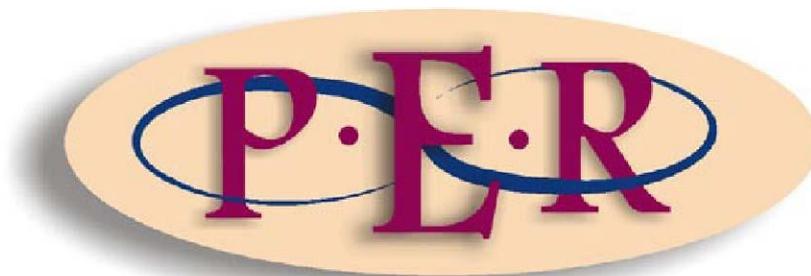


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THE SOUTH AFRICAN *COMPANIES ACT* AND THE REALISATION OF CORPORATE HUMAN RIGHTS RESPONSIBILITIES

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1 Introduction

Bakan in his provocative and insightful text argues that “for many years, some have seen the corporation as a pathological institution, a dangerous possessor of power”¹ while others have stated that “the company is the most important organisation in the world”.² One might view a company as either good or evil, responsible or irresponsible, but regardless of what one’s perception of the character of a company is,³ it is undeniable that in the modern world there is a great need to create the necessary checks and balances to ensure that companies conduct their activities without violating human rights and that they act in a socially responsible manner.

The view that business enterprises should be held accountable for human rights violations taking place within their sphere of operation is not new, even at the international level. Thus, the United Nations Human Rights Council unanimously endorsed the Guiding Principles for Business and Human Rights in 2011.⁴ Even Human Rights Watch, a non-profit, nongovernmental organisation, has established a special unit on corporations and human rights.⁵ The amount of literature that academics have produced on corporations and the realisation of human rights obligations is nothing

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¹ Bakan *The Corporation* 1.

² Bakan *The Corporation* 1.

³ Esser 2011 *SA Merc LJ* 317

⁴ For a more insightful discussion on the United Nations Human Rights Council and the Guiding Principles on Business and Human Rights, see UN OHCHR 2011 http://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_en.pdf.

⁵ It must be noted that Human Rights Watch is a non-profit, nongovernmental human rights organisation made up of roughly 400 staff members around the globe. Its staff consists of human rights professionals, including country experts, lawyers, journalists, and academics of diverse backgrounds and nationalities. See Human Rights Watch 2014 <http://www.hrw.org/our-work>. Also see Human Rights Watch 1999 <http://www.refworld.org/docid/3ae6a82e0.html>.

short of phenomenal.⁶ However, much of this literature has focused mainly on voluntary mechanisms rather than obligations. The focus has also to a large extent been on the international community's ability to regulate this field of law, as opposed to domestic regulation. Little, if any, effort has been expended at national or domestic level to regulate companies in the context of their human rights obligations, through either positive or negative enforcement mechanisms. This is partly because most of the known human rights violations that have taken place to date been caused by big corporations, which are known collectively as Multinational Corporations (MNEs).⁷ MNEs are inherently difficult regulatory targets, as they have enormous economic and political strength.⁸ They are also very proficient at protecting their assets due to their ability to move them around the world, as well as their complex corporate structures and operations.⁹

This article looks at the South African *Companies Act* 71 of 2008 (hereafter the *Companies Act*). It considers the effects of the *Companies Act* in respect of the realisation of human rights responsibilities by companies that operate within South Africa. The article focuses on companies and the *Companies Act*. For the purposes of this article, the term "realisation of human rights responsibilities" shall refer to the need for companies to become conscious of or aware of the need to protect against human rights violations in all their activities.

In this article the argument that I seek to make is not that the State should abdicate or has abdicated its role of protecting human rights in companies through the enactment of the *Companies Act*. Rather I argue that by including the promotion of compliance with the Bill of Rights as provided in the *Constitution* in the application of company law in its purposes section, the *Companies Act* effectively reinforces a duty for companies to ensure that their activities are in line with the spirit, purport and

⁶ Some of these include Stephens 2002 *Berkeley J Int'l L*; Ramasastry 2002 *Berkeley J Int'l L*; Stephens 2000-2001 *Hastings Int'l & Comp L Rev*; Ruggie 2007 *AJIL*.

⁷ The Niger Delta Shell is one example: see Platform London 2012 <http://platformlondon.org/2012/08/22/hold-shell-to-account-for-its-human-rights-abuses-in-nigeria/>. Also see Global Exchange 2014 <http://www.globalexchange.org/corporateHRviolators>, which lists the top ten corporate violators of the day.

⁸ Stephens 2000-2001 *Hastings Int'l & Comp L Rev* 401-403.

⁹ Stephens 2000-2001 *Hastings Int'l & Comp L Rev* 403.

objects of both the *Constitution* and the *Companies Act*.¹⁰ Therefore, while the State has played a pivotal role by enacting a piece of legislation that seeks to balance the competing interests that generally confront companies, companies are expected to breathe life into the objects of the *Companies Act* through their conduct in their sphere of competence.¹¹ This can be done by ensuring that all their activities are in line with the *Constitution*. The State retains its enforcement obligations through different bodies.

Countries do not exist in a vacuum and the international community has no doubt a large role to play in the realisation of human rights responsibilities by corporations.¹² However, it must also be noted that some barriers to human rights realisation originate within the individual country's¹³ own borders and thus it remains up to the individual States to take measures to ensure that these barriers are removed. Countries must put in place mechanisms that ensure the continued protection of human rights by corporations.

Therefore, although international bodies and institutions have a large role to play, it remains the duty of individual states to ensure that there are mechanisms in place which ensure that human rights are protected, and failure by individual States to provide for such protection will inevitably lead to the violation of people's rights. It is very difficult to conceive of the effective regulation of companies without a coordinated domestic effort.¹⁴

The provisions of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),¹⁵ which is part of a wide network of international instruments designed to advance the realisation of human rights obligations by corporations, links the "obligation of States under the Charter of the United Nations to promote universal

¹⁰ S 7(a) of the *Companies Act* 71 of 2008 (hereafter the *Companies Act*).

¹¹ See Robinson "Business Case for Human Rights", quoted in Bilchitz 2008 *SALJ* 754.

¹² "Human rights responsibilities of corporations" in this paper refers to the duty placed on corporations to ensure that they are neither complicit in nor perpetrators of human rights violations.

¹³ Lazzarini 2002 *Conn J Int'l L* 281-283.

¹⁴ Stephens 2000-2001 *Hastings Int'l & Comp L Rev* 401.

¹⁵ *International Covenant on Economic, Social and Cultural Rights* (1966).

respect for, and observance of, human rights and freedoms". The Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises by John Ruggie,¹⁶ amongst other things recommends that States must protect against human rights abuses within their territories by third parties, including companies. Ruggie also notes that all social actors - States, business and civil society - must play their part.¹⁷ This paper, however, as mentioned above, is concerned only with how the *Companies Act* can play a role in the realisation of human rights obligations by companies operating within South Africa.¹⁸

As a point of departure this article will briefly consider some of the reasons why it is necessary to attribute human rights responsibilities to companies and why voluntary mechanisms such as corporate social responsibility (CSR) are inadequate. It is also at this point that I briefly trace the history of South African company law in terms of human rights responsibilities and how the advent of the new democratic order changed or ought to have changed things. In the second part I focus on the *Companies Act*. In this part I analyse the various sections of the *Companies Act*, particularly those that support the argument that the Act has reinforced the idea that companies have human rights responsibilities. In the third part I look at the *Constitution* and in particular the Bill of Rights. I intend to explore how the *Constitution* can be used to give effect to the human rights responsibilities of companies. In the fourth part I make some suggestions as to how the *Companies Act* should be interpreted by the courts in order to give effect to the realisation of those responsibilities. I proceed to make recommendations on how the *Companies Act* can be improved. Finally, I conclude by arguing that the *Companies Act* can indeed be

¹⁶ Ruggie 2010 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/126/29/PDF/G1012629.pdf?OpenElement>.

¹⁷ Ruggie 2010 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/126/29/PDF/G1012629.pdf?OpenElement>.

¹⁸ As stated, this paper focuses on the South African *Companies Act* and companies operating in South Africa. I will therefore not go into a deeper discussion of the international instruments of the UN and the Ruggie Report. For a more detailed discussion of the above, see UN HRC 2014 <http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx>.

used for the realisation of corporate human rights responsibilities, although much depends on how the Act is interpreted.

2 The need for corporate human rights responsibilities

Firstly, it has become very clear that States are no longer the only threat to human rights: corporations have increasingly become a threat over the years.¹⁹ (Shell's involvement in Nigeria's oil industry is a good example. In 2002 allegations were levelled against Shell that it had worked hand in glove with the government to suppress political opposition.)²⁰ Secondly, the economic might of some corporations has eroded the power of States to protect their citizens, especially in developing countries.²¹

Thirdly in some cases a strong nexus exists between corporations and the affected citizens, and ignoring this nexus may lead to fatal consequences. Furthermore, in some cases corporations clearly exercise significant power over individuals in the most direct sense, controlling their well-being.²² A simple indicator of this is in the context of South Africa is the fact that the private sector is the biggest creator of employment, as opposed to the government. This supports the idea that human rights obligations ought to be regulated at company level. Some have actually argued that the solution to the current employment crisis can come only from the private sector.²³ Clearly, therefore, companies have more direct control over the well-being of the people than the State has.

It is perplexing, however, to note that besides all the power or the potential power that a company may possess and the need to regulate company activities nothing in the previous *Companies Act* 61 of 1973 (the 1973 Act) or other previous *Companies*

¹⁹ Ratner 2001 *Yale LJ* 443-447.

²⁰ See Human Right Watch 1999 <http://www.refworld.org/docid/3ae6a82e0.html>. Human Rights Watch is known for its accurate fact-finding, impartial reporting, effective use of media, and targeted advocacy, often in partnership with local human rights groups. See Human Rights Watch 2014 <http://www.hrw.org/our-work>.

²¹ Ratner 2001 *Yale LJ* 450.

²² Ratner 2001 *Yale LJ* 451.

²³ IFC 2013 http://www.ifc.org/wps/wcm/connect/0fe6e2804e2c0a8f8d3bad7a9dd66321/IFC_FULL+JOB+STUDY+REPORT_JAN2013_FINAL.pdf?MOD=AJPERES.

Acts or regulations expressly mentioned human rights as a subject relevant to corporations. Furthermore, no attempts were made to amend the 1973 Act in order to bring it in line with the new constitutional provisions after 1994, except for the amendment of section 417, which dealt with the summoning and examination of persons as to the affairs of the company.

What this meant is that before the *Companies Act* of 2008 commenced the framework for companies and the realisation of human rights obligations was voluntary. CSR was non-binding.²⁴ This was despite the fact that the South African *Constitution*²⁵ in its Bill of Rights expressly provides for the direct application of fundamental rights to juristic persons.²⁶ Fortunately the *Companies Act* has to some extent attempted to remedy this situation in a number of ways, which are explored below.

3 The Companies Act 71 of 2008

The *Companies Act* has taken a bold step to mainstream human rights. In this section I consider some sections of the *Companies Act* that support the view that the *Companies Act* has indeed reinforced the human rights responsibilities of companies.

3.1 The purposes section

Section 7(a) of the *Companies Act* gives express recognition of the constitutional imperative to bring company law within the constitutional framework.²⁷ This was a bold move considering that for many years constitutional law and company law existed as if they were largely separate disciplines with a very limited area of overlap.²⁸ The reference to the Bill of Rights recorded in section 7 of the *Companies Act* now points

²⁴ Bilchitz 2008 *SALJ* 754-755. Also see Wade 2002 *Tul L Rev* 1461-1464, who discusses the notion of CSR in greater detail, particularly comparing the system in which business is expected to achieve a social good even though this is not required by law as opposed to corporate responsibility which is required by law.

²⁵ *Constitution of the Republic of South Africa*, 1996.

²⁶ S 8(2) of Bill of Rights. Direct horizontal application means that the Bill of Rights applies not only to the relations between the State and its citizens, but also to private-law relations between individuals.

²⁷ See s 7 of the *Companies Act* which provides that "The purpose of this Act are to- (a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of Company law".

²⁸ Bilchitz 2008 *SALJ* 774.

to an interpretation that makes it impossible for one to deal with section 7 alone without referring to the *Constitution*.

One may ask what is the significance of including the Bill of Rights in the Act? The inevitable conclusion that one will reach is, as Katzew put it, that:

... now section 7 bolstered by the overarching directive of the Bill of Rights, *demand*s that human rights concerns are placed at the centre of policy making within the company and should be embedded in the holistic functioning of the company.²⁹ (My emphasis)

The founding provisions of the *Constitution* are also critical in the eventual elaboration of the Bill of Rights. Section 1(a) of the *Constitution* provides that South Africa is founded on the values of human dignity, the achievement of equality, the advancement of human rights and freedoms; (b) non-racialism and non-sexism, and enunciates the supremacy of the *Constitution* and the rule of law. Section 7 effectively dispels the idea that only states and individuals are holders of obligations. The belief that placing duties on companies is unprecedented and not allowed was never part of our law. The *Companies Act* clearly reinforces the obligation which arises from the constitution, which is a more justifiable doctrine for responsibility of companies than State or individual responsibility.

3.2 The general interpretation of the Act

The *Companies Act* expressly provides that in interpreting this legislation, it must be interpreted and applied in a manner that gives effect to the purposes set out in section 7.³⁰ This means that courts have to consider the purposes of the *Companies Act* as expressed in section 7. One of those stated purposes is the promotion of compliance with the Bill of Rights. Therefore, whenever a court is interpreting the *Companies Act*, consideration of the Bill of Rights may be inevitable. Furthermore, section 158 supports this idea of purposive interpretation by providing that "... a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act".

²⁹ Katzew 2011 *SALJ* 686-687.

³⁰ S 5 of the *Companies Act*.

The *Companies Act* thus requires the *realisation* and *enjoyment* of the rights in the *Companies Act*. It is submitted that the rights established by the *Companies Act* include all the rights provided for in the Bill of Rights, and therefore section 158 requires the courts, in interpreting the *Companies Act*, to develop the common law in a way that promotes the realisation and enjoyment of the rights in the Bill of Rights as well.

3.3 Director's duties

The *Companies Act* regulates the duties of directors and how directors exercise their functions as directors. Section 76(3)(b) of the *Companies Act* provides that directors *must* act in the "best interests" of the company. The *Companies Act* does not define what is meant by the term "best interests" of the company; however, at common law directors owe their duties to the shareholders as a collective.³¹ In *South African Fabrics v Millman*³² the court held that a company's "interests" in this context are only those of the company itself as a corporate entity and those of its members. The inclusion of section 7 in the *Companies Act* brings into question the applicability of the court's finding in *South African Fabrics Ltd* today. Further, section 158 would imply that this position must be developed by the courts in such a way as to ensure that it is in line with the Bill of Rights as well as ensuring that it promotes the realisation and enjoyment of the rights contained in the Bill of Rights.

As already said, the meaning of the phrase "the best interests of the company" is not clear. A number of academics have debated its precise meaning but despite this there is still considerable uncertainty as to exactly what is meant by the term. As noted by Musukwa:

... while the company law reform process created the ideal opportunity to clarify this issue, it still remains unclear from the wording of section 76(3)(b) whether directors should provide shareholders with primacy when they manage or whether they should also consider the interests of other stakeholders.³³

³¹ *Fisheries Development Corporation v Jorgensen* 1980 4 SA 156 (W) 165.

³² *South African Fabrics Ltd v Millman* 1972 4 SA 592 (A).

³³ Muswaka 2013 *WJSS* 11-19.

This debate is also considered by Esser and Dekker,³⁴ who question the traditional view that directors are expected to manage a company in the best interests of the shareholders collectively. They also note that:

... there is pressure on companies and directors to take into account not only the shareholders when they manage a company, but rather the interests of all stakeholders, such as employees, creditors, consumers, suppliers, the environment and the community. This consideration for the interests of other stakeholders is known as corporate social responsibility.³⁵

The King reports have also considered this issue. However, it must be noted that the King Reports are not binding law.³⁶ What is meant by the term "the best interests of the company" therefore still remains unclear until such time as a court of law clarifies the meaning. However, if one looks at the manner in which it has been interpreted in English cases to mean the interests of the shareholders collectively, one may conclude that the traditional (common law) viewpoint, that is, the shareholder value approach, still applies. As argued by Cassim *et al*, the clear implication of this common-law and statutory principle is that the interests of stakeholders other than the shareholders of the company have received no formal, legal recognition under the Act.³⁷ Likewise the Department of Trade and Industry's (the DTI's) policy document³⁸ supports the notion of the enlightened shareholder value approach, which is not binding and was designed to guide the drafters of the legislation. It, too, has no binding force but is very persuasive.³⁹ This, then, leaves the impression that the primary concern of a company is still the interests of its shareholders.

This was the position until the coming into force of the *Companies Act*. It is submitted that the position expressed in *Millman*⁴⁰ no longer reflects the true position of our law. As Katzew argues, companies are "now situated within a constitutional framework, and so in considering the 'best interests' it is imperative that directors give preference

³⁴ Esser and Dekker 2008 *JICLT*. Also see Esser and Du Plessis 2007 *SA Merc LJ* 346.

³⁵ Esser and Dekker 2008 *JICLT*.

³⁶ The King III Report is not binding but is very persuasive.

³⁷ Cassim *et al Contemporary Company Law* 514.

³⁸ DTI 2004 http://www.gov.za/sites/www.gov.za/files/26493_gen1183a.pdf.

³⁹ For a detailed understanding at the DTI's policy document, see <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/bills/040715companydraftpolicy.pdf> 30 November 2014.

⁴⁰ *South African Fabrics Ltd v Millman* 1972 4 SA 592 (A).

to the values of the *Constitution* and the Bill of Rights."⁴¹ This does not suggest that the nature of a company has changed fundamentally since the commencement of either the democratic era or the *Companies Act*, but rather that the commencement of the *Companies Act* has reinforced the idea that companies, too, must act in accordance with the values of the *Constitution* and the Bill of Rights.

In *Bester v Wright*⁴² the High Court held that, if a director does not comply with a legal rule, be it in terms of the *Companies Act* or any other "law", he or she will be in breach of his or her fiduciary duties. It is clear, therefore, that directors can be held to be in violation of their fiduciary duties if in the exercise of their duties they disregard the Bill of Rights or any other provision which may be concerned with the realisation of human rights.⁴³ This must not be read as suggesting that section 7 is an expansion of directors' fiduciary duties. What must be emphasised is that the duty of a director has always been to act in accordance with the law, and a failure to do so will attract liability. The basis for the liability will be that the director has violated a legal rule whilst exercising his duties. Given the fact that directors are the practical decision makers and therefore the "brain" of the company, they need to ensure that the company's actions take place within the confines of section 7(a).

3.4 Another side of the derivative action

Section 165 is headed "Derivative actions", and the orthodox understanding of this section is that it is aimed at protecting private financial interests in the company of shareholders. However, it contains one important provision for the purposes of the realisation of human rights in that it permits any person who has been granted leave by the court to demand that a company itself institute proceedings in order for it to protect its legal interests, if the court can be satisfied that the action is necessary to protect that person's legal rights.⁴⁴ Again the term "the legal interests" of the company

⁴¹ Katzew 2011 SALJ 705.

⁴² *Bester v Wright* 2011 2 All SA 75 (WCC).

⁴³ Section 8(2) of the *Constitution* provides that "a provision of the Bill of Rights binds a natural person or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".

⁴⁴ Section 165(2)(d) of the *Companies Act*.

is not defined, but as Henochsberg notes the concept is extremely wide and covers not only rights but may even cover potential rights.⁴⁵ It is submitted that this section may be used by individuals to ensure in advance that companies do not violate their human rights. The company could find itself involved in lengthy and costly litigation (the legal interest) as a result of its violation of an individual's legal rights (the individual's human rights).

It is argued that this section has the potential to prevent human rights violations even before they have taken place. This is because a person can approach the court in order to be granted leave to serve a demand upon the company to commence or to continue legal proceedings in order to protect the legal interests of the company.⁴⁶ It is further stated that the court can grant such leave only if it is satisfied that it is necessary or expedient to do so to protect a legal right of that person.⁴⁷ Therefore, if there is the potential of a violation of someone's legal right, that person may approach the court for leave to have the company commence legal proceedings against the person who poses the potential threat to protect the legal interests of the company, eg the company's reputation.

Indeed the derivative action is aimed at protecting the rights of the company, which may be under threat in many different ways. For example, a construction company may want to develop a certain piece of land in a certain area, and that development may lead to violations of the fundamental human rights of the people living in that area, such as the right to access to water or the right to an environment that is not harmful to health. Using the derivative action, it may be possible for those people to approach the court and argue that the intended actions of the company will violate their constitutional rights, which if not prevented may actually lead to the company enduring serious economic consequences as a result of litigation that may follow. Leave may then be granted to demand that the company take related steps to protect its own interests (eg reputation) by avoiding further litigation.

⁴⁵ Kunst, Delpont and Voster *Companies Act* 586.

⁴⁶ S 165(2) of the *Companies Act*.

⁴⁷ S 165(2) of the *Companies Act*.

3.5 Regulation 43

Another important aspect of the *Companies Act* in respect of human rights realisation is the establishment of a social and ethics committee, which is referred to in section 72. Its establishment is regulated by regulation 43 to the *Companies Act*. However, only specified kinds of companies are required to establish this committee,⁴⁸ such as State owned companies, public companies and other companies that would have scored certain points in terms of the *Companies Act*.

The function of the social and ethics committee is to monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, with regard to matters concerning, social and economic development, including the company's position regarding the goals and purposes as envisaged in for example the OECD Principles and the Global Compact Principles as well as the *Employment Equity Act* and the *Broad-Based Black Economic Empowerment Act*.⁴⁹ Regulation 43 also covers issues of equality, of the prevention of corruption, and of unfair discrimination. This is a great initiative on the part of the legislature in the realisation of human rights although it is limited to certain types of companies only.⁵⁰ What must be commended in connection with the establishment of the social and ethics committee through regulation 43 is that it expressly recognises the principles set out in the United Nations Global Compact Principles (UNGCP).⁵¹ Principles 1 and 2 of the UNGCP provide that business should support and respect the protection of internationally proclaimed human rights and make sure that they should ensure that they are not complicit in human rights abuses. This means that companies ought to

⁴⁸ Reg 43 of the Companies Act Regulations requires all listed public companies and every state-owned company to appoint a social and ethics committee, unless it is exempted by the Companies Tribunal. Further, any other company, including a private company, that in any two of the previous five years had a public interest score of 500 or more points must appoint a social and ethics committee.

⁴⁹ *Employment Equity Act* 55 of 1998 as well as the *Broad Based Black Economic Empowerment Act* 53 of 2003. Also see Esser 2011 *SA Merc LJ* 326.

⁵⁰ S 43 of the *Companies Act* provides that the requirement of the establishment of a social and ethics committee applies only to state owned companies, listed companies and any company that has in the previous five years scored above 500 points in terms of reg 26(2), which regulates "public interest scores".

⁵¹ See UN Global Impact 2014 <http://www.unglobalcompact.org/abouttheGc/TheTenprinciples/index.html>.

recognise internationally proclaimed human rights, as well as the OECD recommendations, in terms of the *Companies Act* regulations.

The major problem with the social and ethics committee is that it is set up by the company itself. People in that committee are employees of the company. It is difficult to foresee a situation where the employees of a company will report negatively on the company. Another problem with the social and ethics committee is that it lacks enforcement mechanisms. The effectiveness of the mechanism remains to be seen, but is rather doubtful that it will be productive.

4 The Constitution and the Bill of Rights

The *Constitution* is the supreme law of the Republic. Law or conduct inconsistent with it is invalid, and the obligations imposed by *the Constitution* must be fulfilled.⁵² Further, the *Constitution* provides that the Bill of Rights is the cornerstone of democracy in South Africa and that it enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.⁵³

Section 8(1) and (2) of the *Constitution* provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state as well as natural and juristic persons, but only to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. Effectively this means that creating a legal person (a company) which can pursue profits at the expense of human rights is no longer legally possible.⁵⁴ Under the constitutional dispensation it is no longer legally viable for a company to claim that its adherence to human rights norms is strictly voluntary. The exercise of corporate power is permitted only to the extent that the company does not violate human rights⁵⁵ and/or the Bill of Rights.

However, the approach in section 7 of the *Companies Act* is dissimilar to the approach in the *Constitution*, and as Katzew notes this could mean that the purpose of

⁵² S 2 of the *Constitution*.

⁵³ S 7(1) of the *Constitution*.

⁵⁴ Bilchitz 2008 *SALJ* 780.

⁵⁵ Bilchitz 2008 *SALJ* 780.

promoting compliance with the Bill of Rights is more comprehensive and that by incorporating human rights in the *Companies Act* the legislature was reinforcing the horizontal application of the Bill of Rights.⁵⁶

As noted above, the Bill of Rights binds all juristic persons, to the extent that it is applicable. In matters concerning non-state entities such as companies, the use of this provision would entail a direct horizontal application in which the company would be held liable directly for a breach of any right in the Bill of Rights.⁵⁷ The *Constitution* further provides for the indirect application of the Bill of Rights in that it requires courts in interpreting any legislation to develop the common law or customary law to promote the spirit, purport and objects of the Bill of Rights.⁵⁸ Thus where companies are concerned the latter provision could be used in order to hold companies liable through the development of the common law.⁵⁹

Using the indirect application of the Bill of Rights it is possible to nullify those fundamentals of company law which are not supported by any reasonable concept of justice⁶⁰ such as the notion of the supremacy of the interests of the company's shareholders. The common law needs to be developed to ensure that these principles no longer form part of our law. As Roederer notes:

... those common law foundations that are simply based on the mentality of continuing on, for the sake of maintaining order, stability and precedent, need to be removed from the common law on this basis.⁶¹

The Bill of Rights contains many fundamental human rights which all organs of State including private individuals must observe. These rights, it must be noted, are not absolute and may be limited in certain circumstances. However, it is beyond the scope of this article to discuss this.⁶² What is however important for the purposes of this article is that some of these rights can be crucial when they are implicated in how

⁵⁶ Katsew 2011 *SALJ* 690.

⁵⁷ Smit 2011 *SAJHR* 354-356.

⁵⁸ S 39(2) of the *Constitution*.

⁵⁹ Smit 2011 *SAJHR* 369.

⁶⁰ Roederer 2003 *SAJHR* 57-61. The provisions referred to here are those found in the common law, and the article does not refer to any provisions in the *Companies Act*.

⁶¹ Roederer 2003 *SAJHR* 60.

⁶² S 36 of the *Constitution* provides for circumstances in which a right may be limited.

corporations conduct their activities. It is therefore submitted that the *Companies Act* has managed to incorporate the realisation of human rights into the realm of company law in this regard.

Some of these rights include the freedom and security of the person, which indirectly can be interpreted to mean that companies must take steps to ensure that the working environment of its employees does not violate this right. It is submitted that the right to the freedom and security of a person indirectly includes the right to be free from a hazardous environment, or more directly includes the right to a secure working environment. In *Mankayi v AngloGold Ashant*⁶³ this right was in question. The applicant was a former mineworker who had contracted tuberculosis and chronic obstructed airways due to his exposure to harmful substances during his employment. Although this claim was based on a delict and the judgement was "firmly located within the wording of the very specific legislation,"⁶⁴ it is significant in the effect it has against a company. In dismissing the exception that had been raised by the company that it could not be sued at common law due to some technicalities, the Constitutional Court effectively gave Mr Mankayi the opportunity to pursue his delictual claim against the company. Perhaps a more direct approach would have been to frame the case as an infringement to the right to health, or even the right to an environment that is not harmful to health or wellbeing.⁶⁵ This framing could have tested just how far the courts were willing to go in recognition of the human rights responsibilities of companies, even before the coming into effect of the *Companies Act*. It was unfortunate that Mr Mankayi passed on before the matter could be completed.

The significance of the *Mankayi* case is that the Court realised to some extent that some rules of private common law need to be put out to pasture.⁶⁶ The question of their survival can no longer be based merely on their having secured some place in precedence over the many years that have gone by, or even *stare decisis*.

⁶³ *Makhanyi v Anglo Gold* 2011 3 SA 237 (CC).

⁶⁴ Katzew 2011 *SALJ* 699.

⁶⁵ This could be done using ss 24 and 27 of the *Constitution*.

⁶⁶ Roederer 2003 *SAJHR* 78.

As Bilchitz argues, if the dignity and consequent rights of natural persons are primary in our law, then it must follow that companies have duties to ensure that such rights are protected. The impact of a company's activity on natural persons must thus be a critical factor in imposing binding legal responsibilities upon companies.⁶⁷ As mentioned earlier, section 158 of the *Companies Act* requires a court, in making an order contemplated in the Act, to develop the common law as necessary to improve the realisation and enjoyment of the rights established by the *Companies Act*.⁶⁸ The rights established by the *Companies Act*, include all the rights provided for in the Bill of Rights. Therefore section 158 commands the courts in interpreting the *Companies Act* to develop the common law in such a way that the realisation and enjoyment of the rights in the Bill of Rights are also ensured.

5 The practical effects

The *Companies Act* is still relatively new, and it might be premature for civil society or human rights activists to start celebrating based on the sections discussed above. The relationship between the realisation of human rights and the need for companies to maximise profits is complex. There are also practical and theoretical concerns that make it very difficult to arrive at a definite solution.⁶⁹ Some of these practical problems have been noted by Muswaka,⁷⁰ who states that "a company's execution of responsibilities for human rights may be impeded by the fact that human rights might conflict between different stakeholders". Also true is the fact that "the presence of business can also have important impact on the wider political context, for example when collaboration morally supports or even provides financial means to oppressive regimes".⁷¹

⁶⁷ Bilchitz 2008 *SALJ* 775.

⁶⁸ S 158 of the *Companies Act* reads "When determining a matter brought before it in terms of this Act, or making an order contemplated in this Act- (a) a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act; and (b) [...] must promote the spirit, purpose and objects of this Act."

⁶⁹ Katzew 2011 *SALJ* 698.

⁷⁰ Muswaka 2014 *MJSS* 219-224.

⁷¹ Muswaka 2014 *MJSS* 224.

One can only hope that the courts will adopt a more rights-oriented approach as opposed to the rather conservative, narrow and formalist attitude⁷² which they have displayed thus far, especially when they have been called upon to adjudicate on the interpretation of contracts in the context of the *Constitution*.⁷³ The courts, including the Constitutional Court itself, have failed to move away from the "classical libertarian roots and a concomitant hostility" not only to constitutional values but also to "broader concerns of equity and fairness that had previously been allowed to infiltrate the application of its rules".⁷⁴ We need an approach that is more favourable to reform, and one where human rights rather than ideologies take centre stage in business.

Developments in the international sphere have challenged the narrow understanding of the responsibility of companies as profit-making entities. Notions such as the "triple-bottom-line" have been developed with the intention of recognising that the responsibilities of companies go beyond simply making profit.⁷⁵ In *Pharmaceutical Manufacturers*, the Constitutional Court reaffirmed that the *Constitution* is the supreme law, and all law, including the common law regulating companies, derives its force from the *Constitution* and is subject to constitutional control.⁷⁶ Companies are thus required by the *Constitution* to respect and protect human rights to the extent that these rights are applicable to them. Companies ought to realise that they cannot take away existing rights in pursuit of the profit motive without experiencing repercussions.

It must be noted that whether the constitutional obligation is positive or negative is irrelevant for the purposes of this discussion. Companies may not take away existing rights in the pursuit of profits. By the same token companies have to ensure that the rights given by the *Constitution* to individuals, be they employees or members of the surrounding communities are protected when they are engaging in their day to day

⁷² A more rights oriented approach is one which seeks to give effect to basic fundamental human rights at the expense of trying to conform to the common law notion that companies are simply there to maximise profits. Also see Katzew 2011 *SALJ* 699; Bhana and Pieterse 2005 *SALJ*.

⁷³ Bhana and Pieterse 2005 *SALJ* 865.

⁷⁴ Bhana and Pieterse 2005 *SALJ* 865.

⁷⁵ Bilchitz 2008 *SALJ* 780.

⁷⁶ *Pharmaceutical Manufacturers of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44.

activities. This is not to say that the State should abdicate to companies its role of protecting human rights. Rather, as long as companies are operating in their particular sphere of activities, they need to support the State both in the protection of human rights as well as in preventing violations of human rights,, particularly where those human rights are directly linked to their operations.⁷⁷

Therefore the courts ought to be more liberal⁷⁸ in their approach and realise that company law, "like any other branches of South African law, has to re-establish its legitimacy in a constitutional dispensation founded on the values of dignity, equality and freedom".⁷⁹ The *Constitution* demands this from them and they need know that:

The result [of developing the common law in accordance with s 39 (2)] is not to undermine the foundations of law,[or] to unsettle every rule, and to leave every existing right or entitlement in jeopardy. No doubt the exercise will reveal those rules and structures that do not have solid foundations. Those which cannot be supported by the values of the new constitutional dispensation are in jeopardy of being condemned. They will need to be replaced with rules which are supported by those values. Those rules which can be, or are, supported by those values will find a foundation as secure as any set of rules can be. They will find a foundation that draws from a struggle to rid this country of apartheid and its legacy, a foundation built on comprehensive sets of human rights drawn from the best international and comprehensive practices. In other words those rules will be founded on values that not only have the best democratic pedigrees as evidenced by the struggle and the process that brought the Constitution but also that sound in the best practices and thinking on human rights jurisprudence to this date.⁸⁰

6 Recommendations

Besides the almost obvious obstacles that the *Companies Act* may face it must be acknowledged that with creative judges and innovative litigation the *Companies Act* might be just the answer that those who have for years been crying for companies to be held accountable for human rights violations have been waiting for. However it

⁷⁷ Muswaka 2014 *MJSS* 224.

⁷⁸ The word liberal in this context is used to mean an approach that is more favorable to progress and reform, one that guarantees individual freedom and basic human rights as envisaged by the *Constitution*.

⁷⁹ The re-establishment of legitimacy here does not mean that company law must be overhauled or reinvented, but rather that company law needs to be more in line with the *Constitution*. Also see Bhana and Pieterse 2005 *SALJ* 865.

⁸⁰ Roederer 2003 *SAJHR* 61-62.

must be noted that the *Companies Act* does have some shortcomings as far as the idea of human rights realisation is concerned.

Firstly the *Companies Act* does not at any point expressly mention human rights as an issue which a company needs to concern itself with in its activities. This is confusing, if it was ever the intention of the legislature to make companies realise human rights in their activities. It must be noted that the obligation of the State to "protect" rights in the Bill of Rights involves ensuring that corporations do not commit human rights abuses. States are thus required to have effective policies, legislation as well as regulations, to prevent such abuses.⁸¹

At this point I will make a few critical observations and recommendations towards legislative reform and future development.

As Ruggie noted in his guiding principles,⁸² "worldwide, companies' financial reporting is their most tightly regulated and legally consequential reporting requirement, and companies are generally required to disclose all information that is 'material' to their operations and financial condition with penalties for non-disclosure or misrepresentation".⁸³ Regulators tend to regard information as "material" if there is a substantial likelihood that a "reasonable investor" would consider it important in making an investment decision.⁸⁴ The legislator could have gone a step further by classifying human rights impacts as "material" and indicating that companies should report on their compliance with their human rights obligations. This would have been desirable especially in this modern world where human rights responsibilities are indeed "material," as it is arguable that any "reasonable investor" should consider it important in making an investment decision to know how the company operates as far as its human rights responsibilities are concerned.

⁸¹ Bilchitz *Human Rights Obligations* 13.

⁸² Ruggie 2010 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/126/29/PDF/G1012629.pdf?OpenElement>.

⁸³ Ruggie 2010 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/126/29/PDF/G1012629.pdf?OpenElement>.

⁸⁴ Ruggie 2010 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/126/29/PDF/G1012629.pdf?OpenElement>.

It is also submitted that the legislature should have provided clarity in the *Companies Act* with regard to director's duties, in particular clarity on what a director may or may not be competent to do in the light of the Bill of Rights. As mentioned earlier, the interests of stakeholders other than shareholders have received no formal recognition under the companies Act.⁸⁵ In the *Companies Act*, directors have little if any guidance on how best to oversee their companies' respect for human rights. The reference to acting in the "best interest of the company" is vague, as it does not give clear guidelines as to who the real stakeholders are. The wording in section 76 should therefore have been clearer, as the current wording may create the impression that shareholder primacy is still preferred.⁸⁶ Although the DTI policy documents which advocate for the enlightened shareholder value approach are available, they too, as already pointed out, are merely persuasive and have no binding force.⁸⁷ Furthermore, the definition of a "profit company"⁸⁸ in the *Companies Act* suggests that shareholder supremacy is envisaged.

It would have been desirable to explicitly place a fiduciary duty upon directors to act with due care and diligence to ensure that the company's activities conform to their obligations to realise the fundamental rights in the Constitution to the extent that they are required.⁸⁹ Furthermore, in an attempt to make companies take their human rights responsibilities seriously the legislator could have also required companies to insert in their memoranda of incorporation (MOI) that they are bound by the Bill of Rights and are responsible for their realisation to the extent that they bear responsibility for them, which would make human rights one of the prime constraints in the activities of the company.⁹⁰

⁸⁵ See Cassim *et al Contemporary Company Law* 514.

⁸⁶ Esser 2011 *SA Merc LJ* 324.

⁸⁷ See Cassim *et al Contemporary Company Law* 514.

⁸⁸ S 1 of the *Companies Act* defines "'profit company' as a company incorporated for the purpose of financial gain for its shareholders".

⁸⁹ Bilchitz 2008 *SALJ* 782.

⁹⁰ Bilchitz 2008 *SALJ* 781.

7 Conclusion

This article has argued that, if interpreted properly and in a manner that the *Constitution* envisages, the *Companies Act* has to a certain extent confirmed that there are human rights responsibilities for companies operating within South Africa.

Although the *Companies Act* should be commended for the brave and liberal approach that it has taken in regard to the realisation of human rights by companies, it must also be kept in mind that this article has been concerned with the human rights aspect of the *Companies Act* only. It should be remembered that the *Companies Act* also has other objectives which it seeks to achieve, such as encouraging entrepreneurship and enterprise efficiency.⁹¹

The question may be asked, what happens if there is a conflict between the different purposes of the *Companies Act*. As Mukwana argues, sometimes the execution of a company's responsibilities for human rights may be impeded by the fact that the human rights of different stakeholders might conflict.⁹² As Katzew has stated, section 7 may highlight tensions between the need to impose enforceable obligations on companies to protect those vulnerable to abuse of corporate power, and the need to take into account the company's goal of doing business as efficiently as possible to maximise profits.⁹³

Indeed, the desire for profitability may clash with the social responsibilities of a company and the very nature of a company may render it likely to favour the interests of its shareholders.⁹⁴ However, the law and the courts ought to be guided by the Bill of Rights, together with section 7 of the *Companies Act*, in order to find a way to integrate human rights responsibilities within the day-to-day functioning of companies.⁹⁵

⁹¹ S 7(b)(i) of the *Companies Act*.

⁹² Mukwaka 2014 *MJSS* 224.

⁹³ Katzew 2011 *SALJ* 698.

⁹⁴ Bilchitz 2008 *SALJ* 755.

⁹⁵ Katzew 2011 *SALJ* 699.

It is further submitted that companies ought to realise that it is possible to do business efficiently and correctly without violating human rights. There is a need to foster a rights-respecting corporate culture.⁹⁶ Therefore, as much as companies have a responsibility to make as much profit as possible, in doing so they ought to conform to the basic rules of society, both those embodied in the law and those embodied in ethical custom.⁹⁷ Section 7(d) of the *Companies Act* also makes it clear that companies are a means of achieving economic and *social benefits* (my emphasis).

Bilchitz along similar lines argues that we can no longer continue to adjust our laws to attract corporations and or investment and continue to turn a blind eye to violations of the human rights granted in the *Constitution*. Companies need to also realise that the relationship with the citizenry is no longer about getting only the best terms out of the employment contract.⁹⁸ With rights come responsibilities, and companies need to ensure that they are not in violation of those responsibilities.

The *Companies Act* accordingly is a promising initiative on the part of the legislature as far as the human rights responsibilities of companies are concerned. However, as has been shown above, the *Companies Act* remains to be tested and much of its success or failure will indeed depend on the courts' approach to interpreting it, as well as to creative adjudication in general. The opportunity has presented itself. If the courts are not as conservative as they have been when they have been called to adjudicate on the interpretation of contracts in the context of the *Constitution*, then surely we can anticipate a new era in which it will no longer be a case of "just business, nothing personal" a situation where "business is personal" if it is conducted in an irresponsible manner. So, even if the economic objective is not "enhanced," companies should be obliged to the same extent as natural persons to act within the boundaries of the law,⁹⁹ specifically the Bill of Rights and the *Constitution*.

⁹⁶ Ruggie 2010 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/126/29/PDF/G1012629.pdf?OpenElement>.

⁹⁷ Orts 2002 *Vanderbilt J Transnat'l L* 549.

⁹⁸ Bilchitz 2008 *SALJ* 460.

⁹⁹ Bilchitz 2008 *SALJ* 460.

Further, all role players need to be aware that company law and companies in particular do not exist in a vacuum. As Roederer notes, no law can exist outside the *Constitution*; the rules of the *Constitution* are not separate from the values and practices that support them. If one does not understand what it means to say that when interpreting any legislation, and when developing the common law, or customary law, every court, tribunal or forum must promote the spirit, purport and objectives of the Bill of Rights, then one does not understand, let alone know the law.¹⁰⁰

¹⁰⁰ Roederer 2003 *SAHJR* 81.

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LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
Berkeley J Int'l L	Berkeley Journal of International Law
Conn J Int'l L	Connecticut Journal of International Law
CSR	Corporate social responsibility
DTI	Department of Trade and Industry
Hastings Int'l & Comp L Rev	Hastings International and Comparative Law Review
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFC	International Finance Corporation
JICLT	Journal of International Commercial Law and Technology
MJSS	Mediterranean Journal of Social Sciences
MNEs	Multinational enterprises / corporations
MOI	Memorandum of incorporation
OECD	Organisation for Economic Co-operation and Development
SA Merc LJ	South African Mercantile Law Journal

SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Tul L Rev	Tulane Law Review
Vanderbilt J Transnat'l L	Vanderbilt Journal of Transnational Law
UN	United Nations
UN HRC	United Nations Human Rights Council
UN OHCHR	United Nations Office of the High Commissioner for Human Rights
UNGCP	United Nations Global Compact Principles
WJSS	World Journal of Social Sciences
Yale LJ	Yale Law Journal