Exploring the constitutional impact of the incorporation of the Bill of Rights into the South African corporate law

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SUMMARY

The supremacy of the Constitution requires that its values and principles be complied with to the extent of determining validity. Thus, failure to comply with this injunction renders any law or conduct invalid. Although the values and principles enshrined in the Constitution are largely discussed in the context of public law and private law, these principles and values, of course, also apply to corporate law. This article investigates the impact that constitutional principles have had on the South African corporate legal framework. The primary legislation in this regard is the Companies Act of 2008, which embodies provisions that guarantee respect for the stakeholders' interests and the Bill of Rights in company operations. Those provisions are complemented by other extant pieces of legislation that recognise that the operational value of the corporate entity extends to all the stakeholders, including the environment.

1 Introduction

Section 2 of the South African Constitution of 1996 stipulates that any law or conduct that violates constitutional provisions is invalid. This implies that, for any law to be enforceable, it must comply with the provisions of the Constitution. This constitutional obligation includes promoting the duty to ensure the advancement of human rights and freedoms as encapsulated in the Bill of Rights.[1] This is the first constitutional obligation outlined in section 1 of the Constitution. To give effect to these constitutional obligations, section 7(a) of the South African Companies Act of 2008 provides that one of the purposes of the Act is to 'promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law'. The implication is that companies, in their operations, are to respect the stipulations in the Bill of Rights as provided in Chapter 2 of the Constitution. Besides the

1 Sec 1(a) of the Constitution of the Republic of South Africa, 1996.

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Companies Act, there are other pieces of legislation that impact a company's operations in upholding the tenets of the Bill of Rights.[2] This article explores the salient provisions in legislation to ascertain the extent to which their applications have transformed or could transform companies' operations in South Africa.

2 Advancement of human rights and freedoms in the South African corporate law

Section 1(a) of the South African Constitution affirms the sovereignty of the South African nation, founded on democratic principles and human rights values and freedoms. The Companies Act of 2008 explicitly mandates companies to ensure compliance with the Bill of Rights in their operations.[3] This transformative path, envisaged in the 2008 Act, has not always been a feature in South African companies related legislation. Prior to the enactment of the 2008 Companies Act, the role of companies in promoting human rights and freedoms had been a matter of debate in corporate law.[4] Gwanyanya posits that:

> One might view a company as either good or evil, responsible or irresponsible. However, regardless of what one's perception of the character of a company is, it is undeniable that in the modern world, there is a great need to create the necessary checks and balances to ensure that companies conduct their business activities without violating human rights and that they act in a socially responsible manner.[5]

Gwanyanya further states that much of the literature on the legal obligation of companies to advance human rights and freedoms has been more focused on voluntarism than on obligation.[6] However, this submission might not be absolutely accurate given the introduction of the concept of corporate legal responsibility (CLR) as opposed to corporate social responsibility (CSR) in the South African corporate lexicon. Again, the 2008 Act places a duty on companies to align their operations with the spirit, purport, and objects of the Constitution in the protection, promotion, and fulfilment of human rights and freedoms.[7]

Section 7(d) of the 2008 Act expressly provides that one of the purposes of the legislation is to reaffirm the concept of a company as a means of achieving economic and social benefits for citizens. This, in essence, suggests a significant shift from the traditional role of a

2 The Labour Relations Act 66 of 1995, the Broad-based Black Economic Empowerment Act 53 of 2003 & the National Environmental Management Act 107 of 1998.
3 See sec 7(a) of the Companies Act 71 of 2008.
4 F Cassim & others *Contemporary Company Law* (2017) 20.
5 M Gwanyanya 'The South African Companies Act and the realisation of corporate human rights responsibilities' (2015) *Potchefstroom Electronic Law Journal* 3102.
6 Gwanyanya (n 5) 3102-3103.
7 Section 7(d) of the 2008 Act.

company from shareholder profits maximisation to societal economic development.[8] The statutory broadening of the expectations on the company invariably guarantees their involvement in advancing human rights and freedoms as espoused by the Constitution.

The interpolation of the company's obligation to protect human rights and freedoms in interpreting the directors' fiduciary duty to exercise their powers in the best interests of the company as provided in section 76(3)(b) of the 2008 Act would strengthen the view of the relaxation of the narrow confines of the traditional shareholder-centric role of the company in preference for a more societal approach to the discharge of the directors' responsibilities. A company's director cannot, in the present dispensation, be accused of being in breach of duty by pursuing objectives within the company's operational scope that enhance the societal well-being.

At common law, it is accepted that for a director to act in the company's best interests, the director should consider the interests of both present and future shareholders as a collective body.[9] Whether directors are legally obliged to consider the interests of other stakeholders has not been conclusively answered.[10] However, whatever the interpretation assigned to section 76(3)(b), it must fulfil the purpose of the 2008 Act, including that the directors of a company must act in a manner that best serves to achieve economic and social benefits, and ensure that their conduct aligns with the values and principles of the Bill of Rights.[11]

Esser and Du Plessis support the inclusive stakeholder approach in defining what the directors' duty to act in the best interests of a company entails. They submit that:

> Directors owe their duties to the company and the company is a separate legal entity from the moment it is registered and until it is deregistered … The company is represented by several interests and these include the interests of the shareholders, employees, consumers, the community and the environment. Thus, requiring directors to act in good faith in the interests of "the company" cannot nowadays mean nothing other than a blend of all these interests.[12]

The authors' view promotes a pluralistic approach in defining the director's duty. The pluralist approach indicates that a director of a

8 As above.

9 See *Gaiman v National Association for Mental Health* [1971] 317, where Megarry J stated (330) that '[t]he [company] is, of course, an artificial legal entity, and it is not very easy to determine what is in the best interests of the [company] without paying due regard to the members of the [company]'. His Lordship went on to say that he 'would accept the interests of both present and future members of the (company), as a whole, as being a helpful expression of a human equivalent' (330).

10 The King's Code of Corporate Governance 2016 (King IV). Art 71 of the 2008 Act does not create an obligation in that regard.

11 Secs 7(a) & (d) of the 2008 Act.

company should consider all stakeholders and not only the shareholders' interests.[13] It is noticeable that, since the inception of the Constitution, there has been a strong drive for the protection and promotion of employees' rights,[14] and environmental rights.[15] Those rights and interests must, therefore, be protected by the company in fulfilling its obligation to promote human rights and freedoms enjoined by the Constitution.

3 The South African transformative legislation

Apart from the 2008 Act, the protection and promotion of stakeholder interests in corporate operations are guaranteed by other pieces of legislation as enjoined by the Constitution. Such legislation includes the Labour Relations Act 66 of 1995 (LRA),[16] the Broad-based Black Economic Empowerment Act 53 of 2003 (BBBEE),[17] and the National Environmental Management Act 107 of 1998 (NEMA).[18] These pieces of legislation have continued to exert a significant impact on defining the relationship between the company and the stakeholders. The prevailing historical circumstances that heralded the enactment of these statutes compel their transformative approach to the nation's social and economic issues. For instance, LRA is primarily geared at addressing issues of unfair labour practices in both public and private sectors, the BBBEE Act targets the promotion of equality to address the unfair distribution of state resources and opportunities as witnessed under the apartheid regime,[19] and NEMA focuses on mitigating the adverse impact of corporate operations on the stakeholders within their operational environment.

In addition to the established statutes, the King IV report, which significantly impacts South Africa's corporate law legislation, stresses the

12 IM Esser & JJ Du Plessis 'The Stakeholder debate and director's fiduciary duties' (2007) 19 *South African Mercantile Law Journal* 361. See also JS Oosthuizen 'The nature and purpose of a company' in Cassim & Cassim 'The reform of corporate law in South Africa' (2005) *International Company and Corporate Law Review* 411-12224.

13 R Cassim & F Cassim 'The reform of corporate law in South Africa' (2005) *International Company and Corporate Law Review* 411-12; AA Berle 1931 *Harvard Law Review* 1049.

14 Sec 23 of the Constitution.

15 Sec 24 of the Constitution.

16 Chapter VIII of the LRA gives effect to the right to fair labour relations as envisaged in sec 23 of the Constitution; sec 4 entrenches the right to freedom of association and its general protection granted in sec 18 of the Constitution; sec 89 gives effect to duty of disclosure which fulfils the right to access to information provided for in sec 32 of the Constitution.

17 This piece of legislation aims to address and provide redress for the historic inequalities suffered by people from designated groups and in so doing to give effect to sec 9 of the Constitution which entrenches the right to equality for all.

18 The NEMA is influenced by sec 24 of the Constitution which give effect to the environmental rights.

19 Sec 9 of the Constitution.

importance of the protection of the stakeholders' interests.[20] King IV strongly recommends that companies follow a stakeholder-inclusive approach in their operations[21] and places sustainable development high on this agenda.[22] This approach requires that directors, while acting in the best interests of a company, must take into account the company's performance within the triple-bottom-line context. This entails having due regard to the economy, society, and the environment in which the company operates.[23] In simple terms, this principle implies that in performing their duties, directors of a company must strive to balance the interests of other company stakeholders in addition to the shareholders' interests. An independent value should be attached to these interests.[24] The provisions of King IV support the transformative constitutionalism principle on the need to ensure the advancement of fundamental rights and freedoms by companies.[25]

3.1 The stakeholder inclusive approach under the 2008 Act

The 2008 Act promotes compliance by companies with the Bill of Rights (BOR) as provided for in the Constitution.[26] One of the tenets of the BOR is the advancement of human rights and freedoms. The combined effect of both statutes is that in whatever way South African corporate law is applied, companies have a fundamental duty to respect, protect, and promote the fundamental rights and freedoms as provided in Chapter 2 of the Constitution.

The stakeholder-inclusive approach enables the protection of other interests other than the shareholders of a company. Section 72(4) of the 2008 Act supports this approach by providing for the establishment of a Social and Ethics Committee (SEC) by companies. That provision requires all listed and state-owned companies to appoint SEC[27] to monitor the activities of the company, taking into consideration the relevant legislation, good corporate citizenship programmes, the impact of the company's activities, products, and services on the environment, health, public safety, labour, employment, and social and economic developments taking place in the company.[28] By requiring all listed and state-owned companies to have a SEC responsible for monitoring the impact of the company's operations on other stakeholders, the 2008 Act implicitly compels the affected companies to protect all stakeholders in

20 King IV (n 10) 43-46, 23-30. See also F Cassim *et al Contemporary Company Law* 472 & 521.
21 King IV (n 10) 44 item e(i).
22 King IV (n 10) 23, 26.
23 King IV (n 10) item e(ii).
24 King IV (n 10) 45.
25 Sec 1(a) of the Constitution.
26 Sec 7(a) of the 2008 Act.
27 Sec 72(4) of the 2008 Act. See also reg 43(2) of the Companies Regulations, 2011.
28 Regulation 43(5) of the Companies Regulations, 2011.

the company's operations. That requirement aligns with the transformative concept espoused by the Constitution.

The regulation made by the Minister of Trade and Industry, pursuant to the Act, that a specified category of companies defined by either the annual turnover and workforce, or the nature and the extent of the activities of the company, must establish a SEC to serve the interests of the public,[29] further illustrates that the 2008 Act serves not only the interests of the company and its shareholders, but also those of the stakeholders as a whole.[30] The reference to public interest in defining the role and functions of the SEC further aligns the 2008 Act's provisions with the transformative principles encapsulated by the Constitution.

Even in those instances where a specified category of companies required to have a SEC could apply to the Companies Tribunal under the regulations for an exemption,[31] in granting such exemption, the Companies Tribunal considers whether: '(a) the company is required in terms of other legislation to have, and does have, some form of formal mechanism within its structures that substantially performs the function that would otherwise be performed by the SEC in terms of this section and the regulations; or (b) it is not reasonably necessary in the public interest to require the company to have a SEC, having regard to the nature and extent of the activities of the company'.[32] Public interest remains an influential determinant even in this regard.[33] Thus, in practice, the Companies Tribunal must consider: the impact of a company's operations on the community; the impact of the company as a corporate citizen in the community; the effect of the activities and products of the company on the environment, health and public safety; the conduct of the company in relation to consumers, including advertisement, public relations and consumer protection; and the actions of a company in relations to company employees and the company's employment practices which incorporates compliance with labour relations.[34] Hence, the factors to be considered largely serve the interests

29 Section 72(4)(a) of the 2008 Act; P Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2025) 282, HJ Kloppers 'Driving corporate social responsibility (CSR) through the companies act: an overview of the role of the social and ethics committee' (2013) *Potchefstroom Electronic Journal* 165-199.

30 Regulation 43 of Companies Regulations, 2011 requires that all state-owned companies and listed public companies, or companies which in the past five years have a public interest score of above 500 points in terms of regulations 26(2) of the 2008 Act, must appoint an SEC.

31 Sec 72(5) of the 2008 Act; reg 142 of the Companies Regulations, 2011; Delport (n 29) 283.

32 Section 72(5)(a)-(b) of the 2008 Act; Delport (n 29) 283.

33 Herbstein J in *Argus Printing and Publishing Co Ltd v Darby's Artware (Pty) Ltd and Others* 1952 (2) SA1(C) held that public interest consideration entails a determination as to whether the public will be better served if the applicants were to be allowed to proceed with its scheme than by a continuation of the existing state of affairs.

34 Regulation 43(5)(a)(i)-(v) of the Companies Regulations, 2011; Delport (n 29) 283.

of the stakeholders in all ramifications rather than the company as a corporate entity.

Section 165(2) of the 2008 Act contains an important provision that seeks to advance the fundamental rights and freedoms of the stakeholders.[35] The provision grants power to a specified category of persons to institute proceedings for the protection of a legal right, subject to the qualification that the court is satisfied that such action is necessary for the protection of that person's right.[36] Therefore, section 165 of the 2008 Act may be used as a protective mechanism against the violation of human rights by a company. That provision has great potential to prevent human rights violations by companies.[37] The section serves as a preventative rather than a remedial tool. This is attributed to the fact that, for a court to grant such an order, it must be satisfied that the proceedings are necessary for the 'prevention' of the violation of a legal right. For that reason, to institute an action under that provision, it is sufficient that the violation of the right is anticipated and not that it necessarily occurred.[38] Thus, the 2008 Act is cognisant of the need to advance the rights of stakeholders, in line with the constitutional precepts.

The 2008 Act also takes cognisance of the need to protect company employees' rights as contemplated in section 23 of the Constitution.[39] In terms of the 2008 Act, the rights of the employees are protected during business rescue proceedings under the rights of the affected persons.[40] The section grants both the employees who are represented by a trade union and those who do not have trade union representation, extensive rights.[41] This provision advances the right in section 23(2) of the Constitution which allows workers to form and join a trade union of their choice. Section 144(3) of the 2008 Act grants employees of a company far reaching rights.[42] The section also recognises employees who are the creditors of the company to have voting rights based on any unpaid remuneration prior to the commencement of the business rescue proceedings.[43] Company employees have the right to receive notice of every court proceeding, decisions, meetings, or other related events relating to the business rescue proceedings. This provision advances the employees' constitutional rights of access to information[44] and access to

35 Gwanyanya 2015 (n 5) 3111.
36 Sec 165(2)(d) of the 2008 Act; Gwanyanya (n 5) 3111.
37 Gwanyanya (n 5) 3111.
38 Sec 165(2)(d) of the 2008 Act.
39 Sec 144 of the 2008 Act regulates the rights of affected persons *inter alia* the employees during business rescue.
40 Sec 144(1)(a) and (b) of the 2008 Act.
41 Sec 144(3).
42 The right to information (secs 144(3)(a)), the right of access to the courts (secs 144(3)(b)), the right to freedom of association (secs 144(3)(c)), and the right to freedom of expression (secs 144(3)(d)-(g)).
43 Sec 144(2).
44 Sec 32 of the Constitution.

courts amongst others.[45] This notice must be delivered to employees at their workplace and to the head office of the relevant trade union.[46] Company employees may participate in any court proceedings arising during the business rescue proceedings and may form a committee of representatives for employees.[47] This provision of the 2008 Act gives effect to the employees' right to access to courts.[48]

In addition, the appointed business rescue practitioner must consult with the company employees in the development of the business rescue plan and afford them sufficient opportunity to review the proposed plan, and also to provide an opportunity for the employees' representatives to address meetings as contemplated in section 152(1)(c) of the 2008 Act.[49] Company employees are also allowed to be present and make submissions in the meeting of the holders of voting interests before the proposed business rescue plan is put to a vote as contemplated in section 152(1)(c) of the 2008 Act.[50] Employees of a company are free to vote with creditors on a motion to approve the proposed business rescue plan to the extent that the employees qualify as creditors under section 144(2) of the 2008 Act.[51] Should the proposed business rescue plan be rejected, company employees have the right to propose the drafting of an alternative business rescue plan[52] or to present an offer to acquire the interests of one or more affected persons.[53] It is imperative to note that, the rights of company employees as set out in section 144 of the 2008 Act do not limit any additional rights that employees may have in terms of any law, contract, collective agreement, shareholding, security, or court order.[54]

Section 136 of the 2008 Act provides that despite any provision in an agreement to the contrary, all persons who were employed by a company immediately before the commencement of the business rescue proceedings, continue as employees of the company on unchanged terms and conditions.[55] An exception to this provision applies where a change occurs in the ordinary course of employee attrition and the company has agreed to different terms and conditions in accordance with applicable labour laws.[56] To ensure that any retrenchment of employees during the business rescue proceedings is brought into line with the national legislation contemplated in section 23(6) of the Constitution, the 2008 Act requires that retrenchment should be carried out subject to sections 189 and 189A of the LRA which regulate

45 Sec 34 of the Constitution.
46 Sec 144(3)(a).
47 Secs 144(3)(b) and (c).
48 Sec 34 of the Constitution.
49 Sec 144(3)(d).
50 Sec 144(3)(e).
51 Sec 144(3)(f).
52 Sec 153.
53 Sec 144(3)(g).
54 Sec 144(5).
55 Sec 136(1)(a).
56 Secs 136(1)(a)(i) and (ii).

dismissals based on operational requirements. Any other applicable employment-related legislation should also be taken into consideration.[57]

The 2008 Act further provides for the appointment and removal of company directors.[58] It should be noted that company directors are the steering wheel of a company and are responsible for the everyday management of the business and the affairs of a company.[59] The 2008 Act requires that a director removed from office *must* be notified of the meeting and the resolution passed by the shareholders for his or her removal,[60] and also be allowed a reasonable opportunity to make representations either in person or through a representative.[61] The provisions of section 71(2)(a) and (b) of the 2008 Act give effect to the constitutional principle provided in section 23 of the Constitution which regulates the rights of employees to fair labour practices. To further advance the rights of employees, section 71(9)(a) and (b) of the 2008 Act provides that the section does not deprive a removed director of any rights which he or she may have at common law or prevent the director from applying to a court for damages or other compensation for loss of office as a consequence of being removed from the office of director.

3.2 Labour relations

Section 23 of the Constitution regulates labour relations. It provides that everyone has the right to fair labour practices.[62] The second part of section 23(5) of the Constitution further provides that national legislation may be promulgated to govern collective bargaining. The Labour Relations Act is the national legislation enacted to give effect to the transformative principles of fair labour practices espoused by the Constitution.[63] The LRA establishes special tribunals to deal with labour disputes, namely, the Labour Court, the Labour Appeal Court, the Commission for Conciliation, Mediation and Arbitration (the CCMA), and bargaining councils.[64] Those tribunals actualise the constitutional protection of the right to fair labour practices as provided in section 23 of the Constitution. The LRA applies equally to companies in the same manner as to individuals in labour matters.[65]

Before the statutory recognition of employees as stakeholders in companies, company employees relied exclusively on labour law to enforce their rights against companies in that capacity.[66] Botha demonstrated the essence of this rather belated statutory recognition of

57 Sec 136(1)(b).
58 Secs 68 and 71.
59 Sec 66(1).
60 Sec 71(2)(a).
61 Sec 71(2)(b).
62 Section 23(1) of the Constitution.
63 The long title and s 1(a) of the LRA.
64 Preamble to the LRA.
65 Sec 210 of the LRA.

employees as stakeholders in corporate operations in his observation that:

> Corporate governance has become important, not only because employees need protection from exploitation as a result of the imbalance of power between employers (companies) and employees, but also because employees have become very important stakeholders in companies. Participation rights are newly granted by which companies are held accountable to act in a responsible and ethical manner … The emphasis is on inclusivity: the inclusive approach recognises employees of the company, as well as other stakeholders such as customers and the community in which it operates … The new focus in corporate law and the corporate governance regime on employees' legitimate interests and expectations, prima facie, is promising for employee voice to be heard in the workplace.[67]

It is thus imperative that companies respect the rights of employees by ensuring fair labour practices in their dealings. Section 5(4)(b)(i)(bb) of the 2008 Act[68] and section 210 of the LRA[69] strive to harmonise the application of the LRA and the 2008 Act by providing that the former shall prevail over the latter where there is an inconsistency in their respective provisions.

Section 197B of the LRA[70] provides for the disclosure of information concerning the insolvent state of a company to the employees. Section 197B(1) provides that when a company is experiencing financial problems that may 'reasonably' result in liquidation, the consulting parties as set out in section 189(1) of the LRA need to be advised. These parties include a registered trade union.[71] Where there are no workplace forums or trade unions representing employees, the company must consult directly with employees who are likely to be affected by the company's insolvency.[72] All these provisions strengthen the importance of the workers as stakeholders in the company's affairs and in consonance with the constitutional transformative aspirations.

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66 MM Botha 'Evaluating the social and ethics committee: Is labour the missing link? (1)' (2016) 79(4) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law* 580-593.

67 MM Botha 'Responsibilities of companies towards employees' (2015) 18(2) *Potchefstroom Electronic Law Journal* 1-67; Botha (n 66) 583-584.

68 Sec 5(4)(b)(i)(bb) of the 2008 Act: 'If there is an inconsistency between any provision of this Act and a provision of any other national legislation — (b) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second — (i) any applicable provisions of the — (bb) Labour Relations Act, 1995 (Act No. 66 of 1995 prevail in the case of an inconsistency involving any of them, except to the extent provided otherwise in section 49(4)'.

69 Section 210 of LRA: 'Application of Act when in conflict with other laws If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any act expressly amending this Act, the provisions of this Act will prevail'.

70 The Labour Relations Amendment Act 12 of 2002.

71 Sec 189(1)(ii) of the LRA.

72 Sec 189(1)(c)-(d) of the LRA.

3.3 The Insolvency Act and employees' rights

The preamble to the Insolvency Amendment Act 33 of 2002 (the Insolvency Act) explains that the purpose of the amendments is to amend the Insolvency Act, 1936, strengthen the regulation of the effect of sequestration on employment contracts and claims for severance and retrenchment pay. Although the Insolvency Second Amendment Act of 2002[73] further amended some provisions and introduced new sections into the Insolvency Act, it also contained three amendments to the old Companies Act.[74] The main purpose of the amendments is to mandate companies to notify employees and trade unions of an application for the winding up of the company and to deliver service of winding-up orders on employees and trade unions. When an application for the winding up of a company is made to the court in terms of section 346 of the Insolvency Act, a copy of the application must be served to every registered trade union that represents any employee of the company and to the employees themselves.[75]

In addition, section 197B(2) of the Insolvency Act compels a company that applies for liquidation, or when an application for liquidation is made, to provide the employees with a copy of the application within two days of making the application, or within 12 hours in urgent matters.[76] The employer (company) must also notify employees in writing and disclose all relevant information regarding the reasons for the possible proposed dismissals, the number of employees who are likely to be affected, the manner of determining those to be dismissed and who will remain in employment, when the dismissals will take place, severance pay to be paid, and the possibility of future employment assistance that the employee could expect from the employer during the period of dismissal.[77]

In *EB Steam Company (Pty) Ltd v Eskom Holdings SOC Ltd*[78] Wallis AJ held that providing employees and trade unions of the company with information as required by section 346(4A) of the Insolvency Act is peremptory.[79] This is because a court may not grant a final winding-up order unless the company has complied with the requirement of furnishing information.[80] This requirement protects the interests of the

73 Act 69 of 2002.
74 Section 346 of the 1973 Companies Act was amended by the insertion of s 4A after subsection 4, the insertion of s 346A as well as the amendment of s 347 by inserting s (1A) after subsection (1); EP Joubert 'Comparative study of the effects of liquidation or business rescue proceedings on the rights of the employees of a company' 2018 (LLD Thesis, UNISA) 32.
75 Sec 346(4A)(a)(i) and (ii) of the Insolvent Act; Joubert (n 74) 32.
76 Sec 197B(2)(a) of the LRA.
77 Sec 189(3) of the LRA.
78 [2014] 1 All SA 294 (SCA) paras 22-23.
79 Paragraph 25 – 'Peremptory' means that it is not permissible for the court to grant a final winding-up order if a company has not complied with the requirement of furnishing information.
80 Paragraph 25.

employees by enabling them to make representations and to take other measures to cushion the impact of the company's liquidation on their well-being.[81]

3.4 National Environmental Management Act and stakeholder protection

The right to a healthy environment is granted by section 24 of the Constitution.[82] The 2008 Act does not place a strong emphasis on environmental protection by companies, apart from the ministerial regulatory powers of the Act. However, other pieces of legislation[83] that have a bearing on companies are geared towards environmental protection. The NEMA addresses environmental concerns arising from corporate activities.[84] It requires that 'people and their needs [must] be placed at the forefront of environmental management … all developments [must] be socially, economically and environmentally sustainable'.[85] For instance, the NEMA and common-law principles mandate companies, together with the state, to ensure environmentally friendly operations.[86] Similar laws have also granted the affected communities and individuals redress in matters of environmental degradation resulting from harmful industrial activities.[87] For instance, in *The State v Blue Platinum Ventures (Pty) Ltd and another,*[88] a company that was extracting clay from the environment for brick manufacturing without the necessary approval as required by the NEMA was found guilty and ordered to rehabilitate the areas affected by the operations of the company. That court decision is strengthened by section 24 of the Constitution and the provisions of the NEMA, by reaffirming that companies have a constitutional duty to protect and not to harm the environment.[89]

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81 See also *Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd* [2014] ZAGPJHC 203, par 12.

82 Sec 24 of the Constitution states: 'Everyone has the right — (a) to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that — (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources.'

83 See, e.g., the NEMA, the Atmosphere Pollution Prevention Act 45 of 1965, and the Environmental Management: Air Quality Act 39 of 2004. Only the NEMA is discussed here.

84 AO Nwafor 'The protection of environmental interests through corporate governance: A South African company law perspective' (2015) 11(2) *Corporate Board: Role, Duties and Composition* 10.

85 *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) para 60.

86 Nwafor (n 84).

87 Nwafor (n 84) 11.

88 RN 126/13 of 09/01/2014.

89 Nwafor (n 84) 11. See also sec 8(2) of the Constitution.

Nwafor argues that the common law responsibility of directors to protect the best interests of the company, as currently codified in section 76(3)(b) of the 2008 Act, should be developed by the courts to include recognition of the protection of the environmental right.[90] This would guarantee the enforcement of environmental interests as an issue of corporate governance within the confines of the 2008 Act.[91] This submission aligns with the stakeholder-inclusivity and sustainable development approaches advocated in King IV. The King IV regulations mandate that directors in performing their duties to the company take into account the need to protect the environment in which the company is operating.[92]

The 2008 Act and the common law duty of directors to act in the best interests of a company fall within the purview of section 39(2) of the Constitution[93] which requires that each interpretive process must show promotion of the purport, spirit, and objects of the Bill of Rights.[94] Phrased differently, the section requires that the constitutional values should be reflected in the process of construing legislation or common law.[95] Therefore, the codified common law duty of directors to act in the best interests of their company must be developed to include the recognition of the importance of protecting the environment by companies.[96]

King IV also acknowledges that companies operate in a triple responsibility context, i.e., the economy, society, and the environment.[97] This implies that companies may not negate these three elements in their operations.[98] By doing so, companies uphold the constitutional right to a healthy environment.[99] In addition, regulation 3 of King IV requires that the governing body of companies must ensure that a company is seen to be a 'responsible citizen'.[100] This includes making an effort to advance, among other things, with the Constitution and the Bill of Rights.[101] Companies are also required to monitor the impact of their activities on the environment (including activities

90 Nwafor (n 84) 8-9.
91 Nwafor (n 84) 8-9.
92 King IV (n 10) 23, 26. See also, I-M Esser 'Regulating ESG issues: A comparison of South Africa and the United Kingdom' in H Coetzee & C Fritz (eds) *De Serie Legenda: Developments in Commercial Law Vol III: Entrepreneurial Law* (2019) 78.
93 Nwafor (n 84) 8-9.
94 B Maswazi 'The doctrine of precedent and the value of s 39(2) of the Constitution' (2017) April *De Rebus* 29; *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 79.
95 Maswazi (n 94); *Walele* (n 94); s 39(2) of the Constitution.
96 Nwafor (n 84) 8-9.
97 King IV (n 10) 4.
98 King IV (n 10) 4.
99 Sec 24 of the Constitution.
100 King IV (n 10) 45.
101 King IV (n 10) 45.

involving pollution, waste disposal, and the protection of biodiversity), society, the economy, and the workplace.[102]

Suffice to add that one of the functions of the SEC, as envisaged in section 72 of the 2008 Act, is to monitor the impact of the activities of companies on the environment. Implicit in that mandate is that, under section 24 of the Constitution, corporations as juristic persons have a statutory obligation to protect the environment.[103] Moreover, section 165(2)(d) of the 2008 Act may be used in respect of the company's operation to institute an action where an environmental right has been violated or is at risk.[104] This illustrates that the corporate law of South Africa has incorporated the concept that companies are under a legal duty not to violate environmental rights as provided for under section 24 of the Constitution.

4 Conclusion

The article establishes that South African corporate law, through the 2008 Act, and other applicable statutes, has largely incorporated the constitutional principle of advancement of human rights and freedoms as set out in section 1(a) of the Constitution. Companies are expected to ensure the advancement and non-violation of human rights and freedoms as outlined in section 7(a) of the Act.

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102 King IV (n 10) 45, Esser (n 92) 78.
103 Section 72 of the 2008 Act.
104 Sec 38 read with sec 24 of the Constitution; Nwafor (n 84) 17.