

THE ACCOUNTABILITY OF THE COMPANY TO ITS EMPLOYEES IN TERMS OF THE NEW COMPANIES ACT

R.T. Maddern*

I INTRODUCTION

The Companies Act¹ represents the most comprehensive reform of company law in the Republic of South Africa for 28 years. The Department of Trade and Industry (DTI) in initiating the corporate law reform process recorded the objective as follows:

‘The objective of the review is to ensure that the new legislation is appropriate to the legal, economic and social context of South Africa as a constitutional democracy in an open economy. Where current law meets these objectives, it should remain as part of the common law.’²

Given the stated ambit of this paper, the DTI’s stated intent to secure a policy shift from the ‘traditional shareholder centric approach’, is important to note³. The DTI expressed the view that:

‘Thus, it is proposed that in the running of a modern South African company consideration has to be given not only to economic factors but also to social and environmental ones. This is what King II refers to as a triple bottom line approach. In South Africa, this is particularly true given its peculiar social and political history. On this approach company law review in this country would not only follow the world trends but will take into account the country’s particular circumstances and the legislative environment.

* Richard Thomas Maddern (BA) LLB Wits, Director, Wright Rose-Innes Inc

¹ Act 71 of 2008 Date of Commencement 1 May 2011 (‘the Companies Act’ or ‘the Act’)

² South African Company Law for the Twenty First Century Guidelines for Corporate Perform Notice 1183 of 2004, Government Gazette No. 26493

³ See Note 2, page 2

In view of the above, this policy framework proposes the following model:

“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 stakeholders constituencies”⁴

Given the express policy of the DTI, it came as no surprise then, that the Companies Act⁵ adopts the enlightened shareholder value model. As Carl Stein in his book, *The New Companies Act Unlocked*⁶, records:

‘..... the enlightened shareholder value model which, like the classic model, puts the interests of shareholders first but holds that, in pursuing shareholders’ best interests in the long term, the interests of all other stakeholders including employees, suppliers and creditors, as well as the environment and the community at large, must be considered. The “triple bottom line” concept – that it is good business for companies to be good corporate citizens and to consider social, environmental and economic interests – was favoured by the 2002 King II Report on Corporate Governance. King III goes somewhat further by recommending that companies strive to achieve the correct balance between its various stakeholder groupings, in order to advance the interests of the company. The principles of the King Code are not legally binding except, to some extent, in the case of companies listed on the JSE.

⁴ South African Company Law for the Twenty First Century Guidelines for Corporate Perform Notice 118(3) of 2004, Government Gazette No. 26493, Page 25

⁵ See Note 1 above

⁶ *The New Companies Act Unlocked*, C. Stein with Jeff Everingham, page 8

The enlightened shareholder value model has been adopted by the Act, as it has by most western countries including the UK in its 2005 Companies Act.’

Having adopted the enlightened shareholder value model, the purpose of this paper is to explore the basis on which the Act has done so and to consider some of the implications insofar as the company’s employees are concerned as one of the stakeholder groups, in particular. The position of the company in relation to its employees has changed significantly in the modern world economy, since formulation of the company legislation originally. The 1973 Act and various amendments since, have not taken into account the move from the traditional “master – servant” concept of the role of employees. In addition the role and accountability to organised labour in corporate restructuring and the role of trade unions as an agent and representative of employees in collective bargaining, in particular, is now recognised by a number of provisions of the Act.

II CONCEPTUAL APPROACH ADOPTED BY THE COMPANIES ACT

At first blush, if regard is had to the definition employed by the Act for a ‘profit company’, one might be forgiven in concluding that the Act, instead of adopting the enlightened shareholder value model, appears to have held to the classic model. A profit company is defined as ‘a company incorporated for the purposes of financial gain for its shareholders’⁷. A closer reading of the Act does, however, reveal that this is not so. Section 5(1) confirms that the Act must be interpreted and applied in a manner that gives effect to the purposes set out in Section 7. Section 7, very significantly confirms that:

‘The purposes of this Act are to:

⁷ S 1 of the Act

- (a) Promote compliance with the Bill of Rights as provided for in the constitution in the application of company law;
- (b) Promote the development of the South African economy by:
 - i) encouraging entrepreneurship and enterprise efficiency;
 - ii) creating flexibility and simplicity in the formation and maintenance of companies;
 - iii) **encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;****
- ...
- (d) **reaffirm the concept of the company as a means of achieving economic and social benefits.****
- ...
- (j) **Encourage the efficient and responsible management of companies.****⁸ and
- (k) provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests **of all relevant shareholders*****

The Act goes on to provide:

'When determining a matter brought before it in terms of this Act, or making an order contemplated in this Act –

- (a) a Court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act; and
- (b) the commission, the Panel, the Companies Tribunal or a Court –

**my emphasis

- i) must promote the spirit, purpose and objects of this Act; and
- ii) if any provisions of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.⁹

The reference to the Bill of Rights in expressing the purpose of the Act, reinforces the constitutional supremacy of the South African Constitution. There was no reference to a Bill of Rights in the old Companies Act¹⁰, nor to any of the post 1994 amendments to this Act.

David Bilchitz in his article 'Corporate law and the Constitution'¹¹ comments:

'Inherent in the structure of a company now is the implicit demand that it respect, protect and fulfil human rights to the extent that these rights are applicable to it. The applicability of the Bill of Rights to corporations, in other words, goes beyond purely imposing obligations upon them: it changes the very nature of the corporation in South Africa. Thus, a corporation no longer can claim that its adherence to human rights norms is voluntary. Rather, the exercise of corporate power is only permitted to the extent that it does not violate the human rights of others. The radical nature of this change has perhaps not been noticed until now, but it is a logical outcome of the direct horizontal application of the Bill of Rights to corporations.'

⁹ S 158 of the Act

¹⁰ Act 61 of 1973

¹¹ South African Law Journal 2008 Volume 125 at 781

The Act then, conceptually and fundamentally accepts the point of departure that the modern corporation must promote human rights within its sphere of influence. The single minded pursuit of profit in the interests of the shareholders solely, is a notion which has been displaced. Insofar as employees are concerned, whether the issue is a sweat shop in Mooi River or a mine disaster in Klerksdorp, the power of the modern corporation and correspondingly, its responsibility to its stakeholders, is now unequivocally endorsed by the Act:

‘It is not a question of asking business to fulfil the role of government but of asking business to promote human rights in its own sphere of competence’¹².

III THE CLOSE CORPORATION

In addition to specific incorporation of a reference to the Bill of Rights, the other important conceptual shift endorsed by the Act, is the phasing out of the Close Corporation and the provision for a small private company. In the context of accountability to employees specifically, this is significant. While the large number of close corporations currently in South Africa will be allowed to continue, no new close corporations may be formed either originally or by conversion. The intention is clearly to phase out close corporations over a period of time. The Close Corporation as a vehicle has become a common feature of the South African Corporate landscape and some close corporations are of significant size, both in terms of turnover and in terms of number of employees. The absence in the old Close Corporations Act of a requirement for mandatory audit and disclosure compiled with the relative informality with which Close Corporations were administered has often proved detrimental to employees.

¹² Mary Robinson ‘The Business Case for Human Rights’ in Malcolm MacIntosh (ed) *Visions of Ethical Business* 1998 quoted in Andrew J. Wilson “Beyond Nocal; Conceptual Problems in using international norms to hold transnational corporations liable under the Alien Taught Claims Act, in Olivia d’Schutter (ed) *Transitional Corporations and Human Rights* (2006) 43 at 63 and quoted by David Bilchitz, *supra*, at page 755

Employees have often been at the receiving end of abuse of the Close Corporation's resources and of the corporate personality. The Act now introduces, for all new companies, and those Close Corporations who convert or are required by the Regulations to have annual financial statements audited, increased transparency, accountability and corporate governance requirements, as well as minimum standards for financial statements. The importance of this for employees will become evident as certain of these provisions of the Act are now considered.

IV TRANSPARENCY AND ACCOUNTABILITY TO EMPLOYEES

Stein¹³ comments that the DTI in developing new accountability and transparency requirements have adopted a point of departure based on an assessment of stakeholders risk from the company's activities. Stein summarises the DTI's analysis of employee stakeholders as follows:

'Employees are also suppliers to a company because they supply labour to it in consideration for a salary. Their position differs, however, because they do not deal with a company on an equal footing. They are usually far more dependent on the employer company for their livelihood than a supplier or customer and usually do not have the same wherewithal or knowledge as suppliers or customers in their dealings with the company. Nevertheless, the Department of Trade and Industry again concluded that adequate protection is afforded to employees by other statutes, principally the Labour Relations Act, and other provisions of the Act. Furthermore, where employees are represented by a trade union, they are able to adequately protect themselves by way of agreements between the trade union and the company and are thus not on an

¹³ Stein, above 106

unequal footing in this situation. The Department of Trade and Industry has, however, recognised the important role played by employees and trade unions by giving them a number of rights and remedies under the Act that they never had before. Like customers or suppliers, employees are at risk if the company goes insolvent or experiences financial difficulties and, again, there are number of provisions in the Act which give new or increased rights to employees and trade unions in these circumstances particularly in business rescue proceedings.’

V PUBLIC INTEREST SCORE

As the Act now does away with new Close Corporations, a mechanism had to be found to introduce flexibility in a ‘one-size fits all’ piece of legislation. One of the mechanisms employed by the Act is that of the determination by companies of their public interest score.¹⁴ The explanatory memorandum to the Act records:

‘In order to provide a flexible scheme that balances accountability and transparency, with a lightened regulatory burden, the Act provides for certain common requirements of all companies together with a more demanding disclosure and transparency regime, as set out in Chapter 3 to apply to:

- Public companies which always have greater responsibility to a wider public;
- Certain private companies, which may have a greater responsibility to a wider public as a consequence of their significant social or economic impact’¹⁵

¹⁴ Regulations 26 and 27 of the Act

¹⁵ Explanatory Memorandum to the Act

For the purposes of determining the appropriate financial reporting standard, auditing, independent review, annual returns, the need for a social ethics committee and certain provisions in relation to business rescue, every company is required to calculate its public interest score at the end of each financial year. The public interest score is the aggregate of the following:

- The number of points equal to the average number of employees of the company during the financial year;
- One point for every one million (or portion thereof) in third party liability at the financial year end;
- One point for every one million (or portion thereof) in turnover during the financial year;
- One point for every known individual who, at the end of the financial year, in the case of a profit company has directly or indirectly, a beneficial interest in any of the companies issued securities or in the case of a non-profit company, a member of the company or a member of the association that is a member of the company.¹⁶

In the context of the current analysis, the provision by the Act for the number employees to contribute significantly to the public interest score is a clear recognition of the stake employees have in the company and consequently their right to enhanced accountability, and with that, transparency.

Companies whose public interest score in a financial year is 350 or more will now require audit¹⁷, and while many of these companies (if previously a close corporation) may have historically elected an audit for business reasons, the significance of the provisions of the Act, and Regulations, is that such companies are now deprived of a choice in the matter. The requirement for an audit will in and of itself afford

¹⁶ Regulation 26(2) of the Act

¹⁷ S 30(7)(a) read with Regulation 28(2) of the Act

greater protection to employees. While the requirement for an audit is one directed at large companies, as Stein points out, the Act:¹⁸

‘Creates a clear incentive for companies with public interest scores between 100 and 349 to have an independent compilation ... in order to avert the cost of an audit and the requirement to lodge the annual financial statements which, being audited, are to disclose remuneration of directors and prescribed officers in terms of Section 30(4) of the Act, and are open to public inspection in terms of Section 187(5). Such independent compilation will require an independent review unless the company enjoys the owner/managed exemption of Section 20(2A).¹⁹

The Regulations define “independently compiled and reported” as meaning:

- “That the annual financial statements are prepared:
- i) By an independent accounting professional;
 - ii) On the basis of financial records provided by the company;
 - iii) In accordance with any relevant financial reporting standards.”²⁰

In the case of the smaller company then, an independent review will be of benefit to employees as the Regulations contemplate that any person conducting an independent review has the obligation, in particular, to report to the Commission any “reportable irregularity”.²¹

¹⁸ Regulation 28(2)(c)

¹⁹ Stein above at 129

²⁰ Regulation 26(1)(e)

²¹ Regulation 29(6)(a) ‘An independent reviewer of a company that is satisfied or has reason to believe that a reportable irregularity has taken place or is taking place in respect of that company must, without delay, send a written report to the Commission’

The Regulations go on to provide that the independent reviewer has certain time limits to alert the board of the company, send reports to the Commission, afford members of the board of the company an opportunity to make representations, follow this up with the board, and then, quite significantly, the Regulations provide that should a company be liquidated and an independent reviewer has not sent a report regarding a 'reportable irregularity', then the independent reviewer may be called upon to justify absence of such report. The Regulations specifically contemplate professional sanction²².

Where a company is required to provide audited financial statements, the details in respect of remuneration must now include the remuneration or benefits received as director or prescribed officer of the company. Remuneration has also been afforded a very wide definition and includes fees paid to directors, salary, bonuses and performance related payments and expense allowances, where the director is not required to account for the allowance. It includes contributions paid under any pension scheme not otherwise disclosed and any value of any options or rights given directly or indirectly, financial assistance for the subscription of options or securities or the purchase of securities and loans as well as any other financial assistance if the company is a guarantor of the loan or if the interest is deferred, waived or forgiven.²³

This disclosure requirement will now also apply to prescribed officers who are defined as:

- '(1) Despite not being a director a particular company a person is a "prescribed officer" of the company for all purposes of the Act if that person:

²² Regulation 29(12)(b)

²³ S 30(6)

- (a) exercises general executive control over and management of whole, or a significant portion, of the business and activities of the company; or
 - (b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.
- (2) This Regulation applies to any person contemplated in sub-regulation(1) irrespective of any particular title given by that company to:-
- (a) an office held by the person in the company;
 - (b) a function performed by the person for the company²⁴

The enhanced accountability and disclosure provisions will be of considerable benefit to employees, particularly in the context of collective bargaining.

Given the perennial battle between capital and labour, and more recently, the spectacular corporate failures and what is perceived to be, excessive executive remuneration paid in circumstances where such companies have failed, the provisions of the Act, give employees and their trade unions now access to important and potentially valuable information with regard to remuneration and other benefits paid.

The Act continues to provide for audit committees and company secretaries in respect of certain companies. These provisions existed in the 1973 Act. For the purpose of the present discussion, it is the provisions of the Act providing for a social and ethics committee which

²⁴ Regulation 38

are, comparative to the provisions of the 1973 Act, of greater significance.

VI SOCIAL AND ETHICS COMMITTEE

The Act provides that the Minister may by regulation prescribe categories of companies which shall be required to constitute a social and ethics committee and the functions to be performed, rules governing the composition and conduct of such committees²⁵. The Act indicates that such regulations shall have regard to:

- a) annual turnover;
- b) workforce size;
- c) the nature and extent of the activities of such company.²⁶

The Minister has²⁷ stipulated that every state owned company and listed company and every company that has in two of the previous five years, a public interest score of above 500 points, must appoint a social and ethics committee unless exempted or such company is a subsidiary of another company which will perform the functions so required.

A company's social and ethics committee must comprise of not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day to day management of the company's business and must have been so involved within the previous three financial years.²⁸

Of significance for employees and Trade Unions are the following stipulated functions of the social and ethics committee:

²⁵ S 72(4) of the Act

²⁶ S 72(4)(a) of the Act

²⁷ Regulation 43

²⁸ Regulation 43(4)

- (a) To monitor the company's activities having regard to any relevant legislation, prevailing codes of best practice with regard to:
 - i) OECD recommendations regarding corruption;
 - ii) Employment Equity Act;
 - iii) Broad Based Black Economic Empowerment

- (b) Good corporate citizenship including:
 - i) Promotion of equity;
 - ii) Prevention of unfair discrimination and reduction of corruption;
 - iii) The Environment, Health and Public Safety;
 - iv) Labour and employment including the company's standing in terms of the ILO protocol on decent work and working conditions;
 - v) The company's employment relationships and its contribution towards the educational development of its employees.²⁹

It is the specific mandate in terms of the regulations that the social and ethics committee draw matters within the mandate to the attention of the board.

The social and ethics committee has extensive powers³⁰ to require information from directors and prescribed officers or request information from employees, attend general shareholders meetings and receive notices in relation thereto and be heard at any general shareholders meetings on any aspect which forms part of the business of such committee. The company is also required to pay expenses in relation to the social and ethics committee, which may include the cost

²⁹ Regulation 43(5)

³⁰ S 72(8)

or fees of any consultants or specialists engaged by the social and ethics committee for the performance of its functions.³¹

Given the role of directors and prescribed officers on the social and ethics committee and their mandate and powers, the ineffectual director or prescribed officer would do well to take note of the definition of 'knowing, knowingly or knows' in terms of the Act. This definition is far reaching and provides:

'Knowing, knowingly or knows when used in respect to a person and in relation to a particular matter means that the person either:

- a) had actual knowledge of the matter;
- b) was in a position in which the person reasonably ought to have:
 - i) had actual knowledge;
 - ii) investigated the matter to an extent that would have provided the person with actual knowledge;
 - iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter;³²

VII ROLE OF DIRECTORS IN RELATION TO THE DUTY OF A COMPANY TO ITS EMPLOYEES

In keeping with the global trend to hold directors more accountable for corporate excess and wrongdoing the Act now, in addition to partially codifying the common law duty of directors³³, considerably expands the statutory duties of directors. The most notable of these is the duty to

³¹ S 72(9)

³² S 1: Definitions

³³ S 75 and 76

discharge the solvency and liquidity test,³⁴ in relation to certain key transactions which are designed for the protection of the company's creditors which include its employees. These transactions include the provision of financial assistance in connection with the acquisition by a company of its own securities,³⁵ loans or other financial assistance to directors or prescribed officers and inter-group loans,³⁶ distributions³⁷, issue of capitalisation shares with a cash alternative³⁸, share buy-backs³⁹, amalgamations or mergers⁴⁰, and where a foreign company wishes to transfer its registration to the Republic and become a 'domesticated company'.⁴¹ The inclusion of a test based on both solvency and liquidity extends significantly more protection to creditors, than a test based solely on solvency. A test based solely on whether a company's assets exceed its liabilities would not take into account whether the company would be able to satisfy its debts as they become due and payable.

Where the act requires the solvency and liquidity test to be applied a breach of the statutory duty would render a director liable for any loss, damages or costs sustained by the company as a consequence of any breach.⁴² In this context the director is liable if he is present at a meeting or participated in the making of decision contemplated by the Act⁴³ and failed to vote against the provision of financial assistance in the various circumstances contemplated by the Act⁴⁴ or approved a

³⁴ S 1 with S 4(1) 'For any purpose of this Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time – a) the assets of the company, as fairly valued, equal or exceed the liabilities of the company, as fairly valued; and b) it appears that the company will be able to pay its debts as they become due in the ordinary of business for a period of – i) 12 months after the day on which the test is considered; or ii) in the case of a distribution contemplated in paragraph a of the definition of distribution in Section 1, twelve months following that distribution.'

³⁵ S 44

³⁶ S 45

³⁷ S 46

³⁸ S 47

³⁹ S 48

⁴⁰ S 113

⁴¹ S 13

⁴² S 77(2)(b)ii

⁴³ S74

⁴⁴ S 44 and S 45

distribution,⁴⁵ in circumstances where the solvency and liquidity test and other provisions of the statute have not been complied with⁴⁶.

While the partial codification of the directors' common law duties, coupled with the increased statutory obligations of directors, gives rise to significantly greater exposure of directors to their stakeholders, including employees, this would mean little without the appropriate remedies. In this regard, the Act significantly enhances remedies available to employees and trade unions to proceed against directors who do not properly discharge their duties. These are:

- (a) A trade union may apply to a Court for an Order declaring a director delinquent or placing the director under probation⁴⁷.
- (b) The director is liable for any loss, damage or costs sustained by the company as a direct or indirect consequence of the director having, amongst other things, being party to an act or omission by the Company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company or had another fraudulent purpose⁴⁸.
- (c) A trade union may apply to Court for an Order restraining the company from doing anything inconsistent with the Act⁴⁹.
- (d) As trade unions must be given access to company financial statements for the purpose of initiating business rescue, a trade union may apply to court for an Order directing the company to make available the information⁵⁰.

⁴⁵ S 46

⁴⁶ S 77(3)(e)

⁴⁷ S 162(2)

⁴⁸ S 162(5) (c) (iv)(bb) read with S 77(3)(c)

⁴⁹ S 20(4)

⁵⁰ S 31(3)

- (e) A registered trade union that represents employees or another representative employees of the company may serve a demand on the company to commence or continue legal proceedings or take related steps to protect the legal interests of the company⁵¹.
- (f) The Act provides for criminal penalties involving the imposition of fines or imprisonment up to ten years or both⁵². This is in circumstances where, amongst other things, the person was party to an act or omission by the company calculated to defraud a creditor or employee of the company⁵³.
- (g) While actions against directors may take the form of vicarious claims against the company, the Act also provides for the personal liability of directors. In this regard any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.⁵⁴ This liability may be joint and several with others⁵⁵.
- (h) The Act permits a class action.⁵⁶ While this is not a remedy, the prospect of an enforcement of rights based on contingency fee funding may extend to employees a basis to pursue a remedy against persons, including directors in circumstances where they may well otherwise not have done so.

In the context of the director's responsibility to employees then, the role of director, whilst an onerous one, does not leave the directors without any defences, most notably the newly incorporated business judgment rule,⁵⁷ as well as an opportunity to be relieved of responsibility in circumstances where it appears to the Court that the director may be

⁵¹ S 165(2)9c)

⁵² S 216

⁵³ S 214(1)(c)

⁵⁴ S 218(2)

⁵⁵ S 77(8)

⁵⁶ S157(1)(c)

⁵⁷ S 46(4)(a)

liable but, nevertheless, acted honestly and reasonably in all the circumstances of the case, and it would be fair to excuse the director⁵⁸.

‘Directors have considerable powers. However, with great powers, comes great responsibility. If directors are found wanting in the proper discharge of their duties, they must receive a meaningful punishment. There is nothing wrong with this approach. The challenge which faced the architects of the Act was to strike a careful balance between adequate monetary sanctions and over exposure to financial risk. This is vital, particularly because there is a dearth of non-executive directors in South Africa who have the necessary experience and skills required to properly discharge their duties. Only time will tell whether this balance has been achieved.’⁵⁹

VIII BUSINESS RESCUE

Business rescue is an entirely new system in the Act. It replaces judicial management and in essence involves a structured regime affording opportunity to a financially sick company to be placed in intensive care to return to health. This rescue process is typified by a temporary reprieve from creditors claims⁶⁰.

In relation to business rescue proceedings a registered trade union representing employees, and, in the absence of such representation each of those employees or their respective representatives are, together with the shareholders and creditors, regarded as ‘affected persons’.⁶¹ By defining trade unions and employees as ‘affected persons’, they are ascribed significant rights and protection in relation to financially distressed companies. The most notable of these rights is

⁵⁸ S 77(9)

⁵⁹ Stein page 255

⁶⁰ S 133 of the Act

⁶¹ S 128(1)(ii) and (iii)

the prospect of an affected person applying to Court at any time for an Order placing the company under supervision and commencing business rescue proceedings⁶². The other important rights acquired by trade unions and employees are:

- (a) To receive the resolution of the board to begin business rescue proceedings⁶³;
- (b) To be told why the board has not passed a resolution to begin business rescue proceedings⁶⁴;
- (c) To apply to set aside the resolution of the Board⁶⁵;
- (d) To apply to set aside the appointment of the business rescue practitioner or require the business rescue practitioner to provide security⁶⁶;
- (e) To be notified of any application for business rescue⁶⁷;
- (f) To participate in the hearing of any application to Court for business rescue⁶⁸;
- (g) To apply to Court for an Order placing the company under supervision and commencing business rescue proceedings⁶⁹.

In the context of trade unions and employees considering the merits of a business rescue application, an interrogative, pro-active stance should be adopted with a view to ensuring that business rescue proceedings are only embarked upon where there is a sufficient likelihood of the company becoming solvent or being placed in a better position for creditors. Business rescue should be opposed, in particular, where there is a significant prospect of abuse involving the dissipation of assets. Business rescue should in such circumstances also be opposed on the basis of the incurring of unnecessary

⁶² S 31(1)

⁶³ S 129(3)(a)

⁶⁴ S 129(7)

⁶⁵ S 130(1)(a)

⁶⁶ S 130(1)(b) and (c)

⁶⁷ S 130(3)

⁶⁸ S 130 (4)

⁶⁹ S 131(1)

expenditure in relation to the appointment of the business rescue practitioner and related compliance costs.

Once a company is placed under business rescue the 'affected persons' continue to have significant rights, most notably:

- (a) Within ten business day after being appointed the business rescue practitioner must convene a first meeting of employees representatives to table the view of the practitioner as to whether or not there exists a reasonable prospect of rescuing the company and the employees' representatives are then afforded an opportunity to determine whether an employees' committee should be appointed and if so, may then proceed to appoint the members of such committee. All trade union representatives must be given notice of the meeting.⁷⁰
- (b) To request the removal and replacement of a business rescue practitioner⁷¹;
- (c) To be consulted by the business rescue practitioner during the development of the business rescue plan, and be afforded sufficient opportunity to review any such plan and prepare any submissions to be tabled before the requisite meeting to determine the future of the company⁷²;
- (d) To be present at, and make submissions to, the meeting to determine the future of the company⁷³;
- (e) To vote with creditors on a motion to approve a proposed business plan, to the extent that the employees are creditors⁷⁴;
- (f) Should the proposed business plan be rejected the employees then have the right to propose the development of an alternative

⁷⁰ S 148

⁷¹ S 139(2)

⁷² S 144 (1)(d) read with S 141(d)

⁷³ S 144(1)(e) read with S 151

⁷⁴ S 144(1)(f)

plan or present an offer to acquire the interests or one or more affected persons (management/employee buyout)⁷⁵.

Trade Union and Employee Representatives have an important role in voting to approve a business rescue plan. A proposed business rescue plan will be approved on a preliminary basis if supported by holders of more than 75%⁷⁶ of the creditors' voting interests that were voted and the votes in support of the proposed plan include at least 50% of the independent creditors' voting interest. In this context, to the extent that any remuneration or reimbursement for expenses or other amount of money is due to employees at any time before the commencement of business rescue proceedings, the employee is regarded as a preferred unsecured creditor.⁷⁷

A business rescue plan that has been adopted, is binding on the company and on each of the creditors of the company and every holder of the company securities, whether or not such person was present at the designated meeting or voted in favour of the plan or in the case of any creditor, approved any claim⁷⁸. If a business rescue business plan has been approved and implemented, no creditor is entitled to enforce any debt owed by the company immediately before the beginning of the rescue process, except to the extent provided for in the business rescue plan. This would include employees.⁷⁹

The rights of employees in terms of the Labour Relations Act are reserved should the business rescue plan identify retrenchment of any employees.⁸⁰ Further, during business rescue, the rights of employees are protected by virtue of the restriction on any business rescue practitioner suspending any provision of any employment contract. Consequently, during business rescue proceedings, employees will

⁷⁵ S 144(1)(g) read with S 153(1)(b)(ii)

⁷⁶ S 152(2)

⁷⁷ S 144(2)

⁷⁸ S 152(4)

⁷⁹ S 154(2)

⁸⁰ S 136(1)(b)

continue to be employed on the same terms and conditions unless they agree to the contrary⁸¹.

In the context of business rescue, the significant promotion of employees' rights, both in terms of content and form, in parallel with the rights of creditors, constitutes a significant advancement for employees in keeping with one of the stated purposes of the Act.⁸²

IX WHISTLE BLOWERS

Whilst employees have existing protection in terms of the Protected Disclosures Act 2000, the Act makes specific reference to registered trade unions representing employees of a company, in affording protection in respect of disclosures contemplated by the Act to the Commission, the Companies Tribunal, the Panel, a regulatory authority, the Stock Exchange, a legal advisor, a director, a prescribed officer, companies secretaries, auditors and any person performing the function of internal audit or any board or committee of the company and in respect of such disclosures, a trade union would enjoy qualified privilege and immunity from any civil, criminal or administrative liability⁸³. Public companies or state owned companies are required to maintain a system to receive disclosures contemplated by Section 159 confidentially and then act on them⁸⁴.

⁸¹ S 136(1)

⁸² S 7(k)

⁸³ S 159(4) read with S 159(3)(a)

⁸⁴ S 159(7) read with Regulation 131

X CONCLUSION

‘Over the past twenty years, corporate governance has seen a surge in interest with regard to corporate responsibilities to society. Often, these interests have not been imbedded in statutes but instead have been implemented through guidelines and codes. The Companies Act directly provides a clear framework for the empowerment of stakeholders and includes a directive that companies operate to enhance not only shareholder profits but also societal welfare. To ensure that these purposes are fulfilled, the South African government has provided greater power in governance decisions than is typically found in most other general corporate statutes’⁸⁵.

Having created significant new rights for stakeholder employees and their unions, it remains for employees and their unions to educate themselves on their rights and the significant new remedies open to them, and pursue them diligently and responsibly.

⁸⁵ John F. Olson, *Modern Company Law for a Competitive South African Economy*, page 219