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REGULATION OF CORPORATE FUNDING OF POLITICAL PARTIES AND ACTIVITIES IN SOUTH AFRICA: MAKING CORPORATE POLITICAL SPENDING IN SOUTH AFRICA TRANSPARENT AND ACCOUNTABLE

by

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DECLARATION

This serves to confirm that I, Tseliso Schelesenger Thipanyane,
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Abstract

The regulation of the funding of political parties and activities by corporations (corporate political spending) in the US, Canada and UK was in response to the negative and corrupting effects such funding had on governments and the integrity of elections in these countries. However, through various court challenges, there has been a gradual move away from some of the restrictions brought about by this regulation, with the US now allowing unrestricted corporate political spending. Canada on the other hand has placed funding limits on corporate political spending whilst the UK requires disclosure of such spending and shareholder consent. Funding of political parties and political activities by companies in the US, Canada and UK is only permitted to companies registered in the respective countries.

South Africa on the other hand, currently has no restrictions on corporate political spending, save for self-imposed restrictions by companies through their memorandums of incorporation. However, recent developments in South Africa, a response to general concerns about the effects of corporate political spending on the integrity of the country’s democracy and electoral processes and possible links between the prevailing high levels of corruption and corporate political spending have raised concerns and a need for some regulation of corporate political spending in the country.

Informed by developments in the US, Canada and the UK, this dissertation proposes that South Africa should, through the Companies Act, require public disclosure of corporate political spending and shareholder consent for such spending. The amendment of the Promotion of Access to Information Act 2 of 2000 and the Electoral Commission Act 51 of 1996 could also address the issue of the disclosure of corporate political spending but would not necessarily address the interests of shareholders and stakeholders in corporate political spending decisions.
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1 Introduction

There is currently no legal restriction on the amount of funding companies can provide to South African political parties\(^1\) and political activities, nor is there any requirement for public disclosure of such funding - referred to as corporate political spending in the US and a phrase that will be used in this dissertation.\(^2\) Save where specifically required by a company’s memorandum of incorporation, corporate political spending decisions are thus made by company directors\(^3\) with no obligation to disclose such funding to shareholders and other stakeholders, such as company employees. Attempts to use the Promotion of Access to Information Act\(^4\) to compel political parties do disclose any funding outside what the state provides through the Electoral Commission Act\(^5\) have not been not successful so far.\(^6\)

The unregulated nature of corporate political spending by South African companies does not enhance the objectives that inform the current Companies Act including the requirement that companies should comply with the Bill of Rights.\(^7\) It does not adequately protect the rights of shareholders, especially minority shareholders and other stakeholders in relation to corporate political spending decisions made by company directors, and unduly exposes many companies making such funding to incidences of bribery and corruption.\(^8\) It does also not augur well for the promotion and advancement of transparency and good corporate governance,\(^9\) and can have a negative impact on the requisite “efficient and responsible management of companies.”\(^10\)

It is in this regard that this dissertation recommends that corporate political spending in South Africa should be regulated by law in order to enhance constitutional democracy and better protect and promote the rights and interests of shareholders and other stakeholders.

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\(^{1}\) Registered in terms of s 15 of the Electoral Commission Act 51 of 1996.

\(^{2}\) On the usage of the term, see for example, Bebchuk and Jackson Jr “Shining Light on Corporate Political Spending” 2012-2013 Georgetown Law Journal 923. The term used in the UK is “corporate political donations”, see Williams “Regulating Political Donations by Companies: Challenges and Misconceptions” (2012) Modern Law Review 951.

\(^{3}\) S 66 of the Companies Act 71 of 2008 makes it clear that the “business and affairs of a company” must be managed by or should be under the direction of its board.

\(^{4}\) 2 of 2000.

\(^{5}\) The Public Funding of Represented Political Parties Act 103 of 1997 provides for a fund through which moneys obtained from Parliament and from any source within and outside the country are provided on an equitable basis to political parties represented in Parliament and provincial legislature. See s 2 thereof.

\(^{6}\) See Institute for Democracy in South Africa and Others v African National Congress 2005 5 SA 39 (C); 2005 3 All SA 45 (C) par 81 and My Vote Counts NPC v Speaker of the National Assembly 2016 1 SA 132 (CC) par 8.

\(^{7}\) See s 7(a) of the Companies Act 71 of 2008.


\(^{9}\) See s 7(b) (iii) of the Companies Act 71 of 2008.

\(^{10}\) One of the purposes of the Companies Act 71 of 2008 as per s 7(j).
Shareholders should also have a say in corporate political spending decisions of their companies and the public should be informed about such spending.

Whilst there are provisions in the Companies Act that provide for the appropriate conduct of company directors,\(^{11}\) including remedies against inappropriate conduct,\(^{12}\) these measures are generally reactive, and do not adequately and proactively advance the requisite “transparency and high standards of corporate governance” required by the Companies Act\(^ {13} \) in the context of corporate political spending. Specific legislative provisions providing for mandatory disclosure of corporate political spending by all South African registered companies and for the involvement of shareholders in such decisions will, it is contended, advance good corporate governance,\(^ {14} \) and also make a significant contribution in combating corruption generally associated with corporate political spending. The provisions will also help to better position companies, as good corporate citizens, in entrenching and advancing the country’s constitutional democracy.

Developments at the international and regional level are supportive of the proposal to regulate and ensure greater transparency of corporate political spending in South Africa. The United Nations Convention against Corruption\(^ {15} \) in this regard requires states to consider adopting legislative and administrative measures to enhance transparency in the funding of politicians and political parties.\(^ {16} \) The African Union, out of concern for the possible impact of corporate funding of politicians and their political activities on democracy, especially the impact on transparent and accountable governance and the participation of citizens therein and on the important and crucial fight against rampant corruption in the African continent, adopted the African Union Convention on Prevention and Combating Corruption\(^ {17} \) which requires African

\(^{11}\) See s 75 and 76 of the Companies Act. For example, s 76(3) of the Companies Act provides that company directors should act in good faith and for a proper purpose, in the best interests of their companies - very good provisions if there was transparency and accountability over corporate political spending in the country.

\(^{12}\) See s 22 (prohibiting reckless trading), 76 (standards of directors conduct), 77 (liability of directors and prescribed officers), 78, 156, 162 (application to declare director delinquent), 163 (relief from oppressive or prejudicial conduct), and 164 (dissenting shareholders appraisal rights) of the Companies Act.

\(^{13}\) as required by s 71(b) (iii).

\(^{14}\) See Henderson and Van der Linde “Uncertificated Shares: a comparative look at the voting rights of shareholders (part 1)” 2014 TSAR 496 where the authors state that “[t]he power to vote is the most important tool a shareholder has to influence the behavior of a company.”


\(^{16}\) Article 7(3) of the United Nations Convention Against Corruption.

states to “adopt legislative and other measures” to prohibit the usage of illicit funds to finance political parties and to ensure transparency in the funding of political parties.\textsuperscript{18}

The purpose of this dissertation in this regard, is twofold: (a) to look into the importance of regulating corporate political spending in order to promote good corporate governance of South African registered companies as good corporate citizens; and (b) to explore how this regulation could be effected through the Companies Act,\textsuperscript{19} and other mechanisms and processes such as the King IV Report on Corporate Governance, the Promotion of Access to Information Act 2 of 2000 and the Electoral Commission Act 51 of 1996, and the challenges therein.\textsuperscript{20} This will be informed by a comparative analysis of how the US, Canada and the UK have addressed challenges around corporate political spending in their respective jurisdictions.

Part 2 of this dissertation, in this regard, looks into current global developments and perspectives in the regulation of corporate political spending and its impact on corporate governance, especially in the context of good corporate governance and transparency, and the protection and promotion of the rights and interests of shareholders and relevant stakeholders. This mainly focuses on developments in the US, UK and Canada and also entails a review of international standards set by the United Nations and other regional bodies such as the African Commission, the European Union and the Organisation for Economic Co-operation and Development (OECD). Part 3 critiques current developments and responses pertaining to the regulation of corporate political spending in South Africa. This includes the position of government, political parties, the courts, and the contribution of the King Reports on Corporate Governance, reports of Public Protector, academics and relevant non-governmental organisations; and explores the possibility of amending the Companies Act and existing legislation such as the Promotion of Access to Information Act and the Electoral Commission Act. Part 4 recommends an appropriate legal and institutional framework for the regulation of corporate political spending in South Africa and focuses on the Companies Act\textsuperscript{21} and its implementing and enforcement processes and institutions\textsuperscript{22} and also explores other legislative

\textsuperscript{18} Article 10 of the African Union Convention on Preventing and Combating Corruption.

\textsuperscript{19} This, for example, could be to require that all companies disclose political party funding in their annual reports.

\textsuperscript{20} This would include possible constitutional challenges to the effect that these provisions would constitute unfair discrimination of companies, as juristic persons, in relation to natural persons as per s 9 of the Constitution of the Republic of South Africa, 1996.

\textsuperscript{21} This will consider amongst other provisions of the Companies Act 71 of 2008 pertaining to the liability of directors and prescribed officers (s 22 and 75-77 of the Act) and civil actions against loss or damage incurred by companies as a result of contravention of any provision of the Act (s 218 of the Act).

\textsuperscript{22} This will raise issues pertaining to the effectiveness of the Companies and Intellectual Property Commission (CIPC) to deal with the regulation of corporate political spending in South Africa in view of its capacity challenges
measures such as the Promotion of Access to Information Act and the Electoral Commission Act. This will be informed by relevant international developments, especially in the US, Canada and the UK. Part 5 is a conclusion.

2. Current Global Developments and Perspectives

The funding of political activities and political parties by companies (hereinafter, corporate political spending) has in general been frowned upon due to the perceived negative effects it has on democracy - the rights and ability of citizens to elect their representatives freely without undue influence, and ensuring that elected representatives are accountable to their citizens/electorate and are not under the influence of some powerful and wealthy corporations that have secretly funded their political campaign activities to the detriment of the public. In the context of company law, there was also a view that corporate political decisions made by company directors should not undermine the rights and interests of shareholders and should be made with their concern or consultation.

It is in this regard that laws and regulations were adopted in many countries and in various and differing ways to regulate corporate funding of political activities and to ensure transparency therein. The main thrust of these laws and regulations was to promote transparency and accountability over the funding of political parties and activities in order to minimise the risk of corruption and undue influence by corporate donors in matters of governance. However, some countries have also enacted laws that regulate corporate political decisions in relation to the rights and interests of relevant or affected shareholders and other stakeholders. The extent of how far the regulation of corporate political spending and corporate political spending decisions should go is still a matter of debate and study in many countries where there is such regulation, with the US and UK being examples in this regard.

For purposes of this dissertation, the regulation of corporate political spending in the US, UK and Canada is looked into in detail in order to inform how best corporate political spending and abilities to deal with its current mandate including the filing of annual returns by companies in terms of s 32 of the Companies Act 71 of 2008.

23 Regarded as government of the people, by the people and for the people and emphasising the right of the people to choose their elected representatives and to remove them whenever necessary. This point is captured by the US 1776 Declaration of Independence which states in part: “…Governments are instituted among Men, deriving their just powers from the consent of the governed…” See Rakove (ed) The Annotated U.S. Constitution and Declaration of Independence (2009) 77.


should be regulated in contemporary South Africa, especially under the current Companies Act
2008 which has placed a premium on transparency, good corporate governance, and the role of
companies with respect to the promotion and protection of human rights in the country.26 This
analysis also takes into account international norms and standards set by the United Nations
and other regional bodies such as the European Union and the Organisation for Economic Co-
operation and Development with respect to the regulation of corporate political spending.

2.1 Developments in the United States

In 1907, the US Congress, following numerous political funding scandals by US corporations,
such as the funding of the Republican Party in 1905 by insurance companies using monies of
policy holders and the funding of the re-election campaign of Theodore Roosevelt in 1904,27
enacted the Tillman Act28 which prohibited direct financial contributions to political parties,
political campaigns and candidates in federal elections by corporations (profit and non-profit)
and labour organisations.29 This was intended to “eradicate both perceived and actual
corruption” associated with such funding and a reaction, then, to lack of shareholder approval
in corporate political spending decisions made by companies.30

The US Congress further enacted the Federal Election Campaign Act of 1971 in an attempt to
curb corruption in the electoral process at the federal level and for greater transparency in the
funding of politicians and political parties and their activities.31 The 1974 amendments of the
Federal Election Campaign Act, amongst many other provisions, limited the amount of
financial support any company can give for political campaign activities.32

26 S 7(a) and (b) of the Companies Act 71 of 2008.
27 See Winkler “Other People’s Money: Corporations, Agency Costs and Campaign Finance Law” 2004 George
28 US Tillman Act of 1907. For more detailed historical developments pertaining to the Tillman Act, see Note
29 Discussed by Torres-Spelliscy and Foget “Shareholder-Authorized Corporate Political Spending in the United
Kingdom” 2011-2012 University of San Francisco Law Review 525 549.
30 See Atkey “Corporate Political Activity” 1985 University of Western Ontario Law Review 129 133 and Sitkoff
“Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters” 2002 University of
Chicago Law Review 1103. See also, Winkler (n 27) 871 and 873 who said that these limitations were to also
ensure that corporate managers did not use “other peoples’ money” without their support and for self-serving
purposes.
31 See Fisch “Frankenstein’s Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political
32 Section 441b of the Federal Election Campaign Act prevented corporations from making independent financial
contributions to federal electoral processes, see Fisch (n 31). For a detailed history of the regulation of corporate
political spending in the US, see Federal Election Commission v National Right to Work Committee (NRWC) 459
US 197 (1982).
While the legislative limitations on direct corporate political spending survived a few constitutional challenges, these measures were eventually declared to be unconstitutional in that they constituted unfair discrimination against companies as judicial persons. In this regard, the US Supreme Court in *Buckley v Valeo* declared the funding limitations to be unconstitutional on the basis that they denied corporations their constitutional right to free speech (first amendment rights of the US Constitution). Corporations were thus allowed the freedom to fund political activities but were not allowed to make direct contributions to candidates standing for elections at federal level. Another important decision in this regard was *Federal Election Commission v National Conversation Political Action Committee et al.*, where the US supreme court held that a provision of the Presidential Election Campaign Fund Act that made it a criminal offence for an independent “political committee” to avail “funds of more than $1000…” to a candidate already receiving public financing was unconstitutional.

In January 2010, the US supreme court in *Citizens United v Federal Election Commission* held the prohibition on corporations and unions from supporting one candidate over another and the funding of adverts within 60 days of a general election or 30 days of a primary election imposed by the Bipartisan Campaign Reform Act of 2002 to be unconstitutional. This allowed unlimited corporate political spending on paid political advertisements in federal elections. However, the prohibition against direct funding of candidates in federal elections by corporations introduced by the Tillman Act of 1907 survived the *Citizens United* decision and was upheld by *Federal Election Commission v Beaumont*. In response to the continuation of the ban on direct corporate political spending for candidates in federal elections, the court said:

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35 Discussed in detail by Fisch (n 31) 633.
36 Atkey (n 30) 134.
37 105 S Ct 1459 (1985).
38 See Atkey (n 30) 134.
40 However, some commentators are of the view that this judgment allowed corporations to have unlimited ability in relation to corporate political spending. See Pollman (n 33) 642. According to Friedman, more than two-thirds of the American public was opposed to the removal of these restrictions on corporate political spending, see Friedman “First Amendment and “Foreign Controlled” U.S. Corporations: Why Congress Ought to Affirm Domestic Subsidiaries’ Corporate Political-Speech Rights” 2013 Vanderbilt Journal of Transnational Law 616.
41 Torres-Spelliscy and Foget (n 29) 527.
42 Tillman Act of 1907.
44 Beaumont (n 43) 154.
“[T]he ban has always done further duty in protecting ‘the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.’” (Citation omitted)

However, in McCutcheon et al v Federal Election Commission\(^45\) the US supreme court declared in April 2014 that spending limits imposed on corporate funding of political parties and political campaigns were unconstitutional and violated free speech (First Amendment). What was also important about the ruling was that the prohibition against political funding by foreign entities remained.\(^46\)

The concern about US laws and court decisions over corporate political spending is that such decisions “leave both shareholders and voters in the dark about the sources of corporate political spending”\(^47\) and this is not in the best interests of shareholders.\(^48\) According to Bebchuck and Jackson, decisions on corporate political spending are regarded as ordinary business decisions under current US corporate law which do not require shareholder approval and the role of independent directors (non-executive directors) and do not provide for disclosure of such spending. The authors have thus argued for the development of appropriate rules by US lawmakers that will regulate who should make corporate political spending decisions.\(^49\) In this regard, they made the following recommendations in relation to the content of the requisite rules:\(^50\)

- A clear role for shareholders in determining the amount of corporate political spending and the intended beneficiaries
- An oversight role for independent directors in relation to corporate political spending
- The option for shareholders to review and change their support for decisions on corporate political spending and the role of independent directors therein
- Adequate disclosure of corporate political spending decisions

The benefits of transparency and accountability in corporate political spending decisions by US public companies are said to entail the following: not burdening small corporations, ensuring that management is more accountable to shareholders and better informed

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\(^{46}\) McCutcheon (n 45) at 1448. See also, Brown and Martin “Rhetoric and Reality: Testing the Harm of Campaign Spending” 2015 New York University Law Review 1066 1091.

\(^{47}\) Torres-Spelliscy and Foget (n 29) 576.

\(^{48}\) See Bebchuk and Jackson Jr (n 2) 923, 925 and Pollman (33) 666.


\(^{50}\) Bebchuk and Jackson Jr (n 49) 83.
This importance of disclosure in corporate political spending was also emphasised by the US supreme court in *Citizens United* where the court wrote:

> “With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interests in making profits, and citizens can see whether elected officials are in the pocket of so-called moneyed interests.”

Despite the call and need for transparency and accountability over corporate political spending and the involvement of shareholders and non-executive company directors in the US, not much progress has been made in this regard by the US Congress. According to Pollman, the US Congress prevented the US Securities and Exchange Commission from using public funds to require disclosure of corporate political spending by public companies. This is a bit difficult to understand in view of the Sarbanes-Oxley Act passed in 2002 to promote corporate transparency through appropriate disclosures.

There are also some academics who continue to oppose the requisite transparency and accountability in corporate political spending and the involvement of shareholders and non-executive (independent) directors in corporate political spending decisions. Some rely on the business judgment rule which provides that much of the decisions pertaining to the management of companies and the decision making process in this regard should be left to the directors, who in any case, have fiduciary responsibilities to shareholders in running companies. This is despite the recognition that corporate political spending decisions are not always in pursuit of a company’s interests but may also be motivated by the "directors’ and executives’ own political preferences and beliefs.” James Kwak, on the one hand, argues that whilst mandatory transparency is good for the regulation of corporate political spending, it is not enough and recommends that shareholders should in addition challenge, in courts of law,

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51 Fisch (n 31) 638-640.
52 *Citizens United v Federal Election Commission* (n 39) 916.
53 See Pollman (n 33) 643.
54 As per the Consolidated Appropriations Act 2016, H.R. 2029 Title VII section 707 (2016).
55 Pollman (n 33) 671. See also Guttentag “On Requiring Public Companies to Disclose Political Spending” 2014 *Columbia Business Law Review* 593 599-601.
56 Section 409 of the Sarbanes-Oxley Act provides that: “…each issuer reporting under section 13(a) or 15(d) shall disclose to the public on a rapid and current basis such additional information concerning material changes.”
59 Bebchuk and Jackson Jr (n 49) 90.
corporate political spending decisions that are not in the interests of their companies and are tainted by personal interests of directors and executives that are in conflict with those of their companies. However, other scholars are of the view that corporate political spending compromises the integrity of a political system, especially a liberal democracy system, based on the election of a legislator by willing voters.

Time will tell as to how these issues will turn out in the US going forward. In making a case for transparency and accountability over corporate political spending in the US, Bebchuk and Jackson argued:

“There are large public companies spend significant amounts of shareholder resources on politics. The interests of directors and executives may frequently diverge from the interests of shareholders with respect to such spending and such spending carries special significance for shareholders. Current law, however, does not require public companies to disclose this spending to their investors.”

2.2 Developments in Canada

Like its neighbour, Canada had imposed restrictions on corporate political spending, a move mainly triggered by the Pacific Scandal of 1873 where the governing party of the day accepted funds from an entrepreneur interested in securing government contracts and general corruption practices by many Canadian corporations. The Dominion Elections Act 1874 and its subsequent amendments was a response to this scandal and many other incidents of corruption and was followed by the Election Expenses Act which imposed spending limits on political candidates and third parties for federal elections and required political parties and candidates to disclose their expenses, their revenue and the sources thereof.

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62 Bebchuk and Jackson Jr (n 2) 966.
63 Atkey (n 30) 129. The need for disclosure over corporate political spending was also supported by Brown and Martin “Rhetoric and Reality: Testing the Harm of Campaign Spending” 2015 New York University Law Review 1066 1091.
65 The 1908 amendments made it an offence for any contributor to donate money to any political candidate other than through official agents of political candidates and also prohibited foreigners from assisting in elections. Section 10 of the Dominion Elections Act, 1920, for example, prohibited unincorporated associations like trade unions from making voluntary contributions to election campaigns. For detailed discussion see Boyer “Legal Aspects of the Corporate Political Contribution in Canada” 1978 -1979 Canadian Business Law Journal 161 and 167 who also indicated that the legal restrictions imposed on election funding in Canada between 1908 and 1930 were never enforced.
67 Atkey (n 30) 143. However, unlike the US challenges over corporate spending disclosure, the Canadian Companies Act 1967, through s 19(3), required corporate political spending in excess of £200 to be disclosed in annual reports of companies making such spending. See Ewing (n 61) 57, 59.
The Canada Elections Act\(^68\) prohibited private funding of political activities during an election period by trade unions and corporations whilst individual donations were capped to $1, 100. These limitations were however successfully challenged in *National Citizen’s Coalition Inc v Attorney General of Canada*\(^69\) on the basis that these measures undermined the freedom of expression enshrined in the Canadian Charter of Rights and Freedoms.\(^70\)

The Canada Elections Act of 2000\(^71\) was a response to the challenges around the limitations on corporate political spending. The Canada Elections Act now restricts contributions to any political candidate or registered political party or registered political association involved in federal elections to a total of $1500 per person in any calendar year\(^72\) and prohibits foreign funding of elections in Canada\(^73\) and the usage of foreign funds.\(^74\) This prohibition includes corporations or association not carrying on business in Canada and foreign political parties and foreign governments and their agents.\(^75\)

In relation to disclosure of corporate political spending in this regard, the Canada Elections Act requires full disclosure to the Chief Electoral Officer of Canada of all contributions of more than $200 for political activities at the federal level received by a political entity or candidate through a duly appointed financial agent of such political entity or candidate.\(^76\) The requisite annual report issued by the Chief Electoral Officer has to provide the name and address of each contributor whose contribution exceeds $200.\(^77\)

In the case of corporate spending on election advertising, the Canada Elections Act has imposed a ceiling of $150 000 in relation to a general election by any third party\(^78\) and any entity, including a corporation, spending more than $500 for election advertising has to register with the Chief Electoral Officer.\(^79\) The requisite registration of corporations require the name and contact details of every corporation in question including the company officer with authority to make such election advertising expenses and a copy of each company’s resolution.

\(^69\) 1984 32 Alberta Law Report (2d) 249 (Queen’s Bench) and 1984 DLR (4th) 481 (Alberta Court of Queens’ Bench).
\(^70\) *National Citizens’ Coalition* (n 69) 260 as per Medhurst J.
\(^71\) SC 2000 chC.9 (last amended on 1 January 2016).
\(^72\) See s 367(1) of the Canada Elections Act. This amount increases by $25 every year in terms of s 367 of the Act.
\(^73\) See s 363 of the Canada Elections Act.
\(^74\) See s 358 of the Canada Elections Act.
\(^75\) See s 358 of the Canada Elections Act.
\(^76\) See s 475(4) of the Canada Elections Act.
\(^77\) See s 475(2) of the Canada Elections Act.
\(^78\) See s 350(1) of the Canada Elections Act.
\(^79\) See s 353 of the Canada Elections Act.
authorising such expenses. Any entity including a corporation that intends to spend over $5000 in election advertising is required to appoint an auditor who should submit a detailed election advertising expense report to the Chief Electoral Officer. The Chief Electoral Officer is required to publish the names and addresses of registered entities - that is, those that spend more than $500 in election advertising. The motivation for these limitations were concerns over the influence wealthy individuals and corporations would have on Canadian elections at the federal level, a concern some scholars regard as being overrated.

2.3 Developments in the United Kingdom

In the United Kingdom, corporate political spending is approached differently from the US and is more regulated in relation to transparency and the protection of the rights of shareholders. However, before changes introduced by the Companies Act 1967, corporate political spending in the United Kingdom was not regulated, there were no spending limits imposed and companies were not required to obtain shareholder approval for such spending. The Companies Act 1967 required disclosure of corporate political spending for amounts of £200 or more in the annual reports of the respective companies and copies of these reports were to be filed with the Companies Office. This amount was increased to £2000 in 2007.

The amendments to the UK Companies Act of 1985 in 2000 introduced by the Political Parties, Elections and Referendums Act not only retained the corporate political spending disclosure on annual basis but also required shareholder consent for such spending and further confined corporate political spending to UK registered companies. This was a response to the recommendations of the report of the Committee on Standards in Public Life chaired by Lord Neill of Bladen and established to address public concerns that corporate political spending

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80 See s 353(1) and (5) of the Canada Elections Act.
81 See s 355 and 359 of the Canada Elections Act.
82 See s 362 of the Canada Elections Act.
84 See s 19 of the UK Companies Act 1967 and Klein (n 25) 17, 29.
85 Klein (n 25) 29. See also Torres-Spelliscy and Foget (n 29) 544 and Boyer (n 65) 183.
86 Torres-Spelliscy and Foget (n 29) 544.
87 See s 54(2) (b), 139 and 140 of the Political Parties Elections and Referendum Act 2000 c. 41.
88 See s 374A-374K of the Companies Act 1985 and s 54 of the Political Parties, Elections and Referendums Act. Discussed by Torres-Spelliscy and Foget (n 29).
89 Fifth Report of the Committee on Standards in Public Life The Funding of Political Parties in the United Kingdom (1998).
had undue influence on policies of major parties and the usage of investors’ funds by company directors without their concern and accountability.\textsuperscript{90}

The UK Companies Act of 2006\textsuperscript{91} retained these changes, exempted donations from trade unions, and provided for company directors to be held responsible for unauthorised corporate political spending decisions.\textsuperscript{92} Media corporations were, however, exempted from obtaining shareholder approval for corporate political spending decisions.\textsuperscript{93} The Act only permitted UK registered companies to fund political candidates in UK elections.\textsuperscript{94} In terms of the 2006 Companies Act,\textsuperscript{95} corporate political spending decisions require the permission of shareholders who should also be informed of such spending on an annual basis.\textsuperscript{96} Shareholders are required to vote for a “generic political budget for one year to four years” in an annual general meeting and do not generally approve individual donations nor the identity of the political party to be funded.\textsuperscript{97}

Whilst the UK provisions on corporate political spending in terms of disclosure and accountability to shareholders are more advanced than the US, the minority dissenting shareholders in such spending are not provided adequate protection by the 2006 Companies Act.\textsuperscript{98} This observation was also made by the Neill Committee Report.\textsuperscript{99} Williams, however, does not recommend giving shareholders an absolute say in corporate political spending decisions as this would not be in line with the role of company directors and managers in running the affairs of companies (managerial agency).\textsuperscript{100}

Williams is also critical of current rules pertaining to corporate political spending in the UK in that the disclosure and shareholder consent provisions whilst generally effective in large public

\textsuperscript{90} Torres-Spelliscy and Foget (n 29) 548, 551-2.

\textsuperscript{91} Companies Act 2006 (UK).

\textsuperscript{92} See s 374 and 369 of the Companies Act 2006 (UK).

\textsuperscript{93} See Companies Political Expenditure Exemption Order 2007.

\textsuperscript{94} As per Political Parties, Elections and Referendum Act, 2000 ch 41 s 54(2) (b), schedule 19 (UK) and s 363(3) of the 2006 Companies Act (UK).

\textsuperscript{95} UK Companies Act (2006) s 366. According to s 366, a company cannot make a donation to a political party, or any political organization or to an independent election candidate or incur any political without authorization in the form of a resolution (ordinary resolution save where a company’s articles of association provide otherwise) by members of the company in question. Such a resolution, adopted in terms of s 367 of the Act, last for four years save where a shorter period is provided. Directors who incur political donations without the requisite authorization are jointly and severally liable to compensate the affected company for the full amount donated with interest and to compensate the company for any “loss or damage sustained” by the company as a result of such donation in terms of s 369 of the UK Companies Act.

\textsuperscript{96} See Torres-Spelliscy and Foget (n 29) 555.

\textsuperscript{97} Section 268 (1) of the Companies Act 2006. See also Torres-Spelliscy and Foget (n 29) 546.

\textsuperscript{98} See Williams (n 2) 951, 960.

\textsuperscript{99} See the Neill Committee Report (n 89) par 6.35 and Williams (n 2) 960.

\textsuperscript{100} For discussions see Williams (n 2) 960 - 961.
companies, do not adequately address the challenges of such spending by private companies, which he refers to as “owner-managed” and “closely held” companies where directors and managers control the companies and are effectively the majority if not the only shareholders. His position is based on the fact that corporate tax in UK is lower than individual tax and thus allows wealthy individuals to hide behind corporations they own or control to influence political parties in the UK through corporate political spending decisions whilst actually being subsidised by individual tax payers - much of corporate political spending in the UK is done by private companies.

This lower tax rate for companies in the UK compared to the individual tax rate, according to Williams, gives an advantage to wealthy company owners to influence political decisions through corporate political spending more than ordinary individuals would be able to do. This is also contrary to the sentiments of Baroness Hale who said in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*, “...we do not want our Government or its policies, to be decided by the highest spender.” It is in this regard that Williams while supporting a total ban of corporate political spending in the UK acknowledges that this is currently not possible in the UK and proposes “enhanced disclosure” requiring disclosure of the identity of owners/directors of private companies making corporate political spending decisions and a cap on corporate political spending amounts.

2.4 International and regional developments

At the international level and in terms of the UN Convention against Corruption, states are required to consider adopting legislative and administrative measures to enhance transparency in the funding of politicians and political parties. The Organisation for Economic Co-operation and Development also supports transparency and accountability as key components

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101 The Political Parties, Elections and Referendum Act only requires the identity of companies engaged in corporate political spending and not that of directors. See Williams (n 2) 975.
102 Williams (n 2) 970.
103 Williams (n 2) 954, 966, 968.
104 Williams (n 2) 971.
105 2008UK HL 15; 2008 1 AC 1312 48. Cited by Williams (n 2) 972.
106 Williams (n 2) 976, 977.
108 Article 7(3) of the UN Convention against Corruption.
of good corporate governance. In this regard, the *G20/OECD Principles of Corporate Governance*\textsuperscript{109} provide:\textsuperscript{110}

“The purpose of corporate governance is to help build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies.”

The *OECD Principles of Corporate Governance* also make it clear that one of the consequences of good corporate governance is to “reassure shareholder and other stakeholder that their rights are protected.”\textsuperscript{111} Lack of transparency and accountability over corporate political spending decisions by public companies in particular, would not be in accordance with good corporate governance and would be inconsistent with the *G20/OECD Principles of Corporate Governance*. It is in this regard that the *Principles* acknowledged that many countries require large companies to voluntary disclose in their reports, “non-financial information” that includes “donations for political activities” especially where such information is not readily available.\textsuperscript{112}

Closer to home, the African Union out of concern for the possible impact of corporate funding of politicians and their political activities on democracy (especially transparency, accountability and participation of citizens in matters of governance) and on the important and crucial fight against rampant corruption in the African continent, adopted the AU Convention on Prevention and Combating Corruption in 2003.\textsuperscript{113} Unlike the UN Convention against Corruption, the AU Convention requires African state parties to “adopt legislative and other measures” to prohibit the usage of illicit funds to finance political parties and to ensure transparency in the funding of political parties.\textsuperscript{114}

3. *Current developments in South Africa*

3.1 General position

The current situation in South Africa is that there are no legislative restrictions on corporate political spending; there are no disclosure requirements nor shareholder approval prerequisites


\textsuperscript{110} OECD (n 109) 7.

\textsuperscript{111} OECD (n 109) 10.

\textsuperscript{112} OECD (n 109) 39.

\textsuperscript{113} Adopted in Maputo, Mozambique on 11 July 2003 and entering into force on 5 August 2006. South Africa signed the Convention on 16 March 2004 and ratified it on 11 November 2005.

\textsuperscript{114} Article 10 of the AU Convention on Preventing and Combating Corruption.
for such spending, save where a company’s memorandum of incorporation may provide otherwise. This is despite the provisions of the Constitution of the Republic of South Africa, 1996, endorsing the values of accountability, transparency, openness and responsiveness in matters of governance that extends, at the very least, to state-owned companies, and a general right of access to information in the possession of the state and of natural and juristic persons to some extent. This is also despite the provisions of the Companies Act 2008 which require that company law in South Africa should comply with the bill of rights of the constitution, promote transparency and good corporate governance, and an appropriate balance between the rights and obligations of shareholders and directors. The current situation also ignores the country’s obligations under the UN Convention against Corruption and the AU Convention on Preventing and Combating Corruption.

Transparency and accountability in relation to corporate political spending have thus been a hard sell over the past two decades of South Africa’s democracy. The Public Funding of Represented Political Parties Act which allows public and private funding of political parties without requiring disclosure of private funding of political parties has not helped this situation at all. The resistance to transparency over private funding of political parties supported by the ruling party, the African National Congress (ANC), and to some extent, the official opposition party, the Democratic Alliance (DA), have also contributed to the lack of transparency and regulation of corporate political spending in South Africa.

3.2 Current judicial position

This reluctance, which has certainly contributed to allegations and public perceptions of corruption and the role of corporate political spending therein survived two court challenges brought under the constitutional right of access to information and the inadequacies of the Promotion of Access to Information Act (PAIA). The courts have also been reluctant to develop the law in this regard, preferring to leave this matter to the legislative and executive branches of government.

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116 See s 32 of the constitution read with the Promotion of Access to Information Act.
117 See s 7(a) of the Companies Act 71 of 2008.
119 In Public Protector v Mail and Guardian 2011 (4) SA 420 (SCA) par 33 - 4, 37, 42, 47 and 49, R11 million obtained by Imvume Management from the state oil company, PetroSA, found its way into the coffers of the ruling party, the African National Congress (ANC). The ANC ultimately had to return the funds it had illegally received back to the state oil company.
120 See Institute for Democracy in South Africa (n 6) and My Vote Counts NPC (n 6).
In Institute for Democracy in South Africa and Others v African National Congress and Others\textsuperscript{121} the court in rejecting the application to compel political parties to disclose their private sources of funding, indicated that the disclosure of such funding was not necessary for free and fair elections and that this was supported by the fact that the country held three general elections deemed as free and fair.\textsuperscript{122} The court also held that the Promotion of Access to Information, the enabling legislative for the constitutional right of access to information in terms of section 32 of the constitution as it stood, did not provide for the disclosure of private funding of political parties.\textsuperscript{123} The Court did, however, indicate that its ruling on the application did not rule out political parties being compelled to disclose details of private donations they receive as a “matter of principle”.\textsuperscript{124} One interesting feature of the application was its opposition and rejection by leading political parties in parliament led by the African National Congress and the Democratic Alliance,\textsuperscript{125} though the ANC proposed, as an alternative to the dismissal of the application, a stay of the proceedings in order to allow a process that would lead to the adoption of national legislation that would regulate the funding of political parties.\textsuperscript{126} More than a decade later, the applicant in My Vote Counts NPC v Speaker of the National Assembly\textsuperscript{127} wanted the constitutional court to compel parliament to pass legislation that would oblige political parties to disclose sources of their private funding. The basis for this request was that this disclosure was necessary for an effective exercise of political rights by citizens as provided for by section 9 (3) of the constitution and that section 32 of the constitution pertaining to the right of access to information should, in this regard, be constructed in a manner that will give effect to requests for the disclosure by political parties of their sources of private funding as the Promotion of Access to Information Act did not provide for such disclosure.\textsuperscript{128} The application also indicated that there was no legislation in South Africa that required “systematic and proactive disclosure of private funding of political parties.”\textsuperscript{129}

However, the majority judgment, in dismissing the application, was of the view that there was no need to pronounce on the importance of information on private funding of political parties.

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\textsuperscript{121} Institute for Democracy in South Africa (n 6).
\textsuperscript{122} Institute for Democracy in South Africa (n 6) par 81.
\textsuperscript{123} Institute for Democracy in South Africa (n 6) par 33.
\textsuperscript{124} Institute for Democracy in South Africa (n 6) par 86.
\textsuperscript{125} Institute for Democracy in South Africa (n 6) par 10.
\textsuperscript{126} Institute for Democracy in South Africa (n 6) par 85. A proposition that took more than a decade to see the light.
\textsuperscript{127} My Vote Counts NPC (n 6).
\textsuperscript{128} My Vote Counts NPC (n 6) par 2 and 19.
\textsuperscript{129} My Vote Counts NPC (n 6) par 8.
to voters when exercising their political rights to elect political parties of their choice. The basis for this decision, according to the majority court, was that the main thrust of the application was based on the inadequacy of the Promotion of Access to Information Act to avail to voters in the desired manner, information on private funding of political parties that the voters needed to make informed choices in the election of political parties. This, according to the majority judgment, required a frontal attack on the inadequacies of the Promotion of Access to Information Act and that such attack should have first been brought in the high court in terms of section 172 of the constitution.\textsuperscript{130} The majority judgment was thus of the view that the application was brought in “breach of the principle of subsidiarity.”\textsuperscript{131}

On the other hand, the minority judgment after acknowledging the shortfalls of the Promotion of Access to Information Act in the context of transparency over private funding of political parties\textsuperscript{132} and the benefits of such disclosure to voters\textsuperscript{133} who have to make informed political decisions in electing respective political parties held in favour of the applicant’s request for specific legislation that would require registered political parties in South Africa to disclose their private funding.\textsuperscript{134} The minority judgment in this regard held that records pertaining to private funding of political parties “must be made publicly available to all [and] this would have to be done systematically and regularly, not only upon application.”\textsuperscript{135}

Almost two years after the decision of the constitutional court in \textit{My Vote Counts}\textsuperscript{136} Meer J on 27 September 2017 ruled in \textit{My Vote Counts NPC v President of the Republic of South Africa and Others}\textsuperscript{137} that there was a constitutional imperative for disclosure of information pertaining to the private funding of political parties in order to give effect to the right to vote in the country.\textsuperscript{138} This was based on the reading of section 32(1) of the constitution read with section 19 and section 7 by Meer J, who in this regard, found the inability of the Promotion of Access to Information Act to enable public access of this information to be inconsistent with the constitution and thus invalid to this extent.\textsuperscript{139} Parliament was given 18 months to amend PAIA

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{130}] \textit{My Vote Counts NPC} (n 6) par 122 and 124.
\item[\textsuperscript{131}] \textit{My Vote Counts NPC} (n 6) par 159, 161 and 193.
\item[\textsuperscript{132}] \textit{My Vote Counts NPC} (n 6) par 94 and 117.
\item[\textsuperscript{133}] This includes knowledge of the source of such private funding, the usage of such funding and what message this conveys about the interests of the political party in question and the contribution of such disclosure in deterring corruption that could result through the improper usage of such funding and the granting of special and even illegal favours by political parties to their funders. See \textit{My Vote Counts NPC} (n 6) par 42 and 88 - 90.
\item[\textsuperscript{134}] \textit{My Vote Counts NPC} (n 6) par 118.
\item[\textsuperscript{135}] \textit{My Vote Counts NPC} (n 6) par 96.
\item[\textsuperscript{136}] \textit{My Vote Counts NPC} (n 6). Decided on 30 September 2015.
\item[\textsuperscript{137}] Case No 13372/2016 2017 ZAWCHC 105. Decided on 27 September 2017.
\item[\textsuperscript{138}] \textit{My Vote Counts NPC v President of the Republic of South Africa and Others} (n 137) par 42.
\item[\textsuperscript{139}] \textit{My Vote Counts NPC v President of the Republic of South Africa and Others} (n 137) par 75.
\end{itemize}
\end{footnotesize}
in order to remedy this defect and “allow for the recordal and disclosure of private funding information” to the general public. The registrar of the court was also directed to refer the matter to the constitutional court as required by section 172(2) of the constitution.¹⁴⁰

Time will tell as to whether there will be a challenge to this decision as per section 172(2) (d) of the constitution and whether the constitutional court will confirm the order of constitutional invalidity of the Promotion of Access to Information Act. What was interesting about the court case was that the government, through the minister of justice and correctional services, opposed the application and was joined by the main opposition party, the Democratic Alliance (DA). The court dismissed both challenges with costs.¹⁴¹

3.3 Companies Act and corporate governance principles

The enactment of the Companies Act 71 of 2008, whose purposes as correctly stated by Mervin King, include the promotion of “transparency and high standards of corporate governance”,¹⁴² has not had a significant impact on transparency and accountability when it comes to corporate political spending by South African companies. This is despite the view amongst some scholars that the provisions of the Companies Act on transparency and accountability are “both comprehensive and appropriate”.¹⁴³ This is also despite the ground breaking work on corporate governance in South Africa and constitutes an inadequate consideration of relevant stakeholders in corporate political spending decisions envisaged in a “stake-holder approach to corporate governance”¹⁴⁴ supported by Mervin King and others.¹⁴⁵

Whilst certain provisions of the Companies Act pertaining to the role and fiduciary duties and responsibilities of company directors and managers can be used to address some of the challenges of unregulated corporate political spending, these measures are not adequate as they do not require shareholder consent in corporate political spending decisions¹⁴⁶ and automatic disclosure of the beneficiaries of such spending and the amounts involved. Without any changes to the company law as it stands, the only relief for shareholders would be through

¹⁴⁰ My Vote Counts NPC v President of the Republic of South Africa and Others (n 137) par 75(5).
¹⁴¹ My Vote Counts NPC v President of the Republic of South Africa and Others (n 137) par 7 and 75(4).
¹⁴⁵ See Davis et al Companies and Other Business Structures in South Africa 2013 4, where the authors indicate that corporate governance as a concept, was popularised in South Africa through the publication of the King Report on Corporate Governance in 1994.
¹⁴⁶ See (n 11) and (n 12).
appropriate provisions in the memorandums of incorporation and rules of respective companies and action against company directors and officials who abuse their power and do not act in the best interests of their companies when making corporate political spending decisions.

In response to the pressure for disclosure of private funding of political parties in South Africa, including accountability to shareholders and other relevant stakeholders over corporate political spending, it is interesting to note that a company like Sanlam, with its historic funding ties to the apartheid regime, indicated in its 2016 Corporate Governance Report that whilst it is committed to the strengthening of the country’s constitutional democracy by supporting democratic institutions and social initiatives, it does “not provide support to any individual political party, financial or otherwise.” It would also be interesting to know what led to this position of Sanlam and whether it has instituted necessary measures to ensure that its support to many democratic institutions and social initiatives that it funds does not find its way to political parties through indirect means.

The various King Reports on Corporate Governance including the latest report, King IV: Report on Corporate Governance for South Africa 2016 have not really focused on issues and challenges around corporate political spending in the country. As an example, King IV advocates for a stakeholder-inclusive approach in corporate governance, an approach it describes as one that “balances the needs, interests and experiences of material stakeholders in the best interests of the organisation over time.” King IV as part of its Code on Corporate Governance, also emphasises the importance of transparency in corporate governance and states that members of a governing body of a corporate entity “should be transparent in the manner in which they exercise their governance role and responsibilities”. However, these important principles do not generally extend to corporate political spending and decisions in South Africa currently.

147 See s 15, 116, and 17 of the Companies Act 71 of 2008.
148 See (n 11) and (n 12).
149 See Van Vuuren Apartheid Guns and Money: A tale of profit (2017) 71 81-82 who also points out that the then Sanlam chairman, Fred du Plessis, served in President PW Botha’s Defence Advisory Council and that Sanlam benefitted from state contracts through this association.
150 SANLAM “Corporate Governance Report” 16.
152 King IV Report (n 151) 24, 41.
153 King IV Report (n 151) 44.
3.4 Other legislative developments

Due to the lack of regulation of corporate political spending, most corporations do not disclose the beneficiaries of their corporate political spending and others probably fund more than one political party in the country. As an example, when the well-known business family, the Gupta family, was accused of funding the ruling party and the family of the president in order to acquire business opportunities from state-owned enterprises such as ESKOM, it turned around and indicated that one of the senior executives of the company had also funded the leading opposition party, the Democratic Alliance (DA), whose leader then, Helen Zille, had alleged that she collected the cheque at the home of the Gupta family.154

This state of affairs, which even allows funding of political parties and political activities by foreign entities including foreign companies, has led to numerous allegations and concerns about the undue influence of many corporations over government decisions, leading to allegations of state capture by some of these companies and entities. The latest findings and recommendations by the public protector over the influence the Gupta family and their group of companies have on the president and government and state owned enterprises such as ESKOM, is one example in this regard.

On the possible effect of unregulated private funding of political parties including corporate political spending, the minority judgment in *My Vote Counts* stated:155

“…Private contributions to a political party are not made thoughtlessly, or without motive. They are made in the anticipation that the party will advance a particular social interest, policy or viewpoint. And political parties, in turn, depend on contributions for the very resources that allow them to conduct their democratic activities. Those resources keep flowing to the extent that they meet their contributors’ and funders’ expectations. There can be little doubt, then, that the identity of those contributors and what they contribute, provides important information about the parties’ likely behaviour…”

The allegations of improper relations between the Gupta family businesses and President Zuma that appeared to benefit the president’s family members and his allies through numerous state contracts awarded to the Gupta family businesses led to an investigation by the then Public Protector whose observations pertaining to these relations led to her recommending a commission of inquiry to be appointed by President Zuma but with the presiding officer of this

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155 *My Vote Count NPC* (n 6) par 42.
inquiry appointed by the chief justice.\textsuperscript{156} Subsequent to this report of the Public Protector, there were series of e-mails leaked to the media revealing the nature of the relationship between President Zuma and the Gupta family business and how this relationship has improperly benefitted both parties and their allies.\textsuperscript{157}

The Public Protector’s report and media coverage of the email leaks around President Zuma and his relationship with the Gupta family and general concerns about the impact of unregulated and undisclosed funding of political parties and political activities by private and foreign entities, including corporate entities, led to a public cry for regulation in this regard in order to restore confidence in the integrity of the country’s political system and address the concern that political leaders were largely nothing else but guns for hire. The national assembly responded to these concerns by establishing an ad hoc committee into the funding of political parties on 6 June 2017, with transparency of such funding by private entities being one of the main areas of focus for the committee.\textsuperscript{158}

On 19 September 2017 the Ad Hoc Committee on the Political Party Funding issued a Draft Political Party Funding Bill for written comments by the public.\textsuperscript{159} According to this Bill\textsuperscript{160} political parties can receive donations/funds from private entities excluding foreign governments, foreign government agencies, organs of state, and state-owned enterprises.\textsuperscript{161} Political parties can, however, receive donations from foreign entities including foreign governments for training, skills development and policy development purposes only.\textsuperscript{162} What


\textsuperscript{161} See s 9 of the Draft Political Party Funding Bill.

\textsuperscript{162} See s 9 of the Draft Political Party Funding Bill.
is particularly relevant to this dissertation is the proposed requirement that political parties disclose to the Electoral Commission all donations and the commission should in turn publish all donations disclosed to it on an annual basis in a prescribed form and manner.\textsuperscript{163}

Time will also tell as to whether the Draft Political Party Funding Bill with its provisions on compulsory disclosure of private funding of political parties including by corporate entities, will pass into law, and when will this happen. It will also be interesting to see how parliament will reconcile the enactment of this legislation with the court decision pertaining to the need to amend the Promotion of Access to Information Act in order for political parties to disclose their private funding sources.\textsuperscript{164}

While the enactment of the Draft Political Party Funding Bill, or the proposed “Promotion of Multi-Party Democracy Act”\textsuperscript{165} or the amendment of the Promotion of Access to Information Act would make an important contribution in the promotion of transparency over private funding of political parties and their activities and thus contribute to the fight against corruption, such legislative interventions would not necessarily provide shareholders and other stakeholders a meaningful say in corporate political spending decisions.

4. Recommendations: Appropriate legal and institutional framework

The current state of affairs in relation to corporate political spending in South Africa is not in the best interests of the majority of shareholders and other stakeholders, such as creditors and employees of companies, who might be disadvantaged by the funding made by companies to political parties, especially where such decisions are not in the best interest of the companies and where corruption becomes an issue. Both shareholders and stakeholders should ideally know about funding made by companies they are associated with, and should preferably have a say on funding decisions made by their companies. This would be in line with the stakeholder-inclusive approach in corporate governance supported by King IV.\textsuperscript{166} Commenting on the stakeholder approach to corporate governance, Zhao wrote:\textsuperscript{167}

\textsuperscript{163} See s 10 of the Draft Political Party Funding Bill.
\textsuperscript{164} See (n 140).
\textsuperscript{165} See My Vote Counts NPC (n 6) par 10.
\textsuperscript{166} See (n 151). In Minister of Water Affairs and Forestry v Stiffontein Gold Mining Co. Ltd 2006 5 SA 333 (W) par 16.7, the Court said: “Practising sound corporate governance is essential for the well-being of a company and it is in the best interests of the growth of South Africa’s economy, particularly in attracting new investments”.
\textsuperscript{167} Zhao “Promoting A More Efficient Corporate Governance Model In Emerging Markets Through Corporate Law” 2016 Washington University Global Studies Law Review 447 463.
“According to stakeholder theory, the directors are required to consider the interests of the company’s stakeholders apart from the interests of the company shareholders. The directors must manage the corporation not only for the betterment of the shareholders, but also for the interests of a multitude of stakeholders, clearly including the shareholders, who can affect or be affected by the actions of the company. It is argued that a consideration of stakeholders’ interests enable the creation of long-term favourable conditions for the company to be more competitive.”

In line with the provisions of the country’s post-apartheid constitution and those of the Companies Act 2008, especially those pertaining to corporate governance, it is appropriate and crucial that corporate political spending in South Africa should be better regulated in order to ensure transparency and address the concerns and interests of shareholders and other stakeholders over such spending.

What the above analysis indicates and supports is a need for a legislative intervention that will ensure transparency in corporate political spending and the involvement of shareholders in corporate political spending decisions. The Draft Political Party Bill currently being processed by parliament or the amendment of the Promotion of Access to Information Act as ordered by Meer J will make an important contribution in addressing the transparency challenges pertaining to corporate political spending - challenges pertaining to public access to pertinent information around corporate political spending and decisions similar to those experienced in other countries. However, such legislative interventions will not address the interests and rights of shareholders and other stakeholders in the decision making processes pertaining to corporate political spending. These concerns can only be addressed by requiring shareholder consent and involvement in corporate political spending decisions.

The amendment of the existing Companies Act in relation to corporate political spending decisions is thus the best solution. This would entail amongst other interventions, the amendment of the current section 33 of the Companies Act pertaining to the filing of annual returns by South African companies, and related provisions of the Companies Act governing the relation between shareholders and directors of their companies pertaining to corporate political spending decisions made by companies, including the involvement of shareholders in such decisions. This will also necessitate the amendment of section 30(4) of the Companies Act to ensure that annual financial statements of relevant companies include relevant information on corporate political spending. This would have to include direct and indirect

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168 See (n 163).
169 See (n 140).
170 This would, for example, have a bearing on s 60, 61-62, 65 and 73 of the Companies Act 71 of 2008.
monies (going through intermediaries) given to political parties and political campaigns. The social and ethics committees established in terms of section 72(3) of the Companies Act would also need to be more effective in ensuring that companies act accordingly.

The amendment would also require the companies and intellectual property commission to be more vigilant and effective in ensuring adherence to the requirement for transparency and accountability over corporate political spending decisions and avail the information to the electoral commission\textsuperscript{171} and the public in general in an accessible manner.\textsuperscript{172} The Companies and Intellectual Property Commission\textsuperscript{173} with the support of the Companies Tribunal (established in terms of section 193) can also intervene where shareholders and stakeholders are aggrieved by corporate political spending decisions made by their respective companies.\textsuperscript{174}

This intervention will also enhance good corporate governance of South African registered companies. In \textit{Nedbank Ltd v Bestvest 153 (Pty) Ltd},\textsuperscript{175} the court emphasised the importance and need of corporate governance which it refers to as “corporate stewardship” to find an appropriate balance between the rights and obligations of all stakeholders in the running and management of companies, these being: shareholders, directors, company employees and external stakeholders which companies interact with.\textsuperscript{176}

Concerns raised by Williams about “owner-managed and closely held companies” and the resultant unfair advantage wealth owners of private companies will have over ordinary individuals (natural persons) in funding political parties through their companies whilst paying taxes at a lower rate than that paid by ordinary individuals\textsuperscript{177} could be addressed by general public disclosure of private funding of political parties by proposed by the Draft Political Party Funding Bill or amendments to the Promotion of Access to Information Act order by Meer J.\textsuperscript{178}

There is also no need currently for supporting caps on corporate political spending amounts. A decision in this regard would need to be informed by practice once there is public disclosure of such spending. What is of concern is whether foreign companies should be allowed to fund

\textsuperscript{171} Established in terms of the Electoral Commission Act 51 of 1996.
\textsuperscript{172} See Chapter 8 of the Companies Act 71 of 2008.
\textsuperscript{173} Charged with the promotion of compliance with the Companies Act in terms of s 186 and the monitoring and enforcement of such compliance in terms of 187. The commission also has a mandate to advice the Minister on “matters of national policy pertaining to the company and intellectual property law and to recommend to the Minister changes in the law and administration of the law in line with international best practice.”
\textsuperscript{174} See (n 11) and (n 12) above.
\textsuperscript{175} 2012 (5) SA 497 (WCC).
\textsuperscript{176} \textit{Nedbank Ltd} (n 176) par 20 and 26.
\textsuperscript{177} See (n 101).
\textsuperscript{178} See (n 164).
political parties in South Africa. However, the desirability of this could only be properly assessed once there is full disclosure of private funding of political parties in the country. The ban against the private funding of political parties by foreign government and foreign government agencies proposed in the Draft Political Party Funding Bill\(^\text{179}\) is, however, supported.

In making a case for transparency and accountability in corporate political spending decisions, Bebchuk and Jackson wrote:\(^\text{180}\)

“Large public companies spend significant amounts of shareholder resources on politics. The interests of directors and executives may frequently diverge from the interests of shareholders with respect to such spending, and such spending carries special significance for shareholders”.

In conclusion, whilst there might be concerns to the effect that the regulation of corporate political spending would put a heavier burden on juristic persons than on natural persons and that this could constitute an unfair discrimination, these concerns are trumped, and should be trumped, by the need to ensure that shareholders and the public in general should have sufficient information on corporate political spending decisions made on their behalf and the involvement of shareholders in such decision making is necessary. Companies in any case, wield greater powers and influence than ordinary natural persons and the proposed regulation on corporate political spending should be seen as “reasonable and justifiable in an open and democratic society.”\(^\text{181}\) This proposition has already found support in relation to public disclosure of private funding of political parties proposed by the Draft Political Funding Bill and the decision of the court in *My Vote Counts NPC* to the effect that South Africa’s constitutional framework requires disclosure of information pertaining to the private funding of political parties.\(^\text{183}\)

South Africa’s international law obligations, under the relevant provisions of the UN Convention against Corruption and the AU Convention on Preventing and Combating Corruption, require the country to regulate the funding of political activities as a means of fighting corruption. International agreements which South Africa has entered into, such as the above mentioned ones, are binding on the country.\(^\text{184}\)

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\(^{179}\) See (n 161).

\(^{180}\) Bebchuk and Jackson Jr (n 2) 966.

\(^{181}\) See s 36(1) of the constitution.

\(^{183}\) See (n 138) and (n 163).

\(^{184}\) See s 231(2) and 233 of the constitution.
5 Conclusion

On the impact of unregulated private funding of political parties, including unregulated corporate political spending, that is spending that is not transparent and made and determined without the involvement of shareholders and non-executive company directors, Hennie Van Vuuren, in his ground breaking book, *Apartheid Guns and Money: A tale of profit*, wrote: 185

“One of the greatest threats to democratic politics is the unregulated funding of political parties. Central to this is, on one hand, a culture of expectation among politicians that wealthy interest groups, corporations and foreign governments will fund party politics. On the other hand, these powerful donors rely on a culture of secrecy to conceal their identity from ordinary voters, who might otherwise be outraged at the type of influence that such money can buy. For more than five decades, no regulation has existed to force the disclosure of political parties’ private funding sources. In tolerating this, political parties have given a green light to an insidious form of corruption, which without access to information is almost impossible to detect. Since 1994, this has meant that the ANC has accepted cash from megacorporations, rogue businesspeople and murderous politicians alike. This practice of cash-for-access has continued under the leadership of Jacob Zuma, who in 2015 addressed an ANC gala fundraising dinner at which he told business leaders that if they joined the ANC, their businesses would benefit as ‘everything you touch will multiply.’” (Footnotes omitted).

Recent conduct in the country in relation to unregulated corporate political spending that is not transparent and that is generally done without the involvement of shareholders and other stakeholders have led to allegations of the capturing and manipulation of state power and abuse of state resources (corruption) by corporations that fund political parties and political activities.

It is clear therefore, as seen in this dissertation, that new legislative measures that will ensure transparency and accountability in corporate political spending in South Africa are necessary. Ideally, there should be national legislation that should ensure that companies are transparent and accountable when it comes to corporate political spending. A case has been made for the amendment of the current Companies Act 71 of 2008 to ensure that corporate political spending in South Africa is indeed in line with the founding values of the post-apartheid South Africa and gives effect to the purposes of the Companies Act as provided for by section 7. Such an amendment would be necessary to ensure that shareholders, by way of a special resolution, determine political spending of their companies and the public is informed of such decisions including the amounts involved and the beneficiaries thereof in a “systematic and proactive” manner.186

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185 Van Vuuren (n 149) 77-78.
186 See (n 129).
In the context of the new constitutional dispensation ushered in by the constitution which provides for accountable, responsive and open/transparent governance as some of the values upon which the sovereign, democratic South Africa is founded upon,\textsuperscript{187} it is important that the governance of corporate entities especially public companies and state owned enterprises also adhere to these constitutional values. It is in this regard that some of the purposes of the Companies Act are to:\textsuperscript{188}

\begin{itemize}
  \item Ensure that the application of the Companies Act and conduct of South African registered companies are in compliance with the Bill of Rights of the Constitution
  \item Encourage transparency and high standards of corporate governance
  \item Balance the rights and obligations of shareholders with those of directors in companies.
\end{itemize}

It is therefore important in the light of our constitutional provisions and those of the Companies Act 71 of 2008 that corporate political spending or donations made by companies to political parties and their activities are transparent, involve shareholders, and are made known to the general public. This will not only protect the rights of shareholders in relation to directors of companies but will enhance the ability of shareholders and other stakeholders to hold directors accountable in the exercise of their duties and powers. It will also ensure that companies do not use their resources in a manner that undermines democracy and the fight against corruption. More importantly, this will give greater effect to the values that inform the post-apartheid South African society - transparency and accountability - values which corporate law and all its entities including companies should promote. The constitution in this regard, is the “conscience of the nation”\textsuperscript{189} and corporate law and companies should respect and uphold this conscience.

\textsuperscript{187} See s 1 of the constitution.
\textsuperscript{188} See s 7(a) of the Companies Act 71 of 2008.
\textsuperscript{189} Chief Justice Mogoeng Mogoeng in South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others 2017 1 SA 549 (CC); 2017 2 BCLR 241 (CC) par 12.
6. Bibliography

6.1 Books


6.2 Journal Articles

Atkey R “Corporate Political Activity” 1985 *University of Western Ontario Law Review* 129.


Ncube CB “Transparency and accountability under the new company law” 2010 *Acta Juridica* 43.


Torres-Spelliscy C and Foget K “Shareholder-Authorized Corporate Political Spending in the United Kingdom” 2011-2012 University of San Francisco Law Review 525.

Williams R “Regulating Political Donations by Companies: Challenges and Misconceptions” 2012 Modern Law Review 951


6.3 Cases

South Africa

Bernstein and Others v Bester NO and Others 1996 4 BCLR (CC) 491.


My Vote Counts NPC v Speaker of the National Assembly 2016 1 SA 132(CC).

My Vote Counts NPC v President of the Republic of South Africa and Others 2017 ZAWCHC 105 (unreported).

Nedbank Ltd v Bestvest 153 (Pty) Ltd 2012 5 SA 497 (WCC).

President of the Republic of South Africa and Others v M & G Media Ltd 2012 2 SA 50 (CC), 2012 2 BCLR 181 (CC).

The Public Protector v Mail and Guardian Ltd and Others 2011 4 SA 420 (SCA).

South African Broadcasting Corporation Ltd and Another v Mpofu 2009 4 SA 169 (GSJ).

United States of America


6.4 Statutes

South Africa

Companies Act 71 of 2008.


Electoral Commission Act 51 of 1996.

Promotion of Access to Information Act 2 of 2000.

Public Funding of Represented Political Parties Act 103 of 1997.

Canada


The Dominion Elections Act 1874 (as amended).

United Kingdom

Companies Act 1967.


Companies Act 2006.


Representation of the People Act 1884.

United States of America

Bipartisan Campaign Reform Act 2002.


Securities Act 1933.


Tillman Act 1907.

6.5 International Instruments


United Nations Convention Against Corruption.

6.6 Reports


Committee on Standards in Public Life: The Funding of Political Parties in the United Kingdom (1998).


6.7 Newspaper Articles


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