The elimination of discrimination against women in the composition of company boards by application of the King IV Report on Corporate Governance

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List of abbreviations

CC	Constitutional Court
CEO	Chief Executive Officer
Constitution	Constitution of the Republic of South Africa, 1996
ILO	International Labour Organisation
JSE Ltd	Johannesburg Stock Exchange Limited
WEGE Bill	Women Empowerment and Gender Equality Bill

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Chapter 1: Introduction

1.1 Title

The elimination of discrimination against women in the composition of company boards by application of the King IV Report on Corporate Governance

1.2 Keywords

Listed company, unlisted company, board composition, woman rights, diversity, King IV Report, equality

1.3 Background

1.3.1 Background to the problem

The Apartheid policy that was prominent in South Africa before 1994 instigated inequality and discrimination even as far as the economic landscape of the country.[1] The constitutional dispensation, which we find ourselves in, is now anchored on the principle of non-discrimination where even companies have a responsibility to ensure this principle is upheld in the way they operate. How company boards are structured, such as those listed on the Johannesburg Stock Exchange Limited (JSE Ltd), demonstrate how corporate citizens tend to bypass King IV's corporate governance values when pursuing board compositions. This research study intends to determine how the boards of these listed (or unlisted) companies are composed. There is evidence of less representation of women on boards of listed companies. This is a cause for concern as we live in a constitutional dispensation, which has encouraged equality and dignity and prohibits unfair discrimination. Companies, including those listed on the JSE Ltd, are regulated by the *Companies Act* 71 of 2008 (hereinafter referred to as the *Companies Act*), which is the threshold for all other subsequent regulatory laws or codes as far as companies are concerned, for example, the King IV Report.

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[1] Kruger *Impact of board diversity on corporate governance* 7.

The subsequent regulatory laws or codes in relation to companies are to be considered to the extent that they are compliant with the *Companies Act*. When it comes to the composition of boards, the *Companies Act* in section 66 is only concerned with the size of the company's board in its quantitative sense as it specifically states that at least one board director should be appointed in the case of a private company (unlisted company) or personal liability company and at least three directors should be appointed in the case of a public company (listed or unlisted public company) or non-profit company.[2] The *Companies Act* does not seem to concern itself as to what the company boards should comprise of in terms of women representation. King IV should be taken into consideration in a democracy that is striving for redressing the imbalances of the past and granting all women an equal opportunity, especially in the workforce and at directory levels. Gender inequality stems from the Apartheid policy where women occupied inferior positions due to their lack of skills and education.[3] Democracy has made it possible for women to advance themselves and be exposed to fields, which they were rarely afforded the opportunity to participate in before 1994.[4] It is 27 years post the Apartheid era, yet women are still not put on equal footing as men in the workforce, which is evident in how company boards are structured. [5]Women remain a very small fraction of the board of directors in companies across several industries.[6] The *Companies Act* in Schedule 1 prohibits unfair discrimination between members of a non-profit company, as stated in section 9 of the *Constitution of the Republic of South Africa*, 1996. Section 9 should be equally relevant to, for example, private (unlisted) and public (listed or unlisted) companies pertaining to the composition of board directors. When we refer to subservient instruments such as the King IV Report on Corporate Governance, we have the opportunity to obtain a broader and constitutionally inclined approach in which boards should be structured. Principle 7

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2 Section 66(2)(a)-(b) of the *Companies Act*.
3 Bosch, Van der Linde and Barit *Women on South African boards* 10.
4 Nyirenda *Board Composition* 2.
5 Bosch, Van der Linde and Barit *Women on South African boards* 13.
6 Nyirenda *Board Composition* 11.

of the King IV Report provides the following recommendations for boards of directors:

> The governing body should assume responsibility for its composition by setting the direction and approving the processes to attain the appropriate balance of knowledge, skills, experience, *diversity* and independence to objectively and effectively discharge its governance role and responsibilities.[7]

Diversity could be interpreted to have reference to women directors, irrespective of their race or background and King IV requires an appropriate balance of male and female on company boards.[8]

1.3.2 Motivation

Compliance on the part of listed companies or otherwise is dependent on how sure these companies are of the concepts of the King IV Report and their allocated definitions. In the case of the wording of principle 7 of the King IV Report, the proviso is placed on companies to strive towards attaining "an appropriate balance" of diversity, amongst other features, of ideal board compositions.[9] When we look into the way that boards of listed companies are composed, it could be that they have attached a specific meaning to what an appropriate balance is, which could perhaps be either none or very few women appointees.[10]

With no aid of company case law examples explaining the provisions of the King IV Report, especially with regards to what an appropriate balance or composition entails concerning the ratio of women directors to men directors, one can assume that every one of these companies has its own understanding (or interpretation) of

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7 Institute of Directors SA 2016 "King IV Report on Corporate Governance for South Africa, 2016" 83 (hereinafter the King IV Report, 2016).

8 King IV Report, 2016 28, 52; Principle 6 s 30(b). The company must keep track of targets set for male and female representation.

9 King IV Report, 2016 83.

10 King IV Report, 2016 28.

this concept which is why they perceive how their boards are composed as being appropriate or rather in compliance with King IV's principles.[11]

The general guidance note on board composition by the Institute of Directors South Africa, suggests that women directors - in a general sense - guarantee different business inputs and perspectives, resulting in better decision-making and efficiency at a board level.[12] This study, however, suggests that diversification, specifically in relation to women serving on boards (particularly in listed companies), should be more aligned with what is required when operating as a corporate citizen under a new constitutional dispensation.[13]

One can, therefore, never overlook the right to equality, which was introduced in a constitutional dispensation to redress the imbalances of the past, especially in the economic landscape. This includes placing people who were victims of discriminatory practices on the same footing as those not adversely affected.[14] In order for constituents to attain equal enjoyment of the law in the workforce, King IV also supports the principle of affirmative action under the *Employment Equity Act* 55 of 1998 (hereinafter the *Employment Equity Act*).[15] It is mainly to strike a balance and reimburse women who fell victim to past injustices (or even recent injustices). Having employment equity in place and having fewer female representatives on boards than males raise many concerns such as gender inequality in a new constitutional dispensation. This study will focus briefly on the objectives of a new constitutional dispensation. Although the efficiency of the 1998 Act with regards to attaining an optimal board will be discussed in this research study, there will not be

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11 One case, amongst the few cases that makes reference to the King Report, is *Mthimunye Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd* 2015 ZAWCHC 113; 2015 6 SA 338 (WCC) para 25, where the court highlighted that King IV can be utilized in identifying whether breach of a director's fiduciary duty exists.

12 Du Plessis 2015 *Deakin Law Review* 1-24.

13 King IV Report, 2016 24.

14 Currie and De Waal *The Bill of Rights Handbook* 241.

15 Principle 7 of King IV Report, 2016 83.

any emphasis on labour law as this *Employment Equity Act* is only an example of how to supplement King IV in its interpretation and application.[16]

The motivation for this study is the notion of affirmative action which is also acknowledged by King IV. This study suggests that this notion should be the yardstick for reaching an appropriate balance of women representatives in board composition.[17] Companies need to explain why they did not comply with King IV or affirmative action in their governance reports.

Two companies in different industries will be evaluated in terms of their corporate governance reports to view how compliant they are with King IV. This research study will focus on two companies: Sibanye-Stillwater and Aspen Pharmacare Holdings Limited. In the first company (Sibanye-Stillwater), the board of directors consists of 70 per cent males and 30 per cent females, and the same applies to the board of Aspen Pharmacare Holdings Limited.[18] Considering that these two companies fall under different industries (mining and pharmaceuticals), the common factor between them is that they are not nearing the gender diversity mark as required by the principles of King IV. Furthermore, their reports do not substantiate valid reasons as to why this is the case. Therefore, this study proposes that women are discriminated against in the same way they were before the new constitutional dispensation. This also means that South African companies such as Sibanye-Stillwater and Aspen Pharmacare Holdings Limited are in breach of their international obligations, which will be discussed, that are contained in human rights instruments such as the *Convention on the Elimination of All Forms of Discrimination against Women,* which advocates for signatory states to put in place laws and to

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16 King IV Report, 2016 requires compliance with all laws relevant to a company. The role of a social and ethics committee (SEC) as set out in s 72(4) of the *Companies Act* may also be relevant in this regard.

17 Nyirenda *Board composition* 4.

18 Sibanye Gold Limited trading as Sibanye-Stillwater 2021 https://www.sibanyestillwater.com/about-us/governance/; also see Aspen Pharmacare Holdings Ltd 2019 https://www.aspenpharma.com/wp-content/uploads/2019/10/Aspen-Corporate-Governance-Report-2019.pdf.

enforce those laws that condemn discrimination against women and guarantee equal enjoyment of human rights for men and women in all spheres of life.[19]

1.3.3 Research question

How can unfair discrimination against women in the composition of company boards, with specific reference to Sibanye – Stillwater (Ltd) and Aspen Pharmacare Holdings (Ltd), be eliminated by application of the King IV Report on Corporate Governance?

1.4 Aims and objectives

Without disregarding other factors mentioned earlier by the King IV Report, this study aims to address the component of eliminating the inequality of women against the background of the importance of the right to equality in our constitutional dispensation.[20] Irrespective of a right to equality, there is still a disproportion in the percentage of women who assume seats on the boards, especially those listed on the JSE .[21] This study aims to argue that listed companies should follow King IV principles because the provisions of King IV have been made mandatory by the JSE. For that reason, it is included in the exchange listing conditions of companies.[22] Furthermore, JSE-listed companies are required to publish a compliance or governance report on how they have abided with the provisions and account for where they have failed to do so. This is because the King IV Report, unlike the preceding King reports, is founded on an "apply and explain" principle in the event of non-compliance with King IV.[23] This entails that listed companies cannot ignore King IV provisions concerning good corporate governance, inclusive of women representatives in board composition. This is supported by international law, for

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19 Article 1 of the *Convention on the Elimination of All Forms of Discrimination against Women* (1981).
20 Du Plessis 2015 *Deakin Law Review* 1-24.
21 Nyirenda *Board composition* 7.
22 JSE 2012 https://www.jse.co.za.
23 King IV Report, 2016 7.

example, the *Convention on the Elimination of All Forms of Discrimination against Women*.

The objective of this study is to show that if companies are not reluctant to implement the principle of affirmative action through the *Employment Equity Act* even at a directory level, then compliance with the King IV Report with regards to board composition will be easily achieved. The study will highlight and address the lack of gender representation with regards to women within the boards of listed or other non-listed companies. The failure by companies in appointing females on the same scale as males is an indication of overlooking the provisions of the King IV Report with regards to board size and the composition of an ideal board. This portrays an image of societal patriarchy in which males are constantly at an advantage due to past policies, such as Apartheid, that serve in their favour.[24] At the same time, females are forsaken to occupy subordinate roles even in the corporate landscape.[25] Where women are appointed as board directors or members it usually results in a small number or ratio to men, which is generally disproportionate to the aggregate number of board members as opposed to males on the board.[26] By examining the reports of JSE-listed companies, this research will disclose that these companies do not apply the King IV Report with regards to board composition. This implies that they do not bear in mind the past inequalities by reasonably accommodating women by placing them on an equal footing with corporate males. This similarly indicates that companies are not upholding the right to equality in the structuring of their board composition that they are claiming it to be, as this is evident in the manner in which their boards are composed.[27] A typical example would be that of Sibanye-Stillwater, where the board comprises eleven directors, of which approximately 70 per cent are male.[28] This is one of the companies that prides itself on adhering to the principles of good corporate

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24 *Bosch, Van der Linde and Barit Women on South African boards* 9.
25 Nyirenda *Board Composition* 3.
26 Bosch, Van der Linde and Barit *Women on South African boards* 4.
27 Bosch, Van der Linde and Barit *Women on South African boards* 22.
28 Sibanye-Stillwater 2021 https://www.sibanyestillwater.com/about-us/governance.

governance as stipulated in the King IV Report.[29] Another objective of this study is to create a simple tick-box table that listed or unlisted companies could follow to identify any non-compliance with the King IV Report.

1.5 Research method

The research question will be answered by referring to various primary sources (King IV Report, legislation, international law, relevant case law) and secondary sources (law journals and books). Primary and secondary sources will be searched for using an accredited search engine such as LexisNexis and the University library to ensure that accurate information and arguments are discussed. The above literature, such as those of board composition concerning King IV and affirmative action, are measures that were put in place for purposes of redressing past inequalities. This is further supported by the *Convention on the Elimination of All Forms of Discrimination against Women,* and by not applying this principle in the workforce, especially at a directory level, the purpose of King IV (or affirmative action) is thereby undermined. This study, therefore, suggests that a link exists between the way boards of listed (or unlisted) companies are composed to rectify the imbalances of the past.

1.6 Framework

The research framework of the proposed study and a discussion of each chapter are provided below:

Chapter 1 Introduction and the place of King IV

In this chapter, the title of the study, research question, problem statement and importance of the study will be discussed. Furthermore, concepts relevant to good corporate governance will be introduced. This includes giving an overview of the

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29 Sibanye-Stillwater 2021 https://www.sibanyestillwater.com/about-us/governance.

King IV Report to provide recommendations regarding board composition since the provisions of the *Companies Act* are limited in this regard.

Chapter 2 Corporate governance under a constitutional dispensation

This chapter will emphasise why companies need to acknowledge that they are operating in a constitutional dispensation in which it is paramount that they need to conduct themselves in a way that upholds international law or convention values. This includes upholding the notion of affirmative action to redress the past imbalances and allow this notion to flow to the composition of company boards and its relevance to King IV.

Chapter 3 International norms and the importance of woman equality

South Africa as a state is subject to international law. This chapter discusses the international conventions of which South Africa is a signatory. This includes the *Convention on the Elimination of All Forms of Discrimination against Women* to emphasise that South Africa must enact domestic laws on equality and abide by them as a signatory. Lastly, the chapter will expand upon the extent to which South Africa has accomplished women equality in the corporate landscape.

Chapter 4 Comparative analysis

This chapter will analyse the board composition of two listed companies from different industries (mining and pharmaceuticals). The study will illustrate how these companies address gender diversity in their board of directors. Despite the difference between these companies, they are both required to comply with the King IV Report on aspects such as board composition. The chapter will conclude by providing justification beliefs on how these companies' boards are composed.

Chapter 5 Conclusion and recommendations

This chapter will answer the research question by discussing how listed or unlisted companies should apply King IV in practice to identify inequality in the structure of their company boards. This chapter will provide a concise conclusion on all the preceding chapters and conclude with recommendations on how to counter this social issue.

1.7 Relevance of the study for the research unit

This research is relevant to the North-West University Law Faculty's *Law, Justice and Sustainability* research unit as it concerns corporate governance and company law, falling under the subtheme of finance, trade, and investment. The different King IV rules and statutory regulations are important frameworks for corporate citizens, and compliance is very important to establish equality between women and men.

1.8 Statement regarding ethics

For the purposes of this study, no interviews or questionnaires will be conducted. The study will be based on reports generated by listed companies, case law, legislation, international law, the King IV Report, and law journals. The completed prescribed ethics form as provided by the Faculty of Law is attached.

Chapter 2: Women diversity according to section 9 of the *Constitution of the Republic of South Africa*, 1996

2.1 Introduction

Diversity is one of the most important values on which South Africa's constitutional dispensation is anchored and is to be promoted across all aspects of the country, including the economic landscape. The democracy we live by strives to ensure that all are equal before the law and that none are unfairly discriminated against on any grounds, including gender.[30] Gender inequality, however, continues to be an issue in our country, and women are still not advanced to take on opportunities which they were excluded from in the past through the reign of past regimes such as Apartheid.[31] The most important source of law which prohibits discrimination against women and describes South Africa's democratic ethos is the Constitution, which is hereunder discussed.[32]

The *Constitution of the Republic of South Africa* is derived from several international instruments which South Africa has ratified. Since the attainment of democracy, one cannot speak of the Constitution without acknowledging the place of international law in our country's legal order. The relationship between international law and municipal law is premised on a monism and dualism approach in South Africa.[33] Monism views international law and municipal law as one system of law, while dualism is the belief that these two are different systems which co-exist.[34]

In terms of section 232 of the Constitution, customary international law is law in South Africa unless it is inconsistent with the Constitution or an act of Parliament.[35] This provision enhances the monism approach, where international law is directly

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30 For purposes of this study, the term gender specifically refers to a woman or women.
31 Section 9(3)-(4) of the *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to the Constitution).
32 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 22 & 26.
33 Ferreira and Ferreira-Snyman 2014 *PELJ* 1473.
34 Ferreira and Ferreira-Snyman 2014 *PELJ* 1473.
35 Section 232 of the Constitution.

enforceable in our courts without first incorporating it into our municipal law.[36] A dualist approach is found in section 231(4) of the Constitution, which provides that any international agreement becomes law in South Africa when it is enacted into law by national legislation unless it is inconsistent with the Constitution or an act of Parliament. This provision implies that international law will not be enforceable until it is incorporated into our municipal law.

Even as we interpret the provisions of our Constitution, we ought to turn to international law. In terms of section 233 of the Constitution, courts, when interpreting any legislation, should ensure to give preference to the interpretation that is in line with international law over alternative interpretations that could be in contradiction of same.[37] We find under section 39(1)(b)-(c) of the Constitution that:

> When interpreting the bill of rights, a court, tribunal, or forum
> (b) must consider international law; and
> (c) may consider customary law.[38]

The provisions above indicate the place of international law in South Africa and serve to prove that the Constitution is the one that fosters the relationship between international and municipal law.[39]

The international agreement that seeks to ensure that the law equally protects women and men is the *Convention on the Elimination of All Forms of Discrimination against Women*.[40] The Convention positively affirms the right to equality enshrined under section 9 of the Constitution.[41] This means that South Africa has complied with its obligation in terms of Article 2 of the Convention as a state party to embody equality as a principle under the Constitution.[42] It, therefore, follows that the

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36 Ferreira and Ferreira-Snyman 2014 *PELJ* 1473.
37 Section 233 of the Constitution.
38 Section 39(1)(b)-(c) of the Constitution.
39 Ferreira and Ferreira-Snyman 2014 PELJ 1472.
40 *Convention on the Elimination of All Forms of Discrimination Against Women* (1981).
41 Section 9(1)-(5) of the Constitution.
42 Article 2 of the *Convention on the Elimination of All Forms of Discrimination against Women* (1981) provides that: "State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

provisions of the Convention are law in South Africa as it has been incorporated into municipal law under section 9 of the Constitution, where men and women are equal, and unfair discrimination on the ground of gender is prohibited.[43] For this part of the study, it is important to know that this Convention is a human rights-based instrument with a clear goal of eliminating discrimination against women, as well as providing the measures to attain this goal, such as the notion of affirmative action.[44]

2.2 Equality Clause: Section 9 of the Constitution

Equality is the sameness in treatment and conferring of rights for all constituents.[45] The Constitution makes equality the first right in the Bill of Rights, which sets the tone for how other rights enshrined in the Constitution and other sources of law are to be interpreted. Against the provision of this right under section 9 of the Constitution, women are still not afforded equal opportunities in the corporate sector to hold decision-making roles and key functions of companies.[46] According to Currie and De Waal, women are at the bottom of the socio-economic heap due to patriarchy coupled with the Apartheid system in South Africa.[47] In *Brink v Kitshoff*, the court held that there is an overlap between discrimination against race and gender in South Africa; however, the discrimination against gender has not been widely condemned as one against race. This is, therefore, the reason behind patterns that leave women, especially black women, disadvantaged.[48]

Section 9 of the Constitution provides that promoting equality is not only the state's burden but that of companies as well in their capacity as juristic persons.[49] Equality

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(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle."

43 Section 9(3) of the Constitution.

44 General Recommendation No 25, on article 4, para 1 of the *Convention on the Elimination of All Forms of Discrimination against Women* (1981) on temporary special measures.

45 Currie and De Waal *The Bill of Rights Handbook* 212.

46 Bosch, Van der Linde and Barit *Women on South African boards* 22.

47 Currie and De Waal *The Bill of Rights Handbook* 212.

48 *Brink v Kitshoff* 1996 4 SA 197 (CC) para 44.

49 Section 9(4) of the Constitution.

can be obtained in its formal or substantive sense.[50] The plain meaning of equality, which is treating people the same, is what we refer to as formal equality.[51] This form of equality does not look into the different circumstances in which constituents are placed when advancing a specific right.[52] Substantive equality, on the other hand, is outcome-based. It entails certain instances where women will receive preferential treatment over men so that a specific outcome can be reached, putting them in the same position.[53] With substantive equality comes analysis when applying the law, which studies a certain type of people to understand their social and economic stance before conferring a specific right to them while ensuring the aims of the Constitution is achieved.[54] Substantive equality, therefore, goes beyond what is written in text to further take a holistic approach in ensuring that equality that is suitable for the relevant circumstance is achieved.

It is good to commend that there has been an improvement in the representation of women on company boards; however, the progression is slow. According to the findings made by the Business Women's Association of South Africa in the 2021 edition of the Women in Leadership census, women make up 50.7% of the total population. However, only 45.5% of them form part of the workforce.[55] Of this percentage of women in the workforce, only 17.3% have filled Chief Executive Officer (CEO) and Chairperson positions.[56] This census has found that in JSE-listed companies, multinational companies and state-owned companies, women in directorship roles comprise 26.9%, 38% and 40.4%, respectively.[57] The statistics indicate that the state is leading in bridging the imbalance between men and women in governance roles.

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50 Currie and De Waal *The Bill of Rights Handbook* 213.
51 Currie and De Waal *The Bill of Rights Handbook* 213.
52 Currie and De Waal *The Bill of Rights Handbook* 213.
53 Currie and De Waal *The Bill of Rights Handbook* 213.
54 Currie and De Waal *The Bill of Rights Handbook* 213.
55 Business Women's Association of SA 2021 http://bwasa.co.za.
56 Business Women's Association of SA 2021 http://bwasa.co.za.
57 Business Women's Association of SA 2021 http://bwasa.co.za.

Over women to take on governance roles. appointment of men even when both them and women have the same qualities that are needed for the role, thereby unfairly discriminating against women.

The increase in women's diversity on the board level is essential to a transformative society under a constitutional dispensation.[58] This study takes a corporate governance approach, taking into perspective constitutional values, legislative provisions, and principles of the King IV Report to attain gender diversity in boardrooms. It considers that gender inclusivity is not a business case but rather an advancement of a constitutional right and the best indicator of good corporate governance. Unlike how other writers such as Lehobo view women's diversity on boards, this study sees that the principles of the King IV Report that promote the inclusion of women on boards are adhered to without determining whether a weak or strong correlation exists between them having women directors and improved financial performance.[59] Lehobo is of the view that the appointment of women to corporate leadership roles leads to improved board effectiveness as it is found that women add new perspectives on aspects such as diverse customer needs and corporate social responsibility and help the board make sound decisions.[60] Taljaard also believes that better financial performance in a company can be attributed to the fact that the board of directors is diverse in terms of gender, where women are also fairly represented.[61] Moreover, Taljaard contends that having a diverse board where women and men are appropriately represented results in the improved fiduciary function of the board as viewed from a behavioural and psychological point of view.[62]

Studies also show that companies that have boards that have women directors outperform those that do not.[63] It is also said that having a board of directors with

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58 Nyirenda *Board composition* 9.
59 Lehobo *Relationship Between Gender Diversity and Corporate Profitability* 1.
60 Lehobo *Relationship Between Gender Diversity and Corporate Profitability* 2.
61 Taljaard *Association Between Diversity Within Boards and Company Financial Performance* 2.
62 Taljaard *Association Between Diversity Within Boards and Company Financial Performance* 3.
63 Hersch 2016 https://www.hsph.harvard.edu/ecpe/why-diversity-matters-women-on-boards-of-directors/.

women improves the board's monitoring function, leading to increased firm value.[64] Nyirenda further argues that a board of directors with a good balance of men and women yields creative perspectives that contribute to a company's success as the board will exchange ideas that stem from different cognitive perspectives.[65] Having more women on company boards broadens the talent pool at the top management level.[66]It increases the chance of a company having the right skills, education, and expertise to ensure sound decision-making that will contribute to its success.[67] Having women directors also sets the tone for the rest of the company's hiring. Studies have identified that women are demotivated to study further for certain industry qualifications as those industries are surrounded by gender bias, and they feel that they will be overlooked.[68] For example, the mining industry is dominated by men. Hence you will find very few female directors in mining companies. More in line with the main perspective of this study which other studies have shown, is that a more women-diverse board better depicts the company's client base and the broader society in which the company operates.[69]

This study views the increased inclusion of women into governance roles as a legal obligation and the constitutionally inclined way of structuring a governing body of a company. Companies, especially those listed on the JSE, need to understand that they also play an important role in building a transformative society and that the way their boards are composed is reflective of the constitutional value of equality.[70]

Due to the fact that equality comes in different forms, it, therefore, is important to apply the correct one in order to attain the desired gender balance across boards

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64 Nyirenda *Board composition* 10; Campbell and Mínguez-Vera 2008 *Journal of Business Ethics* 435-451.
65 Nyirenda *Board composition* 8.
66 Hersch 2016 https://www.hsph.harvard.edu/ecpe/why-diversity-matters-women-on-boards-of-directors/.
67 Hersch 2016 https://www.hsph.harvard.edu/ecpe/why-diversity-matters-women-on-boards-of-directors/.
68 Hersch 2016 https://www.hsph.harvard.edu/ecpe/why-diversity-matters-women-on-boards-of-directors/.
69 Hersch 2016 https://www.hsph.harvard.edu/ecpe/why-diversity-matters-women-on-boards-of-directors/.
70 Nyirenda *Board composition* 7.

of companies. Women in South Africa are a designated group because they suffered unfair discrimination in the past, where they were not usually considered to form an ideal board.[71] This needs to be taken into account when the opportunity to give preference to them arises. This will amount to reverse discrimination which is what the court in *President of the Republic of South Africa v Hugo* held.[72] The court is of the view that although all are equal before the law, it is not in all circumstances that equal treatment can be afforded to all constituents because it will not yield the desired results, such as equity.[73] According to Dressel, the difference between equality and equity is as follows:

> Equality means each individual or group of people is given the same resources or opportunities. Equity recognizes that each person has different circumstances and allocates the exact resources and opportunities needed to reach an equal outcome.[74]

Gender diversity will be attained if women are given preference over their male counterparts to reach an equilibrium between both genders insofar as board membership is concerned. The preferential treatment towards women for optimal board composition is referred to as affirmative action, which is equality in its substantive form.[75] As Currie and De Waal explained, the form of equality attained through affirmative action measures serves as reverse discrimination, where unequal treatment between men and women on boards will have to be tolerated until such objective is attained as women were unfairly discriminated against in the past.[76] It is reverse discrimination in that if the preference for female appointments were to be perceived as discrimination, it would be fair and constitutional as the Constitution under section 9(3) prohibits only unfair discrimination.

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71 Bosch, Van der Linde and Barit *Women on South African boards* 22.

72 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41.

73 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41.

74 Dressel 2020 https://www.marinhhs.org/sites/default/files/boards/general/equality_v._equity_04_05_2021.pdf 1.

75 Currie and De Waal *The Bill of Rights Handbook* 241; s 15 of the *Employment Equity Act*.

76 Currie and De Waal *The Bill of Rights Handbook* 214.

2.3 Affirmative Action and its applicability to King IV

Affirmative Action is a principle derived from the *Employment Equity Act* under chapter 3.[77] As a notion that encourages preferential treatment to women for want of striking a balance between them and those previously favoured by the law, the application thereof is mainly for people regarded as employees of a certain company.[78] That being said, non-executive directors cannot lean on its authority as they are independent parties who do not have an employer-employee relation with the company.[79] This entails that preferential treatment is only used for directly involved parties, and companies are not robustly applying this measure because reports have shown that only a small fraction of women are executive members of company boards.[80] Affirmative action is the most effective measure to bring about the desired balancing in terms of gender representation on the boards of companies in South Africa, where women executives are very few.

In the *Chowan v Associated Motor Holdings (Pty) Ltd* case, the court emphasised that despite women's educational backgrounds, they still face prejudice in the workplace.[81] The court held that the applicant's dignity was infringed by the respondent, who was the chief executive of the company (Associated Motor Holdings (Pty) Ltd), when he referred to her as "a female, employment equity, technically competent, they would like to keep her but if she wants to go she must go, others have left this management and done better outside the company".[82] This was after the applicant (a woman) was employed as a Group Financial Manager of the company, and 12 months into the role, she was assured that she would assume the position of Chief Financial Officer of the company in question. When the time to fill the position came, she was overlooked despite having the necessary

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77 Section 12-27 of the *Employment Equity Act*.
78 The Preamble of the *Employment Equity Act* provides that the Act is there to eliminate unfair discrimination in employment. Therefore, affirmative action is a measure used for employment purposes.
79 Bosch, Van der Linde and Barit *Women on South African boards* 3.
80 Bosch, Van der Linde and Barit *Women on South African boards* 3.
81 *Chowan v Associated Motor Holdings (Pty) Ltd* 2018 4 SA 145 (GJ) para 22.
82 *Chowan v Associated Motor Holdings (Pty) Ltd* 2018 4 SA 145 (GJ) para 22.

qualifications and experience. The role was offered to a white male candidate despite the fact that he lacked industry experience and the desired qualification for the position.[83] The CEO argued that the decision not to appoint the woman was based on the fact that she needed at least three to four years to enhance her leadership skills.

According to Matotoka and Odeku, the Chowan case highlights the fronting that happens in the private sector.[84] Companies in the private sector are hesitant to hire and train women; however, women are overlooked when leadership opportunities become available in those companies.[85] Matotoka and Odeku submit that this practice is what is referred to as window dressing, where women's appointments are for tokenism.[86]

2.4 King IV Report principles on the promotion of gender diversity

As a focal point of the organisation, the governing body makes or breaks the company's reputation. To emphasise the quest for good corporate governance, Principle 3 of the King IV Report specifically states that companies must be seen and be responsible corporate citizens. The King IV Report further explains the meaning of corporate citizenship under its glossary of terms. It explicitly defines the term as:

> The recognition that the organisation is an integral part of the society in which it operates, affording the organisation standing as a juristic person in that society with rights but also responsibilities and obligations. It is also the recognition that the broader society is the licensor of the organisation.[87]

Moreover, the King IV Report regards corporate citizenship as one among other concepts that form the report's foundation stones.[88] This, in essence, entails that companies need to be law-abiding citizens that uphold the values of the

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83 *Chowan v Associated Motor Holdings (Pty) Ltd* 2018 4 SA 145 (GJ) para 48.
84 Matotoka and Odeku 2021 *PELJ* 24.
85 Matotoka and Odeku 2021 *PELJ* 24.
86 Matotoka and Odeku 2021 *PELJ* 24.
87 King IV Report, 1996 11.
88 King IV Report, 1996 4.

Constitution, which include equality. By so doing, there will be more women-inclusive boards.

The recommended practice is that a direction must be set to ensure that the company complies with the Constitution, laws such as legislative provisions, and *inter alia*, the company's constitutive documents such as the memorandum of incorporation.[89] This indicates that the King Committee is committed to ensuring that the recommended principles and practices are in line with authoritative sources of law, the main one being the Constitution and other legislative provisions such as the Employment Equity Act and its notion of affirmative action.[90]

No explicit mention of the term "equality" is uttered in principle 7 of the King IV Report, but the recommendation of an appropriate balance of gender diversity implies so if it is interpreted against the history of human rights in our country and is in line with the notion of affirmative action. Under the King III Report, it is emphasised that one of the key aspects of the King Report is sustainability, and this encompasses social transformation that is aimed at redressing past imbalances that are a result of Apartheid.[91] This entails that, where applicable, the principles should be applied to correct past injustices, such as discrimination against women.

An appropriate balance of gender diversity is an equitable representation of both genders. Under section 15(3) of the *Employment Equity Act*, the legislator confirms that such equitable balance is obtainable through voluntary targets and not mandatory quotas.[92] This indicates that the lack of appropriately gender-balanced boards results from companies unwilling to take the initiative to be part of the gender transformation of a democratic society.[93] The problem is, therefore, not on the wording or non-legislative nature of laws surrounding gender equality across all occupational categories in the corporate sector but rather that companies are

89 Recommended Practice 12 under Principle 3 of the King IV Report, 1996 45.
90 Sections 12-27 of the *Employment Equity Act*.
91 King III Report ,2009 14.
92 Section 15(3) of the *Employment Equity Act*.
93 Nyirenda *Board composition* 14.

pursuing other interests such as profitability and competitiveness more than representing the demographics of the society in which they are operating.[94] Moreover, companies neglect that an indication of good corporate citizenship shows a level of responsibility regarding human rights issues such as discrimination against women.[95]

The JSE has provided sustainability disclosure guidance for companies listed on the exchange.[96] This is to provide recommendation guidelines to listed companies in their integrated reporting, which will be applied from 2022 onwards. The guidelines first start by emphasising the fiduciary oversight role which the board plays and follows in a company by recommending that, in describing the board's oversight of sustainability issues, companies should disclose information on the processes they follow to ensure that material sustainability considerations are integrated as it pertains to board appointments.[97] The correct skills and competencies are the listed factors that the board must have as they are key aspects needed for the board to effectively oversee strategies designed to respond to sustainability-related risks and opportunities.[98] Moreover, board composition is the first recommended governance metric under the JSE sustainability disclosure guide.[99] The metric is concerned with the composition of the board by gender and other factors, such as the membership of under-represented social groups. Women are the underrepresented social group in the board structure of listed companies who could have the necessary skills and competencies needed for the sustainability that is strived for by JSE-listed companies. Board members, whether men or women, are appointed for their competencies and skills to carry out their fiduciary duties. The metric on board composition under the sustainability guideline recommends that it is through the

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94 Matotoka and Odeku 2021 *PELJ* 10 argue that companies, while pursuing their financial advancements, thereby contributing to South Africa's economy; must ensure to advance women into management positions. Companies have an obligation to advance equity, an expression in the *Employment Equity Act*, therefore they must balance between achieving equity and making profits.

95 Nyirenda *Board composition* 14; Matotoka and Odeku 2021 *PELJ* 10.

96 JSE 2022 https://www.jse.co.za.

97 JSE 2022 https://www.jse.co.za.

98 JSE 2022 https://www.jse.co.za.

99 JSE 2022 https://www.jse.co.za.

capabilities and perspectives of board members that robust decisions can be made.[100] It is clear that the JSE is after a substance-over-form approach to board composition where it can be guaranteed that directors are capacitated to carry out their roles regardless of their gender.[101]

A competitive advantage comes with having more women as corporate leaders.[102] In terms of recommended Practice 10 of principle 7:

> The governing body should promote diversity in its membership across a variety of attributes relevant for promoting better decision-making and effective governance, including field of knowledge, skills and experience as well as age, culture, race and gender.[103]

Through Affirmative Action measures, companies can promote gender diversity by recognising and inviting more women to form part of their governing body, thereby complying with the abovementioned practice. Recommended practice 11 of Principle 7, on the other hand, focuses on gender and race diversity and encourages the setting of targets in this regard by the existing governing body of a company for purposes of its succession. The way in which different companies comply with this requirement is going to be compared in the chapters to come.[104]

King IV recommends that the board must comprise a majority of non-executive members. However, because women need preference through Affirmative Action, we should be seeing an increase in the number of women executives to indicate an organisation's interest in partaking in the transformation in our economic landscape where it involves women.[105] Practice 8 of Principle 7 in the King IV Report recommends that a governing body comprise a majority of non-executive members; however, companies do not apply this correctly.[106] The JSE listing requirements do

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100 JSE 2022 https://www.jse.co.za. See annexure A.

101 Gender which is a social term as defined by Currie and De Waal *The Bill of Rights Handbook* 227 specifically relating to the ascribed social and cultural male and female roles.

102 Nyirenda *Board composition* 14.

103 Recommended Practice 10 of principle 7 of the King IV Report, 2016 50.

104 See chapter 4 below.

105 Independence of Governing Body King IV practice note 2, 2017.

106 King IV Report, 2016 50.

not make provision for the ratio of executive directors to non-executive. However, section 3.84(e)(iii) compels listed companies to appoint independent directors, as all directors are to be independent on a historical and substance-over-form basis according to the direction the King Code gave.[107] Since the JSE listing requirements provide for compulsory compliance with the King IV Report on the part of listed companies, it follows that the JSE concurs with the King IV Report on this recommendation. Therefore, having a majority non-executive director board forms part of listing requirements for JSE-listed companies.[108] Reports show that companies appoint more male executive members and fewer non-executive members, where we find that in most cases, it is women.[109] An injustice is committed against women in this regard. Women are, as such, marginalised. Their involvement in corporate leadership is at most limited to independent decision-making rather than running the company daily and coming up with views on an operational level.[110] The balance of power needed in board structures must also be appropriate where men and women are equally and fairly represented in different offices of power, being executive and non-executive.[111] This is in line with recommended practices 7(b), 8 and 11 of Principle 7.[112] Unlike the *Companies Act*'s provision in section 66 on the requisite number of directors certain types of entities must have, the King IV Report under recommended practice 7(a)-(f) goes further to provide factors that must be taken into consideration in order to meet the numerical threshold.[113] The King IV Report can therefore be a reliable guideline for

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107 Section 3.84(e)(iii) JSE listing requirements.

108 JSE 2019 https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf.

109 Business Women's Association of SA 2021 http://bwasa.co.za.

110 Conmy 2021 https://www.thecorporategovernanceinstitute.com/insights/guides/director-and-a-non-executive-director/.

111 Practice 7(b) & 11 of the King IV Report ,2016 50.

112 King IV Report,2016 50.

113 "When determining the requisite number of members of the governing body, the following factors should be considered:
(a) The appropriate mix of knowledge, skills and experience including the business, commercial and industry knowledge needed to govern the organisation.
(b) The appropriate mix of executive, non-executive and independent non-executive members.
(c) The need for a sufficient number of members that qualify to serve on the committees of the governing body.
(d) The need to secure a quorum at meetings.

companies where they can make a holistic approach to ensuring they form a sound board to effectively perform their required functions and serve with integrity and independence.

For companies listed on the JSE, section 3.84 of the listing requirements makes it clear that compliance with the principles of the King IV Report is compulsory. Listing requirements for JSE-listed companies detailed in section 3.84 make it compulsory for companies to have policies that ensure a clear balance of power and authority on their boards. The principles in the King Report are applied voluntarily by any other entity except for companies listed on the JSE.[114] This means that, although not legislated, King IV's authority to listed companies can be likened to such.

The listing requirements under section 3.84 is in line with practice 7(b) of principle 7 of the King IV Report, as aforementioned. It is, however, not enough to have policies in place. What is important is the effectiveness in the enforcement thereof. Companies must see to implement the policies they have in place concerning the balance of power in their governance structure.

2.5 Achieving women's diversity on company boards

Across the globe, two measures are used to increase the number of women on boards: voluntary targets and mandatory quotas.[115] The difference between the two is that voluntary targets are aimed at numerical objectives, which are very much realistic.[116] Secondly, the application thereof is flexible in nature, and their mandate is not to have any legal consequence, although they might arise in certain circumstances.[117] Mandatory quotas, on the other hand, stipulate that a certain

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(e) Regulatory requirements.
(f) Diversity targets relating to the composition of the governing body."

114 JSE 2022 https://www.jse.co.za/our-business/sustainability/jses-sustainability-and-climate-disclosure-guidance 2022.

115 Bosch, Van der Linde and Barit *Women on South African boards* 10. According to the findings of the Equileap Global Report on about 3500 public companies across the world, women represent only 25% of the company boards. Equileap 2021 https://equileap.com/wp-content/uploads/2021/07/Equileap_Global_Report_2021.pdf.

116 Bosch, Van der Linde and Barit *Women on South African boards* 10.

117 Bosch, Van der Linde and Barit *Women on South African boards* 10.

percentage of personnel comprise women.[118] There is a time frame when such a percentage must be met, and non-compliance leads to a penalty.[119] The numerical target set out in section 66 of the *Companies Act* of at least one director in the case of a private company, or a personal liability company,[120] or at least three directors in the case of a public company, or a non-profit company as well as the option of a higher number as per the companies Memorandum of Incorporation,[121] is an example of a voluntary target. In the case of a quota where a percentage of seats is reserved for women to attain gender diversity, non-females cannot occupy those seats regardless of the fact that there may be vacant seats where there are no women available to occupy them. Equally, when more suitable female candidates are available, such a target cannot be exceeded. All this is done timeously as the consequence of not meeting the set percentage of women counterparts on the board will lead to the company being liquidated, facing a financial penalty or even being suspended form the JSE.[122]

2.6 Concluding remarks

It is clear that an effective legal framework is in place to eliminate discrimination against women in South Africa. The lack of equitable representation of gender on company boards, especially those listed on the JSE, despite the provisions of legislation and listing requirements, indicates that companies are not consistent in their transformation at the board level.[123] This goes against the international obligations which South Africa has as a signatory member to international human rights instruments such as the *Convention on the Elimination of All Forms of Discrimination against Women* to ensure women are afforded the same opportunities as men at being appointed for leadership positions. Companies also have a role to play in promoting our society's constitutional values, which is why

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118 Bosch, Van der Linde and Barit *Women on South African boards* 10.
119 Bosch, Van der Linde and Barit *Women on South African boards* 10.
120 Section 66(2)(a) of the *Companies Act*.
121 Section 66(2)(b)-(3) of the *Companies Act*.
122 Bosch, Van der Linde and Barit *Women on South African boards* 10.
123 Nyirenda *Board composition* 9.

they need to promote equity in their leadership structure and not only focus on their profitability goals. The King IV Report is also centred around the principles of a transformative economic society. Therefore, it also encourages compliance on the part of companies to the Constitution and binding international agreements such as the aforementioned Convention. Since men are overrepresented in company boards, women's appointments on an affirmative action basis must be encouraged to bridge the imbalance gap. Gender transformation in South Africa by the government and through all industries is achieved through voluntary targets. The lack of mandatory quotas has led to the underrepresentation of women on company boards and discrimination against women in how boards are composed. The next chapter will discuss how the lack of representation of women on company boards is not only a domestic but a global issue of concern.

Chapter 3: Women's equality through the scope of international law

3.1 South Africa as a subject to international law

As a subject to international law, it follows that South Africa is bound by several international instruments that aim at promoting the same values even as far as it concerns women's rights.[124] These instruments are binding on the ground that international law is enforceable in South Africa. As a matter of fact, the Constitution provides that international law must be considered when interpreting the rights in the Bill of Rights.[125] This chapter reflects on several of these instruments and discusses the extent to which South Africa has complied with its obligations and whether the measures it has taken have been robust in achieving its specified objectives.

3.1.1 Convention on the Elimination of All Forms of Discrimination Against Women (1981)

It was in 1995 when South Africa ratified this Convention.[126] This followed the adoption of the *General Law Fourth Amendment Act* in 1993 by the Parliament.[127] This was necessary in order to remove any trace of legislative discrimination against women so that South Africa could ratify the Convention in question.[128]

This is the ultimate instrument that cannot go unrecognised for how it sets an international Bill of Rights for women. The Convention further concerns itself with how signatory countries guarantee the enjoyment of these rights.[129]

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124 Article 1 of the *Convention on the Elimination of All Forms of Discrimination against Women* (1981).
125 Section 39(1)(b) of the Constitution.
126 UN Entity for Gender Equality and the Empowerment of Women 2000 http://www.un.org/womenwatch/daw/cedaw.
127 *General Law Fourth Amendment Act* 132 of 1993.
128 UN Entity for Gender Equality and the Empowerment of Women 2000 http://www.un.org/womenwatch/daw/cedaw.
129 UN Entity for Gender Equality and the Empowerment of Women 2000 http://www.un.org/womenwatch/daw/cedaw.

Relevant to this study is Article 3 and 4(1) of the Convention which explicitly provides:

> Article 3
>
> States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.[130]
>
> Article 4
>
> (1) Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.[131]

Article 3 is concerned about women and men being afforded human rights and both enjoying such rights in the same manner. South Africa has complied with its obligation in terms of Article 3 by constitutionalising the right to equality and protecting it through a Bill of Rights under the Constitution.[132] The King Report on corporate governance is another development that safeguards the right to equal treatment of men and women in the corporate sector.[133]

In terms of Article 4(1), the measures adopted by South Africa, which include the notion of Affirmative Action under the *Employment Equity Act* and the *Broad-Based Black Economic Empowerment Act* 53 of 2003, which are aimed at addressing women's imbalance, are not permanent.[134] South Africa has failed to convey the temporal nature of these measures as envisioned by the Convention in question. Nowhere do the legislative provisions stipulate that they are to be discontinued,

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130 Article 3 of the United Nations *Convention on the Elimination of All Forms of Discrimination against Women* (1981).
131 Article 4(1) of the United Nations *Convention on the Elimination of All Forms of Discrimination against Women* (1981).
132 Section 9 of the Constitution.
133 Principle 7 of the King IV Report, 2016.
134 Article 4(1) of the United Nations *Convention on the Elimination of All Forms of Discrimination against Women* (1981).

which explains how they have taken time to be effectively applied.[135] The years they have been in place have been lengthy, yet the results are not satisfactory, as seen with the underrepresentation of women in company boards in the private and public sectors. Prolonging the temporary treatment offered to women per international standards is desirable; however, the inadequate application of the measures put in place will make them unconstitutional and deemed discriminatory in the long run. Measures such as affirmative action, which international law deems as temporary special measures, are valid until their functional results have come to fruition and not merely by passing a certain time.[136] This, however, does not warrant that legislation should not encompass the importance of the notions awaited discontinuation against set results in response to the issue of gender inequality.

Regional or domestic law also recognises the marginalisation of women on company boards and recommends that member states adopt temporary measures to ensure equal opportunities across genders, which should be discontinued once their set objectives are reached.[137]

3.1.2 SADC Protocol on Gender and Development (2008)

South Africa is a Southern African Development Community (SADC) member state and is thereby bound by the obligations which stem from its constitutive documents, such as the Protocol on Gender Development, whose main objective is to ensure equal enjoyment of laws by women. In this instrument, affirmative action is explicitly stipulated as a measure that state parties need to adopt to bring to life the objectives of this protocol: eliminating discrimination against women and seeing them being advanced in all spheres of life.[138]

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135 Affirmative action as enshrined in s 13 of the *Employment Equity Act*; *Broad Based Black Economic Empowerment Act* 52 of 2003.

136 General Recommendation No 25, on article 4, para 1 of the *Convention on the Elimination of All Forms of Discrimination against Women* (1981) on temporary special measures.

137 *SADC Protocol on Gender and Development* (2008).

138 Article 2(2) of the *SADC Protocol of Gender and Development* (2008).

According to Article 5 of the *Protocol of Gender and Development*, affirmative action is a mandatory measure that member states must adopt.[139] The provision stipulates that:

> State parties shall put in place affirmative action measures with particular reference to women in order to eliminate all barriers which prevent them from participating meaningfully in all spheres of life and create and create a conducive environment for such an environment.[140]

As enshrined in section 13 of the Employment Equity Act, affirmative action demonstrates that South Africa has complied with its international and regional law obligation.[141] Adapting such a notion has fostered women's empowerment and given women a seat where they would not have been afforded such an opportunity in the past. Policymakers have, however, neglected to emphasise the notions' temporal nature. This is where South Africa has deviated from the initial purpose of this notion which is one of the factors that contribute towards the slowness of progress when it comes to the advancement of women's right to equality and taking their position in leadership roles.

Article 12 of the Protocol is important as it directly speaks to gender representation in governance roles, and our study focuses only on women as part of gender. This provision explicitly provides that:

> State Parties shall endeavour that, by 2015, at least fifty percent of decision-making positions in the public and private sectors are held by women, including the use of affirmative action measures as provided for in Article 5.[142]

International instruments such as the *Convention on the Elimination of All Forms of Discrimination Against Women* do not pose a specific timeframe but rather put it that the discontinuation of measures will depend on the achievement of the designated goal. The issue is that unfair discrimination against women on company

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139 Article 1(2) of the *SADC Protocol of Gender and Development* (2008) defines gender as the roles, duties and responsibilities which are culturally or socially ascribed to women, men, girls and boys.

140 Article 5 of the *SADC Protocol on Gender and Development* (2008).

141 *Employment Equity Act*.

142 Article 12 of the *SADC Protocol of Gender and Development* (2008).

boards is persistent and is steered by the fact that there is a sense of urgency in implementing special measures to redress past imbalances. It, therefore, makes it easy for companies to relax their policies around governance which is why we find that women's equality is still an issue in many countries.[143]

Comparing South Africa and other countries' board composition is difficult because of the differences between each country's size, history, economy, and legislative context, as these are significant to the success or failure of measures to redress discrimination against women on boards of companies.[144] As mentioned above, voluntary targets and mandatory quotas are used globally to increase the number of women on boards.[145] While the measures used in South Africa have not proven to be robust in that women's diversity is still at its lowest on company boards, several other countries across the globe also face the same fate.[146]

While it is difficult to make a comparison, countries can learn a few lessons from one another in terms of the efforts they take to deal with the underrepresentation of women on company boards.[147] This chapter discusses the efforts taken by Norway, Spain, Germany, Australia, and France to increase the number of women serving on boards of companies.

Since countries across the globe use either mandatory quotas or voluntary targets to increase the number of women in board seats, the aforementioned countries will be discussed by separating them according to the specific method they follow.

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143 Bosch, Van der Linde and Barit *Women on South African boards* 9.
144 Bosch, Van der Linde and Barit *Women on South African boards* 8; Mateos de Cabo *et al* 2019 *European Management Journal* 611.
145 Bosch, Van der Linde and Barit *Women on South African boards* 10.
146 Australia, Sweden and Britain are following voluntary regulations just as in South Africa and it is apparent that women are not fairly represented on company boards. These countries are threatening to impose quotas if companies continue to not appoint female directors voluntarily. Hills 2015 *Deakin Law Review* 155.
147 Bosch, Van der Linde and Barit *Women on South African boards* 9.

3.2 Using mandatory quotas to increase women's diversity

3.2.1 Norway

Norway is known for being a frontier in enacting mandatory gender quotas to redress the gender imbalance on boards of companies and state-owned organisations.[148] It was in 2003 when the Norwegian Parliament passed this law which led to amendments being made to the *Norway Public Limited Liability Companies Act* 45 of 1997, which prescribed that men and women should make a representation of at least 40% each on boards of listed companies.[149] Compliance with this law was voluntary at its initial stage. About 14% of listed companies that chose to abide by this quota had women serving on their boards as directors in 2005.[150] It was in 2006 when the quota became mandatory, and companies were given two years to comply.[151] The respective listed companies reached the quota by 2009 as non-compliance was set to result in the refusal of the registration of the company board by the responsible authorities. It goes even as far as courts being authorised to issue an order for the dissolvement of the company.[152] There were about 563 listed companies when the law of mandatory gender quotas was passed in Norway; however, the coming into force of the quota legislation led to a third of these companies getting delisted. This indicates that companies do not appreciate compulsory measures being imposed on them but rather that they are left to take voluntary measures to suit their desired objectives in terms of their board succession and gender equity plans.

Norway is regarded as a frontier in gender quotas, and its success in gender-balanced boards can be attributed to the fact that it is small in size and the number of large corporations is significantly small as well.[153] Moreover, the state seems to

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148 Hills 2015 *Deakin Law Review* 154.
149 Bosch, Van der Linde and Barit *Women on South African boards* 16; Hills 2015 *Deakin Law Review* 154.
150 Hills 2015 *Deakin Law Review* 154.
151 Seierstad, Quiñones and Mensi-Klarbach *Gender Diversity in the Boardroom* 13.
152 Bosch, Van der Linde and Barit *Women on South African boards* 16.
153 Seierstad, Quiñones and Mensi-Klarbach *Gender Diversity in the Boardroom* 13.

have a significant influence on the contents of its corporate governance practices on both national and international scales due to the fact that it is the main owner of the shares on its stock market.[154] It is the majority shareholder on the Oslo Stock Exchange and plays a law-making role.[155] Most of the large corporations in Norway are state-owned, and the pressure of getting gender-neutral boards is on them more than on other forms of entities.

3.2.2 Spain

The Norway gender quota and its demonstrated success inspired the Spanish government, which led to the enactment of the *Gender Equality Act,* passed in 2007.[156] The provisions relevant to gender-balanced boards are enshrined under Articles 75 and 78. According to Article 75:

> Companies obliged to present unabridged financial statements of income will endeavour to include a sufficient number of women on their boards of directors to reach a balanced presence of women and men within eight years of the entry into effect of this Act.[157]

Article 78 continues to explicitly state what an ideal balance of membership entails and provides as follows:

> For the intents and purposes of this Act, balanced membership will be understood to mean the presence of women and men in the context in question in a manner such that neither sex accounts for more than sixty nor less than forty percent of the total.[158]

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154 Seierstad, Quiñones and Mensi-Klarbach *Gender Diversity in the Boardroom* 13.
155 Seierstad, Quiñones and Mensi-Klarbach *Gender Diversity in the Boardroom* 21.
156 Mateos de Cabo *et al* 2019 *European Management Journal* 613.
157 Article 75 of the *Spanish Gender Equality Act* 3 of 2007. Currie and De Waal *The Bill of Rights Handbook* 227 define gender as a social term wherein it refers to the social and cultural roles which male and females play. They define sex as a biological term which entails the physical difference between men and women.
158 Article 78 of the *Spanish Gender Equality Act* 3 of 2007.

The difference between Spain and Norway is that, in the place of imposing penalties for noncompliance, the Spanish government chose to give an incentive to complying companies by giving preference to them when extending public contracts.[159]

Spanish companies were, however, not adequately receptive to the quota law despite not having negative consequences for noncompliance, as reports show that about 4,25% of companies complied in 2005. By 2014, the percentage had increased to 4,98%.[160] During that time, the percentage of women directors increased from 6.8% to 11.6%, and companies with at least one female director increased from 26% to 42%. The increase in the percentages is not satisfactory based on the fact that one would anticipate greater compliance as a much softer quota law is imposed wherein noncompliance is not harshly sanctioned. According to Mateos de Cabo *et al.*, it is highly likely for companies that earn more than 5% of their income from government contracts to comply with the quota.[161] When the quota came into force in 2005, about 11.11% of companies fell into this bracket; however, this portion of companies decreased to 10.42% by 2014.[162] The decrease is a result of traces of inconsistency on the part of the Spanish government in that it did not carry the incentive through.[163] No significant increase in the revenue generated by complying companies was imminent due to the government's inconsistency.[164]

3.2.3 Germany

The decision to increase the proportion of women serving on boards of companies in Germany was a political one.[165] This was after Germany moved from the so-called soft law approach of voluntary targets, where corporate governance fell under the spectrum of recommendations, not legal obligations.[166] Recommendations

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159 Article 34.2 of the *Spanish Gender Equality Act* 3 of 2007.
160 Bosch, Van der Linde and Barit *Women on South African boards* 16.
161 Mateos de Cabo *et al* 2019 *European Management Journal* 622.
162 Bosch, Van der Linde and Barit *Women on South African boards* 16.
163 Bosch, Van der Linde and Barit *Women on South African boards* 17.
164 Bosch, Van der Linde and Barit *Women on South African boards* 17.
165 Koch 2015 *Deakin Law Review* 58.
166 Koch 2015 *Deakin Law Review* 58.

surrounding board composition for companies were enshrined under recommendation 5.4.1 of the German Corporate Governance Code, where it is provided that a target for an adequate proportion of women should be set by a company when appointing a supervisory board.[167] The recommendations fell part of a comply or explain regime wherein companies could, in the event that they deviate from the recommendations, disclose and justify their conduct.[168] Due to the fact that voluntary obligations imposed on companies were not successful, the German parliament in 2005 legislated that boards of listed companies must have at least 30% female and 30% male counterparts on their boards.[169] The appointment of shareholders' and employees' representatives is subject to this quota. A period of a year was given for companies registered on the stock market (DAX-registered companies) to comply.[170] Noncompliance invalidates the election of the supervisory board such that the seats meant for women are to be left vacant until a suitable female candidate is found.[171] All DAX30 companies reached the gender quota goal by May 2018.[172] However, the lack of women in top executive positions still subsists in these companies.[173]

The lesson South Africa can take from these countries is to take the stand at being the first country in the African continent to impose clear mandatory gender quotas after amending all legislation that restricts this measure to redress gender inequality. There is a need for mandatory measures when companies are not hesitant to comply with self-determined targets that will assist the state in achieving transformation in aspects such as the advancement of women.[174] As a policy maker,

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167 Koch 2015 *Deakin Law Review* 58.
168 Koch 2015 *Deakin Law Review* 58.
169 *Law for the Equal Participation of Men and Women in Management Positions in Private Industry and Public Services Act* of 24 April 2015.
170 Mateos de Cabo *et al* 2019 *European Management Journal* 616.
171 Koch 2015 *Deakin Law Review* 60.
172 Bosch, Van der Linde and Barit *Women on South African boards* 16; Russell Reynolds Associates 2018 https://www.russellreynolds.com/en/insights/reports-surveys/dax-30--supervisory-board-study-2018.
173 Bosch, Van der Linde and Barit *Women on South African boards* 16; Russell Reynolds Associates 2018 https://www.russellreynolds.com/en/insights/reports-surveys/dax-30--supervisory-board-study-2018.
174 Mateos de Cabo *et al* 2019 *European Management Journal* 612.

the government should impose sanctions on noncomplying companies to deter them from overlooking women in board appointments. In the same sequence, the government can provide incentives for those companies that comply.[175] There needs to be consistency on the part of the government in providing incentives, as this will encourage more companies to comply with gender quotas and guarantee that the ones who are already complying remain consistent in having gender-neutral boards.[176] Converting from a voluntary compliance regime to a mandatory one does not guarantee that we will see increased women-diverse boards in South Africa; however, we shall see the fate of those companies who opt not to comply through the imposing of sanctions.[177]

3.3 Using voluntary targets to increase women's diversity

3.3.1 Australia

Prior to Australia enacting any law pertaining to gender mainstreaming, the initial step was to provide education on this issue.[178] This was initiated by the Australian Institute of Company Directors (AICD), hereinafter referred to as the AICD, through the launch of its Chair's Mentoring Program in 2010.[179] This initiative was followed by the board diversity scholarships a few years later.[180] These initiatives did not yield the desired results, leading to the body introducing law as a voluntary target.[181] This target prescribed that 30% of the board members for ASX200 companies should be women by 2018.[182] It is believed that this is the minimum percentage of female representation needed to advance diversity and reap its results of enhanced

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175 Mateos de Cabo *et al* 2019 *European Management Journal* 612.
176 Mateos de Cabo *et al* 2019 *European Management Journal* 612.
177 Mateos de Cabo *et al* 2019 *European Management Journal* 612.
178 Bosch, Van der Linde and Barit *Women on South African boards* 18.
179 Russell Reynolds Associates 2018 https://www.russellreynolds.com/en/insights/reports-surveys/dax-30--supervisory-board-study-2018.
180 Russell Reynolds Associates 2018 https://www.russellreynolds.com/en/insights/reports-surveys/dax-30--supervisory-board-study-2018.
181 Bosch, Van der Linde and Barit *Women on South African boards* 16.
182 AICD 2017 https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/board-diversity/pdf/06440-4-polgender-diversity-quarterly-report-jan19-a4_final.ashx.

decision-making, better governance, and improved financial performance.[183] It followed that 29.7% of the board members of ASX200 companies were women at the end of 2018.[184] The target reached can be attributed to extensive media coverage containing monthly reports.[185] This country is amongst the few which have made remarkable progress in attaining the target it has set to encourage gender-neutral boards of companies without utilising mandatory gender quotas.[186] This has made the country consider increasing the target towards a 40:40:20 balance where each gender will need to have an equal representation pf 40% and the remaining 20% being a mix of genders. This will accommodate those boards which consist of an uneven number of directors.[187]

3.3.2 France

Board composition was addressed by the Corporate Governance Code of Listed Corporations in France, which explicitly recommended that:

> Each Board should consider what the desirable balance of its membership and that of the Board committees should be, particularly in terms of diversity (gender representation, nationalities, age, qualifications, professional experience, etc.). It should make public in the report on corporate governance a description of the diversity policy applied to members of the Board of Directors as well as a description of the objectives of this policy, its implementation measures and the results achieved in the past financial year.[188]

This code followed a "comply or explain" approach, which meant that companies could opt not to follow the recommendations as long as they provided reasons as to why.[189] Voluntary targets did not work in France, which led to the enactment of a law propelling that men and women be equally represented on administrative and supervisory boards.[190] The French Gender Quota Law, referred to as the *Copé*

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183 AICD 2017 https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/board-diversity/pdf/06440-4-polgender-diversity-quarterly-report-jan19-a4_final.ashx.
184 Bosch, Van der Linde and Barit *Women on South African boards* 16.
185 Bosch, Van der Linde and Barit *Women on South African boards* 16.
186 ILO 2023 https://www.ilo.org/actemp/areas-of-work/WCMS_578474/lang--en/index.htm 4.
187 ILO 2023 https://www.ilo.org/actemp/areas-of-work/WCMS_578474/lang--en/index.htm 4.
188 Recommendation 6.2 of the *AFEP MEDEF Corporate Governance Code of Listed Companies* 6.
189 *AFEP MEDEF Corporate Governance Code of Listed Companies* 30.
190 ILO 2023 https://www.ilo.org/actemp/areas-of-work/WCMS_578474/lang--en/index.htm 7.

Zimmermann, was passed in 2011.[191] It prescribes that a gender quota of 40% must be reached by 2017.[192] This quota is applicable to listed and non-listed companies that have employed over 500 persons for three consecutive years or have a revenue or total assets of over EUR 50 million.[193] Board composition that is not in line with this quota renders the appointment of board members void.[194] Non-compliance also halts board member payments of attendance fees until the board is composed in a way that is prescribed by the law.[195] Attendance fees are a fee structure followed by large companies, as small ones use board member remuneration.[196] This means that the larger companies faced harsher consequences for non-compliance than the smaller companies. Pushing towards a greater increase of gender-balanced boards among its top companies has caused a great impact.[197] Under the non-binding recommendation, women made up about 10% of board membership in large listed companies, whereas the percentage has increased to 44% under the regime of a mandatory quota.[198]

South Africa can take it from countries that use voluntary gender targets that first, the recommendations must set clear targets (e.g., a 30%- or 40%-woman representation) as a basis for companies willing to comply. This is so that even if companies set self-determined board composition targets, there is at least a threshold to aim by. In the event that voluntary targets are ineffective, there need to be considerations of moving to more strict measures, such as making mandatory gender quotas that demand that women make up a certain percentage of a company's directorship.

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191 ILO 2023 https://www.ilo.org/actemp/areas-of-work/WCMS_578474/lang--en/index.htm 7.
192 ILO 2023 https://www.ilo.org/actemp/areas-of-work/WCMS_578474/lang--en/index.htm 7.
193 ILO 2023 https://www.ilo.org/actemp/areas-of-work/WCMS_578474/lang--en/index.htm 7.
194 ILO 2023 https://www.ilo.org/actemp/areas-of-work/WCMS_578474/lang--en/index.htm 7.
195 *AFEP MEDEF Corporate Governance Code of Listed Companies*; ILO 2023 https://www.ilo.org/actemp/areas-of-work/WCMS_578474/lang--en/index.htm 7.
196 ILO 2023 https://www.ilo.org/actemp/areas-of-work/WCMS_578474/lang--en/index.htm 7.
197 ILO 2023 https://www.ilo.org/actemp/areas-of-work/WCMS_578474/lang--en/index.htm 7.
198 ILO 2023 https://www.ilo.org/actemp/areas-of-work/WCMS_578474/lang--en/index.htm 8.

3.4 South Africa's efforts to meet its international obligations

According to a women in leadership census by the Business Women's Association of South Africa conducted in 2021, it was found that the representation of women in the top management of South African companies, especially companies listed on the JSE, is not enough.[199] The census followed 266 companies, 17 of which were state-owned enterprises, and 249 were companies listed on the JSE.[200] The report states that there are 3237 directorships in JSE-listed companies; however, only 870 of those directors are women, making it a percentage of only 26.9.[201] The report showed that there had been improvements in women's representation from previous years. However, it is not to the level of satisfaction the legal measures provide to promote women-inclusive boards in South Africa. In 2008, women's directorship in JSE-listed companies was 14.3%, while it stood at 20.7% in 2017. In 2015, there were 540 women directors in JSE-listed companies, and the number increased to 598 in 2017.

The legal measures put in place in South Africa to encourage female-diverse boards is the Constitution, as it promotes the right to equality amongst men and women and ensures that women's appointments to boards of companies are made where it is apparent that women are underrepresented due to past discriminatory policies.[202] There is also the *Employment Equity Act* that promotes the Constitution's quest for equality and is applicable as it pertains to executive directors because they are, by definition, employees of a company.[203] The voluntary principles of the King IV Report, which are compulsory only to JSE-listed companies, hold that gender diversity underpins good corporate governance.[204] With a apply and explain compliance model, companies are encouraged to apply the principles, which include

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199 Business Women's Association of SA 2021 http://bwasa.co.za.
200 Business Women's Association of SA 2021 http://bwasa.co.za.
201 Business Women's Association of SA 2021 http://bwasa.co.za.
202 Section 9 of the Constitution.
203 Sections 1 and 13 of the *Employment Equity Act*.
204 King IV Report,2016 28.

setting targets for a gender-diverse board of directors and explaining how they have reached their self-determined targets in their integrated reports.

South Africa has considered having gender quota legislation depicting the values and recommendations set by international and regional law.[205] There has been an introduction to the Women Empowerment and Gender Equality Bill (the WEGE Bill), passed to the National Assembly in 2013.[206] This WEGE Bill advocates for equal representation and empowerment of men and women, and section 7(1)(a)-(c) explicitly provides that:

> 7(1) Despite any other law, designated public bodies and designated private bodies must, within their ambit of responsibilities and available resources, develop and implement plans and measures as prescribed, in order to achieve the progressive realisation of a minimum of 50 per cent representation and meaningful participation of women in decision-making positions and structures including Boards, which must include—
>
> *(a)* building women's capacity to participate;
>
> *(b)* enhancing the understanding and attitudes of communities to accept the capabilities and participation of women as their equals; and
>
> *(c)* developing support mechanisms for women.[207]

According to a media statement, the Bill has now been passed to the National Council of Provinces for further consultations and public hearings.[208] This has sent a message that one can expect that gender quotas will be legislated in South Africa in the near future. If it comes into force, this will put South Africa on the edge in the global strive towards closing the gender gap.

Just like Australia and France, South Africa has been using a voluntary recommendation approach to increase women's participation in company boards. Such an approach has been used since 1994 from the first King Report on corporate

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205 Hills 2015 *Deakin Law Review* 153; *Women Empowerment and Gender Equality Bill* (WEGE) of 2013.

206 Hills 2015 *Deakin Law Review* 153; *Women Empowerment and Gender Equality Bill* (WEGE) of 2013.

207 Section 7(1)(a)-(c) of the *Women Empowerment and Gender Equality Bill* (WEGE) of 2013.

208 SA Government 2014 https://www.gov.za/adoption-wege-bill-validation-women%E2%80%99s-struggle-emancipation.

governance with no sign of converting the code into legislation. This is where South Africa differs from France and Germany as countries that later passed compulsory laws after not being satisfied with the inadequacies of the voluntary targets set. The results of the conversion prove that it will take strict government policy and sanctions that interfere with companies and how they should operate to redress other social issues, such as gender discrimination. South Africa should also derive measures from what policymakers across the globe have implemented as we are faced with the same issue. This will ensure that it compares well to the rest of the world concerning women's diversity on boards of companies.

This study contends that just because South Africa can take after countries such as Norway to enact mandatory quotas since they have proven to work in that country, it does not follow that the direct consequence of applying the same governance mechanism will lead to an increased number of women on boards of South Africa.[209] The change can happen over time. South Africa differs in some aspects from countries such as Norway and Spain, which successfully implement mandatory gender quotas. This could be attributed to the fact that these countries are more developed economically, their population does not compare to one in South Africa, and more people are educated. These are important factors that determine the effectiveness of governance measures.[210] South Africa must first deal with barriers causing women to be marginalised.

3.5 Concluding remarks

Regardless of how inadequate the measures that South Africa has taken to ensure women's diversity, the country's commitment to international law remains. South Africa has not yet tried compulsory gender quotas compared to other countries, such as Germany, Norway, and Spain, as discussed above, and this could be just what is needed. These countries outperform countries like South Africa, Australia,

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209 Bosch, Van der Linde and Barit *Women on South African boards* 11.
210 Bosch, Van der Linde and Barit *Women on South African boards* 8; Mateos de Cabo *et al* 2019 *European Management Journal* 611.

and France, which have chosen to follow a self-determined target in achieving a gender-diverse society where women are leading across different sectors that contribute to a country's economy. Countries need to incentivise companies that are part of their transformation agenda and be consistent in so doing. The divide between imposing voluntary measures or mandatory quotas by others is attributed to the responsive nature of companies as subjects to which these measures are imposed. It can be held that South Africa and Australia are in the predicament of women being underrepresented on company boards because they overlook how companies respond to the soft nature of the measures imposed to encourage gender-neutral boards. The prolongation of the wait for companies to show their willpower to comply with self-determined targets amounts to unending discrimination against women in board composition. Governments must stand up for their constituents and impose strict measures on companies to help attain the equity needed in our society. The next chapter will discuss the importance of reporting on a company's self-determined voluntary target of diversity on the board. This is what is required of companies that are listed on the JSE.

Chapter 4: Comparative analysis

4.1 Board composition in the mining and pharmaceuticals industry

4.1.1 Introduction

This chapter discusses the board composition of two listed companies, one from the mining and the other from the pharmaceuticals industry. These two companies are listed on the JSE, and since 2017, it has been made mandatory for them to compile reports on the progress of their self-determined gender targets.[211]

The release of the JSE Sustainability and Climate Disclosure Guidance in June 2022 has emphasised how listed companies are affected by climate change in their business operations. This should not be overlooked but rather be an integral part of their annual reports.[212] The boards of these companies have now gained an oversight role on sustainability-related impacts, risks, and opportunities. Furthermore, their reports must include information on the processes whereby the board ensures that material sustainability considerations are integrated with board appointments, ensuring the correct skills and competencies to oversee strategies designed to respond to sustainability-related risks and opportunities are available.[213] According to the JSE Sustainability and Climate Disclosure Guidance metric, the composition of the board, in terms of gender and the membership of under-represented social groups *inter-alia*, indicates the state of a board's diverse nature.[214] The JSE Sustainability and Climate Disclosure Guidance certainly promote women's diversity in that it recognises that boards cannot effectively carry out their oversight task in the disclosure of sustainability and climate-related issues without having a gender-diverse board structure, specifically going as far as mentioning that

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211 Principle 5 of King IV, 2016 49.

212 JSE 2022 https://www.jse.co.za/our-business/sustainability/jses-sustainability-and-climate-disclosure-guidance.

213 JSE 2022 https://www.jse.co.za/our-business/sustainability/jses-sustainability-and-climate-disclosure-guidance.

214 JSE 2022 https://www.jse.co.za/our-business/sustainability/jses-sustainability-and-climate-disclosure-guidance.

even members of underrepresented social groups are an ideal part of a diverse board. It has been established in this study that women are such a group.

The obligation for a listed company to provide a report is derived from principle 5 of the King IV Report, which provides that these reports enable stakeholders to assess a company's performance as far as its short, medium and long prospects are concerned.[215] A discussion of these reports indicates that the two companies, namely Sibanye-Stillwater and Aspen, have complied with this listing requirement.[216] Moreover, the listing requirements have made the recommendations by the King IV Report compulsory for the companies in question, and this part of the study examines the extent to which they have complied.

4.1.2 Sibanye-Stillwater Limited

A review of this company's board structure is of great significance in this study as the sector which this company stems from, which is the mining industry, plays an integral part in South Africa's economy. This industry contributes massively to the country's gross domestic product and can affluently advance the economy.[217]

The company believes in the value of effective leadership, one of the core standards the King IV Report upholds.[218] With regards to Principle 7 of the King IV Report, where the company is required to ensure that there is an appropriate balance of diversity in terms of women and men, it follows in their report that with only about 30 per cent of women in directorship roles, they are satisfied that the balance has been obtained.[219] Only three women serve on this company's board, and none are executive directors.[220] Emphasis is placed on the fact that they assume non-executive roles as this study contends that it is not enough for women to just be on

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215 Principle 5 of King IV ,2016 49.
216 Principle 5 of King IV ,2016 49.
217 Dzingai and Fakoya 2015 *Sustainability* 3.
218 Sibanye-Stillwater 2021 www.sibanyestillwater.com.
219 Sibanye-Stillwater 2021 www.sibanyestillwater.com.
220 Sibanye Gold Limited trading as Sibanye-Stillwater 2021 https://www.sibanyestillwater.com/about-us/governance.

the board but not assume key roles such as CEO.[221] Through such key roles, they will have influential power towards the strategic decisions about the day-to-day running of the company, as this is something that history has robbed them of.

The board comprises 13 directors, which includes a chairman and a lead independent director.[222] There are two male executive directors; the remainder is independent non-executive directors.[223] This study contends that there is an imbalance in the way the board of this company is structured in that even though the King Report recommends that a board should be made up of a majority of non-executive directors, Sibanye has not promoted women's diversity in the balance in power.[224] As aforementioned, women are usually appointed as independent non-executive directors at most, while men are seen to assume executive seats.[225] In this case, the structure of only two executive directors has added to the imbalance in gender representation.[226] The board size has resulted in more male candidates and further discrimination against women.

A study by Dzingai and Fakoya shows that boards comprising a majority of independent directors have increased firm value as those directors manage to monitor the managers diligently.[227] Moreover, a larger independent board results in independence and objectiveness in their decision-making.[228] The scope of the role of independent non-executive directors is more centred around performing tasks that relate to maintaining the relationship between the company's inside directors and management to ensure they meet the obligations they have towards

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221 Bosch, Van der Linde and Barit *Women on South African boards* 34.
222 Sibanye Gold Limited trading as Sibanye-Stillwater 2021 https://www.sibanyestillwater.com/about-us/governance.
223 Sibanye Gold Limited trading as Sibanye-Stillwater 2021 https://www.sibanyestillwater.com/about-us/governance.
224 Sibanye Gold Limited trading as Sibanye-Stillwater 2021 https://www.sibanyestillwater.com/about-us/governance.
225 Bosch, Van der Linde and Barit *Women on South African boards* 34.
226 Sibanye Gold Limited trading as Sibanye-Stillwater 2021 https://www.sibanyestillwater.com/about-us/governance.
227 Dzingai and Fakoya 2015 *Sustainability* 3.
228 Dzingai and Fakoya 2015 *Sustainability* 3.

shareholders.[229] They often contribute positively towards strategic decisions that impact shareholders' investment.[230] The independence of these directors is depicted in the way in which they make decisions independently from the company's management and monitor the behaviour of internal directors and managers on behalf of the shareholders.[231] This, however, does not provide sufficient reasons for the marginalisation of women by not allowing them to be present as both internal and external directors in the same way as men. Cleary companies such as Sibanye-Stillwater have not made it part of their ethos to redress social issues of society such as discrimination against women, and to promote gender equality in their operation.

Below is a discussion of how the pharmaceutical industry compares to the mining industry as far as board composition is concerned. The company observed is Aspen, which continues to contribute significantly to the health care of constituents.

4.1.3 Aspen Pharmacare Holdings Limited

Good governance, ethical business practices, accountability, and effective control, are what the company's board upholds. In their previous reports, Aspen has committed to ensuring their board demonstrates gender diversity, wherein they have set an aspirational target of 50 per cent female representation.[232] This statement was made in the 2019 integrated report, where women representation stood at 30 per cent. In the 2021 report, there has been no improvement, and no sense of commitment to the aspired target, as the percentage of women representation, is still the same.

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229 Dzingai and Fakoya 2015 *Sustainability* 3.
230 Dzingai and Fakoya 2015 *Sustainability* 6.
231 Dzingai and Fakoya 2015 *Sustainability* 6.
232 Aspen Pharmacare Holdings Ltd 2019 https://www.aspenpharma.com/wp-content/uploads/2019/10/Aspen-Corporate-Governance-Report-2019.pdf.

The board comprises ten directors, two of which are executive, while the remainder is non-executive directors.[233] Only three women are serving on the board, and just as Sibanye-Stillwater, the women are only non-executive directors.[234]

The aspired target of women's representation is a desirable one concerning the way in which women were discriminated against in the past and are still being discriminated against. It would mean an appropriate balance as the King IV Report envisioned under Principle 7. Since the company is listed on the JSE, reaching this target could set the tone for other listed companies in their board composition and would set the pharmaceutical industry as a frontier in promoting gender equality and good corporate governance.

The aspired target is aligned with the provisions of the 2013 WEGE Bill under section 7(1) and Article 12 of the *SADC Protocol of Gender and Development* (2008), which, as previously discussed, advocate for a 50 per cent representation and meaningful participation of women in decision-making positions and structures, including boards.[235] Failure of Aspen to progressively reach its self-determined gender target even as it aligns with international law and domestic statutory provisions poses a question on the integrity of their reports.

This study emphasises that women must be appointed as directors of companies because they are also suitably qualified candidates for the role. Furthermore, the decision to appoint them as directors should not be on the basis that they are members representing their gender.[236] Below is a discussion of the roles they play and how they are entrenched in the theories behind board composition. According to researchers, directors play a control role, a strategic role, a service or resource provision role, and the advice and counsel role.[237] Nowhere in studies does one find

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233 Aspen Pharmacare Holdings Ltd 2021 https://www.aspenpharma.com/wp-content/uploads/2019/10/Aspen-Corporate-Governance-Report-2019.pdf.

234 Aspen Pharmacare Holdings Ltd 2021 https://www.aspenpharma.com/wp-content/uploads/2019/10/Aspen-Corporate-Governance-Report-2019.pdf.

235 See fn 126 and 186.

236 Bosch, Van der Linde and Barit *Women on South African boards* 34.

237 Bonn and Pettigrew 2009 *Journal of Management and Organization* 2; Madhani 2017 *IUP Journal of Corporate Governance* 3.

that any of the aforementioned roles are inclined to what men can do over women. These roles will be discussed under the justification theories from which they derive.

4.1.3.1 Agency Theory

Directors play a control role within a company which is best explained by the agency theory.[238] The control role entails that the directors are responsible for monitoring and supervising the company's operations, decisions and plans, and managing and supervising the managers or employees, etc.[239]

According to Madhani, the agency theory originated as an economic theory by Alchian and Demsetz in 1972 and was further developed by Jensen and Meckling in 1976.[240] Abdullah and Valentine define the agency relationship as:

> A contract under which one party (the principals or shareholders) engages another party (the agents or directors) to perform some services on the principal's behalf. Agency theory clarifies the relationship between the principal (shareholders) and its agents (management) in a firm, where the principal elects the board, which in turn elects the management team to execute the routine daily business decisions.[241] The principal agent theory is the first or foundational believe around how boards should be structured and enhances the functions of directors.[242]

It is regarded as a first-generational model, and according to this theory, the monitoring of managers is the primary role of directors.[243] The board is seen to monitor the company's management and acts as the middleman between management and the shareholders.[244] As a result of the role assumed by directors, managers will find it difficult to pursue their self-interests over the interests of the

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238 Cullen, Kirwan and Brennan "Comparative Analysis of Corporate Governance Theory" 4; Wang and Coffey 1992 *Journal of Business Ethics* 772.

239 Cullen, Kirwan and Brennan "Comparative Analysis of Corporate Governance Theory" 4; Wang and Coffey 1992 *Journal of Business Ethics* 772.

240 Madhani 2017 *IUP Journal of Corporate Governance* 4.

241 Abdullah and Valentine 2009 *Middle Eastern Finance and Economics* 88; Madhani 2017 *IUP Journal of Corporate Governance* 4.

242 Madhani 2017 *IUP Journal of Corporate Governance* 4; Cullen, Kirwan and Brennan "Comparative Analysis of Corporate Governance Theory" 4.

243 Madhani 2017 *IUP Journal of Corporate Governance* 4; Wang and Coffey 1992 *Journal of Business Ethics* 772.

244 Cullen, Kirwan and Brennan "Comparative Analysis of Corporate Governance Theory" 4; Wang and Coffey 1992 *Journal of Business Ethics* 772.

principal, in this case, the shareholders.[245] It is also through conforming to reporting requirements as well as external audits that this role gets successfully executed.[246] This reduces poor performance on the part of a company's management and reduces the risk of management pursuing their own interests as opposed to those of the shareholders.[247] This theory is premised on the belief that external directors are in a better position than internal ones when managing and controlling the company's management while also protecting the interests of the shareholders.[248]

The agency theory points to the concept of corporate governance as defined by the King IV Report, which is the exercise of ethical and effective leadership by the governing body towards achieving ethical culture, good performance, effective control, and legitimacy as governance outcomes.[249] The agency theory is mainly concerned with effective leadership, where the responsibility is placed on a company's board of directors to ensure that the management of the company is well monitored and advised while the interests of shareholders are the main priority.[250] According to Wang and Coffey, board composition is a corporate governance mechanism used to monitor the company's top management.[251] Different interests arise between the principals, the shareholders, and the agents, the company managers.[252] The board eradicates any opportunism that might arise due to top management's exposure to shareholders' investments.[253] According to Hindasah and Harsono, in their monitoring function, women directors best monitor managerial opportunism.[254] Their monitoring efficiency is impaired in cases where they are appointed as non-executive directors, as it is in most cases because then

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245 Dzingai and Fakoya 2015 *Sustainability* 3; Cullen, Kirwan and Brennan "Comparative Analysis of Corporate Governance Theory" 11.
246 Madhani 2017 *IUP Journal of Corporate Governance* 4.
247 Madhani 2017 *IUP Journal of Corporate Governance* 4.
248 Madhani 2017 *IUP Journal of Corporate Governance* 6; Wang and Coffey 1992 *Journal of Business Ethics* 771.
249 King IV Report,2016 11.
250 Hindasah and Harsono 2021 *Jurnal Manajemen Bisnis* 216.
251 Wang and Coffey 1992 *Journal of Business Ethics* 773.
252 Wang and Coffey 1992 *Journal of Business Ethics* 773.
253 Wang and Coffey 1992 *Journal of Business Ethics* 773.
254 Hindasah and Harsono 2021 *Jurnal Manajemen Bisnis* 218.

their access to company information is restricted, and they have less knowledge of the day-to-day activities of the particular company. This, therefore, entails that there is less influence that external women directors can play towards monitoring and controlling the company's management than with executive directors who are the employee of the particular company. Large companies require more monitoring than small ones. Therefore, the influence of external women directors is less significant than internal ones for larger companies. Women have less influence in companies because they are not enough of them serving as CEOs and other key roles such as executive board members.[255]

4.1.3.2 Stewardship Theory

The strategic role is explained by the stewardship theory. The strategic role which directors play does not refer to the strategic formulation of the company.[256] Rather, it refers to how the directors support and lead the management of a company to move its vision and mission forward.[257] The mission is that of maximising shareholders' wealth and protecting it.[258] Directors are expected to advise management and help them seek ways to improve and solve strategic problems by actively giving expert advice instead of just monitoring and controlling the company's management.[259] Unlike the Agency theory, the stewardship theory does not place too much emphasis on the monitoring role of the directors towards managers in the interest of looking after shareholders' interest, but rather, it is based on the belief that there is a relationship of trust between the managers of a company and its shareholders.[260] The existence of such a relationship minimises the cost of monitoring by the directors.[261] Managers are believed to be trustworthy and are good stewards of the resources they are trusted with. The theory emphasises

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255 Hindasah and Harsono 2021 *Jurnal Manajemen Bisnis* 220.
256 Madhani 2017 *IUP Journal of Corporate Governance* 3.
257 Madhani 2017 *IUP Journal of Corporate Governance* 3.
258 Cullen, Kirwan and Brennan "Comparative Analysis of Corporate Governance Theory" 4.
259 Madhani 2017 *IUP Journal of Corporate Governance* 3.
260 Madhani 2017 *IUP Journal of Corporate Governance* 14.
261 Madhani 2017 *IUP Journal of Corporate Governance* 14.

the role played by internal directors such as the CEO.[262] It finds that they form a harmonised relationship between the board of directors, managers, and the shareholders of the company, which is effective for realising the company's goals.[263] Being appointed as an internal executive, such as CEO, is one the key roles which directors can assume as it allows them to make more informed superior business decisions.[264] This is due to the fact that internal directors spend most of their time working in the company, which they govern just like any of its employees. So it follows that they understand the company more than external directors.[265] It follows that the performance of a company will more likely be linked to internal directors as they are the ones who work harder to maximise shareholders' investments.[266] Advocates of this theory hold that internal directors have the skills and experience and are, as such, capacitated to impart such to management.[267]

This study contends that the stewardship theory cannot be put to practice for external directors. The theory advocates for increased inside board membership, which should include an equal proportion of men and women executive directors.[268] Based on the findings by Song, Van Hoof and Park, "A higher proportion of outside board members decreases market-based performance."[269] This calls for an increase in the number of women with relevant industry knowledge, skills, and experience to be sought for internal board membership roles. A study by Booth-Bell and Jackson purports that board diversity leverages stewardship.[270] Booth-Bell and Jackson further found that boards with women directors make greater financial returns and

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262 Madhani 2017 *IUP Journal of Corporate Governance* 14.
263 Madhani 2017 *IUP Journal of Corporate Governance* 14.
264 Madhani 2017 *IUP Journal of Corporate Governance* 14.
265 Madhani 2017 *IUP Journal of Corporate Governance* 14.
266 Madhani 2017 *IUP Journal of Corporate Governance* 14; Gaur, Bathula and Singh 2015 *Management Decision* 911.
267 Madhani 2017 *IUP Journal of Corporate Governance* 3.
268 Song, Van Hoof and Park 2017 *International Journal of Contemporary Hospitality Management* 2121.
269 Song, Van Hoof and Park 2017 *International Journal of Contemporary Hospitality Management* 2121.
270 Booth-Bell and Jackson 2021 *Global Journal of Accounting and Finance* 76.

are more innovative. This affirms the stewardship theory's support for efforts to have a diverse board inclusive of women because it results in an effective board.[271]

4.1.3.3 Resource Dependence Theory

This theory explains the service or resource provision role of directors. Through this role, directors of a company are tasked to ensure that the relevant networks are built and that there is an availability of resources for the efficient and sustainable operation of the company.[272] According to Korac-Kakabadse, Kakabadse and Kouzmin, directors are the link between the company and the resources it needs to further its goals.[273] Directors also have to keep up with stakeholder engagement, both internally and externally and should seek ways to counter any conflict resulting from such.[274] This role of the board emphasises the fact that each board member brings a set of resources to the board, such as industry knowledge, experience, information, and access to stakeholders such as suppliers, social groups, and policy decision-makers.[275] According to this theory, the role of directors is leaned more towards attaining resources from the outside environment than monitoring managers of a company.[276] A well-connected director can attain the necessary information and resources to help formulate strategic decisions.[277] The directors who carry out this role efficiently are the non-executives, as they have the necessary resources to help a company deal with external factors.[278] This, therefore, means that one should not view the board objectively and make judgements based on the quantity, such as the number of executive and non-executive directors, but rather

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271 Booth-Bell and Jackson 2021 *Global Journal of Accounting and Finance* 76

272 Madhani 2017 *IUP Journal of Corporate Governance* 4.

273 Korac-Kakabadse, Kakabadse and Kouzmin *2001 International Journal of Business in Society* 24-30; Madhani 2017 *IUP Journal of Corporate Governance* 15.

274 Madhani 2017 *IUP Journal of Corporate Governance* 4; Cullen, Kirwan and Brennan "Comparative Analysis of Corporate Governance Theory" 15.

275 Madhani 2017 *IUP Journal of Corporate Governance* 4; Cullen, Kirwan and Brennan "Comparative Analysis of Corporate Governance Theory" 15.

276 Madhani 2017 *IUP Journal of Corporate Governance* 16.

277 Madhani 2017 *IUP Journal of Corporate Governance* 16.

278 Madhani 2017 *IUP Journal of Corporate Governance* 16.

be focused on whether board functions will be carried out effectively based on the quality that each one brings.[279]

Based on this theory, women, even as they are at most appointed as non-executive directors, serve as a linking mechanism between the company and its various stakeholders.[280] According to Lückerath-Rovers, women are significant in that they provide legitimacy to the various stakeholders regarding the company's values on diversity.[281] Large companies, especially those that are more customer-oriented, are more inclined to conform to societal diversity expectations.[282] Furthermore, appointing women on boards is highly valued by stakeholders of a company in that it helps them decide whether to invest in companies that do not demonstrate equal opportunities at top management.[283]

4.1.3.4 Resource-Based View Theory

This theory explains the role of directors in almost the same way as the resource dependency theory. This theory upholds the notion that companies must ensure those rare resources that will add competitive advantage.[284] Such resources are the necessary skills and knowledge that directors of a company have as opposed to a company's board size or the ratio of executives to non-executives, as these can be imitated by a company’s competitors.[285] According to this theory, directors are appointed and valued by the unique resources they bring to the company, as board composition is one of the resources which is value-adding to a company.[286] They can, at most, be external directors, meaning non-executive directors. However, their skills, knowledge, information, and all the attributes they possess for the role are

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279 Madhani 2017 *IUP Journal of Corporate Governance* 17.
280 Lückerath-Rovers 2009 *Management Online Review* 1.
281 Lückerath-Rovers 2009 *Management Online Review* 1.
282 Lückerath-Rovers 2009 *Management Online Review* 15.
283 Lückerath-Rovers 2009 *Management Online Review* 1.
284 Madhani 2017 *IUP Journal of Corporate Governance* 17.
285 Madhani 2017 *IUP Journal of Corporate Governance* 17.
286 Madhani 2017 *IUP Journal of Corporate Governance* 17.

what is pursued about them.[287] In fact, according to Dalton *et al.*, external directors (non-executive directors) provide more insightful advice to key role players such as the CEO of the company, which in most cases, the internal directors (executive directors) will not be able to provide.[288] These external directors bring in various industry knowledge, experience, and expertise which are intangible and difficult to substitute.[289]

Findings by Lückerath-Rovers express how the need for women directors is not based on the company or board size but rather on the need for external linking.[290] Lückerath-Rovers' study explicitly states that the greater the need for external linking, the greater the need for female directors.[291] This is because women demonstrate a better understanding of customer needs and are more capable than men in giving the company insight on how to maximise opportunities.[292] Ahmadi and Bouri further argue that the advantage of women directors is that they ensure better board behaviour in addition to diversifying the opinions on the board.[293] Competitive advantage is guaranteed in boards that increase the presence of women as they bring board information, innovation, unique perspectives, creativity, and better decision-making skills than their male counterparts.[294]

More than men, women have better communication and multi-tasking skills, which are believed to make them better communicators who are competent enough to manage different situations that may arise in or outside the company.[295] In addition, they are able and willing to take on different responsibilities at once.[296] The overall

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287 Madhani 2017 *IUP Journal of Corporate Governance* 17; Cullen, Kirwan and Brennan "Comparative Analysis of Corporate Governance Theory" 14.
288 Dalton *et al* 1999 *The Academy of Management Journal* 674; Madhani 2017 *IUP Journal of Corporate Governance* 17.
289 Madhani 2017 *IUP Journal of Corporate Governance* 17.
290 Lückerath-Rovers 2009 *Management Online Review* 8.
291 Lückerath-Rovers 2009 *Management Online Review* 8.
292 Ahmadi and Bouri 2017 *Accounting* 246.
293 Ahmadi and Bouri 2017 *Accounting* 248.
294 Ahmadi and Bouri 2017 *Accounting* 248.
295 Ahmadi and Bouri 2017 *Accounting* 248.
296 Ahmadi and Bouri 2017 *Accounting* 248.

value of having women directors is that a company gets to enjoy the reward of effective corporate governance and improved firm performance.[297]

4.2 Concluding remarks

This part of the study has shown how JSE-listed companies are exposed to scrutiny based on the way in which they operate, even as it includes their self-determined targets.[298] From the two company reports specifically focusing on the section of their respective governance structures, one can make an informed assessment about the way in which the two companies have not adequately achieved a women-diverse board as recommended by the King IV Report.[299] The theories from which board appointments can be derived are important guidelines for companies in selecting members for their boards.[300] The main theory behind board governance is the principal agent theory. In all instances, directors are appointed to carry out the instruction of the company owners, which are the shareholders.[301] It is evident that board independence is significant, as is recommended by the King IV Report and JSE listing requirements.[302] All company directors, despite their categorisation as an executive, non-executive or independent non-executive, are independent in the sense that they make objective decisions and are not serving to pursue any of their personal interests but those of the shareholders for the effective running of the company.[303] What is socially incorrect is that women are not fairly represented even in those non-executive roles, which comprise the majority of the board.[304] Since JSE-listed companies are now required to include climate-related matters in their reports, we can expect that from 2022 onwards, reports of the two companies discussed above will include the role of women in their sustainability measures, especially how board appointments will be made to include them for the relevant

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297 Ahmadi and Bouri 2017 *Accounting* 248
298 See fn 194.
299 See fn 216 and 218.
300 See fn 221.
301 See fn 227.
302 See fn 93 and 94.
303 See fn 245.
304 See fn 252 and 253.

aspects such as skills and other attributes which they bring to the role.[305] The next chapter will elaborate on how discrimination against women on company boards can be eliminated.

305 JSE 2022 https://www.jse.co.za/our-business/sustainability/jses-sustainability-and-climate-disclosure-guidance.

Chapter 5: Recommendations and conclusion

The legal mechanisms to eliminate discrimination against women have been put in place in South Africa.[306] These are legislation or voluntary targets.[307] The issue with these two mechanisms is that they are limited in scope.[308] Legislation for the promotion of gender equality is already in place, i.e., the *Employment Equity Act*. However, it is limited in the sense that it is targeted at a specific category, such as direct employees of a company.[309] Voluntary targets such as the King Code, on the other hand, are recommendable; however, they are limited in the way in which they can be enforced as they do not have the same legal status across all companies.[310]

The study has shown that the *Companies Act* has failed to set the tone for gender equality, especially the promotion of women's representation in the composition of boards. It has been proposed that companies can go beyond the provisions of the *Companies Act* for guidelines on how their boards should be composed. This includes determining their own targets while keeping in mind the history of our country, where women have been discriminated against in the past and are still being discriminated against by not being offered an opportunity to take leadership in the economic landscape.[311]

It is clear that the notion of affirmative action under the *Employment Equity Act* does not serve as an effective solution to the underrepresentation of women on company boards, as the application thereof is limited to employees of a company.[312] It follows that the *Employment Equity Act* and specifically the notion of Affirmative Action only apply to directors if and when they are regarded as employees of a company.[313] This, therefore, means that it does not apply to non-executive directors and possibly explains why there is a lack of women diversity in appointing non-

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306 Bosch, Van der Linde and Barit *Women on South African boards* 40.
307 See chap 2 & 3.
308 Bosch, Van der Linde and Barit *Women on South African boards* 29.
309 Chapter 1 para 4 of the *Employment Equity Act*.
310 See fn 100.
311 Bosch, Van der Linde and Barit *Women on South African boards* 26.
312 Chapter 1 para 4 of the *Employment Equity Act*.
313 Bosch, Van der Linde and Barit *Women on South African boards* 26.

executive directors, as seen in the two companies previously discussed. Since there are also few women executive directors, as reports have shown, it follows that companies still do not adhere to the *Employment Equity Act* when making employee director appointments. The JSE tries to improve this predicament by means of the JSE Sustainability and Climate Disclosure Guidance metrics for good corporate governance practices wherein it recommends JSE-listed companies to disclose in their reports the percentage of employees during the time of reporting by gender as it refers to gender as one of the indicators of diversity.[314]

Another mechanism which was once considered is the implementation of mandatory gender quotas, as they have been seen to be effective in countries such as Norway and Spain.[315] It is the WEGE Bill. This measure, however, is already aborted and thereby unconstitutional in South Africa following the provision under section 15(3) of the *Employment Equity Act*.[316] This section explicitly provides that the affirmative action measures aimed at ensuring an equitable balance of suitably qualified people from designated groups across all categories and levels in the workforce can either be in the form of preferential treatment or numerical targets to the exclusion of quotas.[317] This, however, does not prevent companies from determining quotas for the gender representation which they desire for effective leadership on their boards. This is seen from the aspired target set by Aspen of 50 per cent women representation in their board.[318]

This study ends by regarding compliance with King IV as the most effective way to eliminate discrimination against women on company boards. Since the recommendations are voluntary to some (unlisted companies) and compulsory to others (companies listed on the JSE), all that needs to happen is that companies

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314 JSE 2022 https://www.jse.co.za/our-business/sustainability/jses-sustainability-and-climate-disclosure-guidance.
315 See fn 135 & 143.
316 Section 15(3) of the *Employment Equity Act*.
317 Section 15(3) of the *Employment Equity Act*.
318 See fn 219.

must be willing to comply. It depends on the organisation's willpower to apply the recommended principles and practices in the best way possible.

As it is a requirement for listed companies to disclose the extent to which they have complied with the recommendations by King IV in their annual reports, they also need to be honest about those principles they have not complied with. This will minimise scrutiny and will not leave questions on the integrity of their reports. Companies which elect to comply with the King IV Report should go further as giving detailed reasons in their integrated reports as to why they are not reaching those self-determined gender targets that the public, moreover the shareholders, anticipate from them. This will open a channel for stakeholder engagement, a principle upheld by the King Report.[319] Women are a designated group, making them a particular stakeholder that companies can pursue. Through engaging with women, companies will understand the barriers that cause women not to have the attributes that make them eligible to assume board seats. Companies can, as such, provide the resources that are needed to counter these problems.[320] Stakeholder engagement should especially look into the needs of the women within the company to understand what can be done to ensure that they are not continuously marginalised.

Since there needs to be various aspects such as industry knowledge, skills, and experience to make one suitably qualified to be a director, women sometimes lack these attributes, which makes them overlooked.[321] It is about time that companies take the initiative to identify, train, and promote women within the company to management positions and later serve on the board.[322] Companies can groom their own talent by providing a mentorship programme to women who aspire and have

319 Principle 16 of the King IV Report, 2016 explicitly provides that: "In the execution of its governance role and responsibilities, the governing body should adopt a stakeholder inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the organisation over time."

320 Bosch, Van der Linde and Barit *Women on South African boards* 44.

321 Hills 2015 *Deakin Law Review* 158.

322 Bosch, Van der Linde and Barit *Women on South African boards* 36.

a high potential to serve on the board.[323] In some cases, companies might need to change their culture and values, thereby removing any gender stereotypes in order to accommodate women where they have not done so in the past.[324] This will mostly be companies that fall under male-dominated industries, such as mining.

Regulatory bodies such as the Institution of Directors, JSE board and committee itself, Companies and Intellectual Property Commission, and industry regulatory bodies need to monitor and enforce the way in which companies should comply with legislation and regulations, especially on key aspects such as board composition.[325] These institutions can assist by providing information on companies that meet, fail to meet, or do better than their set gender targets.[326] Companies with a female-diverse board should also be incentivised by being given preference in the extension of public contracts by the government, as is done by the Spanish Government.[327] The consequence of not complying with the King code in this regard would be the forfeiture of the same.

The first question that a company must ask itself to ascertain whether it has complied with the King code as it pertains to the composition of its board is, whether there is an appropriate balance of gender diversity .[328] Secondly, whether there are targets set for gender representation, progress has been made against such targets and such has been disclosed in the annual report.[329]Thirdly, whether the board is considering gender diversity when nominating candidates for election.[330] Lastly, whether it has disclosed that it satisfied that the composition of the board reflects the appropriate mix of diversity amongst other attributes such as skills, knowledge and experience.[331]

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323 Bosch, Van der Linde and Barit *Women on South African boards* 36.
324 Bosch, Van der Linde and Barit *Women on South African boards* 36.
325 Bosch, Van der Linde and Barit *Women on South African boards* 41.
326 Bosch, Van der Linde and Barit *Women on South African boards* 41.
327 See fn 35.
328 Principle 7 of the King IV Report, 2016.
329 Practice 30 of Principle 7 of the King IV Report,2016 52.
330 Practice 16b of Principle 7of the King IV Report,2016 51.
331 Practice 30 of Principle 7 of the King IV Report,2016 52.

In conclusion, although King IV varies in how it is enforceable to JSE-listed and non-listed companies, it can be as authoritative as any other mechanism for promoting women's equality in as much as companies are willing to make it.[332]It all depends on how committed a company is towards being a responsible corporate citizen to help eliminate discrimination against women by providing equal opportunities at the board level across all genders.[333]

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332 Nyirenda *Board composition* 7.
333 Nyirenda *Board composition* 7.

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