An Examination of South African Corporate Law Through the Lens of *Ubuntu*

Siphethile Phiri
LLB LLM LLD
Law Lecturer, Private Law Department, Africa University, Zimbabwe
https://orcid.org/0000-0002-8428-0390

SUMMARY

This article submits that *ubuntu* is indubitably a constitutional value that informs the constitutional epoch. Constitutional supremacy means that all values and principles of the Constitution must be observed to avoid invalidation. In light 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 black-letter law, which encompasses extensive scrutiny of relevant legal literature. This research methodology is selected owing to its ability to address the question of what the law is in a particular case. The article intends to determine the position of *ubuntu* as a constitutional principle in the context of South African corporate law. The conclusion reached is that South African corporate law contains significant traces of the ontological elements of *ubuntu*. This is reinforced by a clear correlation between the values of *ubuntu* and corporate law principles. Simply put, several South African corporate-law concepts appear to be founded on the influence of *ubuntu* – for instance, the exception to the cornerstone principle of juristic personality. The lifting of the corporate veil aims to avoid unconscionable abuse of the corporate structure, which is in line with the *ubuntu* principles, which operate against any form of unconscionable abuse, as defined in common law. Nonetheless, since there is still no express inclusion of *ubuntu* in the Constitution or corporate statutes, the conclusions reached in this article are based on its implied application.

Keywords: Constitution; constitutional value; corporate law; South Africa; transformative constitutionalism; *ubuntu*

1 INTRODUCTION

Since the judgment of *S v Makwanyane*[1] (*Makwanyane*), *ubuntu* has been widely accepted as a constitutional value because its status is equal to that of the constitutional right of human dignity.[2] In *Makwanyane*, Sachs J

[1] 1995 (3) SA 391 (CC).

[2] Mokgoro "Ubuntu and the Law in South Africa" 1998 1(1) *Potchefstroom Electronic Law Journal* 16–32; Metz "Ubuntu as a Moral Theory and Human Rights in South Africa" 2011 11

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 advancement of human rights and freedoms.[4] Although the object of this article 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:

> "[T]he concept of *ubuntu*, like many concepts, is not easily defined. 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 "*umuntu ngumuntu ngabantu*", which translates as "a person is a person through other persons".[6] Thus, *ubuntu* involves an interdependent relationship among persons and a sense of communality.[7] *Ubuntu* is also translated to refer to humaneness, personhood, and morality.[8]

Mokgoro 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]

In 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 an already existing and continuing community that considers the living, the living dead and the yet to be born.[11]

African Human Rights Law 532–559; Himonga, Taylor and Pope "Reflections on Judicial Views of Ubuntu" 2013 16(5) *Potchefstroom Electronic Law Journal* 371–429.

3 *Makwanyane supra* par 365.

4 S 1(*a*) of the Constitution of the Republic of South Africa, 1996 (Constitution).

5 Mokgoro 1998 *PELJ* 1. See also Tutu *No Future Without Forgiveness* (1999) 34–35, where he argues: "[U]buntu is very difficult to render into Western language."

6 Breda "Developing the Notion of Ubuntu as African Theory for Social Work Practice" 2019 55(4) *Social Work* 439.

7 Mokgoro 1998 *PELJ* 19.

8 *Ibid*.

9 Mokgoro 1998 *PELJ* 10–11.

10 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* 113.

11 Grootboom 2019 *Pretoria Students Law Review* 113; Khomba "Shaping Business Ethics and Corporate Governance: An Inclusive African Ubuntu Philosophy" 2013 13(5) *Global Journal of Management and Business Research* 31–42.

The communal understanding of the concept of *ubuntu* plays an imperative role in South African corporate law. This is revealed through corporate-law concepts such as corporate social responsibility (CSR), corporate legal responsibility (CLR) and environmental, social and corporate governance (ESG), which are examined below under heading 4.

2 *UBUNTU* AS A PRINCIPLE OF TRANSFORMATIVE CONSTITUTIONALISM

Ubuntu is one of the principles that has influenced transformative constitutionalism in South Africa, alongside 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 overarching and key transformative principle of constitutionalism.[15] Consequently, it has been widely accepted that *ubuntu* is an implied constitutional value because its status is equal to that of human dignity.[16]

Kroeze[17] highlighted the constitutional importance of *ubuntu* – namely, that, as a constitutional value, it gives content to rights[18] and the limitation of rights, in an open and democratic society. This submission is accurate since *ubuntu* recognises communal existence, which requires respecting the rights of others for a harmonious coexistence.[19] As a result, certain rights can be limited in order to avoid a conflict between people's rights. Thus, individuals' rights are exercised within the context of and in relation to the needs of the entire community.[20] Therefore, *ubuntu* is based on the primary values of humanness, caring, respect and ensuring a good quality of community life in the spirit of family.[21]

The connection between *ubuntu*'s limitation of rights and the limitation of rights in terms of the Constitution illustrates that both systems acknowledge that no right is absolute. The limitations clause contained in section 36 of the

12 S 1(*a*)–(*d*) of the Constitution.

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

14 S 251(4) Interim Constitution.

15 Himonga *et al* 2013 *PELJ* 380.

16 *Makwanyane supra* par 311; see also art 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 Kroeze "Doing Things With Values II: The Case of Ubuntu" 2002 13 *Stellenbosch Law Review* 252–253.

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

19 Grootboom 2019 *Pretoria Students Law Review* 92 and 113.

20 *Ibid*.

21 Tshoose "The Emerging Role of the Constitutional Value of Ubuntu for Informal Social Security in South Africa" 2009 3 *African Journal of Legal Studies* 13; Radebe and Phooko "Ubuntu and the Law in South Africa: Exploring and Understanding the Substantive Content of Ubuntu" 2017 36(2) *South African Journal of Philosophy* 240.

Constitution may be considered as a rights-balancing mechanism that is partially influenced by *ubuntu*. This is attributed to the fact that the constitutional limitation of rights, as in African communities, aims to promote peaceful coexistence among individual claimants of rights.[22] For instance, section 16(2) of the Constitution limits the fundamental right to freedom of expression by excluding "(*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.[23] 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 a scramble for survival within the community. For instance, the right to freedom of expression, if not properly managed may result in the enticement of violence or hatred. This constitutional qualification that a democratic society must be based on human dignity, equality and freedom reverts back to *ubuntu*, which has equal status with human dignity.[24] The provision of section 36 of the Constitution may be summed up to indicate that rights may be limited in order to promote peaceful coexistence, which in African philosophy is interpreted as ubuntuism.

Ubuntu is considered to be an integral part of the Constitution. Sachs J in *Dikoko v Mokhakla*[25] (*Dikoko*) held that *ubuntu* is "intrinsic to and constitutive of our constitutional culture"[26] and it supports the whole constitutional order.[27] It combines individual rights with a communitarian philosophy.[28] In *Dikoko*,[29] Sachs J portrays *ubuntu* as a fundamental constitutional value. Despite its importance and influence, *ubuntu* has faced exclusion in South African law, which previously mainly consisted of Roman-Dutch and English law.[30] The formal recognition of indigenous law in the South African legal system is a recent phenomenon.[31] Although *ubuntu* is not a Western concept, its respect for human rights and human dignity aligns it with the Constitution and, more specifically, with the Bill of Rights.[32]

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22 Mokgoro 1998 *PELJ* 25.

23 S 36(1) of the Constitution.

24 *Makwanyane supra* par 311.

25 2006 (6) SA 235 (CC).

26 *Dikoko v Mokhakla supra* par 113.

27 *Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) par 37.

28 *Ibid*.

29 *Dikoko v Mokhakla supra* par 235.

30 Hosten *Introduction to South African Law and Legal Theory* (1995) 1268.

31 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* 8; 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* 94–106.

32 Himonga *et al* 2013 *PELJ* 382–383.

However, *ubuntu* still faces the serious challenge of being either under- or over-explained.[33] This is due to difficulty in finding a precise definition of the concept.[34] This challenge is the main reason for the irregular and inconsistent application of *ubuntu*, even by courts.[35]

In a nutshell, although the Constitution does not have an express provision on *ubuntu*, *ubuntu* is recognised as a founding value of the Constitution and has been applied in many instances as such.[36] The exclusion of this influential African philosophy as an express founding principle might be owing to Bhengu's observation that the three founding principles of the Constitution (equality, freedom and dignity) are of Western origin.[37] Thus, the Eurocentric nature of the Constitution led to the obscuring of *ubuntu*. Bhengu's submission proposes that the express founding values of the Constitution originate from the Western philosophical view that "one is born a human and therefore deserving equal treatment, freedom and dignity".[38] The Eurocentric notion of human beings is individualistic in nature, and 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)*.[39]

In the African philosophy of *ubuntu,* the definition of a human being is communal and not individualistic. The community-based viewpoint of a human being has given birth to famous African idioms such as *umuntu ngumuntu ngabantu* (a person is a person because of others)[40] and *inkosi yinkosi nga bantu bayo* (a king is a king because of his people).[41] The way in which members of the Ndebele tribe from Zimbabwe greet each other portrays a communalist spirit. One will greet by saying "*linjani*" (How are you? in a plural sense) and the responder will say "*sikhona*" ("we" are fine as opposed to "I" am fine).[42] The "li" prefix is plural, which illustrates the value placed on communality, as opposed to the "u" prefix, which expresses individualism. Nonetheless, the express exclusion of the African philosophy of *ubuntu* owing to Eurocentric constitutional influence does not in any way render *ubuntu* less important or irrelevant in the South African legal system. *Ubuntu* continues to

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33 English "Ubuntu: The Quest for an Indigenous Jurisprudence" 1996 *South African Journal on Human Rights* 645.

34 *Ibid*.

35 English "Ubuntu: The Quest for an Indigenous Jurisprudence" 1996 *South African Journal on Human Rights* 645.

36 Himonga *et al* 2013 *PELJ* 369; *Makwanyane supra* par 224; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); Hosten *Introduction to South African Law and Legal Theory* 1268.

37 Bhengu *Ubuntu: The Essence of Democracy* (1996) 4; Grootboom 2019 *Pretoria Students Law Review* 112.

38 Bhengu *Ubuntu: The Essence of Democracy* 4; Grootboom 2019 *Pretoria Students Law Review* 112.

39 Ramose "An African Perspective on Justice and Race" 2001 3 *Polylog: Forum for Intercultural Philosophy* 12; Tutu *No Future Without Forgiveness* 34–35.

40 Ifejika "What Does Ubuntu Really Mean?" (2006) *The Guardian* https://www.theguardian.com/theguardian/2006/sep/29/features11.g2 (accessed 2023-08-09).

41 Ndlovu-Gatshen "Inkosi Yinkosi Ngabantu: An Interrogation of Governance in Precolonial Africa – The Case of the Ndebele of Zimbabwe" 2008 20 *Southern African Humanities* 1.

42 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 155.

be silently and indirectly applied in many aspects of the law, and it is undisputedly playing a vital role in the legal system.

3 THE ROLE OF COURTS IN THE INCLUSION OF *UBUNTU*

Courts have attempted to define and interpret *ubuntu* as a "culture" and philosophy of the African people that expresses compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community, which combines individuality with communitarianism.[43]

In *S v Mhlungu*,[44] Sachs J, in advocating for the incorporation of the history of South Africa in decision-making by the courts, held:

> "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."[45]

Courts encourage the application of *ubuntu* in decision-making.[46] *Mhlungu* not only paved the way for the application of indigenous values that stem from *ubuntu*, but also urged courts to reflect on *ubuntu* in decision-making.[47] In the Constitutional Court, Ngcobo J in *Hoffmann v South African Airways*[48] (*Hoffmann*) promoted the constitutional rights to equality and human dignity by expressly applying *ubuntu*, *mero motu*, and held that *ubuntu* must be shown towards HIV patients.[49]

The ruling of the court is based on the observation that, in the application of *ubuntu,* all human beings are equal and deserve respect regardless of their status or any other qualification.[50] Bhengu asserts that if a nation follows the principles of *ubuntu*, there will be no discrimination.[51] This aligns with the definition of *ubuntu* in *Hoffmann* as "the recognition of human worth and respect for the dignity of every person".[52] This indicates that the courts view *ubuntu* through the same lens as African communities, which consider *ubuntu* as comprising of unqualified aspects that include human dignity. In the African

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43 For instance, *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) par 37; *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 (6) BCLR 728 par 62–63.

44 1995 (7) BCLR 793 (CC).

45 *S v Mhlungu supra* par 127.

46 *Ibid*.

47 Netshitomboni *Ubuntu: Fundamental Constitutional Value and Interpretive Aid* (unpublished Master of Laws dissertation, University of South Africa) 1998 20.

48 2001 (1) SA 1 (CC).

49 *Hoffmann supra* par 38.

50 *Ibid*.

51 Bhengu *Ubuntu: The Essence of Democracy* 38.

52 *Hoffmann* (fn 48 above) fn 31.

community, one deserves respect by mere dint of being a human being within a community.[53] A person is treated with dignity and respect regardless of their status or any qualification. Similar to the courts, they consider *ubuntu* as being analogous to the unqualified constitutional right of human dignity.[54] This was also demonstrated in the leading case of *Makwanyane*,[55] where the Constitutional Court related the protection of human dignity to the concept of *ubuntu*. In that case, the influence of *ubuntu* was central to the development and promotion of entrenched constitutional rights by the Constitutional Court.[56]

Similarly, in conducting their business, corporations must not include terms that are contrary to *ubuntu*.[57] To explain the influence of *ubuntu* on corporate contracts, in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*[58] (*Mohamed*), counsel for the respondent contended:

> "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."[59]

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".[60] Furthermore, "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".[61] To substantiate further, reference was made to *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[62] (*Everfresh*), where it was held:

> "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."[63]

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53 Bhengu *Ubuntu: The Essence of Democracy* 58.

54 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* 8; 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* 109.

55 *Makwanyane supra* par 481.

56 *Makwanyane supra* par 302.

57 *Hoffmann supra* par 38; Hosten *Introduction to South African Law and Legal Theory* 1268.

58 [2017] ZASCA 176.

59 *Mohamed supra* par 12.

60 *Mohamed supra* par 16.

61 *Mohamed supra* par 17.

62 [2011] ZACC 30, 2012 (1) SA 256 (CC).

63 *Everfresh supra* par 22.

In the above discussions, the term "good faith" has been employed extensively. Therefore, it is imperative to define the term. Good faith has been defined to mean "honesty" or "sincerity of intention".[64] The need to act in honesty and sincerity reflects elements of *ubuntu*, which has been seen in a number of corporate law concepts.[65]

Courts should accept overall responsibility for giving content to all constitutional values, including *ubuntu* as an implied constitutional value that the Constitution seeks to promote.[66] Placing emphasis on human dignity and social justice in the Constitution accepts that these values must be given an indigenous perspective.[67] In *Everfresh,*[68] the Constitutional Court emphasised that, when developing the common law, the courts must infuse the law with constitutional values, including values of *ubuntu*, which inspires much of the constitutional compact.

4 *UBUNTU* AND SOUTH AFRICAN CORPORATE LAW

As in the Constitution, the Companies Act[69] (the Act), which is South Africa's main corporate-law statute, does not have an express provision on *ubuntu*. However, traces of *ubuntu* are seen in most of its provisions. 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 intent to defraud any person or for any fraudulent purpose. Personal liability is imposed on directors of a company who engage in prohibited conduct.[70] To curb abuse of juristic personhood, section 20(9) of the Act gives the courts the discretion to lift the corporate veil where there is "unconscionable abuse" of juristic personality.[71] In *Ex Parte: Gore NO*[72] (*Ex Parte: Gore*), the court found irregularities and dishonesty in the management of a group of companies owned by three brothers.[73] The group of companies were managed as a single entity through the holding company.[74] The court held that the group was a mere sham aimed at deceiving the shareholders.[75] This resulted in the court disregarding the separate legal personality of the subsidiary companies and treating them and the holding company as one entity.[76] In the modern transformative

64 Cambridge Dictionary "good faith" (undated) https://dictionary.cambridge.org/dictionary/english/good-faith (accessed 2023-08-16).

65 See for instance s 76(3)(*a*) of the Act.

66 S 39 of the Constitution.

67 Kroeze 2002 13 *Stellenbosch Law Review* 252–253; Netshitomboni *Ubuntu: Fundamental Constitutional Value and Interpretive Aid* 20.

68 *Everfresh supra* par 34.

69 71 of 2008.

70 See also ss 20(9) and 163(4) of the Act.

71 See 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* 17–26.

72 [2013] ZAWCHC 21; [2013] 2 All SA 437 (WCC).

73 *Ex Parte: Gore supra* par 8.

74 *Ibid*.

75 *Ex Parte: Gore supra* par 15.

76 *Ex Parte: Gore supra* par 37.

constitutionalism era, which requires that *ubuntu* be promoted, it is correct to submit that the conduct of directors who infringe on ubuntuism falls within the ambit of "unconscionable abuse" of corporate personality. This includes conduct such as dishonesty and irregularities, as stipulated in *Gore*. It is clear 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.[77] Thus, the impact of one's conduct on others and the surrounding environment is of considerable importance. In corporate-law concepts, this can be seen through CSR, CLR and ESG, which require and oblige companies to consider the impact of companies' activities on their employees and the surrounding environment at large. *Ubuntu* is associated with concepts such as humanness, interconnectedness and concern for others, which are consistent with CSR, CLR and ESG values.[78] These corporate-law concepts have been incorporated into the Act. For instance, section 72(4) of the Act requires certain categories of company to have a social and ethics committee (SEC). The determination to have an SEC is based on public-interest consideration.[79] Companies have both a statutory and a constitutional obligation to act considerately towards the environment in which they operate.[80] Companies in their operations must therefore ensure that, at all times, they act with care for and in harmony with their environment, which accords with the concept of *ubuntu*.

Woerman and Engelbrecht, in their paper, explore the manner and the extent to which *ubuntu* can serve as an alternative theory for determining the responsibility of companies towards involved parties. Their submission favours the relationholder theory, as opposed to the stakeholder theory.[81] This is because the relationholder theory is premised on *ubuntu*, which better accommodates the interests of various stakeholders on a moral basis, promoting a harmonious relationship with parties with whom the company communes, as opposed to their stakes.[82] 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 through the lens of stake-holding interests.[83] This is because *ubuntu*, or relationholder theory, grounds the responsibility of companies towards different parties involved with the company solely on their existing relationship with the company.[84] From the *ubuntu* perspective, a company is not a nexus of contracts in terms of the stakeholder theory but is a nexus of relationships or

77 Mbigi and Maree *Ubuntu: The Spirit of African Transformation Management* (1995) 75.

78 *Ibid*.

79 S 72(4) of the Act.

80 E.g., s 72(4) of the Act; Ch 7 of the National Environmental Management Act 107 of 1998 and s 24 of the Constitution.

81 Woerman and Engelbrecht "The Ubuntu Challenge to Business: From Shareholders to Relationholders" 2019 157 *Journal of Business Ethics* 28.

82 Woerman and Engelbrecht 2019 *Journal of Business Ethics* 29–30.

83 Woerman and Engelbrecht 2019 *Journal of Business Ethics* 30.

84 Woerman and Engelbrecht 2019 *Journal of Business Ethics* 31.

communality.[85] However, Du Plessis *et al*'s[86] definition of stakeholder refers to an individual or group of individuals who are affected by the activities of a company – such as customers, suppliers, employees, creditors and the environment. There is a close relationship between the stakeholder and relationholder theory, in that they both foster communal consideration. Therefore, Woerman and Engelbrecht seem not to be introducing a new concept. Philips *et al*[87] describe stakeholder theory as a theory involving ethics similar to Woerman and Engelbrecht's submission.

Makwara *et al*[88] also advocate for the inclusion of African ethical ethos such as *ubuntu* in the regulation of African business practices because Western theories fail to align with the moral values of many African communities. *Ubuntu* is a "code of ethics and behaviour and it honors the dignity of others and development and continuous mutual affirming and enhancing relationships".[89] This is because *ubuntu* not only provides an understanding of what being is, but it also gives an understanding of what "being with others" entails.[90] Ethical business practice entails appreciating the importance of human dignity.[91] Khomba states:

> "Ethical behavior is characterised by unselfish attributes which balance 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."[92]

Ubuntu is demonstrated through care and compassion. Thus, through the lens of *ubuntu*, companies have a moral responsibility to affirm and enhance humanity.[93] In corporate law, this relates to a number of aspects such as the stakeholder inclusive value approach and the enlightened shareholder value approach. The stakeholder inclusive value approach requires that company directors, in conducting their fiduciary duties in the best interests of a company, must consider the interests of all stakeholders, in and out of the company.[94] This approach is confirmed by the modern consideration of a company as both a social and economic tool as envisaged by the Act.[95] Section 7(*d*) of the Act provides that the Act aims to reaffirm the concept of the company as a means of achieving economic and social benefits. This reinforces the triple bottom line approach, which requires a consideration of

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85 *Ibid*.

86 Du Plessis, McConvill and Bagaric *Principles of Contemporary Corporate Governance* (2005).

87 Phillips, Freeman and Wicks "What Stakeholder Theory Is Not" 2003 13(4) *Business Ethics Quarterly* 480.

88 Makwara, Dzansi and Chipunza "Contested Notions of Ubuntu as a Corporate Social Responsibility (CSR) Theory in Africa: An Exploratory Literature Review" 2023 15 *Sustainability* 3–8.

89 Nussbaum "Ubuntu: Reflections of a South African on Our Common Humanity Reflections" 2003 17(1) *World Business Academy* 2.

90 Grootboom 2019 *Pretoria Students Law Review* 113.

91 Byars and Stanberry *Business Ethics* (2018) 9.

92 Khomba 2013 *Global Journal of Management and Business Research* 32.

93 Woerman and Engelbrecht 2019 *Journal of Business Ethics* 31.

94 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* 98–99.

95 S 7(*d*) of the Act.

the impact of corporate activities in three contexts – that is, society, environment and economy – in which a company operates.[96] The enlightened shareholder value approach, on the other hand, supports a traditional consideration of a company.[97] It regards a company as an economic tool, incorporated to generate profits for the shareholders.[98] However, in terms of the enlightened shareholder value approach, the interests of other stakeholders may be considered if such is to the benefit of the shareholders.[99] The enlightened shareholder value approach opens room for consideration of communal interests, even though such consideration is subject to the benefit of shareholders.[100] Thus, this approach does not completely neglect the fact that the success of a company is not achieved in isolation. South African corporate law, similarly to the Constitution,[101] limits freedom of expression.[102] For instance, freedom of expression in corporate law is limited when it comes to the choice of a company name.[103] The selection of an appropriate company name is an essential aspect of corporate law.[104] Although companies for the most part enjoy the freedom to choose whatever name they consider fit, companies may not use names that fall within the ambit of section 16(2) of the Constitution. Such names are regarded as unconstitutional and prohibited. 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 reflects *ubuntu*. This is because *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 are 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 from using a name that is misleading,[105] or that constitutes: "(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."[106] The main idea

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96 Księżaka and Fischbach "Triple Bottom Line: The Pillars of CSR" 2017 4(3) *Journal of Corporate Responsibility and Leadership* 99–106.

97 Kiarie "At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road Should the United Kingdom Take?" 2006 17(11) *International Company and Commercial Law Review* 332.

98 Kiarie 2006 *International Company and Commercial Law Review* 332.

99 Wiese *Corporate Governance in South Africa With International Comparisons* (2017) 8; 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* (unpublished PhD thesis, University of Cape Town) 2016 51.

100 Mupangavanhu *Directors' Standards of Care, Skill, Diligence, and the Business Judgment Rule* 51.

101 S 16(2) of the Constitution.

102 See for instance s 11(2)(*a*)–(*c*) of the Act.

103 *Ibid*.

104 Cassim, Cassim, Jooste, Shev and Yeats *Contemporary Company Law* (2012) 113.

105 S 11(2)(*b*) of the Act.

106 S 11(2)(*c*) of the Act.

behind section 11 of the Act is to prevent deception and abuse of the public through the use of misleading, offensive or unconstitutional names.[107]

In *Islamic Unity Convention v Independent Broadcasting Authority*[108] (*Islamic Unity Convention*), the Constitutional Court limited the freedom of expression, holding:

> "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."[109]

Since *ubuntu* is equated with human dignity, limiting the constitutional right to freedom of expression on the basis that it violates the dignity and other values of the Constitution signals that *ubuntu* is carried through the 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.[110] This constitutional freedom has also found its way into South African corporate law. The fiduciary duty of company directors to act in the best interests of a company[111] has been broadly accepted to imply that directors must consider not only the interests of the company but also those of other stakeholders involved with the company directly or indirectly.[112] Section 76(3)(*b*) of the Act, read with the Constitution, imposes an obligation on company directors to ensure the protection of the fundamental right to freedom and security of corporate employees, community members and the environment in which a company operates.[113] This statutory provision recognises the value of community, as the core element of *ubuntu*.[114] As has been stated, the communal influence of *ubuntu* advocates for the promotion and protection of the interests of every individual living in the community and in generations to come.[115] Thus, the directors' duty to consider the interests of all stakeholders and their environment reveals the inclusion of the spirit of *ubuntu* in corporate law. This element of *ubuntu* is incorporated in the enlightened shareholder value approach and in the stakeholder inclusive value approach, as already highlighted.

Principle 16 of the King IV Report[116] also advocates for a stakeholder inclusive approach.[117] It provides that, in executing the responsibilities and roles of governance in the best interests of a company, the governing

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107 Cassim *et al Contemporary Company Law* 113.

108 2002 (4) SA 294 (CC).

109 *Islamic Unity Convention supra* par 10.

110 Nwafor "The Protection of Environmental Interests Through Corporate Governance: A South African Company Law Perspective" 2015 11(2) *Corporate Board: Role, Duties & Composition* 6.

111 S 76(3)(*b*) of the Act.

112 Nwafor 2015 *Corporate Board: Role, Duties & Composition* 8–9.

113 *Ibid*.

114 Grootboom 2019 *Pretoria Students Law Review* 92 and 113.

115 *Ibid*.

116 Institute of Directors Southern Africa *King VI Report on Corporate Governance For South Africa 2016* (2016) (*King IV*).

117 *King IV* 71–73.

corporate body should adopt an approach that balances the needs, interests and expectations of different stakeholders.[118] In constitutional terms, it implies that, in its operations, a company must ensure that it does not violate anyone's rights and freedoms, and should rather promote harmonious operation and coexistence.[119] 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",[120] and aims also to reaffirm the concept of the company as a means of achieving economic and social benefits.[121] Company employees, the community and the environment in which the company operates must be protected (for example, from harm that might result from hazardous operations undertaken by the company).[122] Companies must ensure that the environment in which they operate is safe for humans and for the natural environment.[123] 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 also reflects *ubuntu* elements.[124]

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.[125] In other words, the right to freedom and security indirectly imposes a duty on companies to protect employees from exposure to a hazardous environment that might be caused by companies. The right also directly includes the right to a secure working environment.[126]

In *Mankayi v AngloGold Ashanti*[127] (*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.[128] 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.[129] According to Gwanyanya, framing the claim in terms of section 24 of the Constitution would have been useful, prior to the coming into effect of the Act, for determining the extent to which courts are willing to recognise the obligation of companies to protect human rights.[130] Failure by

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118 Principle 16 of *King IV* 71.

119 See s 8(2) of the Constitution.

120 S 7(*a*) of the Act.

121 S 7(*d*) of the Act.

122 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) (*Fuel Retailers Association*) par 60; principle 3 par 14(c)–(d) of *King IV* 45.

123 Principle 3 par 14(c)–(d) of *King IV* 45. See also the stakeholder inclusive approach.

124 S 7(*a*) of the Act.

125 Gwanyanya "The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities" 2015 18(1) *Potchefstroom Electronic Law Journal* 3116.

126 *Fuel Retailers Association supra* par 63.

127 2011 (3) SA 237 (C).

128 *Mankayi supra* par 17; read also par 13 and 15.

129 Gwanyanya 2015 *PELJ* 3116.

130 *Ibid*.

the courts to depart from the "classical libertarian roots and a concomitant hostility" to promoting constitutional values shows that there is a need for a more favourable approach, in which human-rights protection takes centre stage in the business sector.[131] However, *Mankayi* does not represent an absolute failure on the part of the courts, since the court in this case 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 environmental factors.[132]

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 the South African economy should be expanded by "encouraging transparency and high standards of corporate governance".[133] Transparency and high standards of corporate governance support the *ubuntu* spirit[134] in the sense that they promote "efficient and responsible management of companies" – such as good corporate governance (GCG)[135] and ESG.[136]

One of the principles of GCG is that directors of a company must act in the best interests of the company. Section 76(3) of the Act states that directors, in pursuing the best interests of a company, must act in good faith and for a proper purpose. Directors acting in good faith must be honest, must not receive secret profits, and must promote the purpose of the company.[137] The section 76 standard of directors' duty was confirmed in *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd*[138] (*Visser Sitrus*). The court found that the directors of the first respondent company acted in the best interests of the company in declining to approve the transfer of shares.[139] This is because permitting the transfer of shares would have negatively affected the interests of other shareholders as a collective body.[140] This indicates the "communal/collective" consideration of interests, which is an element of *ubuntu*. The decision of the court shows that the best interests of a company are not considered based on the interests of an individual shareholder but of all shareholders as a collective body.

The GCG approach is seen from three different perspectives, namely: the shareholder system; enlightened shareholder value system; and the pluralist

131 Gwanyanya 2015 *PELJ* 3116.

132 *Ibid*.

133 S 7(*a*)–(*b*)(iii) of the Act. See also Botha "First Do No Harm! On Oaths, Social Contracts and Other Promises: How Corporations Navigate the Corporate Social Responsibility Labyrinth" in Botha and Barnard *De Serie Legenda Developments in Commercial Law Vol III Entrepreneurial Law* (2019) 17.

134 Principle 1 par f of *King IV* 44.

135 See s 7(*b*)(iii) of the Act; Botha in Botha and Barnard *De Serie Legenda Developments in Commercial Law Vol III Entrepreneurial Law* 17.

136 S 72(4) of the Act.

137 Botha "The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective" 2009 *Obiter* 708; s 76(3)(*a*)–(*c*) of the Act; Botha and Shiells "Towards a Hybrid Approach to Corporate Social Responsibility in South Africa: Lessons From India?" 2020 83 *Journal of Contemporary Roman Dutch Law* 586.

138 2014 (5) SA 179 (WCC).

139 *Visser Sitrus supra* par 95.

140 *Ibid*.

approach (stakeholder inclusive approach).[141] In respect of the shareholder system, shareholders of the company are the focus of corporate activity.[142] In contrast, the enlightened shareholder value perspective holds that directors should, in appropriate circumstances, ensure productive and long-term relationships with stakeholders, while consideration of shareholders' interests remains an important aspect.[143] The pluralist approach further entails the balancing of shareholders' interests with those of other stakeholders of the company.[144] South African corporate law is a combination of the enlightened shareholder approach and the stakeholder inclusive approach since a company serves a dual purpose – that is, profit generation for the shareholders, while also balancing the interests of other stakeholders.[145] GCG in the South African context requires a balance to be struck between the interests of various stakeholders of the company, thereby displaying the elements of peaceful coexistence and interdependency advocated by *ubuntu*.[146] 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 represents a change from the traditional position where a company served only as an economic tool for the shareholders, with no consideration for other stakeholders. This object of the Act evinces 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 interests of the company.[147] This code advocates for the consideration of the community interests, which is the core element of the principles of *ubuntu*.[148] Even though King IV is a voluntary code on good corporate governance, the Johannesburg Stock Exchange (JSE) regards the King IV principles on good corporate governance as mandatory for all listed companies.[149] Failure to comply with its listing requirements can lead to the suspension of the company's listing.[150] However, although the suspension is a sound enforcement measure, it applies only to large public companies listed on the JSE.[151]

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141 Botha 2009 *Obiter* 704–705.

142 Botha 2009 *Obiter* 705.

143 *Ibid*.

144 Botha 2009 *Obiter* 705.

145 Botha 2020 *Journal of Contemporary Roman Dutch Law* 582.

146 Mokgoro 1998 *PELJ* 25.

147 Principle 16 of *King IV* report 36.

148 Grootboom 2019 *Pretoria Students Law Review* 92 & 113.

149 JSE Listing Requirements https://www.bing.com/ck/a?!&&p=c26697b3078e672cc045df11d0731f57d36b0b5a9051f9b23b2d177685563b68JmltdHM9MTczMzcwMjQwMA&ptn=3&ver=2&hsh=4&fclid=101ed174-1e1c-6643-237a-c57c1fe867bc&psq=jse+listing+requirements&u=a1aHR0cHM6Ly9jbGllbnRwb3J0YWwuanNlLmNvLnphL19sYXlvdXRzLzE1L0Rvd25sb2FkSGFuZGxlci5hc2h4P0ZpbGVOYW1lPS9Jc3N1ZXJfUmVndWxhdGlvbnMvQXJjaGl2ZWRfTGlzdGluZ19SZXF1aXJlbWVudHMvU2VydmljZSUyMElzc3VlJTIwMTYucGRm&ntb=1 (accessed 2024-12-09) par 3.84.

150 *Ibid*.

151 Botha and Shiells 2020 *Journal of Contemporary Roman Dutch Law* 586.

GCG is essential in the business of a corporation.[152] In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*[153] (*Water Affairs*), Hussain J highlighted the importance of GCG by stating:

> "Practising sound corporate governance is essential for the well-being of a company and is in the best interests of the growth of this 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."[154]

Hussain J also pointed out that the King Committee was correct in stating that "one of the characteristics of GCG is social responsibility".[155] This implies that, like *ubuntu*, the governing board, acting in the best interests of a company, has the responsibility to consider the interests 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.[156] This means that companies, in their GCG strategies, should consider the impact of their activities on the community, environment and the economy in which they operate.[157]

GCG has been applauded for playing a crucial role in the success of companies.[158] Thus, the King IV Report puts in place the expected standards of GCG by considering a company to be both an economic and a societal entity that should strike a balance between making profits and the interests of the community. It is thus submitted that this concept of corporate law is drawn from the *ubuntu* concept; incorporating these principles may lead to the transformation and Africanisation of South African corporate law.

The corporate law concepts discussed above attune to the main fundamentals of *ubuntu* by advocating for the new dual dimension of corporate governance which aims to advance both the social and the economic needs of all the stakeholders involved. This is attributed to the ontological elements of *ubuntu* which aspire to peaceful communal existence, where individuals are expected to operate in a communally acceptable manner, considering the needs and interests of existing and future members of the community. From the *ubuntu* perspective, the well-being of an individual is established through the wellness of the community.[159] In this philosophy, a company that exploits its employees and the surrounding community cannot be considered to be thriving.[160] In simple terms, a company that is not a good corporate citizen may not (through the lens of *ubuntu*) be considered to be doing well since it fails to take into account the needs of the involved stakeholders. In the

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152 Botha in Botha and Barnard *De Serie Legenda Developments in Commercial Law Vol III Entrepreneurial Law* 20.

153 2006 (5) SA 333 (W).

154 *Water Affairs supra* 351.

155 *Water Affairs supra* 352; Botha and Shiells 2020 *Journal of Contemporary Roman Dutch Law* 587.

156 Principle 3 of *King IV* 45–46.

157 *Ibid*.

158 *Water Affairs supra* 351.

159 Harris *Corporate Governance and Ubuntu: South African and Namibian Perspective* (unpublished LLM thesis, University of Cape Town) 2021 29.

160 See further Mangena "African Ethics Through Ubuntu: A Postmodern Exposition" 2016 9(2) *Africology: The Journal of Pan African Studies* 69.

communal nature of *ubuntu*, an individual's existence is premised on their environment as well as the community in which they live.[161]

5 GENERAL CHALLENGES IN INCLUDING *UBUNTU* IN SOUTH AFRICAN CORPORATE LAW

The general challenge associated with African philosophies is their lack of codification.[162] They are, instead, transmitted from one generation to the other through word of mouth, which may result in distortion of information.[163] Unlike European philosophies, which are codified, African philosophies are not, which makes it challenging to implement and practise them comprehensively and accurately.[164] Starting with the Constitution, the supreme law of the land,[165] *ubuntu* is not expressly entrenched therein, despite its acceptance as a constitutional principle.[166] Even though it is submitted that *ubuntu* has been introduced into South African corporate law, the Act also lacks express provisions in this regard. *Ubuntu* operates on inferred applications. The lack of solid provisions to back up the application of this principle poses challenges to its application and interpretation.[167]

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 an interest in and paid some attention to African philosophies such as *ubuntu*. Gwaravanda and Ndofirepi observe, however, that African philosophers are sometimes blinded by the Eurocentric tendencies in the practice of African philosophy.[168] This is because the European mindset is considered universal, and it is assumed that, since Europeans discovered the way the world operates, all that is left for Africans is to lay their own "burnt" bricks on top of the European foundation.[169]

Perceived inferiority and the Eurocentric influence also pose a challenge in applying the African philosophy of *ubuntu*.[170] Anything of African origin is generally considered sub-standard.[171] Thus, preference is given to ideologies of European origin because of their perceived superiority over Africanism.[172]

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161 Harris *Corporate Governance and Ubuntu: South African and Namibian Perspective* 29.

162 Keevy "Ubuntu Versus the Core Values of the South African Constitution" 2009 34(2) *Journal for Juridical Science* 23.

163 Mugumbate, Mupedziswa, Twikirize, Mthethwa, Detsa and Oyinlola "Understanding Ubuntu and Its Contribution to Social Work Education in Africa and Other Regions of the World" 2023 *Social Work Education* 12.

164 Mugumbate *et al* 2023 *Social Work Education* 12–13.

165 S 2 of the Constitution.

166 Himonga *et al* 2013 *PELJ* 380.

167 Himonga *et al* 2013 *PELJ* 380.

168 Gwaravanda and Ndofirepi "Eurocentric Pitfalls in the Practice of African Philosophy: Reflections on African Universities" 2020 21 *Phronimon* 1.

169 Gwaravanda *et al* 2020 *Phronimon* 2.

170 Alvares "Critique of Eurocentric Social Science and the Question of Alternatives" 2011 46(22) *Economic and Political Weekly* 72.

171 *Ibid*.

172 *Ibid*.

The validation of African legal concepts has always been weighed through the lens of other legal systems.[173] For instance, for many years, the rules of customary law have been weighed against common-law values. In cases of inconsistency, the common law takes precedence.[174] This is conceivably also the position with the Constitution, which recognises *ubuntu* through customary law.[175] The Constitution permits the application of customary law by courts, subject to the Constitution and any legislation that specifically deals with customary law.[176] 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 a parallel footing with the common law.[177] In *Alexkor Ltd v Richtersveld Community*[178] (*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."[179]

Indigenous legal systems have been recognised as part of the South African pluralistic justice system.[180] 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."[181]

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

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173 Ntlama and Ndima "The significance of South Africa's Traditional Courts Bill to the challenge of promoting African traditional justice systems" 2009 4 *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* 6.

174 Ntlama and Ndima *International Journal of African Renaissance Studies* 6; 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* 276.

175 S 39(2); ch 12 of the Constitution.

176 S 211(3) of the Constitution.

177 Rautenbach 2015 *Journal of International and Comparative Law* 276.

178 2003 (12) BCLR 1301 (CC).

179 *Alexkor Ltd v Richtersveld Community supra* par 51.

180 Par 16(1) of sch 6 of the Constitution.

181 *Dikoko v Mokhakla supra* par 48; see also Mukheibir "Ubuntu and the Amende Honorable – A Marriage between African Values and Medieval Canon Law" 2007 28 *Obiter* 583.

Although, in recent decades *ubuntu* has found some recognition, there is a need to develop certain aspects for it to meet the changing standards of the current democratic era. The courts and other adjudicating forums have given constitutional recognition to *ubuntu*.[182] The Constitution requires that the development of customary law aspects must promote the spirit, purport and objects of the Bill of Rights.[183] Even though customary law and *ubuntu* are not the same, *ubuntu* forms an indispensable part of African customs. Thus, South African customary law incorporates *ubuntu*.[184]

6 CONCLUSION

In conclusion, from the literature examined above, it is clear that *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 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 noticeable success, developments are still needed, beginning with the express inclusion of *ubuntu* in the Constitution and in corporate-law frameworks. This will assist in a better understanding of *ubuntu*, which is still clouded in the midst of subjective interpretations.

182 S 39(2) of the Constitution.

183 *Ibid*.

184 *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) par 24.