

What's really right? Corporate Social Responsibility as a legal obligation in South Africa

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Corporate Social Responsibility

Introduction

Corporate Social Responsibility is no longer merely a “nice to have” as it finds itself referenced expressly in black and white law in regulations to the Companies Act No. 71 of 2008. The extent to which corporate social responsibility now finds itself amongst issues to be taken seriously by boards of directors is evidenced by the growing amount of attention being paid by companies to determine the scope and ambit of their corporate social responsibilities.

Neil Kirby has recently been appointed as the Co-Vice-Chair of the Corporate Social Responsibility Committee of the International Bar Association. This article presents introductory remarks to the legal framework now in place to address corporate social responsibility (CSR) and how corporate citizens must take steps to address their social responsibilities not only in the context of what may have been done, but what is now legally required of them. The legal framework is a combination of constitutional rights, statutory provisions and the common law.

For purposes of dealing with CSR in a South African context, the guiding principles are summarised in *The King Report on Governance for South Africa 2009* (“*The King Report*”). Whilst one is not able to prioritise the principles that are set out in *The King Report*, one principle does encapsulate the uniquely South African context of CSR:

“In the African context these moral duties find expression in the concept of Ubuntu which is captured in the expression ‘uMuntu ngumuntu ngabantu’, ‘I am because you are; you are because we are’. Simply put, Ubuntu means humaneness and the philosophy of Ubuntu includes mutual support and respect, interdependence, unity, collective work and responsibility. It involves a common purpose in all human endeavour and is based on service to humanity (servant leadership).”^[1]

The Constitutional Context

The Constitution of the Republic of South Africa, 1996 (“the Constitution”) is the supreme law of the Republic^[2] and “law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” The Constitution therefore is the primary piece of legislation to which one refers when determining the acceptability of conduct or law in South Africa. It therefore plays a direct and important role in the determination of whether or not law or conduct, as law is determined either by Parliament, in the form of a statute, or the Executive, in the form of regulation, or a policy concerning the conduct of citizens (including, but not limited to, corporate citizens), is constitutional.

The Constitution includes a Bill of Rights (“the Bill of Rights”) in which provision is made for various rights to be enjoyed by persons in South Africa. Section 7(1) of the Bill of Rights provides expressly that “[t]his Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.” The Bill of Rights is therefore to be taken very seriously in so far as its application is concerned.

The application provisions of the Constitution determine its reach in relation to the conduct of both corporate and natural persons. Therefore, section 8(2) is of cardinal importance in so far as it provides that the Bill of Rights binds both natural and juristic persons “if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

Therefore, juristic entities are subject to the Bill of Rights and are required, as a matter of law, to consider their behaviour in relation to the Bill of Rights in, arguably, the same way that an individual would have to consider his or her actions in relation to the Bill of Rights. However, how does this

influence the process of determining the scope and ambit of corporate social responsibility in South Africa? The answer emerges in the common law.

The courts in South Africa have already indicated the intersection between CSR and the Constitution. In a decision by the KwaZulu-Natal High Court in *Standard Bank of South Africa Limited v Dlamini*,^[3] the High Court, when dealing with an issue arising from a credit agreement between the parties, analysed the applicable law in the form of the National Credit Act^[4] and the Consumer Protection Act^[5] with reference to the rights enjoyed by an individual and the obligations required of a corporate entity when dealing with an individual as follows:

“In passing I note that the [Consumer Protection Act or CPA] assented to on 24 April 2009 commenced on 31 March 2011. Although the agreement in this case was terminated before the general effective date of the CPA, i.e. 31 March 2011, the Bank, like most large corporations that invest in corporate social responsibility projects, had to be aware of the purposes of the CPA which was already in the public domain. The purposes of the CPA are:

‘... to promote and advance the social and economic welfare of consumers in South Africa by –

(c) promoting fair business practices;

(d) protecting consumers from –

(i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and

(ii) deceptive, misleading, unfair or fraudulent conduct;

(e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour; ...’.

Institutions such as the Bank should welcome the framework proffered by the [National Credit Act] and the CPA for bridging the socio-economic inequalities substantively and for reforming the credit industry, if for no reason but that sustained inequalities and need lead to unrest and social instability which is not good for business. Even though the [CPA] was not effective when the Bank sold the vehicle to Mr Dlamini, it should have voluntarily acknowledged that as goods sold in terms of a credit agreement, section 5(2)(d) of the CPA would have applied to the sale.

It should have been clear when the Bank issued summons on 3 March 2012 that consumer relations was no longer business as usually practised over its 150 year history in South Africa. Disappointingly, the Bank remained unresponsive to the CPA and its aspirations before it became enforceable. My interpretation and application of the provisions of the NCA above are fortified by the CPA.”^[6]

South African courts have successfully knitted principles of corporate governance with the Constitution and other statutory directives contained in a diverse range of legislation, ranging from the National Credit Act to Public Procurement and financing legislation. The courts have also indicated that corporate governance principles apply equally to juristic entities in the private sector and the public sector. There are therefore clearly legal conditions that exist for purposes of formulating corporate responsibility programmes and implementing those principles, which require juristic entities to ensure that such policies and programmes are consistent not only with codes of practice but also the Constitution and elements of statutes that require such entities to be cognisant of the rights of individuals. These conditions came into existence in the absence of legislation expressly creating obligations to meet corporate governance obligations and which legislation is dealt with below in greater detail.

The sentiments expressed above by the courts in South Africa are also echoed in *The King Report* in the following principle:

“Responsible corporate citizenship should manifest in *tangible and reportable programmes and results*. In South Africa, corporate citizenship includes, among others, responsibilities outlined in the Bill of Rights of the Constitution, and issues relating to transformation, human capital, human rights, the environment, social capital, safety and health.”^[7]

Companies legislation

CSR uniquely receives particular attention from a legislative point of view. The overhauled Companies Act^[8] requires a juristic entity to appoint a social and ethics committee.^[9] The provisions of the Companies Act allow the Minister of Trade and Industry (“the Minister”) to prescribe certain provisions in regulation concerning a social and ethics committee. Therefore, section 72(4) of the Companies Act provides expressly that:

“The Minister, by regulation, may prescribe –

1. a category of companies that must each have a social and ethics committee, if it is desirable in the public interest, having regard to –

1. annual turnover;

2. workforce size; or

3. the nature and extent of the activities of such companies;

2. the functions to be performed by social and ethics committees required by this subsection; and

3. rules governing the composition and conduct of social and ethics committees.”

Consequently, regulations were published by the Minister in terms of the Companies Act.[10] In terms of the regulations, additional directives were provided as to the constitution and obligations of social and ethics committees. Regulation 43 requires that all listed public companies, every State-owned company and any other company that has in any two of the previous five years scored above 500 points in terms of regulation 26(2), must appoint a social and ethics committee.[11]

The Reversed Legislative Landscape

The meaning of and implications of the provisions of the Companies Act dealing with CSR are, as yet, unknown, as the Companies Act, as amended, together with its regulations is a recent piece of legislation in South Africa having commenced only on 1 May 2011. However, having regard to the provisions of regulation 43 there are remarkable similarities between it and the rights contained in the Bill of Rights especially those dealing with equality,[12] labour,[13] dignity[14] and security of the person.[15] Therefore, the path already created by constitutional jurisprudence, in respect of the application of the Bill of Rights in South Africa to CSR, will be informative in so far as the determination of what the scope and ambit of regulation 43 are in relation to the activities to be undertaken by social and ethics committees in South Africa. Certainly, the intersection of regulation 43 and section 8 of the Constitution becomes critical in determining the principles that a juristic person must accept and policies to be implemented where that juristic person is obliged to appoint a social and ethics committee – bearing in mind the supremacy of the Constitution vis-à-vis the Companies Act and its regulations.

In relation to the application of the Bill of Rights as between persons other than the State and an individual, i.e. an individual and a juristic person, for example, there has been much debate both in academic text and by the Constitutional Court.[16]

The overall view therefore appears to be that CSR not only lies in the hands of juristic persons as a directive that has emanated from principles of good governance[17] but now one of law in so far as –

- the regulations to the Companies Act prescribe that certain social and ethics activities, principles, undertakings and constitutional rights must be integrally part of the manner in which certain companies are governed; and
- the Constitution, are concerned.

The shift that is required in thinking in relation to corporate activities, as a result of, at least, regulation 43, is significant. Not only because regulation 43 turns compliance with various international instruments into black letter law in South Africa but requires juristic persons to evaluate –

- how those international instruments impact directly on their activities within the Republic as well as any other locations in which that entity may have business interests; and
- where a local entity, as a subsidiary of an international group of companies, is to integrate local social responsibility conditions with international conditions or an international policy concerning CSR.

The Way Forward

The encapsulation of CSR in legal provisions, through the introduction of social and ethics committees may indeed be an appropriate manner in which to provide that social and corporate responsibility issues are dealt with by companies in various sectors. Whether or not the particular legislative regime selected by the South African government will work to produce socially responsible corporate entities, remains to be seen.

Ironically, however, CSR remains informed directly by principles of responsibility and not only principles of law. Certainly, adherence to the law is an obligation and a duty that cannot be derogated from by any person, however, the responsibility to ensure that a corporate entity is behaving socially and ethically responsibly, is an obligation that easily transcends the law into the realm of what is or is not acceptable activity or action by that company with reference to its social context.

Those juristic persons that fall outside the provisions of regulation 43, due to disqualification based on the criteria in regulation 43(1), do not escape the application of corporate governance principles. Such entities would need to strive to maintain the principles prescribed by the Institute of Directors Southern Africa in respect of corporate governance; such principles dealing with matters ranging from workplace health and safety and environmental sustainability, to social and transformation issues including, but not limited to, broad-based black economic empowerment.[18]

It may be that the cleaving of the corporate community into two, one required to comply with regulation 43 and the other not, may create two ecologies of CSR where the principles differ and where compliance is measured by different means. Whilst the Constitution remains constant and applicable across the board to all juristic persons, the provisions of the regulations to the Companies Act, in particular requirements of regulation 43, may generate an ecology that is remarkably different to the CSR ecology that exists alongside that created, ultimately, by the regulation 43 social and ethics committees. This may, in turn, result in differing cultures of CSR within South Africa. Time will tell.

With regulation 43 already in force, CSR needs to be understood in far greater detail with reference both to its proposed form, under regulation 43, and its existing form under historic corporate governance directives and constitutional jurisprudence.

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[1] See page 23 of *The King Report*

[2] Section 2 of the Constitution

[3] 2013 (1) SA 219 (KZD)

[4] No. 34 of 2005

[5] No. 68 of 2008

[6] At paragraphs 77 to 78 of the *Dlamini* judgment

[7] At page 24 of *The King Report on Governance for South Africa, 2009*

[8] No. 71 of 2008

[9] Section 72(4)

[10] GNR 351, in *Government Gazette* 34239, dated 26 April 2011

[11] Regulation 26(2) which provides:

"[f]or the purposes of Regulations 27 to 30, 43, 127 and 128, every company must calculate its 'public interest score' at the end of each financial year, calculated as the sum of the following:

(a) a number of points equal to the average number of employees of the company during the financial year;

(b) one point for every R1 000 000 (or portion thereof) in third party liability of the company, at the financial year end;

(c) one point for every R1 000 000 (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 –

(i) in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; or

(ii) in the case of a non-profit company, to be a member of the company, or a member of an association that is a member of the company."

[12] Section 9 of the Constitution

[13] Section 23 of the Constitution

[14] Section 10 of the Constitution

[15] Section 12 of the Constitution

[16] *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 (CC) (1996) (3) SA 850 (CC) at paragraph 28

[17] See *The King Report*

[18] See *The King Report*



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