

## **The Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles \***

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**Abstract.** This paper illustrates the effect of BBBEE on good corporate governance. Corporate governance and specifically directors' duties relating to stakeholder protection are focused on. Traditionally, directors are expected to manage a company in the best interests of the shareholders collectively. The question arises as to whether directors should also consider the interests of other stakeholders, *inter alia* employees, creditors, the environment and the community. The South African Broad Based Black Economic Empowerment Act 53 of 2003, not only aims at correcting racial imbalances, but also strives to promote social investment and the empowerment of communities. By adhering to this act, directors will by implication consider the interests of the community and give effect to the triple-bottom line approach when managing a company. This paper will illustrate the unique dynamics of corporate governance in South Africa.

**Keywords:** *Corporate governance, South Africa, broad based black economic empowerment, stakeholders, triple-bottom line approach.*

### **1 Introduction**

Directors are expected to manage a company in the best interests of the shareholders collectively. This traditional view is increasingly being questioned. There is pressure on companies and directors to take into account not only the *shareholders* when they manage a company, but rather the interests of all *stakeholders*, such as employees, creditors, consumers, suppliers, the environment and the community. This consideration for the interests of other stakeholders is known as corporate social responsibility.<sup>1</sup>

In the South African legal sphere, there is specific legislation which compels companies to take the interests of certain stakeholders into account. This is, for example evident in the Labour Relations Act 66 of 1995; the Promotion of Access to Information Act 2 of 2000; and the Broad Based Black Economic Empowerment Act 53 of 2003 (hereafter the BBBEE Act). The South African BBBEE Act, not only aims to correct racial imbalances, but also strives to promote social investment and the empowerment of communities. This paper will discuss the impact of Broad Based Black Economic Empowerment (BBBEE) on corporate governance in South Africa.

This paper will illustrate how, through BBBEE legislation, directors are compelled to consider the community as a stakeholder and to manage a company to its benefit as well.

The first section of this article defines corporate social responsibility. The discussion of social responsibility is followed by a discussion of directors' duties and specifically addresses the question in whose interests they should manage a company. The traditional position in South Africa concerning the beneficiaries of directors' duties, the *King II Report*,<sup>2</sup> the *Policy Document*<sup>3</sup> on company law reform, as well as the recent Companies Bill are focused on.

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<sup>1</sup> This is discussed in more detail in par 2 *infra*.

<sup>2</sup> See *King Report II on Corporate Governance for South Africa*, Institute of Directors in Southern Africa (2002) (hereafter the *King II Report*).

<sup>3</sup> *Policy Document* of the South African Department of Trade and Industry (DTI): The Guidelines for Corporate Law Reform, South African Company Law Reform for a 21st Century, (May 2004) (hereafter the *Policy Document*).

In the second part of this article the South African BBBEE Act is considered and it is explained how this Act addresses racial imbalances and promotes social investment. Even though social responsibility traditionally concerns voluntary initiatives by companies, it is indicated that legislation can be used as a tool to enhance corporate governance in companies. It is argued below that law plays an increasing role in enforcing corporate social responsibility policies.<sup>4</sup>

## 2. Corporate Social Responsibility

Social, safety, health and environmental factors have been introduced as important factors that company management must have regard to. Since this article deals with the consideration of social aspects when directors manage a company it is important to understand the concept of corporate social responsibility. In essence, it relates to the consideration of the interests of different stakeholders. A company is said to be socially responsible when directors manage it in such a way that the company “voluntarily expends its resources to do something *not required by law* and without immediate economic benefits”.<sup>5</sup> According to Parkinson “[E]very large corporation should be thought of as a social enterprise, that is, an entity whose existence and decisions can be justified only in as far as they serve public or social purposes.”<sup>6</sup> Parkinson suggests that company directors should take some social responsibility for the decisions they make when managing a company. The behavior of companies should reflect an increased sensitivity to the impact of the company’s activities on third parties. He refers to this suggestion as “profit-sacrificing social responsibility”.<sup>7</sup> However, he does state that “profit-sacrificing social responsibility” may lead to an increase in profitability over the long term.<sup>8</sup> Parkinson believes that the duty of directors and the internal structures of major companies should be altered to take account of stakeholders’ interests beyond that required of directors in terms of the law.<sup>9</sup>

The above mentioned assumption that corporate social responsibility is *voluntary* and that it relates to a company extending its resources to do what is *not required by law* merits further attention. The role of legislation and other forces in facilitating socially responsible conduct is considered by McBarnet. First she states that various external and market forces compel companies to act in a socially responsible manner *beyond that required of them in terms of legislation*. These forces include pressure on companies by non-governmental organizations to adopt socially responsible policies and protests by civil societies against certain practices of companies (for example the campaign against Nike and their use of cheap labor).<sup>10</sup>

She then argues that the law also plays an important role in enforcing socially responsible behavior. Governments foster corporate social responsibility through indirect regulation.<sup>11</sup> McBarnet therefore concludes that corporate social responsibility can no longer be seen as a mere *voluntary* act: “what is emerging in the area of CSR [corporate social responsibility] is a complex interaction between government, business and civil society...”<sup>12</sup>.

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<sup>4</sup> See par 2 *infra*. See also Doreen McBarnet, Voiculescu A & Campbell T (eds), *The New Corporate Accountability: Corporate Social Responsibility Beyond Law, Through Law, For Law*, in “The New Corporate Accountability: Corporate Social Responsibility and the Law” (2007) on this issue.

<sup>5</sup> Our emphasis. See Lionel Hodes, *The Social Responsibility of a Company*, 100 South African Law Journal 468 (1983). See also McBarnet *supra* at 1 where it is stated that corporate social responsibility includes a shift of corporate responsibility from profit maximization for the shareholders within the obligations of the law to responsibility to a broader range of stakeholders. It is a shift from the “bottom line” to the “triple-bottom line”.

<sup>6</sup> John E Parkinson, *Corporate Power and Responsibility Issues in the Theory of Company Law* (1993) 23 Clarendon Press Oxford where he quotes Robert A Dahl, *A Prelude to Corporate Reform*, in Robert L Heilbroner, London P (eds) “Corporate Social Policy” 18 (1975).

<sup>7</sup> Parkinson *supra* 260 ff.

<sup>8</sup> Parkinson *supra* 261.

<sup>9</sup> This will have the effect of corporate socially responsible conduct no longer being defined as voluntary conduct, where companies do more than what is expected of them in terms of the law.

<sup>10</sup> McBarnet *supra* at 4ff.

<sup>11</sup> The pension regulation in the United Kingdom is an example in point. This legislation requires pension companies to state how they complied with social, environmental and ethical issues. It does not oblige companies to consider social, environmental and ethical issues when making business decisions, but merely requires them to disclose whether they did so (see the Pension Act of 1995). This disclosure requirement was added to the Act in July 2000. See also s 172(1) of the United Kingdom Companies Act of 2006 which requires directors to have regard to a number of factors (like the interests of employees and the impact of the company’s operations on the community and the environment) when managing a company. However, it is within the directors’ discretion whether to consider these factors or not.

<sup>12</sup> McBarnet *supra* at 37.

With legislation indirectly compelling companies to act in a socially responsible manner one can no longer refer to corporate social responsibility as consisting only of voluntary actions. If corporate social responsibility is still regarded as a voluntary act and legislation compels companies to act socially responsible what would companies have to do to act socially responsible? Do they have to do more than what the legislation compels them to do? But what is “more than compelled by legislation” and how does one predict it? We propose a definition of corporate social responsibility that also takes legislation which indirectly compels directors to act socially responsible into account. Thus, corporate social responsibility should rather be aimed at social conduct where stakeholders’ interests are taken into account be it by way of indirect legislation or by way of voluntary conduct.<sup>13</sup>

In the next section, the duties of the directors are considered in order to determine the extent of the social concerns they are allowed to consider in order to cause the company to act in a socially responsible manner.

### **3. Directors’ Fiduciary Duties in terms of South African Company Law**

In terms of South African company law, the fiduciary duties of directors are categorized into separate sub-duties. These include acting with an unfettered discretion, for a proper purpose, within the limits of powers conferred upon the particular director and without a conflict of interest. All these duties form part of one overriding duty, namely to act in good faith for the company as a whole.<sup>14</sup> The interpretation thus far has been that the duties of directors should be exercised in the best interests of the company. The concept of “a company as a whole” relates to shareholders “collectively”, “all the shareholders, present and future”, and the company as a “separate legal entity.”<sup>15</sup> Directors must act in good faith in the interests of the company seen as the interests of the shareholders collectively.<sup>16</sup>

There has, however, been a shift in public opinion towards the recognition of a wider variety of interests, which should be considered in addition to those of the shareholders.<sup>17</sup> The wider variety of interests includes, *inter alia*, those of the following stakeholders: investors, employees, consumers, the general public, and the environment. This article focuses on the community at large as a stakeholder. The interest of the wider community is served by BBBEE in light of past discrimination under Apartheid. As a stakeholder, the community has an interest in the way the company is managed by the directors. If it is managed to address existing racial imbalances in the economy and encourage socio-economic upliftment, the best interests of the community will be served. This exhibits the characteristics of good corporate governance by being sensitive to the impact of the company’s decisions on the South African society.

Two important schools of thought have developed in response to the question in whose interest the company should be managed, namely the enlightened-shareholder value and pluralist approaches.<sup>18</sup> In the enlightened-shareholder value approach, the primary role of the directors is seen as promoting the success of the company for the benefit of the company as a whole and to generate maximum value for shareholders.<sup>19</sup> The second school is that of pluralism which sees shareholders as one constituency among many and recognizes the

<sup>13</sup> This can be seen in the way that many small and medium enterprises (SMMEs) in South Africa still attempt to comply with BBBEE measures even though they are mostly exempted from it. Bigger companies are indirectly requiring SMMEs to comply with BBBEE practices. For example Eskom (the national electricity provider) is increasingly stipulating that their procurement policies should specifically look at black owned and women owned SMMEs. In 2007 Eskom has allocated 17% of their budget for women owned SMME companies. Sven Lünsche *It's Too Little – Hardly Too Much*, Financial Mail, (March 30, 2007) available at <http://www.fm.co.za/cgi-bin/pp-print.pl> (visited on May 20, 2008).

<sup>14</sup> *Sibex Construction (SA) (Pty) Ltd v Injectaseal* 1988 (2) SA 54 (T) at 65; *Novick v Comair Holdings Ltd* 1979 (2) SA 116 (W) at 130 and 151; *Swanee's Boerdery (Edms) Bpk (in Liquidation) v Trust Bank of Africa Ltd* 1986 (2) SA 850 (A) at 854.

<sup>15</sup> See Len S Sealy, *Directors’ Wider Responsibilities – Problems Conceptual, Practical and Procedural*, 13 Monash University Law Review 164, 166, 173 (1987) where he refers to this concept of the company, where the company is an object of directors’ duties, entirely perceived in terms of its members, as “corporate membership”. See also Michele K Havenga, *The Company, the Constitution and the Stakeholders*, 5 Juta’s Business Law 134, 136 (1997). This viewpoint was confirmed in the *Policy Document* ch 3 par 3.2.2.

<sup>16</sup> John H Farrar et al., *Farrar’s Company Law* 139-140 (3ed 1991) Butterworths; Hendrik S Cilliers & Marius L Benade, *Corporate Law* 139-140 (3ed 2000) Butterworths; Ron C Beuthin & Stephanie M Luiz, *Beuthin’s Basic Company Law* 199 (3ed 2000) Butterworths

<sup>17</sup> Michele K Havenga, *Directors’ Fiduciary Duties under our Future Company-law Regime*, 9 South African Mercantile Law Journal 310, 312, 314 (1997).

<sup>18</sup> These were the terms used during the company law reform processes in South Africa and the United Kingdom.

<sup>19</sup> Francis Dawson, *Acting in the Best Interest of the Company – For Whom are Directors’ Trustees*, 11 New Zealand Universities Law Review 68, 81 (1984); the *Policy Document* ch 3 par 3.2.2.

interests of various groups.<sup>20</sup> Thus, a company's existence and success are seen as intertwined with the consideration of the interests of its employees and other potentially qualifying stakeholders in the business, such as suppliers and customers.<sup>21</sup>

Esser and Du Plessis propose a "third" school of thought to determine the true meaning of "the company as a whole" and the beneficiaries of directors' duties.<sup>22</sup> A company is represented by several interests, including those of shareholders, employees and creditors. It is argued by Esser and Du Plessis that to require directors to act in good faith in the interests "of the company", cannot mean anything else nowadays, but a blend of all these interests. First, directors should act in the best interests of the company as a separate legal entity. An interest that may be primary at one point in time in a company's existence may become secondary at a later stage.<sup>23</sup> Different weight need to be attached to the interests represented in a company. These interests and the level of weight attached to each of them may differ during the various stages of a company's existence. The protection that these stakeholders receive in other legislation should play an important role when determining how much weight to attach to the different interests. It was therefore suggested by Esser and Du Plessis that directors should be aware of the protection offered to stakeholders in legislation other than company law legislation in order to know how to balance the competing interests of stakeholders.<sup>24</sup>

The South African Companies Act 61 of 1973 does not enforce corporate social responsibility on companies. However, the South African *King II Report on Corporate Governance* addresses the need for the recognition of stakeholders' interests by recommending that companies adopt a "triple-bottom line" approach.<sup>25</sup> This approach relates to the consideration of social, economic and environmental concerns when managing a company.<sup>26</sup> In terms of the *King II Report* the shareholders (collectively) are still the most important beneficiary of directors' fiduciary duties, but social, economic and environmental concerns should also be considered. The *King II* committee argued that by considering these factors the shareholders will usually benefit in any event.<sup>27</sup> This confirms the viewpoint above that corporate social responsibility can include voluntary conduct as well as actions which are indirectly enforced through legislation.

The *Policy Document* on company law reform also advocated that directors should manage a company in terms of the "triple-bottom line" approach.<sup>28</sup> Directors should consider the interests of stakeholders, but only when the shareholders collectively will benefit.<sup>29</sup> Clause 91(1)(b) of the Companies Bill of 2007 deals with a director's fiduciary duty to act in good faith. It is argued below that the Bill did not address this issue of stakeholder protection sufficiently.

Clause 91(1)(b) of the Companies Bill of 2007 is relevant when evaluating which approach to the protection of stakeholders the drafters preferred.<sup>30</sup> Clause 91(1)(b) states that "a director has a duty to act

<sup>20</sup> Sealy *supra* at 173; Janice Dean, *Stakeholding and Company Law*, 22 The Company Lawyer 66 (2001); Lilian Miles, *Company Stakeholders*, 24 The Company Lawyer 56 (2003); the *Policy Document* ch 3 par 3.2.2.

<sup>21</sup> Havenga (1997) (5) *supra* at 173; the *Policy Document* ch 3 pars 3.2.1-3.2.2; Lee Roach, *The Paradox of the Traditional Justifications for Exclusive Shareholder Governance Protection: Expanding the Pluralist Approach*, 22 The Company Lawyer 9 (2001).

<sup>22</sup> Irene-marie Esser & Jean J Du Plessis, *The Stakeholder Debate and Directors' Fiduciary Duties*, 19 South African Mercantile Law Journal 346, 358 (2007).

<sup>23</sup> The interests of creditors may, for example, be more important than those of the shareholders when a company is nearing insolvency.

<sup>24</sup> See Esser & Du Plessis *supra* at 346, 358. Codes of best practice may be a possible way to achieve this and make sure that directors are informed of the protection that stakeholders receive in other legislation.

<sup>25</sup> See par 17.1 of the *King II Report*. See on the "triple-bottom line" approach Tshepo Mongalo, *The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa*, 120 South African Law Journal 173, 177 (2003); Siyabonga Shandu, *Shareholders' Interests versus Social Demands: Incongruous Agendas*, 26 Obiter 87 (2005); Michele K Havenga, *Regulating Directors' Duties and South African Company Law Reform*, 26 Obiter 609, 618 (2005).

<sup>26</sup> The economic aspect of this approach concerns financial and non-financial aspects of the business of the company. The environmental aspect relates to the effect on the environment caused by the products or services of the specific company.

<sup>27</sup> *King II Report* par 17.1, Introduction. In addition to requiring listed companies to comply with *King II* the Johannesburg Stock Exchange (JSE) Limited also launched a Socially Responsible Investment Index (SRI Index) in May 2004. In terms of this Index the JSE developed criteria to measure the "triple-bottom line" performance of the FTSE/JSE All Share Index available at <http://www.jse.co.za/sri/index.htm> (visited on January 20, 2008).

<sup>28</sup> In 2004, a *Policy Document* on the guidelines for corporate law review was issued by the South African Department of Trade and Industry. The document envisaged an overall review of corporate laws in South Africa, comprising the Companies Act 61 of 1973, the Close Corporations Act 69 of 1984 and the common law relating to these corporate entities.

<sup>29</sup> The *Policy Document* ch 3 par 3.2.3.

<sup>30</sup> See Irene-marie Esser, *A Global Perspective on African Corporate Governance: The Protection of Stakeholders' Interests*, 32 South African Yearbook of International Law 405, 406 ff (2007) for a discussion on the meaning of "the company" in terms of the Companies Bill of 2007.

honestly and in good faith, and in a manner the director reasonably believes to be in the best interests of, and for the benefit of, *the company*".<sup>31</sup>

The Companies Bill posed an ideal opportunity to clarify the meaning of "the company". With the current drafting, it remains unclear whether directors should manage a company to the sole benefit of the shareholders or whether they should consider the interests of other stakeholders. It can be argued that the traditional viewpoint is still applicable due to the wording of the clause ("the company" has always been interpreted as meaning the shareholders collectively) and the *Policy Document* favoring the enlightened-shareholder value approach.<sup>32</sup>

When the different remedy provisions are considered, it can be argued that the Companies Bill envisages a wider approach than the traditional position.<sup>33</sup> All parties who are afforded a remedy, has an interest in the management of a company's affairs. This category is wider than only shareholders. For example, clause 164 states that a shareholder, *creditor*, or director of a company may apply to a court for relief if directors, *inter alia*, exercised their powers in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the *interests of the specific applicant*.<sup>34</sup>

This provision therefore provides creditors with a remedy to protect their own interests (as opposed to the interests of the company). This can be interpreted as indicating that directors have fiduciary duties towards creditors, thus changing the traditional common law viewpoint referred to above.<sup>35</sup>

The question arises whether this changes the traditional common law viewpoint regarding the meaning of "the company" so that directors have to take into account these other interests (for example creditors) independently from those of the shareholders collectively.

A clear definition of "the company" in the proposed new South African company legislation will eliminate this confusion.<sup>36</sup>

#### 4. Broad Based Black Economic Empowerment

One of the major consequences of Apartheid was the deliberate exclusion of black people from meaningful participation in the economy. This culminated in limited access to proper education, skills development and employment opportunities for black people. In addition they lacked significant property and asset ownership.<sup>37</sup>

Since 1995, the South African government undertook a "multi-faceted" approach to address inequality which existed as a result of past discrimination. Despite the government's efforts on black economic empowerment, change has been slow. By 2005, whites (although they only made up 10% of the population) still controlled more than two-thirds of the companies listed on the Johannesburg Stock Exchange, 30% were owned by foreigners and only 4% were controlled by black people. Almost 60% of blacks were still regarded as poor, despite an emerging black middle class.<sup>38</sup> Concern about this situation has also been expressed in the *King II Report*:

Companies in South Africa... co-exist in an environment where many of the country's citizens disturbingly are on the fringes of society's economic benefits.<sup>39</sup>

<sup>31</sup> Our emphasis.

<sup>32</sup> The *Policy Document* ch 3 par 3.2.3.

<sup>33</sup> Clauses 163, 164 and 166 in chapter 7, part B of the Companies Bill of 2007 deal with various rights to seek specific remedies. Clause 163 relates to an application to declare a director delinquent or to place a director under probation. A company, a shareholder, director, company secretary or other officer of a company, a registered trade union or other representative of the employees of a company, or the Commission or the Takeover Regulation Panel may apply to a court for an order declaring a person delinquent or under probation. Clause 166 relates to derivative actions.

<sup>34</sup> Our emphasis. See clause 164(1)(c) of the Companies Bill of 2007.

<sup>35</sup> Clauses 163 and 166 may also create confusion as to whom directors owe their duties to, although not as directly as is done in terms of clause 164. Clauses 163 and 166 only provide specific parties with certain remedies regarding the interests of the company, whereas clause 164 provides the parties concerned with remedies regarding their own interests.

<sup>36</sup> See, for example, s 172 of the United Kingdom's Companies Act of 2006. This section clearly refers to the interests of different stakeholders. It is therefore clear what is meant by "the company". The practical application of s 172 is, however, unclear. Proposed clauses are recommended by Esser & Du Plessis *supra* at 361 on directors' duties.

<sup>37</sup> Paul Benjamin et al., *Black Economic Empowerment: Commentary, Legislation & Charters* (1)1-2 (2005).

<sup>38</sup> Jonathan Goldberg, *Update on Broad Based Black Economic Empowerment*, 44 Civil Engineering 114, 115 (26 Aug 2006).

<sup>39</sup> Tony Balshaw & Jonathan Goldberg, *Cracking Broad-Based Black Economic Empowerment: Codes & Scorecard Unpacked* 44 (2005). The "triple-bottom line" approach interestingly enough also corresponds with one of the core values of the Constitution namely *ubuntu* which relates to basic humanity. According to *ubuntu* people can only be respected because they co-exist in harmony with other people. In the spirit of *ubuntu* a business cannot account for profit alone, it must also look at the people and environment within which it functions.

The foundations of BBBEE are found in the equality clause of the Constitution, which provides that everyone is equal before the law and has the right to equal protection and benefit of the law.<sup>40</sup> Section 9(2) of the Constitution specifically allows for legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination.<sup>41</sup> Various legislative tools exist to realize the right to equality as contained in section 9 of the Constitution, for example, the Employment Equity Act,<sup>42</sup> the Preferential Procurement Policy Framework Act<sup>43</sup> and the Skills Development Act.<sup>44</sup> The BBBEE Act is also created with this aim in mind and forms the focus of this discussion.

Black economic empowerment aims to bring about a significant increase in the numbers of black people that manage, own and control the country's economy.

The Broad Based Black Economic Empowerment strategy is a necessary government intervention to address the systematic exclusion of the majority of South Africans from full participation in the economy. The defining feature of Apartheid was the use of race to restrict and severely control access to the economy by black persons. The accumulation process was one of restricted wealth creation and imposed underdevelopment on black communities to ensure that they were, in the main, suppliers of cheap labor.<sup>45</sup>

## 5. The Broad Based Black Economic Empowerment Act

### 5.1 Introduction

New pressure was put on companies to commit to black economic empowerment with the enactment of the BBBEE Act.<sup>46</sup> It is seen as the “centerpiece” of the government’s policies to promote BBBEE.<sup>47</sup>

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<sup>40</sup> Section 9(1) of the South African Constitution.

<sup>41</sup> Section 217 of the South African Constitution also states that when state organs implement procurement policies, they may favour people who were disadvantaged by unfair discrimination.

<sup>42</sup> Act 55 of 1998. The Employment Equity Act provides for measures to remove all forms of discrimination in the workplace and ensures that so-called “designated groups” (*i.e.* women, disabled persons, African, Coloured and Indian people) are represented on all levels of organisation with “designated employers.” A designated employer means (a) an employer who employs 50 or more employees; (b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 of the Act; (c) a municipality; (d) an organ of state, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and (e) an employer bound by a collective agreement in terms of s 23 or s 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.

<sup>43</sup> Act 5 of 2000.

<sup>44</sup> Act 97 of 1998. See, for example, the Preferential Procurement Policy Framework Act 5 of 2000 and the Skills Development Act 97 of 1998. The Preferential Procurement Policy Framework Act provides a framework for the preferential procurement policies of government and its agencies. The effect is that an organ of State will apply a preferential point system before a tender is awarded. The better the racial composition of the contractor the higher the points that a contractor can obtain. This will ensure that contractors from previously disadvantaged background can benefit from state contracts. The purpose of the Skills Development Act is to provide a framework wherein the skills of the South African workforce can be developed and improved. The Act facilitates the integration of these strategies to improve skills within the National Qualifications Framework and also provides for learnerships that lead to recognised occupational qualifications. Skills development is financed by means of a levy-financing scheme and a national skills fund. It establishes a National Skills Authority as well as various sector education and training authorities (SETAs); labor centres; and the Skills Development Planning Unit to aid in this process. This Act plays an important role to enable previously disadvantaged groups to improve their training and qualifications and consequently improve their career opportunities. Also see Marlize van Jaarsveld, *Black Economic Empowerment and Skills Development: A Success in Many Ways?* 17 South African Mercantile Law Journal 261, 266-267 (2005).

<sup>45</sup> See *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* available at <http://www.thedi.gov.za/bee/bee.htm> (visited at May, 22 2008) at par 2.2.1. (Hereafter the *Strategy Document*.)

<sup>46</sup> Act 53 of 2003. The Act came into force in 2004.

<sup>47</sup> Benjamin et al. *supra* at (1)1-2. Francois Marais & Lindi Coetzee, *The Determination of Black Ownership in Companies for the Purpose of Black Economic Empowerment (Part 1)*, 27 Obiter, 112–115 (2006) hail the BBBEE Act and the Preferential Procurement Policy and Framework Act, 5 of 2000 as the “governments cornerstone acts”. Various other statutes also regulate the sphere of broad based black economic empowerment. Benjamin et al. *supra* at (1)3 provide a comprehensive list of all these legislation and include the Preferential Procurement Policy Framework Act 5 of 2000, the State Tender Board Act 86 of 1968, the Framework for Supply Chain Management Regulation 2003 issued in terms of the Public Finance Management Act 1 of 1999, the Employment Equity Act 55 of 1998, the Skills Development Act 97 of 1998, the Skills Development Levies Act 9 of 1999, the National Empowerment Fund Act 105 of 1998, the Competition Act 89 of 1998.

The Act is structured in such a manner as to ensure that BBBEE will have a “knock-on” effect throughout the business supply chain. Ultimately businesses will in itself become drivers of BBBEE in the businesses of their suppliers and other stakeholders.<sup>48</sup>

The BBBEE Act binds the public sector (*i.e.* Governmental departments, public entities or State-owned enterprises and organs of State) but also private entities to the extent which they would like to interact with the State.<sup>49</sup>

The BBBEE Act contains the basic structure of black economic empowerment. The Act contains basic definitions, allows for the establishment of a Black Economic Empowerment Advisory Council,<sup>50</sup> and allows for the issuing of a *Strategy Document*, Codes of Good Practice, and Transformation Charters.<sup>51</sup> The *Strategy Document* contains Government’s BBBEE policy. It defines BBBEE and provides policy objectives and key principles.<sup>52</sup>

The Codes of Good Practice are especially important. The Act provides the framework for BBBEE but the Codes contain the detailed regulations. These are discussed in more detail below.<sup>53</sup>

The Act defines BBBEE as the economic empowerment of all black people (which include black women, workers, youth, people with disabilities and people living in rural areas) through socio-economic strategies.<sup>54</sup>

The objectives of the Act relate to the facilitation of BBBEE.<sup>55</sup> This will be achieved by (a) promoting economic transformation in order to enable meaningful participation of black people in the economy; (b) achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises; (c) increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training; (d) increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training; (e) promoting investment programs that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity; (f) empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills; and (g) promoting access to finance for BBBEE.

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Certain specific sectoral legislation is included like the Telecommunications Act 103 of 1996, the Broadcasting Act 4 of 1999, the Marine Living Resources Act 18 of 1998, the Gas Act 48 of 2001 and the Minerals and Petroleum Resources Development Act 28 of 2002. All these measures form an integrated framework and should be understood in relation to each other. Okechukwu C Iheduru, *Black Economic Power and Nation-Building in Post-Apartheid Southern Africa*, 42 Journal of Modern African Studies 1, 9 (March 2004) also includes the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Extension of Security of Tenure Act 62 of 1997 and the Restitution of Land Rights Act 22 of 1994.

<sup>48</sup> Balshaw & Goldberg *supra* at 25.

<sup>49</sup> This includes national or provincial departments, municipalities, Parliament, provincial legislatures and public entities.

<sup>50</sup> See ss 4-8. The Council has not yet been appointed. It is believed that this should happen in the near future since the final Codes have now been gazetted. See Benjamin et al. *supra* at 1.

<sup>51</sup> The Act allows for the development of a Transformation Charter for a particular sector of the economy by all major stakeholders in that particular industry, for example, the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Sector (GN 1639 in GG 26661 of 13 August 2004); Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South African in the Petroleum and Liquid Fuels Industry (GN 538 in GG 26293 of 26 April 2004); Construction Sector Charter of Black Economic Empowerment (GN 111 in GG 29616 of 19 February 2007); Financial Sector Charter (issued Oct 2003); Forwarding and Clearing Industry Black Economic Empowerment Strategy; Maritime Transport and Service Industry BEE Charter; Tourism BEE Charter; Marketing, Advertising and Communication Charter. Also see Benjamin et al. *supra* at 4(1-181). Publication of these Charters in the Government Gazette is possible, provided that it has been developed by major stakeholders in that sector and it advances the objectives of the BBBEE Act (see Statement 010 Code 000). In some industries, in anticipation of the BBBEE Act, some sectors have drafted Transformation Charters which contain objectives and targets for a particular industry. Some of these have been gazetted. These Charters, even if they are gazetted will remain subject to the primary Codes 000 to 700.

<sup>52</sup> The current *Strategy Document* has not been issued in terms of section 11 of the BBBEE Act, but will probably form the basis of strategies which still need to be published.

<sup>53</sup> After promulgation of the BBBEE Act the so-called Phase 1 Codes (and Scorecards) were published. The Phase 1 Codes only dealt with the management and control element of BBBEE. The Phase 2 Codes then followed which dealt with the remainder of the generic scorecard elements. In February 2007 the Phase 1 & 2 Codes were gazetted along with the relevant generic scorecards. These codes are available at <http://www.thedi.gov.za/bbe/beecodes.htm> (visited on May, 22 2008).

<sup>54</sup> Section 1 of the BBBEE Act.

<sup>55</sup> Section 2 of the BBBEE Act.

## 5.2 Codes of Good Practice

The Codes of Good Practice contain the detail on BBBEE measures and provide the framework for measuring the progress made on the implementation and execution of BBBEE measures. The Department of Trade and Industry issued eight Codes of Good Practice each comprising of one or more Statements.<sup>56</sup>

The most significant component of the Codes is the generic scorecard. Compliance with the Act is measured with reference to the generic scorecard. The generic scorecard is a balanced model document contained in Code 000 (Statement 000) which is applied to measure progress made in achieving BBBEE. The use of a common scorecard by different stakeholders provides a basic framework against which BBBEE progress in different enterprises and sectors can be measured.<sup>57</sup> The basic framework contains 7 elements of BBBEE and a specific weighting is given to each element. These elements are (the weighting in terms of the scorecard appears in the adjacent brackets) namely, ownership<sup>58</sup> (20 points), management and control<sup>59</sup> (10 points), employment equity<sup>60</sup> (15 points), skills development<sup>61</sup> (15 points), preferential procurement<sup>62</sup> (20 points), enterprise development<sup>63</sup> (15 points), socio-economic development<sup>64</sup> (5 points).

From the weightings given to the various aspects of BBBEE in the generic scorecard the focus seems to be on direct empowerment through increased black ownership and control of enterprises and assets, increased black management at senior level, human resource development and employment equity (through the Skills Development Act and the Employment Equity Act). There is, however, another component of the BBBEE Act that does not always get the attention it deserves, namely indirect empowerment. Indirect empowerment is ensured in the BBBEE Act through preferential procurement, enterprise development, and corporate social investment.<sup>65</sup>

The benefits for society associated with direct empowerment are quite obvious. Increased black ownership and control of enterprises and assets, increased black management at senior level, human resource development, employment equity and skills development will benefit the community at large. These direct empowerment elements make up 60% of the generic scorecard.

<sup>56</sup> These are: Code 000: Framework for Measuring BBBEE [Statement 000 - General Principles and the Generic Scorecard, Statement 003 - Guidelines for the Development and Gazzetting of Transformation Charters and Sector Codes, Statement 004 - Scorecards for Specialized Enterprises]; Code 100: Measurement of the Ownership Element of BBBEE [Statement 100 - General Principles for Measuring Ownership, Statement 102 - Recognition of the Sale of Assets, the Recognition of Equity Equivalents for Multinational]; Code 200: Measurement of the Management Control Element of BBBEE [Statement 200 - General Principles for Measuring Managing Control]; Code 300: Measurement of the Employment Equity Element of BBBEE [Statement 400 - General Principles for Measuring Skills Development]; Code 500: Measurement of the Preferential Procurement Element of BBBEE [Statement 500 - General Principle for Measuring Preferential Procurement]; Code 600: Measurement of the Enterprise Development Element of Broad Based Black Economic Empowerment [Statement 600 - General Principles for Measuring Enterprise Development]; Code 700: Measurement of the Socio-Economic Element of BBBEE [Statement 700 - General Principles for Measuring Socio-Economic Development]. The Code of Good Practice on BBBEE for Qualifying Small Enterprises is contained in Code 800 (Statements 800-807).

<sup>57</sup> *Strategy for Broad Based Black Economic Empowerment* as issued by the DTI, March 2003, Appendix A.

<sup>58</sup> In determining ownership the “flow through principle” has been applied, meaning that the natural chain of ownership must be followed to ensure a black natural person is a beneficiary. In the phase 2 Codes this is slightly modified and ownership is also determined by looking at economic interest and exercisable voting rights. These two together form an equity interest. See Stephanie Luiz & Kathleen Van Der Linde, *Broad-based Black Economic Empowerment: Some Challenges in Measuring Ownership of Companies*, 18 South African Mercantile Law Journal, 473-485, 476-483 (2006) for a discussion of problems arising from the application of the equity interest to measure ownership.

<sup>59</sup> This component measures the representivity of black people on senior top management and other top management levels.

<sup>60</sup> The Code dealing with this aspect aligns with the Employment Equity Act. It goes even further than the Employment Equity Act in that it sets targets for representivity at different levels of the business and for different categories of employees.

<sup>61</sup> This Code sets targets for employers for amounts to be spent on learnerships in terms of the Skills Development Act, and also aligns with this Act.

<sup>62</sup> Preferential procurement policies ensure that black owned professional service providers and entrepreneurs are used as suppliers.

<sup>63</sup> Enterprise development is aimed at setting up and growing viable enterprises that are majority owned by black operators while developing existing companies.

<sup>64</sup> Socio-economic development is quite broad and was previously the “residual element” in the scorecard (Phase 2 Code 700 statement 700). It refers to schemes or projects that target infrastructural development or reconstruction in underdeveloped areas, rural areas etc. This can be made in terms of monetary transfers or by devoting time by staff of management to upliftment projects.

<sup>65</sup> See *Strategy for Broad Based Black Economic Empowerment* *supra* at Appendix A. Also see Benjamin et al. *supra* at 3(23-25); Luiz & Van Der Linde *supra* at 475-476.

The indirect empowerment actions make up the remaining 40% of the scorecard. It is especially this part of the scorecard (and in particular socio-economic development) that can have an impact on the socio-economic upliftment of the greater black community. This can be illustrated with reference to the Transformation Charters where specific examples are given of ways to ensure socio-economic upliftment. For example, in terms of the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry<sup>66</sup> measures for improving the standard of housing of mine employees are provided. This includes the upgrading of hostels, conversions of hostels to family units and the promotion of home ownership options. Measures for improving nutrition of miners are also established. The Financial Sector Charter on Black Economic Empowerment<sup>67</sup> talks about a targeted investment which refers to the financing of or investment in transformational infrastructure projects that support economic development in underdeveloped areas and contribute towards equitable access to economic resources. Such infrastructure projects could be in the transportation, telecommunications, water, and energy sectors. These types of projects will have a “knock-on” effect on the broader socio-economic environment of the country.

The ultimate effect of the Act and Codes is that companies to which the Act applies will be given a Broad Based Black Economic status (which is determined by a so-called verification agency).<sup>68</sup> This status will depend on the extent to which the company complies with the BBBEE Act and Codes. The status will determine the extent to which the company can function in the public and private sector. Companies with a good rating will obviously be able to benefit more from public sector work and procurement policies or as role players further down in the supply chain. There are various levels of BBBEE status are set out in Code 000 Statement 000 ranging from a level 1 contributor through to a level 8 contributor.<sup>69</sup>

Companies with annual revenue of less than R5m are exempted from compliance with the Codes, while those with a turnover between R5m and R35m are judged by a separate and more lenient scorecard.<sup>70</sup> In effect only companies with a turnover above R35 million are compelled to comply with the scorecard. The final Codes published in terms of the BBBEE Act also give leniency to small and medium enterprises. They have a less strict scorecard to comply with. It is believed that this leniency was necessary to ensure that this sector continues with job creation. Currently, 80%-85% of all new jobs are created in this sector.<sup>71</sup>

## **6.0 Impact of Black Economic Empowerment Legislation on Corporate Social Responsibility**

### **6.1 Interplay between Corporate Social Responsibility and Broad Based Black Economic Empowerment**

Corporate social responsibility amounts to more than mere philanthropic efforts by companies. It entails the responsibility of each company for its effect on the society in which it operates.<sup>72</sup> A company is a separate legal entity that can only act through individuals.<sup>73</sup> Since company directors carry out managerial functions and responsibilities on behalf of the company, they are subject to various duties. These duties include statutory duties in terms of the Companies Act,<sup>74</sup> other legislation and common law duties.<sup>75</sup> Corporate social responsibility

<sup>66</sup> Available at [http://www.dme.gov.za/minerals/mining\\_charter.stm](http://www.dme.gov.za/minerals/mining_charter.stm) (visited on May 20, 2008).

<sup>67</sup> Available at [http://www.fscharter.co.za/page.php?p\\_id=1](http://www.fscharter.co.za/page.php?p_id=1) (visited on May 20, 2008).

<sup>68</sup> Par 10, Statement 000. The DTI must issue clear guidelines on the verification process. The South African National Accreditation System (SANAS) currently conducts accreditation of BBBEE verification agencies and it must also develop and maintain criteria in this regard. The DTI encourages the establishment of an Independent Industry Body that will provide guidance to the verification industry through the development and maintenance of high quality and reliable BBBEE verification services.

<sup>69</sup> Level 1 is the highest level of compliance. A level 1 contributor scores more than 100 points on the generic scorecard and has a 135% black economic empowerment recognition level. See par 8 of the Code 000 Statement 000.

<sup>70</sup> Lünsche *supra* at 2.

<sup>71</sup> SMME's are further indirectly supported by the Act in that companies which assist and support enterprise development can claim 15% of the BBBEE Code Points. The scorecard also provides for 15 points out of a maximum of 100 for contributing to socio-economic development and for backing black owned business.

<sup>72</sup> Derek French, Stephan W Mayson, & Christopher L Ryan *Mayson, French & Ryan on Company Law* 24ed (2007-2008) Oxford UP.

<sup>73</sup> Havenga (1997) 5 *supra* at 134; Cilliers & Benade *supra* at 5, 115-163; Beuthin & Luiz *supra* at 179. See also Regulation 59 of Table A of the Companies Act 61 of 1973 in Schedule 1 that states: “the business of the company shall be managed by its directors.”

<sup>74</sup> For example ss 234-251 of the Companies Act 61 of 1973.

<sup>75</sup> Irene-marie Esser & Johan Coetze, *Codification of Directors' Duties*, 12 Juta's Business Law 26 (2004); Esser (2007) 32 *supra* at 406.

therefore requires that directors also include interests other than just that of the shareholders when managing a company.<sup>76</sup>

In South Africa the economic and socio-economic landscape has drastically been transformed since the dawn of democracy more than a decade ago. This transformation can not be achieved by the State alone. Private role players, such as companies, also have a responsibility to assist with transformation of the country to rid it from the scars of Apartheid. This much needed involvement is not left to voluntary projects by companies, but is also compelled through legislation.

The BBBEE Act forces companies and directors of companies to consider all stakeholders. Compliance with the Act will also benefit the shareholders indirectly. If a company falls under the scope of application of the Act and does not properly comply with the prescribed black economic empowerment scorecard the company will receive a poor BBBEE rating which will negatively affect its ability to do business in South Africa. This will directly impact on the interests of the shareholders.

It is undeniable that BBBEE and good corporate governance overlap. This overlap is especially unique in the South African context due to the political past of the country and the need for socio-economic upliftment. The BBBEE Act forces companies, directly or indirectly, to consider the broader South African community within its political and socio-economic context. First, on a direct level, a BBBEE strategy of a company will ensure an increase in black participation (on the level of ownership, management, expertise and control) in all levels of the company. The strategy can also increase the extent to which rural and local communities, workers, co operatives and women own and manage existing enterprises and develop new enterprises, as well as increase their access to economic resources, activities, infrastructure and skills training. It also develops appropriate human resources and skills. Secondly, on an indirect level, preferential procurement, involvement in enterprise development and socio-economic upliftment projects will ensure that the community at large reaps the benefits of corporate socially responsible conduct. The effect of BBBEE will therefore filter through to the community at large and the country. This amounts to compliance with the "triple-bottom line". All BBBEE measures will qualify as socially responsible conduct, while all socially responsible conduct will not necessarily amount to BBBEE measures. In the South African business environment these two aspects should therefore be viewed as inter-linked and not as two separate issues. This is illustrated by Figure 1 below.

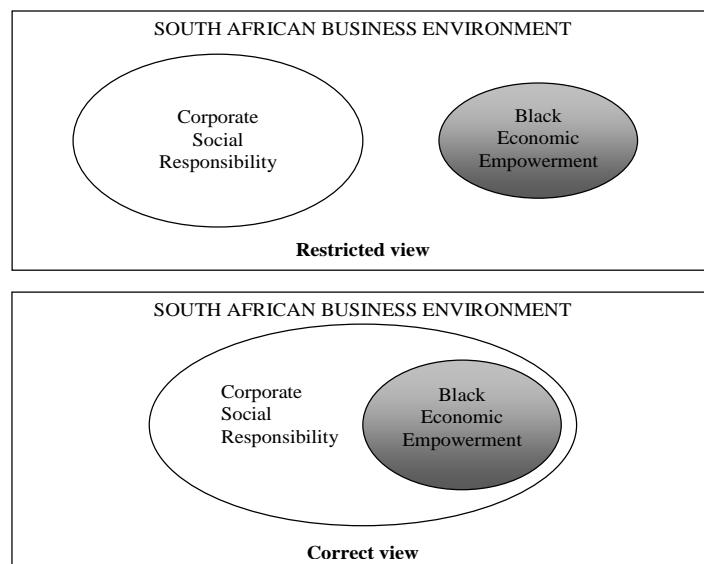


FIGURE 1: Illustration of interplay between corporate social responsibility and broad based black economic empowerment

<sup>76</sup> The relationship between a company and a director of that company is an example of a commercial fiduciary relationship. A director can be seen as an agent, due to the fact that the director does not act on his or her own behalf, but on behalf of the company. A director can also be regarded as a trustee since he does not own company assets, but controls the assets and exercises powers for the benefit of the company rather than for his own benefit. Nevertheless, the relationship between a director and a company remains unique. Categorizing directors as agents or trustees is intended to prove the existence of a fiduciary duty rather than to equate directors with those particular positions. A company directorship is generally regarded as one of the most complex fiduciary offices. Michele K Havenga, *Breach of Directors' Fiduciary Duties: Liability on what Basis*, 8 South African Mercantile Law Journal 366 (1996). Also see *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* at 65C; Dawson *supra* at 68, 80; Beuthin & Luiz *supra* at 192.

## 6.2 Concerns regarding Broad Based Black Economic Empowerment

BBBEE (as is the case with good corporate governance) is not always met with enthusiasm. Some argue that although the recognition of all stakeholders in an enterprise sounds attractive, the scope of directional discretion will have to be widened, to allow directors to take into consideration all stakeholders' interests. This will mean that structural checks and balances would have to be implemented to counteract against widened powers of directors.<sup>77</sup>

Concerns have also been raised that BBBEE will put an unnecessary burden on companies. On the contrary, it has indeed been found that companies with a higher BBBEE score have had a greater improvement in their profit margins.<sup>78</sup>

International investors are also often weary of BBBEE in fear of the fact that ownership transfers to previously disadvantaged groups will lead to value dilution of the company shares. It should be remembered that multinational companies have been exempted from the ownership element of the scorecard. These fears can be addressed by linking BBBEE to good corporate governance. Companies will be able to illustrate to investors that the majority of black economic empowerment objectives are closely linked to good corporate governance, which is a familiar topic in the business arena.<sup>79</sup>

## 6.3 Evaluation of the Broad Based Black Economic Empowerment Act

BBBEE has given new momentum to the South African economy over the past few years. This can be seen from the volume of BBBEE transactions carried out over the past decade.<sup>80</sup> Completed BBBEE transactions to date represent in excess of R200 billion (US\$25 billion). In 2007 alone, there were 153 transactions totaling R96 billion (US\$12 billion).<sup>81</sup> In the last four years BBBEE has become the dominant feature on the mergers and acquisitions landscape in South Africa.<sup>82</sup> High volumes of corporate activity are still expected to continue over the next five to seven years, which will have a positive impact on the South African economy.<sup>83</sup>

It is still too early to determine whether BBBEE has had the intended impact on the community. From the size of the deals and amounts spent it is evident that gestures to this effect have been made. Compliance with BBBEE legislation is monitored on the basis of a tick-box. In other words, compliance is determined by asserting whether the company complied with certain criteria, in this case the 7 elements on the generic scorecard. The success and effect of these good corporate governance actions on society are still to be determined.<sup>84</sup>

The potential effectiveness of this tool can be seen from the several important BBBEE transactions in 2005. For example Tiger Brands (a food conglomerate) struck a deal in terms of which 4% of its shares (worth R729m) will be transferred within the next 10 years to its staff who are 80% black. Edcon (a retail conglomerate) set aside R455m for a staff empowerment scheme. Mvela Group acquired 25% of the health care group Afrox. Old Mutual, Nedcor and Mutual & Federal increased black shareholding by 12,75% in a R7,2bn deal for the benefit of black controlled entities owned by black clients. ABSA sold 10% to a consortium led by Mvelaphanda Holdings. Standard Bank and the Liberty Group sold 10% worth R5,6bn to Tutuwa Consortium.<sup>85</sup>

<sup>77</sup> Alistair Alcock, *Corporate Governance: A Defence Against the Status Quo*, 58 Modern Law Review 898, 907, 912 (1995) argues further that a firm that operates according to a board where various stakeholders are represented is a "recipe for disaster".

<sup>78</sup> Economic Empowerment Rating Agency (Empowerdex) *Impact of BBBEE Implementation on Profit Margin and Productivity Report* (2007) available at <http://www.empowerdex.co.za/content/Default.aspx> (visited on May 20, 2008).

<sup>79</sup> African Institute of Corporate Citizenship *Why We Need to Link BEE to CSR?* Business Day (Jan 24, 2005) at 4.

<sup>80</sup> According to Ernst & Young's Mergers and Acquisitions 2004 Review, in 2004 BBBEE transactions increased by 29% to 244 from 189 the previous year. The average BBBEE deal value increased from R42,2 billion in 2003 to R52,9 billion in 2004. (See Fin24.com *BEE to Drive Corporate Activity* (May 16, 2008) available at [http://www.fin24.com/articles/default/display\\_article.aspx?ArticleId=1518-1786\\_2323546](http://www.fin24.com/articles/default/display_article.aspx?ArticleId=1518-1786_2323546) (visited on May 22, 2008)).

<sup>81</sup> South Africa The Good News *BEE Transactions Drive Domestic Corporate Activity* (May 19, 2008) available at [http://www.sagoodnews.co.za/bee/bbe\\_transactions\\_drive\\_domestic\\_corporate\\_activity.html](http://www.sagoodnews.co.za/bee/bbe_transactions_drive_domestic_corporate_activity.html) (visited on May 21, 2008).

<sup>82</sup> See Fin24.com *supra*.

<sup>83</sup> The top ten BBBEE transactions for 2006 were: (1) Acquisition of 10% of FirstRand by BEE Consortium R7,895 billion, (2) Sale by Thintana of 15.1% of Telkom to the Elephant Consortium R6,600 billion, (3) Acquisition of 7.6% of Standard Bank by Tutuwa R4,140 billion, (4) Sale of 18% of Lonplats to Incwala R3,187 billion, (5) Acquisition of 25% of Uhambo Oil R3,000 billion, (6) Acquisition of 4.8% of MTN by Umthunzi Telecoms Consortium R2,500 billion, (7) JCI unbundling R1,840 billion, (8) Merger of Rebsure and Mvelaphanda R1,546 billion, (9) Nail unbundling R1,428 billion, (10) Pelawan Investments/ Anooraq Resources Corporation merger R1,276 billion. See Empowerdex *supra*.

<sup>84</sup> See Ben Pettet, The Combined Code: A Firm Place for Self-Regulation in Corporate Governance, 13 The Company Lawyer 394-400 (1998) on the dangers of box-ticking.

<sup>85</sup> Balshaw & Goldberg *supra* at 116.

During the initial stages of BBBEE fears existed that only a small group of the black population will reap the benefits of BBBEE resulting in the formation of a so-called “black middle class or elite”.<sup>86</sup>

In order to address this issue the BBBEE Act has been published, which specifically aims to ensure that empowerment reaches the broad black community.<sup>87</sup>

It is also believed that the revised Codes have already gone a long way in ensuring that black economic empowerment will be broad based. The Codes make provision for broad based ownership schemes and employee schemes. Special incentives also exist for schemes involving black women, black new entrants and black designated groups including workers, unemployed people, the youth, aged people, people with disabilities and people living in rural areas.<sup>88</sup>

Despite optimism about the impact of BBBEE (as a component of good corporate governance) on the country’s economic and socio-economic development, it should not be viewed as a magical quick-fix solution to the country’s problems.

BEE is not the holy grail that will transform any type of metal into gold by itself. However, what is certain is that hard and/or smart work will transform the bottom line of companies with BEE being an important catalyst.<sup>89</sup>

Although racial redress in corporate ownership does not really form part of the traditional concept of corporate social responsibility, as discussed in paragraph 2 above, it comprises an important element thereof in South Africa. The BBBEE Act illustrates that social change (in this case the correction of racial imbalances in participation of the economy) can be pursued by means other than company law.<sup>90</sup>

## 7. Conclusion and Summary

Ten years ago many companies did not have CSR policies let alone BEE policies and strategies. Many companies now want to go beyond simply complying with regulations. This is a new concept for cooperation. It has developed because of a growing national and international awareness of corporation’s responsibility to their stakeholders and larger society.<sup>91</sup>

The BBBEE Act illustrates how the State, through legislation can compel companies to have a social conscience. This compulsion by the State has interestingly enough proven to be more successful in effecting social change than mere market forces have been up to now.<sup>92</sup>

In terms of South African company law directors have to manage a company in the best interests of the shareholders collectively. The *King II Report* and the *Policy Document* on company law reform recommended that directors should also consider the interests of other stakeholders when they manage a company. It is stated in the *Policy Document* that:

<sup>86</sup> South Africa’s black middle class has grown by 30% between 2006 and 2007. Their collective spending power rose from R130-billion to R180-billion. 12% of South Africa’s black population account for over half (54%) of all black buying power. University of Cape Town’s Unilever Institute of Strategic Marketing and TNS Research Surveys, *Black Diamond Study 2007: SA’s Booming Black Middle Class* available at [http://www.unileverinstitute.co.za/index.php?Itemid=34&id=72&option=com\\_content&task=view](http://www.unileverinstitute.co.za/index.php?Itemid=34&id=72&option=com_content&task=view) (visited on May 22, 2008).

<sup>87</sup> The term broad based is defined in terms of the act as: the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include, but are not limited to (a) increasing the number of black people that manage, own and control enterprises and productive assets; (b) facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises; (c) human resource and skills development; (d) achieving equitable representation in all occupational categories and levels in the workforce; (e) preferential procurement; and (f) investment in enterprises that are owned or managed by black people. (See s 1 of the BBBEE Act).

<sup>88</sup> Fears also exist that BBBEE will result in black token empowerment. The BBBEE Act specifically prohibits fronting practices. Fronting is defined as “any practice or initiative which are in contravention of or against the spirit of any law, provision, rule, procedure, process, system, policy, practice, directive, order or any other term or condition pertaining to black economic empowerment under the codes”. Examples of fronting practices are window dressing, benefit diversion, opportunistic intermediaries. (Code 000 Statement 100). See Benjamin et al. *supra* at (1)8 & 42-43 and Balshaw & Goldberg *supra* at 24.

<sup>89</sup> Vuyo Jack *BEE Success Comes with Work and Life’s Cycles* Business Report (September 24, 2006) available at <http://www.busrep.co.za/index.php?fSectionId=2512&fArticleId=3449596> (visited on May 22, 2008).

<sup>90</sup> JL Levin, *Considering the Legitimacy of Government Measures to Introduce Black Economic Empowerment Legislation*, 18 South African Mercantile Law Journal, 388-392, 392 (2006); Havenga (2005) *supra* at 615.

<sup>91</sup> Benjamin et al. *supra* at (1)3-4.

<sup>92</sup> Benjamin et al. *supra* at (1) 27. See par 2 *supra* on the role of law in voluntary corporate social responsibility. Market forces referred to in the context above include for example sanctions under Apartheid, consumer groups, trade unions *etcetera*.

[C]ompanies and governments alike are increasingly aware that higher standards of corporate governance and ethics are required and that there should be greater interdependence between enterprises and the societies in which they operate.<sup>93</sup>

The draft Companies Bill of 2007 is unclear on the preferred approach to stakeholder protection. It seems, however, if the Bill also favors the enlightened-shareholder value approach where shareholders are still the main beneficiaries of directors' duties, but interests of other stakeholders may be taken into account when directors make business decisions.

While consideration of the "triple-bottom line" is still voluntary in terms of present South African company law the South African legislator has stepped in through the BBBEE Act forcing directors to consider more than the interests of the shareholders collectively. The BBBEE Act does not only address racial imbalances but also to a limited extent looks at socio-economic upliftment. The effect of the BBBEE Act is that companies and directors are forced to take into account the interests of the previously disadvantaged South Africans into account.

The BBBEE Act is but one example of the use of legislation to guide the corporate conscience. The Act confronts companies with the political and socio-economic reality in the country within which they operate and involves them in the process of reform and reconciliation. It is crucial that the corporate conscience and Government efforts for reforms are combined and coordinated to ensure that it functions to the benefit of the country at large.

### **Acknowledgement:**

We wish to thank Professor Kathleen van der Linde for her valuable comments.

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<sup>93</sup> At par 3.1 & 3.2.