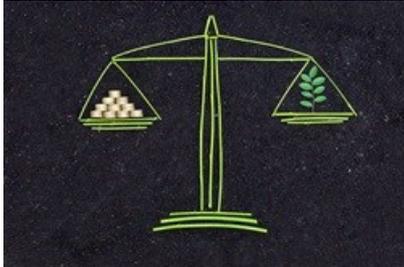


Green skeletons: corporate social responsibility advances

By  Neil Kirby

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The term 'corporate governance', and possibly the term 'corporate social responsibility', is bandied about in commercial circles with an air of confidence that is most beguiling.



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Whilst the King III report of 2009 sets out the obligations of corporate citizens in respect of the environment and how those actions should be reported and dealt with by the persons responsible for directing and governing corporations, very little is arguably known about what steps a corporate should take in order practically to address its impact on the environment and how to report about a particular impact on the environment caused by a corporate entity.

The practicalities of corporate social responsibility and governance with reference to the environment and corporate entities has been usefully addressed in a recent decision by the Supreme Court of Appeal in *Company Secretary of ArcelorMittal South Africa vs Vaal Environmental Justice Alliance (69/2014) [2014] ZASCA 184 (26 November 2014)* (the VEJA decision).

The VEJA decision concerned, fundamentally, a request for information directed to ArcelorMittal South Africa Limited (AM) by the Vaal Environmental Justice Alliance in terms of sections 50(1) and 53 of the Promotion of Access to Information Act No. 2 of 2000 (PAIA). The request for information concerned the Environmental Master Plan of AM and the request was framed as follows (in paragraph 8 of the judgment):

- "The requested documents are necessary for the protection of the section 24 constitutional rights and are requested in the public interest. VEJA requires the requested documents to ensure that [AM] carries out its obligations under the relevant governing legislation, including the National Environmental Management Act 107 of 1998, the National Environmental Management: Waste Act 59 of 2008, and the National Water Act 36 of 1998. VEJA seeks to ensure that the operations of AM are conducted in accordance with the law, that pollution is prevented, and that remediation of pollution is properly planned for, and correctly and timeously implement."

Economic interests

The information was refused. Accordingly, an appeal was dealt with in the High Court and finally the Supreme Court of Appeal. The competing interests and rights in the matter are summarised in paragraph 3 of the judgment, which brings sharply into focus the responsibilities of corporations in society and the tension that exists between economic interests, both of a corporation and the country, and governance and social responsibility matters, which must also be dealt with by a company:

- "The present litigation represents, in juxtaposition, two competing interests, namely industrial activity and its concomitant significance for the country's development and economy, as against concerns about the preservation of the environment for the benefit of present and future generations. In *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) para 1, the Constitutional Court spoke about 'the interaction between social and economic development and the protection of the environment'. This tension was brought sharply into focus at the commencement of submissions on behalf of [AM] in reply, during the hearing before us, when we urged not to incline against the corporation simply because it obviously emits gasses into the atmosphere and discharges waste products whilst being a boon to the country's economic development. In the present case there is, in addition, the complicating feature of the asserted entitlement to information held in private hands", (at paragraph 3).

The judgment carefully examines the positions of both the appellants and the respondent with reference to the interaction between the parties for purposes of dealing with the request for information. In the analysis of the facts and law, the Supreme Court of Appeal begins with the characterisation of the activities of AM on the environment and how those actions influence not only the rights of VEJA but the obligations of AM in respect of accounting to citizens affected by AM's impact on the environment (at paragraph 52):

- "As part of the evaluation of the factual background, I agree with the submission on behalf of VEJA that [AM's] acknowledged history of operational impact on the environment is important. This is not an aspect touched on by the [High Court]. [AM's] industrial activities, impacting as they do on the environment, including on air quality and water resources, have an effect on persons and communities in the immediate vicinity and are ultimately of importance to the country as a whole. Translated, this means that the public is affected and that [AM's] activities and the effects thereof are matters of public importance and interest. Put differently, the nature and effect of [AM's] activities are crucially important. [AM] is a major, if not the major, polluter in the areas in which it conducts operations."

The dispute between the parties, concerning provisions of PAIA, that VEJA did not meet the formal requirements of PAIA to obtain the information in so far as it has no right to the information, was dismissed by the Supreme Court of Appeal with reference to the activities of AM as well as the particular environmental legislation relied on by VEJA to establish its right to access the information requested. Fundamentally, at paragraph 71, the Supreme Court of Appeal held that:

- "It is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative corporate governance in relation to the environment."

Collaborative corporate governance

The statement above in paragraph 71 of the judgment underscores and draws one's attention to Principle 1.2 of the King Report on Governance for South Africa, 2009, which provides that "[t]he board should ensure that the company is and is seen to be a responsible corporate citizen."

In addition to Principle 1.2, the concept of collaborative corporate governance is dealt with specifically in paragraphs 26 and 27 of Chapter 1 of the aforementioned report:

- "There is a need to establish mechanisms for decision-makers to engage in collaborative responses to sustainability challenges. There has been a shift away from an emphasis - common at the time of King II - on individual companies' sustainability-related efforts. Although initiatives by individual companies are important, it is increasingly recognised that there are limits to what single companies acting by themselves can achieve. This is particularly true given the systemic character of many socio-environmental challenges, such as climate change, water depletion, informal settlements, and corruption."

Importantly, one of the primary differences between the King II and King III reports is the notion of collaborative corporate governance. The VEJA decision provides legal buttressing to that concept and takes matters, arguably, one step further in so far as the VEJA decision underscores the interaction between a corporate and a corporate activist in circumstances where a request by a corporate activist of a corporate in terms of PAIA is framed as potentially collaborative corporate governance.

This advancement of corporate governance is crucial in an era where increasing emphasis is placed on the responsibilities of corporate entities and in the light of express corporate governance provisions contained in the regulations promulgated in terms of the Companies Act No 71 of 2008.

The VEJA decision is also the dawning of an era where corporates will now be required to examine more carefully the skeletons in their closets and deal with them. Chief amongst matters that concern the public are the effects of corporate actions on the environment, especially by large industrial corporations, where a history of environmental degradation is apparent. In this regard, the Supreme Court of Appeal stated emphatically that:

- "Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced", (paragraph 82).

What's in your closet?

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