AN EXAMINATION OF THE SOUTH AFRICAN CORPORATE LAW THROUGH THE LENS OF UBUNTU

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*by Siphethile Phiri**

Abstract

This article submits that ubuntu is indubitably a constitutional value which informs the constitutional era. Constitutional supremacy mandates that all values and principles of the Constitution must be observed to avoid invalidation. As a result of this constitutional obligation, this article intends to examine the inclusion of ubuntu as a constitutional principle in South African corporate law. To achieve this objective, the article employs doctrinal legal research methodology, also known as the black letter law, which encompasses scrutiny of various relevant legal sources. This research methodology is selected due to its ability to address the question of what the law is. In this case, the article intends to determine the position of ubuntu as a constitutional principle in the context of the South African corporate law. The conclusion reached is that the South African corporate law contains significant traces of the ontological elements of ubuntu. This is reinforced by the clear correlation between the values of ubuntu and corporate law principles. Accordingly, several South African corporate law concepts seem to correlate with the principles of ubuntu. A number of examples are expounded upon. Nonetheless, there is still no express inclusion of ubuntu in corporate law.

* LLD Candidate in Mercantile Law (UNISA).

1 An overview of ubuntu

Since the judgment of *S v Makwanyane and Another*,[1] (*Makwanyane*) ubuntu has been widely accepted as a constitutional value because of its equal status with the constitutional right of human dignity.[2] In *Makwanyane*, Sachs J emphasised that it was important to give 'long overdue recognition to African law and legal thinking as a source of legal ideas, values, and practices'.[3] Ubuntu also reflects constitutional imperatives such as equality and the advancement of human rights and freedoms.[4] Although the object of this paper is not to define the philosophical meaning of ubuntu, it is imperative to give a brief overview of what ubuntu entails within the ambit of the Constitution.

Owing to its African origin, ubuntu is not easily definable in English. Mokgoro submits that 'defining an African notion in a foreign language and from an abstract, as opposed to a concrete approach, defies the very essence of the African worldview and may also be particularly illusive'.[5] Ubuntu originates from the popular Nguni idiom that '*umuntu ngumuntu ngabantu*' which directly translates to a 'person is a person through other persons'.[6] Thus, ubuntu involves an interdependent relationship of persons and a sense of communality.[7] Ubuntu is also translated to refer to humaneness, personhood, and morality.[8]

Mokgoro further adds:

> These African values which manifest themselves in *ubuntu/botho* are in consonance with the values of the Constitution generally and those of the Bill of Rights in particular. The values of *ubuntu*, I would like to believe, if consciously harnessed can become central to a process of harmonising all existing legal values and practices with the Constitution. *Ubuntu* can therefore become central to a new South African jurisprudence and to the revival of sustainable African values as part of the broader process of the African renaissance.[9]

1 1995 3 SA 391 (CC).
2 JY Mokgoro 'Ubuntu and the law in South Africa' (1998) 1(1) *Potchefstroom Electronic Law Journal* 16-32, M Thaddeus 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law* at 532-559; C Himonga et al 'Reflections on judicial views of ubuntu' (2013) 16(5) *Potchefstroom Electronic Law Journal* at 371-429.
3 *Makwanyane* (n 1) para 365.
4 Constitution of the Republic of South Africa, 1996 sec 1(a).
5 Mokgoro (n 2) 1. See also DM Tutu *No future without forgiveness* (1999) Rider, London at 34-35, where he argues that 'ubuntu is very difficult to render into Western language'.
6 AD Breda 'Developing the notion of ubuntu as African theory for social work practice' (2019) 55(4) *Social Work* at 439.
7 Mokgoro (n 2) 19.
8 As above.
9 Mokgoro (n 2) 10-11.

> In the African perception, human beings are considered in a communal sense, as opposed to the individualistic, Eurocentric perspective.[10] In accordance with ubuntu, a person is a human being by becoming a part of a an already existing and continuing community that considers the living, the living dead and the yet to be born.[11]

The communal understanding of the concept of ubuntu plays an imperative role in the South African corporate law. This is revealed through corporate law concepts such Corporate Social Responsibility (CSR), Corporate Legal Responsibility (CLR) and Environmental, Social and Corporate Governance (ESG) which l shall examine in paragraph 4 below.

2 Ubuntu as a principle of transformative constitutionalism

Ubuntu is one of the principles which has influenced transformative constitutionalism in South Africa, among the need to promote equality, freedom, dignity and other fundamental principles.[12] In the interim Constitution,[13] as opposed to the final Constitution, ubuntu was expressly stated as a founding value.[14] Although the Constitution does not expressly stipulate that ubuntu must be applied, ubuntu has nonetheless been accepted as an over-arching and a key principle of transformative constitutionalism.[15] Consequently, it has been widely accepted that ubuntu is an implied constitutional value because of its equal status to human dignity.[16]

Kroeze[17] highlighted the constitutional importance of ubuntu, namely that it gives content to rights, as a constitutional value[18] and the limitation of rights, as part of the values of an open and democratic society. This submission is absolutely accurate since

10 K Grootboom ‘Abstract v substantive equality — A critical race theory analysis of “hate speech” as considered in the SAHRC-report on utterances made by Julius Malema’ (2019) 13 *Pretoria Students Law Review* at 113.

11 Grootboom (n 10) 113; JK Khomba et al ‘Shaping business ethics and corporate governance: An inclusive African ubuntu philosophy’ (2013) 13(5) *Global Journal of Management and Business Research* at 31-42.

12 Constitution (n 4) sec 1(a)-(d).

13 Interim Constitution of the Republic of South Africa Act 200 of 1993.

14 Interim Constitution (n 13) at 114.

15 Himonga et al (n 2) at 380.

16 *Makwanyane* (n 1) para 311; See also article 27.7 of the African Charter on Human and People’s Rights which imposes a duty on an individual to strengthen cultural values in a spirit of tolerance.

17 IJ Kroeze ‘Doing things with values II: The case of ubuntu’ (2002) 13 *Stellenbosch Law Review* at 252-253.

18 For example, the Constitutional rights to: equality (sec 9), human dignity (sec 10), freedom and security of a person (sec 12), privacy (sec 14), assembly, demonstration, picket and petition (sec 17), freedom of association (sec 18), freedom of movement and residence (sec 21), freedom of trade, occupation and profession (sec 22), labour relations (sec 23), environmental rights (sec 24) & access to information (sec 32).

ubuntu recognises communal existence, which required respecting the rights of others for a harmonious co-existence.[19] As a result, certain rights can be limited to avoid a conflict of people's rights. Thus, individuals' rights are exercised within the context of the entire or in relation to the needs of the entire community.[20] Therefore, ubuntu is based on the primary values of humanness, caring, respect and ensuring quality community life in the spirit of family.[21]

The connection between the limitation of rights by ubuntu and the limitation by the Constitution illustrates that both systems acknowledge that no right is absolute. The limitations clause[22] contained in Section 36 of the Constitution may be considered as a rights-balancing mechanism, which is partially influenced by ubuntu.[23] This is attributed to the fact that the constitutional limitation of rights, as in African communities, aims to promote peaceful co-existence among individual claimants of Constitutional rights.[24] For instance, section 16(2) of the Constitution limits the fundamental right to freedom of expression to exclude:

> (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Again, for the limitation of a fundamental right or freedom to be permissible, it has to pass the test of reasonability and justifiability in an open democratic society based on human dignity, equality and freedom.[25] The limitation of fundamental rights and freedoms is meant to promote peaceful coexistence within a community. If rights are left unlimited such will result in the infringement of the rights of others. Which might result in chaos and scramble for survival within the community. For instance, the right to freedom of expression if not properly managed may result in enticement of violence or hatred. The constitutional qualification that a democratic society must be based on human dignity, equality and freedom reverts back to ubuntu, which is of equal status with human dignity.[26] The provision of section 36 of the Constitution may be summed up to indicate that, rights may be limited in order to promoted peaceful coexistence. Which in the African philosophy can be interpreted to mean the promotion of ubuntu.

19 Grootboom (n 10).
20 As above.
21 CI Tshoose 'The emerging role of the constitutional value of ubuntu for informal social security in South Africa' (2009) 3 *African Journal of Legal Studies* at 13; SB Radebe & MR Phooko 'Ubuntu and the law in South Africa: Exploring and understanding the substantive content of ubuntu' (2017) 36(2) *South African Journal of Philosophy* at 240.
22 Sec 36 of the Constitution.
23 See Mokgoro (n 2) 25.
24 As above.
25 Constitution (n 3) sec 36(1).
26 *Makwanyane* (n 1) para 311.

Ubuntu is considered an integral part of the Constitution. Sachs J in *Dikoko v Mokhakla*[27] (*Dikoko*) held that ubuntu is 'intrinsic to and constitutive of our constitutional culture'[28] and it supports the whole constitutional order.[29] It combines individual rights with a communitarian philosophy.[30]

In *Dikoko*, Sachs J portrays ubuntu as a fundamental constitutional value.[31] Despite its importance and influence, ubuntu has been facing exclusion in the South African law, which previously mainly consisted of Roman-Dutch and English law.[32] The formal recognition of indigenous law in the South African legal system is a recent phenomenon.[33] Although ubuntu is not a Western concept, its respect for human rights and human dignity aligns it to the Constitution and, more specifically, the Bill of Rights.[34]

However, ubuntu still poses the serious challenge of being either under- or over-explained.[35] This is due the difficulties in finding a precise definition of the concept.[36] This challenge is the main reason for the irregular and inconsistent application of ubuntu even by courts.[37]

Thus, although the Constitution does not have an express provision on ubuntu, ubuntu is recognised as the founding provision of the Constitution and has been applied in many instance as such.[38] The exclusion of this influential African philosophy from being an express founding principle might be due to Bhengu's observation that the three founding principles of the Constitution (equality, freedom and dignity) are of Western origin.[39] Hence, the Eurocentric nature of the Constitution led to the silencing of ubuntu.[40] Bhengu's submission exposes that the express founding values of the Constitution originate from the Western philosophical view that 'one is born a human and

27 2006 6 SA 235 (CC).
28 *Dikoko* (n 27) at 235.
29 *Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37.
30 As above.
31 *Dikoko* (n 27) at 235.
32 WJ Hosten et al *Introduction to South African law and legal theory* (1995) at 1268.
33 J Church 'The convergence of the western legal system and the indigenous African legal system in South Africa with reference to legal development in the last five years' (1999) *Fundamina* at 8; J Church 'The Place of Indigenous Law in a Mixed Legal System and a Society in Transformation: A South African Experience' (2005) *Australia & New Zealand Law & History E-Journal* at 94-106.
34 Himonga et al (n 2) 382-383.
35 R English 'Ubuntu: the quest for an indigenous jurisprudence' (1996) *South African Journal on Human Rights* at 645.
36 As above.
37 As above.
38 Himonga et al (n 2) 369; *Makwanyane* (n 1) para 224; *Hoffmann v South African Airways* 2001 1 SA 1 (CC). fn 31.
39 MF Bhengu *Ubuntu: The essence of democracy* (1996) at 4; Grootboom (n 10) 112.
40 As above.

therefore deserving equal treatment, freedom and dignity'.[41] The Eurocentric notion of human beings is individualistic in nature.[42] The Eurocentric viewpoint of what a human being is, is different from the African philosophical notion of a human being. In the African philosophy one is a human being through communal interactions (*umuntu ngumuntu ngabantu)*.[43]

In the African philosophy of *ubuntu,* the definition of a human being is communal and not individualist. The community-based viewpoint of a human being has given birth to the famous African idioms such as *umuntu ngumuntu ngabantu* (a person is a person because of others),[44] and *inkosi yinkosi nga bantu bayo* (a king is a king because of his people).[45] The way in which the Ndebele tribe from Zimbabwe greet each other, portrays communalism spirit. One will greet by saying '*linjani*' ('How are you?' in plural) and the responder will say '*sikhona*' ('we are fine' as opposed to 'I am fine').[46] The 'li' prefix is in plural which illustrates the value placed on communality. Nonetheless, the express exclusion of the African philosophy of ubuntu due to Eurocentric constitutional influence does not in any way render ubuntu less important or irrelevant in the South African legal system.

3 The introduction of ubuntu into South African corporate law

Courts have attempted to define and interpret *ubuntu* as a 'culture' and philosophy of the African people which expresses compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community, which combines individuality with communitarianism.[47]

In *S v Mhlungu*,[48] Sachs J, in advocating for the incorporation of the history of South Africa in decision-making by the courts, held:

41 Bhengu (n 39) 4; Grootboom (n 10) 112.
42 As above.
43 MB Ramose 'An African perspective on justice and race' (2001) 3 *Polylog: Forum for Intercultural Philosophy* at 12; Tutu (n 5) 34-35.
44 N Ifejika 'What does ubuntu really mean?' (2006) *The Guardian* What does ubuntu really mean? | | The Guardian (accessed 09 August 2023).
45 SJ Ndlovu-Gatshen 'Inkosi yinkosi ngabantu: an interrogation of governance in precolonial Africa — the case of the Ndebele of Zimbabwe' (2008) 20 *Southern African Humanities* at 1.
46 S Phiri 'An examination of the inclusion of certain principles of transformative constitutionalism in South African corporate law' unpublished, LLD Dissertation, University of South Africa, 2021 at 155.
47 For instance, *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37; *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2006 6 BCLR 728 paras 62–63.
48 1995 7 BCLR 793 (CC).

> We are a new Court, established in a new way, to deal with a new Constitution. We should not rush to lay down sweeping and inflexible rules governing our mode of analysis. We need to develop an appropriately South African way of dealing with our Constitution, one that starts with the Constitution itself, acknowledges the way it came into being, its language spirit, style and inner logic, the interests it protects and the painful experiences it guards against, its place in the evolution of our country, our society and our legal system, and its existence as part of a global development of constitutionalism and human rights.[49]

Courts have encouraged the application of ubuntu in decision-making.[50] *Mhlungu* did not only pave the way for the application of indigenous values which stem from ubuntu, but also urged courts to reflect on *ubuntu* in decision-making.[51]

In the Constitutional Court in *Hoffmann v South African Airways*[52] (*Hoffmann*) Ngcobo J promoted the constitutional rights to equality and human dignity by expressly applying ubuntu, and held that ubuntu must be showed towards HIV patients.[53] The ruling of the Court is based on the observation that, in ubuntu, all human beings are equal and deserve respect regardless of their status or any other qualification.[54] Bhengu asserts that if a nation follows the principles of ubuntu, there will be no discrimination.[55] This aligns with ubuntu as defined in *Hoffmann* to mean, 'the recognition of human worth and respect for the dignity of every person'.[56]

This indicates that the courts view ubuntu through the same lenses as African communities which consider ubuntu as including human dignity.[57] In the African community one deserves respect by mere fact of being a human being within a community.[58] A person is treated with dignity and respect regardless of their status or any qualification. This was also demonstrated in the leading case of *Makwanyane* where the Constitutional Court related the protection of human dignity to the concept of ubuntu.[59] In that case, the influence of ubuntu was central in the development and promotion of the entrenched constitutional rights by the Constitutional Court.[60]

49 *S v Mhlungu* 1995 7 BCLR 793 (CC) para 127.
50 As above.
51 S Netshitomboni 'Ubuntu: Fundamental constitutional value and interpretive aid' unpublished Master of Laws dissertation, University of South Africa, 1998 at 20.
52 2001 1 SA 1 (CC).
53 *Hoffmann* (n 52) para 38.
54 As above; Church (n 33) 102.
55 Bhengu (n 39) 38.
56 *Hoffmann* (n 52).
57 As above.
58 Bhengu (n 39) 58.
59 *Makwanyane* (n 1) para 481.
60 *Makwanyane* (n 1) para 302.

Similarly, corporations, when conducting their business, may not include contract terms which are against ubuntu.[61] To exhibit the influence of u*buntu* in corporate contracts, in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*[62] (*Mohamed*) the counsel for the respondent contended that:

> … public policy is informed by the concept of good faith, ubuntu, fairness and simple justice between individuals … we are obliged, in construing the impugned clause, to promote the spirit, purport and objects of the Bill of Rights as contemplated in s 39(2) of the Constitution. In other words, we must interpret it through the prism of the Bill of Rights. In essence, the case advanced for the respondent is that the principle of *pacta sunt servanda* is not a sacred cow that should trump all other considerations.[63]

It was held further in that case that, 'the spirit of good faith, *ubuntu* and fairness require that parties should take a step back, reconsider their position and not snatch at a bargain at the slightest contravention'.[64] And that, 'the values embraced by an appropriate appreciation of *ubuntu* are also relevant in the process of determining the spirit, purport and objects of the Constitution'.[65] Reference was also made to *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[66] (*Everfresh*) where it was held as follows:

> Good faith is a matter of considerable importance … and the extent to which our courts enforce the good faith requirement … is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. The issue of good faith … touches the lives of many ordinary people in our country.[67]

In the above judgments, the term 'good faith' was used extensively. Therefore, it is imperative to find the definition meaning of the term. Good faith has been defined to mean 'honesty' or 'sincerity of intention'.[68] The need to act in honest and sincerity bears the elements of ubuntu which can been seen in a number of corporate law aspects.[69]

61 *Hoffmann* (n 52) para 38; fn 31.
62 [2017] ZASCA 176.
63 *Mohamed* (n 62) para 12.
64 *Mohamed* (n 62) para 16.
65 *Mohamed* (n 62) para 17.
66 [2011] ZACC 30, 2012 1 SA 256 (CC).
67 Above para 22.
68 Cambridge dictionary available at GOOD-FAITH | English meaning - Cambridge Dictionary (accessed on 16 August 2023).
69 See for instance sec 76(3)(a) of the Act.

Courts should accept overall responsibility of giving content to all the constitutional values, including ubuntu as implied constitutional value which the Constitution seeks to promote.[70] Emphasis placed on human dignity and social justice in the Constitution accepts that these values must be given an indigenous perspective.[71] In *Everfresh,* the Constitutional Court emphasised that, when developing common law, the courts must infuse the law with the constitutional values,[72] these includes values of ubuntu which inspire much of the constitutional compact.

4 Ubuntu and the South African Corporate Law

Similar to the Constitution, the Companies Act[73] (hereafter the Act) which is South Africa's main corporate law statute, does not have an express provision on ubuntu. However, the traces of ubuntu are seen in many of its provisions, as will be shown below. Thus, although not expressly stated, ubuntu has in many ways been included in South African corporate law.

Section 22(1)(a) of the Act prohibits a company from engaging in reckless trading with gross negligence, with the intent to defraud any person or for any fraudulent purpose. Personal liability is imposed on directors of a company who engaged in prohibited conduct.[74] To curb the abuse of a juristic personal, section 20(9) of the Act gives the courts the discretion to lift the corporate veil where there is 'unconscionable abuse' of juristic personality.[75] In *Ex Parte: Gore NO and Others*[76] (*Ex Parte: Gore*) the Court found irregularities and dishonesty in the management of a group of companies owned by the three brothers.[77] The group of companies were managed as a single entity through the holding company.[78] The Court held that the Group was a mere sham aimed at deceiving the shareholders.[79] This resulted in the Court disregarding the separate legal personality of the subsidiary companies and treating them as one entity with the holding company.[80]

In the modern era of transformative constitutionalism, which requires that ubuntu must be promoted, it will be accurate to submit

70 Constitution (n 4) sec 39.
71 Kroeze (n 17) 252-253; Netshitomboni (n 51) 20.
72 *Everfresh* (n 66) para 34.
73 71 of 2008.
74 See also secs 20(9), 163(4) of the Act.
75 See S Phiri 'Piercing the corporate veil: A critical analysis of section 20(9) of the South African Companies Act 71 of 2008' (2020) 1(1) *Strategy Corporate & Business Review* at 17-26.
76 (18127/2012) [2013] ZAWCHC 21; [2013] 2 All SA 437 (WCC) (13 February 2013).
77 *Ex Parte: Gore* (n 76) para 8.
78 As above.
79 *Ex Parte: Gore* (n 76) para 15.
80 *Ex Parte: Gore* (n 76) para 37.

that the conduct of directors which infringes on the values of ubuntu, qualify as 'unconscionable abuse' of corporate personality. These include conduct such as dishonesty and irregularities as stipulated in *Gore*. This illustrates that the term 'unconscionable abuse' extends to those grounds prohibited in the ubuntu context.

Ubuntu describes human beings in their relationship with the community as a collective entity.[81] Thus, the impact of one's conduct on others and the surrounding environment is of considerable importance. Similarities can be seen with corporate law concepts such as CSR, CLR and the ESG, which require and oblige companies to consider the impact of companies' activities on its employees and the surrounding environment at large. Ubuntu is associated with concepts such as humanness, interconnectedness and concern for others, which is consistent with CSR, CLR and ESG values.[82] These corporate law concepts have been incorporated into the Act. For instance, section 72(4) of the Act requires certain categories of companies to have a Social and Ethics Committee (SEC). The determination to have a SEC is based on public interest consideration.[83] Companies have both a statutory and a constitutional obligation to act considerate towards the environment in which they operate.[84] Therefore, companies must ensure that they treat their environment with care and harmony at all the times, which is similar to the concept of ubuntu.

Woerman and Engelbrecht, in their paper in which they explore the manner and the extent in which ubuntu can serve as an alternative theory for determining the responsibility of companies towards third parties, subscribe to the relationholder theory, as opposed to the stakeholder theory.[85] Relationholder theory is premised on ubuntu, which renders it more accommodative to the interests of various stakeholders on moral bases to promote a harmonious relationship with the parties which the company communes with, as opposed to their stakes.[86] Woerman and Engelbrecht propose that CSR must now be viewed through the lens of a harmonious relationship between the company and the surrounding community and not stakeholder interests.[87] This is attributable to the fact that, ubuntu and relationholder theory grounds the responsibility of companies towards different parties involved with the company solely on the existing relationship with the company.[88] A company in

81 L Mbigi & J Maree *Ubuntu: The spirit of African transformation management* (1995) at 75.
82 As above.
83 Sec 72(4) of the Act.
84 Eg. Sec 72(4) of the Act; Ch 7 of NEMA and sec 24 of the Constitution.
85 M Woerman & S Engelbrecht 'The ubuntu challenge to business: From shareholders to relationholders' (2019) 157 *Journal of Business Ethics* at 28.
86 Above at 29-30.
87 Woerman & Engelbrecht (n 85) 30.
88 Woerman & Engelbrecht (n 85) 31.

the ubuntu perspective is not a nexus of contracts, as it is described by the stakeholder theory, but instead as a nexus of relationships or communality.[89] However, based on Du Plessis et al's definition of stakeholder that it refers to an individual or group of individuals who are affected by the activities of a company,[90] such as customers, suppliers, employees, creditors, and the environment. There is a close relationship between stakeholder and relationholder theory in that they both foster communal consideration. Therefore, Woerman and Engelbrecht seem not to be introducing any new concept. Philips et al describes stakeholder theory as a theory which involves ethics,[91] which is similar to Woerman and Engelbrecht's submission.

Makwara et al also advocate for the inclusion of the African ethical ethos, such as ubuntu, in the regulation African business practices because the Western theories fail to align with the moral values of many African communities.[92] Ubuntu, it should be borne in mind, is a 'code of ethics and behavior and it honors the dignity of others and development and continuous mutual affirming and enhancing relationships'.[93] This is because ubuntu does not only give an understanding of what being is, but also of what 'being with others' entails.[94] Ethical business practice entails appreciating the importance of human dignity.[95] Khomba et al state that:

> 'Ethical behavior is characterised by unselfish attributes which balances what is good for an organisation with what is good for the other stakeholders as well. Thus, business ethics embrace all theoretical perspectives of competing economic and societal systems.'[96]

Ubuntu is demonstrated through care and compassion. Thus, companies, through the lens of ubuntu, have a moral responsibility to affirm and enhance humanity.[97] In corporate law, this relates to a number of aspects such as the stakeholder-inclusive value approach and enlightened shareholder value approach. The stakeholder inclusive value approach requires that the company directors, in conducting the fiduciary duties in the best interest of a company,

89 Woerman & Engelbrecht (n 85) 31.
90 Du Plessis, J McConvill & M Bagaric *Principles of contemporary corporate governance* (2005) at 16.
91 R Phillips, E Freeman & A C Wicks 'What stakeholder theory is not' (2003) 13(4) Business Ethics Quarterly at 480.
92 T Makwara, DY Dzansi & C Chipunza 'Contested notions of ubuntu as a Corporate Social Responsibility (CSR) theory in Africa: An exploratory literature review' (2023) 15 *Sustainability*.
93 B Nussbaum 'Ubuntu: Reflections of a South African on our common humanity Reflections' (2003) 17(1) *World Business Academy* at 2.
94 Grootboom (n 10).
95 S M Byars & K Stanberry *Business ethics* (2018) at 9.
96 Khomba et al (n 11) 32.
97 Woerman & Engelbrecht (n 85) at 31.

must consider the interests of all stakeholders, in and out the company.[98] This approach is confirmed by the modern consideration of a company as both a social and economic tool.[99]

Section 7(d) of the Act provides that the Act as its object aims to reaffirm the concept of the company as a means of achieving economic and social benefits. This reinforces the triple bottom approach, which requires a consideration of the impact of corporate activities on three parts i.e., the society, environment, and economy in which a company operates in.[100] The enlightened shareholder value approach, on the other hand, supports a traditional consideration of a company.[101] It regards a company as an economic tool, incorporated to generate profits for the shareholders.[102] However, in terms of the enlightened shareholder value approach, interests of other stakeholders may be considered if such is to the benefits of the shareholders.[103] The enlightened shareholder value approach opens room for consideration of communal interests even though such considerations are subject to the benefit of shareholders,[104] this illustrates that this approach does not completely neglect the fact that a company cannot achieve success in isolation.

South African corporate law, similar to the Constitution,[105] has limited the constitutional freedom of expression.[106] For instance, freedom of expression in corporate law is limited when comes to the choice of a company name.[107] The selection of an appropriate company name is an essential aspect in corporate law.[108] Although companies for the most part enjoy the freedom to choose whatever name they consider fit, companies may not use names which fall within the ambit of section 16(2) of the Constitution. Section 16(2) of the Constitution imposes a justifiable limitation on the right to freedom of expression. The limitation set out in section 16(2) of the Constitution in substance has a reflection of ubuntu. This is because

98 IM Esser 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1' (2017) 50(1) *De Jure* at 98-99.
99 Sec 7(d) of the Act.
100 P Księżaka & B Fischbach 'Triple bottom line: The pillars of CSR' 2017 4(3) *Journal of Corporate Responsibility and Leadership* at 99-106.
101 S Kiarie 'At crossroads: Shareholder value, stakeholder value and enlightened shareholder value: Which road should the United Kingdom take?' (2006) *International Company and Commercial Law Review* 17(11) at 332.
102 As above.
103 T Wiese 'Corporate governance in South Africa with international comparisons' (2017) Juta: Cape Town 8; BM Mupangavanhu 'Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for corporate governance' (2016) unpublished PhD thesis, University of Cape Town at 51.
104 Mupangavanhu (n 103).
105 Constitution (n 4) sec 16(2).
106 See for instance sec 11(2)(a)-2(c) of the Act.
107 As above.
108 MF Cassim et al *Contemporary company law* (2012: Juta) at 113.

ubuntu like other constitutional values does not promote (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Rather it promotes peaceful community existence.

The criteria for choosing a suitable company name is regulated by section 11 of the Act. When choosing a suitable name, the incorporators of a company must consider the provisions of this section together with section 16(2) of the Constitution. As a result, a company is prohibited to use a name which is misleading,[109] constitute — (i) propaganda for war; (ii) incitement of imminent violence; or (iii) advocacy of hatred based on race, ethnicity, gender or religion, or incitement to cause harm.[110]

In *Islamic Unity Convention v Independent Broadcasting Authority*,[111] (*Islamic Unity Convention*) the Constitutional Court, in limiting the freedom of expression, held that:

> Certain expressions do not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect to.[112]

Since ubuntu is equated to human dignity, limiting the constitutional right to freedom of expression on the basis that it violates dignity and other values of the Constitution signals that ubuntu is carried through Constitution.

Furthermore section 12(1) of the Constitution provides that everyone has a right to freedom and security of the person. This constitutional right entails that every person must be protected from any potential harm.[113] This constitutionally protected freedom has also found its way into the corporate law of South Africa. The fiduciary duty of company directors to act in the best interests of a company,[114] has been broadly accepted to imply that the directors must consider not only the interests of the company, but also those of other stakeholders involved with the company directly or indirectly.[115]

Section 76(3)*(*b*)* of the Act, read with the Constitution, imposes an obligation on company directors to ensure the protection of the

109 Sec 11(2)(b) of the Act.
110 Sec 11(2)(c) of the Act.
111 2002 (4) SA 294 (CC).
112 *Islamic Unity Convention* (n <XREF>) para 10.
113 AO Nwafor 'The protection of environmental interests through corporate governance: A South African Company Law perspective' (2015) 11(2) *Corporate Board: Role, Duties & Composition* at 6.
114 Section 76(3)(b) of the Act.
115 Nwafor (n 113) 8–9.

fundamental right to freedom and security of corporate employees, community members and the environment in which a company operates in.[116] This statutory provision portrays communal recognition, the core element of ubuntu.[117] As already said, the communal influence of ubuntu advocates for the need to promote and protect the interests of every individual living in the community and generations to come.[118] Thus, the directors' duty to consider the interest of all stakeholders and their environment is a revelation of the inclusion of spirit of ubuntu in corporate law.[119] This element of ubuntu is incorporated in the enlightened shareholder value approach and the stakeholder inclusive value approach as already highlighted.

Principle 16 of the King IV Report[120] also advocates for a stakeholder inclusive approach.[121] It provides that in executing the responsibilities and roles of governance in the best interests of a company, the governing corporate body should adopt an approach that balances the needs, interests, and expectations of different stakeholders.[122] In constitutional terms it implies that, in its operations, a company must ensure that it does not violate anyone's rights and freedoms, but rather promote harmonious operation and co-existence.[123] Section 7 of the Act confirms the obligation of companies in this regard. The section provides that the Act aims *inter alia* to 'promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law'[124] and also to reaffirm the concept of the company as a means of achieving economic and social benefits.[125] Company employees, the community and the environment in which the company operates must be protected (e.g. from harm which might result from hazardous operations undertaken by the company).[126] Companies must ensure that the environment in which they operate is safe for humans and for the natural environment.[127] This fundamental right to freedom and security of a person goes hand in hand with the constitutional right to a healthy and safe environment which is also bears ubuntu elements.[128]

116 As above.
117 Grootboom (n 10).
118 As above.
119 Grootboom (n 10).
120 Institute of Directors Southern Africa King IV Report on Corporate Governance For South Africa 20016 (King IV).
121 King IV (n 120) at 71-73.
122 Principle 16 of King IV (n 120) at 71.
123 See sec 8(2) of the Constitution.
124 Sec 7(a) of the Act.
125 Sec 7(d) of the Act.
126 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) (*Fuel Retailers Association*) para 60; principle 3 para 14(c)-(d) of King IV (n 120) at 45.
127 As above.
128 Sec 7(a) of the Act.

Gwanyanya posits that the constitutional right to freedom and security of the person in the context of corporate law can be indirectly interpreted to mean that companies must take initiatives to guarantee that the environment in which their employees work does not violate their constitutional right to freedom and security.[129] In other words, the right to freedom and security indirectly imposes a duty on companies to protect employees from exposure to a hazardous environment which might be caused by companies. The right also directly includes the right to a secure working environment.[130]

In *Mankayi v AngloGold Ashanti*[131] (*Mankayi*) the Court allowed the applicant to bring a delictual claim against the respondent company for damages suffered as a result of illness arising in the course of employment in a hazardous environment.[132] Gwanyanya, however, contends that the claim should rather have been based on the violation of the constitutional right to a healthy or hazard-free environment in terms of section 24 of the Constitution.[133] According to Gwanyanya, framing the claim in terms of section 24 of the Constitution would have been useful for determining the extent to which courts are willing to recognise the obligation of companies in the protection of human rights prior to the coming into effect of the Act.[134] Failure by the courts to depart from the 'classical libertarian roots and a concomitant hostility' and to promote constitutional values, shows that there is need for a more favorable approach where human rights protection takes center stage in the business sector.[135] However, this was not an absolute failure on the part of the courts, since it managed to enforce another constitutional right to freedom and security of the person as guaranteed by section 12 of the Constitution, which is connected to the environmental factors.[136]

Section 1(d) of the Constitution provides that South Africa is a sovereign, democratic state founded on the values of accountability, responsiveness, and openness. The Act captures this founding provision by providing that by the South African economy should be expanded by 'encouraging transparency and high standards of corporate governance'.[137] Transparency and high standards of

129 M Gwanyanya 'The South African Companies Act and the realisation of corporate human rights responsibilities' (2015) 18(1) *Potchefstroom Electronic Law Journal* at 3116.
130 *Fuel Retailers Association* (n 126) para 63.
131 2011 (3) SA 237 (C).
132 *Mankayi* (n 131) para 17; read also para 13 & 15.
133 Gwanyanya (n 129) 3116.
134 As above.
135 Gwanyanya (n 129) 3116.
136 As above.
137 Section 7(a)-(b)(iii) of the Act. See also MM Botha 'First do no harm! On oaths, social contracts and other promises: How corporations navigate the corporate social responsibility labyrinth' in MM Botha and J Barnard *De Serie Legenda Developments in commercial law Vol III Entrepreneurial law* (2019) at 17.

corporate governance support ubuntu spirit[138] in the sense that it promotes 'efficient and responsible management of companies' as embodied in concepts like good corporate governance (GCG)[139] and ESG.[140]

One of the principles of GCG is that directors of a company must act in the best interest of the company. Section 76(3) of the Act states that directors, in pursuing the best interest of a company, must act in good faith and for a proper purpose. Acting in good faith entails that directors must be honest, not receive secret profits and only promote the purpose of the company.[141] The section 76 standard of the duty of directors was confirmed in *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others*[142] (*Visser Sitrus*). The Court found that the directors of the first respondent company acted in the best interest of the company in declining to approve the transfer of shares.[143] This is because permitting the transfer of shares would have negatively affected the interests of other shareholders as a collective body.[144] This indicates the 'communal/ collective' consideration of interests, an element of ubuntu. This shows that, the best interests of a company as per the decision of the court is not considered based of the interests of an individual shareholder but all shareholders as a collective body.

The GCG approach can be seen from three different perspectives: the shareholder system; the enlightened shareholder value; and the pluralist approach (stakeholder inclusive approach).[145] In respect of the shareholder system, shareholders of the company are the focus of corporate activity.[146] In regard to the enlightened shareholder value perspective on the other hand, directors should, in appropriate circumstances, ensure productive and long-term relationships with stakeholders while consideration of shareholders' interests remains an important aspect.[147] The pluralist approach, on the other hand, entails the balancing of the shareholders' interests with those of other stakeholders of the company.[148] South African corporate law is a combination of the enlightened shareholder approach and the stakeholder inclusive approach, since a company serves a dual

138 Principle 1 para f of King IV (n 120) at 44.
139 See sec 7(b)(iii) of the Act; Botha (n 137) 17.
140 Sec 72(4) of the Act.
141 MM Botha 'The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective' (2009) *Obiter* at 708; Sec 76(3)(a)-(c) of the Act; MM Botha & B Shiells 'Towards a hybrid approach to corporate social responsibility in South Africa: Lessons from India?' (2020) 83 *Journal of Contemporary Roman Dutch Law* at 586.
142 2014 (5) SA 179 (WCC).
143 *Sitrus* (n 142) para 95.
144 As above.
145 Botha 2009 (n 141) 704-705.
146 Botha 2009 (n 141) 705.
147 As above.
148 Botha 2009 (n 141) 705.

purpose that is profit generation for the shareholders, while also balancing of the interests of other stakeholders.[149] GCG in the South African context requires a balance to be struck between the interests of various stakeholders of the company, thereby displaying element of peaceful co-existence and interdependency as advocated by ubuntu.[150] This is demonstrated in section 7(d) of the Act, which provides that the Act aims to reaffirm the concept of the company as a means of achieving economic and social benefits. Which changes the traditional position where a company served only as an economic tool for the shareholders, with no consideration of the other stakeholders. This object of the Act portrays collective interest consideration, the core element of ubuntu.

The King IV Report requires the governing body of a company, in implementing its governance roles and responsibilities, to espouse the stakeholder inclusive approach which balances the needs, interests, and expectations of other stakeholders while advancing the best interest of the company.[151] This code advocates for the consideration of the community interests the core element of the principle of ubuntu.[152] Even though King IV is a voluntary code on good corporate governance, the JSE regards the King IV principles on good corporate governance as mandatory for all listed companies.[153] Failure to comply with the listing requirements can lead to the suspension of a company's listing.[154] However, although suspension is a sound enforcement measure, it applies only to large public companies listed on the JSE.[155]

GCG is essential in the business of a corporation.[156] In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*[157] (*Water Affairs*) Hussain J highlighted the importance of GCG by stating that:

> Practicing sound corporate governance is essential for the well-being of a company and is in the best interest of the growth of a country's economy, especially in attracting new investments. To this end, the corporate community within South Africa has widely, and almost uniformly, accepted the findings and recommendations of the King Committee on Corporate Governance ...[158]

149 Botha 2020 (n 141) 582.
150 Mokgoro (n 2) 25.
151 Principle 16 of King IV report (n 120) at 36.
152 Grootboom (n 10).
153 JSE Listing requirements available at https://www.jse.co.za/sites/default/files/media/documents/201904/JSE%20Listings%20Requirements.pdf (accessed on 23 August 2023) para 3.84.
154 As above.
155 Botha & Shiells (n 141) 586.
156 Botha (n 137) 20.
157 2006 (5) SA 333 (W).
158 *Water Affairs* (n 157) 351.

Hussain J also pointed out that the King Committee was correct in stating that 'one of the characteristics of GCG is social responsibility'.[159] This implies that, like ubuntu, the governing board in acting in the best interests of a company, have the responsibility to consider the interest of the entire community involved with the company (CSR). CSR is an element of GCG. CSR encourages companies to demonstrate good corporate citizenship in their governance.[160] This means that companies, in their GCG strategies, should consider the impact of the activities of a company on the community, environment and the economy in which the company operates in.[161]

GCG has been applauded for playing an imperative role in the success of companies.[162] Thus, the King IV Report puts in place expected standards of GCG, by considering a company as both an economic and societal entity which should strike a balance between making profits and the interests of the community interest. Hence, the current author submits that this concept of corporate law is drawn from the ubuntu concept. Thus, incorporating these principles may lead to the transformation and Africanisation of the South African corporate law.

The above discussed corporate law concepts attunes to the main fundamentals of ubuntu through advocating for the new dual dimension of corporates which aim to advance both the social and the economic needs of all the stakeholders involved. This is attributed to the ontological elements of ubuntu which succumbs to peaceful communal existence, where individuals are expected to operate in a communal acceptable manner taking into account the needs and interests of existing and future members of the community. In the ubuntu perspective, the well-being of an individual is inquired through the wellness of the community.[163] From this philosophy, a company which exploits its employees, and the surrounding community cannot be considered as thriving.[164] In simply terms, a company which does not act as good corporate citizen may, when considered through the lens of ubuntu, be considered to not be doing well since it fails to take into account the needs of the involved stakeholders. In the communalistic nature of ubuntu an individual's existence is premised on their environment as well the community they live in.[165]

159 *Water Affairs* (n 157) 352; Botha & Shiells (n 141) 587.
160 Principle 3 of King IV (n 120) at 45-46.
161 As above.
162 *Water Affairs* (n 157) 351.
163 A Harris 'Corporate governance and ubuntu: South African and Namibian perspective' (2021) LLM Thesis unpublished, University of Cape Town at 29.
164 See further, F Mangena 'African Ethics through Ubuntu: A Postmodern Exposition' (2016) 9(2) *Africology: The Journal of Pan African Studies* at 69.
165 Harris (n 163).

5 General challenges in the inclusion of *ubuntu* in the South African corporate law

The general challenge associated with the African philosophies is lack of codification.[166] They are therefore, transmitted from one generation to the other through word of mouth, which may result in distortion of information.[167] Unlike European philosophies, which are codified, African philosophies are not, which makes it a challenge to implement and practise comprehensively and accurately.[168] In the Constitution, the supreme law of the land,[169] ubuntu is nowhere expressly stated, despite its acceptance as a constitutional principle by the courts.[170] Even though it has been submitted that ubuntu has been introduced into South African corporate law, the Act also lacks express provisions to this regard. Ubuntu operates on inferred application. The lack of solid provisions to back the application of this principle poses challenges in its application and interpretation.[171]

Lack of codification leads to poor circulation and knowledge-sharing of ubuntu principles. This results in many people, especially in modern communities, knowing nothing or very little about ubuntu. Scholars have developed interests in the African philosophies such as ubuntu which has led to receiving some scholarly attention. Gwaravanda and Ndofirepi observe, however, that African philosophers are sometimes blinded by the Eurocentric tendencies in the practice of African philosophy.[172] This is because European mind-set is considered universal. It is believed that, since Europeans discovered the way the world operates, what is left for Africans is only to lay their own "burnt" bricks on top of the European foundation.[173]

Perceived inferiority and Eurocentric influence thus also pose a challenge in the application of the African philosophy of ubuntu.[174] Anything of African origin in most cases is generally considered substandard.[175] Thus, preference is always given to ideologies of European origin because of perceived superiority over Africanism.[176]

166 I Keevy 'Ubuntu versus the core values of the South African Constitution' (2009) 34(2) *Journal for Juridical Science* at 23.
167 JR Mugumbate et al 'Understanding Ubuntu and its contribution to social work education in Africa and other regions of the world' (2023) *Social Work Education* at 12.
168 As above at 12-13.
169 Sec 2 of the Constitution (n 4).
170 Himonga et al (n 2) at 380.
171 Himonga et al (n 2) at 380; Mugumbate (n <XREF>).
172 E Gwaravanda & A Ndofirepi 'Eurocentric pitfalls in the practice of African Philosophy: Reflections on African universities' (2020) 21 *Phronimon* at 1.
173 Gwaravanda (n 172) at 2.
174 CA Alvares 'Critique of Eurocentric social science and the question of alternatives' (2011) 46(22) *Economic and Political Weekly* at 72.
175 As above.
176 As above.

African legal concepts' validation has been always weighed through the lens of other legal systems.[177] For instance, for many years, the rules of customary law have been weighed against common law values. In cases of inconsistence between the two, common law takes precedent.[178] This can be the perceived position with the Constitution which recognises ubuntu through customary law.[179] The Constitution permits the application of customary law by courts subject to the Constitution and any legislation that specifically deals with customary law.[180] However, ubuntu like any other law, must be weighed only against the Constitution, the supreme law of the land. Interestingly, attempts have been made to place indigenous law on parallel footing with the common law.[181] In *Alexkor Ltd v Richtersveld Community*[182] (*Alexkor*) it was held:

> While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution.[183]

The consideration of indigenous legal systems as part of the South African pluralistic justice system has ubuntu recognition.[184] In *Dikoko,* Mokgoro J applied the African concept of ubuntu in support of the determination of the appropriate amount for compensation in a defamation case and held:

> In our constitutional democracy the basic constitutional value of human dignity relates closely to ubuntu or botho, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms … A remedy based on the idea of ubuntu or botho could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the quantum ordered and the parties are further estranged rather than brought together by the legal process. It could indeed give better appreciation and sensitise a defendant as to the hurtful impact of his or her unlawful actions, similar to the emerging idea of restorative justice in our sentencing laws.[185]

177 N Ntlama & DD Ndima 'The significance of South Africa's traditional Courts Bill to the challenge of promoting African traditional justice' (2009) 4 *International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity* at 4.
178 N Ntlama & DD Ndima (n 177); C Rautenbach 'Legal reform of traditional courts in South Africa: Exploring the links between ubuntu, restorative justice and therapeutic jurisprudence' (2015) 2(2) *Journal of International and Comparative Law* at 276.
179 Sec 39(2); ch 12 of the Constitution.
180 Sec 211(3) of the Constitution.
181 Rautenbach (n 178) 276.
182 2003 12 BCLR 1301 (CC).
183 Alexkor as above para 51.
184 Para 16(1) of sch 6 of the Constitution.

Mokgoro J's reasoning denotes that ubuntu is based on 'deep respect for the humanity of another' and restorative justice, which illustrates the importance of ubuntu in dispute resolution by the courts.

Although, in recent decades ubuntu has found some recognition, there is a need to develop certain aspects of ubuntu for it to meet the changing standards of the current democratic era. The application ubuntu as developed by courts and other adjudicating forums has constitutional recognition.[186] The Constitution requires that the development of customary law aspects must promote the spirit, purport and objects of the Bill of Rights.[187] Even though customary law and ubuntu are not the same, ubuntu forms an indispensable part of the African customs.[188]

6 Conclusion

In conclusion, from the literature examined above, ubuntu forms part of South African transformative constitutionalism and has been considered a constitutional value. There is also a clear correlation between the values of ubuntu and a number of the corporate law provisions. It is submitted that these similarities illustrate a successful introduction of the essence of ubuntu into South African corporate law. However, despite this notable success, there are still developments which need to be made, beginning with the express inclusion of ubuntu in the Constitution and the corporate law frameworks. This will promote a better understanding of ubuntu, a concept which is still clouded in the mist of subjective interpretations.

185 Dikoko (n 26) para 48; see also A Mukheibir 'Ubuntu and the Amende Honorable — a marriage between African values and medieval canon law' (2007) 28 *Obiter* at 583.
186 Constitution (n 4) sec 39(2).
187 As above.
188 *Mayelane v Ngwenyama* 2013 4 SA 415 (CC) para 24.