DISCLOSURE OF DIRECTORS' REMUNERATION UNDER SOUTH AFRICAN COMPANY LAW: IS IT ADEQUATE?

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The remuneration of directors is a controversial issue in many jurisdictions in the light of the global financial crisis and the escalating remuneration packages of directors. One way of managing the escalating levels of directors' remuneration is to compel companies to disclose the details of directors' remuneration packages. Full disclosure of the remuneration of directors would increase transparency and accountability in the remuneration-setting process of directors. This article explores the adequacy of the Companies Act 71 of 2008 in relation to the disclosure of directors' remuneration. It further examines the disclosure requirements of directors' remuneration under the JSE Listings Requirements and the King Report on Governance for South Africa, 2016 ('King IV'). It compares South Africa's remuneration disclosure requirements with the legislative standards for remuneration disclosure under the Companies Act 2006 of the United Kingdom, and examines whether our disclosure requirements meet the standards of the UK Companies Act, 2006. This article concludes that the minimum standards of remuneration disclosure set by the Companies Act are too low to satisfy enhanced transparency, and suggests various proposals for strengthening the disclosure requirements of directors' remuneration under the Companies Act.

I INTRODUCTION

The remuneration of directors has become a controversial and sensitive issue in many jurisdictions in view of the global financial crisis and the escalating remuneration packages of directors, particularly in public listed companies. The practices among financial institutions that contributed to the global financial crisis have fuelled widespread concern that the high levels of directors' remuneration need to be controlled, and that the market has failed to do so.

The Companies Act 71 of 2008, as amended, does address the issue of the remuneration of directors. However, the question arises whether the provisions relating to the disclosure of the remuneration of directors are adequate.

This article explores the adequacy of the Companies Act in dealing with the disclosure of the remuneration of directors. Part II of the article examines the rationale for the high levels of directors' remuneration. It explores further in part III the policy justifications for using remuneration disclosure as a technique to address exorbitant levels of the remuneration of directors.

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Part IV of this article examines the disclosure requirements of the remuneration of directors that are applicable under the Companies Act, the Listings Requirements of the Johannesburg Stock Exchange ('the JSE Listings Requirements') and the King Report on Corporate Governance for South Africa, 2016 ('the King IV Report'). Part V of this article compares South Africa's remuneration disclosure requirements with the legislative standards for remuneration disclosure under the Companies Act, 2006 of the United Kingdom ('the UK Companies Act, 2006'), and examines whether the requirements for remuneration disclosure under the South African Companies Act meet the standards of the UK Companies Act, 2006. Finally, in part VI, this article suggests certain proposals for legislative reform of the Companies Act in regard to the disclosure requirements of the remuneration of directors.

II SOME REASONS FOR THE HIGH LEVELS OF REMUNERATION OF DIRECTORS

There is a lack of consensus regarding the reasons for the high levels of directors' remuneration in public and private companies. One of the main reasons advocated for the high remuneration levels of directors is that they reflect the size and complexity of executive jobs in modern times, as well as the higher risks and greater responsibilities associated with them.[1] Another reason given for the high levels of directors' remuneration is the need for companies to compete with global markets for a relatively small available pool of competent directors.[2] Thus companies adopt the position that they need to pay higher remuneration to directors in order to attract the few available skilled directors. Even though this position is often regarded as a self-serving myth and is criticised,[3] companies are unlikely to ignore the benefits of being able to recruit, incentivise, and retain, suitable global talent.[4]

A further reason for the high levels of directors' remuneration is attributed to the shift from a fixed basic salary model towards incentive-based payments.[5] The agency theory regards directors as agents of the company's shareholders. Therefore, in order to minimise the principal/agent problem experienced by companies,[6] companies tend to increase the use of manage-

[1] See John Shields, Michael O'Donnel & John O'Brien 'The bucks stop here: Private sector executive remuneration in Australia' A Report prepared for the Labor Council of New South Wales (2003) 12, available at *http://www.researchgate.net/publication/242042789*, accessed on 17 March 2017. See generally Michael E Porter, Jay W Lorsch & Nitin Nohria 'Seven Surprises for new CEOs' (2004) 82 *Harvard Business Review* 62.

[2] Shields, O'Donnel & O'Brien ibid.

[3] Ibid at 12–13.

[4] Ibid at 18.

[5] Ibid at 13.

[6] The principal/agent problem in corporate governance refers to the misalignment of the interests of directors (who have been given the power to manage the

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rial incentives such as annual performance bonuses, share-option schemes and long-term incentive schemes that seek to align the interests of directors with those of shareholders.[7] Directors often make significant gains from these short-term and long-term incentives. In the absence of sound corporate-governance practices, these performance-based remuneration methods may potentially be manipulated by directors for self-gain.[8] For instance, most of these incentives may be devoid of truly challenging performance requirements. They may be determined using short-term focused, less challenging, and inappropriate, criteria.[9] As a result, the high incentives paid to the directors may not be truly reflective of performance.

The escalating remuneration packages may also be attributed to the deficiencies in the process by which directors' remuneration is determined.[10] Under s 66(1) of the Companies Act the board of directors is in control of the management of the company. The directors of companies with dispersed shareholding are generally far more powerful than the shareholders, and their powers are deeply entrenched as there is a strict separation of powers. Furthermore, South Africa has a unitary board structure, comprising both executive and non-executive directors. The chief executive officer, chief financial officer and other executive heads often sit on the same board with the non-executive directors. There is thus a high possibility of conflict of interests when the same board has to determine the remuneration of the employees of the company, including that of the executive and the non-executive directors.[11]

Although the appointment of remuneration committees (comprised of non-executive directors who are independent of executive management) may be an important procedural improvement to ensure objectivity in the pay-setting process,[12] the Companies Act does not specifically require

affairs of the company) and those of shareholders. There is a likelihood that the directors (agents) will prioritise their own immediate interests at the expense of the long-term interests of the shareholders (principal). See generally Allen Sykes 'Overcoming poor value executive remuneration: Resolving the manifest conflicts of interest' (2002) 10 *Corporate Governance: An International Review* 256; Alistair Bruce, Trevor Buck & Brian G M Main 'Top executive remuneration: A view from Europe' (2005) 42 *Journal of Management Studies* 1493 at 1494–6; and Shields, O'Donnel & O'Brien op cit note 1 at 13.

[7] See Bruce, Buck & Main ibid at 1494–5.

[8] Sykes op cit note 6 at 256–9.

[9] Ibid.

[10] Ibid at 256–60; Jennifer Hill 'What reward have ye? Disclosure of director and executive remuneration in Australia' (1996) 14 *Company and Securities Law Journal* 232 at 237.

[11] Tshepo Mongalo 'Shareholder activism in the United Kingdom highlights the failure of remuneration committees: Lessons for South Africa' (2003) 120 *SALJ* 756 at 760–3; Hill op cit note 10 at 236–7; Guido Ferrarini & Niamh Moloney 'Executive remuneration in the EU: The context for reform' (2005) 21 *Oxford Review of Economic Policy* 304 at 309.

[12] Hill op cit note 10 at 235; Ferrarini & Moloney op cit note 11 at 310.

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companies to appoint remuneration committees.[13] In any event, the effectiveness of the independent remuneration committees may be hampered by a number of factors, including feelings of friendship and loyalty amongst executive and non-executive directors. As a result, these committees have not always been effective.[14] Executive directors are therefore often able to influence their own remuneration packages.

The escalating levels of the remuneration of directors may have a damaging impact on companies, employees, shareholders, creditors, the economy, and society in general.[15] They may also exacerbate the income inequalities and labour unrest in South Africa, and threaten social cohesion.[16] There are valid reasons to curb high levels of the remuneration of directors, particularly in South Africa, in light of the widening gap between the earnings of executive directors and the rest of the employees, as well as the wealth gap between rich and poor.[17]

One way of managing the escalating levels of the remuneration of directors and to control the conflict of interests and the danger of self-dealing which is inherent in the remuneration-setting process, is to compel companies to disclose the details of the remuneration packages of directors, the process by which they are determined, and their links to performance.[18] This is discussed further below.

[13] See the King IV Report at 57 paras 65–7 on the remuneration committee.

[14] See Mahmoud Ezzamel & Robert Watson 'Market comparison earnings and the bidding-up of executive cash compensation: Evidence from the United Kingdom' (1998) 41 *The Academy of Management Journal* 221 at 222; Mongalo op cit note 11 at 760–3; Hill op cit note 10 at 235; Charles M Yablon 'Overcompensating: The corporate lawyer and executive pay' (1992) 92 *Columbia LR* 1867 at 1873; Sykes op cit note 6 at 257; Lucian A Bebchuk & Jesse M Fried 'Pay without performance' in F Scott Kieff & Troy A Paredes (eds) *Perspectives on Corporate Governance* (2010) 125.

[15] H E Scholtz & A Smit 'Executive remuneration and company performance for South African companies listed on the Alternative Exchange (AltX)' (2012) 16 *Southern African Business Review* 21 at 22; and Stephanie M Luiz 'Executive remuneration and shareholder voting' (2013) 25 *SA Merc LJ* 267 at 267.

[16] See Mongalo op cit note 11 at 760.

[17] It has been observed that South Africa is one of the most unequal nations in the world, and inequality is a threat to development and long term sustainability. See Gabriela Inchauste, Nora Lustig, Maboshe Maskekwa et al *Fiscal Policy and Redistribution in an Unequal Society: The Case of South Africa* Economic Update No 6 (2014), available at *http://www.worldbank.org/en/country/southafrica/publication/south-africa-economic-update-fiscal-policy-redistribution-unequal-society*, accessed on 17 March 2017; Oxfam 'Even it up: Time to end extreme inequality' (2015), available at *https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/cr-even-it-up-extreme-inequality-291014-summ-en.pdf*, accessed on 17 March 2017. See also PricewaterhouseCoopers *Executive Directors' Remuneration Practices and Trends Report* 6 ed (2014) South Africa available at *http://www.pwc.co.za/en_ZA/za/assets/pdf/executive-directors-remuneration-report-july–2014.pdf*, accessed on 17 March 2017.

[18] See Ferrarini & Moloney op cit note 11 at 312 and Hill op cit note 10 at 236–9.

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III THE RATIONALE FOR FULL REMUNERATION DISCLOSURE

One of the reasons advocated for full disclosure of the remuneration of directors is that the availability of accurate information increases transparency and accountability, as s 7*(b)*(iii) of the Companies Act requires.[19] Greater transparency would enable shareholders to monitor the board and the remuneration committee more effectively.[20]

One way in which shareholder monitoring may be exercised is through voting on the actual remuneration packages proposed at shareholders' meetings.[21] For instance, shareholders have a right to vote on a special resolution to approve the remuneration of the company's directors for their service as directors in terms of s 66(9) of the Companies Act (which will be discussed further below). Shareholder monitoring may also be exercised through direct engagement with companies in order to improve their remuneration policies and practices.[22] Engagement enables shareholders to express their concerns related to directors' remuneration directly to a company's board of directors or remuneration committee. The presentation of the financial statements, containing details of directors' and prescribed officers' remuneration, to the shareholders' meeting in terms of s 30(3)*(d)* of the Companies Act (which will be discussed further below) affords shareholders an opportunity to engage with company boards on remuneration matters. Such shareholder monitoring mechanisms must be supported by the appropriate disclosure of directors' remuneration in order to be effective.

Appropriate disclosure would enable the shareholders and other stakeholders to make an informed evaluation of directors' remuneration and to assess whether or not it is justified.[23] It would also enable them to 'identify and combat undesirable practices'[24] in remuneration arrangements. The disclosure of performance metrics and targets for performance-based remuneration would assist shareholders and stakeholders in assessing the extent to which the remuneration is linked to performance and the long-term value of the company.[25]

[19] In terms of s 7*(b)*(iii) of the Companies Act, one of the purposes of the Act is to encourage transparency and high standards of corporate governance, given the role that companies play in the country's social and economic life. See also Debbie Collier, Kathy Idensohn & Jill Adkins 'Income inequality and executive remuneration: Assessing the role of law and policy in the pursuit of equality' (2010) 34 *South African Journal of Labour Relations* 84 at 94 and Ferrarini & Moloney op cit note 11 at 311.

[20] Ferrarini & Moloney ibid; Kym Sheehan 'The regulatory framework for executive remuneration in Australia' (2009) 31 *Sydney LR* 273 at 291.

[21] Sheehan ibid.

[22] Ibid.

[23] Stephanie M Luiz 'An appropriate regime for the remuneration of executives' (2006) 39 *CILSA* 57 at 65.

[24] Collier, Idensohn & Adkins op cit note 19 at 94.

[25] See Guido Ferrarini, Niamh Moloney & Maria Cristina Ungureanu 'Executive remuneration in crisis: A critical assessment of reforms in Europe' (2010) 10 *Journal of Corporate Law Studies* 73 at 86.

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Effective disclosure may further reduce the agency costs associated with directors' remuneration by making information on remuneration, and any potential conflict of interests in the process of determining such remuneration, readily available to shareholders.[26] It may also play a role in addressing conflict-of-interest risks in the remuneration-setting process and in focusing the board's attention on company performance and shareholder interests.[27] Full remuneration disclosure may thus enhance investor protection and confidence in the market.[28] This is in line with the promotion of investment in South African markets envisaged in s 7*(c)* of the Companies Act.

Another reason advanced for the importance of the disclosure of the remuneration of directors is that it may lead to increased scrutiny, which may have deterrent effects on excessive remuneration and mere wealth appropriation by self-serving and opportunistic executive directors who are able to influence their own remuneration packages.[29] It may discourage a situation where the directors have an inherent interest in high remuneration and are more concerned with creating their own wealth, and less concerned with the performance and the interests of company stakeholders. Increased scrutiny may thus force executive directors to accept reasonable and fair remuneration.[30]

By contrast, some reasons advocated against full remuneration disclosure of directors are that disclosure leads to deprivation of the privacy of directors; it may be costly to the company; and the availability of information on the level of the remuneration paid in other companies may lead to the ratcheting of payments.[31] Ratcheting occurs when boards of directors simply seek to pay their directors more than the industry average, regardless of whether or not the directors deserve such levels of remuneration.[32] It has been contended that directors who are paid below the prevailing industry average are more likely to advocate for an increase in their salaries.[33] By contrast, the directors who are paid above the prevailing industry average are less likely to get a reduction in their salaries.[34] This is so because the remuneration committees must ensure that the company's senior executives are paid the prevailing industry rate or more in order to retain them.[35] This practice has the tendency to distort the industry average,[36] since a company that does not

[26] Ferrarini & Moloney op cit note 11 at 311.
[27] Luiz op cit note 23 at 65; Ferrarini & Moloney ibid; Sheehan op cit note 20 at 292; Hill op cit note 10 at 237.
[28] Hill ibid at 237–8.
[29] Ibid at 237.
[30] Ibid.
[31] Ferrarini & Moloney op cit note 11 at 312.
[32] Bebchuk & Fried op cit note 14 at 129.
[33] Ezzamel & Watson op cit note 14 at 221–3.
[34] Ibid.
[35] Ibid.
[36] Bebchuk & Fried op cit note 14 at 129.

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pay the prevailing industry rate is likely to face recruitment, motivational and retention challenges.[37]

However, we believe that public policy considerations in favour of the disclosure of the remuneration of directors which have been discussed above, such as the prevention of self-dealing and prevention of conflict of interest in the remuneration-setting process, far outweigh the privacy considerations.[38] Further, we believe that transparency will contribute to more accountability and openness in the remuneration-setting process. Moreover, effective disclosure of the remuneration of directors by companies is not only in the public interest, but it also concerns information which shareholders and prospective investors are entitled to know.[39] Accordingly, we argue that there exist far stronger reasons to disclose the remuneration of directors than not to disclose it.

IV SOUTH AFRICA'S REMUNERATION-DISCLOSURE REGIME

In South Africa the disclosure of directors' remuneration is regulated by s 30(4) of the Companies Act. In addition, the JSE Listings Requirements and the King IV Report contain important provisions regarding the remuneration of directors and the disclosure of directors' remuneration.

(a) The meaning of 'remuneration'

The term 'remuneration' is not defined in s 1 of the Companies Act. The Companies Act defines 'remuneration' in s 30(6) only in regard to the disclosure of information in the annual financial statements of a company that is required by the Companies Act to have its annual financial statements audited.[40] Apart from this definition, the precise meaning of 'remuneration' in the Companies Act is not clear. For example, it is not clear whether 'remuneration' in the Companies Act encompasses only payments in cash or whether it encompasses other benefits as well. It is also not clear what 'remuneration' in s 66(8) of the Companies Act means, and whether the phrase 'service as directors' in s 66(8) of the same Act refers only to remuneration to directors for their services as directors (such as attending board meetings) or whether the phrase includes remuneration paid to executive directors in terms of their employment contracts (such as salaries and bonuses).[41] This is discussed further below.

[37] Ezzamel & Watson op cit note 14 at 230.

[38] See also David Ablen 'Remunerating "fairly and responsibly" — The "principle of good corporate governance and best practice recommendations" of the ASX Corporate Governance Council' (2003) 25 *Sydney LR* 555 at 565.

[39] See Hill op cit note 10 at 241; Ablen ibid at 565.

[40] This is discussed further in part IV(b) below. See also s 30(4) and (5) of the Companies Act.

[41] See Farouk H I Cassim, Maleka Femida Cassim, Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) 455–6.

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In contrast, s 226A(1) of the UK Companies Act, 2006[42] clearly defines the term 'remuneration' as follows:

> '[A]ny form of payment or other benefit made to or otherwise conferred on a person as consideration for the person —
> *(a)* holding, agreeing to hold or having held office as director of a company, or
> *(b)* holding, agreeing to hold or having held, during a period when the person is or was such a director —
> (i) any other office or employment in connection with the management of the affairs of the company, or
> (ii) any office (as director or otherwise) or employment in connection with the management of the affairs of any subsidiary undertaking of the company, other than a payment for loss of office.'[43]

It is clear from the words 'any form of payment or other benefit' in the above definition that remuneration payments in the UK Companies Act, 2006 encompass both payments in cash, as well as benefits other than in cash.

(b) Remuneration disclosure under the Companies Act

Section 30(4) of the Companies Act requires extensive disclosure of information in relation to the remuneration of directors in the annual financial statements. It is, however, important to specify the identity of the companies that are required to comply with the disclosure requirements of s 30(4). This is because not all companies are required to comply with s 30(4) of the Companies Act. Companies that are required to disclose the remuneration of directors in their annual financial statements are companies that are

[42] Section 226A is contained in chap 4A of part 10 of the UK Companies Act, 2006, which deals with directors of quoted companies. This chapter was inserted by s 80 of the Enterprise and Regulatory Reform Act, 2013.

[43] Section 215 of the UK Companies Act, 2006 (contained in chap 4 of part 10 which deals with transactions with directors requiring approval of members) provides a comprehensive definition of 'payment for loss of office'. It defines 'payment for loss of office' to mean: 'a payment made to a director or past director of a company — *(a)* by way of compensation for loss of office as director of the company; *(b)* by way of compensation for loss, while director of the company or in connection with his ceasing to be a director of it, of — (i) any other office or employment in connection with the management of the affairs of the company, or (ii) any office (as director or otherwise) or employment in connection with the management of the affairs of any subsidiary undertaking of the company; *(c)* as consideration for or in connection with his retirement from his office as director of the company; or *(d)* as consideration for or in connection with his retirement, while director of the company or in connection with his ceasing to be a director of it, from — (i) any other office or employment in connection with the management of the affairs of the company, or (ii) any office (as director or otherwise) or employment in connection with the management of the affairs of any subsidiary undertaking of the company.' Section 215(2) expressly states that the references to compensation and consideration include benefits otherwise than in cash.

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required in terms of the Companies Act to have their annual financial statements audited.[44]

In terms of s 30(2)*(a)* of the Companies Act the annual financial statements of a public company must be audited. In the case of any other profit or non-profit company, the annual financial statements must be audited if so required by the regulations made by the Minister in terms of s 30(7), taking into account whether it is desirable in the public interest, having regard to the economic or social significance of the company, as indicated by any relevant factors, including its annual turnover, the size of its workforce, or the nature and extent of its activities.[45] In terms of reg 28(2) of the Companies Regulations, 2011, in addition to public companies and state-owned companies, any company that falls into the following categories in any financial year must have its annual financial statements for that financial year audited:

- Any profit or non-profit company if, in the ordinary course of its primary activities, it holds assets in a fiduciary capacity for persons who are not related to the company and the aggregate value of such assets held at any time during the financial year exceeds R5 million.[46]
- Any non-profit company if (i) it was incorporated directly or indirectly by the state, an organ of state, a state-owned company, an international entity, a foreign state entity or a foreign company; or (ii) it was incorporated primarily to perform a statutory or regulatory function in terms of any legislation, or to carry out a public function at the direct or indirect initiation or direction of an organ of the state, a state-owned company, an international entity, or a foreign state entity, or for a purpose ancillary to any such function.[47]
- Any other company whose public interest score[48] in that financial year is 350 or more, or is at least 100, if its annual financial statements were internally compiled.[49]

It must be noted that the annual financial statements of a profit company or non-profit company must be audited voluntarily if its Memorandum of

[44] Section 30(4) of the Companies Act.

[45] Section 30(2)*(b)*(i) of the Companies Act.

[46] Regulation 28(2)*(a)*.

[47] Regulation 28(2)*(b)*.

[48] Refer to reg 26(2) of the Companies Regulations, 2011 for details on how the public interest score is to be calculated.

[49] Regulation 28(2)*(c)*. Section 30(2A) of the Companies Act exempts companies from having their annual financial statements audited or independently reviewed in instances where every person who is a holder of or has a beneficial interest in any securities issued by that company, is also a director of the company. However this exemption does not apply to the company if it falls into a class of company that is required to have its annual financial statements audited in terms of the Companies Regulations, 2011. The exemption also does not relieve the company of any requirement to have its financial statements audited or reviewed in terms of another law, or in terms of any agreement to which the company is a party.

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Incorporation or a shareholders' resolution or directors' resolution requires this to be done.[50]

In terms of s 30(4)*(a)* the annual financial statements of a company that is required in terms of the Companies Act to be audited must disclose the remuneration and benefits received by each director or prescribed officer in the company. Remuneration, as defined in s 30(6) of the Companies Act, for purposes of s 30(4) and (5) of the Companies Act, includes:

- the fees paid to a director for services rendered to or on behalf of the company, including an amount paid to a person for accepting the office of director;
- salary, bonuses and performance-related payments;
- expense allowances to the extent that the director is not required to account for the allowance;
- pension scheme contributions not otherwise required to be disclosed in terms of s 30(4)*(b)*;
- the value of any option or right given directly or indirectly to a past, current or future director or a person related to any of them (as contemplated in s 42 of the Companies Act);
- financial assistance provided to a past, present or future director or to a person related to any of them, for the subscription of options or securities, or the purchase of securities, as contemplated in s 44 of the Companies Act; and
- with respect to any loan or other financial assistance by the company to a past, present or future director or a person related to any of them, or any loan made by a third party to any such person as contemplated in s 45 of the Companies Act if the company is a guarantor of that loan, the value of any deferred, waived or forgiven interest, or the difference in value between the interest that would reasonably be charged in comparable circumstances at fair market rate in an arm's length transaction and the interest actually charged to the borrower if it is less.

Further, in terms of s 30(4)(*b*) of the Companies Act, the annual financial statements must include the following information with regard to current or past directors or prescribed officers:

- the amount of any pensions paid by the company;
- any amount paid or payable by the company to a pension scheme;
- compensation for loss of office;
- any securities issued and the consideration received by the company for those securities; and
- the details of service contracts.

In addition, s 30(5) requires that the annual financial statements disclose the amount of any remuneration and benefits paid to or receivable by persons in respect of services rendered as directors or prescribed officers of the

[50] See s 30(2)*(b)*(ii)*(aa)* of the Companies Act.

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company, or services rendered while being directors or prescribed officers of the company as (i) directors or prescribed officers of any other company within the same group of companies; or (ii) otherwise in connection with the carrying on of the affairs of the company or any other company within the same group of companies.

It is clear from the above definition that s 30(4) of the Companies Act, read in conjunction with subsecs (5) and (6), has emphasised the individualised disclosure of various components of directors' remuneration, including fixed and variable components of the remuneration package. This separate disclosure of the nature and extent of various component parts of each director's remuneration package is an improvement on s 297 of the Companies Act 61 of 1973, which required the financial statements merely to disclose the amount of the emoluments received by directors as an aggregate.[51]

(c) The King IV Report

The King IV Report was published on 1 November 2016 and replaced its predecessor, the King Report on Corporate Governance for South Africa, 2009 ('the King III Report').[52] Notably, the King IV Report has replaced the 'apply or explain' application regime of the King III Report with an 'apply and explain' application regime.[53] This means that companies and other organisations should apply the principles of the King IV Report and explain how the principles are being effected.[54] The application or adoption of the principles of the King IV Report is, therefore, assumed.[55] The explanation that is required is a narrative account of how the recommended practices have been implemented.[56]

The King IV Report contains significant improvements on remuneration disclosure and the format of such disclosure when compared to the King III Report.[57] It recommends that remuneration should be disclosed in three parts, namely (i) a background statement setting out the context for remuneration considerations and decisions; (ii) an overview of the main provisions of the remuneration policy; and (iii) an implementation report

[51] See s 297(1A)*(a)* of the Companies Act 61 of 1973. The other components that had to be disclosed in terms of s 297 were the amount of the pensions paid or receivable by directors and past directors, the amount of any compensation paid to directors and past directors in respect of loss of office, and details of directors' service contracts. Refer to s 297(1)*(b)*–*(d)* of the Companies Act 61 of 1973.

[52] Disclosure on the application of the King IV Report is effective in respect of the financial years beginning on or after 1 April 2017. See the King IV Report at 38.

[53] King IV Report at 37.

[54] Ibid.

[55] Ibid.

[56] Ibid.

[57] Principle 2.26 of the King III Report simply recommended that each company should disclose the remuneration of each individual executive and non-executive director in its annual remuneration report, which was to be contained in the integrated report.

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which contains details of all the remuneration awarded to each executive director during the reporting period.[58]

Principle 2.25 of the King III Report recommended that companies should remunerate directors and executives fairly and responsibly. Principle 14 of the King IV Report goes further than the King III Report in this regard, since it recommends that the board should ensure that the company remunerates not only 'fairly' and 'responsibly', but also 'transparently', in order to promote the achievement of strategic objectives and positive outcomes in the short, medium and long term. Importantly, the King IV Report places emphasis on transparency.

Principle 14 of the King IV Report contains detailed recommended practices on the remuneration policy. It recommends that the board should approve a policy that articulates and gives effect to its direction on fair, responsible and transparent remuneration.[59] The remuneration policy should be designed to attract, motivate, reward and retain human capital and promote the achievement of strategic objectives within the organisation's risk appetite.[60] It should also promote an ethical culture and responsible corporate citizenship.[61] The board should oversee that the implementation of the remuneration policy achieves the objectives of the policy.[62]

The King IV Report recommends further that the remuneration policy for executive directors and prescribed officers should be fair and responsible in the context of overall employee remuneration in the organisation.[63] The remuneration policy should further address all components of remuneration.[64] This includes base salary, financial and non-financial benefits, variable remuneration, and the fees of non-executive directors.[65]

(d) The JSE Listings Requirements

The JSE Listings Requirements specifies certain disclosure requirements regarding directors' remuneration with which listed companies must comply. Paragraph 8.63*(k)* of the JSE Listings Requirements requires listed companies to disclose in the annual financial statements each director's remuneration and benefits for the current and preceding financial year.[66] The remuneration and benefits payable to those directors who have resigned during the reporting period must also be disclosed.[67]

[58] King IV Report 65 paras 32–5.
[59] King IV Report 64 para 27.
[60] King IV Report 65 para 28a–b.
[61] Ibid para 28d.
[62] Ibid para 31.
[63] Ibid para 29a.
[64] Ibid para 30.
[65] Ibid.
[66] The requirements in para 8.63*(k)* of the JSE Listings Requirements are in addition to complying with International Financial Reporting Standards and s 30 of the Companies Act.
[67] Paragraph 8.63*(k)* of the JSE Listings Requirements.

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In terms of para 8.63*(k)* of the JSE Listings Requirements, read with para 7.B.7, the following information must be disclosed in the annual financial statements:

- fees for services as a director;
- management, consulting, technical or other fees paid for such services rendered;
- basic salary;
- bonuses and performance-related payments;
- sums paid by way of expense allowance;
- any other material benefits received, with an explanation as to what this includes;
- contributions to pension schemes;
- any commission, gain or profit-sharing arrangements; and
- details in respect of share options or any other right given which has had the same or a similar effect in respect of providing a right to subscribe for shares.

It is important to note that para 8.63*(a)* of the JSE Listings Requirements requires each listed company to disclose a narrative statement in its annual report of how it has applied the principles set out in the King III Report, providing an explanation that enables its shareholders to evaluate how it has applied the principles.[68] The company must also disclose a statement addressing the extent of its application of the principles of the King III Report, and the reasons for each and every instance of non-application during the accounting period. The company must explain whether or not it has complied throughout the accounting period with all the provisions of the King III Report, and must indicate for what part of the period any non-compliance occurred. In this way, the JSE Listings Requirements have expressly adopted the recommendations of the King III Report, and have made them applicable to all companies listed on the Johannesburg Stock Exchange.[69]

[68] The JSE Listings Requirements still refer to the previous King III Code, which has now been replaced by the King IV Report. The JSE has, however, proposed amendments to para 8.63 of the JSE Listings Requirements to incorporate a reference to the King IV Report. These amendments are expected to be implemented during the course of 2017. See the proposed Amendments to the JSE Listings Requirements of 1 November 2016.

[69] If a company whose securities are listed on the JSE has contravened or failed to comply with the provisions of the JSE Listings Requirements, the JSE has a discretion to impose a variety of penalties on such company. For instance, the JSE may censure the company and its directors; impose a fine on the company and its directors; suspend the listing of the securities of the company; or remove the listing of any securities of the company. The JSE may further make a public announcement that it has taken the above steps against the company. See paras 1.6–1.8, 1.11–1.12, 1.20–1.24 and 1.27 of the JSE Listings Requirements. These potential penalties would exert strong pressure on listed companies to comply with the provisions of the JSE Listings Requirements.

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It is, therefore, noteworthy that if the JSE adopts the recommendations of the King IV Report in its Listings Requirements (as it has done with the King III Report) these recommendations will be binding on companies listed on the JSE.

V A COMPARISON BETWEEN SOUTH AFRICA'S REMUNERATION-DISCLOSURE REGIME AND THAT OF THE UK

Disclosure of directors' remuneration in the UK is regulated by the UK Companies Act, 2006, the Enterprise and Regulatory Reform Act, 2013, and the Large and Medium-sized Companies and Groups (Accounts and Reports) (Amendment) Regulations, 2013 (hereafter referred to as 'the 2013 Regulations').[70] The Enterprise and Regulatory Reform Act, 2013 contains significant amendments to the UK Companies Act, 2006 in regard to payments to directors of quoted companies.[71] Quoted companies, as defined by s 385(2) of the Companies Act, 2006, mean companies whose equity share capital has been included in the Official List in accordance with part 6 of the Financial Services and Markets Act, 2000,[72] or is officially listed in a European Economic Area state, or is admitted to dealing on either the New York Stock Exchange or Nasdaq.

In addition, UK-listed companies must comply with the relevant provisions of the Corporate Governance Code or explain their reasons for non-compliance, and they must also comply with the Listing Rules requirements relating to remuneration of directors. This part will discuss the relevant features of the UK legislation with specific focus on the UK Companies Act, 2006, the Enterprise and Regulatory Reform Act, 2013 and the 2013 Regulations. Notably, the provisions discussed below regulating the disclosure of directors' remuneration in the UK are only applicable to quoted companies, as defined in the legislation.

(a) A three-part remuneration report

Section 420(1) of the UK Companies Act, 2006 requires companies to prepare a directors' remuneration report for each financial year of the company, which must be approved by the board of directors and signed by a director or company secretary.[73] The specific contents of the directors'

[70] The 2013 Regulations came into force on 1 October 2013 and have replaced the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations, 2008.

[71] See ss 79–82 of the Enterprise and Regulatory Reform Act, 2013.

[72] The 'Official List' refers to the Financial Conduct Authority's ('FCA') list of securities that have been admitted to listing. The FCA must maintain the Official List in accordance with part 6 of the Financial Services and Markets Act, 2000 (see s 103(1)).

[73] See s 422(1) of the UK Companies Act, 2006.

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remuneration report are prescribed in the 2013 Regulations.[74] The directors' remuneration report for a UK-quoted company must be divided into three parts, namely a statement by the remuneration committee chairperson,[75] a separate directors' remuneration policy,[76] and an annual directors' remuneration report.[77] The requirement of a three-part remuneration report is one method of increasing transparency in the UK by ensuring that the remuneration report is easy to read and understand. In contrast, the South African Companies Act does not provide for a similar requirement. As discussed above, the King IV Report contains a recommendation for a three-part remuneration report.[78] This is a positive step because it will enhance transparency and accountability in the remuneration of directors in those companies which adopt such recommendations.

(b) A statement by the remuneration committee chair

With effect from 1 October 2013, the directors' remuneration report for a UK-quoted company must comprise a statement by the remuneration committee chairperson as required by reg 3 of the 2013 Regulations.[79] The statement by the chair of the remuneration committee must summarise for the relevant financial year the major decisions on directors' remuneration, any substantial changes relating to directors' remuneration made during the year, and the context in which those changes occurred and why those decisions have been taken.[80] The significance of the requirement of a statement by the chair of the remuneration committee is that it ensures direct communication between the remuneration committee chair and the company's shareholders and other stakeholders.

In contrast, the South African Companies Act does not make provision for a similar requirement. The JSE Listings Requirements are also silent on this issue. It is of interest that the King IV Report recommends that the remuneration report should comprise a background statement.[81] In terms of the King IV Report, the background statement should briefly provide context for remuneration considerations and decisions.[82] It should refer to factors that influenced remuneration; the most recent results of the voting on the remuneration policy and the implementation report and the measures

[74] The regulations made under s 421 of the UK Companies Act, 2006 must prescribe the information that must be contained in a directors' remuneration report, how the information is to be set out in the report and what the auditable part of the report will be.

[75] See part 2 of the 2013 Regulations.

[76] See part 4 of the 2013 Regulations.

[77] See part 3 of the 2013 Regulations.

[78] King IV Report 65 para 32.

[79] Where there is no remuneration committee chair, the statement must be made by a director nominated by the directors to make the statement. See reg 3 of the 2013 Regulations.

[80] See reg 3*(a)*–*(c)* of the 2013 Regulations.

[81] King IV Report 65 para 32.

[82] King IV Report 66 para 33.

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taken in response thereto; the remuneration committee's key focus areas and any substantial amendments to the policy; whether remuneration consultants were used; the remuneration committee's views on whether the implementation of the remuneration policy achieved its stated objectives, as well as future areas of focus.[83] Although the background statement is similar to the statement by the chair of the remuneration committee in the UK, the King IV Report is more advanced in this regard because it also requires disclosure of whether the implementation of the remuneration policy achieved its objectives. The background statement is forward looking in so far as it must indicate future areas of focus.

(c) A separate directors' remuneration policy

A director's remuneration policy refers to guidelines that determine the company's approach to all aspects of directors' remuneration for the year going forward.[84] The UK Companies Act, 2006 specifically requires companies to disclose a directors' remuneration policy separately, and the content and format of such a policy is set out in part 4 of the 2013 Regulations.[85] The directors' remuneration policy, in terms of the 2013 Regulations, must address the issues set out in sub-subheadings (i)–(vi) below.

(i) *A description of the components of the remuneration package*

In terms of reg 25 of the 2013 Regulations, the directors' remuneration policy must provide, in tabular form, a clear description of each of the component parts of the remuneration package. The component parts of the directors' remuneration package include the total amount of salary and fees, all taxable benefits, performance-related payments and awards as well as all pension-related benefits.[86] The table must further include any particular arrangements which are specific to any director individually.[87]

(ii) *The link between remuneration and company strategy*

Regulation 26*(a)* of the 2013 Regulations requires the directors' remuneration policy to provide an explanation as to how each component of the remuneration package supports the company's short and long-term strategic objectives. Regulation 26*(d)* contains stringent requirements for a detailed disclosure of the framework used to assess performance, including the performance measures applied and, where more than one performance measure applies, an indication of the weighting of the performance measure

[83] Ibid.
[84] See regs 25–40 of the 2013 Regulations.
[85] Section 421(2A) of the UK Companies Act, 2006 provides that the regulations must provide that any information required to be included in the report as to the policy of the company with respect to the making of remuneration payments and payments for loss of office be set out in a separate part of the report.
[86] Regulation 25 read with part 3 of the 2013 Regulations.
[87] Ibid.

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or group-of-performance measures.[88] An accompanying explanation for choosing the particular performance measures and methods of assessing performance must be provided in accordance with reg 27 of the 2013 Regulations.[89] There must also be a clear illustration, in the form of a bar chart, of the level of remuneration that would be received by each of the directors (other than a director who is not performing an executive function) in accordance with the directors' remuneration policy in the first year to which the policy applies.[90] These disclosure requirements help to focus the company's attention on the link between remuneration and the company's strategy. They also compel quoted companies to consider the sensitivities between remuneration and performance.

(iii) *Employee engagement*

Regulation 38 read with reg 39 of the 2013 Regulations requires each UK-quoted company to provide an explanation of how the pay and employment conditions of the company's employees (other than directors) were considered when setting the policy for directors' remuneration, including whether (and if so, how) the company consulted with employees, and whether any remuneration comparison measurements were used. An explanation of any differences in the company's policy on the remuneration of directors from the policy on the remuneration of the company's employees must be provided in accordance with reg 27*(e)* of the 2013 Regulations. These disclosure requirements compel each UK-quoted company to consider the fairness between the remuneration of the directors and the employees of the company. Companies will have to consider the issue of the widening gap between the earnings of their directors and that of their employees. Employee engagement will thus become one of the priorities for company boards in the UK.

[88] Regulation 26 of the 2013 Regulations further requires that the directors' remuneration policy provide an explanation as to how each component of the remuneration package operates; the maximum that may be paid in respect of that component; a description of the framework used to assess performance, including a description of any performance measures which apply; the weighting of the performance measures; details of any performance period; the amount that may be paid in respect of the minimum level of performance that results in any payment under the policy, and any further levels of performance set in accordance with the policy. It must also provide an explanation as to whether there are any provisions for the recovery of sums paid or the withholding of the payment of any sum.

[89] In terms of reg 27 of the 2013 Regulations the remuneration policy must contain an explanation of why any performance measures were chosen and how any performance targets are set. In respect of any component (other than salary, fees, benefits or pension) which is not subject to performance measures, an explanation must be provided as to why there are no such measures. If any component did not form part of the remuneration package in the previous approved directors' remuneration policy, there must be an explanation as to why that component is now contained in the remuneration package.

[90] Regulations 33–5 of the 2013 Regulations.

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(iv) *Recruitment, service contracts and termination payments*

In terms of reg 29 of the 2013 Regulations, the directors' remuneration policy must indicate the company's approach to recruitment remuneration, and must contain a statement of the principles which would be applied by the company when agreeing on the components of a remuneration package for the appointment of directors, as well as the maximum level of variable remuneration which may be granted. The remuneration policy must also disclose the company's approach on the setting of notice periods under directors' service contracts, and the principles on which the determination of payments for loss of office will be approached, including the calculation of each component of the payment and an explanation of whether the circumstances of the director's loss of office and performance during the period of service will be relevant to the calculation of the termination payment.[91] These requirements help to focus the board's attention more closely on the often problematic termination arrangements and golden parachutes sometimes given to directors.

(v) *Shareholder participation in regard to the remuneration policy*

In terms of reg 40 of the 2013 Regulations, the directors' remuneration policy must indicate whether any views expressed by the shareholders to the company were taken into account in the formulation of the directors' remuneration policy. This compels companies to take shareholder engagement on remuneration matters seriously.

Section 439A, read with s 421(2A) of the UK Companies Act, 2006, further requires a quoted company to put the directors' remuneration policy to a binding shareholder resolution at an accounts meeting held in the first financial year on which the company becomes a quoted company.[92] Thereafter, the directors' future remuneration policy must be put to a shareholder vote every three years at an accounts meeting or other general meeting which is not the accounts meeting.[93] These requirements exert strong pressure on companies to take shareholders' concerns into account and to review any objectionable provisions in the remuneration policy.

(vi) *A revised directors' remuneration policy*

A directors' remuneration policy may be revised in accordance with s 422A of the UK Companies Act, 2006.[94] This means that the remuneration policy may be amended or updated. The revised policy must address all the matters set out in sub-paras (i)–(v) above, and must be set out in the same manner, as

[91] Regulations 36–7 of the 2013 Regulations.

[92] In terms of s 439A(8) of the UK Companies Act, 2006 'accounts meeting' refers to a general meeting of the company, before which the company's annual accounts for a financial year are to be laid.

[93] Section 439A(1)*(b)* of the UK Companies Act, 2006 inserted by s 79(4) of the Enterprise and Regulatory Reform Act, 2013.

[94] This provision was inserted by s 79(2) of the Enterprise and Regulatory Reform Act, 2013.

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required by the Regulations with regard to the directors' remuneration policy.[95] It must also be approved by the board of directors in terms of s 422A(2) of the UK Companies Act, 2006.[96] These provisions relating to the revision of a company's remuneration policy allow for flexibility to make changes to the policy in between the annual general meetings, should the need arise.

Notably, there is no requirement for a remuneration policy in the South African Companies Act. This is a grave omission, since greater transparency in relation to the remuneration policy provides shareholders and other company stakeholders with insight into how the remuneration of directors is structured and determined. This empowers shareholders and stakeholders to assess whether the remuneration policy formulated by the company is sound, as well as to hold the directors accountable on the basis of the remuneration policy.

The King IV Report has introduced an approach which is similar to that adopted in the UK in that it provides for the adoption of a separate remuneration policy and the disclosure of an overview of its main provisions. According to the King IV Report, such an overview should set out the remuneration elements and design principles for determining the remuneration of directors.[97] The remuneration policy should include the details of obligations in executive employment contracts which could give rise to payments on termination of employment or office.[98] To ensure fairness between the remuneration of executive directors and the remuneration of the rest of the company's employees, the King IV Report recommends that the remuneration policy should disclose an explanation of how the policy addresses fair and responsible remuneration for executive management in the context of overall employee remuneration.[99] The remuneration policy should also disclose the basis for the determination of non-executive directors' fees, and the use and justification of remuneration benchmarks.[100] A reference to an electronic link to the full remuneration policy should be provided for public access.[101] This would allow company stakeholders to access and scrutinise the full remuneration report.

Although the recommendations of the King IV Report on the disclosure of a remuneration policy are an improvement on its predecessor, the King III Report, and are in line with the provisions of the 2013 Regulations in the UK, they are non-binding on non-listed entities. Poor implementation of these recommendations would make effective shareholder and stakeholder assessment of the underlying drivers of individual remuneration packages

[95] See part 4 of sched 8 of the 2013 Regulations.
[96] Section 422A(2) of the UK Companies Act, 2006 was inserted by s 79(2) of the Enterprise and Regulatory Reform Act, 2013.
[97] King IV Report 66 para 34a.
[98] Ibid para 34b.
[99] Ibid para 34e.
[100] Ibid para 34f–g.
[101] Ibid para 34h.

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extremely difficult. Moreover, the shareholder vote on the adoption of the remuneration policy under the King IV Report is merely a non-binding advisory vote, as we discuss below.[102]

(d) An annual directors' remuneration report

An annual directors' remuneration report, also known as the implementation report, is a detailed description of how the approved remuneration policy was implemented in the relevant financial year and in the previous financial year.[103] This sub-part discusses the salient features of an annual directors' remuneration report in terms of the UK Companies Act, 2006, whilst making comparisons with the South African Companies Act. Under the UK Companies Act, 2006 the directors' remuneration report must address the issues set out in sub-subheadings (i)–(vii) below.

(i) *Disclosure of various components of directors' remuneration*

An annual directors' remuneration report must contain a single total figure table setting out, for the relevant financial year and for each director:

- the total amount of salary and fees;
- all taxable benefits;
- performance related payments and awards;
- all pension related benefits; and
- the total amount of the sums set out above.[104]

Disclosure of the above information must also be made in respect of the financial year preceding the relevant financial year in a manner that will allow comparisons between the two financial years.[105] Further, an annual directors' implementation report must, for the relevant financial year, give details of inter alia any payments to past directors,[106] payments for loss of office,[107] as well as directors' shareholdings and share interests.[108]

These requirements (specifically for individualised disclosure of various components of directors' remuneration in the UK, including fixed and variable components of the remuneration package) are similar to the requirements of s 30(4) of the South African Companies Act. Separate

[102] Notably, the JSE has proposed that there be a mandatory non-binding advisory vote for both the remuneration policy and the remuneration implementation report. See the proposed Amendments to the JSE Listings Requirements of 1 November 2016.

[103] See part 3 of the 2013 Regulations.

[104] Ibid.

[105] Regulation 9 of the 2013 Regulations.

[106] Regulation 15 of the 2013 Regulations.

[107] Regulation 16 of the 2013 Regulations. Payments for loss of office must be broken down into their individual components, and an explanation of how each component was calculated must be provided.

[108] Regulation 17 of the 2013 Regulations. According to this section the requirements or guidelines for directors to own shares in the company must be disclosed, as well as whether those guidelines or requirements have been met.

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disclosure of the individual components of the remuneration package rather than on an aggregate basis assists company stakeholders to assess whether the composition of the package has been carefully structured, with an appropriate balance between fixed remuneration, short-term elements and long-term elements. It may also be used as a comparative tool amongst comparable companies. Extensive and focused disclosure in this regard makes effective remuneration monitoring possible, since it may expose certain weaknesses in the remuneration structure.

Although the provisions relating to the disclosure of a separate annual directors' remuneration report in the UK are comparable to s 30(4) read with subsecs (5) and (6) of the South African Companies Act, it should be noted that the Companies Act does not go as far as the UK Companies Act, 2006. The latter appears to be more advanced than the former, as will be detailed under sub-subheadings (ii)–(vii).

(ii) *Percentage change in remuneration of the chief executive officer*

An annual directors' remuneration report must set out the percentage change in the remuneration of the director who performs the role of the chief executive officer ('CEO') and an average percentage change of all the other employees of the company or group in accordance with reg 19 of the 2013 Regulations. This requirement compels the board and remuneration committees to ensure that the pay increases of the CEO are in line with those of the rest of the employees. In contrast, the South African Companies Act does not have a similar provision. There is no equivalent provision either in the JSE Listings Requirements, or in the recommendations of the King IV Report.

(iii) *The relative importance of spend on pay*

Regulation 20 of the 2013 Regulations requires an annual directors' remuneration report to set out in a graphical or tabular form, in respect of the relevant financial year and the immediately preceding financial year, the actual expenditure of the company and the difference in spend between those years on the remuneration of employees, shareholder distributions and any other significant distributions and payments.[109] This compels companies to reveal how much they spent on directors' remuneration in relation to other important payments. There is no equivalent provision in the South African Companies Act. The JSE Listings Requirements and the King IV Report are also silent on this issue.

(iv) *The link between remuneration and performance*

Regulation 12(2) of the 2013 Regulations requires companies to set out, with respect to performance-related payments and awards, the details of each of the performance measures, including their weightings and performance

[109] In respect of any other significant distributions and payments or other use of profits, an explanation must be given as to why the particular matters were chosen by the directors, and how the amounts were calculated. See reg 20(2)–(3) of the 2013 Regulations.

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targets. The details of actual performance relative to the targets set and measured over the reporting period, details concerning any discretion exercised in respect of an award and the resulting levels of awards or payments must also be disclosed.[110] An annual directors' remuneration report must also show a correlation between the company's performance and the CEO's remuneration over a specified period of financial years.[111] These provisions ensure greater transparency in relation to the link between remuneration and performance in the implementation report.

On the other hand, s 30(4) of the South African Companies Act has merely focused on disclosure of the types of remuneration, and has overlooked the issues of the quality of the disclosure. This section does not go as far as reg 12 of the 2013 Regulations, which requires UK-quoted companies to disclose the performance conditions for the directors, how the directors performed against those conditions, and the resulting levels of remuneration. Disclosure of such information will assist to assess the appropriateness of the key performance criteria applied, as well as to establish the link between remuneration and performance.

The King III Report recommended that companies in South Africa should provide an explanation of the basis on which remuneration is measured. The King IV Report goes further than the King III Report in this regard, and recommends that companies should disclose the use of performance measures that support positive outcomes across the economic, social and environmental context in which the organisation operates.[112] However, as discussed earlier, the recommendations of the King IV Report are not binding, save in respect of listed companies.

(v) *Statement of implementation of remuneration policy in the following financial year*

Regulation 21 of the 2013 Regulations provides that an annual directors' remuneration report must contain a statement describing how the company intends to implement the approved directors' remuneration policy in the following financial year, including any significant changes to be made to the policy in the following financial year compared to how it was implemented in the relevant financial year.[113] The idea is to manage expectations. There is no equivalent provision in the South African Companies Act. It is of interest that the King IV Report recommends that future remuneration areas of focus should be disclosed in the background statement of the remuneration report,[114] and not in the annual directors' report, as is the case in the UK.

[110] Regulation 12(2) and (3) of the 2013 Regulations.
[111] See, for example, reg 18(2) of the 2013 Regulations.
[112] King IV Report 65 para 29b.
[113] Regulation 21 of the 2013 Regulations. The statement should also disclose the performance measures, their relative weightings and the performance targets determined for the performance measures, as well as how awards will be calculated.
[114] King IV Report 66 para 33f.

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(vi) *Transparency in the decision-making process*

In the UK, an annual directors' remuneration report must provide information on the names of each director who is a member of the company's board committee that has considered matters relating to the directors' remuneration (this is usually the remuneration committee).[115] It must also state whether any person provided advice or services that materially assisted the committee in its consideration of any matter relating to the directors' remuneration.[116] In the case of such a person, an annual directors' remuneration report must disclose the nature of any other services provided by that person to the company during the relevant financial year.[117] It must further provide information relating to the selection and appointment of that person,[118] state whether and how the remuneration committee has satisfied itself that the advice received was objective and independent,[119] and state the amount of the fees or charges paid by the company to that person for the advice or services provided, and the basis on which it was charged.[120] These requirements compel companies to focus on transparency in the decision-making process used for determining the directors' remuneration, with a focus on board committees and external consultants. They assist shareholders and other stakeholders to assess the independence and objectivity in the remuneration-setting process, including the independence of remuneration consultants whose services may have been utilised.

There are no similar requirements in the South African Companies Act. A notable feature of the King IV Report in this regard is that the background statement should provide information relating to whether remuneration consultants have been used, and whether the remuneration committee is satisfied that they were independent and objective.[121] This recommendation places an emphasis on the role and the independence of external consultants in the determination of directors' and prescribed officers' remuneration. While this is a positive development, the King IV Report is lagging behind the detailed provisions of the 2013 Regulations in the UK in relation to transparency in the decision-making process for the determination of the directors' and prescribed officers' remuneration.

(vii) *Shareholder participation in regard to an annual directors' remuneration report*

Section 439 of the UK Companies Act, 2006 gives shareholders of a quoted company an annual vote on a resolution to approve an annual directors'

[115] Regulation 22(1)*(a)* of the 2013 Regulations.

[116] Regulation 22(1)*(b)* of the 2013 Regulations. This provision also applies to a committee which considers remuneration issues when an individual is being nominated as a director. See reg 22(4) of the 2013 Regulations.

[117] See reg 22(1)*(c)*(i) of the 2013 Regulations.

[118] See reg 22(1)*(c)*(ii) of the 2013 Regulations.

[119] See reg 22(1)*(c)*(iii) of the 2013 Regulations.

[120] See reg 22(1)*(c)*(iv) of the 2013 Regulations.

[121] King IV Report 66 para 33d.

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remuneration report at the accounts meeting.[122] An annual directors' remuneration report must disclose the details of how the shareholders voted at the last general meeting on the resolution to approve an annual directors' remuneration report, as well as on the resolution to approve the directors' remuneration policy.[123] Where there was a significant percentage of votes against either resolution, the company is required to provide, in the remuneration report, an explanation (to the extent that this is possible) for those votes, and the steps taken by the directors in response to those concerns.[124] In this way shareholder engagement becomes one of the priorities for boards and remuneration committees.

There are no equivalent provisions in the South African Companies Act. Notably, the Companies Act does not provide for shareholder approval of the remuneration report disclosed in the annual financial statements in accordance with s 30(4). In contrast, the King IV Report provides that the remuneration implementation report should be approved by a non-binding advisory vote of the shareholders every year.[125]

(e) Enhanced transparency in regard to remuneration and termination payments

The Enterprise and Regulatory Reform Act, 2013, has imposed new restrictions on directors' remuneration and termination payments in chap 4A of the UK Companies Act, 2006.[126] According to the new restrictions, a quoted company is prohibited from making any remuneration payment or a payment for loss of office to a person who is, or is to be, or has been a director of the company unless the payment is consistent with the approved remuneration policy or has been approved by a separate resolution of the shareholders.[127]

[122] In terms of s 440 of the UK Companies Act, 2006, failure to give the requisite notice of the resolution for approval of an annual directors' remuneration report constitutes an offence by every officer of the company who is in default. Section 440(2) of the UK Companies Act, 2006, provides that if the resolution is not put to a shareholder vote at the accounts meeting, an offence is committed by each existing director. Section 439(5) of the UK Companies Act, 2006, makes it clear that no entitlement of a person to remuneration is made conditional on the passing of this resolution. However, in order to give teeth to the advisory vote, the new section, s 439A(2) of the UK Companies Act, 2006, provides that if the resolution to approve an annual directors' remuneration report is not passed at an accounts meeting, the company must put the directors' remuneration policy to shareholder approval the following year.

[123] Regulation 23*(a)*–*(b)* of the 2013 Regulations.

[124] Regulation 23*(c)* of the 2013 Regulations.

[125] King IV Report 67 para 37.

[126] Chapter 4A of the Companies Act, 2006, was inserted by s 80 of the Enterprise and Regulatory Reform Act, 2013. The restrictions in this chapter will come into operation from the second financial year beginning on or after 13 October 2013 or during the second financial year beginning in the year in which the company becomes a quoted company.

[127] Section 226B and 226C of the UK Companies Act, 2006, inserted by s 80 of the Enterprise and Regulatory Reform Act, 2013.

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In order to enhance transparency, the new section, s 226D(1)*(a)* and *(b)* of the UK Companies Act, 2006, provides that directors' remuneration and termination payments must not be approved unless a memorandum setting out the particulars of the payment, including its amount, has been made available for inspection by the shareholders of the company. The memorandum must also explain the ways in which the payment is consistent or inconsistent with the approved directors' remuneration policy.[128] It must be available for shareholder inspection at the company's office for fifteen days prior to the date of the relevant meeting, and must also be available at the meeting.[129] Companies are therefore compelled to inform shareholders beforehand inter alia about the nature and scale of the termination and remuneration payments. This results in enhanced transparency in regard to remuneration and termination payments.

The South African Companies Act does not have equivalent provisions. A provision similar to s 227(1)*(a)* of the Companies Act 61 of 1973 has now been excluded by the 2008 Companies Act.[130] Section 227(1)*(a)* of the Companies Act of 1973 prohibited the making of any payment or the granting of any benefit or advantage by a company to 'any director or past director of the company or of its subsidiary company or holding company or of any subsidiary of its holding company by way of compensation for loss of office or as consideration for or in connection with his retirement from office', unless full particulars with respect to the proposed payment, including the amount thereof, benefit or advantage had been disclosed to shareholders of the company, and the making of the payment or the granting of the benefit or advantage had been approved by a special resolution of the company. It is regrettable that the current Companies Act does not contain a similar provision, as this has removed the benefits of transparency and shareholder control over termination payments. Likewise, the JSE Listings Requirements do not provide for shareholder approval of termination payments. Although the King IV Report provides for disclosure of termination payments in the implementation report, it does not provide for shareholder approval of such payments.[131]

(f) Format of pay disclosure

The UK Companies Act, 2006 and the 2013 Regulations deal in detail with the format of pay disclosure in the directors' remuneration report. Part 3 of the 2013 Regulations contains detailed provisions for the presentation of each of the directors' remuneration for the relevant financial year in tabular and graphical forms. In terms of these requirements the remuneration reports

[128] Section 226D(2) of the UK Companies Act, 2006.
[129] Section 226D(1) of the UK Companies Act, 2006.
[130] Section 227 of the Companies Act 61 of 1973 dealt with payments to directors for loss of office or in connection with arrangements and take-over schemes.
[131] King IV Report 67 para 35c.

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must be more transparent, simple and graphical so that they are easy to navigate, understand and compare.

In contrast, the Companies Act has not directly addressed the form in which the disclosure of directors' remuneration must be presented. The Companies Act also does not require disclosure of the remuneration and benefits paid to directors for the current financial year and the preceding financial year. Disclosure of such information makes it easy to compare remuneration trends with previous years. It is, however, noteworthy that the JSE Listings Requirements do require the disclosure of the remuneration paid to directors for the current financial year as well as for the preceding financial year: but this only applies to listed companies.[132]

It is submitted that greater transparency in South Africa ought to be enhanced by a requirement in the Companies Act of standardised reporting. Emphasis should be placed on clear and more informative remuneration reports that are easy to navigate, understand and compare with the previous financial years of the company. Standardised reporting would also facilitate comparisons with other companies. The King IV Report specifically recommends the presentation of directors' remuneration in tabular form.[133] However, the recommendations of the King IV Report in this regard are not as detailed as the provisions of the 2013 Regulations in the UK. Moreover, the King IV Report does not require a comparison to be made with the previous financial years of the company.

(g) Penalties for non-disclosure

In order to strengthen transparency, the UK Companies Act, 2006, has prescribed specific penalties for non-compliance with its remuneration disclosure requirements. Failure to comply with the requirement to prepare a directors' remuneration report for each financial year of the company constitutes an offence.[134] The offence is committed by every person who was a director of the company immediately before the end of the period for filing accounts and reports for the financial year in question, and failed to take all reasonable steps for securing compliance with that requirement.[135] A person guilty of the offence is liable on conviction to a fine and on summary conviction, to a fine not exceeding the statutory maximum.[136]

If a directors' remuneration report that does not comply with the requirements of the UK Companies Act, 2006, is approved, every director of the company who knew that the report did not so comply (or was reckless as to whether it complied) and failed to take reasonable steps to secure

[132] See para 8.63*(k)* of the JSE Listings Requirements.

[133] The King IV Report 67 para 35a.

[134] A directors' remuneration report, as indicated above, must consist of a statement by the remuneration chairman, a future remuneration policy, and an annual directors' remuneration report.

[135] Section 420(2)*(a)* and *(b)* of the UK Companies Act, 2006.

[136] Section 420(3)*(a)* and *(b)* of the UK Companies Act, 2006.

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compliance with those requirements or to prevent the report from being approved, commits an offence.[137] A person guilty of the offence is liable on conviction on indictment, to a fine and on summary conviction, to a fine not exceeding the statutory maximum.[138]

In contrast, the South African Companies Act does not contain criminal penalties for the equivalent offence. Section 77(3)*(d)*(i) of the Companies Act provides for personal liability of a director for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having signed, consented to or authorised the publication of any financial statements that were false or misleading in a material respect, despite knowing that the statement was false, misleading or untrue. A director may be held jointly and severally liable with any other person who is (or may be) held liable for the same act.[139] It should be noted that the proceedings to recover the loss, damages or costs sustained must be commenced within three years after the particular act or omission that gave rise to the liability.[140] In other words, no action may be taken against a director after the expiry of a period of three years after the act or omission that gave rise to the liability, because the action will have prescribed.[141]

(h) Shareholder approval of directors' remuneration payments under the Companies Act

Section 66(8) and (9) of the South African Companies Act provides that the company may pay remuneration to its directors for their 'service as directors' (except to the extent that the Memorandum of Incorporation of the company provides otherwise) only in accordance with a special resolution of the shareholders approved within the previous two years. As discussed earlier, there is no definition in the Companies Act in regard to the meaning of 'remuneration' in the context of s 66(8) and (9), and the only definition of 'remuneration' in the Companies Act is contained in s 30(6), which defines 'remuneration' broadly for purposes of disclosure in the annual financial statements of a company.

It is unclear whether the approval by special resolution is required only for directors' services as directors (such as fees for attending board meetings), or whether the phrase includes remuneration paid to executive directors in

[137] Section 422(2)*(a)* and *(b)* of the UK Companies Act, 2006.
[138] Section 422(3)*(a)* and *(b)* of the UK Companies Act, 2006.
[139] Section 77(6) of the Companies Act.
[140] Section 77(7) of the Companies Act.
[141] It is important to note, in this context, that the Companies Act also provides for general civil liability for a contravention of its provisions. For instance, s 20(6)*(a)* affords each shareholder of a company a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with the Companies Act. Further, any person who contravenes any provision of the Companies Act is liable to any other person for any loss or damage suffered by that person as a result of the contravention (see s 218(2) of the Companies Act).

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terms of their employment contract (such as salaries and bonuses).[142] Fees paid to directors for attending board meetings are not generally significant compared to the fees paid to executive directors of a company in terms of their employment contracts, which fees may be exorbitant at times.[143] It is thus not clear whether the phrase 'service as directors' in s 66(8) should be narrowly interpreted to mean the fees paid to directors for attending board meetings only or should be broadly interpreted to include the fees paid to executive directors in terms of their service contracts.[144]

The interpretation of the phrase 'service as directors' in s 66(8) is yet to be clarified by the legislature or the courts.[145] Until the phrase 'service as directors' is so clarified, it is suggested that the phrase should be broadly interpreted to include remuneration paid to executive directors in terms of their employment contracts so as not to risk contravening s 66(8) and (9) of the Companies Act.[146] As discussed earlier, it is also not clear whether the requirement for shareholder approval by special resolution applies to cash payments only or whether it also includes benefits other than cash, as is the case in the UK.[147]

Notably, the King IV Report recommends that a resolution for the adoption of the company's remuneration policy should be tabled to shareholders for a non-binding advisory vote every year at the annual general meeting.[148] The King IV Report further provides for consequences where the resolutions for the adoption of the remuneration policy or the remuneration implementation report (or both) have been voted against by 25 per cent or more of the voting rights exercised. In such an event, it is recommended that steps should be taken in good faith and with the best reasonable effort towards an engagement process to ascertain the reasons for the dissenting votes, and appropriately addressing legitimate and reasonable objections and concerns raised.[149] It is recommended further that the background statement of the remuneration policy after the voting should disclose the persons with whom the company engaged, the manner and form of the engagement to ascertain the reasons for the dissenting votes, as well as the steps taken to address legitimate and reasonable objections and concerns.[150] The fact that

[142] Cassim et al op cit note 41 at 455.

[143] Ibid at 456.

[144] For a discussion of this issue see Cassim et al ibid at 455–6 and Luiz op cit note 15 at 292–6.

[145] Cassim et al ibid at 456.

[146] Ibid. See further Luiz op cit note 15 at 293, who agrees with adopting a broader interpretation of the phrase 'service as directors'.

[147] See the definition of 'remuneration payment' in s 226A(1) of the UK Companies Act, 2006, discussed earlier.

[148] King IV Report 67 para 37. The JSE has proposed that the non-binding advisory vote should be a mandatory non-binding vote for listed companies in order to enhance shareholder voice in this issue. See the proposed Amendments to the JSE Listings Requirements of 1 November 2016.

[149] King IV Report 67 para 38.

[150] Ibid para 39.

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the shareholder votes on the resolutions to adopt the remuneration policy, and the remuneration implementation report are non-binding and merely advisory, is disappointing. There is still no guarantee that company boards will take shareholders' concerns about the remuneration policy and the remuneration implementation report into account.

VI PROPOSALS FOR LEGISLATIVE REFORM IN SOUTH AFRICA

It is submitted that the minimum standards of remuneration disclosure set by the Companies Act are too low. Regulatory techniques developed in the UK in regard to remuneration disclosure should be considered and, with the necessary adaptations, introduced to strengthen South Africa's current remuneration-disclosure regime. The additional disclosure requirements should apply to those companies that are presently required to comply with the disclosure requirements of s 30(4), as discussed in part IV above.

We argue that the disclosure requirements in s 30(4) of the Companies Act should be strengthened by requiring companies to disclose further information in regard to the remuneration of directors as set out below:

- The Companies Act should have a requirement for the disclosure of a separate remuneration policy equivalent to that of the director's remuneration policy in the UK. Greater transparency in relation to the remuneration policy provides insights into how the remuneration of directors is structured, and into the underlying drivers of the individual remuneration packages.
- The Companies Act should provide for stronger shareholder and employee participation in the remuneration policy. The remuneration policy should indicate whether any views expressed by the shareholders to the company were taken into account in the formulation of the remuneration policy. It should also explain how the pay and employment conditions of the company's employees were considered when setting the policy for the directors' remuneration.
- The Companies Act should require disclosure on how the amount spent on directors' remuneration compares to that spent on other important payments, the remuneration of employees, distributions to shareholders and investments. Pay-ratio disclosures should be mandated by legislation, and companies should be required to show how the increase in the remuneration of the directors compares to that of the company's employees.
- The Companies Act should require companies to provide sufficient information on the link between remuneration and performance. The performance criteria, including performance measures, weightings and targets on which variable remuneration is based must be clearly disclosed and justified. This would ensure greater transparency in relation to the link between remuneration and performance.
- The Companies Act should require the disclosure of sufficient information relating to the decision-making process that was utilised for

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determining the remuneration of directors, including stakeholder consultations. Companies should be required to disclose the identity and independence of all the persons who were involved in the remuneration-setting process during the relevant financial year. This would compel companies to focus on transparency in the decision-making process used for determining executive directors' remuneration, and would assist stakeholders to assess the issues of independence and objectivity in the remuneration-setting process.

- There must be disclosure of the company's principles on which the determination of payments for loss of office will be approached.
- The Companies Act should require the remuneration of directors to be published in a clear and standardised manner that is easy to read, assess and comprehend. It must also be presented in a format that is transparent, simple and graphical that will be easy to navigate and understand, and which will facilitate comparisons with remuneration trends in previous financial years of the company and with those of other companies.
- The Companies Act should provide for harsher penalties for the failure to comply with the disclosure requirements, in order to strengthen transparency.
- South Africa should consider adopting formal shareholder approval for board decisions on remuneration policies and on remuneration payments. Shareholder approval should be sought for both board fees and the remuneration paid to executive directors under their service contracts with the company.
- The term 'remuneration' should be clearly defined in the Companies Act, and not only for purposes of s 30(4) and (5) of the Companies Act, and should include cash payments and other benefits.
- Listed companies should be required to have the equivalent of an annual directors' remuneration report as required by the UK Companies Act, 2006, setting out how the approved remuneration policy was implemented in the relevant financial year and in the previous financial year.
- Listed companies should also be required to disclose communication by the remuneration committee chairperson summarising for the relevant financial year the major decisions on directors' remuneration, any substantial changes relating to directors' remuneration made during the year and the context in which those changes occurred.

VII CONCLUSION

The remuneration of directors has emerged as a contentious issue in various jurisdictions in view of the role that exorbitant remuneration packages are thought to have played in contributing to the global financial crisis, as well as the damaging impact that they may have on various company stakeholders. As we have discussed, the escalating levels of the remuneration of directors may also exacerbate the income inequalities and labour unrest in South Africa, and threaten social cohesion. The remuneration-setting process is to a

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large extent characterised by insufficient transparency and a lack of procedural fairness, as well as a high possibility of conflict of interests of directors with those of shareholders and other company stakeholders.

One way of managing the escalating levels of the remuneration of directors is to compel companies to disclose the details of the remuneration packages of directors, the process by which they are determined and their links to performance. Full remuneration disclosure would increase transparency and openness in the remuneration-setting process, as well as the board's accountability to shareholders and other company stakeholders.

This article has assessed the adequacy of the disclosure of directors' remuneration in terms of the Companies Act, the King IV Report and the JSE Listings Requirements in light of the minimum standards for the disclosure of directors' remuneration in the UK Companies Act, 2006, the Enterprise and Regulatory Reform Act, 2013 and the 2013 Regulations. The article has focused on the information relating to directors' remuneration that is required to be disclosed as part of the annual financial reporting process, the manner in which the information is to be disclosed, employee and shareholder participation, approval of directors' remuneration, as well as the penalties for non-compliance with the disclosure requirements. It is submitted that the South African Companies Act is lagging behind the UK legislation in these respects. The King IV Report has taken positive steps in relation to remuneration disclosure which are in line with the approach under the UK legislation. However, the principles of the King IV Report, as was the case with the King III Report, are voluntary and non-binding, save for listed companies.

Although s 30(4) of the Companies Act is comparable to the provisions relating to the disclosure of an annual directors' remuneration report in the UK in so far as it requires disclosure of the various components of the total remuneration package, the Companies Act does not go as far as the UK legislation. Section 30(4) does not require companies to disclose the benchmarks that were used to determine the directors' remuneration and thus fails to address the link between remuneration and performance. This section has also not addressed the critical issue of stakeholder consultation in the remuneration setting process. There is no requirement to disclose how the amount spent on directors' remuneration compares to that spent on other important payments, the remuneration of employees, distributions to shareholders, and investments. Greater transparency in the remuneration-setting process is required, as well as a standardised manner of publishing the remuneration payment details of directors that is simple, and easy to navigate and understand. Furthermore, the remuneration information disclosed in terms of s 30(4) of the Companies Act is not subject to formal shareholder approval and the requirement in s 66(9) of the Companies Act that the remuneration of directors for their services as such must be approved by a special resolution of the shareholders lacks clarity and certainty. The non-binding advisory vote of the shareholders on the resolution to adopt the remuneration policy in the King IV Report is disappointing.

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We argue that the minimum standards of disclosure of directors' remuneration under the Companies Act are inadequate to satisfy enhanced transparency and the board's accountability to company stakeholders. Thus, it is imperative that the remuneration disclosure rules in s 30(4) of the Companies Act should be strengthened. Legislative techniques developed in the UK with regard to remuneration disclosure should be considered and, with the necessary adaptations, introduced in the Companies Act. Legislating comprehensive remuneration-disclosure rules will be in line with the stated objective of s 7*(b)*(iii) of the Companies Act to promote the South African economy by encouraging transparency and high standards of corporate governance, given the role that companies play in the country's social and economic life.

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