

Background for Corporate Social Responsibility Practice in the Republic of South Africa

The Main Social Problems South Africa is Facing Today¹

In order to understand the main problems South Africa is facing today in terms of corporate social responsibility, it is interesting to have a look at the general structure of the South African Society and its difficulties.

South Africa, although modernized in many aspects, continues to grapple with extreme income inequality. Despite the robust growth in the post-apartheid period, the unemployment rate remains very high, and the poor continue to have limited access to economic opportunities and basic services. The life expectancy is of only slightly more than 50 years and South Africa has the largest number of people living with HIV/Aids in the world (over 5,5 million). The migrant labour system rooted in the apartheid system has contributed to many of the major current health problems through social changes that have led to destruction of family life, alcohol abuse, and violence, particularly gender-based violence. The health delivery system remains, however, mainly skewed in favour of the elite.

The South African Government tries to rectify the many inequalities that still remain after the apartheid period. Between 1991 and 2008, net secondary school enrolment went up from 45% to 72%. Since the end of apartheid, 1.6 million free housing units have been constructed for low income families. Access to electricity went up from 34% in 1993 to 81% in 2007. Similar improvements have also been recorded for water and sanitation. The government has also instituted a social grant system, which primarily supports children and has been expanded to cover 13 million people in 2009.

In order to face a number of significant challenges, including accelerating growth and sharing its benefits more broadly, extending opportunities to all and improving the coverage of delivery of public services, the South African government has launched a Medium Term Strategic Framework for 2009 to 2014 with ten priorities: more inclusive economic growth, decent work and sustainable livelihoods, economic and social infrastructure, rural development, food security and land reform, access to quality education, improved health care, the fight against crime and corruption, cohesive and sustainable communities, improving public service delivery and sustainable resource management and use.

In this context, corporate social responsibility is particularly important and can help to address the remaining challenges South Africa is facing. Although corporate social responsibility is also essential, for example, in the field of the protection of the environment, a focus on labour law, fiscal law and accountancy issues presents a good starting point. In these fields the problems South Africa is facing, concern mostly the following issues:

- **The Fight Against Inequality and Discrimination**
- **Decent working conditions**
- **Health care**
- **The Fight Against Crime and Corruption**

The efforts should therefore be concentrated on making improvements in these areas of concern.

¹ Based on Information found on the web site of the World Bank.

Corporate Social Responsibility in the Field of Labour Law

The South African Labour Law is constituted of several texts of different legal value. There are legislative acts, stating binding obligations for employers, as well as “Basic Guides”, “How To’s”, “Codes of Good Practice”, Regulations and Notices and Sectoral Determination. Indeed, in many cases, the legislation is supported by codes of practice, which may be statutory codes of practice drawn up by the National Economic Development and Labour Law Council (NEDLAC) or non-statutory codes of practice issued by the Commission for Conciliation, Mediation and Arbitration (CCMA). These codes of practice, although often merely providing guidelines and accordingly not always being of direct legal effect, are taken into account by the Labour Courts in deciding whether or not an employer has breached statutory employment regulations. Additionally, there are numerous laws implementing health and safety regulations.

Unlike in many other countries, collective agreements are normally legally enforceable. The Labour Relations Act 66 of 1995 supports this binding character of the collective agreements.

It is interesting to analyze which kind of obligations are contained in South African law and which of them can be considered as binding.

Main Binding Obligations for Employers under South African Law²

The main legislative act of South African labour law is called “Basic Conditions of Employment Act”³. Its purpose is to implement the “right to fair labour practices” stated in Section 23(1) of the South African Constitution and to give effect to the obligations South Africa incurs as a member of the International Labour Organisation. The Act concentrates on the regulation of working time, of leave, of particulars of employment and remuneration and of the termination of employment, on the prohibition of the employment of children and forced labour. It also addresses the variation of basic conditions of employment, sectoral determination, the establishment of an employment conditions commission, the monitoring, enforcement and legal proceedings and the protection of employees against discrimination.

In the context of corporate social responsibility in distribution contracts, particular attention can be paid to the obligations for the employer in the following fields:

- **Non-Discrimination**

The Constitution guarantees the right to equality and also gives protection to all from unfair discrimination. It goes further by acknowledging that affirmative action measures are necessary to advance disadvantaged groups. Furthermore, the Constitution requires laws to be enacted to prevent, among others, workplace discrimination. The legislature has since passed and implemented the Employment Equity Act to deal with unfair discrimination and workplace equality. It guarantees equal opportunity and fair treatment to all employees. It also imposes the obligation on certain employers to implement affirmative action measures to

² Based on Information found on the web site of the South African Department of Labour.

³ N° 75 of 1997 as amended by Basic Conditions of Employment Amendment Act, N° 11 of 2002.

advance “designated groups” (African, Indian and Coloured people as well as women and people with disabilities).

- **Legal Minimum Age and the Prohibition of Forced Labour**

Sections 43 to 48 of the Basic Conditions of Employment Act prohibit employment of children and forced labour. Under South African law it is a criminal offence to employ a child under 15 years of age and children under 18 may not be employed to do work inappropriate for their age or work which places them at risk. Moreover, causing, demanding or requiring forced labour is a criminal offence.

- **Leave**

Under Sections 20 and 21 of the Act, employees are entitled to 21 consecutive days’ **annual leave** or by agreement, one day for every 17 days worked or one hour for every 17 hours worked. An employer must not pay an employee instead of granting leave except on termination of the employment.

Sick leave is regulated by Sections 22-24 of the Act. An employee is entitled to six weeks’ paid sick leave in a period of 36 months. During the first six months an employee is entitled to one day’s paid sick leave for every 26 days worked.

Sections 25 and 26 regulate the questions of **maternity leave** and state that a pregnant employee is entitled to four consecutive months’ of maternity leave. Furthermore, a pregnant employee or an employee nursing her child is not allowed to perform work that is hazardous to her or her child.

Section 27 entitles an employee to three days paid **family responsibility leave** per year, on request, when the employee’s child is born or sick, or in the event of the death of the employee’s spouse or life partner, or the employee’s parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.

In addition to the points mentioned above, the Basic Conditions of Employment Act regulates for example also the **termination of employment** and the **working hours** of the employment.

- **Registration of Employees**

There does not seem to be an official obligation to register an employee, although this might be implied from other requirements such as the obligations concerning the pension and insurance systems.

- **Pension and Insurance Systems**

The insurance and pension systems are also regulated by laws. There is the Unemployment Insurance Act of 1987, the Pension Laws Amendment Act of 1987 and the Older Persons Act

of 2006. This legislation seeks to alleviate and prevent poverty in the event of the loss of income due to unemployment, disability and old age. Under the first Act, all employers, and all employees, must for example necessarily register with the Unemployment Insurance Fund (UIF).

Guidelines for Employers under South African Law⁴

The “Basic Conditions of Employment” Act is supplemented by other guides and codes such as for example guides in the fields of:

- Affirmative Action
- Annual Leave
- Child Labour
- Claiming Compensation for Occupational Injuries
- Compensation Fund Registration
- Employers Basic Conditions of Employment Duties
- Employment Contracts
- Leave
- Health and Safety Duties
- Minimum Wages
- Overtime
- Termination
- Trade Unions
- UIF Declarations and Benefits

Compliance with the Law and Guidelines Presented Above

In spite of the impressive legislative basis, a lot of problems remain unresolved in the field of South African labour law. Gender-based inequalities for example still exist at the workplace. Most women, making up nearly half the labour force, remain in poorly paid jobs. While trade unions and business associations have undertaken some actions to promote gender equality, the top level of social dialogue bodies is male-dominated⁵. Despite its middle-income status, South Africa remains characterized by high levels of income inequality between population groups (Black Africans, Whites, Asians). According to an OECD publication released in the first quarter of 2010, South Africa’s inequality levels are among the highest in the world. Poverty and inequality in South Africa have racial, gender and age dimensions with high concentrations found predominantly among black Africans (in particular among black women and young people)⁶.

Moreover, despite legislation protecting the rights of workers and being highly organized, workers in various sectors of the economy continue to face severe challenges. The failure of the government to enforce labour and tenure laws renders them defenceless against powerful employers. Human Rights Watch’s research in the Western Cape, the second-richest province,

⁴ See Supranote 2.

⁵ Debbie Budlender, Working Paper of the International Labour Organisation: *Gender Equality and Social Dialogue in South Africa*, 2007.

⁶ International Labour Organisation, *Republic of South Africa, Decent Work Country Programme 2010-2014*.

uncovered a number of exploitative conditions under which farmworkers interviewed work and live. In response to a report addressing these findings, several South African government officials committed to addressing abuses and enforcing labour laws⁷.

Moreover, South Africa has a weak system of mandatory contributions for the working population and no mandatory retirement provision. Occupational retirement and medical insurance does not extend to those outside of the coverage of collective bargaining agreements in the formal wage economy. The social security coverage in South Africa does not extend to foreign migrant workers and their families. Irregular migrants are particularly at risk of not having any provision for social protection coverage⁸.

Another problem is the existence of an informal economy where the work situations are precarious with no written contracts. Atypical forms of work characterized by casual labour, part-time employment, temporary and seasonal work also expose workers to unacceptable forms of vulnerability and exploitation and impacts negatively on the implementation and enforcement of rights of these workers as certain employers attempt to bypass labour legislation and regulation. The South African governments and its social partners have, however, begun a process to review legislation with a view towards regulating this kind of labour⁹.

⁷ Human Rights Watch, *World Report of 2012: South Africa*.

⁸ See Supranote 6.

⁹ See Supranote 6.

Corporate Social Responsibility in the Fields of Fiscal Law and Accountancy

Main Binding Obligations for Employers under South African Law

Under the “Companies Act” of 2008¹⁰, all companies, large and small must for example prepare annual financial statements, must maintain accurate accounting records and must have a financial year. It is an offence to falsify or fail to keep proper records or to publish false financial statements. The rules concerning companies are extensive and detailed and the following obligations constitute only a small selection of the requirements companies have to meet.

- **Registration of a Company**

Section 13 of the Companies Act on the “Right to incorporate a company” details the procedure to follow in order to incorporate a profit company stating the exact documents that must be filed together with the Notice of Incorporation. Section 14 of the Companies Act then addresses the “Registration of Company”. It states that as soon as practicable after accepting a filed Notice of Incorporation in terms of section 13 of the Act, the Companies and Intellectual Property Commission must assign the company a unique registration number, enter the prescribed information concerning the company in the companies register, endorse the Notice of Incorporation, issue and deliver to the company a registration certificate in the prescribed manner and form, dated of the later and, by written notice, may require the applicant to serve a copy of the application and name reservation on any particular person, or class of persons, named in the notice, on the grounds that the person or persons may have an interest in the use of the reserved name by the applicant.

Moreover, section 23 focuses on the “Registration of external companies and the registered office”.

It is thus obvious that South African law not only requires the incorporation and registration of a company but also contains very detailed provisions on how to do so.

- **Keeping Proper Records**

Section 24 on “Form and standards for company records” requires that any documents, accounts, books, writing, records or other information that a company is required to keep in terms of this Act or any other public regulation must be kept in written form, or other form or manner that allows that information to be converted into written form within a reasonable time and that it must be kept for a period of seven years, or any longer period of time specified in any other applicable public regulation. The Section then states a long and detailed list of the documents that must be kept by the company according to the requirements mentioned above.

In addition to these general requirements concerning the treatment of documents, Section 28 of the Act demands that a company must keep accurate and complete accounting records in one of the 50 official languages of the Republic as necessary to enable the company to satisfy its obligations in terms of this Act or any other law with respect to the preparation of financial

¹⁰ N° 71-2008.

statements. A company's accounting records must be kept, or be accessible from, the registered office of the company.

The Act states in the same Section that it is an offence for a company, with an intention to deceive or mislead any person, to fail to keep accurate or complete accounting records, to keep records other than in the prescribed manner and form, if any, or to falsify any of its accounting records, or permit any person to do so, or any person to falsify a company's accounting records.

For greater certainty, the Commission may issue a compliance notice to a company in respect of any failure by the company to comply with the requirements mentioned above, irrespective of whether that failure constitutes an offence.

Further Sections of the Acts provide more details about the requirements concerning financial statements and annual financial statements and, moreover, Section 34 provides more details concerning additional accountability requirements for companies that are public or state-owned.

- **Publishing of Accounts**

The Companies Act mandates the publication of the annual financial statements and, furthermore, Section 31 of the Act states that a person who holds or has a beneficial interest in any securities issued by a company, is entitled without demand to receive a notice of the publication of any annual financial statements of the company required by the Act and on demand to receive without charge one copy of any annual financial statements of the company required by this Act.

Compliance with the Requirements Presented Above

As the King Report of 2002 states, although the South African regulatory environment encourages competitiveness and flexibility, it is widely inefficient.

As the Deutsche Bank Report on Corporate Governance in South Africa¹¹ states, the corporate governance landscape in South Africa has undergone drastic changes during the past decade, with the country today being fully aware of corporate governance issues. South Africa has adopted new legislation on insider trading, two codes of corporate governance (known as King Code I and II) as well as new accounting standards, more rigorous listing requirements and improved disclosure rules. However, corruption and weak enforcement remain a problem.

The report states that the South African Institute of Chartered Accountants, the accounting standard-setting body, has embarked on a harmonization process to bring South African GAAP in line with International Accounting Standards. Although the process is not complete, many International Accounting Standards have been adopted without modification. The Deutsche Bank is of the opinion that the accounting standards in South Africa are sound and provided that these standards are properly applied when financial statements are prepared and audited. The application, however, remains problematic.

¹¹ Report found on the web site of the IFC.

A weakness in South African corporate governance concerns enforcement. While the legislation in place is strong even compared to developed countries, South Africa appears to suffer from weak enforcement due partly to a relative dearth of financial resources attached to the task. Furthermore, the judicial system struggles with backlogs and is often unable to adjudicate cases quickly.

Corruption may also pose a threat to enduring corporate governance improvement in the country. Corruption impacts corporate governance principally in the areas of implementation and enforcement as corporate governance-related laws and regulations may not be enforced or may be enforced only selectively.

Conclusion

South Africa disposes of a modern legal framework addressing most of the issues that are important for corporate social responsibility approaches. However, these laws are not always enforced and are, therefore, not representative for the actual reality of corporate social responsibility practices in South Africa.