THE PROTECTION OF ENVIRONMENTAL INTERESTS THROUGH CORPORATE GOVERNANCE: A SOUTH AFRICAN COMPANY LAW PERSPECTIVE

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Abstract

The quest to maximize profits by corporate administrators usually leaves behind an unhealthy environment. This trend impacts negatively on long term interests of the company and retards societal sustainable development. While there are in South Africa pieces of legislation which are geared at protecting the environment, the Companies Act which is the principal legislation that regulates the operations of the company is silent on this matter. The paper argues that the common law responsibility of the directors to protect the interests of the company as presently codified by the Companies Act should be developed by the courts in South Africa, in the exercise of their powers under the Constitution, to include the interests of the environment. This would guarantee the enforcement of the environmental interests within the confines of the Companies Act as an issue of corporate governance.

Keywords: Environment, Directors, Companies, Corporate governance, Common Law, Constitution

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1 Introduction

The process of industrialization which galvanizes development in every nation is usually accompanied by myriad of problems among which is environmental degradation. Poorly regulated mining activities, industrial pollution and disposal of waste associated with corporate operations are known to constitute threats to the environment and the inhabitants. In the less developed economy, the quest for industrialization and the maintenance of clean and healthy environment are projected on parallel lines. The inordinate desire by the operators of the emerging industries to maximize profits which is often achieved with the connivance, advertently or inadvertently, of governmental agencies and officials are impediments to the maintenance of clean and healthy environment.

The impact of the operations of the unregulated, or inefficiently regulated industries, and the activities of the agencies of the government are usually felt massively within the operational zones of such industries and beyond. The foundation for an implosion is led and could well go beyond the imaginations of the operators of such industries and regulating agencies. The people whose means of livelihood are curtailed and animals whose sublime habitats are disturbed are bound to react, sometimes, in such a violent manner as would be well beyond the control of the creators of such discomfort.

The implosion could lead to, not just the disruptions of the operations of the industries, but also abject criminality, with devastating impacts on the security of the citizens and the economy of the affected nation. Such is the case where the governing rule of corporate operations remains the maximization of profits.

The paper examines the impacts of corporate operations on the environment through the eyes of environmental legislation and court decisions in South Africa zeroing down on the Companies Act of 2008.[1] The Act preserves the common law precept of shareholder interests as the rule of corporate governance by requiring the directors to solely protect the interests of the company in the performance of

[1] Act 71 of 2008.

their duties. A case is made for the exercise of judicial powers under the Constitution to develop the common law concept of 'interests of the company' as presently codified by the Companies Act to include the environmental interests. This would ensure that the attention of the directors are directly drawn to their obligations to the environment as a stakeholder in corporate operations.

2 The adverse impacts of corporate operations on the environment

It is axiomatic that corporations contribute enormously to the social and economic developments of every nation in which their operations are centered. Those positive contributions are mostly felt in the areas of provision of goods and services. They also contribute to the economic empowerment of the citizens through the provision of gainful employment. The very big ones among them, especially those with established international outlook, also exert a significant level of political influence on the government of the host nations. Some of these benefits are seen as justifications by the government for granting all kinds of concessions to corporate investors through government policies and statutory instruments which are often made without consultations with the stakeholders.[2]

The benefits of corporate investments are indeed enormous, but so also are the adverse impacts of corporate operations on the environment and the communities where those operations are centered. Coal mining, for instance, is known to be associated with the issues of environmental degradation and health related concerns. It is a source of deforestation. The mining process releases toxic amounts of minerals and heavy metals into the soil and water the adverse effect of which could persist for years after the mining process. Reports show that Coal mining releases methane, a greenhouse gas 20 times more powerful than carbon dioxide, into the environment. Mining activities displaces whole communities, forced off their land by expanding mines, coal fires, subsidence and contaminated water supplies.[3]

Some of the recorded health hazards resulting from coal mining include Pneumoconiosis (black lungs disease) caused by a persistent inhalation of coal dust by miners and those who live nearby. Estimates show that 1,200 people in the US still die from black lung disease annually. Cardiopulmonary disease, chronic obstructive pulmonary disease, hypertension and kidney disease have been found in higher-than-normal rates among residents who live near coal mines, according to a 2001 US study.[4] Toxic levels of arsenic, fluorine, mercury, and selenium are emitted by coal fires which could burn for decades, entering the air and the food chain of those living nearby. Mine collapses and accidents kill thousands of workers around the world every year. Chinese coal mine accidents killed 4,700 people in 2006.[5]

South Africa has had a fair share of mine accidents and deaths resulting from mining activities. On 16 September 1986, 177 mineworkers were killed while 235 were injured and one was reported missing at Kinross Mine in one of South Africa's worst mine disasters since 1946. An acetylene tank sparked flames that swept through the mining tunnel igniting plastic covering on the wiring. The flames also set fire to polyurethane foam that is used to keep walls in the mine dry. The burning plastic combined with polyurethane and churned toxic fumes that filled the shafts, choking miners to death.[6] Other mine accidents that killed a large number of people in South Africa include the 1960 Coalbrook Mine accident with 437 fatalities, the Orkney Mine accident at the Vaal Reefs Mine in 1995 that killed 104 mine workers, methane gas explosion that killed 39 workers at the Trans Natal Corporation. An estimated 6800 mine workers have been killed through mine accidents and more than one million were permanently

[2] Scores of farmers in the Free State and Mpumalanga provinces in South Africa were reported to have complained that the first time they heard of applications approved by the department of mineral resources was when the representatives of mining companies arrived on their farms to start drilling. See Environment, "Mining devastating SA's farms: How rampant mining is destroying the farms in SA's breadbasket" available at http://www.environment.co.za/acid-mine-drainage-amd/mining-devastating-sas-farms-how-rampant-mining-is-destroying-the-farms-in-sas-breadbasket.html (accessed on 27 March 2015).

[3] Environment, "Effect of Mining" available at http://www.environment.co.za/mining-2/effects-of-mining.html (accessed on 27 March 2015).

[4] Ibid.

[5] Ibid.

[6] South African History Online Towards a Peoples History, "More than 170 mineworkers are killed at Kinross Mine, South Africa" available at http://www.sahistory.org.za/dated-event/more-170-mineworkers-are-killed-kinross-mine-south-africa (accessed on 27 March 2015). See also Times Live, "The 435 SA miners who didn't make it" available at http://www.timeslive.co.za/opinion/2010/10/14/the-435-sa-miners-who-didn-t-make-it (accessed on 27 March 2015). Another report from government department suggests that since the first reported mine accident in 1904, more than 54,000 South African mine workers have lost their lives in mine accidents. Many more workers have died as a result of exposure to hazardous dust, gas and fumes. See Department of Mineral Resources, available at http://www.dmr.gov.za/mine-health-a-safety/occupational-safety.html (accessed on 27 March 2015).

disabled between 1900 and 1991. In August 2012, 44 people were killed, including 34 mineworkers who were killed in Marikana, North West Province following an unprotected strike.[7]

Oil exploration and drilling are no less harmful to the environment and the community. The piping used to transport and extract oil is made of metals, which can corrode. This corrosion causes pipes to rupture and contaminate the land and waters which surround it. If the pipes do not rupture, contamination is still eminent via the large waste pits, often left unlined and open.[8] Dust particles left from drilling may coat the surrounding areas, and flames from burning the natural gas found in oil fields cause air pollution. Oil spills, accidents, and illegal dumping of oil barrels and produced water lead to devastating ecological and health consequences that can last for decades. Many of these chemicals are detrimental or deadly to animals.[9]

The ingestion of the toxic substances produces a number of health related consequences such as skin infections, chronic headaches, fainting spells, vomiting, and chronic diarrhea. Long term health effects include: lung disease, liver and kidney damage, damage to the nervous system, malformation, brain damage, miscarriages and many other devastating chronic conditions.[10]

Creating of an enabling environment through government policies and legislation is a *sine qua non* to rapid industrialization process and societal economic transformation. The sustainability of such development is, however, not guaranteed where the trail left behind is a heavily retarded environment and adverse impacts on the health of the community. This concern was expressed by the South African court in *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*[11] where Ngcobo J observed that;

> development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked.

This symbiotic interaction between development and the environment was similarly reflected in the Report of the World Commission on Environment and Development which emphasised that;

> environmental stresses and patterns of economic development are linked one to another. Thus agricultural policies may lie at the root of land, water, and forest degradation. Energy policies are associated with the global greenhouse effect, with acidification, and with deforestation for fuelwood in many developing nations. These stresses all threaten economic development. Thus economics and ecology must be completely integrated in decision making and lawmaking processes not just to protect the environment, but also to protect and promote development. Economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind.[12]

The need for sustainable development lies at the root of a number of legislation so far enacted in South Africa to address issues of environmental concerns arising from corporate activities in the country. The National Environmental Management Act[13] (NEMA) stands out as one of such statutes which requires "people and their needs to be placed at the fore front of environmental management…[and] all developments to be socially, economically and environmentally sustainable."[14] This piece of legislation and other statutes,[15] as well as the basic common law principles applicable in South Africa, have placed

[7] Ibid.
[8] See "Effect of Oil Drilling" available at http://rainforestfoundation.org/effects-oil-drilling-0 (accessed on 29 March 2015.
[9] Ibid.
[10] Ibid.
[11] 2007 (6) SA 4 (CC) para 44.
[12] Report of the World Commission on Environment and Development: *Our Common Future* (Brundtland Report), http://www.un.org/esa/sustdev/documents/docs_key_conferences.htm, link: General Assembly 42nd Session: Report of the World Commission on Environment and Development, (accessed on 29 March 2015), also referred to by Ngcobo J in *Fuel Retailers' case* ibid, para 44.
[13] Act 107 of 1998.
[14] See *Fuel Retailers'case* above n 12 para 60.
[15] Such as Atmospheric Pollution Prevention Act 45 of 1965, National Environmental Management: Air Quality Act 39 of 2004 etc.

obligations on government and corporations to ensure environmentally friendly developments. The same laws have also provided avenues for the communities and individuals to seek redress on issues of environmental degradations and harmful consequences of industrial activities.

Cases founded on those laws abound in the reports. One of the most recent is *The State v Blue Platinum Ventures (Pty) Ltd and Another*,[16] an environmental impact case which incidentally took a criminal dimension. The accused persons were engaged in brick manufacturing extracting clay from the environment without having obtained the necessary approval prescribed by NEMA. The prosecution had, in the course of addressing the court, articulated the consequences of the conduct of the accused persons as appearing "trivial in the eye (sic) of an ordinary person, but [that] it has got serious environmental impact as far as that area is concerned. During rainy seasons … the houses next to that area are exposed they may collapse. There is a river along that area… and all this extraction was conducted from a very sensitive area (sic)."[17] The accused persons, one of whom is a director of the company, were found guilty of the offence. They were consequently ordered by the court to rehabilitate all the areas affected by the company's operations. In *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) and Another*[18] which took a delictual dimension, the court held that regulation 5.9.2 made pursuant to Mines and Works Act 27 of 1956 was enacted for the benefit of the owners of land which might be polluted as a result of the actions of a company. The liability created by the regulation, as found by the court, is strict in nature. Thus the defendants were held strictly liable for allowing acidic water escape from the property of the first defendant to those of the plaintiff's and other buildings in that area without having previously rendered the water innocuous.

A recourse to the common law principles of delict or tort to found relief for harmful corporate operations by stakeholders is fairly well established. *Adams v Cape Industries Plc*[19] is one of those celebrated cases recorded in the late twentieth century. The case bears a vivid demonstration of a corporation's neglect of the wellbeing of its employees and the community at the centre of its operations. Although factually locally centered, the jurisdictional issues raised in the case gave it such international acclaim that at present it is more popularly cited in other spheres of law, such as conflict of laws, which at times over shadows the importance of the case in illustrating the real crux of the matter which is the corporate failure in fulfilling the expectations of the stakeholders. Part of the facts showed that the employees of the company's subsidiary in Texas became ill with asbestosis resulting from asbestos dust manufactured in South Africa. The US court held the parent company liable in negligence for a breach of duty of care to the employees. The quest by the judgment creditors to enforce the US court judgment against the parent company in the UK threw up issues of jurisdiction bordering on conflict of laws and the lifting of the corporate veil which are not of concern here. The US court recourse to negligence to found remedy for the employees exposes the gap in the companies legislation. The interests of the employees were not protected by the legislation.

The case of *Lubbe v Cape Industries Plc*[20] further illustrates the recourse by corporate employees to delictual remedies in seeking reliefs for industrial injuries arising from corporate operations. The injury in this case, as in *Adam's case*, occurred in an asbestos manufacturing company in South Africa while the relief was sought against the parent company in the UK. Lord Bingham's statement, while formulating the relevant issues in the House of Lords, depicts the conditions for holding multinational companies responsible for injuries suffered by the employees of the parent company's subsidiaries in the course of the company's business and the extent of the injury to which the company could be held liable. He said:

> The issues in the present cases fall into two segments. The first segment concerns the responsibility of the defendant as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries. Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent

[16] Case No: RN 126/13 of 09/01/2014. See also *Rex v Marshall* (1951) 2 All SA 440(A) where the manager and resident engineer of a company were convicted for allowing acidic water to escape from their mine and contaminated a small stream that crossed a number of lower-lying farms.
[17] Ibid p 7 para 20.
[18] 1997 (4) SA 578 (W).
[19] [1990] Ch 433 (CA).
[20] [2000] UKHL 41. See also *Chandler v Cape plc* [2012] EWCA Civ 525.

> company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence.
>
> The second segment of the cases involves the personal injury issues relevant to each individual: diagnosis, prognosis, causation (including the contribution made to a plaintiff's condition by any sources of contamination for which the defendant was not responsible) and special damage. Investigation of these issues would necessarily involve the evidence and medical examination of each plaintiff and an inquiry into the conditions in which that plaintiff worked or lived and the period for which he did so. Where the claim is made on behalf of a deceased person the inquiry would be essentially the same, although probably more difficult.[21]

Aside from delictual claims, *Hichange Investment (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Product and Others*[22] was fought under section 28 of the NEMA which *inter alia* imposes duties and obligations on every person whose industrial activities may cause significant pollution or degradation of the environment to adopt the necessary measures that would ensure that the harmful impacts of such activities are avoided or minimised. The applicants *locus standi* was founded on section 32 of the NEMA which empowers any person or group of persons to seek appropriate reliefs for a breach of the provisions of the NEMA, either in that person's or group's interest, interest of other persons, public or environmental interest. Section 10 of the Atmospheric Pollution Prevention Act 45 of 1965 dealing with the granting of registration certificate to such companies which enables them to engage in environmentally hazardous activities was also invoked. The relevant facts of the case as briefly captured in the judgment of the court are as follows:

> The effluent caused by the first respondent's tanning process lies at the heart of the dispute between the parties. Salt-cured skins and hides delivered to the first respondent's tannery are initially treated in rotating wooden drums containing a high pH sulphide and lime based liquor in order to remove the hair and fat from the skin. The hides and skins then pass through a "splitting" stage, resulting in two identical but thinner pieces, before they are pickled in a low pH liquor of salt and acid. After this, the ovine skins are sold as "pickled pelts" while the bovine hides are tanned with chromium sulphate before being sold as "wet blues". The overall processing operation produces various emissions and forms of waste, and gives rise to various odours caused by gaseous emissions including ammonia and H 2 S…. Bearing in mind the evidence that H 2 S smells like rotten eggs, it is therefore not surprising that the applicant complained about the offensive odour coming from the first respondent's premises and the corrosion which was being caused.[23]

Given these set of facts the trial judge proceeded to articulate the responsibilities of the governmental agencies as conferred by the provisions of the relevant statutes where he observed that;

> In the exercise of their functions bestowed upon them, in particular by s. 28 of NEMA and s. 9 and 10 of APPA, the second, third and fourth respondents are obliged to act responsibly and to take action to ensure, insofar as they are able, that a person causing pollution does not impinge upon the rights of others.[24]

Armed with the stated facts and statutory provisions, Leach J held *inter alia*:

> If one bears in mind the undisputed evidence that even the most minute concentration of H 2 S in the atmosphere is detected by the human nose as a stink similar to rotten eggs, I am satisfied on a balance of probabilities that the H 2 S generated by the first respondent's processes would regularly have been detectable to the persons working nearby on the premises of the applicant, as the latter alleges. This is confirmed by the deponent to the fourth respondent's answering affidavit, one Scarr, who states that he has visited the tannery and that the smell is extremely offensive. One should not be obliged to work in an environment of stench and, in my view, to be in an environment contaminated by H 2 S is adverse to one's "well-being". I am therefore satisfied that the activities of the first respondent have caused "pollution" as defined in NEMA…. In all the circumstances, I am satisfied that the first respondent has been shown to have breached s. 28(1)

[21] Ibid para 20-21.
[22] 2004 (4) SA 393 (ECD), 2004 JDR 0040 (E).
[23] Ibid pp 4-5.
[24] Ibid p 28.

> and that the substantial requirements for relief to be granted under s. 28 (12) have therefore been fulfilled.[25]

The above cases are set down as a few illustrations of the extent of environmental degradations and health hazards emanating from corporate operations in South Africa. The real point for concern is that the existence of these cases and established evidence of adverse consequences of corporate operations in this nation did not seem sufficiently compelling to warrant the inclusion by parliament in South Africa of stakeholder's interests, especially the interests of the environment, among the interests to be protected by the directors in the performance of their duties as led down in the Companies Act..

3 Directors responsibilities under the Companies Act

The position at common law is that companies are established for the benefit of the shareholders. Thus, the responsibilities of the directors are to be seen solely from the eye of profit maximisation for the benefit of the shareholders whose interests are aligned with that of the company.[26] The South African Companies Act of 2008 upholds the common law position by declaring in section 76(3)(b) *ex abundanti cutela* that a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director in the 'best interests of the company'. The Act which contains a copious definition of various terms and phrases in section 1 thereof, does not define what 'interests of the company' entails. At common law, the interest of the company as an artificial entity has always been seen as synonymous with the interest of the shareholders of the company. That point was made in *Greenhalgh v Arderne Cinema Ltd*[27] where Evershed MR emphasised that the interest of the company as a whole does not mean the company as commercial entity distinct from the corporators, "it means the corporators as a general body". Similarly, in *Gaiman v National Association for Mental Health*[28] Megarry J observed that the company being an artificial entity, it is not easy to determine what is in its best interests without paying due regard to its present and future members as a whole. The interests of the company would be meaningless unless it is aligned with the interests of some identifiable individuals.[29] The word 'company' in this context is synonymous with the shareholders of the company.[30] The directors could as such be seen as fulfilling their obligations under the Act by the pursuit of profit maximisation which benefits the shareholders without regard to environmental concerns. This would be so especially when regard is had to section 76(4)(a)(iii) which provides that;

> (4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company-
> (a) will have satisfied the obligations of subsection (3)(b) and (c) if-
> (iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a *rational basis* for believing, and did believe, that the decision was in the best interests of the company.[31]

This provision embodies what is referred to in corporate law as 'business judgment rule'.[32] This rule requires the court to defer to the subjective beliefs or opinions of the directors on what is in the best interests of the company.[33] This was judicially expressed by Lord Wilberforce in *Howard Smith Ltd v Ampol Petroleum Ltd*[34] where he foreclosed any appeal on merits from management decisions to the

[25] Ibid pp 33-34.
[26] E Merrick Dodd Jr, 'For Whom are Corporate Managers Trustees' (1932) 45 *Harvard Law Review* 1145, 1146-1147. Cf A A Berle, 'Corporate Powers as Powers in Trust' (1931) 44 *Harvard Law Review* 1049.
[27] [1951] Ch 286 (CA) at 291.
[28] [1971] Ch 317 at 330, [1970] 2 All ER 362 (ChD). See also *Brady v Brady* [1988] BCLC 20 at 40 (CA) where Nourse LJ held that "the interests of a company, as an artificial person, cannot be distinguished from the interests of persons who are interested in it."
[29] See Paul L. Davies QC, Sarah Worthington and Eva Micheler, *Gower and Davies Principles of Modern Company Law 8th ed* (London: Sweet and Maxwell, 2008) p 507.
[30] See Farouk HI Cassim 'The Duties and the Liability of Directors' in Farouk HI Cassim, Maleka Femida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev and Jacqueline Yeats (eds), *Contemporary Company Law* (Cape Town: JUTA & Co Ltd, 2011) p 468.
[31] Emphasis added.
[32] See Farouk HI Cassim 'The Duties and the Liability of Directors' in Farouk HI Cassim, Maleka Femida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev and Jacqueline Yeats (eds), *Contemporary Company Law* 2nd ed (Cape Town, JUTA & Co Ltd 2012) p 563.
[33] Minnal Rammath and Vincent O Nmehielle, "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* 101.
[34] [1974] AC 821 at 832. See also *Extrasure Travel Insurance Co Ltd v Scattergood* [2003] 1 BCLC 598 para 90.

courts of law, and observed that the courts of law would not assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.

A strict subjectivity in the application of the business judgment rule does not, however, seem to have a place under the South African Companies Act provision which sets a 'rational' standard for determining the beneficial impacts of the director's belief. The phrase 'rational basis' as used in that provision demands an objective assessment of the director's belief. The rationality of that belief can only be ascertained by examining the decision in the light of what a reasonable director would have believed or done in comparable circumstances.[35] This was the preferred approach in *Charterbridge Corporations Ltd v Lloyds Bank Ltd*[36] where Pennycuick J stated that "the proper test, I think, in the absence of any separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company." An analogy to further buttress this point could be drawn from the common law duty which demands that a director should not fetter his discretion in the exercise of fiduciary powers.[37] Judicial expression was given to the demands of this fiduciary duty by Lord Denning MR in *Boulting v Association of Cinematograph, Television and Allied Technicians*[38] as follows:

> It seems to me that no one, who has duties of a fiduciary nature to discharge, can be allowed to enter into an engagement by which he binds himself to disregard those duties or to act inconsistently with them. No stipulation is lawful by which he agrees to carry out his duties in accordance with the instructions of another rather than on his own *conscientious judgment*; or by which he agrees to subordinate the interests of those whom he must protect to the interests of someone else.[39]

The reference to 'conscientious judgment' suggests that a decision must be arrived at after full consideration of its implications. It must be a 'rational decision' in the sense that there is high probability that a reasonable director in comparable circumstances would have arrived at a similar decision. A decision which seeks to protect the business interests of the company would almost always invariably pass this rubicon. The stakeholders may as such be disappointed to discover that rational decisions taken by the directors which are geared at profit maximisation may not be successfully challenged in court even when they are injurious to the environment.

The King Code of Governance Principles and the King Report on Governance (King III)[40] which is tailored in line with the Companies Act corporate governance provisions could be looked upon as a soothing balm for the stakeholders in corporate operations. King III lays down the principles and practices of corporate governance emphasising issues of social, economic and environmental concerns which are more popularly referred to as the triple bottom line approach to corporate governance.[41] King III, however, recognises the supremacy of the Companies Act indicating that its provisions are merely aspirational and not legislative.[42] Nevertheless judicial recognition has been given to the provisions of the King Code. In *South African Broadcasting Corporation Ltd v Mpofu*[43] the court held that the suspension of the state-owned company director failed short of the requirements of good governance as set down in the King Code. Victor J articulated the significance of the King Code in corporate governance as follows:

[35] Farouk HI Cassim above n 32 p 564.
[36] [1970] Ch 62 at 70. Compare *Regentcrest plc v Cohen* [2001] 2 BCLC 80 at 105 (ChD) where Jonathan Parker J said: "The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind." This is a strictly subjective approach and would not accommodate the idea of 'rational basis' as used in section 76(4)(a)(iii) of the CA.
[37] A position now codified in s 173 of the UK Companies Act of 2006 as duty to exercise independent judgment.
[38] [1963] 2 QB 606 at 626.
[39] Emphasis added.
[40] King III was introduced by the Institute of Directors in Southern Africa (IoDSA) in September 2009.
[41] Farouk HI Cassim above n 35 p 521.
[42] King III Amendment states that "[w]here there are inconsistencies between King III and the Act in that King III recommends practices that go beyond what is envisaged in the [Companies] Act, these will remain intact in King III as best practice…. It needs to be noted that while attempts have been made towards the alignment of King III with the Companies Act, in so far as it is possible, King III is aspirational and may recommend practices that go beyond legislation; the legislation constituting the minimum standard in place. The responsibility is on the user of King III to ensure that King III is not relied upon to also ensure legislative compliance.
[43] [2009] 4 All SA 196 (GSJ).

> Companies and their Boards are required to measure up to the principles set out in the Code. King recommends that public enterprise should try and apply the appropriate principles set out in the Code. The Code sets out principles and does not determine detailed conduct. The conduct of public enterprises must be measured against the relevant principles of the Code and must adhere to best practices. The Code regulates directors and their conduct not only with a view to complying with the minimum statutory standard but also to seek to adhere to the best available practice that may be relevant to the company in its particular circumstances.[44]

Jajbhay J going on moral excursion, stated that,

> The Board of Directors in state-owned enterprises are not only enjoined to consider their responsibilities in terms of the King Report…. They must also consider their responsibilities in our constitutional democracy in terms of the African leadership philosophy and values…. In South Africa we have a value system based on the culture of ubuntu…. This in effect is the capacity to express compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community. Ubuntu speaks to our inter-connectedness, our common humanity and the responsibility to each that flows from our connection. Ubuntu is a culture which places some emphasis on the commonality and on the interdependence of the members of the community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community, that such a person may be part of. In South Africa ubuntu must become a notion with particular resonance in the building of our constitutional democracy. All directors…must take cognisance of these factors in the determination of their duties as directors. Ubuntu manifests itself through various human acts and behaviour patterns in different social situations. This was clearly lacking when the determination to suspend the respondent was made.[45]

Aligning the King Code with the concept of 'Ubuntu' depicts the moral basis upon which the Code is structured. The pronouncements by both judges are unequivocal on the fact that the King Code, and more importantly the ubiquitous concept of Ubuntu that transverses every facet of the South African jurisprudence since the constitutional democracy, could impose moral obligations on the directors, to consider the interests of stakeholders. The harmful environmental concerns of the company's operations could be considered only as a matter of corporate best practices. Neither the King Code nor Ubuntu could transmute into a legal right enforceable by the stakeholders in corporate governance. The strength of Ubuntu as invoked in that case lies more in personal relationships than in matters of public concern such as the environment.

In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*[46] the court again relied on King Report[47] to strengthen its finding and not as creating rights for the stakeholders or imposing obligations on the company. The crux of the court's decision was that the conduct of the mining companies and their directors constitute a flouting of environmental obligations contrary to the Constitution, the Mineral Petroleum Development Act and the National Environmental Management Act. It was emphasised by the court that unless courts are prepared to assist the State by providing suitable mechanisms for the enforcement of statutory obligations, an impression will be created that mining companies are free to exploit the mineral resources of the country for profit over the lifetime of the mine, and simply walk away from their environmental obligations. The court held that this cannot be permitted in a constitutional democracy which recognises the right of all of its citizens to be protected from the effects of pollution and degradation.

[44] Ibid para 29.

[45] Ibid para 61-63. See also *Dikoko v Mokhatla* 2006 (6) SA 235, Sachs J said: "Ubuntu-botho is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture. Historically it was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised society to overcome and transcend the divisions of the past." In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (2004 (12) BCLR 1268) it was observed by the court that "[t]he spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."

[46] 2006 (5) SA 333 (W) para 16.9.

[47] Especially the King Report of March 2002 p 12 para 18.7 which states that "[a] well-managed company will be aware of, and respond to, social issues, placing a high priority on ethical standards. A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues. A company is likely to experience indirect economic benefits such as improved productivity and corporate reputation by taking those factors into consideration."

Indeed, section 7(a) of the Companies Act declares that the purpose of the Act is, among others, to protect compliance with the Bill of Rights as provided for in the Constitution, in the application of company law. The South African Constitution[48] provides in section 8(2) that the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right. The import of section 8(2) of the Constitution is that the obligations created by the Bill of Rights are not simply state matters. Corporations, as juristic persons, are similarly bound to observe the rights embodied in the Bill of Rights. One of those rights contained in the Bill of Rights is the environmental right which is provided for under section 24 of the Constitution as follows:

> Everyone has the right-
> *(a)* to an environment that is not harmful to their health or well-being;
> and
> *(b)* to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The potency of these rights is assured by the Constitution by specifically setting down those who have the *locus standi* to enforce the rights. Section 38 of the Constitution provides that;

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-
> *(a)* anyone acting in their own interest;
> *(b)* anyone acting on behalf of another person who cannot act in their own name;
> *(c)* anyone acting as a member of, or in the interest of, a group or class of persons;
> *(d)* anyone acting in the public interest; and
> *(e)* an association acting in the interest of its members.

This general constitutional power of enforcement of the provisions of the Bill of Rights is complemented by the specific provision contained in section 32 of the NEMA which confers power on any person or group of persons to seek relief for the breach or threatened breach of any statutory provision concerned with the protection of the environment. The action could be instituted either in the person's or group's interest, in the interest of any other person or public interest, or more still in the interest of protecting the environment.[49] Kidd observed that this provision is designed to broaden the *locus standi* of persons seeking to vindicate statutory environmental interests in the public interest, which includes the interest of the environment.[50] This should not be read as excluding the primary beneficiaries who are the persons or group of persons whose interests are affected by a breach of environmental protection statute.

The question arising from these provisions and which is of particular concern here is whether the environmental rights granted by the Constitution and the NEMA respectively could be read into section 76(3) of the Companies Act to broaden the protected interests under that provision and by so doing widening the duties of company directors by imposing an enforceable obligation on them to consider the environmental interests.

Section 158(a) of the Companies Act provides that when determining a matter brought before it in terms of this Act, or making an order contemplated in this Act, a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act. The focus therefore is on the rights created by the Companies Act and not the Constitution or any other statute. One of the provisions of the Companies Act that specifically creates a right of action which could implicitly be extended to stakeholders, and in this context environmental interest, is section 165. That section deals

[48] Act 108 of 1996.
[49] See also s 33 NEMA dealing with the right of private prosecution for the breach of any duty concerned with the protection of the environment.
[50] M Kidd, "Public Interest Environmental Litigation: Recent Cases Raise Possible Obstacles" 2010 (13) 5 *Potchefstroom Electronic Law Journal* 32.

with derivative action, an established common law device by which relief is sought by shareholders on behalf of the company for an injury done to the company by those in control of the company who would not seek redress for the company.[51] The common law device is now modified by the statute which provides in section 165(2)(d) as follows:

> (2) A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person-
> (d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.[52]

There are two interests to be protected under this provision which seem inextricable: one is the interest of the company, and the other is the interest or legal right of the person bringing the action. There are no boundaries on the scope of the protected legal right save that it must be related to the company's affairs so that any relief decreed by the court would be beneficial, not just to the person instituting the proceedings, but also to the company.

Environmental concerns are one of those issues that affect both the stakeholders and the company. A wasted and hazardous environment could retard the company's long term benefits in the same manner as it could constitute health hazards to the community. This is the basis for the emphasis on the sustainable development and long term benefits of the company. Thus, in *Teck Corporation v Millar*[53] Berger J observed that if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders. In *Peoples Department Stores Inc. (Trustee of) v Wise*[54] the Supreme Court of Canada per Major and Deschamp JJ accepted as an accurate statement of the law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of the environment. In *Fuel Retailers'case*[55] Ngcobo J had led emphasis on clean environment as key to sustainable development. Thus, developing the common law as enjoined by section 158(a) demands an expansion of the interests protected in section 76(3) to include the interests of the environment. This would create an obligation which could be enforced against the directors as a legal right by an interested person under section 165(2)(d). This position is strengthened by the provision of section 7 of the Companies Act which provides that the purpose of the Act is to promote *inter alia*, compliance with the Bill of Rights as provided for in the Constitution, in the application of company law.[56] This would require that the interpretations of the Companies Act's provisions take into cognizance the constitutional provisions in the Bill of Rights.[57] One of those provisions in the Companies Act that the constitutional provisions in the Bill of Rights could easily be read into is section 76(3)(b) dealing with the nebulous term, 'best interests of the company'. Although the courts at common law have ascribed a meaning to that term restricting it to the interests of the shareholders,[58] it could now be expanded as enjoined by section 158(a) of the Companies Act to include environmental interests as provided in the Bill of Rights. This would be in tandem with section 39(2) of the Constitution which provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and

[51] See *Wallersteiner v Moir No.2* [1975] 2 WLR 389 per Lord Denning MR at 395-396 (CA) who stated that the principle is that, where the wrongdoers themselves control the company, an action can be brought on behalf of the company by the minority shareholders on the footing that they are its representatives to obtain redress on its behalf. Derivative action is now defined in the UK Civil Procedure Rules of 1998 as an action "where a company, other incorporated body or trade union is alleged to be entitled to claim a remedy and a claim is made by one or more members of the company, body or trade union for it to be given the remedy". This seems to represent the new thinking in section 165 of the South African Companies Act. See generally Anthony O Nwafor, "Shareholder Derivative Action- Nigerian Statutory Innovation -Not Yet a Victory for the Minority Shareholder" (2010) 7 *Macquarie Journal of Business Law* 214 for a more detailed discussion on the concept of derivative action.

[52] This is only a part of section 165 as deemed relevant to this discourse.

[53] (1972) 33 DLR (3d) 288 (British Columbia SC).

[54] [2004] 3 S.C.R. 461, 2004 SCC (Canlii) at para 42. Interestingly, the court was interpreting the provisions of section 122(1) of the Canadian Business Corporations Act of 1985 bearing a provision reminiscent of the promotion of shareholders value in the strict sense. The provision is as follows: "122(1) Every director and officer of a corporation in exercising their powers and discharging their duties shall (a) act honestly and in good faith with a view to the best interests of the corporation."

[55] 2007 (6) SA 4 (CC) para 44.

[56] See s 7(a) CA 2008.

[57] S 5(1) CA 2008.

[58] *Greenhalgh v Arderne Cinema* [1951] Ch 286 (CA) at 291; *Gaiman v National Association for Mental Health* [1971] Ch 317 at 330, [1970] 2 All ER 362 (ChD). See also *Brady v Brady* [1988] BCLC 20 at 40 (CA) where Nourse LJ held that 'the interests of a company, as an artificial person, cannot be distinguished from the interests of persons who are interested in it.'

objects of the Bill of Rights.[59] The Companies Act obviously falls within the ambit of 'any legislation' as used in section 39(2) of the Constitution. Thus apart from section 158(a) of the Companies Act, the expansion of the common law meaning of 'interests of the company' as used in section 76(3)(b) of the Companies Act could also be attained under section 39(2) of the Constitution. This would not do any harm to the contents of that provision but would rather strengthen it in line with the dynamics of corporate operations as evidenced in the pronouncement of Iacobucci J in *R v Salituro*[60] where he said:

> Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

Arden LJ in *Item Software (UK) Ltd v Fassihi*[61] had shown that the term 'interests of the company' is amenable to such incremental changes where she said:

> [T]he fundamental duty to which a director is subject, that is the duty to act in what he in good faith considers to be the best interests of the company….The duty is expressed in these very general terms, but that is one of its strengths: it focuses on principle not on the particular words which judges or the legislature have used in any particular case or context. It is dynamic and capable of application in cases where it has not previously been applied but the principle or rationale of the rule applies. It reflects the flexible quality of the doctrines of equity…. "Equity refuses to confine within the bounds of classified transactions its precept of a loyalty that is undivided and unselfish.

It accords with fact-driven development as espoused by Nkabinda J in *Masiya v Director of Public Prosecutions Pretoria (The State) and Another.*[62] Developing the common law in the manner advocated would accord recognition to the interests of the environment which invariably contributes to the long term corporate interests and guarantees the sustainability of such interests.

Holding company directors liable for a breach of environmental obligations is not now in this jurisdiction. The *Blue Platinum Ventures'case*[63] which took a criminal dimension is a good example. Although that case may not command so much respect as precedent in corporate governance issues relating to the environment having emanated from the lower rung of the judicial hierarchy and was uncontested, it stands out as a warning signal on the consequences of a disregard of a legal obligation by the directors. Developing the common law concept of 'interests of the company' in the manner advocated will merely establish the civil liability of the company directors under the Companies Act for a breach of environmental obligations which could be enforced by the stakeholders under section 165(2) of the Companies Act.

The espoused approach would also strengthen the functions of the Social and Ethics Committee, a statutory innovation found in section 72(4) of the Companies Act.[64] One of the functions prescribed for the Committee by the Companies Regulations is to monitor the activities of the company relating to the environment, health and public safety, including the impact of the company's activities and of its products

[59] See *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC) para 31 where the Constitutional Court affirmed that the impact of the Constitution on common law is set out in section 39(2) of the Constitution. In *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 36 it was held that courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights whether or not the parties in any particular case request the court to develop the common law under s 39(2). Where there is deviation from the spirit, purport and objects of the Bill of Rights, courts are obliged to develop the common law by removing the deviation.

[60] [1991] 3 SCR 654. See also *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC).

[61] [2004] EWCA Civ 1244 para 41. In *Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512 at 1516 Lord Templeman stated that "Equity is not a computer. Equity operates on conscience".

[62] Above n 59 para 31.

[63] Above n 16.

[64] Regulation 43(1) of the Companies Regulations, 2011 made pursuant to section 72(4) of the Companies Act prescribes the establishment of social and ethics committee for every state owned company; every listed public company; and any other company that has in any two of the previous five years, scored above 500 points which is calculated in terms of regulation 26(2).

or services.[65] The law does not at present contain any provision that would enable the Committee to enforce the results of its findings. The best it could do under the Regulation is to bring matters within its mandate to the attention of the Board and to report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.[66] The difficulty in such report achieving any meaningful purpose could be gleaned from Lord Denning MR's statement while justifying derivative action in *Wallersteiner v Moir No 2.*[67]as follows:

> If it [the company] is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle*. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. *But suppose it is defrauded by insiders who control its affairs - by directors who hold a majority of shares - who can then sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves.* Yet the company is the one person who is damnified. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress.

This point could further be stretched in the present contest by suggesting that even when the board and the general meeting could pass resolutions, if the reports of the Committee are considered to be of serious concern,[68] compliance would not be guaranteed when the same directors are those running the affairs of the company. The best route to ensuring compliance is that of derivative action under section 165(2)(d) which could only be attained by developing the common law concept of 'interests of the company' as codified in section 76(3)(b) of the Companies Act to include environmental interests. This would open the door for stakeholders outside the company to initiate proceedings under section 165(2)(d).

4 Conclusion

It is a truism that corporations contribute positively to the development of the society. The adverse impacts of corporate operations on the environment is also appreciable. This has informed the passing of laws by the parliament and the recognition by the courts in South Africa of the established basic common law concepts in delict to afford remedies to the stakeholders and control the environmental impacts of corporate operations.

The Companies Act of 2008, which is the principal legislation governing corporate operations in South Africa, has, however, remained silent on the corporate responsibility to the environment. The directors' duties as provided in the Act remains the same common law precept requiring the directors to act in good faith in the best interests of the company. The narrow confines at common law of the term 'interests of the company' as synonymous with the interests of the shareholders needs to be revisited. The need has arisen, having regard to adverse impacts of corporate operations on the environment, to adopt in this jurisdiction the dynamism espoused by Arden LJ in *Item Software* in defining that concept. This is even more compelling as section 158(a) of the Companies Act mandates the courts to develop the common law to give effect to the rights protected by the Act.

Such right as contained in section 165(2)(d) of the Act could only have meaning if the common law idea of interests of the company is developed to include the environmental interests. This would bring to focus the protection of the environmental rights provided for in the Bill of Rights as an integral part of the duties of company directors under section 76(3) of the Companies Act.

Developing the interests of the company to include the interests of the environment would also re-enforce the functions of the Social and Ethics Committee which at present can only report but cannot enforce the contents of their report. Where such report involves issues of environmental concerns, the Committee or any other stakeholder could rely on section 165(2)(d) to enforce the findings against the directors as a breach of duty.

[65] See Reg 43(5)(iii).
[66] Reg 43(5)(b)(c).
[67] [1975] 1 All ER 849 at 857. Emphasis added.
[68] Otherwise, they could simply pass as matters for notification.

While this could stand as an interim measure in drawing the attention of the directors to their environmental responsibilities, the impacts of corporate operations on the environment demand the adoption by the parliament of a more enduring measure by including the interests of the environment among the protected interests in section 76(3) of the Companies Act.

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5. Case No: RN 126/13 of 09/01/2014. See also *Rex v Marshall* (1951) 2 All SA 440(A) where the manager and resident engineer of a company were convicted for allowing acidic water to escape from their mine and contaminated a small stream that crossed a number of lower-lying farms.
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