

THE PROSPECTS FOR CORPORATE GOVERNANCE OPERATING AS A VEHICLE FOR SOCIAL CHANGE IN SOUTH AFRICA

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A range of scholarly literature has emerged recently which discusses the extent to which the corporate governance regime in South Africa can incorporate the interests of stakeholders. This is a timely question in view of present movements toward such an approach in the country. At face value, adopting an approach which combines the interests of shareholders with those of stakeholders is ideal in a country which is trying to redress the extreme inequalities caused by exploitative and discriminative policies under the apartheid regime. But, as this article will argue, there are significant challenges to be met if this approach is to succeed. The article also questions whether, in the context of an emerging economy, companies are the most appropriate vehicle through which to promote the interests of employees, the environment, the local community and society at large. This article will be structured as follows. Part 1 describes the many socio-economic challenges facing the South African government. Part 2 discusses its corporate governance regime, which imposes a legal duty on directors to adopt an 'inclusive approach' whilst managing their business and which continues to reiterate the value of good corporate citizenship and responsibility. Part 3 addresses the difficulties which arise from the inclusive approach. Part 4, which concludes, argues that increased involvement of the state through legal regulation is crucial in order to create a more robust framework in which the needs of society can be met.

I SOCIO ECONOMIC CHALLENGES

In April 1994, South Africa held its first democratic election, ending decades of apartheid rule. The majority black African National Congress (ANC) government that was elected inherited a diverse and multicultural society. The

population of South Africa today stands at 48 million, with Africans in the majority (80%), the white population at 9.1%, those of mixed race at 8.9% and the Indian/Asian population at 2.5%.¹ Its Constitution recognises 11 official languages,² although many more languages are commonly spoken.³ This apparent diversity has led the term ‘Rainbow Nation’, first coined by Archbishop Desmond Tutu, to be commonly applied to South Africa’s people.

South Africa is currently the world’s 20th biggest economy. From 1994, the government channelled considerable effort into overhauling South Africa’s economy. The old economy was characterised by high tariffs and subsidies, anti-competitive behaviour and extensive government intervention. Today, this intervention has been reduced, with the government actively encouraging competition, investment and privatisation.⁴ The economy is growing at an annual rate of 3% – 5% with a relatively low rate of inflation. Trade and investment have been liberalised and public debt reduced. The government has also effected policy changes to encourage international investment and to promote its products and services on the global markets.⁵

The government has invested heavily in social and development programmes to ensure the provision of health, education, electricity, clean water and sanitation facilities. Deep divisions remain, however, within South African society. The new, democratically elected, ANC government inherited a fragmented and disparate society marked by extreme contrasts, which on the one hand boasted a highly developed infrastructure and an economy on a par with most developed nations, while on the other being impaired by high unemployment, a severe housing shortage, environmental degradation, spiralling violent crime, a low level of skills and one of the worst HIV/AIDS epidemics in the world.⁶ To heighten the visibility of this ‘double economy’,

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¹ South Africa’s Population (2008)

<<http://www.southafrica.info/about/people/population.htm>> at 23 June 2009.

² *Constitution of the Republic of South Africa 1996* (SA) s 6(1).

³ For example, the Constitution mentions the Khoi, Nama and San languages, Arabic, German, Greek, Gujarati, Hebrew, Hindi, Portuguese, Sanskrit, Tamil, Telegu and Urdu.

⁴ See its economic reform programme – Growth, Employment and Redistribution (GEAR) strategy, which was put in place to cover the period 1996 – 2000. GEAR was implemented to increase investment, deregulation and trade liberalisation.

⁵ For a discussion of South Africa’s economic progress, see C Rustomjee, ‘Pathways Through Financial Crisis: South Africa’ (2006) 12 *Global Governance* 431.

⁶ See United Nations Human Rights Council Universal Periodic Review *Report of the Working Group on the Universal Periodic Review South Africa A/HRC/8/32*, 23 May 2008. See also J

these divisions roughly followed racial lines, with a relatively affluent white minority and a poor black mass populace. This continues to be the situation, despite the rise of a wealthy black middle class and concerted efforts by the state to redistribute wealth, access to land and mass education.

In addition, after decades of inequality, deprivation and social upheaval due to violent resistance to the apartheid regime, many of the traditional familial and social values of native South Africans have fragmented, and educational levels have been poor to non-existent. The history of sanctioned violent resistance has led to a culture of general lawlessness. Indeed, South Africa has one of the highest violent crime rates in the world.⁷ Its murder rate is judged to be more than twice that of its immediate (and troubled) neighbour, Zimbabwe, more than three times that of Nigeria, almost twelve times that of the United States and 43 times the intentional homicide rate in the United Kingdom.⁸ Thus significant challenges remain in bridging the gap between the privileged and the impoverished and in ensuring the economic integration of the black majority.⁹

A A Sink or Swim Situation

In order to achieve socio-economic change to improve the lives of black South Africans and to integrate South Africa into a rapidly changing global environment, the government embarked on an ambitious (and continuing) legislative and social engineering exercise aimed at transforming society. Its priority is to achieve an equitable culture founded on respect for human rights, human development and enhancement of social, economic and cultural rights. To further this aim, it entered into a social contract with civil society, the corporate sector and organised labour in a public-private partnership to

Herbst, 'Mbeki's South Africa' (2005) 84 *Foreign Affairs* 93; R Hamann, 'Can business make decisive contributions to development? Towards a Research Agenda on Corporate Citizenship and Beyond' (2005) 23 *Development Southern Africa* 175, 180.

⁷ J Simpson *South Africa faces crime challenge* (2007) BBC News <<http://news.bbc.co.uk/2/hi/africa/6347717.stm>> at 23 June 2009.

⁸ United Nations Office on Drugs and Crime *International Homicide Statistics* 2004 recorded the incidence of intentional homicide in South Africa in 2004 as 69 per 100 000 of the population, compared to 32.9 for its immediate neighbour Zimbabwe, 17.7 for Nigeria, 5.9 for the United States of America and 1.6 for the UK (England and Wales).

⁹ *South Africa: Economic Review* (2008)

<<http://www.southafrica.info/business/economy/econoverview.htm>> at 23 June 2009.

generate the requisite domestic capital as well as to re-invigorate the economy to make this goal realisable.¹⁰

Indeed, the post apartheid era has seen the expanded role of the corporate sector in South Africa's economic transformation. The operations of large conglomerates such as De Beers, Anglo American, Impala Platinum, Billiton, Eskom, Sasol and Mittal have contributed to the rapid growth of South Africa's economy through long term investment and the provision of employment and other opportunities. Importantly for the purposes of this article, in envisaging a role for companies in meeting the country's deep socio- economic challenges, the South African government ushered in an 'inclusive' approach¹¹ to corporate governance in 1994.¹²

II THE CORPORATE GOVERNANCE REGIME IN SOUTH AFRICA: EMBRACING STAKEHOLDERS

South Africa boasts a corporate governance regime comparable with most developed economies, with its own corporate regulations, a stock exchange (Johannesburg Securities Exchange), regulators and inspectorates, which include a Department of Trade and Industry, Registrar of Companies, Financial Services Board and the Institute of Directors. As in the UK, two regimes relating to the law of corporate governance exist: first, the legal regime (company legislation and common law) and, second, a system embodied in codes of practice.¹³ The majority of South Africa's private equity holders are foreign institutional investors, which bring considerable external influence to bear. In recent years, changes have been made to its corporate governance regime – including encouraging shareholder activism, stricter

¹⁰ UN Human Rights Council Universal Periodic Review, 'Report for the Working Group on the Universal Periodic Review South Africa' (2008) A/HRC/8/32.

¹¹ Namely that in managing the company, the responsibility of the board is not only toward its shareholders, but also toward its stakeholders, such as its employees, the environment and society at large.

¹² See I Esser, 'The Enlightened-Shareholder-Value Approach Versus Pluralism in the Management of Companies' (2005) 26 *Obiter* 719.; A West, 'Theorising South Africa's Corporate Governance' (2006) 68 *Journal of Business Ethics* 433; I Esser and A Dekker, 'The Dynamics in Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles' (2008) 3 *Journal of International Commercial Law and Technology* 157.

¹³ See P C Aka, 'Corporate Governance in South Africa: Analysing the Dynamics of Corporate Governance Reforms in the 'Rainbow Nation'' (2007) 33 *North Carolina Journal of International Law and Commercial Regulation* 219, 243–4.

enforcement of takeover and merger procedures, revising the Companies Act, adopting internationally accepted accounting standards into law and strengthening the powers of regulators. It is submitted that the South African corporate governance regime mirrors closely that in Anglo American jurisdictions.¹⁴

A major influence on corporate governance in South Africa is the series of King Reports on Corporate Governance. The first, King I, was published in 1994.¹⁵ The Report set out the potential direction of corporate governance reform post apartheid. It incorporated a code of practice very much based on that in Britain, with an emphasis on shareholder protection and the duties of directors. However, it also diverged from this model by recommending stronger stakeholder engagement and consideration of the impact of the company's activities on the wider community.¹⁶ King II, published in 2002,¹⁷ took this 'inclusive approach' to a higher level.¹⁸ It emphasised the need for companies to recognise that they did not act independently of the societies in which they operated.¹⁹ Although the primary duty of directors was to the company (essentially confirming the shareholder model), the interests of stakeholders, such as the community, customers, employees and suppliers, all needed to be considered when developing company strategy. King II advocated a move to the 'triple bottom line' to embrace the economic, environmental and social aspects of a company's activities.²⁰ Thus, corporate

¹⁴ See A West, 'The Ethics of Corporate Governance: A South African Perspective' (2009) 51 *International Journal of Law and Management* 10.

¹⁵ See P Armstrong 'The King Report on Corporate Governance' (1995) 3 *Juta's Business Law* 65.

¹⁶ King I was recognised internationally, when published, as the most comprehensive publication on the subject, embracing an inclusive approach to corporate governance. See <<http://www.iodsa.co.za/king.asp#King%20I%20Report%20-%201994>> at 23 June 2009.

¹⁷ The Code is voluntary and not legally binding. However, the Johannesburg Securities Exchange publishes a Social Responsibility Index which measures the triple bottom line of selected companies. Companies joining the Index will thus have a strong incentive to observe the Code.

¹⁸ King II (*The King Report on Corporate Governance for South Africa 2002*) [5] and [17], available from Institute of Directors in Southern Africa, e-mail: iodsa@iodsa.co.za, website: <<http://www.iodsa.co.za>>. The Executive Summary of the Report can be viewed at <<http://www.ukzn.ac.za/ukznms/King-ReportExec-sum.pdf>> at 13 July 2009. See also Aka, above n 13, 249–51.

¹⁹ These provisions reflect the country's determination to ensure that companies play a positive role in the country's development. See S Andreasson, *Understanding corporate governance reform in South Africa: Anglo-American divergence, the King Reports and hybridization* (2009) *Selected Works* <http://works.bepress.com/stefan_andreasson/8> at 23 June 2009.

²⁰ 'Triple bottom line' is based on the premise that the performance of a company should extend beyond financial considerations to include those of society and the environment. The

governance should extend to the non-financial aspects of the company's operations such as the promotion of black empowerment, the environment and society at large.²¹

King II pointed out that companies were likely to experience indirect benefits if they took social factors into consideration, given that the majority of South Africa's citizens 'remain[ed] on the fringes of society's economic benefits'.²² Indeed, an exclusion of stakeholders would run counter to the traditional African values of co-existence, collectiveness and consensus.²³

Companies don't operate in a vacuum... Every company, large and small, has contractual and non-contractual relationships with individuals and entities. These might include the community in which the company operates, its customers, employees, shareowners and suppliers. In order for the inclusive approach to be implemented these stakeholder groups need to be defined and recognized by the company, and then the values by which the company will carry out its daily transactions with these stakeholders must be identified and communicated. This is not a one-way street, by contrast, the only way the company can achieve its goals is to ensure that it has mutually beneficial relationships with its stakeholders. Communication on performance, targets and commitments is the key to building trust. In my own experience, this inclusive approach is the way to create sustained business success and steady, long-term growth in shareowner value.²⁴

Importantly, King II envisaged that companies would carry out their responsibility to their stakeholders by informing stakeholders of company performance in a voluntary report ('triple bottom line' reporting). This reporting should be carried out in a clear, transparent and open manner.²⁵

argument is that, as companies used social and environmental resources, they should report on returns on investment to society and the environment.

²¹ This 'inclusive' approach is not new. On the contrary, it has been promoted by global bodies such as the WTO, UN (UN Global Impact, UN Global Reporting Initiative), World Business Council for Sustainable Development (WBCSD) and charities such as OXFAM. This same approach was adopted by the UK in its recent company law reform process, now embodied in the new *Companies Act 2006* (UK) s 172.

²² Executive Summary of the King II Report, above n 18, [36].

²³ Executive Summary of the King II Report, *ibid* [38].

²⁴ A Slater, 'What you had was good – gems from a governance guru' (2005) 2 *Corporate Responsibility Management* 1.

²⁵ Companies may base their reporting on the Global Reporting Initiative (GRI) Guidelines which recommend the inclusion of specific information related to environmental, social and economic performance and help companies define the content and quality of their reports. The Guidelines were the result of collaboration by representatives from a broad range of

Reporting should cover the company's social and environmental responsibilities.²⁶ King II did not, however, favour a legislative regime to force companies to comply with its recommendations, preferring, instead, self regulation. King said:

There's some suggestion that certain aspects of the recommendations in King II should be legislated – in other words, be compulsory for all companies. Business is a difficult matter, and those who run it can't have the prescience to envisage what is going to happen from day to day, so they need flexibility in the processes associated with administering their companies. To have the rigidity of a statute doesn't make business sense.²⁷

A King III (Inclusive Approach and Triple Bottom Line Reporting)

The 'inclusive approach' in King II was recently endorsed in King III (February 2009) and in the new *Companies Act 2008*. King III (consisting of a draft Report and Code for Corporate Governance) was released on 25 February 2009.²⁸ It renewed its call to businesses to focus on more than just the economic value of their activities, asking them also to take into account their social and environmental performance.

King III will, when it comes into effect, apply to all entities, big and small, public and private,²⁹ although it is mandatory for companies listed on the Johannesburg Securities Exchange (JSE) to comply with it. Companies are encouraged to adapt the principles under the Code as appropriate to the size, nature and complexity of their businesses. King III follows an 'apply or explain' approach to governance – that is to say, where companies have applied the Code and best practice recommendations, they must state this positively to their stakeholders. Where a specific principle or recommendation has not been applied, the board must explain the reasons for this. This will

stakeholders from all over the world. See, for the Guidelines, <<http://www.globalreporting.org/Home>> at 23 June 2009.

²⁶ Thus triple bottom line reporting applies accounting concepts to 'corporate social responsibility'.

²⁷ M Barrier, 'Principles, not rules: Thanks to Codes drafted under Mervyn King, South Africa has taken the lead in defining corporate governance in broadly inclusive terms' – Interview, 2003, Business Services Industry <http://findarticles.com/p/articles/mi_m4153/is_4_60/ai_106863373/pg_3?tag=content;coll> at 23 June 2009.

²⁸ King III (Draft Report and Draft Code) (2009) Institute of Directors <<http://www.iodsa.co.za/>> at 23 June 2009.

²⁹ King II applied only to listed companies.

allow stakeholders to comment on and challenge the board to improve the standard of governance. In emphasising the necessity of an ‘inclusive’ approach to corporate governance, King III focuses extensively on the following tenets – ‘sustainability’ ‘corporate citizenship’ ‘social responsibility’ and ‘stakeholder relationships’, reflecting the recent emergence of these concepts to signify a new role for business in society.

1 *‘Corporate citizenship’*

Chapter 2 of King III provides that the board has a responsibility to see that the company acts as, and is seen to be, a ‘responsible corporate citizen’ (Principle 2.1). The board is not only responsible for the company’s financial bottom line, but for the company’s performance in respect of its ‘triple bottom line’. King III asserts that a good corporate citizen is one which has comprehensive policies and practices in place which enable it to make decisions and conduct its operations ethically, meet legal requirements and show consideration for society, communities and the environment (Principle 2.2). Directors must demonstrate effective and responsible leadership to ensure that the company is run in an ethical, transparent and accountable manner (Principle 2.3). Last but not least, the board has a responsibility to sustain and create an ethical corporate culture within the company (Principle 2.4).

2 *‘Integrated sustainability’ reporting (‘triple bottom line’ reporting)*

Chapter 6 encourages proactive and transparent communication and engagement with stakeholders on all material matters affecting the company (Principle 6.1). Reporting must be integrated across all areas of performance – including social and environmental performance. The board should report forward-looking information that will enable stakeholders to understand key issues affecting the company as well as the effect of its operation on the economic, social and environmental well being of the community (Principle 6.2). But this means more than simply collating and adding on economic, social and environmental information; sustainability reporting should be integrated with other aspects of the business process and managed throughout the year (Principle 6.4). Companies are encouraged to draw on international and local guidance materials in their sustainability reporting (Principle 6.3).³⁰

³⁰ These include the GRI (Global Reporting Initiatives) guidelines, AA1000 (AccountAbility 1000) framework and stakeholder engagement standards, OHSAS (Occupational Health and Safety Standards) 18000 and 18001, ISO (International Organisation for Standardisation) 9000 quality management assurance standards and ISO 14000 environmental standards.

Finally, there should be an external assurance provider to provide assurance over the accuracy and completeness of sustainability reporting to stakeholders (Principle 6.5).

3 'Stakeholder Relations'

Renewed commitment is given in King III to the management of stakeholder relations. Chapter 8 provides that the board should take account of the legitimate interests of stakeholders in its decisions and should proactively manage the relationships with its stakeholders (Principle 8.1). King III proposes that companies should consider not only formal processes of communication with their stakeholders (annual general meetings and liaison with union representatives). They should also consider informal methods of communication, such as direct contact, websites, advertising, or press releases (Principle 8.2). Companies should strive to achieve the correct balance between stakeholder groupings. King III provides that board decisions as to how to balance interests of stakeholders should be guided by the aim of ultimately advancing the best interests of the company (Principle 8.4). This applies equally to the achievement of the 'triple bottom line' and the whole notion of good corporate citizenship as described in Chapter 2. Although the company has the primary duty to manage the relationships with its stakeholders, the stakeholders are expected to co-operate with the company in order to facilitate the process. They therefore need to consider, before acting solely in their own interests, the implications of their actions for the other stakeholders. Ultimately, not taking account of the interests of other stakeholders may result in damage to the company and its long term sustainability. Stakeholders should consider whether, and if so how, to give active support to a company's corporate governance initiatives (Principle 8.4).

The expectation that companies will take their responsibilities to stakeholders seriously goes hand in hand with recent South African legislation promoting corporate citizenship,³¹ increasing pressure from stakeholder groups and the promulgation of various initiatives in this area on the international front, most notably the Global Reporting Initiative. Various Socially Responsible Investment (SRI) funds now exist, which track companies' social, ethical and environmental performance in South Africa. In May 2004, the JSE launched

³¹ See the *Broad Based Black Economic Empowerment Act 2003*, *Mineral and Petroleum Resources Development Act 2002*, *National Environmental Management Act 1998*, *Employment Equity Act 1998*, *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* and *Prevention and Combating of Corrupt Activities Act 2004*. See W Visser, 'Corporate Citizenship in South Africa: A Review of Progress since Democracy' (2005) 18 *Journal of Corporate Citizenship* 29, 31.

its own tradeable SRI index, the first of its kind in an emerging economy based on the 'triple bottom line' approach.³² To be included in the Index, companies must prove their governance standards, environmental policies, health and safety records and policies relating to HIV/AIDS, and show how they have supported black economic empowerment.³³ Many companies in South Africa today claim their commitment to improving their 'triple bottom line' performance, as evidenced below:

Anglo American – 'Today, sustainable development is embedded in our policies, strategies and everyday practices. We now assess the economic, social and environmental risks and benefits of every decision.'³⁴

BHP Billiton – 'Sustainable Development at BHP Billiton encompasses our commitment and policy towards health, safety, the environment and the community (HSEC). To ensure improved performance, we have set specific targets in these areas.'³⁵

Mondi – 'The Code of Business Ethics applies to all Mondi employees. It comprises five principles:

Legal compliance: Mondi will comply with all applicable laws and regulations.

Honesty and integrity: Mondi will observe the highest standards of honesty and integrity.

Human rights: Mondi will respect the Universal Declaration of Human Rights.

Stakeholders: Mondi will have due regard to the interests of its stakeholders – shareholders, employees, customers, business partners and communities.

Sustainability: Mondi will conduct its business sustainably, ensuring safety, health and the protection of the environment.'³⁶

SABMiller – 'South Africa's biggest killer, HIV/Aids has left many children orphaned and vulnerable. SAB Ltd is working with The StarFish Foundation

³² See, for more information, <<http://www.jse.co.za/sri/>> at 10 August 2009. The Index lists the constituent companies, which number approximately 60 today. It launched with 51 companies in 2004. See also Visser, above n 31, 35-6.

³³ See M Vaughn and L R Ryan, 'Corporate Governance in South Africa: A Bellwether for the Continent' (2006) 14 *Corporate Governance: An International Review* 504, 507.

³⁴ See Anglo American 'Sustainable Development' <<http://www.angloamerican.co.uk/aa/development/>> at 13 July 2009.

³⁵ See BHP Billiton 'Sustainable Development' <<http://www.bhpbilliton.com/bb/sustainableDevelopment.jsp>> at 13 July 2009.

³⁶ See Mondi 'Business Ethics' <<http://www.mondigroup.com/desktopdefault.aspx/tabid-1366>> at 13 July 2009.

in nine organisations that care for adults and orphans affected by HIV/Aids... The work seeks to give local people the knowledge and expertise to run these organisations effectively. Ultimately, the aim is to develop a large number of stable and well-run community-based organisations that are capable of working with the government to deliver care, resources and services to children orphaned by the pandemic. By training 117 caregivers and funding nine such organisations to take part in the programme for 18 months, SAB Ltd will benefit an estimated 2,700 children.³⁷

De Beers – ‘HIV/AIDS management in Southern Africa is embedded into the workings of our business and is a key part of our business risk management process... [Anti-retroviral treatment] is available free to HIV infected employees and their spouse or life partners where it can be provided in a responsible and sustainable manner.’³⁸

B Companies Act 2008

The recent reform of company law in South Africa (outlined in *South African Company Law for the 21st Century – Guidelines for Corporate Law Reform 2004*)³⁹ set out the basis for a redraft of the *Companies Act 1973*. The Department of Trade and Industry (DTI) formulated a new approach to corporate governance to replace the old model which was focused on shareholders:

[A] company should have as its objective the conduct of business activities with a view to enhancing the economic success of the corporation, taking into account, as appropriate, the legitimate interests of other stakeholder constituencies.⁴⁰

It endorsed the approach taken in King I and II that the company is a social as well as an economic institution and, accordingly, its pursuit of economic

³⁷ See SAB Miller ‘Caring for Children affected by HIV/AIDS in South Africa’ <<http://www.sabmiller.com/index.asp?pageid=960&year=2008>> at 13 July 2009.

³⁸ See De Beers ‘HIV/AIDS’

<<http://www.debeersgroup.com/en/Sustainability/Employees/HIVAIDS/>> at 13 July 2009.

³⁹ <http://us-cdn.creamermedia.co.za/assets/articles/attachments/01326_notice1183.pdf> at 23 June 2009.

⁴⁰ Ibid 24–5. This is essentially the ‘enlightened shareholder value’ approach in the UK (discussed further below). The review of the new UK Company law spanned over 8 years, starting in 1998. This undoubtedly had an influence on the review process in South Africa.

objectives should be constrained by social and environmental imperatives. The new Act provides:

Standards of directors' conduct

76(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director—

- (a) in good faith and for a proper purpose;
- (b) in the best interests of the company; and
- (c) with the degree of care, skill and diligence that may reasonably be expected of a person—
 - (i) carrying out the same functions in relation to the company as those carried out by that director; and
 - (ii) having the general knowledge, skill and experience of that director.⁴¹

The new Act does not legislate on the precise content of the above duty, rather it leaves the position to be dealt with in accordance with the 'inclusive' approach. The courts thus have the opportunity to delineate the ambit of section 76 through the development of common law. The Companies Act was approved by Parliament and the National Council of Provinces (NCOP). It is intended that the Act will be effective in 2010.

⁴¹ Traditionally, directors must exercise their powers 'for the benefit of the company as a whole'. This is synonymous with the interests of the body of shareholders but not those of stakeholders. The reform process saw a move away from the traditional shareholder model towards an 'enlightened shareholder value' concept, very much reflecting developments in the UK in this area at that time. The new approach would require directors to take into account, where appropriate, the needs of various stakeholders, although shareholders' interests would remain paramount. There is evidence that courts in South Africa are already moving in this direction. See *Minister of Water and Forestry v Stilfontein Gold Mining 2006 (5) SA 333 (W)*, where company directors had refused to comply with an order from the Ministry to drain water from a mine on health and safety grounds, arguing that it was not possible for the company to comply with the directives and still remain financially viable. The court judged that their conduct flew in the face of what was recommended in the code of corporate practices and conduct recommended by the King Committee when the South African corporate community had, widely and uniformly, endorsed their findings and recommendations. The King Committee had all along stressed that one of the characteristics of good corporate governance was social responsibility. The directors in the case were ordered to comply with the order. See Vennemeth and Hart Attorneys, 'Law Letter, February 2007' <http://www.vnh.co.za/docs/law_letter_feb_2007.pdf> at 13 July 2009.

III 'TRIPLE BOTTOM LINE' REPORTING

The need for companies in South Africa to adopt an 'inclusive' approach has generated much discussion. Many academics have argued that such an approach is compatible with traditional African values (community, consensus, obligation and cooperation), that it is fundamental to long term corporate success and that it would enable companies to meet socio-economic challenges within South Africa.⁴²

The Anglo-American model is never going to sit entirely comfortably with the political demands and pressures that South African society generates and notions of the African approach. South Africa is therefore a good test case for assessing the viability and potential of a hybrid model that is able to reconcile the competing demands of shareholder and stakeholders models in a cultural context that is different from that in which they originally developed...⁴³

Global and local attention on sustainability issues is clearly growing. Because the company is so integral to society, it is considered as much of a citizen of a country as is a natural person who has citizenship. It is expected that the company will be directed to be and be seen to be a decent citizen. This involves social, environmental and economic issues – the 'triple bottom line'. Boards should no longer make decisions based only on the needs of the present because this may compromise the ability of future generations to meet their own needs... The success of companies in the 21st Century is bound up with three interdependent sub-systems – the natural environment, the social and political system and the global economy. Global companies play a role in all three and they need all three to flourish... In short, planet, people and profit are inextricably intertwined.⁴⁴

How is this 'inclusive' approach to be proven? The answer is that company directors must expand their traditional reporting framework to take into account not only their financial, but also social and environmental performance, the so-called 'triple bottom line reporting' (Principle 6.1, King III – 'Reporting should be integrated across all areas of performance, reflecting the choices made in the strategic decisions adopted by the board, and should include reporting on economic, social and environmental

⁴² See West, above n 12 and Andreasson, above n 19. See also G J Rossouw, A van der Watt and D P Malan, 'Corporate Governance in South Africa' (2002) 37 *Journal of Business Ethics* 289–302; G J Rossouw, 'Business Ethics and Corporate Governance in Africa' (2005) 44 *Business and Society* 94.

⁴³ Andreasson, above n 19.

⁴⁴ King III, above n 28, 15.

issues’).⁴⁵ The overall fulfilment by companies of their obligations (ie the ‘inclusive approach’) to the environment, employees and society at large should be measured, calculated, audited and reported, just as their financial performance is.⁴⁶ Importantly, triple bottom line reporting informs stakeholders about the intentions of the company to enhance its social performance, emphasises its positive actions, signifies its respect for Corporate Social Responsibility (CSR) and demonstrates the legitimacy of the company in the eyes of stakeholders.⁴⁷ Triple bottom line reporting is regarded as a contemporary and exciting notion and has been embraced by stakeholder organisations, ‘ethical’ investment funds, accounting firms as well as multinationals all over the world, with the term itself spreading ‘like wild fire’.⁴⁸

Companies have demonstrated a great willingness to prove their responsibilities to society in their disclosure practices. The reporting practices of the largest 100 companies listed on the JSE on policies relating to the environment, community, promotion of black economic empowerment, employee relations and human rights were investigated recently.⁴⁹ It was found that the frequency and level of such reporting was significantly higher than that of companies in the leading economies. The same reporting by companies in the more developed countries tended to concentrate only on shareholder, rather than stakeholder, concerns. It has been shown that South Africa is catching up on environmental, social and governance issues, and reporting on these issues is more developed than commonly expected and often exceeded standards in high income countries.⁵⁰

But does triple bottom line reporting actually deliver? Are its benefits felt ‘on the ground’ where it matters? Quite apart from the criticism that it is far from clear what the concept actually means, ‘triple bottom line’ reporting cannot be

⁴⁵ King III does not use the words ‘triple bottom line’ reporting, using instead ‘integrated sustainability reporting’. However both kinds of reporting refer to the same issues, namely economic, social and environmental performance.

⁴⁶ W Norman and C MacDonald, ‘Getting to the Bottom of TBL (2004) 14 *Business Ethics Quarterly* 243.

⁴⁷ See C Dawkins and F W Ngunjiri, ‘Corporate Social Responsibility Reporting In South Africa: A Descriptive and Comparative Analysis’ (2008) 45 *Journal of Business Communication* 286, 288–9.

⁴⁸ Norman and McDonald, above n 46, 244.

⁴⁹ See Dawkins and Ngunjiri, above n 47.

⁵⁰ See J Baskin, ‘Corporate Responsibility in Emerging Markets’ (2006) 24 *Journal of Corporate Citizenship* 29. See also SIRAN, Social Investment Forum and EIRIS, *A Review of ESG Practices I Large Emerging Market Companies <2009>*, 31, <http://www.siran.org/pdfs/Emerging%20Markets%20Paper%20_%20FINAL.pdf> at 23 June 2009.

measured or aggregated. In the absence of an (as yet) agreed upon methodology, it is near impossible to quantify a company's social or environmental performance in a way which reduces them to some kind of bottom-line result.⁵¹ For example, how does one interpret the following information in the annual report of a company?

- (a) it is increasing the proportion of black employees by 5%,
- (b) it has cut down emissions by 10%,
- (c) it directed 22% of its budget to community-based programs,
- (d) 175 workers participated in its training programs, and
- (e) it invested R1.5 million into R&D addressing HIV/AIDS

Does the information prove that the company's social and environmental bottom lines are improved. Have stakeholder concerns been met? Aggregated together, what does it all mean? The problem is that any answers to these questions can only be subjective, reflecting the personal values of the person judging them, rather than those of the stakeholders.⁵² It is not possible to measure the benefits to the society and environment in monetary terms, as there is with financial profit, there being no social or environmental equivalents to revenue, expenses, losses, assets and liabilities.⁵³

Triple bottom line reporting also offers companies few means of prioritising the requirements of different stakeholders. How should the board trade the interests of one group of stakeholders off against another, when their needs conflict? Integrating and coordinating the diverse yet interrelated needs of stakeholders into company policy is necessarily a subjective exercise. The board may thus be exposed to litigation by stakeholders who perceive that their interests have not been taken into consideration. Ultimately, requiring the board to balance the interests of various stakeholders against each other may cause it to lose focus and pursue inconsistent objectives. If so, the overall outcome is likely to be inefficiency, raising company costs.⁵⁴ More cynically,

⁵¹ See Norman and MacDonald, above n 46, 249–251.

⁵² R Price, *What Triple Bottom Line?: Actually, It's All Social* <<http://www.kiriganai.com.au/attachments/publications/What%20Triple%20Bottom%20Line%20-%20It%27s%20all%20Social.pdf>> at 23 June 2009.

⁵³ See F Robins, 'The Challenge of TBL: A Responsibility to Whom?' (2006) *Business and Society Review* 1; Norman and MacDonald, above n 46, 250.

⁵⁴ Robins, above n 53, 7.

it has been argued that 'triple bottom line' reporting allows companies to make vague commitments to social and environmental concerns. As there is no real social or environmental bottom line to measure their performance against, companies do not have to worry about being compared to others in the same industry or about whether their social and environmental bottom lines have declined over the years.⁵⁵

Even if triple bottom line reporting can be 'a vital source of moral resuscitation in business life', it is still dependent for its success on stakeholder engagement, organisational integrity and stakeholder activism.⁵⁶ These criteria are built on the assumption that stakeholders have adequate resources and experience to enter into dialogue with companies, that there is an active stakeholder culture in society and that companies are willing to work with stakeholders to find an optimal solution. In an emerging economy such as South Africa's, the existence of these conditions cannot necessarily be taken for granted.⁵⁷ Indeed, a recent study of a major HIV/AIDS initiative by Anglo-American plc in South Africa shows the vital importance of external international agencies.⁵⁸

What does the experience in South Africa show so far? An answer can be gleaned from the performance by companies in the SRI Index. As noted above, membership of the Index is dependent on companies' performance of their triple bottom line obligations, as periodically evaluated. The results of the first two rounds of evaluations suggested that companies participating in the assessment process merely described their sustainability process in an 'aspirational and anecdotal manner' and 'in a general, rather than objective and direct manner'.⁵⁹ Also, their commitment to communication with shareholders and investors was more thoroughly acted upon than their commitment to stakeholder relations. Some firms scored themselves highly despite their poor commitment to stakeholder issues.⁶⁰ Few companies have committed themselves to achieving specific targets or reporting their performance against these targets. The Index is also poorly monitored.⁶¹ There is little comparative or quantitative information and only few reports

⁵⁵ See Norman and McDonald, above n 46, 256.

⁵⁶ See M Painter-Morland, 'TBL Reporting as Social Grammar: Integrating CSR and Corporate Codes of Conduct' (2006) 15 *Business Ethics: A European Review* 352.

⁵⁷ See Hamann, 2006, above n 6, 190

⁵⁸ See R Croucher and E Cotton, *Global Unions, Global Business* (2009).

⁵⁹ See D Sonnenberg and R Hamann 'The JSE Socially Responsible Investment Index and the State of Sustainability Reporting in South Africa' (2006) 23 *Development Southern Africa* 305.

⁶⁰ See P Bond, 'Social Movements and CSR in South Africa' (2008) 39 *Development and Change* 1037, 1038.

⁶¹ See Bond, above n 60, 1038.

have included independent, third party verification of company activities. Further, company reports are often presented in a manner which stakeholders do not understand, even if they read them. In addition, the KPMG International Survey of Corporate Responsibility Reporting 2008 shows that, although 86% of companies in South Africa included some level of sustainability reporting (whether stand alone or incorporated into their annual reports), only 15% sought an audit of their reports.⁶² This may be because of the low demand for auditing from stakeholders and a general lack of awareness among companies about the benefits of an audit. The Report also pointed out that, although many companies based their reports against the Global Reporting Initiative (GRI) indicators, they provided very little information on sustainability strategies, context or material issues.⁶³

A *Developments in the UK: How Much Reporting is Good Reporting?*

It is noteworthy that similar developments with regard to directors' duties and their reporting obligations took place in the UK not long ago. In its review of its company law regime (1998 – 2005) - the so-called Operating and Financial Review - the UK considered requiring companies to produce comprehensive reports to inform not only shareholders, but also stakeholders of the performance and development of the business of the company. In recognition of the unique environment in which companies operate today, it was judged that directors should consider a variety of stakeholder interests and view high shareholder returns as the result of running a successful enterprise, rather than as an end to be pursued in its own right. This marked a shift away from the traditional shareholder-oriented approach; now, it was regarded that the promotion of the success of the company could not effectively be achieved by trampling on the interests of other stakeholders whose contributions were necessary for the success of the company.⁶⁴ Section 172 *Companies Act 2006* thus introduced a modified version of directors' duties – the 'enlightened shareholder value' or 'inclusive' approach - obliging directors to take into account, where circumstances so required, the interests of stakeholders when considering what would best promote the success of the company.

⁶² The Report can be viewed at <http://www.kpmg.com/SiteCollectionDocuments/International-corporate-responsibility-survey-2008_v2.pdf> at 13 July 2009.

⁶³ Ibid 93–4.

⁶⁴ See G Vinten, 'Shareholder vs Stakeholder: Is There a Governance Dilemma?' (2001) 9 *Corporate Governance* 36; and L Roach, 'The Legal Model of the Company and the CLR' (2005) 26 *The Company Lawyer* 98, 99–101. Note also that the UK introduced, for the first time, a Minister for CSR in 2000.

Hand in hand with this modified duty was the duty to report on matters which would be of use to stakeholders, such as the environment, the company's employees, social and community issues, persons with whom the company has contractual or other arrangements which are essential to the business, and receipts from, and returns to, members of the company in respect of shares held by them. This was a clear acknowledgement that stakeholders, such as employees, customers and the community, had a legitimate interest in the activities of the company and should therefore also have access to company information. Regulations to put this formal and comprehensive reporting regime on a statutory footing were introduced to take effect 1 April 2005.⁶⁵ To the surprise of many, however, and despite all the work done to introduce the obligation to produce a mandatory Operating and Financial Review (OFR), in November 2005 the then Chancellor of the Exchequer, Gordon Brown MP, announced that the government was abandoning the decision to oblige companies to produce an OFR and would instead substitute a much simpler, less comprehensive and less forward-looking reporting regime.⁶⁶ The reasons given for this U-turn, which angered many stakeholder representatives,⁶⁷ were the reduction of costs, the removal of red tape and the relieving of companies from what would be a considerable administrative burden. The OFR Regulations were repealed in January 2006 and replaced by a simplified regime (now found in section 417 of the *Companies Act 2006*). Although companies must still engage in reporting to stakeholders, they are now subject to a much less detailed and much less prescriptive regime compared to that under the original OFR.⁶⁸

What are the implications of the English experience for South Africa, whose recent developments have so clearly mirrored those in the UK? First, in relation to the reporting duties of directors, it is perhaps difficult to ignore the reluctance on the part of the UK government to create significant cost and

⁶⁵ *Companies Act 1985 Operating and Financial Review and Directors' Report etc Regulations 2005* (Statutory Instrument 2005 No 1011) <<http://www.opsi.gov.uk/si/si2005/20051011.htm>> at 13 July 2009.

⁶⁶ 28 November 2005, Speech by the Rt Hon Gordon Brown MP, Chancellor of the Exchequer, at the CBI Annual Conference in London, <http://www.hm-treasury.gov.uk/press_99_05.htm> at 13 July 2009.

⁶⁷ B Hall, 'Brown to Scrap Reporting Rule; Chancellor in U-turn on OFR; Move Aims to Mend Fences with Business; CBI Welcomes Decision', *Financial Times*, 28 November 2005, 1; M Milner, 'Friends of the Earth Seek U Turn on End of Business Review', *The Guardian*, 12 January 2006.

⁶⁸ The debate surrounding the OFR is extensively dealt with in A Schall, L Miles, and S Goulding, 'Promoting an Inclusive Approach on the Part of Directors: the UK and German Positions' (2006) 6 *Journal of Corporate Law Studies* 299. Readers might also be interested in developments in this area in Germany, which is also discussed.

regulatory burdens for companies by imposing on them detailed, comprehensive and prescriptive reporting obligations. A fair balance must be struck between the extent to which companies are to engage in reporting and the usefulness of this reporting to stakeholders. But how much reporting is good reporting? This is by no means an easy question to resolve. The U-turn on the part of the UK government was criticised for undermining the significant preparation taken by companies to prepare for more robust levels of reporting and for eroding potential relations with stakeholders. It was also argued that backing down at the last minute would only lead to further uncertainty, risks of non-compliance by companies and a blasé attitude toward stakeholders.⁶⁹ South African regulators will no doubt now need to determine the extent of reporting that companies have to produce. The companies must avoid the danger of viewing reporting obligations in isolation and as ends in themselves. The dominant question is how the obligations can dovetail effectively with the wider duty of directors to be more receptive to the interests of stakeholders. All in all, the English experience perhaps shows that this is not an easy task to undertake.

B Corporate Social Responsibility

Current movements toward an ‘inclusive approach’ to directors’ duties, triple bottom line reporting and ‘corporate citizenship’ in South Africa cannot be divorced from the ongoing discussion in the literature and business circles of the corporate social responsibility of companies. Ultimately, the current intention of policy makers in South Africa is to encourage companies to recognise and give effect to their corporate social responsibilities. However one labels it – ‘triple bottom line’, ‘inclusive approach’ or ‘corporate citizenship’ – the intention is to link business with wider societal concerns. Many now argue that CSR issues are making their way onto the corporate governance agenda, as the boundaries and definition of corporate governance change and evolve in today’s environment. This is reflected in the development of formal governance structures incorporating CSR issues, such as CSR reports and CSR committees. Companies demonstrating good governance are also expected by the public to show the extent of their corporate citizenship.⁷⁰ In the light of this, the present part of this article

⁶⁹ ‘OFR Letter to Alan Johnson’ January 2006, SustainAbility, <http://www.sustainability.com/downloads_public/news/OFR_PR.pdf> at 13 July 2009.

⁷⁰ C Strandberg, ‘The Convergence of Corporate Governance and CSR’ (2005) 1 <http://www.corostrandberg.com/pdfs/Corporate_Governance.pdf> at 24 June 2009; R Bird, A Hall, F Momentè and F Reggiani, ‘What CSR Activities are Valued by the Market?’ (2007) 76 *Journal of Business Ethics* 2, 189; K Money and H Schepers, ‘Are CSR and Corporate

investigates the following question – to what extent does CSR deliver, especially in the context of a developing economy?

CSR can be defined in the following way:

Corporate social responsibility is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.⁷¹

That there is an increasing recognition that companies have social responsibilities that go beyond maximising profits for shareholders is now undeniable.⁷² In South Africa, this recognition is evident in all three King reports and in the new *Companies Act 2008*. Many claim that it is profitable for a company to behave well.⁷³ Companies which take their responsibility to stakeholders seriously attract respect for their products and services as well as customer loyalty. Such companies can also persuade governments that they are taking issues such as the environment, their employees and the welfare of their community seriously and so avoid legal regulation. A good reputation enables companies to recruit employees who stay longer, thus reducing recruitment and retraining costs. Finally, understanding the wider impact of their businesses enables companies to think about profitable new products and services.⁷⁴

Governance Converging?’ (2007) 33 *Journal of General Management*, 1; A Kolk and J Pinkse, ‘The Integration of Corporate Governance in Corporate Social Responsibility Disclosures’ (2009)

<<http://ssrn.com/abstract=1350939>> at 24 June 2009; A Gill, ‘Corporate Governance as Social Responsibility: A Research Agenda’ (2008) 26 *Berkeley Journal of International Law* 452.

⁷¹ R Holme and P Watts, *Corporate Social Responsibility: Making Good Business Sense* (World Business Council for Sustainable Development 2000) 6 <<http://www.wbcsd.org/web/publications/csr2000.pdf>> at 16 July, 2009.

⁷² See P Lund Thomsen, ‘Corporate Accountability in South Africa: The Role of Community Mobilising in Environmental governance’ (2005) 81 *International Affairs* 3, 619.

⁷³ The same position is taken by international bodies – see the UN Global Compact at <<http://www.unglobalcompact.org>> at 24 June 2009; World Business Council for Sustainable Development

<<http://www.wbcsd.org/templates/TemplateWBCSD5/layout.asp?type=p&MenuId=NjA>> at 24 June 2009 and International Organisation for Standardisation at <<http://www.iso.org/iso/home.htm>> at 24 June 2009; World Trade Organisation, ILO and OECD Guidelines for Multinational Companies.

⁷⁴ See <<http://www.businesslink.gov.uk/bdotg/action/detail?type=RESOURCES&itemId=1075408491>>. The link between CC or CSR and profit, however, is not necessarily obvious. See G Balabanis, H C Phillips and J Lyall, ‘CSR and economic performance in the top British companies: are they linked?’ (1998) 98 *European Business Review* 25; R K Mittal, N Sinha and

A wealth of literature has emerged discussing the potential of CSR to improve the welfare of company stakeholders in developing economies (including South Africa). However, the literature also shows that there is often a discrepancy between what companies promise to do and what they actually do.⁷⁵ In the context of South Africa, the literature demonstrates that measures to provide HIV/AIDS support, for example, have been uneven, slow and selective, necessitating formal regulation so as to achieve targets.⁷⁶ Companies have continued to pollute the environment despite coercion by the state and lobby groups to adopt more stringent environmental management systems. Where the state has introduced legislation to penalise companies which fail to limit pollution, success has been limited by poor enforcement. Even worse, enforcement authorities have been reluctant to prosecute offending companies for fear that strict enforcement may lead to job losses and disinvestment.⁷⁷ Recent research also suggests that, in the context of mining companies (a significant industry in South Africa), CSR action is selective; issues with an economic impact, such as HIV/AIDS, tend to be given priority, whereas those related to black empowerment, the environment,

A Singh, 'An analysis of linkage between economic value added and CSR' (2008) 46 *Management Decision* 1437; C Thomsen and J Lauring, 'Practising the Business of CSR' (2008) 4 *International Journal of Business Governance and Ethics* 117; D J Vogel, 'Is there a Market for Virtue? The Business Case for CSR' (2005) 47 *California Management Review* 19; A McWilliams and D Siegal, 'CSR and Financial Performance: Correlation or Misspecification?' (2000) 21 *Strategic Management Journal* 603.

⁷⁵ See Lund-Thomsen, above n 72, 621–2; D Fig, 'Manufacturing Amnesia: Corporate Social Responsibility in South Africa' (2005) 81 *International Affairs* 599;

A Pendleton, 'The Real Face of CSR' (2004) *Consumer Policy Review* at <<http://www.allbusiness.com/legal/laws-government-regulations-environmental/946545-1.html>> at 24 June 2009.

⁷⁶ See Fig, 2005, above n 75, 616; D Dickinson, 'Corporate South Africa's response to HIV/AIDS: Why so slow?' (2004) 30 *Journal of Southern African Studies* 627; D Dickinson and M Stevens, 'Understanding the Response of large South African companies to HIV/AIDS' (2005) *Journal of Social Aspects of HIV/AIDS* 286; R Hamann and C Schild, 'Business and Human Rights in South Africa' (2008) *National Business Initiative* 1

<http://www.nbi.org.za/_documents/S_A/businesshumanrights-webversion.pdf> at 24 June 2009; AIDS and Rights Alliance for Southern Africa 'The Mining Sector, Tuberculosis and Migrant Labour in Southern Africa', July 2008, 1–19

<<http://www.scribd.com/doc/3998598/Mines-TB-and-Southern-Africa>> at 13 July 2009; M Curtis, 'Fanning the Flames: The Role of British Mining Companies in Conflict and the Violation of Human Rights' November 2007 1–40

<<http://www.waronwant.org/attachments/Fanning%20the%20Flames.pdf>> at 13 July 2009; G Frynas, 'The False Developmental Promise of CSR: Evidence from Multinational Oil Companies' (2005) 81 *International Affairs* 581 and S Dhanarajan, 'Managing Ethical Standards: When Rhetoric meets Reality' (2005) 15 *Development in Practice* 529.

⁷⁷ See Fig, above n 74, 603.

education and training receive less attention.⁷⁸ Experience shows that it is more realistic to stop perceiving a link between companies and social welfare and concentrate instead on establishing a state which is run by a political party with genuine accountability to the poor and demonstrating environmental, gender and race consciousness.⁷⁹ Indeed, civil society groups may be a more durable force in aligning the interests of companies with that of society, as opposed to companies themselves. There have been many instances where the community, civil society groups and campaigners have achieved direct results for society by challenging the actions of companies which profess their commitment to CSR, whether through lobbying, litigation or campaigning.⁸⁰ Although not in the South African context, the efforts of civil society groups against the actions of Aracruz Celulose SA (Brazil's largest pulp and paper manufacturer) provide another demonstration of the potential value of civil society groups.⁸¹

Secondly, the desire to be competitive, attract investment and prosper economically often leads the state to liberalise laws to attract foreign investors. The investors come into conflict with local communities. Company activity degrades the environment, increases pollution and displaces whole communities. In the context of a developing country, the ability of NGOs, grass roots and civil society organisations to challenge company actions is often hampered by a lack of experience and resources, a lack of legal literacy, a distrust of legal processes and intimidation by the authorities.⁸² It is also the case that, in developing countries, the poor and marginalised do not have a strong voice and are not represented. Thus the connection between issues which companies recognise they can/must address and the expectations of stakeholders are not necessarily clear. In any case, defining 'favourable impact', 'good performance' and 'sustainable effect' is subjective and does

⁷⁸ S Viviers and JM Boudler, 'CSR in the Mining Sector: Critical Issues' (2008), 1-23, <http://www.isbee.org/index.php?option=com_docman&task=doc_download&gid=221&Itemid=39> at 13 July 2009

⁷⁹ See Bond, above n 60, 1038.

⁸⁰ For example, the Treatment Action Campaign, an HIV/AIDS pressure group, succeeded in forcing the government to extend its anti-retroviral treatment programme to inmates in prisons in 2006 as a result of a successful suit in the High Court in Durban (Treatment Action Campaign and Others v Government of the Republic of South Africa and Others KZN4576/06). See also Lund-Thomsen, 2005, above n 72 and Fig, 2005, above n 75, 614.

⁸¹ Fig, 2005, above n 75.

⁸² See Lund-Thomsen, 2005, above n 72, 630-1.

not necessarily reflect the expectations and desires of the intended beneficiaries themselves.⁸³

Finally, it is argued that firms already help tackle poverty and other stakeholder concerns through their roles as investors, employers and tax payers. 'Business as usual' increases employment among the poor, provides new market opportunities for smallholders, increases the access of the poor to essential services and contributes to government taxes, which can be spent on anti-poverty measures. Is there an additional reason for drawing companies into the CSR rhetoric? In short, the business of business is business and practices which deviate from this goal are misguided.⁸⁴

IV CONCLUSION

The South African government faces enormous challenges in addressing the deep imbalances in a society split by the apartheid regime. For some time now, it has encouraged an agenda for companies based on the foundations of 'triple bottom line' reporting, the 'inclusive approach' and 'corporate citizenship'. We have questioned the effectiveness of current initiatives in meeting social and economic equity challenges and development goals in South Africa. To be sure, companies can contribute to the social good and are increasingly expected to do so. There has been a tremendous 'buy-in' to the King Reports and, given the fact that no drastic changes from the previous two reports are evident in King III, it is safe to say that, at the very least, companies will continue to pay lip service to King III.

However, this article argues that, whilst companies are important contributors to economic development, imposing on directors a legal duty to adopt an 'inclusive approach' when managing their companies and requiring them to engage in triple bottom line reporting, creates for them inherent conflicts and tensions. There are already significant ambiguities surrounding the notion of triple bottom line reporting. In addition, expecting too much of CSR is unrealistic. CSR cannot meet all the needs of society. It cannot address acts of corporate irresponsibility, the health and safety of employees, the needs of the community (health and education) and the environment. We have seen above various arguments that companies are failing to meet their own standards,

⁸³ M Blowfield, 'Reasons to be Cheerful? What we know about CSR's impact' (2007) 28 *Third World Quarterly* 683, 693.

⁸⁴ See P Newell and JG Frynas, 'Beyond CSR? Business, Poverty and Social Justice: An Introduction' (2007) 28 *Third World Quarterly* 669, 671 and 674.

despite professing their commitment to CSR. This has led to our reiteration that the primary responsibility for protecting stakeholders remains with the state.

Successful CSR initiatives require the participation of the state, a well mobilised civil society and companies which are willing and able to respond to CSR priorities. In societies characterised by marked inequalities of power and resources (such as South Africa), it is relatively meaningless to talk about partnership and cooperation between companies and stakeholders. Important prerequisites such as trust, leverage and the ability to enforce agreements are simply absent. In such settings, the state must seek both to shift norms and to take a direct role in overseeing companies' actions. The state, as others have argued, is in a position to influence norms through its actions and need not simply respond to those currently existing.⁸⁵ It is in a position to create an environment in which communities can claim and secure rights, whether through introducing laws which confer rights and create obligations, prosecuting and penalising parties which fail to observe minimum standards of conduct, and providing due process and adequate redress.⁸⁶ Relying on CSR in its present form to deliver sustainable development or meet the needs of company stakeholders adequately is unrealistic.⁸⁷ The danger is that this may lead to a further erosion of the conditions necessary for the functioning of CSR activities. Weak enforcement of labour, environmental or human rights laws cannot be compensated for by relying on soft corporate

⁸⁵ The role of the state is central, and not just in ratifying custom or in reasserting it when it is violated. Much more is needed if the law is to be enforced. Laws and their enforcement depend on stratified social structures within the framework of the state. See G Hodgson, 'On the Institutional Foundations of Law: The Insufficiency of Custom and Private Ordering', (2009) 43 *Journal of Economic Issues* 143.

⁸⁶ P Newell 'Citizenship, Accountability and Community: The Limits of the CSR Agenda' (2005) 81 *International Affairs* 541, 555–7; International Council on Human Rights Policy, 'Beyond Voluntarism' 2002, 1–16
<http://www.ichrp.org/files/summaries/7/107_summary_en.pdf> at 24 June 2009.

⁸⁷ For an argument that corporate social responsibility can and must be supported by legal measures (unless supported by regulation, which either demands high standards, or at the very least incentivises the attainment of such standards CSR initiatives are doomed to failure), see I Lynch-Fannon, 'Corporate Social Responsibility Movement and Law's Empire: Is There a Conflict?' (2007) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=988944> at 24 June 2009; R Barkmeyer, 'Legitimacy as a Key Driver and Determinant of CSR in Developing Countries' Paper for the 2007 Marie Curie Summer School on Earth System Governance (2007) 1–23 <<http://www.2007amsterdamconference.org/Downloads/07SummerSchool%20-%20Barkemeyer.pdf>> at 24 June 2009; U E Ite, 'Multinationals and CSR in developing countries: a case study of Nigeria' (2004) 11 *CSR And Environmental Management* 1, 1–11; T McInerney, 'Putting Regulation Before Responsibility: Towards Binding Norms of CSR' (2007) 40 *Cornell International Law Journal* 171.

governance and CSR approaches. The South African government runs a risk of undermining its legitimacy through doing so.