directors run corporations, consideration must be given to 'not only economic factors but also social and environmental ones'.[17] The newly enacted Act gave express

[13] Tshepo Herbert Mongalo *Corporate Actions and The Empowerment of Non-Shareholder Constituencies* (unpublished Phd doctorate, University of Cape Town) 41.
[14] Ibid. The committee had already acknowledged this impact by 1999.
[15] Armour J, Deakin S & Konzelmann S, 'Shareholder Primacy and the Trajectory of UK Corporate Governance' (2003) 41 *British Journal of Industrial Relations* 531 at 537.
[16] Michele Havenga, Regulating Directors' duties and South African Company Law reform (2005) *Obiter* at p612.
[17] South African Company Law for the 21st Century: Guidelines for Corporate Law Reform (DTI May 2004) 4.

recognition to the constitutional imperative to bring company law within the constitutional framework.

The Act, through section 76 sets out directors' duties and to whom they are owed and to whom can enforce them.[18] Keeping that section in mind, when one considers statute and its applicability, one must do so holistically. Section 7 of the Act espouses its purposes.[19] This section goes length to describe corporate governance and through which, redirects the aim of South African company law. Quotations such as: 'promote compliance with the Bill of Rights as provided for in the Constitution' and the purpose to 'reaffirm the concept of the company as a means of achieving economic and social benefits' illustrate a real course redirection in comparison to the common law position before.[20] Therefore, an overview of section 7 reveals that both the quest to maximize profit and the exhortation to tread carefully in respect to other stakeholders appears. These additions, in the words of *Katzew*, are a 'challenge to the established paradigm of shareholder supremacy and require a fresh examination of the questions at the heart of company law'.[21] Professor *Tshepo Mongalo* reaffirms this sentiment when he has reiterated the stance that the traditional shareholder centric model is no longer justifiable.[22] This article will now examine to what extent the Act, through specific provisions, has moved to a more enlightened shareholder centric model.

(i) Section 7 – Purpose

As alluded to above, *Katzew* has pinched the link between section 7 of the Act and a corporation's greater human rights responsibilities, where she specifies that 'fostering a human rights culture within the decision-making processes of the company can surely be reconciled with the long-term interests of the shareholders'.[23] Section 7(a) states the first purpose of the Act, and that is to promote compliance with the Bill of Rights. This reiterates the constitutional demand through Section 8(1), that the Bill of Rights applies to *all law* (own emphasis). [24] Sections 7(b), (c), (g) and (j) all indicate goals that accord

[18] Section 76 of the Companies Act 71 of 2008.
[19] Supra at Section 7
[20] Ibid.
[21] Katzew J, 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* (4) 686.
[22]Mongalo op cit note 5 at 25.
[23] Green op cit note 10 at 694.
[24] Section 8(1) of the Bill of Rights.

with the traditional understanding of the company: to maximize profit and risk for the best interests of the company.[25] The Act goes further than this through Section 7(b)(iii) and (d) where it recognises the 'significant role of enterprises within the social and economic life of the nation' and 'reaffirm the concept of the company as a means of achieving economic and social benefits'.[26]

The Act, therefore, demands more of directors than to strictly cater to shareholder obligations, it requires them to consider the corporation as a method to achieve and protect broader human rights as well.

(ii) Section 20(9) – Standing to pierce the corporate veil

At common law, a conversative approach was adopted to piercing the corporate veil.[27] Veil piercing has notoriously been difficult to define and this difficulty has been experienced by the courts.[28] The leading case of *Cape Pacific* held and set parameters relating to piercing of the veil, namely that it is 'undoubtedly a salutary principle' that the judiciary should always respect the separate personality of a company.[29] This conservative approach to piercing the veil was further emphasised by this court when it held that courts do not have the ultimate discretion to separate the company's legal personality.[30] The court in the *Gore* judgement asserted that the words 'unconscionable abuse of the juristic personality of a company' used in s 20(9) postulate conduct in relation to the formation and use of companies that is diverse enough to cover all the descriptive terms such as 'sham', 'device', 'stratagem', and *conceivably much more* (own emphasis).[31]

Ultimately, the statutory form of the common law remedy, Section 20(9) read alongside with *Gore's* liberally enlightened judgement, paints a clear picture that the legal basis which courts would pierce the veil has been considerably been extended, in comparison to the common law.[32] Subsequently, Section 20(9)'s assertion concerning

[25] Section 7(b), (c), (g) and (j) of the Companies Act 71 of 2008.
[26] Supra at Section 7(b)(iii) and (d).
[27] *Salomon v A Salomon and Co Ltd* (1897) AC.
[28] R Cassim, 'Piercing the veil under section 20(9) of the Companies Act 71 of 2008: A New Direction" (2014) 26 *SA Merc* 307.
[29] *Cape Pacific v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).
[30] Ibid at 803.
[31] *Stephen Malcolm Gore N.O and 37 others* 2013 (3) SA 382 (WC).
[32] Joshua Horney, first mandatory short essay submission, 15 March 2022, accessed on 19 June 2022 – reutilised research I conducted.

an "interested person" and its application in court to bring an action to pierce the veil, has an extended scope than ever before.

(iii) Section 66 – limitation of Shareholder influence – corporate governance

The Act now expressly dictates the managerial duties of the company on the shoulders of the shareholders, where s66(1) states that 'the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's memorandum of incorporation provides otherwise'.[33]
Therefore, and never seen before, the boards obligation to manage the corporation is statutorily enacted. Prior to this enactment, the board obtained its authority from the memorandum of incorporation, and in that sense, it was delegated authority from the shareholders.[34] Judge Davis J enforced this stance, where he held that the overall responsibility to manage the company resides in the ambit of the board of directors.[35] Therefore, with the enactment of section 66(1) of the 2008 Act, original power to manage the business and affairs of the company has, for the first time, been given to the board of directors by statute.[36] This position is solidified by the use of the words 'business and affairs' in the act, where the shareholders seem to have, at least statutorily, lost the ability to manage the company.[37] [38]

(iv) Section 165(2) – the derivative action

Prior to the Act, the derivative action was strictly limited to the shareholders until the introduction of section 165(2) that drastically altered this landscape. The scope was extended, that where the interests of the company were involved, a shareholder, a

[33] The companies act 71 of 2008 at s66(1).
[34] Willem Jacobs & others 'Corporate Governance: A Guide for Directors' *Cliffe Dekker Hofmeyr* July 2021, available at *https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/sectors/downloads/Corporate-governance-A-directors-guide.pdf*, accessed on 24 March 2022.
[35] *Kaimowitz v Delahunt* 2017 (3) SA 201 (WCC).
[36] Rehana Cassim 'The Right of a Director to Participate in The Management of a Company: Kaimowitz v Delahunt 2017 (3) SA 201 (WCC)' (2018) 30 *SA Mercantile Law Journal* 172-187.
[37] Irene-Marie Esser 'Shareholder protection philosophy in terms of the Companies Act 71 of 2008' (2016) 79 THRHR.
[38] Horney op cit note 32.

director, a registered trade union representing the employees and even an individual who has been granted leave by the court have the ability to bring a derivative suit.[39][40]

The consideration of the abovementioned non-shareholder constituencies cannot be denied; however, it seems they remain, in the words of *Tshepo Mongalo*, mere "pies in the sky" if corporations all to easily get away with not accommodating them.[41] This need for enforcement requires firstly, pro-vigorous consideration of stakeholder interests by directors and secondly, a rectification measure to hold directors who fail to do such accountable. Although, under the enlightened shareholder value approach, directors now can take stakeholder interests into consideration when deliberating decisions, this still lacks intent, as their fiduciary obligations remained owed to the company and its shareholders.[42] The change from shareholders strictly to the shareholders first would have been progressive, as argued by the author, if the latter was capable of being enforced by non-shareholder consistencies. Allowing consideration by directors of further consistencies ultimately serves to meet the same conclusions as shareholder primacy. Below, the author will suggest an alternative approach to the enlightened shareholder value approach. However, as such reform is unlikely to be realised in the near future, the author moves to examine specific provisions of the Companies Act 2008, calling for reform and amendment, where the legislature may have missed a beat in protecting and realising the rights and interests of non-shareholder consistencies and have perpetuated social and economic issues faced by South Africans by doing so.

(c) Alternative to the Enlightened Shareholder Value Approach: The Actionable Enlightened Shareholder Value Approach

Professor *Irene-Marie Esser* stated that 'the drafting of the new Companies Act provided the ideal opportunity to resolve this issue, and to indicate which theory is

[39] Section 165(2)(a)-(d) of the Companies Act 71 of 2008.
[40] Horney op cit note 32.
[41] Mongalo op cit note 13 at 46.
[42] Ibid at 47.

preferred and how it should be applied practically'.[43] She made these comments when observing the company law review process in South Africa mentioned above.

The actionable enlightened shareholder value approach represents the corporate governance approach which allows for enforcement and liberation to all constitute groups. Societal welfare is considered not only after shareholder interest, but as significant aspect of holistic corporate health. It is important to note, that although the Act does not obviously address the approach, the specific provisions selected and mentioned above provide an apparent framework for the partial empowerment of stakeholder consistencies. However, the Company Law review team made a clear indication that the enlightened shareholder value approach is more desired in the Guidelines for Corporate Law Reform:

> *"a company should have as its objective 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*"[44]

The justification of the approach is simple and will be briefly described below. For a cogent in-depth discussion of the following elements, please refer to Professor *Tshepo Mongalo's* PhD thesis.[45] Such fundamental elements are: (a) The realisation of status of constituencies outside the shareholders, (b) a broad range of remedies available to such constituencies, (c) the availability of such to utilise these remedies efficiently, in the public interest, with leave of the court, (d) further constituencies, outside the shareholders, can institute proceedings in the best interests of the company, and (e) the ability to hold any person accountable for loses suffered through the break of a provision of the Act.[46] All approaches have certain shortcomings and limitations, where the actionable enlightened shareholder theory is not different.[47] However, if practically applied, it can offer a more consistent and effective arrangement of corporate laws.

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[43] Esser IM, *Recognition of Various Stakeholder Interests in Company Management* (an LLD thesis submitted at the University of South Africa 2008).
[44] The Department of Trade and Industry, South Africa*: South African Company Law Reform for the 21st Century: Guidelines for Corporate Law Reform* (May 2004).
[45] Mongalo Op cit note 13.
[46] Ibid at 66.
[47] Ibid at 73. Professor Mongalo sets out the difficulties of the approach, pointing out though that it is not practical to suggest that corporate directors will be free to make decisions without challenge and that the follow of floodgate litigation is unfounded.

In reality, the likelihood of a fundamental paradigm shift to the actionable enlightened shareholder theory is vastly doubtful, the author thus turns this papers attention to the practical issues with the Companies Act 2008. These practicality issues will centre around non-stakeholder interests, specifically where the legislature has not provided for them. This is particularly important in a South African context, where unemployment, interest rates, poverty and inequality are strife. The consistency of violent unrest in the labour force is stifling, where it is argued that such violence is not only a labour/employment issue, but rather a socio-economic issue that can be remedied through the efficient integration between employment and corporate legalisation.

II. THE COMPANIES ACT 2008 LACKING ENFORCEABILITY OR RECOGNITION OF NON-SHAREHOLDER RIGHTS AND INTERESTS

Arguably, the most vexing question in company law is in whose best interest the company should be managed? Under the enlightened shareholder value approach, referred to above, shareholders are described as central in corporate decision making. Where it was pointed out that the mere development of stakeholder constituencies under the enlightened shareholder value approach is simply put as emphasising shareholders first, with all other stakeholders coming after. It is argued that the caveat of shareholders first ultimately perpetuates the restrictedness of the corporate enforcement context propagated under the shareholder primacy theory mentioned above. Below are specific areas where the author believes there to be clear intention by the legislature to recognise non-shareholder constituencies, however where such needs to be enforced by the judiciary. Additionally, where sections of the Companies Act 2008 perpetuate the outdated perception that the companies' interests are, unequivocally, only the shareholders' interests. This part will illustrate the lack of representation and recognition of stakeholder constituencies in legislation and the formulation of decisions.

(a) To whom are directors' fiduciary duties aimed and a discussion of the derivative action?

It is submitted, in line with the prominent academics mentioned above, that the disregard of fiduciary duties establishes the root for protecting the legal interests of the company. Since derivative actions as explained above essentially holds such directors accountable to the company, where there is a breach of fiduciary duties, then these such duties surely cannot possibility be owed exclusively to the shareholding group. This being the basis of an extended legal standing in derivative actions.

Conventional corporate law allows shareholders unwavering standing to derivatively enforce obedience with fiduciary duties and same has been justified on the basis that shareholders are the personification of the company in the best interests of company.[48] This view has its heart from the agency theory, which states that 'managers

[48] M Havenga, 'Directors' Fiduciary Duties Under Our Future Company-law Regime' (1997) 9 *SA Merc* LJ 310, at 317.

are the agents of shareholders (or owners) and in their capacity as agents are obligated to act in the best financial interest of the shareholders of the corporation'.[49] Therefore, fiduciary duties of directors is aimed at protecting the interests of the shareholders, predominantly on the mistaken belief that shareholders are the "owners" of the company or residual rights investors.[50] Notwithstanding that the true purpose of fiduciary duties as mechanisms to prevent self-serving by directors. South African courts have consistently limited standing in derivative actions to shareholders – where they have established the mistaken belief that ownership is the basis for fiduciary duties rather than preventing directors from misbehaving.[51] It has been pointed out and argued by many corporate commentators that this simply is not the case. However, as correctly observed by *Mitchell*, the days where shareholders were the only beneficiaries of directorial duties are long gone and that 'stockholders are the enforcers of the [fiduciary duties] is not itself a necessary result of the existence of the [duties], but rather is the product of nineteenth-century ownership concepts and the doctrinal confusion of different types of fiduciary duties owed by directors and controlling stockholders'.[52] Corporate investors in the 21st century comprise of many different actors – those being investors and lenders. Additionally, as pointed out by *Tshepo Mongalo*, 'the nature of investment instruments today is such that these instruments are not monolithic and that hybrid instruments, bearing the attributes of equity and of debt at the same time, are very common'.[53]

Against the backdrop of whom director duties are owed is to remember that what the enlightened shareholder value approach and the corporate constituency statutes endeavour to do is to point to the extension of stakeholders that should be considered in corporate decision-making. However, both these developments do not cater for the enforcement of a failure by the board of directors to consider enumerated stakeholders' interests in corporate decision-making. It will be argued that the implementation of the enlightened shareholder value approach and/or corporate constituency statutes may be

[49] GJ Rossouw "Balancing Corporate and Social Interests: Corporate Governance Theory and Practice" 2008 *Afr J Bus Ethics* 28-37.
[50] Bayless Manning and James J. Hanks Jr. *Legal Capital* (3ed) (1990), at 13.
[51] Please see Tshepo H Mongalo 'Supervision Of The Use Of Corporate Power As The Ultimate Purpose Of Directorial Duties And The Advisability Of Corporate Law Enforcement In The Public Interest' (2017) 3 (1) Journal Of Corporate And Commercial Law & Practice
[52] LE Mitchell 'A theoretical and practical framework for enforcing corporate constituency statutes' (1992) 70(3) *Texas Law Review* at 603.
[53] Rossouw op cit note 48 at 34.

bolstered by a balanced scheme of enforcement by non-shareholder groups, where such fear of enforcement will have the legal interests of non-shareholder groups greatly recognized in corporate decision making. From the outset, it seems the legislature feared floodgate litigation is under enforcing non-shareholder interests once again. The use of benefit corporation statutes is a possible avenue to achieve such enforcement, where same will be discussed in turn under recommendations below.

To this extend, the 2008 Act, through Section 165(2), on the face of it, extended standing under the derivative action.[54] The final criterion is especially interesting, where a serious impediment to instituting such claims is if the court it satisfied that granting leave is necessary or expedient to protect the legal right concerned.[55] There seem to be practical considerations built into the derivative action that make this section seem overzealous. The fact that a derivative action is being taken inherently means that the interests of the company are at hand, which is a limiting requirement in itself. Additionally, a derivative suit by its nature will be in the name of the company, again another limiting feature.

The legislature's apparent fear of floodgate litigation has stifled a real opportunity to grant efficient extended legal standing to further stakeholder outside the shareholders. However, the inclusion of non-shareholder constituencies in the derivative action space cannot be underestimated. It is a massive step in the right direction, however with a bit more oversight on the legislatures part, it could have been a real extension of legal standing bar inhibiting provisions.

(b) The injunction between corporate governance and social responsibility

Corporate governance has been and will likely always be an area of contention in company law. Its definition is argued and has no universally accepted wording. However, one can broadly state that it includes the formations and methods involved in the control, management, and decision-making of organizations.[56] Many iterations of its definition include a system of regulation that oversees corporate conduct and of *balancing the interests of all stakeholders and additional parties* (own emphasis).[57] An interesting angle to travel in this regard is the question whether the South African

[54] The Companies Act 71 of 2008 at s165(2).
[55] Ibid at s165(2)(d).
[56] F H I Cassim, M F Cassim & R Cassim et al Contemporary Company Law 2 ed (2012) 97–8.
[57] MM Botha 'Responsibilities of companies towards employees' PER/ PELJ 2015 (18) 2.

constitutional dispensation has provided obligatory guidelines which companies must preserve. Specifically, the bill of rights in this regard. The application of labour rights, environmental rights and social transformation are all new implications for corporations that can no longer be ignored or avoided due to constitutional infractions.[58]

It has been widely recognized in company law that the company has a separate legal personality that operates independently from those who run it and its shareholders.[59] The practice of good corporate governance is espoused by various reports and the Act, which encourage not only good business but behaving as good corporate citizens as well.[60] The notion of "corporate social responsibility' has garnered real standing over the past decade.[61] Corporate governance and corporate social responsibility go hand and hand in the effective running of a business. *Da Piedade* and *Thomas* state that a 'growing convergence between corporate governance and corporate responsibility issues can be observed' in that company law commentators now include corporate responsibility in the dominion of directors' fiduciary duties, where recognition of the fact that 'without proper governance and management accountability, corporate responsibility will not be able to be effectively institutionalised within organisations'.[62]

A specific focus in this regard needs to be placed on corporations' employees. Where South Africa faces a real issue of violent strikes, and those in three-piece suits ignore the real connection between labour and corporate governance. *Calitz*, correctly surmised that 'violence has also become endemic during strikes in South Africa, the most notorious example being the strike at Lonmin mine in 2012 during which 44 people were killed'. [63] Violent striking seems to have become an every-day occurrence, where in *Food and Allied Workers Union on behalf of Kapesi* the workers conspired to have a manager murdered – after engaging in horrendous acts such as setting vehicles

[58] This has been succinctly scrutinized by both Katzew and Bilchitz, see their research for a deeper understanding: Katzew J, 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* (4) 686 & Bilchitz, D. 2008. "Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations." *South African Law Journal* 125 (4): 754–789.
[59] *Salomon v Saloman and Co Ltd* 1897 AC 22 (HL).
[60] Institute of Directors *King Reports I, II, and III*.
[61] Cassim op cit note 56 at 9.
[62] Da Piedade L and Thomas A "The Case for Corporate Responsibility: An Exploratory Study" 2006 *SAJHRM* 65-74
[63] K Calitz "Violent, frequent and lengthy strikes in South Africa: Is the use of replacement labour part of the problem?" 2016 *South African Mercantile Law Journal* 436,437.

alight to murdering witnesses.[64] Statistics released from the Department of Labour illustrate that there were approximately 85 strikes per year between 2005 - 2015, where 5.2 million workdays were lost and where an unhealthy percentage of such strikes did not comply with statute.[65] The Constitution guarantees the right to strike, and the Labour Relations Act facilitates the exercise of this fundamental right.[66] The importance of the right to strike is not the issue, it's the lack of preventing violent crimes, that is often associated as an employment law issue. It is argued that this is not the case, where violence in the workplace is merely a corollary of South African life.[67] Poverty is strife, education is poor, opportunity is prevented by a lack of opportunity and South Africans spend 45% of their time in darkness resulting from an energy crisis. Violent strikes cannot be attributed only to shortcomings in labour law, it will be argued that company law has place in such argument.

Firstly, the missed opportunity regarding the Social and Ethics Committee. Section 72(1) of the Companies Act 2008 provides, expect where the memorandum of incorporation provides overwise, that the board may appoint any number of committees of directors and delegate to any committee with any authority of the board.[68] Before the Companies Act, labour and other statutes provided for corporate social responsibilities. Although the Companies Act doesn't specifically refer to corporate social responsibility, it is argued that it provides that the Minister of Trade and Industry is authorised to prescribe through regulations that a company must have a social and ethics committee.[69] Over and above this, regulation 43(1) of the Companies Regulations requires state-owned companies to have a social and ethics committee alongside listed public companies.[70]

Although the argument on whether the social and ethics committee is a shareholders or directors committee is still ongoing, it is not the substance of this argument. The absence of allowing employees representation in the social and ethics

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[64] *Food and Allied Workers Union on behalf of Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC).
[65] Annual Industrial Action Report 2015 available at http://www.labour.gov.za/DOL/documents/annual-reports/industrial-action-report/2015/industrial-action-report-2015, accessed on 15 November 2022.
[66] The Labour Relations Act 66 of 1995.
[67] T Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" (2013) 34 *ILJ* 836.
[68] Companies Act 71 of 2008 at s72(1).
[69] Cassim op cit note 55 at 47.
[70] Regulation 43(1).

committee is a blunder on the legislatures end. With representation on the social and ethics committee, employees would be provided with the opportunity to express their voice on issues around health, safety, labour and employment.[71] An amendment in this regard would be prudent. If the committee is to be regarded as a director committee, as argued by *Tshepo Mongalo* and *Joubert*, then directors owe fiduciary duties to the employees and further stakeholders in the company, as demonstrated above.[72] [73]

Finally, Sections 16 and 89 of the Act prescribe that trade unions have access to information, but this is seriously limited.[74] For example, a company has no obligation to provide economic information to trade unions and the only mechanism a trade union may be given access to such information is initiating business rescue proceedings.[75] In this case, it is all too late because the company is already in financial distress. The rights to be consulted and to collective bargain also falls outside the ambit of the Companies Act and seem to be confined to labour law. The ideal case, as the author argues, is to extend social obligations such as collective bargaining, sharing of information and environmental considerations to the ambit of the social and ethics committee. This opportunity clearly has been missed by the legislature.

(c) Interrogation of the business rescue procedure as provided for under the Act

An important new component in company literature that must be taken into consideration, is the ability of our structures to endure the repercussions of the devastating effects of the pandemic. Tragedies like this may indicate a need to adapt and progress. According to *Rory Voller*, the Commissioner of the Companies and Intellectual Properties Commission (CIPC), as of 13 May 2020, which countless did not know would be just the beginning of the pandemic, where 150 companies requested for

[71] Cassim op cit note 55 at 48.
[72] N. L. Joubert, 'Reigniting the Corporate Conscience: Reflections on Some Aspects of Social and Ethics Committees of Companies Listed on the Johannesburg Stock Exchange' in C. Visser and J. T. Pretorius (eds.), Essays in Honour of Frans Malan Former Judge of the Supreme Court of Appeal (Durban: LexisNexis, 2014), p. 190.
[73] Tshepo Mongalo, 'The Social and Ethics Committee Innovating Corporate Governance in South Africa' (2019) in Sjåfjell, B. & Bruner, C.M. (eds), The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability (2019), pp. 260 – 72. Chapter 26.
[74] Companies Act 71 of 2008 at Section 16 and 89.
[75] Cassim op cit note 55 at 49.

business rescue.[76] It is therefore trite that businesses main aspirations are to fill the pockets of the already rich shareholder group. The next section of this article will examine whether the business rescue procedure as provided for by the Act effectively achieves the purpose espoused in section 7, as discussed. This has relevance as it directly interrogates whether the enlightened provisions in the Companies Act are enforceable.

Before examining if business rescue, as the Act provides for, achieves its goal in section 7, it is important to question the actual intention and underlying justification for business rescue itself. The provisions that specifically mention business rescue can be found in chapter 6 of the Act, which define it as 'proceedings to facilitate the rehabilitation of a company that is financially distressed'.[77]

The Minister of Trade and Industry has illustrated his understanding of business rescue as follow:

'…the Act introduces the principle that the idea of business rescue schemes rather than summary liquidation are more preferrable, with the idea in mind that it is better to try and save a business in distress rather than summarily close it down because creditors exceed debtors, the possibility of restoration being more equitable for all interested parties than the current somewhat immediate, maybe too early in some instances, brutal settlement and distribution process…'.[78]

'Rescue' in this context refers to the rearrangement of the company to return profitability and to avoid liquidation.[79] The effect of business rescue is that if a corporation is in dire financial anguish but there is still a decent potential of rebuilding, the rehabilitation may be accelerated through the filing for business rescue. Implications of such are the following: a business rescue practitioner undertakes the temporary supervision of the company; the claims against the company by creditors are subject to a temporary memorandum; and business rescue proposal is developed.[80] What is vital in this process is a reasonable prospect of success of the venture and the institution of the proceedings must be timely and not, as the court put it in the case *of Welman vs*

[76] Power FM Staff Reporter '150 Companies File For Business Rescue Since Start of 2020' available at https://www.power987.co.za/news/150-companies-file-for-businessrescue-since-start-of-2020/, accessed on 28 June 2022.
[77] The Companies Act 71 of 2008 at Section 128(1)(b).
[78] Stein and Everingham The New Companies Act *Unlocked* (2011) 408.
[79] FHI Cassim, M Femida et al Contemporary Company Law 2 ed (2012) 861.
[80] The companies Act 71 of 2008 at section 128(1)(b)(i) to (iii).

Marcelle Props 193 CC & another, when the business is 'terminally-ill' nor 'chronically ill'.

As such, the companies financial distress is a founding criterion for instituting business rescue proceedings.[81] In laymen's terms, the company is not able to pay off its debts to its creditors, as such there is a liquidity issue. Business rescue, as mentioned in the act, is a new introduction to South African law, being first introduced in 2011 with birth of the Companies Act. Prior to this, a company requiring such process was required to either attend to judicial management or bite the bullet with liquidation proceedings Both of these proceedings are generally creditor friendly. Judicial management was prescribed by the previous Companies Act and was soon abolished as it was discovered to be fundamentally unproductive.[82] The intention of the author is not differentiate between liquidation and business rescue in too much detail suffice to say that the goal of liquidation is fundamentally different to business rescue, where business rescue proceedings look to salvage the corporation and liquidation looks to close the corporation.[83]

As will be discussed in greater detail, business rescue shifts the attention from a principally pro-creditors proceeding to a much more expansive scope of interests. This does not prevent business rescue shortcoming though, especially when one examines its application in South Africa. A few criticisms of the proceedings include the difficulty in generating finance post-commencement; that creditors still abuse the process and the process still garners a relatively low success rate.

As stated above, *Katzew* states that section 7 'reveals that both the quest to maximise profit and the exhortation to respect human rights appear as purposes of the Act'.[84] Section 7(k) is one said provision that contains specific 'human rights' constituents. Although the ultimate aim of business rescue is to garner profitability for the business, section 7(k) undertakings to safeguard and stabilize the competing interests of various different parties. Such section goes on to state that '…provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'. Stakeholders in this

[81] Ibid at section 128(f)
[82] Ibid.
[83] Philip Swanepoel 'Business Rescue VS Liquidation: What is The Difference?' (2020), available at https://www.mblh.co.za/NewsResources/NewsArticle.aspx?ArticleID3352, accessed on 30 October 2020.
[84] Havenga op cit note 17.

context has not been defined, however if one examines King IV alongside the definition of 'affected persons' in section 128(1)(a) of the Act, you will find this definition includes shareholders, creditors, and employees.

The case of *South African Airways SOCC Ltd v National Union of Metalworkers and others*[85] illustrated a business rescue practitioner, through section 189(3) notices, retrenched countless employees. Although this decision by the business rescue practitioner was eventually overturned in the labour Appeal court, the intention behind directors is clear, when the corporation is suffering, the first place to look for recourse is letting go of employees. The Courts ultimate decision is encouraging nonetheless, where thee judge stated: 'The saving of jobs is a high priority for South Africa and the introduction of an effective and successful business rescue procedure was seen by government as an important measure to prevent further job losses.'[86]

[85] *South African Airways SOC Ltd (In Business Rescue) and Others v National Union of Metalworkers and Others* 2021 (2) SA 260 (LAC).
[86] Ibid.

III. POSSIBLE ROADMAP TO NON-SHAREHOLDER CONSTITUENT INTEREST RECOGNITION

Slight recommendations have been discussed under each heading above, where the author has pointed out specific provisions of the Act that could use amendment. Below is a structural recommendation, where the author argues that the introduction of the German Two Tier Board structure could have significant benefits on South African business and inequality alike.

(a) *Applicability of the Two-Tier Board Structure And Co-Determination In A South African Context*

The German corporate governance system, in comparison to the South African one, differs substantially. Unlike the shareholder centric scheme that operates in South Africa, German corporate governance is stakeholder positioned.[87] In that sense, employees particularly, actively influence decisions that ultimately impact them directly through workers councils, whom have representation on the supervisory board. This board structure is exemplified by the two-tier board composition, that incorporates co-determination amongst all holders of interest in the corporation.[88] The origin of this system can be found in securing the extended success of the corporation through valuing social governance and the protection of community interest as ranging beyond the interests of the shareholding group alone but to actively reduce stakeholder alienation.

(i) Two-tier board structure

Well known academic *Mintz* states that this system dates to the 1920s where companies were regarded as more than their shareholding but instruments to serve the greater community.[89] A mandatory two-tiered board structure is prescribed by the German Stock Corporations Act in all stock corporations, corporations with more than five

[87] Linda Muswaka 'The Two-Tier Board Structure and Co-determination: Should South Africa follow the Germany Example?' 5 Mediterranean Journal of Social Sciences 144.
[88] Cassim op cit note 36 at 142.
[89] Mintz M, "A COMPARISON OF CORPORATE GOVERNANCE SYSTEMS IN THE U.S., UK AND GERMANY" 3 *Corporate Ownership & Control* 24

hundred employees and all corporations in the iron, steel and mining industries.[90] This board structure is split into the management and supervisory board. The management board is responsible for every day running of the corporation, where it self-sufficiently manages the company for the interests of the company – that being the sustainable development of the company through caring for its shareholders, employees and other stakeholders.[91] The supervisory board selects, observes and recommends the members of the management board making it a predominant aspect in decision making.[92] The focus of the German legislature means that the supervisory board places close supervision on the management board. This means the interests of employees and further stakeholders do not fall through the cracks, that may be the case under the current model adopted in South Africa and established above. It is clear that the German model sees the company as mechanisms that have a human and personal component to them, and that focusing on employee participation with likely produce a greater benefit for the company as a whole.[93] The fundamental philosophy is that the active participation of employees in decision-making ultimately promotes faith, co-operation and coherence in the company.[94] This produces a cooperation in supervision between shareholders and employees and offsets the quest of short-term profit with more pressing societal concerns.[95]

(ii) Co-determination

The German approach can be seen as a consensual one regarding decision making, where employees are key stakeholders. This influence extends to participating in company defining decisions. This employee participation in corporate decision making is known as '*Mitbestimmung*' in German, but more commonly known as co-determination in English.[96] The underlying theory behind co-determination is that a company's employees and its capital marketers have equal important in the profitability of the company and therefore should have their voices equally heard.[97] In layman's

[90] German Stock Corporations Act 1965.
[91] The German Corporate Governance Code 2013 6.
[92] The German Corporate Governance Code 2013 2.
[93] Muswaka op cit note 87 at 143.
[94] Lutter M "The German System of Worker Participation in Practice" 1982 Journal of Business Law 154
[95] Muswaka op cit note 87 at 143.
[96] Ibid at 144.
[97] Ibid at 143

terms, shareholders and employees are equal. The South African unitary board is the opposite of this, where the control and management of the company falls strictly in the hands of the directors, as discussed above, who normally tend to shareholder interests above all.

If one examines the objectives of co-determination, one would find equality between provides of capital and labour at its heart, where democracy between shareholders and stakeholders is essential in promoting social accountability.[98] This is evidenced by the principles on co-determination that are clearly geared towards producing the productive co-operation between the interests of shareholders and stakeholders alike.

The Co-determination Act of 1976 dictates that there be both employee and shareholder representation on the supervisory board.[99] It goes on to provide that half of the seats on the supervisory board must be employee representatives in all companies that have more than two thousand employees or fall into specific industries of work such as iron or steel.[100] The main effect of this piece of legislation is that compelling employee representation on the supervisory board puts the corporation in direct negotiation with its employees at all times.[101]

Conventionally, these negotiations centred on conditions of employment and salary increases, however realistically they can cater for far-reaching issues such as privacy, societal issues and environmental responsibilities. One thing that is concreate, is that when employees live in communities, they are more inclined to question corporate decisions that may negatively affect the community.

(iii) Commentary and recommendations

As discussed above, the enlightened shareholder value approach combining with the unitary board system seems to still favour shareholder interests as non-shareholder constituency groups are given slight to no recognition nor representation when fighting for their interests. This leaves employees with no mechanism to participate in decision making and corporate governance. A socially responsible company will need to attend to the legitimate interests of all its stakeholders. Especially in a country like South

[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] Ibid.

Africa, where unemployment, inflation, frustration, and poverty have become strife. It seems that South Africa 'failed to take meaningful measures to improve protection of social and economic rights, which has been undermined by widespread unemployment, inequality, poverty, the government's response to the Covid-19 pandemic, and corruption'.[102]

A fair contribution between shareholders who invest equity and funds into the company and employees who contribute skill, care, and time (human capital) to developing the company and sustaining it. When looking through this lens, then stakeholders are theoretically investors in the company, with their time and expertise, and if we continue to accept the stakeholder theory[103], then the author believes there is a strong argument to be made that shareholders and stakeholders are equal beneficiaries in the company's profits and direction. The author then submits that the German two tier board structure coupled with co-determination is far more effective in achieving stakeholder interest recognition.

Key stakeholders in a corporation would clearly be interested in findings that affect them directly or indirectly. Therefore, their input in such decisions has an important role in corporate governance. This is achieved by their authority to influence decisions as board level. The soundest model of stakeholder contribution, under a stakeholder oriented corporate governance system, and in the opinion of the author is board representation. In this regard, the following recommendations are suggested.

First, it is proposed that the two-tier board structure be recognized in South Africa. In this regard, as suggested by *Linda Muswaka*, the Companies Act should include the following provision[104]:

"*66A Two-Tier Board Structure*

(1) This provision applies to –

a) all companies listed on the Johannesburg Stock Exchange;

b) all companies with more than five hundred employees; and

c) all companies in the mining sector regardless of their size.

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[102] *Human Rights Watch*, available at World Report 2022: South Africa | Human Rights Watch (hrw.org), accessed on 18 June 2022.
[103] Muswaka op cite note 87 at 146.
[104] Cassim op cit note 36 at 146.

(2) A company to which this provision applies must have two boards, the management board mandated with the running of the day-to-day operations of the company and the supervisory board whose core function will be to appoint, supervise and advise the members of the management board and will also be directly involved in decisions of fundamental importance to the company.

(3) Simultaneous membership of the management board and the supervisory board is prohibited."

Secondly, it is recommended that the German based co-determination laws be adopted into the Companies Act, where same should make reference to not only shareholders and employees, but all other relevant stakeholders in the business. In this regard, and in considering the above mentioned recommendation, the following provision should be introduced into the Companies Act:

"*66B Composition of the Supervisory Board*

(1) A company to which the two-tier board structure in terms of section 66A applies, shall have half the seats on the supervisory board being held by shareholders and the other half being held by representatives of all key stakeholders of the company in equal proportion.

(2) The Chairperson of the supervisory board, whose vote counts double in the case of a tie, is elected members of the supervisory board."

The main effect of the above recommended provisions would be that the Companies Act now imposes explicit negotiation with stakeholders' concerns. It is argued by the author that if this type of co-determination had been present at the time of the Lonmin mine strike and Marikana Massacre, the terrible loss of life that was seen could have been avoided.[105] It is common cause that a light to the gas was the disconnection been the disgruntled employees and the mining board.[106] If the employee's had, as suggested above, a representative body that sits on the board, the further board members have no choice but to listen to their demands and to negotiate respectively.

Ultimately, its vital for all stakeholders to have an active role in corporate governance and the ability to influence corporate decision making.

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[105] C Twala 'The Marikana massacre: A historical overview of the labour unrest in the mining sector in South Africa' (2012) 1(2) *South African Peace and Security Studies* 66.
[106] Ibid.

(b) Benefit Corporations Statutes in South Africa

Section 8(1) of the Companies Act provides two distinct choices of companies: "two types of companies may be formed and incorporated under this Act, namely profit companies and non-profit companies".[107] A benefit corporation, as one can briefly define, is a for-profit corporation that commits to create a material positive influence on social and environmental issues, however such impact originates from the operations of the business.[108]

The benefit corporation legal form was considered in the revision of the company's legislation as mentioned before but was not adopted.[109] Firstly, as pointed out by Klaaren, its introduction would have likely complicated the statute book, where at the time the primary goal was to have a simplification of company formation procedures.[110] However now and from seen above, the answer to the always debated question of 'who's interests is the corporation run for' seems to be stakeholders rather than shareholders. Where Klaaren enforces same by saying "Over the past several decades, there has been express recognition of the changing corporate environment, towards one with a greater social and ethical concern, higher standards of accountability and transparency, an increase in globalisation, as well as an emphasis on the importance of investor-friendly domestic laws to encourage investment".[111]

Although, as illustrated above under chapter I (b), on the reading of the current provisions of the Act there is room for our courts to interpret its provisions to allow for the development of more stakeholder inclusion, however, and as pointed out countless times in this piece, there is a lack of tangible handles for realising these objectives. The need for concrete parameters for the exercise of managerial discretion may be required, where directors for a for-profit organisation should be reinforced by visibly articulated laws.[112] The question that remains is whether the current model permits a hybrid model of governance that supports profit gain and social responsibilities? Below the author

[107] Jonathan Klaaren 'Benefit corporations for Africa? A South African perspective on alternative corporate forms' (2020) International Review of Applied Economics at 2
[108] Ibid.
[109] Ibid.
[110] Ibid.
[111] Ibid at page 8.
[112] Richard S. Bradstreet and Helena Stoop 'Finding Space for the B Corporation Within the South African Legal Landscape' in Henry Peter, Carlos Vargas Vasserot and Jaime Alcalde Silva *The International Handbook of Social Enterprise Law* (eds) page 762.

will investigate ways in which, under the current model, benefit corporation ideas can be introduction into our jurisprudence.

(i) Requirements to have a purpose clause

A huge alteration brought by the Act was the elimination of the *ultra vires* doctrine, where a company was expected to include a objects clause in its constitutional documents, where an action outside this would be declared void is no longer mandatory. Now the memorandum of corporation sets out objects, but these have no effect on the validity of transactions with third parties.[113] However, each shareholder does have a claim for damages against any person who negligently or intentionally causes damage to the company or acts inconsistently with the Act.[114] As already scrutinised, 'the company' is prevailingly the shareholders, however the effect of adding a public benefit object on that duty would remain in the hands of judicial interpretation. Judicial discretion in this regard is required, in the hope of an enlightened judgement that radically effects this view. Additionally, a definition of 'the company' by the legislature could have far reaching effects, especially is articulated in such definition, a phrase speaking to non-shareholder constituencies and their interests.

(ii) Responsibility of the Board and the Social and Ethics Committee

The directors are bound by fiduciary duties to act in the best interest if the company. A concrete definition of the company that incorporates profit driven incentives and societal responsibility would be helpful in this regard. The vexing question of whom do directors owe their responsibilities is integral in this regard. The author believes that judicial interpretation is essential in this regard, and in particular its consideration of Kind IV. King IV is far more onerous in its demands of directors' responsibilities as they act in the best interests of the company.[115] Richard S. Bradstreet and Helena Stoop argue that "its (arguably) progressive ethos has certainly not yet been fully embraced by black letter law".[116] The authors message to judicial decision makers would be twofold: firstly, recall that the underlying principles espoused in the constitution should inform

[113] Ibid at 767.
[114] Ibid.
[115] King IV: Report on Corporate Governance for South Africa TM (2016) 3.
[116] Twala op cit note 105 at 773.

all interpretations and secondly, to be mindful not to mandate the pluralist approach when examining directors duties, the Act has made it more than clear this is not the position to take.

The Social and ethics committee has been examined in some depth above, however in this regard Richard S. Bradstreet and Helena Stoop have stated that "The social and ethics committee has a broad mandate and is required to (inter alia) monitor compliance with legislation, codes of best practice, and mechanisms such as the UN Global Compact Principles. It must also monitor activities related to good corporate citizenship, which consider employee relations and environmental impact amongst other matters and criteria".[117]

Although this committee is commendable it is argued that it stops short of being an official embrace of stakeholder theory as it acts merely as an advisory committee. In the words of Andre "the benefit corporation derives its moral legitimacy from the values of its owners and the oversight of a third-party evaluator". Thereafter, the accountability to an independent advisory committee would not equate to certification by a truly independent body which is uninvolved with the company's management altogether.[118] A truly independent body that is unbiased and unconnected from the corporate owners' intentions. This is what the author recommends, a transformation of the social and ethics committee clauses, that entails the committee working hand in hand with an independent external body that evaluates the corporation's consideration of non-shareholder constituent groups and delivers a certification in this regard. A certification that, similar to the Broad Based Black Economic Empowerment Act accreditation that accredits levels based off accommodation by corporations with the statute. Where the better the level your corporation has, the better tender deals and other forms of economic benefits the company receives.

The author is cognisant of the fact that an amendment such as that mentioned would be unlikely, this is more of an offering of advice and illustrating of a missed opportunity by the legislature when developing the over-haul of amendments to the companies Act in 2008.

[117] Ibid at 771.
[118] Ibid.

(iii) Reality

Without obligations to stakeholder being clearly defined in our primary legislation, a company with a conscious would run, as it seems against the primary intentions of the Act. The unfortunate reality is that in the context of a private company, a court would be hard pressed to find a real basis in law to enforce compliance with voluntary principles. If a court would do so, then it would be circumventing existing interpretations and precedent. This would radically alter what we know as the 'best interests of the company' and is the exact reason the author calls for a brave judiciary. As illustrated throughout this paper, the Act – although not enough or concretely – does provide for stakeholder rights and interests. It requires firm interpretation by a court to bring same into reality.

IV. SUMMARY AND CONCLUSION

The aim of this research was to illustrate the flaws in the enlightened shareholder value approach and to point out the blunders made by legislature during the extensive overhaul of company law legislation in the early 2000s. In doing so, the author gave a brief breakdown of the structure of corporations historically, where shareholder interests sat at the heart of all corporate decision making. The birth of the 2008 Companies Act was shown to be an important step in the right direction when realising non-shareholder interests through the Enlightened Shareholder Value Approach, however with this step came missed opportunities that ultimately meant that corporations must consider non-shareholder interests, but only after satisfying the shareholders first.

The author offered an alternative to the enlightened shareholder value approach, where non-shareholder constituencies interests are enforceable, being the Actionable Enlightened Shareholder Value Approach. Realizing a radical change of this nature is unlikely, the author scrutinized the 2008 Companies Act, pointing out the lack of enforceability of non-shareholder interests and missed opportunities. Directorial duties and the best interests of the company were evaluated alongside the derivative action, where it was concluded that the legislatures fear of floodgate litigation crippled their discretion to elevate non-shareholder interests. The business rescue procedure provided by the Act was scrutinized to illustrate progress has been made by the judiciary, however directors may still be biased towards economic goals rather than sustainable ones.

The author concluded with a dive into the future, with possible ways to improve the situation in South Africa and to allow those previously impoverished, the chance to actively participate in the market. Firstly, was the idea of co-determination and the two-tier board structure. This sits the employees and/or trade unions firmly in the room with the directors, meaning for efficient contribution to decision making. Secondly, the idea of benefit corporation statutes where once again the author examined directorial duties, however this time from a lens of progression and suggestion, stating that a clear definition of ‘the best interests of the company’, and ‘the company’ that cements non-shareholder interests would be greatly beneficial. Additionally, that an amendment of the social and ethics committee’s obligations to that of one that facilitates the

examination of a truly independent body that certifies a corporation's compliance with social and environmental responsibilities is the rightful purpose of the committee. The committee as it stands is progressive but unenforceable.

Ultimately, the enlightened shareholder value approach is an improvement, but lacks in enforceability, where non-shareholder constituencies interests are still undervalued in comparison to the all mighty dollar as they say. The world is changing, where corporations and the law need to adapt because adaptation bears success for all.

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