

The potential role of Corporate Governance in promoting worker participation in Companies.

BY

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1. Introduction

1.1. Background

The traditional role that companies have played has been limited to generating profits for shareholders. Maximising shareholder value has traditionally been the only objective for directors in running the company. Due to globalisation, companies have grown, and their influence has had a tremendous impact on the economy, society, and the environment.¹ The effect has not only affected the shareholders who have been the sole or key stakeholders of the company. The company's activities also materially affect other role players (hereinafter; referred to as "other stakeholders") who interact with the company. The stakeholders include employees, clients, customers, suppliers, the environment, and society.² The interests of other stakeholders in times past, and arguably in the present day, have not been given adequate consideration from a company law or corporate governance perspective. The failure to meaningfully consider the interests of non-shareholding stakeholders, like employees culminated in adverse impacts or consequences for these stakeholders.³ Concerning employees, it has resulted in exploitation in terms of, *inter alia*, fair remuneration workplace safety, and this will be fully ventilated at the proper time.

Given the significant contributions of different stakeholders to the company's welfare, this has resulted in questions concerning the privileged position of shareholders continuing to be tenable.⁴ In other words, the concern is whether other stakeholders should have their interests catered for by the company at the corporate governance level. If the answer is in the affirmative, the question then revolves around the extent to which the interests of other stakeholders should be considered when running the company. The study does not, however, consider all stakeholders. The focus will be on employees as internal stakeholders of the company.

1.2. Problem Statement.

¹ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

² Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

³ Williams AC and Zumbansen P *The Embedded Firm: Corporate Governance Labour and Finance Capitalism* (Cambridge University Press 2011)

⁴ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012 307

The relationship between the employer and collective employee(s) in South Africa is inherently adversarial. Moreover the bargaining power between employer and employee is unequal. An employer wields greater bargaining power over the employee. The adversarial nature of the employer-employee relationship creates a possibility of exploitation of the employee. Various statutory measures have been put in place to improve the plight of the employee who, without such interventions, is left at the employer's mercy. Labour law-related legislation is an intervention meant to level the playing field between employer and employee. However, these effective interventions, still leaves the employee vulnerable. This research will show that these detrimental outcomes for the employee are present due to a failure in stakeholder relations in the corporate governance of organisations.

The purpose of this study is to investigate the extent to which employees may participate meaningfully as internal stakeholders of profit companies. The study acknowledges, as previously mentioned, that there is extensive protection granted to employees through separate legislation, i.e., labour laws. Moreover, that labour laws enable worker participation. The research will establish the efficacy of worker participation initiatives facilitated through labour laws alone. If inadequate, the study further examines whether corporate governance could (and should) not cover the gap left by labour laws in advancing workers' welfare. In other words, from a company law or corporate governance vantage point, the question is whether corporate governance considers the interests of employees and the extent to which it could and should play a broader role in facilitating participation in the company.

1.2. Research questions.

1. How does Labour law facilitate employee participation in the company's affairs, and to the extent that it does, is the facilitation adequate to promote employee welfare as a stakeholder group?
2. Does company law/ corporate governance afford participation to employees as stakeholders of the organisation & if so, how do these initiatives advance worker participation?

1.3. Research objective.

The key objective of the research is to ascertain how employees are afforded access to participation in the company. This thesis will assert that worker participation can be facilitated through labour laws to a greater extent and supplemented through company law, particularly corporate governance. It will be demonstrated that the primary mechanism for advancing employees' welfare is through participation mechanisms facilitated through labour laws. Dedicated labour law legislation is the primary way of ensuring that employees advance their interests through participation in the company. It will be demonstrated that, notwithstanding the apparent and far-reaching enabling measures through labour laws, gaps remain extant.

It will be shown that labour laws' advancement of employees' interests tends to be mechanical or rules-based and adversarial, which does little in creating a harmonious stakeholder relationship between employee and employer arising out of voluntarism as opposed to compliance. Moreso, labour law benefits are reserved for a class of workers who qualify as employees. Therefore, there will always be a regulatory gap in the labour laws, and the omitted instances that allow for exploitation often result in unfairness. To continuously improve the worker's position, it is of utmost importance that the employee participates in the company's affairs. Participation mechanisms in labour law are progressive but not consistently effective and do not resolve the problems faced by employees completely.

The research will demonstrate that corporate governance is an appropriate supplementary mechanism to enable worker participation and advance employees' interests. Advancing the employees' interests at the corporate governance level will help cover the regulatory gap by ensuring that companies treat their employees fairly, even when the law does not require them to do so. It will be apparent that employee empowerment through participation at a corporate governance level will enhance the employer-employee relationship by ensuring a harmonious relationship emanating from voluntarism and genuine engagement. The risks flow from the inadequacies of the labour laws, can be ameliorated by promoting the interests of employees at the corporate governance level. Better relations between employer and employee are achievable when both parties are more responsible and deal with each other in good faith.

This will be realisable when a more effective paradigm of leadership based on the application of sound governance principles (through 'soft law') as opposed to only regulation (or 'hard law') is adopted.

2. The basis for Labour Law.

In this part of the discussion, the need for Labour law will be closely examined, particularly in regulating the contract of employment. The discussion will examine the nature of the employment contract and explain why the contract should be regulated. Further, the reasons for and against the existence of the Labour Law will be discussed in more detail.

2.1. The nature of the employer and employee relationship in South Africa.

The employment relationship is established through a contract,⁵ and the contract governs the employer and employee relationship.⁶ Traditionally, in a contractual relationship,⁷ parties enjoy autonomy and have the freedom to enter contracts and determine the terms of the agreement.⁸ Most employment contracts commence through offer and acceptance, usually concretised through a written contract with terms negotiated by the parties.⁹ Equally, suppose there is no regulation in an employment contract; it would mean that the employment contract, supplemented by its tacit terms where applicable, is deemed wholly representative of the contracting parties' rights, obligations, and expectations.¹⁰ It is so because contract law imbues both employer and employee with the freedom to contract on whatever terms they agree upon, riding on the assumption of equal bargaining power by free-market actors.¹¹ However, when looking at an employment contract, it is axiomatic that an employer and employee do not enjoy equal bargaining power.¹² Labour laws have recognised this fact, and their existence is based on this recognition.

Therefore, it is likely that an employment contract negotiated between a self-interested employer and employee will not always yield fair terms. There is an inherent risk that the employer will

⁵ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014) 7.3

⁶ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014) 7.3.

⁷ In this case an unregulated contract between a worker and an employee.

⁸ Tamara Cohen “The relational contract of Employment” 2012 *Acta Juridica* 86

⁹ Tamara Cohen “The relational contract of Employment” 2012 *Acta Juridica* 86

¹⁰ Tamara Cohen “The relational contract of Employment” 2012 *Acta Juridica* 86

¹¹ Van Niekerk, Andre, and Smit *Law @ Work 5th ed* (LexisNexis 2019) 16

¹² Van Niekerk, Andre, and Smit *Law @ Work 5th ed* (LexisNexis 2019) 16

dictate terms to the employee since it wields greater bargaining power.¹³ The terms may be unfair and would lead to exploitation. Few employees can bargain with employers on equal terms.¹⁴ Employees who hold executive positions may have the power to bargain individually.¹⁵ Even if this is accepted, these constitute a low proportion of the total number of employees.¹⁶ Therefore, in most instances, the employer generally dictates the terms of the employment relationship, and on most occasions, these terms favour the employer.¹⁷

Classical contract law, characterised by the fundamental principles of freedom and sanctity of contract, presupposes that the terms of a freely concluded contract reflect the contracting parties' mutual will.¹⁸ In the interests of legal certainty, the courts must enforce these terms without regard to equity.¹⁹ As demonstrated above, the position enunciated by classic contract law is unrepresentative of the true state of affairs when it comes to an employer and employee relationship.

To further elaborate on the unsuitable nature of classic contract law in employment contracts; a distinction is made between two types of contracts, a discrete contract, and a relational contract.²⁰ A discrete contract is a short-term commercial contract of limited scope and duration and hardly ever creates a personal relationship or future obligations.²¹ A discrete contract may be interpreted using classical contract law. An employment relationship on the other hand is relational, wherefore require additional separate requirements to cater for relationship.²²

As aforesaid, in employment contracts, the parties to the agreement are not equal when negotiating a contract due to the disparity bargaining power. Consequently, employment contracts tend to

¹³ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 86

¹⁴ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 13

¹⁵ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 16

¹⁶ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 16

¹⁷ Dennis Davis "The functions of Labour Law" 1980 (13) *Comparative and International Law Journal of Southern Africa* 214

¹⁸ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 85

¹⁹ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 85

²⁰ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 85

²¹ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 87

²² Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 86

reflect the employer's will, which often results in oppressive subordination under the guise of freely chosen agreements.²³ Therefore, an employment contract has become a command disguised as an agreement.²⁴ The preceding views are particularly germane in the third world country context, with high unemployment rates. Most unskilled, uneducated, and vulnerable workers reveal that the notions of contractual freedom and informed consent are a legal fiction when it comes to employment relationships.²⁵

Based on the above reasoning, applying the rules of classical contract law, in an employment relationship, without more would be inappropriate given the glaring unequal bargaining power between the employer and its employee.²⁶ It is further pertinent to note that persisting with the arrangements whereby employer and employee contract on equal terms will see contract law affirming and reinforcing the extant but inequitable distributions of wealth.²⁷ Eminent Labour Law scholars have long recognised the disparate bargaining power between employers and employees. Sir Otto Kahn-Freund expressed himself as follows concerning the employment relationship:

"[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power

*... The main object of labour law has always been, and ... will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."*²⁸

Therefore, the need to regulate the contract of employment in order to level the ground for employers and employees is self-evident.²⁹ This is primarily achieved through labour laws.³⁰ The principles of classic contract law have to be supplemented by labour laws, designed to balance the

²³ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 85

²⁴ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 85

²⁵ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 85

²⁶ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 16

²⁷ M Brassey *Employment and Labour Law* vol 1 C1:23

²⁸ Paul Davis and Mark Freedland *Kahn Freund's Labour and the Law* 3rd ed (London Stevens and Sons 1983) 10

²⁹ Paul Davis and Mark Freedland *Kahn Freund's Labour and the Law* 3rd ed (London Stevens and Sons 1983) 10

³⁰ *Ibid.*

power of employees and employers and ensure fairness in the employment relationship.³¹ It is pertinent to traverse different perspectives on the purpose and place of labour laws, in other words, the views that justify the existence of Labour laws and theories that favour dispensing with Labour Laws. The common law of contract and discrete contracts are inappropriate mechanisms of managing a contractual relationship in the employment context.³² The appropriate mechanism would be the relational contract and discussed under the social justice perspective in detail.³³

2.2. Perspectives on South African Labour Law.

It is necessary to discuss different perspectives that seek to explain how the state may intervene in the labour market.³⁴ The discussion is essential as it provides an opportunity to justify the need for Labour Law regulation in the employment relationship.³⁵ From a labour law vantage point, there are two broad theoretical perspectives on how the state may deal with the labour market.³⁶ These perspectives offer a more detailed explanation for justifying labour regulation or deregulation. It would be remiss not to discuss them, mainly because considering them enables engaging views that justify deregulation. The theoretical perspectives are the libertarian perspective and the social justice perspective. The two ideas are considered in turn.

2.2.1. The libertarian perspective.

The libertarian perspective underpins the free-market model.³⁷ The libertarians, in principle, prefer a deregulated labour market.³⁸ In the libertarian school of thought, the employment contract and the bargain attendant to it are the sole mechanisms regulating the employment relationship.³⁹

³¹ Tamara Cohen “The relational contract of Employment” 2012 *Acta Juridica* 86

³² Tamara Cohen “The relational contract of Employment” 2012 *Acta Juridica* 90

³³ Tamara Cohen “The relational contract of Employment” 2012 *Acta Juridica* 91

³⁴ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 9-10

³⁵ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 9

³⁶ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 10

³⁷ Monray M Botha “The different worlds of Labour and Company Law: Truth or Myth?” *PELJ* 2014 (17) 5 2056

³⁸ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 10

³⁹ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 8

Proponents of this perspective view labour law as suspect. Labour legislation is perceived "with the disdain normally reserved for an alien plant species, an unwelcome intruder invading the indigenous landscape of the common law and imposing unwarranted regulation".⁴⁰ One may say they view labour law as a gimmick to rig the market calculated at enabling employees to extract higher rents than they deserve.⁴¹ Libertarians view labour law as a tool that undermines the freedom to contract on equal terms in the marketplace.⁴² In essence, proponents of the libertarian perspective do not favour regulation of the labour market; conversely, they prefer employers to have more flexibility in employment matters which is best achieved through deregulation.⁴³

The argument advanced in favour of deregulation is that by regulating, the law meant to protect employees tends to have the unintended collateral effect of preserving the employed at the expense of the unemployed.⁴⁴ In essence, one may say; it appears that when the law imposes minimum labour standards that an employer will not afford, it prevents an employer from employing a worker who could have accepted less favourable employment terms. As a result, prospective potential employees are forced to be unemployed against their will since statutory regulation is inimical to the freedom to work under any conditions.⁴⁵

The import from this view is that the real choice for policymakers is between allowing employees to work under any conditions acceptable to them or forcing them to be unemployed against their will.⁴⁶ To elaborate, one may consider a scenario where an employer and employee would have contracted for less favourable terms acceptable to them. They will find themselves unable to conclude a contract on mutually acceptable terms.⁴⁷ It would be because labour law prescribes

⁴⁰ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 9

⁴¹ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5 2045

⁴² Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 9

⁴³ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5 2045

⁴⁴ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 8

⁴⁵ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 8

⁴⁶ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 8

⁴⁷ For instance, a hypothetical example is that a prospective worker may be willing to accept work that pays below the minimum wage, and an employer is willing to take the employee at that rate but unable to pay above minimum wage. In this situation, the worker and employee are effectively prevented from contracting of terms acceptable to both.

some contract terms that the employer may not accept or afford and probably above the minimum acceptable by the prospective worker.⁴⁸ In response to how to protect employees, the promoters of the libertarian perspective advance the argument that the only legitimate means of protecting employees is through effective and adequate common law and allowing markets to enforce good behaviour. For example, an employer who ill-treats workers would be shunned by talent.⁴⁹ Therefore, employers will compete for labour by offering ever-improving terms and conditions of employment.⁵⁰

However, the latter line of reasoning is glaringly untenable. In most situations, the employee can offer neither unique skills nor outstanding expertise and does not have the financial resources to resist the employer's employment conditions.⁵¹ Libertarians believe that abolishing labour law will benefit the labour market and the broader society.⁵² Also, due to the scarcity of employment, it is not true that employers compete for labour or talent. Instead, unskilled, and most skilled prospective workers compete for work and risk a getting exploited due to what Karl Marx calls the dull compulsion of economic necessity.⁵³ Therefore, it is not true that an employee can choose between accepting work and rejecting work. The need to put food on the table will constrain workers to accept any conditions they would not have preferred but for hardship.⁵⁴

A further argument advanced in favour of deregulation is that labour market regulation tends to deter investment.⁵⁵ The view is that jurisdictions with little labour market regulation have a competitive advantage in accessing global markets.⁵⁶ In essence, an individual contract of employment (governed by the common law of contract) is the best means to ensure flexibility and competitiveness.⁵⁷ In dealing with the proposition that the common law of contract should be the

⁴⁸ Shereen Mills (2004) 25 *ILJ* 1203

⁴⁹ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019) 9

⁵⁰ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019) 10

⁵¹ Dennis Davis "Functions of Labour Law" 1980 (13) *Comparative and International Law Journal of Southern Africa* 212-218

⁵² Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

⁵³ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

⁵⁴ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

⁵⁵ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019) 9

⁵⁶ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019) 9

⁵⁷ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019) 9

sole mechanism through which an employment relationship is governed, one must accept that the common law of contract plays a fundamental role in regulating the employment relationship.⁵⁸

Further, the view that deregulation is a viable idea is cynical and disingenuous. The allocation of power and distribution of wealth pre-labour law is not natural.⁵⁹ In essence, it is the progeny of the dictates of the law, such as, *inter alia*, company law, property law and contract law.⁶⁰ For instance, companies rely on the law to advance profit agendas and trade efficiencies such as limited liability.⁶¹ Therefore, labour law seems to be intervening in a market that is not genuinely free of regulation after all.⁶² Law of contract, property and company law, among others, show that the pre-labour law market is not free from regulation but simply regulated in favour of those with resources, who typically become employers.⁶³ They further rely on the regulations from law to enforce the same contracts they have entered into from a superior bargaining position and escape liability by using the corporate shield of limited liability, among other things.⁶⁴ One may, therefore, say that the argument for deregulation of the labour market alone is cynical and disingenuous. A more principled approach would be to treat all regulations in the same manner. If it is tenable to deregulate labour, it may just as well be appropriate to deregulate company law as well. The same fears around deregulation in these areas of law ought to be applicable in labour law.⁶⁵ The import is that labour law, like company law and property law etc. should be seen as a necessary part of the regulations that determine how markets function.⁶⁶

There are several other reasons why deregulation would be inappropriate in South Africa's labour market. Firstly, it is fallacious to argue a case that trade gains and access to foreign direct investment should be linked to poor labour standards.⁶⁷ There is no empirical evidence in support

⁵⁸ Tamara Cohen “The relational contract of Employment” 2012 *Acta Juridica* 85

⁵⁹ Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 314

⁶⁰ Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 314

⁶¹ Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 314

⁶² Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 314

⁶³ Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 314

⁶⁴ Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 314

⁶⁵ Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 315

⁶⁶ Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 314

⁶⁷ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019) 10

of this position. The discussion will show sufficient empirical evidence to hold a contrary position.⁶⁸ Studies on the potential links between labour standards and access to capital have concluded that there is no significant link between export returns or foreign direct investment and labour standards. It established that countries with poor labour standards held no competitive advantage.⁶⁹

Furthermore, notwithstanding considerations from economists, there are legal obstacles to the deregulation of the labour market.⁷⁰ The first has to do with South Africa being a constitutional democracy governed by a supreme constitution.⁷¹ The Constitution, which is the supreme law of South Africa, has a justiciable bill of rights, and there are labour related fundamental rights.⁷² Section 23 of the Constitution⁷³ entrenches labour rights, particularly the right to fair labour practices.

The second reason against labour deregulation is premised on South Africa's obligations under international law. South Africa is a member state of the International Labour Organisation (ILO).⁷⁴ South Africa has ratified the eight ILO core conventions since the constitutional dispensation was ushered in. The eight-core conventions are the most important of the ILO conventions.⁷⁵ The primary objective of the ILO is to ensure international regulation of labour standards. The guiding principle is that universal and lasting peace can be established based on social justice.

Further, the ILO core conventions require South Africa to respect the right to freedom of association, promote collective bargaining, guarantee equality at work, and prevent all forms of child labour.⁷⁶ Consequently, the labour market is not a matter better left to economics. The Constitution and international law obligations fetter the policy choices available.⁷⁷ In concluding

⁶⁸ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019) 10

⁶⁹ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019) 10

⁷⁰ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019) 10

⁷¹ The Constitution of the Republic of South Africa, 1996

⁷² Section 23 of the Constitution of the Republic of South Africa, 1996

⁷³ Du Toit D *et al*, *Labour Relations Law – A comprehensive Guide* 6th ed (LexisNexis 2015)

⁷⁴ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019)

⁷⁵ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019) 10

⁷⁶ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019) 10

⁷⁷ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019) 11

the libertarian view, it is apparent that if labour laws are abolished, worker participation initiatives enabled by labour law would fall away, not be observed or taken seriously. Nothing guarantees that employers who are inherently in a stronger position will be willing to engage the weaker employee in circumstances where no law assists the powerless employee.⁷⁸

2.2.2. The Social Justice Perspective.

The second perspective, that is a diametrical opposite to the libertarian views above, is the social justice perspective.⁷⁹ The social justice perspective recognises that the law is a tool to advance social justice, and the essence of social justice is fairness.⁸⁰ Unlike the libertarian view, the social justice perspective accepts the risk of exploitation of employees resulting from the inequality of bargaining power.⁸¹ It rejects the idea that a contractual relationship should be based on the discrete concept of a contract explained above.⁸² There is an acceptance that some species of contracts, such as the employment contract, cannot be regulated by the principles of the common law of contract alone. The view is informed by considering that contracts of employment are relational.⁸³ In essence, the relationship between the contracting parties is long-term and evolving.⁸⁴ Hence, the long-term cooperation of the contracting parties is essential for the successful performance and endurance of the contract.⁸⁵ For relational contracts to succeed, short-term interests and opportunism must be subdued and defer to long-term cooperative social behaviour, leading the parties "to treat their contracts more like marriages than one-night stands".⁸⁶

Social justice seeks to ensure that the risk of exploitation is significantly mitigated. The risk of exploitation is evident when one considers that "people are both selfish and social",⁸⁷ traits that

⁷⁸ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17) 8

⁷⁹ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019)

⁸⁰ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019)

⁸¹ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17) 9

⁸² Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 91

⁸³ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 91

⁸⁴ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 91

⁸⁵ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 89

⁸⁶ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 89

⁸⁷ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 91

may be dangerous to weaker stakeholders if a company holds them. Considerations of 'solidarity and reciprocity must temper these characteristics'.⁸⁸ Social justice achieves its objectives in two ways: the protectionist sense and granting procedural rights. Most of the issues relating to these interventions will be discussed in due course.

The protectionist intervention flows from acknowledging the inequality of bargaining power between employer and employee.⁸⁹ At this stage, social justice promotes fairness by ensuring that the parties do not contract below a certain threshold of terms.⁹⁰ Norms or regulations prescribe standards that employees may not waive, particularly in moments of desperation. More on this aspect is detailed below.

The second way in which social justice facilitates fairness is based on the view that bargaining power is not only unequal at the stage of entering into a contractual relationship.⁹¹ The employer still occupies a powerful position during the subsistence of the contract. Social justice seeks to redress this disparity of power through procedural initiatives.⁹² This type of intervention is essential because the employment contract is relational and evolves during its tenure, as suggested above.

One of the first signs of such procedural initiatives is the collective bargaining system.⁹³ As aforesaid, Sir Otto Kahn-Freund asserted that labour law is a means of countering the unequal bargaining power between employers and employees⁹⁴ or, conversely, that labour law is a mechanism for ensuring a balance between the position of the employer and that of the

⁸⁸ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 89

⁸⁹ Dennis Davis "Functions of Labour Law" 1980 (13) *Comparative and International Law Journal of Southern Africa* 212-218

⁹⁰ Guy Davidov "The (changing?) idea of labour law" 2007 (146) *International Labour Review* 314

⁹¹ Dennis Davis "Functions of Labour Law" 1980 (13) *Comparative and International Law Journal of Southern Africa* 212-218

⁹² Dennis Davis "Functions of Labour Law" 1980 (13) *Comparative and International Law Journal of Southern Africa* 212-218

⁹³ Van Niekerk, Andre and *Smit Law @ Work* 5th ed (LexisNexis 2019) 12

⁹⁴ Davis P and Freedland M *Kahn-Freund's Labour and the Law* 3rd ed (London Stevens and Sons 1983) 15

employees.⁹⁵ Eliminating disparities in bargaining power is best achieved through collective bargaining.⁹⁶ In this sense, it is hoped that workers can match or equal collective bargaining power through collective action.⁹⁷ The law intervenes to facilitate collective action such as trade union activities like demarcating a strike's boundaries or when the power disparities are significant enough to preclude any prospect of an autonomous negotiated settlement.⁹⁸ It is noteworthy that a collective bargaining regime does not mean that a real balance has been achieved in the bargaining power between employers and employees.⁹⁹ However, it can be said that where collective action takes place, the disparities in power between the employer and the employee are usually less dramatic.¹⁰⁰ The collective bargaining regime will be discussed more fully in the next chapter.

It is apt to attempt to conceptualise why there might be a likelihood of a dispute or unfairness between employer and employee, necessitating calls for social justice. It is submitted that the problems between labour and business relate to labour market flexibility, at least from a labour perspective.¹⁰¹ Labour market flexibility has become associated with various notions that are either for or against labour protection or otherwise, by legislative means.¹⁰² A more pertinent description of labour market flexibility is "the extent to which an enterprise can alter various aspects of its work and workforce to meet the demands of the business, for example, the size of the workforce, contents of the jobs, working time etc." ¹⁰³

From the above, the yardstick of labour market flexibility is the extent to which the market is free of protective or regulatory measures. In other words, how easily an employer hire can and lay off

⁹⁵ Dennis Davis & Michelle, Le Roux "Changing the role of the Corporation: A journey away from adversarialism" 2012 *Acta Juridica* 309

⁹⁶ Dennis Davis & Michelle Le Roux "Changing the role of the Corporation: A journey away from adversarialism" 2012 *Acta Juridica* 319

⁹⁷ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" 2014 (17) *PELJ*

⁹⁸ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)

⁹⁹ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)

¹⁰⁰ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" 2014 (17) *PELJ* 5

¹⁰¹ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014) 6.3

¹⁰² Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014) 6.3

¹⁰³ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014) 6.3

employees or alter various aspects of the work without regulatory impediments.¹⁰⁴ The reason companies would want more flexibility is not difficult to perceive. Companies need flexibility because the corporate need for employees is a derived demand. "In other words, employers do not wish to hire labour for the sake of it, but simply because there is a market demand for a product that labour will be used to produce"¹⁰⁵. Companies are engaged in production to increase shareholder wealth, and employees, in terms of this line of reasoning, tend to be viewed as a factor of production.¹⁰⁶ Their labour is needed to facilitate increasing shareholder wealth. Therefore, an employer-focused on increasing shareholder wealth will endeavour to obtain labour at the lowest cost possible.¹⁰⁷ Conversely, an employee will not pro-actively retain labour even when the employees have become redundant. When a company views workers from that vantage point, the risk that employee interests will be collateral damage when the company seeks to reduce labour related costs is not difficult to notice.

Interestingly, in countries where there is much-unskilled labour and extremely high unemployment levels, it is easy to obtain labour at a meagre cost since most unskilled labourers would be desperate for work.¹⁰⁸ On the other hand, an employee will need to at least earn a living wage; a living wage may always be higher than what other, more desperate employees may be prepared to accept. This problem became evident when there was an outcry that immigrants accept work for low salaries that locals are not ready to accept.¹⁰⁹

It nevertheless remains possible for the employee to be exploited by the employer. It can, therefore, be argued that labour law and collective bargaining play a significant role in resolving power disparities; however, there is always a regulatory gap that cannot be addressed through adversarial

¹⁰⁴ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014) 6.3

¹⁰⁵ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014) 5.3

¹⁰⁶ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014) 5.3

¹⁰⁷ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014) 5.3

¹⁰⁸ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 67

¹⁰⁹ Raphael Chaskalson "Do immigrants "steal" jobs in South Africa? What the data tell us"

<https://www.groundup.org.za/article/do-immigrants-steal-jobs-south-africa-what-data-tell-us/> (Date of use 12 June 2021).

measures or even through labour laws. Some solutions to the problems may lie in corporate governance or corporate social responsibility measures.

2.2.3. Market Views on Functions of labour laws.

The market views reveal another hotly contested angle regarding the perspectives of the function of labour law. But the main contention of the labour market views comes from the fact that government intervention plays a role in prosperity and economic success.¹¹⁰ The argument supporting this theory is that efficiency is achieved by letting markets work freely and considering such interventions as labour law harmful.¹¹¹ Essentially, under this theory, the function of labour law is assessed on questions of efficiency and fairness.¹¹² Labour law promoters have ostensibly not given much resistance to the view of labour undermining efficiency.¹¹³ Labour law promoters have sought to justify labour law's claim to exist on other grounds. They do so by insisting that the intervention is necessary for other noble objectives such as fairness or distributive justice, defending human dignity, promoting equality, among other things.¹¹⁴ This approach has left the impression that labour law advances equity at the expense of efficiency.¹¹⁵ In essence, the issue became a very simplified and ideological one supported by efficiency equated with the free working of markets. Alternatively, it became about equity seen as an intervention in the market favouring other goals.¹¹⁶ The view resulted in some conservative governments putting in some effort to dismantle labour law.

The idea that there must be a trade-off between equity and efficiency conforms well with the portrayal of employment relations as confrontational.¹¹⁷ The conflict is born out of the perception that the employment relationship is a zero-sum game. There is a view that if one of the parties were to yield ground, they lose to the other party. The inherent conflict of interests between

¹¹⁰ Monray M Botha “The different worlds of Labour and Company Law: Truth or Myth?” 2014 (17) *PELJ* 2049

¹¹¹ Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 313

¹¹² Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 313

¹¹³ Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 313

¹¹⁴ Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 313

¹¹⁵ Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 313

¹¹⁶ Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 313

¹¹⁷ Guy Davidov “The (changing?) idea of labour law” 2007 (146) *International Labour Review* 313

employers and employees exists on three levels. First, the higher the wages and benefits, the lower the profit left to the employer. Secondly, there is a conflict regarding decisions concerning the work itself. Finally, there is a conflict regarding the division of labour: the employer sometimes wants to divide the work into repetitive, uninteresting, and unchallenging tasks. This implies an inherent conflict, usually resolved in favour of the employer because of the employer's superior bargaining position.¹¹⁸

The foregoing clearly demonstrates why labour law is required. The need arises from the desire to avoid the unilateral and unfair settlement of the conflict.¹¹⁹ Labour law, therefore, has a redistributive role.¹²⁰ At the bargaining stage of the contract, labour law imposes minimum conditions of employment, and the employer and employee may agree on more favourable terms.¹²¹ The task of labour law is to prevent or remedy this failure by favouring equity considerations, either redistributive or otherwise, over efficiency considerations.

2.3. The efficacy of Labour Law in its functions.

The previous discussion has dealt with the views for and against labour regulation. However, its nature and definition were not addressed. This approach was deliberate since the preference was to make out a case for its existence, and then in this part, the thesis investigates how it achieves its purpose. As a starting point, it should be noted that the definition of labour legislation and its functions are inextricably linked.¹²² The issues around the role of labour law seek to answer the question "What is labour law for?".¹²³ In other words, what purpose is served by labour law? For

¹¹⁸ Guy Davidov "The (changing?) idea of labour law" 2007 (146) *International Labour Review* 313

¹¹⁹ Paul Davis and Mark Freedland *Kahn Freund's Labour and the Law* 3rd ed (London Stevens and Sons 1983) 18

¹²⁰ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" 2014 (17) *PELJ* 2049

¹²¹ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" 2014 (17) *PELJ* 2051

¹²² Dennis Davis "Functions of Labour Law" 1980 (13) *Comparative and International Law Journal of Southern Africa* 212

¹²³ Guy Davidov and Brian Langille *The idea of Labour Law* (Oxford University Press 2011) 1

this thesis's context, a crucial follow-up question is whether the labour law serves its purposes or functions efficaciously.

A working definition of labour law is complex, and it would be a grave injustice to try to reduce it to a single meaning.¹²⁴ A better approach to appreciating the concept would be to explain what labour law entails, and its purpose.¹²⁵ Piron defines labour law as "that part of the positive law which regulates the Industrial and collective labour relations in the private sector between an employer and his worker, workers and their fellow workers and the workers and employees and the state."¹²⁶ The relationship is such that the definition of labour law will point to the predominant functions of labour law.¹²⁷

Kahn Freund sheds light on Piron's point of view on the nature of labour law functions.¹²⁸ He affirms that the main objective of labour law is, among other things, to regulate support, to restrict the power of management and the power of labour.¹²⁹ The view is based on the idea that labour law acts as a countervailing force to counteract bargaining power inequality in the employer-employee relationship.¹³⁰ For his part, Langille, a Canadian scholar, posits that labour law's objective is "justice" in employment and productive working relations, which will not otherwise be obtained if workers in the labour market were still at a bargaining disadvantage in the "contracting process."¹³¹ It must be added that the disadvantage in negotiation will be harmful even during the employment relationship. The discussion will now investigate how labour law seeks to achieve its objectives. It is submitted that Labour law aims to achieve its objective in a protectionist or substantive sense and a procedural sense.

The underlying idea of a function of labour as a compensatory force correcting the imbalance of power between employee and employer was partly dealt with above. Suffice to mention that the function of labour law counteracting unequal bargaining power is based on the idea that employees

¹²⁴ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" 2014 (17) PELJ 2048

¹²⁵ Guy Davidov and Brian Langille *The idea of Labour Law* (Oxford University Press 2011) 1

¹²⁶ J Piron "The theory of collective bargaining" 1978 *THRHR* 183 at 196.

¹²⁷ Dennis Davis "Functions of Labour Law" 1980 (13) *Comparative and International Law Journal of Southern Africa* 213

¹²⁸ O Kahn Freund *Labour and the law* (1972) 8.

¹²⁹ *ibid*

¹³⁰ *ibid*

¹³¹ Langille B "Core Labour Rights – The True Story (Reply to Alston)" 2005 *EJIL* 409

are disadvantaged by unequal bargaining power compared with the employer.¹³² Adam Smith put it well when he said that "*it is not difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute and force the other into a compliance with their terms.*"¹³³ The disparity arises because the employer, on most occasions, has resources, and the employee has little or no bargaining power due to lack of financial clout and possibly political reasons. Only a few employees can bargain with employers on equal terms.¹³⁴ It is employees who hold executive positions and have unique skills who have the clout to bargain individually.¹³⁵ Even if this is accepted, these constitute a low proportion of the total number of employees.

2.3.1. intervention in the protectionist sense.

In the protectionist sense, labour law seeks to fix the inequality of bargaining power, and this can be traced to when the employer and prospective employee are negotiating a contract.¹³⁶ At this time, the employer and the employee must agree on the terms of the agreement. The employer in a superior bargaining position may dictate the terms to an employee who, on most occasions, is constrained to accept the terms due to the dull compulsion on economic necessity, as Marx observed.¹³⁷ Economic necessity, particularly in South Africa, where poverty is rife among unskilled workers, is the need to survive and have bread on the table.¹³⁸ It is fair to say that many people looking for jobs are somewhat desperate. The expression which best describes the bargain scenario is that the "*masters can hold out much longer... Many workers could not subsist a week, few could subsist a month, and scarce any a year without employment*".¹³⁹ The risk of exploitation is evident because an employee, in many cases, is desperate and unable to refuse work even if unfair terms are proposed.¹⁴⁰

¹³² Guy Davidov "The (changing?) idea of labour law" 2007 (146) *International Labour Review* 316

¹³³ Guy Davidov "The (changing?) idea of labour law" 2007 (146) *International Labour Review* 312

¹³⁴ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 15

¹³⁵ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019) 16

¹³⁶ Guy Davidov and Brian Langille *The idea of Labour Law* (Oxford University Press 2011) 12

¹³⁷ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" 2014 (17) *PELJ* 2051

¹³⁸ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" 2014 (17) *PELJ* 2051

¹³⁹ Guy Davidov "The (changing?) idea of labour law" 2007 (146) *International Labour Review* 312

¹⁴⁰ Dennis Davis "Functions of Labour Law" 1980 (13) *Comparative and International Law Journal of Southern Africa* 215

To resolve this issue, labour law endeavours to secure justice for the employee by rewriting the substantive deal between employers and employees.¹⁴¹ Intervention in this sense is achieved through protective legislation. Statutes providing and integrating the interests of women and children, labour standards; aspects like *inter alia*; maximum hours of work, vacations, minimum wages, health, and safety regulations. It is important to note that the employer or the employee cannot change the minimum requirements, which are presumed to be included in any employment contract.

The Basic Conditions of Employment Act 75 of 1997¹⁴² ("BCEA") provides in its long title that it seeks to give effect to the provisions of section 23 of the Constitution¹⁴³ by providing for basic conditions of employment. Interestingly basic denotes the minimum acceptable standards. Therefore, the BCEA provides for minimum standards of employment that apply to certain groups of employees. The BCEA further states that it enables South Africa to comply with its obligations as a member of the International Labour Organisation.¹⁴⁴ Section 2 (1) (ii) of the BCEA regulates the variations of the basic conditions of employment.¹⁴⁵ Section 4 of the BCEA provides that an essential condition of employment constitutes a term of any employment contract. Except where any other law provides a more favourable term to the employee or has been varied, replaced, or excluded by the BCEA itself.¹⁴⁶ Or where the contract of employment provides for a better provision.¹⁴⁷ In essence, the BCEA rewrites the minimum terms of the employment contract, which the parties cannot vary unless so expressly allowed by the BCEA.¹⁴⁸ Section 5 explicitly provides that the BCEA is not affected by agreements since anything done under it supersedes any agreement, whether entered into after or before the commencement of the Act.¹⁴⁹ The practical

¹⁴¹ Dennis Davis "Functions of Labour Law" 1980 (13) *Comparative and International Law Journal of Southern Africa* 213

¹⁴² Basic Conditions of Employment Act 75 of 1997

¹⁴³ S23 of the Constitution of the Republic of South Africa, 1996.

¹⁴⁴ Basic Conditions of Employment Act 75 of 1997

¹⁴⁵ Basic Conditions of Employment Act 75 of 1997

¹⁴⁶ Basic Conditions of Employment Act 75 of 1997

¹⁴⁷ Section 4 of the Basic Conditions of Employment Act 75 of 1997

¹⁴⁸ Basic Conditions of Employment Act 75 of 1997

¹⁴⁹ Basic Conditions of Employment Act 75 of 1997

effect of BCEA will be to make it impossible for the employer to drive down the bargain below certain thresholds because it is non-waivable.

The Labour Relations Act¹⁵⁰ also contains provisions to give effect to Section 23 of the Constitution.¹⁵¹ It achieves this differently by regulating, among other things, freedom of association, collective bargaining, strikes, unfair labour practices and unfair dismissals. These aspects will be considered in detail in the next chapter. It is pertinent that rewriting the contract's substantive terms is essential because it can no longer be assumed that the contractual terms reflect the parties' free will.¹⁵²

2.3.2. protection in the Procedural sense.

Labour law balances bargaining power in the procedural sense.¹⁵³ The intervention is through procedural protections, which compliments substantive intervention. Labour law endeavours to fulfil the function of protecting the rights to a fair bargaining process.¹⁵⁴ A procedural protection mechanism is needed over and above the first substantive protection; in labour relations, legal norms cannot often be effective unless social sanctions also back them. One way is to formalise the countervailing power of trade unions and organised labour to withhold their labour.¹⁵⁵ Strong trade unions tend to be more effective than what substantive law can ever deliver as a countervailing power mechanism.¹⁵⁶ Procedural interventions ensure the provision of legitimate channels within which trade unions may operate.¹⁵⁷ The essence of substantive labour law is sometimes said to be paternalistic, and the results are standards imposed upon the parties, whether they like it or not. The essence of procedural labour law is freedom of contract and self-

¹⁵⁰ Labour Relations Act 66 of 1995

¹⁵¹ Constitution of the Republic of South Africa. 1996

¹⁵² Guy Davidov "The (changing?) idea of labour law" 2007 (146) *International Labour Review* 312

¹⁵³ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" 2014 (17) *PELJ* 2049

¹⁵⁴ Dennis Davis "Functions of Labour Law" 1980 (13) *Comparative and International Law Journal of Southern Africa* 214

¹⁵⁵ Dennis Davis "Functions of Labour Law" 1980 (13) *Comparative and International Law Journal of Southern Africa* 214

¹⁵⁶ Dennis Davis "Functions of Labour Law" 1980 (13) *Comparative and International Law Journal of Southern Africa* 213

¹⁵⁷ Dennis Davis "Functions of Labour Law" 1980 (13) *Comparative and International Law Journal of Southern Africa* 213

determination, which people call industrial democracy. Its results are basic rights that lead to better but self-determined outcomes.¹⁵⁸ More on procedural initiatives will be discussed in the next chapter. The reason for so doing is because procedural methods are part of worker participation initiatives facilitated through labour law, the following chapter deals with the aspect.

It has been demonstrated above that Labour Law intervenes in the market to rectify power imbalances lurking in the employer and employee relationship. This function of labour law is crucial in this discourse. It has also been stated that the functions of labour law are not limited solely to this function. The objectives of labour law also involve the need to preserve social peace and broader social purposes, such as productive relations between employers and employees. It is, therefore, not a function of labour law to intervene in market forces. When a successful partnership exists between employers and employees, they not only have a mutual understanding of one another's needs. but they also have the shared goal of developing a winning business.¹⁵⁹ The procedural function of labour law enables employees to function in a participatory role in the company. There are also initiatives like workplace forums provided in the Labour Relations Act - designed to reduce workplace conflict. The next chapter will evaluate their efficacy in ensuring harmonious relations at the workplace. In addition, collective bargaining as a participatory mechanism and form of power will be considered.

¹⁵⁸ Monray M Botha “The different worlds of Labour and Company Law: Truth or Myth?” 2014 (17) *PELJ* 2049

¹⁵⁹ Monray M Botha “The different worlds of Labour and Company Law: Truth or Myth?” 2014 (17) *PELJ* 2049

3. Worker participation initiatives through Labour Law.

In this section, emphasis is placed on worker participation initiatives facilitated by labour law. The view is to critically examine how labour law enables worker participation and, more pertinently, if the initiatives are efficacious. If not, make a case for supplementing labour law through initiatives from other branches of law like company law or corporate governance. The Labour Relations Act¹⁶⁰ has given new impetus to the discussion on worker participation. The focus is on two main ways employers and employees can facilitate worker participation under the auspices of South African labour law. More particularly, the emphasis is on collective bargaining and workplace forums. The key question about these initiatives is how collective bargaining and workplace forums advance the objectives of worker participation and, therefore, productive industrial relations and industrial peace.¹⁶¹

Recent events in South Africa, the tragedy at Marikana in 2016 being one example, and the conflicting nature of the relationship between employers and employees reinforce the need for worker participation and peaceful relations between employers their employees.¹⁶² Notably, even in the new constitutional dispensation, the relationship has been characterised by acrimonious clashes that undermine prospects of harmonious co-existence between employers and workers.¹⁶³ The relationship between employers and employees has been mired by conflict, animosity and strikes and the Marikana instance is one example. The reason for this is the way employees and employers engage, particularly the way collective bargaining is conducted.

Worker participation may be described in general terms as a process that allows employees, either individually or collectively, to participate meaningfully and contribute to the running and decision making of the organisation.¹⁶⁴ Participation could include instances in decisions where employees and the business is affected.

¹⁶⁰ Labour Relations Act 66 of 1995

¹⁶¹ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

¹⁶² Maswanganyi N (28 December 2012) 'No Repeat of Marikana', in 'Changed SA Labour Landscape' Business Day Live. Available at [http://www.bdlive.co.za/national/labour/2012/12/28/no-repeat-of-marikana-in-changed-sa-labour-landscape?service=print.](http://www.bdlive.co.za/national/labour/2012/12/28/no-repeat-of-marikana-in-changed-sa-labour-landscape?service=print))

¹⁶³ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014) 11.3

¹⁶⁴ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014) 12.2

Worker involvement could involve codetermination or joint decision-making, which consists in making decisions only when both parties approve them.¹⁶⁵ Worker participation initiatives like core determination envisage more than consultation, although related. Worker participation gives employees a voice in labour issues that affect them.¹⁶⁶ Employees are directly interested, especially in matters that affect them in the workplace.¹⁶⁷ This part will contend that the success or failure of the worker participation initiatives hinges on how the initiatives are implemented. It will be argued that the success of worker participation depends on the party's commitment to meaningful engagement.¹⁶⁸ For meaningful engagement to succeed depends on the parties' commitment and good faith when they participate in these engagements.

Collective bargaining and workplace forums are the main methods of worker participation through labour laws.¹⁶⁹ The success or failure of these initiatives depends on the parties' attitudes when engaging.¹⁷⁰ For example, notwithstanding the adversarial nature of collective bargaining, its success depends on the efficacy of the parties during negotiation processes.¹⁷¹ While collective bargaining ultimately depends on parties exercising power to extract concession, the reference should be to reach consensus first and foremost. Parties still need to be able to negotiate meaningfully and in good faith for the collective bargaining regime to be sustainable.¹⁷²

3.2. Collective bargaining and worker participation.

The genesis of collective bargaining can be traced back to times before the Constitution.¹⁷³ However, it now rests on the Constitution as a human rights imperative. The right to freedom of association is the bedrock for collective bargaining in a generalised sense. Section 18¹⁷⁴ grants

¹⁶⁵ Marie Johane "Worker participation in decision-making: Who benefits?" 2012 *STrans* (13) 6

¹⁶⁶ Anton Ravnic, "Worker Participation in Company Management" (1994) 44:5-6 *Zbornik PFZ* 572.

¹⁶⁷ *ibid.*

¹⁶⁸ Tonia Novitz, "Engagement with Sustainability at the International Labour Organization and Wider Implications for Collective Worker Voice," *International Labour Review* 159, no. 4 (December 2020): 468

¹⁶⁹ Darcy Du Toit "Collective Bargaining and Worker Participation" (2000) 21 *ILJ* 1544

¹⁷⁰ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014) 7.3

¹⁷¹ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014) 7.3

¹⁷² Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014) 7.3

¹⁷³ Constitution of the Republic of South Africa, 1996

¹⁷⁴ Section 18 of the Constitution of the Republic of South Africa, 1996

"everyone" the right to freedom of association, the scope of right applies to every association. However, section 23 (2) ¹⁷⁵ is more apposite and puts the right to freedom of association within the labour relations context. Section 23 (2) provides for the right of a worker to form and join a trade union, participate in the activities and programmes of the trade union, and strike.¹⁷⁶ Section 23 (3) grants an employer the right to form and join an employer's organisation and to participate in the programs of the employer's organisation. Section 23 (5) provides that every trade union and employer's organisation have the right to engage in collective bargaining.¹⁷⁷

In 1996, South Africa ratified two major ILO conventions on freedom of association, namely Conventions 87 and 98. Convention 87 guarantees all employers and workers, including supervisors, the right to freely establish and join organisations of their choice, subject to the organisation's rules.¹⁷⁸ That is consistent with what is enshrined in the Constitution. Convention 98 encourages member states to guarantee the right to collectively organise and bargain. It also provides for workers' protection against victimisation and discrimination by their employers on account of their trade union membership.¹⁷⁹ The rights of freedom of association and collective bargaining have as well been fleshed out in legislation. The most critical piece of legislation in this regard is the Labour Relations Act 66 of 1995.¹⁸⁰ The provisions above are the source of international obligations and the constitutional background for Chapter II of the Labour Relations Act 66 of 1995.¹⁸¹

The LRA implements labour related constitutional rights in detail and several ways. First, the LRA offers specific protection for employees and employers. For instance, no employee may be promised an advantage or benefit if s/he undertakes not to become a trade union member.¹⁸² Secondly, the LRA defines trade unions and employers' organisations to emphasise their collective bargaining role and engagement.¹⁸³ Their principal purpose must be to regulate relations between

¹⁷⁵ Section 23 of the Constitution of the Republic of South Africa, 1996.

¹⁷⁶ Ibid.

¹⁷⁷ Section 23 of the Constitution of the Republic of South Africa, 1996

¹⁷⁸ Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

¹⁷⁹ Darcy Du Toit *Labour Relations Law - A Comprehensive Guide*

¹⁸⁰ Labour Relations Act 66 of 1995

¹⁸¹ Ibid

¹⁸² Darcy Du Toit *Labour Relations Law - A Comprehensive Guide*

¹⁸³ Ibid.

employers and employees. Thirdly, the LRA then contextualises the right to freedom of association by embedding it with organisational rights (the rights enjoyed by the trade unions and employers' organisations) and from there on to facilitate engaging in collective bargaining (itself again a fundamental constitutional right).¹⁸⁴

Without the right to join or form a union, there would be no union, and without a union, there would be no collective bargaining.¹⁸⁵ Seen this way, freedom of association is the first link in a conceptual chain that links an individual employee (who becomes a member of a trade union) to the process of collective bargaining and, beyond this, the right to strike as envisaged in the constitutional provisions cited above.¹⁸⁶ The principal protection of workers' freedom of association is found in section 4 of the LRA.¹⁸⁷ This section states that employees have the right to form, join or participate in a union's legal activities.¹⁸⁸ Subject to the trade union's Constitution, every trade union member has the right to participate in union elections, to stand for election as office-bearer, official or a trade union representative (shop steward).¹⁸⁹ Also protected (see section 4(3) of the LRA) is the right of a trade union's members to participate in the lawful activities of a trade union federation if their union belongs to that federation.¹⁹⁰

Section 5 of the LRA is exceptional in several respects. Firstly, its protection is extended to include persons seeking employment (job applicants).¹⁹¹ No one may require an employee or a job applicant not to become a member of a trade union, to give up membership of a union or prejudice an employee or applicant because of their membership of a trade union, participation in the lawful activities of a union, or their participation in the forming of a trade union.¹⁹²

Collective bargaining is essential in labour relations, primarily because it balances the power relationship and allows employees to improve their rights.¹⁹³ Closely related to this idea is that the success of collective bargaining should be the attainment of its goal of levelling the playing field

¹⁸⁴ Ibid.

¹⁸⁵ Darcy Du Toit *Labour Relations Law - A Comprehensive Guide*

¹⁸⁶ Ibid.

¹⁸⁷ Labour Relations Act 66 of 1995

¹⁸⁸ Section 4 of Labour Relations Act 66 of 1995

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Section 5 of Labour Relations Act 66 of 1995

¹⁹² Ibid.

¹⁹³ Brenda Grant "In Defence of Majoritarianism: Part 1 - Majoritarianism and Collective Bargaining" (1993) 14 ILJ 305

for the employer and employee.¹⁹⁴ The next issue will be what needs to be done to ensure that there still remain harmonious labour relations in collective bargaining processes despite the process being adversarial. Conversely, the enquiry seeks to answer how collective bargaining can facilitate worker participation without occasioning/ with minimum aggressive bargaining. Collective bargaining is also based on jointly regulating the labour relationship through negotiation between employers and employees and their elected representatives.¹⁹⁵ Since collective bargaining is a joint effort, it follows that it is a process that inherently facilitates worker participation.¹⁹⁶

It is now established in law that the LRA does not impose a general duty to bargain but instead promotes voluntary regulation of collective bargaining.¹⁹⁷ The law does not interfere with the bargaining processes except that it facilitates collective bargaining.¹⁹⁸ The success or failure of collective bargaining depends on the parties' conduct during the process. To this end, it is submitted that the lifeblood of collective bargaining is negotiation.¹⁹⁹ The infamy surrounding the adversarial nature of collective bargaining can be traced back to the failure to negotiate properly.²⁰⁰ Since negotiation is a voluntary, consensus-seeking process, it makes sense that collective bargaining is not compelled or has no duty to bargain.²⁰¹ Even under the old Labour Relations Act, the courts held that a duty to bargain was not enough to achieve collective bargaining objectives.²⁰² Instead, parties needed to approach the negotiations with an open mind and a genuine desire to reach an agreement.²⁰³ This discussion will examine the key facilitative process for collective bargaining, viz., the negotiating process. The view is that if parties conduct the negotiations well in the collective bargaining process, it may result in successful collective bargaining resulting in a harmonious labour relations environment. In dealing with this aspect, the negotiation process in collective bargaining will be the focus.

¹⁹⁴ Monray M Botha “The different worlds of Labour and Company Law: Truth or Myth?” 2014 (17) *PELJ* 2051

¹⁹⁵ Darcy Du Toit *Labour Relations Law - A Comprehensive Guide*

¹⁹⁶ *Ibid.*

¹⁹⁷ Darcy Du Toit “Collective Bargaining and Worker Participation” (2000) 21 *ILJ* 1544

¹⁹⁸ Monray M Botha “The different worlds of Labour and Company Law: Truth or Myth?” 2014 (17) *PELJ* 2051

¹⁹⁹ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁰⁰ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁰¹ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁰² Repealed Labour Act.

²⁰³ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

3.2.1. Negotiation.

In general, negotiation is the process through which collective bargaining and other dispute resolution processes are facilitated.²⁰⁴ Negotiation is pertinent in this context because it promotes participation rather than unilaterally imposing decisions on the other party. How negotiations are conducted is crucial because it determines whether the engagement is meaningful, and the resulting relationship will be harmonious.²⁰⁵ Negotiation, therefore, warrants particular attention in any consideration of labour relations. While collective bargaining and conciliation are two of the generic terms given to drawing together parties to the employment relationship for discourse, the actual mechanism for reaching consensus and formulating agreements, in which the parties have different preferences as to the outcome, is one of negotiation.²⁰⁶

Before addressing the actual functioning of the negotiations in detail, it is appropriate to consider how a typical engagement process between an employer and unions takes place in South Africa. This will further demonstrate the pertinence of negotiation. In South Africa, collective bargaining occurs more visibly during the unofficial period known as the strike season.²⁰⁷ In most cases, the unions will be interested in a wage increase for their members. Trade unions usually formulate demands that they serve on employers.²⁰⁸ Sometimes, trade unions' demands are poorly thought out or formulated, and the costs to employers may be or appear to be unreasonable.²⁰⁹ Employers, in turn, counter-offer unions with an equally untenable offer, like in the Sibanye still Water instance where the employer counter-offered with a zero per cent salary increase.²¹⁰

Nevertheless, the stalemate occurs when the parties are still relatively far apart in reaching a consensus.²¹¹ The inability to find each other can only result from inept negotiation skills, a lack of realistic expectations concerning market-related settlements, or both.²¹² It could be a case of sheer apathy in considering the other party's interests. When one party insists and resolutely

²⁰⁴ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁰⁵ Fisher and Ury *Getting to Yes*

²⁰⁶ *ibid.*

²⁰⁷ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁰⁸ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁰⁹ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²¹⁰ <https://www.iol.co.za/business-report/companies/sibanye-stillwater-to-meet-unions-as-strike-looms-at-gold-mines-a0575f02-fa74-531c-bd1e-e4aa509c6d89>

²¹¹ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²¹² Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

maintains 13%, and the other at 6%, there is little chance of a settlement, and neither party will achieve their stated outcome. A strike will ensue, as often happens when one of the parties is so far adrift of the market and economic conditions, and this applies as much to employers as to unions alike. Eventually, one of the parties is expected to make a concession.²¹³ A concession would typically take time. It is especially so if the parties are extremely far apart, which takes some time to resolve the dispute.²¹⁴

After all that has taken place, it may dawn on the parties that much of the strife could have been avoided if effective collective bargaining mechanisms were in place and the parties had genuinely bargained in 'good faith'.²¹⁵ More importantly, after the acrimonious and perhaps violent strike, there is no winner at the end of the day, and relations stand far more strained than they had been before the strike.²¹⁶ An employer who is recalcitrant and indisposed in arriving at a fair wage increase loses productive time and takes damage to property in what could have been avoided.²¹⁷ In the exercise of social power, unions fail to understand that wages settlement should follow or be determined by economic factors.²¹⁸ A failure to take economic factors into account is ultimately irresponsible, and unions will not be able to extract concessions driven over and above market expectations on a sustained basis.²¹⁹

This thesis will adopt a distinction between distributive negotiation/bargaining and integrative negotiation/bargaining. The difference will illustrate a form of engagement detrimental to harmonious relations and is usually driven by greed and, on the other hand, that which promotes meaningful engagement. It will be argued that distributive negotiation should never be the facilitating mechanism of engagement between employer and employee. Integrative bargaining is instead the better means of engagement between the employer and employee. Unfortunately, distributive negotiation tends to be more prevalent than integrative bargaining. The discussion of these negotiation methods follows in turn.

²¹³Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²¹⁴ enter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²¹⁵ enter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²¹⁶ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²¹⁷ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²¹⁸ enter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²¹⁹ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

3.2.1.1. Distributive bargaining.

Improper negotiation can be associated with distributive negotiating in the collective bargaining process.²²⁰ Distributive bargaining is typified as a win-lose interaction or the zero-sum approach.²²¹ The view is that any gain a party may make must be to the other party's detriment. These kinds of negotiations typically relate to the sharing of a scarce resource. Contextualised in labour relations, the apprehension is that increasing wages or expenses on employees will increase costs and reduce profits, thereby reducing dividends to shareholders.²²² By its very nature, distributive bargaining is generally adversarial, as each party seeks either to protect its share of the pie or to increase its share.²²³ The perception is that this may only occur at the other party's expense.²²⁴ Distributive bargaining is antithetical to the noble objectives of ensuring harmonious labour relations at the workplace and makes the employer and employee relationship more estranged.

The characteristics of distributive negotiation in collective bargaining are associated with unfair bargaining behaviours in the old LRA²²⁵. Some of those behaviours manifest as *inter alia*;

- unreasonable preconditions for bargaining,
- premature unilateral action.
- illegitimate pressure tactics.
- denial of union access.
- sham bargaining,
- inadequate substantiation of proposals and dilatory tactics.²²⁶

The above practices are symptomatic of unproductive distributive bargaining as a negotiation mechanism. Fisher and Ury described this type of negotiation as positional bargaining and

²²⁰ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²²¹ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²²² Fisher and Ury *Getting to Yes*

²²³ Ibid

²²⁴ Ibid

²²⁵ Old Labour Act

²²⁶ Darcy Du Toit *Labour Relations Law - A Comprehensive Guide*

typically a win-lose affair.²²⁷ Each party takes up a position and then proceeds to defend it from the other party's attack while simultaneously attempting to attack the other party's position, which in turn is defended rigorously.²²⁸ These exchanges quickly turn into a defence-attack spiral in which the stronger the attack, the stronger the resistance, and vice versa.²²⁹ The aforesaid is the typical engagement process between unions and employees.²³⁰

3.2.1.2. Integrative Bargaining.

On the other hand, integrative negotiation is the other pole of the negotiation continuum.²³¹ In this mode, the parties at the bargaining table are working toward a mutually beneficial outcome. "In popular parlance, these are "win-win" negotiations where the parties "seek to make the pie bigger", rather than quarrelling over each other's share."²³² Integrative bargaining implies that the parties share a common goal or can negotiate in an environment where there is some comfort in anticipation of the result being mutually desirable. It requires that parties prepare for their engagement and is well suited for situations like an employment agreement. While most of the negotiations, particularly pertaining to ordinary commerce like buying and selling, are done by counterparts who will never interact again, positional bargaining may be appropriate.²³³ Labour relationships are different; as aforesaid, the relationship is relational.²³⁴ The parties continue to meet daily. The experience and result of the negotiations become part of the shared history, informing the parties' attitudes and perceptions of each other, which becomes part of their shared history.²³⁵ The model of engagement proposed by authors Fisher and Ury is recommended to improve the worker and employee engagements from positional bargaining. The model envisages principled negotiation and entails observing four essential steps that the parties should follow.

²²⁷ Fisher and Ury *Getting to Yes*

²²⁸ Ibid

²²⁹ Ibid

²³⁰ Ibid.

²³¹ Fisher and Ury *Getting to Yes*

²³² Fisher and Ury *Getting to Yes*

²³³ Ibid

²³⁴ Tamara Cohen "The relational contract of Employment" 2012 *Acta Juridica* 87

²³⁵ Venter R and Levy A *Labour Relations in South Africa* 5th ed (Oxford University Press 2014)

Firstly, the parties in the negotiation process should be self-conscious, and they may achieve this by separating the people from the problem.²³⁶ Parties should avoid the trap of being subjects to their emotions. Emotions tend to entangle or dilute the objective merits of the issue.²³⁷ Adopting positions worsens differences as people's egos become identified with their positions. To prevent this problem, it is pertinent that "before working on the substantive problem, the "people problem" should be disentangled from it and dealt with separately. participants should come to see themselves as working side by side, attacking the problem, not each other."²³⁸ Evidence from most collective bargaining conflicts reveals that "people problems" tend to become forefront and obfuscate critical issues. Many unions accuse companies of being arrogant and accuse union leaders of being emotional,²³⁹ and that reveals how personality problems tend to be problematic.

Secondly, the parties should focus on interests as opposed to positions.²⁴⁰ By so doing, the parties will avoid the drawback of focusing on people's stated positions, whereas the object of a negotiation should be the satisfaction of their underlying interests.²⁴¹ Focusing on positions makes reaching consensus extremely difficult. The parties become less amenable to persuasion and default back to the zero-sum approach instead of seeking a win-win scenario.

The third factor closely related to the second above is that the parties should invent options for mutual gain. In this way, it is proposed that the parties ought to be able to be open to arriving at a solution that may be best described as a best-fit compromise for them.²⁴² Options for mutual gain imply that the position preferred by both parties is unsuitable. Therefore, the parties ought to be open to the idea of arriving at solutions that may be the best reflection of what the parties prefer.²⁴³

Lastly, the parties should use objective criteria to resolve the dispute between them. The importance of this is that a negotiator may obtain a favourable result simply by being stubborn. Consequently, this approach "may reward intransigence and produce arbitrary results". However, this eventuality may be obviated by insisting that a single say-so is not enough and "that the

²³⁶ Fisher and Ury *Getting to Yes*

²³⁷ Ibid

²³⁸ Ibid

²³⁹ [SABC unions file dispute, accuse management of 'gross arrogance' \(timeslive.co.za\)](http://timeslive.co.za) , [Striking Metrobus drivers accuse management of arrogance with refusal to talk \(ewn.co.za\)](http://ewn.co.za)

²⁴⁰ Fisher and Ury *Getting to Yes*

²⁴¹ ibid

²⁴² ibid

²⁴³ ibid

agreement must reflect some fair standard independent of the naked will of either side".²⁴⁴ For collective bargaining, one may take the example of a wage increase negotiation; it may be helpful to counter the employer's zero per cent increase by at least setting official inflation as a starting point. The following section of the work investigates another alternative form of labour law-based worker participation initiative not predicated on aggressive bargaining.

3.2. Workplace Forums.

Chapter V of the Labour Relations Act, the provision for workplace forums, the requirement for workplace forums introduced a new concept into South African labour law.²⁴⁵ It was deviating from the tradition of collective bargaining between employers and trade unions in some matters of common concern. It aimed to create a "second channel" of cooperative management and labour interaction, alongside collective bargaining.²⁴⁶ Indeed, the idea is welcome and would be the first step away from aggressive collective bargaining. While terms and conditions of employment would continue to be regulated by collective bargaining, a range of non-wage issues that previously fell within the scope of managerial discretion would be subject to consultation and joint decision-making.²⁴⁷ The aim, it was stressed, was not to "undermine collective bargaining, but to supplement it by removing collective bargaining from functions to which it is not well adapted".²⁴⁸ Adopting this line of thinking would complement the International Labour Organization (ILO), which adopted a convention and some recommendations calling for national measures to promote consultation on issues generally not dealt with in collective bargaining.²⁴⁹

The drafters of the workplace forum provisions were guided by the model of the German works council system.²⁵⁰ The objective was to introduce a form of participatory workplace governance into the South African labour relations system.²⁵¹ The idea of a workplace forum was that, in addition to collective bargaining, which is mainly concerned with the problem of distribution, a

²⁴⁴ Fisher and Ury *Getting to Yes*

²⁴⁵ Darcy Du Toit *Labour Relations Law - A Comprehensive Guide*

²⁴⁶ Darcy Du Toit *Labour Relations Law - A Comprehensive Guide*

²⁴⁷ Ibid

²⁴⁸ Ibid

²⁴⁹ Ibid

²⁵⁰ Ibid

²⁵¹ Ibid

system of participatory decision-making should be introduced into South Africa.²⁵² The contemplated functions of workplace forums were described as communication and co-operation between management and labour on production-related matters, more or less free of distributive conflicts over wages.²⁵³ Therefore, clearly, workplace forums are an innovative way of improving worker participation in running the company's affairs.

Although the model was adapted from other jurisdictions, it is pertinent to note that the model that emerged deviated in some ways from the German and Dutch models to respond to the realities of South African industrial relations.²⁵⁴ Despite the ambitious goals, the introduction of the Workplace Forum. Brassey suggests that the efficacy of the legislative provisions that created the workplace forum was bedevilled by distrust on both labour and capital.²⁵⁵ Capital feared that management's prerogative would be undermined at the workplace, while the unions feared that collective bargaining would be compromised.²⁵⁶ Brassey contends that to gain acceptance for this kind of workplace forum, which was exclusively worker-based, legislation was drafted that diluted the workplace forum's power and built-in safeguards to ensure that the system operated favouring the trade union movement. Accordingly, Brassey suggests that 'the result is a misshapen beast that no one seems keen to ride'.²⁵⁷

From the preceding, labour law-based worker-participation initiatives have assisted in removing extremities in risks that arise from inequitable bargaining power. The worker participation initiatives go a long way in granting the employee a voice in the workplace. However, the discussion will now make a case for supplementing labour law-based initiatives with corporate governance-based solutions. The need for doing so is based on the undesirability of aggressive bargaining. It is proposed to initially paint a picture or discuss how the use of force as means to resolve differences results in parties having an estranged relationship.

²⁵² Ibid

²⁵³ Ibid

²⁵⁴ Ibid

²⁵⁵ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁵⁶ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁵⁷ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

3.3. Inherent Problems in using force and regulation in an employment relationship.

It is essential to have an overview of how collective bargaining as a means of engagement between employer and employee achieves the advancement of worker participation and, incidental to that, the advancement of employee interests within the company. To this end, it will be immediately apparent that the collective bargaining system is an adversarial process, as described above.²⁵⁸ Therefore, it obtains favourable settlements for the employee by constraining the employer by exercising power or vice versa.²⁵⁹ This is more evident by the use of strikes and lockouts as a means to obtain concessions from the counter-party.²⁶⁰ A key consideration in this regard is that the employee's favourable outcomes are resultantly neither an outcome from consensus nor voluntary and altruistic, at least in most cases.

Therefore, it cannot be sustainable to rely on a system that seeks to achieve concessions by exercising power, sometimes in a manner that leaves relationships (even more) estranged.²⁶¹ Sometimes, an employer would concede to the unions' demands to avoid an often-violent strike.²⁶² The problem with a process seeking to obtain concessions through the exercise of power is that it may inhibit prospects of a harmonious relationship in the long run. This view is equally applicable to engagements in employment relations.²⁶³ It is further submitted that, in an open and democratic society infused by noble values like *ubuntu*, it must be possible to conduct collective bargaining and achieve concessions through a negotiation process. Indeed, the purpose of this thesis is not to undermine the regime of collective bargaining. The case being made is that there must be a way for employers and employees to bargain and still retain harmonious relations. The view is that; while collective bargaining advances worker participation, the participation should not result in detrimental outcomes on the relationship to the employment relationship.

²⁵⁸ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁵⁹ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012

²⁶⁰ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012

²⁶¹ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012

²⁶² Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁶³ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

To illustrate the results of how problems around maintaining labour relations through force-based bargaining mechanisms, a *locus classicus* case, which illustrates this point, is the matter of *Zuva Petroleum*²⁶⁴, a Zimbabwean case and the aftermath of the case. The facts of the case are within a narrow compass and are to be summarised in turn. The appellants, who in the case were erstwhile employees of the respondent, had their contracts of employment terminated on notice in terms of the common law and were paid cash *in lieu* of notice.

An arbitrator ruled that the termination of employment contracts was illegal because it was not in terms of a code of conduct.²⁶⁵ The Labour Court allowed the appeal against the arbitrator's decision. It held that the Labour Act [Chapter 28:01]²⁶⁶ had not abolished the employer's common law right to terminate employment on notice alone. On further appeal, the Supreme Court of Zimbabwe agreed that the employer could terminate the employment contract on notice. The Supreme court held that a statute could not be construed as having altered a common law position without explicitly stating so.²⁶⁷ In the absence of an express provision abolishing the employer's right to terminate an employment contract on notice, the employer could terminate the employment contract by merely giving notice.

One may elaborate by saying that, when the case unfolded, most employers were under the impression that the right in question was no longer available to them. This view was fortified by the existence of a stringent retrenchment process in terms of the Labour Act [Chapter 28:01]. Flowing from that impression, most employers assumed they were not permitted to terminate an employment contract before complying with the more onerous retrenchment processes in the Act.²⁶⁸ Effectively, the case brought certainty, and the employers became aware that to lay off employees, they can avoid an expensive retrenchment procedure by merely opting for a cheaper process of giving notice even to the majority of the staff complement.²⁶⁹ In essence, this effectively

²⁶⁴ *Nyamande & Anor v Zuva Petroleum (Pvt) Ltd* 2015 (2) ZLR 157 (S)

²⁶⁵ *Nyamande & Anor v Zuva Petroleum (Pvt) Ltd* 2015 (2) ZLR 157 (S)

²⁶⁶ Labour Act [Chapter 28:01]

²⁶⁷ *Nyamande & Anor v Zuva Petroleum (Pvt) Ltd* 2015 (2) ZLR 157 (S)

²⁶⁸ Caleb Mucheche “legal analysis of retrenchment and termination of employment under the Labour Laws of Zimbabwe ushered in by the Labour Amendment Act, 2015: simplified, seamless and synchronized termination and retrenchment of employees by employers” *The Zimbabwe Electronic Law Journal*

²⁶⁹ Caleb Mucheche “legal analysis of retrenchment and termination of employment under the Labour Laws of Zimbabwe ushered in by the Labour Amendment Act, 2015: simplified, seamless and synchronized termination and retrenchment of employees by employers” *The Zimbabwe Electronic Law Journal*

confirmed to employers that they still retained their flexibility in hiring and terminating employment relationships.

Being aware of their right to terminate an employment contract on notice, many employers gave termination notices to their employees; some preferred to give notice to most of their employees. The following week, close to 25,000 employees lost their jobs due to termination on notice.²⁷⁰ It is not far-fetched to surmise that the employers kept their employees because they did not prefer an expensive retrenchment process. Employers were keeping employees, even those who had become redundant, because they thought labour laws constrained them not to lay them off and obliged them to retrench as a measure of last resort.²⁷¹ It was not because employers felt they had a sense of responsibility towards the employees; it was all about regulation's constraint.²⁷²

The point here is that most employers, when constrained by bargaining or regulation, will not wilfully treat employees well or fairly.²⁷³ The other consequence is that the employer will try to avoid regulation. Therefore, to fully protect employees, there is a need to ensure less emphasis on aggressive bargaining and more emphasis on consensus building models of engagement. Relevant solutions need to be found beyond the parameters of labour regulation, a good behaviour must be altruistic and not regulated.²⁷⁴ Moreso, to unlock the full potential of labour law initiatives, there should be a check on how employee engagement is handled, focusing on creating harmonious relations.²⁷⁵

An illustration in the South African context will be more apt. In South Africa, an employer is bound to observe labour laws in circumstances where the worker concerned qualifies as an employee in terms of the law.²⁷⁶ When a worker qualifies as an employee, various regulatory instruments kick in and a concomitant need to ensure compliance becomes inevitable.²⁷⁷

²⁷⁰ [Massive Zim job losses in wake of court ruling - The Mail & Guardian \(mg.co.za\)](#)

²⁷¹ Caleb Mucheche “legal analysis of retrenchment and termination of employment under the Labour Laws of Zimbabwe ushered in by the Labour Amendment Act, 2015: simplified, seamless and synchronized termination and retrenchment of employees by employers” *The Zimbabwe Electronic Law Journal*

²⁷² [NYAMANDE & DONGA v ZUVA PETROLEUM \(PVT\) LTD \[SC 43-15\] | veritaszim](#)

²⁷³ Caleb Mucheche “legal analysis of retrenchment and termination of employment under the Labour Laws of Zimbabwe ushered in by the Labour Amendment Act, 2015: simplified, seamless and synchronized termination and retrenchment of employees by employers” *The Zimbabwe Electronic Law Journal*

²⁷⁴ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁷⁵ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁷⁶ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁷⁷ Van Niekerk, Andre and Smit *Law @ Work 5th ed* (LexisNexis 2019)

Conversely, a relationship between a company and a worker engaged in a non-employee capacity like an independent contractor will exclude the application of and responsibilities under labour law.²⁷⁸ The need to avoid responsibilities ushered in by regulation has motivated employers to circumvent regulation by calling workers anything else but employees. One way of achieving this is to maintain workers who do not qualify as employees.²⁷⁹ In essence, it became preferable that the nature of the relationship between an employer and a worker falls short of the so-called 'standard' employment relationship.²⁸⁰ A cynical employer would prefer this type of arrangement because it enables the employers to avoid restrictive labour regulation either in whole or in part.

A popular means of circumventing regulation is evident when employers deny their workers an employee status.²⁸¹ Employers do this because by depriving the worker of the employee status, labour law will not apply, which will mean they have significantly fewer responsibilities towards workers.²⁸² This reveals a concerning attitude; it is also hard to perceive how employers who embrace such legal stratagems would manage to engage workers meaningfully. Employers will typically seek other relationships with their workers ranging from independent contractors to business partnerships. It is therefore clear that this is done to avoid responsibilities to employees.

The Basic Conditions of Employment Act and Labour Relations Act had a section added to arrest this growing tendency. Section 200A and Section 83A²⁸³ ('Presumption as to who is an employee'), respectively.²⁸⁴ The legislation is comprehensive in dealing with this and another manifestation, the so-called rolling contractor, who is an employee on a fixed-term contract of employment of

²⁷⁸ Van Niekerk, Andre and Smit *Law @ Work* 5th ed (LexisNexis 2019)

²⁷⁹ Shereen Mills "The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility?" (2004) 25 *ILJ* 1203

²⁸⁰ Venter R and Levy A *Labour Relations in South Africa* 5th ed (Oxford University Press 2014)

²⁸¹ Venter R and Levy A *Labour Relations in South Africa* 5th ed (Oxford University Press 2014)

²⁸² Shereen Mills "The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility?" (2004) 25 *ILJ* 1203

²⁸³ Basic Conditions of Employment Act 75 of 1997

²⁸⁴ Venter R and Levy A *Labour Relations in South Africa* 5th ed (Oxford University Press 2014)

short duration, often renewed every week.²⁸⁵ This practice is dealt with by the definition of dismissal found in Section 186(b) of the LRA,²⁸⁶ more recently reinforced by section 198B.²⁸⁷

Two cases came before South African courts: *Building Bargaining Council*²⁸⁸ *Southern and Eastern Cape v Melmon's Cabinets CC* and *Motor Industry Bargaining Council v Mac-Rite Panel Beaters and Spray Painters*. Mac-Rite argued that workers were entrepreneurs, each responsible for manufacturing and selling its product through a series of agreements with the employer (Business Partner), which was considered its agent.²⁸⁹ Clearly, the employer did not want to commit itself to responsibilities that come along with workers who have employee status. Not surprisingly, the courts saw these arguments and referred to them as a "cruel hoax" and "bizarre subterfuge".²⁹⁰ It is therefore clear that regulating good behaviour and responsibility will elicit resistance. A solution outside regulating good behaviour and aggressively obtaining concessions must be found beyond labour laws.

The above discussion on the problems of labour employing force in procedural intervention and regulation shows how aggressive power play and bargaining tends to undermine meaningful engagement.²⁹¹ It still leaves some employees vulnerable to exploitation or unfair treatment. It must be acknowledged that collective bargaining and regulation go a long way in improving the plight of the employees. The contention here is that using force and regulating good behaviour towards stakeholders cannot be a good model of enabling worker participation that would be sustainable eventually. Preferably workers and their employers should resolve differences through negotiation.²⁹² The use of force as means of persuasion should be reserved as a measure of last resort. The discussion now considers the worker participation initiatives and how these may be infused with meaningful engagement values to ensure positive outcomes for all stakeholders.

Despite these initiatives and the comfort that these provide, one may not say labour law and its worker participation initiatives offer complete cover for the workers. It is submitted that; to further

²⁸⁵ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁸⁶ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)
Labour Relations Act 66 of 1995

²⁸⁸ *Southern and Eastern Cape v Melmon's Cabinets CC and another* (2001) 22 ILJ 120 (LC) and
Motor Industry Bargaining Council v Mac-Rite Panel Beaters and Spray Painters (Pty) Ltd (2001) 22 ILJ 1077 N

²⁸⁹ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁹⁰ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁹¹ Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

²⁹² Venter R and Levy A *Labour Relations in South Africa 5th ed* (Oxford University Press 2014)

improve the plight of workers, solutions also need to be sourced from company law and corporate governance. Company law and corporate governance initiatives have a complementary role to labour law. These do not seek to take away the primary function of labour law but to complement it. The next chapter will consider how company law or corporate governance, how the employer's voice is treated under this discipline of the law.

4. Corporate Governance/ Company Law and worker participation.

4.1. The nature of a corporation and the place for stakeholders.

A good point to commence the discussion would be to traverse some theories on the nature of a corporation. To this end, the focus will be on three approaches are dealt with below. An understanding of the nature of the corporation is essential because one gets an idea as to how companies are constituted, and that is imperative for appreciating the relationship companies have with stakeholders, employees. The views on the nature of the corporation are pertinent because they are a starting point in making a case for stakeholder participation in a company. Only the contractarian model and theories on stakeholder participation will be considered. These theories are the shareholder primacy, enlightened shareholder approach and the pluralist approach. The meaning and relevance of these theories are dealt with fully below.²⁹³

4.2. Contractual Theory.

The first view on the nature of the Corporation is that "a company can be described as a series of contracts concluded by self-interested economic actors, including equity investors, managers, employees, creditors".²⁹⁴ Taken together, these contracts make up the structure of the company.²⁹⁵ When these various sets of contracts are evaluated, those concluded with equity investors hold sway, and the company operates ultimately to serve their interests.²⁹⁶ At its core, the contractual theory postulates that the company is born from the pact between the various contracting parties and the interests of the company are limited to the interests of the contracting parties.²⁹⁷

In relation to stakeholders of the company, the theory resonates with the shareholder primacy principle. The model was prevalent in the United Kingdom and was the basis of the 1973

²⁹³ Benade *Entrepreneurial Law*

²⁹⁴ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012

²⁹⁵ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012 307

²⁹⁶ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012 307

²⁹⁷ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012 308

Companies Act²⁹⁸ and the older Companies Act of South Africa.²⁹⁹ In the shareholder-primacy model, only the interests of the shareholders are advanced in the “normal” lifetime of the Corporation.³⁰⁰ For the avoidance of doubt, the interests of other stakeholders like employees are excluded. The qualifier “normal” has been carefully chosen because if the situation becomes anomalous the interests of shareholders may no longer be of primacy, for example, when the company is insolvent, the interests of the creditors take priority over shareholder interests.³⁰¹ The Shareholder primacy principle is considered in more detail below.

4.2.1.1. Shareholder Primacy Principle.

The rationale for shareholder primacy is that shareholders bear the risks of the business.³⁰² Shareholders invest their capital in the Corporation, which entitles them to its profits once other claims are met,³⁰³ including claims by employees who get their wages even if the business records no profit. It is further argued that shareholders, as residual beneficiaries of everything remaining after all other claims have been paid, are in the best position to monitor the company's efficiency.³⁰⁴ An enterprise's survival and economic success will provide social benefits to many stakeholders, who will not be offered if the enterprise is a financial failure.³⁰⁵ The elements mentioned above justifying this approach are theoretical economic underpinnings of the traditional shareholder-centred approach.

The argument that shareholders are residual risk bearers is also contestable on two fronts. First, a challenge can be raised by comparing risks taken up by other stakeholders, such as employees.³⁰⁶

²⁹⁸ United Kingdom Companies Act 2006.

²⁹⁹ Monray M Botha “The different worlds of Labour and Company Law: Truth or Myth?” *PELJ* 2014 (17)5

³⁰⁰ Davis D, and Geach W *Companies and other Business Structures*, 4th ed

³⁰¹ Benedict Sheehy, "Scrooge - The Reluctant Stakeholder: Theoretical Problems in the Shareholder Stakeholder Debate," *University of Miami Business Law Review* 14, no. 1 (2005): -230

³⁰² Du Plessis JJ, Hargovan A and Bagaric M *Principles of Contemporary Corporate Governance* (Cambridge University Press Melbourne 2011)

³⁰³ Dennis Davis and Michelle Le Roux “Changing the role of the corporation: A journey away from Adversarialism” *Acta Juridica* 2012

³⁰⁴ Dennis Davis and Michelle Le Roux “Changing the role of the corporation: A journey away from Adversarialism” *Acta Juridica* 2012

³⁰⁵ Dennis Davis and Michelle Le Roux “Changing the role of the corporation: A journey away from Adversarialism” *Acta Juridica* 2012

³⁰⁶ Benedict Sheehy, "Scrooge - The Reluctant Stakeholder: Theoretical Problems in the Shareholder Stakeholder Debate," *University of Miami Business Law Review* 14, no. 1 (2005): -216

Second, one can raise a challenge by comparing shareholders' risks with the risks and positions assumed by other corporate financiers.³⁰⁷ The exit option is an important risk mitigation measure. Concerning publicly traded corporations, there is a highly liquid market for shares. At any point, if the shareholder deems the risk unacceptable, then a party's shareholdings can easily be sold.³⁰⁸ On the other hand, if one considers other stakeholders, such as employees who bear the risk of unemployment and do not have the general ability to withdraw their investment, then the shareholders have less risk.³⁰⁹

On Shareholders having residual claims, it is submitted that the position is not strictly accurate. Notably, the only time shareholders have the actual residual claim is when the corporation is insolvent or being wound-up.³¹⁰ in practice, Companies are rarely wound up albeit that insolvency is prevalent. A third argument supporting shareholder primacy is that shareholders have the greatest incentive to see that the corporation profit suffers from its own weakness.³¹¹ While shareholders may be eager to see the value of the corporation maximized, there are certainly others with the same interest

At this juncture, it is pertinent to set out that employees are less privileged as a stakeholder group because it is assumed they do not assume the risks of the business as shareholders do.³¹² Further, this line of thinking is based on the idea that employees have heterogeneous interests; more specifically, they need good jobs and wages as their key interests.³¹³ These interests must be satisfied whether the company returns a good profit or not. Therefore, It is argued that, given the heterogeneous and self-seeking nature of workers, placing them as prime in the corporate structure will cause the company to likely fail.³¹⁴ This assertion is based on the view that their interests are too heterogeneous within their own group.³¹⁵ Groups, such as employees, have a vested interest in

³⁰⁷ Ibid

³⁰⁸ Delport P *The New Companies Act Manual*

³⁰⁹ Benedict Sheehy, "Scrooge - The Reluctant Stakeholder: Theoretical Problems in the Shareholder Stakeholder Debate," *University of Miami Business Law Review* 14, no. 1 (2005): -216

³¹⁰ Benedict Sheehy, "Scrooge - The Reluctant Stakeholder: Theoretical Problems in the Shareholder Stakeholder Debate," *University of Miami Business Law Review* 14, no. 1 (2005): -216

³¹¹ Benedict Sheehy, "Scrooge - The Reluctant Stakeholder: Theoretical Problems in the Shareholder Stakeholder Debate," *University of Miami Business Law Review* 14, no. 1 (2005): -217

³¹² Benedict Sheehy, "Scrooge - The Reluctant Stakeholder: Theoretical Problems in the Shareholder Stakeholder Debate," *University of Miami Business Law Review* 14, no. 1 (2005): -217

³¹³ Simon Deakin "The idea behind the Corporation and Shareholder Primacy" 2008 MHBA 23

³¹⁴ Ibid

³¹⁵ Ibid

employment security.³¹⁶ Those who do not have the diverse portfolio common to shareholders have a greater interest than shareholders in maximising their portfolio. However, the position that shareholders have the greatest interest in corporate profits does not consider the diversity of shareholder interests, including that director may have short positions on the shares.³¹⁷

Therefore, in terms of this theory, other stakeholders, including employees, are deemed as outsiders.³¹⁸ However, *per contra*, it is pertinent to note that once a company is up and running, the rights and duties of the parties in a company change.³¹⁹ Shareholders no longer have the absolute rights they had when the company was established. Other stakeholders other than shareholders obtain rights against the company.³²⁰ This suggests that the corporation is more than a mere contract between shareholders.³²¹ In the present day and age, this theory stands anachronistic and will be inimical to any efforts to empower stakeholders, particularly employees.³²² Therefore, in so far as the stakeholder debate is concerned, the idea that a company exists to serve the interests of shareholders alone came under pressure and is longer tenable. This pressure gave way to the establishment of an alternative, tempered approach known as the shareholder enlightened shareholder approach. The enlightened shareholder approach is considered below.

4.2.1.2. Enlightened Shareholder Approach.

The second way in which the interests of stakeholders may be considered is from the enlightened shareholder approach vantage point.³²³ In terms of this approach, the directors should have regard to other stakeholders where appropriate.³²⁴ Interests of other stakeholders are essential where there is the need to ensure productive relationships with a range of the stakeholders and have regard to

³¹⁶ Benedict Sheehy, "Scrooge - The Reluctant Stakeholder: Theoretical Problems in the Shareholder Stakeholder Debate," *University of Miami Business Law Review* 14, no. 1 (2005): -217

³¹⁷ Benedict Sheehy, "Scrooge - The Reluctant Stakeholder: Theoretical Problems in the Shareholder Stakeholder Debate," *University of Miami Business Law Review* 14, no. 1 (2005): -217

³¹⁸ *Ibid*

³¹⁹ Benedict Sheehy, "Scrooge - The Reluctant Stakeholder: Theoretical Problems in the Shareholder Stakeholder Debate," *University of Miami Business Law Review* 14, no. 1 (2005): -219

³²⁰ *Ibid*

³²¹ *Ibid*

³²² *Ibid*

³²³ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

³²⁴ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

the longer term.³²⁵ Corporate stakeholders are seen as critical to generating long-term shareholder wealth but with shareholder interests retaining primacy.³²⁶ In essence, the directors may take into account the interests of other stakeholders, such as the interests and rights of employees but only if it ultimately promotes the success of the company for the benefit of the shareholders as a whole.³²⁷ Beyond the tempered and harmonising enlightened shareholder value approach, there is a more radical approach to stakeholder participation in corporate governance and that is the pluralist approach which is considered below.

4.2.1.3. Pluralist Approach.

The Pluralist Approach holds that cooperative and productive relationships will only be optimised where directors are permitted or required by law to promote the interests of the shareholders with other stakeholders who are committed to the success of the company.³²⁸ Pertinently it becomes clear that adoption of the pluralist approach would invariably necessitate an overhaul of the legal concept of "best interests of the company" from being primarily associated with the interests of the shareholders to ensure the inclusion of other non-shareholder stakeholders too, including employees.³²⁹ Essentially, a pluralistic approach takes into account the interests of other non-shareholder stakeholders on equal footing.³³⁰ Shareholders are not in a privileged position; rather, the approach focuses on balancing the interests of stakeholders. It prefers the interests of one stakeholder over the interests of another only where it is in the interests of all stakeholders.³³¹ There are two further theories that deal with the nature of the Company and those are the concessionary and communitarian theory but will not be discussed in this thesis because the issues raised by these theories are adequately covered elsewhere.³³² However, the issues around the stakeholder theories should be understood through the lenses of the "best interests of the company". The question to provide thought guideline being whether it is in the best interests of the company to cater for stakeholders.

³²⁵ Benedict Sheehy, *University of Miami Business Law Review* 14, no. 1 (2005): -

³²⁶ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

³²⁷ Benedict Sheehy, *University of Miami Business Law Review* 14, no. 1 (2005): -

³²⁸ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

³²⁹ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

³³⁰ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

³³¹ Benedict Sheehy, *University of Miami Business Law Review* 14, no. 1 (2005): -

³³² Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

4.3. The best interests of the company.

The common law and the various iterations of statutory enactments require directors of a company should act in the best interests of the “company.”³³³ Conversely the concern is around what constitutes the best interests of the “company”? The considerations in answering this question are whether the directors should be confined to the interests of shareholders alone or should consider the interests of other non-shareholder constituencies such as the employees, customers, creditors, and the community within which the company operates. This concern has already been pre-empted by the stakeholder theories above.

The question about whose interest should be considered when running the company is not new and has been a source of controversy as well. A debate concerning this issue can be traced back to the 1930s in an exchange between Berle and Dodd.³³⁴ The Berle and Dodd debate is indispensable because it is a key starting point in resolving the question around whose interests directors should promote when running the company.³³⁵ For Berle, he contended that the company serves the interests of shareholders because companies exist to ensure that there is an increase in shareholder value.³³⁶ The contention is based on the idea that the *raison detre* of incorporating a company is to increase shareholder value. The point is made clearer by Milton Friedman, who set out what he thought to be the company's social responsibility.³³⁷ In essence, his view was that the company's primary responsibility is to increase its profits, therefore, to serve its shareholders.³³⁸ He further argued that since companies are incorporated to make profit, they should confine their operations to promote this purpose.³³⁹ The argument proceeds to state that shareholders should decide for themselves what social issues they wish to promote.³⁴⁰ He contends that it is inappropriate for

³³³ Monray Botha “Responsibilities of Companies towards Employees” *PER/PELJ* 2015 (18) 2

³³⁴ Dennis Davis and Michelle Le Roux “Changing the role of the corporation: A journey away from Adversarialism” *Acta Juridica* 2012

³³⁵ Monray M Botha “The different worlds of Labour and Company Law: Truth or Myth?” *PELJ* 2014 (17)5

³³⁶ Dennis Davis and Michelle Le Roux “Changing the role of the corporation: A journey away from Adversarialism” *Acta Juridica* 2012

³³⁷ Monray M Botha “The different worlds of Labour and Company Law: Truth or Myth?” *PELJ* 2014 (17)5

³³⁸ *Ibid*

³³⁹ Monray M Botha “The different worlds of Labour and Company Law: Truth or Myth?” *PELJ* 2014 (17)5

³⁴⁰ *Ibid*

executives who have been employed to encourage shareholders to make decisions on social matters for the team.³⁴¹

The reason for giving the shareholders the privileged position is that they are the principal stakeholders who assume the risks of the business and provide the company with the necessary capital to conduct its operations; this issue is traversed further below.³⁴² On the other end of the continuum is the contention by Dodd. He contends that the company should be viewed as an institution that performs services, the purpose of which goes beyond the narrow confines of profit-making.³⁴³ Dodd promotes a case for directors to consider the interests of other stakeholders because a commitment to their needs would ultimately benefit the shareholders as well by increasing the return on profit in the long run.³⁴⁴

Later in 1954, Berle made a partial concession.³⁴⁵ He acknowledged that the purpose of companies had moved from the narrow confines of shareholder wealth promotion to embrace the interests of other stakeholders only when they advance shareholder interests.³⁴⁶ The concession was partial because it did not fully acknowledge the proposition by Dodd, which in essence requires fair and equal treatment of all stakeholders.³⁴⁷ The concession can more accurately be described as embracing the enlightened shareholder model. The enlightened shareholder model postulates that the company should focus on shareholder maximisation subject to the caveat that the company should consider the interests of other stakeholders such as employees to the extent that so doing advances the shareholders' interests. the interests of non-shareholders (who are nevertheless stakeholders) remain subordinate to the interests of shareholders.

³⁴¹ Ibid

³⁴² Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

³⁴³ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012

³⁴⁴ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012

³⁴⁵ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012

³⁴⁶ Benedict Sheehy, *University of Miami Business Law Review* 14, no. 1 (2005): -2

³⁴⁷ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012

4.4. Stakeholder Question in South Africa.

It has already been pointed out that in South Africa under the former Companies Act³⁴⁸ regime, the corporate law regime was based on the shareholder primacy principle.³⁴⁹ In other words, companies operated to serve the interests of the shareholders. South Africa went through a corporate law reform process which culminated in the new 2008 Companies Act 71 of 2008.³⁵⁰ One of the contemplated reforms was the question on whose interests should be served by the company in South Africa.³⁵¹ Considerations revolved around the adoption of the enlightened shareholder value approach or the pluralist approach as way to govern the new corporate law dispensation.

The *Department of Trade and Industry's policy paper of 2004: Guidelines for Corporate Law Reform*,³⁵² considered this question in more detail. The authors were under some pressure, particularly from trade unions,³⁵³ to adopt a pluralist model, which would have resulted in the increased scope of key stakeholders in whose direct interests the company operates.³⁵⁴ The policy paper ultimately preferred the enlightened shareholder value approach as a guide to the directors when they consider how to act in the best interests of the company.³⁵⁵ Also, it considered the mechanism that should be put in place to move forward and enforce that obligation.³⁵⁶

The answer to these questions can be settled by tracing the jurisprudential position and how the position has evolved in South Africa. It is pertinent to note that the common law requires that directors must act honestly and in the best interests of the company.³⁵⁷ Courts in the UK as well as the USA, from which most of the company law-common law component derives influence from, interpreted the interests of the company' to mean the long-term interests of shareholders as a whole.³⁵⁸

³⁴⁸ Companies Act 71 of 2008

³⁴⁹ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012

³⁵⁰ *Department of Trade and Industry's policy paper of 2004: Guidelines for Corporate Law Reform*, 2004.

³⁵¹ *Ibid*

³⁵² *Department of Trade and Industry's policy paper of 2004: Guidelines for Corporate Law Reform*, 2004.

³⁵³ *Department of Trade and Industry's policy paper of 2004: Guidelines for Corporate Law Reform*, 2004.

³⁵⁴ Davis D, and Geach W *Companies and other Business Structures*, 4th ed,

³⁵⁵ *Department of Trade and Industry's policy paper of 2004: Guidelines for Corporate Law Reform*, 2004.

³⁵⁶ *Department of Trade and Industry's policy paper of 2004: Guidelines for Corporate Law Reform*, 2004.

³⁵⁷ *Ibid*

³⁵⁸ Davis D and Geach G *Companies and Other Business Structures* 4th ed (Oxford University Press 2013)

There are several reasons why the idea of a corporation serving the interests of shareholders alone became untenable.³⁵⁹ The vital reason had to do with the power held by companies. It is now common cause that in the modern-day if one were to consider what the most powerful institution is, it is no longer the church or state and politics, there is no more powerful institution in society than business.³⁶⁰ The extent to which companies have become powerful compares to the power wielded by governments.³⁶¹ There is a suggestion that companies will soon surpass states in terms of being the dominant form of a social organisation.³⁶² In terms of global wealth, it has been demonstrated through surveys that as of 2015, of the top 100 largest economies, 69 thereof were corporations and only 37 were countries.³⁶³ In a more practical illustration, it has been demonstrated by Naidoo that if an American corporation Wal-Mart were a country, its revenues totalling US\$448 Billion, would place it at par with the 12th largest economy in the world slightly behind Australia and ahead of Russia. The impact of companies is not only relevant in wealth alone but is so extensive that they affect society and the environment as well.³⁶⁴

A company which serves the interests of shareholders alone while ignoring the interests of other stakeholders and yet possessing corporate power may be detrimental.³⁶⁵ A company of that nature has been described as a "*pathological institution, a dangerous possessor of the power it yields over people and societies*."³⁶⁶ The elaboration goes on further to state that "*the character of the company concerning other stakeholders would be comparable to that of a sociopath which treats others instrumentally, caring only about what can be derived from the interaction no matter the cost to the other party*".³⁶⁷ It is notable that at the beginning of the 21st-century company's interactions with other stakeholders had evolved to the point of being a sociopathic institution, at odds with universally pro-social tendencies in human psychology and behaviour.³⁶⁸ One may, therefore argue that the need for companies to abandon the exclusive shareholder primacy principle can be justified based on the *Boni mores* of society.

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³⁶⁰ Ramani Naidoo *Corporate Governance- An Essential Guide for South African Companies* 13

³⁶¹ Ramani Naidoo *Corporate Governance- An Essential Guide for South African Companies*

³⁶² *ibid*

³⁶³ Ramani Naidoo *Corporate Governance- An Essential Guide for South African Companies* 13

³⁶⁴ Ramani Naidoo *Corporate Governance- An Essential Guide for South African Companies* 13

³⁶⁵ Cynthia A Williams *et al The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* 14

³⁶⁶ Cynthia A Williams *et al The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* 15

³⁶⁷ Cynthia A Williams *et al The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* 15

³⁶⁸ Williams *et al The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* 16

There is a considerable body of opinion which strongly endorses the idea that corporate governance is intended to maintain a balance between economic and social objectives. It follows that corporate governance must be regarded as the system by which organisations are or should be governed and controlled with the contribution and benefit of all stakeholders, including employees.³⁶⁹ One of the main reasons for expanding the scope of critical stakeholders is the coming in of the new constitutional dispensation, more on the Constitution's impact is traversed below.

4.5. Operative context and a case for a paradigm shift.

It is apt to begin by stating the obvious; in 1994, South Africa entered a new constitutional dispensation, in terms of how the society is organised. A key element of this new dispensation is a supreme Constitution.³⁷⁰ The importance of the Constitution is multifaceted the Constitution applies as supreme law to all areas of the law. Any law, be it a rule of common law inherited from Roman Law, a statute, regulation, or statutory or regulatory provision, a usage or a principle of customary law which fails to contemplate the values or is repugnant to the Constitution is illegitimate and invalid. In other words, all laws must be constitutionally compliant. Labour law and company law are no exceptions and remain subordinate to the Constitution.

In the *South African Company Law for the 21st Century Guidelines for Corporate Law Reform* paper, it was observed that new company law should therefore be consistent with the Constitution of South Africa and the principles of equality and fairness that it enshrines. While the above reflects the tension between non-shareholder stakeholders and shareholders, it is imperative to consider what the South African law provides about the governance of companies. section 66 of the Companies Act confers original authority to administer the company under the direction of its board of directors. The board of directors who have the power to exercise all the powers and functions of the company, except to the extent otherwise provided by the Companies Act or the Memorandum of Incorporation of the company. In fulfilling this objective, section 76 (3) (b) of the Companies Act mandates the directors to exercise the powers and perform the functions of director in the best interests of the company.³⁷¹ This is a particularly important provision for this

³⁶⁹ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

³⁷⁰ *Department of Trade and Industry's policy paper of 2004: Guidelines for Corporate Law Reform*, 2004

³⁷¹ S76 (3) (b) of the Companies Act 71 of 2008.

discourse because the purpose is to establish in the interest of whom the enterprise is managed. The Companies Act, however, does not define the company for purposes of section 76 (3) (b). As a result, the common law definition of the company carries the day.

Regarding the common law, when one talks about the company, it refers to the shareholders as a whole and not the company as an entity standing alone.³⁷² Essentially, it means the body of current and future shareholders. The language of this clause eliminates any doubt that the directors of a corporation have a duty to the Corporation and the Corporation alone. The duties are consequently enforceable only by the company.³⁷³

'A requirement to benefit an artificial entity as an end in itself would be irrational and futile since a non-real entity is incapable of experiencing well-being.'³⁷⁴ A company as an artificial legal entity cannot have any interests.³⁷⁵ It was observed in the case of *Greenhalgh v Arderne Cinemas Ltd*³⁷⁶ that the phrase 'company as a whole' does not mean the commercial entity as distinct from the incorporators. It means the shareholders or incorporators as a general body.³⁷⁷ The inclusion of the hypothetical future shareholder introduces an interesting aspect of the governance framework. This is more in tandem with the concept of long-term sustainability. In essence, the directors in administering the company must balance the interests of the present and the hypothetical future shareholder(s). This, in appropriate instances, would allow the board to prioritise employees to retain a competent workforce which would invariably benefit the future shareholders. Directors are, as a result, not obliged to maximise profits to satisfy short term demands for dividends at the expense of growth and profitability over a more extended period. Another way of expressing the same principle is that directors must act for the benefit of existing shareholders, having regard to their future interests as well as their existing interests.³⁷⁸

It is pertinent to note that the import of the Act as elucidated by the common law is that the interests of stakeholders other than the shareholders of the company have received no formal, legal recognition under the Act.³⁷⁹ At least not to the extent of embracing the pluralist approach. It

³⁷² Femida Cassim *et al Contemporary Company Law* 515

³⁷³ Femida Cassim *et al Contemporary Company Law* 515

³⁷⁴ Femida Cassim *et al Contemporary Company Law* 515

³⁷⁵ Cassim *et al Contemporary Company Law* 515

³⁷⁶ *Greenhalgh v Arderne Cinemas Ltd* [1950] 2 All ER 1120

³⁷⁷ Cassim *et al Contemporary Company Law* 515

³⁷⁸ Cassim *et al Contemporary Company Law* 516

³⁷⁹ Cassim *et al Contemporary Company Law* 517

follows by logical extension that the duties of directors are focused on maximising shareholder wealth.

It is also pertinent to note that to be able to decipher the approach to the Act more accurately, it must be examined in a more diagnostic manner. For this purpose, general aids for interpreting legislative texts shall apply. It is an established principle of statutory interpretation that the Act does not intend to change the common law beyond what is necessary.³⁸⁰ The corollary of this rule is also that if the legislature wants to change the common law, it will do so explicitly. Accordingly, it has already been shown that the common law position is that directors are required to manage the Corporation's operations in the interests of its shareholders and to maximise profits for the benefit of shareholders.³⁸¹ In the absence of an explicit provision to the contrary, it is submitted that the shareholder interests still enjoy primacy through the enlightened shareholder approach.

The problem inherently tied with the enlightened shareholder approach is that of determining to what extent are the shareholders to be enlightened. Practically, this raises the question as to how the will of the shareholders will go about factoring in the interests of the other constituent stakeholders. In trying to resolve this conundrum, it is pertinent to note that section 7 (d) of the Companies Act provides that one of the purposes of the Companies is to reaffirm the concept of the company as a means of achieving economic and social benefits.³⁸² The import of this provision is to broaden the purposes of the company. In other words, its bottom line is no longer wealth maximisation alone; the provision allows for directors to utilise the company as a mean of ensuring there are social benefits therefrom.

The preceding is helpful in at least establishing that other stakeholders may be considered as a way of ensuring social and economic benefits. A company's pursuit of economic objectives should be constrained by social and environmental imperatives.³⁸³ However, it is crucial to establish to what extent the company may permissibly indulge the interests of other stakeholders. Section 7 (d) should be construed to mean that directors must pay attention to the interests of stakeholders, but that it does not provide stakeholders with direct rights. Furthermore, if the legislator wanted to create a new duty applicable to directors, it would have been done explicitly and not by merely

³⁸⁰ Cassim *et al Contemporary Company Law* 514

³⁸¹ Cassim *et al Contemporary Company Law* 514

³⁸² Section 7 (d) of the Companies Act 71 of 2008

³⁸³ Piet Delpont and Meskin *Henochsberg on the Companies Act 71 of 2008* S7

incorporating it into the "purpose" provision.³⁸⁴ There are other pertinent provisions of the Companies Act that may help resolve the problem. In this regard, notably, S1 defines a profit company as a company incorporated for financial gain for its shareholders. The same principle is laid down in para 81 (1) (d) (i) (bb) which provides for the winding-up of a solvent company in an impasse if its activities cannot be carried out to the advantage of the shareholders in general. These sections focus on profit maximisation of shareholders, as opposed to benefit to all stakeholders.³⁸⁵ Thus it is taken that the Companies Act is from its tenure, read holistically as pro-enlightened shareholder value oriented. So, directors must consider stakeholder interests, but only in as far as this will promote long-term profit maximisation; thus, in the interests of present and future shareholders.³⁸⁶

The relationship between companies and their employees is a crucial one. It is the case because the employees are an essential internal constituency of stakeholders. A necessary feature of the employment relationship is the existence of an *ex lege* fiduciary relationship between an employer and employee. On this basis, our law is the same as the English Law, namely that in every contract of employment there is a duty that an employer will not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties.³⁸⁷

The company, as employer relies on its employees to fulfil its objectives like production. On the other hand, the employee depends on the company for wages, and this is the source of their livelihood.³⁸⁸

³⁸⁴ Delpont and Meskin *Henochsberg on the Companies Act 71 of 2008 S7*

³⁸⁵ Delpont and Meskin *Henochsberg on the Companies Act 71 of 2008 S7*

³⁸⁶ Monray Botha "Responsibilities of Companies towards Employees" *PER/PELJ* 2015 (18) 2

³⁸⁷ Monray Botha "Responsibilities of Companies towards Employees" *PER/PELJ* 2015 (18) 2

³⁸⁸ Monray Botha "Responsibilities of Companies towards Employees" *PER/PELJ* 2015 (18) 2

5. Corporate Social Responsibility in the labour relations context.

5.1. **Setting the scene: From the survival of the fittest to Ethical Leadership.**

In the preceding chapters of this thesis, the typical behaviour of a self-seeking company was detailed, and its possible undesirable impacts were traversed. To contextualise the current discussion, it is essential to reiterate the same briefly. It was stated that a company that seeks to generate profit exclusively, and is not constrained by any other factors, would be harmful to some of its stakeholders.³⁸⁹ Its operations will be detrimental to other stakeholders, even if those controlling its actions only intend to generate profit and have no intention to harm other stakeholders.³⁹⁰ A company of that nature has been described as a 'pathological institution, a dangerous possessor of the power it yields over people and societies.'³⁹¹ Further 'the character of the company when relating to other stakeholders would be comparable to that of a sociopath which treats others instrumentally, caring only about what can be derived from the interaction no matter the cost to the other party.'³⁹²

Companies may wreak harm to other stakeholders either intentionally or inadvertently. One may say, it is simpler where the company deliberately inflicts harm on stakeholders out of brute malice, like when using slave labour. In that instance, it would be a clear callous act of criminality. Matters are much more complex when the company inadvertently inflicts harm due to sheer indifference to the interests of other stakeholders.³⁹³ For example, a company that is indifferent to other stakeholders in its operations may comply with all the laws and act in good faith but still prejudice

³⁸⁹ Marie Johane *STrans*

³⁹⁰ Stella Vettori "'Employee as Corporate Governance Stakeholder in South Africa", 2005 *Social Responsibility Journal*

³⁹¹ Cynthia A Williams *et al The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* 15.

³⁹² Cynthia A Williams *et al The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* 15

³⁹³ *Ibid*

other stakeholders. It is the latter subtle instance that this thesis seeks to address. The considerations arising in this thesis deliberately focus on employees as the stakeholder group.

At the beginning of the 21st-century, the company's interactions with other stakeholders evolved and became akin to a sociopathic institution, at odds with universal pro-social tendencies in human psychology and behaviour.³⁹⁴ The company's evolution into a sociopath institution may be ascribed to the compassionless and unethical indifference to the interests of other stakeholders.³⁹⁵ It is axiomatic that directors of a company would rarely if ever, deliberately harm stakeholders such as employees merely out of spitefulness.³⁹⁶ Harm occurs because companies would be unwaveringly fixated on generating as much profit as they can afford.³⁹⁷ Workers would be a mere factor of production with no other discernible value to the employer.³⁹⁸ In essence, harm to other stakeholders emanating from a company's behaviour is seldom the direct intent of directors. To the extent that harm occurs to other stakeholders, it would be due to the indirect intention, incidental to the unbridled profit motive.³⁹⁹

The power and influence exercised by companies have been considered in previous chapters and will not be addressed extensively in this part of the thesis. Suffice to say, at this stage, it has been demonstrated that companies, primarily multinationals, have accumulated significant power, and the power is reverberating within the communities they operate.⁴⁰⁰ Suppose the power is exercised anyhow, with the sole objective of pursuing profits; it will follow that, on most occasions, it will lead to the exploitation of people proximate to it.⁴⁰¹ Notably, workers are also part of the stakeholder groups that would be affected, usually negatively.⁴⁰² Then, there is a discernible need for a paradigm shift to ensure that companies are more conscious of the interests of other stakeholders and responsible when carrying out their operations.⁴⁰³ When companies become

³⁹⁴ Williams *et al* *The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* 16

³⁹⁵ Williams *et al* *The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* 16

³⁹⁶ *Ibid*

³⁹⁷ *Ibid*

³⁹⁸ *Ibid*

³⁹⁹ *Ibid*

⁴⁰⁰ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 15

⁴⁰¹ Williams *et al* *The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* 16

⁴⁰² ⁴⁰² Stella Vettori "Employees as Corporate Governance Stakeholders in South Africa *Social Responsibility Journal* 2005 Vol 5

⁴⁰³ Stella Vettori "Employees as Corporate Governance Stakeholders in South Africa *Social Responsibility Journal* 2005 Vol 5

conscious of their actions, it sets the scene for ethical leadership.⁴⁰⁴ Ethical leadership is a necessary mechanism that would prod companies away from the dog eat dog style of relating to stakeholders to a more caring and ethical oriented approach in so far as stakeholders are concerned.⁴⁰⁵

Companies must be imbued with a conscience, at least in the figurative sense.⁴⁰⁶ A natural consequence of the contemplated conscience in action is that companies will begin to behave more responsibly in relation to other stakeholders.⁴⁰⁷ Further, it is imperative because, as Bob Tricker remarked, "corporate entities though granted many of the legal powers of human beings have no moral sense. The board must be the corporate (moral) sense."⁴⁰⁸ It is argued that a good indication that companies are acting in a socially responsible manner is that they ethically interact with stakeholders.⁴⁰⁹

5.2. Ethics as a yardstick for a corporate conscience.

King IV report, under principle one, enjoins directors to lead or govern an organisation ethically and effectively.⁴¹⁰ Good corporate governance is built around effective and ethical leadership.⁴¹¹ "Effective leadership" denotes leading a company in a manner that enables it to generate value or make a profit.⁴¹² On the other hand, "ethical leadership" enjoins directors to lead companies, so they create profits responsibly.⁴¹³ One of the principal functions of a board is to ensure that the companies they lead have a sound ethical culture.⁴¹⁴ Therefore, one may say that "ethical leadership" is a check and balance mechanism on "effective leadership". The value of this

⁴⁰⁴ Ibid

⁴⁰⁵ Ibid

⁴⁰⁶ Ryan "Social Conscience Comes with a Price Tag" *Without Prejudice* (2004) vol 4 Issue 4, 7-8

⁴⁰⁷ Stella Vettori "Employees as Corporate Governance Stakeholders in South Africa" *Social Responsibility Journal* 2005 Vol 5

⁴⁰⁸ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 398

⁴⁰⁹ Stella Vettori "Employees as Corporate Governance Stakeholders in South Africa" *Social Responsibility Journal* 2005 Vol 5

⁴¹⁰ The King IV Report on Corporate Governance for South Africa 2016, 43

⁴¹¹ *The King IV Report on Corporate Governance for South Africa 2016*, 43

⁴¹² Stella Vettori "Employees as Corporate Governance Stakeholders in South Africa" *Social Responsibility Journal* 2005 Vol 5

⁴¹³ Monray Botha "Responsibilities of Companies Towards Employees" *PER/PELJ* 2015 (18) 2

⁴¹⁴ Hendricks JW and Hefer L *Corporate Governance Handbook: Principles and Practice* 3rd ed (Juta 2019) 180

arrangement cannot be overstated; its essence is to prevent the earlier incident of inadvertent detrimental effects on non-shareholder stakeholders by ushering in conscious leadership in companies.

Companies' decisions have ethical implications. Ethical considerations are ubiquitous at almost every level of corporate decision-making edifice.⁴¹⁵ It could be at the strategic level when the board deliberates on an issue, managerial throughout an organisation or at an operational level in each of its activities.⁴¹⁶ Ethics-related risks are pervasive whether decisions are at strategic, managerial or operational levels.⁴¹⁷ Companies must operate within ethical parameters to avoid adverse outcomes on the community or other stakeholders.⁴¹⁸ The aggregate effects of its actions on the society and environment should be fair and constrained by social justice considerations.⁴¹⁹ In this manner, ethics define and constitute the company's conscience, and pertinently, serve as a check or a restraining factor that ensures that the interests of other stakeholders are protected in the company.⁴²⁰

5.2.1. Meaning of Ethics.

King IV describes ethics in the broader sense as considering what is good and right (suitable) for oneself and others (stakeholders).⁴²¹ The principle may be elaborated in terms of the golden rule, which requires that "you treat others as you wish to be treated yourself".⁴²² In the context of companies, ethics refers to the ethical values applied to decision-making, conduct and relationships between a company, stakeholders, and the wider society.⁴²³

ISO:26000 provides that the behaviour of companies should be based on values of honesty, equity, and integrity.⁴²⁴ The values imply that a company should be concerned about people and commit to address the impact of its activities and decisions on them.⁴²⁵ Ethics serve as uniform guiding

⁴¹⁵ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 396

⁴¹⁶ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 396

⁴¹⁷ Ramani Naidoo *Corporate Governance: An essential Guide for South African Companies* 396

⁴¹⁸ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 396

⁴¹⁹ Botha *PER/PELJ* 2015 (18) 2

⁴²⁰ Botha *PER/PELJ* 2015 (18) 2

⁴²¹ IODSA *The King IV Report on Corporate Governance for South Africa 2016*, 12

⁴²² IODSA *The King IV Report on Corporate Governance for South Africa 2016*, 12

⁴²³ Hendrikse and Hefer *Corporate Governance Handbook* 3rd ed (⁴²³ Hendrikse and Hefer Hendrikse and Hefer *Corporate Governance Handbook* 3rd ed (Juta Cape Town, 2019)

⁴²⁴ ISO: *International Standard: Guidance on Social Responsibility*. ISO-26000 1st ed 2010 (ISO) 11

⁴²⁵ ISO: *International Standard: Guidance on Social Responsibility*. ISO-26000 1st ed 2010 (ISO) 11

principles that help companies establish what is fair and acceptable in a society, and it is important to note that ethics establish the social order within communities.⁴²⁶ In this sense, fairness and ethics are two sides of the same coin when it comes to business conduct.⁴²⁷ In the context of employee stakeholders, one may say that; if a company engages with employees ethically, most of the concerns arising from unequal bargaining power in the employer and employee relationship will be significantly alleviated.⁴²⁸ It will occur because companies will not overplay their economic power in a manner that will result in the exploitation of their employees.⁴²⁹ Employers can only treat employees fairly if they feel a sense of responsibility towards employees.⁴³⁰ The aforementioned sense can be encompassed by organisational ethics.

Further, where a company engages its employees ethically, most of the responsible behaviours sought to be achieved through legislation will be attained even in instances where regulation is absent.⁴³¹ That would be especially helpful in countries with weak labour regulation regimes.⁴³² Equity demands fairness and levelling the business environment among stakeholders.

5.2.1.1. Distinguishing Ethics, morals, and values.

Notably, on most occasions, ethics are universally accepted and should not be conflated with morals that, in most circumstances, depend on the idiosyncratic preferences of each individual and are usually variable across societies.⁴³³ So being ethical is not necessarily a matter of following personal feelings because individual feelings often deviate from what is ethical.⁴³⁴ Ethics cannot be equated with religious principles, although there may be a commonality.⁴³⁵ It is also important to emphasise that ethics are not about legal compliance because laws may, for several reasons, fail to achieve ethical results.⁴³⁶ The law may be deficient by prescribing low standards and perhaps even reprehensible. The apartheid laws are the most cited example of unethical laws.⁴³⁷ Although

⁴²⁶ Ibid

⁴²⁷ Hendrikse and Hefer Hendrikse and Hefer *Corporate Governance Handbook* 3rd ed (Juta Cape Town, 2019)

⁴²⁸ Ibid

⁴²⁹ Ibid

⁴³⁰ Ibid

⁴³¹ Ibid

⁴³² Ibid

⁴³³ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 396

⁴³⁴ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 399

⁴³⁵ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 399

⁴³⁶ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 399

⁴³⁷ Ibid

there is no unanimity concerning the repulsiveness of apartheid, it is safe to say most people and credible international bodies like the United Nations find apartheid to have been a reprehensible system of law by even calling it a crime against humanity.⁴³⁸ It follows by logical extension that a law that establishes crime against humanity cannot be ethical. It will, later, be demonstrated that ethics and corporate social responsibility require standards that go well beyond minimum legal requirements.

The board of directors should develop a code of ethics or similar policy.⁴³⁹ The board of directors should promote the policy or code of ethics and establish corporate ethics management structures.⁴⁴⁰ There is no one size fits all model for ethics. Like its preceding iterations, King IV recommends that every company defines a code of ethics and conduct that ensures that its ethical values and norms are clearly articulated as part of its corporate governance structure.⁴⁴¹

Concerning the structure for monitoring, the structure could be a committee or a manager responsible for ensuring that sufficient mechanisms exist to monitor and assess the effectiveness of ethics in a company.⁴⁴² However, under the Companies Act, certain companies must set up a social ethics committee.⁴⁴³ The Social Ethics Committee is discussed in more detail in the next chapter.

When drawing up a code of ethics and defining the content of the code, it is appropriate to select the fundamental values that resonate with the people who make up the company.⁴⁴⁴ A code of ethics may embody specific universal values such as honesty, trust, fairness, compassion, which always form the fabric of the company's ethics. The existence and demonstrated adherence to established ethical principles is an essential measure of corporate integrity.⁴⁴⁵

Ethics will, in a practical sense, involve applying ethical values to a company's behaviour.⁴⁴⁶ Some companies have incorporated a portion dealing with how employee relations and other

⁴³⁸ Ibid

⁴³⁹ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 398

⁴⁴⁰ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 398

⁴⁴¹ King IV on Corporate Governance, 2016

⁴⁴² Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 404

⁴⁴³ Companies Act 71 of 2008

⁴⁴⁴ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 398

⁴⁴⁵ Hendrikse and Hefer *Hendrikse and Hefer Corporate Governance Handbook* 3rd ed (Juta Cape Town, 2019)

⁴⁴⁶ Hendrikse and Hefer *Hendrikse and Hefer Corporate Governance Handbook* 3rd ed (Juta Cape Town, 2019)

stakeholders will be dealt with in their Codes of Ethics and Business Conduct codes.⁴⁴⁷ Applying ethics in a company will avert the prospects of a company generating harmful effects. The benefit of being an ethical organisation will be reflected when companies enjoy a good reputation, which benefits the company when raising finance. It makes it easy to hire and retain staff.⁴⁴⁸

The ethical foundations set out above are a starting point and are, in most cases, aspirational and abstract.⁴⁴⁹ It is crucial to mention that when there is ethical leadership within a company, there will be fertile ground for the company to be a responsible corporate citizen.⁴⁵⁰ Its relationships with its stakeholders, particularly its employees, will demonstrate that companies are socially responsible.⁴⁵¹ An essential precondition for a company to be a responsible corporate citizen is to adopt an enabling ethical culture.⁴⁵² When a company has fostered an enabling ethical culture, corporate social responsibility will be inculcated organically in its dealings with other stakeholders. In the sections below, the discussion is continued by discussing corporate citizenship and corporate social responsibility.

5.3. Demystifying Corporate Social Responsibility and corporate citizenship.

As a point of departure, it is important to note that companies as legal persons without a physical presence can only act through their human agents or functionaries.⁴⁵³ Companies are inanimate and inherently incapable of the physical presence that human beings enjoy in society.⁴⁵⁴ Ironically, notwithstanding the aforesaid, companies have a far-reaching impact on society through their actions. The impact that companies have on society exceeds that of natural human beings.⁴⁵⁵ The extent to which companies can impact society was discussed in earlier chapters and reiterated in brief above.⁴⁵⁶

⁴⁴⁷ Sukhdeo and Arnolds “Pursuing the triple bottom line sustainability through conscious corporate Governance” 2016 *South African Journal for Labour Relations* 86

⁴⁴⁸ Tony Blunden *Mastering Operational Risk*

⁴⁴⁹ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 398

⁴⁵⁰ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 375

⁴⁵¹ Howell and Sorour *Corporate Governance*

⁴⁵² Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies*

⁴⁵³ Howell and Sorour *Corporate Governance*

⁴⁵⁴ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 375

⁴⁵⁵ Howell and Sorour *Corporate Governance*

⁴⁵⁶ Howell and Sorour *Corporate Governance*

Significantly, the extent to which companies can impact society is not of a trifling nature; in fact, the impact of companies in society can demonstrably surpass the impacts of some sovereign governments.⁴⁵⁷ The capacity to wield the power of this nature derives from the company's strength as an economic institution.⁴⁵⁸ As a direct consequence of companies' ability to wield power and impact society significantly, there is a need for companies' actions and standing in the society to be considered.⁴⁵⁹ Companies should be appreciated both as economic and corporate citizens.⁴⁶⁰ Companies are better placed to fulfil both roles if they are run within the confines and constraints of ethics.⁴⁶¹ Companies are expected to be corporate citizens when interacting with stakeholders and conducting operations within the communities in which they operate. In this sense, companies are expected to minimise their social and environmental harm and report their impacts.⁴⁶² Further, companies are expected to find solutions to social issues proactively.⁴⁶³ A company's ability to meet this expectation is foregrounded by adopting ethical practices as aforesaid.

The evolution of companies' behaviour and impacts on stakeholders and society can be divided into three segments, postulated by theorist Michael Porter⁴⁶⁴. Significantly, each segment reveals a different ethical orientation vis-à-vis stakeholders or society, thus determining the type of corporate citizen the company will be. The first segment was the stage when there was philanthropy.⁴⁶⁵ Philanthropy is one way in which companies give effect to corporate social responsibility. In terms of the philanthropy model, social responsibility is not discernible in its operations, in essence, when companies are conducting business.⁴⁶⁶ It makes it feasible for companies to do many bad things, and conceivably their social and environmental outputs would be objectionable.⁴⁶⁷ For employees, companies are able to use workers without adequate safety standards in place or pay way less than a living wage, especially in jurisdictions with inadequate labour regulation..⁴⁶⁸ Companies remedied or atoned for their reprehensible outcomes by devoting

⁴⁵⁷ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 375

⁴⁵⁸ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 375

⁴⁵⁹ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 375

⁴⁶⁰ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 375

⁴⁶¹ Ibid

⁴⁶² Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 375

⁴⁶³ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 375

⁴⁶⁴ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 375

⁴⁶⁵ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 375

⁴⁶⁶ Hendrikse and Hefer *Hendrikse and Hefer Corporate Governance Handbook* 3rd ed (Juta Cape Town, 2019)

⁴⁶⁷ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 375

⁴⁶⁸ Ibid

some of their earnings to good causes well after the damage has been done.⁴⁶⁹ So social responsibility was something companies would do after the fact, in essence, after trampling on the interests of other stakeholders during operations.

Concerning employees, the relations were fertile for exploitation, and if an employee is dissatisfied, the open only option was to quit their jobs.⁴⁷⁰ A company will still be considered a good corporate citizen if it gives away goods after the fact or supports social causes. For example, a mining firm that exposes workers to health hazards and yet after reaping profits sponsors a football team will still earn itself a good corporate citizen status regardless of the ugly conduct during operations. This phenomenon saw a growing tendency wherein companies that misbehave and are caught would seek to atone for its bad conduct by donating to good causes.⁴⁷¹

In the second stage, when corporate responsibility was still in its nascent stages, companies tried to minimise harm by doing fewer bad things.⁴⁷² In relation to employees, one may say it was sufficient to meet minimum legal requirements, for instance, in health and safety.⁴⁷³ During this stage, companies would measure their responsibility through their ability to meet minimum legal requirements, and the need to exceed what is stated by the law was unwarranted.⁴⁷⁴ If companies committed unconscionable labour acts like exploiting employees, they would argue and say they had not broken the law.⁴⁷⁵ An example of this is Nike Inc, which utilised child labour for its manufacturing plants, and the justification for doing so was that the law did not prohibit the conduct.⁴⁷⁶ Meeting minimum legal requirements and committing to philanthropical social responsibility was adequate to confer a company a "good corporate citizen" status.⁴⁷⁷ In essence, even if a company committed legally permissible exploitative practices against stakeholders, it would not lose its good corporate citizen status as long as it had not violated the law.⁴⁷⁸ This line

⁴⁶⁹ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 375

⁴⁷⁰ Kent Greenfield "Defending Stakeholder Governance" *Case W. Res L. REV.* 1043 (2008)

⁴⁷¹ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

⁴⁷² Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 375

⁴⁷³ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

⁴⁷⁴ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

⁴⁷⁵ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

⁴⁷⁶ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

⁴⁷⁷ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁴⁷⁸ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

of thinking proved untenable when Nike lost sales due to utilising child labour; the incidence will be ventilated in detail below.

In the third stage, which is endorsed in this thesis, there is an expectation for companies to work on real solutions that serve social problems.⁴⁷⁹ From the above, it is apparent that companies are incrementally given more responsibilities and are more involved in matters relating to society and the environment. Companies are expected to be responsible corporate citizens by exceeding their economic and legal expectations.⁴⁸⁰ In this stage, the good corporate citizen is expected to better for stakeholders beyond what the law prescribes.⁴⁸¹ The company's integrity is expected to be impeccable such that even in the absence of regulation, stakeholders are treated fairly by the more powerful company.⁴⁸² In essence, companies are expected not to take advantage of the absence of regulation and use the vacuum as an opportunity to extract unfair advantages over desperate employees who tend to accept work under any conditions, including exploitative conditions.⁴⁸³ Companies should, in essence, avoid harm or social injury even if the company does not derive any direct financial benefits by doing so.

5.3.1. Difference between Corporate Citizenship and Corporate Social Responsibility.

It is pertinent to attempt to attach meaning and distinguish corporate social responsibility from corporate citizenship. It is vital for academic purposes, at least.⁴⁸⁴ The term corporate citizen relates to the legal personality of the company.⁴⁸⁵ It is essentially concerned with the fiction of a company being a legal person.⁴⁸⁶ The emphasis is on the company bearing rights and duties as a participant in society.⁴⁸⁷ A company can be a good or bad citizen; what is determinative of the category it chooses for itself are the outputs and impacts of its operations on society. The test is

⁴⁷⁹ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 375

⁴⁸⁰ Wiese T *Corporate Governance In South Africa - With International Comparisons*

⁴⁸¹ Ibid

⁴⁸² Ibid

⁴⁸³ Ibid

⁴⁸⁴ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 377

⁴⁸⁵ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 377

⁴⁸⁶ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 377

⁴⁸⁷ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 377

whether the company conducts itself within parameters of ethics or not.⁴⁸⁸ In comparison, corporate social responsibility focuses on the good companies are expected to do in becoming corporate citizens.⁴⁸⁹ It is vital to mention at this stage that a company that operates outside parameters of ethics will not become a good corporate citizen merely because it engages in philanthropical work after hours.⁴⁹⁰

For this discussion, the thesis will adopt the definition of CSR by the European Commission postulated in its Green Paper of 2001.⁴⁹¹ CSR is "a concept whereby companies integrate social and environmental concerns in their business operations and their interaction with their stakeholders on a voluntary basis".⁴⁹² The preceding definition is pertinent because it is an antithesis of the type of company described earlier in this thesis, viz; a company that only considers its narrow profit interests to the exclusion of all other stakeholders.⁴⁹³ CSR speaks to a companies' commitment to improving and managing the economic, environmental, and social implications of their activities at the firm, local, regional, and global levels.

Another crucial related concept that merits description is corporate social investment (CSI). CSI denotes corporate philanthropy and is conceivably part of CSR.⁴⁹⁴ More specifically, CSI relates to activities that are not routine business activities of the company, usually having a robust developmental approach geared for the benefit and upliftment of the communities often in which companies operate.⁴⁹⁵ It requires companies to contribute to the common good at the possible expense of the business.⁴⁹⁶ At the launch of king IV, former Chief Justice Mogoeng said that corporate social investment should not be viewed as an exercise in grudging compliance. Instead, companies should seek to ensure that their business success is visible in the communities in which they operate.⁴⁹⁷ One may say that the while the primary model of social responsibility promoted

⁴⁸⁸ Ibid

⁴⁸⁹ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 377

⁴⁹⁰ Ibid

⁴⁹¹ European Union *GREEN PAPER: Promoting a European framework for Corporate Social Responsibility* 2001

⁴⁹² European Union *GREEN PAPER: Promoting a European framework for Corporate Social Responsibility* 2001

⁴⁹³ Williams *et al The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* 16

⁴⁹⁴ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 377

⁴⁹⁵ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 378

⁴⁹⁶ Wiese T *Corporate Governance In South Africa - With International Comparisons*

⁴⁹⁷ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 378

in this thesis is that of ethical practices during operations, business is still expected to do more and achieve invest in stakeholders and the communities in which they operate.⁴⁹⁸

It has been discussed above that companies become good corporate citizens if the output of their activities is beneficial to society and through CSR initiatives.⁴⁹⁹ There can be no serious challenge to the need for companies to be good corporate citizens as will be illustrated below. CSR has gained traction as a practical program and commands attention everywhere.⁵⁰⁰ The majority of companies now acknowledge the need to be good corporate citizens and often engage in CSR activities.⁵⁰¹ In large companies, it is not easy to find companies that still justify their existence in terms of profits rather than service to the community.⁵⁰² Companies often report with pride their efforts aimed at improving society and protecting the environment.⁵⁰³ Reports usually range from limiting greenhouse emissions, recycling, stakeholder upliftment, among other things. Reports on these issues often precede other ostensibly "less" critical issues such as profits.⁵⁰⁴ To further buttress the point that companies are moving away from the idea of justifying their presence in terms of profits alone, the following illustration will be apt.

While business has been oriented towards the shareholder maximisation model described above, it led to the protection of shareholder interests alone. Consequently, shareholders as providers of capital were the only important stakeholder. However, the shareholder primacy principle has since come under pressure, and even capitalists are abandoning the concept.⁵⁰⁵ On the 19th of August 2021, the business roundtable, a forum composed of CEOs of most multinational companies, committed to a new purpose for the corporation.⁵⁰⁶ The essence of the new statement on the corporation's purpose, signed by 181 CEOs, commits that companies will be led for the benefit of

⁴⁹⁸ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁴⁹⁹ Ibid

⁵⁰⁰ Mike Perez <https://www.economist.com/briefing/2019/08/22/big-business-is-beginning-to-accept-broader-social-responsibilities> accessed 24 March 2021

⁵⁰¹ Mike Perez <https://www.economist.com/briefing/2019/08/22/big-business-is-beginning-to-accept-broader-social-responsibilities> accessed 24 March 2021

⁵⁰² Mike Perez <https://www.economist.com/briefing/2019/08/22/big-business-is-beginning-to-accept-broader-social-responsibilities> accessed 24 March 2021

⁵⁰³ Ibid

⁵⁰⁴ Mike Perez <https://www.economist.com/briefing/2019/08/22/big-business-is-beginning-to-accept-broader-social-responsibilities> accessed 24 March 2021

⁵⁰⁵ Ibid

⁵⁰⁶ Business Roundtable: <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> Accessed 20 February 2021.

all stakeholders.⁵⁰⁷ The paradigm shift promises a move from the shareholder primacy principle, which had been endorsed yearly at least from 2007 to 2018, to a design whereby companies are led in the interests of all stakeholders, arguably a step towards the pluralist model.⁵⁰⁸

Some of the mentioned stakeholders by the business roundtable include customers, employees, suppliers, communities, and shareholders. Consequently, there is a growing demand for companies to have a goal other than to make profits for shareholders but to include other stakeholders.⁵⁰⁹

Concerning stakeholder involvement, it is essential to acknowledge an interdependent relationship between companies and their stakeholders and to clarify that companies do not necessarily sacrifice their profitability when they become good corporate citizens.⁵¹⁰ Further, a company's ability to create value for itself depends on its ability to create value for other stakeholders.⁵¹¹ CSR does not suggest that companies give up profit orientation *in toto* in favour of pure philanthropic learning.⁵¹² It is a myth that there is a trade-off between social responsibility and profits.⁵¹³ It is also equally fallacious that socially responsible companies underperform when compared to Machiavellian counterparts.⁵¹⁴ Since the interests of the company and those of stakeholders are interdependent, an inclusive stakeholder approach maximises this symbiosis to promote the company's long-term sustainability.⁵¹⁵ Sustainability is one of the reasons why companies should prefer a paradigm shift from shareholder centric approach to creating value for all stakeholders. The relationship between sustainability and corporate social responsibility are considered in turn.

5.4. Sustainability and Corporate Social Responsibility.

Sustainability as a concept suggests something enduring and capable of longevity.⁵¹⁶ Early definitions of sustainability may be traced to the 1987 Brundtland Commission.⁵¹⁷ The Report

⁵⁰⁷ Ibid

⁵⁰⁸ Business Roundtable: <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> Accessed 20 February 2021.

⁵⁰⁹ Ibid

⁵¹⁰ Ibid

⁵¹¹ Ibid

⁵¹² Ibid

⁵¹³ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵¹⁴ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵¹⁵ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵¹⁶ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵¹⁷ Our Common Future: 1987: Brundtland Report

defined sustainability as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.⁵¹⁸

For a company, this entails sustaining the company itself while sustaining the resources on which the company relies to achieve its objectives and its continued existence.⁵¹⁹ The resources include the environment, society, or stakeholders, for this context, employees. The rationale for requiring the company to sustain its stakeholders as a measure of sustaining itself is that a company will not succeed in a society that fails. A company will not be able to conduct its functions efficiently if the employees are demoralized or receive revenue good streams from disgruntled customers.⁵²⁰

Pertinently sustainable development is about integrating the goals of high-quality life, health and prosperity with social justice and maintaining the earth's capacity to support life in all its diversity.⁵²¹ These social, economic and environmental goals are interdependent and mutually reinforcing.⁵²² Inversely, one may say that if one factor, the financial aspect, is given too much prominence at the expense of the environment and social facets, sustainability will not be achieved, and these factors will be mutually destructive. So, sustainable development has three dimensions being economic, social environmental, and they are inseparably interdependent.⁵²³ For example, in South Africa, to eliminate poverty, social justice is an indispensable prerequisite, and so is economic development and protection of the environment.⁵²⁴

Social responsibility is linked to sustainable development.⁵²⁵ Suppose one considers that sustainable development encompasses economic, social, and environmental goals common to all people. In that case, it can be used, to sum up the broader expectations of society that need to be considered by organisations seeking to act responsibly.⁵²⁶ In essence, the overarching concern for a company's social responsibility should contribute to sustainable development.⁵²⁷ The objective

⁵¹⁸ Ibid

⁵¹⁹ Ibid

⁵²⁰ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵²¹ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵²² Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵²³ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵²⁴ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵²⁵ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵²⁶ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵²⁷ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

of corporate social responsibility is to achieve sustainability for society, and the focus is not on one single organisation.⁵²⁸

In relation to companies, McKinsey survey research demonstrated that when executives consistently make investments and decisions with long-term objectives in mind, their companies generate more shareholder value, create more jobs, and contribute more to economic growth than do companies that focus on the short term.⁵²⁹ The research further demonstrates that companies yield better long-term performance when they address the interests of employees, customers, and other stakeholders. In most instances, short-term focus is a result of pressure from Shareholders and directors to meet near-term earnings targets at the expense of long-term strategies.⁵³⁰ One may say that a company's focus on short-term goals directly results from over-emphasising only the economic facet of the company at the expense of the social and environmental elements.⁵³¹ When a company does this, it runs the risk of failing to pay adequate attention to the interest of other stakeholders.⁵³² Therefore, long-term value creation is consistent with sustainable development and is fertile ground to nurture and instil social responsibility initiatives within an organisation.⁵³³

Companies do not exist in a vacuum but are integrally connected to the societies in which they operate.⁵³⁴ King IV states that corporate citizenship is an inevitable consequence of business being an integral part of society.⁵³⁵ Corporate citizenship is premised on the idea that companies cannot succeed in a society that fails.⁵³⁶ In this sense, companies interested in their long-term survival will be concerned about society and ensure their outputs positively impact society.⁵³⁷ A critical part of the concern for the corporation is to give direct consideration rather than ancillary consideration to the legitimate interests and expectations of stakeholders, including employees.⁵³⁸ Substantial efforts to ensure that companies are responsible for their outputs or impacts on society and the environment are traceable through the four iterations of corporate governance codes.⁵³⁹ King III

⁵²⁸ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵²⁹ [The case for stakeholder capitalism | McKinsey](#)

⁵³⁰ [The case for stakeholder capitalism | McKinsey](#)

⁵³¹ [The case for stakeholder capitalism | McKinsey](#)

⁵³² [The case for stakeholder capitalism | McKinsey](#)

⁵³³ [The case for stakeholder capitalism | McKinsey](#)

⁵³⁴ IODSA *The King IV Report on Corporate Governance for South Africa 2016*, 12

⁵³⁵ IODSA *The King IV Report on Corporate Governance for South Africa 2016*, 12

⁵³⁶ Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 391

⁵³⁷ [The case for stakeholder capitalism | McKinsey](#)

⁵³⁸ [The case for stakeholder capitalism | McKinsey](#)

⁵³⁹ King Reports

called for businesses to be accountable for economic, social, and environmental performance. This concept is now known as the triple context. In King IV, the emphasis is on the interconnectedness of the economic, social, and environmental context. Such concepts should be considered as an integral whole.⁵⁴⁰

5.4.1. Sustainability and the triple context

The discussion above emphasised that companies are now expected to account for their conduct as corporate citizens.⁵⁴¹ The scope of accounting is not limited to financial performance but extends to social and environmental performance.⁵⁴² The triple context is the financial or economic factors combined with social and environmental components.⁵⁴³ This section shows that when a company becomes a good corporate citizen by operating ethically within the triple context, it will enhance its sustainability.⁵⁴⁴

The three legs of sustainability are economic prosperity or economic sustainability.⁵⁴⁵ Economic sustainability suggests a paradigm shift from the short-term focus or profitability of the individual company or current shareholders to the company's long-term economic health.⁵⁴⁶ It is submitted that the longer-term focus orients the company to governance that encourages consideration of stakeholder welfare.⁵⁴⁷ It is axiomatic that for a company to be durable, it must attract talent and retain it. In a company where long-term orientation is a guiding principle, it will be acceptable for directors to invest in employee welfare even if this means diminishing returns to shareholders if it is in the company's best interest in the longer term.⁵⁴⁸

The second leg focuses on environmental stewardship or environmental sustainability.⁵⁴⁹ Companies are expected to do no harm to the environment and invest in its preservation. A detailed exposition of the environmental facet is beyond the scope of this thesis. The third leg of

⁵⁴⁰ IODSA *The King IV Report on Corporate Governance for South Africa 2016*, 12

⁵⁴¹ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁴² Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁴³ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁴⁴ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁴⁵ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁴⁶ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

⁵⁴⁷ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

⁵⁴⁸ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

⁵⁴⁹ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

sustainability is social responsibility or socio-efficacy.⁵⁵⁰ The focus is on development, which is about human beings' welfare; in essence, companies add value to their social impact.⁵⁵¹ In business, the concept of sustainability embraces the achievement of balanced, integrated economic, social, and environmental performance.⁵⁵² Therefore, when evaluating the sustainability of a business, it is necessary to consider financial issues together with social, environmental risks and accountability.⁵⁵³

5.5. The Business Case for Social Responsibility Towards Employees.

The focus will now examine the Business case for social responsibility towards Employees. Employees are vital internal stakeholders of a company.⁵⁵⁴ The King Report is instructive, and it provides that the company is represented by several interests, including the interests of shareholders, employees, consumers, the community, and the environment.⁵⁵⁵ It further states that the company's survival depends on its ability to create value for other stakeholders while creating value for itself. Wherefore acting in the best interests of the company cannot mean anything other than a blend of these interests.⁵⁵⁶ This means that the interests of shareholders and the employees as stakeholders are interdependent. Thus, following an inclusive stakeholder approach maximises this symbiosis to promote the company's long-term sustainability.⁵⁵⁷

The discussion will be bifurcated into two themes to make a case for corporate social responsibility towards employees. The first component looks at the positive reasons that may encourage companies to adopt CSR towards their employees. In other words, the focus seems at what companies and to benefit. The second component looks at the negative reasons. In other words, what companies stand to lose or suffer because of ignoring the voice or interests of employees.

⁵⁵⁰ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁵¹ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

⁵⁵² Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

⁵⁵³ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

⁵⁵⁴ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

⁵⁵⁵ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

⁵⁵⁶ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012 307

⁵⁵⁷ Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

5.5.1. Positive Reasons for Adopting CSR towards Employees.

A properly embedded ethical culture within a company should be the primary driver that behoves companies to adopt social responsibility measures in favour of their employees or any other stakeholders.⁵⁵⁸ Over and above a well embedded ethical campus, there are further positive benefits that a company will benefit if it acts in a socially responsible manner towards its employees. And these are considered below.

Adopting sustainable business practices, particularly treating employees fairly, will result in easier hiring of employees and retention of staff.⁵⁵⁹ A couple of surveys and research demonstrate that people want to work for a company with a reputation for being progressive, socially and environmentally responsible.⁵⁶⁰ A 1997 survey indicated that 75% of graduating MBA students in Minnesota said they would cut a salary to work for a socially responsible company.⁵⁶¹ It, therefore, follows that if employees are not treated well, and their voice is ignored, it may affect staff retention and result in high staff turnover.⁵⁶²

A company that is inclusive and makes its employees feel part of the organisation will invariably benefit from increased employee productivity.⁵⁶³ A company that appreciates its social responsibility towards its employees will address issues beyond the scope of its narrow economic, technical, and legal requirements.⁵⁶⁴ An employer would therefore consider what would be beneficial to the employee.⁵⁶⁵ So doing will see an employer factor in employee's views and sentiments when making decisions that affect them. An employer will also consider paying employees higher wages even if it can get other employees who may accept employment for lower wages.⁵⁶⁶ A responsible employer will also provide for a safer work environment even if no laws require this to be done. The net effect of the responsible behaviours towards employees would boost the morale and productivity of the employee at the workplace eventually.⁵⁶⁷

⁵⁵⁸Du Plessis J *et al Principles of Contemporary Corporate Governance 3rd ed* (Cambridge University Press 2015)

⁵⁵⁹ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁶⁰ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁶¹ Harvard Business Review

⁵⁶² Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁶³ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁶⁴ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁶⁵ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁶⁶ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁶⁷ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

Most financial institutions now consider social and environmental issues when conducting credit assessments.⁵⁶⁸ Good corporate social responsibility will further facilitate good risk management practices.⁵⁶⁹ A company that focuses on doing good based on integrity and respect for stakeholders will avoid committing disgraceful acts even when permitted by law.⁵⁷⁰ A company that avoids reputational harm by practising corporate responsibility will strengthen its brand image and reputation, essential for competitiveness.⁵⁷¹

5.5.2. Negative Reasons for corporate Social Responsibility.

The discussion now considers the detrimental effects that the company will suffer if it does not practice corporate social responsibility towards its employees or workers. Ideally, the positive reasons for good corporate social responsibility should be sufficient to exhort employers to adopt corporate social responsibility as an indispensable business imperative.⁵⁷² Negative reasons are not a good motivation for responsible behaviour because this thesis's nature is grounded in ethical behaviour. Fear of an adverse outcome or sanction does not translate to ethical behaviour, it translates into compliance. It is also submitted that the negative reasons are usually opposite outcomes to the positive reasons stated above, and therefore, negative ones are dealt with briefly.

The immediate and most apparent negative outcome when CSR is ignored is that it will sometimes amount to breaking the law.⁵⁷³ The Companies Act requires specific companies to appoint a social and ethics committee.⁵⁷⁴ If a company decides to make money at all costs, it will not meet its legal obligations. Further, in a set-up where corporate responsibility is ignored, the company will be more prone to violating other laws relating to protecting the environment or safety protocols for workers while at work.⁵⁷⁵

Closely related to the morbid propensity to violate the law, failure to adopt CSR may weaken the company's ethical framework. A company will always have a tone from the top, either good or bad. A company that fails to adopt CSR will create a bad culture that may later be self-destructive.

⁵⁶⁸Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁶⁹Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁷⁰Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁷¹Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁷²Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁷³Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁷⁴ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁷⁵ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

A demotivated employee is more prone to engaging in unethical practices.⁵⁷⁶ A typical example would be Enron⁵⁷⁷, where even the employees themselves became corrupt.⁵⁷⁸ When there is widespread delinquency within the organisation, it will eventually collapse the company itself as there will be no basis upon which it can continue being sustainable.⁵⁷⁹ Society is getting more critical of the behaviours of corporations, especially global ones. The irresponsible behaviour of corporations receives increased media coverage and attract massive attention from the public.

A company that does not treat employees socially responsible will lose its license to operate and legitimacy in society. Stakeholders will become indisposed and will refuse to deal with the company. A typical example is Nike. Nike utilised cheap labour in Indonesia. The grotesque actions involved child labour and meagre wages. Following Nike's actions, numerous riots and massive boycotts followed. There is no doubt that Nike wanted to maximise shareholder value, and its actions were not crafted with a primary direct intention to harm the employees in Indonesia.⁵⁸⁰

Nike went to Indonesia to increase profits, thereby improving shareholder value.⁵⁸¹ Two factors drive shareholder value, and those are costs and sales. Then companies opt for countries or territories with lower labour standards; the intention is to lower production costs and thus improve cash flows.⁵⁸² However, this strategy only works if the sales remain constant.⁵⁸³ If cost reduction strategies result in fewer sales, the company may ironically lose much more money while saving on costs. Nike is a typical example. While having established factories in Indonesia and compromised on labour standards to save costs, it backfired when the cost-saving strategies reduced sales due to boycotts. Most CSR practices towards employees have become common,

⁵⁷⁶ Hendricks JW and Hefer L *Corporate Governance Handbook: Principles and Practice* 3rd ed (Juta 2019)

⁵⁷⁷ Hendricks JW and Hefer L *Corporate Governance Handbook: Principles and Practice* 3rd ed (Juta 2019)

⁵⁷⁸ Hendricks JW and Hefer L *Corporate Governance Handbook: Principles and Practice* 3rd ed (Juta 2019)

⁵⁷⁹ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁸⁰ Paul Zick, "CSR Infrastructure for Communication and the Nike Controversy," *Journal of Management and Sustainability* 3, no. 1 (2013): 71

⁵⁸¹ Ibid

⁵⁸² ibid

⁵⁸³ Ibid

especially in developed countries. Engaging in CSR may not result in monetary rewards. However, not engaging in CSR toward employees becomes punishable.⁵⁸⁴

Surveys also support the view that company misconduct may result in stakeholders punishing the company. A millennial poll on corporate social responsibility, conducted amongst 25000 respondents in 23 countries and six continents, reveals that 49% of the respondents believed that a company's image and how the public perceives it is mostly influenced by how it fulfils its corporate responsibility social responsibility.⁵⁸⁵ At least 20% indicated that they had either punished or rewarded companies based on their social and environmental performance, and most indicated they might do so in the future.⁵⁸⁶ Closer to home, in South Africa, the Clicks advert with potentially racist depictions was met with widespread protests that resulted in their shops nationwide being closed and even looted.⁵⁸⁷ Other companies like H & M have also been met with countrywide protests because the public or sectorial political movements saw them as racialisists. The two examples demonstrate that when a company ignores social imperatives, it risks reputational harm, and in South Africa, it might result in loss of business.

From the above, a company may act responsibly towards stakeholders or employees because it has a solid ethical campus. When companies act socially responsibly by owning what is expected of them, one may say that it would be the best-case scenario. Such companies would have expanded their view of success to exceed just the financial facet. Companies will be encompassing their lasting impacts in terms of social and environmental facts. Having demonstrated the business case for social responsivity, it is pertinent to investigate how companies may implement socially responsible practices towards their employees.

⁵⁸⁴ *ibid*

⁵⁸⁵ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁸⁶ Naidoo Ramani *Corporate Governance An Essential Guide for South African Companies* (LexisNexis 2016)

⁵⁸⁷ <https://www.dailymaverick.co.za/article/2020-09-08-clicks-stores-trashed-over-racist-ad/>

6. Company Law initiatives for worker participation.

6.1. Introduction.

The preceding chapter makes a case for corporate social responsibility towards employees. It is apparent that, over and beyond the protections offered by Labour specific legislation, companies must take a proactive approach in treating their stakeholder fairly, particularly the employees.⁵⁸⁸ The proactive measures should not be actuated by labour laws but should flow from corporate governance; it should be what companies want to do even without regulation.⁵⁸⁹ It was stated that companies should adopt an ethical culture and deal with their stakeholders ethically to effectively adopt the contemplated proactive measures.⁵⁹⁰

As demonstrated earlier, while labour law specific initiatives go a long way in empowering the employee or improving the employee's plight, it still leaves a lot to be desired.⁵⁹¹ In essence, labour law initiatives, while having achieved a lot in enabling worker participation, have not fully delivered satisfactorily.⁵⁹² In fact, it was demonstrated that some labour law initiatives such as collective bargaining are becoming less effective.⁵⁹³ Their adversarial nature and inept negotiating skills also strain the employer and employee relationship.

This thesis does not assert that labour law initiatives should be jettisoned. Instead, the proposition is that labour law should be enhanced to ensure employees are treated fairly and their voices heard.⁵⁹⁴ In the previous chapters, it has already been proposed that corporate Governance and company law initiatives are fundamental complementary mechanisms that may improve worker participation.⁵⁹⁵ Notably, though employees have traditionally been excluded from company law and corporate governance structures, one of the key justifications for this has been that other employee interests are best achieved through separate legislation. Nevertheless, the need to

⁵⁸⁸ Monray Botha "Responsibilities of Companies towards Employees" *PER/PELJ* 2015 (18) 2

⁵⁸⁹ Wiese T *Corporate Governance In South Africa - With International Comparisons*

⁵⁹⁰ *Ibid*

⁵⁹¹ Monray Botha "Responsibilities of Companies towards Employees" *PER/PELJ* 2015 (18) 2

⁵⁹² *Ibid*

⁵⁹³ *Supra*

⁵⁹⁴ Tonia Novitz, "Engagement with Sustainability at the International Labour Organization and Wider Implications for Collective Worker Voice," *International Labour Review* 159, no. 4 (December 2020): 463-482

⁵⁹⁵ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)

enhance labour law initiatives indicates an essential need for developing worker participation initiatives facilitated by company law and corporate governance frameworks to improve the welfare of employees.⁵⁹⁶ This will be particularly helpful for workers who do not qualify as employees under the Labour Relations Act.⁵⁹⁷

The business case for companies to adopt fair practices to their employees has already been traversed in detail in the preceding chapter. This chapter focuses on the practical means of enhancing worker participation through corporate governance mechanisms.⁵⁹⁸ These practical measures are considered in turn.

6.2. Company Board Structure.

How a company's governing body is structured will determine how it interacts with its stakeholders.⁵⁹⁹ The structure and composition of the company's board of directors go a long way in determining how directors will prioritize the varying interests of different stakeholders.⁶⁰⁰ The model of company ownership and governance structure in a country will determine how companies in that country are governed and how they interact with stakeholders. There are multiple models of company ownership; however, this thesis will confine to two key models *viz*; the outsider and insider stakeholder model. Considering all models is beyond the scope of this thesis. The two models have different ramifications for the employees as stakeholders.⁶⁰¹ The outsider stakeholder model is found in English speaking countries, and it is followed in South Africa.⁶⁰² The second model is the insider stakeholder model, which is common in continental Europe. The models will be considered below, focusing on how they may promote or inhibit worker participation.⁶⁰³ Lasty, a discussion on the model as it applies in South Africa will follow.

6.2.1. Outsider Stakeholder model.

⁵⁹⁶ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)

⁵⁹⁷ Labour Relations Act 66 of 1995

⁵⁹⁸ *Infra*

⁵⁹⁹ Hendricks JW and Hefer L *Corporate Governance Handbook: Principles and Practice* 3rd ed (Juta 2019)

⁶⁰⁰ Hendricks JW and Hefer L *Corporate Governance Handbook: Principles and Practice* 3rd ed (Juta 2019)

⁶⁰¹ Hendricks JW and Hefer L *Corporate Governance Handbook: Principles and Practice* 3rd ed (Juta 2019)

⁶⁰² Gail Gibson *The A-Z of GRC*

⁶⁰³ *ibid*

The outsider model is also known as the single-tier outsider Anglo-US company ownership model.⁶⁰⁴ It is characterized by share ownership by individuals who may not have a relationship with the company other than a desire for profit.⁶⁰⁵ Companies under this model will typically have a single board of directors, and shareholders elect the majority of the directors.⁶⁰⁶ Management is charged with making the companies they run to be more profitable in the interests of shareholders.⁶⁰⁷ Concerning other stakeholders, such as employees, it is generally believed that they are better served through separate legislation as aforesaid.⁶⁰⁸

The outsider model in its original design does not actively promote the protection of stakeholders within corporate governance. Therefore, employees are primarily protected through the contract and separate sector-specific legislation like labour laws, as demonstrated in previous chapters.⁶⁰⁹ Since the protection and advancement of employee interests are only principally through contract and labour specific legislation, it follows that this model, if unmodified, will have little to offer to workers in terms of enabling worker participation. It leaves workers at the mercy of employers who are usually indisposed to permit worker participation or may overlook employees' interests as this would not be a key priority in the organization.⁶¹⁰ Since the outsider model is followed in South Africa, its ramifications will be considered below under the South African context later in this discussion.⁶¹¹

6.2.2. The insider models.

The insider model is the alternative to the outsider model discussed above. The insider model is most prevalent in continental Europe and Japan.⁶¹² The model enables workers' interests to be

⁶⁰⁴ibid

⁶⁰⁵ibid

⁶⁰⁶ ibid

⁶⁰⁷ Dennis Davis and Michelle Le Roux "Changing the role of the corporation: A journey away from Adversarialism" *Acta Juridica* 2012

⁶⁰⁸ Supra

⁶⁰⁹ Supra

⁶¹⁰ Eric Engle; Tetiana Danyliuk, "Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm," *Golden Gate University Law Review* 45, no. 2 (May 2015): 72

⁶¹¹ Eric Engle; Tetiana Danyliuk, "Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm," *Golden Gate University Law Review* 45, no. 2 (May 2015): 72

⁶¹² Eric Engle; Tetiana Danyliuk, "Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm," *Golden Gate University Law Review* 45, no. 2 (May 2015): 72

given attention at a corporate governance level.⁶¹³ The locus-classicus is the German system of corporate governance. In the case of the Insider-model, there is a different structure of the board. The insider model utilizes a two-tier board structure instead of a unitary board that shareholders wholly elect. The board is comprised of a management board and a supervisory board.⁶¹⁴

The executive board is responsible for corporate management. The supervisory council controls the management board. Employees, together with shareholders, have the power to participate in the election of board members of the supervisory board.⁶¹⁵ More pertinently, there must be at least three members of the supervisory appointed by the stakeholders, largely the employees, and the stakeholders also appoint a chairperson whom they may remove at any time.⁶¹⁶ The supervisory board plays a vital function in ensuring checks and balances and policy-making. Concerning the management board, it is responsible for undertaking management roles.⁶¹⁷ There must be at least two management board members whose terms of office should not exceed three financial years; notably, the supervisory board may remove them at any time.⁶¹⁸ They are subject to the same responsibilities as directors.

From the above, it is apparent that in the insider model, employees are endowed with formal rights to influence key managerial decisions by virtue of the extensive participation rights they enjoy at a corporate Governance level.⁶¹⁹ Therefore, the insider model is better placed in terms of enabling worker participation. The importance of the insider model is that it is well suited in advancing the

⁶¹³ Eric Engle; Tetiana Danyliuk, "Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm," *Golden Gate University Law Review* 45, no. 2 (May 2015): 72

⁶¹⁴ Eric Engle; Tetiana Danyliuk, "Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm," *Golden Gate University Law Review* 45, no. 2 (May 2015): 72

⁶¹⁵ Eric Engle; Tetiana Danyliuk, "Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm," *Golden Gate University Law Review* 45, no. 2 (May 2015): 72

⁶¹⁶ Eric Engle; Tetiana Danyliuk, "Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm," *Golden Gate University Law Review* 45, no. 2 (May 2015): 81

⁶¹⁷ Gail Gibson *The A-Z of GRC*

⁶¹⁸ Eric Engle; Tetiana Danyliuk, "Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm," *Golden Gate University Law Review* 45, no. 2 (May 2015): 72

⁶¹⁹ Eric Engle; Tetiana Danyliuk, "Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm," *Golden Gate University Law Review* 45, no. 2 (May 2015): 72

interests of workers who do not qualify as employees under the Labour Relations Act⁶²⁰ and who, therefore far under what is known as the representation gap. Further, the insider model will prod companies to treat workers fairly, especially when the law could be deficient.⁶²¹ Moreso, one may say that the board is a critical organ in a company's decision-making. Participating and influencing at the board level is an essential indication of serious worker participation. Indeed, if employees have influence at the board level, it allows employees to voice and entrench their interests.⁶²²

6.2.3. South African System.

South Africa follows the Anglo/insider model of the board structure.⁶²³ It is crucial to assert that labour and corporate law are traditionally radically separated in practice and scholarship.⁶²⁴ However, there is growing consensus it could have been true in the past, but in the present day such a split is no longer desirable. Even if South Africa adopts this model, the Companies Act 71 of 2008 ushered in some modifications that complement labour law initiatives.⁶²⁵ At this stage, the question that arises for consideration is whether South Africa should adopt the insider model or a two-tier board structure to improve worker participation at a corporate governance level. Or if the insider model modified as by the Companies Act is adequate in advancing worker participation in the company.⁶²⁶

South Africa follows the outsider model, and shareholders elect the board of directors who are principally responsible for running the company.⁶²⁷ These directors have traditionally been charged with the responsibility of creating a corporate governance structure that advances the interests of equity investors. The primacy of shareholders has had an indisputable concomitant effect of subordinating the interests of employees or other stakeholders to those of shareholders.⁶²⁸

⁶²⁰ Labour Relations Act 66 of 1995

⁶²¹ Gail Gibson *The A-Z of GRC*

⁶²² Eric Engle; Tetiana Danyliuk, "Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm," *Golden Gate University Law Review* 45, no. 2 (May 2015):

⁶²³ Hendricks JW and Hefer L *Corporate Governance Handbook: Principles and Practice* 3rd ed (Juta 2019)

⁶²⁴ Eric Engle; Tetiana Danyliuk, "Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm," *Golden Gate University Law Review* 45, no. 2 (May 2015):

⁶²⁵ Companies Act 71 of 2008

⁶²⁶ Companies Act 71 of 2008

⁶²⁷ Hendricks JW and Hefer L *Corporate Governance Handbook: Principles and Practice* 3rd ed (Juta 2019)

⁶²⁸ *ibid*

Therefore, it follows that shareholders enjoy primacy, which means that worker-related interests or opportunity to advance their interests or participate in corporate governance is not prioritized. The fact that shareholder interests hold sway has led to a situation where worker interests or welfare to be curtailed to cut costs to improve the dividend distribution.⁶²⁹ The fact that the structure does not allow for employee representation at board level means that the single-tier model offers less for employees. Nevertheless, the question then becomes whether this creates a case for adopting a two-tier model. This concern is dealt with in turn.

6.2.4. The Adoption of Two-tier Model in South Africa.

Given the inherent weakness of the single-tier model in advancing worker interests, a case has been made for South Africa to consider adopting a two-tier board structure. In fact, studies reveal that in some countries, such as in the United Kingdom, where workplace-based institutions for worker representation did not supplement adversarial labour relations, labour and management relations were exceedingly poor. This discussion now considers whether the adoption of the two-tier model will enhance worker participation in South Africa.

It has already been asserted that a two-tier board structure is a system best suited to facilitate worker participation in decision making.⁶³⁰ One of the principal reasons is that it helps manage the information flow and improve board efficiency. Further, there is no doubt that a two-tier board structure has resulted in more efficient worker participation in jurisdictions that use the system like Germany.⁶³¹ The issue for consideration here would be whether; what works in Germany could be transplanted in South Africa and yield the same efficiencies generated by the two-tier system in Germany.

In dealing with this issue, firstly, one should direct attention to the labour market or Labour system structure of Germany and South Africa.⁶³² The relationship between the governance of a corporation and labour regulation differs between the so-called liberal market system and the

⁶²⁹ Hendricks JW and Hefer L *Corporate Governance Handbook: Principles and Practice* 3rd ed (Juta 2019)

⁶³⁰ Hendricks JW and Hefer L *Corporate Governance Handbook: Principles and Practice* 3rd ed (Juta 2019)

⁶³¹ *ibid*

⁶³² Dennis Davis & Michelle Le Roux “Changing the role of the Corporation: A journey away from adversarialism” 2012 *Acta Juridica*

coordinated market system.⁶³³ Labour and corporate meet in more harmonious circumstances in the coordinated market system.⁶³⁴ The coordinated market system deliberately seeks to institutionalize employees' views within the company, thereby acknowledging employees as core stakeholders who contribute to the company's sustainability.⁶³⁵ The outcome of this is the direct promotion of a sense of institutional responsibility. For example, in Germany, legislation enables employees to elect directors as previously mentioned, resulting in co-determination. Therefore, the system allows for the development of policies that are likely to expand or protect jobs even where this may compromise shareholder value.⁶³⁶

Compared to the coordinated market model, the South African labour market system is based on the liberal market system, underpinned by collective bargaining.⁶³⁷ The board is unitary and is charged with developing a corporate governance system to increase shareholder value.⁶³⁸ Even in terms of the enlightened shareholder model, directors consider other stakeholders only when this would be in the interests of shareholders.⁶³⁹ Therefore, there is an essential difference from the coordinated labour model in prioritizing stakeholders.

While the coordinated model deliberately seeks to institutionalize the employee, the liberal market model prioritizes a single stakeholder group being shareholders.⁶⁴⁰ In The liberal market system, the predominant form of employee participation is done through collective bargaining between labour and capital represented by trade unions and employer or employer's organizations.⁶⁴¹ Even so, managers retain the managerial prerogative. As such, collective bargaining cannot result in co-

⁶³³Dennis Davis & Michelle Le Roux "Changing the role of the Corporation: A journey away from adversarialism" 2012 *Acta Juridica*

⁶³⁴Dennis Davis & Michelle Le Roux "Changing the role of the Corporation: A journey away from adversarialism" 2012 *Acta Juridica*

⁶³⁵Dennis Davis & Michelle Le Roux "Changing the role of the Corporation: A journey away from adversarialism" 2012 *Acta Juridica*

⁶³⁶ *Supra*

⁶³⁷ Dennis Davis & Michelle Le Roux "Changing the role of the Corporation: A journey away from adversarialism" 2012 *Acta Juridica*

⁶³⁸Dennis Davis & Michelle Le Roux "Changing the role of the Corporation: A journey away from adversarialism" 2012 *Acta Juridica*

⁶³⁹ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

⁶⁴⁰ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

⁶⁴¹ Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

determination or joint decision-making over key decisions relating to the running of the business as these are entirely left to management.⁶⁴² The bargaining process is designed to enable the most powerful party to prevail as discussed in the preceding chapters. Therefore, it is a more adversarial process than any form of co-determination.⁶⁴³ So, a crucial difference in terms of attitude is that there is a readiness to engage harmoniously in the coordinated market system. In the liberal market system, there is a readiness to bargain adversarial and often also violently.

In South Africa, engagement between labour and capital has not always been enabled by adversarial methods. There is one significant statutory exception to the adversarial framework, and that would be the introduction of workplace forums in terms of the Labour Relations Act. The workplace forums as a means of engagement have already been discussed earlier. It will suffice to mention that the system was adopted from the German system of Works Councils. The intention was to introduce a form of participatory workplace governance into the South African labour relations system. An examination of the success or failure of the workplace forums will give an idea as to whether South Africa is ready for co-determination between Labour and Capital.⁶⁴⁴

Despite being a noble objective, workplace forums did not meet with a degree of success. Brassey suggests that the efficacy of legislative provisions which created workplace forums were bedevilled by distrust on both the side of labour and capital. The capital was concerned that the managerial prerogative would be undermined, while labour was concerned that collective bargaining would be compromised.⁶⁴⁵ Davis has suggested that the failure of workplace forums may be attributed to the adversarial nature of labour relations. Adversarial labour relation has dominated South Africa from the Apartheid era and is so entrenched that any form of co-determination is adjudged not feasible.⁶⁴⁶

Therefore, it is submitted that while a two-tier system is -more enabling for worker participation. The system wherein it has been successful, like Germany, have a different environment in terms

⁶⁴² Monray M Botha "The different worlds of Labour and Company Law: Truth or Myth?" *PELJ* 2014 (17)5

⁶⁴³ Dennis Davis & Michelle Le Roux "Changing the role of the Corporation: A journey away from adversarialism" 2012 *Acta Juridica*

⁶⁴⁴ Ibid

⁶⁴⁵ Ibid

⁶⁴⁶ Dennis Davis & Michelle Le Roux "Changing the role of the Corporation: A journey away from adversarialism" 2012 *Acta Juridica*

of culture and attitude from both sides. Germany is strong on co-determination, while South Africa is rich in adversarial engagement.⁶⁴⁷

Therefore, it may not be wise to uproot a two-tier system that has worked in Germany because of an enabling environment and place it in South Africa where the labour relations culture and environment would be hostile to co-determination.⁶⁴⁸ Admittedly there is much pressure to adopt a two-tier system; this thesis does not endorse that drastic approach. While the governance structure in South Africa limits employee participation, the key reason for hostile relations is not the structure of the board but adversarial relations.⁶⁴⁹ Even when bargaining, there is usually no negotiation in good faith, making it difficult to envisage how the same persons would apply co-determination at the board level. One may say that with current adversarial relations, South Africa could be ready for a two-tier structure. However, many initiatives can still be achieved using a single-tier board.⁶⁵⁰ It will be more helpful to modify the current structure to accommodate stakeholders. There have been modifications to company law and corporate governance to accommodate stakeholders. These modifications are considered in turn.

6.3. Worker Participation Initiatives facilitated by Company Law or Corporate Governance.

The Companies Act made significant changes to the governance regarding employee participation: it "enshrined certain rights of employees to the point that extends their labour rights".⁶⁵¹ The rights of employees under company law play a vital complementary role to labour law initiatives. In this part, the thesis will examine participative mechanisms under the Act and corporate governance initiatives.

6.2.1. Initiatives by the Companies Act 71 of 2008.

⁶⁴⁷ Dennis Davis & Michelle Le Roux "Changing the role of the Corporation: A journey away from adversarialism" 2012 *Acta Juridica*

⁶⁴⁸ Supra

⁶⁴⁹ Supra

⁶⁵⁰ Supra

⁶⁵¹ Supra

There are several ways in which the Companies Act 71 of 2008 enables worker participation. These rights include allowing workers to participate in company formation and determining its objects, providing access to information, the right to participate in business rescue, extended standing and enforcement mechanisms etc. The thesis will now investigate these initiatives in detail.

6.2.1.1. Formation and objects of a company

Section 13 of the Companies Act⁶⁵² provides that an individual, or some individuals, may form a company by signing a Memorandum of Incorporation (MOI).⁶⁵³ As a 'person' is defined to include a legal person, this enables trade unions or workers' representatives to be a party to the formation of a company.⁶⁵⁴ The default position concerning amending an MOI is that only the board or shareholders may propose such an amendment.⁶⁵⁵ Section 16 (2) of the Companies Act⁶⁵⁶ provides an alternative arrangement concerning the proposals for amendments;⁶⁵⁷ it suggests an MOI can allow a trade union or worker representative to propose such an amendment.⁶⁵⁸ However, the Act does not allow workers to vote on such a proposal unless they are shareholders.⁶⁵⁹ Tobie Wiese suggests that this may be likely when a new venture like a subsidiary is being formed.⁶⁶⁰

6.2.1.2. Enforcement and dispute resolution

Workers are interested in ensuring good governance to ensure the company's sustainability. It is in the interests of workers to be concerned about the aforementioned, at least for job security purposes. Section 20 (4)⁶⁶¹ empowers *inter alia* trade unions representing employees of a company to initiate proceedings to restrain the company from doing anything inconsistent with the Act.⁶⁶²

⁶⁵² Companies Act 71 of 2008

⁶⁵³ Tobie Wiese "Worker Participation and the Companies Act of 2008: An Overview" (2013) 34 *ILJ* 2470

⁶⁵⁴ Tobie Wiese "Worker Participation and the Companies Act of 2008: An Overview" (2013) 34 *ILJ* 2470

⁶⁵⁵ Tobie Wiese "Worker Participation and the Companies Act of 2008: An Overview" (2013) 34 *ILJ* 2470

⁶⁵⁶ Section 13 of the Companies Act 71 of 2008

⁶⁵⁷ Monray Botha "Responsibilities of Companies towards their Employees" 2015 *PELJ* (18) 39

⁶⁵⁸ Tobie Wiese "Worker Participation and the Companies Act of 2008: An Overview" (2013) 34 *ILJ* 2471

⁶⁵⁹ Monray Botha "Responsibilities of Companies towards their Employees" 2015 *PELJ* (18) 39

⁶⁶⁰ Tobie Wiese "Worker Participation and the Companies Act of 2008: An Overview" (2013) 34 *ILJ* 2470

⁶⁶¹ Section 20 (4) of the Companies Act 71 of 2008

⁶⁶² Tobie Wiese "Worker Participation and the Companies Act of 2008: An Overview" (2013) 34 *ILJ* 2471

Further, section 162 (2) of the Companies Act allows workers or a trade union representing employees to apply to have a director declared delinquent or placed on probation.⁶⁶³ Trade unions are also empowered to initiate a derivative action to recover for losses to the company.⁶⁶⁴ For example, the new derivative action will permit a registered trade union to apply to a court to compel a company to institute an action to recover losses, obtain compensation for damages, or protect other company legal interests.⁶⁶⁵ These provisions enable employees to participate by effectively granting workers *locus standi* to litigate and hold directors accountable if they abuse companies. In the matter of *Organisation Undoing Tax Abuse and another v Myeni and others* [2020] 3 All SA 578 (GP), one of the parties that sought to have a former South African Airways Chairperson declared delinquent was a trade union. This Union was the South African Airways Pilot Association ("SAAPA").⁶⁶⁶ The ability of unions to cause a director to be declared a delinquent ensures that employees are at a vantage point whereby they can hold directors accountable, which augments workers' voices. The ability of employees to ensure there are proper checks and balances is further supplemented by the granting to employees in the category of persons who have whistleblower protection.⁶⁶⁷

6.2.1.3. Business rescue.

The provisions in the Companies Act⁶⁶⁸ regarding business rescue proceedings offer fundamental changes to employee participation. Sections 129 and 131⁶⁶⁹ provide that the business-rescue procedure can be initiated through a board of directors' resolution or by a court order applied for (and obtained) by an affected person.⁶⁷⁰ The Act recognizes workers and trade unions as 'affected persons'.⁶⁷¹ A union can access a company's financial statements to initiate a rescue process.⁶⁷² Moreso, workers, may apply to a court to set aside a board resolution beginning business rescue

⁶⁶³ Section 162 of the Companies Act 71 of 2008

⁶⁶⁴ Tobie Wiese "Worker Participation and the Companies Act of 2008: An Overview" (2013) 34 *ILJ* 2471

⁶⁶⁵ Tobie Wiese "Worker Participation and the Companies Act of 2008: An Overview" (2013) 34 *ILJ* 2471

⁶⁶⁶ *Organisation Undoing Tax Abuse and another v Myeni and others* [2020] 3 All SA 578 (GP)

⁶⁶⁷ Monray Botha "Responsibilities of Companies towards their Employees" 2015 *PELJ* (18) 43

⁶⁶⁸ Companies Act 71 of 2008

⁶⁶⁹ Section 129 and 131 of the Companies Act 71 of 2008

⁶⁷⁰ *Ibid*

⁶⁷¹ Monray Botha "Responsibilities of Companies towards their Employees" 2015 *PELJ* (18) 43

⁶⁷² Boatright 2004 *Bus Ethics Quart*

proceedings, on the grounds, *inter alia*, that the company is not financially distressed.⁶⁷³ Workers are also recognized as preferred unsecured creditors of the company for any arrears of wages before business rescue proceedings.⁶⁷⁴ The business rescue provisions of the Act thus provide a measure of job security and acknowledge the stakeholder interest of workers to be informed and to participate in the formulation of the business rescue plan.⁶⁷⁵

6.2.1.4. Worker participation as Shareholders.

The Companies Act allows workers to participate in the company as shareholders.⁶⁷⁶ It achieves this by allowing the issue of shares without shareholder approval.⁶⁷⁷ Companies can grant financial assistance to purchase their own shares and can create employee share schemes.⁶⁷⁸ The provisions of the Companies Act,⁶⁷⁹ which permit directors to issue shares without shareholder approval, are pertinent because they facilitate worker participation and black economic empowerment transactions.⁶⁸⁰ The board may bypass recalcitrant shareholders because the shares may be issued without shareholder approval.⁶⁸¹ Therefore, it is a potentially powerful tool in the hands of the board to enhance worker participation.⁶⁸² It is submitted that the possibility of granting employees a stake by issuing shares goes a long way in fostering worker participation. In that way, the company becomes a shared resource, and the employees become residual risk bearers like all other shareholders.⁶⁸³

6.2.1.5. Social Ethics Committee.

Section 72 (4) (a) of the Companies Act⁶⁸⁴ enables the Minister of Trade and Industry to prescribe companies that should appoint a social and ethics committee (SEC). This is a statutory committee, and notably, it is the most significant effort by the legislature in ensuring that companies address

⁶⁷³ Tobie Wiese "Worker Participation and the Companies Act of 2008: An Overview" (2013) 34 *ILJ* 2472

⁶⁷⁴ Monray Botha "Responsibilities of Companies towards their Employees" 2015 *PELJ* (18) 43

⁶⁷⁵ Monray Botha "Responsibilities of Companies towards their Employees" 2015 *PELJ* (18) 43

⁶⁷⁶ Tobie Wiese "Worker Participation and the Companies Act of 2008: An Overview" (2013) 34 *ILJ* 2479

⁶⁷⁷ Tobie Wiese "Worker Participation and the Companies Act of 2008: An Overview" (2013) 34 *ILJ* 2479

⁶⁷⁸ Clarkson 1995 *Ac Man Rev*

⁶⁷⁹ Companies Act 71 of 2008

⁶⁸⁰ Tobie Wiese "Worker Participation and the Companies Act of 2008: An Overview" (2013) 34 *ILJ* 2479

⁶⁸¹ Tobie Wiese "Worker Participation and the Companies Act of 2008: An Overview" (2013) 34 *ILJ* 2481

⁶⁸² Monray Botha "Responsibilities of Companies towards their Employees" 2015 *PELJ* (18)

⁶⁸³ Boatright 2004 *Bus Ethics Quart*

⁶⁸⁴ Section 72 (4) (2) (a) of the Companies Act 71 of 2008

to deal with CSR issues.⁶⁸⁵ The functions of the social and ethics committee involve monitoring the company's activities. Therefore, one may say that the social ethics committee has an oversight role. It pays attention to issues such as

(i) social and economic development.

(ii) good corporate citizenship.

(iii) the environment, health, and public safety, including the impact of the company's activities and its products and services.

(iv) consumer relationships, including the company's advertising, public relations, and compliance with consumer protection laws, as well as

(v) labour and employment.⁶⁸⁶

Therefore, the committee also ensures that issues that a company may ignore while chasing profits are not forgotten. One may say that the SEC serves as the company's conscience, which ensures that the company is aware of its outputs and impact on stakeholders.⁶⁸⁷

⁶⁸⁵ Boatright 2004 *Bus Ethics Quart*

⁶⁸⁶ Monray Botha "Responsibilities of Companies towards their Employees" 2015 *PELJ* (18

⁶⁸⁷ Monray Botha "Responsibilities of Companies towards their Employees" 2015 *PELJ* (18

5.3. Conclusion.

The thesis demonstrated how employees are afforded access to participation in the company's affairs through labour and company law initiatives, respectively. It has been demonstrated that, notwithstanding the apparent measures through labour laws, gaps remain. labour laws' efforts tended to be mechanical rules-based and adversarial, which does little in creating a harmonious stakeholder relationship between employee and employer arising out of voluntarism as opposed to compliance. Advancing the employees' interests at the corporate governance level will help cover the regulatory gap by ensuring that companies treat their employees fairly, even in instances where the law does not require them to do so.

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