

**THE DIRECTORS' FIDUCIARY DUTY TO ACT IN THE BEST INTERESTS OF THE
COMPANY: THE POSSIBLE DEVELOPMENTS OF COMMON LAW BY STATUTE
AND HOW THEY AFFECT HUMAN RIGHTS**

By

BAKHULULE NOMADWAYI

(213502232)

Submitted in fulfillment of the requirements for the degree of

Master of Laws

At

UNIVERSITY OF KWAZULU-NATAL

COLLEGE OF LAW AND MANAGEMENT STUDIES

SCHOOL OF LAW

SUPERVISOR: MR S.P. PHUNGULA

JANUARY 2018

TABLE OF CONTENTS

Declaration.....	iv
Dedication.....	v
Abstract.....	1
1. Introduction.....	2
1.1 Background.....	2
1.2 Statement of purpose	3
1.3 Rationale.....	4
1.4 Research questions.	4
1.5 Methodology	4
1.6 Literature review.....	5
2. Problems with Common Law Fiduciary Duty to Act in the Best Interests of the Company.....	8
2.1 Duty to act in the best interests of the company	9
2.1.1 Common law meaning of best interests of the company.....	10
3. The impact of Companies Act on Common law duty to act in the best interests of the company.....	13
3.1 The Synopsis of Section 7.....	13
3.2 The effect of section 7 on duty to act in the best interests of company.....	15
4. The Violation of Human Rights and Disregard of Stakeholders’ interests.....	17
4.1 Potential violation of human rights	17
4.1.1 The rights to equality and dignity.....	18
4.1.2 The difficulties in protecting stakeholders’ interests.....	22
4.2 Disregard of stakeholders’ interests	23
4.2.1 The Enlightened shareholder value and pluralist approach.....	24
4.2.2 The importance of other stakeholders in a company.....	26
5. Corporate Social Responsibility.....	27
5.1 An overview of Corporate Social Responsibility.....	27
5.2 <i>King III</i> on Corporate Social Responsibility.....	28
5.3 Effect of Corporate Social Responsibility.....	29
5.4 Should the rights always prevail?	30

5.5 Are human rights good for business?	30
6. The Balancing of competing interests.....	32
6.1 The balancing approach.....	32
7. Social and ethics committee.....	34
7.1 The Composition of social and ethics committee.....	34
7.2 The functions of Social and Ethics committee.....	35
7.3 shortcomings and pitfalls.....	35
8. Conclusion.....	36
8.1 Conclusion on the duty to act in the best interests of the company.....	36
8.2 Conclusion on impact of Companies Act.....	37
9. Bibliography.....	39

DECLARATION

I, Bakhulule Nomadwayi, do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfillment of the academic requirements of any other degree or other qualification. Signed at Durban on this 10th day of January 2018.

Signature: 

DEDICATION

This dissertation is dedicated to my late mother. To my grandmother who continues to encourage and inspire me throughout my life, thank you for raising me to be the person I am today. To my family and friends who have been sources of support, inspiration and encouragement throughout my studies, thank you for your love and support.

ABSTRACT

This research traces the developments of the directors' fiduciary duty to act in the best interests of the company and looks at how these developments affect human rights and interests of stakeholders. The main focus of the study is on the human rights impact of this duty. Initially, this duty was only regulated in terms of common law which proved to be problematic. The problem with common law lies within the definition of 'best interests of the company', which not only exclude the interests of other stakeholders but also has the potential to bring about violation of human rights, particularly the rights to equality, dignity and fair labour practice. At common law best interests of the company means interests of the company itself and its shareholders. The common law only protects the company and its shareholders, while excluding the rights and interests of stakeholders. The common law duty to in the best interests of the company is not in line with our contemporary law because it ignores human rights. The neglect of human rights by this duty renders it inconsistent with the values contained in the Constitution. Furthermore, the exclusion of stakeholders' rights by this duty cannot be justified because stakeholders play an important part in safeguarding the stability and continued existence of the companies.

The fiduciary duty to act in company's best interests is now contained in the Companies Act of 2008. Inclusion of this duty in the Act enables our courts to interpret it in a manner that protects human rights and which takes into account interests of other stakeholders. Section 7 (a) of the Act provides that among other goals of the Act is the promotion of compliance with the Bill of Rights when applying the company law. The impact of section 7 is that it imposes an indirect duty on directors to consider the human rights impact of their decisions. Section 158 of the Act enables the courts to "develop common law as it is necessary to improve the realisation and enjoyment of rights established by the Companies Act of 2008." Given this recognition of the Bill of Rights by the Companies Act, it's of vital importance that our courts should interpret and apply the duty to act in the best interests of the company in manner that is consistent with the Constitution. Directors are now obliged to pay attention to the human rights impact of their decisions

1 INTRODUCTION

1.1 Background

Prior to the adoption of common law duties of directors, profit companies and creditors tended to suffer loss of money as the result of directors' misconduct and carelessness in performance of their duties as directors of companies.¹ In order to curb this problem there was a need to introduce fiduciary duties that would regulate the standard of directors' conduct.² Hence, the directors' duties were first introduced under common law from English common law.³ However, the common law duties were problematic,⁴ particularly the duty to act in company's best interests since it was aimed at protecting almost exclusively the company itself and its shareholders.⁵ In other words, the directors were expected to perform their functions in a way that benefits the company and its shareholders. For instance, if they failed to act in the best interests of the company they were held personally liable.⁶ At common law the term best interests of a company means interests of the company itself and those of its shareholders.⁷ Thus, it has been said that this duty is not in line with our contemporary law in that it ignores interests of other stakeholders and human rights,⁸ more particularly the rights to equality and dignity.⁹ Ramnath and Nmehielle¹⁰ point out that the Truth and Reconciliation Commission has found that the business sector has contributed to violation of human rights, during the apartheid era. For example, during the apartheid era in South Africa, some of the big companies had assisted the apartheid government in committing human rights violations thereby supplying the government with material (weapons) necessary for committing such human rights violations.¹¹

¹ Cassim, FHI et al *Contemporary Company law* 2nd Ed Cape Town, (2012) Op cit note 238 where the company had suffered a substantial shortfall in its fund as a result of which its managing director was convinced of fraud.

² Ibid at page 507.

³ Bouwman, N. "An Appraisal of the Modification of the Director's Duty of Care and Skill", (2009) 21 SA *Merc LJ* at 511.

⁴ Cassim supra note 1 at 515.

⁵ Davis, D. and Le Roux, M. "Changing the Role of the Corporation: A Journey Away from Adversarialism", 2012 *Acta Juridica* at 309-10.

⁶ Ramnath, M. & Nmehielle, V. "Interpreting Directors' Fiduciary Duty to Act in the Company's Best Interests through the Prism of the Bill of Rights: Taking Other Stakeholders into Consideration", 2013(2) *SPECULUM JURUS* at 98.

⁷ Gwanyanya M. "The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities", 2015(18)1 *PER/PELJ* at 3109.

⁸ Botha, M.M. "Responsibilities of Companies towards Employees", 2015 (2) *PER/PELJ* at 17.

⁹ See *Hoffman v South African Airways* 2001 (1) SA 1 (CC).

¹⁰ Ramnath & Nmehielle supra note 6 at 98.

¹¹ Ratner, S.R. "Corporations and human rights: a theory of legal responsibility", (2001)111 (3) *The Yale Law Journal* at 462.

The fiduciary duty to act in company's best interests is now "partially codified" in the Companies Act of 2008.¹² Codification of this duty enables our courts to interpret this duty in a way that supports human rights and which takes into account stakeholders' interests. In this regard s 158 of the Companies of Act 71 of 2008 (hereafter the Act) provides that the courts, "when determining any matter in terms of Companies Act, must develop common law as it is necessary to improve the realisation and enjoyment of rights established by the Companies Act of 2008." Further to that, s 7 (a) of the Act provides that the "purpose of the Act is to promote compliance with the Bill of Rights as provided for in the constitution, in the application of company law." With this recognition of the Bill of Rights by the Act, it is of vital importance that our courts should interpret and apply the duty to act in the best interests of the company in manner that is consistent with the Constitution.

1.2 Statement of purpose

The purpose of this dissertation is to explore the impact of the Companies Act of 2008 on common law fiduciary duty to act in the best interests of the company and to provide liberal interpretation of this duty. It will first identify problems facing this duty, focusing mainly on its failure to recognize human rights and interests of other stakeholders. This paper will focus more on the human rights aspect of this duty. This duty has a potential to infringe several rights, but for the purpose of this research the rights to equality and dignity will be utilised to indicate how this duty affects human rights. The critical analysis of rights to equality and dignity is beyond the scope of this research. Thus, this dissertation will only discuss a few labour cases in attempt to show how this duty impinges the rights to equality and dignity. It will look at the Act particularly s 7 and indicate how this provision changes the duty to act in best interests of the company. It will be argued that the mentioning of Bill Rights in s 7 of the Companies Act extends the application of the duty to act in best interests of the company and demands that application of this duty should now reflect Constitutional values. The type of companies that are being considered in this dissertation are profit companies. It will be argued that Act is not sufficient to protect human rights because it does not contain a specific or express provision which requires directors to pay attention to human rights. It will also be argued that total codification of the duty to act in the best interests of the company could be the solution to its problems.

¹² Coetzee, L. & Van Tonder, J. "Advantages and disadvantages of partial codification of director's duties in the South African Companies Act 71 of 2008", (2016) 41(2) *Journal for Judicial Science* at 2.

1.3 Rationale

The rationale behind this study is firstly, to indicate that the common law fiduciary duty to act in companies' best interests falls short of our contemporary law because it fails to take into account the rights and stakeholders' interests. For example, it excludes rights and interests of employees and customers. Secondly, it will explore the impact of the Companies Act of 2008 and provide clarity on how this Act reconciles the duty to act in best interests of Company and human rights. Thirdly, it seeks to show the importance of other stakeholders in companies. For example, it will illustrate that the existence of profit companies depend on employees because they earn profits through the works and efforts of their employees. Therefore, in order to keep the employees' momentum, the companies should respect their rights and interests. Furthermore, the society plays a vital role in the profit making by companies. This is by a way of customers buying the product of the company. Thus, if customers' rights are disregarded this might discourage them from buying the companies' product and that would result in loss profit to the companies. Therefore, in order to keep employees' momentum, avoid strikes, and to reduce human rights violation by business sector, this duty ought to be applied and interpreted in manner that takes into account the rights and interests of all affected stakeholders.

1.4 Research Questions

- Does the common law concept of the company's best interests conflict with human rights?
- Is section 7 of Companies Act of 2008 sufficient to protect the rights or interests of other stakeholders?
- Should the interests of the shareholders prevail over the interests of other stakeholders when one determines what is in the best interests of the company?
- Is there a link between human rights and the best interests of the company?

1.5 Methodology

The methodology used in this research is desktop because it involves the reading, understanding and examination of the literature on the subject of directors' duties, specifically the duty to act in company's best interests and its impact on human rights. This research entails the study of South African common law and legislation, focusing more on Companies Act of 2008. The research relies on relevant library materials such as law journal articles, decided cases, textbooks, theses and internet sources.

1.6 Literature Review

There has been a lot of debate around the meaning of “best interests of the company”.¹³ This is because Companies Act¹⁴ (hereinafter called the Act) is silent as to what is meant by ‘the best interests of the company’.¹⁵ Although the Act is silent, at common law “best interests of company” means interests of a company itself and those of its shareholders.¹⁶ This meaning seems to be problematic because it ignores other stakeholders’ rights and interests; for example, it does not give recognition to the rights or interests of employees, customers, suppliers and society as a whole. Hence, Botha¹⁷ argues that this meaning “is too narrow and is outdated, because shareholders are no longer the only primary stakeholders of a corporation.” Other stakeholders, including employees, managers and customers, also play a significant function in the making of profit by the company thereby ensuring that company’s activities are fulfilled.¹⁸ Ramnath and Nmehielle state that “other stakeholders such as employees also invested into the company in the form of human capital and they bear the risk of loss if the company is unsuccessful.”¹⁹ This seems to suggest that directors’ decisions do not only affect the shareholders or company, and that any poor decision by the director may impact negatively on employees and customers. However, Ramnath and Nmehielle fail to illustrate how the employees can bear loss if the company is unsuccessful and this will be looked at in this paper.

The narrow meaning of best interests of the company renders the entire common law duty to act in company’s best interests problematic. One of the problems with this duty is that it was established before introduction of the Constitution.²⁰ Hence, it falls short of the major changes that have been introduced by the Constitution, one of which is the Bill of Rights.²¹ In this regard, Ramnath and Nmehielle state that “the common law duty was created pre-constitutional era where profit maximization was the primary concern for companies. Accordingly, this duty embraced limited social responsibility dimensions.”²² Therefore, this duty needs to be updated so that it is consistent with our constitutional values.

¹³ Gwanyanya supra note 7 at 3109 and Botha supra note 8 at 7.

¹⁴ 71 of 2008.

¹⁵ Gwanyanya supra note 7 at 3109 and Cassim supra note 1 at 524.

¹⁶ Ramnath & Nmehielle supra note 6 at 102.

¹⁷ Botha supra note 8 at 7.

¹⁸ Botha op cit note 36 at page 8; see also Ramnath & Nmehielle supra note 6 at 105.

¹⁹ Op cite note 37 at 104.

²⁰ Ramnath & Nmehielle supra note 6 at 101.

²¹ See Chapter two of the Constitution.

²² Ramnath & Nmehielle supra note 6 at 101.

It has also been said that the common law meaning of best interests of company is inconsistent with the purpose of the Act, particularly section 7 (a) that seeks to bring application of the Act in line with the Constitution.²³ In this regard Gwanyanya states that, “the inclusion of section 7 in the Companies Act bring into question the applicability of the common law meaning of best interests of company today.”²⁴ Hence, there is a strong suggestion that the term “best interests of the company” must be interpreted broadly to protect the rights of other stakeholders and to meet the demands of our society.²⁵ As stated by Katzew, in order to be in line with the needs of the contemporary law the duty to act in company’s best interests needs to be construed and applied in such a way that it promotes the human rights and other interests of the society.²⁶ Ramnath and Nmehielle²⁷ support this when they argue that, “the directors’ fiduciary duty to act in the company’s best interests...embody normative concepts that requires directors to make a value judgment on company’s social responsibility.” Their argument seems to be that when directors make such value judgments they must take into account various policies and norms the society that prevail over at the relevant time and attempt to protect the interests of the society.

Academics seem to agree that it cannot be said that a director has properly discharge the duty to act in company’s best interests, if such director failed to consider s 7 of Act when making the decision. Samaradiwakera-Wijesundara²⁸ argues that the director’s duties as contained in s 76 of the new Act “should be viewed through interpretative lens of Companies Act contained in section 7 thereof.” Thus, it seems that inclusion of section 7 in the Companies Act reinforces the notion that companies are now bound by Constitution and that every decision taken by directors should reflect the values of the Constitution. Katzew²⁹ support when stating that “company is now situated within our constitutional framework.... Companies Act therefore demands that the values of the Constitution underpin the very purpose and object of the

²³ Gwanyanya supra note 7 at 3109.

²⁴ Ibid.

²⁵ Samaradiwakera-Wijesundara, C. “Business and Human Rights: To what extent has the Constitution transformed the obligations of businesses”, 16 November 2014 at page 7 Available At: <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Samaradiwakera-Wijesundara.pdf>. Accessed on 20 July 21, 2017.

²⁶ Katzew J “Crossing the Divide between the Business of Corporation and the Imperatives of Human Rights- the Impact of Section 7 of the Companies Act 71 of 2008”, (2011) 128 SAJL at 704.

²⁷ Ramnath & Nmehielle supra note 6 at 99.

²⁸ Samaradiwakera-Wijesundara supra note 25 at 10.

²⁹ Katzew supra note 30 at 692- 693.

company and that this must be borne in mind in the decision-making processes of the company.” Therefore, the effect of s 7 is that companies now have both positive and negative obligations to protect human rights. This is because decisions and activities of the companies can sometimes act as barrier to the enjoyment of human rights, including both labour rights and fundamental rights of dignity and equality.³⁰ Section 8(2) of the Constitution provides for horizontal application of the Bill of Rights, and it has been said that the purpose this section to guide against violation of human rights by companies.³¹ Samaradiwakera-Wijesundara³² argues that s 7 of Companies Act and section 8 (2) of the Constitution should be read together and that these sections require companies to comply with the Bill of Rights. Gwanyanya supports this when stating that, “commencement of the Companies act reinforced the idea that Companies, too, must act in accordance with the Constitution.”³³

The above arguments are of vital importance in that they seek to avoid a situation whereby the fiduciary duty to act in company’s best interests is interpreted in a manner that violates human rights. The purpose of Act is however not based only on promotion of social responsibility and human rights. The Act has other objectives among others; the encouraging of entrepreneurship and enterprise efficiency.³⁴ Therefore, if directors are forced to protect human rights, this might result in a clash between two or more purposes of the Act.³⁵ This effectively requires directors to balance between different purposes of the Act (profit and human rights protection). Gwanyanya asserts that companies ought to realise that profit can be made without violating human rights.³⁶ On the other hand, Ramnath and Nmehielle argue that directors ought to be aware that respecting the rights of other stakeholders has the effect of advancing the interests of the company.³⁷ These authors reasoned that, considering other stakeholders’ interests in board decisions would help the company to stabilize its business.³⁸ For example they argue that the “likelihood of employee strikes, consumer boycotts and other disruptive activities may be reduced”.³⁹

³⁰ Bilchitz, D. “Corporate law and Constitution: Towards binding human rights responsibilities for corporations”, (2008) 125 *SALJ* at 754.

³¹ Bilchitz supra note 34 at 780); see also Samaradiwakera-Wijesundara supra note 29 at 3.

³² Samaradiwakera-Wijesundara supra note 29 at 4.

³³ Gwanyanya supra note 7 at 3111.

³⁴ Ibid at page 3122.

³⁵ Ibid.

³⁶ Ibid at page 3123.

³⁷ Ramnath & Nmehielle supra note 6 at 144.

³⁸ Ibid at page 115.

³⁹ Ibid.

However, most of the literature fails to give regard to the fact that some directors are not aware of the developments in our law. In other words, they do not have understanding of what our contemporary law is. The reason for this could be that most directors are not lawyers and one could argue that most of the time they do not know what the law is. Therefore, the question remains in what ways should the directors balance between interests of company and the rights of stakeholders. In most cases directors are trained to make good decisions for the company, in other words, to make decisions that will benefit the company. They have little awareness of public policy and they usually do not understand what is best for the society or other stakeholders. Therefore, even if they are willing to take into account the rights and interests of other stakeholders when making their decisions; they may still lack knowledge as to the nature of interests or human rights that they should take into account. The question therefore remains; what would then happen if a director was not aware of a particular right or interest at the time when he or she took the decision? Would directors be required to seek legal advice for their decisions to avoid ignoring the rights of other stakeholders? If so, how would the legal costs affect the company or defeat the profit maximisation. In addition, the literature fails give sufficient case law discussion to indicate the manner in which this duty affects human rights. Therefore, this dissertation will attempt to fill on these gaps.

2. Problems with Common Law Fiduciary Duty to Act in the Best Interests of the Company

The common law fiduciary to act in company's best interests has been partly codified in Companies Act of 2008, together with other duties of directors.⁴⁰ Partial codification means that the legislature did not do away with common law duties of directors and that common law will remain applicable alongside the legislation.⁴¹ This means that where the Act is not clear the courts will use case law to interpret and supplement the Act when interpreting the duty to act in the best interests of the company.⁴² Therefore, it is submitted partial codification of directors' duties is beneficial to the courts since they may look at common law where the wording of the Act becomes vague. However, if there is a conflict between the Act and common law, provisions of the Act will prevail.⁴³

⁴⁰ See ss 76, 77(2) and 158(a) and Cassim supra note 1 at 523.

⁴¹ Coetzee & Van Tonder op cite note 24 at page 2; see also Bouwman supra note 3 at 516.

⁴² Van Tonder, J. "An analysis of directors' duty to act in the best interests of the company through the lens of the Business Judgment Rule", *Obiter* at 707.

⁴³ *Ibid.*

Although this duty is beneficial, it has proven to be problematic in light of the developments that have occurred on its interpretation. The problem with this duty lies within the common law definition of “best interests of the company” which, not only excludes the interests of other stakeholders, but also has the potential to bring about violation of human rights, particularly the rights to equality, dignity and fair labour practice.⁴⁴ Therefore, it is necessary to examine the common law duty to act in the best interests of the company to show, to what extent does this duty affect human rights and interests of other stakeholders. Thus, the next section examines common law duty to act in company’s best interests, focusing on the meaning of “best interest of the company”.

2.1 The duty to act in the best interests of the company

At common law, directors have a fiduciary duty to act in good faith and in the best interests of the company.⁴⁵ Hence, they are supposed to use their authority and carry out their functions in good faith and in what they deem to be in the best interests of the company.⁴⁶ In *Re Smith & Fawcett Ltd*,⁴⁷ the court stated that “[t]hey [directors] must exercise their discretion *bona fide* in what they consider- not what a court may consider- to be in the best interests of the company, and not for collateral purpose.” Thus, this duty is subjective and for a director to be held personally liable, he must be aware that his actions were wrong.⁴⁸ In *Extreme Travel Insurances Ltd v Scattergood*⁴⁹ the court held that “there must be reasonable grounds for the belief of the directors that they were acting in the best interests of the company”. This duty “qualifies the exercise of powers which directors in fact have.”⁵⁰ This applies even if the directors are also shareholders of the company.⁵¹ In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*⁵² the entire board of directors decided to resign on advice of their attorney that they were at risk of being sued for reckless trading, since the company did not have sufficient funds to comply with a court order. The court held that “directors have a duty to act in good faith and in the best interests of the company.”⁵³ By resigning, the directors would not be able to perform their duties to the company and could not be said to acting in the best interests of

⁴⁴ See Botha se supra note 8 at 7-9; Ramnath & Nmeielle supra note 6 at 98.

⁴⁵ *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) para18.

⁴⁶ *Re Smith & Fawcett Ltd* [1942] Ch 304 at 306.

⁴⁷ [1942] Ch 304 at page 306.

⁴⁸ Cassim supra note 1 at 524.

⁴⁹ [2003] 1 BCLC 598 (ChD) at 619.

⁵⁰ Delpont et al *Henochberg on the Companies Act 71 of 2008*(2012) at 297.

⁵¹ *Ibid.*

⁵² *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W).

⁵³ *Ibid* at para 16.

the company.⁵⁴ Apparently, the purpose of this duty is to protect the company from self-interested directors. It prevents the directors from putting their own interests above the company's interests and requires that the decisions of directors should at least benefit the company.

As mentioned above, the common law duty to act in the interests of the company is now provided for in s 76 (3) (b) of the Act. In terms of this section, "a director of the company when acting in that capacity must exercise the powers and perform the functions of a director in the best interests of the company." However, the Act is silent as to what is meant by "best interests of the company" and this resulted to a debate around the meaning of this term.⁵⁵ The wording of s 76 (3) (b) reveals that directors owe this duty to the shareholders of the company and the effect of this is that only the company can enforce this duty.⁵⁶ However, Cassim⁵⁷ argues that "the word company is not defined for the purposes of s 76 (3) b." Hence, the common law meaning of this term is applied.⁵⁸ Therefore, it is necessary to consider the meaning of "best interests of the company" as it stands at common law and to determine whether this meaning is suitable having regard to both human rights and interests of other stakeholders.

2.1.1 Common law meaning of best interests of the company

As highlighted above, the meaning of best interests of the company has led to a lot of debate since the Act does not provide a meaning of this term. Although the Act is silent, it has been argued that at common law "best interests of the company" means interests of the company itself and those of its shareholders.⁵⁹ In *South African Fabrics v Millman*⁶⁰ (*Millman*) the court found that company's interests in the context of this duty are only those of its shareholders and the company itself as commercial entity. As noted above, the Act does not define the term "best interests of the company" and for this reason one may argue that s 76 refers to the interests of the company alone and not its shareholders. This is because the company is regarded as a private entity that is separate from its shareholders. However, submission may be made that the position taken by the court in *Millman* is appropriate. In other words, the inclusion of shareholders in the definition of best interests of the company is correct because there is a

⁵⁴ Ibid.

⁵⁵ Gwanyanya supra note 7 at 3108 and Botha supra note 8 at 7.

⁵⁶ Cassim supra note 1 at 515 and Van Tonder supra note 42 at 712.

⁵⁷ Cassim supra note 1 at 515.

⁵⁸ Ibid.

⁵⁹ Ramnath & Nmehielle supra note 6 at 98; Gwanyanya supra note 7 at 3108 and Cassim supra note 1 at 515.

⁶⁰ 1972 4 SA 592 (A).

reciprocal and beneficial relationship between the company and shareholders.⁶¹ On one hand, shareholders raise capital for the company. They buy stock at less cost and sell it at high cost which in turn raises profit for the company. On the other hand, the company raises the profit for shareholders and increases their wealth. Moreover, the object of a company is to raise money for its shareholders and any act or decision that is beneficial to the company is also beneficial to the shareholders. Therefore, although the company is treated as a separate entity it cannot be separated from its shareholders for the purpose of the duty to act in company's best interests. It will be argued later on that the court in *Millman* should have expanded the definition of 'interests of company' even more to include other stakeholders such customers and employees, because they too play an essential role to the survival of the company.

Generally it is believed that the term "best interests of the company" means that a director must put the company's interests above the interests of individual parties within the company and ensure the company complies with its legal requirements.⁶² Therefore, directors' decisions were expected to advance the financial interests of the shareholders and any decision taken by the director, which is purported at advancing interests of any person other than shareholders, would render such director personally liable for breach of this duty. Ramnath and Nmehielle⁶³ state that "companies were seen as essentially private concerns with no social obligation beyond the payment of taxes". The absence of social obligation for companies meant that stakeholders could not enforce their rights against the companies or directors. It is submitted that this position has now changed because stakeholders' rights are protected by specific legislation. For example, labour legislation⁶⁴ protects the rights of employees and Consumer Protection Act⁶⁵ protects the consumer rights. Therefore, companies have an obligation to protect rights or interests of stakeholders.

The common law position that directors need to run the company to the advantage of shareholders is further illustrated by the case of *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*⁶⁶. The facts of the case have already been discussed above. What happened in this case is that the entire board of directors decided to resign on advice of

⁶¹ Josh Fredman, "What is the Relationship Between a Corporation and its Shareholders?" (2017) Available at: <https://pocketsense.com/relationship-between-corporation-its-shareholders-12022852>. Accessed on 7 December 2017.

⁶² Cassim supra note 1 at 515.

⁶³ Op cit note 29 at 103.

⁶⁴ Labour Relations Act 66 of 1995.

⁶⁵ Consumer Protection Act 68 of 2008.

⁶⁶ Supra note 52.

their attorney that they were at risk of being sued for reckless trading, since the company did not have sufficient funds to comply with a court order. The court held that directors have a duty to act in good faith and in the best interests of the company. The court further held that if all directors resign, they would not be able to perform their duties to the company and could not be said to acting in the best interests of the company. Surely the purpose of this duty is to protect the company from self-interested directors and it prevents the directors from putting their own interests above the company's interests thereby requiring their decisions to at least benefit the company or its shareholders.

The common law principle that directors should run the company only for the benefit of shareholders is no longer applicable and the company law has developed since the above cases were decided.⁶⁷ In addition, the common law interpretation of "the best interests of the company" is too narrow to an extent that it fails to meet the standards of our contemporary law thereby excluding the rights and interests other stakeholders.⁶⁸ Stout⁶⁹ states that this common law position should not continue to be applied because "a large majority of state [laws] explicitly authorise corporate boards to consider the interests of not just shareholders, but also employees, customers, creditors and community in making business decisions". Thus, the common law meaning of best interests of the company is problematic in that it fails to give recognition to the rights or interests of other key players of the company. This narrow meaning of "best interests of the company" renders the entire duty problematic.⁷⁰ The first problem with this duty is that it fails give recognition to human rights. To illustrate on this, today employees have a right to equality, dignity and fair labour practice.⁷¹ Therefore, a director cannot simply dismiss an employee because of his or her HIV status, even if doing so is in the best interests of the company because by so doing the director might violate employee's right to equality.⁷² The directors are now obliged to pay heed to the constitutional rights of employees.

S 7 of the Act changes the traditional understanding of the duty to act in the best interests of the company and brings its application within the scope of the Bill of Rights. In addition, this

⁶⁷ The Companies Act of 2008 was enacted after this case and s 7 of this act requires directors to take into account the rights and interests of other stakeholders.

Available at: <http://www.scholarship.Law.cornell.edu/facpub/724> Accessed on 15 August 2017.

⁶⁸ Botha supra note 8 at 7.

⁶⁹ Stout, Lynn A. "Why we should Stop Teaching Dodge v. Ford", (2008) *Cornell Law Faculty Publications*. Paper 724 at 166.

⁷⁰ Ramnath & Nmehielle supra note 6 at 98.

⁷¹ See sections 8 and 9 of the Constitution of the Republic of South Africa, 1996; section 187 (1) of Labour Relations Act 66 of 1995; and section 6(1) of the Employment Equity Act 55 of 1998.

⁷² See *Hoffman v South African Airways* 2001 (1) SA 1 (CC).

provision imposes a social obligation upon companies. The effect of s 7 is that directors cannot simply ignore human rights when running the company. Therefore, the next section examines s 7 of the Act and attempts to indicate how this section reconciles human rights and duty to act in the best interests of the company.

3. Impact of section 7 of the Companies Act of 2008 on common law duty to act in the best interests of the company

The traditional view is that human rights responsibility acts as a barrier to maximisation of profit by the companies.⁷³ However, the modern view is that companies have great influence over the individuals and are likely to bring about human rights violations.⁷⁴ Hence, they are expected to respect and promote human rights. Human rights are inherent to all human beings and they belong to everyone from birth until death. Section 8 (2) of the Constitution provides that human rights to all natural or juristic persons “if and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” Thus, the issue of whether directors should consider human rights when making decisions should no longer be debatable because s 7 of the Act together with the Bill of Rights demands that directors should consider the effect of their resolutions on the rights of stakeholders.

3.1 The Synopsis of Section 7

In order to understand the impact of Act on common law duty to act in the best interests of the company, it is necessary to look at s 7. S 7 sets out all the purposes of the Act.⁷⁵ The first relevant section of this provision is s 7(a), which brings application of the Act within the scope

⁷³ Katzew supra note 26 at 687.

⁷⁴ Ratner supra note 11 at 461.

⁷⁵ See 7 provides that the purposes of the Act are to—“(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law; (b) promote the development of the South African economy by— (i) encouraging entrepreneurship and enterprise efficiency; (ii) creating flexibility and simplicity in the formation and maintenance of companies; and (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation; (c) promote innovation and investment in the South African markets; (d) reaffirm the concept of the company as a means of achieving economic and social benefits; (e) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy; (f) promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity; (g) create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk; (h) provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions; (i) balance the rights and obligations of shareholders and directors within companies; (j) encourage the efficient and responsible management of companies; (k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and (l) provide a predictable and effective environment for the efficient regulation of companies.”

of the Bill of Rights. According to this section, the object of the Act “is to promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law.” Effectively, this provision extends the duty to act in company’s best interests and imposes an additional duty upon directors to pay attention to human rights. This section is the repetition of s 8(1) of the Constitution, which provides that “Bill of Rights apply to all laws”⁷⁶ and also has its basis from s 8(2) of the Constitution, which specifically imposes a binding human rights obligation on juristic persons. S 8(2) requires that juristic persons should comply with the Bill of Rights “to an extent that is applicable taking into account the nature of the right and duty imposed by the right.” However, s 8(2) has been criticised on the basis that it fails to provide clarity as to under which circumstances the Bill of Rights is applicable to juristic persons.⁷⁷ Thus, it has been said that this section articulates the complexity of imposing human rights obligation on companies, particularly the difficulty on “how to determine the nature and the extent of the company’s obligation.”⁷⁸ However, the Act does not include a provision similar to s 8(2) of the Constitution.⁷⁹ It is submitted that failure to include such provision in the Act was itself a flaw because the purpose of legislation is to expand on and to implement the principles set out in the Constitution. Therefore, a provision similar to s 8(2) of the Constitution should be inserted into the Act. Such provision would enable the legislature to clarify the nature and the extent of companies’ obligation towards human rights. In addition, such provision can assist directors to achieve a balance between the interests of the company and human rights thereby providing guidelines on how to achieve such balance.

The second relevant segment of s 7 are subsections 7(b) (iii) and 7(d). These subsections seem to have changed the traditional rule that directors must manage the company in a manner that benefit its shareholders, thereby requiring directors to consider both economic and social issues when making their decisions. S 7(b) (iii) specifically recognises the “significant role of enterprises within the social and economic life of the nation” and s 7(d) “reaffirms the concept of company as means of achieving social and economic benefits.” What is clear from the above provisions is that companies now form part of Constitutional plan, which is aimed not only at ensuring adherence to Bill of Rights but also to reaffirm the perception of company “as means of achieving social and economic benefit.”⁸⁰ Although it is not specifically stated, the effect of

⁷⁶ See section 8(1) of the Constitution; see also Katzew supra note 30 at 690.

⁷⁷ Bilchitz supra note 30 at 780.

⁷⁸ Katzew op cit note 11 at 690.

⁷⁹ Katzew supra note 26 at 690.

⁸⁰ Samaradiwakera-Wijesundara supra note 25 at 10.

ss 7(a) 7(b) (iii) and 7(d) is that directors should give due regard to the rights and interests of stakeholders when running the company.⁸¹ Subsections 7(b), 7(c) and 7(g) reiterate the traditional purposes of regulating the companies, one of them of which is to assist them in making profit.⁸² Thus, an examination of s 7 reveals both the need protect human rights and profit maximization as the objects of the Act.⁸³ Consequently, this requires directors to balance between the need to protect human rights and profit goals of the company, when running the company. The question of how directors should balance between interests of the company (profit) and human rights will be discussed below.

3.2 The effect of section 7 on duty to act in the best interests of company

Although the duty to act in the best interests of the company is not fully codified in the Act, s 7 does change the manner in which this duty is applied.⁸⁴ Traditionally, this duty was more concerned about shareholders' financial interests in that, directors were expected to ensure that their decisions advance the financial interests of shareholders.⁸⁵ The mentioning of Bill of Rights in s 7 (a) now extends the application this duty and requires directors to consider effect of their decisions on the rights of stakeholders.⁸⁶ Furthermore, s 7(d) amends the shareholder dominance approach thereby requiring directors to run the company in a way that promotes social and economic benefits. Therefore, it cannot be said that a director has properly discharged the duty to act in company's best interests if such director has failed to consider s 7 when making decisions that affect stakeholders' rights or interests. The duty to act in company's best interests is now provided for s 76(3) (b) of the Act. Consequently, this duty will be "applied and interpreted in a manner that promotes the purposes" of the Act, as required by s 5 of the Act.⁸⁷ In this regard, Samaradiwakera-Wijesundara⁸⁸ states that s 76 of the Act "should be viewed through the interpretative lens of the Companies Act as contained in s7 thereof." This means that where the adherence to directors' duty to act in best interests of the company results in violation of human rights, the courts should consider s 7 of the Act and

⁸¹ Esser, I. "Corporate Social Responsibility: A company law perspective", (2011) SA 23 *MercLJ* at 325; see also Gwanyanya supra note 7 at 3111.

⁸² Samaradiwakera-Wijesundara supra note 25 at 10.

⁸³ Katzew supra note 26 at 690.

⁸⁴ *Ibid.*

⁸⁵ Esser & Delport "The Protection of Stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1" (2017) *I De jure* at 104.

⁸⁶ See Gwanyanya supra note 7 at 3109 and Katzew supra note 26 at 704.

⁸⁷ Section 5 provides that "*the act must be interpreted and applied in a manner that gives effect to the purposes set in section 7*".

⁸⁸ Samaradiwakera-Wijesundara supra note 25 at 7.

weighs any affected rights against the company's interests.⁸⁹ Where it is necessary to protect the rights of affected stakeholders, the courts will have to develop this duty in accordance with s 158 of the Act. S 158 makes reference to the common law. The mentioning of common law in this section is justified because it allows the courts to develop the common law where it conflicts with the provisions of the Act. For example, it allows courts to develop the common law concept of best interests of the company as it conflicts with s 7 of the Act. Katzew summarises the effect of s 7 as follows:

“... The company is now situated within our constitutional framework. Company law as embodied in the Companies Act, therefore demands that the values of the Constitution underpin the very purpose and the object of the company and that this must be borne in mind in the decision-making process of the company.”⁹⁰

A proper interpretation of s 7 reveals that the common law meaning of best interests of the company is inconsistent with purposes of Companies Act, particularly s 7(a) which brings application of the Act within the scope of the Constitution.⁹¹ In light of the changes made by s 7, it is unlikely that the narrow meaning of “best interests of the company” will continue to apply.⁹² It is important to note that s 7 does not entirely change the duty to act in the best interests of the company because directors are still required to advance the financial interests of shareholders, but with an additional requirement that their decisions should reflect the Bill of Rights.⁹³ However, the Act does not contain a provision that specifically requires directors to consider interests of stakeholders.⁹⁴ Such provision, according to Muswaka, would include an automatic duty to consider the rights of stakeholders.⁹⁵ Hence, non-appearance of such a provision in the Act might mislead directors to believe that they are not obliged to consider human rights when running the company.⁹⁶ Therefore, such provision should be inserted to make it clear for the directors that they are obliged to consider the rights and interests of stakeholders. Although the Act fails to provide for a specific duty to consider human rights, directors may still be held liable if they disregard human rights when making the decisions.⁹⁷ Samaradiwakera-Wijesundara⁹⁸ supports this when she states that “a failure to identify human

⁸⁹ Gwanyanya supra note 7 at 3108.

⁹⁰ Katzew supra note 26 at 693.

⁹¹ Gwanyanya supra note 7 at 3109.

⁹² Ibid.

⁹³ Katzew supra note 26 at 694.

⁹⁴ Muswaka, L. “The Corporate Responsibility for Human Right: A conceptual framework”, (2014) *MJSS* at 220.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Gwanyanya op cit note 57 at 3115.

⁹⁸ Samaradiwakera-Wijesundara supra note 25 at 9.

rights impact of company's operations and taking precautions to mitigate against any possible human rights violations would amount to a breach of this duty."

4. The Violation of Human Rights and Disregard of Stakeholders' interests

As mentioned above, the common law definition of "best interests of the company" is problematic because it excludes the interests of other stakeholders and has the potential to bring about violation of human rights, particularly the rights to equality, dignity and fair labour practice.⁹⁹ This narrow definition of best interests of the company renders the entire duty to act in company's best interests problematic and cannot continue to apply in light of the changes that have been brought by s 7 of the new Act. The effect of s 7 is that directors required to pay attention to human rights when running the company. This section of the study seeks to indicate why the common law definition of "best interests of the company" can no longer continue to apply. It does this by indicating the extent to which this duty affects human rights and interests of other stakeholders.

4.1 Potential human rights violation

As already mentioned above, duty to act in company's best interests is problematic because it was established before introduction of the Constitution.¹⁰⁰ Thus, it could well be said that this duty falls short of the major changes that have been introduced by the Constitution. One of the most fundamental changes that have been brought by the Constitution is introduction of Bill of Rights¹⁰¹ which entails among other rights, the rights to equality and dignity.¹⁰² Therefore, because this duty was established before the Constitution, it may sometimes conflict with one of the values contained in our Constitution. The reason for this could well be that "common law position was conceived and bred at in a society in which human rights responsibilities of corporations were in its infancy."¹⁰³ As a result, a narrow or strict interpretation of this duty may result in human rights violations by corporations. It may not only bring about violation of employment and consumer rights, but it may also affect the fundamental rights including the rights to equality and dignity.¹⁰⁴

⁹⁹ See Botha supra note 8 at 7-9 and Ramnath & Nmehielle supra note 6 at 98.

¹⁰⁰ Ramnath & Nmehielle supra note 6 at 101.

¹⁰¹ See Chapter two of the Constitution.

¹⁰² See ss 8 and 9 of the Constitution.

¹⁰³ Ramnath & Nmehielle supra note 6 at 101.

¹⁰⁴ See Katzew supra note 26 at 695 and Bilchitz supra note 30 at 754.

4.1.1 Rights to Equality and Dignity

The right to equality is provided for in s 9 of the Constitution, which provides that “everyone is equal before the law and has the right to equal protection and benefit of the law.”¹⁰⁵ This section also provides that no person “may unfairly discriminate directly or indirectly against anyone on one or more grounds, including: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”¹⁰⁶ Section 9(4) has been included into the Labour Relations Act ¹⁰⁷(LRA) and Employment Equity Act¹⁰⁸ (EEA) and is now applied horizontal.¹⁰⁹ Furthermore, HIV status has been expressly incorporated as one of the illegal forms of discrimination in s 6 of the EEA. Moreover, the right to equality is commonly associated with right to dignity because human dignity becomes crucial in determining whether ones right to equality has been infringed.¹¹⁰ Thus, violation of one’s equality effectively involves an injury to one’s dignity.¹¹¹ In this regard, Pretorius¹¹² states, “the harm against which the equality provisions of the Constitution are aimed at is treatment which would impair the fundamental human dignity of individuals.” Therefore, if the exercise of duty to act in company’s best interests is the threat to equality, it is also a threat to a right to dignity.

In South Africa, there are a number of decided cases that can be used to illustrate the manner in which duty to act in the best interests of the company violates the rights to equality and dignity.¹¹³ These cases show the development of labour legislation within the context of human rights litigation against companies.¹¹⁴ However it is submitted that these cases could well be relevant when illustrating the manner in which the duty to act in the best interests of the company contributes to violation of human rights. The first relevant case here is that of *Hoffman v South African Airways*,¹¹⁵ which was handed down by the Constitutional Court in 2000. The facts of the case read as follows:

¹⁰⁵ See section 9 (1).

¹⁰⁶ Section 9(3) and (4).

¹⁰⁷ Act 66 of 1995.

¹⁰⁸ Act 55 of 1998.

¹⁰⁹ Smit, L. “Human Rights Litigation Against Companies in South African Courts: A Response to Mankayi v AngloGold Ashanti”, (2011) 27 *SAJHR* at 359.

¹¹⁰ Pretorius, J.L et al *Employment Equity Law Durban*: Butterworth, (2001) page 2-9.

¹¹¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998) 12 BCLR 1517 (CC) para 126

¹¹² Pretorius supra note 110 at 2-9.

¹¹³ See for example *Bootes v Eagle Ink System KwaZulu-Natal (Pty) Ltd* (2008) 29 ILJ 139 (LC) and *Hoffman v South African Airways* 2001 (1) SA 1 (CC).

¹¹⁴ Smit supra note 109 at 358.

¹¹⁵ Supra note 9.

Mr. Hoffman applied to be a cabin attendant at South African Airways (SAA). He was required to go through a selection process, which consisted of four stages. At the end of the process, he was found to be a right applicant for the job. This decision was however subject to pre-employment medical test examination, in which he was found to be HIV positive. Because of his HIV status, his medical report was changed from 'suitable' to 'unsuitable'. He was then informed that he could not be employed because of his HIV status. One of the reasons put forward by SAA to justify Mr. Hoffman's exclusion was that, life expectancy of people who are living with HIV was too short to warrant the cost of training them.¹¹⁶

The importance of this case in connection with the duty to act in the best interests of the company lies within this justification of SAA. It is submitted that this reason of SAA could well be linked with the duty to act in the best interests of the company and indicates how this duty brings about violation of right to equality and dignity. From this justification is clear that directors of SAA were avoiding to waste money on training an employee (Mr. Hoffman) that would only serve the company for a short term. In other words, SAA directors might have believed that incurring too much cost on training an employee who would die soon, would not be in the best interests of the company (SAA). Up until now there is no case in South Africa that has specifically considered the impact of duty to act in company's best interests on human right. However, Smit¹¹⁷ states that "the evolution of the legislation and litigation suggests that public and private entities are now regarded by courts as having similar human rights duties regarding equality in the workplace." In this case the directors of SAA favoured their duty to act in company's interests of SAA to the detriment of Mr. Hoffman's rights to equality of dignity. Therefore, it could be argued that the directors' duty to act in best interests of the company had somehow contributed to violation of Mr. Hoffman's right to equality and dignity. The court based its decision on s 9 of the Constitution and it held that SAA had unfairly discriminated against Mr. Hoffman and the purpose of discrimination and object of the medical evidence failed to justify such discrimination.¹¹⁸ In response to SAA's argument that other airlines have similar requirements, the court held:

"Legitimate commercial requirements are, of course, an important consideration in determining whether to employ an individual. However, we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests. The greater interests of society require the recognition of the inherent dignity of every human being and the elimination of all

¹¹⁶ See para 7 of the judgement.

¹¹⁷ Smit supra note 109 at 359.

¹¹⁸ See para 29.

forms of discrimination. Our Constitution protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secured that our own rights are protected.”¹¹⁹

If this reasoning can be interpreted within the context of duty to act in the best interests of the company, it would simply mean that shareholder’s financial interests should not always prevail, especially if the decision aimed at advancing shareholder’s interests has a potential to violate human rights. It requires that when directors make the decisions, they should look beyond the interests of the company thereby guarding against violation rights to equality, dignity or any other right. In other words, it requires the directors to strike a balance between shareholders’ interests and any right that is affected by their decisions.

Another case illustrating violation of fundamental rights by this duty is that of *Bootes v Eagle Ink System KwaZulu-Natal (Pty) Ltd*¹²⁰. In this case, Mr. Bootes (applicant) was employed as a sales manager of Eagle Ink systems (Eagle). However, after it was found out that he is HIV positive he was dismissed. The reason behind his dismissal was that “Eagle’s management believed that its customers would be fearful and unwilling to be served by an HIV positive person.”¹²¹ Before his dismissal, Eagle attempted to keep applicant away from work by means of involuntary leaves. The court found that fear of customers to deal with an HIV positive sales manager cannot be considered a valid reason for dismissal. The court stated that in South Africa people living with HIV “have the advantage of constitutionally entrenched right not to be discriminated on the grounds of their HIV positive status.”¹²² The court went further to state that anyone who discriminates against an HIV positive person has enormous burden to justify or prove that the discrimination is fair.¹²³

This case can also be linked with the duty to act in the best interests of the company. The reason for applicant’s dismissal was that “Eagle’s management believed that its customers would be fearful and unwilling to be served by an HIV positive person.”¹²⁴ From this reason, it could be said that Eagle’s management did not want to lose customers, as this would mean no profits for the company or its shareholders. Therefore, one could well argue that Eagle’s management believed that they acted in the best interests of the company (Eagle Ink) thereby ensuring that

¹¹⁹ See para 24.

¹²⁰ (2008) 29t ILJ 139 (LC).

¹²¹ Para 65.2.

¹²² Para 67.

¹²³ See para 67.

¹²⁴ Para 65.2.

its customers would feel comfortable when dealing with the company's sale manager. In other words, the management believed that loss of customers would defeat the objects of the company one of which is to make profits for shareholders. However, in reaching its decision the management failed to consider the applicant's right not to be discriminated on the ground of HIV and his constitutional right to equality. Thus, it could be said that the management's decision has impaired applicant's dignity thereby disregarding his right to equality. Although this case seems to prove that the company was protecting customers (stakeholders), the company failed to protect the interests of an employee (Mr. Bootes). Therefore the company should have balanced its own interests with those of the affected and attempt to protect Mr. Bootes. Had the management go beyond the interests of the company to consider the applicant's rights, the management could have reached better decision which accommodate both the rights of the applicant and the interests of the company.

The above cases were decided within the context of labour law, but they provide useful illustration of the manner in which the duty to act in the best interests of the company contributes towards violation of rights to equality and dignity. It is submitted that common law meaning of best interests of the company is no longer appropriate because there is strong relationship between citizens (stakeholders) and companies, which demands companies to protect the rights of stakeholders.¹²⁵ Companies derive certain benefits from citizens, which are essential to the survival of the companies.¹²⁶ For example citizens contribute to the companies in the form of labour and by buying the products of the companies. Companies also play a significant role to lives of citizens thereby creating jobs opportunities for them. The connection between companies and citizens justifies the imposition of human rights obligations on companies.¹²⁷ Therefore, although companies are regarded as separate legal entities, they cannot operate separately from citizens because the success of their activities depends on individuals and society as a whole.¹²⁸ Surely the company has a duty to consider the interests of those who have an interest in the company's well-being.

In *Governing body of Juma Masjid Primary School and Other v Essay NO and other*,¹²⁹ a trust (Musjid) allowed the Executive Council for Education for KwaZulu-Natal (MEC) to conduct

¹²⁵ Gwanyanya supra note 7 at 3106.

¹²⁶ Botha supra note 8 at 31; see also Katzew supra note 26 at 695.

¹²⁷ Bilchitz D, "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations", (2010) 12 *SUR - Int'l J on Hum Rts* at 208.

¹²⁸ Ibid.

¹²⁹ 2011(8) BCLR 761 (CC), see particularly para 58 where the court held that "*Socio-economic rights (like right to a basic education) may be negatively protected from improper invasion. Breach of this obligation is directly*

a public school in its private property. Trust is defined as juristic person in terms of section 1 of the Act. However, as time went on the relationship between Musjid and MEC became sour. As a result, Musjid applied for an order evicting the public school from its property. Musjid was successful in both high court and Supreme Court of Appeal, but the matter was taken to the Constitutional court on the basis that order amounted to violation of children's right to basic education which is provided for in terms s 29(1) (a) of the constitution. The Constitutional court opted for horizontal application of Bill of Rights and did not treat Musjid as an organ of state even it performed public powers. The court accepted that juristic persons have an obligation to protect human rights. This obligation takes the forms of negative obligation to refrain from violating rights and the positive obligation in terms of which companies are expected to positive steps to protect the rights of individuals.¹³⁰ The practical effect of imposing such obligation on companies is that profit or financial interests of shareholders will be compromised where it is necessary to protect rights of stakeholders. However, the advancement of shareholders' financial interests falls under the umbrella of duty to act in the best interests of the company, which prioritise shareholders' financial interests over the rights of stakeholders. Therefore, this duty needs to be adjusted accordingly to enable companies to comply with their human rights obligation. The rights of other stakeholders are now also protected by specific legislation, for example, employee's rights are protected by Labour Relations Act and Consumer Protection Act of 2008 protects the Consumers' rights.¹³¹

4.1.2 The difficulties in protecting stakeholders' rights

Although stakeholders' rights are now protected by specific legislation, there is a doubt as to whether directors will fully comply with such legislation, because the "Act does not at any point expressly mention human rights as an issue which a company needs to concern itself in its activities."¹³² The rights of other stakeholders are protected by specific legislation, for example, employee's rights are protected by Labour Relations Act and Consumer Protection Act of 2008 protects the Consumers' rights. Put differently, the Act does not impose a specific duty upon directors to pay attention to human rights. In addition, in South Africa companies are mainly regulated by the Act and because of this, directors may mistakenly believe that Companies Act is more important than other statutes in respect of company's decisions. In

when there is a failure to respect the right, or indirectly, when there is a failure to prevent direct infringement of the right by another or to respect existing protection of the right by taking measures that diminish that protection."

¹³⁰ Katzew supra note 26 at 695 and Bilchitz (2010) 12 SUR at 206.

¹³¹ Cassim supra note 1 at 521.

¹³² Gwanyanya supra note 7 at 3120.

other words, directors might turn to be biased by favouring the shareholders' interests over the rights of other stakeholders, since interests of company are expressly provided for in the Act and this is in spite of the inclusion of s 7 of the Act. Therefore, something more needs to be done to force directors to apply this duty in a manner that gives recognition to human rights as provided for in the Constitution and other legislation.¹³³ As argued by Gwanyanya,¹³⁴ "the legislature should have provided clarity in the Act with regard directors' duties; in particular clarity on what director may do or may not do in the light of Bill of Rights."

The Act was promulgated a number of years after introduction of the Constitution and the legislation had an opportunity to develop this duty to an extent that it is consistent with the Bill of Rights. There is still an opportunity for legislature to amend this duty. It is submitted that total codification of this duty alone could be a solution to its problems. In addition to a total codification of this duty, new words need to be inserted. For example, section 76(3) (b) should read as follows- in the best interests of the company paying attention to the rights of other stakeholders as provided for in Constitution and other legislation. Amendment to the current wording of this duty will minimise its harmful effects on rights and interests of other stakeholders. S 7 of the Companies Act lists promotion of compliance with the Bill of Rights as one of the purposes of the Act. Therefore, this section enables the courts to extend the scope of the duty to act in company's interests, thereby interpreting it in such a way that complies with the Bill of Rights. However, by the time a case reaches court the damage is already done. In order to avoid the damage, the legislature needs to provide sufficient guidelines as to how directors should exercise this duty. Therefore, there is no that this duty needs to be amended by means of total codification.

4.2 Disregard of Stakeholders' Interests

As pointed out above, the duty to act in the best interests of the company does not only have potential to violate fundamental rights but it also fails to give recognition to the interests of other stakeholders.¹³⁵ The term interest is broader than rights and may cover equitable considerations.¹³⁶ For example, it may cover financial interests and expectations of other stakeholders. On the other hand, the term stakeholder includes any person who is contributing

¹³³ Ibid at page 3121.

¹³⁴ Ibid.

¹³⁵ Botha supra note 8 at 7-9 and Ramnath & Nmehielle supra note 6 at 98.

¹³⁶ Cassim supra note 1 at 762.

to or who is affected by company's activities when it generates profits.¹³⁷ Thus, the term stakeholder includes employees, managers, and customers because they are affected by company's activities and they play an important role towards fulfillment of company's activities or objects.¹³⁸ Thus, if the narrow meaning of best interests of the company continues to apply, it will cause problems since it fails to recognise the interests of customers, employees and community as a whole.¹³⁹ Therefore, the question is in whose interests should the directors perform their duties?¹⁴⁰

4.2.1 The Enlightened Shareholder Value and Pluralist Approach

The debate on whose interests should the company be managed has led to two school of thoughts, being the "enlightened-shareholder-value" and "pluralist approach".¹⁴¹ In terms, the "enlightened-shareholder-value approach" directors are expected to ensure that the company successfully generates the profits for its shareholders.¹⁴² However, this approach does allow directors to consider the stakeholders' interests, provided consideration of such interests would not defeat the company's primary goal of profit making.¹⁴³ Thus, this approach does have a little room for protection of stakeholders' interests. Cassim¹⁴⁴ argues that "this approach, rather than the narrow approach of having regard only to the interests of shareholders, is essential to the success of the company in modern times." Botha states that a good reputation is advantageous to the company in that it contributes towards the growth and stability of the company and this reputation is determined by the performance of the company and the degree to which it considers the interests and expectations of stakeholders.¹⁴⁵

With pluralist approach, directors are expected to promote stakeholders' interests "as a proper and valid object in itself".¹⁴⁶ It does not matter if promoting stakeholder's interests defeats the objects of profit-maximisation, directors should sacrifice the profits where it is necessary to promote interests and well-being of other stakeholders in the company.¹⁴⁷ Thus, in terms of this approach the company can only be successful if directors are allowed to strike a balance

¹³⁷ Rahim, M.M. "The 'Stakeholder Approach' to Corporate Governance and Regulation: An Assessment", (2011) at 306.

¹³⁸ Botha supra note 8 at 7.

¹³⁹ Esser & Delpont supra note 85; 97).

¹⁴⁰ See Esser & Delpont supra note 85 at 97; Botha supra note 8 at 7-9 and Van Tonder supra note 42 at 712.

¹⁴¹ Cassim supra note 1 at 518 and Esser & Delpont supra note 85 at 101.

¹⁴² See Cassim supra note 1 at 518 and Esser & Delpont supra note 85 at 101.

¹⁴³ Cassim supra note 1 at 519.

¹⁴⁴ Ibid.

¹⁴⁵ Botha supra note 8 at 28 and Cassim supra note 1 at 519.

¹⁴⁶ Cassim supra note 1 at 520.

¹⁴⁷ Ibid.

between shareholders' financial interests and interests of stakeholders.¹⁴⁸ Hence, it has been said that this approach imposes a social responsibility on companies in respect of which directors are obliged to consider how their decisions affect the stakeholders.¹⁴⁹ As stated by the court in *AP Smith Manufacturing Co v Barlow*,¹⁵⁰ "modern conditions require that corporations acknowledge and discharge social as well as private responsibility as member of the community in which they operate." Therefore, it seems that the traditional duty to act in best interests of the company has no room under this approach since it ignores the stakeholder's interests. It submitted that Enlightened-shareholder-value is the suitable approach for South Africa because it allows directors to maximise profit for company, while at the same time making sure their decisions do not affect interests of those who have interests in company's wellbeing.

Unlike South Africa, the United Kingdom had decided to codify the directors' duties in its Companies Act of 2006 (hereafter referred to as the UK Act).¹⁵¹ Consequently, the common law duty to act in the best interests of the company was replaced by section 172 of the UK Act. In terms of this section, a director is required to "act in the way he considers, in good faith, would-be most likely to promote the success of the company for the benefit of its shareholders as a whole", having regard to "the likely consequences of any decision in the long term; the interests of the company's employees; the need to foster the company's business relationships with suppliers, customers and others; the impact of the company's operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct, and the need to act fairly as between members of the company." This section follows the enlightened shareholder value approach, in that it does not abolish the shareholder dominance, but simply requires directors to consider the impact of their decisions on other stakeholders.¹⁵² How far should directors go about considering the stakeholders' interests is determined by the nature of the company and its activities. South Africa should also opt for total codification the common law duty to act in the best interests of the company because this duty has proven to be problematic. Amendment of this duty will minimise its harmful effects on rights and interests of other stakeholders thereby forcing directors to consider stakeholders' interests.

¹⁴⁸ Ramnath & Nmehielle supra note 6 at 106.

¹⁴⁹ Cassim supra note 1 at 520.

¹⁵⁰ 98 A2d 581 (NJ1953) at 586.

¹⁵¹ See ss 172- 177.

¹⁵² Cassim supra note 1 at 520.

4.2.2 The importance of other stakeholders in a company

In order to make profits for its shareholders, companies depend on customers, employees and the community in which they operate. In other words, for companies to generate profit, they depend on customers buying the company's product and employees performing their work.¹⁵³ In this regard, Botha¹⁵⁴ states, "a company that employs and retains talented employees will reap the benefit. Employees are more than valuable assets of the company; they play a significant role in the sustainability and long-term growth of the company." Furthermore, the company is not only made of shareholders and directors but "is best described as a series of contracts concluded by self-interested economic factors: equity investors, managers, and employees."¹⁵⁵ Other stakeholders such as employees, community and customers are contributing to the financial growth and stability of the company. Thus, it seems that without one or more of these actors company could struggle to survive. Hence, interests of these actors need to be protected. Van Tonder¹⁵⁶ argues that:

"irrespective of what the legal rules are, good management will attempt to balance interests of shareholders, employees, creditors, customers, the environment and the society in general, having regard to the nature and size of the company and the interests most affected by any particular transaction or decision."

The term interests of company should no longer be understood to refer to interests of the company alone. The court in *Teck Corp Ltd v Millar*¹⁵⁷ stated that when directors consider employees' interests, they are acting bona fide and in company's best interests. This is because consideration or protection of stakeholders' interests avoids unnecessary litigation against the company and maintains a good reputation for the company. In addition, today the object of the companies is not limited to advancement of shareholders' financial interests but they are also used as "means of achieving social and economic benefit".¹⁵⁸ Hence, the common law meaning of best interests of the company is not appropriate because like shareholders, other stakeholders are essential to the survival of the corporation.¹⁵⁹

¹⁵³ Ramnath & Nmehielle supra note 6 at 104; Botha supra note 8 at 31.

¹⁵⁴ Botha supra note 8 at 31.

¹⁵⁵ Botha op cit note 25 at page 31.

¹⁵⁶ Van Tonder supra note 42 at 722.

¹⁵⁷ *Teck Corp Ltd v Millar* (1972) 33 DLR (3d) 288 (BCSC) at 313-4.

¹⁵⁸ See s 7 (d) of Companies Act of 2008.

¹⁵⁹ Botha supra note 8 at 9.

Ramnath and Nmehielle support this view when they argue that “other stakeholders such as employees also invested into the company in the form of human capital and they bear the risk of loss if the company is unsuccessful.”¹⁶⁰ From this, it is obvious that other stakeholders make a significant contribution to the company and that directors’ decisions do not only affect the company and its shareholders. Thus, any bad decision by the director may have negative impact on other stakeholders such as employees and customers. However, Ramnath and Nmehielle fail to illustrate how the employees bear the loss if the company is unsuccessful. Hence, it is necessary to illustrate this by way of an example. A typical example of this would be where the employees demand increase in their salary. A company might refuse to increase employees’ salary on the ground that it has not made sufficient profits. As a result, employees might engage in a strike which might see them not being paid for the period of the strike. During the strike not only the employees will suffer, but this also includes customers who might not be able to purchase a particular product, which is only supplied by the particular company, which is closed due to employees’ strike.¹⁶¹ In addition, the community may suffer harm when company’s activities become harmful to the environment.¹⁶² Therefore, stakeholders’ rights and interests need to be protected.

5. Corporate Social Responsibility

5.1 An overview of Corporate Social Responsibility

Corporate Social Responsibility (CSR) takes place when corporations do more than what is required by the law in an attempt to look after the public interests.¹⁶³ It should be noted that there is no precise definition of CRS and various authors define this concept differently.¹⁶⁴ CRS encourage companies to contribute towards sustainable development, plus well-being and safety of the community by considering the interests and expectation of other stakeholder in their decision making.¹⁶⁵ This also involves companies taking steps to protect the rights of those who are affected by their decisions. Initially CSR was voluntary, but this has changed because CRS is now provided for in Companies Act of 2008 and other statutes including the Broad-Based Black Economic Empowerment and LRA and Consumer Protection Act.¹⁶⁶ Thus,

¹⁶⁰ Op cite note 37 at 104.

¹⁶¹ Ramnath & Nmehielle supra note 6 at 104.

¹⁶² Ibid.

¹⁶³ Esser (2011) SA 23 *MercLJ* at 319.

¹⁶⁴ Botha supra note 8 at 9.

¹⁶⁵ Botha op cit note 51 at 11.

¹⁶⁶ Esser 2011 SA 23 *MercLJ* at 320.

it has been said that any definition describing CRS as voluntary conduct becomes irrelevant.¹⁶⁷ Companies are now legally obliged “to take steps to address their social responsibility.”¹⁶⁸ The King Report on Corporate Governance for South Africa 2009 (*King III*) provides a good summary of CRS position in South Africa:

“In the African context these moral duties find expression in the context of Ubuntu which is captured in the expression of ‘umntu ngumntu ngabantu’, ‘I am because you are; you are because we are’. Simply put, Ubuntu means humaneness and the philosophy of ubuntu includes mutual support and respect, interdependence, unity, collective work and responsibility.”¹⁶⁹

5.2 King III on Corporate Social Responsibility

King III promotes the principles of CRS and requires that companies should act socially responsible.¹⁷⁰ *King III* presents a shift from the traditional approach in terms of which directors were expected to run the company for the benefit of shareholders.¹⁷¹ It differs from previous codes because it applies to all entities.¹⁷² This code provides that companies form integral part of the society and should be regarded as citizens of the Republic like any other natural person.¹⁷³ Hence, they are expected to act socially responsible. *King III* provides for “inclusive shareholder value approach.” This approach gives recognition to rights and interests of other stakeholders and demands that the companies should follow the triple-bottom line approach in terms which directors are required to consider social, economic and environmental factors when running the company.¹⁷⁴ Esser and Delpont state that, the “inclusive approach” requires that directors to give regard to the rights and interests of the stakeholders and that at the end their decisions should be in the best interests of the company, “even if the particular decision, may in the short time, at least be to the detriment of shareholders.”¹⁷⁵ *King III* also stresses the importance of Bill of Rights in relation to business. It requires companies to abide by the Bill of Rights and that “the fundamental values of dignity, freedom and equality should guide the company in its interaction with every stakeholder.”¹⁷⁶ Hence, it is extending the scope of

¹⁶⁷ Ibid at page 321.

¹⁶⁸ Neil, K. “What’s Really Right? Corporate Social Responsibility as legal obligation in South Africa”, 2014 Available at: <http://www.werksmans.com/legal-briefs-view/whats-really-right-corporate-social-responsibility-legal-obligation-south-africa/> accessed on 15 August 2017.

¹⁶⁹ See page 23 of King Report.

¹⁷⁰ See principle 1.2 of the King Report at page 27.

¹⁷¹ Esser & Delpont supra note 85 at 104 and Botha supra note 8 at 25.

¹⁷² See para 13 of introduction and background.

¹⁷³ Esser 2011 SA 23 MercLJ at 328.

¹⁷⁴ Cassim supra note 1 at 521.

¹⁷⁵ Esser & Delpont supra note 85 at 105.

¹⁷⁶ See chapter 1 at para 23 where it is provided that “The notion of creating a structure that can pursue profit at the expense of human rights is legally untenable in South Africa. Companies are social entities with both rights

directors' duty to act in the best interests of the company thereby requiring directors to consider the impact of their decisions on rights and interests of stakeholders. Botha¹⁷⁷ states that this "new concept of a company" needs to be acknowledged.

5.3 Effect of CSR on duty to act in the best interests of the company

What is clear is that CSR is aimed at protecting stakeholders. Its effect is that it changes the traditional rule that directors must run the company in a manner that benefits its shareholders and demands that directors should run the company in manner that will benefit both the company and other stakeholders.¹⁷⁸ Thus, it is extending the scope of directors' duty to act in the best interests of the company thereby requiring directors to consider the impact of their decisions on rights and interests of stakeholders. This is also evident from s 7 (d) of Act, which requires the companies to be run in a manner that promotes economic and social benefit. However, CSR is problematic as it may lead to conflict of interests. Esser¹⁷⁹ argues that it may result conflict of interests especially where the other groups have an interest, which has a value that is independent of the shareholders' interests. For example, she argues that directors might be forced to offer workers with information as required in terms of their constitutional right to access of information, even where this might be detrimental to shareholder's interests.¹⁸⁰ It is submitted that where such conflict of interests occurs, the court can apply an approach similar to the limitation clause as envisaged in section 36 of the Constitution so to strike a balance between the competing rights and interests. It seems therefore that if the traditional meaning of best interests of company cannot continue to apply because it might act as barrier to the exercise of CSR by corporations. CRS therefore requires directors to balance between human rights and interests of the company in course of their decision-making. Human rights are essential to the survival of the company and should not be overlooked when determining what is in the best interests of the company.

and responsibilities, and as such, the Bill of Rights applies to them in a manner that goes beyond mere financial considerations. The responsibilities outlined in the Bill of Rights provide the framework within which companies must legally operate. The foundational values of dignity, freedom and equality should guide the company in its interaction with every stakeholder. The specific rights contained in the Bill of Rights provide important guidance to companies for the sustainability of their strategies and operations".

¹⁷⁷ Botha supra note 8 at 25.

¹⁷⁸ The King III report p. 23.

¹⁷⁹ Cassim supra note 1 at 521.

¹⁸⁰ Gwanyanya supra note 7 at 3120.

5.4 Should the rights always prevail?

The Bill of Rights is contained in the Constitution, which is our supreme law. The effect of this is that rights enjoy a superior status and any other law or policy should conform to them.¹⁸¹ This implies that “the nature of rights are such that an empirical cost benefit analysis cannot be used to justify their subordination to other interests.”¹⁸² It submitted that this should not always be the case and that in certain circumstances the profit goals of the company should justify the subordination of human rights to company’s interests. For example, when violation rights is not serious or can be justified, then the subordination rights to the interests of the company is justified. Thus, when balancing interests of the company against rights, an equal weight will be given to both human rights and the company’s profit goals. This is because the pursuit of profit is also important because it ensures the continued existence of the companies.¹⁸³ Put differently, if profit goals of the company are compromised, a company would be unable to pay its suppliers and employees and to provide the product to its customers. As a result, a company might end up closing its business and this might lead to loss of jobs. The closure of companies might also affect the economic growth and stability. Therefore, the profit goals of the company should not be overlooked and equal weight should be given to both human rights and profit goals of the company. If more weight is to be given to either human rights or profit goals of the company, compelling or sufficient reasons will need to be put forward.¹⁸⁴ Therefore, the question of whether human rights should prevail should depend on the facts of each case and reasons put forward in favour of human rights or company’s interests.

5.5 Are human rights good for business?

There appears to be a strong argument in favour of the view that human rights are good for the business.¹⁸⁵ The opposing view is that the purpose of business is to make profit and that company should not be disturbed in pursuit of this goal by burdening them with human rights responsibility.¹⁸⁶ However, the importance of human rights requires that profit goals of the company should be compromised where it is necessary to protect the rights, particularly the fundamental rights of dignity and equality.¹⁸⁷ Hence, the pursuit of profit by the company must

¹⁸¹ Samaradiwakera-Wijesundara supra note 25 at 19.

¹⁸² Samaradiwakera-Wijesundara op cit note 71 at 19.

¹⁸³ Koch, C. “An ethical justification of profit maximization”, (2010) 5 *Society and Business Review* at 274.

¹⁸⁴ Samaradiwakera-Wijesundara supra note 25 at 20.

¹⁸⁵ Ramnath & Nmehielle op cit note 71 at 110.

¹⁸⁶ Leopoldo Amaral. “Respecting human rights is good for business”, (2012) Available at: <https://www.osisa.org/hrdb/blog/respecting-human-rights-good-business> Accessed on 10 September 2017.

¹⁸⁷ Ibid.

not affect the rights of stakeholders.¹⁸⁸ Therefore, the question is whether human rights are beneficial to the business.

Respecting human rights is beneficial to the company because individuals (customers and employees) tend to prefer companies with good human rights reputation.¹⁸⁹ The likelihood is that educated employees will be unwilling to serve companies that have bad human rights reputation.¹⁹⁰ Those companies that have good human rights reputation can easily attract skilled workers.¹⁹¹ This is because today, employees are more concerned about their wellbeing and the likelihood is that they will prefer to work for companies that will protect their rights.¹⁹² Therefore if a company adheres to human rights responsibility, such company would be able to secure skilled or educated employees who in turn will ensure that company's activities are successfully completed through application of their skills or knowledge. In addition, human rights violation might cause damage to the company's reputation, especially the well-known companies since the media usually expose them.¹⁹³ The possible consequence of this is that the investors would refuse to invest on such companies. Thus, it seems that human rights and business cannot be separated because the respect for human rights contributes to the success of the company's business.¹⁹⁴ In addition, respect for rights saves money (legal costs) for the company thereby limiting unnecessary human rights litigation against the company. Furthermore, it prevents interruption of the business activities thereby reducing employees' strikes and consumer boycotts.

Human rights are indeed good for the business and an exclusion of human rights by duty to act in the best interests of the company does not only affect the rights holders, but also affect the stability and the success of the company.¹⁹⁵ Therefore, extension of duty to act in company's best interests will not only result in protection of stakeholders' rights, but will also ensure stability and success of the company's business.

¹⁸⁸ Ramnath & Nmehielle supra note 6 at 111.

¹⁸⁹ Ibid.

¹⁹⁰ Wouters, J. & Chanet, L. "Corporate Human Rights Responsibility: A European Perspective", (2008) 6 *Northwestern Journal of International Human Rights* at 270.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Leopoldo supra note 186.

¹⁹⁵ Ramnath & Nmehielle supra note 6 at 115.

6. The balancing of competing interests

It has been indicated above that companies have a duty to protect human rights. However, companies have other goals, the most important one of which is to make profit for shareholders.¹⁹⁶ As result, a situation might arise whereby human rights obligation would clash with profit goals of the company.¹⁹⁷ Bilchitz¹⁹⁸ states that the companies' need for income might conflict with company's human rights responsibility and in those circumstances directors might favour shareholders' financial interests over human rights. Katzew makes a similar submission when stating that inclusion of Bill of Rights in s 7(a) "highlights a tension between the need to impose enforceable obligation on companies to protect those vulnerable to an abuse of corporate power [and] the need to take into account the company's goal of doing business as efficient as possible to maximize profit."¹⁹⁹ The question therefore is what can be done in circumstances where profit goals of a company clash with company's human rights responsibility?

6.1 The balancing approach

As noted above s 7 of the Act brings application of the Act within the scope of the Bill of Rights. Consequently, the company's actions are restricted by the Bill of Rights, particularly sections 8(1) and (2) which require company's activities to be conventional to the Bill of Rights "to the extent that it is applicable to them."²⁰⁰ However, the rights contained in the Bill of Rights can be limited in terms of section 36 of the Constitution. Hence, the limitation of rights can play a significant role when striking the balance between company's best interests (profit) and the obligation to protect rights. However, an in-depth analysis of section 36 is not within the scope of this paper. According to Bilchitz, harmonisation of rights has turned out to be a culture of South African law and it usually entails the balancing of rights against opposing interests.²⁰¹ This balancing approach can also be applied when balancing between human rights and interests of the company. In this regard, Katzew states that:

"A balancing of competing policy concerns is required. These include on the one hand, the efficient management of the company so as to increase profitability of the company, and on the

¹⁹⁶ See section 7 of the Companies Act of 2008.

¹⁹⁷ Gwanyanya supra note 7 at 3122.

¹⁹⁸ Bilchitz supra note 30 at 780.

¹⁹⁹ Katzew supra note 26 at 698.

²⁰⁰ Bilchitz supra note 30 at 780.

²⁰¹ Bilchitz, D. "Does balancing the rights Adequately Capture the Nature of the Rights?" (2011) 25 *SAPL* at 426.

other hand, the adoption of policies to ensure that social, transformative purpose of the company as set out in s 7 of the Companies Act and Constitution are achieved.”

Our courts have developed a twofold enquiry, which can be useful in determining whether a particular decision or conduct of company amounts to violation of rights.²⁰² The first leg of the enquiry requires the court to scrutinize the decision or conduct of the company and determine whether any right is infringed by such decision or conduct.²⁰³ If no right is affected then company’s decision or conduct shall prevail. If the conduct of the company does impinge the right contained in the Bill of Rights the court shall proceed to determine whether such conduct is justifiable in terms of s 36 of the Constitution (second leg of enquiry).²⁰⁴ Samaradiwakera-Wijesundara states that when balancing the profit goals of the company against human rights protection, it is crucial to consider the exact function of the company, its goals and the behaviour is tolerable in chase of such goals.²⁰⁵ She further states that attention should be paid to the conduct of the company and it must be determined whether such conduct is in fact detrimental to human rights.²⁰⁶ If it becomes apparent, that such conduct or decision will be detrimental to rights of stakeholders, such conduct or decision shall be withdrawn without having to consider Bill of Rights. In that case, directors would have to find alternative ways that will assist the company to achieve its profit goals.

This role of balancing between interests of the company (profit) and rights should not be left to court, because by time the matter reaches the court damage might be already done. Therefore, it should be the primary role of directors to determine whether any right is affected by their decisions or conduct. If their decisions or conduct does in fact affect a particular right, such decision or conduct must be withdrawn, especially if it cannot be justified. However, most directors are not legal experts and might find it difficult to achieve this balance. Most directors are trained to make good decisions for the company, and their decisions are expected to benefit the company. They have little awareness of public policy and they usually do not understand what is best for the society or other stakeholders. Therefore, even if they are willing to take into account the rights of stakeholders when making their decisions; they may still lack knowledge as to the nature of rights that they should take into account. Hence, it is suggested whenever the difficulty arises they must seek legal advice. Legal advice will be more necessary

²⁰² Ibid at page 423.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Samaradiwakera-Wijesundara supra note 25 at 20.

²⁰⁶ Ibid.

if a particular conduct is likely to result in serious violation of rights. The costs of legal advice may result to loss of profit, especially by the small company. However, legal expenses cannot justify violation of rights by companies.

7. Social and Ethics Committee

The Act introduces a Social and Ethics Committee which will play a significant role towards the realisation of human rights.²⁰⁷ The understanding of social and ethics committee becomes important when dealing with duties of directors, particularly the duty to act in the best interests of the company. The introduction of social and ethics committee does impact on the duty to act in the best interests of the company in that it ensure that directors act in a manner that is inclusive.²⁰⁸ The committee is aimed at promoting Corporate Social responsibility and ensures that directors consider the rights and interests of stakeholders when making the decisions.²⁰⁹ Therefore, it is necessary to consider role of this committee and examine the manner in which it contributes to the protection of rights of stakeholders.

7.1 The Composition of social and ethics committee

The formation of social and ethics committee is regulated in terms of Regulation 43 of the Companies Regulations 2011.²¹⁰ In terms of this regulation, the requirement of social and ethics committee only applies to particular companies including; state-owned companies, listed public companies and “any other company that has in any two of the previous years scored above 500 points in terms of their Public Interests Score card.”²¹¹ These specified companies are required to elect a social and ethics committee. The requirement of social and ethics committee does not apply to“(a) subsidiary of another company that has a social and ethics committee, and the social and ethics committee of that other company will perform the functions required by this regulation on behalf of that subsidiary company; or (b) it has been exempted by the Tribunal in accordance with section 72 (5) and (6).”²¹² Private companies will also be required to have the SEC where it is necessary for the public interests, having regard to the annual turnover and the number of employees and nature of those companies’ activities. The social and ethics committee should consist of at least three directors or prescribed

²⁰⁷ See section 72 of the Companies Act of 2008.

²⁰⁸ Gwanyanya supra note 7 at 3106.

²⁰⁹ Botha, M.M. “Evaluating the Social and Ethics Committee: Is the Labour Missing Link?: Part 1”, (2016) 79 *THRHR* at 591.

²¹⁰ Cassim supra note 1 at 522.

²¹¹ Regulation 43 (1) of the Companies Regulations 2011, R. 351 GG 34239 of 26 April 2011.

²¹² Ibid.

officers.²¹³ One of them should at least be a director who does not participate in the daily running of the business of the company and must not have participated in the last three financial years.²¹⁴

7.2 The functions of Social and Ethics committee

The functions of the committee are set out in regulation 43(5). The first function is to keep an eye on the actions or dealings of the company, by paying attention to any appropriate legislation, such Employment Equity Act, Broad-Based Black Economic Empowerment Act or existing codes of good practice. Its function relates, for example, to issues pertaining to social and economic development. It must ensure that the company's activities reflect the OECD Principles, which provide recommendations on the subject of corruption, labour and employment matters, as well as the United Nations Global Compact Principles (UNGCP).²¹⁵ Principles 1 and 2 of the UNGCP require companies to "support and respect the protection of internationally proclaimed human rights and to ensure that they are not complicit in human rights abuse." Hence, the role of committee is to prevent violation of human rights by the companies and to ensure that directors comply with their duty to consider human rights during their decision-making.²¹⁶ Thus, inclusion of the committee in the Act has marked a good step by legislature towards the realisation of human rights.²¹⁷ It will ensure that the rights of stakeholders are not harmed by the company's decisions. The effect of this is that the company will earn a good human rights reputation, which can attract both employees and customers.²¹⁸

7.3 Shortcomings and pitfalls

The social and ethics committee is not perfect because it does have pitfalls that might prevent it from protecting human rights and interests of stakeholders. One of its major pitfalls is that it is created by the company itself and comprises of employees or directors of the company.²¹⁹ The inclusion of directors in the committee can itself be seen as flaw. This is because the duty to consider human rights is placed upon directors and it is unlikely that directors will report or take actions against themselves or their colleagues for failing to comply with this duty.

²¹³ Cassim supra note 1 at 522.

²¹⁴ Regulation 43 (4).

²¹⁵ Regulation 43 (5) (a) (i).

²¹⁶ Havenga, M.K. "The Social and Ethics Committee in South African Company Law", (2015) 78 *THRHR* at 291.

²¹⁷ Gwanyanya supra note 7 at 3113.

²¹⁸ Havenga (2015) 78 *THRHR* at 290.

²¹⁹ Gwanyanya supra note 7 at 3113.

Gwanyanya²²⁰ argues that it unlikely that “the employees of a company will report negatively on the company.” It is submitted that the composition of the committee should be changed to include persons who will represent the interests or rights of external stakeholders such as customers. This will prevent the employees or directors from acting biased and will ensure that they report their colleagues. There is also a doubt as to whether the committee will be able to perform its functions effectively because it does not have enforcement mechanisms.²²¹ Botha²²² states that it is not clear whether the directors can refuse to follow the instructions from the committee. The lack of enforcement mechanisms will render the functions of the committee ineffective. Consequently, the rights might continue to be harmed by the companies’ activities or decision. Therefore, the Act or the regulation should contain provisions, which allow the committee to ensure that its instructions are followed.

8. CONCLUSION

8.1 Conclusion on the duty to act in the best interests of the company

The duty to act best interests of the company is problematic because it fails to protect the rights and interests of stakeholders. The exclusion of stakeholders’ rights by this duty cannot be justified because other stakeholders such as employees and customers play an essential role to the survival of the company. Stakeholders’ rights are now protected by specific legislation, including LRA and CPA.²²³ However, it is doubtful whether directors will comply with such legislation because the Act fails impose a specific duty upon directors to consider human rights.²²⁴ Furthermore, in South Africa companies are mainly regulated in terms the Companies Act. For this reason, directors may mistakenly believe that Companies Act is more important than other statutes when it comes to company’s decisions. As a result, the directors might turn to be biased by favouring the shareholders’ interests over the rights of other stakeholders that protected in other legislation, since interests of company are expressly provided for by Companies Act.

It is suggested that total codification of this duty alone could be a solution to its problems. In addition to a total codification of this duty, new words need to be inserted. For example, section 76(3) (b) should read as follows-in the best interests of the company paying attention to the

²²⁰ Ibid at page 3114.

²²¹ Ibid.

²²² Botha (2016) 79 *THRHR* at 590.

²²³ Cassim supra note 1 at 521.

²²⁴ Gwanyanya supra note 7 at 3120.

rights of other stakeholders as provided for in Constitution and other legislation. A complete codification of this duty will enable the legislature to provide clarity in the Act with regard to this duty, particularly the “clarity on what director may do or may not do in the light of Bill of Rights.”²²⁵ Amendment of this duty will minimize its harmful effects on rights and interests of other stakeholders and will make it easy for the companies to comply with their human rights obligations.

8.2 Conclusion on impact of Companies Act

The effect of s 7 of the Act is that it places companies under an obligation to protect human rights. The effect of imposing such obligation on companies is that profit will be compromised where it is necessary to protect human rights. The profit goals of the company fall under the duty to act in the best interests of the company, which prioritize shareholders’ financial interests over human rights. Therefore, this duty needed to be adjusted accordingly to enable companies to comply with their human rights obligation. The Act does to some extent adjust or extend this duty, but it does this indirectly since it does not contain a specific provision that requires directors to consider the rights and interests of stakeholders.²²⁶ Failure to include such provision will mislead directors to believe that they are not obliged to consider human rights when making the decisions.²²⁷ It should be noted that one of the purpose of partial codification directors’ duties was to provide clarity for directors.²²⁸ Hence, it is recommended that the Act should contain a specific provision, which requires directors to consider rights and interests of stakeholders. Such provision will provide clarity for directors and give the legislature an opportunity to clarify the extent and nature of companies’ human rights responsibility.

Section 36 of Constitution together with the test developed by the courts in relation to this section, will assist the courts in achieving the balancing between company’s best interests (profit) and human rights. It is recommended that directors should bear the primary role of balancing between human rights and profit goals of the company. This will save money for money for the company thereby preventing unnecessary litigation against the company. It was noted that most directors are not legal experts and might find it difficult to achieve the balance between human rights and pursuit of profit. Thus, it is recommended that directors must seek legal advice when they experience difficult in achieving such balance. Legal advice will be

²²⁵ Ibid.

²²⁶ Muswaka supra note 94 at 220.

²²⁷ Ibid.

²²⁸ Coetzee & Van Tonder supra note 12 at 4.

more necessary if particular decision or conduct of company is likely to result in serious violation of human rights.

The Act introduces Social and Ethics Committee, which bolsters the companies' human rights obligation. The committee is aimed at promoting CSR and ensures that directors consider the rights of human rights when making the decisions.²²⁹ The inclusion of this committee in the Act confirms the extension of the duty to act in the best interests of the company. It will play a significant role towards the furtherance of human rights and will prevent directors from ignoring the human rights when making decisions. However, the committee does have pitfalls. Firstly, it created by the company itself and comprises of employees or directors of the company.²³⁰ It is unlikely that directors will report or take actions against themselves or their colleagues for failing to comply with their duty consider human rights.²³¹ Thus, it is suggested that the committee must include persons who will represent the interests or rights of external stakeholders. The second problem is that the committee does not have enforcement mechanisms.²³² As a result directors might refuse to follow its instructions.²³³ The lack of enforcement mechanisms will render the functions of the committee ineffective and the rights might continue to be harmed by the directors' decision. Therefore, the Act or the regulation should contain provisions which allow the committee to enforce its instructions.

²²⁹ Botha (2016) 79 *THRHR* at 591.

²³⁰ Gwanyanya *supra* note 7 at 3113.

²³¹ *Ibid* at page 3114.

²³² *Ibid*.

²³³ Botha (2016) 79 *THRHR* at 590.

9. BIBLIOGRAPHY

Table of statute:

Companies Act NO. 71 of 2008.

Constitution of the Republic of South Africa, 1996.

Employment Equity Act NO. 55 of 1998.

Labour Relations Act NO. 66 of 1995.

United Kingdom Companies Act of 2006

Case law:

AP Smith Manufacturing Co v Barlow 98 A2d 581 (NJ1953).

Bootes v Eagle Ink System KwaZulu-Natal (Pty) Ltd (2008) 29 ILJ 139 (LC).

Da Silva v CH Chemicals (Pty) Ltd 2008 (6) SA 620 (SCA).

Ex parte Gore NO and Others NNO 2013 (2) All SA 37 (WCC).

Extreme Travel Insurances Ltd v Scattergood [2003] 1 BCLC 598 (ChD).

Governing body of Juma Masjid Primary School and Other v Essay NO and Others 2011 (8) BCLR 761 (CC).

Hoffman v South African Airways 2001 (1) SA 1 (CC).

Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd 2006 (5) SA 333 (W).

National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 12 BCLR 1517 (CC).

South African Fabrics v Millman NO 1972 4 SA 592 (A).

Teck Corp Ltd v Millar (1972) 33 DLR (3d) 288 (BCSC).

Re Smith & Fawcett Ltd [1942] Ch 304.

Reports:

The King Report on Corporate Governance for South Africa, 2009.

Regulations:

Regulation 43 (1) of the Companies Regulations 2011, R. 351 GG 34239 of 26 April 2011.

Journal Articles:

Bilchitz, D. "Corporate law and Constitution: Towards binding human rights responsibilities for corporations", (2008) 125 *SALJ* 754-789.

Bilchitz D, "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations." (2010) 12 *SUR - Int'l J on Hum Rts* 199-232.

Bilchitz, D. "Does balancing the rights Adequately Capture the Nature of the Rights?" (2011) 25 *SAPL* 423-444.

Bouwman, N. "An Appraisal of the Modification of the Director's Duty of Care and Skill", (2009)21 *SA Merc LJ* 509-534.

Botha, M.M. "Responsibilities of Companies towards Employees", (2015) 18.2 *PER / PELJ* 1-67.

Botha, M.M. "Evaluating the Social and Ethics Committe: Is the Labour Missing Link?: Part 1", (2016) 79 *THRHR* 580-593.

Coetzee, L. & Van Tonder, J. "Advantages and disadvantages of partial codification of director's duties in the South African Companies Act 71 of 2008", 2016:41(2) *Journals for Juridical Science*: 1-13.

Davis, D. and Le Roux, M. "Changing the Role of the Corporation: A Journey Away from Adversarialism", 2012 (1) *Acta Juridica*306-325.

Esser, I. "The protection of stakeholder interests in terms of the South African King III report on corporate governance: An improvement on King II?", (2009) 21 *SA MercLJ* 188-201.

Esser, I. "Corporate Social Responsibility: A company law perspective", (2011) 23 *SA MercLJ* 317-335.

Esser & Delpont "The Protection of Stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1" (2017) 1 *De Jure* 97-110.

Gwanyanya, M. "The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities", 2015(18)1 *PER/ PELJ* 3101-3131.

Havenga, M.K. "Directors' Fiduciary Duties under Future Company Law Regime", (1997) 9 *SA Merc LJ* 310- 324.

Havenga, M.K. "The Social and Ethics Committee in South African Company Law", (2015) 78 *THRHR* 285-292.

Katzew, J. "Crossing the Divide between the Business of Corporation and the Imperatives of Human Rights- the Impact of Section 7 of the Companies Act 71 of 2008", (2011) 128 *SAJL* 686- 710.

Koch, C. "An ethical justification of profit maximization", (2010) 5 *Society and Business Review* 270-280.

Rahim, M.M. "The 'Stakeholder Approach' to Corporate Governance and Regulation: An Assessment", (2011) 8 *MqJBL* 306-325.

Ramnath, M. & Nmehielle, V. "Interpreting Directors' Fiduciary Duty to Act in the Company's Best Interests through the Prism of the Bill of Rights: Taking Other Stakeholders into Consideration", (2013) 2 *Speculum Juris* 98-115.

Ratner, S.R. "Corporations and human rights: a theory of legal responsibility", (2001) 111.3 *The Yale Law Journal* 443-545.

Smit, L. "Human Rights Litigation Against Companies in South African Courts: A Response to Mankayi v AngloGold Ashanti", (2011) 27 *SAJHR* 354-373.

Van Tonder, J. "An analysis of directors' duty to act in the best interests of the company through the lens of the Business Judgment Rule", *Obiter* 26, pp 702- 724.

Wouters, J. & Chanet, L. "Corporate Human Rights Responsibility: A European Perspective", (2008) 6 *Northwestern Journal of International Human Rights* 262-303.

Academic texts:

Cassim, FHI et al *Contemporary Company law* 2nd Ed Cape Town, (2012).

Delport et al *Henochberg on the Companies Act 71 of 2008*. (2012).

Pretorius, J.L et al *Employment Equity Law Durban*: Butterworth, (2001).

Internet sources:

Josh Fredman, "What is the Relationship Between a Corporation and its Shareholders?" (2017) Available at: <https://pocketsense.com/relationship-between-corporation-its-shareholders-12022852> - Accessed on 7 December 2017.

Leopoldo Amaral. "Respecting human rights is good for business", (2012) Available at: <https://www.osisa.org/hrdb/blog/respecting-human-rights-good-business> Accessed on 10 September 2017.

Neil, K. "What's Really Right? Corporate Social Responsibility as legal obligation in South Africa", (2014) Available at: <http://www.werksmans.com/legal-briefs-view/whats-really-right-corporate-social-responsibility-legal-obligation-south-africa/>-Accessed on 15 August 2017.

Samaradiwakera-Wijesundara, C. "Business and Human Rights: To what extent has the Constitution transformed the obligations of businesses", (2014) Available at: <http://www.nylslawreview.com/wpcontent/uploads/sites/16/2014/11/Samaradiwakera-Wijesundara.pdf> .Accessed on 20 July 2017.

Stout, Lynn A. "Why we should Stop Teaching Dodge v. Ford", (2008), *Cornell Law Faculty Publications*. Paper 724. Available at: <http://www.scholarship.Law.cornell.edu/facpub/724>
Accessed on 15 August 2017.