PROMOTING LABOUR RELATIONS STABILITY UNDER COMPANY LAW: A CRITICAL ANALYSIS OF INTERNAL CORPORATE SOCIAL RESPONSIBILITY IN SOUTH AFRICA

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By

Mikovhe Maphiri

MPHMIK003

Supervisor: Professor Jacqueline Yeats

Co-supervisor: Professor Debbie Collier

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CONTENTS

DEDICATION

I dedicate this thesis to my mother, Pastor Tshifhiwa Doreen Maphiri, for all the sacrifices you made which allowed me the privilege of pursuing this opportunity.

ABSTRACT

Traditionally, companies have viewed aspects relating to employees' needs and interests as falling within the domain of labour law, collective bargaining and the contract of employment. This approach has prevailed throughout decades of labour strife and unrest, as the adversarial nature of labour law in South Africa and the political history of the country have influenced the management of labour relations. In essence, labour law in all its facets has not succeeded in providing effective channels for worker participation and much-needed employee engagement in the workplace, and ultimately this failure has exacerbated instability in the labour relations environment.

The thesis argues for a complementary channel for worker participation and for a collaborative approach to be adopted by company law and labour law, envisaged through internal corporate social responsibility (internal CSR). In this regard, and against the backdrop of the unrest in the mining industry, the thesis examines the potential of the provisions of s 72(4) of the Companies Act 71 of 2008 (the Companies Act), read with reg 43 of the Companies Regulations, 2011, as a potential conduit for the promotion of labour relations stability through internal CSR under company law.

The thesis provides an in-depth evaluation of the different approaches to corporate governance and an examination of the composition, mandate and structuring of the s 72(4) social and ethics committee as a potential platform for promoting labour stability through internal CSR. An argument is made for the use of the social and ethics committee as a platform for internal CSR to promote much-needed employee engagement. The arrangements would not overlap with trade union activities, nor would they replace workplace forums (which in any event have not functioned as intended and the legislative framework probably needs revising), nor do the arrangements place fiduciary obligations on employees. Moreover, the potential for employee voice through the committee is likely to promote much-needed engagement on labour issues, and this could be achieved through collaboration between company law and labour law. The thesis recommends amendments to the Companies Act and the Companies Regulations that will allow for the promotion of internal CSR for labour stability under company law.

This thesis states the law as at **31 October 2021.**

ABBREVIATIONS

AGM	Annual General Meeting
AMCU	Association of Mineworkers and Construction Union
BBBEE	Broad-Based Black Economic Empowerment
BCEA	Basic Conditions of Employment Act
BEE	Black Economic Empowerment
COSATU	Congress of South African Trade Unions
CRLSG	Department of Trade and Industry's Company Law Review Steering Group
CSI	Corporate Social Investment
CSR	Corporate Social Responsibility
DTIC	Department of Trade, Industry and Competition
EEA	Employment Equity Act
ESG	Environmental Social Governance
ILO	International Labour Organisation
LRA	Labour Relations Act
OECD	Organisation for Economic Co-Operation and Development
RDP	Reconstruction and Development Programme
SLP	Social and Labour Plan
UK	United Kingdom
UN	United Nations

DECLARATION

DECLARATION

I, ……**MIKOVHE COMFORT MAPHIRI**……, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

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CHAPTER ONE: INTRODUCTION AND METHODOLOGY

1.1 INTRODUCTION

South Africa is a diverse country with a unique history. The country possesses a great wealth of metallic and non-metallic mineral resources, present in all the nine provinces.[1] Metallic minerals such as gold, platinum, diamond, and coal are the most well-known mineral resources mined in South Africa.[2] The country is also home to rare minerals such as chrome, iron ore and asbestos, which have great commercial value and have been mined with varying degrees of intensity for more than a hundred years.[3]

Since its formation, the gold mining industry has played a key role in the development of the economy and the overall industrialisation of the country.[4] The discovery of all these minerals led to the establishment of mining houses comprising a small number of parastatals and privately owned conglomerates.[5] These companies sought to optimise production by dominating the exploration and mining of mineral resources.[6] The discovery and eventual exploration of mineral resources led to industrialisation and the rapid growth of secondary industries, which created an increasing demand for labour.[7]

Today, the exploration of mineral resources remains a key driver in economic development, since it is one of the leading contributors to South Africa's Gross Domestic Product (GDP).[8] However, over the years, South Africa's production of mineral resources and its overall contribution to GDP have been experiencing a steady

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[1] Metallic minerals such as chromite, cobalt, copper, iron and manganese are some of the minerals that are exported globally. See P Hans *Gold Mining in South Africa* (1935) 17.
[2] J Davenport *Digging Deep: A History of Mining in South Africa, 1852–2002* (2013) 2.
[3] Ibid. One of the first mines to be constructed and to commence in South Africa was a commercial mine in the Northern Cape, in 1852.
[4] According to Hans, South Africa has an extensive amount of low-grade sedimentary deposits that are highly profitable if worked on a large scale. For this reason, the success of most South African companies in the mining sector has laid the foundation for other secondary industries such as railways and power stations: see Hans (n 1).
[5] The mining houses that exploited mineral resources in South Africa were the De Beers Group, which monopolised diamond production; the Anglo-American Corporation, a subsidiary of the De Beers Group; the Anglo Transvaal Consolidated Investment Company; the South African Coal, Oil and Gas Corporation (SASOL); New Consolidated Goldfields (Goldfields of South Africa); and the Rand Mines Union. See VL Allen *The History of Black Mineworkers in South Africa* (2005) 52–55.
[6] Ibid.
[7] Ibid. Industries such as railways, ports, banks and power stations created an increasing demand for labour.
[8] See 'GDP from mining 1993–2019'. Data available at *https://tradingeconomics.com/south-africa/gdp-from-mining* (accessed on 27 April 2020).

decline.[9] Poor labour relations, trade union rivalry and the overall debates on the nationalisation of mines and wage disputes have weakened production and output.[10] This has led to retrenchments and unrest in an industry that employs close to half a million people.[11] An analysis of the present state of South Africa's industrial relations environment in the context of the mining industry is thus a useful lens through which to gain an understanding of the foundations of labour relations instability in South Africa.

1.2 CONTEXTUAL BACKGROUND

From colonial times, the history of South Africa was based on racial segregation: blacks were separated from whites to optimise the use of a cheap and unskilled black labour force.[12] Thus it has been said that apartheid and colonialism are key donors to the present state of inequality and labour instability in South Africa.[13] For many decades, corporations have achieved market power through capitalism by controlling the influence they have on politics, which then culminates in the influence that companies have on the distribution of labour and economic resources.[14] Moreover, to ensure maximum return on shareholder investment, mining companies relied heavily on the recruitment of a cheap black labour force.[15] This commercial objective was facilitated by systems of segregation and inequality which were put in place to govern society through the division and non-recognition of black labour.[16] This approach triggered militant strike action, which formed part of the South African liberation movement's struggle against apartheid.[17]

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[9] S Valiani *The Future of Mining in South Africa: Sunset or Sunrise?* (2018) 6.
[10] JP Casey 'The future of mining in South Africa' available at *https://www.miningtechnology.com/features/the-future-of-mining-in-south-africa/* (accessed on 22 February 2020).
[11] See generally the Department of Mineral Resources, available at *dmv.gov.za* (accessed on 11 February 2020). See also 'Dineo Faku Mantashe calls out mining industry on planned retrenchments' available at *https://www.iol.co.za/business-report/energy/mantashe-calls-out-mining-industry-on-planned-retrenchments-34216803* (accessed on 11 February 2020).
[12] Allen (n 5). Blacks and whites were separated to optimise the cheap labour force, and to ensure that blacks could provide services to whites.
[13] J Boëttger & M Rathbone 'The Marikana massacre, labour and capitalism: Towards a Ricoeurian alternative' (2016) 81(3) *Koers* 2.
[14] J David 'Corporate economic power and the state: A longitudinal assessment of two explanations' (1988) 93(2) *American Journal of Sociology* 852.
[15] H Wolpe 'Capitalism and cheap labour power in South Africa: From segregation to apartheid 1' (1972) 1(4) *Economy and Society* 433.
[16] Ibid.
[17] See, generally, R Fine & DM Davis *Beyond Apartheid: Labour and Liberation in South Africa* (1992) 220.

In 1907, strikes of varying degrees occurred in the mining, building, municipalities and railways sectors,[18] including the occurrence of violence involving workers and the police.[19] Labour sought to address issues related to compensation, occupational health and safety, minimum wages, the use of replacement labour during strikes, trade union recognition, and disputes around job reservation for whites.[20] Notwithstanding the transition to democracy and the adoption of a Bill of Rights including labour rights, labour instability and overall unrest in South Africa remain largely focused on workers' demands for better minimum wages and the use of replacement labour.[21]

By the 1970s, the rise of labour strikes in companies against the system of apartheid formed one of the most important aspects of the fight for democracy.[22] In the period 1970 to 1982, there was a steady increase in strikes by employees, with over 1 000 black workers striking daily against the apartheid regime.[23] Strikes by employees evolved into long-term structures for change across the country, not only in the workplace, but also in communities across South Africa.[24]

To mitigate the occurrence of protracted strike violence in industries, segregation became more uniform, with sophisticated laws being put in place to solidify the power of corporations by optimising on a cheap African labour force.[25] This was implemented through the migrant labour system.[26] According to Legassick and De Clercq,[27] in the 1950s the migrant labour system was used to recruit indigenous Africans from the former homelands to work as labourers.[28] The system was meant to

[18] For example, the Witwatersrand miners' strike of 1913, the general strike of 1914, and the Rand Revolt of 1922. See D Yudelman *The Emergence of Modern South Africa: State, Capital, and the Incorporation of Organized Labor on the South African Gold Fields, 1902–1939* (1983) 70.
[19] TD Moodie 'The moral economy of the Black Miners' Strike of 1946' (1986) 13 *Journal of Southern African Studies* 1. In this thesis, the terms 'workers' and 'employees' are used interchangeably.
[20] J Crush 'Migrancy and militance: The case of the National Union of Mineworkers of South Africa' (1989) 88 *African Affairs*7.
[21] A Rycroft 'What can be done about strike related violence?' available at *https://www.upf.edu/gredtiss/_pdf/2013-LLRNConf_Rycroft.pdf* (accessed on 20 April 2016).
[22] Crush (n 20) 7.
[23]A Sitas 'Thirty years since the Durban strikes: Black working-class leadership and the South African transition' (2004) 52(5) *Current Sociology* 830.
[24] Ibid.
[25] Wolpe (n 15) 433.
[26] Ibid.
[27] M Legassick & F de Clercq *Capitalism and Migrant Labour in Southern Africa: The Origins of the System* (1984) 141.
[28] A Bezuidenhout & S Buhlungu 'Enclave Rustenburg: Platinum mining and the post-apartheid social order' (2015) 42 *Review of African Political Economy* 526 and 539.

ensure the sustainability and profitability of capitalism in South Africa by employing low-paid migrant labourers.[29]

Migrant labour, inhuman working conditions, and the enforcement of segregation through discriminatory laws were key components in servicing these growing industries which had no regard for labour, particularly black migrant labour.[30] For the migrant labour system to operate optimally, segregation was a key component in influencing the dynamics of the labour relations environment.[31] The division of land through the Native Land Act of 1913, as well as the recruiting system in place, sought to ensure that black labourers had to migrate from the homelands to seek work in the mines, thus making every labourer, regardless of nationality, a migrant labourer.[32] The effects of apartheid policies, more especially in the formation of the homelands, are still strongly felt.[33] The effects include 'displaced urbanization and a settlement pattern that is to a large extent fragmented, unequal, inefficient and frequently not sustainable.'[34]

Legislation was used as a key instrument to control the movement of migrant labourers by preventing black labourers from owning land and moving freely in white urban areas.[35] The government legislated further to limit black urban development through the 1937 amendments to the Natives Land Act, which prevented blacks living in the townships from owning land in white urban areas; the right to acquire freeholds in areas adjacent to white urban areas was also restricted.[36] Hence, blacks were forced

[29] R Hamann 'South Africa: The role of history, government, and local context' in SO Idowu & WL Filho (eds) *Global Practices of Corporate Social Responsibility* (2009) 457.
[30] Allen (n 5) 15. The accumulation of capital in South Africa has from its inception been associated with the employment of migrant labour. In the mines, African migrant workers had to sign legally binding contracts, but the contracts were not explained to the miners, even though they could not read and write. A magistrate would be periodically assigned by the mine to visit the new recruits and go through a semi-formal process of attestation with the migrant labourers. The migrant labourers would then sign by making a thumbprint on the contracts provided to them by their employer. It is important to note, however, that subjection to this form of contract system was not a condition for all migrant labourers, but only for African migrant labourers. English-speaking migrant labourers were protected as they were highly preferred and categorised as skilled workers, with the right to negotiate contracts and terms of employment, as well as the right to organise by forming and joining trade unions of their choice. Also see N Worden *The Making of Modern South Africa: Conquest, Segregation, and Apartheid* (1994) 141.
[31] Worden (n 30) 141.
[32] A Jeeves *Migrant Labour in South Africa's Mining Economy: The Struggle for the Gold Mines' Labour Supply, 1890–1920* (1985) 88.
[33] Bezuidenhout & Buhlungu (n 28) 532.
[34] Ibid.
[35] M Festenstein & C Pickard-Cambridge *Land and Race: South Africa's Group Areas and Land Acts* ed (1987) 2.
[36] Allen (n 5) 24.

to pursue work opportunities in the mining, agricultural and textile industries, or to serve as miners or domestic workers, or they were forced to return to the homelands.[37]

The Industrial Coalition Act 11 of 1924, together with its successor, the Industrial Conciliation Act 28 of 1956, which was subsequently renamed the Labour Relations Act 28 of 1956, cemented the powers of the apartheid system insofar as racial segregation in the workplace was concerned. The Industrial Conciliation Act marginalised black migrant labourers from mainstream industrialisation by prohibiting the formation of mixed and black trade unions. The Act secured positions for white labourers and excluded Africans from the definition of an employee.[38] This exclusion of black migrant labourers from the protection of the Act meant that they could be employed on less favourable terms.[39]

These aspects have influenced the genealogy of the present labour relations legal framework and the current labour relations environment, which remains adversarial in nature.[40] These aspects led to decades of labour strife, as they cemented the pattern for labour instability in South Africa – one that is characterised by violence and the loss of life.[41] Today, most companies adopt corporate social investment (CSI) initiatives to redress past injustices by giving back to disadvantaged communities,[42] and this thesis argues for an inward focus on CSR as it has the potential to mitigate labour instability through employee engagement in the workplace.[43]

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[37] Ibid 22.

[38] In South Africa, pass laws had been used from as early as the early 1700s to monitor slaves in the Cape Colony. During the apartheid era, pass laws were used to strengthen white domination by policing the African population, directing them as to where to stay, farm, work and live. This strengthened white rule in both politics and business. See M Savage 'The imposition of pass laws on the African population in South Africa 1916–1984' (1986) 85 *African Affairs* 181.

[39] D du Toit et al *Labour Relations Law: A Comprehensive Guide* 5 ed (2006) 7. The Industrial Council or conciliation board agreements were the terms that were put in place to standardise the employment contracts of white migrant labourers. Issues such as wage rates and the working hours of employees were set out in the agreements. The principal aim was to protect white migrant labourers since black migrant labourers were not recognised under the Act.

[40] M le Roux & D Davis 'Changing the role of the corporation: A journey away from adversarialism' 2012 *Acta Juridica* 319.

[41] IG Farlam *Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the Northwest Province* (2015) 42.

[42] Most corporations prefer the term 'CSI' to the term 'CSR' as the argument is that corporations are simply responsible corporate citizens through corporate investments and are not the custodians of any *ad hoc* governmental responsibilities undertaken by the company. See RE Hinson & TP Ndhlovu 'Conceptualizing corporate social responsibility (CSR) and corporate social investment (CSI): The South African context' (2011) 7(3) *Social Responsibility Journal* 336.

[43] I Ali et al 'Corporate social responsibility influences, employee commitment and organizational performance' (2010) 4(13) *African Journal of Business Management* 2796. Chapter 3 of this thesis provides a detailed conceptualisation of internal CSR.

1.3 PROBLEM STATEMENT

Since 1994, the South African government has sought to address the inequalities that plagued the labour relations environment by facilitating policy changes on wages and job creation schemes,[44] and to restore dignity in the workplace by protecting the rights of workers.[45] To achieve this, the new democratic government was faced with the long and hard work needed to promote structures that would mitigate against the reoccurrence of labour injustice by promoting labour stability through reformed laws and policies.[46] New legislation specifically formulated to address labour challenges and inequalities was designed to facilitate a peaceful and stable labour relations environment. To promote much-needed labour stability and mitigate the chances of unrest,[47] the government introduced and passed 11 statutes which protect the rights of workers.[48] Prominent among these laws are the Labour Relations Act[49] and supporting legislation and frameworks, such as the Basic Conditions of Employment Act (BCEA),[50] collective bargaining,[51] and the establishment of worker participation

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[44] L Seftel 'The RDP: Job creation and minimum standards: A labour perspective' in E Kalula & D Woolfrey (eds) *The New Labour Market: Reconstruction, Development and Equality: Selected Papers from the Labour Law Conference 1994* (1995) 29.

[45] A key driver in facilitating the restoration of dignity for workers was the establishment of the National Economic Development and Labour Council (NEDLAC). This forum played a critical role in the negotiation of the new Labour Relations Bill, now known as the Labour Relations Act 66 of 1995. See D Bond 'New South Africa, old language! The role of metaphor in reporting the negotiation of the South African Labour Relations Bill, June· July 1995' (2013) *Stellenbosch Papers in Linguistics Plus* 144.

[46] TA Kochan 'Labour law and employment policies for a global economy' in E Kalula & D Woolfrey (eds) *The New Labour Market: Reconstruction, Development and Equality: Selected Papers from the Labour Law Conference 1994* (1995) 8.

[47] A Glenn & E Webster (eds) *Challenging Transition Approach: The Labour Movement, Radical Reform, and Transition to Democracy in South Africa* (1994) 75.

[48] See, for example, the Basic Conditions of Employment Act 75 of 1997, the Broad-Based Black Economic Empowerment Act 53 of 2003, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Constitution of the Republic of South Africa, 1996, the Employment Equity Act 55 of 1998, the Occupational Health and Safety Act 85 of 1993, the Skills Development Act 97 of 1998, the Skills Development Levies Act 9 of 1999, the Labour Relations Act 66 of 1995, and the Unemployment Insurance Fund Act 30 of 1996.

[49] The Labour Relations Act 66 of 1995 applies to all workers and employers and aims to advance economic development, social justice, labour peace and the democracy of the workplace. See Chapter 1 of the Labour Relations Act.

[50] The Basic Conditions of Employment Act 75 of 1997 (BCEA) applies to all workers and employers and aims to advance economic development, social justice, labour peace and the democracy of the workplace. See s 2 of the BCEA.

[51] Bargaining councils encompass multifarious majority forums that include relatively large bargaining units. Bargaining councils can extend their agreements beyond the negotiating parties to cover non-parties. This distinctive feature of extending bargaining council agreements results in them having a much greater impact on the labour market than do other collective agreements, because it extends the bargaining unit to all interested parties. See generally S Godfrey, J Maree & J Theron 'Regulating the labour market: The role of bargaining councils' (2006) 27 *Industrial Law Journal* 733.

platforms through workplace forums.[52] The recognition of black trade unions[53] and the establishment of bargaining councils laid the foundation for a more inclusive labour relations environment.[54] Furthermore, the democratic era provided the key players in the labour relationship with innovative opportunities to bring about labour peace and stability through new systems of negotiation and mediation, which were crucial in settling disputes and bringing about much-needed co-operation.[55] Key developments included the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA).[56]

These efforts generated optimism about the future of work as there were great expectations for a better future amongst employees and new investors in South Africa. However, notwithstanding the estimable changes brought about by labour law, and a new democratic government, labour instability persists.[57]

In the past ten years, violence during strike action has become the hallmark of industrial action in South Africa.[58] According to Calitz, this violence is endemic and reflective of a largely failed collective bargaining system.[59] Violence during strike action is reflected in international and local news headlines,[60] in the data collected by

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[52] For a discussion of workplace forums, see chapter 2. See also M Anstey *Employee Participation and Workplace Forums* (1997) 85.

[53] L Tørres *Amandla – ngawethu? The Trade Union Movement in South Africa and Political Change* (unpublished PhD thesis, University of Oslo, 2001). See chapter 6 of the thesis where Tørres tracks the rise of trade unionism in South Africa.

[54] S Godfrey, S Maree & J Theron 'Conditions of employment and small business: Coverage, compliance and exemptions' Development Policy Research Unit Working Paper 06/106, Labour and Enterprise Project, Sociology Department, Institute of Development and Labour Law, University of Cape Town (2006) 733, available at *http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/DPRU%20WP06-106.pdf* (accessed on 7 May 2020).

[55] The key players in the labour relationship are employers, employees, government and trade unions. See S Bendix *Industrial Relations in South Africa* 5 ed (2010) 10.

[56] The CCMA is a direct product of our historical struggles; it is an independent tripartite institution which has the primary role of interpreting the law. See R Bernikow 'Ten years of the CCMA – An assessment for labour', a presentation prepared for DITSELA (Western Cape) Labour Law Seminar held 23–25 February 2007 at the University of the Western Cape, available at *http://heinonline.org* (accessed on 18 June 2016).

[57] *Marikana Commission of Inquiry* (n 41) 42.

[58] C Chinguno 'Marikana: Fragmentation, precariousness, strike violence and solidarity' (2013) 40(138) *Review of African Political Economy* 639.

[59] K Calitz 'Violent, frequent and lengthy strikes in South Africa: Is the use of replacement labour part of the problem?' (2016) 28(3) *SA Merc LJ* 436.

[60] Reuters 'This is what labour unrest has done to Eskom' available at *https://www.cnbcafrica.com/insights/energy-environment/2018/08/01/this-is-what-labour-unrest-has-done-to-eskom/* (accessed on 31 January 2020). See also G Hartford 'The mining industry strike wave – what are the causes and what are the solutions?' *Ground Up Media* (10 October 2012) available at *http://www.groundup.org.za/article/mining-industry-strikewave-what-are-causes-and-what-are-solution*s (accessed on 12 February 2016).

the Department of Labour, and in the case law.[61] In the 2010 case of *Food and Allied Workers Union obo Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River*[62] the workers engaged in atrocious acts of violence which involved the burning and vandalising of corporate assets.[63] Motor vehicles and homes were burnt and witnesses were killed.[64] Evidence was heard of a conspiracy by the workers to assassinate the regional director of the company.[65] This strike was also marked by the most brutal acts of violence on non-striking employees.[66]Most notably, the tragic events that occurred in Marikana from 12 to 16 August 2012 reflect the extent of the work that still needs to be done to promote industrial peace in South Africa.[67]

1.3.1 The Marikana massacre: An overview

Lonmin, a public listed company (PLC), with its headquarters in London in the United Kingdom (UK), was a British producer of platinum mined in South Africa's mining towns, including Marikana, in the Northwest Province.[68] The company, which is now a wholly owned subsidiary of Sibanye-Stillwater, became the subject of local and international newspaper headlines when 34 mineworkers were killed, and 78 mineworkers sustained injuries, as a result of the strike violence that occurred in Marikana.[69] The events leading up to the Marikana massacre were complex and not one single factor was responsible for the tragedy.[70]

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[61] Data from the Department of Labour's Industrial Action Report indicates that in 2014 alone, 10 264 775 working hours were lost due to labour unrest in South African companies. This shows a remarkable increase from the 1 847 006 working hours lost in 2013. In 2018, South Africa's workers lost an estimated R266 million in wages due to strike activities, and during this period work stoppages also reached their highest level for the past five years. See the Department of Labour's Industrial Action Report, available at *https://www.gov.za/documents/department-labour-annual-report-20182019-26-aug-2019-0000* (accessed on 25 June 2019). See also S Smit 'Bad workplaces, longer strikes' *Mail and Guardian* (14 February 2020) available at *https://mg.co.za/news/2020-02-14-bad-workplaces-longer-strikes/* (accessed on 11 June 2020).

[62] *Food and Allied Workers Union obo Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River; Premier Foods Ltd t/a Blue Ribbon Salt River v Food and Allied Workers Union obo Kapesi and Others* (CA7/2010) [2012] ZALAC 46 (16 March 2012).

[63] Ibid para 4.

[64] Ibid.

[65] Ibid para 5.

[66] Ibid para 4.

[67] P Alexander et al *Marikana: Voices from South Africa's Mining Massacre* (2013) 20.

[68] Ibid 1.

[69] Ibid 2. See generally 'Lonmin acquisition on Sibanye Stillwater' available at *https://www.sibanyestillwater.com/news-investors/news/transactions/lonmin/* (accessed on 6 August 2021).

[70] J F Boëttger & M Rathbone 'The Marikana massacre, labour and capitalism: Towards a Ricoeurian alternative' (2016) 81(3) *Koers* 2. In the past ten years, many opinions have been expressed about who was to blame for the Marikana massacre: the police who shot the mineworkers, the mining companies,

On 16 August 2012, the South African Police Service (SAPS) opened fire on a crowd of striking mineworkers at Marikana.[71] The police used brutal force, killing 34 miners and seriously injuring 78 miners.[72] This event was the culmination of an intense week-long protest. The miners had been demanding a wage increase at the Lonmin platinum mine during an unauthorised strike. On 9 August 2012, almost 3 000 miners went on strike to demand a living wage of R12 500 per month , which is approximately $705 per month.[73] On 10 August 2012, a large group of the striking miners approached the National Union for Miners (NUM) local office to demand support from their union. Instead, the miners were fired at, and two miners were fatally wounded.[74] The NUM union leaders present categorically refused to support the strike, despite the union's stated mission to promote and represent the interests of its members.[75] According to the Marikana commission report, NUM union leaders were afraid of the miners, the evidence led at the commission show that prior to the massacre, there were plans by the union members to go and kill the union leaders.

> There was a discussion that NUM officials transporting people to work was rendering the strike ineffective and weak. The decision was to go and get weapons to arm themselves to go and kill NUM in their offices.[76]

A key trigger for this lack of trust by union members with union leaders was based on the fact that the relationship between the union leaders and the company was a corrupt

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or the politicians, such as the president of the country. At the time of the massacre, Ramaphosa was not the president of the country, but he held a number of positions that influenced the outcome of the massacre: first, he was a former leader of the National Union of Mineworkers (NUM); secondly, he was also a non-executive director and shareholder at Lonmin.See *Marikana Commission of Inquiry* (n 41) 42. In July 2022, the South Gauteng High Court found President Ramaphosa complicit in the events leading to the killing and injuring of striking miners who were demanding a better wage. Judge Frits van Oosten found that Ramaphosa and Sibanye-Stillwater (formerly Lonmin) were part of the main cause in the events leading up to the killing of the miners. See *Sivuka and 328 Others v Ramaphosa and Others* (36879/2015) [2022] ZAGPJHC 450 (30 June 2022).

[71] P Alexander 'Marikana, turning point in South African history' (2013) 138(40) *Review of African Political Economy* 605.

[72] S de Smet, M Breyne & C Stalpaert 'When the past strikes the present: Performing requiems for the Marikana massacre' (2015) 28(3) *South African Theatre Journal* 222.

[73] On 23 September 2022, 1 US dollar was equal to 17.7554 South African rands. See the exchange rates available at *https://www.exchangerates.org.uk/Dollars-to-South-African-Rands-currency-conversion-page.html* (accessed on 23 September 2022). In 2022, An employed person in South Africa earns an average of R23,982 (approximately $1,480) per month. This is R11 482 less than what the miners were asking for in 2012.See Trading Economics South Africa Average Monthly Gross Wage available at https://tradingeconomics.com/south-africa/wages (accessed on 10 September 2022).

[74] *Marikana Commission of Inquiry* (n 41) 32.

[75] The Daily Maverick 'Marikana prequel: NUM and the murders that started it all' available at *https://www.dailymaverick.co.za/opinionista/2012-10-12-marikana-prequel-num-and-the-murders-that-started-it-all/* (accessed on 8 October 2022).

[76] Alexander (n 71) 607.

one, which saw union leaders prioritizing the needs of the company at the expense of their members.[77] The breakdown in communication between the miners and their union further aggravated a volatile situation;[78] the miners were desperately trying to be heard so that they could meet their needs and those of their families. The striking miners were denied a voice as no engagement was granted to enable a meeting with NUM or the company (the Lonmin representatives).[79] The events became increasingly violent; later scholars compared the Marikana massacre to the Sharpeville massacre, which took place during the apartheid regime.[80] However, notwithstanding the lack of legal protection or union support, thousands of miners continued to strike in solidarity to reach their common goal – an increase in their wages which would allow them to live better-quality and dignified lives.

As with the protests that took place during the apartheid regime, the families of the striking miners were also in general solidarity with the protest and worked to support the movement conducted by their husbands and sons, joining in the protest action and bringing supplies when necessary.[81]

The Marikana massacre exposed the lived realities of the unchanged mining industry in South Africa, which has thrived at the expense of the health and safety of workers for almost two hundred years.[82] This massacre caused an uproar as the international community, the local community, the families of the deceased miners and the shareholders of Lonmin PLC demanded answers about what happened in Marikana from 12 to 16 August 2012.[83] In response to this, on 23 August 2012, the then President

[77] The Daily Maverick 'Marikana prequel: NUM and the murders that started it all' available at *https://www.dailymaverick.co.za/opinionista/2012-10-12-marikana-prequel-num-and-the-murders-that-started-it-all/* (accessed on 8 October 2022).
[78] Ibid.
[79] Ibid.
[80] In the Sharpeville massacre of 1961, 69 people were killed and more than 300 injured when members of the South African Police (SAP) opened fire on a crowd that had assembled in the township of Sharpeville near Vereeniging, south of Johannesburg, to protest against the apartheid pass laws. See B Dixon 'A violent legacy: Policing insurrection in South Africa from Sharpeville to Marikana' (2015) 5(6) *British Journal of Criminology* 1131.
[81] A Benya 'The invisible hands: Women in Marikana' (2015) 42(146) *Review of African Political Economy* 548.
[82] See generally Davenport (n 2) 2.
[83] This was because the tragedy also involved the police, who used the most lethal force against civilians since the Sharpeville massacre of 1960. See generally D Newbury 'Picturing an "ordinary atrocity": The Sharpeville massacre' in G Batchen et al (eds) *Picturing Atrocity: Photography in Crisis* (2012) 209.

of the Republic of South Africa appointed, in terms of s 84(2)*(f)* of the Constitution, the Marikana Commission of Inquiry.

The commission's terms of reference were, *inter alia*, to investigate matters of public, national and international concern arising from the tragic events that took place at the Lonmin mine in Marikana. The evidence led at the commission showed that one cause of the massacre was the failure of the collective bargaining process, which led to the violence and loss of life in Marikana.[84] The evidence further illustrated that the tragic events that occurred in Marikana were also a result of the miners' decision to conduct a strike and to enforce it using violence and intimidation.[85]

This was largely influenced by members of NUM who demanded an increase in wages for miners.[86] Prior to the uprising that took place in Lonmin, the process of wage negotiations and strikes about wage increases had already been taking place, as miners in the nearby Impala Platinum Mine (Implats) entered into a collective agreement in terms of s 14 of the LRA for the regulation of wage disputes.[87]

In South Africa, black male miners still do not earn a living wage that is adequate to support their families and dependants.[88] Prior to the events that took place in Marikana, miners across South Africa's Platinum Belt, including those at Lonmin, earned between R4 000 and R6 000 per month.[89] The Marikana strike was primarily centred on the demand for higher wages, with the miners demanding a monthly wage of R12 500 per month.[90] The Marikana Commission of Inquiry went further to provide

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[84] *Marikana Commission of Inquiry* (n 41) 42. See P Alexander et al *Marikana: Voices from South Africa's Mining Massacre* (2013) 2. When the police encountered the miners near the railway line, the miners refused to hand over their stick-like weapons, citing the need to protect themselves against attacks from mine security guards and members of the NUM. The majority union at the mine at the time, the NUM, had angered and alienated miners by refusing to take up their cause for a salary increase. The commission found that the miners had been marching in a peaceful and orderly fashion until the police fired live ammunition at them; this activated the mayhem and the fatal violence that followed. See M Swart 'The killing fields of Marikana and the justice deficit' in M Swart & Y Rodny-Gumede (eds) *Marikana Unresolved: The Massacre, Culpability, and Consequences* (2020).

[85]Ibid Swart.

[86] Ibid.

[87] Ibid.

[88] A Banya & J Seidman 'There is no change in Marikana' in M Grimm et al *Business as Usual after Marikana: Corporate Power and Human Rights* (2018) 107.

[89] Ibid.

[90] *Marikana Commission of Inquiry* (n 41) 50. According to Statistics South Africa's Quarterly Employment Survey (QES) for Q4 2021, which shows what workers are paid across the various sectors in the country, the average worker is paid R23 982 per month (up slightly from R23 908 recorded in Q3 2021).This is approximatelyR287 784peryear.See*https://www.statssa.gov.za/publications/P0211/P021 11stQuarter2022.pdf* (accessed on 2 September 2022). According to the Minerals Council South Africa,

clear and extensive evidence that Lonmin PLC was directly as well as indirectly responsible for the Marikana massacre.

According to the evidence led at the commission, the company was jointly responsible for the killing of 34 mineworkers, for the 70 mineworkers who sustained injuries, and for the escalation of violence prior to the massacre.[91] The company was also accused of being responsible for the poor working conditions and the environmental conditions under which the workers and the local communities had suffered for decades.[92] This was because the mining company did not provide decent family housing for the miners, nor did the company provide infrastructure to uplift and support the local communities, which comprised the families, consisting of women and children, of the miners who migrated to Marikana to work in the Platinum Belt.[93]

Mineworkers rent and live in illegal shacks in informal settlement areas, rife with disease and crime, with no running water and basic sanitation services, and with some mineworkers living with their families in these informal shacks.[94] Prior to the massacre, Lonmin had a total workforce of almost 30 000 employees.[95] Lonmin could provide accommodation for 2 500 employees, whilst the remaining 27 500 miners were given a living allowance of R1 850 per month.[96] The evidence led at the commission further accused Lonmin of making empty promises to the miners and the

since the 2012 Marikana massacre, 'wages for employees in the platinum sector have almost doubled, risingby91.4%.Inthebroaderminingindustry,wages have grown by 86.5%'. Available at *http s://www. mineralscouncil.org.za/component/jdownloads/send/85-2022/1921-minerals-council-south-africa-commemorates-marikana-and-recommits-to-ensuring-the-events-are-never-repeated* (accessed on 2 September 2022). In this regard, miners have certainly come a long way since the Marikana wage disputes about a 'living wage' of R12 500 per month. See the Marikana Commission of Inquiry (n 41) 50. Sibanye-Stillwater, a multinational mining and metals group which merged with Lonmin PLC, has a diverse portfolio of mining and processing operations and projects and investments across five continents. See Sibanye-Stillwaters' integrated report available at *https://reports.sibanyestillwater.com/2021/download/SSW-IR21.pdf* (accessed on 2 September 2022). At Marikana now, according to Sibanye, entry-level workers earn a basic monthly wage of R14 713 a month, or R177 000 a year. This amount is still below the average salary of a worker in South Africa, and slightly more than what the miners were asking for at the time of the Marikana massacre.

[91] Banya & Seidman (n 88) 110 and 111. See also P Bond 'Lessons unlearned as Lonmin expires and Sibanye rises amid ongoing labour – community – feminists revolts' in M Swart & Y Rodny-Gumede (eds) *Marikana Unresolved: The Massacre, Culpability and Consequences* (2019) 224.

[92] *Marikana Commission of Inquiry* (n 41) 527.

[93] Banya & Seidman (n 88) 110 and 111.

[94] *Marikana Commission of Inquiry* (n 41) 530.

[95] L Snyman & R Krause 'Qualitative and quantitative assessment of Lonmin's social and labour plan in the Marikana Commission of Inquiry held at Centurion, Pretoria' 12, available at *http://www.sahrc.org.za/home/21/files/Lonmin%20Social%20and%20Labour%20Plan%20Analysis%20Qualitative%20and%20Quantitative%20Assessment%20(Final)[1].pdf* (accessed on 11 August 2019).

[96] *Marikana Commission of Inquiry* (n 41) 530.

local communities as the houses it had undertaken to build and the infrastructure it had promised to provide in the area since 1999 had not yet materialised.[97] The objective to build houses for the miners formed part of Lonmin's social and labour plan (SLP).

The Mineral and Petroleum Resources Development Act (MPRDA)[98] is the primary regulatory framework for ensuring, amongst other objectives, the transformation of the mining and production industries.[99] To ensure the effective transformation of mining and the mining communities, the MPRDA requires the submission of SLPs as a prerequisite for the granting of mining and production rights.[100]

SLPs contain principal measures that are required from mining rights holders to address the socio-economic conditions of mineworkers and the mining communities.[101] The objectives of a SLP are to 'promote employment and advance the social and economic welfare of all South Africans; contribute to the transformation of the mining industry; and ensure that holders of mining rights contribute towards the socioeconomic development of the areas in which they are operating.'[102] In investigating the events of Marikana, the commission reviewed Lonmin's SLP in order to determine a causal connection between the company's delivery of the objectives of its SLP and the events that took place in Marikana.[103]

Lonmin's SLP included the provision of adult basic education and training.[104] Lonmin set out as an objective the implementation of adult basic education programmes which would be used to support the miners and adults in the Madibeng local municipality, where the company conducts most of its business activities.[105] Employment equity was a key performance indicator which, as part of its SLP, was

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[97] L Chamberlin 'Lonmin has broken law by dodging housing obligations' *Business Day* (1 July 2015) available at *https://www.businesslive.co.za/archive/2015-07-01-lonmin-has-broken-law-by-dodging-housing-obligation/* (accessed on 15 January 2017).
[98] Act 28 of 2002.
[99] Section 2 of the MPRDA.
[100] Regulation 41 of the MPRDA Regulations.
[101] This is in line with the objectives of s 2(i) of the MPRDA.
[102] Regulation 41 of the MPRDA Regulations.
[103] *Marikana Commission of Inquiry* (n 41) 526.
[104] See Annexure 'A': Lonmin Social and Labour Plan Analysis – Quantitative Assessment available at *http://www.sahrc.org.za/home/21/files/Lonmin%20Social%20and%20Labour%20Plan%20Analysis%20Qualitative%20and%20Quantitative%20Assessment_ANNEXURE%20A[1].pdf* (accessed on 11 August 2019).
[105] Ibid 19.

meant to ensure the advancement of historically disadvantaged persons, such as women who were employed in the mine and in other capacities.[106]

The advancement of local and economic development as required by reg 46 of the MPRDA Regulations also formed part of Lonmin's economic development initiative. As part of its SLP, Lonmin committed itself to being a socially responsible corporate citizen, which would advance local economic development through the establishment of key community projects.[107] In addition, reference is made in Lonmin's SLP to the workshops being held with the local communities on the environmental impact of the mines and the establishment of social investment projects which would be useful in eradicating poverty in the Madibeng municipality.[108]

Significantly, Lonmin's SLP sets out to promote worker participation through stakeholder engagement. This entails the involvement of workers and the local communities in facilitating programmes that will cater for their needs.[109] Stakeholder engagement is a critical aspect in ensuring the long-term sustainability of a company.[110] According to the commission's report, in the events leading up to the massacre, Lonmin vehemently refused to engage with the workforce by ignoring the simple request of the workers to talk to management. This stands in stark contrast to some of the objectives set out in the SLP.

It was thus submitted that the lack of delivery of these projects and the resulting lack of impact on the lived reality of the mining communities where Lonmin conducted its business, including the workers and their families, probably constituted a significant factor precipitating the events that took place in Marikana.

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[106] Ibid 3. The term Historically Disadvantaged South Africans (HDSA) refers to any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa Act 200 of 1993 came into operation. See Procurement Policy Schedule (80/20) available at *http://westcoastdm.co.za/wpcontent/uploads/2012/01/procurement_policy_schedule_80_20_eng.pdf* (accessed on 15 September 2022).

[107] Ibid.

[108] Ibid. Some of the projects identified in Lonmin's SLP included a water and sanitation project aimed at providing basic water and sanitation services to the residents of Madibeng municipality in Rustenburg; the establishment of a brick-making factory which would be useful in supporting the 5 000 houses it had planned to build; and a 'Schools Plan' that would be put in place to provide the infrastructure and technical education needed within the communities.

[109] See the report by Snyman and Krause on the Qualitative and Quantitative Assessment of Lonmin's Social and Labour Plan in *Marikana Commission of Inquiry* (n 41) 19.

[110] M Greenwood 'Stakeholder engagement: Beyond the myth of corporate responsibility' (2007) 74 *Journal of Business Ethics* 315.

It has been ten years since the death of the mineworkers, yet justice for the victims of the massacre and their families remains elusive.[111] To this day, no legal action has been taken against the directors of Lonmin, despite the recommendation that they be investigated, and no reparations for the victims of Marikana have been paid, despite the lengthy state-funded commission of inquiry process.[112] A three-year process resulted in no political and corporate accountability for the massacre.[113] This makes the subject of labour stability and the creation of harmony in the labour relations environment a very pertinent one in post-apartheid South Africa. Companies do not operate in a vacuum, nor is the influence of companies on GDP independent of the impact that such companies have on stakeholders.

Since Marikana, labour instability and strike violence have not declined; labour violence has simply gained momentum.[114] In the 2015 case of *Verulam Sawmills (Pty) Ltd v Association of Mineworkers and Construction Union ('AMCU') and Others*,[115] the company presented its case against the trade unions when strikers contravened the picketing rules by carrying weapons and prohibiting non-striking employees from

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[111] M Swart 'The killing fields: Marikana and the justice deficit' in M Swart & Y Rodny-Gumede (eds) *Marikana Unresolved: The Massacre, Culpability and Consequences* (2019) 120.

[112] Ibid. See also the Business & Human Resources Centre 'So Africa: Still no accountability or justice for the Marikana massacre victims 8 years later' available at *https://www.business humanrights.org/en /latest-news/so-africa-still-no-accountability-or-justice-for-the-marikana-massacre-victims-8-years-later/* (accessed on 12 January 2021).

[113] The commission's first sitting was on 1 October 2012 and its final sitting was on 14 November 2014. The final report was submitted to the President on 31 March 2015.

[114] Over the past few years, workers have attempted to heighten the impact of their strike action by using various tactics that have a negative impact on the lives and property of other people. See M Tenza 'An investigation into the causes of violent strikes in South Africa: Some lessons from foreign law and possible solutions' (2015) 19 *Law, Democracy & Development* 211. These include trashing cities, vandalising corporate assets, forming picket lines at supermarkets, and preventing shoppers from doing business with their chosen businesses. These tactics are employed by workers to force their employers to give in to their demands. In *NUMSA and Others v Dunlop Mixing and Technical Services (Pty) Ltd* 2021 (4) SA 144 (SCA) at para 3 the court stated as follows: 'In furtherance of the strike action, the first appellant authorised the holding of a picket outside the premises of the respondents at Induna Mill Road, Howick. On 22 August 2012, the picket allegedly became a violent demonstration in which damage to property resulted. That day, the Labour Court issued an order, at the instance of the respondents, restraining the appellants from engaging in unlawful acts. The order included a "perimeter order" prohibiting the holding of a picket within 50 metres of the access road to the respondents' premises. Between 22 August and 27 September 2012, various acts of violence are alleged to have occurred, resulting in damage to property owned by the respondents and its employees.' The Supreme Court held that where a picket is authorised under the Labour Relations Act and damages are suffered as a result of the picket, the aggrieved employer may seek relief from the Labour Court. The claim would be for 'just and equitable compensation' resulting from the damage to property caused by the violent strike action.

[115] *Verulam Sawmills (Pty) Ltd v Association of Mineworkers and Construction Union ('AMCU') and Others* (J1580/15) [2015] ZALCJHB 359; [2015] 12 BLLR 1266 (LC); (2016) 37 *ILJ* 246 (LC) (20 October 2015). See also L Polgreen 'In South Africa, labor unrest in mining deepens' *New York Times* (13 September 2012).

entering the workplace.[116] The striking employees blocked the entrance of the company and went on to damage the company's assets by burning vehicles which belonged to the company.[117] On 3 August 2015, the company was forced to close all its business operations, with workers threating to kill the managing director and chanting 'shoot Edward'.[118]

The evidence presented to the court indicated that the trade union, in this case AMCU, did not take all the reasonable steps needed to ensure that employees did not commit heinous acts of violence and to prevent them from damaging property. Myburgh AJ relied on the case of *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union and Others*,[119] where the court determined that unions can be held liable for the violent conduct of their workers. Myburgh AJ went further to state that when violence ensues during strike actions, this results–

> in non-strikers also withholding their labour, the strikers gain an illegitimate advantage in the power-play of industrial action, placing illegitimate pressure on employers to settle. Typically, one of two things then happen – either the employer gives in to the pressure and settles at a rate above that reflecting the forces of demand and supply (which equates to a form of economic duress) or the employer digs in its heels and refuses to negotiate or settle while the violence is ongoing (which inevitably causes strikes to last longer than they should). Either way, the orderly system of collective bargaining that the LRA aspires to is undermined – and ultimately, economic activity and job security is threatened.[120]

More cases of labour instability through strike violence are recorded in the case law, which indicate an increased level of labour instability and violence in the workforce.[121] Given the history of the country and the mechanisms put in place for ensuring labour

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[116] Ibid para 1. See s 69 of the LRA.
[117] Ibid para 6.
[118] Ibid para 7.
[119] *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union and Others* (2012) 33 *ILJ* 998 (LC).
[120] *Verulam Sawmills (Pty) Ltd v Association of Mineworkers and Construction Union ('AMCU') and Others* (n 101) para 15.
[121] See *Gri Wind Steel South Africa v AMCU and Others* (C561/17) [2017] ZALCCT 60; [2018] 3 BLLR 273 (LC); (2018) 39 *ILJ* 1045 (LC) (23 November 2017) where striking workers blockaded entrances to the workplace and prevented non-striking workers from entering the workplace. The workers went on to vandalise vehicles entering the premises and lit fires on private roads. In *KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union and Others* (2018) 39 *ILJ* 609 (LC) employees went on a protected strike against their employer; the strike soon turned violent as workers used force to remove non-striking workers. The strike also included damage to property by employees.

stability through legislation, there ought to be less adversarial engagement with employees and the demands of workers should be settled without violence. However, this is not the case. Notwithstanding its intentions, the present labour law framework is not effective in facilitating effective platforms for resolving employee disputes without violence. To address this deficit, a new approach, through corporate governance, is proposed to promote stability in South Africa's industrial relations environment.

This thesis argues that a singular (labour law) approach to bringing about labour peace and stability in the workplace is ineffective and does not encourage the growth of an engaged and motivated workforce. To address this, the thesis proposes a hybrid (labour law and corporate governance) approach which seeks to reap the benefits of collaboration between labour law and company law through internal corporate social responsibility.

1.4 CORPORATE SOCIAL RESPONSIBILITY AND LABOUR

Traditionally, the concept of corporate social responsibility (CSR) denotes the obligations of organisations to act transparently and ethically to ensure that they make positive impacts on society and the environment.[122] Such lofty obligations were bound to lead to academic debates regarding the meaning, scope and application of CSR.[123] It is argued in these debates, *inter alia*, that companies should voluntarily operate their businesses in a way that goes beyond the legal requirements.[124] In doing so, companies are required to engage in active compliance with standards of accountability, transparency and ethical leadership in their business management structure, as advocated by the national and international standards of good corporate governance.[125]

In complying with such standards, a company aims to minimise business, legal and social risks by taking 'responsibility' for the company's actions and being responsive to the needs of society as a whole.[126] Companies are expected to engage in

[122] TM Jones 'Corporate social responsibility revisited, redefined' (1980) 22(3) *California Management Review* 56.
[123] L da Piedade & A Thomas 'The case for corporate responsibility: Arguments from the literature' (2006) 2 *SA Journal of Human Resource Management* 57.
[124] Ibid.
[125] AB Carroll 'A three-dimensional conceptual model of corporate performance' (1979) 4 *The Academy of Management Review* 497.
[126] B Kytle & JG Ruggie 'Corporate social responsibility as risk management: A model for multinationals' Corporate Social Responsibility Initiative Working Paper No. 10, Harvard University

actions that further social welfare.[127] Thus, CSR encourages companies to be 'responsible' by making positive strides in improving, protecting, preserving and maintaining all stakeholders, which include the environment, the company's customers, investors, communities and the company's employees.[128] However, in undertaking such actions, the aim is to ultimately increase company profits and attract shareholder investment through positive public relations and high standards of ethics.

CSR is generally perceived to be a response to business failures that have accompanied the rapid growth and power of modern corporations.[129] A key aspect of this growth is the separation of the ownership of companies from their operational control, as well as the rise of modern management techniques.[130] The operational control of companies largely centres on the daily management of employees, which is evident when companies run into problems. Given the ultimate profit-making aim of companies and the indispensable role of employees in meeting the profit-making objectives of companies, emphasis should be placed on internal CSR.[131]

The use of the term 'internal CSR' in this thesis refers to a company's promotion of accountability, transparency, engagement and overall social responsiveness, with priority being given to the internal rather than the external stakeholders of the company.[132] Employees are the most relevant internal stakeholders because they play an essential role in the management and daily operations of companies.[133] It goes

(1979) 1. See also R Etcheverry 'Corporate social responsibility – CSR' (2004–2005) 23 *Penn St Int'l L Rev* 493.

[127] W Visser *Corporate Social Responsibility in Developing Countries: The Oxford Handbook of Corp orate Social Responsibility* (2008) 488.

[128] JJ du Plessis et al *The Concept 'Corporate Governance' and Essential Corporate Governance Principles* 4 ed (2005) 5.

[129] W Visser 'Revisiting Carroll's CSR pyramid: An African perspective' in ER Pedersen & M Huniche (eds) *Corporate Citizenship in Developing Countries* (2006) 484. See also LM Peng & FO Seng 'The manifestation of internal corporate social responsibility on employee's behaviour in small medium sized enterprises' (2015) 2(2) *Journal of Social Science Studies* 261.

[130] Visser ibid. There is an overlap between the discussions on environmental social governance (ESG) and the arguments for CSR by companies. Today, most companies use ESG ratings to measure a company's commitment to CSR and sustainability, as well as other values that aim to promote strong corporate values. Good CSR practices might help to improve ESG ratings. See K Karwowski & M Raulinajtys-Grzybek 'The application of corporate social responsibility (CSR) actions for mitigation of environmental, social, corporate governance (ESG) and reputational risk in integrated reports' (2021) *Corporate Social Responsibility and Environmental Management* 1270. By implementing ESG and CSR companies may improve sustainability and responsibility. For a detailed discussion of the ESG ratings and their value for corporate accountability, see H Silvolaand & T Landau *Sustainable Investing: Beating the Market with ESG* (2001). The focus of the thesis is not on ESG ratings, but on internal CSR which is critical for building workplace cooperation through employee engagement.

[131] Peng & Seng (n 129) 261.

[132] Ibid.

[133] G Birth, L Illia & L Francesco 'Communicating CSR: Practices among Switzerland's top 300 companies' (2008) 13 *Corporate Communications: An International Journal* 194.

without saying that companies cannot function without employees.[134] A company's treatment of its employees and how much the employees value the company for which they work will have a direct impact on how the company performs.[135]

Personal employee development and consultation through employee engagement on remuneration are all issues that responsible companies need to address as part of promoting an inclusive and motivated workforce.[136] This thesis argues that CSR, as an inclusive approach to doing business, should focus on its internal aspects as a means of promoting labour stability in South Africa.[137] The thesis does this by recognising the limits of labour law, and using company law to complement the approaches to creating labour harmony under labour law. The argument is that internal CSR appears to be lacking in South Africa, as evidenced in the recurring instances of labour discord in companies.

Currently, the corporate legal framework does not expressly encourage internal CSR. Indeed, the Companies Act[138] does not make explicit reference to CSR in both its internal and external dimensions.[139] Although CSR is a broad and generic term used to describe a company's responsibility to society, this thesis focuses on its internal dimension as it affects labour relations.[140] The thesis links the absence of internal CSR in company law to labour discord.

Scholarly research suggests that labour unrest in South African companies is driven by workers' dissatisfaction over wages and compensation benefits for employees.[141] For example, Visser argues that the demands by employees for higher wages, improved working conditions and trade union recognition were the main causes

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[134] J Collier & R Esteban 'Corporate social responsibility and employee commitment' (2017) 16(1) *Business Ethics: A European Revie*w 19.
[135] Birth et al (n 133) 196.
[136] Ibid. The concept of employee engagement is described as '[t]he degree to which employees are fully involved in their work and the strength of their commitment to their job and the company; this gives a competitive advantage including higher productivity and better customer service.'
[137] I-M Esser 'Corporate social responsibility: A company law perspective' (2011) 23 *SA Merc LJ* 317.
[138] Act 71 of 2008.
[139] HJ Kloppers 'Driving corporate social responsibility CSR through the Companies Act: An overview of the role of the social and ethics committee' (2013) 16 *PER* 173.
[140] Du Plessis et al (n 128) 4. The term 'stakeholder' was defined to mean the outside interests of the company that are at stake, for example, those of creditors, potential investors, consumers, the public or the community at large. See also I-M Esser & A Dekker 'The dynamics of corporate governance in South Africa: Broad based black economic empowerment and the enhancement of good corporate governance principles' (2008) 3 *Journal of International Commercial Law and Technology* 159.
[141] OO Owoseni 'An examination of some determinants of industrial conflict in employee-employer relationships' 2, available at *http://www.ilo.org/public/english/iira/documents/congresses/regional/lagos2011/5thsession/session5b/conflicts emp.pdf* (accessed on 20 July 2016).

of strikes in South Africa in the early 1980s.[142] Brand,[143] Rycroft[144] and Odeku[145] reaffirm Visser's argument and confirm that these are the leading causes of labour discord and unrest in South Africa today.[146] Scholarly research also shows that labour instability in South African companies has dire consequences for the financial performance of companies.[147]

Additionally, in the context of the difficult economic conditions at the global level and the national level, labour instability impacts negatively on the poor working class as their incomes are placed under pressure due to currency depreciation. Sudden hikes in the prices of electricity and petrol and the high cost of living all contribute to the demand for higher wages.[148] Hence, twenty-seven years after democracy, the problem of labour discord remains a barrier to the realisation of the socio-economic development goals of the country.

1.5 THE RELATIONSHIP BETWEEN COMPANY LAW AND LABOUR LAW

From inception, company law and labour law have been viewed as two distinct worlds that had little or no area of interaction with each other.[149] This is because company law is traditionally designed for the exclusive regulation of companies, governing the management and control of companies as well as the market within which they operate. The regulation of such a market is for the sole purpose of creating a company law regime that is traditionally centred on maximising shareholder value under the shareholder primacy model.[150] The management of companies under this model views

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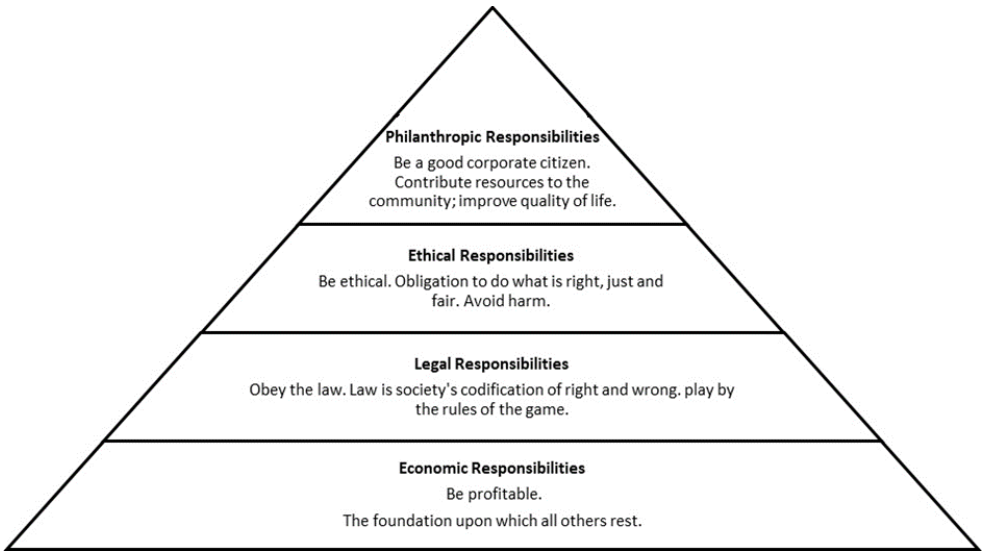
[142] W Visser 'A racially divided class: Strikes in South Africa, 1973–2004' 23, available at *http://sun025.sun.ac.za/portal/page/portal/Arts/Departemente1/geskiedenis/docs/strikesinsa.pdf* (accessed on 31 July 2016).
[143] J Brand 'Limit the right to bad faith bargaining and violent strike' *Business Day* (25 August 2010).
[144] A Rycroft 'What can be done about strike-related violence?' (2014) 30(2) *International Journal of Comparative Labour Law and Industrial Relations* 199.
[145] KP Odeku & F Olufunmilayo 'Transforming the mining industry in South Africa: Issues, challenges and prospects' (2015) 12 *Bangladesh e-Journal of Sociology* 89.
[146] Visser (n 142) 23.
[147] F Ganda & CC Ngwakwe 'The differential effect of labour unrest on corporate financial performance' (2015) 5(3) *Risk Governance & Control: Financial Markets & Institutions* 246.
[148] See Department of Research and Information 'Economic trends: Key trends in the South African economy' (31 March 2015) 24, available at *http://www.idc.co.za/images/download-files/economic-overviews/RI-publication-Keytrends-in-SA-economy_March2016.pdf* (accessed on 23 November 2016).
[149] MM Botha 'The different worlds of labour and company law: Truth or myth?' (2014) 17(5) *PER* 2043.
[150] For a discussion of shareholder primacy, see chapter 3 para 3.3.1.

the purpose of the company as promoting the best interests of the shareholders collectively.[151]

Moreover, this approach argues that the management of employees and the regulation of labour relations should be reserved for traditional labour law functions and the contract of employment.[152] Thus, for many decades, company law was traditionally reserved for the regulation of corporate actions, with very little to no attention being paid to employees.[153] However, Smit argues that the role of labour law transcends the purpose of remedying the imbalance of bargaining power in labour relations and therefore its value can be used to address issues beyond employment.[154] In his model of corporate social performance, Carroll identified the corporation as a business instrument whose responsibilities transcend traditional corporate law functions.[155] He identified four categories of a company's social responsibility which reflect a progression of social values owed by the company to society. These responsibilities are identified as the discretionary, ethical, legal and economic responsibilities of companies.[156]

[151] See chapter 3 para 3.3.1.
[152] V Harper 'Enlightened shareholder value: Corporate governance beyond the shareholder–stakeholder divide' (2010) 36 *Journal of Corporation Law* 74.
[153] N Smit 'Labour is not a commodity: Social perspectives on flexibility and market requirements within a global world' (2006) *TSAR* 153.
[154] Ibid.
[155] AB Carroll 'The pyramid of corporate social responsibility: Toward the moral management of organizational stakeholders' (1991) 34(4) *Business Horizons* 42.
[156] Ibid.

Diagram A: Carroll's Pyramid of Corporate Social Responsibility[157]



The approach was intended to present a diversified perspective on the responsibility of the corporation as a model whose impact transcends shareholder value protection. However, despite this approach, company law – including the company laws of South Africa – remains largely unconcerned with areas that overlap with labour.[158] It is thus widely accepted that South African company law should govern the relations between the directors and the officers, making room for the shareholders of the company, and should consider the relevant stakeholders only to the extent that this is appropriate.[159]

As a result, the relationship between the company and its workers is seldom addressed. In most cases, when it is addressed, the approach is often made from the perspective of employees as affected persons for the purpose of facilitating fundamental transactions that are primarily intended to promote the interests of the shareholders if this is in the 'best interest of the company'.[160]

Traditional employee issues are reserved for labour law and are thus only considered for the central purpose of protecting shareholder value. This perspective is flawed as there is more synergy between company law and labour law than is traditionally presented in the legal frameworks.[161] The role and place of employees in

[157] Ibid.
[158] Smit (n 153).
[159] T Mongalo 'An overview of company law reform in South Africa: From the guidelines to the Companies Act 2008' (2010) *Acta Juridica* xx.
[160] *Hutton v West Cork Railway Co* (1883) 23 Ch D 654.
[161] Le Roux & Davis (n 40) 306.

company law has value not only for shareholder value protection but also for employee interests and inclusive stakeholder value.[162] Smit explains this position as follows:

> A company, whether it operates for gain or not, is an association of a number of people for a common object. Employees play an undeniable role in the functioning and the prosperity of all companies. However, it has been shown that company law does not have much regard for the interests of employees. The position of the employee within the company can be approached in two ways: firstly, by ensuring that the enterprise bestows attention on the interests of its employees, communicates with them and acts reasonably towards them and, secondly, by according to employees a role in corporate governance within the company.[163]

In Anglo-American jurisdictions, labour law has traditionally performed the function of being a 'countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.[164] These sentiments have been repeated by labour law scholars who argue that the role of labour law is to perform some form of balancing act where the power between the master and the servant, the contemporary interpretation being the company and the employee, is balanced in such a way that workplace justice and industrial peace will result.[165] This is facilitated by the process of collective bargaining and protective legislation such as labour law, human rights laws, and occupational health and safety laws, as well as traditional trade union functions.

In the South African context, labour law performs a unique and important function. Labour law has a social justice function where trade unions are regarded as the key drivers of social justice, both inside and outside the workplace.[166] This was the experience during the apartheid regime as well as during the Marikana massacre, where miners demanded that the company implement the objectives set out in its SLP, which was intended to promote adequate housing and improved living and working conditions in Marikana.[167] The Constitution, the LRA and the supporting labour

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[162] Smit (n 153) 153.
[163] Ibid.
[164] P Davies & M Freedland *Kahn-Freund's Labour and the Law* 3 ed (1983) 18.
[165] Ibid. See also D Davis 'The functions of labour law' (1980) 13(2) *Comparative and International Law Journal of Southern Africa* 212.
[166] M Budeli *Freedom of Association and Trade Unionism in South Africa: From Apartheid to the Democratic Constitutional Order* (unpublished PhD thesis, University of Cape Town, 2007).
[167] W Gumede 'The failure of the apartheid corporate model' in M Swart & Y Rodny-Gumede (eds) *Marikana Unresolved: The Massacre, Culpability and Consequences* (2020) 95.

legislation play a key role in promoting and protecting the rights of employees in South Africa.[168] However, the role of companies in promoting employee well-being and improving the overall engagement of employees in corporate governance is limited.

The Companies Act has provided some elements of CSR by establishing the social and ethics committee in terms of s 72(4).[169] However, there is not much understanding of the committee's function in the context of the role of the company in promoting labour harmony through employee engagement practices.[170] For this reason, most companies have not implemented internal CSR at all; most prefer to focus on the external aspects – the philanthropic aspects of CSR for marketing purposes.[171]

Furthermore, although s 76(3) of the Companies Act has codified the common-law fiduciary duties of directors requiring that directors must act in good faith and in the best interest of the company, there is no guide to what constitutes the 'best interest of the company', particularly with regard to CSR and labour relations stability.[172]

The ambiguity is particularly evident on issues concerning the duties of directors towards the employees of the company,[173] and in promoting internal CSR. Hence, there is no guidance for company directors on how to deal with labour instability. This area remains unclear in the literature, specifically in the context of internal CSR, as there is little discussion about internal CSR in company law.[174]

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[168] Legislation such as the Labour Relations Act and the Basic Conditions of Employment Act, as well as institutions such as the CCMA and the labour courts, play a key role in promoting equity and social justice in South Africa.

[169] I-M Esser & P Delport 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2' (2017) 50 *De Jure* 231.

[170] MM Botha 'Evaluating the social and ethics committee: Is labour the missing link?' (2017) 80 *THRHR* 6.

[171] ZR Hameed et al 'How do internal and external CSR affect employees' organizational identification? A perspective from the group engagement model' (2016) 7 *Frontiers in Psychology* 788.

[172] FHI Cassim et al *Contemporary Company Law* 2 ed (2012) 515. The common-law principle that directors must act in the best interest of the company is codified in s 76(3)*(b)*, which states that a director of a company when acting in that capacity must exercise the powers and perform the functions of a director 'in the best interest of the company'.

[173] I-M Esser & A Dekker 'The dynamics of corporate governance in South Africa: Broad based black economic empowerment and the enhancement of good corporate governance principles' (2008) 3 *Journal of International Commercial Law and Technology* 159.

[174] Ibid.

In English case law,[175] the best interest of the company refers to the collective best interest of the shareholders.[176] This consideration undermines CSR as companies are required to consider the interest of the stakeholders only if this is in the long-term best interest of the shareholders.[177] Furthermore, Esser and Dekker question the traditional view of company management by directors in South Africa.[178] The traditional view expects company directors to manage a company in the best interest of the shareholders collectively.[179] This means that company directors must act in a way that prioritises the interest of the company's shareholders in the business management structure.

Esser and Dekker argue that, in company law, the traditional approach to acting in the best interests of the shareholders collectively is still evident as there is no legal obligation for directors to consider any interests other than those of shareholders.[180] Clearly, the shareholder primacy approach undermines and side-lines the interests and welfare of employees and is a contributory factor to labour instability. What is needed is a fundamental shift in the traditional thinking about the purpose of the company and its fundamental concepts.

1.6 RESEARCH OBJECTIVE

The primary aim of this research is to explore the practicality of internal CSR as a mechanism to promote labour stability and cooperative relations in the workplace, hence mitigating the exposure of companies to labour unrest. The purpose of such an exploration is to examine the potential value of internal CSR in promoting worker participation through employee engagement, which is necessary to facilitate labour stability in companies, which in turn supports productivity, GDP growth and investment.

At a more general level, the research is intended to contribute to the understanding of the role of internal CSR in company law and provide guidance on

[175] *Keech v Sandford* [1726] EWHC Ch J76; *Mills v Mills* (1938) 60 *CLR* 150 High Court of Australia. Latham CJ urged that the rule laid down by cases is that directors must always and solely act in the interest of the company. See *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306 (CA). However, the British cases do not explain what is meant by stakeholders as they generally focus on the director's duty to act in good faith and in the best interest of the company, without being specific about the duty to act in the best interest of employees as stakeholders of the company.
[176] *Keech v Sandford* (n 175).
[177] Esser & Delport (n 169).
[178] Esser & Dekker (n 173) 159.
[179] Ibid.
[180] For a discussion of the shareholder primacy approach, see chapter 3 para 3.3.1.

the use of internal CSR as a mechanism to promote labour stability. It is hoped that this will make a meaningful contribution to a better understanding of strategic CSR and its role in the corporate management of labour relations.

The research further seeks to reap the benefits of both a theoretical and practical understanding of internal CSR and the supporting concepts of corporate governance such as the *ubuntu* approach as a principle for promoting shared value in companies. Currently there is no legal framework that explicitly promotes internal CSR in South Africa, and it remains an issue that is open to surmise and conjecture by companies. Company directors, therefore, as can be expected, address the issue subjectively and on a voluntary basis, albeit with no uniform understanding of precisely what ought to be considered for internal CSR for labour stability. This thesis therefore aims to close this gap.

1.7 RESEARCH QUESTIONS

To achieve the objectives mentioned above, this thesis seeks to answer one broad research question: How can the use of internal CSR foster collaborative and cooperative workplace forces for labour stability under company law?

To answer this question, the following issues will be explored:

a. What is internal CSR and what is its significance for labour relations stability in South Africa? Chapters 2, 3 and 4 address this aspect in detail.

b. In what ways can the company law framework facilitate internal CSR for workplace cooperation? Chapters 4, 5 and 6 address this aspect in detail.

1.8 DELINEATIONS AND LIMITATIONS

This thesis looks at the ways in which labour instability may be mitigated in a company law context by using internal CSR. The primary focus is on the concept of internal CSR and its value for labour stability through company law. Hence, in the context of labour relations, the thesis limits its scope to an investigation of a less adversarial means of worker participation for the promotion of labour stability under company law.

For this reason, the thesis provides an overview of the failure of worker participation measures under labour law; however, the focus in terms of addressing the deficiencies in this regard is grounded in company law and corporate governance.

Given the focus of the thesis, as well as space constraints, the discussion regarding the labour law mechanisms for worker participation is limited.[181] The thesis builds on the solutions identified by Le Roux and Davis,[182] by investigating whether a more collaborative approach by corporate law and labour law could mitigate some of the adversarial impacts of labour law by building on the synergies embedded in company law and labour law as a form of good corporate governance

In advocating new solutions, the thesis explores the workings of internal CSR as a more progressive measure for promoting labour stability under company law. For this reason, the thesis does not extensively investigate avenues for labour stability under labour law and other supporting labour law frameworks such as those mentioned above. Lastly, the thesis does not deal extensively with measures of codetermination as practised in Germany.[183] This is a comprehensive topic which warrants a thesis in its own right and will be addressed somewhat superficially in this thesis.

1.9 METHODOLOGY

The research in this thesis was primarily conducted using the desktop method of research. Both primary and secondary sources of law were sourced from the University of Cape Town's law library as well as from the university's interlibrary loan facility which provides unrestricted access to books, cases, journals and articles. The Primo resource also provides access to a wide range of articles, newspaper articles, conference proceedings, datasets, reference entries and electronic databases, to name a few of the wide range of resources that were used in this research. The thesis focuses on the Companies Act 71 of 2008 and investigates how the realisation of internal CSR may promote labour stability through company law.

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[181] On the labour law framework for worker participation in the South African context, see M Anstey 'Worker participation: Concepts and issues' in M Anstey *Worker Participation* (1990) and M Anstey 'Workplace forums in South Africa' in M Anstey *Employee Participation and Workplace Forums* (1997).

[182] Le Roux & Davis (n 40) 306. As discussed further in chapter 2, Le Roux and Davis explore the relationship between corporate and labour law after the introduction of the new Companies Act. They argue for a company law and a corporate governance approach that embraces both shareholder and employee interests and which serves the interests of both stakeholders in a productive way, as opposed to an exclusive approach to corporate governance that does not cater for employee needs, which is essentially destructive. They do this by identifying the relationship between labour law and corporate governance.

[183] G Patmore *Worker Voice: Employee Representation in the Workplace in Australia, Canada, Germany, the UK and the US 1914–1939* (2006). See also S Renaud 'Dynamic efficiency of supervisory board codetermination in Germany' (2007) 21 *Labour* 689.

1.10 JUSTIFICATION FOR THE CHOICE OF COMPARATIVE JURISDICTIONS

In this section I discuss the justification for comparing the South African company law framework with the relevant frameworks in the United Kingdom (UK) and the United States (US), and my reasons for choosing s 176 of the UK Companies Act of 2006 and Rule 14a-8 of the US Securities Exchange Commission for the purpose of comparative analysis.

The fundamental principles of company law in South Africa were significantly influenced by developments in English law as well as developments in commerce and trade during the eighteenth and nineteenth centuries.[184] One of the first pieces of English legislation to confirm the influence of English law in South Africa was the Joint Stock Companies Act of 1844.[185] The Act introduced certain basic components of company law which formed the basis of English law and therefore also South African company law.[186] This influence was further catalysed by the growth in trade and industry which was brought about by the excavation of mineral resources in South Africa, leading to the boom in commerce and industrialisation in the country. During this era, English law began to have profound authority.[187]

Hence, the first South African company legislation was the Companies Act 46 of 1926, based on the Transvaal Companies Act 38 of 1909, which was in turn based on the English Companies (Consolidation) Act of 1908.[188] The next major piece of South African legislation was the Companies Act 61 of 1973, which remained in force for almost four decades, until it was repealed on 31 April 2011.[189] To a large extent, the history of the Companies Act of the UK is therefore mostly also the history of the

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[184] SD Girvin 'The antecedents of South African company law' (1992) 13 *Journal of Legal History* 67.
[185] Ibid 66.
[186] Ibid. According to Girvin, this included the distinction between private partnerships and joint stock companies, provision for incorporation by mere registration, and provision for full publicity. See Girvin (n 184) 67.
[187] For a discussion of the history of the industrialisation process, see chapter 2 of the thesis.
[188] Girvin (n 184) 67. The influence of English law is also reflected in the fact that English case law has persuasive force in South Africa and has a strong influence in many cases decided in the courts of South Africa today. One example is the famous English case of *Solomon v Solomon* (1897) AC 22 (HL).
[189] Girvin (n 184) 70. All the company law statutes that existed during the apartheid regime remained in force after the democratic elections in 1994, until the Act was repealed in April 2011. Although an extensive process of corporate law reform was first undertaken in South Africa by the Van Wyk de Vries Commission in 1963 to introduce the Companies Act of 1973, the Act remained a faithful reproduction of the English Companies Act. See T Mongalo 'South Africanizing company law for a modern competitive global economy' (2004) 121(1) *South African Law Journal* 93.

South African Companies Act. English law is South Africa's common law and thus influences the interpretation and application of our law in South African courts.

As discussed in chapter 4, the process of corporate law reform was largely influenced by developments in corporate governance in the UK and the US.[190] According to Mongalo, South Africa's recent corporate law reform project, which culminated in the enactment of the 2008 Companies Act, used US corporate law as a benchmark.[191] Delaware corporate law was used as a benchmark in a number of respects.[192] The statutory business judgment rule, which was introduced into South African corporate law by the 2008 Companies Act, is borrowed from US corporate law.[193] The Delaware General Corporations Law has also influenced South Africa's approach to share repurchases,[194] which has had an influence on share buybacks under both the Companies Act of 1973 and the Companies Act of 2008. This includes influences on South Africa's corporate restructuring procedure as set out in Chapter 6 of the Companies Act.[195] The Model Business Corporation Act has had a major influence on South Africa's company law; for example, the definition of 'distribution' in s 1.40(6) of the Model Business Corporations Act is very similar to the definition of a 'distribution' in the Companies Act and it includes the declaration or payment of a dividend.[196]

In the document outlining the guidelines for corporate law reform in South Africa,[197] published by the then Department of Trade and Industry, reference is made to the consultation paper which set in motion the review of core company law in the UK undertaken by the UK government. The legislature in South Africa has followed a similar process in facilitating corporate law reform. The lengthy process of deliberating and drafting the Bill for public comment included inviting corporate law and corporate governance experts from the US and the UK to participate in the process. International experts were sought because South Africa values and understands the

[190] See chapter 4 para 4.2.2.
[191] T Mongalo 'Directors' standards of conduct under the South African Companies Act and the possible influence of Delaware law: Research' (2016) 2(1) *Journal of Corporate and Commercial Law & Practice* 4.
[192] The state of Delaware is the preferred jurisdiction for the incorporation of corporations trading publicly in the US stock markets. See EB Rock 'Saints and sinners: How does Delaware corporate law work?' (1997) 44 *UCLA Law Review* 1009.
[193] Cassim et al (n 172) 563.
[194] Section 160(a) of the Delaware General Corporations Law.
[195] Section 141(a) of the Delaware General Corporations Law.
[196] Ibid.
[197] 'Guidelines for Corporate Law Reform' (n 2).

importance of comparative foreign law in building a competitive economy.[198] Thus the South African legislature has for many years adopted legal philosophies and principles underpinning English company law and the company laws of Delaware in both the Companies Act of 1973 and the new Companies Act.[199] These jurisdictions have been chosen not only because they are common-law jurisdictions like South Africa but, more importantly, because the law in these jurisdictions influenced the development of the new Companies Act.

Significantly, s 5(2) of the Companies Act empowers a court to consider foreign company law to the extent deemed appropriate when interpreting the Companies Act. Since no South African legislative or judicial precedent explicitly mandates the application of internal CSR it is imperative to investigate how the UK and the US have approached internal CSR. Rule 14a-8 of the US Securities Exchange Commission is significant because it looks at innovative ways of promoting labour union shareholder activism at board level.[200] This is a unique way of bringing the employee voice into corporate decision-making, which forms a significant component of internal CSR. The UK's Corporate Governance Code of 2019 addresses in great detail the process of strengthening the stakeholder voice in companies.[201] These approaches offer lessons that could be useful in promoting internal CSR for labour harmony in South Africa.

Girvin notes that when comparing the systems in the UK and South Africa it is imperative not to over-emphasise the differences between the two systems, for the basic structures are essentially the same and there remains a good deal of similarity in certain details.[202]

Cotterrell introduces the idea of 'legal families' in comparative research as significant justification for making a valuable comparison.[203] The idea of 'legal families', whatever its difficulties, suggests that different state legal systems, or elements of legal doctrine within them, can be treated as having sufficient similarity

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[198] TH Mongalo 'An overview of company law reform in South Africa: From the Guidelines to the Companies Act' (2008) *Acta Juridica* xiii–xxv.
[199] Ibid.
[200] See chapter 5 for a discussion of the Rule 14a-8 shareholder proposal.
[201] Financial Reporting Council 'The UK Corporate Governance Code July 2018' available at *https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf* (accessed on 1 September 2020).
[202] Girvin (n 184) 71.
[203] R Cotterrell 'The concept of legal culture' in D Nelken *Comparing Legal Cultures* (2017) 17.

to make comparisons useful. Based on the fact that the US, the UK and South Africa share a common-law legal system, according to Cotterrell's definition of legal families, a comparison of the systems should allow for useful findings to be made.

For a justifiable comparative analysis, a significant point to consider is the justification of the legal rules and principles in their cultural context. According to Friedman, '[l]egal culture consists of attitudes, values, and opinions held in society, with regard to law, the legal system, and its various parts' or 'ideas, attitudes, expectations and opinions about law, held by people in some given society'.[204] The UK and the US have significantly similar legal cultures and are thus, to a certain extent, comparable.

From a corporate governance perspective, US and UK corporate legal instruments have traditionally remained shareholder-centric, with the focus being on the shareholders of the company.[205] The injustices of the past have no significant bearing on how companies are managed. The corporate governance system is largely centred on promoting shareholder interest as the primary objective of the company.[206]

On the other hand, the South African corporate legal system is cognisant of the injustices of the past and seeks to move away from corporate laws and practices that marginalise historically disadvantaged persons.[207] There is also a shift towards promoting good corporate governance practices through CSR. Hence it is imperative to comparatively explore the development of internal CSR through strengthening the stakeholder voice in the UK and through labour union shareholder activism in the US.

In addition to sharing similar legal cultures, the US, the UK and South Africa all share similar economic, financial and market systems.[208] Moreover, both during the apartheid regime and after democracy the US and the UK remained South Africa's major trading partners. Some South African companies also have a US or a UK listing; for example, the Anglo-American mining company and, prior to merging with Sibanye

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[204] LM Friedman 'Legal culture and social development' (1969) 4(1) *Law & Society Review* 34.
[205] For a detailed discussion on corporate governance approaches, see chapter 4.
[206] For a detailed discussion on shareholder primacy, see chapter 3 para 3.3. See A Berle 'For whom corporate managers are trustees: A note' (1932) 45 *Harvard LR* 1365–1372.
[207] Mongalo (n 198) xx.
[208] V Thakoor 'Market Power, Growth, and Inclusion: The South African Experience' IMF Working Paper WP/20/206, available at *file:///C:/Users/01460245/Downloads/wpiea2020206-print-pdf%20(1).pdf* (accessed on 23 September 2022).

Gold, Lonmin PLC was a UK-based company which had conducted mining operations in South Africa for decades.[209]

1.11 OVERVIEW OF CHAPTERS

Chapter 1 explains the problem that the thesis will address. This chapter provides a contextual background to the research by outlining the problem statement, the research questions, and the research objective. The chapter sets out the methodology used to answer the research questions and delineates the thesis.

Chapter 2 investigates the historical context of CSR, together with a consideration of the development of CSR in South Africa. The chapter argues that the absence of a framework supporting internal CSR has had a considerable influence on escalating labour discord in companies. In doing so, the chapter highlights the missed opportunities for creating much-needed labour relations stability through workplace forums in the labour context. The chapter concludes by critiquing the ongoing developments in the Department of Trade, Industry and Competition (DTIC) regarding the mandatory appointment of employees to company boards, and advocates for a more progressive method of workplace cooperation though internal CSR.

Chapter 3 discusses different corporate governance approaches to the purpose of the company. The chapter reviews the theories used to answer the big corporate governance questions: What is the purpose of the company and in whose interest should the company operate? To answer these questions, the chapter draws on the jurisprudential foundations of the shareholder-centric approaches and the non-shareholder-centric approaches to corporate governance. The value in examining corporate governance approaches to internal CSR lies in the fact that the approaches to pursuing internal CSR are influenced by the foundations of the principles of corporate governance at play. The chapter concludes by advocating for the *ubuntu* approach as an appropriate approach for pursuing internal CSR as a mechanism to promoted labour relations stability.

Building on the previous chapters, chapter 4 sets out the enforcement framework for CSR under the Companies Act. The chapter reviews the place of CSR in company law in the history of South African company law, the process of corporate law reform, and the eventual implicit inclusion of CSR in the provisions of s 72(4), read together

[209] 'Lonmin acquisition on Sibanye Stillwater' available at *https://www.sibanyestillwater.com/news-investors/news/transactions/lonmin/* (accessed on 6 August 2021).

with reg 43 of the Companies Regulations, 2011. The chapter concludes that there is potential for internal CSR in company law, but its efficacy as a mechanism for labour stability and employee voice is significantly limited. The limitations and potential areas of amendment are discussed in the chapter. This discussion also includes a review of clause 15 of the Companies Amendment Bill, 2021.

Chapter 5 considers the relevant frameworks in UK and the US, and whether there are lessons to be learnt from these jurisdictions in terms of the limitations identified in chapter 4. The chapter considers how the UK and the US have implemented internal CSR as a mechanism for promoting labour relations stability though company law and supporting regulatory frameworks. Lessons are drawn from the UK and the US because of their long-standing influence on the development of South Africa's corporate law and the role that this influence continues to play in contemporary company law and in the process of corporate law reform.

The chapter observes that these jurisdictions have no place for internal CSR within their corporate legal frameworks. The position of employees is secondary to that of the shareholders and therefore nothing in their law explicitly advocates for internal CSR for employees. Notwithstanding this, significant lessons for the South African experience can be drawn from the UK's Corporate Governance Code, read together with the Guidance on Board Effectiveness, which focuses on strengthening stakeholder voice using platforms for amplifying employee engagement.

Chapter 6 makes recommendations for amendments to the existing law, which would provide for internal CSR as a mechanism to promote labour relations stability. The thesis makes recommendations about the corporate governance approach that should be adopted by companies in South Africa. The thesis introduces a hybrid model of corporate governance, one that embraces the strengths of the *ubuntu* approach and the enlightened shareholder value approach to corporate governance. The thesis goes further to propose amendments to the provisions of the s 72(4) social and ethics committee and the Companies Regulations 2011. These recommendations are informed by the comparative arguments made in the thesis as well as the context informing the history of our country and the challenges associated with leaving labour problems exclusively to labour law. The thesis suggests that the approach of using the avenues in both company law and labour law has the potential to promote labour stability through the internal CSR model.

1.12 CONCLUSION

This chapter provides an introductory outline of the key issues that will be discussed at length in the body of the thesis. The chapter starts by presenting an account of the development of South Africa's labour relations environment and the challenges that influenced the dynamics of the labour relationship. It was observed that some of the causes of labour instability are embedded in the adversarial nature of the labour relations environment, which has been influenced by colonialism and apartheid and the fact that the industrialisation process was largely achieved through the mining of mineral resources, which thrived on the exploitation of black migrant labour.

The chapter provides an overview of the different realms of company law and labour law, which seek to promote the interests of the company and the workers respectively. The chapter observes that the proposed solutions for maintaining labour peace under labour law have been ineffective, because labour instability is as much a company law problem as it is a labour law problem. The chapter goes further to hypothesise that the integration of internal CSR under company law could be the answer to achieving labour relations stability. Thus, the integration of internal CSR under company law to achieve labour harmony was presented as the main objective of the thesis.

The chapter also presents the primary research objective, which is to investigate whether the use of internal CSR can foster collaborative and cooperative workplace forces for labour stability under company law in South Africa. Using the methodology provided in this chapter, the chapters that follow offer suggestions as to how this may be achieved.

The next chapter offers an overview of the context and history of CSR, alongside a consideration of the missed opportunities for worker participation in South Africa. It provides a contextual background for the argument that the absence of a framework supporting internal CSR has influenced the escalation of labour discord in companies. To substantiate this argument, the chapter outlines the foundations of CSR and internal CSR by providing evidence of the positive influence of internal CSR on companies. Significantly, the chapter also considers the role of worker participation and the failure of workplace forums in South Africa. Based on this analysis, the chapter indicates that in order to mitigate labour instability and manage the conflict embedded in the labour

relations environment, a collaborative effort between labour law and company law is needed.

CHAPTER TWO: WHY INTERNAL CSR SHOULD BE REGARDED AS A MECHANISM FOR PROMOTING LABOUR STABILITY IN SOUTH AFRICA

2.1 INTRODUCTION

This chapter provides an overview of the context and history of CSR, alongside a consideration of the missed opportunities for worker participation in South Africa. It argues that the absence of a framework supporting internal CSR has influenced the escalation of labour discord in companies. Therefore, deciphering the foundations of CSR and the place of internal CSR within the wealth of research on CSR is crucial for establishing the groundwork for internal CSR as an important mechanism for labour relations stability.

The literature on internal CSR provides evidence of the positive influence of internal CSR on companies. Specifically, the literature reveals a connection between internal CSR and improved employee relations,[1] employees' increased organisational identification, employees' corporate citizenship behaviour,[2] employees' performance,[3] and company attractiveness to prospective employees as outcomes of internal CSR.[4]

The chapter provides an overview of the concept of CSR,[5] tracing the evolution of the concept as well as the development in the understanding and practices of internal CSR in the South African context.[6] The chapter reviews the concept of CSR and internal CSR measures in the context of South Africa's unique socio-political history, which has influenced the interpretation and practices of CSR.[7] The chapter provides a

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[1] PA Vlachos, NG Panagopoulos & AA Rapp 'Feeling good by doing good: Employee CSR-induced attributions, job satisfaction, and the role of charismatic leadership' (2013) 118(3) *Journal of Business Ethics* 577.

[2] S Brammer, A Millington & B Rayton 'The contribution of corporate social responsibility to organizational commitment' (2007) 18(10) *The International Journal of Human Resource Management* 1701.

[3] CB Bhattacharya, S Sen & D Korschun 'Using corporate social responsibility to win the war for talent' (2008) 49(2) *MIT Sloan Management Review* 37.

[4] Ibid.

[5] Note that the concept of CSR is broad and multi-dimensional, with a plethora of interpretations and conceptualisations from different disciplines, which go beyond the scope of this thesis. See L Hack et al 'A critical corporate social responsibility (CSR) timeline: How should it be understood now?' (2014) 16(4) *International Journal of Management Cases* 46. See also RE Hinson & TP Ndhlovu 'Conceptualising corporate social responsibility (CSR) and corporate social investment (CSI): The South African context' (2011) 7(3) *Social Responsibility Journal* 332.

[6] I Ali et al 'Corporate social responsibility influences, employee commitment and organizational performance' (2010) 4(13) *African Journal of Business Management* 2796.

[7] In the context of this thesis, socio-political influences refer to the social and political events that took place during apartheid and that have set the tone for the contemporary South African legal and social

detailed review of the history of CSR and internal CSR by tracking its status as a global phenomenon, where companies are called upon to consider CSR in their strategic management and overall corporate governance practices.[8] Significantly, the chapter provides a brief overview of the role of worker participation and workplace forums in South Africa.

2.2 THE HISTORY OF CSR AND INTERNAL CSR: AN OVERVIEW

For many decades, the concept of CSR has evolved and has influenced practices in the business-making strategies of different corporations.[9] CSR has been described by academics, business law writers and sustainability consultants in various ways.[10] Whether described as 'a moral compromise', 'a principle',[11] 'a doctrine'[12] or an 'investment strategy',[13] CSR is a highly celebrated concept that has formed the subject of multi-disciplinary debates across the globe.[14] The very essence of the definition of CSR is premised on a series of discourses that are focused on making a business case

landscape. These events were largely influenced by the apartheid regime in South Africa and thus form the essence of our history. See N Worden *The Making of Modern South Africa: Conquest, Segregation, and Apartheid* (1994) 1.

[8] See also P Katsoulakos et al 'A historical perspective of the CSR movement' (2004) *CSR Quest Sustainability Framework* 5. The notion that a company has a responsibility beyond profit maximisation has its early roots in the eighteenth century with businesses like Cadbury's chocolate makers in the United Kingdom (UK). These businesses incorporated eco-friendly business-making initiatives as well as improved channels for employee relations that prospered in the 1870s.

[9] AB Carroll 'Corporate social responsibility: Evolution of a definitional construct' (1999) 38(3) *Business & Society* 267.

[10] B Sheehy 'Defining CSR: Problems and solutions' (2015) 131(13) *Journal of Business Ethics* 630.

[11] DJ Wood 'Corporate social performance revisited' (1991) 16(4) *Academy of Management Review* 696. Wood seeks to build the framework for a corporate social performance (CSP) model and specifically refers to the principles of CSR as including legitimacy, public responsibility and managerial discretion. Her argument on the principle of legitimacy is that CSR legitimises the business within society as a business that is aware of its power and uses that power in a way that builds relationships between the business and society. The principle of public responsibility reinforces the responsibility of businesses for the problems derived from their engagement with society and the environment. The principle of managerial discretion, therefore, echoes the notion that company directors are agents of the company who can exercise their moral discretion in issues affecting the social responsibility of the company.

[12] Henderson, in expressing his opposition to the concept of CSR, specifically refers to CSR as a doctrine that derails business from pursuing its primary goal. According to Henderson, this primary goal refers to the facilitation of economic progress through capitalist approaches that help to advance the competitiveness of the business in the market economy. See D Henderson 'The case against "corporate social responsibility"' (2001) 17(2) *Policy* 30.

[13] See R Etcheverry 'Corporate social responsibility – CSR' (2004–2005) 23 *Penn St Int'l L Rev* 493 at 498 and 499. Scholarly debates on CSR align CSR as a mechanism for long-term value through social investments. The argument is that CSR is not an expense to the company, but rather an investment that can yield long-term value for the company by strengthening the values of excellence and commitment within the company and with its external stakeholders.

[14] Carroll 'Corporate social responsibility' (n 9) 267.

as well as a developmental case for CSR.[15] However, notwithstanding its prominence in the debates on corporate governance and sustainability,[16] it is well-known that the concept suffers from a lack of consensus about what CSR really means and how it should be applied.[17]

In these debates, it is argued *inter alia* that an ideal corporate system is conscious of its impact on the environment within which it conducts its business when it aligns corporate strategies with the long-term needs and interests of all its stakeholders.[18] In pursuing this ideal, the company optimises on long-term shareholder value through planned strategies that address social and environmental impact issues as part of its core business-making strategy.[19]

In one of the first books to address CSR, Johnson presented the argument that a socially responsible organisation is one whose managerial staff balances a multiplicity of interests, instead of striving for greater profits for its shareholders.[20] In doing so, the company acts responsibly when it considers the impact of its decisions on its employees, suppliers, dealers, the community, and the nations of the world.[21]

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[15] A McWilliams & D Siegel 'Corporate social responsibility: A approach of the firm perspective' (2001) 26(1) *Academy of Management Review* 17.

[16] MA Harjoto & H Jo 'Corporate governance and CSR nexus' (2011) 100(1) *Journal of Business Ethics* 45.

[17] The definitional construct of CSR is problematic and forms part of the wider debate on modern CSR conceptualisation. See Wood (n 11) 691. This lack of a uniform definition is mainly evidenced by the fact that most, if not all, scholarly articles on CSR begin by acknowledging that the concept has no uniform definition. Its interpretation and application vary, allowing scholars to develop models that categorise social issues with philosophies of social responsiveness. See, for instance, AB Carroll 'A three-dimensional conceptual model of corporate performance' (1979) 4(4) *Academy of Management Review* 497. Therefore, over the years, the discourse on the definitional construct of CSR is essentially reflected in each author's main arguments. As a result, many scholars use this platform as an opportunity to add to the international debate on CSR in a manner that endorses their theories on what CSR is and how CSR should be applied. See Hack et al (n 5) 46.

[18] The notion of business and consciousness is premised on the argument that businesses through the agency approach have a moral construct derived from their engagement with society. Therefore, through CSR, business develops the ability to be sensitive to the needs of the society. Etcheverry specifically refers to this sensitivity as social behaviour that requires business to depart from the exclusive traditional capitalist approaches to doing business. See Etcheverry (n 13) 501 and 502.

[19] This argument is in line with Harper's argument about the enlightened shareholder value (ESV) approach, as discussed in chapter 3, where she submits that the recognition of the interests of non-shareholder constituencies is instrumental in advancing the interests of shareholders in the long term. In other words, when companies acknowledge and apply CSR, there is potential for the realisation of long-term shareholder value. See V Harper 'Enlightened shareholder value: Corporate governance beyond the shareholder–stakeholder divide' (2010) 36(1) *Journal of Corporation Law* 78.

[20] H Johnson *Business in Contemporary Society: Framework and Issues* (1971) embraces a stakeholder perspective to CSR, as argued for by RE Freeman *Strategic Management: A Stakeholder Approach* (1984) 31. See the discussion of the stakeholder approach in chapter 3.

[21] Johnson ibid.

Therefore, Johnson regards employees and external philanthropy recipients as equal constituents who should be included in a company's CSR initiatives.[22] This perspective focuses on the consideration of CSR practices for internal stakeholders as a crucial aspect of a company's CSR initiatives.

However, other scholars define CSR from a doctrinal perspective, applied with a view to pursuing a capitalist business case for CSR.[23] They regard CSR as a capitalist doctrine, applied by companies with the intention of publicising their image to attract investor confidence as a shareholder value-adding mechanism for the company.[24] In addition, these scholars regard CSR as a long-term corporate investment that can be used to improve company profits through socially responsive community and environmental projects.[25]

According to CSR scholars,[26] when companies are sensitised to the needs of society more broadly, the costs of addressing those needs are marginal when compared to the long-term benefits that a company can receive when it assumes responsibility for the social, environmental, legal and economic needs of society.[27]

On the other hand, internal CSR involves the engagement by companies in the internal dimensions of CSR.[28] This is essentially premised on the notion that a company's CSR-related commitment is credible only if social responsibility measures are not limited to the external dimensions, but applied equally internally.[29] In contrast to CSR, internal CSR is primarily about internalising CSR, because research has shown that employees are an important asset for a company and therefore, in terms of CSR, should receive special attention.[30]

Thus, internal CSR factors describe social behaviour within a company and relate primarily to employees.[31] Therefore, the literature on internal CSR is exclusively

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[22] Ibid.
[23] Etcheverry (n 13) 493.
[24] CB Bhattacharya et al 'Doing better at doing good: When, why, and how consumers respond to corporate social initiatives' (2004) 47(1) *California Management Review* 15.
[25] B Lee & JM Logsdon 'How corporate social responsibility pays off' (1996) 29(4) *Long Range Planning* 495.
[26] M Weber 'The business case for corporate social responsibility: A company-level measurement approach for CSR' (2008) 26(4) *European Management Journal* 247.
[27] AB Carroll 'The pyramid of corporate social responsibility: Toward the moral management of organizational stakeholders' (1991) 34(4) *Business Horizons* 42.
[28] LM Peng & FO Seng 'The manifestation of internal corporate social responsibility on employee's behavior in small medium sized enterprises' (2015) 2(2) *Journal of Social Science Studies* 259.
[29] Ibid.
[30] Ibid.
[31] Ibid.

about employee issues, which include occupational health and safety, employee engagement, structural change, and the demographic aspects of employee welfare in the company.[32]

Although the notion of CSR with a focus on the internal stakeholders of the company has proven to be a useful and viable concept for stakeholder management,[33] a clear and comprehensive conceptualisation of internal CSR has not yet been provided by scholars in the field, especially in South Africa.[34] Nevertheless, further emphasising its importance, research shows that active involvement in internal CSR activities on the part of the company increases employees' organisational commitment, promotes channels for stakeholder engagement, reduces social risks, and is useful in attracting and retaining talent.[35]

Internal CSR focuses on the employees, and the need to channel corporate strategy towards improving stability in corporations through employees' participation in corporate strategy, training, health and safety, and equal opportunity within the company.[36] In essence, internal CSR is characterised by a broad interpretation and terminology:

> Internal CSR can mean the ethical behaviour of a corporation towards the whole body of internal stakeholders; greater responsiveness and accountability on the part of the company to the concerns of the employees; or voluntary initiatives that go beyond the legal requirements by the company to the employees.[37]

Freeman, Velamuri and Moriarty refer to CSR with a focus on internal stakeholders as 'corporate stakeholder responsibility'.[38] However, other scholars focus on employees and define internal CSR in terms of its internal focus, its intended target market, and its desired outcomes.[39] This is reflected in Wheeler and Sillanpaa's use of the terms

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[32] LM Peng 'Internal corporate social responsibility: An overview' (2014) 16(8) *Aust J Basic Appl* 24. The demographic aspects include gender, seniority, salary, marital and family aspects, and race.
[33] Bhattacharya, Sen & Korschun (n 3) 43.
[34] Brammer, Millington & Rayton (n 2) 1701.
[35] G Birth, L Illia & L Francesco 'Communicating CSR: Practices among Switzerland's top 300 companies' (2008) 13 *Corporate Communications: An International Journal* 198.
[36] Peng (n 32) 24.
[37] Ibid.
[38] R Freeman et al 'Company stakeholder responsibility: A new approach to CSR' (2006) *Institute for Corporate Ethics Bridge Paper* 19.
[39] D Wheeler & M Sillanpaa 'Including the stakeholders: The business case' (1998) 31 *Long Range Planning* 201.

'primary social, secondary social, primary non-social, and secondary non-social stakeholder responsibility'.[40]

Although various scholars provide different terminology for internal CSR, the common feature in the definitions of internal CSR is the presence of a specific intrinsic feature, which is to focus on employees as one of the material stakeholders of the company.[41] This approach is not as easily identifiable in CSR literature, which tends to neglect employees.[42]

This gap in the CSR debates is surprising, given the power and influence that internal stakeholders have in the company, which is their ability to expose the company to risks that could have far-reaching consequences for the overall success of the company in achieving its bottom-line objectives.[43] It is therefore important, particularly in the context of the adversarial labour relations that prevail in South Africa, to review the value of internal CSR for labour relations stability as part of the widely defined and broadly researched concept of CSR.[44]

2.2.1 CSR in South Africa: The apartheid era

In South Africa, the development of the concepts of CSR and internal CSR is intertwined with the apartheid system.[45] As noted by Hamann:[46]

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[40] Ibid.

[41] Carroll 'Corporate social responsibility' (n 9) 286.

[42] Peng (n 32) 24.

[43] B Kytle & JG Ruggie 'Corporate social responsibility as risk management: A model for multinationals' Corporate Social Responsibility Initiative Working Paper No. 10, Harvard University (1979) 1. See also the case of Marikana: IG Farlam *Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the Northwest Province* (2015) 42.

[44] Kytle & Ruggie ibid.

[45] In South Africa, apartheid was a system of oppression that was used by the ruling party to discriminate against people based on race and gender. This system was put in place by the ruling party in 1948 and remained in place until the early 1990s. In April 1994, millions of South Africans queued to participate in the first non-racial democratic elections in South Africa. These elections provided South Africans from all walks of life with the opportunity to vote. With these elections came political changes which called for a reformed and unified system of governance and much-needed radical changes in the legal and socio-economic spheres. The Constitution of the Republic of South Africa, 1996 provided the foundation for legal reforms and for the introduction of new laws to promote socio-economic development, human dignity and equality for all. See generally S Dubow *Racial Segregation and the Origins of Apartheid in South Africa, 1919–36* (1989).

[46] R Hamann 'Corporate social responsibility, partnerships, and institutional change: The case of mining companies in South Africa' (2004) 28(4) *Natural Resources Forum* 278. See also D Fig 'Manufacturing amnesia: Corporate social responsibility in South Africa' (2005) 81(3) *International Affairs* 599.

> In the South African context, the definition of CSR has been significantly influenced by the legacy of colonialism and apartheid … the country's painful history has a significant implication on how CSR is understood and implemented in South Africa.[47]

The apartheid system had tragic consequences for the dignity and livelihoods of the people of South Africa.[48] This tragedy extended beyond the racial segregation of people, as it specifically set the foundation for labour instability through the marginalisation of black employees.[49]

In many ways, the impact of the apartheid regime continues to create an imbalance in the socio-economic development of society; this imbalance forms part of the contested debates on land reform,[50] as well as institutional, corporate and academic transformation.[51] A multi-faceted approach is needed to redress past political injustices, which, it is argued, should include policies and frameworks that call for companies, institutions, organisations and other social partners to promote CSR. In the South African context, the conceptualisation of CSR should be understood in the context of bridging the inequality gaps created by past injustices as well as the need for companies and other social partners to assist government in promoting social justice and black empowerment through CSR.[52]

In the early 1970s, when CSR debates and practices were gaining momentum in the US, the literature in South Africa was silent on the debates about CSR. Moreover, in considering the nature and extent of corporate involvement with apartheid, the post-apartheid literature on CSR is filled with conflicting arguments on the social responsibility of companies during this era.[53] The literature suggests that corporate

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[47] R Hamann 'South Africa: The role of history, government, and local context' in SO Idowu & WL Filho (eds) *Global Practices of Corporate Social Responsibility* (2009) 457.
[48] L Sullivan 'Agents for change: The mobilization of multinational companies in South Africa' (1983) 15 *Law & Pol'y Int'l Bus* 427.
[49] See 'South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment' 6, available at *http://www.empowerdex.com/Portals/5/docs/dti%20BEE%20STRATEGY.pdf* (accessed on 11 September 2017).
[50] H Kloppers 'Introducing CSR: The missing ingredient in the land reform recipe?' (2014) 17(2) *PER* 708.
[51] See the fifth national policy conference of the African National Congress (ANC) 'Economic Transformation Discussion Document', available at *http://www.anc.org.za/sites/default/files/National%20Policy%20Conference%202017%20Economic%20Transformation_1.pdf* (accessed on 11 September 2017).
[52] P Newell & JG Frynas 'Beyond CSR? Business, poverty and social justice: An introduction' (2007) *28*(4) *Third World Quarterly* 675.
[53] Fig (n 46) 10.

strategy during apartheid primarily prioritised shareholder interests at the expense of employees, among other relevant corporate stakeholders.[54]

Thus, as noted by Fig,[55] the question of whether companies contributed to the breakdown of apartheid through CSR or whether companies endorsed the development of apartheid laws through poor labour practices is a contentious one.[56] According to Fig, companies were not socially responsible in the apartheid era as their contribution to financing the enforcement of apartheid policies led to the marginalisation of black employees.[57]

The violence that occurred during industrial action by employees was influenced by the struggle against apartheid laws, which, scholars have suggested, were endorsed by companies.[58] These scholars have linked apartheid-era labour unrest to the discrimination against and oppression of black employees during that time.[59]

According to Hamann,[60] employees revolted against companies perceived to be accomplices and who endorsed apartheid-related polices and agendas within and outside the working environment for obvious profit-making objectives.[61] Since companies were responsible only to the shareholders of the company,[62] any form of responsibility by companies towards their employees and the broader group of corporate stakeholders did not form part of the business-making strategy of companies during apartheid.

A capitalistic and shareholder-centric approach to doing business was the order of the day as CSR initiatives were not formally required nor generally encouraged by companies doing business at that time.[63] However, this was not the case for all companies, as the literature suggests that some foreign companies had an in-house

[54] See JJ du Plessis, J McGonvill & M Baganic *Principles of Contemporary Corporate Governance* (2011) 6 for a classification of the different stakeholder groups.
[55] Ibid.
[56] Fig (n 46) 599.
[57] Ibid.
[58] A Glenn & E Webster *Challenging Transition Approach: The Labour Movement, Radical Reform, and Transition to Democracy in South Africa* (1994) 75.
[59] Ibid.
[60] Hamann (n 46) 278.
[61] Ibid.
[62] M Friedman 'The social responsibility of the business is to increase its profits' *New York Times* 13 September 1970 at 3. For a detailed discussion of the shareholder primacy approach, see chapter 3.
[63] See generally M Lipton *Capitalism and Apartheid: South Africa* (1986) 17.

internal CSR model that encouraged socially responsible corporate behaviour towards employees.[64]

2.2.2 Early forms of internal CSR in South Africa: The Sullivan principles

Since the American Civil Rights Movement of the 1960s, the US government has become more aware of the impact of companies or the nature of their investments in promoting CSR.[65] In this regard, shareholder activism in the US was a key driver in facilitating forms of internal CSR by US companies doing business in South Africa.[66] These activists believed that responsible corporate investment in South Africa was an issue that institutional investors needed to confront head on; hence, shareholder activists submitted key proposals to company directors on taking steps to ameliorate the impact of their investments in supporting apartheid in their companies.[67]

Therefore, in a bid to chastise the government about apartheid, international corporations were faced with pressure from shareholder activists and the US government to implement the Sullivan principles or to divest all investments made in South Africa.[68] The international pressure against apartheid sought to place South Africa in trade quarantine by radically enforcing the Sullivan principles or divesting all investments made by US companies from South Africa, which would mean that all companies doing business and providing any form of aid, whether financial, educational or medical, would be withdrawn by the US government.[69]

Reverend Leon Sullivan, a US minister and civil rights activist, introduced what would be regarded by scholars as an unprecedented approach to corporate governance in South Africa.[70] In 1977, Sullivan proposed a set of six principles to govern US investments and business operations in South Africa.[71] These principles were centred on promoting values embedded in internal CSR by *inter alia* eliminating workplace

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[64] L Sullivan 'Agents for change: The mobilization of multinational companies in South Africa' (1983) 15 *Law & Pol'y Int'l Bus* 427.
[65] P Lansing 'The divestment of United States companies in South Africa and apartheid' (1981) 60(2) *Nebraska Law Review* 8.
[66] PA Broyles 'The impact of shareholder activism on corporate involvement in South Africa during the Reagan era' (1998) *International Review of Modern Sociology* 3.
[67] P Broyles & A Flatooni 'Opposition to South African apartheid: The impact of shareholder activism on US corporations' (1999) 31(3) *The Canadian Journal of Peace and Conflict Studies* 13.
[68] D Culverson 'The politics of the anti-apartheid movement in the United States, 1969–1986' (1996) 111(1) *Political Science Quarterly (Academy of Political Science)* 127.
[69] Ibid.
[70] Sullivan (n 64) 427.
[71] Z Larson 'The Sullivan principles: South Africa, apartheid, and globalization' (2020) 44(3) *Diplomatic History* 79.

discrimination, promoting income equality, and facilitating employee mentoring and community investment.[72]

The principles were initially designed to fight for equal employment opportunities for African-Americans in the US. Sullivan hoped that by making the same principles available to blacks living under apartheid, apartheid would be weakened at a socio-economic level.[73] It was hoped that corporations would apply these principles and use their privileged position to lobby for political change by implementing the principles in their business governance and strategies.[74] Although most scholars argue that the King Code[75] was the first set of principles to advance a code of conduct for the governance of companies in South Africa, it can be argued that the first set of principles to promote good corporate governance and CSR was in fact the Sullivan principles.[76]

The principles promoted internal CSR supporting values, which were used to promote peaceful change and improved working conditions for black employees in US companies.[77] According to Sullivan, 'this change was to facilitate the eradication of apartheid and foster the equal participation of blacks and non-whites in the socio-economic and political processes of the country through companies.'[78] The principles were viewed as voluntary codes of conduct that sought to promote channels for internal stakeholder engagement in US companies doing business in South Africa.[79]

The purpose of the principles was to *inter alia* implement structural changes to the employer–employee relationship.[80] This would be achieved by giving black employees opportunities to work in executive positions and to assume positions that would allow them to gain skills that went beyond taking menial instructions from their employers. The aim was to redress the imbalance of black employees in higher

[72] Sullivan (n 64).
[73] Ibid.
[74] Ibid.
[75] Institute of Directors in Southern Africa *King IV Report on Corporate Governance in South Africa* (2016). The King Codes published by the Institute of Directors are discussed at length in chapter 4.
[76] Ibid. See chapter 4 para 4.3.4.1 for a detailed discussion of the King Codes.
[77] Ibid.
[78] Ibid. Apartheid laws excluded black people from obtaining leadership positions in the workplace. Black people were barred from obtaining an education that would enable them to obtain positions of leadership in the workplace or even work in industries that were reserved for the white population.
[79] Sullivan (n 64).
[80] Ibid.

positions by giving them apprenticeship opportunities in top positions and improving the quality of the working environment provided by US companies.[81]

The approach of the Sullivan principles was way ahead of the times as they sought to advance the values of black economic empowerment (BEE).[82] The principles required US companies to embrace – at all levels of business management, boards and directorships – the inclusion of black employees in the management, structure and governance of US-based companies.[83] This form of internal stakeholder engagement and inclusion was established by facilitating substantial programmes in education, skills training and management development in all US companies.[84]

From an internal CSR perspective, Sullivan's principles were initiated to address the varied needs of black employees, which were a result of the deficiencies in the educational offerings and employment choices made available to black people in society as well as in corporate South Africa.[85] Therefore, US companies were asked to observe the following six principles:

> Principle 1: Non-segregation of races in all eating, comfort, locker rooms, and work facilities.
>
> Principle 2: Equal and fair employment practices for all employees.
>
> Principle 3: Equal pay for all employees doing equal or comparable work for the same period.
>
> Principle 4: Initiation and development of training programs that will prepare blacks, coloureds, and Asians in substantial numbers for supervisory, administrative, clerical, and technical jobs.
>
> Principle 5: Increasing the number of blacks, coloureds, and Asians in management and supervisory positions.
>
> Principle 6: Improving the quality of employees' lives outside the work environment in such areas as housing, transportation, schooling, recreation, and health facilities.[86]

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[81] MP Mzamo 'South Africa: Corporate social responsibility and the Sullivan principles' (1997) 28(2) *Journal of Black Studies* 219.
[82] For a more detailed discussion of BEE, see chapter 4.
[83] Sullivan (n 64) 427.
[84] Ibid.
[85] Ibid.
[86] See 'Sullivan Principles, 1978 Version' *Divestment for Humanity: The Anti-Apartheid Movement at the University of Michigan*, available at *https://michiganintheworld.history.lsa.umich.edu/antiapartheid/items/show/182* (accessed 20 May 2020).

To some extent, US companies complied with the voluntary Sullivan principles, but the effectiveness of the principles in ending apartheid is debatable.[87] Constant scrutiny by apartheid activists prevented shareholder activists from making the Sullivan principles an essential component of the business operations of US-based companies doing business in South Africa; therefore, the extent of compliance remained a moot point.[88] Nonetheless, more than a hundred US companies were required to incorporate the Sullivan principles as part of their corporate governance initiatives.[89] Most companies were thus pressurised to comply with the Sullivan principles or alternatively withdraw from doing business in South Africa.[90]

Moreover, since apartheid was declared a crime against humanity by the United Nations (UN),[91] shareholder activists distanced themselves from apartheid by actively pursuing avenues through which good corporate governance practices were to be adhered to in jurisdictions where they had invested.[92] Hence, shareholders pursued a peaceful end to apartheid through shareholder activism campaigns such as the Sullivan principles.

2.2.3 The shortcomings of the Sullivan principles for internal CSR

One could argue that the requirement to incorporate the Sullivan principles was one of the first initiatives that introduced internal CSR practices to companies in South Africa. However, the application of the principles was not without limitations. First, the principles conflicted with the core objective of the corporation, which was to optimise profit maximisation for its shareholders.[93] Apartheid laws ensured that such a purpose was fulfilled as employing cheap black labour minimised a company's costs.[94]

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[87] L Zeb 'The Sullivan principles: South Africa, apartheid, and globalization' (2020) 44(3) *Diplomatic History* 480.
[88] Ibid.
[89] Lansing (n 65) 8.
[90] Ibid.
[91] 1973 UN Convention on Apartheid as a Crime Against Humanity, available at https://www.politicsweb.co.za/documents/1973-un-convention-on-apartheid-as-a-crime-against (accessed on 10 February 2020).
[92] See J Dugard 'Convention on the Suppression and Punishment of the Crime of Apartheid' available at *https://legal.un.org/avl/pdf/ha/cspca/cspca_e.pdfon* (accessed on 15 June 2019).
[93] The primary goal of companies has for many decades been based on profit maximisation for shareholders. See Friedman (n 62).
[94] VL Allen *The History of Black Mineworkers in South Africa* (2005) 54.

Secondly, the principles lacked an enforcement mechanism as they were voluntary in nature. Non-compliance with the Sullivan principles did not yield any real legal or regulatory consequences for a company. Thirdly, corporate managers had the power to exercise their discretion as to whether to accept the proposals made by shareholder activists on issues relating to the management of the company. If the company did not accept the proposals made by shareholders on CSR initiatives, such initiatives would not be implemented by the company.[95]

2.2.4 The US disinvestment movement

A more radical approach by shareholders was to initiate a corporate disinvestment campaign whereby US-based companies would remove their investments from South Africa.[96] The disinvestment movement, which facilitated a sanctions campaign against apartheid, began in the 1950s, but gained momentum in the 1960s and 1970s as US shareholders became sensitised to the role of companies in supporting the apartheid regime.[97] Because of their indirect support for apartheid, US companies doing business in South Africa were banned during the Reagan Administration by the Comprehensive Anti-Apartheid Act of 1986, which imposed sanctions.[98] This Act was passed as a response to pressure from the international community, forcing the Senate to withdraw from engaging economically with the apartheid government.[99]

The primary supporters of the disinvestment campaigns were US-based shareholder activists who disassociated themselves from the apartheid practices in their companies.[100] Shareholder activists organised an international disinvestment movement that would cut all investments, financial guarantees and other economic advantages provided by businesses and the US government to South Africa. Shareholder activists placed South Africa in a trade embargo. This approach was

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[95] SJ Schwab & RS Thomas 'Realigning corporate governance: Shareholder activism by labor unions' (1998) 96 *Michigan Law Review* 1048.
[96] Broyles (n 66) 2.
[97] Lansing (n 65) 8. By 1963, 25 countries had imposed official sanctions on South Africa to chastise the country about apartheid by exposing the country's economy to vulnerabilities.
[98] Ibid. See ss 101 to 110 of the Comprehensive Anti-Apartheid Act of 1986. In terms of this Act, the US sought to discourage apartheid through economic and political measures that were set out in the Act. From a company perspective, the Act sought to prohibit the importation of South African products and goods: see s 319 of the Act. Any investments made between South Africa and the US were prohibited under s 310 of the Act. This included the prohibition of air transportation with South Africa under s 306 of the Act.
[99] Comprehensive Anti-Apartheid Act of 1986.
[100] Broyles & Flatooni (n 67).

further catalysed by the UN's position in condemning apartheid as a violation of human rights.[101]

The US was bound to follow the UN Charter, hence shareholder activists sought to divest their investments from South Africa. Several states in the US supported the disinvestment campaign, for example, Nebraska, which introduced a legislative resolution to completely dissociate itself from South Africa as it stood against human rights violations and social inequality.[102] Similarly, Illinois and Michigan[103] imposed sanctions on the country because of its apartheid laws and practices.

From a corporate perspective, the sanctions banned all business activities between South Africa and the US and imposed strict limitations on financial engagements.[104] The effect was that the US could not extend its credit facilities to the South African government. Moreover, any humanitarian and investment agreements made between the South African government and the US were ended to censure the government; this had a direct impact on foreign companies.[105]

The Carter Administration did not prevent US companies from doing business, but rather encouraged US companies doing business in South Africa to adopt progressive labour law standards.[106] The government was concerned about the impact of the campaign on future developments: black employees might resort to more violence as employment opportunities were significantly reduced by the disinvestment campaigns, and the campaigns would also foster a decline in the economy.[107] However, the sanctions and divestment campaigns as well as the principles did not

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[101] 1973 UN Convention on Apartheid as a Crime Against Humanity, available at *https://www.politicsweb.co.za/documents/1973-un-convention-on-apartheid-as-a-crime-against* (accessed on 10 February 2020).
[102] Ibid.
[103] See the Michigan Resolution 462, adopted on 6 February 1978, at 294, which urged Congress to impose immediate sanctions on the South African government because of its position on apartheid and human dignity. These resolutions were passed in the Michigan House in memory of Steve Biko. See the Michigan House of Representatives, available at *http://kora.matrix.msu.edu/files/50/304/32-130-1F01-84 MI%20HR%20Resolutions%2077.pdf* (accessed on 23 July 2019).
[104] Ibid.
[105] Lansing (n 65) 8. Institutions of higher learning that had close ties with South Africa also discontinued their alliances with South Africa as a part of the disinvestment campaign. Columbia University and the University of Wisconsin divested their investments made in South Africa.
[106] Ibid. The progressive labour standards were those of the International Labour Organisation (ILO) and international good labour practices recommended by the UN.
[107] Ibid. See also Senate Report on 'U.S. Corporate Interests in South Africa' (1978) *Disinvestment for Humanity: The Anti-Apartheid Movement at the University of Michigan* available at *https://michiganintheworld.history.lsa.umich.edu/antiapartheid/items/show/198* (accessed 20 May 2020).

effectively promote internal CSR, because apartheid laws and practices were focused on maximising shareholder value at the expense of employees.[108]

2.2.5 The shortcomings of the disinvestment movement

The disinvestment campaign had little or no impact on the financial performance of US businesses in South Africa. Moreover, a critical drawback of the campaign was that most corporate managers embraced a shareholder-centric approach to doing business, as they argued that it was not the business of their companies to exercise discretion about the internal affairs of another country.[109] Corporate governance in the US is premised on ensuring profit maximisation for the shareholders and not on passing moral judgements about the politics of the countries in which the company does business. Moreover, the disinvestment campaign had little or no impact on the political climate of South Africa as there were many competitors who could easily occupy the gaps in the market created by US-based companies who divested from South Africa.[110] Another argument was that the only constituents that would suffer as a result of the disinvestment campaign would be the black and other historically disadvantaged employees, because disinvestment would lead to job losses that would be harshly felt by employees. Despite support from over 35 states in the US, there was some resistance to the laws passed by the states supporting disinvestment as these conflicted with the Constitution.[111]

In sum, US companies did not favour the disinvestment campaign as the South African economic climate ensured profitable operations in South Africa. Moreover, the strong political ties between South Africa and the US contributed to the relative failure of the disinvestment campaign. As noted earlier, South Africa has large reserves of natural resources such as gold, platinum and chromite, and these fostered political alliances between South Africa and Anglo-American countries.[112] The reserves formed the core foundation of the political alliance between South Africa and the US, an alliance that most businesses were not willing to compromise.

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[108] Mzamo (n 81) 229.
[109] See chapter 3 for a discussion of shareholder primacy.
[110] Lansing (n 65) 8.
[111] Ibid. During this era those who argued against disinvestment based their arguments on the fact that it was unconstitutional to regulate commerce or to prescribe the conditions upon which it should be conducted.
[112] J Davenport *Digging Deep: A History of Mining in South Africa, 1852–2002* (2013) 2.

Generally, CSR initiatives were limited to community projects such as the Urban Foundation and the Chairman's Fund, established by US corporations and investors.[113] The Urban Foundation was set up by US mining corporations to ameliorate the harshest aspects of apartheid in rural communities in South Africa as part of corporate philanthropy, with mining companies establishing housing and educational projects.[114] The Urban Foundation went further to campaign against apartheid policies and laws as a form of corporate activism against apartheid.[115] However, during the apartheid era, apart from the initiatives of the Urban Foundation and the implementation of the Sullivan principles by US multinational enterprises, CSR practices and principles in corporate South Africa remained a foreign concept as most companies and scholars were not actively engaged in CSR.[116] Moreover, the rigid application of apartheid laws and the policing of the movement, education and settlement of the black population made the establishing of such initiatives by companies and shareholder activists an almost impossible task.

In sum, CSR is a well-developed and broadly defined concept in the literature, with differences of opinion between academics on what it really means and how it should be applied.[117] This lack of consensus has accompanied wide gaps in the understanding and application of the concept.[118] As a result, companies have over the years developed negative attitudes towards CSR.[119] Some scholars argue that CSR is any 'responsible activity that allows a company to achieve a sustainable competitive advantage regardless of motive.'[120] Other scholars argue that the motive of the

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[113] Anglo-American initiated one of the first CSR projects by mining houses: the Urban Foundation project was launched by Harry Oppenheimer in 1977 to provide private sector support to townships during apartheid. See Hamann (n 46) 436.
[114] Ibid.
[115] Ibid.
[116] M Alperson *Foundations for New Democracy: Corporate Social Investment in South Afric*a (1995) 3.
[117] Ibid.
[118] See M Lutz 'The lawyer's role in mitigating CSR risk' (2005) 99 *Proceedings of the Annual Meeting American Society of International Law* 268. Lutz specifically emphasises that the lack of clarity on standards of CSR imposes significant difficulties for lawyers advising clients on how to avoid the litigation costs associated with non-compliance with CSR in America. He argues that the unclear standards on the meaning and application of CSR can lead to the application of CSR for the wrong reasons, as CSR is not a standardised concept. This lack of standardisation can lead to companies applying the concept in an 'inconsistent and unpredictable way'.
[119] L da Piedade & A Thomas 'The case for corporate responsibility: Arguments from the literature' (2006) 2 *SA Journal of Human Resource Management* 57.
[120] A McWilliams & DS Siegel 'Creating and capturing value: Strategic corporate social responsibility, resource-based approach, and sustainable competitive advantage' (2011) 37(5) *Journal of Management* 1480.

corporation is essential in CSR as it can influence the legitimacy of the company's values in promoting good corporate citizenship,[121] thus creating more certainty about how companies can strategically embrace stakeholders such as employees, consumers, the community, and the environment in their business strategies.[122] However, despite the lack of agreement on the definition, approach, standards and practices, the literature on CSR reveals some level of consensus on the need for CSR, its significance and its intended outcomes.[123]

2.3 THE CHARACTERISTICS OF CSR

2.3.1 Voluntary in nature

As a multi-faceted and multi-dimensional concept, CSR tends to embody certain essential features that are visible in CSR definitions and practices. The core characteristics of CSR are therefore essential in conceptualising CSR and its intended purpose as most existing debates and practices of CSR revolve around its character.[124] Scholars define CSR as representing all corporate initiatives that go beyond their legal requirements as purely discretionary.[125]

However, more broadly defined, CSR can encompass a combination of law and stock exchange listing requirements.[126] CSR is based on voluntary corporate practices.[127] However, companies across the globe have adapted to the discretionary component of CSR and are willing to consider a semi-regulated form of CSR to align the company with international good corporate governance standards whilst avoiding over-regulation through compliance with various societal norms.[128]

The essential characteristics of CSR are similar to some of the measures used to restore labour relations stability in the workplace. CSR is voluntary in nature, which

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[121] Ibid.
[122] Kytle & Ruggie (n 43). See also Carroll 'Corporate social responsibility' (n 9) 268. Carroll attempts to define CSR by tracing the concept from its inception to the twentieth century. Since then, the literature has developed in approach and practice, emphasising that the debates have been taking place for decades, which has therefore influenced the way in which businesses and practitioners conduct business.
[123] Ibid. See IS Mohd 'Corporate social responsibility: What can we learn from the stakeholders?' (2012) 65 *Procedia: Social and Behavioural Sciences* 327. See also K Mass & F Boons 'CSR as a strategic activity' in C Louche et al *Innovative CSR: From Risk Management to Value Creation* (2010) 157; E Barman *Caring Capitalism: The Meaning and Measure of Social Value* (2016) 127.
[124] Carroll 'Corporate social responsibility' (n 9) 286.
[125] Ibid.
[126] Johannesburg Stock Exchange 'Listings Requirements', available at *https://www.jse.co.za/listing-process/listing-on-the-jse* (accessed on 26 August 2019).
[127] R Gamerschlag et al 'Determinants of voluntary CSR disclosure: Empirical evidence from Germany' (2011) 5 *Review of Managerial Science* 234.
[128] Ibid.

parallels with the collective bargaining process, which is also voluntary in nature.[129] However, in South Africa, CSR extends beyond voluntariness, since companies listed on the Johannesburg Stock Exchange (JSE) are mandated to apply CSR.[130] Companies that are not listed on the JSE can exercise their discretion as to whether they should set up initiatives beyond legal requirements as a form of corporate responsibility.[131] Steadman suggests that, in the South African context, the forums for workplace participation that work best are those which are established voluntarily;[132] this argument is in line with how CSR is applied, since it is non-binding and most companies adopt CSR practices on a voluntary basis.[133]

This voluntary aspect of CSR has led to various debates about the viability of the concept, with critics arguing that the voluntary aspects serve as a major drawback, since companies can simply overlook the concept in its entirety as its application is purely discretionary.[134] However, other critics argue that CSR should not be a legally mandated form of corporate legal responsibility as its voluntary nature plays a significant role in the viability of the concept.[135]

Notwithstanding the voluntary aspect of CSR, studies show that CSR has a positive effect on profit maximisation, employee risk management and investor confidence.[136] This positive effect facilitates platforms for labour stability and harmony as corporate responsiveness in its voluntary dimensions can facilitate platforms for good employee relations by managing social risks though CSR.[137]

Furthermore, in other jurisdictions, CSR has moved beyond its voluntary dimensions as it has been proven to be instrumental in creating a business case for

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[129] H Cheadle 'Collective bargaining and the LRA' (2005) 9(2) *Law, Democracy & Development* 151. See also F Steadman 'Workplace forums in South Africa: A critical analysis' (2004) 25 *Industrial Law Journal* 1178.

[130] I Ioannis & G Seraphim 'The consequences of mandatory corporate sustainability reporting: Evidence from four countries' (2017) 11 *Harvard Business School Research Working Paper* 9. The King II Report requires mandatory disclosure or rather integrated reporting of both financial and non-financial matters, and these matters include CSR matters.

[131] See JSE 'Listings Requirements' (n 125). See also W Visser 'Corporate citizenship in South Africa: A review of progress since democracy' (2005) 18 *The Journal of Corporate Citizenship* 34.

[132] Steadman (n 128) 1178.

[133] Gamerschlag et al (n 126) 233.

[134] R Hamann & P Kapelus 'Corporate social responsibility in mining in Southern Africa: Fair accountability or just greenwash' (2004) 47(3) *Development* 85.

[135] MM Rahim *Legal Regulation of Corporate Social Responsibility: A Meta-Regulation Approach of Law for Raising CSR in a Weak Economy*(2013) 95.

[136] Ibid.

[137] Kytle & Ruggie (n 43) 1.

companies by satisfying stakeholder expectations whilst retaining feasible returns for shareholders' investments.[138] However, the outcome of CSR as a profit maximisation strategy, useful in *inter alia* mitigating social risks and facilitating employee engagement, does not apply universally, as some companies are yet to appreciate the value of voluntary CSR.[139]

Therefore, the debate on CSR beyond philanthropy rests on the assumption that CSR needs to be legally regulated and embedded in business practices as the benefits of CSR are assumed to create real value for all companies.[140] How this may be achieved remains moot in the debates on mandatory CSR.[141]

2.3.2 CSR promotes shared value in stakeholder relationships

CSR is about creating and maintaining shared value.[142] According to Kramer and Porter, shared value recognises the needs of society as crucial in achieving economic success.[143] Thus, shared value recognises that social harms or weaknesses created by the company incur *internal* costs for companies which can be mitigated by acting responsibly. This is evidenced in labour unrest when employees raise social concerns over basic conditions of employment, employee health and safety, as well as remuneration; such unrest creates massive costs and losses for the company.[144]

Under this model, addressing employee needs and constraints does not necessarily raise costs for firms, because they can innovate by using new management approaches and techniques to address these needs – and, as a result, increase their productivity and expand their markets.[145] Shared value, then, is not about the personal values of the company or its directors. It is about 'sharing' the value already created

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[138] See generally L Gatti, B Vishwanath, P Beele & B Cottier 'Are we moving beyond voluntary CSR? Exploring theoretical and managerial implications of mandatory CSR resulting from the new Indian Companies Act' (2019) 160(4) *Journal of Business Ethics* 961. See also YC Chen, M Hung & Y Wang 'The effect of mandatory CSR disclosure on firm profitability and social externalities: Evidence from China' (2018) 65(1) *Journal of Accounting and Economics* 169.
[139] U Idemudia 'Corporate social responsibility and developing countries: Moving the critical CSR research agenda in Africa forward' (2011) 11(1) *Progress in Development Studies* 5.
[140] Ibid.
[141] A Bhattacharyya & ML Rahman 'Mandatory CSR expenditure and firm performance' (2019) 15(3) *Journal of Contemporary Accounting & Economics* 100.
[142] M Porter & MR Kramer 'Creating shared value' (2011) 89(1/2) *Harvard Business Review* 62.
[143] Ibid.
[144] See chapter 1 para 1.3. See also *Marikana Commission of Inquiry* (n 43).
[145] Porter & Kramer (n 141) 62.

by firms: a redistribution approach. It is about expanding the total pool of economic and social value.[146]

A good example of this difference in perspective is the use of CSR practices and objectives as means to create harmony in stakeholder relationships through CSR. The revenue of a company can be increased by applying the values of corporate philanthropy internally, which includes paying employees better wages and providing proper structures for engagement and negotiation through CSR.[147]

According to the King IV Report, value is defined in two dimensions, first as a process and second as a philosophy.[148] In terms of King IV, value creation is a 'process that results in increases, decreases or transformations of the capitals caused by the company's business activities and outputs.'[149] The value creation process, therefore, has neutral, positive and negative outcomes.[150] As a philosophy, values are convictions and beliefs about how the company and those who represent it should conduct themselves, how resources and stakeholders should be treated, what the core purpose and objectives of the company should be, and how the company's duties should be performed.[151]

The essential character of CSR is thus reflected in its ability to derive value for companies and organisations. The concept postulates that both economic and social progress can be addressed by using value as a principle guiding the practices of CSR within the company.[152] This perspective is evident in the CSR corporate initiatives of communitarian societies, such as South Africa, which value the customs and cultural practices of their local communities as a significant component of law, including CSR practices.[153] This element of value creation through CSR is evidenced in the King Reports, which embrace the local values of *ubuntu* as a form of good corporate

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[146] Ibid.
[147] Peng & Seng (n 28) 259.
[148] Institute of Directors in Southern Africa *King IV Report on Corporate Governance in South Africa* (2016) 18.
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Porter & Kramer (n 141) 62.
[153] AA Hamidu, HM Haron & AN Amran 'Corporate social responsibility: A review on definitions, core characteristics and theoretical perspectives' (2015) 6(4) *Mediterranean Journal of Social Science* 84. See generally TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1995).

governance.[154] Conversely, scholars argue that the value dimension of CSR is part of the reason why the concept is highly debated.[155]

This is because the value dimension of CSR as a process and as a philosophy is tied down to a subject context that requires a director's perception of what he or she regards as valuable. However, in interpreting CSR as a form of shared value through the lens of Kramer and Porter, the values of the company are intertwined with the values of society.

Even though some CSR studies have in the past investigated the relationship between companies and employees' effective commitment to the company, the studies on CSR and employees focused on how CSR that affected prospective employees increased the attractiveness of the company to employees and their overall organisational commitment.[156] The research on internal CSR is limited to a few studies that investigate the impact of internal CSR on increasing organisational commitment, communication, risk and talent retention.[157] However, because the external aspects of CSR are well-researched, there are more established practices and measures of external CSR that are widely available and accepted, unlike measures of internal CSR.[158]

Nevertheless, companies have adopted internal CSR-related practices in respect of their employees.[159] These practices are administered by CSR-promoting regulating authorities.[160] For example, the International Labour Organisation (ILO) seeks to promote the fundamental rights of employees at work. The ILO advocates against child labour, promotes the fair and equal remuneration of employees, and promotes the rights of employees to organise.[161] In 2006, the ILO implemented a CSR initiative

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[154] Visser (n 130) 349. Chapter 3 of this thesis provides a detailed conceptualisation of *ubuntu* as a corporate governance approach. See Institute of Directors in Southern Africa *King IV Report on Corporate Governance in South Africa* (2016) 23.
[155] Hamidu et al (n 152) 84.
[156] J Jayamalathi et al 'Perception of employee on the relationship between internal corporate social responsibility (CSR) and organizational affective commitment' (2014) 3(2) *Journal of Progressive Research in Social Sciences* 169.
[157] Bhattacharya, Sen & Korschun (n 3) 34. See also A Stone 'Improving labour relations through corporate social responsibility: Lessons from Germany and France' (2016) 46 *California Western International Law Journal* 148.
[158] HR Kim et al 'Corporate social responsibility and employee–company identification' (2010) 95(4) *Journal of Business Ethics* 558.
[159] Ibid.
[160] See the guide on employment policy and international labour standards (2014) available at *http://www.ilo.org/wcmsp5/groups/public/-ed_norm/normes/documents/publication/wcms_233783.pdf* (accessed on 9 June 2017).
[161] Kim et al (n 157).

which sought to advance ILO leadership in the promotion of CSR policy to multinational enterprises (MNEs).[162] In 2009, the ILO launched a help desk to promote easy access to information on CSR and labour standards.[163]

Another example is the Dow Jones Sustainability World Indexes Guide, which introduced the Sustainability Indexes (DJSIs).[164] The DJSIs are based on an analysis of corporate economic, environmental and social performance, assessing issues such as corporate governance, risk management, branding, climate change mitigation, supply chain standards and labour practices.[165] The DJSIs seek to prevent companies that do not operate in a sustainable and ethical manner from listing with the Dow Jones Global Total Stock Market Index.[166] In a bid to promote internal CSR practices, the Global Reporting Initiative (GRI) contains sustainability guideline indicators that seek to promote labour relations issues such as occupational health and safety, diversity in the workplace, and education and training as part of the practices that organisations should adopt.[167]

In South Africa, the *King IV Report on Corporate Governance* addresses internal CSR issues by promoting the highest ethical standards in relation to remuneration issues and practices.[168] A form of inclusive capitalism, which includes a wider group of stakeholders as beneficiaries in the company's profit-making initiatives, is thus promoted.[169] According to Turker, internal CSR practices are connected with the physical and psychological working environment of employees.[170]

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[162] R Zandvliet & P van der Heijden 'The rapprochement of ILO standards and CSR mechanisms: Towards a positive understanding of 'privatization' (2014) available at *file:///C:/Users/infom/Downloads/SSRN-id2391295.pdf* (accessed on 15 August 2021). See also ILO & ITC 'International Instruments and Corporate Social Responsibility: A Booklet to Accompany Training on Promoting Labour Standards through Corporate Social Responsibility' available at *https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/instructionalmaterial/wcms_227866.pdf* (accessed on 15 August 2021).

[163] See 'The ILO and Corporate Social Responsibility (CSR)', available at *https://www.social-protection.org/gimi/gess/ShowRessource.action;jsessionid=AgDxi2Lvhuo44_j5UteQqpfezuwHpjDYOjNb9WHkDJLBWfe7Q4TN!-491661851?id=39799* (accessed on 15 August 2021).

[164] Ibid. See also M López 'Sustainable development and corporate performance: A study based on the Dow Jones sustainability index' (2007) 75(3) *Journal of Business Ethics* 285.

[165] Ibid.

[166] Ibid.

[167] Ibid.

[168] See the Institute of Directors in Southern Africa *King IV Report on Corporate Governance in South Africa* (2016) 14, which deals extensively with remuneration issues in South Africa. A growing debate about corporate governance in South Africa is specifically addressed in the King IV Report, regarding issues of accountability and remuneration in companies.

[169] Ibid.

[170] D Turker 'How corporate social responsibility influences organizational commitment' (2009) 89(2) *Journal of Business Ethics* 191.

Internal CSR is concerned with the health and well-being of employees in the company, their participation and development, and their overall well-being as internal stakeholders.[171] This differs from external CSR, which focuses on corporate socially responsible practices for external stakeholders, the local community, investors and suppliers, customers, public authorities and the environment through philanthropy, volunteerism and environmental awareness.[172]

2.3.3 The business case for CSR

The business case is primarily concerned with how companies can benefit from CSR. It considers the economic and financial value of CSR.[173] In CSR literature, the arguments for the business case for CSR are based on whether the investment in social responsibility provides monetary, if not reputational, marketing or risk management benefits for companies.[174]

2.3.3.1 Reputation protection and CSR

CSR is a useful tool for building and preserving a good corporate reputation.[175] CSR is useful in attracting conscious investors and employee talent, which are beneficial in mitigating labour instability in companies.[176] When a company engages in CSR initiatives that are in harmony with the values of the communities in which it does business, its reputation is strengthened as the company is perceived to be a good corporate citizen.[177]

Therefore, the ability to engage in CSR activities that are aligned with the goals of the communities in which companies do business can foster mutually beneficial stakeholder relationships. A study by Minor and Morgan[178] on the business case for CSR as a reputation management tool found that CSR benefits companies by not only legitimising their reputation but also building reputational insurance.[179] As witnessed

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[171] Ibid.
[172] Ibid.
[173] P Schreck 'Reviewing the business case for corporate social responsibility: New evidence and analysis' (2011) 103(2) *Journal of Business Ethics* 167. See also J Vogel 'Is there a market for virtue? The business case for corporate social responsibility' (2005) 47(4) *California Management Review* 19.
[174] See also EC Kurucz et al *The Business Case for Corporate Social Responsibility* (2008).
[175] D Minor & J Morgan 'CSR as reputation insurance: Primum non-nocere' (2011) 53(3) *California Management Review* 40.
[176] J Bebbington et al 'Corporate social reporting and reputation risk management' (2008) 21(3) *Accounting, Auditing & Accountability Journal* 337.
[177] Ibid.
[178] Minor & Morgan (n 174) 40.
[179] Ibid.

in the Marikana massacre, corporate reputation can be difficult to protect and maintain when a company is exposed to risks.[180] Moreover, most institutional investors are likely to invest in companies with a good CSR record.[181]

2.3.3.2 Stakeholder engagement and CSR

According to Greenwood, stakeholder engagement is a corporate strategy that involves the practice of connecting positively with stakeholders on the activities of the company.[182] In essence, stakeholder engagement influences corporate accountability. Therefore, when a company is committed through internal CSR to communicating and engaging with its employees, the company is acting responsibly.[183] Hence it is argued that the more a company engages with its stakeholders, the more the company embraces its moral essence.[184] In this way, internal CSR evokes a sense of inclusive corporate responsibility as the channels of stakeholder engagement are broadened through internal CSR.[185]

Internal CSR is therefore about engagement that has proven to have a positive impact on the financial performance of the company. Mirvis' research on CSR employee engagement, in which he notes a strong relationship between employee engagement, a company's income growth and overall financial performance, identifies such engagement as an important tool to recruit, retain and engage with employees.[186] Therefore, he defines internal CSR as a mechanism for employee engagement that is necessary for improving internal stakeholder commitment and overall identification within the company.

Because internal CSR focuses on the internal stakeholders of the company, it builds a strong connection between the company and its employees.[187] According to Birth et al,[188] internal CSR practices such as employee communication, employee

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[180] *Marikana Commission of Inquiry* (n 43).
[181] S Kim 'What's worse in times of product-harm crisis? Negative corporate ability or negative CSR reputation?' (2014) 123(1) *Journal of Business Ethics* 157.
[182] M Greenwood 'Stakeholder engagement: Beyond the myth of corporate responsibility' (2007) 74 *Journal of Business Ethics* 318.
[183] Ibid.
[184] Ibid. However, this is not to say that a company acts immorally when it does not engage with its employees.
[185] P Mirvis 'Employee engagement and CSR: Transactional, relational, and developmental approaches' (2012) 54(4) *California Management Review* 94.
[186] Ibid.
[187] K Raubenheimer & E Rasmussen 'Employee-focused corporate social responsibility in practice: Insights from managers in the New Zealand and Australian financial sector' (2013) 38(3) *New Zealand Journal of Employment Relations* 39. See also Kim et al (n 157) 557.
[188] Birth et al (n 35) 184.

development, workplace health and safety, and participation reduce the company's costs and increase the company's productivity by building relationships between the company and its employees.[189]

As a result, internal CSR practices increase the employees' motivation and overall satisfaction as employees know that the company is committed to ensuring the promotion of their well-being.[190] Hence, scholars regard internal CSR practices as an intangible corporate benefit that is useful in building long-term relationships within the company.[191] Furthermore, scholars argue that CSR with a focus on employees is useful in collecting information through stakeholder engagement from the employees on areas of dissatisfaction within the company that may expose the company to social risks.[192] They argue that CSR with a special focus on employee engagement can serve as a useful social risk management tool as internal CSR requires companies to build close relations with their employees.[193]

2.3.3.3 Costs and risk reduction through CSR

The concept of risk is defined in the King IV Report as 'the uncertainty of events; including the likelihood of such events occurring and their effect, both positive and negative, on the achievement of a company's objectives'.[194] Risk includes uncertain events with a potentially positive effect on the company (ie opportunities) not being captured or not materialising. Risk can be economic, political, technological or social.[195]

The arguments for a business case for CSR in the context of risk reduction is premised on the assumption that engaging in certain CSR initiatives will reduce the exposure of the company's capital to risk.[196] Kytle and Ruggie of the Harvard Kennedy School of Government developed a conceptual framework for companies to manage

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[189] See also DE Ruppert et al 'Employee reactions to corporate social responsibility: An organizational justice framework' (2006) 27(4) *Journal of Organizational Behavior* 537.
[190] Raubenheimer & Rasmussen (n 186) 39. See also Kim et al (n 157) 557.
[191] Birth et al (n 35).
[192] Ibid. See also C Godfrey et al 'The relationship between corporate social responsibility and shareholder value: An empirical test of the risk management hypothesis' (2009) 30(4) *Strategic Management Journal* 425.
[193] Birth et al (n 35). See also Godfrey et al (n 191) 425.
[194] Institute of Directors in Southern Africa *King IV Report on Corporate Governance in South Africa* (2016) 16.
[195] Ibid.
[196] AB Carroll & A Buchholtz *Business and Society: Ethics, Sustainability, and Stakeholder Management* 9 ed (2014) 41.

emerging social risks.[197] According to Kytle and Ruggie, corporate risks arise from a social perspective when the demands of primary stakeholders present potential threats to the long-term viability of the company.[198] This can be in the form of labour unrest where employees expose the company's assets to risk through vandalism and/or protracted strike action, accompanied by violence and even loss of life.[199]

They argue that CSR allows the company's corporate economic interests to be preserved by mitigating the company's exposure to social risks through CSR.[200] For example, CSR initiatives, practices and policies, which provide equal employment opportunities in the form of employee engagement, enhance long-term shareholder value by reducing the costs and risks associated with employee protests.[201] Furthermore, companies may create countermeasures to anticipate labour instability and mitigate it through structures that promote stakeholder engagement by identifying potential social risks in companies.

Social risks are different forms of interaction that may involve employees, civil organisations, investors, customers or suppliers.[202] Broadly, these arise from the areas of human rights, labour standards, environmental standards and sustainability.[203] Internal CSR will be an area of attention if employees complain about the outsourcing of jobs, low wages, and poor or unsafe working conditions. Internal CSR serves as a useful mechanism to mitigate internal stakeholder risks.[204] Therefore, internal CSR has been identified as a risk mitigation tool that companies can use to protect themselves against internal stakeholder social risks that may expose the company to vulnerabilities.[205] Internal CSR is about social risk identification, risk mitigation, and stakeholder risk analysis though stakeholder engagement. It provides a platform for identifying internal stakeholder risk pressure points when it focuses on the internal stakeholders of the company.[206]

Based on the above overview of CSR and internal CSR, it is argued that there is a significant difference between CSR that focuses on the external stakeholders of the

[197] Kytle & Ruggie (n 43) 7.
[198] Ibid.
[199] *Marikana Commission of Inquiry* (n 43) 42.
[200] Kytle & Ruggie (n 43) 7.
[201] Ibid.
[202] Ibid.
[203] Ibid 21.
[204] Ibid.
[205] Ibid 8.
[206] Ibid.

company and CSR that focuses on the internal stakeholders of the company. However, there is an overlap between the two concepts in approach and in practice, because both approaches to CSR, whether internal or external, provide some benefit to the company. Moreover, much of the work on internal CSR is derived from the foundations embedded in CSR interpretations and practices.

2.3 ARGUMENTS AGAINST CSR

Undoubtedly the doctrine of CSR is highly celebrated, with a plethora of research across disciplines advocating its value, substance and utility. As discussed above, the argument for CSR is made on the basis that corporations have duties that go beyond the lawful execution of legal and economic functions, and that the financial performance of a company must benefit society.[207] However, this perspective is not universally accepted; critics are opposed to CSR on the basis that traditional capitalism is the correct approach to doing business because business is solely based on market forces.[208] Although one may contend that the critics are fighting a losing battle, the arguments against CSR are worth reviewing to provide a holistic conceptual analysis of internal CSR.

As discussed above, the advocates of CSR justify CSR using three basic arguments. First, there is an ethical duty to promote social justice by and within the corporation. This perspective is supported by scholars who argue for philanthropy as an essential component of doing business.[209] Secondly, advocates of CSR base their arguments on the practicality of CSR, because it has the capacity to yield tangible benefits for the company. The business case for CSR is based on the value that CSR offers to financial performance, risk management and employees' affective commitment to the company.[210] The argument is for a business case beyond ethical duty. In other words, it pays to do good.[211] Thirdly, the awareness of the power of the corporation in society justifies the place of CSR.[212]

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[207] Carroll 'Corporate social responsibility' (n 9) 267.
[208] Henderson (n 12) 30.
[209] M Schwartz & A Carroll 'Corporate social responsibility: A three-domain approach' (2003) 13(4) *Ethics Quarterly* 503.
[210] Kytle & Ruggie (n 43) 1.
[211] Weber (n 26) 247.
[212] TM Jones 'Corporate social responsibility revisited, redefined' (1980) 22(3) *California Management Review* 61.

It must be noted that the arguments against CSR come from scholars who embrace the traditional view of the purpose of the corporation.[213] The directors of the company are meant to serve the shareholders of the company by ensuring maximum returns on investment for shareholders.[214] From this perspective, the criticisms are identified as follows: First, the concept of CSR invokes unwarranted costs being incurred by the company. CSR creates administrative expenses that distract the company directors from the single bottom-line objective of the company, which is to make financial profits for its shareholders.[215] In other words, CSR interferes with the economic function of the company because the success of the company should be controlled by market factors and not by social responsibility.

Secondly, critics argue that there is no causal link between CSR and financial performance. This argument is based on the fact that the research findings on CSR and financial performance results are not conclusive, and the value of CSR to corporate financial performance has not been fully established.[216] Although Margolish and Walsh have proved otherwise,[217] the argument by these scholars is that the benefits of CSR to financial performance are not conclusive for every corporation.[218] In other words, not every corporation can expect financial value to result from CSR.[219] The argument against CSR in a financial performance context is based on the incorrect assumption that the financial value of CSR should determine the legitimacy of the corporation through social responsibility initiatives. However, scholars who argue for the causality component of CSR and financial performance do not base their arguments on whether CSR has a positive or negative impact on financial performance, in that

[213] For a discussion of shareholder primacy, see chapter 3 para 3.3.1.
[214] M Friedman 'The social responsibility of the business is to increase its profits' *New York Times* (13 September 1970).
[215] JF Steiner & G Steiner *Business, Government, and Society: A Managerial Perspective: Text and Cases* 13 ed (2012) 121.
[216] Cochran and Wood advanced this argument by stating that the measures of CSR are not adequate. Reputation as a measure is highly subjective and can thus not be solely yielded to CSR. See generally P Cochran & R Wood 'Corporate social responsibility and financial performance' (1984) 27(1) *The Academy of Management Journal* 43.
[217] JD Margolish & JP Walsh 'Misery loves companies: Rethinking social initiatives by business' (2003) 48(2) *Administrative Science Quarterly* 269. Margolish and Walsh conducted 127 studies to investigate whether there is a financial incentive in the form of profit for engaging in socially responsible behaviour. See also JD Margolish & JP Walsh *People and Profits? The Search for a Link between a Company's Social and Financial Performance* (2001) 18.
[218] Ibid.
[219] See generally Cochran & Wood (n 215) 43.

the lack of financial performance through CSR does not negate the significance of the company in engaging in CSR.[220]

Thirdly, corporate directors do not have the appropriate training to pursue social responsibility as a corporate goal and, in instances where they are forced to do so, inequalities will result.[221] Fourthly, when social responsibility reduces shareholder value, this amounts to theft as company directors are misappropriating funds that belong to shareholders.[222] The final argument against CSR is that when corporations engage in CSR, they overstep the objective corporate function by acting as *ad hoc* governments. This could result in political subjugation that could threaten democracy.[223]

2.4 THE LABOUR RELATIONSHIP AND THE LIMITATIONS OF LABOUR LAW

2.4.1 The adversarial reputation of the labour relationship and labour law

Labour law involves the regulation of the relationship between the employee and the employer.[224] South African labour legislation was introduced to establish the parameters for conducting the labour relationship and to provide minimum regulations pertaining to the substantive conditions of employment.[225] The Labour Relations Act was introduced *inter alia* to give effect to the fundamental rights conferred by s 27 of the Constitution,[226] and to facilitate orderly collective bargaining[227] and employee decision-making in the workplace.[228]

Notwithstanding the distinctive purposes of labour law,[229] the adversarial nature of the labour relations environment dominates the dynamics of how disputes are resolved, which is often through violence and protracted strike action.[230] Labour law

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[220] See generally Margolish & Walsh 'Misery loves companies' (n 216) 269.
[221] Jones (n 211) 61.
[222] Friedman (n 213).
[223] Jones (n 211) 61.
[224] S Bendix *Industrial Relations in South Africa* 5 ed (2010) 7.
[225] Section 1 of the LRA.
[226] Section 1*(a)* of the LRA. Section 27 of the Constitution provides that '(1) Everyone has the right to have access to— *(a)* health care services, including reproductive health care; *(b)* sufficient food and water; and *(c)* social security … (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'
[227] Section 1*(d)*(ii) of the LRA.
[228] Section 1*(d)*(iii) of the LRA. The primary provision for this is Chapter V of the LRA which deals with workplace forums.
[229] Section 1 of the LRA.
[230] See chapter 1 para 1.3.

was introduced to *inter alia* manage the conflict which is embedded in the labour relationship and the overall labour relations environment.[231]

According to Bendix, conflict in the labour relationship is inevitable and the potential for it to arise is infinite.[232] Conflict arises when people or groups of persons in the labour relationship disagree with each other. It primarily manifests itself as the opposition of persons or forces that gives rise to dramatic actions.[233] In the South African context, conflict in the labour relationship has occurred in the context of fighting for equal rights and recognition in the workplace and, more pertinently, about issues affecting remuneration and basic conditions of employment.[234]

This adversarial reputation of the labour relationship has influenced the outcomes of collective bargaining processes, which are often disrupted when employees use violence to negotiate more favourable outcomes during the collective bargaining process.[235] In leveraging more power, employees may abuse their constitutional right to strike by engaging in illegal, violent protracted strike action.[236] Bad faith negotiation by trade unions, accompanied by the presentation of an extensive list of extreme demands meant to bully the employer into accepting these demands, delays solutions and leads to more disputes.[237] A strike is meant to represent a peaceful withholding of labour to negotiate seriously through the process of collective bargaining.[238] In response, companies who form part of this labour relationship may adopt a 'take it or leave it' approach to collective bargaining negotiations, leading to more unrest in the negotiation process.[239]

According to Davis and Le Roux, this is largely influenced by the conflict between the interests of labour and capital, which sees workers promoting their interests at the expense of the company by extracting concessions on what companies

[231] Section 1*(d)*(iv) of the LRA.
[232] Bendix (n 223) 7.
[233] R Yonatan et al 'Words at work: Constructing a labour conflict' (2015) 71(2) *Relations industrielles* 248.
[234] Bendix (n 223) 7.
[235] See *Marikana Commission of Inquiry* (n 43).
[236] *Food and Allied Workers Union obo Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River; Premier Foods Ltd t/a Blue Ribbon Salt River v Food and Allied Workers Union obo Kapesi and Others* (CA7/2010) [2012] ZALAC 46 (16 March 2012) para 6.
[237] Ibid para 5.
[238] Ibid para 6.
[239] F Leppan, A Govindjee & B Cripps 'Bargaining in bad faith in South African labour law: An antidote?' (2016) 37(3) *Obiter* 477.

may regard as extreme wage demands.[240] Companies seek to maximise their return on capital investment by promoting maximum return on capital, which is sometimes achieved at the expense of employees' needs and interests.[241]

Internal CSR seeks to reconcile the adversarialism embedded in the labour relationship and in labour law by advocating a more collaborative approach towards creating stability in labour relationships.[242] Internal CSR has the potential to ameliorate the adversarialism embedded in both company and labour law by promoting a collaborative approach to solving labour disputes.[243] It does this by promoting an employee-focused approach to corporate governance.[244] The adversarial nature of the labour relationship is influenced by the culture of trade unions and employees using violence to wield power.[245]

2.4.2 The influence of trade unions on the labour relationship

Prior to democracy, trade unions were at the forefront of revolutionary ideals about the recognition of workers in the workplace and in building society.[246] For decades, trade unions have used their influence and power to promote socialist ideals on how countries must be governed, by harnessing their influence at the workplace to promote a socialist political agenda.[247] The influence and power of trade unions in South Africa lies in their social, economic and industrial power, which was critical in attaining democracy.[248]

Over the years, this power has influenced the management styles of many companies as trade unions play a key role in the governance practices of companies.[249] In the mining industry, trade union rivalry has been one of the main causes of labour

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[240] M le Roux & D Davis 'Changing the role of the corporation: A journey away from adversarialism' 2012 *Acta Juridica* 319 at 322.
[241] This was witnessed in the Marikana massacre. See *Marikana Commission of Inquiry* (n 43).
[242] This collaborative approach is like the one advocated by Davis & Le Roux (n 239) 319.
[243] Ibid.
[244] Peng (n 32).
[245] See *Marikana Commission of Inquiry* (n 43).
[246] D Ncube *The Influence of Apartheid and Capitalism on the Development of Black Trade Unions in South Africa* (1985) 33.
[247] Ibid.
[248] K Williams 'Trade unionism in South African history' in K Jubber *South Africa's Industrial Action and Sociology* (1979) 65.
[249] HC Schoeman 'The rights granted to trade unions under the Companies Act 71 of 2008' (2013) 16(3) *PER* 236.

instability.[250] Much of the rivalry has been caused by the close affinity between trade unions and government politics, which often diverts the attention and purpose of trade unions away from their members to political agendas.[251]

Internal CSR has the potential to bridge the gap created when trade unions shift their focus from their members to their rivals by strengthening the stakeholder voice in the management of companies.[252] It does this by drawing the power away from shop stewards and bringing it back to the employees. Significantly, internal CSR does not exclusively represent the thoughts or ideals of an organisation such as a trade union, but seeks to advance the needs and interests of employees as stakeholders collectively through the promotion of employee-focused CSR values and strategies.[253]

Trade union politics is an impediment to worker participation if the voices of workers are silenced by the misalignment of union objectives with union trivialities. This has a significant impact on how union members are represented during the collective bargaining process.[254] Hence Steadman has identified union politics as a factor that has contributed to the failure of workplace forums in South Africa.[255] However, for internal CSR to operate effectively in companies, there is a need for trade union leadership that is centred on promoting the needs and interests of union members.

2.4.2.1 The rate of union membership in South Africa

Very little has been written about the size and membership of the trade union sector in South Africa. Additionally, the data on trade unions and trade union membership is limited. However, research shows that the rate of union membership is decreasing in

[250] G du Plessis 'Trade union rivalry could set country on fire' *Financial News 24* (19 May 2015) available at *https://www.fin24.com/BizNews/Trade-union-rivalry-could-set-country-on-fire-20150519* (accessed on 29 May 2015).
[251] F Duncan 'Worldview: Here's why SA's trade unions are a problem' *BIZ news* (19 November 2019) available at *https://www.biznews.com/premium/2019/11/21/trade-unions-problem* (accessed on 20 January 2020). See M Budeli 'Unionism and politics in Africa: The South African experience' (2012) 45(3) *Comparative and International Law Journal of Southern Africa* 457, where he concurs with S Buhlungu *Trade Unions and Democracy: COSATU Workers' Political Attitudes in South Africa* (2006) about the influence of trade unions on politics and transformation in South Africa.
[252] Peng (n 32) 24. See generally 'Deloitte Hearing the Stakeholder Voice: Effective Stakeholder Engagement for Better Decision Making' (September 2018), available at *file:///C:/Users/infom/Downloads/deloitte-uk-risk-hearing-the-stakeholder-voice.pdf* (accessed on 2 September 2020).
[253] Raubenheimer & Rasmussen (n 186) 39.
[254] *Marikana Commission of Inquiry* (n 43).
[255] Steadman (n 128) 1180.

South Africa.[256] Workers employed in the South African economy and in the public service have a union density of 23%, meaning that about 77% of workers employed do not belong to a union and therefore employers can determine the conditions of employment and wages as they see fit.[257]

The highest trade union memberships in South Africa are recorded in the mining sector. Most of these trade unions have existed since the apartheid regime and have over the years amassed a membership of close to two million members in total. The three largest trade unions in South Africa are the Congress of South African Trade Unions (COSATU),[258] with a membership of 1.8 million, followed by the Federation of Unions of South Africa (FEDUSA)[259] with 560 000 members and the National Council of Trade Unions (NACTU) with almost 400 000 members, including the powerful National Union of Mineworkers (NUM) .[260] All three are affiliated with the International Trade Union Confederation.[261] NUM is the fastest growing union in South Africa, and is COSATU's largest affiliate. It was founded by President Cyril Ramaphosa and has about 300,000 members.

According to a study conducted by the Education, Training and Development Practices Sector Education and Training Authority, a key issue which affects the

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[256] Education, Training and Development Practices Sector Education and Training Authority 'Trade Union Subsector Skills Plan 2020–2021', 26, available at *https://www.etdpseta.org.za/education/sites/default/files/2020-06/Trade-Unions-Final-Report-2019.pdf* (accessed on 23 September 2022).

[257] K Cloete 'Labour pains: Trade union membership has declined badly and bosses are calling the shots' available *at https://www.dailymaverick.co.za/opinionista/2021-03-02-labour-pains-trade-union-membership-has-declined-badly-and-bosses-are-calling-the-shots/* (accessed on 15 September 2022).

[258] COSATU was undoubtedly an influential player in the fight against apartheid. See *http://www.cosatu.org.za /* (accessed on 15 January 2020). It is one of the largest trade union movements in the world. However, recently, rivalry between competing trade unions has been one of the biggest contributors to labour unrest across industries in South Africa. See L Sinwell & S Mbatha *The Spirit of Marikana: The Rise of Insurgent Trade Unionism in South Africa* (2016) at 21. The tripartite alliance between the ANC, the South African Communist Party (SACP) and COSATU has left many of its members forming new trade unions, such the Association of Mineworkers and Construction Union (AMCU), which has led to trade union conflict and violence. See also J Venter 'Conflict in the trade union environment in South Africa: Implications for the ANC and the 2014 election: Reconnaissance' (2014) 425 *Word and Action / Woord en Daad* 22.

[259] Federation of Unions of South Africa, available at *http://www.fedusa.org.za/* (accessed on 20 September 2022).

[260] National Union of Mineworkers, available at *https://num.org.za/* (accessed on 23 September 2022).

[261] The International Trade Union Confederation is the world's largest trade union federation. The primary mission of the International Trade Union Confederation is to promote and defend the rights and interests of workers through international cooperation between trade unions, global campaigning and advocacy within the major global institutions. See International Trade Union Confederation, available at *https://www.ituc-csi.org/about-us* (accessed on 23 September 2022).

bargaining power of trade unions is their decreasing membership.[262] However, contrary to the decreasing union memberships in general, there is an increase in the number of registered unions.[263] This study is uncertain about how this apparent contradiction can be reconciled. In order to influence government and private sector policies in the past, the unions relied on their numbers; however, this is becoming less possible. Infighting in unions, loss of trust over managerial control of the union, and perceptions about the mismanagement of funds have seen union membership dwindle over the years, with disgruntled members opting to fragment unions, further diluting the bargaining power that unions previously enjoyed.[264] However, globally, changing economic circumstances and the impact of the Covid-19 pandemic, among others, have been viewed as the main reasons for the decrease in membership.[265]

2.5 WORKER PARTICIPATION AND THE FAILURE OF WORKPLACE FORUMS: AN OVERVIEW

Worker participation can mean different things to different organisations, institutions and companies.[266] The term 'worker participation' does not have a universally accepted meaning.[267] According to Anstey, it is essentially characterised by the collective as well as the individual participation of workers in organisational decision-making processes, which go beyond the confines of collective bargaining.[268] Workplace participation can take various forms. It can occur through information sharing, which involves a process of creating direct or indirect participation by the company and its workers; it can take the form of collective bargaining, which is an indirect process of worker participation, and represents the voluntary process of negotiating issues between the company and its workers; and it can take the form of

[262] 'Trade Union Subsector Skills Plan 2020–2021' (n 255) 26.
[263] Ibid 29.
[264] B Kenny 'The South African labour movement: A fragmented and shifting terrain' (2020) 32 *Tempo Social* 119.
[265] OG Otieno, DO Wandeda & M Mwamadzingo 'Trade union membership dynamics amidst COVID-19: Does social dialogue matter?' in ILO *COVID-19 and Recovery: The Role of Trade Unions in Building Forward Better* (2021), available at *https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_810048.pdf* (accessed on 23 September 2022).
[266] R Heron, D Macdonald & C Vandenabeele *Workplace Cooperation: An Introductory Guide* (1997) 1, available at *http://www.oit.org/wcmsp5/groups/public/---ed_dialogue/-lab_admin/documents/publication/wcms_111329.pdf* (accessed on 15 August 2021).
[267] M Anstey 'Worker participation: Concepts and issues' in M Anstey *Worker Participation and Workplace Forums* (1990) 3.
[268] M Anstey 'Employee participation' in M Anstey *Employee Participation and Workplace Forums* (1997) 1.

job involvement, whereby workers in self-managing teams assume greater decision-making power over the daily operations of a company which affect their jobs.[269]

The key parties involved in workplace participation are the directors of the company, the trade unions, and the employees of the company.[270] In companies with trade unions, trade unions would facilitate the process of worker participation.[271] However, worker participation is not limited to union representatives, since company directors and employees can be engaged in worker participation outside the operations of trade unions.[272] The outcomes of workplace participation include benefits that are like those of internal CSR. These outcomes include increased efficiency in productivity and overall output by companies.[273]

A study by Birth et al found that employees' insights and contributions in companies were useful in identifying existing weaknesses in the organisational processes of the companies as well as in the quality of goods produced.[274] Another benefit of workplace participation, which is like that of internal CSR, is that is helps to improve industrial relations by creating channels for solving employees' disputes through less adversarial means.[275] When workers are engaged with management on workplace issues, and serious initiatives are taken to collaboratively resolve disputes, the occurrence of industrial action and related strike violence could be minimised.

Like internal CSR, workplace participation has the potential to improve the quality of the working environment as workers can consult with employers on initiatives which would best improve the quality and safety of their work environment.[276] According to Anstey, this has the potential to increase employee job satisfaction and effectiveness. A sense of belonging, increased organisational loyalty and improved communication are some of the benefits of worker participation, as with

[269] Ibid 4.
[270] Heron et al (n 265) 1.
[271] In European countries, such as Germany and the Netherlands, the establishment of workplace forums is not limited to trade unions and employees. Employers are under a duty to establish work councils in companies that meet the criteria for establishing a work council. See generally A van den Berg, Y Grift & A van Witteloostuijn 'Managerial perceptions of works councils' effectiveness in the Netherlands' (2011) 50(3) *Industrial Relations Berkeley* 497.
[272] Heron et al (n 265) 2.
[273] Van den Berg et al (n 270) 497.
[274] Birth et al (n 35) 194.
[275] Jayamalathi et al (n 155) 169.
[276] Birth et al (n 35) 194.

internal CSR.[277] Decision-making is a critical aspect of worker participation: when workers are engaged in the decision-making processes of the company, companies can make more inclusive decisions that will mitigate future conflict between the company and its workers.[278]

In essence, worker participation presents characteristics and features that are like those of internal CSR. Internal CSR is a participative process which facilitates workplace cooperation through information sharing and consultation on the management of the company, including financial participation.[279] This form of consultation is crucial in solving disputes between companies and their employees in a cooperative way.

2.5.1 The establishment and functions of workplace forums

Chapter 5 of the LRA sets out the workings and overall functions of workplace forums, with a view to facilitating worker participation.[280] The criteria for the establishment of a workplace forum are set out in s 79 of the LRA. A workplace forum is established to facilitate joint decision-making on matters listed in s 86 of the LRA.[281]

Initially, workplace forums were intended to deal with non-wage matters such as restructuring, basic conditions of employment, the physical conditions of health and safety, the introduction of new technologies, and changes to the organisation of work.[282] However, s 79 of the LRA specifies that the functions of workplace forums are to promote the interests of all employees in the workplace, to enhance the efficacy of the workplace, and to allow employees to consult and participate in joint decision-making with the employer.

Joint decision-making must take place once a forum has been established.[283] This requires employees and employers to reach a consensus on matters that require there to be a joint decision.[284] Traditionally, companies make decisions at board level

[277] Ibid. See also M Anstey 'Employee participation' (n 267) 23.
[278] Raubenheimer & Rasmussen (n 186) 39. See also Kim et al (n 157) 557.
[279] Peng (n 32) 24. See also A Stone (n 156) 147; Kim et al (n 157) 557; Brammer, Millington & Rayton (n 2) 1701.
[280] Steadman (n 128) 1171.
[281] Section 86 of the Labour Relations Act 66 of 1995.
[282] Explanatory Memorandum to the Draft Bill 135, available at *https://www.gov.za/sites/default/files/gcis_document/201409/338731112a.pdf* (accessed on 15 July 2020).
[283] Section 86(1) of the LRA.
[284] Ibid.

without engaging with employees on the decisions taken by the company.[285] This top-down approach to governance has perpetuated labour instability in companies as decisions affecting the employees are often made without consultation.[286] Similarly, for internal CSR to be effective, joint decision-making processes are required between the company and the employees on issues affecting the welfare of the employees. This requires collaboration and consensus when companies are making decisions that affect employees.[287]

Information sharing through workplace forums is a process which revolves around the regular and systematic provision and sharing of accurate and comprehensive information by the employer with the employees.[288] Access to accurate and comprehensive information is critical in promoting labour stability. Internal CSR is about information sharing; however, information sharing under internal CSR is reciprocal, as employees and employers share information with each other on issues that will benefit not only the employees but also the employers.[289]

2.5.2 The failure of workplace forums in labour law

When the legislature included the provisions of Chapter 5 in the LRA, it was hoped that workplace forums would be useful in ameliorating the adversarial nature of labour law by facilitating much-needed participation in the management of labour relations.[290] Workplace forums were thus designed to promote employee participation in the workplace by dealing with non-wage matters through less adversarial methods.[291] However, the implementation and effectiveness of workplace forums has failed to live up to expectations.[292]

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[285] This is often the case in *laissez faire* jurisdictions where shareholder primacy is the primary approach to corporate governance. See generally D Million 'Radical shareholder primacy' (2014) 10 *University of Thomas Law Journal* 1013.
[286] This was the case during the Marikana massacre. See *Marikana Commission of Inquiry* (n 43).
[287] Peng (n 32).
[288] Anstey 'Workplace forums in South Africa' (n 179).
[289] Peng (n 32); see also Kytle & Ruggie (n 43).
[290] Steadman (n 128) 1178. See also C Summers 'Workplace forums from a comparative perspective' (1995) 16 *Industrial Law Journal* 806.
[291] These non-wage matters include matters such as restructuring, changes in the organisation of work, the physical conditions of workers, the introduction of new technologies and work methods. See also M Anstey 'German codetermination and South African workplace forums compared' in M Anstey *Employee Participation and Workplace Forums* (1997) 108.
[292] Steadman (n 128) 1183.

The establishment of workplace forums was met with significant opposition.[293] Trade unions' mistrust in the establishment of workplace forums was accompanied by trade unions' fear that workplace forums might undermine and take over the role of trade unions.[294] Much of the trade unions' mistrust and fear was based on the fact that workplace forums would affect union density in the long term, since non-union members would have an opportunity to receive the same benefits that unionised members receive from their unions.[295]

According to Du Toit et al, the concerns of the unions were based on their unwillingness to embrace an alternative measure for promoting the interests of workers in the workplace. Du Toit et al correctly call this 'a fear of the unknown'.[296] This uncertainty about how the forums would work included confusion about the representation of non-unionised employees and what future impact this would have on the prospect of collective bargaining by trade unions.[297] Instead of workplace forums being seen as a means of facilitating much-needed participation in the workplace, the conflict between workplace forums and trade unions led to the ineffective implementation and overall failure of workplace forums as a form of worker participation in South Africa.[298]

In addition, the failure of workplace forums was because of employers' resistance to facilitating consultation on joint decision-making issues that should be addressed by the company and the workplace forum. Workplace forums failed because consultation and joint decision-making measures were not initiated, as managers felt that workplace forums would undermine the 'managerial prerogative' and would delay the making of important decisions needed for running the company.[299] It was assumed that the time needed to facilitate the integration of workers' interests and voice on corporate decision-making would have significant cost implications for companies.[300]

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[293] MM Botha 'In search of alternatives or enhancements to collective bargaining in South Africa: Are workplace forums a viable option?' (2015) 18(5) *PER* 1829.
[294] Steadman (n 128) 1193.
[295] Ibid.
[296] D du Toit, S Godfrey & B Jordaan *Workplace Forums in Comparative Perspective* (2000) Unpublished research report for the South Africa Netherlands Project on Alternatives in Development.
[297] Ibid. See also Steadman (n 128) 1193.
[298] Ibid.
[299] Ibid.
[300] Ibid.

According to Steadman, studies on worker participation found that, due to the unitary board structure in South Africa, companies prefer a more unilateral way of corporate decision-making, with decisions affecting employees implemented using a top-down approach.[301] Employers are of the opinion that workplace forums will usurp the managers' power to manage the company, which may lead to the exploitation of management by unions and employees.[302] Moreover, the limited capacity of workers to participate effectively in workplace forums has deterred the establishment of workplace forums.[303] Significantly, the size of some workplaces has been an obstacle in the establishment of forums.[304]

What internal CSR does differently from workplace forums is that it presents a model of participation which does not include the process of establishing a forum or being bound by a trade union. However, internal CSR cannot operate as an alternative to workplace forums, and it is not intended to replace the much-needed work of workplace forums. It can only work in conjunction with existing workplace forums. It is the key that is needed to facilitate the collaboration needed to promote labour stability under company law. However, to achieve this, workplace forums must work efficiently.

One of the biggest challenges in facilitating workplace forums as a form of worker participation in South Africa is the power struggle between trade unions and company directors.[305] This power struggle creates a pushback approach with regard to initiatives that are intended to facilitate employee voice and participation within companies. Thus, trade unions and company directors prefer to protect their power by resisting any form of co-operation between the company and the workers.[306] Internal CSR does not seek to establish a separate forum that will advance employee voice in companies. It is a governance process that values collaboration and engagement with stakeholders as a key driver in achieving organisational success and stability.[307]

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[301] Ibid.
[302] Ibid.
[303] Ibid 1184.
[304] Ibid.
[305] T Wiese 'Worker participation and the Companies Act of 2008: An overview' (2013) 34 *Industrial Law Journal* 2468.
[306] Ibid.
[307] Vlachos et al (n 1) 577.

Internal CSR in its dimensions does not attempt to erode existing collective bargaining structures but works in conjunction with collective bargaining. According to Steadman, the strengthening of non-union and minority interests through workplace forums was seen as a critical concern in the establishment of workplace forums.[308] Internal CSR sees value in strengthening non-union and minority union interests as it seeks to promote stability and engagement with employees irrespective of whether they are members of a trade union or not.[309]

Internal CSR views engagement with employees as critical in promoting employee security.[310] One of the concerns which led to the failure of workplace forums was that workplace forums would favour unions' interests at the expense of employers' interests.[311] Internal CSR closes this gap because the interests that are protected are the interests of employees as individuals, and not the interests of forums or unions as a collective.[312] As explained above, these interests become the interests of the company as internal CSR seeks to promote shared value in the management processes of companies.[313] Internal CSR thus does not seek to replace existing processes and structures embedded in labour law, but seeks to complement existing structures in company law and labour law as an means to promote labour relations stability in companies.[314]

2.6 ONGOING DEVELOPMENTS IN PROMOTING EMPLOYEE–BOARD MEMBERSHIPS IN SOUTH AFRICA

At the time of writing this thesis, the DTIC was in the process of drafting a new Bill to improve worker representation and decision-making at company board level.[315] According to Minister Ebrahim Patel, the decision to include worker representatives on company boards is founded upon the need to build an inclusive economy.[316] The new approach will introduce a platform that moves away from making passive

[308] Steadman (n 128) 1184.
[309] Peng & Seng (n 28) 259–277. See also P Mirvis 'Employee engagement and CSR: Transactional, relational, and developmental approaches' (2012) 54(4) *California Management Review* 94.
[310] Peng & Seng ibid.
[311] Steadman (n 128) 1184.
[312] Peng & Seng (n 28).
[313] Porter & Kramer (n 141) 62.
[314] The structure in company law is the social and ethics committee. The mandate and functions of this committee are discussed in chapter 5.
[315] See 'DTI moots new Bill to improve worker representation, decision-making in company boards' available at *https://www.sanews.gov.za/south-africa/dti-moots-new-bill-improve-worker-representation-decision-making-company-boards* (accessed on 15 July 2021).
[316] Ibid.

dividend flow arrangements between companies and workers towards integrating an inclusive voice for labour, to be heard in the top decision-making structures of companies.[317]

The objective of this form of representation is to facilitate the meaningful economic inclusion and economic empowerment of workers.[318] The Companies Amendment Bill was published in October 2021.[319] However, the Bill does not address the issue of employee boards as suggested by the Minister. It was hoped that the Bill would outline the modalities of improved workers' interests in the company decision-making process at board level.[320] The decision to include workers is a progressive step towards acknowledging the significance of employees in promoting the wellbeing of a company and its operations. It is common cause that the voices of such employees in corporate decision-making at board level will be useful in not only facilitating employee engagement, but also in promoting harmonious and stable industrial relations.

Board diversity is important in promoting inclusive corporate governance.[321] However, a mandatory requirement to include employee representatives on corporate boards gives rise to several important questions: whether this form of participation can be achieved in a unitary board structure; directors' liability and the implications for employee directors; and whether employee directors will assume a fiduciary duty or whether a different standard will be applied. Significantly, whose interests will the employee directors be representing, the union's or the company's? It is submitted that the process currently under review has the potential to create more unrest and hostility in companies.

In Germany, codetermination forms the foundation of the German corporate governance framework and has existed in its current form since the Codetermination Act of 1976.[322] The internal CSR landscape has been cultivated by enhancing worker

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[317] Ibid.
[318] Ibid.
[319] Companies Bill, 2021, available at *http://www.thedtic.gov.za/wpcontent/uploads/Revised_Companies_Amendment_Bill-1_October2021.pdf* (accessed on 5 October 2021).
[320] Ibid.
[321] See principle 7 of the King Code of Corporate Governance. See also I-M Esser & PA Delport 'The South African King IV Report on Corporate Governance: Is the Crown Shiny Enough?' (2018) 39(11) *Company Lawyer* 378–384.
[322] R Scholz & S Vitols 'Board-level codetermination: A driving force for corporate social responsibility in German companies?' (2019) 25(3) *European Journal of Industrial Relations* 233; M Anstey 'German

representation and participation in a company's corporate governance processes.[323] The German model of worker participation allows workers to participate in corporate decision-making within the two-tiered board structure; this gives employees the power to veto board decisions on some issues in the company's organisational structure.[324] The two-tiered board structure provides for two levels of boards. The first level is the executive board, composed of executive directors, which is chaired by the chief executive officer, and the second level is the supervisory board, which consists of non-executive directors, including trade union representatives, employee representatives and shareholders.[325] The process of engagement and participation with employees takes place at the supervisory board level, not at the executive board level.[326]

The South African board structure for corporate governance has from inception been a unitary one.[327] In countries like Germany that have established co-determination platforms based on dual board structures, employee voice and input have been successful because of the two-tiered system.[328] The South African case is different and therefore requires more precision on how this process can be applied in a traditionally single-tiered board structure,[329] particularly in light of the failures of worker participation under labour law.[330] First, it is important to consider which companies would be mandated to include employee representatives on their boards. How would the decision to exclude or include certain companies prevent injustices to employees with a smaller number of company representatives? One challenge that led to the failure of workplace forums under labour law was the minimum requirements for establishing a workplace forum.[331] In the past, the Companies Act has used the

codetermination and South African workplace forums compared' in M Anstey *Employee Participation and Workplace Forums* (1997) 105.
[323] Ibid.
[324] Ibid.
[325] Ibid. See also W Müller-Jentsch *Re-assessing Co-determination: The Changing Contours of German Industrial Relations* (2003) 40.
[326] M Roth 'Corporate boards in Germany' in P Davies, K Hopt, R Nowak & G van Solinge (eds) *Corporate Boards in Law and Practice: A Comparative Analysis in Europe* (2013) 275.
[327] L Muswaka 'The two-tier board structure and co-determination: Should South Africa follow the Germany example?' (2014) 5(9) *Mediterranean Journal of Social Sciences* 142. See also E Webster & I Macun 'A trend towards co-determination? Case studies of South African enterprises' (1998) 2(1) *Law, Democracy & Development* 63.
[328] See generally D Block & AM Gerstner *One-tier vs. Two-tier Board Structure: A Comparison between the United States and Germany* (2016) 22.
[329] M Spisto 'Unitary board or two-tiered board for the new South Africa?' (2005) 1(2) *International Review of Business Research Papers* 84.
[330] Steadman (n 128) 1172.
[331] Ibid.

public interest score requirements embedded in reg 26(2) of the Companies Regulations to establish which companies must appoint a social and ethics committee. How this may be done in an employee voice context presents some difficulties for employees in companies that do not meet the requirements of reg 26(2).

Secondly, the criteria according to which such employee representatives would be chosen raise several questions. Would the employees be chosen from among existing trade union members, or would the employees be selected regardless of union membership? Workplace forums have shown that to facilitate some form of codetermination, union trust is essential for achieving success.[332] The failure to establish workplace forums was largely based on trade unions' fear of marginalisation.[333] How the Companies Act plans to mitigate this foreseeable pushback from trade unions is yet to be seen.

Thirdly, does the establishment of employee representatives assume that employees are fiduciaries, and how will this fiduciary obligation be placed on employees?[334] Moreover, given the diversity of the country, the inequality that exists, and the differences in the education and background of employees,[335] how will the rights and duties of such employees be navigated?

Significantly, does the presence of employees on the board imply employee involvement in the management of the company? This leads to the question whether the German two-tiered system is more appropriate than a unitary single-tier structure in respect of worker participation. According to Anstey, board structure has no bearing on the realities of corporate decision-making; whichever way the board is structured in term of responsibilities and representation, employees appointed to the board face the reality that the real power and decision-making resides with the directors.[336]

The decision to facilitate employee voice in company boards is noble and long overdue. However, there is much to learn from the failure of workplace forums under labour law. The establishment of such structures brings about a plethora of challenges which need to be navigated with caution, because the inclusion of employees on

[332] Ibid.
[333] Ibid.
[334] Ibid 1178.
[335] Ibid 1172.
[336] M Anstey 'Worker participation: Concepts and issues' in M Anstey *Worker Participation* (1990).

company boards may impose administrative costs and liabilities on companies.[337] The question of how this will work out in the South African context presents opportunities for discussion.

It is submitted that what the DTIC aims to achieve is not the same as what this thesis proposes can be achieved through internal CSR. Internal CSR in company law is a governance style that aims to facilitate employee voice without establishing a separate forum and including employees on boards, which creates fiduciary obligations and other technicalities.[338] Internal CSR seeks to place employee needs at the forefront of corporate decision-making, which is crucial in promoting labour stability.[339] This process does not override the existing legislation and common-law principles which regulate company law and labour law.

A mandatory requirement to include employee representatives on company boards is likely to be met with significant pushback by companies, workers and trade unions. Moreover, given the adversarial trade union-controlled industrial relations environment, much is to be learned from the failure of codetermination through workplace forums in South Africa. However, this is not to detract from the significance of this important and much-needed progress in corporate governance.

2.7 CONCLUSION

The purpose of this chapter was to validate the place of internal CSR as a mechanism for promoting labour stability in South Africa. The chapter first examined the history of CSR and internal CSR, by considering the multifaceted meanings and characteristics of CSR and internal CSR in the literature. This chapter showed that internal CSR has the potential to mitigate the adversarial nature of the labour relationship by using the essential features of stakeholder engagement and shared value to complement, not replace, existing labour law instruments. Conflict is a natural occurrence where power imbalances exist, which they invariably do. Internal CSR for labour cooperation looks at how companies can build agreed outcomes that respect different and competing interests but acknowledge common interests.

[337] Section 76 of the Companies Act 71 of 2008 codified the common-law directors' duties.
[338] Peng (n 32) 24. See also Vlachos et al (n 1) 577.
[339] Ibid.

The chapter went on to show how this could be achieved, by describing the missed opportunity for achieving labour stability under labour law through workplace forums and examining the possibility of salvaging that missed opportunity through internal CSR. To achieve this, a collaborative effort between company law and labour law is needed. The chapter concluded by considering the DTIC's proposal for the mandatory inclusion of employees as board members in terms of company law. The chapter considered the possible challenges that might arise from this proposal and noted the benefits of using a more progressive way of facilitating board representation through internal CSR.

The next chapter builds on the preceding chapters by establishing a foundation for a corporate governance approach that will facilitate internal CSR for labour stability under company law. The chapter evaluates the efficacy of the shareholder-centric approach, the non-shareholder-centric approach and stakeholder capitalism under the World Economic Forum's Davos Manifesto as potential corporate governance approaches for internal CSR for labour stability under company law. It does so with the objective of identifying the strengths and limitations of each approach in promoting employee voice as an essential feature of internal CSR in companies. The chapter further considers the *ubuntu* approach to corporate governance as crucial in promoting humanness in corporate relationships, which is pivotal in promoting much-needed labour relations stability through internal CSR . It examines the ethos of the *ubuntu* approach to corporate governance, which is centred on humanness as pivotal in promoting labour relations stability through internal CSR under company law. This analysis is done in the context of the strengths and limitations of the shareholder-centric approach, the non-shareholder-centric approach and the *ubuntu* approach. Based on this analysis, the succeeding chapter indicates whether company law can incorporate an African values-based approach to corporate governance.

CHAPTER THREE: CORPORATE GOVERNANCE APPROACHES AND INTERNAL CSR

3.1 INTRODUCTION

The primary objective of this chapter is to provide a theoretical overview of the different approaches to corporate governance categorised in the chapter: specifically, a shareholder-centric approach; a non-shareholder-centric approach; and an African-values approach. A literature review of each of the approaches to corporate governance is provided.[1]

This chapter recommends the *ubuntu* approach as the most appropriate lens through which internal CSR for labour relations stability may be pursued. This is because the *ubuntu* approach is based on collective unity, a key component of shared value, which could be useful in promoting labour stability through corporate governance. As discussed in chapter 2, shared value is an essential element of internal CSR as it deviates from the traditional model of shareholder primacy which is based on colonial interpretations of shareholder value founded on capitalism.[2]

The approach embedded in the normative shareholder primacy model impedes the prospect of promoting labour relations stability under company law, because traditional shareholder value theories prioritise the interests of the shareholders over the needs of the workers. This approach thus views workers as commodities and human capital needed to maximise shareholder interests. This goes against the collaborative approach that is needed to promote labour stability through labour law and company law. The shareholder-centric approach encourages the marginalisation of employees by managing the company exclusively in the interest of its shareholders collectively. Hence, it is submitted in this chapter that an African values-based

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[1] The five approaches underlying the different approaches to CSR are the shareholder primacy approach, as argued for by A Berle 'For whom corporate managers are trustees: A note' (1932) 45 *Harvard LR* 1365–1372; the stakeholder approach, as argued for by A Keay 'Stakeholder theory in corporate law: Has it got what it takes?' (2010) 9 *Richmond Journal of Global Law and Business* 249–300 and RE Freeman, SJ Harrison & AC Wicks *Managing for Stakeholders: Survival, Reputation and Success* (2008); the enlightened shareholder approach, as argued for by V Harper 'Enlightened shareholder value: Corporate governance beyond the shareholder–stakeholder divide' (2010) 36 *Journal of Corporation Law* 59–112; the stakeholder capitalism approach, as argued for by RE Freeman and the Davos Manifesto of the World Economic Forum 'Stakeholder Capitalism: A Manifesto for a Cohesive and Sustainable World' available at *https://www.weforum.org/press/2020/01/stakeholder-capitalism-a-manifesto-for-a-cohesive-and-sustainable-world/* (accessed on 17 April 2020); and the *ubuntu* approach, as argued for by D Lutz 'Ubuntu philosophy and global management' (2009) 84(3) *Journal of Business Ethics* 314.

[2] M Porter & M Kramer 'Creating shared value' (2011) 89(1/2) *Harvard Business Review* 62.

approach to good corporate governance, which seeks to advance the traditional ethical values of *ubuntu*, could be the correct approach to corporate governance which is needed to promote labour stability under company law. The discussion on the shareholder-centric approaches and the non-shareholder-centric approach is based on the big debates about the purpose of the company.

3.2 THE PURPOSE OF THE COMPANY

In the corporate governance literature, the most prominent questions asked in corporate law debates have been the following: What is the main purpose of a company and in whose interest should companies operate?[3] In response, most companies are inclined to follow a corporate objective that resonates with the theoretical foundation in force within their particular jurisdiction.[4]

Traditional corporate law jurisdictions such as the US and the UK have followed a *laissez faire* capitalist system, where the main objective of the company has been to make profits for the company's shareholders.[5] As was clarified in the problem statement in chapter 1, the shareholder-centric approach to corporate governance may create labour instability because when a company focuses purely on profit maximisation, other areas of interest, such as the extended group of stakeholders, can expose the company to risks.

Therefore, the corporate governance approach governing the corporate law in a specific jurisdiction may define the strategy used by companies to manage stakeholder relationships.[6] This can have a direct impact on the approach to CSR by companies and the corresponding impact of such an approach on creating labour stability in the industrial relations environment.

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[3] Although some scholars argue that the discussion on the purpose of the corporation in society has been ongoing since the early 1700s. See A Smith *The Theory of Moral Sentiment* (1759). The most widely referenced arguments on the purpose of the corporation have been those of Merrick Dodd. See EM Dodd 'For whom are corporate managers trustees?' (1932) 45 *Harvard Law Review* 1145; A Keay 'Tackling the issue of corporate objective: An analysis of the United Kingdom's enlightened shareholder value approach' (2007) 29 *Sydney Law Review* 578; A Keay 'The ultimate objective of the company and the enforcement of the entity maximisation and sustainability model' (2010) 10 *Journal of Corporate Law Studies*35–71; A Keay 'Stakeholder approach in corporate law: Has it got what it takes?' (n 1); S Dunne et al 'The nature and purpose of the corporation: A roundtable discussion (2016) 1 *Ephemera* 135–153.

[4] Ibid.

[5] A Keay 'Stakeholder approach in corporate law: Has it got what it takes?' (n 1) 249.

[6] S Andreasson 'Understanding corporate governance reform in South Africa: Anglo-American divergence, the King Reports, and hybridization' (2011) 50 *Business & Society* 651.

The past five decades have seen an increase in the academic debates about the purpose of the company and CSR.[7] These debates have been useful in building the position of corporate accountability through CSR.[8] However, in shareholder primacy jurisdictions such as the US, most companies seek to separate the objective of the company from CSR, because the latter is viewed as a concept that takes away from the traditional business model.[9]

The two most prominent models in this regard are the shareholder primacy approach and the stakeholder inclusivity approach.[10] These approaches differ in their objectives and application, which move parallel to each other as they promote divergent values around the purpose of the company. The shareholder primacy approach has been the foundational business model which is widely accepted in the management practices of corporations.[11]

On the other hand, the stakeholder approach seeks to balance a wide variety of interests as it considers a wider group of corporate stakeholders that need to be considered in conducting the daily operations of a company.[12] These approaches stipulate unique and radical approaches to running a business.[13]

CSR under the stakeholder approach considers the impact that the company has on a variety of stakeholder groups other than shareholders.[14] The notion that a company has responsibilities to shareholders is not questioned.[15] However, because a company relies on multiple stakeholders' orientations to survive and prosper, it is not responsible to the company's shareholders alone.[16] Scholars continue to debate what level of emphasis should be given to shareholders, and to what extent stakeholder

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[7] See the seminal work of HR Bowen & FE Johnson *Social Responsibility of the Businessman* (1953); JD Margolish & JP Walsh 'Misery loves companies: Rethinking social initiatives by business' (2003) 48(2) *Administrative Science Quarterly* 268; AB Carroll 'Corporate social responsibility: Evolution of a definitional construct' (1999) 38(3) *Business & Society* 267.

[8] El Gammal, W Yassine, NK Fakih & AN El-Kesar 'The relationship between CSR and corporate governance moderated by performance and board of directors' characteristics' (2020) 24(2) *Journal of Management and Governance* 411.

[9] MJ Loewenstein & J Geyer 'Shareholder primacy and the moral obligation of directors' (2021) 26(1) *Fordham Journal of Corporate & Financial Law* 105.

[10] D Million 'Radical shareholder primacy' (2014) 10(4) *University of Thomas Law Journal* 1013.

[11] Loewenstein & Geyer (n 9) 113.

[12] Keay 'Stakeholder approach in corporate law: Has it got what it takes?' (n 1) 249.

[13] Ibid.

[14] Ibid.

[15] M Friedman 'The social responsibility of the business is to increase its profits' *New York Times* (13 September 1970).

[16] AB Carroll & A Buchholtz *Business and Society: Ethics, Sustainability, and Stakeholder Management* 9 ed (2014) 64.

groups should form part of the business-making strategy of the company.[17] Therefore, the core character of CSR is reflected in this very debate, which is entwined in the debates surrounding the purpose of the company.[18]

Stakeholder management is essentially about perspective; it is about identifying various groups of individuals who have a stake in the company's decisions, actions and practices.[19] It relates to incorporating those stakeholder concerns into the company's plans and daily operations. It is about integrating ethical and management wisdom into all areas of corporate conduct.[20] Although the discourse on how much emphasis should be given to shareholders as compared to the stakeholders of the company remains a moot point in the CSR debates, the management of all stakeholder relationships through corporate responsibility highlights the essential character of CSR in the discourses surrounding the purpose of the company.

3.3 SHAREHOLDER-CENTRIC APPROACHES

The shareholder primacy approach is the foundational approach to traditional corporate governance. This approach is based on the exclusive focus on and prioritisation of shareholder interests.[21] In the discussion that follows, the focus will be on reviewing traditional corporate governance theories (those theories based on shareholder primacy) and reflecting on why they have an influence on the perpetuation of labour instability.

3.3.1 The shareholder primacy approach

In 1932, Adolf Berle argued that the sole responsibility of company directors is to the shareholders of the company, and to optimise shareholder investments by ensuring a maximum return for shareholders.[22] This approach was popularised by Milton Friedman's famous essay in the *New York Times* magazine, which set out a controversial but highly referenced argument on the social responsibility of the company. According to Friedman, 'the social responsibility of the directors is to the company'.[23] This means that the directors of the company have to use the resources of

[17] Porter & Kramer (n 2) 62.
[18] Carroll & Buchholtz (n 16) 93.
[19] Ibid.
[20] Ibid.
[21] Million (n 10) 1020.
[22] Berle (n 1) 1367.
[23] Ibid. The first discussions of shareholder primacy emerged in academia during the 'law and economics' movement. Adolf Berle's work was pivotal in championing the debate for shareholder primacy.

the company to optimise shareholder value, and any other use of the company's resources for general social interests constitutes a breach of a director's fiduciary duty. Friedman's arguments have been criticised as one-sided, traditional and unsustainable in that a one-dimensional approach (ie profit) to business cannot be the sole purpose of incorporating companies.[24] In 1976, Jenson and Meckling published a highly cited article on the 'theory of the firm', which echoes the sentiments of Friedman by assuming that the shareholders of the company are the company's only constituents for whom directors are incorporated to serve.[25]

The justification of the approach is premised on the 'agency contract model'.[26] Under the 'agency contract model' directors are appointed to act as the agents of the company by the shareholders, who are presumed to be the principals of the directors in the company.[27] In this regard, the shareholder primacy approach presupposes that there is a contract between the principal and the agent – usually a contract of mandate. The director as agent is empowered to execute all corporate actions at the direction of the shareholders, who are presumed to be the principals of the directors under the agency contract model.[28]

This model leads to the incorrect assumption that directors control the company for the benefit of shareholders who are the owners of the company.[29] This assumption completely negates the separate legal personality of the company by regarding directors as corporate agents of the shareholders of the company.[30] Company directors are fiduciaries who must act in the best interest of the company; in loose terms, directors are agents of the company and not agents of the shareholders.[31] Therefore, directors are required to act under the common law in the best interest of the

[24] Friedman (n 15) 3.
[25] M Jensen & W Meckling 'Theory of the firm: Managerial behaviour, agency costs, and ownership structure' (1976) 3 *Journal of Financial Economics* 305.
[26] Ibid.
[27] F Brandt & K Georgiou 'Shareholders vs stakeholders capitalism' (2016) 10 *Comparative Corporate Governance and Financial Regulation* 36.
[28] Keay 'Tackling the issue of corporate objective' (n 3) 581.
[29] Ibid 579.
[30] A company is not a sole proprietor. Shareholders do not own the company as the company is a separate legal person, distinct from its members. See *Salomon v A Salomon & Co Ltd* 1897 AC 22; 1895–99 All ER Rep 33 (HL).
[31] Critics argue that this perspective is flawed in that most arguments under shareholder primacy are presented by economists, who are not lawyers and have a limited understanding of the rights and responsibilities of the company. See LA Stout 'The toxic side effects of shareholder primacy' (2013) 161 *University of Pennsylvania Law Review* 2003.

company.[32] The bests interest of the company is not by law the best interest of the shareholders, because shareholders are not the owners of the company but are residual claimants in cases of winding up and are entitled to claim dividends.[33] Moreover, it is argued under this approach that shareholder primacy is efficient in that company directors will focus on one constituent, which will optimise shareholder value by investing all company resources for shareholders.[34] Company directors are thus not troubled by socio-economic issues, which, according to Friedman, yield no financial value.[35]

Hanks[36] and Keay[37] persuasively justify shareholder primacy on the basis that '[o]nly the shareholders have proprietary rights in the corporation, and that [in] any other dealings relating to the corporation should protect themselves by contractual agreement'.[38] Thus, expanding the interests of the company to a wider group of corporate constituents introduces an unlimited number of competitors to the residual assets of the company which, in terms of this approach, should be left for the exclusive domain of the shareholders, who are the principal agents of the company, in terms of the incorrect understanding of the agency model.[39]

Directors are charged with an unwavering fiduciary duty to the company and its shareholders, and any other constituent who seeks to be protected is already protected by law (for example, labour law, environmental law, constitutional law, the Consumer Protection Act) with contracts (for example, contracts of employment) that limit their rights to the corporation by delineating their rights and duties under contract.[40] The protection of internal stakeholders, such as employees under the shareholder primacy norm, has the potential to detract from shareholder value and should be left to the exclusive domain of labour law and employment contracts.[41]

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[32] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550–551. See also F Dawson 'Acting in the best interests of the company – For whom are directors' trustees?' (1984) 11 *New Zealand Universities Law Review* 68.
[33] *Dadoo Ltd v Krugersdorp Municipal Council* (n 32) 550–551. See also Institute of Directors in Southern Africa *King II Committee's Report on Corporate Governance* (2002) para 17.3 at 10.
[34] Friedman (n 15) 17.
[35] Ibid.
[36] JJ Hanks 'Playing with fire: Non-shareholder constituency statutes in the 1990s' (1991) 21(1) *Stetson Law Review* 103.
[37] Ibid. See also Keay 'Tackling the issue of corporate objective' (n 3) 584.
[38] Hanks (n 36) 103.
[39] Institute of Directors in Southern Africa *King II Committee's Report on Corporate Governance* (2002) para 17.3 at 10.
[40] Harper (n 1) 74.
[41] Hanks (n 36) 103.

3.3.2 The limitations of the shareholder primacy approach for internal CSR

A shareholder-centric approach to corporate management has a plethora of limitations in developing economies such as South Africa. As discussed in chapter 1, South Africa is a country still recovering from the injustices of apartheid and colonialism, and therefore cannot approach business on a single bottom-line basis.[42] In South Africa, a shareholder-centric approach may not necessarily be the same as shareholder profit maximisation as the negation of other corporate constituents such as employees may expose the company to risks.

Risks such as labour unrest have been proven to have a negative effect on the optimisation of shareholder value.[43] Moreover, the perspective that company directors owe fiduciary duties to shareholders is incorrect and inefficient, as a singular perspective to corporate management has the potential to yield an unsustainable business model which is not progressive.

The shareholder primacy approach is based on a 'managerialist philosophy' which seeks to limit the fiduciary duty of directors to shareholders based on the agency model.[44] This assumption is incorrect. When a company is duly incorporated it assumes a separate legal personality which is like that of a natural person and is thus incapable of being owned by any corporate constituent. In *Salomon v Salomon,*[45] the court held that a company is a separate legal person, distinct from its members, and that directors generally owe fiduciary duties to the company as a separate legal entity. Directors are thus engaged primarily to be agents of the affairs of the company and not to act as agents on behalf of the shareholders.[46] Fortunately, in the South African

[42] F Ganda & CC Ngwakwe 'The differential effect of labour unrest on corporate financial performance' (2015) 5(3) *Risk Governance & Control: Financial Markets & Institutions* 246. See also chapter 1 paras 1.2 and 1.3.

[43] See chapter 2. See generally 'Why the wealth of Africa does not make Africans wealthy' available at *https://edition.cnn.com/2016/04/18/africa/looting-machine-tom-burgis-africa/index.html* (accessed on 24 September 2018). See also Oxfam International 'Multinational companies cheat Africa out of billions of dollars' available at *https://www.oxfam.org/en/pressroom/pressreleases/2015-06-02/multinational-companies-cheat-africa-out-billions-dollars* (accessed on 24 September 2018).

[44] Million (n 10) 1031.

[45] *Salomon v Salomon* (n 30): 'the company is at law a different person altogether from the subscribers', per Lord Macnaghten 51; 'once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself', per Lord Halsbury LC 30. *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550: 'a registered company is a legal *persona* distinct from the members who compose it', per Innes CJ. See also *Ex parte Gore NO and Others* [2013] JOL 30155 (WCC).

[46] *Salomon v Salomon* (n 30).

context, the company has the legal standing to enforce fiduciary duties against directors who fail to fulfil their fiduciary duties as set out in the Companies Act.[47]

Furthermore, the assumption that other corporate constituents such as employees should protect their interests through contract and labour law is not always correct as it can expose the very interest that the company seeks to protect under shareholder primacy to risk. The approach limits the protection of employees to the workings of labour law and the common-law employment contract and in so doing it implies that there is equal bargaining power between the company and its employees.

The power dynamics in a labour relationship are a key driver of labour instability in the labour relations environment.[48] Power in a labour relationship is reflective of the adversarial nature of the labour relationship as it is never constant or attributed to one party. According to Bendix, power in a labour relationship is reciprocal and fluctuating in nature,[49] and can be influenced by various factors.[50] The more dependent an employee is on the employer (the company), the more power the employer will wield over the employee. Conversely, the more important a group of employees or trade unions are in a specific company, the more power they will have over the company.[51]

Furthermore, the shareholder primacy approach negates the fact that there is more than one constituent in the management and control of companies. The approach incorrectly assumes that power will always be in the hands of the shareholders, who are the owners and residual claimants of the company's assets.[52] However, this is not the case as there is a broader body of corporate stakeholders such as the employees, the consumers and creditors, whose relationship with the company can have an influence on the maximisation of shareholder value.

The shareholder primacy approach hence presents itself as an inviable approach for realising internal CSR for labour stability. The approach fails to consider employees under corporate law by prioritising shareholders as the primary and sole

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[47] However, although a company is a separate and distinct legal entity which cannot act on its own, the shareholders may under certain circumstances institute derivative actions on behalf of a company when liable directors refuse to do so. See *Alexander Ward & Co Ltd v Samyang Navigation Co Ltd* [1975] 2 All ER 424 (HR).
[48] S Bendix *Industrial Relations in South Africa* 5 ed (2010) 16.
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Berle (n 1) 1371. See also I-M Esser *Recognition of Various Stakeholder Interests in Company Management* (LLD thesis, University of South Africa, 2008) 22.

beneficiaries of the company's resources under company law. More specifically, in South Africa, companies do not operate in a vacuum. The self-reliant and individualistic approach to corporate management does not maximise shareholder value; in fact, it exposes the company to protracted cycles of labour instability in the form of unrest and violence. This is not sustainable as the return on shareholder investment may not be realised in the long term.[53]

3.3.3 The enlightened shareholder value approach

The enlightened shareholder value approach is based on a variation of the shareholder primacy approach model.[54] It involves the directors having to consider the interest of the stakeholders if such interest will yield long-term shareholder value.[55] The primary advocate of the enlightened shareholder value approach was the UK's 1998 Department of Trade and Industry's Company Law Review Steering Group (CLRSG).[56] The steering group comprised experts from law, academia and commerce, who oversaw the corporate law reform process. The process included, but was not limited to, the publication of a series of consultation documents that included the comments and proposals for public opinion.[57]

In the process, the CLRSG tried to modernise company law by making it more accessible.[58] Part of this objective was to provide an answer to the question about the purpose of a company in the UK context. In whose interest should companies operate? In answering this question, the CLRSG published several papers and conducted discussions on the shareholder value norm and the stakeholder value model. The results and eventual findings of the CLRSG comprised a bespoke approach to corporate governance through the enlightened shareholder value approach.[59]

In many respects, this approach is comparable to the enlightened value maximisation approach, as proposed by Jensen, who states that the '[l]ong-term market value of an organisation cannot be maximised when an organisation mistreats or

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[53] M Grimm et al *Business as Usual after Marikana: Corporate Power and Human Rights* (2018) 86.
[54] Keay 'Tackling the issue of corporate objective' (n 3) 581.
[55] Ibid 590.
[56] White Paper on Modernising Company Law, House of Commons Trade and Industry Committee, Sixth Report of Session 2002-03, available at *https://publications.parliament.uk/pa/cm200203/cmselect/cmtrdind/439/439.pdf* (accessed on 8 May 2020) 4.
[57] Ibid.
[58] E Ferran 'Company law reform in the United Kingdom: A progress report' (2005) 69(4) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 634.
[59] Keay 'Tackling the issue of corporate objective' (n 3) 590.

completely ignores important corporate constituencies'.[60] He further argues that value creation can only be achieved through good relations with employees, consumers, suppliers, regulators, communities, and so on.[61] The enlightened shareholder value approach is statutorily embodied under the provisions of s 172 of the UK's Companies Act, 2006, which requires company directors to consider a list of various constituents when exercising their duties.[62]

Harper argues in favour of the UK's enlightened shareholder value approach from a US context. Her approach focuses on the normative advantages embodied in the enlightened shareholder approach in a traditionally shareholder-centric economy such as the US.[63] Her argument is that the enlightened shareholder value approach provides useful channels for effective shareholder empowerment arising from shareholder activism, which will allow enlightened shareholders to engage in stakeholder issues.[64]

The enlightened shareholder value approach is well entrenched in many sections of South Africa's Companies Act.[65] The approach is reflected in the purpose and interpretation sections of the Act.[66] In terms of s 7, the purpose of the Act is to promote compliance with the Bill of Rights in the Constitution.[67] This also means that the company cannot pursue profits at the expense of human and environmental rights.[68]

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[60] M Jensen 'Value maximization, stakeholder approach, and the corporate objective function' (2001) 7 *European Financial Management* 245.
[61] Ibid. See also Harper (n 1) 62.
[62] See chapter 5 for a discussion of the provisions of s 176 of the UK's Companies Act.
[63] Harper (n 1) 62.
[64] Ibid.
[65] Section 20(9) of the Companies Act provides relief from the abuse of a company as a legal entity, Section 162 of the Companies Act provides stakeholders with the right to apply for delinquency or probation. The derivative action is a remedy available to stakeholders in terms of s 165. See *Mouritzen v Greystones Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD). See also T Mongalo *Corporate Actions and the Empowerment of Non-shareholder Constituencies* (LLD thesis, University of Cape Town, 2015) 46–49. Mongalo correctly submits that under the enlightened shareholder value approach, the extension of fiduciary duties to non-shareholder constituencies means that a breach of such fiduciary duty can be remedied only by instituting derivative action proceedings. However, this is not without limitations. Section 163 of the Companies Act provides an avenue for protection from oppression action by shareholders or directors. The appraisal remedy appears in s 164 of the Companies Act. For a detailed analysis of the proper and effective use of the appraisal remedy under the South African Companies Act, see J Yeats *The Proper and Effective Exercise of Appraisal Rights under the South African Companies Act, 2008: Developing a Strategic Approach through a Comparable Foreign Law* (LLD thesis, University of Cape Town, 2015) 29–31.
[66] Section 5(1) of the Companies Act provides that the Act must be interpreted and applied in a manner that gives effect to the purpose set out in s 7 of the Companies Act.
[67] The right to belong to a trade union is entrenched in s 23 of the Constitution, and the Companies Act gives rights to trade unions and employees. See HC Schoeman 'The rights granted to trade unions under the Companies Act 71 of 2008' (2013) 16(3) *PER* 236.
[68] See Chapter 2 of the Constitution.

This also includes the promotion of transparency and corporate governance by reaffirming the company as a means to achieve socio-economic goals.[69] This is also evidenced in s 20(4), where employees are given the right to participate in the governance of companies.[70] Quite significantly, the codification of the common-law directors' duties and the provisions of the s 72(4)*(a)* social and ethics committee, as discussed in detail in chapter 4 of this thesis, reflect the ethos of the enlightened shareholder value approach.[71] This section must be read in conjunction with reg 43 of the Companies Regulations, 2011.

Regulation 43 requires certain companies to appoint a social and ethics committee, which is an innovative committee put in place to oversee the company's environmental, social and ethical footprint. It is within the mandate of the social and ethics committee to ensure that the company promotes CSR-related objectives in its management and strategic plan.[72] The presence of a structured committee such as the social and ethics committee reflects the strong presence of the enlightened shareholder value approach in company law. However, the efficacy of the Act in promoting internal CSR, managing stakeholder risks, and ensuring good labour stability through the Act is yet to be seen.[73]

3.3.4 The limitations of the enlightened shareholder value approach for internal CSR

Although the enlightened shareholder value approach provides a paradigm shift in the corporate law regime of both the UK and South Africa, it has some limitations in that its focus is on prioritising stakeholder interests only if this is in the long-term interest of the shareholders.[74] As is the case in South African company law, s 172(1) of the UK's Companies Act requires the prioritisation of stakeholders as the collective best interest of the company.[75] There is, therefore, little or no controversy about the requirement to consider the interests of the employees, as the Act explicitly states that such needs should be considered under the provisions of s 172(1).[76]

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[69] Section 7 of the Companies Act.
[70] Section 20(4) of the Companies Act. Shareholders, directors and trade unions representing employees may institute proceedings to restrain the company from doing anything that is inconsistent with the Act.
[71] Loewenstein & Geyer (n 9) 105.
[72] Regulation 43(5)*(a)* of the Companies Regulations, 2011.
[73] See chapter 4. See also N Bouwman 'The social and ethics committee' (2011) 9 *Without Prejudice* 32.
[74] For a discussion of the UK's enlightened shareholder value approach, see Keay 'Tackling the issue of the corporate objective' (n 3) 592.
[75] Ibid 593.
[76] Section 172(1) of the UK's Companies Act.

Labour instability primarily occurs when there is a conflict between the needs of a company as an employer and the needs of employees as stakeholders of that very same company.[77] The enlightened shareholder value approach maintains that the values that must be prioritised in the governance of companies are those of the shareholders, and other stakeholder interests may be realised if this is in the long-term benefit of the shareholders.[78] This is the approach that companies usually take during collective bargaining, which makes employees strengthen their position through unreasonable demands as they seek to position themselves at a value equivalent to that of shareholders.[79]

In the discussion about workplace forums and their failure as an effective means of worker participation in South Africa, it was stated that one reason for the failure of workplace forums was the belief that workplace forums would deprive managers of their power to manage the company, which could lead to the exploitation of management by unions and employees.[80] This is because in corporate management internal CSR will be considered only if it benefits shareholders, and where the consideration of such interests does not guarantee a benefit to shareholders, the results will be like those that led to the failure of workplace forums.

According to Keay, another limitation embedded in the enlightened shareholder approach is that it suggests that the term 'enlightened shareholder' is a different concept from 'shareholder value'.[81] This assumes that under the enlightened shareholder value approach, shareholders are conscientised or rather enlightened about the needs of other constituencies, which they were oblivious to under shareholder primacy,[82] and that the approach is more enlightened as directors are required to consider a broader body of corporate stakeholders. However, this is not the case as the focus is still primarily on shareholders.[83] The enlightened aspects of the enlightened

[77] This was the case in the Marikana massacre and in *Food and Allied Workers Union obo Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River; Premier Foods Ltd t/a Blue Ribbon Salt River v Food and Allied Workers Union obo Kapesi and Others* (CA7/2010) [2012] ZALAC 46 (16 March 2012).
[78] Keay 'Tackling the issue of corporate objective' (n 3) 581.
[79] See *Verulam Sawmills (Pty) Ltd v Association of Mineworkers and Construction Union ('AMCU') and Others* (J1580/15) [2015] ZALCJHB 359; [2015] 12 BLLR 1266 (LC); (2016) 37 *ILJ* 246 (LC) (20 October 2015).
[80] F Steadman 'Workplace forums in South Africa: A critical analysis' (2004) 25 *Industrial Law Journal* 1178.
[81] Keay 'Tackling the issue of the corporate objective' (n 3) 593.
[82] Ibid.
[83] Harper (n 1) 108.

shareholder value approach are that all corporate actions must be done to benefit the long-term interests of the shareholders.[84] In sum, the approach does not offer a radical shift from the traditional shareholder primacy approach to corporate governance.

The limitation of the enlightened shareholder approach in the South African context is that the DTIC adopted a replica of the UK CRLSG's enlightened shareholder value approach as the foundation for South African company law. This presented the country with an approach to corporate law and governance that was not unique to the history, challenges and economic limitations of the country.

The limitations are more evident specifically in the context of labour relations issues which affect the governance of companies. In dealing with the problem of labour instability in the corporation, a company director will consider the interests of the employees only if this is in the long-term best interest of the shareholders. Any or all material interests (for example, the interest of the employees) that may be in the best interest of the company will not be pursued unless they are ultimately in line with the long-term needs of the shareholders. This is in line with Harper's argument about the 'two masters problem' embodied in the enlightened shareholder value approach.[85]

The approach taken by the DTIC in South Africa is almost a mirror image of the practices adopted in the UK.[86] The company laws of Delaware in the US have also had a strong influence on South African company law.[87] For decades, the management and control of companies in these jurisdictions focused on shareholder beneficiation and conferred upon the shareholders ultimate control of the company, whilst directors simply managed the company on their behalf.[88] These influences in corporate law have had an impact on the levels of inequality in labour and capital ownership, which have in turn had an impact on the challenges of inequality as identified by Pikkety.[89]

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[84] Keay 'Stakeholder approach in corporate law: Has it got what it takes?' (n 1) 254.
[85] Harper (n 1) 108. The 'two masters problem' is centred on the argument that a company director cannot serve the shareholders and the stakeholders at the same time. When faced with a demand from the stakeholders, a profit-sacrificing decision in the interest of stakeholders can affect shareholder value.
[86] Department of Trade and Industry *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* GN 1183 in *GG* 2649 of 23 June 2004 at 13–14. See also TH Mongalo 'An overview of company law reform in South Africa: From the Guidelines to the Companies Act' (2008) *Acta Juridica* xiii–xxv.
[87] Mongalo ibid.
[88] This position has remained the same in the US. However, in the UK, the process of corporate law reform introduced the enlightened shareholder approach, which is discussed in para 3.3.3.
[89] T Piketty *Capital and Wealth Taxation in the Twenty-first Century* (2013) 336.

3.4 NON-SHAREHOLDER-CENTRIC APPROACHES

3.4.1 The stakeholder approach

The stakeholder approach is a corporate governance approach that has its roots in the organisational management and business ethics discipline.[90] The approach underscores the notion that good corporate relationships within companies will only be optimised when company directors balance shareholders' needs with those of the other corporate constituents who are related to or directly affected by the company.[91] The approach regards the main objective of corporate law as being concerned with a wider group of corporate stakeholders.[92]

The stakeholder approach provides a radical shift from the shareholder primacy approach as it fundamentally denounces the single bottom-line perspective to doing business.[93] The shift extends fiduciary duties from the shareholders to all stakeholders who are deemed to be the beneficiaries of directors' fiduciary duties.[94] This approach requires directors as fiduciaries to assess and balance the interests of the company's legitimate and identifiable stakeholders.[95]

The protection of employees as identifiable stakeholders is largely based on the argument that the resources of the company should be used in a manner that benefits those who contribute to the capital of the company.[96] In essence, it requires companies to re-evaluate their profit-making priorities by incorporating the broader context in which the company operates.

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[90] Keay 'Stakeholder approach in corporate law: Has it got what it takes?' (n 1) 254.

[91] R Mitchell et al 'Toward an approach of stakeholder identification and salience: Defining the principle of who and what really counts' (1997) 22(4) *Academy of Management Review* 853.

[92] Ibid.

[93] See also Institute of Directors in Southern Africa *King II Committee's Report on Corporate Governance* (2002) para 17.3 at 10. See para 29 in the introduction. Also see King II 'Introduction: Executive Summary' para 17.1 where the Code acknowledges a shift from the single bottom-line approach to a triple bottom-line approach to business.

[94] Keay 'Stakeholder approach in corporate law: Has it got what it takes?' (n 1) 249.

[95] Esser submits that the interests of 'employees may in certain circumstances receive priority over those of the shareholders collectively'. See I-M Esser *Recognition of Various Stakeholder Interests in Company Management* (unpublished LLD thesis, University of South Africa, 2008) 34. She proposes a 'merry-go-round approach', in terms of which the company is represented by the various stakeholder interests. According to Esser, the various stakeholders' interests will have different weightings, and an interest that may be primary at one point in the company's existence may become secondary at a later stage. Esser submits further that the weighting to be attached to a stakeholder's interest will depend on the extent of protection offered by other statutes, such as the Labour Relations Act 66 of 1995 and the National Environmental Management Act 107 of 1998, to name a few of the statutes that may protect stakeholders.

[96] Keay 'Stakeholder approach in corporate law: Has it got what it takes?' (n 1) 249.

The stakeholder approach is derived from the term 'stakeholder', which has a long history comprising many verifications and modifications.[97] Hence the stakeholder approach is to some extent controversial because of the very definition of a stakeholder. The stakeholder approach thus comprises many debates, which are reflected in the literature on the correct interpretation and application of the approach.[98] In essence, the stakeholder approach is about shifting the focus from the shareholders of the company to the stakeholders of the company. These stakeholders include, but are not limited to, 'employees, suppliers, consumers, financiers (stockholders, bondholders, banks, and so on), communities and the environment'.[99] Companies must consider a wider group of stakeholders as the sustainability of the company is affected by those who have a stake in the activities which comprise the business.[100]

According to Kneale, the group of stakeholders to be considered must have either a direct or an indirect interest in the success or failure of the company.[101] Therefore, in applying the stakeholder approach, the responsibility of the business is extended beyond the profit-making objectives of the company as the company has a duty to both the shareholders and the stakeholders of the company. Thus, the stakeholder approach has been used to support arguments in favour of CSR in CSR-related debates and practices as it considers a wider group of corporate constituents.

3.4.2 The limitations of the stakeholder approach for internal CSR

The basic idea behind the stakeholder approach is quite simple; however, in its practical application, it has several complexities. First, the approach is derived from the term 'stakeholders'; the latter have been defined as a group to whom management

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[97] RE Freeman *Strategic Management: A Stakeholder Approach* (1984) 31.

[98] There is generally an absence of a universally accepted definition of the term 'stakeholder', but stakeholders can be defined as individuals that can be reasonably expected to be significantly affected by the operations of the company. It has been suggested that those who can show that they have contributed to the assets of a company by one factor of production or another, such as land, the offering of services, employee labour or contractors, the contribution of capital by investors, can constitute stakeholders. See JJ du Plessis, J McConville & M Bagaric *Principles of Contemporary Corporate Governance* (2005) 24. See also L Roach 'The paradox of the traditional justifications for exclusive shareholder governance protection: Expanding the pluralist approach' (2001) 22 *The Company Lawyer* 18; S Miles 'Stakeholder: Essentially contested or just confused?' (2012) 108 *Journal of Business Ethics* 285 where she discusses the contestation of the concept.

[99] E Sternberg 'The defects of stakeholder approach' (1997) 5 *Corporate Governance* 5.

[100] T Donaldson, T Preston & E Lee 'The stakeholder approach of the corporation: Concepts, evidence, and implications' (1995) 20(1) *Academy of Management Review* 66.

[101] C Kneale *Corporate Governance in South Africa* (2012) 12.

needs to be responsive.[102] According to Freeman, 'a stakeholder is any group or organisation or individual who can affect or is affected by the company's or organisation's objectives.'[103] The stakeholder perspective is more inclusive in the sense that it now embodies a wider group of corporate constituents. This can create a problem of overemphasising the objectives of the company. A wide definition of stakeholders transforms everyone and anything into a corporate stakeholder for as long as they are affected by the objectives of the company.[104]

Moreover, given the influence of technology, telecommunications, artificial intelligence, globalisation and now blockchain technology, the stakeholder approach is quite far-reaching in that everyone and anything that is affected by the company's objectives constitutes a stakeholder.[105] According to Sternberg, the stakeholder approach gravely undermines business and is therefore impractical.[106] The approach is impractical from a business context because it undermines corporate performance by stretching the resources of the company in such a way that it undermines shareholder equity, agency and wealth maximisation.[107] However, in as much as the approach appears to be inclusive by extending the fiduciary duties of directors to a broader body of corporate constituents, its workings and applications are not without restraint.

According to Jensen,[108] the stakeholder approach implies that company directors are accountable to all stakeholders. The practicality of the approach requires company directors to balance stakeholder benefits, which can be an unworkable corporate objective. The rationale for this is that stakeholders are all those who can affect or are affected by the company. The number of interests that the company directors need to consider can be infinite. Moreover, striking a balance could result in prejudice as the number of stakeholders needs to be limited.[109]

Moreover, even if the company considers a group of identifiable and restricted stakeholders to which the directors' fiduciary duties would apply, there is always an element of conflict in managing stakeholder relationships. This is most apparent when conflict arises in a labour relationship as the potential for conflict in the labour

[102] Freeman (n 97) 31.
[103] Ibid.
[104] Sternberg (n 99).
[105] Freeman (n 97).
[106] Ibid.
[107] Sternberg (n 99).
[108] Jensen (n 60) 236.
[109] This was the case in s 172(2) of the UK's Companies Act, where the CRLSG and the government delineated the number of stakeholders to whom the company is accountable.

relationship is endless.[110] If one considers the workings of the stakeholder approach for the mitigation of labour instability through internal CSR, one will have to consider the burden on the company directors in balancing the interests of stakeholders when conflict arises.

Under the stakeholder approach, the balancing of interests becomes unfeasible when the interests of all stakeholders involved are in conflict. This was witnessed in the Marikana massacre, where 34 mineworkers – who are identifiable stakeholders under the stakeholder approach – died at the hands of the police.[111] The stakeholder approach has no weighting of interests; it simplifies the practicality of balancing the interests more specifically when there is a conflict between the groups of stakeholders.[112] When the labour relations environment is unstable and violent conflict arises, the divergent needs and interests of employees as stakeholders may often harm the needs of shareholders who are also legitimate and identifiable stakeholders.[113]

This approach compromises the efficacy of company directors. The approach implies that company directors are accountable to everyone, which in turn affects their efficiency.[114] This stretches the notion of accountability quite broadly as it extends the fiduciary duties of directors to a broader body of corporate stakeholders. Under this approach, directors are not only accountable to the shareholders of the company, but they are also accountable to all identifiable corporate stakeholders. This approach presents further challenges of bias for company directors as they may fail to be accountable to both the employees and the shareholders of the company simultaneously.[115]

The effect of spreading the net this widely is that company directors may be confused about who they are accountable to at a specific time, as in reality not all interests can be balanced simultaneously.[116] The approach does not specify which interests directors should serve first. Thus, the approach fails to recognise and account for the hierarchy of corporate objectives. In the words of Sternberg: 'Are stakeholder interests, strictly equal? If so, which are they? And when, and by how much and

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[110] Bendix (n 48) 15.
[111] IG Farlam *Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the Northwest Province* (2015) 42.
[112] Esser (n 95) 323.
[113] This was witnessed in the Marikana massacre. See *Marikana Commission of Inquiry* (n 111) 42.
[114] Sternberg (n 99) 5.
[115] Ibid.
[116] Ibid.

why?'[117] When such ranking is not clearly delineated under the stakeholder approach, this may create further conflict in an already adversarial labour relations environment.

Another limitation of the stakeholder approach is that it undermines the significance of the traditional business model by assuming that the role of the corporation in a society is similar to that of an *ad hoc* government which seeks to meet the socio-economic needs of society.[118] In democratic societies such as South Africa, the government is responsible for *inter alia* ensuring that citizens have access to adequate housing, healthcare, sanitation services and education.[119] The stakeholder approach presupposes the same responsibility for the company by virtue of it being a corporate body operating within a system that affects or is affected by the company.[120]

Moreover, regarding stakeholders as corporate citizens within a corporation that seeks to promote good corporate citizenship places the burden of accountability on the corporation to its stakeholders to be comparable to that of the government to its citizens.[121] However, although it is impractical for governments in developing economies such as South Africa to single-handedly achieve the realisation of socio-economic rights, it is imperative that under the stakeholder approach corporations balance the conflicting interests of stakeholders, but without being equated to a government.

3.4.3 Stakeholder capitalism under the 2020 Davos Manifesto

In January 2020, the theme of the World Economic Forum's annual meeting was 'Stakeholder capitalism: A manifesto for a cohesive and sustainable world'.[122] The main purpose of the meeting was to renew the concept of stakeholder capitalism to overcome income inequality, societal division and climate change.[123] A key aspect of the meeting was to revisit the Davos Manifesto of 1973, which set out for the first time the stakeholder concept that business should serve the interests of society, not only their shareholders.[124] In 2020, the World Economic Forum embraced an updated version of the Davos Manifesto, which seeks to promote stakeholder capitalism by

[117] Ibid.
[118] Sternberg (n 99) 5.
[119] In South Africa, socio-economic rights are also entrenched in the Bill of Rights (Chapter 2 of the Constitution, 1996).
[120] Sternberg (n 99) 6.
[121] Ibid.
[122] World Economic Forum (n 1).
[123] Ibid.
[124] Ibid.

refining the workings of corporations. The Manifesto *inter alia* defines the purpose of the company as follows:

> A. The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities, and society at large. The best way to understand and harmonize the divergent interests of all stakeholders is through a shared commitment to policies and decisions that strengthen the long-term prosperity of a company.

Stakeholder capitalism embraces the component of stakeholder value creation; this component was boldly rejected by traditional capitalism scholars under the shareholder primacy approach.[125] The scholars contended that stakeholder capitalism completely denounces the notion of agency and trusteeship by viewing corporate managers as fiduciaries whose main purpose is to perform their duties in the best interests of identifiable stakeholders.[126]

Stakeholder capitalism, which is now a prominent approach in the international corporate governance community, is not a novel corporate governance approach. It was introduced for the first time in the 1932 management classic, *The Modern Corporation and Private Property* by Adolf Berle and Gardiner Means.[127] When companies focus solely on the maximisation of shareholder value, other stakeholders are placed at risk. More pertinently, it can be argued that the advocates of the stakeholder approach are similar to the advocates of stakeholder capitalism. The difference is that the stakeholder capitalism advocates argue for value creation for stakeholders with the objective of harmonising divergent stakeholder needs and interests, whilst the stakeholder approach scholars argue for a balancing of interests between different stakeholder groups.[128] This delineation is correctly reflected in the 2020 Davos Manifesto.[129]

In South Africa, the King Reports on Corporate Governance have incorporated stakeholder capitalism.[130] This is clear from the foundational principles of King IV,

[125] Million (n 10) 1020.
[126] Roach (n 98) 5.
[127] A Berle & G Means *The Modern Corporation and Private Property* (1932).
[128] Freeman et al (n 1).
[129] World Economic Forum (n 1).
[130] See the discussion of the King Reports in chapter 4.

which are 'ethical leadership, the organisation in society, corporate citizenship, sustainable development, integrated thinking and integrated development.'[131] According to King IV, inclusive capitalism is about taking into account all the components that create capital.

Thus, inclusive capitalism is about creating value in a sustainable manner as it seeks to acknowledge the different stakeholders who are involved in the value creation process as equal capital sources for organisational value.[132] This is done with an awareness of the fact that the traditional way of thinking, which focuses solely on financial capital markets as the core focus of value creation, is insufficient to guard the multifaceted and interconnected risks of the future; hence, an inclusive market system should be adopted.[133]

3.4.4 The limitations of stakeholder capitalism for internal CSR

The stakeholder capitalism approach does not appear to differ from the stakeholder approach in any material way. However, in the workings of stakeholder capitalism under the Davos Manifesto 2020 as adopted by the World Economic Forum,[134] there are some key differences which create some limitations in the approach. Stakeholder capitalism is centred on value creation for sustainable business.[135] The component of value creation stems from a subjective understanding of what the company regards as value.

Critics argue that the core foundation of the stakeholder capitalism approach is unworkable, and that it is, at best, a public relations strategy.[136] This is because companies commit to maintaining a stakeholder capitalism front whilst maintaining a shareholder primacy approach.[137] Moreover, it gives the impression of a radical shift from traditional capitalism values without delineating the differences between capitalism in the traditional sense and stakeholder capitalism. This can be open to

[131] Institute of Directors in Southern Africa *King IV Report on Corporate Governance in South Africa* (2016) 4.
[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] World Economic Forum (n 1).
[136] See J Lu 'Is Davos as bad as critics say? Global leaders weigh in' *NPR* (24 January 2020) available at *https://www.npr.org/sections/goatsandsoda/2020/01/24/797182641/is-davos-as-bad-as-critics-say-global-leaders-weigh-in* (accessed on 20 April 2020).
[137] Ibid.

surmise and conjecture for companies embracing this approach in their business models.

3.5 AN AFRICAN VALUES-BASED APPROACH TO CORPORATE GOVERNANCE

For centuries, the African voice in the debates on contemporary legal jurisprudence, corporate law and corporate governance has been constrained. In a corporate law context, the default position has been to identify the normative shareholder primacy approach and practices.[138] Nevertheless, African values and principles such as the concept of *ubuntu* are continuing to exert considerable influence in corporate governance and in post-apartheid legal jurisprudence.[139] This section of the thesis presents the case for the infusion of the *ubuntu* approach and its underlying considerations of humanness into corporate governance. The values of *ubuntu*, which are characterised by humanness, harmony and morality, are endorsed as the appropriate approach for the realisation of internal CSR for labour stability.

3.5.1 The African principle of *ubuntu*: An overview

The word *ubuntu* is derived from the Nguni maxim, *Umuntu Ngumuntu Ngabantu*, which means 'a person is who they are because of another person'.[140] It forms part of the normative rules governing the differences between what is considered morally good and bad.[141] *Ubuntu* is thus a culturally based principle which places value on human conduct. The foundations of *ubuntu* are community, interdependence, commonality and harmony, which have the potential to humanise corporate capitalism through humanity in business relationships.[142] The philosophy is founded on the ethical values of humanness as it seeks to promote morality as the key value that makes people human.[143] Dignity, respect and acceptance thus form the key features of the principle. In the South African constitutional context, *ubuntu* embodies the constitutional values of dignity, reasonableness and fairness.[144]

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[138] Berle (n 1).
[139] JY Mokgoro 'Ubuntu and the law in South Africa' (1998) 1 *PER* 3.
[140] K Khomba et al 'Shaping business ethics and corporate governance: An inclusive African ubuntu philosophy' (2013) 13(5) *Global Journal of Management and Business Research* 31.
[141] Lutz (n 1) 314.
[142] M Woermann & S Engelbrecht 'The ubuntu challenge to business: From stakeholders to relationholders' (2019) 157(1) *Journal of Business Ethics* 42.
[143] See the work of Metz, which is centred on championing *ubuntu* as a moral ethic: T Metz 'Ubuntu as a moral approach and human rights in South Africa' (2011) 11(2) *African Human Rights Law Journal* 533.
[144] *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

The African values of *ubuntu* have thus been crucial in determining constitutional impact and justice.[145] A central aspect of the philosophy of *ubuntu* which is pertinent to the theme and objective of this thesis, articulated by Keep and Midgley, is the inclusive nature of *ubuntu*, which is crucial in promoting stakeholder engagement and in making it an ideal 'overarching vehicle for expressing shared value'.[146] This aspect has the potential to promote labour stability in corporations as it seeks to promote inclusion and harmony in communal relationships. The *ubuntu* approach to corporate governance is critical in championing the struggle to promote social justice and fairness which is aimed at preventing the exclusion of marginalised people, including marginalised workers.[147]

Broadly defined, *ubuntu* is an African world view which places the communal best interest above the interests of individuals, by depending on human interaction to promote harmony in relationships. Aligning the ethos of *ubuntu* with the objective of this thesis would mean that the *ubuntu* values-based approach embodies an interdependency between the company and its employees.[148] It values the promotion of ethical moral values such as dignity and humanity as critical in promoting harmony through humanism (*botho*).[149]

3.5.2 *Ubuntu* and the moral ethic

The most common arguments surrounding the principle of *ubuntu* are the arguments about *ubuntu* as a moral approach as opposed to *ubuntu* as a corporate governance approach. The argument for *ubuntu* as a moral approach is well established in the work of Metz,[150] Mokgoro,[151] Shutte[152] and Broodryk.[153] It goes beyond the objective of this thesis to discuss all their insights and arguments on *ubuntu* as a moral approach. However, the common argument of these scholars is that *ubuntu* serves as a unifying

[145] *Liberty Group Ltd v Mall Space Management CC* [2020] 8 ECL 13 (SCA).
[146] H Keep et al 'The emerging role of ubuntu-botho in developing a consensual South African legal culture' (2007) *Recht der Werkelijkheid* 48.
[147] *S v Makwanyane and Another* (n 144) 772.
[148] Institute of Directors in Southern Africa *King IV Report on Corporate Governance in South Africa* (2016) 24.
[149] TIT Magang & VG Magang 'Ubuntu or botho African culture and corporate governance: A case for diversity in corporate boards' (2017) 6(4) *Business and Management Research* 64.
[150] Metz (n 143).
[151] Mokgoro (n 139).
[152] A Shutte *Ubuntu: An Ethic for a New South Africa* (2001).
[153] J Broodryk 'The philosophy of ubuntu: To improve business success' (2006) 22(6) *Management Today* 20.

moral value, which has the potential to create harmony in difficult times. The moral significance of *ubuntu* in the corporate law context will thus be understood as the need to promote transparency and fairness in corporate governance.

The *ubuntu* approach is different from the traditional corporate law approaches to the purpose of the company in that the latter approaches are embedded with the problems of power, legitimacy and agency, which create more instability in the labour relationships through their either/or effect in corporate governance. Collective unity is a key aspect of *ubuntu* which gives equal weight to the interests of the company with the interests of its stakeholders. As Woerman and Engelbrecht correctly state, *ubuntu* shifts the focus from 'stakes to harmonious relationships', which are absent from the traditional corporate governance approaches.[154]

The *ubuntu* approach moves away from the contractarian approach to stakeholder relationships by assuming that the company has a moral responsibility to those related to it. The essence of *ubuntu* as a moral approach is that the relationship between the company and its constituents is based on what is morally correct. The relationship between the company and its stakeholders is thus based on the values of morally correct behaviour and not on contract. When linking the moral approach embedded in *ubuntu* with the purpose of the company, the distinguishing feature then becomes the premise of *botho* humanity, which views individuals or constituents as interconnected and interdependent, moving away from the independent narrative embedded in shareholder-centric theories.[155]

In an *ubuntu* context, a company thus has the moral responsibility to promote harmony, humility and responsiveness to those with whom it has a relationship. This narrative has much to offer in the corporate governance landscape as corporate law has the propensity to perpetuate and worsen labour instability, inequality, environmental degradation, and other corporate abuses. *Ubuntu* thus paves the way for harmony, unity, diversity and inclusion, all of which are not prominent in traditional corporate law approaches.

3.5.3 The *ubuntu* approach and corporate governance

The *ubuntu* approach as a corporate governance approach requires a company to be governed in a manner that promotes shared humanness or the spirit of *botho*.[156] This

[154] Woermann & Engelbrecht (n 142) 42.
[155] Shareholder primacy is discussed above. See Berle (n 1) 1367.
[156] Broodryk (n 153).

humanness is based on the moral interdependence of stakeholders that is embedded in the *ubuntu* approach.[157] Thus *ubuntu* has the potential to serve as both a moral approach[158] and a corporate governance approach – that is, it has normative implications that can guide corporate actions without ignoring the separate legal personality of the company.[159]

This role of *ubuntu* in corporate governance is not a novel perspective in the corporate governance literature.[160] As argued above, the stakeholder approach as advocated by Freeman embodies certain elements of *ubuntu* albeit with some limitations.[161] The essence of the stakeholder approach is the balancing of stakeholders' interests. In contrast, the essence of *ubuntu* is the building of communal stakeholder relationships based on the interdependency between the company and its stakeholders.[162] Because of this interdependency, *ubuntu* regards the interests of the stakeholders as the interests of the company.

This brings into play the elements of humanity embedded in the approach which shape the interaction between the company and other stakeholders as co-dependent on one another.[163] The value of the concept becomes much clearer when its social dimensions are highlighted. Hence, 'group solidarity, compassion, collective unity and respect are key features in the social values of *ubuntu*'.[164] These features are crucial in mitigating the adversarial nature of the labour relations environment by bringing about much-needed stability through collective unity in corporate management.

This narrative stands in stark contrast with traditional corporate law approaches which view companies and its respective stakeholders as independent and unequal, based on the value of the contributions made and the overall superiority of one constituent over the other.[165] The company, since it is independent and of primary

[157] M Tschaepe 'A humanist ethic of ubuntu: Understanding moral obligation and community' (2013) 21(2) *Essays in the Philosophy of Humanism* 47.
[158] Metz (n 143) 533.
[159] *Salomon v Salomon* (n 30).
[160] Institute of Directors in Southern Africa *King II Report on Corporate Governance in South Africa* (2002). See chapter 4 for a discussion on King.
[161] R Freeman et al 'Company stakeholder responsibility: A new approach to CSR' Institute for Corporate Ethics Bridge Paper (2006) 9.
[162] Woermann & Engelbrecht (n 142). See also Institute of Directors in Southern Africa *King IV Report on Corporate Governance in South Africa* (2016) 24.
[163] Ibid.
[164] Mokgoro (n 139) 3.
[165] This forms the essence of the shareholder primacy approach. See Brandt & Georgiou (n 27).

importance, is established for the benefit of the shareholders and has interests which must remain primary throughout the operations of the company.[166]

Under the *ubuntu* approach, when company directors exercise their fiduciary duties, they are completely divorced from the traditional notions of shareholder primacy by adopting an inclusive approach to corporate governance. *Ubuntu* in corporate governance is thus about harnessing the energies and outputs of communal relationships to meet the interests of the company by broadening the value proposition for shareholders to more than just profit maximisation.[167]

Under *ubuntu* the value component is morally driven and communal in that it seeks to promote humanness in all areas of corporate management.[168] This is, however, an ongoing process, and one that will require a company director and employees to consider the ethos of *ubuntu* when negotiating employees' demands through collective bargaining and when fulfilling their fiduciary duty to the company. Under *ubuntu*, what is in the best interest of the company is a collective decision which embraces dignity and humanness. The dignity of the corporation as a corporate citizen is thus preserved when the ethos of *botho* is considered in corporate management. This aligns with the Constitution and the King principles.[169]

To summarise, the *ubuntu* approach to corporate governances acknowledges that a company is represented by various groups of corporate stakeholders whose values and interests are different and vary from time to time. Directors should be aware of this and should specifically bear in mind all corporate legislation when protecting these stakeholders and when managing the company. However, the main purpose of applying *ubuntu* as a corporate governance approach is to maintain and protect long-term value, which is not limited to shareholder value in the traditional sense and/or stakeholder value as argued for under stakeholder capitalism.[170] The value dimensions under *ubuntu* extend beyond traditional shareholder value in that *ubuntu* embraces the African values of humanness and collective unity in corporate management. These values may not necessarily translate into corporate financial performance, but they

[166] Million (n 10).
[167] Ibid.
[168] Ibid.
[169] For a detailed discussion on the King Code, see chapter 5.
[170] World Economic Forum (n 1).

have the potential to mitigate labour instability by creating shared value as a key feature of internal CSR.[171]

3.5.4 The limitations of the *ubuntu* approach for internal CSR

While a focus on interdependence, harmony and humanity can be viewed as an ideal approach to remedying the global challenges caused by the traditional governance approaches, the metaphorical elements of humanness and collective unity embraced under *ubuntu* might be too simplistic for the realities of day-to-day corporate governance. Critics of the approach contest the viability of the moral value of *ubuntu* in achieving bottom-line objectives.[172] They question the practicality of *ubuntu* as a business practice, with scholars arguing that the principle cannot meet the realities of the business world.[173] It is not clear whether the approach will be suitable for promoting corporate financial performance. Moreover, the identity of *ubuntu* as a moral value promotes elements of African socialism, which are political and somewhat controversial in the business environment.[174]

As with CSR, the definition of *ubuntu* is highly controversial. It is political in nature and there is no uniformity about what *ubuntu* means.[175] Although the general meaning and spirit of *ubuntu* are broadly understood in the literature, there are different interpretations of *ubuntu*.[176] For instance, Shutte's approach uses religion to argue for *ubuntu* in both philosophy and as a faith value based on Christian beliefs;[177] Metz's approach argues for *ubuntu* as a moral ethic;[178] and Mokgoro's *ubuntu* is centred on building legal and constitutional jurisprudence based on the understanding of *ubuntu* as an approach aimed at promoting justice and fairness in the courts' decision-making

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[171] For a discussion on shared value as an essential characteristic of internal CSR, see chapter 2 para 2.3.1.

[172] M Saleh, N Zulkifli & R Muhamad 'Looking for evidence of the relationship between corporate social responsibility and corporate financial performance in an emerging market' (2011) 3(2) *Asia-Pacific Journal of Business Administration* 165. See also DA McDonald 'Ubuntu bashing: The marketisation of "African values" in South Africa' (2010) 37(124) *Review of African Political Economy* 143.

[173] McDonald ibid.

[174] Ibid 140.

[175] Ibid.

[176] Ibid. See also N Mboti 'May the real ubuntu please stand up?' (2015) 30(2) *Journal of Media Ethics* 126.

[177] Shutte (n 152).

[178] T Metz 'Just the beginning for ubuntu: Reply to Matolino and Kwindingwi' (2014) 33(1) *South African Journal of Philosophy* 65.

processes.[179] This creates different interpretations of and arguments for *ubuntu*. It is argued that the approach is paradoxical in that the moral ethos of the principle is widely interpreted and subjective.[180]

In a corporate governance context, *ubuntu* is broad and vague and can leave the company director with insufficient guidance on how to approach the elements of morality in the decision-making process. For example, in terms of *ubuntu*, which value should a company director prioritise in cases of labour instability leading to violence and a continued state of unrest? Which decision should a company director take when the impact of such a decision affects different relationships within the company? Which decision should the director take when shareholder value maximisation is at risk?

A case in point is Marikana. How would an *ubuntu*-inspired company director attempt to advance solutions to the labour unrest through *ubuntu*? Morality is subjective, and is influenced by a person's level of exposure, feelings, and religious and cultural beliefs.[181] It can thus mean different things to different groups within a specific period. An *ubuntu*-inspired director would approach conflict and the challenges of labour instability through the lens of creating harmony and preserving communal relationships if this is in the collective best interests of the company.

Finally, it has been argued that *ubuntu* as a moral approach is too simplistic for corporate governance and can thus suffer from being vague, since it arguably lacks both theoretical and analytical rigour.[182] Like CSR, the approach is over-marketised in the moral regeneration discourses that are useful for nation-building and attracting capital from investors.[183] However, despite these criticisms, it can be argued that traditional corporate law approaches do not unequivocally embody principles that are suitable for the economic and corporate conditions of all countries.

Thus, it is submitted that the *ubuntu* approach could be the appropriate approach for the pursuit of internal CSR for labour stability but may not be the correct approach

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[179] Mokgoro (n 139) 2. See also D Cornell & K van Marle 'A call for a nuanced constitutional jurisprudence: South Africa, ubuntu, dignity, and reconciliation' in VG Sanja Bahun & J Rajan *Violence and Gender in the Globalized World* 2 ed (2015) 113.
[180] McDonald (n 172) 141.
[181] See generally R McKay & H Whitehouse 'Religion and morality' (2015) 141(2) *Psychological Bulletin* 453.
[182] McDonald (n 172) 140.
[183] Ibid.

for the governance of all companies. This is because the pursuit of labour stability is best approached when the interests of all relevant stakeholders are equated. The interdependence between the company and its employees is thus understood as pivotal to the overall sustainability of the company. The *ubuntu* approach to corporate governance has the potential to facilitate much-needed worker participation under company law, as opposed to the existing enlightened shareholder value approach.

3.6 CONCLUSION

This chapter provided a review of the different approaches to corporate governance. The shareholder-centric approach, the non-shareholder-centric approach and the *ubuntu* approach to corporate governance were discussed. The chapter found that the shareholder-centric and the non-shareholder-centric approaches have either a strong shareholder value emphasis or an exclusive stakeholder value emphasis. Therefore, because of the inherent flaws and limitations of the shareholder-centric and the non-shareholder-centric approaches discussed above, an African-values approach centred on the principles of *ubuntu* was advocated. This is because the *ubuntu* approach to corporate governance is crucial in promoting humanness in corporate relationships, which is pivotal in promoting much-needed labour relations stability through internal CSR.

The shareholder-centric and non-shareholder-centric approaches do not offer an equivalent for internal CSR for labour stability. Nevertheless, the limitations embedded in *ubuntu* as a corporate governance approach because of its metaphorical features are acknowledged. With these limitations in mind, it is submitted that *ubuntu* as a corporate governance approach has much to offer to the efforts to achieve labour stability through internal CSR. This is because the element of ‘humanness’ in *ubuntu* is meaningful and, if understood, it can be acted upon in a way that promotes meaningful engagement with stakeholders.

This is based on the value of the interdependent relationship between the company and its stakeholders and the accompanying need to promote shared value through harmony in labour relationships. This forms the essence of internal CSR, as discussed in chapter 2. The discussion in this chapter has laid the foundation for the chapter that follows, which seeks to find a place for internal CSR for labour stability in the Companies Act.

The next chapter discusses the legal framework for company law and the place of internal CSR under company law. It builds on the foundations of the preceding chapters by critically investigating whether internal CSR for labour stability can find a place within the provisions of the s 72(4) social and ethics committee. The chapter expounds on how internal CSR could promote labour stability by using the principles of *ubuntu*. The chapter critically discusses the proposed amendments to the Companies Act and the potential place for employee voice in the Companies Amendment Bill, 2021. Furthermore, the chapter critically considers how the proposed amendments in the Companies Bill could promote internal CSR in the Act. The chapter also notes some oversights in the Bill and some improvements that can be made.

CHAPTER FOUR: INTERNAL CSR AND THE COMPANIES ACT

4.1 INTRODUCTION

Chapter 3 established which corporate governance approach would best promote internal CSR for labour stability. The *ubuntu* approach was presented as the most appropriate approach for promoting internal CSR for labour stability under company law. This is because labour stability through internal CSR could be achieved if there is an element of humanness and collective unity in worker participation initiatives.

As noted in chapter 2, the DTIC in South Africa is currently in the process of reviewing the legal framework for company law to encourage worker participation by placing employees on boards of directors. While this is noteworthy progress in corporate governance, this chapter argues that there is already a place for employee representation in company law, although this avenue is underutilised and overlooked. The reference to this ongoing development adds to the argument in this thesis that similar outcomes could be achieved through a refined focus to company law, informed by internal CSR considerations on the composition and objectives of the social and ethics committee. The chapter seeks to show how this committee has the potential to complement existing labour law by promoting labour stability through company law, without infringing on the existing avenues for labour stability under labour law.

The chapter commences with a brief overview of South Africa's company law review process and the Companies Act. It provides a microscopic review of the provisions of s 72(4), which establishes the social and ethics committee, read together with reg 43 of the Companies Regulations, 2011. This is followed by an examination of the potential of the social and ethics committee to accommodate the broader notions of internal CSR as a channel for strengthening employee engagement and protecting employees' rights and interests in terms of company law. In doing so, the legal structure and functions of the committee are explored. Lastly, the chapter provides a comment on clause 15 of the Companies Amendment Bill, 2021, which addresses the proposed changes to the workings of the social and ethics committee.[1]

[1] Companies Bill, 2021, available at *http://www.thedtic.gov.za/wpcontent/uploads/Revised_Companies_Amendment_Bill-1_October2021.pd*f (accessed on 5 October 2021).

4.2 THE STATUTORY REGIME

In South Africa's business law landscape, four major legal frameworks have governed company law.[2] These legal instruments are strongly influenced by English law, which forms part of South Africa's common law and has been at the epicentre of the South African corporate law landscape for centuries.[3] The incorporation of businesses as companies in South Africa was a relatively rare business form as there was no comprehensive legislation governing companies until 1844.[4] The first South African company legislation was the Companies Act 46 of 1926, which was based on the Transvaal Companies Act 38 of 1909, which was in turn based on the English Companies (Consolidation) Act of 1908.[5] The next major piece of South African legislation was the Companies Act 61 of 1973, which remained in force for almost four decades, until it was repealed on 31 April 2011.[6] Today, the company law of South Africa is governed by the 'new' Companies Act 71 of 2008.[7]

4.2.1 The Companies Act 61 of 1973

The Companies Act 61 of 1973 (the 1973 Act) has governed the way in which companies do business in South Africa in two different socio-political landscapes. First, the Act was passed during the height of the apartheid regime in 1973 and remained in force for 38 years.[8] The operations of the Act were further influenced by English case law and the directives issued by the ruling party, which played a key role

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[2] See 'Company Law for the Twenty-first Century: Guidelines for Corporate Law Reform' published in General Notice 1183 of *Government Gazette* 26493, 23 June 2004, at 3. Available at *http://www.gov.za/sites/www.gov.za/files/26493_gen1183a.pdf* (accessed on 3 February 2016).

[3] T Mongalo 'South Africanizing company law for a modern competitive global economy' (2004) 121(1) *South African Law Journal* 93.

[4] SD Girvin 'The antecedents of South African company law' (1992) 13(1) *Journal of Legal History* 66.

[5] Ibid 67. The influence of English law is also reflected in the fact that English case law has persuasive force in South Africa and has a strong influence in many cases decided in the courts of South Africa today. One example is the famous English case of *Salomon v A Salomon & Co Ltd* 1897 AC 22; 1895–99 All ER Rep 33 (HL).

[6] Ibid 70. All the company law statutes that existed during the apartheid regime remained in force after the democratic elections in 1994, until the Act was repealed in April 2011. Although an extensive process of corporate law reform was first undertaken in South Africa by the Van Wyk de Vries Commission in 1963 to introduce the Companies Act of 1973, the Act remained a faithful reproduction of the English Companies Act. See Mongalo 'South Africanizing company law' (n 3) 96.

[7] Although the Companies Act 71 of 2008 has been in force for more than a decade, most scholars still refer to it as the 'new' Companies Act. See generally I-M Esser & P Delport 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1' (2017) 50 *De Jure* 102.

[8] Ibid.

in ensuring an exclusive corporate law regime.[9] The result of this was an unnecessarily complicated, inaccessible and confusing collection of legal instruments with no coherence or consistency.[10]

As noted by Mongalo, the purpose of any corporate law regime is to ensure competitive advantage by creating a corporate law landscape that is attractive to investors.[11] This is because the success of any economy is determined by the presence of foreign direct investment in the economic market.[12] This is evidenced by the power of corporations in building society, creating employment and contributing to the GDP.[13] It goes without saying that the existence of markets depends on the investments made by investors. However, attracting and keeping such investors depends on the corporate law regime at play and other market factors,[14] such as a stable labour relations environment. The emphasis is on the accountability and transparency of corporations, as corporations have become even more crucial in sustaining the economy and building society. Therefore, to encourage investor confidence, the whole structure and purpose of the modern corporation must be focused on building the highest levels of accountability and transparency by enforcing good corporate governance principles.[15] However, in doing so, the corporate law regime at play must not be so overly regulated that the process of doing business becomes inefficient.[16]

The 1973 Act did not possess the qualities required for the modern corporation. First, the formation of companies was a cumbersome and inflexible procedure.[17] The Act was wholly prescriptive, which in turn discouraged the incorporation of companies and entrepreneurship, resulting in low business investment.[18] Additionally, the process of corporate finance was based on the inflexible capital maintenance scheme and the

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[9] Girvin (n 4) 67.
[10] 'Guidelines for Corporate Law Reform' (n 2) 13 and 14.
[11] Mongalo 'South Africanizing company law' (n 3) 97.
[12] Ibid.
[13] J Lewis 'Factors influencing foreign direct investment in lesser developed countries' (1999) 8 *The Park Palace Economist* 103–105. See Tables 2 to 6, where Lewis summarises the relationship between foreign direct investment and GDP.
[14] Ibid 99. Market factors include the economic principles at play.
[15] 'Guidelines for Corporate Law Reform' (n 2) 13.
[16] Ibid. For instance, in South African company law and the UK Companies Act, 2006, the common-law duties of directors are codified by s 75 of the Companies Act and s 172 of the UK Companies Act, 2006, respectively.
[17] In terms of the Companies Act 61 of 1973, a person who wished to form a company had to draw up or get a legal professional to draw up two basic documents: the company's memorandum of association and its articles of association. Section 13(1) of the new Act has simplified this process as it requires only one such document, namely a memorandum of incorporation (MOI).
[18] T Mongalo 'An overview of company law reform in South Africa: From the Guidelines to the Companies Act' (2008) *Acta Juridica* xxi.

archaic concept of par value shares.[19] The process of corporate restructuring under the judicial management system was an expensive and underused procedure in company law.[20] Significantly, the common-law duties of directors, which provide for directors' liability, were also not codified.[21]

Moreover, given South Africa's socio-political transformation, the 1973 Act was not amended to promote corporate governance and compliance with human and environmental rights, or to provide for avenues for social responsibility by the company to any other group of corporate stakeholders, apart from the shareholders of the company.[22] This was in spite of the rise in global awareness about the role of corporations in environmental degradation and human rights abuses.[23] The Act was silent on CSR, and the literature confirms that the 1973 Act did not contain legislative provisions which explicitly or implicitly promoted the administration of CSR by companies in South Africa.[24]

A modern corporation in the South African context is one that acknowledges the supremacy of the Constitution, which guarantees fundamental human and environmental rights.[25] These aspects are significant in promoting modern sustainable corporations which have a competitive advantage. This is because global investor confidence is influenced by the protection of these rights through transparency, accountability and engagement.[26] These are key themes which are embedded in the *ubuntu* approach as respect for human dignity is essential for promoting harmony in labour relationships. Thus, the approach embedded in the 1973 Act became obsolete as it eschewed the notion of an inclusive focus on corporate governance. The Act did this by cementing the position of the traditional shareholder primacy approach to

[19] See s 35(2) of the 1973 Companies Act. A major change introduced by the new Companies Act is that a share will no longer have a fixed or nominal value ('par value shares') but will be fixed in number only ('no par value shares'). For a discussion of the capital maintenance scheme, see R Jooste 'Can share capital be reduced other than by way of buy-back?' (2005) *South African Law Journal* 294.
[20] For a discussion of business rescue, see the seminal work of Anneli Loubser: A Loubser 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 137.
[21] Section 77(6) of the Companies Act.
[22] Ibid.
[23] See generally P Davies, MP Hernandez & T Wyatt 'Economy versus environment: How corporate actors harm both' (2019) 27 *Critical Criminology* 86.
[24] M Gwanyanya 'The South African Companies Act and the realisation of corporate human rights responsibilities' (2015) 18 *PER* 3107.
[25] See Chapter 2 of the Constitution of the Republic of South Africa, 1996.
[26] See generally A Willis 'The role of the global reporting initiative's sustainability reporting guidelines in the social screening of investments' (2003) 43 *Journal of Business Ethics* 233.

corporate management as a fundamental practice for doing business in South Africa for almost four decades.[27]

4.2.2 Corporate law reform and the Companies Act of 2008

The South African process of corporate law reform has been described by scholars as a challenging and delicate process.[28] This process was introduced to allow company law to break free from its outdated colonial roots and to provide a modern corporate law framework.[29] The process aimed to create an accessible company law regime that would facilitate effective channels for socio-economic transformation, improved accountability and transparency within the corporation.[30] In addition, the country's corporate law regime was not only inaccessible, but also lagging behind global market trends and developments in corporate law.[31] There was underlying pressure to be up to date with higher standards of good corporate governance, as expressed by the DTI when it commented on the inability of the company law to effect change in the domestic corporate law landscape:

> South Africa cannot afford to be left behind. There is a growing recognition by companies and governments that there is a need for higher standards of corporate governance and ethics and greater interdependence between enterprises and the societies in which they operate … Socio-political and economic change in South Africa has underscored the need for social responsiveness, transparency, and accountability of enterprises.[32]

The need to modernise company law became increasingly important as global corporate failures were occurring at a much faster rate.[33] Modern corporations need to be governed by a corporate law regime that can strike a balance between investor

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[27] See chapter 3 for a discussion of shareholder primacy.
[28] Although the discussions on corporate law reform had taken place from as early as 1998, the process of corporate law reform took place for a period of five years. See Mongalo 'An overview of company law reform in South Africa' (n 18) xvi.
[29] Mongalo 'South Africanizing company law' (n 3) 93.
[30] 'Guidelines for Corporate Law Reform' (n 2) 10.
[31] Ibid.
[32] Ibid. See also R Cassim & F Cassim 'The reform of corporate law in South Africa' (2005) *International Company and Commercial Law Review* 411.
[33] See generally JA Petrick & RF Scherer 'The Enron scandal and the neglect of management integrity capacity' (2003) *American Journal of Business* 37.

interests and stakeholder interests.[34] These components are essential in ensuring the success of any economy. Thus, the long overdue process of corporate law reform offered South Africa an unprecedented opportunity to provide for much-needed economic transformation through an accessible company law framework.[35]

To facilitate a more effective process of corporate law reform, part of the process included the establishment of a review committee which was charged with providing a framework for corporate law reform.[36] This committee comprised local and international experts, including academics, in the fields of commerce and law.[37] One of the key objectives of the review committee was to provide a framework that encouraged investment in South Africa through improved competitiveness and accountability.[38]

In this regard the process was focused on simplifying company law, by providing a framework that was less prescriptive, easy and accessible to everyone.[39] The formation of companies would now be simplified and, with the development of modern technology, would allow for incorporation through online platforms provided by the Companies and Intellectual Property Commission.[40] The motivation for this was to promote investor confidence and encourage entrepreneurship.

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[34] MK Havenga 'The social and ethics committee in South African company law' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 291.

[35] Mongalo 'South Africanizing company law' (n 3) 97. The first company law restructuring took place in 1963, when the Van Wyk de Vries Commission sought to conduct a complete overhaul of the Companies Act 61 of 1973. The Act was deemed cumbersome in that it was not keeping up with the fast-growing developments in English law. The Jenkins Committee of 1962 was thus established to track developments of what was considered modern company law. The objective was to track the path for a unique South African company law framework, but the basic structures of the Act remained similar, if not identical, to company law in the UK.

[36] Mongalo 'An overview of company law reform in South Africa' (n 18) xii.

[37] The review committee comprised experts in law, academia and commerce, including accountants and judges from the US and Australia. See Mongalo 'An overview of company law reform in South Africa' (n 18) xii to xxv for a list of the names and positions of the company law review team. One expert was Professor Samuel C Thomas Jnr, a distinguished faculty scholar from Penn State University specialising in mergers and acquisitions, tax, corporation securities and very complex international commercial transactions. Professor Thomas also advised the US tax policy advisor, on behalf of the US Treasury Department's Tax Assistance Office, to the South African Ministry of Finance in Pretoria. See generally *https://pennstatelaw.psu.edu/faculty/thompson-jr* . Another expert was Mr James Hanks Jnr, a corporate governance law expert from the US, whose work included working on mergers and acquisitions, corporate governance and compliance law. See *https://www.law.umaryland.edu/faculty/profiles/faculty.html?facultynum=1096.*

[38] Mongalo 'An overview of company law reform in South Africa' (n 18) xii.

[39] 'Guidelines for Corporate Law Reform' (n 2) 13–14.

[40] The Companies Act established the Companies and Intellectual Property Commission, which allows for the process of incorporation and company name reservation to take place online. This is in line with global developments, where businesses across the globe are going digital.

The new Companies Act embodied a number of innovative components, including replacing the archaic concept of par value shares with the modernisation of capital,[41] corporate restructuring through business rescue,[42] the creation of higher standards of good corporate governance by codifying the common-law duties of directors which provide for directors' liability,[43] and the formation of structures for alternative dispute resolution.[44] The Act also simplified and streamlined legislative procedures by introducing the Companies Tribunal. The aim of this tribunal is *inter alia* to reduce the costs of compliance by providing speedy and effective remedies for ordinary South African stakeholders.[45]

4.3 THE SOCIAL AND ETHICS COMMITTEE AND CSR

On 1 May 2011, the legislature undertook what could arguably be labelled a paradigm shift to good corporate governance in South Africa. This was done through the provisions of s 72(4) of the Companies Act, read in conjunction with reg 43 of the Companies Regulations, 2011. Section 72(4) of the Companies Act provides that:

> The Minister may by regulation prescribe that a company or a category of companies must have a social and ethics committee, if it is desirable in the public interest, having regard to–
> *(a)* its annual turnover;
> *(b)* the size of its workforce; or
> *(c)* the nature and extent of its activities.

The regulations require certain companies to report on how the operations of the company impact a broad range of corporate stakeholders, including employees, the environment, consumers, suppliers and local communities.[46] In this regard, the social and ethics committee presents an ideal platform for sensitising the directors and the shareholders of a company at board level on issues affecting employees as the internal

[41] See generally Part D of the Companies Act.
[42] Chapter 6 of the Companies Act deals specifically with business rescue. Business rescue is a corporate restructuring procedure that aims to facilitate the rehabilitation of a financially distressed company by providing for the appointment of a business rescue practitioner who will temporarily supervise the management of the company and its affairs. Business rescue also provides for a temporary moratorium on the rights of claimants against the company or in respect of its assets. See R Bradstreet 'The new business rescue: Will creditors sink or swim?' (2011) 128 *South African Law Journal* 352–380.
[43] See s 77(6) of the Companies Act.
[44] Part C of Chapter 7 sets out 'Voluntary resolution of disputes', with ss 166, 167 and 169 providing a framework for alternative dispute resolution.
[45] See Part B of Chapter 8 of the Companies Act.
[46] Regulation 43(5) of the Companies Regulations, 2011.

stakeholders of the company. This interesting feature of modern company law creates an unprecedented opportunity for companies to consider their legal and socio-ethical footprint in a manner that is uniquely South African.

It can thus be said that the social and ethics committee is an innovative and unprecedented means of recognising CSR and internal CSR within the provisions of the new Companies Act.[47] Although the committee does not explicitly refer to CSR, its mandate entails the monitoring of and reporting on the company's socio-economic development footprint, which indicates a strong affinity to CSR and internal CSR-related objectives and practices.[48]

The social and ethics committee can be described as the custodian of the social, environmental and ethical values of the corporation.[49] The committee thus serves as a board committee as it can sit at the company's annual general meeting and can ensure that the company, in its quest to optimise shareholder value, considers the impact of such optimisation on corporate stakeholders.[50]

It should be noted that the social and ethics committee is a board committee by virtue of its appointment by the board in terms of the provisions of s 72(5). The board establishes a social and ethics committee by exercising its power to delegate the functions of a director to a person or group of persons. Moreover, this position is emphasised by reg 43(3) of the Companies Regulations, 2011, which states that '[a] board of a company … is required to have a social and ethics committee'.[51]

The presence of a structured committee such as the social and ethics committee within the company is crucial as it can help to ensure that the company's business activities are conducted with an integrated approach to creating shared value within the corporation. A discussion of the social and ethics committee insofar as it relates to the place for internal CSR and employee engagement for labour stability follows.

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[47] See s 72(4) and reg 43(5)*(a)* of the Companies Regulations, 2011.
[48] See chapter 2.
[49] Regulation 43(5)*(a)*(i)–(v) of the Companies Regulations, 2011.
[50] See also HJ Kloppers 'Driving corporate social responsibility CSR through the Companies Act: An overview of the role of the social and ethics committee' (2013) 16 *PER* 167.
[51] The debate on whether the social and ethics committee is a company committee or a board committee is ongoing. See Kloppers ibid and MM Botha 'Evaluating the social and ethics committee: Is labour the missing link?' (2017) 80 *THRHR* 2. However, in this thesis it is submitted that the social and ethics committee is a board committee.

4.3.1 The requirements to appoint a social and ethics committee

In terms of the regulations, the Minister of Trade and Industry may prescribe a category of companies that must have a social and ethics committee.[52] However, for a company to appoint a social and ethics committee, it must be desirable to do so, taking into account the company's annual turnover, the size of the company's workforce, and the nature and activities of the company.[53] All state-owned companies and every listed public company must appoint a social and ethics committee in terms of reg 43. Moreover, any other company that has, in any two of the previous five years, had a public interest score of at least 500 points must appoint a social and ethics committee.[54]

The legislature has put a cap on the categories of companies that can appoint a social and ethics committee, but the rationale for this is not clear; there is no explanation why the categories of companies which must appoint a social and ethics committee are limited. However, the costs of setting up a social and ethics committee may explain the limitation.[55] Nevertheless, given the functions of the social and ethics committee and its influence on a company's contribution to the socio-economic development agenda, it seems prudent for all companies, regardless of size and public interest score, to establish a social and ethics committee.[56]

A company may apply to the Companies Tribunal for an exemption from the requirement to appoint a social and ethics committee, as required by s 72(5) of the Companies Act.[57] The tribunal is responsible for deciding in terms of s 72(5)*(b)* if it is reasonably necessary in the public interest to require the company to have a social and

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[52] Regulation 43(3) of the Companies Regulations, 2011.

[53] Section 72(5) of the Companies Act.

[54] Regulation 26(2) sets out the formula for calculating the public interest score of the company. The public interest score of a company is calculated at the end of a company's financial year as the total sum of each of the following:

(a) the number of points equal to the average number of employees of the company during the financial year;
(b) one point for every one million rand (or portion thereof) in third party liability at the financial year end;
(c) one point for every one million rand (or portion thereof) in turnover during the financial year; and
(d) one point for every individual who, at the end of the financial year, is known by the company to have, directly or indirectly, a beneficial interest in any of the company's issued securities, or to be members of a non-profit company.

[55] The costs of setting up a social and ethics committee are discussed in para 4.3.4.5.

[56] Regulation 43(5) of the Companies Regulations, 2011.

[57] See generally *Ex parte Grassridge Windpower (RF) (Pty) Ltd* (CT00145/ADJ/2019). In this case, the applicant applied for an exemption on the basis that it had exceeded the minimum public interest score of 500 in the past two financial years and therefore the applicant was required to appoint a social and ethics committee in terms of s 72(4), read with reg 43. An exemption was granted although the applicant had met all the requirements of s 72(4).

ethics committee, having regard to the nature and extent of the activities of the company.[58] However, if one examines the basis upon which such exemptions are applied for and the reasons for granting such exemptions by the tribunal, it appears that the tribunal grants exemptions on the basis of a legal technicality and not necessarily based on the holistic impact of such exemptions on the broader society.[59] The granting of such exemptions, if not considered holistically, may have significant consequences for employee engagement and internal CSR as a form of worker participation.

Moreover, given the ambitious objectives set out by the DTI in 2001,[60] in this area there should be an integrated holistic approach to the granting of such exemptions and not merely an application of the law to the facts.[61] Given the impact of companies on the economy and in building societies, it is imperative to ensure that exemptions are granted with reference to the social setting of the company and the overall needs of the community within which the company conducts its business, as this can have significant limitations for CSR and internal CSR as a form of employee engagement.

4.3.2 The composition of the social and ethics committee

In terms of reg 43(4) of the Companies Regulations 2011, a company's social and ethics committee must comprise not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company's business. The rationale for this composition is the creation of a committee that ensures transparency and accountability. This is done by ensuring that the committee members uphold the integrity of their mandate, since the appointed directors and prescribed officers are not involved in the executive management of the company's business and will therefore be able to provide an objective monitoring function for the board of directors. The value in this is also extended to the shareholders of the company, since the social and ethics committee must also report to the shareholders at the annual meeting of the shareholders.[62]

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[58] Ibid.
[59] See generally *Ex parte Fox Street 5 (RF) Ltd* (CT006FEB2019) and *Ex parte Eric Ellerine Trust (Pty) Ltd* (CT014Sept2018).
[60] 'Guidelines for Corporate Law Reform' (n 2) 3.
[61] *Ex parte Fox Street* (n 59).
[62] Regulation 43(5)*(b)* and *(c)* of the Companies Regulations, 2011.

4.3.3 The functions of the social and ethics committee and internal CSR

The functions of the social and ethics committee are set out in reg 43(5)*(a)*. Generally, the committee's function is to monitor and report on all matters within the committee's mandate. In terms of reg 43(5)*(a)*, the committee should monitor the company by overseeing the company's compliance with the following functions:

> (i) social and economic development, including the company's standing in terms of the goals and purposes of–
>
> *(aa)* the 10 principles set out in the United Nations Global Compact Principles; and
>
> *(bb)* the OECD recommendations regarding corruption;
>
> *(cc)* the Employment Equity Act; and
>
> *(dd)* the Broad-Based Black Economic Empowerment Act
>
> (ii) good corporate citizenship, including the company's–
>
> *(aa)* promotion of equality, prevention of unfair discrimination, and reduction of corruption;
>
> *(bb)* contribution to the development of communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and
>
> *(cc)* record of sponsorship, donations and charitable giving;
>
> (iii) the environment, health and public safety, including the impact of the company's activities and of its products or services;
>
> (iv) consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws; and
>
> (v) labour and employment; including–
>
> *(aa)* the company's standing in terms of the International Labour Organization Protocol on decent work and working conditions; and
>
> *(bb)* the company's employment relationships, and its contribution toward the educational development of its employees.

The discussion that follows provides an overview of the functions of the social and ethics committee as set out in the regulations. Details are provided on the efficacy of the social and ethics committee's functions in promoting avenues for internal CSR as set out in reg 43(5)*(a)*(i)(v) of the Companies Regulations, 2011. Regulation 43(5)*(a)*(iv), which deals with consumer relationships and the Consumer Protection Act 68 of 2008, is excluded, as these issues fall beyond the scope of this thesis.

4.3.3.1 Monitoring social and economic development

From the moment of incorporation, companies play a key role in the development of the socio-economic fabric of any society.[63] This role and influence of the corporation are manifested in the development of society through the establishment of infrastructure, the provision of goods and services, and ultimately job creation.[64] The value of the company in socio-economic development is indispensable, irrespective of whether the company is operating in a developed or developing economy. Moreover, given the advent of modern technology and globalisation, the impact of the modern corporation in socio-economic development is infinite. For this reason, it has become increasingly important for companies to monitor and report on socio-economic development.[65]

In the South African context, investment by companies in society is pivotal in that the infrastructure brought by companies to communities provides an avenue for the provision of socio-economic rights as outlined in Chapter 2 of the Constitution. Thus, the social standing of a company is improved when the company intentionally monitors its contribution to socio-economic development. This forms part of the essential character of CSR as discussed in chapter 2 of this thesis, which describes CSR as a concept that promotes corporate philanthropy through initiatives that enhance socio-economic development.

In this regard, it is correctly proposed by Kloppers that when the social and ethics committee monitors and reports on socio-economic issues, the focus must be on the social dimensions of the company's footprint as opposed to the economic impact of the company.[66] This is because the company has sufficient resources to report on economic development issues and this mandate should be reserved exclusively for the audit committee.[67] Moreover, in line with Kloppers' reasoning, this will also allow the social and ethics committee, which has at least three members, to focus its resources on monitoring and reporting on social development initiatives in the company. This delineation is pivotal for both internal CSR and employee engagement at board level.

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[63] 'Guidelines for Corporate Law Reform' (n 2) 13–14.
[64] Botha (n 51) 2.
[65] J Solomon & W Maroon *Integrated Reporting: The Influence of King III on Social, Ethical and Environmental Reporting* (2012) 7, available at *file:///C:/Users/infom/Downloads/techtpiirsa%20(2).*pdf (accessed on 15 June 2019).
[66] Kloppers (n 50) 172.
[67] Ibid.

4.3.3.2 Monitoring compliance with the Employment Equity Act

Regulation 43(5)*(a)*(i)*(cc)* provides that a function of the social and ethics committee is to monitor compliance with the Employment Equity Act 55 of 1998 (EEA). It is important to note from the outset that the company's compliance with international CSR instruments and the Broad-Based Black Economic Empowerment Act 53 of 2003[68] is voluntary; however, employers who have more than 50 employees and employers with an annual turnover threshold that is equal to or exceeds the standard industrial classification as set out in Schedule 4 of the EEA are compelled to apply the EEA.[69] The EEA promotes equality as entrenched in the equality clause in the Constitution.[70]

The purpose of the Act is to achieve workplace equity by promoting equal opportunity in employment and preventing discrimination in the workplace.[71] In doing so, companies must implement affirmative action measures to redress the disadvantages experienced by historically disadvantaged black persons, women and people with disabilities.[72] The Act requires the employer to prepare and implement an employment equity plan.[73] The standardised plan comprises broad objectives which include affirmative action measures, measures for internal monitoring, dispute resolution mechanisms and measures for equitable representation.[74] This plan is meant to enable the company as the employer to make reasonable progress towards achieving equality and non-discrimination in the workplace. The social and ethics committee is required in terms of the regulation not only to report on this plan, but also to monitor compliance with the EEA within the company.[75]

The EEA plays an important role in promoting standards that are central to internal CSR in that equality in the workplace is a significant component of the promotion of labour stability.[76] Chapter 3 of the EEA deals specifically with

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[68] The Broad-Based Black Economic Empowerment Act is discussed below.
[69] In terms of Schedule 4 of the EEA, mining and quarrying industries which have a turnover threshold of R7,5 million will have to apply the Act. For a comprehensive list of the turnover thresholds applicable to designated employers, see schedule 4 of the Act.
[70] Section 2*(a)* of the EEA.
[71] Section 2*(b)* of the EEA.
[72] Section 15 of the EEA.
[73] Section 20 of the EEA. In terms of s 20(2)*(a)* the plan must include the objectives to be achieved for each year and the affirmative measures to be implemented by the company in terms of s 15(2) of the Act.
[74] Section 20 of the EEA.
[75] Regulation 43(5)*(a)*(i)*(cc)* of the Companies Regulations, 2011.
[76] LM Peng 'Internal corporate social responsibility: An overview' (2014) 16(8) *Aust J Basic Appl* 24. See chapter 2 for a detailed discussion of internal CSR.

affirmative action, which is an essential feature of internal CSR.[77] In most cases, labour instability stems from discrimination and employment inequality, which may be the result of several factors. The company needs to monitor and report on factors such as race, disability and gender in the annual employment equity report.[78] This report must be based on the employment equity plan which the company must draft and incorporate as part of its business strategy.[79] Significantly, s 16 of the EEA requires the company to take reasonable steps to consult with employees and a representative of a trade union regarding issues of interest to the employees of the company.[80] Doing so allows the company to have better insight into the structure and objectives of the company's employment equity plan. This has merit for internal CSR in that it allows for continual improvement on equity and anti-discrimination measures in the company, as companies must report on their progress, if any, in achieving the objectives set out in the employment equity plan.

Section 24(1) of the EEA states that every employer must identify persons, including senior managers, to implement and monitor an employment equity plan. The Act specifies that every designated employer must assign a senior manager to take responsibility for the monitoring and implementation of the employment equity plan, without specifying whether the structure must be in the form of a committee.[81] The social and ethics committee must comprise three or more non-executive directors and/or prescribed officers. The wording of the Act implies that the senior manager under the EEA must be a manager who is involved in the day-to-day operations of the company and will thus be able to engage the company on issues relating to the implementation of the employment equity plan. However, it is unclear whether this committee is obliged to draft the plan and to oversee its implementation since it comprises mainly non-executive directors or prescribed officers.[82]

In an internal CSR context, the proposed interpretation would be that the committee's role is to monitor compliance with the plan that is drafted by a director

[77] Chapter 3 of the EEA specifically provides for affirmative action and the process by which it can be achieved.
[78] Section 21 of the EEA. Section 21(1)–(6) sets out a timeframe for the company's preparation and submission of the employment equity report to the Director-General, the set date being the first working day of October every year. This report must be published in terms of s 22(1) and must be included in the company's annual financial report.
[79] Section 20 of the EEA.
[80] Sections 16 and 17 of the EEA.
[81] Ibid. See also Kloppers (n 50) 175.
[82] Regulation 43(4) of the Companies Regulations, 2011.

engaged in fulfilling his or her fiduciary duty. The committee would thus be correctly tasked with the active role of overseeing compliance with the plan and the workings of the improvements implemented by the executive directors in promoting employment equity within the company.

Moreover, useful improvements by the directors would be fostered as the committee would play an impartial role in reviewing compliance with the EEA. Additionally, given the fact that the social and ethics committee can report at the annual board meeting and the shareholders' meeting, the monitoring of compliance with the EEA by the social and ethics committee can serve as a useful method of monitoring employment equity for the shareholders, as compliance with the EEA may have a significant influence on labour stability, which is crucial for shareholder value. This then embraces the collective unity embedded in the *ubuntu* approach as a form of corporate governance as it values both the needs and interests of the employees as significant to the needs of the company.

4.3.3.4 Monitoring compliance with the Broad-Based Black Economic Empowerment Act

In terms of the provisions of reg 43(5)*(a)*(i)(*dd)*, the committee should monitor the company's compliance with the Broad-Based Black Economic Empowerment Act (BBBEE Act). Although a consideration of black economic empowerment is not one of the objectives of this thesis,[83] it is important to provide a narrative overview of its significance in promoting socio-economic equality through the Black Economic Empowerment Policy and the BBBEE Act. Both the policy and the Act embody objectives that are central to the ethos of CSR and internal CSR.

4.3.3.4.1 The Black Economic Empowerment Policy: An overview

In South Africa, the advent of the new democratic regime ushered in the introduction of a Black Economic Empowerment Policy (BEE Policy) which sought *inter alia* to promote the economic development of the country.[84] The BEE Policy was aimed at promoting the participation of black persons in the mainstream economic development

[83] See chapter 1 para 1.6.
[84] S Ponte, S Roberts & L van Sittert 'Black economic empowerment, business and the state in South Africa' (2007) 38(5) *Development and Change* 933.

process.[85] The rationale for the BEE Policy was to create avenues for substantial change in the racial composition of the ownership and management structures in existing and new industries.[86] Hence, the Black Economic Empowerment Commission report defines BEE as 'an integrated and coherent socio-economic process',[87] located within the country's national transformation programme, the Reconstruction and Development Programme (RDP).[88] Although there has been much debate about the workings of this framework, it is argued that BEE is not simply a moral initiative to redress the injustices of the past.[89] The policy is a pragmatic growth strategy that aims to realise the country's full economic potential while helping to bring the black majority into the previously racially divided economic mainstream.[90]

4.3.3.4.2 The Broad-Based Black Economic Empowerment Act

The BBBEE Act essentially operates on the understanding that years of systemic racism have contributed to contemporary economic woes, and that government intervention can assist in addressing the consequences of such systemic racism. Black people in South Africa were dispossessed of their land by the apartheid regime and systematically excluded from the economy. The apartheid regime excluded black people from fair trade, professional employment and general freedom of movement. BEE seeks to compensate black people for some of the previous injustices.

The BBBEE Act seeks to increase the number of black people who manage, own and control the country's economy as well as to reduce inequalities.[91] The BBBEE Act is a core institutional CSR instrument which serves as a legislative tool for entrenching CSR responsiveness in companies.[92] This Act was passed in order to remedy one of

[85] Ibid.
[86] A Bindu & B Bassi 'Corporate social responsibility and broad-based black economic empowerment legislation in South Africa: Codes of good practice' (2011) 50(4) *Business & Society* 677.
[87] See chapter 1 of the Black Economic Empowerment Commission's report, Skotaville, Johannesburg (2001) 2, available at *https://www.westerncape.gov.za/text/2004/5/beecomreport.pdf* (accessed on 20 June 2020).
[88] Ibid.
[89] Ibid.
[90] Chapter 2 of the Black Economic Empowerment Commission report (n 87) 5.
[91] See I-M Esser & A Dekker 'Dynamics of corporate governance in South Africa: Broad based black economic empowerment and the enhancement of good corporate governance principles' (2008) 3 *Journal of International Commercial Law & Technology* 157.
[92] L Patel & L Graham 'How broad-based is broad-based black economic empowerment?' (2012) 29(2) *Development Southern Africa* 193.

the major consequences of apartheid, which was the deliberate exclusion of black people from meaningful participation in the economy.[93]

The BBBEE Act has a multifaceted approach to addressing the economic inequalities that exist as a result of past discrimination.[94] Companies in South Africa operate in an environment where the country's economic benefits are out of the reach of many citizens; as a CSR-supporting regulatory framework, the BBBEE Act aims to close this particular gap.[95] The Act is founded upon the provisions of the equality clause in the South African Constitution, particularly s 9(2), which specifically allows for legislative and other measures to protect or contribute towards the advancement of persons disadvantaged by discrimination.[96]

The BBBEE Act is designed to ensure that it encourages the public sector and the private sector to become BEE drivers, by promoting a preferential procurement policy as a form of CSR in South Africa.[97] Although this Act has helped to improve the economic participation of persons previously disadvantaged by apartheid by assisting with the transformation of the socio-economic landscape through measures to promote BEE, its effectiveness in promoting economic participation by historically disadvantaged persons remains a subject of much debate.[98] BEE has been described by critics as slow and ineffective as most South African companies are far from making BEE a real priority.[99]

The reason for this criticism is that, almost three decades later, BEE has been slow in effecting real change as the beneficiaries of most BEE transactions comprise a very small elite group[100] who are politically connected 'tenderpreneurs'.[101] The vast

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[93] Ibid. See also chapter 2 for a discussion of the influence of apartheid on labour and industrialisation in South Africa.
[94] S Juggernath, R Rampersad & K Reddy 'Corporate responsibility for socio-economic transformation: A focus on broad-based black economic empowerment and its implementation in South Africa' (2011) 5(20) *African Journal of Business Management* 8224.
[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] E Shava 'Black economic empowerment in South Africa: Challenges and prospects' (2016) 8(6J) *Journal of Economics and Behavioral Studies* 164.
[99] See Esser & Dekker (n 91) 157.
[100] R Southall 'Ten propositions about black economic empowerment in South Africa' (2007) 34(111) *Review of African Political Economy* 67.
[101] L Piper & A Charman *Tenderpreneur (also tenderpreneurship and tenderpreneurism)* 2018 UCL Press 1, available at *https://repository.uwc.ac.za/bitstream/handle/10566/5835/PiperandCharman-TenderpreneurV3.pdf?sequence=1&isAllowed=y* (accessed on 23 September 2022): '"Tenderpreneur" is a South African colloquialism for a businessperson who uses political contacts to secure government procurement contracts (called "tenders") often as part of reciprocal exchange of favours or benefits. The

majority of black South Africans have not benefited from the BEE policy. As a result, little progress has been made in ameliorating poverty and inequality levels through BEE in South Africa.[102]

Moreover, despite the shift from BEE to broad-based black economic empowerment (BBBEE), the focus of the BBBEE Act reinforces the inadequacies of the BEE policy in that the Act remains focused on promoting ownership through commercial transactions which increase black shareholding and directorships in state-owned companies[103] and some privately owned companies for politically connected individuals.[104] It encourages a re-racialisation of the political economy by promoting the advancement of politically connected elites under the guise of empowerment. This results in a significant disproportion of empowerment in BEE transactions. The black population at large is yet to see the benefits of BEE since its implementation.

Despite the criticism of BEE based on ownership metrics, BEE has had some positive impact in promoting transformation, for example, the number of black South Africans employed as managers increased by 176.3% between 2001 and 2017 (compared to the 32.1% population growth in that group over the same period).[105] Yet, in 2021, the Commission for Employment Equity found that white people remained dramatically over-represented in the top levels of the private sector: they occupied 67.8% of top management positions, 58% of senior management positions, and 43.2% of all professionally qualified positions.[106] As of the second quarter of 2021, the

term is a portmanteau of "tender" (to provide business services) and "entrepreneur". Today, "tenderpreneurs" are associated with corruption, nepotism and clientelism.'

[102] South Africa is known as one of the most unequal countries in the world with one in five South Africans living in poverty. See K Scott 'South Africa is the world's most unequal country. 25 years of freedom have failed to bridge the divide' available at *https://edition.cnn.com/2019/05/07/africa/south-africa-elections-inequality-intl/index.html* (accessed on 1 September 2022).

[103] Ibid. After democracy, the creation of a black socialist class become an immediate objective of the ANC. However, aspiring black entrepreneurs lacked the capital needed to take advantage of the new economic dispensation. The ANC government also inherited the country's parastatal sector comprising almost 300 state-owned companies. The ANC used these companies to employ black directors and issue shares to black shareholders as a means of transferring wealth and assets into black hands.

[104] C Lötter 'Only South Africa's elite benefits from black economic empowerment – and COVID-19 proved it' available at *https://www.biznews.com/leadership/2022/09/05/bbbee-only-benefits-elite* (accessed on 6 September 2022).

[105] Ernest Mabuza 'Number of blacks with jobs more than doubled since 1994: IRR' available at *https://www.timeslive.co.za/news/south-africa/2017-02-06-number-of-blacks-with-jobs-more-than-doubled-since-1994-irr/* (accessed on 20 September 2022).

[106] See the 21st Commission for Employment Equity (CEE) ANNUAL REPORT (2020–2021) 26, available at *https://cisp.cachefly.net/assets/articles/attachments/85727_21_cee_report.pdf* (accessed on 15 September 2022).

unemployment rate of white South Africans (8.6%) remained significantly lower than that of blacks (38.2%), coloureds (28.5%), and Indians and Asians (19.5%).[107]

It is undeniable that there is an overlap between BEE and CSR. The overlap is evidenced by the fact that companies operate in a socio-economic landscape that requires the partnership of communities to achieve common or unified goals. Companies play a key role in assisting the government with ameliorating the injustices of the past by assisting with the provision of socio-economic development through CSR.[108] The BBBEE Act uses its score ratings system to ensure that companies comply with some form of CSR. The score ratings system gives companies either a poor or a good BEE rating.[109]

The BBBEE Act allows for preferential procurement in corporations. This process of preferential procurement allows for diversity within the management structure of the corporation and brings historically disadvantaged persons to the executive table. Internal CSR embodies the notions of diversity and inclusion, while BEE allows companies to achieve the benefits of internal CSR by diversifying their boards and management structures. Furthermore, the BBBEE Act allows for the upskilling of ordinary employees by providing avenues for skills development within the company. Skills development is viewed as a priority under the revised BEE Codes of Good Practice.[110]

As discussed in chapter 2, internal CSR helps to retain talent within the corporation as research has shown that employees are inclined to work for companies that value CSR.[111] Upskilling employees helps to create businesses that are at the cutting edge of developments within their industries. This also has value because the company can become more competitive by retaining employees with skills and experience instead of retrenching workers, which can result in labour instability. The revised Codes of Good Practice incentivise such initiatives by giving companies BEE points for skills development.[112] Thus BEE allows for the empowerment of employees through participation and wealth creation. This resonates quite strongly with the notion

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[107] Ibid 43.
[108] For a discussion of the role of companies in CSR prior to democracy, see chapter 2.
[109] See the Broad-Based Black Economic Empowerment Codes of Good Practice (the Codes of Good Practice) issued under s 9(1) of the BBBEE Act at 3 and 6. Available at *https://bbbeecommission.co.za/wp content/uploads/2017/12/Phase-1-36928_11-10_TradeIndCV01_3a.pdf* (accessed on 10 June 2020).
[110] Ibid 7.
[111] See chapter 2.
[112] See the Codes of Good Practice (n 109) 7.

of inclusive capitalism as argued for in King IV, in that stakeholders are given an opportunity to share in the company's accumulation of wealth.[113]

It may be argued that the BBBEE Act has the potential not only to be a key driver of the meaningful participation of black people in the economy, but also to facilitate internal CSR. However, despite the progressive work that has been championed by the Act, problems remain. Critics argue that the progressive nature of BEE may not necessarily be in the best interests of the company, as BEE may impose unnecessary burdens on the company.[114] This is despite the evidence that companies with a good BEE score perform better than most companies who do not attempt to be BEE-compliant.[115] Additionally, the investment appetite of most international investors is affected by BEE, as most investors fear that the value of their investments will depreciate when ownership is partly transferred to historically disadvantaged groups.[116]

a) Preferential procurement process under the BBBEE Act

The BBBEE Act aims to drive transformation in the economy by promoting a procurement process which encourages procurement from suppliers who comply with the BBBEE scorecard.[117] To maintain their BBBEE certificates companies must keep their supplier information up to date with supplier details.[118] From an internal CSR perspective, this means that companies must ensure that their supplier information matches the objectives of the Act, which are *inter alia* to ensure a preferential procurement process aimed at promoting economic transformation for historically disadvantaged employees.[119] The preferential procurement process under the BBBEE Act is derived from the Preferential Procurement Policy Framework Act 5 of 2000 and

[113] Institute of Directors in Southern Africa *King IV Report on Corporate Governance in South Africa* (2016).
[114] Esser & Dekker (n 91).
[115] T Chahoud et al *Corporate Social Responsibility (CSR) and Black Economic Empowerment (BEE) in South Africa: A Case Study of German Transnational Corporations* (2011) 72.
[116] Esser & Dekker (n 91).
[117] BBBEE is measured by means of a balanced scorecard and includes scores for direct empowerment, human resource development and indirect empowerment. The elements and weightings of the generic BBBEE scorecard include the measuring of the following aspects: Ownership, Management, Employment equity, Skills development, Preferential procurement, Enterprise development, Socioeconomic development initiatives. See LP Krüger 'The impact of black economic empowerment (BEE) on South African businesses: Focusing on ten dimensions of business performance' (2011) 15(3) *Southern African Business Review* 211.
[118] Section 2 of the BBBEE Act.
[119] Ibid.

its regulations. This Act provides for the implementation of a policy and system according to which government tenders are not exclusively awarded according to the tender bid specification and price; preference is given to historical disadvantaged individuals (HDIs) who are South African citizens.[120]

4.3.3.4.3 BEE principles and the generic scorecard

The implementation of BEE in South African organisations is based on several evaluation principles embedded in their BEE compliance. The fundamental principle for measuring BEE compliance is that substance takes precedence over legal form.[121] First, BEE is based on promoting the right to ownership which is contained in the Code of Good Practice (the Code), which is measured by the generic scorecard.[122] The scorecard is a guideline used to gauge companies' empowerment scores. Broad-based ownership is measured by several factors, the most important of which measures the effective ownership of entities by black people. Secondly, measuring control in companies, in terms of BEE, the management control element, as set out in Code measures the extent to which HDIs manage and control companies.[123] Thirdly, employment equity is centred on promoting equality in employment, so that HDIs have equal job and entrepreneurial opportunities.[124] BEE companies are required to be gender-biased and non-racial and provide good working environments for their employees.[125]

Fourthly, the generic scorecard measures employment equity as set out in the Employment Equity Act.[126] Fifthly, procurement as a measuring guide aims to ensure *inter alia* that local procurement is strengthened in order to help build South Africa's industrial base in critical sectors of production and value-adding manufacturing, which

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[120] See Procurement Policy Schedule (80/20) available at *http://westcoastdm.co.za/wpcontent/uploads/2012/01/procurement_policy_schedule_80_20_eng.pdf* (accessed on 15 September 2022).
[121] The Amended Code Series 000: Framework for Measuring Broad-based Black Economic Empowerment, available at *https://www.bbbeecommission.co.za/wp-content/uploads/2017/12/Phase-1-36928_11-10_TradeIndCV01_3a.pdf* (accessed on 4 September 2022).
[122] Ibid 7.
[123] Ibid 11.
[124] Ibid 43. This is in line with the Employment Equity Act as discussed above. 'Gender-biased' means that black women or persons with disabilities must be preferred in the place of a white male or female.
[125] A Mathura *The Impact of Broad Based Black Economic Empowerment on the Financial Performance of Companies Listed on the JSE* (PhD thesis, University of Pretoria, 2010) 47.
[126] As discussed above.

are largely labour-intensive industries.[127] Sixthly, the generic scorecard measures how BEE companies promote skills development, and how black people are trained so that they can improve their skills and be employable in both the public and the private sectors.[128] This includes but is not limited to skills training in the workplace. Other principles include enterprise development,[129] human resource development,[130] direct empowerment and indirect empowerment.[131]

4.3.3.4.4 The enforcement of the BBBEE Act in companies

Compliance with the BBBEE Act is 'voluntary' and will be determined by the companies' clients and industry standards. However, the voluntary elements of BBBEE are limited where the Employment Equity Act issues fines for non-compliance with BBBEE as a sub-element, which forms part of the BBBEE scorecard.[132] However, where a company decides not to be compliant or where a company has a low BBBEE rating, its ability to actively participate in the preferential procurement policy of government is significantly reduced.[133] This includes but is not limited to the benefits of qualifying to tender for contracts with government bodies and state-owned enterprises, leveraging brand awareness and attracting new clients through a high BBBEE certification.[134]

4.3.3.4.5 The problems embedded in BEE: Fronting, fraud and corruption in BEE companies

In terms of s 1*(e)* of the BBBEE Act as amended, 'fronting' can be summarised as any transaction, arrangement or practice frustrating or undermining the objectives of the

[127] Framework for Measuring Broad-based Black Economic Empowerment (n 121) 7 and 11.
[128] Ibid 7.
[129] Ibid 12.
[130] Ibid 44.
[131] Ibid 64. See also S Dreyer & N Mans-Kemp 'Reflecting on compliance with Broad-Based Black Economic Empowerment codes of good practice: Trends and suggestions' (2021) 52(1) *South African Journal of Business Management* 2.
[132] Section 15 of the EEA. See also LA Booysen & SM Nkomo 'Employment equity and diversity management in South Africa 2010' in *International Handbook on Diversity Management at Work* (2010).
[133] LP Krüger 'The impact of black economic empowerment (BEE) on South African businesses: Focusing on ten dimensions of business performance' (2011) 15(3) *Southern African Business Review* 210.
[134] Dreyer & Mans-Kemp (n 131) 2.

BBBEE Act.[135] When a business is fronting, the business is pretending to be more compliant than it actually is. As with CSR, fronting practices often take the form of corporate 'window-dressing' in order to score more points to qualify for a government tender or a required licence to operate in specific industries such as the mining sector.[136] This usually occurs when white-owned companies list black people as beneficiaries, directors or shareholders so that they appear to have proper BBBEE status. Fronting has become embedded in the procurement systems where gross nepotism and fraud are rampant in South African local government. The manipulation of the tendering processes hampers the ability of small businesses and other ordinary company owners to benefit from the BEE system.[137] BEE is intended to uplift previously underprivileged black people. However, in South Africa, privileged black South Africans are disrupting the potential success of BEE.

A case in point is the Aurora mining scandal which has continued for the past ten years.[138] Aurora is a black-owned BEE mining company; its executive directors are Khulubuse Zuma, the nephew of former President Jacob Zuma, and Zondwa Mandela, the grandson of former President Nelson Mandela.[139] It was alleged that the Aurora directors looted the company's assets before the company was liquidated, leaving it unable to pay its creditors and its employees.[140] The company is also accused of environmental damage; the case against the directors of the company is ongoing.[141] The company was liquidated and sequestration proceedings were successfully instituted against the company directors.[142] In 2015, the court found the directors guilty in their personal capacity and liable for R1.7 billion in damages.[143]

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[135] See also F Emuze & R Adlam 'Implementation of broad-based black economic empowerment in construction: A South African metropolitan area study' (2013) 20(1) *Acta Structilia* 139.
[136] Ibid.
[137] Ibid.
[138] Unknown 'Labour department starts paying Aurora miners' *Mail and Guardian* (16 December 2010) available at *https://mg.co.za/article/2010-12-16-labour-department-starts-paying-aurora-miners*/ (accessed on 6 June 2020).
[139] *Engelbrecht NO and Others v Zuma and Others* [2015] JOL 33491 (GP) 3.
[140] Unknown 'Former Aurora mine directors expected back in court' *Eyewitness News* (7 August 2019) available at *https://ewn.co.za/2019/08/07/aurora-mine-former-directors-due-in-springs-court* (accessed on 6 June 2020).
[141] N Jordaan 'Khulubuse Zuma and Zondwa Mandela's acid mine drainage case postponed' *Sowetan Live* (15 July 2019) available at *https://www.sowetanlive.co.za/news/south-africa/2019-07-15-khulubuse-zuma-and-zondwa-mandelas-acid-mine-drainage-case-postponed/* (accessed on 12 June 2021). See also 'Aurora and the Grootvlei gold mine pollution' available at *https://outa.co.za/projects/water-and-environment/aurora* (accessed on 12 June 2021).
[142] *Engelbrecht NO and Others v Zuma and Others* (n 139).
[143] Ibid.

In South Africa, corruption in the tendering process is endemic. Corruption in the tendering process means that many potential recipients are denied the benefits of BEE because many white-owned businesses hold themselves out to be fully black-owned.[144] According to Emuze and Adlam,[145] the use of fronting is not bound to any particular race. The notion that fronting can only be effected by white organisations and/or persons is incorrect.[146] However, the corruption associated with fronting in BEE is a result of the fact that the beneficiaries of BEE transactions are politically connected individuals who establish companies for corrupt purposes and with poor governance structures, which results in the exploitation of employees.[147]

As noted by Esser and Dekker,[148] the BBBEE Act had real potential to be a key CSR driver and could have been a driver of internal CSR and employee engagement, but the limitations in the Act pose some challenges to realising internal CSR, as most companies are not BEE companies. It is important to note, however, that the BBBEE Act does not require compliance.[149] Companies in the private sector, more specifically those who do not wish to do business with the government, and other private companies that do not embrace the ethos of BEE within the corporation, may choose not to comply with BEE.[150] However, it is highly recommended that companies comply with BEE. This then justifies the decision to ensure that compliance with the BBBEE Act must be monitored by the social and ethics committee and reported on to the company and its shareholders at the annual general meeting.[151]

The social and ethics committee thus serves not only to monitor possible corruption in BEE contracts but also to facilitate much-needed employee engagement through the committee work, which has the potential to promote avenues for employee voice through internal CSR.

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[144] Juggernath et al (n 94) 8224. See *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* (CCT 34/10) [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) (23 November 2010) para 41.
[145] See also Emuze & Adlam (n 135) 139.
[146] Ibid.
[147] Bindu & Bassi (n 86) 678.
[148] Esser & Dekker (n 91).
[149] Klopper (n 50) 174.
[150] Section 10(1) of the BBBEE Act requires every organ of state and public entity to apply any relevant Code of Good Practice issued in terms of the BBBEE Act when *inter alia* authorising any economic activity in respect of any law and/or developing and implementing any preferential procurement policy.
[151] Regulation 43(3) of the Companies Regulations, 2011.

4.3.3.5 Monitoring good corporate citizenship

The concept of corporate citizenship relates to the acceptance by business of its influence on stakeholders and its responsibility to different stakeholder groups.[152] This concept is very broad and may refer to a variety of issues that the company will need to address as part of its corporate citizenship agenda.[153] Principle 3 of the King IV Report prescribes that the governing board should ensure that an organisation is a responsible corporate citizen.[154] Regulation 43(5) of the Companies Regulations, 2011 delineates the areas of corporate citizenship on which the social and ethics committee must focus: 'promotion of equality, the prevention of unfair discrimination, and reduction of corruption'. The promotion of equality and the prevention of unfair discrimination form a significant component of the Constitution, including the Bill of Rights, as equality in the workplace is a critical aspect of good corporate governance. Moreover, monitoring and reporting on issues affecting equality and unfair discrimination is significant for internal CSR, which may yield benefits in reducing corporate exposure to labour unrest.[155] However, the focus now will be on the reporting of corruption by the committee.

This issue needs improved and innovative measures of redress through effective channels for monitoring and reporting, not only at the board level but also for all relevant and identifiable stakeholders.[156] Public sector and private sector corruption hamper the effective administration of socio-economic development initiatives for stakeholders.[157] This has a significant impact on the distribution of CSR and internal CSR initiatives within companies.[158] To highlight the significance of monitoring and reporting on corruption by the social and ethics committee, Transparency International (TI) ranked South Africa at 70/180 in 2019, with a score of 44/100. Similarly, South

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[152] For a discussion of the concept of corporate citizenship, see chapter 3. See also C Valor 'Corporate social responsibility and corporate citizenship: Towards corporate accountability' (2005) 110(2) *Business and Society Review* 191. See also W Visser *Sustainable Business Futures: Setting the Global Agenda for Corporate Responsibility and 'Ubuntu Capitalism'* (2014) 30.

[153] These issues relate to, but are not limited to, the issues affecting employment equity, fair remuneration, economic transformation, responsible tax policy and the protection of biodiversity. See the King IV Recommended Practices on Corporate Citizenship.

[154] For a detailed discussion of the recommended practices prescribed by King IV, see principle 3 of the *King IV Report on Corporate Governance in South Africa* (2016).

[155] The reference to equality and the prevention of unfair discrimination has been discussed above: see para 4.3.5.2.

[156] See the Public Protector's report entitled 'State of Capture' (14 October 2016) 13, available at *http://www.saflii.org/images/329756472-State-of-Capture.pdf* (accessed on 11 June 2020).

[157] Ibid.

[158] Ibid.

Africa scored only 44/100 in the 2019 Global Corruption Barometer.[159] Moreover, given the extent of corruption in South Africa's state-owned companies,[160] the inclusion by the legislature of the monitoring of and reporting on corruption within the mandate of the social and ethics committee is significant for the promotion of labour stability. This is because labour instability creates labour unrest which is often fuelled by the corrupt practices of both the company and the leaders of the trade unions representing employees. Marikana is an example of this. The Marikana Commission of Inquiry found that 'the unjustified shooting of 112 striking mineworkers and the deaths of 34 was the result of a "defective" police that carried "a substantially heightened risk of bloodshed".'[161] The commission's report states that National Commissioner Phiyega and her senior officers sought to mislead the commission and that, in the days leading to the massacre, 'General Phiyega was complicit in engaging in discussions where political factors were inappropriately considered and discussed in relation to policing the situation at Marikana'.[162] The commission found that Phiyega and her senior commanders had withheld crucial evidence, constructed misleading evidence, and provided untruthful testimony. The commission found the most senior police officers to have been dishonest and recommended that the then President Zuma establish a board of inquiry under s 8(1) of the South African Police Services Act 68 of 1995 to consider the fitness of Phiyega and Northwest Police Commissioner Zukiswa Mbombo to hold office.[163]

The requirement in the Companies Act to monitor corporate citizenship creates even greater avenues for employment equity and accountability in the workplace. The monitoring of corruption and the reporting on anti-corruption measures and practices by the social and ethics committee to the board and to the company's shareholders can create better channels for internal CSR. Moreover, it also provides better platforms for whistleblowing about corrupt practices in the company, since an independent and objective body such as the social and ethics committee can be tasked with performing this function.

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[159] See the Transparency International report, available at *https://www.transparency.org/en/countries/south-africa* (accessed on 11 June 2020).
[160] 'State of Capture' report (n 156).
[161] S Adelman 'The Marikana massacre, the rule of law and South Africa's violent democracy' (2015)7(2) *Hague Journal on the Rule of Law* 248.
[162] The IG Farlam *Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the Northwest Province* (2015) 169.
[163] Adelman (n 161) 248.

The concept of corporate citizenship comprises areas in which companies need to actively monitor compliance by establishing the necessary structures and control measures to protect and maintain the company's corporate citizenship status. This includes, but is not limited to, the governance of ethics, the social responsibility of the company for employees (as discussed above, this can be in the form of employment equality, diversity and transformation in the company), environmental responsibility, and the broader aspects of socio-economic development. For companies to sustain corporate citizenship there must be a business case for a company do so. Internal CSR embodies the standards that form the foundation of corporate citizenship and therefore the contribution by employees as the focal point for internal CSR can play a significant role in realising the company's corporate citizenship agenda.

However, reg 43(5) of the Companies Regulations, 2011 presents some limitations because it does not provide a definition of corporate citizenship. Moreover, the monitoring of and reporting on aspects of corporate citizenship that affect employees, such as corruption and equality in the workplace, could have a significant impact on the company and its stakeholders if employees were included in the committee.

4.3.3.6 Monitoring compliance with recording and charitable giving

Regulation 43(5)*(a)*(ii)*(bb)* of the Companies Regulations, 2011 embodies one of the most significant contributions of the regulations in realising traditional notions of CSR. Although the regulations do not explicitly mention CSR, they provide guidance on the mandate of the social and ethics committee, which reflects the traditional notions of CSR, practised in many organisations and companies for decades.[164] The premise of the regulation is to maintain good corporate citizenship by encouraging the company's contribution to the socio-economic development of communities in which the company's business activities are predominantly marketed. The focus here is on community service through CSR in the altruistic sense.

South African companies appear to be inclined to engage in traditional CSR as most companies show records of engaging in initiatives relating to education funding, social and community development, food security and disaster relief, resulting in an estimated spending of R10,2 billion on CSI in 2019.[165] Education in South Africa

[164] For a detailed discussion of traditional CSR, see chapter 2.
[165] See the Trialogue Business in Society Handbook (2019) 32-33, available at *https://trialogue.co.za/publications/2019-business-in-society-handbook-flipbook/* (accessed on 13 July 2020).

receives the most corporate support as most corporates invest most of their CSI on education, while spending on health, including structures for HIV/AIDS, represents a smaller proportion of CSI.[166] Most recently, during the Covid-19 pandemic, companies in South Africa have adopted CSR measures by donating to communities which are most affected by the pandemic.[167] It goes without saying that there is a general shift in awareness of the need to give back by companies, albeit on a voluntary basis.

Traditional CSR embodies the notion of companies making charitable donations in communities in which the company does business.[168] This process requires a company to identify avenues for value creation within the community by making donations in those communities.[169] In most cases, the employees of the company are often drawn from communities in which the company does business. This has value for internal CSR in that most employees are inclined to work for companies with a social responsibility platform, and which encourage giving back to local communities. As argued by Birth et al, this approach has the potential to retain talent, attract talent, and promote avenues for value sharing within the corporation.[170] Moreover, reputational management is further managed and monitored by companies who give back, since charitable giving has the potential to legitimise the company's corporate citizenship status.

It can be argued that there is value in monitoring the contributions made by the company as part of its mandate in promoting good corporate citizenship. This requirement is advocated in both local and international good corporate governance instruments. In South Africa, King IV advocates the notion of integrated reporting, which means that companies should report on both the financial and non-financial matters of the company.[171] It goes without saying that the process of monitoring and

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[166] Ibid 32. The research findings of the 2019 Trialogue CSI report show that an average of 50 percent of corporate CSI is spent on education, 15 percent on social and economic development, 9 percent on food security and agriculture, and 7 percent on health.

[167] See generally Global Compact Network South Africa 'South African Private Sector Response to Covid-19', available at *https://globalcompactsa.org.za/how-south-african-companies-are-responding-to-covid-19/* (accessed on 13 July 2020).

[168] See chapter 2.

[169] J Jayabalan et al 'Perception of employee on the relationship between internal corporate social responsibility (CSR) and organizational affective commitment' (2016) 3(2) *Journal of Progressive Research in Social Sciences* 168.

[170] G Birth, L Illia & L Francesco 'Communicating CSR: Practices among Switzerland's top 300 companies' (2008) 13 *Corporate Communications: An International Journal* 198.

[171] Institute of Directors in Southern Africa *King IV Report on Corporate Governance in South Africa* (2016).

reporting on the company's CSR objectives is crucial in ensuring compliance with the Act, as well as in supporting CSR-regulatory frameworks.[172]

However, it is argued that the requirement to comply in the Regulations may have the effect of encouraging 'tick box' CSR as no structures are in place in the Act to enforce accountability.[173] In other words, non-compliance with CSR does not yield any legal consequences for companies as they are generally not required to engage in charitable giving or to engage in acts of corporate philanthropy. Thus, the social and ethics committee's influence in encouraging external CSR, or rather philanthropic CSR, is limited to the role of simply monitoring and reporting on such matters.

It is submitted that the legislature had an opportunity to make traditional CSR a legal requirement under the provisions of the s 72(4) social and ethics committee, read together with the Companies Regulations, 2011, but the place for CSR within the Act is significantly limited as the social and ethics committee's role is simply to monitor and report on issues relating to CSR, leaving the committee with no teeth at all.

4.3.3.7 Monitoring compliance with environmental and public safety concerns

In South Africa, as in other developing economies, the environment is the basis for survival. The degradation of environmental resources, such as water, fisheries, soil and forests, has a greater impact on low-income groups in developing economies than it has on developed economies. In developing economies, most of the low-income population lives in rural areas where agriculture is key to supporting their livelihoods, hence environmental degradation and climate change have much more devastating impacts on rural communities.[174] The social and ethics committee's functions include the monitoring of environmental health and public safety, as required by reg 43(5)*(a)*(ii).

The committee is required to monitor the company's activities, having regard to the relevant legislation and regulatory frameworks supporting environmental and public safety. The monitoring of the environment involves overseeing the company's compliance with different environmental laws.[175] This includes, but is not limited to,

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[172] King IV and the JSE listing requirements, to name a few.

[173] Klopper (n 50). See chapter 2 para 2.3.2 for a discussion of the arguments against CSR.

[174] *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department of Water Affairs and Forestry* 2006 JDR (SCA).

[175] For example, the National Environmental Management Act 107 of 1998 and the National Environmental Management: Biodiversity Act 10 of 2004, to name a few of the laws governing environmental law in South Africa.

the laws relating to pollution and waste, marine resources, energy and biodiversity conservation. Compliance with these laws is guided by the nature of the business and may thus entail compliance with national and international instruments addressing environmental law compliance.[176] This is again an extension by the legislature to matters that are not only social in nature.[177]

The monitoring of environmental and public safety concerns forms a significant component of CSR. Although the environment forms part of the external features of CSR, the company's compliance with environmental laws is important in creating an environment where employees are protected from the harmful impacts on the environment caused by the companies they work for. This resonates more closely with the dimensions of external CSR as the company's impact on the environment can have a significant impact on the local communities, and this in turn has an impact on employees who are often drawn from the local community.

For a committee to monitor and report on environmental and public safety concerns, the committee must have a working knowledge of environmental and public safety laws and policies. The regulations confer the mandate to monitor and report on the health and public safety aspects of the company on the committee. However, the regulations do not provide context on the legislative framework that the social and ethics committee must use to measure compliance. According to Klopper, it is accepted that health in this instance could refer to the occupational health and safety that is addressed by the Occupational Health and Safety Act 85 of 1993.[178] The management of occupational health and safety forms a significant component of internal CSR, which embodies the role of companies as employers in ensuring safety in the workplace.

The management of health and safety under the Occupational Health and Safety Act requires companies to assess the health and safety risks in the workplace by setting up risk assessment and control measures. The Act also confers certain rights on the workers; these rights are essential for ensuring workers' safety. First, the Act confers

[176] The international frameworks include the United Nations Framework Convention on Climate Change. See generally the United Nations Convention on Climate 1992, available at *https://cer.org.za /wp-content/uploads/2014/02/conveng.pdf* (accessed on 4 June 2020). See also the Paris Agreement, which requires the parties to the Convention to report on greenhouse emissions.
[177] Klopper (n 50) 178.
[178] Ibid.

the right to refuse to work in dangerous and unsafe working environments.[179] Secondly, workers have the right to know about workplace hazards and must be given enough access to information on basic health and safety.[180]

Thirdly, employees have the right to participate in health and safety discussions in health and safety committees.[181] These aspects are very broad, and a committee needs a certain level of specialisation to report on them. Moreover, the Act also requires the employers to establish an occupational health and safety committee in the company to ensure that the requirements of the Act and the regulations are met.

This is a separate committee whose main function is to ensure that the company fulfils the objectives of the Act. Again, this raises the question of the duplication of functions and the waste of company resources as two committees may be established to fulfil the same objective. The rationale for the social and ethics committee dealing with issues relating to occupational health and safety is unclear and could thus be regarded as a waste of resources.

4.3.3.8 Monitoring labour and employment

The last function of the social and ethics committee is to monitor and report on labour and employment issues to the company and its shareholders. Regulation 43(5)*(a)* refers to the monitoring and reporting of a company's standing in terms of the ILO Decent Work Agenda and to monitoring the company's employment relationships and its contribution to the educational development of its employees. In the ILO's Decent Work Agenda, the concept of decent work is based on the understanding that work is not only a process of securing income, but is also an important source of personal dignity, peace in the community and family stability.[182] These aspects are crucial in promoting labour stability.

South Africa's decent work profile embodies a broad range of indicators which the company must monitor.[183] First, monitoring compliance with adequate earnings

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[179] Section 8 of the Occupational Health and Safety Act 85 of 1993. Section 23 of the Mine Health and Safety Act 29 of 1996 specifically recognises the right of employees to leave a dangerous workplace whenever circumstances arise at that workplace which, with reasonable justification, appear to those employees to pose a danger to their health or safety.

[180] See s 13*(a)*: duty to inform in the Occupational Health and Safety Act.

[181] Section 14*(a)–(e)* of the Occupational Health and Safety Act.

[182] Botha (n 51) 5 and see the ILO Decent Work Agenda, available at *https://www.ilo.org/global/topics/decent-work/lang--en/index.htm* (accessed on 13 July 2020).

[183] For a discussion of South Africa's decent work agenda, see generally the International Labour Organisation 'South Africa's decent work agenda' available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/--integration/documents/publication/wcms_180322.pdf* (accessed on 15 June 2020).

and productive work is one of the duties of a company under the Decent Work Agenda.[184] This aspect is often the main cause of labour instability as most disputes leading to labour unrest are related to wages.[185] Decent work is about decent hours of work as set out in the Basic Conditions of Employment Act.[186] Stability and security at work involves ensuring job security by promoting permanent employment for workers.[187]

The ILO's Decent Work Agenda promotes the values of internal CSR. According to the ILO, decent work embodies the aspirations of people in their working lives.[188] The Decent Work Agenda is aimed at promoting the highest standards of fairness and sustainability, and thus coincides with the sustainable development goals:

> Decent work is central to efforts to reduce poverty and is a means for achieving equitable, inclusive and sustainable development. It involves opportunities for work that is productive and delivers a fair income, provides security in the workplace and social protection for workers and their families, and gives people the freedom to express their concerns, to organize and to participate in decisions that affect their lives.[189]

Decent work embraces the principles of dignity, equality, fair income and safe working conditions.[190] It is about putting people first by placing them at the centre of development, and by giving employees a voice through the promotion and protection of employees' rights.[191] The four pillars of the Decent Work Agenda, namely, employment creation, social protection, rights at work and social dialogue, embrace aspects that are at the forefront of internal CSR and therefore need to be monitored and reported on, because compliance with these pillars forms a key component of promoting labour stability.[192]

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[184] Ibid.
[185] See generally S Godfrey, S Maree & J Theron 'Conditions of employment and small business: Coverage, compliance and exemptions' Development Policy Research Unit Working Paper 06/106, Labour and Enterprise Project, Sociology Department, Institute of Development and Labour Law, University of Cape Town (2006) available at *http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/DPRU%20WP06-106.pdf* (accessed on 7 May 2020).
[186] The BCEA sets ordinary hours of work at 45 hours per week, while 48 hours suggests regular overtime work.
[187] Godfrey et al (n 185).
[188] See the ILO's Decent Work Agenda (n 182).
[189] Ibid.
[190] Ibid.
[191] Ibid.
[192] Godfrey et al (n 185).

4.3.4 Identifying the challenges for internal CSR in the Companies Act

It can be argued that the social and ethics committee serves as the primary point of reference for CSR within the provisions of the Companies Act. Even though the Act does not explicitly state that companies must apply CSR, this progress is undoubtedly a reason for optimism about CSR under the Act. The monitoring of labour and employment issues by the social and ethics committee presents an even greater synergy between labour and company law.

The Companies Act, through the social and ethics committee, provides for avenues to enhance employee equality and participation in companies. However, there are some limitations in the workings of the committee and the regulations that may prevent the realisation of internal CSR for labour stability under company law. A discussion of the shortcomings of the social and ethics committee as a potential driver of internal CSR under the Act follows.

4.3.4.1 The exclusion of the King Code on Corporate Governance

Regulation 43(5)*(a)* sets out the role of the social and ethics committee as monitoring compliance and reporting to the board on the principles of the UN Global Compact and the recommendations regarding corruption.[193] However, the King Code, a distinguished and highly recognised instrument for measuring socio-economic development, is not mentioned. More pertinently, the King Code provides significant principles which promote internal CSR.[194] The express recognition of these principles in the Act would have provided broader avenues for the realisation of internal CSR and, more importantly, would have provided support for the legal recognition of the King Code in South Africa. A brief overview of the history and significance of the King Code in an internal CSR context follows.

The King Reports on Corporate Governance are a key influence on and driver of the radical reform of corporate governance in South Africa.[195] For close to three decades, the King Committee has promoted good corporate governance practices in

[193] See reg 43(5)(i)*(aa)–(bb)* of the Companies Regulations, 2011 for a comprehensive list of the goals and objectives of the social and ethics committee.
[194] Klopper (n 50) 173 acknowledges the notable exclusion of King from stakeholder protection in the social and ethics committee.
[195] The King Committee has published four reports on good corporate governance, which are known as King I, King II, King III and King IV. The codes in these reports have been used as the global standard for developing effective corporate leadership in South Africa and the rest of the world by setting high standards of ethics and corporate governance for companies and organisations doing business in South Africa.

South Africa by publishing the King Reports on Corporate Governance.[196] The King Codes have, from their inception, been promulgated as principle-based codes of good corporate governance which are primarily voluntary and non-enforceable.[197] Under the leadership of Professor Mervyn King, the King Committee published four codes of corporate governance between 1994 and 2016, which have ushered in an internationally recognised and unprecedented approach to the way in which companies do business in South Africa and have over the years acquired global prominence and recognition.[198]

The first King Report was published in 1994. King I coincided with the largest radical political transition in South African history, as the country transitioned into a fully-fledged democracy, and the integration of the principles of social equality into business was pursued as a matter of urgency.[199] Stakeholder recognition and the need to return South Africa to the international global economic market as a good corporate governance country was a critical driver for King I.[200]

Esser and Dekker therefore described its purpose as promoting the highest standards of accountability in corporate management in South Africa.[201] The theme was to promote the inclusion of stakeholders, more specifically in the context of historically disadvantaged persons.[202] In pursuing these goals, King I went beyond financial and regulatory aspects by proposing an inclusive approach by companies doing business in South Africa,[203] as most companies at the time were white family-owned conglomerates that were characterised as repressive and ineffectively managed.[204]

In 2002, the King Committee convened to review King I and published King II. King II sought to integrate the African value system of *ubuntu* into companies doing

[196] JJ du Plessis, J McConville & M Baganic *Principles of Contemporary Corporate Governance* (2011) 5.
[197] M Barrier 'Principles, not rules: Thanks to codes drafted under Mervyn King, South Africa has taken the lead in defining corporate governance in broadly inclusive terms' (2003) 60(4) *Internal Auditor* 68.
[198] Ibid.
[199] Institute of Directors in Southern Africa *King I Report on Corporate Governance in South Africa* (1994).
[200] Ibid.
[201] Esser & Dekker (n 91) 157.
[202] A Abdo & G Fisher 'The impact of reported corporate governance disclosure on the financial performance of companies listed on the JSE' (2007) 36(66) *Investment Analysts Journal* 43.
[203] Esser & Dekker (n 91) 157.
[204] See chapter 2 for a detailed discussion of labour and companies.

business in South Africa.[205] The concept of sustainability in the context of good corporate governance was further extended in King II, and governance of risk and issues relating to corporate disclosures were also extended by widening the scope of application to include government departments and public institutions.[206] Significantly, King II ushered in the concept of the triple bottom-line approach as an essential element for promoting sustainable development and good business continuity practices after democracy.[207]

In 2008, the King III report ushered in the long-awaited review of the Companies Act of 1973 and was a major driver of the new Companies Act.[208] King III placed a strong emphasis on sustainability, corporate citizenship and leadership by modernising the principles contained in the King reports.[209] King III emphasised integrated reporting, accountability and financial disclosure as the core principles of good corporate governance in South Africa.[210]

In 2016, the King Committee published the highly anticipated King IV report.[211] King IV replaced King III in its entirety and seeks to promote a rule-based approach to corporate governance, moving from the 'apply or explain' approach of King III to the 'comply and explain' approach.[212] In King IV the focus is more on ethical leadership, attitude, an inclusive capitalism mindset and behaviour, with a detailed emphasis on remuneration.[213]

4.3.4.2 The significance of including the King Code

The King Reports have undoubtedly played a key role in the development of good corporate governance in South Africa. However, a significant limitation on the effective application of the King Code by companies is the fact that it is 'soft law': it is simply recommended and is non-binding. However, the Code is binding on JSE-

[205] K Khomba et al 'Shaping business ethics and corporate governance: An inclusive African ubuntu philosophy' (2013) 13(5) *Global Journal of Management and Business Research* 31.
[206] RG Eccles & D Saltzman 'Achieving sustainability through integrated reporting' (2011) 9(3) *Stanford Social Innovation Review* 56.
[207] Institute of Directors in Southern Africa *King III Report on Corporate Governance in South Africa* (2009).
[208] Ibid.
[209] Ibid.
[210] Ibid.
[211] Institute of Directors in Southern Africa *King IV Report on Corporate Governance in South Africa* (2016).
[212] Ibid.
[213] Ibid.

listed companies as the listing requirements of the JSE require all companies to comply with the principles of King.[214]

The legislature has a perfect opportunity to include the King Code in the Companies Act as law. The social and ethics committee of a company would be given a unique opportunity to monitor the company using the principles of King IV and to report to the shareholders' meeting on how the company is complying with an internationally recognised local instrument such as King IV. The current exclusion of King IV from the Act not only undermines the value of King IV in the South African context, but also speaks to the fact that company law in South Africa prefers to embrace foreign legal concepts and instruments rather than embracing original South African principles and concepts.

King IV embodies key principles and recommendations that are crucial in promoting internal CSR and stakeholder engagement. The recognition of King IV in the Act would provide for monitoring and reporting on internal CSR at the company's annual general meeting and the shareholders' meeting. This would also present an opportunity to enforce King IV in companies that are not listed on the JSE.

4.3.4.3 The exclusion of employees and trade unions

Trade unions play an important role in the business of a company. The employees of a company are often trade union members and are the lifeline of most corporate entities.[215] Conversely, without any business being done by companies, there can be no employees. A critical oversight by the legislature has been the exclusion of employees and trade union representatives from the social and ethics committee. This exclusion is surprising, given the broader recognition of employees in the Act, which provides for a more inclusive role for employees and trade unions when it comes to running and administering the company's business.[216]

Employees are recognised, protected and given some level of power by the Companies Act. First, the Act explicitly gives employees recognition and power when

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[214] Under the JSE Limited Listing Requirements, corporate governance listing requirement 3.84(c) requires all issuers to appoint a social and ethics committee, in accordance with the King Code, available at *https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE%20Listings%20Requirements.pdf* (accessed on 20 June 2020).

[215] Section 1 of the Companies Act defines a registered trade union as being a trade union in terms of s 96 of the Labour Relations Act 66 of 1995.

[216] HC Schoeman 'The rights granted to trade unions under the Companies Act 71 of 2008' (2013) 16 *PEL* 197.

a company is placed under business rescue.[217] The Act explicitly protects the interests of employees and workers by recognising them as affected persons who can place a company under business rescue.[218] The Act goes further to acknowledge employees as creditors of the company to the extent that they are unpaid during the process of business rescue.[219] The Act acknowledges employees and the trade unions as affected persons[220] with the right to be consulted when the business rescue practitioner is drafting the business rescue plan. Employees and their respective trade unions are also given the opportunity to address creditors before a vote on the plan and are given the right to buy out, as a group, a creditor or shareholder who has voted against the business rescue plan.[221]

Trade unions are given more recognition in that they must be allowed to inspect the company's financial statements during business rescue.[222] Trade unions representing employees are also given the right to receive notice when a company is providing financial assistance as contemplated in s 45(2).[223] Furthermore, prior to the granting of financial assistance as provided for in s 45 of the Companies Act, financial information must be disclosed to trade unions representing employees.[224] This is intended to promote greater trust and transparency between a company and trade unions.[225]

Section 20 of the Companies Act also gives power to employees and trade unions as it enables trade unions to interdict a company from doing anything that is inconsistent with the provisions of the Act. Additionally, s 162 of the Companies Act provides that a director or a former director may, under certain circumstances, be declared a delinquent.[226] In this instance, the legislature gives a registered trade union the power to apply to a court to have the director declared a delinquent or placed under

[217] Chapter 6 of the Companies Act deals with business rescue and compromise with creditors.
[218] Section 144 of the Companies Act sets out the rights of employees under business rescue.
[219] Section 136 of the Companies Act regulates the rights and interests of employees as creditors during business rescue.
[220] Section 128(1)(ii) and (iii) of the Companies Act.
[221] Section 31(3) of the Companies Act states that trade unions must be given access to a company's financial information for the purpose of business rescue.
[222] Ibid.
[223] For a discussion of financial assistance, see R Jooste & J Yeats 'Financial assistance: A new approach' (2009) 126 *South African Law Journal* 566.
[224] Section 31(3) of the Companies Act.
[225] Schoeman (n 216) 200.
[226] For a discussion of delinquent directors, see R Cassim 'Delinquent directors under the Companies Act 71 of 2008: *Gihwala v Grancy Property Limited* 2016 ZASCA 35' (2016) 19 *PER* 2.

probation.[227] The power and voice of trade unions is further extended in derivative actions under the provisions of s 165(1) of the Act.[228] Hence, the notable exclusion of employees and trade unions from the social and ethics committee is cause for some concern, as there are opportunities for value creation if they are included in the committee.

4.3.4.4 Employees and trade union inclusion

The exclusion of important stakeholders such as employees and trade union representatives from the social and ethics committee presents significant limitations for the realisation of internal CSR under the Act. This exclusion of important stakeholders does not reflect a committee that seeks to effectively oversee the company's compliance with its ethical and social obligations.[229] The deliberate exclusion of employees and trade unions from the board committees limits the avenue for internal CSR in the following ways.

First, it can be argued that employees are one of the most valuable assets in a corporation; without employees, most companies, if not all, would not be operational. On-the-ground information on issues leading to labour instability such as employment equity issues, wage disputes and the monitoring and reporting of corruption fall within the committee's mandate. Employees and trade union representatives could better serve the committee as members as they are not fiduciaries who are more engaged in the day-to-day executive management of the company. Objective insight into the internal aspects affecting the company could better serve the committee and the company's shareholders.

Secondly, the requirement of having three non-executive directors and/or prescribed officers to report on issues affecting labour and employment without the participation of labour is a significant oversight which gravely undermines the efficacy of the committee as a CSR driver. This does not mean that the committee should be used to address issues that can be addressed by the LRA, through collective bargaining. The argument here is that the position of employees and trade union representatives as key stakeholders in the corporation is gravely undermined by their exclusion from a

[227] Ibid.
[228] For a discussion of derivative actions, see MF Cassim *The Statutory Derivative Action under the Companies Act of 2008: Guidelines for the Exercise of the Judicial Discretion* (PhD thesis, University of Cape Town, 2014) 8.
[229] See also Botha (n 51) 3.

committee which serves as the only voice for employees as stakeholders at board level.[230] Their contribution to internal CSR could conscientise the company on issues fuelling unrest and could assist in devising avenues for internal CSR within the corporation, without overstepping the role, purpose and objective of existing labour governance frameworks. For internal CSR to be realised under company law, internal stakeholders must be present in CSR drivers such as the social and ethics committee.

Thirdly, employees have first-hand information about issues such as their rights to organise, information on forced labour and discrimination, which all form part of the ten UN Global Compact principles that the committee must monitor and report on; these are potential triggers for labour instability and violent unrest in the company.[231] At present, the value dimension of employees in this regard is not realised as they are excluded from the social and ethics committee.

Fourthly, employees are also consumers and can provide insight into consumer relations issues and can assist companies' external CSR initiatives in the communities in which the company does business, as most employees are drawn from the community in which the company does business. The value that employees and trade unions offer is overlooked and therefore limits the value of labour to internal CSR within the company. The inclusion of employees and trade union representatives could foster improved inclusion and transparency in the work of the social and ethics committee.

Bearing in mind the ongoing developments in the DTIC, which seek to include employees on boards, the best way to achieve this would be to include employees and trade unions representing employees in the social and ethics committee. This inclusion would apply to employees irrespective of whether they belong to a trade union or not. This has the potential to facilitate a more effective form of stakeholder engagement than the inclusion of employees as board members, which may have significant consequences for issues relating to fiduciary duties and the overall governance structures of companies.

Including employees as board members ticks the box on stakeholder engagement without specifically speaking to issues to which employees may be able to make a meaningful contribution. For instance, white-collar employees may transition easily

[230] Ibid.
[231] Regulation 43(5) of the Companies Regulations, 2011.

into board processes after receiving training and continuous improvement workshops to upskill them on governance and overall board processes. On the other hand, blue-collar employees such as unskilled or semi-skilled miners may be unable to effectively have a voice on issues that are more technical in nature and that relate to the governance of companies.

It is submitted that the social and ethics committee has the potential to facilitate stakeholder engagement and employee voice as a form of worker participation in a way that adds value to employees where value is needed. First, the inclusion of employees and trade union representatives as members of the social and ethics committee will not impose a fiduciary duty on them. This means that the fiduciary obligation that would apply to employees as members of the board will not be triggered.

In other words, employees would be able to engage on primary employee issues, issues which form part of the mandate of the social and ethics committee.[232] Keeping the Marikana tragedy in mind, including employees on the board would have been beneficial if their inclusion had given employees a voice on issues relating to labour, the company's SLP and their wage demands. These are aspects that the social and ethics committee can monitor for compliance, and the committee can objectively provide for employee voice at board level. If employees had been included in an effectively run social and ethics committee there would have been a substantial difference in the outcome of Marikana.

The ongoing changes also raise questions about which category of employees and trade union groups would have a place as board members. Moreover, including employees as board members would threaten trade unions, which are currently experiencing significant declines in membership as well as rivalry among themselves. The social and ethics committee has the potential to facilitate a seamless form of employee engagement. The committee provides a good middle ground where employee engagement can be pursued without interfering with the place of trade unions within the company. However, to achieve this, the process must begin with the inclusion of employees and trade unions in the composition of the committee and not the inclusion of employees as board members with a fiduciary obligation.

[232] Regulation 43(5)*(b)* and *(c)* of the Companies Regulations, 2011.

4.3.4.5 The functions of the committee are wide and generic

There is no clear guidance on what is expected of the committee, and the committee's functions are over-generalised. The committee's mandate entails monitoring and reporting on areas that are legal in nature and specialised; monitoring and reporting on compliance, having regard to any relevant 'legislation or other legal requirement', implies that the committee must comprise non-executive directors and prescribed officers who have sufficient legal knowledge of a variety of issues.[233]

The regulations imply that a member of the committee must have adequate knowledge of international labour law instruments and codes of best practice, such as the UN Global Compact and ILO instruments. Members must have substantial knowledge of issues affecting labour governance, employment equality and BEE policy. Moreover, members must also be well-informed about issues relating to consumer relations and advertising. These aspects are very broad and generic, and they essentially make establishing and maintaining a social and ethics committee an expensive process.

Committee members are non-executive directors and prescribed officers who are generally not experts in all the fields on which they must report. In areas where committee members are not knowledgeable, they will need to obtain the services of a labour relations analyst, a consumer relations expert, a market behaviour analyst, and environment law consultants, to name a few of the experts which the social and ethics committee may need. This increases the budget of the committee, which in turn encourages applications for exemptions.[234]

4.3.4.6 The significance of delineating the functions of the social and ethics committee

The multiplicity of the functions of the social and ethics committee makes the committee an all-purpose committee. This takes away the value of making the social and ethics committee a specialised committee because the functions of the social and ethics committee, the audit committee and the risk committee overlap. It is therefore submitted that the social and ethics committee should simply be limited to acting as a

[233] Regulation 43(5) of the Companies Regulations, 2011.
[234] Section 72(5) of the Companies Act.

social responsibility committee. This would help to ensure that the committee is meticulous in facilitating stakeholder voice by exclusively focusing on avenues for promoting both CSR and internal CSR.

Furthermore, this will reduce the costs involved in appointing specialised consultants to assist the committee members in monitoring and reporting on areas outside their respective areas of specialisation and departs from the present position which requires the members to monitor and report on aspects that are already covered in the Act. Thus, a delineation of the committee will make the committee a specialised committee that may be useful in promoting employee voice within the workplace, because its exclusive focus will be on monitoring issues that affect employees through internal CSR and engaging employees on issues that affect them. At board level, the members of this committee will thus have a voice, which includes employee voice in a less adversarial but collective way. The focus of the committee would thus be on the issues affecting the social responsibility dimensions of the company without intruding on the roles of the other board committees.[235]

4.4 THE COMPANIES BILL OF 2021

On 1 October 2021, the DTIC published the Companies Amendment Bill, 2021 (the Bill) for public comment.[236] The Bill is the second draft of the Companies Amendment Bill, which was first published on 21 September 2018 (the 2018 draft Bill).[237] If the Bill is passed, it will constitute the first set of substantive amendments to the Companies Act since the latter came into effect on 1 May 2011. The amendment of the Companies Act is needed *inter alia* to ensure that South African company law keeps up to date with changes in the business world. To keep up with these changes, the Bill aims to introduce a contemporary company law framework which reduces unnecessary administrative paperwork, making it easier for companies to do business in South Africa.[238]

[235] Other board committees such as the risk committee, the audit committee, and the remuneration committee, to name a few.
[236] Companies Bill, 2021, available at *http://www.thedtic.gov.za/wpcontent/uploads/Revised_Companies_Amendment_Bill-1_October2021.pdf* (accessed on 5 October 2021).
[237] Ibid.
[238] See Part 1 of the Bill.

Significantly, the Bill aims to remedy some of the ambiguities and deficiencies in the current Act, to make it 'user friendly and less burdensome'.[239] The proposed amendments intend to ease the business process and address challenges of inequality in corporate governance. The Bill therefore comprises extensive amendments to the provisions of the Companies Act.[240] Certain important amendments are proposed to s 72 of the Companies Act; these extensive amendments to the section that provides for the social and ethics committee, which are contained in clause 15 of the Bill, are relevant to the objectives of this thesis. A detailed discussion of the proposed amendments follows.

a) Clause 15(5): The exemption of certain companies from the requirement to establish a social and ethics committee through an application to the Companies Tribunal

Clause 15 of the Bill provides that companies that are required to appoint a social and ethics committee may apply to the Tribunal for an exemption from establishing a social and ethics committee by publishing their intention to lodge an application for exemption with the Companies Tribunal.[241] Following the publication of its intention, the company will then have to apply to the Companies Tribunal for an exemption from this requirement.[242] The Bill proposes an additional publication requirement which needs to be met before a company applies to the Companies Tribunal for an exemption. The Bill does not change the factors that the Companies Tribunal will consider when granting the exemption application.

It is not clear what the purpose of the additional publication requirement is. Is this for the purpose of stakeholder engagement or simply to alert the Tribunal to its intention to lodge? Can the general public raise objections to the intention to apply for exemption and what will the procedure involve? Aspects of stakeholder engagement are still largely overlooked in the Companies Act and the Bill. The social and ethics committee performs a unique social responsibility function in the Act. Although the mandate of the committee is not expressly stated as such, it is implied that the committee is created to fulfil functions that are central to the values of CSR.[243]

[239] See Part 1, para 2.2.1 of the Bill.
[240] See Part 2 of the Bill, which provides a clause-by-clause description of the Bill.
[241] Clause 15(5)*(a)* of the Bill.
[242] Clause 15(5)*(a)* of the Bill.
[243] For a detailed discussion of the mandate of the social and ethics committee, see para 4.3.3 above.

For the committee to effectively fulfil its functions, processes to facilitate and promote much-needed stakeholder engagement are needed in the Act. The Bill should have proposed that the notice of intention to apply for the exemption be published in a newspaper or the *Government Gazette*, as opposed to the notice being given only to the Tribunal. A public notice of intention to submit an exemption would allow for much-needed engagement with the stakeholders of the company. This is a missed opportunity for amplifying the stakeholder voice under company law. Moreover, considering the fact that the committee's mandate requires the committee to monitor and report on the company's implementation of traditional CSR issues to the shareholders of the company, notice should be given to the stakeholders of the company.[244] Giving notice to the stakeholders collectively, as opposed to the Tribunal exclusively, would allow the stakeholders to express their views on the application for an exemption.

The Bill provides for a procedure to exempt certain companies from the requirement to establish a social and ethics committee through an application to the Companies Tribunal.[245] Subsidiaries of companies that have a social and ethics committee are not required to establish a social and ethics committee. The present operation of reg 43(2)*(a)* excludes a designated subsidiary company whose holding company has a social and ethics committee from appointing a social and ethics committee. What is evident from clause 15 is that the Bill aims to align the Companies Regulations with the Act. This requirement will thus allow the objectives of the social and ethics committee to be performed by the holding company, which will be tasked with performing the functions of the social and ethics committee as prescribed by the Companies Regulations for the whole group. This limits the administrative burden and expense associated with appointing two social and ethics committees for the same group of companies. However, this requirement prejudices the external stakeholders as well as the internal stakeholders, who may benefit from the mandate of the social and ethics committee being executed by a subsidiary company. However, given the mandate of the committee, it would be prudent to consider the size of the holding company, its geographic location, and the size of its subsidiaries. The external

[244] For a discussion of traditional CSR, see chapter 2 para 2.2.
[245] Clause 15(5)*(a)* and *(b)* of the Bill.

stakeholders and the internal stakeholders of a subsidiary company may benefit from having a designated social and ethics committee.

b) Clause 15(5B): Minimum qualification requirements for members of the social and ethics committee

Clause 15(5B) recommends that the 'qualification requirements of the members of the committee [are] to be established by the Minister as he or she deems necessary [for] … the committee perform its functions.' This amendment can be regarded as justifiable as the committee's mandate covers a broad range of industry-specific issues. Members need to be adequately qualified and possess the relevant experience to effectively fulfil their mandate in terms of the regulations. However, it is unclear what the exact qualifications will be as the Bill is silent in this regard. Given the broad range of functions of the committee, a degree and relevant experience in law, more specifically labour law and environmental law and policy, would be a suitable requirement to consider for anyone who wishes to be a member of the social and ethics committee.

However, the question arises as to whether the qualifications alone will be sufficient to effectively select suitable members of the committee. Qualifications, experience and ongoing training should all be considered when appointing and inducting the members, allowing the members of the committee to refresh their skills and knowledge areas. If a prescribed officer, a director and a non-executive director are appointed as members of the social and ethics committee, specialist training is necessary to allow them to effectively fulfil the committee's mandate. This training is necessary given the broad range of functions of the committee.[246]

However, had the Bill included employees and trade union members representing employees as potential members of the committee, most of the issues relating to the qualifications of members would be resolved. As discussed above, employees would provide much-needed insight on issues affecting employees in the workplace. This insight and knowledge-sharing is critical in finding solutions to labour instability. Additionally, employee and trade union insight would help committee members to consult and engage with employees on matters relating to the execution of their mandate as prescribed by the regulations, because the mandate of the committee

[246] Regulation 43(5)*(a)*(i)–(v) of the Companies Regulations, 2011.

as a whole is centred on reporting on issues that directly affect employees.[247] The requirement for members to have specific qualifications without having employees and trade unions as members of the committee limits the value of having on-the-ground qualified and experienced members who would help the company to be more effective in identifying the areas that need to be monitored and reported on. This is a missed opportunity under the Bill.

c) Clause 15(8)*(a)–(b)*: The composition of the social and ethics committees for public companies, state-owned and private companies

The composition requirements of the social and ethics committee are aligned with the regulations and provide that the social and ethics committee must consist of at least three directors. The Bill provides that 'the social and ethics committee may include prescribed officers, provided that for state-owned companies and public companies a majority of directors are not involved in the day to day management of the business of the company and must not have been so involved within the previous three financial years.'[248] 'In the case of any other company, not being a public company or state-owned company, [the committee] must consist of not less than three directors or prescribed officers provided that at least one of the directors must not be involved in the day to day management of the business of the company and must not have been so involved within the previous three financial years.'[249]

The Companies Act and the regulations do not distinguish between the composition of the social and ethics committee for different kinds of companies. The reason for this distinction in the Bill is unclear. However, given that the mandate of the committee is to make an objective evaluation of the company's environmental, labour, social and ethical footprint, having a majority of non-executive members would benefit the company by providing an objective perspective to the committee's implementation of its mandate as stipulated in the regulations.[250] The composition of the committee being different, depending on whether a company is a public company, a state-owned company, or a private company and any other company, seems unwarranted. For an objective function to be properly executed by the social and ethics committee, a majority of the directors who are not involved in the day-to-day

[247] See the discussion of the mandate of the committee above.
[248] Clause 15(8)*(a)* of the Bill.
[249] Clause 15(8)*(b)* of the Bill.
[250] Regulation 43(5)*(a)–(c)* of the Companies Regulations, 2011.

management of the business of the company should be appointed. This requirement should be applied to all kinds of companies and should not be reserved for public and state-owned companies.

d) Clause 15(9): The appointment of the social and ethics committee and the filling of vacancies

A significant aspect of clause 15 of the Bill is the mechanism for appointing members of the committee and filling vacancies on the social and ethics committee. The current Companies Act and the regulations are silent on these issues.[251] The strict requirements that are proposed in the Bill could be useful in preventing unnecessary delays in the appointment of the committee. Significantly, clause 14 of the Bill proposes amendments to s 61 of the Act by providing for the appointment of the social and ethics committee at the company's annual general meeting (AGM). This applies to members of the social and ethics committee of a public company or a state-owned company. The Bill also proposes that the report of the social and ethics committee be presented at the AGM; currently, the social and ethics committee is required to present the report at the meeting of the shareholders.[252] Although the much-needed update of the Companies Act is said to promote a less prescriptive Companies Act, some of the proposed amendments in clause 15(9) and (10) do the exact opposite.

The Bill overloads the agenda items of a company's AGM with items concerning the social and ethics committee. This leaves little to no room for other important issues. Ordinarily, AGMs take place for one day; the reasons for this are the costs of running an AGM and other over-arching issues, which include the availability of members. The opportunity to consider issues affecting the shareholders and other agenda items will be limited due to the prescriptive nature of the Bill on issues related to the social and ethics committee. This amendment has the potential to turn a company's AGM into an exclusive social and ethics committee meeting, leaving other agenda items as other matters.

e) Clause 15(13)*(a)*: The social and ethics committee report

A notable shift on the second draft of the Companies Bill is that the Bill prescribes that a social and ethics committee must prepare and present a report to the shareholders at

[251] Clause 15(9)–(11) of the Bill.
[252] The amendments to the Bill which affect the social and ethics committee report are discussed below.

the AGM or other meetings of shareholders where a company does not hold an AGM. The Bill clarifies the status of the social and ethics committee report and the requirements relating thereto, including its presentation to shareholders. The Bill details the aspects which must be covered in the committee report, which must be presented at a company's AGM. Again, the Bill imposes another agenda item at a public company or state-owned company's AGM relating to the workings of the social and ethics committee. The negative implications that this may have for the running of an AGM have been discussed above.

However, the advantage of having the report of the social and ethics committee presented at the AGM is that the work of the social and ethics committee is thus formally presented to the board. When directors are presented with the work of the committee at board level, they can no longer claim ignorance about issues relating to CSR, as such issues are a central part of the committee's mandate and report. This requirement elevates the status of the social and ethics committee and forces the board to take the social and ethics committee seriously. This is in line with the principles of King IV, which encourage transparency and accountability in the governance of companies.[253]

Clause 15(13)*(c)* of the Bill emphasises that the social and ethics committee reports must be submitted to the shareholders of the company. This reinforcement highlights the shareholder primacy influence in the governance of companies under the Companies Act, albeit disguised under the enlightened shareholder value approach.[254] Clause 15 of the Bill provides that the report must outline how the social and ethics committee has performed its functions. It is not clear whether this aspect of the report is intended to cover the accountability aspect of the committee. Since the committee members are required to be a majority of the non-executive directors in a public company and a state-owned company, it would be in the best interest of the company to have the same standards of board liability applied to committee members. Presenting a report at a meeting of the shareholders implies that the mandate of the committee has been fulfilled. For the committee to adequately perform its functions,

[253] Principle 1 of the King IV report. See King IV (n 211) 43.
[254] See chapter 3 for a discussion of the shareholder primacy approach.

the same liability requirements that are applied to directors who have a fiduciary duty to the company must be applied to the members.

f) Clause 15(13)*(e)*(i): Engagement with shareholders on the report of the social and ethics committee

The Bill goes further to state that the committee's report must be approved by way of an ordinary shareholders' resolution. Where the report is not approved by the shareholders, the social and ethics committee must engage with the shareholders who voted against the report, and must, within four months after the shareholders' meeting, publish an engagement statement outlining the process and outcome of the engagement.[255] This engagement statement will then be presented at the next AGM or other meetings of shareholders. This is a shift from the current regulations, which require that a member of the social and ethics committee reports to the shareholders at a company's AGM on the matters within its mandate. It can be argued that a report by a committee which is created for monitoring the social and ethical footprint of a company should not be exclusively reserved for engagement with the shareholders, but that there should also be engagement with the stakeholders collectively. It appears that the drafters of the Companies Bill opted to reinforce the workings of the enlightened shareholder value approach by overlooking the value and position of stakeholders in amplifying stakeholder voice though the committee.

The Companies Bill is not sufficiently clear on the approach that should be followed to promote stakeholder voice under company law; in particular, the potential platforms for promoting labour stability through employee voice are overlooked in the Bill. Engaging with shareholders and reporting to shareholders on the committee's mandate does not reflect an inclusive and progressive Companies Act. As discussed in chapter 5, strengthening stakeholder voice through stakeholder engagement and the appointment of employee directors constitutes the current approach to promoting stakeholder value. Clause 15 of the Bill does not seem to embrace this approach, as it strengthens the shareholder voice in the social and ethics committee, a committee centred on promoting the company's compliance with issues affecting the stakeholders. Shareholder voice has a place and platform through shareholder

[255] Clause 15(13)*(e)*(ii) of the Bill.

activism. A better approach would have been to require the committee to report to the stakeholders collectively.

To conclude, the workings of clause 15 are meant to reinforce the shareholder primacy aspect of the Act by completely negating the value and place of stakeholder voice in the committee. Chapter 3 recommended an *ubuntu* approach to corporate governance.[256] It was argued that this approach has the potential to promote labour stability in company law by promoting the principles of *ubuntu* in the governance of companies. As stated in chapter 2, in April 2021, the DTIC announced that the revised Companies Bill would contain provisions for employee boards in South Africa. The present Bill does not address employee boards, and clause 15 of the Bill overlooks the value and place of employees in the operations of the social and ethics committee. Consequently, the wording and structure of clause 15 of the Companies Bill reflects another missed opportunity for establishing a collaborative role between company law and labour law through the social and ethics committee.

4.5 CONCLUSION

This chapter investigated the place of internal CSR in the provisions of the new Companies Act. The chapter started with an overview of the history of the South African corporate law regime, leading to the process of corporate law reform which culminated in the new Companies Act. The chapter went further to provide a critique of the proposed amendments to the workings of the social and ethics committee in terms of the Bill. In the context of corporate governance and social responsibility, the chapter found that the only avenue for CSR and internal CSR in the Act is through the provisions of the s 72(4) social and ethics committee.

It was shown that the presence of a structured committee such as the social and ethics committee in a company is crucial for ensuring that business activities are conducted with an integrated perspective to promote social responsibility and good business ethics within the company. This is because, for the very first time in the history of South African company law, there is a place for monitoring and reporting on the social responsibility of the company. However, the efficacy of this committee as a potential conduit for internal CSR within the structure of the Companies Act is questionable because the Act does not explicitly refer to the mandate of the social and

[256] Chapter 3 para 3.5.

ethics committee as one that is meant to monitor CSR within the company, both in its internal and external dimensions.

The functions and the composition of the social and ethics committee seem not to have been properly considered. If they were considered, there would be no question about including employees as board members, as the channels for stakeholder engagement under the Act would have already been achieved by establishing this committee. Therefore, it is submitted that there is unrealised potential for stakeholder voice and worker participation under the Act through this committee. This unrealised potential undermines the value, substance, utility and potential for CSR and internal CSR in the Companies Act. This underutilisation is amplified by the exclusion of the King Code as a key instrument against which the social and ethics committee can measure compliance, as well as the exclusion of employees and trade unions representing employees from the committee.

With the above in mind, the next chapter examines lessons that can be drawn from the UK and the US in developing avenues for internal CSR for labour stability. The chapter expounds on the lessons which may be drawn from how companies in the US and the UK strengthen stakeholder voice as a form of internal CSR. This is done by critiquing the US's Rule 14a-8 labour union shareholder proposal, the application of the provisos of s 176 of the UK's Companies Act of 2006, and the new provisions on strengthening stakeholder voice under the Corporate Governance Code.

CHAPTER FIVE: LESSONS FROM INTERNAL CSR MEASURES IN THE UK AND THE US

5.1 INTRODUCTION

A study of internal CSR in the South African context cannot be conducted without an appreciation of the influence of comparable foreign law on South Africa's company law. This analysis is valuable as it provides context for the contribution of foreign law as a dominant force in South African law. Hence, the discussion about the process of corporate law reform that preceded this chapter gave context to the influence of foreign law on South Africa's corporate law landscape, both before and after democracy.[1] This is further reinforced by s 5(2) of the Companies Act 71 of 2008, which empowers a court in interpreting or applying this Act to consider foreign company law, subject to the proviso that such consideration is appropriate.

Therefore, one may conclude that for a proper appreciation of internal CSR as a mechanism through which labour stability may be pursued in South African company law, a thorough examination of the implementation of internal CSR in both the UK and the US is warranted. This is because of the significant influence of the UK Companies Act, 2006, the Model Benefit Corporation Legislation and the Company Laws of Delaware on South African company law.[2] Furthermore, an understanding of how the company laws of the UK and the Code on Corporate Governance address issues relating to internal CSR should be helpful in identifying potentially problematic areas of dealing with labour stability through the lens of company law. This will help to provide lessons from the structures put in place in other jurisdictions or to find solutions to these problems.

To navigate these issues, the chapter provides an overview of the forces behind corporate governance and CSR in the US. This involves an overview of the work of the Business Round Table as well as an analysis of the provisions of Rule 14a-8 of the Securities and Exchange Commission (SEC) Rules and Regulations for shareholder social proposals and labour union shareholder proposals under the Act. Furthermore, the chapter explores the use of avenues for internal CSR under the Corporate Governance Code, read together with s 172 of the UK Companies Act, 2006. The

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[1] See chapter 4 para 4.2.2.

[2] T Mongalo 'South Africanizing company law for a modern competitive global economy' (2004) 121(1) *South African Law Journal* 93.

analysis essentially investigates how company law in the UK promotes avenues for internal stakeholder engagement as a form of internal CSR, under the Code and within the Act.

5.2 INTERNAL CSR IN THE US

5.2.1 The influence of US company law on the Companies Act.

As discussed in the preceding chapters, the US has had a significant influence on the development of South African corporate law.[3] Prior to the process of corporate law reform, this influence was apparent in the governance of companies using the shareholder primacy approach,[4] the influence of the US in corporate governance reform,[5] the implementation of US law in South Africa's corporate restructuring proceedings,[6] derivative action proceedings and the business judgement rule.[7] Although there are no explicit lessons from the US on how to promote labour stability through internal CSR under US corporate law, there is much to learn from the work of the Business Roundtable, and SEC Rule 14a-8, which deals with shareholder and labour union shareholder proposals. Subject to some limitations,[8] there are some lessons for trade unions in South Africa, which could have an impact on promoting employee voice at board level, which is a significant feature of CSR. The long-standing influence of US corporate law on South Africa's company law means that the developments in US corporate law and corporate governance are worth considering. Thus, in the US context, the provisions of the Rule 14a-8 labour union shareholder proposal provide a platform for promoting internal CSR for labour stability, with the objective of sourcing adoptable lessons for internal CSR in South African company law.

5.2.2 The forces behind CSR development in the US: An overview

Corporate governance in US corporate law has been a controversial and highly debated topic for decades.[9] In approach and in practice, its development has not been without criticism as the discourses on corporate governance and the legislative instruments

[3] Chapter 1 para 1.10; chapter 2 paras 2.2.3 to 2.2.5; chapter 4 para 4.2.2.
[4] Chapter 3 para 3.3.
[5] T Mongalo 'An overview of company law reform in South Africa: From the Guidelines to the Companies Act 2008' (2010) *Acta Juridica* xx.
[6] Chapter 6 of the Companies Act 2008.
[7] Section 76(4) of the Companies Act 2008.
[8] These limitations are discussed in para 5.2.2.2 and para 5.2.4.1 below.
[9] EM Dodd 'For whom are corporate managers trustees?' (1932) 45 *Harvard Law Review* 1145.

introduced to facilitate 'good' corporate governance continue to evolve.[10] Traditional US corporate law has maintained shareholder supremacy throughout the case law. This was primarily evidenced in the 1919 case of *Dodge v Ford Motor Co* which solidified the principles of shareholder primacy and the business judgment rule in US corporate law.[11] The Michigan Supreme Court declared that 'it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others.'[12] In this judgment, the court confirmed the primary function of the board as a corporate governance structure that is tasked with the primary purpose of maximising shareholder profit.

The Securities Acts of 1933 and 1934 further enshrined this principle as a means of protecting shareholders who had suffered in the Great Depression due to corporate mismanagement.[13] In *Revlon, Inc v MacAndrews & Forbes Holdings*,[14] it was held that a board can consider stakeholder interests, but only when they are aligned with those of stockholders.[15] The trajectory of shareholder supremacy was thus firmly rooted in US case law early on, and has remained the primary essence of corporate decision-making in the US.[16]

However, CSR has gained traction as the past few decades have seen an increasing demand that corporations must be held accountable for their social and environmental impact.[17] The power of the internet and the rising influence of new forms of social media and changing expectations have exerted pressure on US companies to engage in CSR, as the traditional responses of corporations to these issues – silence and indifference – are no longer acceptable.[18] Stakeholders and private

[10] For example, in the US, LLCs must include language that the company's purposes 'shall include creating a material positive impact on society and the environment', and a 'Director's Clause', listing the different stakeholders whose interests managers shall consider. See Certified B Corporation, Legal Requirements, available at *https://bcorporation.net/certification/legal-requirements* (accessed on 6 June 2019).
[11] *Dodge v Ford Motor Co* (1919) 170 NW 668.
[12] Ibid.
[13] LL Dallas 'Is there hope for change? The evolution of conceptions of "good" corporate governance' (2017) 54 *San Diego L Rev* 502.
[14] *Revlon, Inc v MacAndrews & Forbes Holdings, Inc* 506 A2d 173 (Del 1986) 176.
[15] Ibid.
[16] MF Weismann 'The missing metrics of sustainability: Just how beneficial are benefit corporations?' (2017) 42 *Del J Corp L* 4.
[17] M Verhaegen 'Public reporting by benefit corporations: Importance, compliance, and recommendations' (2018) 14 *Hastings Bus LJ* 37.
[18] TCW Lin 'Incorporating social activism' (2018) 98 *BUL Rev* 1544.

individuals now use social media to organise protests, raise money, promote awareness of social issues, and pressure companies to respond.[19]

Policymakers are also influencing US corporate culture, with a new focus on sustainability and accountability, recognising that corporations affect more than just their shareholders.[20] Thus, CSR in the US is becoming less of a voluntary activity, as the government increasingly requires mandatory disclosures with legislation such as the 2010 Dodd-Frank Act.[21] This is also occurring at the state level, with California, for example, passing the 2010 Transparency in Supply Chains Act, requiring companies to disclose how carefully they monitor their supply chains for potential human rights abuses.[22]

Changes in the conception of corporate responsibility have also brought about greater corporate political rights. *Citizens United v FEC* recognised that corporations have a First Amendment right to dedicate funds to political spending, absent direct campaign contributions.[23] In *Burwell v Hobby Lobby,* the Supreme Court recognised that a corporation may have protected religious liberties, which some believe suggests that a corporation may have protected goals other than profit maximisation.[24] Courts are also generous to boards with the business judgment rule, allowing directors a wide berth of discretion in decisions that affect stakeholders.[25] While some have argued that these recent cases pave the way for firms to pursue goals other than profit maximisation, shareholder supremacy still remains firmly in place.[26] To allow management to favour stakeholder interests even as they conflict with shareholder interests, in 2019, the Business Round Table released a new statement on the purpose of the corporation, which was signed by 181 CEOs who committed themselves to

[19] Ibid.
[20] Dallas (n 13) 553.
[21] GB Walliser & I Scott 'Redefining corporate social responsibility in an era of globalization and regulatory hardening' (2018) 55 *Am Bus LJ* 167. The Dodd-Frank Act, formally known as the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, aims to protect consumers from exploitation by mortgage companies and pay lenders. It was passed in 2010 during the Obama Administration after the tragic events of the 2008 financial crisis, which saw millions of Americans unemployed with trillions lost in wealth. See generally JC Coffee Jr 'What went wrong? An initial inquiry into the causes of the 2008 financial crisis' (2009) 9(1) *Journal of Corporate Law Studies* 1–22. The Act provides for new rules that aim to prevent another financial crisis by building a stable and safer financial system which is centred on transparency and accountability.
[22] Ibid 202. See also California Transparency in Supply Chains Act of 2010, Ca. Civ. Code § 1714.43 (2017).
[23] *Citizens United v FEC* 558 US 310 (2010).
[24] *Burwell v Hobby Lobby* 134 S. Ct. 2751 (2014). See also Weismann (n 16) 11.
[25] Dallas (n 13) 554.
[26] Weismann (n 16) 11–12.

leading their companies for the benefit of a wider group of corporate stakeholders. This presents a fundamental shift from the shareholder primacy approach, which, as discussed in chapter 3, has no room for CSR.[27]

For more than 40 years, the Business Round Table has been involved in the process of issuing principles of corporate governance in the US.[28] Since the late 1970s, each version of the principles of corporate governance was centred on promoting shareholder primacy, which, as discussed in chapter 3, supports the notion that companies are created to serve shareholder interests and that the fiduciary duties of the directors of the company are owed to the shareholders.[29] The new statement of the Business Round Table embraces a radical shift away from the traditional approach of shareholder primacy, by outlining a modern and more inclusive standard for corporate responsibility in US companies. In the statement, companies commit to:

> – Delivering value to our customers. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations.
> – Investing in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.
> – Dealing fairly and ethically with our suppliers. We are dedicated to serving as good partners to the other companies, large and small, that help us meet our missions.
> – Supporting the communities in which we work. We respect the people in our communities and protect the environment by embracing sustainable practices across our businesses. Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate.
> – We are committed to transparency and effective engagement with shareholders. Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.

The statement embraces principles that form the basis of the concept of CSR and internal CSR. The concept moves away from the capitalistic view of employees as dispensable factors of production. The Business Round Table leads the discussion by

[27] Chapter 3 para 3.3.1.
[28] Business Round Table, available at *https://opportunity.businessroundtable.org/ourcommitment/* (accessed on 12 September 2020).
[29] See chapter 3 para 3.2.1.

embracing principles which encourage fair compensation and employee skills development, anchored upon 'human dignity, diversity and respect'.[30] As discussed in chapter 1, a key driver of labour discord in South Africa is companies essentially not investing in employees, through poor compensation, leading to wage disputes and unrest.[31] This radical shift by the Business Round Table is exemplary in that companies are committed to changing their traditional ways of doing business – which was a singular emphasis on shareholder value.[32] The Business Round Table members have taken a self-regulating measure to promote business practices that will benefit a wider body of corporate stakeholders. This approach is principle-based as it allows business to make itself accountable for doing good.[33]

Corporate governance in the US is rule-based and not principle-based. A rule-based approach to regulation prescribes a legalistic set of rules about how companies are supposed to behave, whereas a principle-based approach allows the company to decide in principle on the procedure it will adopt to achieve certain outcomes.[34] This approach is centred on trust between the company and the stakeholders, ensuring that the rights of stakeholders as well as the appropriate accountability measures are in place.[35] A rule-based approach to corporate governance where shareholders and labour unions have pursued the CSR agenda has occurred through the lens of labour unions and shareholder activism. The discussion that follows shows how labour unions and shareholder activists have pursued the CSR agenda through shareholder proposals and labour union shareholder proposals in the US.

5.2.2 Shareholder social proposals: SEC Rule 14a-8

The process of shareholder activism in the US takes place within the workings of the Security Exchange Commission (SEC) Rule 14a-8 on shareholder proposals.[36] In the early 1940s, the SEC adopted a rule that paved the way for shareholders to submit shareholder proposals that 'constitute a proper subject for action by security holders'.[37] Rule 14a-8 of the SEC allows qualifying shareholders to put a proposal to a

[30] Business Round Table (n 28).
[31] See chapter 1 para 1.3.
[32] See chapter 3 para 3.3.
[33] Business Round Table (n 28).
[34] LM Sama & V Shoaf 'Reconciling rules and principles: An ethics-based approach to corporate governance' (2005) 58(1/30) *Journal of Business Ethics* 179.
[35] Ibid.
[36] Rule 14a-8(i)(7) of the SEC.
[37] Ibid.

shareholder vote.[38] The shareholder who intends to submit a shareholder proposal must give notice to the management of the company of the shareholder's intention to include the proposal in the company's forthcoming meeting.[39] The company will generally include such proposals in its proxy materials for its upcoming annual or special shareholder meeting once all the requirements for the submission of a shareholder proposal under Rule 14a-8(i) are met.[40]

However, corporate managers can exclude a proposal if it meets the criteria for exclusion, enumerated in Rule 14a-8(i).[41] This *inter alia* includes proposals that are improper under state law or in conflict with the corporation's certificate of incorporation,[42] or if it is not a proper subject for action by the shareholders.[43] Proposals are illegal or deceptive if their implementation would cause the company to violate any state federal or foreign law.[44] Corporate managers can exclude shareholder proposals that conflict with the commission rules.[45]

Proposals submitted by shareholders to address a personal grievance or claim by the shareholder against the company are also excluded.[46] The shareholder proposal must present an interest that is shared by the broader group of corporate shareholders and must not merely seek to further the personal interests of one shareholder. A proposal that specifically seeks to address the management functions of a company may be excluded if it deals with a matter relating to the company's ordinary business

[38] §240.14a-8. For a shareholder to be eligible to have a proposal included in a proxy statement a shareholder must own securities worth at least $2 000 for at least one year by the date on which the shareholder submits the proposal. The shareholder must continue to hold those securities until the date of the meeting. If the shareholder is a registered holder of securities, the shareholder's name must appear in the company's records as a shareholder. See EN Rindfleisch 'Shareholder proposals: Catalyst for climate change-related disclosure, analysis, and action' (2008) 5(1) *Berkeley Business Law Journal* 58.
[39] If the proposal is for the company's annual meeting, the proposal must be submitted 120 days prior to the day of the year in which the proxy materials were sent for the previous year's meeting: § 240.14a-8(e)(2).
[40] This can be the annual general meeting as required in the company's memorandum of incorporation.
[41] Rule 14a-8(i)(7) excludes proposals that are directly related to a policy issue with a nexus to the company.
[42] SJ Schwab & RS Thomas 'Realigning corporate governance: Shareholder activism by labor unions' (1998) 96 *Michigan Law Review* 1056.
[43] 17 CFR §240.14a-8(i)(I).
[44] §240.14a-8(i)(2).
[45] §240.14a-9.
[46] 17 CFR §240.14a-8(i)(4).

operations.[47] Proposals that are beyond the company's power to enforce are also excluded.[48]

5.2.2.1 The Rule 14a-8 shareholder proposal for internal CSR

The Rule 14a-8 shareholder proposal presents a unique opportunity for shareholder activists to submit proposals to the board on both CSR and internal CSR issues. Despite the probability of the success of the proposal being entirely in the hands of the directors, shareholder proposals provide some benefits for internal CSR.[49] First, they provide a platform where shareholders' voices can be heard. Therefore, shareholder activists with a CSR agenda can create a platform for internal stakeholder issue dialogue through shareholder proposals.

Secondly, shareholder proposals can play an educative role in the company on issues affecting stakeholders and the broader body of society. They provide a platform where company directors can be made aware of how shareholders want their investments to positively impact society. In other words, such proposals take the CSR agenda to the board as they seek to educate the company on shareholder interests, particularly about issues outside the usual shareholder proposals, which are commonly based on financial performance.[50]

Thirdly, the approach increases shareholders' involvement in issues affecting the company. In most cases, shareholders play a passive role in corporate management as their investments are dispersed in different portfolios and they are often not necessarily engaged on how their investments are managed and controlled.[51] Moreover, in contrast to a proxy fight, shareholder activism in the US is a highly preferred method that shareholders can use to address internal stakeholder issues and make recommendations on issues affecting executive pay, board diversity and procedures governing shareholders' voting rights.[52] This is because the costs of presenting a shareholder proposal at the company's annual meeting are much more affordable compared to a

[47] Corporations have rejected, under the ordinary business exception, proposals that relate to issues concerning the corporation's impact on the environment and climate change. See SH Choi 'It's getting hot in here: The SEC's regulation of climate change shareholder proposals under the ordinary business exception' (2006) 17 *Duke Envtl L & Pol'y F* 165.
[48] §240.14a-8(i)(6).
[49] Choi (n 47).
[50] Schwab & Thomas (n 42).
[51] Ibid.
[52] Ibid.

proxy fight, which is litigious in nature.[53] However, some proposals can become litigious.[54]

5.2.2.2 The limitations of the Rule 14a-8 shareholder proposal

In as much as shareholder activism has been used in the US to promote shareholder value, critics often downplay the role of shareholder proposals in influencing the CSR agenda in corporations for several reasons. First, shareholder proposals are not free; they involve costs,[55] which are incurred by the shareholders.[56]

Secondly, the management of the company can exclude a shareholder proposal if it falls within one of the 13 bases for exclusion as set out in Question 9, Rule 14a-8(c). The substantive objections to shareholder proposals can warrant the granting of an exception if the shareholder proposal falls within certain categories, which include proposals inconsistent with centralised management, proposals that interfere with management, proposals that interfere with the management's proxy solicitation process, or proposals that are illegal and deceptive.[57] This imposes some limitations for CSR, because shareholder proposals which seek to encourage social and environmental policy concerns may be deemed to be proposals that promote a personal grievance of shareholder activists.[58]

A proposal under Rule 14a-8(i)(7) can be properly excluded if it focuses on the company's employment practices; it has been argued that such a proposal interferes with the ordinary business operations of the company.[59] This is because the relationship between a company and its employees affects the day-to-day management of the company. In terms of the SEC's 1998 amendments to Rule 14a-8, the term 'ordinary business' does not refer to matters that are ordinary in the literal meaning of the word, but to matters that relate to providing flexibility in directing certain core

[53] See generally L Bebchuk & O Hart 'Takeover bids vs. proxy fights in contests for corporate control' NBER Working Papers 8633 (2001), National Bureau of Economic Research, available at *https://ideas.repec.org/p/nbr/nberwo/8633.html* (accessed on 1 February 2022).
[54] N Gantchev 'The costs of shareholder activism: Evidence from a sequential decision model' (2013) 107(3) *Journal of Financial Economics* 623.
[55] Ibid.
[56] Ibid. See also Schwab & Thomas (n 42) 1030.
[57] Rule 14a-8(c) of the SEC rules.
[58] Rule 14a-8(c)(4) of the SEC rules.
[59] PR Uhlenbrock 'Roll out the barrel: The SEC reverses its stance on employment-related shareholder proposals under Rule 14a-8 – again' (2000) 25 *Del J Corp L* 300.

matters involving the business of the company and its operations.[60] However, where a proposal relates to the ordinary business operations of the company and includes significant policy issues that transcend the day-to-day business of the company, the proposal may not be added to a shareholder vote even if it touches upon a social policy issue.[61]

Furthermore, the submission of a shareholder proposal by shareholder activists under Rule 14a-8 of the SEC does not necessarily mean acceptance and implementation of the shareholder proposal by the board. The board can still exercise its discretion and raise substantive and procedural objections to the shareholder proposal; this discretion is employed regardless of whether the shareholder proposal refers to CSR matters or not.[62] Moreover, if the underlying motive or goal of the shareholder proposal by shareholder activists is to exercise control over the internal management of the company, the board of directors will often exclude the shareholder proposals.[63]

Finally, due to the *laissez faire* capitalist structure of US corporate law, the notion of bringing non-financial matters into the boardroom is often not viewed as part of the classic ideology of the purpose of the corporation. Therefore, shareholder proposals which seek to promote a CSR agenda are generally not in line with the classic concept of what the corporation stands for in US corporate law.

5.2.3 Labour union shareholder proposals

5.2.3.1 An overview of the origins and role of labour unions in the United States

At its core, a labour union is a group of workers who come together to negotiate with their employers about pay and basic working conditions.[64] Labour unions can represent

[60] Final Rule: Amendments to rules on shareholder proposals securities and exchange commission 17 CFR Part 240 Release No. 34-40018; Ic-23200; File No. S7-25-97 Rin 3235-Ah20, available at *https://www.sec.gov/rules/final/34-40018.htm* (accessed on 3 December 2020).
[61] In *Comcast Corporation*, the SEC Rule 14a-8(i)(7) requesting that the company omits the shareholder proposals from its proxy materials was upheld by the SEC because the proposals related to ordinary business operations. In terms of the SEC Rule 14a-8(i)(7) a proposal may be properly omitted from a company's proxy materials pursuant to Rule 14a-8(i)(7) on the basis that 'the Proposal micromanages the Company and relates to the Company's ordinary business operations, or alternatively, pursuant to Rule 14a-8(i)(3) on the basis that the Proposal is impermissibly vague and indefinite so as to be materially misleading in violation of Rule 14a-9'. Available at *https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/nunziatoetal012120-14a8-incoming.pdf* (accessed on 3 December 2020).
[62] Schwab & Thomas (n 42) 1049.
[63] Rule 14a-8(i)(7).
[64] JS Ahlquist 'Labor unions, political representation, and economic inequality' (2017) *Annual Review of Political Science* 409.

a group of workers in a specific industry or workers across different fields who do similar kinds of work.[65] In the US, in the early days of the Industrial Revolution, workers worked in conditions that were structured to support capitalism. The working environment and the overall conditions relating to their wages, pay and other aspects were abysmal.[66] The history of labour unions in the US is like the history of the trade union movement in South Africa. The rise of the black trade union movement undoubtedly played a pivotal role in the development of the South African labour relations environment.

The black trade union movement, especially in the mining industry, played a key role in advancing the demands of mineworkers against the decisions by mine owners to reduce wages and reserve jobs and work benefits for white migrant labourers.[67] The protest actions that took place in the 1920s solidified the demands made by black mineworkers to gain recognition for their rights, to be recognised as workers, to form and join trade unions, and to negotiate their conditions of employment.[68]

The protests by the miners fuelled non-cooperation through insubordination by the mineworkers as a collective bid to raise their demands with their employers, which was a key driver in the formation of what was generally believed to be the first trade union for black workers, formally known as the Industrial Workers of Africa.[69] The growing power and influence of the black trade union movement led to the state intervening to negotiate the demands of the unrecognised black trade union movement, in order to mitigate the radical acts of black miners.[70]

In the immediate aftermath of the Industrial Revolution in the US, there was an immediate need for workers to formally organise themselves and form an organisation that would negotiate on their behalf for better working conditions and an

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[65] Ibid 410.
[66] E Beck 'Working conditions in the Industrial Revolution' available at *https://www.historycrunch.com/working-conditions-in-the-industrial-revolution.html#/* (accessed on 15 September 2022).
[67] R Fine & DM Davis *Beyond Apartheid: Labour and Liberation in South Africa* (1992) 11.
[68] R Stares *Black Trade Unions in South Africa: The Responsibilities of British Companies* (1977) 9.
[69] IB Tabata *Industrial Unrest in South Africa: Lusaka: All African Convention and Unity Movement of South Africa* (1973) 1.
[70] J Maree & PJ de Vos *Underemployment, Poverty and Migrant Labour in the Transkei and Ciskei* (1975) 7.

increase in pay.[71] The aftermath of the Industrial Revolution ushered in the emergence of early labour unions whose immediate mandate was to liaise between the owners of companies and the workers so that both would benefit from their labour relationship.[72]

As the rise of the industrial corporation grew and US corporations took over the economies of the western world, there was increasing pressure for the voices of workers to be heard on issues relating to working conditions,[73] family benefits and the health and safety of workers. This growth or global modernisation which called for the incorporation of global companies influenced the formation of labour unions as industrialisation increased in the US and throughout Europe.[74]

In the US, labour unions perform several functions. In this discussion, these functions have been broadly classified into three categories: militant functions, political functions, and corporate governance functions.[75] The traditional role of labour unions is focused on activities that seek to improve the working conditions of workers. Through collective bargaining, labour unions aim to secure better wages for their members, improved working conditions and improved treatment of their members by their employers.[76]

When negotiations with employers fail, labour unions engage in strikes, boycotts and other tactics such as go-slows to protect the needs and interests of their members.[77] This is the militant function.[78] The objective of the militant function is to protect members against victimisation and injustice and advance their members' interests in better wages and improved working conditions beyond the collective bargaining table. This is the same function performed by trade unions in South Africa, where trade unions engage in protracted strike actions and picketing and lockouts as means to protect their workers from injustice by advocating for better working

[71] EJ Fillenwarth 'Politics and labor unions' (1961) 37 *Notre Dame Law* 176.
[72] Ibid 177.
[73] Ahlquist (n 64) 415.
[74] H Mohajan 'The first industrial revolution: Creation of a new global human era' (2019) 5(4) *Journal of Social Sciences and Humanities* 377–387.
[75] Fillenwarth (n 71) 180. Labour unions in the US context and trade unions in the South African context have many functions. The discussion above is limited to a discussion of three identified functions.
[76] Ibid.
[77] Ahlquist (n 64) 420.
[78] Ibid 422.

conditions and higher wages, which are all centred on protecting the dignity of workers as entrenched in the Constitution.[79]

As is the case in South Africa, labour unions in the US also embrace political functions;[80] they do this by advocating for policies that improve the lives of all workers in the country or backing movements for social and economic change.[81] These functions include but are not limited to affiliating the union with a political party, helping the political party in enrolling members, collecting donations, and seeking the help of political parties during strikes and lockouts. According to Ahlquist, labour unions play a key role in addressing political inequality, and they influence politics in ways that lead to reduced economic disparities.[82] This is not a new realisation. Labour unions provide intense social experiences that may convert workers into voters and more engaged citizens. Members do this by actively recruiting one another into official union positions and electoral politics.[83]

Compared to trade unions in South Africa, labour unions in the US have three traditional functions.[84] First, labour unions organise employees at non-union companies.[85] Secondly, once the unions have organised employees, labour unions bargain with management and government by exerting pressure about issues affecting employees.[86] Thirdly, once management has reached an agreement through collective bargaining, labour unions monitor the agreement to ensure that companies comply with the agreement.[87] Labour unions in the US essentially monitor collective

[79] Chapter 4 of the LRA deals with strikes and lockouts (ss 64–77). The Constitution does not give employers the right to lockout employees; however, the LRA provides in s 64(1) that every employee has the right to strike, and every employer has recourse to a lockout.
[80] Ahlquist (n 64) 422.
[81] HB Asher *American Labor Unions in the Electoral Arena* (2001).
[82] Ahlquist (n 64) 420.
[83] Ibid.
[84] TS Barrows & E Kaufman (eds) *What do Unions do? A Twenty-year Perspective* (2017) 1.
[85] JW Budd 'The effect of unions on employee benefits and non-wage compensation: Monopoly, power, collective voice and facilitation' in TS Barrows & E Kaufman (eds) *What do Unions do? A Twenty-year Perspective* (2017) 161.
[86] These issues include, but are not limited to, aspects of job security and increased democratic participation within the workplace. See J Hagedorn, CA Paras, H Greenwich & A Hagopian 'The role of labor unions in creating working conditions that promote public health' (2016) 106(6) *American Journal of Public Health* 989.
[87] P Levine 'The legitimacy of labor unions' (1998) 18(2) *Hofstra Labor and Employment Law Journal* 529.

bargaining agreements and create platforms for the presentation of employee complaints through employee grievance arbitration systems.[88]

As is the case in South Africa, unions engage in strike action and picket against companies that do not honour trade union agreements.[89] The National Labour Relations Act (NLRA) in the US was enacted to cater for traditional union functions.[90] The Act seeks to correct the inequality in bargaining power between the employee and the employer. The Act gives employees the choice to join and be represented by trade unions,[91] to engage in collective bargaining,[92] and to use traditional avenues for addressing employee dissatisfaction, such as strikes and picketing.[93]

As in South Africa, unions in the US have become increasingly dissatisfied with the workings of labour law.[94] The power and influence of the NRLA in the US has declined significantly, due to its inefficacy in solving employee-related disputes and in providing effective channels for collective bargaining.[95] Labour unions are, however, able to use corporate and securities law to convey their message to corporate managers and shareholders.[96]

Of significance to the objective of this thesis is the role of unions in the governance of companies. Labour union shareholder proposals provide an innovative platform for labour unions to bring the debate about internal stakeholder issues into the boardroom, outside the workings of the NLRA.[97] Labour union shareholder campaigns essentially move away from traditional union functions by introducing a platform for internal stakeholder engagement inside the boardroom through the workings of the Rule 14a-8 shareholder proposal.[98] Labour union shareholder activism is used because the failure of the NLRA and the traditional strike and collective

[88] Schwab & Thomas (n 42) 1021. See also J Currie & S McConnell 'The impact of collective-bargaining legislation on disputes in the US public sector: No legislation may be the worst legislation' (1994) 37(2) *Journal of Law and Economics* 521.
[89] Barrows & Kaufman (n 84).
[90] National Labour Relations Act of 1935, also known as the Wagner Act.
[91] Section 7(a) of the NRLA expresses the right of workers to join unions and collectively bargain.
[92] 29 USC § 157 of the NLRA.
[93] Section 7 [§ 157] of the NLRA.
[94] See chapter 2 for a discussion of labour unions in South Africa.
[95] Schwab & Thomas (n 42) 1032.
[96] RS Thomas & KJ Martin 'Should labor be allowed to make shareholder proposals?' (1998) 73(1) *Washington Law Review* 41.
[97] Schwab & Thomas (n 42) 1032.
[98] Ibid.

bargaining procedures has led to the redundancy of labour unions, because of their ineffectiveness in dealing with labour issues in the US.[99]

5.2.3.2 The rationale behind labour union shareholder activism

Labour union shareholder activism involves a process of advancing labour union shareholder proposals at board level on issues affecting employees at the company's annual general meeting.[100] Through their union pension funds, labour unions use the corporate voting process available to shareholders under the SEC Rule 14a-8 to advance employee rights by presenting proposals which demand changes in corporate governance.[101] Under the SEC Rule 14a-8, labour unions derive the same powers as shareholder activists by virtue of the union pension funds.[102]

Similarly, individual union members use the corporate voting process to assume a power like that of shareholders.[103] Thus the union shareholder activists do what the shareholder activist can do under the Rule 14a-8 shareholder proposal. In the US, unions have used this procedure to actively raise their voice on issues such as executive pay and labour interests.[104] Labour unions particularly use this method to gain the attention of directors and shareholders on traditional labour union complaints and further use their power as shareholders to optimise traditional organising and collective bargaining goals.[105]

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[99] Ibid.
[100] Thomas & Martin (n 96) 42.
[101] Schwab & Thomas (n 42) 1045.
[102] According to Freeman, in the 1980s the proposed use of union pension funds was to 'advance social purposes' and to strengthen unionism with the potentially important consequences for the economy and unionism. See RB Freeman 'Unions, pensions, and union pension funds' in *Pensions, Labor, and Individual Choice* (1985) 89–122 at 113. Today, union pension funds consist of the pool of assets forming an independent legal entity that are bought with the contributions to a pension plan for the exclusive purpose of financing pension plan benefits. The benefits are in the form of a payment made to a pension fund member or their dependents after retirement. The fund or plan members have a legal or beneficial right or some other contractual claim against the assets of the pension fund. Pension funds take the form of either a special purpose entity with legal personality (such as a trust, foundation or corporate entity) or a legally separated fund without legal personality managed by a dedicated provider (pension fund management company) or other financial institution on behalf of the plan or fund members. See also Pension Country Profile: United States at 307, available at *https://www.oecd.org/finance/private-pensions/42575094.pdf* (accessed on 3 September 2022).
[103] Ibid 1021.
[104] Ibid.
[105] Ibid 1043.

5.2.3.3 The process of labour union proposals under Rule 14a-8(a)

Rule 14a-8 of the SEC allows for US public companies to use the shareholder proposal rule subject to certain legislative restrictions and limitations.[106] The SEC allows labour unions to present proposals at the company's annual general meeting in the same way as shareholders would traditionally present their proposals under the same rule.[107] The labour union as a shareholder activist would notify the company of its intention to present a proposal for action at the company's upcoming shareholder meeting.[108] The company would under normal circumstances include the shareholder proposal in its own proxy material and therefore such proposal would be subject to a vote by the security holders in respect of the company's proposal. In the US, most labour union shareholder activism campaigns occur at companies where unions are engaged in contract negotiations for workers or in corporate campaigns that benefit workers.[109]

It is important to note, however, that the Rule 14a-8 shareholder proposal is not the only avenue that labour unions can use to advance issues affecting labour unions at board level. US corporate law also provides for avenues through which labour union shareholder activists can present shareholder proposals to the company's shareholders outside the workings of Rule 14a-8.

Labour unions can present floor resolution proposals at the company's annual general meeting, provided that the labour unions have given the company sufficient notice of their intention to do so.[110] Through these floor resolutions labour unions bypass the strict procedural requirements of Rule 14a-8.[111] Another alternative is to use the binding bylaw amendments.[112] The binding bylaw amendments are more powerful in that they have the potential to insert labour unions directly into the

[106] These limitations are identical to the ones discussed above in para 5.2.2.2 that apply to shareholder activists.
[107] Thomas & Martin (n 96) 50.
[108] Ibid 52.
[109] Schwab & Thomas (n 42) 1022.
[110] Ibid.
[111] A shareholder proposal presented as a floor resolution at the company's shareholder meeting has three advantages. First, the union may inform a company of its intention to introduce a resolution at the annual general meeting without complying with the 120-day deadline as required in Rule 14a-8(3). The labour shareholder activist can present such a floor proposal at the annual general meeting without meeting the 120-day deadline requirement of Rule 14a-8. Moreover, the requirement of Rule 14a-8(a)(1) that shareholder activists must hold several shares for the one-year period is also excluded when labour shareholder activists present a floor resolution. Additionally, a labour union may also submit more than one proposal and therefore exceed the limit of one proposal per shareholder activist. See Rule 14a-8(a)(4).
[112] Schwab & Thomas (n 42) 1043.

boardroom where executive decisions on strategy and management are made.[113] Traditional corporate governance proposals have less power in that they rely on indirect pressure on corporate boards to further the objectives of labour unions.[114]

5.2.3.4 The advantage of labour union shareholder activism for labour issues

Labour union shareholder proposals provide labour unions with a unique opportunity to advance employee interests outside the traditional methods of collective bargaining and strikes to back their demands to corporations.[115] Globally, the position of labour unions and employees in the boardroom has been overlooked, and employees and labour unions have remained peripheral players in corporate management, despite the vast influence of employees on corporate financial performance and on the overall success and sustainability of the company.[116] The procedure provided under Rule 14a-8 provides labour unions with a unique opportunity where labour unions can use their stockholdings to create a voice for themselves as shareholders. This puts labour unions at the cutting edge of innovative corporate law, as the presence of labour unions in the boardroom provides a unique opportunity for unions to exercise their voice as shareholders.[117]

This has benefits for labour unions in increasing their organising power, and in strengthening their position in collective bargaining outside the formal collective bargaining processes. It is important to note, however, that the same substantive and procedural limitations provided to shareholders when presenting shareholder proposals are also extended to labour union shareholders under Rule 14a-8.

5.2.4 Lessons from the US for South Africa

The US model of corporate governance was not designed to cater for wider groups of corporate stakeholders, apart from the shareholders of the company. The governance model is purely shareholder-centric, with limited interaction for non-shareholder interests under corporate law.[118] However, although the Business Round Table

[113] Ibid.
[114] Rule 14a-8.
[115] Schwab & Thomas (n 42) 1025.
[116] G Birth, L Illia & L Francesco 'Communicating CSR: Practices among Switzerland's top 300 com panies' (2008) 13 *Corporate Communications: An International Journal* 182.
[117] Thomas & Martin (n 96) 41.
[118] A Keay 'Tackling the issue of corporate objective: An analysis of the United Kingdom's enlightened shareholder value approach' (2007) 29 *Sydney Law Review* 581.

discussions have played a key role in promoting employee recognition and voice and in addressing issues that affect employees at board level, the Business Round Table's recommendations are simply voluntary and do not form part of US corporate law, meaning that corporations are not obliged to adopt the stakeholder value approach adopted by other members of the Business Round Table. Employee issues can be pursued under corporate law using some avenues, but these avenues have some limitations in the South African context. The limitations identified above are discussed below.

5.2.4.1 The limitations under SEC Rule 14a-8

As discussed above, labour unions, through their union pension funds, can use the corporate voting process available to shareholders under Rule 14a-8 to advance issues relating to traditional union functions under corporate law.[119] The union shareholder activist plays the same role as that of trade unions in South Africa, but the difference is that the union pension fund shareholders can use the shareholder activism process under Rule 14a-8 of the SEC to advance issues affecting employees outside the collective bargaining processes by virtue of them being labour union shareholders of the union pension funds.

Thus, labour unions use their position as stakeholders by virtue of the union pension funds to advocate on issues affecting them. In stark contrast to the position in the US, trade unions in South Africa do not assume any roles as shareholders under company law. Trade unions perform unique functions that are not limited to advancing traditional union functions.[120] As evidenced during the apartheid regime, as well as during the Marikana massacre, trade unions perform social justice functions, where their role includes advocating socio-economic justice and transformation, both within and outside the formal working environment.[121]

However, trade unions in South Africa do not have the same opportunity provided under Rule 14a-8 where they can make shareholder proposals, because trade unions in South Africa are not recognised as shareholders. Although the Companies Act allows for a wider recognition of stakeholders, giving trade unions wider

[119] Schwab & Thomas (n 42) 1021.
[120] R Stares *Black Trade Unions in South Africa: The Responsibilities of British Companies* (1977) 9. See also HC Schoeman 'The rights granted to trade unions under the Companies Act 71 of 2008' (2013) 16(3) *PER* 236.
[121] R Fine & DM Davis *Beyond Apartheid: Labour and Liberation in South Africa* (1992) 7.

recognition on issues that may affect them in *inter alia* business rescue and derivative action proceedings, trade unions are not recognised with regard to issues affecting CSR.

South African trade unions do not have the same power at board level as the US-based trade unions do under Rule 14a-8, nor do they have the resources to explore traditional union functions at board level using corporate law avenues. Moreover, for any labour union shareholder activism to take place under the US shareholder activism process, there must be support for the labour union proposal from shareholders themselves.[122] In many cases, labour instability occurs when shareholders are prioritised at the expense of the needs and interests of employees as stakeholders. The US labour union shareholder activism approach appears not to offer any lessons that South Africa can adopt in pursuit of internal CSR for labour stability. However, in a soft law context, the Business Round Table offers estimable corporate responsibility initiatives that can be emulated by South African directors and companies doing business in South Africa.

5.2.4.2 The limitations on pension fund investments and trade unions

In the US, pension funds are invested in both government and corporate bonds, and as ownership stakes in companies in the form of shares.[123] Furthermore, real estate investments and alternative forms of investments such as hedge funds and private equity may be made.[124] The Organisation for Economic Co-operation and Development's (OECD) preliminary data for 2020 shows that pension funds held over USD 35 trillion of assets worldwide at the end of 2020, exceeding 2019 levels despite the impact of the global Covid-19 pandemic.[125]

In the US, labour unions have greater influence over pension funds than do trade unions in South Africa. This is because the model of company financing in the US is

[122] Thomas & Martin (n 96) 65.
[123] G Klec & D Mum 'Trade union influence on companies via pension fund investment' in S Vitols *Long-term Investment and the Sustainable Company: A Stakeholder Perspective*' (2015) 125.
[124] Other company financing options include government grants: instead of approaching private companies, certain companies can apply for funds from the government. See generally *https://www.entrepreneurmag.co.za/advice/funding/government-funding-funding/government-grants/* (accessed on 15 September 2022). Peer to peer lending, rather than borrowing from financial companies, is a funding approach that connects people with money to other people's money via an online platform.
[125] Organisation for Economic Co-operation and Development (OECD) 'Pension Funds in Figures June 2021' available at *https://www.oecd.org/finance/private-pensions/Pension-Funds-in-Figures-2021.pdf* (accessed on 21 September 2022).

based much more on the issue of equity via the stock exchange, resulting in a higher volume of shares.[126] In South Africa, company financing takes place through various methods, but predominantly it takes place through external capital (banks) and through the issuing of shares.[127] In South Africa, the issue of shares and the power to issue the shares is an important power in a company.[128] Shares are used to acquire capital for the company, or in the pursuit of a legitimate company purpose, like issuing enough shares *inter alia* to enable an eventual listing on the Johannesburg Stock Exchange (JSE) Ltd[129] or to facilitate BEE ownership.[130] Trade union shareholder activism is a comparatively new phenomenon and it requires labour unions to have shares in the company in order to exercise their rights as shareholders.

The model used in the US under Rule 14a-8, which deals with the power of labour unions to exercise shareholder voting rights, requires labour unions to have power over their pension funds.[131] In South Africa, trade unions as a rule cannot control the management of pension funds. Trade union members are not members of the board and are also not shareholders. They contribute to the pension funds through their members' contributions. The contributions constitute pure company pension funds that are under the control of the contributing company. Unlike in the US, trade union influence over companies via pension fund investment is not an option for trade unions in South Africa, since most pension funds are administered by private companies that invest on behalf of a company's employees.[132] Capital derived from union members is largely under the control of the financial industry, which often acts to the detriment of workers who have unpaid benefits upon retirement.[133]

In the US, labour unions are represented mainly in pension funds for public sector workers, not, as a rule, in company pension funds. Workers are involved in the

[126] Klec & Mum (n 123) 125.
[127] Section 41 of the Companies Act. See PA Delport 'Share issues and shareholder protection' (2013) 46(4) *De Jure* 1061.
[128] Delport ibid 1056.
[129] The JSE Limited is the largest stock exchange in Africa and is the one licensed exchange in South Africa for the listing of equity and debt securities. See M Greene 'Securities finance in 24 jurisdictions worldwide' available at *https://www.bowmanslaw.com/article-documents/Getting-the-Deal-Through-Securities-Finance.pdf* (accessed on 21 September 2022).
[130] Ibid. For a detailed discussion on BEE see chapter 4 para 4.3.3.4.
[131] Thomas & Martin (n 96) 1045.
[132] Open Secrets 'The bottom line: Who profits from unpaid pension funds?' available at *https://www.opensecrets.org.za/wp-content/uploads/The-Bottom-Line.pdf* (accessed on 21 September 2022).
[133] For a detailed discussion on South Africa's pension crisis see Open Secrets ibid.

board on a parity basis and are mainly nominated by the labour union, and they also exercise the voting rights attached to the shares they hold in the company.[134]

A 2019 report published by Open Secrets in November 2019, 'The bottom line: Who profits from unpaid pension funds?', showed that in 2019, 'over 16 million South Africans belong to a pension fund. Of these, around 90 percent are members of over 5 000 privately administered pension funds, most of which are run by some of South Africa's largest financial institutions.'[135] Every month, employees give up a portion of their earnings to secure retirement benefits that will allow them to live with dignity, and to provide for themselves and their dependants when they can no longer work. These hopes have been ruined for the millions who have not been paid the pensions that they are owed. According to the Financial Services Board's 2018 Annual Report, over R42 billion in benefits is owed to over four million pensioners and pension fund members. This number is growing. This represents a fundamental failure by state regulators and pension fund administrators, which has serious economic consequences. Trade unions do not have access to these funds and therefore cannot use the funds to acquire shares in the company.

For the US model to have an effect in South Africa, the way in which pension funds are administered needs to be changed. Trade unions will need to have access to the pension funds as investors so that they can use those funds to acquire shares in the company and thus have a voice as shareholders at the board level. To adopt the US labour union shareholder activism model for internal CSR in South Africa, a radical approach is needed to overhaul the laws regulating the administration of pension funds in South Africa. This is a mammoth task that will have an impact on the country's pension fund system.[136]

5.3 INTERNAL CSR IN THE UK

5.3.1 The influence of UK company law on the Companies Act

For centuries, UK company laws have been the blueprint of South African company law.[137] In a corporate law context, UK company law and case law have influenced how

[134] Klec & Mum (n 123) 125.
[135] Institutions such as Liberty, Old Mutual, etc. See Open Secrets (n 132) 12.
[136] The Pension Funds Act 24 of 1956 provides for the registration, incorporation, regulation and dissolution of pension funds and for matters incidental thereto.
[137] SD Girvin 'The antecedents of South African company law' (1992) 13 *Journal of Legal History* 66.

South African courts interpret the law and apply the principles of corporate governance.[138] As discussed in chapter 3, in adopting a corporate governance approach for South African company law, the DTI adopted the UK's enlightened shareholder value approach which considers the interest of the stakeholders provided this is in the long-term best interest of the shareholders.[139] The limitations of adopting the enlightened shareholder value approach were discussed in chapter 3.[140]

In the new Companies Act, many of the traditional company law doctrines and concepts inherited from nineteenth century English law have been abandoned or significantly modified.[141] Although still significantly influenced by UK law, South African law has shown a new approach to adopting new corporate law concepts, such as the solvency and liquidity test,[142] new and higher standards of corporate governance,[143] accountability, disclosure and transparency, new ideas and approaches to mergers and amalgamations,[144] shareholder appraisal rights[145] and corporate rescue.[146] The long-standing influence of UK company law on South Africa's company law renders the developments in the UK on strengthening the stakeholder voice under company law worthy of comparison. Thus, in the UK context, the platform for strengthening stakeholder voice under the provisions of the Corporate Governance Code is considered in order to source adoptable lessons for internal CSR under company law in South Africa. Like the US, the UK does not explicitly refer to CSR and internal CSR in the Companies Act of 2006. However, the implementation of internal CSR practices under the Code can provide some useful lessons.

5.3.2 The forces behind CSR development in the UK: an overview

Globally, the UK is recognised as having a world-class corporate governance framework.[147] This framework has been emulated by a number of jurisdictions across

[138] Girvin ibid 67.
[139] Chapter 3 para 3.3.3.
[140] Chapter 3 para 3.3.4.
[141] FHI Cassim 'Introduction to the new Companies Act: General overview of the Act' in FHI Cassim et al *Contemporary Company Law* 2 ed (2012) 3.
[142] See generally K van der Linde 'The solvency and liquidity approach in the Companies Act 2008' 2009 *Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg* 224.
[143] Section 7 of the Companies Act 2008.
[144] E Davids, T Norwitz & D Yuill 'A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008: Corporate governance and mergers & takeovers: part II' 2010 *Acta Juridica* 337–371.
[145] See J Yeats 'Putting appraisal rights into perspective' (2014) 25(2) *Stellenbosch Law Review* 328.
[146] See Chapter 6 of the Companies Act 2008.
[147] LF Spira & J Slinn *The Cadbury Committee: A History* (2013) 4.

the globe as it has been proven to promote international competitive advantage by making the UK an attractive place to invest.[148] The development of good corporate governance is underpinned by the work of the Cadbury, Greenbury and Hampel Committees which have, over the years, advanced principles for good corporate governance.[149]

Much of the work on corporate accountability has been championed by the Cadbury Committee.[150] The Cadbury Committee was established in the wake of the corporate scandals that shook the financial world in the early 1990s.[151] The collapse of large companies and the financial scandals associated with the collapse led to a decrease in investor confidence and an increased lack of accountability in listed companies.[152] The scandals revealed the pressing need to move towards increased financial regulation and to create higher standards for corporate accountability and transparency.[153] In a bid to ameliorate the impact of the corporate scandals and address the issues of accountability and transparency, the Cadbury Committee published several reports on corporate governance, the first of which is known as the Cadbury Report.

The first Cadbury Report was published in December 1992 to counter the impact of the corporate scandals and the overall impact of poor corporate governance in UK companies.[154] The central component of this voluntary code was ensuring a clear division of the responsibilities of the board, by separating the responsibilities of the

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[148] See the Green Paper on Corporate Governance Reform published by the Department for Business, Energy and Industrial Strategy ('Green Paper on Corporate Governance Reform') 3, available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584013/corporate-governance-reform-green-paper.pdf* (accessed on 10 September 2020). See also IW Jones & MG Pollitt 'Who influences debates in business ethics. An investigation into the development of corporate governance in the UK since 1990' in *Understanding How Issues in Business Ethics Develop* (2001), available at *file:///C:/Users/infom/Downloads/Who_Influences_Debates_in_Business_Ethics_An_Inves%20(3).pdf* (accessed on 15 May 2020).

[149] Ibid.

[150] Spira & Slinn (n 147).

[151] For a good review of the background to the Cadbury Report, see C Boyd 'Ethics and corporate governance: The issues raised by the Cadbury Report in the United Kingdom' (1996) 15(2) *Journal of Business Ethics* 168.

[152] Ibid.

[153] Corporate governance failures in the UK comprised illegal and unethical behaviour by senior management, resulting in a lack of efficient leadership. This was the case in Guinness where senior managers manipulated accounting figures and disregarded the stock exchange rules. This lack of accountability led to the collapse of Guinness in 1986. In the more famous case of Polly Peck International, a UK company, the company collapsed because of insider trading and misrepresenting the true financial statements of the company. Other cases of corporate scandals in the UK include the Bank of Credit and Commerce International (BCCI) and the rail track. See generally Boyd (n 151) 168.

[154] Ibid.

chair of the board and the chief executive, which fostered strong independent elements on the board.[155]

Secondly, the board needed to include outside directors and the remuneration committee of board members needed to comprise non-executive directors. An audit committee also had to be appointed, including at least three non-executive directors.[156] The Code has influenced the development of several international corporate governance codes, with South Africa's King Code being one example of the successful influence of the Cadbury committee.[157]

The Greenbury Report of 1995 was primarily centred on addressing executive pay.[158] The focus of the committee was on determining directors' remuneration and preparing a code of practice to be used by public listed companies.[159] The Greenbury Committee recommended that all public companies should establish a remuneration committee,[160] and the Greenbury Report contained some 20 key recommendations focused on improving remuneration policy with a key focus on executive pay.[161]

A key concern of Greenbury was to ensure that, through the remuneration system in the UK, directors share the interest of the shareholders, which is to make the company a success for the benefit of the shareholders.[162] The Hampel Committee was created in 1995 to review the implementation of the findings of both the Cadbury and Greenbury Committees.[163] The committee's terms of reference were *inter alia* to review the Cadbury Code and to ensure that the purpose of the Code – ensuring

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[155] See the Report of the Committee on the Financial Aspects of Corporate Governance, available at *https://ecgi.global/sites/default/files//Codes/documents/cadbury.pdf* (accessed on 20 July 2020) ('Cadbury Report') para 4.5.
[156] Ibid para 4.40.
[157] The Code is given statutory authority subject to the extent that companies listed on the London Stock Exchange comply or explain how they have applied the Code. The companies need to explain the extent to which they conform to the Code and, where they do not conform, they must state exactly to what degree they have not complied. See I-M Esser 'The protection of stakeholder interests in terms of the South African King III report on corporate governance: An improvement on King II' (2009) 21 *SA Merc LJ* 188.
[158] J Hughes 'The Greenbury Report on directors' remuneration' (1996) 17(1) *International Journal of Manpower* 4.
[159] Directors' Remuneration Report: Report of a Study Group chaired by Sir Richard Greenbury 1995 ('Greenbury Report') available at *file:///C:/Users/infom/Downloads/greenbury.pdf* (accessed on 9 September 2020) 9.
[160] Ibid.
[161] Hughes (n 158) 6.
[162] See generally Hughes ibid 4 and the Greenbury Report (n 159).
[163] 'Corporate Governance Reports: The Hampel Committee on Corporate Governance in the UK – Consultation Paper' (1997) 5(2) *Corporate Governance: An International Review* available at *https://doi.org/10.1111/1467-8683.00046* (accessed on 15 September 2002).

openness, integrity and accountability – is achieved.[164] The most significant contribution of Hampel was to emphasise the need to 'avoid tick box' corporate governance through improved structures of corporate accountability.[165] A principle-based, voluntary approach to corporate governance was advocated by the Code, as opposed to the rule-based approach to corporate governance.[166]

The Hampel Report, first published in 1998, embraced arguments that promoted corporate social responsibility and corporate accountability to a broad range of corporate stakeholders. The Hampel Report later became the basis of the combined Code, which consists of a consolidation of several reports: the Cadbury, Greenbury, Hampel, Turnbull, Higgs and Smith Reports.[167] The content of all these reports formed the foundation of what became known as the Combined Code.[168] It is important to note, however, that none of the reports, from Cadbury to Smith, dealt with internal CSR, which is the central focus of this thesis.

The discussions on employee engagement and the need to improve stakeholder voice as significant components of corporate governance did not form part of the corporate governance debates in the UK, because the role of the company prior to the process of corporate law reform was primarily centred on shareholder primacy.[169] The UK process of corporate law reform not only embraced the recognition of employees as stakeholders, but regarded the responsibility of directors to consider employees when making decisions that are in the long-term best interest of the shareholders as a fiduciary duty.[170] The discussion that follows considers how UK companies and the Corporate Governance Code play a role in promoting employee recognition and stakeholder voice as a significant aspect of internal CSR under UK corporate law.

5.3.3 UK company law and the provisions of s 172 for internal CSR

In the UK, the consideration of the interests of wider stakeholder groups is not a new point of discussion under company law. The role of employees as critical benefactors

[164] Jones & Pollitt (n 148) 25.
[165] Ibid.
[166] The principle-based approach stands in sharp contrast to the approach adopted in the US, which is more focused on creating mandatory systems of corporate governance, such as those advocated by the Sarbanes-Oxley Act of 2002. It is argued that such flexibility in a principle-based approach will promote self-regulation and better governance. See also S Arcot et al 'Corporate governance in the UK: Is the comply or explain approach working?' (2010) 30(2) *International Review of Law and Economics* 194.
[167] Ibid.
[168] Ibid.
[169] Keay (n 118) 581.
[170] See V Harper 'Enlightened shareholder value: Corporate governance beyond the shareholder-stake holder divide' (2010) 36 *Journal of Corporation Law* 59–112.

of the company's funds and in the management and affairs of the company was first introduced in the famous case of *Hutton v West Cork Railway*[171] where the court held that directors can only spend–

> money, which is not theirs but the companies, if they are spending it for the purposes which are reasonably incidental to the carrying on of the business of the company. That is the general doctrine. Bona fides cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational … It is for the directors to judge, provided it is a matter which is reasonably incidental to the carrying on of the business of the company … The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.

The value of the judgment today lies in the doctrine that, during the life of the company, it may conduct itself in a way which benefits stakeholders – in this case, the employees – provided that that conduct will, in the end and albeit indirectly, be in the shareholders' interest.[172] The language of the court's decision clearly indicates that the interests of employees under UK company law may be considered only through the lens of long-term shareholder value. This approach forms the core foundation of the enlightened shareholder value approach, which is embodied in the provisions of s 172 of the Companies Act, 2006.[173] *Hutton v West Cork Railway* was thus a landmark case for the recognition of employees as key constituents in the allocation of a company's resources. This was further cemented by s 309 of the Companies Act of 1985, which provides that directors must have regard to the interests of employees:

> (1) The matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its members.
> (2) Accordingly, the duty imposed by this section on the directors is owed by them to the company (and the company alone) and is enforceable in the same way as any other fiduciary duty owed to a company by its directors.

[171] *Hutton v West Cork Railway* (1883) 23 Ch D 654.
[172] Ibid.
[173] Keay (n 118) 581.

(3) This section applies to shadow directors as it does to directors.

The provisions of s 309 were revolutionary in that they gave explicit recognition to the directors' fiduciary duty to the employees of the company. This means that employees of the company were provided with the legal standing to enforce such fiduciary duty in instances where the company director was in breach. A provision of this nature in the South African Companies Act would improve the place of internal CSR within the Companies Act. Moreover, in cases of labour instability, companies would be under a fiduciary duty to have regard to the interests of the employees.

However, a critical drawback to s 309 is that it does not give any indication of how directors should respond where there is a conflict between the directors' fiduciary duty to the company and the directors' fiduciary duty to the employees. The conflicts of interest that arise in labour disputes often lead to a situation where company directors are making decisions which are in the short-term benefit of the shareholders. The result is to the detriment of employees, as seen in the Marikana tragedy.[174]

However, s 172 of the Companies Act, 2006 can be recognised as a positive move in the recognition of employees under UK company law. This is based on the statutory duty that directors must promote the success of the company, which in most cases means the best interests of the shareholders, while having regard to stakeholder issues.[175] These include the interests of the company's employees and other stakeholder groups as set out in the Act. Arguably, s 172 imposes the most important duty on directors. Under s 172, a director must act in good faith and promote the success of the company. Section 172(1) contains six factors to consider, although this list is not exhaustive:

(a) the likely consequences of any decision in the long term,
(b) the interests of the company's employees,
(c) the need to foster the company's business relationships with suppliers, customers and others,
(d) the impact of the company's operations on the community and the environment,

[174] See chapter 1 para 1.3. See also IG Farlam *Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the Northwest Province* (2015) 42.
[175] Section 172 of the Companies Act, 2006.

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act as between members of the company.

This duty applies to all decisions that a director can make in fulfilling his fiduciary duty to the company. It requires such directors to think about the impact of their decisions on the shareholders and the employees, and how such impact can affect the long-term success of the company. Although there is no definition of success in the Companies Act, 2006, commercial companies' success could be seen as a long-term increase in shareholder value.

5.3.4 Strengthening the stakeholder voice under the Corporate Governance Code

Despite the explicit recognition of employees under the Companies Act and in case law,[176] the engagement of employees and the voice of employees at board level have been overlooked in English company law and in the reports.[177] While some companies in the UK have in the past used trade unions, work councils and consultation bodies to engage with employees, not much was done to promote stakeholder engagement and employee voice at board level.[178]

This approach is prevalent in two-tiered board systems, such as the one adopted in Germany, where employee representatives sit on the supervisory board.[179] However, companies in the UK and South Africa have a unitary board system where all directors have the same fiduciary duties and liability applies.[180] It is submitted that the unitary board system has served South Africa well and therefore a discussion of the two-tiered board system as an alternative system for South Africa is not undertaken in this thesis.[181]

During the recent process of corporate governance reform, the UK government engaged with the public on the significance of having regard to the wider responsibility

[176] *Hutton v West Cork Railway* (1883) 23 Ch D 654.
[177] This position has changed since the passing of the Corporate Governance Code in January 2019.
[178] See generally L Whittall et al 'Workforce trade union engagement with European Works Councils and transnational agreements: The case of Volkswagen Europe' (2017) 23(4) *European Journal of Industrial Relations* 400.
[179] See generally M Spisto 'Unitary board or two-tiered board for the new South Africa' (2005) 1(2) *International Review of Business Research Papers* 84.
[180] Ibid. See also s 172 of the UK's Companies Act and ss 75 and 76 of the South African Companies Act.
[181] Protocol on Corporate Governance in the Public Sector, at 9, published by the Department of Public Enterprises, available at *https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf* (accessed on 18 January 2022).

of the company to its stakeholders, and the importance of improving stakeholder voice in companies.[182] The approach of the UK's corporate governance reform process was centred on strengthening the employee, the customer, and the wider stakeholder voice.[183] This discussion about the reform of corporate governance became more prevalent when Britain began the process of leaving the European Union.[184] To sustain investor confidence and promote good corporate governance during this transition, the British government conducted an extensive review of the corporate governance framework and introduced the 2019 Corporate Governance Code.[185] The UK government sought to ensure reform in three specific areas of corporate governance: executive pay; strengthening the employee, customer and supplier voice; and corporate governance in large and privately held businesses.[186]

The Financial Reporting Council (FRC) in the UK published a new Corporate Governance Code (the 'Code', which is read together with the revised Guidance on Board Effectiveness. The new Code, which came into full effect on 1 January 2019, introduces significant changes to corporate governance and reflects former prime minister Theresa May's quest to promote social reform and restore investor confidence in UK businesses.[187] The prime minister stated that–

> we are now setting out a range of legislative and business-led measures which will improve corporate governance and give workers and investors a stronger voice. This will be good for business. Firms which listen to their workers and are responsive to their shareholders see the benefits on their bottom line. So, by giving a stronger voice to those outside the boardroom, we incentivise businesses to take the right long-term decisions and help restore the public's trust.[188]

[182] Green Paper on Corporate Governance Reform, published by the Department for Business, Energy, and Industrial Strategy ('Green Paper on Corporate Governance Reform') available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584013/corporate-governance-reform-green-paper.pdf* (accessed on 10 September 2020).
[183] Ibid 34.
[184] Ibid.
[185] Ibid.
[186] Ibid 16–43.
[187] Ibid.
[188] Ibid.

The Code was put in place to promote an effective system for the management and control of companies.[189] The significance of the Code lies in the fact that companies do not operate in a vacuum; they are interconnected, affecting a greater body of corporate stakeholders.[190] Thus the success and overall sustainability of any business lies in the patent reality that stakeholder interests are central to the long-term sustainability of the business.[191] For companies to succeed in the long term and thereby maintain the sustenance of society through creating employment and prosperity, 'directors and the companies they lead need to build and maintain successful relationships with a wider range stakeholder group'.[192]

The Code has been at the forefront of promoting collective responsibility within the UK's unitary board structure.[193] The integral component of this Code lies in an updated set of principles that emphasises the significance of good corporate governance and long-term sustainability.[194] Companies with a premium listing in the UK or companies that are incorporated in foreign jurisdictions are encouraged to apply the principles embodied in the Code, following the detailed provisions and using the Guidance on Board Effectiveness[195] to promote the effective and responsible governance of companies.

As with South Africa's King II,[196] the application of the Code is based on the comply or explain approach, with the listing rules requiring companies to make statements explaining how they have applied the principles. The Code comprises five sections which address: board leadership and company purpose;[197] the division of

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[189] Financial Reporting Council 'The UK Corporate Governance Code July 2018' ('Corporate Governance Code' or 'Code') available at *https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf* (accessed on 1 September 2020).

[190] Ibid 1.

[191] For a discussion of the stakeholder approach, see chapter 3.

[192] Corporate Governance Code (n 189) 1.

[193] This Code, as discussed above, is the culmination of a series of reports published, including the Cadbury, Greenbury, Hampel and Turnbull Reports.

[194] As discussed above, the Code embraces a principle-based approach to corporate governance which is regarded as the best method for promoting good corporate governance in the UK, as opposed to the rule-based approach followed in jurisdictions like the US.

[195] Like the King Code's best practice guidelines, the Guidance on Board Effectiveness is not a rule of thumb on how the principles must be applied. The Guidance is designed to help the boards with their actions and decisions on how to apply the Code. See generally Financial Reporting Council 'Guidance on Board Effectiveness' (July 2018) available at *https://www.frc.org.uk/getattachment/61232f60-a338-471b-ba5a-bfed25219147/2018-Guidance-on-Board-Effectiveness-FINAL.PDF* (accessed on 10 September 2020).

[196] For a discussion of King, see chapter 4 paras 4.3.4.1 and 4.3.4.3.

[197] Principle 1 of the Corporate Governance Code.

responsibilities;[198] composition, succession and evaluation;[199] audit, risk and internal control;[200] and remuneration.[201] A key focus of this discussion will be on how the Code is structured to strengthen the stakeholder voice as a form of employer engagement with the workforce. This discussion provides insight on how the Code may help companies to promote employee engagement within a unitary board structure. As discussed in chapter 2, stakeholder engagement is an essential feature of internal CSR.[202]

5.3.5 Employee voice and stakeholder engagement under the Code

Internal CSR is about stakeholder engagement and raising employee voice in companies.[203] The Code addresses the debate on strengthening stakeholder dialogue by introducing Principle 1D, which aims to encourage stakeholder engagement between the company, the shareholders and the stakeholders.[204] The Code goes further to emphasise the value of effective stakeholder engagement by setting out the methods through which effective engagement can be pursued in order to foster greater platforms for strengthening employee voice within the workforce.[205]

However, these methods are not cast in stone, as the FRC has emphasised that companies should adopt an approach that would effectively promote the principles and provisions of the Code. Under the Guidance for Board Effectiveness, an effective board is described as one that appreciates the significance of dialogue with the shareholders, the workforce and the broader body of corporate stakeholders.[206] This is done by ensuring that the processes for effective stakeholder engagement are followed, that dialogue takes place between the company and its stakeholders, and that the feedback by the board is considered in the board's decision-making process.[207]

The process of effective engagement is objective in nature, because effective engagement is dependent on several factors which can vary, based on the nature and

[198] Principle 2 of the Corporate Governance Code.
[199] Principle 3 of the Corporate Governance Code.
[200] Principle 4 of the Corporate Governance Code.
[201] Principle 5 of the Corporate Governance Code.
[202] See chapter 2 para 2.3.3.2.
[203] Ibid.
[204] Corporate Governance Code (n 189) 1.
[205] Ibid 4–5.
[206] Guidance on Board Effectiveness (n 195) 11.
[207] Ibid.

size of the company.[208] In the context of internal CSR, effective engagement is about strengthening employee voice and improving avenues for company dialogue between the company and its workforce.[209] In the UK, employee engagement has formed part of the pertinent discussions leading up to the process of corporate governance reform,[210] the results of which are embedded in Principle 1D of the Code, read together with the provisions of the Code.[211] Principle 1D of the Code states the following:

> In order for the company to meet its responsibilities to shareholders and stakeholders, the board should ensure effective engagement with, and encourage participation from, these parties.

The relevant provision, which applies on a comply or explain basis, states that–

> the board should understand the views of the company's other key stakeholders and describe in the annual report how their interests and the matters set out in section 172 of the Companies Act 2006 have been considered in board discussions and decision-making. The board should keep engagement mechanisms under review so that they remain effective. For engagement with the workforce, one or a combination of the following methods should be used:
>
> a) a director appointed from the workforce.
> b) a formal workforce advisory panel.
> c) a designated non-executive director.
>
> If the board has not chosen one or more of these methods, it should explain what alternative arrangements are in place and why it considers that they are effective.

The three methods set out above describe the ways in which companies can facilitate stakeholder engagement, which could be beneficial in promoting employee voice and gathering views from the workforce as a form of stakeholder engagement. The discussion that follows highlights the strengths and weaknesses of the stakeholder

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[208] See generally Deloitte *Hearing the Stakeholder Voice: Effective Stakeholder Engagement for Better Decision Making* September 2018, available at file:///C:/Users/infom/Downloads/deloitte-uk-risk-hearing-the-stakeholder-voice.pdf (accessed on 2 September 2020).

[209] See Department for Business, Energy and Industrial Strategy *Corporate Governance Reform: The Government Response to the Green Paper Consultation* August 2017, available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/640631/corporate-governance-reform-government-response.pdf* (accessed on 2 September 2020).

[210] Ibid.

[211] Corporate Governance Code (n 189) 4–5.

engagement methods set out under the Code and how they relate to internal CSR as a form of employee engagement under the Code.

5.3.5.1 A director appointed from the workforce: employee director

The concept of an employee director has its origins in the German system of co-determination.[212] The Codetermination Acts of 1952 and 1972 entrenched worker directors in organisations employing more than 2 000 employees.[213] The idea of employee directors under the Code is not a novel form of employee engagement. The inclusion of worker directors in company boards has been pursued in other European countries, such as France, the Netherlands, Denmark and, to a limited extent, the UK.[214]

The Code, read together with the provisions, prescribes that there should be a director appointed from the workforce to facilitate the process of employee engagement with the board.[215] This director will assume the same statutory duties and responsibilities as other directors under s 172 of the Companies Act, 2006.[216] However, the employee director's role will be to bring the voice of the workforce into the boardroom. The appointment of a director from the workforce provides a unique opportunity for the board to ask an employee direct question about issues affecting the workforce. This method allows the board to gain perspective on the issues raised by the workforce.

A member of the workforce may provide a good point of reference for the issues affecting the employees of the company. These issues are not limited to disputes on minimum wages and basic conditions of employment. The director appointed from the workforce can provide perspective on issues relating to workforce culture and provide insight on how the workforce is receiving board leadership.

According to the Guidance on Board Effectiveness, these issues can include '[s]ilo thinking, misaligned incentives, pressure to meet overambitious targets, leadership arrogance, lack of openness to challenge and low levels of meaningful

[212] M Anstey 'Worker participation: Concepts and issues' in M Anstey *Worker Participation* (1990) 12. See also A Conchon *Board-level Employee Representation Rights in Europe: Facts and Trends* (2011) 37.
[213] Anstey ibid 13.
[214] Ibid.
[215] Ibid.
[216] Ibid.

engagement between board leadership and the employees.'[217] Moreover, a director appointed from the workforce is most likely to place employee issues at the forefront of his or her role, and provide the board with direct access to information on issues triggering employee disputes. A further advantage is that the workforce director is more familiar with employees and can present the views of the employees more effectively because he or she is an employee as well.

However, as is the case with any method for stakeholder engagement, the inherent limitations are embedded in issues relating to confidentiality. This will require the board to communicate in writing the matters which can be shared and those which cannot be shared by the employee director with the workforce.[218] The employee director will need training, skills and support on the role of an employee director, and this will apply irrespective of whether the employee director is working in a blue-collar or a white-collar job.

Moreover, the fact that the director is an employee director does not exempt such director from removal under s 168 of the Companies Act.[219] This may call for the amendment of the company's articles of association to accommodate the process of appointment and removal of the workforce director in accordance with the agreed rules for stakeholder engagement.

5.3.4.2 A formal workforce advisory panel

A key advantage of using the workforce advisory panel as a form of stakeholder engagement between the board and the workforce lies in the fact that the board will hear the views of the employees from the employees themselves. It allows for direct dialogue between the employees and the board. Moreover, the workforce advisory panel allows for the board to hear the views of a wider group of employees as opposed to the views of only one employee. Depending on the nature and the size of the company, the workforce advisory panel allows for the voices of different employees to be heard as it can consist of a broader category of employee groups within the company.

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[217] Guidance on Board Effectiveness (n 195) 7.
[218] See generally Deloitte (n 208).
[219] For a detailed discussion of the removal of directors by the board of directors in the UK, see Rehana Cassim *A Critical Analysis of the Removal of Directors by the Board of Directors and the Judiciary under the Companies Act 71 of 2008* (PhD thesis, University of South Africa, 2018) ch 3.

The workforce advisory panel allows for diversity in stakeholder engagement as there must be more than one employee representative on the panel. This allows for opportunities for collaboration within the panel as employees across all scales and professional rankings can be represented at board level. Moreover, having a workforce panel focused on employee engagement allows for the administrative responsibilities embedded in the stakeholder engagement process to be fairly distributed between the members of the panel.

Although the use of workforce panels may present itself as the best option for facilitating employee voice and overall engagement within the company, the use of workforce panels as a method for employee engagement can present some limitations for stakeholder voice if the following issues are not adequately addressed. First, there must be a clarity of purpose for the workforce advisory panel: is there a need for a workforce advisory panel or can a board use the existing statutory body such as the works council to facilitate employee engagement in the company?

As is the case with South Africa's social and ethics committee, where there are no clear terms of reference as to the exact function of the social and ethics committee, there is an overlap of functions with other committees such as the risk and audit committees.[220] Moreover, is it clear that the board is not supposed to follow the views of the workforce advisory panel but simply to consider them in their decision-making processes? A key drawback to this is that the views of the workforce advisory panel may create some form of 'tick box' stakeholder engagement which does not facilitate meaningful dialogue; it is not clear whether the board has any duty to implement the suggestions of the panel. This is like the experience in South Africa's social and ethics committee, where the committee is merely required to draw the matters within its mandate to the attention of the board,[221] without reporting on how such recommendations have been implemented.

Thirdly, how is the process of appointing a workforce advisory panel administered? Are the members of the panel appointed by the board, the employees or the shareholders? For effective stakeholder engagement, members should be appointed by the workforce or trade unions, or a nomination committee could make nominations.

[220] See chapter 4 para 4.3.3.
[221] Regulation 43(5)*(b)* of the Companies Regulations, 2011.

The nomination process should be transparent for the purpose of promoting inclusivity and diversity within the panel.

Fourthly, with regard to the number of panels, will there be a single advisory panel, or will there be several advisory panels? Finally, the training of the advisory panel on stakeholder engagement and overall continuing improvement processes in stakeholder engagement is critical. According to the Companies Regulations, 2011, the social and ethics committee in South Africa must present a report to the company directors and the shareholders of the company at the annual meeting of the shareholders. The UK Corporate Governance Code is silent on whether the panel will engage directly with the board and on how often this engagement process will take place. How the workforce advisory panel can exist within existing board committees and how it can be integrated into the board process will also need to be carefully considered. This calls for continual internal improvement measures, such as employee training on board processes.

5.3.4.3 A designated non-executive director

One of the methods for gathering the views of the workforce under the Code is to designate a non-executive director to represent the views of the employees.[222] A key advantage is that the designated non-executive director would present one of the most straightforward options in gathering the voice of the workforce, because the non-executive director would have a strong understanding of the board and would thus be able to assess the areas needing improvement for effective stakeholder engagement.[223]

Non-executive directors are not engaged in the day-to-day management of the company but have a sound knowledge of board processes. This would provide a better platform for championing employee voice within the board. A similar approach is taken in the provisions for the s 72(4) social and ethics committee in South Africa, where the Companies Regulations require the social and ethics committee to comprise not less than three non-executive directors and/or prescribed officers.[224]

The key difference is that the role of the non-executive director or prescribed officer from a social and ethics committee perspective is not exclusively for gathering the views of the workforce for the purpose of strengthening employee voice on the board. The UK's method of appointing a designated non-executive director for the

[222] Corporate Governance Code (n 189) 5.
[223] See generally Deloitte (n 208).
[224] Regulation 43(4) of the Companies Regulations, 2011.

exclusive purpose of gathering the views of the workforce is exemplary as it can also increase the confidence of the board in the facilitation of effective stakeholder engagement. This is because the non-executive director occupies a comfortable middle ground between the board and the workforce.

However, the disadvantage is that a non-executive director would have to be appointed for the sole purpose of gathering workforce views as there may be a potential conflict of interest between the interests of the shareholders and the interests of the workforce. The conflict of interests problem could prove to be less empowering for employees as employee interests at board level may potentially be compromised by the representation of a non-executive director. The conflict of interest would naturally arise where the interests of the workforce are not in line with the interests of the board, by either compromising long-term shareholder value or not considering it at all. This role would place significant responsibility on the non-executive directors, leading to concerns about a lack of impartiality in advancing the views of the workforce to the board. This may also lead to associated capacity constraints as this position may require a considerable time commitment from the non-executive director.[225]

5.3.4.4 Enforceability

The Companies Act, 2006 and the Code are not wholly prescriptive and do not dictate the measures by which companies may facilitate effective stakeholder engagement. Companies are encouraged to follow an approach that will suit the individual needs, size and overall circumstances of their business and facilitate the most effective engagement with the workforce. What is clear from this view is that the UK has taken a radical approach to recognising stakeholder interests by creating platforms for strengthening employee voice in its updated Corporate Governance Code. This perspective is further emphasised by the workings of provision 6, which applies on a comply or explain basis, and provides that:

> There should be a means for the workforce to raise concerns in confidence and – if they wish – anonymously. The board should routinely review this and the reports arising from its operation. It should ensure that arrangements are in place for the proportionate and independent investigation of such matters and for follow-up action.[226]

[225] See generally Deloitte (n 208).
[226] Corporate Governance Code (n 189) 5.

The process of stakeholder engagement under the Code is not merely a process for the board to solicit perspectives from the workforce which will allow them to operate in a way that promotes the optimisation of long-term shareholder value as required by s 172 of the Companies Act, 2006. Stakeholder engagement under the Code provides a platform for the workforce to raise its concerns and encourages the board to review these concerns. This means that the engagement is not one-sided and the improvement of employee recognition and voice within the workforce can be implemented in a sustainable manner.

5.3.6 Lessons from the UK for South Africa

The UK model of corporate governance provides a new and unique perspective on promoting internal CSR through workforce engagement. The channels through which such engagement can be achieved are commendable. In the internal CSR context, the UK has adopted an inclusive and more radical approach to strengthening the stakeholder voice under the newly published Corporate Governance Code, read together with the Guidance on Board Effectiveness.[227] What is pertinent from the Code is the need to facilitate internal stakeholder recognition through workforce engagement on issues affecting workers.[228] This approach forms the core foundation of internal CSR: it entails the effective management of employees and details the need to strengthen the voice of employees at board level within a unitary board structure. South Africa could adopt a similar approach, which would require boards to adopt a combination of methods to strengthen stakeholder voice as set out in the Code of Corporate Governance. Unlike the limitations of the US model under Rule 14a-8, establishing a structure for workforce engagement as set out under the Code is less onerous. The legislature could require companies to appoint an employee director from the workforce who should provide a good point of reference for issues affecting the employees. The director would be appointed as an employee director as set out in the Code in the UK. The director would exercise their fiduciary duties to the company by reporting to the company on issues affecting the employees. As is the case in the UK,

[227] Chapter 6 para (X).
[228] Financial Reporting Council 'The UK Corporate Governance Code July 2018' (hereafter referred to as the 'Corporate Governance Code') available at *https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf* (accessed on 1 September 2020).

South African companies could appoint a workforce advisory panel as set out in the Code. This would be useful in ameliorating some of the shortcomings created by the failure of workplace forums under the LRA. The workforce advisory panel which would have to be selected from the employees would have to engage with the board as stakeholders and report to the employees who nominated them to represent their interest. One method of obtaining the views of the workforce under the Code is to designate a non-executive director to represent the views of the employees. The legislature could make it a requirement to appoint a designated non-executive director to deal with the issues of employees. However, it is submitted that if the social and ethics committee, as discussed in chapter 4, is given the option to appoint employees and trade union members representing employees as members of the committee a similar result could be achieved. These aspects were comprehensively discussed in this chapter, and they are arguably the closest we will get to internal CSR practice through company law, although they are voluntary. The processes of appointing a director from the workforce, a formal workforce advisory panel, and a designated non-executive director, as set out in Principle 1D of the Code, can ultimately facilitate internal CSR and ameliorate the problems of labour discord through company law.

If the South African legislature has no objections to incorporating some of these measures into company law, company directors as well as employees would better understand their role and position in promoting internal CSR in company law. I therefore propose that s 72(4) of the Companies Act, read together with the reg 43 of the Companies Regulations 2011, should incorporate the processes of Principle 1D of the UK's Corporate Governance Code as a mechanism for promoting internal CSR and labour harmony under company law. However, some limitations in the South African context are identified below.

5.3.5.1 Limitations of the UK model

In the internal CSR context, the UK has adopted an inclusive and more radical approach to strengthening the stakeholder voice under the newly published Corporate Governance Code, read together with the Guidance on Board Effectiveness.[229] What is more pertinent from the Code is the need to facilitate internal stakeholder recognition through workforce engagement on issues affecting the workers under the

[229] Ibid.

Code.[230] This approach forms the core foundation of internal CSR: it entails the effective engagement of employees and details the need to strengthen the voice of employees at board level within a unitary board structure. As discussed above, boards are asked to establish one method or a combination of methods set out in the Code for workforce engagement, or to explain the alternative measures put in place to facilitate workforce engagement by giving reasons why they are an effective method for employee engagement.

The UK model applies on a 'comply or explain' basis and requires companies to assign a non-executive director, appoint a workforce or employee advisory council, or nominate a director from the workforce to represent employees at board level.[231] Stakeholder engagement can yield good benefits for labour stability if it is taken seriously. It has the potential to strengthen the business and promote long-term success that will benefit shareholders and employees.

However, the 'comply or explain' approach adopted under the Code may lead to 'tick box' compliance with stakeholder engagement and internal CSR. The 'apply and explain' approach adopted in King IV is viewed as prescriptive because it moves away from the 'apply or explain' approach of King III, which is identical in all forms to the UK's 'comply or explain' approach.[232] The UK's 'comply or explain' approach is a compliance-based approach which allows companies which fail to engage with the principles of the Code to simply explain away their non-compliance with the Code. This makes the process of stakeholder engagement voluntary, with a compliance-based undertone to it.

Moreover, the UK's stakeholder engagement approach under the Code is a new process whose effectiveness have not yet been adequately shown. At the time of writing this thesis, there are no studies currently reviewing the effectiveness of the 2019 stakeholder engagement process under the Corporate Governance Code for creating workforce voice in UK companies. Notwithstanding these limitations, it is submitted that the UK approach to strengthening the stakeholder voice under the Code is worth considering in South Africa, but with some alterations that would make it suitable. This approach provides significant opportunities for the realisation of internal

[230] Corporate Governance Code (n 189).
[231] Principle 1D of the Corporate Governance Code.
[232] Institute of Directors in Southern Africa *King IV Report on Corporate Governance in South Africa* (2016) 4.

CSR. It presents a radical adaptation and recognition of the need to strengthen stakeholder voice at board level and thereby meets the need to protect employees as stakeholders.

5.4 CONCLUSION

This chapter reflected on the position of internal CSR in the US and the UK. It explored the forces behind CSR developments in these jurisdictions to establish a foundation for internal CSR in their corporate legal frameworks. The SEC Rule 14(a)-8 shareholder proposal and the Rule 14(a)-8 labour union proposal were examined. The chapter found that an employee-related agenda that aimed to promote internal CSR through shareholder activism was limited and ultimately impossible under SEC Rule 14a-8, because Rule 14a-8(i)(7) excludes shareholder proposals with a CSR agenda as such proposals are deemed to promote the personal grievances of the shareholders. However, the provisions of SEC Rule 14a-8(i)(7) provide important lessons which, if adopted by trade unions in South Africa, could give them the privileges of labour unions' shareholder activists that are similar, but not identical, to those in the US.

On the other hand, the UK presents some significant developments from an employee engagement perspective and, more specifically, the recent position adopted in the Corporate Governance Code offers some useful lessons. The radical recognition of employee voice and the need to promote workforce engagement under the Code present significant developments for internal CSR. However, the analysis shows that there is no specific acknowledgement of internal CSR in the Companies Act, 2006 and elements of internal CSR are limited within the Code. However, the lessons from the UK include the option to appoint an employee director, a workforce advisory panel or a designated non-executive director. These measures have the potential to be a good conduit for employee voice and internal CSR in companies. The changes introduced under the Corporate Governance Code and the Guidance for Board Effectiveness in the UK provide lessons which are worth emulating as an avenue for promoting stakeholder voice as a form of internal CSR at board level. The next chapter synthesises the key arguments of the thesis and proposes some key recommendations based on the findings and arguments of the preceding chapters.

CHAPTER SIX: RECOMMENDATIONS AND CONCLUSION

6.1 REVIEW OF RESEARCH

This thesis has investigated the place of internal CSR as a complementary mechanism to promote labour stability in South Africa. The specific focus was on investigating the position of the s 72(4) social and ethics committee as a potential conduit for promoting internal CSR in South African company law.[1] It was argued that the Companies Act has the potential to promote employee voice and overall stakeholder engagement under the provisions of the s 72(4) social and ethics committee. It was shown that the value of this committee is that it has the potential not only to facilitate much-needed stakeholder engagement at board level, but also to promote labour relations stability under company law.

To mitigate labour instability, a collaborative approach is needed in both labour law and company law. This thesis has shown that the potential for such collaboration is rooted in the workings of the social and ethics committee. The channels for employee voice are already included in the Act. However, these channels are underrated and misaligned. What is needed is a renewed approach to the workings of the social and ethics committee. At present, the committee is functioning as a toothless form of corporate accountability with its 'tick box' approach to CSR and stakeholder engagement. This committee has the potential to promote labour relations stability, facilitate a less adversarial method of worker participation, and bring about much-needed board diversity and employee voice within a unitary board structure.[2]

A refined approach to the composition and overall mandate of the committee has the potential to achieve innovative forms of worker participation through internal CSR under company law. It was argued that this could be what is missing in promoting much-needed labour relations stability and employee voice through internal CSR in company law. The thesis identified these gaps in the literature and makes the following recommendations.

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[1] See s 72(4) of the Companies Act, read together with the Companies Regulations, 2011.
[2] Chapter 4 para 4.3.

6.2 RESEARCH FINDINGS AND RECOMMENDATIONS

6.2.1 Reviewing the purpose of the company

Chapter 2 examined the different approaches to the nature and purpose of the company, and found that traditional corporate governance approaches usually focus on two extremes, which can be categorised into two groups: the shareholder-centric approaches and the non-shareholder-centric approaches.[3] It was further argued in the preceding chapters that current strategies for mitigating labour instability should not be confined to labour law as the problem of labour instability is not exclusively a labour law problem. Company law and companies exacerbate the problem through poor corporate governance and 'tick box' CSR, which leads to a lack of corporate accountability, as witnessed in the Marikana massacre.[4] It is thus argued that labour instability and violence must be addressed by having recourse to company law. However, to achieve this, a new approach to the purpose of the company is needed.

6.2.1.1 The recommendation: A hybrid approach to corporate governance

It was argued that the legislature has missed an opportunity to adopt a bespoke African values-based approach to corporate governance. The challenges associated with adapting foreign legal concepts for domestic company law cannot be resolved when corporate governance is firmly grounded in traditional shareholder value practices. It was argued that the legislature's adoption of a UK-based approach to corporate governance was not the most appropriate for South African company law and the overall corporate governance framework. This conclusion is based on a consideration of the normative shareholder and stakeholder approaches in chapter 3, as well as the modern perspectives provided by the World Economic Forum in the 2020 Davos Manifesto on Stakeholder Capitalism.[5]

However, this is not to say that the *ubuntu* approach should completely replace the enlightened shareholder value approach. A hybrid approach to corporate governance which marries the strengths of the *ubuntu* approach to the enlightened shareholder value approach is recommended. The governance of companies under the *ubuntu* approach is proposed as appropriate for recognising the place of internal CSR for labour stability under the Companies Act. The *ubuntu* approach has the potential

[3] Chapter 3 paras 3.3 and 3.4.
[4] Chapter 1 para 1.3.
[5] Chapter 3 para 3.4.3.

to mitigate labour instability and promote much-needed employee engagement in the Companies Act without negating the significance of shareholder value for corporate sustainability. However, given the limitations of *ubuntu* as a corporate governance approach it is submitted that the *ubuntu* approach should be combined with the existing enlightened shareholder value approach. This could be done by adopting a values-based approach when dealing with governance issues that affect employees as the internal stakeholders of the company.

The values-based approach of *ubuntu* provides an inclusive and integrity-based approach to corporate governance.[6] It embraces the spirit of community, harmony and empathy. However, when dealing with issues that do not directly affect employees, the enlightened shareholder value approach should remain in place as it considers stakeholder issues provided that this is in the long-term best interests of the shareholders.

The *ubuntu* approach promotes values which are essential in bridging the gap between company law and labour law issues. It is thus recommended as the appropriate approach for promoting labour stability and much-needed employee engagement under company law. This is because the approach is centred on collective unity which aims to promote harmony in stakeholder relationships. Under the *ubuntu* approach, the interests of the employees are deemed to be the interests of the company and therefore the consideration of such interests will be in the best interests of the company.

6.2.1.1.1 Implementing the hybrid approach: Combining the *ubuntu* approach with the enlightened shareholder value approach

As discussed in chapter 3, the *ubuntu* approach to corporate governance lacks the rigour to work as corporate governance approach outside of issues directly affecting the stakeholders of the company. [7] Therefore, adopting only an *ubuntu* approach in the South African context may limit South Africa's prospects of being a premium place to do business. The *ubuntu* approach must be applied in the context of CSR, internal CSR and employee voice in the governance of companies.

The *ubuntu* approach has limitations that could be addressed by the enlightened shareholder value approach. Similarly, the enlightened shareholder value approach has

[6] Chapter 3 para 3.4.4.
[7] For a discussion on the limitations of ubuntu, see para 3.5.4.

limitations that can be addressed by adopting the *ubuntu* approach.[8] A hybrid approach which marries the strengths of these two approaches could be useful in bridging the gaps identified in the two approaches. When a company is faced with a crisis such as the one that occurred in Marikana, the *ubuntu* approach to doing business must take precedence.[9] However, when a company is dealing with issues affecting shareholder capital such as mergers and acquisitions, providing financial assistance for the acquisition of a company's shares[10] and derivative actions,[11] then the enlightened shareholder value approach must take precedence. When a company is dealing with employees as affected persons such as in business rescue,[12] or with the implementation of the social and ethics committee's mandate, a director in the exercise of their fiduciary duties should apply the *ubuntu* approach.[13]

It is recommended that codes of best practice may be useful in helping a director who is exercising their fiduciary duty to the company to adopt the correct approach. Moreover, this will establish the foundation for a bespoke approach to corporate governance, one that is devoid of individualistic shareholder-centric influences and that serves society based on co-operation between companies and employees in promoting the overall sustainability of a company. Moreover, this may also present an opportunity for less adversarial labour relationships and for an improved labour relations environment overall.

It is therefore further recommended that s 7 of the Companies Act should be amended to include the promotion of *ubuntu* as one of its purposes:

> The purposes of this Act are to—

[8] For a discussion on the limitations of the enlightened shareholder value approach see para 3.3.4.
[9] See chapter 1 para 1.3. See also IG Farlam *Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the Northwest Province* (2015) 42.
[10] In terms of s 44 of the Companies Act, financial assistance is widely defined as including a loan, guarantee, the provision of security or otherwise, but does not include lending money in the ordinary course of business by a company whose primary business is the lending of money. In respect of the shares of a company, a company may provide such financial assistance to a person wishing to subscribe for shares in that company, or to a person who wishes to purchase shares in that company from an existing shareholder of that company.
[11] Section 165 of the Companies Act
[12] See R Bradstreet 'The new business rescue: Will creditors sink or swim?' (2011) 128 *South African Law Journal* 352–380.
[13] For a detailed discussion on the social and ethics committee, see chapter 4 of the thesis.

(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;

(b) promote the development of the values of *ubuntu* by promoting humanness and collective unity in the South African economy by–

(i) encouraging entrepreneurship and enterprise efficiency.

(ii) creating flexibility and simplicity in the formation and maintenance of companies; and

(iii) encouraging transparency, *ubuntu* and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation ….

(l) provide a predictable and effective environment for the efficient regulation of companies.[14]

6.2.2 The legal analysis of internal CSR

The operation of the s 72(4) social and ethics committee was comprehensively examined in chapter 5. It was argued that the place for CSR in South African company law is implied in the provision made for a social and ethics committee in s 72(4), read together with the Companies Regulations, 2011. It was found that the exclusion of ordinary employees and trade unions representing employees from membership of the social and ethics committee undermines the value of internal CSR and employee engagement in the Act. The exclusion of employees and trade unions representing employees represents a missed opportunity to bring about much-needed employee voice at board level, as the social and ethics committee is empowered to monitor the company directors and report to the shareholders of the company at the shareholders' meeting.[15]

6.2.2.1 The recommendation: Amending the Companies Act and the Companies Regulations, 2011

The Companies Act should be amended to expressly include employees and trade unions representing employees as members of the social and ethics committee. This has benefits for promoting employee voice at board level as well as for encouraging internal CSR for labour stability. It is therefore submitted that s 72(4) of the Companies

[14] The underlined text reflects the proposed amendments to the current provision.
[15] Regulation 43(5)*(c)* of the Companies Regulations, 2011.

Act, read together with the Companies Regulations, 2011, should be amended as follows. First, it should be made clear that the social and ethics committee is a CSR committee, by changing its name to the 'social responsibility committee'. Secondly, the uncertainties about the mandate of the committee must be removed, as its mandate overlaps with those of other committees. Its mandate must be exclusively for CSR and internal CSR matters. Therefore, the provisions for the composition of the social and ethics committee should be amended as follows:

> A company's social responsibility committee must comprise:
>
> *(a)* Not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company's business and must not have been so involved within the previous three financial years.
>
> *(b)* Three or more employees employed by the company within the previous three financial years, one of whom must be a member of a trade union representing the company's employees.[16]

The mandate of the social and ethics committee should be amended as follows:

> A social responsibility committee has the following functions:
>
> *(a)* To monitor the company's activities, having regard to any relevant legislation, other legal requirements, or prevailing codes of best practice, with regard to matters relating to
>
> (i) social and economic development, including the company's standing in terms of the goals and purposes of–
>
> *(aa)* the 10 principles set out in the United Nations Global Compact Principles;
>
> *(bb)* the principles of the King Code of Good Corporate Governance;
>
> *(cc)* the OECD recommendations regarding corruption;
>
> *(dd)* the Employment Equity Act; and …
>
> *(b)* to draw matters within its mandate to the attention of the Board as occasion requires; and

[16] Regulation 43(4) of the Companies Regulations, 2011. The underlined text reflects the proposed amendments to the current provision.

> *(c)* to report, through one of its members, to the stakeholders of the company on the matters within its mandate.[17]

The above amendments to the name, mandate and composition of the social and ethics committee have been proposed for various reasons. First, an explicit reference to the social responsibility of the company in a contemporary South African corporate legal framework is necessary. Defining the committee as a social responsibility committee places a legal responsibility on the company and its directors to effectively apply internal CSR. Inserting the word 'responsibility' into the Act brings the company director's liability into full effect on issues affecting stakeholders, as the committee members share the same responsibilities and liabilities as directors even if they are not members of the board.[18]

Secondly, the inclusion of employees and trade union representatives in the social responsibility committee would improve the efficacy of the committee in executing the matters within its mandate. These matters at present involve the company's compliance with employee laws and international labour protocols.[19] The compliance with these laws and instruments is essential in promoting labour stability through platforms for employee voice at board level.

The proposed amendment to the mandate of the committee gives legal recognition to the King Code as principles against which the social responsibility committee must monitor compliance. This inclusion gives legal effect to South Africa's internationally acclaimed code on good corporate governance. It allows King to have an influence beyond the JSE listing requirements and therefore recognises the principles of King as hard law. The proposed amendments to the Companies Regulations are based on the proposed approach of *ubuntu*.

The shareholders collectively should not be the primary beneficiaries of the directors' fiduciary duties and therefore it is recommended that the committee reports to the stakeholders of the company, as opposed to the present position, which requires the committee to report to the shareholders of the company exclusively. Therefore, replacing the current words in reg 43(5)*(c)* – 'to report, through one of its members to

[17] Regulation 43(5)*(a)* of the Companies Regulations, 2011. The underlined text reflects the proposed amendments to the current provision.
[18] Section 75 of the Companies Act.
[19] Chapter 4 paras 4.3.3.2 to 4.3.3.4.

the shareholders at the company's annual meeting on the matters within its mandate' – with the words 'to report, through one of its members, to the stakeholders of the company on the matters within its mandate' widens the accountability of the committee to include the stakeholders of the company, rather than only the shareholders. This is because the reporting of issues affecting the stakeholders of the company to the shareholders of the company reinforces the shareholder-centric aspects of the Act and the committee.

Moreover, this recommendation does not prescribe the way in which reporting to stakeholders should be done. However, the minimum requirement which is proposed is that such report must be published in the annual report and must include measures put in place to promote employee voice and the effectiveness, if any, of the measures. This report is not meant to substitute the company's environmental social governance report, but is a report exclusively focused on the mandate of the committee and the impact of employee voice on issues affecting the stakeholders of the company.

The report must address issues of monitoring stakeholder voice which may also include, but should not be limited to, employee voice on board leadership, whistleblowing and corporate culture, shared value initiatives and board accountability on CSR matters, access to information, and levels of meaningful engagement between board leadership and employees.

This way of reporting is valuable because it allows for an inclusive form of reporting, one which is not only for the shareholders of the company who, in terms of the current provisions, must be reported to at the annual general meeting. This way of reporting allows stakeholders to be well-informed on issues affecting the mandate of the social responsibility committee and the effectiveness of the committee in promoting the voice of workers at board level.

Finally, it is also important to consider whether the social responsibility committee will incur liability for the ineffective or improper implementation of its mandate. The liability of directors as set out in the provisions of s 75 of the Companies Act also apply to the social responsibility committee, and therefore the fact that the directors have set up a committee to monitor the directors and report to the stakeholders does not negate the liability of the committee members for the failure of the committee to effectively execute its legal mandate.

6.2.3 Lessons from the law in the UK and the US

Chapter 5 reviewed the driving forces behind the developments of CSR in the US and the UK. The influence of the UK's corporate governance reports and the Guidance on Board Effectiveness, which aims to promote stakeholder voice, was reviewed.[20] It was found that there is no explicit promotion of CSR and internal CSR in the Companies Act, 2006 and the Corporate Governance Code.[21] However, channels for stakeholder engagement and employee voice are suitably embraced in the Act and under the Code. Likewise, the drivers of CSR in the US were reviewed. It was found that corporate governance in the US is founded on the principles of traditional shareholder primacy which, as discussed in chapter 4, has no room for internal CSR.

6.2.3.1 The recommendation: advance secondary legislation exclusively centred on strengthening stakeholder engagement at board level

The UK-based approach requires relevant companies to explain how company directors have complied with the legislative requirements to consider the interests of employees and other external stakeholders.[22]As in the UK, secondary legislation in South Africa should guide companies on how to identify, gather and incorporate stakeholders' views, specifically the views of employees, for labour stability and voice. [23]

The secondary legislation should require public and private companies which meet the requirements of reg 26(2) of the Companies Regulations to explain how their directors have complied with the requirements of s72(4) and how they have considered employees' interests and other interests when fulfilling the duty to act in the best interest of the company.

The secondary legislation will be helpful in navigating the platforms for stakeholder voice, which are a critical component of internal CSR as a mechanism for promoting labour stability under company law. The secondary legislation will be useful in

[20] Section 172 of the Companies Act, 2006 and the Corporate Governance Code, read together with the Guidance on Board Effectiveness.
[21] Chapter 5 para 5.2.2.
[22] Section 172 of the Companies Act, 2006. See chapter 5 paras 5.3.3 and 5.3.4.
[23] Secondary legislation refers to laws created by Ministers under the powers given to them by an Act of Parliament. Secondary legislation is used to address the gaps in primary legislation, or the details of the Act. Secondary legislation includes Proclamations, Regulations and Government Notices published in the *Government Gazette*. In the context of the recommendations made in this thesis, this may be in the form of an amendment to the existing Companies Regulations, 2011.

reflecting on a company's current engagement practices and considering avenues for further improvements.

6.3 CONCLUSION

The social and ethics committee is presented as potential platform through which internal CSR for labour relations stability may be pursued. The social and ethics committee is not recommended as a replacement for workplace forums as a platform for worker participation, or as a replacement for solving labour relations instability under labour law, which has an important role in managing the labour relationship. The social and ethics committee will be effective as a mechanism for labour relations stability through internal CSR only in collaboration with or alongside labour law. The weaknesses embedded in workplace forums were acknowledged; however, for labour stability to be effectively realised in both labour law and company law, workplace forums must be functional, and the social and ethics committee must promote internal CSR through employee voice on company boards.

These recommendations are derived from an evaluation of the history of South Africa's industrial relations environment, an analysis of the value and utility of internal CSR for labour relations stability, a review of the foundations of the purpose of the company, and the avenues for internal CSR initiatives in South Africa, the UK and the US. It is therefore submitted that the recognition of internal CSR in the Companies Act, the hybrid approach to corporate governance, which embraces the strengths of the *ubuntu* approach and the enlightened shareholder value approach to corporate governance, and the proposed amendments to the Companies Act and the Companies Regulations could contribute to the promotion of labour relations stability through internal CSR in company law.

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