AN ANALYSIS OF TRENDS IN SHAREHOLDER ACTIVISM IN SOUTH AFRICA

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I. INTRODUCTION

Shareholder activism is a generic term which describes the actions undertaken by shareholders to influence boards of directors into improving the financial outcomes or the governance of the company.[1] It may be regarded as a self-help measure that shareholders undertake in order to protect their investments in the company.[2] For many years, shareholder activism was an ineffective force in South Africa. South Africa has long been described as a country where the average annual general meeting (AGM) of a company lasts less than an hour and where shareholders rarely exercise their statutory and common-law rights.[3] But, in the current socio-economic climate and, in particular, frustration with increasing high-profile corporate scandals and governance failures, shareholder activism in South Africa is starting to evolve and gain momentum in South Africa.

A prime reason for the increase in shareholder activism is due to certain provisions of the South African Companies Act 71 of 2008 (Companies Act), which came into force on 1 May 2011, which have created an enabling environment for shareholder activism. South African shareholders are developing a greater awareness of environmental, social and governance (ESG) issues, which has also contributed to the increase in shareholder activism. Moreover, international trends, particularly in the United States of America (USA) and the United Kingdom (UK), are now influencing South African shareholder activists.

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1 S. L. Gillan and L. T. Starks, 'Corporate Governance Proposals and Shareholder Activism: The Role of Institutional Investors', 57, *Journal of Financial Economics* (2000): 275–305, at 275; H. Chung and T. Talaulicar, 'Forms and Effects of Shareholder Activism', 18 (4), *Corporate Governance: An International Review* (2010): 253–7, at 253.

2 I. H.-Y Chiu, 'The Meaning of Share Ownership and the Governance Role of Shareholder Activism in the United Kingdom', 8 (2), *Richmond Journal of Global Law and Business* (2008): 117–60, at 142.

3 R. Naidoo, *Corporate Governance – An Essential Guide for South African Companies*, 3rd edn (LexisNexis 2016), at 118.

African Journal of International and Comparative Law 30.2 (2022): 149–174
Edinburgh University Press
DOI: 10.3366/ajicl.2022.0402
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The first part of this article provides a brief background to shareholder activism in South Africa. The second part discusses the legal framework in the Companies Act, the King IV Report on Corporate Governance for South Africa 2016 (King Report),[4] and the main regulatory instrument governing listed companies in South Africa, being the Listings Requirements of the Johannesburg Stock Exchange (JSE Listings Requirements), which enable shareholder activism. Examples of strategies adopted by South African shareholder activists are also discussed. Finally, this article proposes some recommendations to enhance shareholder activism in South Africa.

II. BACKGROUND TO SHAREHOLDER ACTIVISM IN SOUTH AFRICA

Despite its growing prevalence globally, shareholder activism is controversial. Those who support it assert that companies with active shareholders are more likely to be successful than those whose shareholders are passive and apathetic, since active shareholders may be able to ensure that companies comply with good corporate governance practices.[5] Conversely, opponents of shareholder activism argue that shareholder activism results in disruptive behaviour by shareholders, which could ultimately weaken companies. The presence of individual shareholder activists at AGMs is often seen as an annoyance by the board – resulting in directors responding to challenging questions in a hostile manner.[6]

Another criticism of shareholder activists is that they are 'short-termists' who are concerned solely with realising short-term returns (such as maximising shareholders' investments in the company) at the expense of long-term shareholder interests and value creation.[7] Nevertheless, it is conceivable that focusing on the short-term interests of the company may not necessarily be inconsistent with focusing on its long-term interests.[8] For example, when the motivation behind the activism relates to poor leadership by the board, a change in leadership may reap long-term benefits for the company.[9]

Despite arguments against shareholder activism, it is generally thought that shareholder activists are an effective monitoring mechanism that could improve

4 Paragraph 7.F.5 of the JSE Listings Requirements requires listed companies to disclose in their annual report their implementation of the King Report through the application of the disclosure and application regime. It is mandatory for JSE-listed companies to comply with certain corporate governance principles of the King Report, while the balance of the principles must be adopted on an 'apply or explain' basis.

5 See A. Anand, 'Implications of Shareholder Activism', in P. M. Vasudev and S. Watson (eds), *Global Capitals Markets: A Survey of Legal and Regulatory Trends* (Edward Elgar 2017): 17–34, at 23. See further on shareholder apathy R. Cassim, 'Corporate Governance', in F. H. I. Cassim (ed.), *Contemporary Company Law*, 3rd edn (Juta, 2021) 641–79, at 675.

6 S. Viviers, 'Individual Shareholder Activism in South Africa: The Case of Theo Botha', 9 (2), *Journal of Economic and Financial Sciences* (2016): 347–69, at 354.

7 S. L. Gillan and L. T. Starks, 'The Evolution of Shareholder Activism in the United States', 19 (1), *Journal of Applied Corporate Finance* (2007): 55–73, at 59.

8 Anand, *supra*, note 5, at 24.

9 *Ibid*.

corporate governance practices in companies.[10] Studies show that there is a correlation between diligent sustainability business practices and economic performance, and that share prices are positively influenced by good sustainability practices.[11] At the very least, the presence of shareholder activists at AGMs could result in the board of directors revising its strategies for fear of reputational damage.[12]

A. Shareholders as the Ultimate Compliance Officers

The King Report recognises stakeholders as the ultimate compliance officers when it comes to the quality of a company's application of corporate governance principles.[13] The Report states that shareholders, as a particular sub-set of stakeholders, have certain rights that are enshrined in the Companies Act, and that this strengthens their ability to holds boards of companies accountable.[14]

While shareholders may be the ultimate compliance officers of a company, it must be recognised that a shareholder's right to vote is a proprietary right.[15] It follows that if shareholders vote in a manner that is adverse to the interests of the company as a whole, they cannot on that ground be restrained from casting their votes in whatever way they please.[16] Since shareholders may vote in their own best interests, it must be conceded that not all shareholders would vote in a manner that would encourage good corporate governance by the company if such a vote would not serve their own interests.[17] Thus, despite the provisions of the Companies Act, the King Report and the JSE Listings Requirements which enhance shareholder activism, shareholders may not necessarily use these

10 See K. Stathopoulos and G. Voulgaris, 'The Importance of Shareholder Activism: The Case of Say-on-Pay', 24 (3), *Corporate Governance: An International Review* (2016): 359–70, at 361; Naidoo, *supra*, note 3, at p. 118; M. F. Cassim, *The New Derivative Action under the Companies Act: Guidelines for Judicial Discretion* (Juta, 2016), at 29–31.

11 See, for example, the study conducted by Arabesque Partners, 'From the Stockholder to the Stakeholder: How Sustainability Can Drive Financial Performance' (2014), available at < https://arabesque.com/research/From_the_stockholder_to_the_stakeholder_web.pdf > (accessed 25 May 2020). This study is based on more than 190 academic studies, industry reports, newspaper articles and books. It concluded that: (1) 90 per cent of the cost of capital studies show that sound ESG standards lower the cost of capital; (2) 88 per cent of studies show that solid ESG practices result in better operational performance; and (3) 80 per cent of studies show that share price performance is positively influenced by good sustainability practices.

12 Viviers, *supra*, note 6, at 361.

13 King Report, at 32.

14 *Ibid*.

15 *Pender* v. *Lushington* (1877) 46 ChD 317; *Sammel* v. *President Brand Gold Mining Co. Ltd* 1969 (3) SA 629 (A), at 680; *Desai* v. *Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A), at 519; *Kuwait Asia Bank EC* v. *National Mutual Life Nominees Ltd* [1991] 1 AC 187 (PC), at 221; *CDH Invest NV* v. *Petrotank South Africa (Pty) Ltd* [2018] 1 All SA 450 (GJ), at [44]; R. Cassim, 'The Power to Remove Company Directors from Office', 25 (1) *Fundamina: A Journal of Legal History* (2019): 37–69, at 57–8; R Cassim, *The Removal of Directors and Delinquency Orders under the South African Companies Act* (Juta, 2020), at 66.

16 *Pender* v. *Lushington*, *supra*, note 15, at 319; *CDH Invest NV* v. *Petrotank South Africa (Pty) Ltd and Another*, *supra*, note 15, at [44].

17 C. Rademeyer and J. Holtzhausen, 'King II, Corporate Governance and Shareholder Activism', 120 (4), *South African Law Journal* (2003): 767–76, at 776.

provisions to promote good corporate governance, but their votes may in fact hamper good corporate governance.[18]

In contrast, regulation 28[19] of the Pension Funds Act 24 of 1956 (Regulation 28) imposes a fiduciary duty on pension fund trustees to act in the best interests of its members whose benefits depend on the responsible management of fund assets.[20] Regulation 28 requires pension fund trustees to adopt a responsible investment approach and to give appropriate consideration to any factor that may materially affect the sustainable long-term performance of a fund's assets, including factors of an ESG character.[21] Thus, unlike other shareholders who may vote in their own interests, Regulation 28 obliges pension funds to ensure that the companies in which they invest manage ESG risks responsibly.

B. Strategies used by Shareholder Activists in South Africa

The general strategies used by shareholder activists may be classified into private and public strategies, and further, into walk and voice activism. Walk activism entails shareholders selling all or part of their stake in the company, or threatening to do so.[22] Studies have shown that when shareholders divest from a company and sell their shares, particularly in large amounts, it may have a disciplinary effect on companies, which ultimately leads to a change in governance.[23] The threat of shareholders with a large shareholding selling their shares may also give the board the incentive to act in the best interests of the company and take decisions that will not destroy the company's value.[24] Divestment may also affect the company's reputation. On the other hand, when the holdings of shares in a company are exceptionally large, the shares cannot be sold without driving the price down, which would result in the shareholders suffering further losses.[25] This may discourage large institutional shareholders from simply divesting from certain companies. Walk activism has not been used extensively in South Africa due to the fact that South Africa has a relatively small stock market.[26]

Voice activism entails shareholders attempting to influence the board through using their voice. These strategies include engaging in dialogue with the board, proposing shareholder resolutions, garnering support from other shareholders and thus accruing additional voting rights, raising concerns at AGMs and stimulating

18 *Ibid*.

19 Published by Government Notice R.98 in *Government Gazette* 162 of 26 January 1962. Regulation 28 took effect on 1 July 2011.

20 Preamble to Regulation 28.

21 *Ibid*.

22 Chung and Talaulicar, *supra*, note 1, at 253.

23 See Gillan and Starks, *supra*, note 7, at 56.

24 Stathopoulos and Voulgaris, *supra*, note 10, at 360.

25 Gillan and Starks, *supra*, note 1, at 278.

26 S. Viviers, N. Mans-Kemp, L. Kallis and K. Mckenzie, 'Public "Say on Pay" Activism in South Africa: Targets, Challengers, Themes and Impact', 22 (1), *South African Journal of Economic and Management Sciences* (2019): 1–10, at 3.

public debate on matters of concern.[27] Voice activism may be public or private. Institutional shareholders in particular may be able to request private meetings with the board in order to express their concerns on particular matters. A further voice-related strategy is to simply vote against certain resolutions proposed by the board. For example, shareholders will 'just vote no' to board appointments and the re-election of directors as a form of protest in order to pressurise the board into considering their demands.[28] Studies show that shareholder activists have been generally successful in blocking the appointment of certain directors by adopting 'just vote no' campaigns.[29]

It is not costly for shareholder activists to voice their concerns on public media platforms, such as social media, television, radio and print media, and in this manner exert pressure on companies to reconsider their strategies. This strategy is used mostly by minority shareholders who may not have access to decision-makers in a private meeting.[30]

A further strategy is to initiate litigation against the company. This strategy is not used often in South Africa because of the high legal costs associated with court proceedings and the risk that courts may award legal costs against shareholder activists. Likewise, in the UK it is uncommon for shareholder activists to resort to legal action against the company.[31] If shareholder activists in the USA are well-funded, they may commence legal proceedings with the motive of obtaining further information from the company or attempting to reverse board decisions.[32] While it is uncommon for shareholder activists in Australia to resort to legal action against the company, a strategy used by hostile shareholder activists to encourage the swift resolution of contentious matters is to put the company on notice that they are contemplating legal proceedings.[33]

In South Africa the preferred strategy of shareholder activism is private activism, in the form of engagement with the board.[34] In some instances, the manner in which shareholder activists relate to the board evolves as they discover approaches which may yield more effective results for them. For example, the Public Investment Corporation SOC Limited (the largest asset management firm in Africa, which is wholly owned by the South African government), used to adopt

27 Chung and Talaulicar, *supra*, note 1, at 253; S. Viviers and E. v.d. M. Smit, 'Institutional Proxy Voting in South Africa: Process, Outcomes and Impact', 46 (4), *South African Journal of Business Management* (2015): 23–34, at 24.

28 Chiu, *supra*, note 2, at 139.

29 See D. D. Guercio, L. Seery and T. Woidtke, 'Do Boards Pay Attention when Institutional Investor Activists "Just Vote No?"', 90, *Journal of Financial Economics* (2008): 84–103, at 102 and Viviers and Smit, *supra*, note 27, at 29.

30 Viviers et al., *supra*, note 26, at 6.

31 G. Davies, G. Mulley and M. Bardell, 'United Kingdom', in F. J. Aquila (ed.), *The Shareholder Rights and Activism Review*, 4th edn (Law Business Research Ltd 2019): 146–61, at 148.

32 F. J. Aquila, 'United States', in F. J. Aquila (ed.), *The Shareholder Rights and Activism Review*, 4th edn (Law Business Research Ltd 2019): 162–72, at 170.

33 Q. D. Digby and T. Stutt, 'Australia', in F. J. Aquila (ed.), *The Shareholder Rights and Activism Review*, 4th edn (Law Business Research Ltd 2019): 1–13, at 5–6.

34 Viviers et al., *supra*, note 26, at 6; T. Davies, 'Shareholder Activism in SA – A Shuffle rather than a Shift' (18 February 2018), available at < https://justshare.org.za/media/news/shareholder-activism-in-sa-a-shuffle-rather-than-a-shift > (accessed 29 May 2020).

a confrontational approach with management, and used to raise concerns publicly at AGMs. Over time its relationship with some companies evolved in that in some instances it chooses to engage with management using private strategies such as meeting privately to discusses its concerns.[35]

Likewise, the most common form of shareholder activism in the UK is in the form of private dialogues and negotiations.[36] This is because public forms of shareholder activism strategies are generally regarded in the UK as being too aggressive.[37] In sharp contrast, studies show that most shareholder activists in the USA prefer public activism.[38] While shareholder activism in Australia has been of the private type for many years, in recent years Australian shareholder activists have been increasingly adopting some of the public strategies used in the USA which are more aggressive and publicly hostile.[39]

C. Types of Shareholder Activists in South Africa

It is possible to distinguish between economic and governance activism. Economic activism is motivated by economic incentives and is directed at prompting improved financial performance by the company.[40] For example, it may focus on the profits made by a company, its dividends and its level of indebtedness.[41] Governance activists seek to improve the company's level of compliance with corporate governance practices. For example, it may focus on board composition, sustainability, human rights and the environmental performance by a company.[42] While most shareholder activism is economically oriented, in recent years there has been a global increase in governance activism.[43]

In South Africa three types of shareholder activists have emerged over recent years. These are institutional investors, individual shareholder activists and non-profit entities. Institutional investors include large retirement and pension funds, insurance companies, hedge funds and asset managers. They generally have more resources to properly scrutinise the company's performance compared to individual shareholders.[44] While institutional investors have generally pursued economic activism in South Africa, many of them are now turning their attention to governance activism as well. Companies tend to be mindful of the actions of institutional investors since a divestment by them could easily affect the share price.

35 A. Goldstuck and S. Naidoo, 'The Experience of Governance Innovations in South Africa' (2016), at 23, available at < https://www.greenfinanceplatform.org/sites/default/files/downloads/resource/The_Experience_of_Governance_Innovations_in_South_Africa_UNEP Inquiry.pdf > (accessed 25 May 2020).

36 Chiu, *supra*, note 2, at 140; Davies et al., *supra*, note 31, at 149.

37 Viviers and Smit, *supra*, note 27, at 30.

38 Aquila, *supra*, note 32, at 169.

39 Digby and Stutt, *supra*, note 33, at 9.

40 Chung and Talaulicar, *supra*, note 1, at 253.

41 Viviers, *supra*, note 6, at 349.

42 *Ibid*.

43 *Ibid*.

44 Rademeyer and Holtzhausen, *supra*, note 17, at 769.

The King Report regards institutional investors as being highly influential on the basis that the types of investment decisions made by them and the manner in which their shareholder rights are exercised either reinforces or weakens good governance in the companies in which they invest.[45] Principle 17 of the King Report suggests that boards of institutional investors should ensure that responsible investment is practised by the company in order to promote good governance. Nonetheless, the interests of institutional investors do not necessarily coincide with the interests of other shareholders.[46] In some instances, institutional investors may have continuing business relationships with a company in which they have invested and may be unwilling to oppose the board on a corporate governance matter if this would disrupt their business relationship with the company.[47]

In an attempt to promote shareholder activism and responsible investing practices, the Code for Responsible Investing in South Africa (CRISA) was published in 2011 by the Institute of Directors in Southern Africa NPC. CRISA is a voluntary set of principles that provides guidance to institutional investors and their service providers (such as asset and fund managers) on the manner in which they should execute investment activities to promote sound corporate governance.[48] CRISA recommends that institutional investors should develop a policy on the manner in which they incorporate sustainability considerations, including ESG issues, into their investment analysis and activities.[49] It further recommends that institutional investors should publicly disclose, on an annual basis, the extent to which they have applied the CRISA principles,[50] and explain the reasons for non-compliance and any alternative measures that were adopted.[51]

CRISA may be equated to the 2020 UK Stewardship Code[52] (the UK Stewardship Code), which is a voluntary code that sets out stewardship principles to be complied with by asset owners, asset managers and service providers on an 'apply and explain' basis. Stewardship is defined as the responsible allocation, management and oversight of capital to create long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society.[53] The UK Stewardship Code requires signatories to integrate stewardship and investment, including material ESG issues, and climate change to fulfil their responsibilities.[54] It requires signatories to report and disclose the extent to which they have applied the principles set out therein.[55]

45 King Report, at 32.

46 R. P. Austin and I. M. Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 17th edn (LexisNexis 2018), at 435.

47 *Ibid*., at 436.

48 CRISA at 3.

49 *Ibid*., principle 1, recommended practice 1.

50 *Ibid*., principle 5, recommended practice 11.

51 *Ibid*., recommended practice 12.

52 The UK Stewardship Code was first published in 2012 and a revised version was published in 2020.

53 The UK Stewardship Code, at 4.

54 *Ibid*., principle 7.

55 *Ibid*., at 5–6.

A trend has emerged in South Africa of individual shareholder activists, holding shares in their personal capacity, engaging in shareholder activism. In some instances, an individual activist will buy just one share in a company so that they will qualify as a shareholder, which will give them certain shareholder rights, such as access to the company's documents.[56] Since it may be difficult for individual shareholder activists to access management directly, they tend to rely on public strategies of shareholder activism, such as raising their concerns at the AGM and on various media platforms.[57] Unlike institutional investors, when an individual shareholder sells his or her shares in a company this does not have any impact on the share price as their shareholding is too small. While individual activists have had some success at changing policies in companies, boards often respond to their activist strategies in a hostile manner.[58]

A further trend emerging in South Africa is that of non-profit companies and non-governmental organisations starting to engage in shareholder activism in South Africa on a regular basis. Their concerns generally relate to ESG issues, diversity and transformation. For example, Just Share NPC (a non-profit shareholder activist organisation) and the Raith Foundation (a non-profit organisation registered as a trust) have recently engaged in shareholder activism relating to climate change (discussed further below).

D. Primary Concerns of Shareholder Activists in South Africa

In South Africa, governance activism has focused primarily on compliance by listed companies with the corporate governance principles of the King Report.[59] In recent years, due to the widening wage gap and a stagnant economy in South Africa, a burning issue with shareholder activists has been that of justifying excessive executive remuneration packages. There has been increasing opposition from shareholder activists to the approval of resolutions on executive remuneration policies.[60]

Other issues raised by shareholder activists in South Africa have centred on transformation, the lack of board diversity in terms of race and gender, the tenure and lack of independence of board members, poor attendance at board meetings, inadequate disclosure of information by companies, inadequate communication with shareholders, lack of transparency and companies' level of indebtedness.[61] For example, Comair Limited (Comair), which is South Africa's only JSE-listed airline operator, was the subject of shareholder activism regarding the composition of its board. Challenging questions were raised by shareholders at Comair's AGM held in October 2019 about the long tenure of board members

56 Viviers, *supra*, note 6, at 353.
57 *Ibid*.
58 *Ibid*., at 359.
59 *Ibid*., at 349.
60 Viviers et al., *supra*, note 26, at 2.
61 Viviers, *supra*, note 6, at 353; P. Larkin, 'Shareholder Activists Eye JSE Underperformer', *Star*, 19 February 2020, at 17.

and whether this might have led to a compromise of the independence of the board.[62] A minority shareholder questioned the independence of four independent non-executive directors who had respectively served on the board for 25, 39, 40 and 46 years.[63] These directors would be re-elected to the board annually, with few shareholders raising concerns about their repeated appointment.[64] Shortly after the AGM, due to much pressure from the shareholders, some of Comair's long-serving directors resigned and Comair was forced to replace them with independent directors.[65]

As is the case in South Africa, in the UK shareholder activism has concentrated on board-related matters (such as executive remuneration) and board representation, but has recently focused on ESG issues.[66] In sharp contrast in the USA, where shareholder activism is much more prevalent compared to South Africa, shareholder activists have been increasingly focusing on a range of environmental, social and political issues.[67] They include gender pay gaps, human rights, climate change, animal welfare, pesticides, deforestation, water and gun control.[68] In a similar vein, for many years a focus of shareholder activists in Australia has been on climate change in the insurance, energy and resources sector.[69]

III. THE SOUTH AFRICAN LEGAL FRAMEWORK RELATING TO SHAREHOLDER ACTIVISM

Shareholder activists of listed companies in South Africa must engage in shareholder activism within the legal framework set out in the Companies Act and the JSE Listings Requirements. The Memorandum on the Objects of the Companies Bill 2008[70] explicitly encourages shareholder activism by stating that company law should protect shareholder rights, advance shareholder activism and provide enhanced protections for minority shareholders. The King Report likewise recommends that the board should ensure that shareholders are equitably treated, and that the interests of minority shareholders are adequately protected.[71]

Section 7 of the Companies Act sets out its purposes. One noteworthy purpose in the context of shareholder activism is to promote the development of the South African economy by encouraging transparency and high standards

62 S. Njobeni, 'New Blood for Comair Board after Shareholder Outcry', *Business Day* (21 January 2020), available at < https://www.businesslive.co.za/bd/companies/industrials/2020-01-21-new-blood-for-comair-board-after-shareholder-outcry/ > (accessed 25 May 2020).

63 R. Mahlaka, 'Comair Comes under Fire for Corporate Governance Mess', *Business Maverick* (16 January 2020), available at < https://www.dailymaverick.co.za/article/2020-01-16-comair-comes-under-fire-for-corporate-governance-mess/air > (accessed 25 May 2020).

64 *Ibid*.

65 Njobeni, *supra*, note 62.

66 Davies et al., *supra*, note 31, at 151.

67 Aquila, *supra*, note 32, at 168.

68 Davies, *supra*, note 34.

69 Digby and Stutt, *supra*, note 33, at 7.

70 Companies Bill [B 61D-2008] paragraph 1.2.4(c).

71 King Report, principle 16, recommended practice 9.

of corporate governance, given the significant role of enterprises within the social and economic life of the nation.[72] Other noteworthy purposes in the context of shareholder activism are to encourage active participation in economic organisation, management and productivity,[73] and to balance the rights and obligations of shareholders and directors within companies.[74] Following the implementation of the Companies Act in 2011, shareholder activists have begun exercising their innovative legal rights under the Companies Act, resulting in a marked increase in shareholder activism in South Africa. The main provisions of the South African legal framework which encourage shareholder activism are discussed below under four headings – shareholders' meetings, access to the company's records, approval of executive remuneration packages and remedies to enforce shareholders' rights.

A. Shareholders' Meetings

As a general guiding principle, the King Report recommends that the board of directors should oversee that the company encourages proactive engagement with shareholders, including engagement at the AGMs of the company.[75] It suggests that all directors should be available at the AGMs to respond to shareholders' queries on how the board carried out its governance duties.[76] Some of the specific provisions of the Companies Act which encourage shareholder activism at shareholders' meetings are canvassed below.

1. Increased Quorum Requirements for Shareholders' Meetings

The Companies Act encourages shareholders to attend shareholders' meetings by increasing the quorum requirements for shareholders' meetings. It provides that the quorum for shareholders' meetings is 25 per cent of all the voting rights that are entitled to be exercised in respect of a matter to be decided at that meeting.[77] A company may specify a higher or lower percentage in place of the 25 per cent threshold.[78] Under the previous Companies Act 61 of 1973, for private companies a quorum was a mere two shareholders entitled to vote, and for public companies three shareholders entitled to vote.[79]

The increased quorum requirements compel companies to persuade shareholders to attend meetings, or to appoint proxies in their place so that the quorum requirements will be met. Under section 58(1) of the Companies Act, a

72 Companies Act, section 7(b)(iii). See further F. H. I. Cassim, 'The Companies Act 2008: An Overview of a Few of Its Core Provisions', 22 (2), *South African Mercantile Law Journal* (2010): 157–75, at 158.

73 Companies Act, section 7(f).

74 *Ibid*., section 7(i).

75 King Report, principle 16, recommended practice 6.

76 *Ibid*., recommended practice 7.

77 Section 64(1) of the Companies Act.

78 *Ibid*., section 64(2).

79 Section 190 of the Companies Act 61 of 1973.

shareholder is entitled to appoint any individual as a proxy, including an individual who is not a shareholder of the company, to participate in, speak at and vote at a shareholders' meeting on behalf of the shareholder. The fact that the proxy need not be a shareholder of the company facilitates the appointment of proxies, resulting in an increased attendance at the meeting. Significantly, the Companies Act now permits proxy forms to be submitted electronically,[80] which further facilitates the appointment of proxies, thus encouraging shareholder activism.

If the requisite quorum is not present at a meeting after one hour or a period specified in the company's constitution or rules, the meeting must be postponed without motion, vote or further notice, for one week.[81] If the quorum requirements are still not satisfied at the postponed meeting, the shareholders present in person or by proxy will be deemed to constitute a quorum.[82] It is costly for companies to reschedule and postpone meetings. Doing so may also delay the conclusion of urgent business. Companies consequently strive to encourage shareholders to attend shareholders' meetings or, at the very least, to appoint a proxy in their place.

2. *Electronic Meetings and Electronic Submission of Proxy Forms*

A useful provision in the Companies Act which encourages shareholder activism is section 63(2). This section permits shareholders' meetings to be held electronically, and permits participation in meetings via electronic communication. Section 63(2) is subject to the proviso that the electronic communication employed must enable all persons participating in the meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting. Not only do electronic meetings facilitate shareholders' participation and voting at meetings, but they also save on the travelling time and expenses of attending a shareholders' meeting in person. The Companies Act goes so far as to make it mandatory for every shareholders' meeting of a public company to be reasonably accessible within South Africa for electronic participation by shareholders, irrespective of the whether the meeting is held in South Africa or elsewhere.[83] Flexibility is maintained in smaller private companies by permitting such companies to restrict electronic meetings in their constitutions.[84]

Despite the advantages of holding electronic meetings, many shareholders do not utilise the electronic means of communication because the Companies Act requires shareholders or their proxies to bear the costs of the electronic communication, unless it decides otherwise.[85] It is submitted that, in order to encourage shareholders to participate in meetings held by electronic communication, companies ought to bear the costs of such meetings. It is also

80 See section 58 read with section 6(11) of the Companies Act.
81 *Ibid.*, section 64(4)(a).
82 *Ibid.*, section 64(8).
83 *Ibid.*, section 61(10).
84 *Ibid.*, section 63(2).
85 *Ibid.*, section 63(3)(b).

of concern that some dual-listed public companies do not provide South African shareholders with video or telephonic links to the AGMs held outside of South Africa.[86] This effectively excludes South African shareholders from meetings as most shareholders are unable to afford the time or the costs of travelling out of South Africa in order to attend shareholders' meetings.

3. Empowering Shareholders to Requisition Meetings

It is submitted that one of the most important provisions in the Companies Act which serves to enable shareholder activism is section 61(3). This provision empowers shareholders to requisition a shareholders' meeting. In terms of section 61(3), the board must call a shareholders' meeting if one or more written and signed demands for such a meeting are delivered to the company by the shareholders. The aggregate of the demands must be signed by shareholders holding at least ten per cent of the issued share capital of the company who are entitled to vote on the proposed resolutions.[87] While the company's constitution may specify a lower threshold than ten per cent, it may not specify a higher threshold. A lower threshold than ten per cent would serve to encourage shareholder activism as it would make it easier for the shareholders to call a shareholders' meeting. In contrast, under the UK Companies Act of 2006[88] and the Australian Corporations Act of 2001[89] the threshold for shareholders to demand a shareholders' meeting is only five per cent of the voting rights. Arguably, reaching the threshold of ten per cent would not be as difficult in public listed companies if the demand for a meeting is supported by a few institutional shareholders.

The JSE Listings Requirements impose additional rules governing the demand of a meeting by shareholders of a listed company. Under paragraph 3.93 of the JSE Listings Requirements, if a listed company receives a valid demand to call a shareholders' meeting pursuant to section 61(3) of the Companies Act, it must immediately inform the JSE of the demand in writing and release an announcement about the demand through the Stock Exchange News Service (SENS). Thereafter, the company is obliged to issue a notice of the meeting within ten business days from the date of the receipt of the request to call a shareholders' meeting (unless the JSE decides otherwise), and to set a meeting date which is not later than 25 business days from the date when the notice of the meeting is issued.[90] The date, time and venue of the meeting must be published on SENS within 24 hours after the notice of the meeting is distributed to shareholders.[91] These rules ensure that listed companies do not delay in convening shareholders' meetings demanded by shareholders under section 61(3) of the Companies Act, and that the details of the meeting are immediately publicised.

86 Viviers, *supra*, note 6, at 361.

87 Section 61(3)(b) of the Companies Act. See further *Van Zyl* v. *Nuco Chrome Bophuthatswana (Pty) Ltd and Others* (43825/2012) [2013] ZAGPJHC 40 (13 March 2013), at [19].

88 Section 303(2).

89 Section 249D(1)(a).

90 Paragraph 3.94(i) and (ii) of the JSE Listings Requirements.

91 *Ibid*., paragraph 3.94(iii) read with paragraph 3.90.

An example of shareholders in South Africa successfully requisitioning a meeting under section 61(3) of the Companies Act relates to Grand Parade Investments Limited (GPI), a listed South African entity with holdings in the food and gaming sectors. In 2016, GPI signed a franchise agreement with Dunkin' Brands Group Inc., which owns Dunkin' Donuts and Baskin-Robbins, and acquired franchise licences for these entities. In November 2018, a consortium of shareholder activists of GPI worked together to influence GPI to dispose of its interest in these franchises. The consortium included a group of small fund managers who together held a 12.5 per cent shareholding in GPI. The consortium requisitioned a meeting to change the composition of the board of directors and appoint four of its own non-executive directors to the board. Its concerns related to doubts about the competency and independence of the board, and large bonuses paid to executive directors despite a declining share price and poor dividends.[92] At the shareholders' meeting, the interim chief executive officer of GPI expressed much hostility towards the consortium and labelled it 'asset strippers'.[93] In spite of this, the consortium succeeded in garnering sufficient shareholder support to appoint two of its nominees to the board as non-executive directors.[94] A few days later, the interim chief executive officer resigned and three months later GPI announced that it was placing Dunkin' Donuts and Baskin-Robbins in voluntary liquidation in order to cut its losses.[95] This example illustrates the power and influence of shareholder activists when they exercise their rights under the Companies Act to requisition meetings – actions which ultimately led to the company letting go of its interests in the struggling franchises.

4. Empowering Shareholders to Participate in Meetings and Propose Resolutions

Under section 61(8) of the Companies Act, shareholders must be permitted to raise any matters in an AGM, with or without advance notice to the company. Even a single shareholder may raise any matter at the AGM, without giving any advance notice to the company or giving the board an opportunity to prepare a response. This provision patently serves to enable shareholder activism.

While holding AGMs electronically has been very useful as a result of the COVID-19 pandemic and requirements of social distancing, a concern of shareholder activists has been that companies doing so have required shareholders to submit all their questions in advance of the meeting, and have further informed shareholders that their questions may be moderated before being submitted to the

92 H. Wasserman, 'Amid a War over Burger King's South African Owner, This Investor says Dunkin' Donuts and Baskin-Robbins should be Shut Down', 29 November 2018, available at < https://www.businessinsider.co.za/war-over-burger-king-may-claim-dunkin-donuts-2018-11 > (accessed 25 May 2020).

93 See M. Hasenfuss, 'A Grand Parade of Activists', 19 December 2018, available at < https://westbrooke.co.za/a-grand-parade-of-activists/ > (accessed 25 May 2020).

94 *Ibid*.

95 L. Claasen, 'Activist Investors Win as GPI Closes Dunkin' Donuts and Baskin-Robbins in SA', 18 February 2019, available at < https://www.businesslive.co.za/bd/companies/retail-and-consumer/2019-02-18-activist-investors-win-as-gpi-closes-dunkin-donuts-and-baskin-robbins-in-sa/ > (accessed 25 May 2020).

chair.[96] This is contrary to section 61(8) of the Companies Act which does not require a company to be given advance notice of matters raised at an AGM.[97] Moreover, if shareholders' questions may be moderated in the course of a virtual AGM, this contravenes the proviso in section 63(2) that shareholders must be able to communicate electronically with the board without an intermediary.[98] It is imperative that companies ensure that virtual AGMs do not infringe sections 61(8) and 63(2) of the Companies Act.

A further compelling provision of the Companies Act which enables shareholder activism is section 65(3). Under this provision, '[a]ny two shareholders' of a company may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights.[99] The two shareholders in question may require the resolution to be submitted to shareholders for consideration at a meeting demanded by the shareholders in terms of section 61(3), at the next shareholders' meeting or by a round robin resolution in terms of section 60 of the Companies Act.[100]

Section 65(3) of the Companies Act has been the trigger for noteworthy incidences of shareholder activism in South Africa. For example, in April 2019 an individual shareholder activist and the Raith Foundation proposed two resolutions relating to climate change to be considered at the 2019 AGM of Standard Bank Limited (Standard Bank). The first resolution resolved that Standard Bank should prepare a report on its assessment of the greenhouse gas emissions resulting from its financing portfolio and its exposure to climate change risk in its lending, investing and financing activities.[101] The second resolution resolved that Standard Bank should adopt and publicly disclose a policy on lending to coal-fired power projects and coal-mining operations.[102] The board recommended that shareholders should vote against both resolutions on the grounds that they would not provide shareholders with a more meaningful understanding of the company's climate change risk exposure and risk management, that there was uncertainty as to how the Standard Bank group would practically comply with the resolutions and that it did not consider the resolutions to be in the group's interests.[103]

While the first resolution received the support of only 38 per cent of the shareholders, the second resolution received a majority support of 55 per cent, which meant that it was binding on Standard Bank. In compliance with this resolution, on 31 July 2019 Standard Bank announced the release of its Coal-

96 Just Share, 'SA Companies' Virtual AGM Arrangements Risk Non-compliance with Companies Act', available at < https://justshare.org.za/media/news/sa-companies-virtual-agm-arrangements-risk-non-compliance-with-companies-act > (accessed 26 May 2020).

97 *Ibid*.

98 *Ibid*.

99 Section 65(3)(a) of the Companies Act.

100 *Ibid*., section 65(3)(b).

101 Standard Bank Group Shareholder Information and Notice of Annual General Meeting, March 2019, at 8, available at < https://thevault.exchange/?get_group_doc=18/1555481722-SBGShareholdersinfoandnoticeofAGMLORESSingles.pdf > (accessed 25 May 2020).

102 *Ibid*.

103 *Ibid*., at 9–10.

Fired Power Finance Policy.[104] This policy enabled shareholders to assess whether Standard Bank had adequately addressed the climate and financial risks posed by the financing of new coal-fired power infrastructure and further provided shareholders with information that could be used to make informed investment decisions.[105]

The effect of these resolutions is that Standard Bank was compelled to improve its level of disclosure of information and transparency relating to its policies on climate change. This was the first time that South African shareholders had proposed climate-related resolutions in regard to a listed South African entity in terms of section 65(3) of the Companies Act. This example demonstrates the power of shareholder activists, including those holding a minimal shareholding in the company, to engage in governance activism and compel companies to take steps to mitigate climate change risks.

In sharp contrast, Sasol Limited, a JSE-listed energy and chemical company, reacted quite differently to the climate change resolutions proposed by shareholder activists under section 65(3) of the Companies Act. In October 2019, a group of six South African institutional shareholders proposed a climate-risk related shareholder resolution to be tabled at Sasol's AGM. The resolution sought to compel Sasol to report on how its greenhouse gas emission reduction strategy aligned with the goals of the Paris Climate Agreement initiative, which was backed by 197 countries, including South Africa, aimed at combating climate change.[106] In rejecting the tabling of this resolution, Sasol argued that the matters raised in the resolution had already been addressed in its 2019 Climate Change Report.[107] However, shareholder activists argued that Sasol's climate change report did not contain the details that the investors were seeking as it merely provided for a commitment to reduce greenhouse gas emissions from its operations by at least ten per cent by 2030 and an undertaking to publish an emissions road map in 2020.[108]

In a step backward, in April 2020 Standard Bank likewise refused to table climate risk-related resolutions proposed by the Raith Foundation and Just Share NPC at its AGM, on the grounds that the resolutions were premature as the company intended to make further disclosures in 2020, and that engagement

104 See Just Share, 'South African Banks and Climate Risk: Latest Developments', 14 August 2019, available at < https://justshare.org.za/media/news/update-south-african-banks-and-climate-change > (accessed 25 May 2020).

105 Just Share, 'Just Share Commends Institutional Investors for "First of Its Kind" Climate Collaboration', 5 November 2019, available at < https://justshare.org.za/media/news/just-share-commends-institutional-investors-for-first-of-its-kind-climate-collaboration-2 > (accessed 25 May 2020).

106 See Old Mutual Investment Group Media Release, 5 November 2019, available at < https://justshare.org.za/wp-content/uploads/2019/11/041119_Media-Release_Sasol-Resolution-31st_Oct_-2019_FINAL.pdf > (accessed 25 May 2020).

107 T. Maeko, 'Institutional Investors Reject Sasol's Climate Plan', the *Mail & Guardian*, 5 November 2019, available at < https://mg.co.za/article/2019-11-05-institutional-investors-reject-sasols-climate-plan/ > (accessed 25 May 2020).

108 *Ibid*.

on the issue had not yet been exhausted.[109] Thus on the one hand while some progress is being made by shareholder activists regarding proposing climate change resolutions under section 65(3) of the Companies Act, on the other hand, the tabling of such resolutions is met with resistance by companies. But, in a positive step, Nedbank Limited became the first South African company to voluntarily table two resolutions relating to its activities in respect of climate change. The resolutions commit to adopting and publicly disclosing an energy policy.[110] Both resolutions were successfully passed at Nedbank's AGM held in May 2020.[111]

It is noteworthy that the two shareholders who proposed the resolutions to be passed by shareholders of Standard Bank held less than 0.001 per cent of the company's issued ordinary share capital.[112] In contrast, in the USA, a shareholder holding such a minute shareholding in a company would not be permitted to propose resolutions in this manner. The submission of resolutions by shareholders for consideration at shareholders' meetings in the USA is regulated by a formal mechanism which is far more evolved than section 65(3) of the Companies Act. Under Rule 14a-8 of the Securities Exchange Act 1983 (Rule 14a-8), adopted under section 14(a) of the Securities Exchange Act of 1934, as amended, a shareholder must hold shares of at least $2,000 in market value, or one per cent of the company's securities (entitled to be voted on the proposal) for at least one year by the date the proposal is submitted, in order to submit proposals to be voted on at a shareholders' meeting.[113] Moreover, each shareholder may submit only one proposal to a company for a particular shareholders' meeting,[114] which may not exceed 500 words.[115] Amendments to Rule 14a-8 recently proposed by the Securities and Exchange Commission aim to tighten the shareholding requirement to propose resolutions,[116] and further propose that a single person may submit only one proposal for a particular meeting whether submitted directly

109 See Just Share, *supra*, note 104.

110 W. Thompson, 'Nedbank takes big step towards climate change policy', *Business Day*, 12 May 2020, available at < https://www.businesslive.co.za/bd/companies/financial-services/2020-05-12-nedbank-takes-big-step-towards-climate-change-policy/ > (accessed 26 May 2020).

111 See Sharenet, available at < https://www.sharenet.co.za/v3/sens_display.php?tdate=20200522151600&seq=40 > (accessed 26 May 2020).

112 See Standard Bank Group Shareholder Information and Notice of Annual General Meeting, *supra*, note 101, at 8.

113 17 CFR s. 240.14a-8.

114 17 CFR s. 240.14a-8(c).

115 17 CFR s. 240.14a-8(d).

116 See Securities and Exchange Commission Release No. 34-87458, *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8* (5 November 2019). The amendments set out a three-tiered ownership requirement structure under which shareholders who own a smaller dollar amount of securities than $2,000 would be required to own those securities for a longer period of time before qualifying to submit a shareholder proposal. The amendments also require a shareholder to provide the company with a written statement to the effect that the shareholder intends to continue to hold the requisite amount of securities through to the date of the shareholder meeting, and that the shareholder will be available to discuss the proposal with the company between ten and 30 days of submission.

or indirectly as a shareholder representative.[117] Rule 14a-8 contains specific bases of exclusion on which the company may rely to exclude the resolution from its proxy materials. Some of these bases are that the proposal would violate applicable law or proxy rules; it relates to a shareholder's personal grievance or interest; it is not significantly related to the company's business or is not capable of being implemented by the company; and it deals with matters relating to the company's ordinary business operations, or has already been substantially implemented.[118]

In contrast, under section 65(3) of the Companies Act any two shareholders may propose resolutions to the company, regardless of their shareholding or the length of time for which they have held their shares. Consequently, an individual shareholder activist who purchases one share shortly before the company's AGM may propose resolutions to be passed by the company. Section 65(3) of the Companies Act does not limit the number of resolutions to one per shareholder as does Rule 14a-8, nor does it contain specific bases of exclusion. To the extent that section 65(3) of the Companies Act does not contain the above restrictions of Rule 14a-8, it creates an enabling environment for shareholders to propose resolutions, thus encouraging and enhancing shareholder activism.

B. Access to the Company's Records

Under section 26(1) of the Companies Act, a holder of a beneficial interest in a company's securities has the right to inspect and copy the company's constitution, register of directors, reports and minutes of shareholders' meetings, annual financial statements, any document that was made available by the company to shareholders in relation to resolutions and the securities register. A company's securities register must include details of the person's name, business, residential or postal address, email address and identifying number.[119] In *Nova Property Group Holdings Ltd and Others* v. *Cobbett and Another*[120] the Supreme Court of Appeal held that section 26(2) of the Companies Act confers an unqualified right of access to a company's securities register, and that the motive of the person seeking such access is irrelevant.[121]

The above rights to access the company's information facilitate and enable shareholder activism. They also reinforce the purpose of the Companies Act in section 7(b)(iii) of encouraging transparency.[122] For example, if a shareholder

117 See Securities and Exchange Commission Release No. 34-87458, *supra*, note 116.

118 See 17 CFR s. 240-14a-8(i) for the 13 bases of exclusion of a proposal.

119 Regulation 32(2)(a) and (b) of the Companies Regulations 2011. A person's email address and identifying number may, at the instance of the company or the shareholder, be regarded as confidential (regulation 32(6) of the Companies Regulations 2011).

120 2016 (4) SA 317 (SCA), at [47].

121 *Ibid*., at [33].

122 The rights of access to information in section 26 are in addition to, and in substitution for, any rights a person may have to access information in terms of section 32 of the Constitution of the Republic of the South Africa, 1996, the Promotion of Access to Information Act 2 of 2000 or any other public regulation (section 26(7) of the Companies Act). See further on the Promotion of

activist were to access the company's securities register it would enable him or her to identify other shareholders, communicate directly with them, and garner support for resolutions to be proposed.

C. Approval of Executive Remuneration Packages

As mentioned earlier, there has been a growing movement by South African shareholder activists of opposing the approval of executive remuneration policies. The right of shareholders to influence the executive remuneration policies of companies are known as 'say-on-pay' votes.[123] Studies show that shareholders are more likely to vote against high levels of executive remuneration when the company is performing poorly as shareholders are more likely to express their dissent on excessive executive pay when voting from a loss position.[124] Shareholders also tend to regard excessive remuneration as an avenue for expressing their dissatisfaction with management decisions.[125]

Section 66(8) of the Companies Act states that a company may pay remuneration to its directors for their 'service as directors', except to the extent that the company's constitution provides otherwise. In terms of section 66(9), this remuneration may be paid only in accordance with a special resolution approved by the shareholders within the previous two years. Since there is no definition in the Companies Act of the term 'remuneration' in the context of section 66(8) and (9), it is ambiguous whether the approval by special resolution is required only for directors' services as directors (such as non-executive directors' board fees for attending meetings) or whether the phrase 'service as directors' includes remuneration paid to executive directors under their contracts of employment (such as salaries and performance bonuses).[126] It is also not clear whether the approval by special resolution relates only to cash payments or whether it relates to non-cash benefits as well. In contrast, section 226(1A) of the UK Companies Act usefully contains a definition of 'remuneration' as meaning 'any form of payment or other benefit', which makes it clear that it encompasses cash benefits as well as non-cash benefits. Despite the ambiguity of section 66(8) and (9) of the Companies Act, these provisions serve to heighten shareholder activism with respect to the remuneration paid to directors for their service as directors. Furthermore, they encourage transparency and high standards of corporate governance, stated to be one of the purposes of the Companies Act in section 7(b)(iii).

Access to Information Act 2 of 2000 *My Vote Counts NPC* v. *Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC).

123 See further on Say-on-Pay votes Stathopoulos and Voulgaris, *supra*, note 10, at 359 and Viviers et al., *supra*, note 26, at 1.

124 See Stathopoulos and Voulgaris, *supra*, note 10, at 361.

125 *Ibid*., at 364.

126 R. Cassim, 'Governance and the Board of Directors', in F. H. I. Cassim (ed.), *Contemporary Company Law*, 3rd edn (Juta, 2021) 535–639, at 620.

The King Report contains detailed provisions which encourage shareholder activism with regard to the disclosure and approval of directors' remuneration. At the outset, principle 14 of the King Report recommends that the board should ensure that the company remunerates not only fairly and responsibly, but also transparently. It recommends that remuneration should be disclosed in three parts: (1) a background statement setting out the context for remuneration considerations and decisions; (2) an overview of the main provisions of the remuneration policy; and (3) an implementation report which addresses the implementation of the remuneration policy and contains details of all remuneration awarded to individual directors.[127] It usefully recommends that a reference to an electronic link to the full remuneration policy should be provided for public access.[128]

Regarding the approval of the company's remuneration policy and implementation report, the King Report recommends that a resolution for the adoption of these documents should be tabled every year for separate non-binding advisory votes by shareholders at the AGM.[129] If more than 25 per cent of the voting rights exercised vote against the adoption of the remuneration policy or the implementation report (or both), the board should engage with shareholders, in good faith and with best reasonable effort, with a view to ascertaining the reasons for the dissenting votes and addressing legitimate and reasonable objections and concerns raised by the shareholders.[130] These measures may include amending the remuneration policy or clarifying or adjusting remuneration governance and processes.[131] In order to ensure that such engagement takes place, the King Report recommends that the background statement of the remuneration report succeeding the voting should disclose details of the persons with whom the company engaged, the manner and form of the engagement and the nature of the steps taken to address legitimate objections and concerns.[132] These recommendations are commendable in that they not only encourage the board to engage with the shareholders, but they also require details of such engagement to be disclosed.

In line with the above recommendations of the King Report, paragraph 3.84(k) of the JSE Listings Requirements requires the remuneration policy and the implementation report of JSE-listed companies to be tabled annually for separate non-binding advisory votes of shareholders. This provision furthermore requires companies to extend invitations (in its voting results announcement) to dissenting shareholders to engage with it if the remuneration policy or the implementation report (or both) are voted against by shareholders exercising 25 per cent or more of the voting rights exercised.

While the South African legal framework on the approval of executive remuneration is laudable insofar as it serves to encourage shareholder activism, enhances disclosure and transparency by companies, and promotes engagement

127 King Report, principle 14, recommended practices 32–35.
128 *Ibid*., recommended practice 34h.
129 *Ibid*., recommended practice 37.
130 *Ibid*., recommended practice 38.
131 *Ibid*.
132 *Ibid*., recommended practice 39.

with shareholders, it is disappointing that shareholders' votes on the remuneration policy and implementation report are not binding – they are merely advisory. Even if companies engage with shareholders regarding their legitimate concerns about its remuneration policies, shareholders would not be able to compel the board to reconsider such policies.[133] In order to effectively curb the trend of excessive executive remuneration pay in a stagnant economy, it is submitted that the South African legal framework should adopt a requirement for a binding shareholder approval on executive remuneration policies and payments.

The growing dissatisfaction of shareholders in South Africa with excessive executive remuneration packages is clearly illustrated with regard to the failure of shareholders to approve the remuneration policies of Rebosis Property Fund Ltd (a JSE-listed real-estate investment trust) (Rebosis). In February 2020, 80 per cent of the ordinary shareholders of Rebosis voted against implementing the company's remuneration policy.[134] Furthermore, 94.99 per cent of the class A shareholders voted against the actual remuneration policy.[135] Shareholders sought additional information on the key performance areas, and found that the remuneration policy lacked important details regarding targets and benchmarks.[136] Shareholders were also concerned about the erratic remuneration of the chief executive officer which rose by 15 per cent in 2016, then fell by 48 per cent in 2018 before rising by 164 per cent in 2019.[137] While shareholders could not force the board to reconsider its remuneration policies, at the very least the board was required to engage with shareholders on their concerns since more than 25 per cent of them voted against its proposed remuneration policies. Rebosis became the first JSE-listed company to ever receive as much as an 80 per cent vote against its remuneration implementation report.[138]

D. Remedies to Enforce Shareholders' Rights

While there are several provisions in the Companies Act which enable shareholder activists to exercise their rights under the Companies Act to institute legal action, as mentioned earlier due to the high legal costs associated with court proceedings these remedies are generally used by shareholder activists only as a last resort. Some of these provisions are briefly mentioned below.

Section 161 of the Companies Act entitles a shareholder to apply to court for a declaratory order determining any of his or her rights, whether in terms

133 V. Madlela and R. Cassim, 'Disclosure of Directors' Remuneration under South African Company Law: Is It Adequate?', 134 (2), *South African Law Journal* (2017): 383–414, at 411.

134 See A. Anderson, 'Irked Shareholders Vote Against Rebosis' Pay Policy', *Business Day*, 4 February 2020, available at < https://headtopics.com/za/irked-shareholders-vote-against-rebosis-pay-policy-11175944 > (accessed 25 May 2020).

135 *Ibid*.

136 *Ibid*.

137 *Ibid*.

138 A. Crotty, 'Revolting Shareholders Make History for Rebosis Bosses', *Times Select*, 4 February 2020) available at < https://select.timeslive.co.za/business/2020-02-04-revolting-shareholders-make-history-for-rebosis-bosses/ > (accessed 25 May 2020).

of the Companies Act, the company's constitution, any rules of the company or an applicable debt instrument. This provision may also be relied on to protect any right of a shareholder or to rectify harm done to a shareholder by any of the company's directors to the extent that they may be held liable in terms of section 77 of the Companies Act for any loss, damages or costs sustained by the company as a consequence of their actions. As affirmed by the High Court in *Du Plooy NO and Others* v. *De Hollandsche Molen Share Block Ltd and Another*,[139] the aim of section 161 of the Companies Act is to provide a shareholder with a means to protect his or her rights. Since this provision provides scope for declaratory orders, interdicts to restrain breaches of shareholders' rights and orders to direct compliance with such rights, it is a useful provision which enables shareholder activism.

Shareholder activists may also exercise their rights under the Companies Act to institute legal action in the form of the oppression remedy. Section 163 of the Companies Act gives a shareholder a right to apply to court for relief where any act or omission by the company has had a result that is oppressive or unfairly prejudicial to the shareholder or that unfairly disregards his or her interests.[140] A shareholder may also bring this action if the powers of a director are being exercised in a manner that is oppressive or unfairly prejudicial to the shareholder or unfairly disregards his or her interests.[141] In ruling on an application under section 163(1), a court may make any interim or final order it considers fit.[142]

The derivative action in section 165 of the Companies Act enables a shareholder to serve a demand on a company to commence or continue legal proceedings, or take related steps, to protect the legal interest of the company.[143] A derivative action relates to proceedings instituted by persons given standing to litigate in their own names for and behalf of the corporation in respect of wrongs done to the corporation.[144] It gives protection to minority shareholders to remedy a wrong to the company which would not be remedied by the board because they are the wrongdoers themselves.[145] As the Supreme Court of Appeal in *Mbethe* v. *United Manganese of Kalahari (Pty) Ltd*[146] emphasised, the derivative action is not only a tool to protect minority shareholders but is a fundamental tool to enforce good corporate governance.

Section 164 of the Companies Act provides for dissenting shareholders' appraisal rights, which are designed to be a minority shareholder exit

139 2017 (3) SA 274 (WCC), at [50]. See further on section 161 *Morudi and Others* v. *NC Housing Services and Development Co. Ltd and Others* (903/2016) [2017] ZASCA 121 (22 September 2017), at [31].

140 Section 163(1)(a) of the Companies Act.

141 *Ibid*., section 163(1)(c).

142 *Ibid*., section 163(2). See further on the oppression remedy *Grancy Property Ltd v. Manala* 2015 (3) SA 313 (SCA); *Off-Beat Holiday Club* v. *Sanbonani Holiday Spa Shareblock Ltd* 2017 (5) SA 9 (CC); *De Sousa and Another* v. *Technology Corporate Management (Pty) Ltd and Others* 2017 (5) SA 577 (GJ).

143 Section 165(2) of the Companies Act.

144 *Lewis Group Limited* v. *Woollam* 2018 (6) SA 97 (WCC), at [27].

145 *Mbethe* v. *United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA), at [66].

146 *Ibid*.; *Mbethe* v. *United Manganese of Kalahari (Pty) Ltd* 2016 (5) SA 414 (GJ), at [66]–[71].

mechanism.[147] The appraisal right enables a shareholder to sell its shares and force the company to purchase them in cash at fair value in certain circumstances, such as where the majority votes in favour of a scheme, merger or sale of all or a greater part of a company's assets or undertaking.[148] In *Cilliers* v. *La Concorde Holdings Ltd*,[149] an individual shareholder activist, Cilliers, wished to exercise his appraisal rights in respect of a sale of assets by a wholly owned subsidiary of La Concorde Holdings Ltd (the holding company). Cilliers did not hold shares in the subsidiary that was disposing of its assets but instead held shares in the holding company. It was argued on behalf of the holding company that section 164 of the Companies Act conferred an appraisal right on shareholders of the disposing company only (being the subsidiary), and not on the holding company.[150] In ruling in favour of Cilliers, the court held that despite not holding shares in the subsidiary Cilliers was entitled to exercise his appraisal rights.[151] It reasoned that since the disposing company (being the subsidiary) could not proceed with the transaction unless a special resolution of the holding company approved it, shareholders of the holding company would have the right to vote on the matter, which would trigger the appraisal right in section 164 of the Companies Act.[152] Significantly, the court affirmed the importance of shareholder activism by drawing attention to clause 4 of the Companies Bill of 2007,[153] which stated that the law should protect shareholder rights, advance shareholder activism and provide enhanced protections for minority shareholders.[154]

IV. RECOMMENDATIONS TO ENHANCE SHAREHOLDER ACTIVISM IN SOUTH AFRICA

In the discussion which follows, some suggestions are made to enhance shareholder activism in South Africa.

At the outset, shareholder activists must ensure that when engaging in shareholder activism they do not take any frivolous or vexatious actions since this would legally enable the board to oppose such actions. For example, under section 61(5) of the Companies Act, the board need not convene a shareholders' meeting which is demanded by the shareholders in terms of section 61(3) if the company successfully applies to court to set aside the demand on the grounds that

147 *Juspoint Nominees (Pty) Ltd and Others* v. *Sovereign Food Investments Limited and Others* (*BNS Nominees* (*Pty*) *Ltd and Others Intervening*) (878/16) ZAECPEHC 15 (26 April 2016), at [66]. See further M. F. Cassim, 'The Appraisal Remedy and the Oppression Remedy under the Companies Act of 2008 and the Overlap between Them', 29 (2), *South African Mercantile Law Journal* (2017): 305–24.

148 Section 164(2) of the Companies Act.

149 2018 (6) SA 97 (WCC).

150 *Ibid*., at [30].

151 *Ibid*., at [33].

152 *Ibid*., at [31].

153 As mentioned earlier, the advancement of shareholder activism is embodied in paragraph 1.2.4(c) of the Memorandum on the Objects of the Companies Bill, 2008.

154 *Supra*, note 149, at [45].

the demand is frivolous, vexatious or seeks only to reconsider a matter that has already been decided by the shareholders.

A further example is that a company that has been served with a demand to commence legal proceedings in the context of the derivative action may apply to court within 15 business days to set aside the demand on the grounds that it is frivolous, vexatious or without merit.[155] For instance, in *Lewis Group Limited* v. *Woollam*[156] an individual shareholder activist (Woollam) instituted proceedings to declare delinquent[157] four directors of the company using the derivative action remedy. Lewis Group Limited applied to court to set aside Woollam's demand on the basis that it was frivolous, vexatious and without merit. The High Court held that a shareholder may not use the derivative action to declare a director delinquent, and that this action must be brought personally by a shareholder, in his or her own name.[158] The court found that, due to insufficient evidence, Woollam's allegations against the directors did not merit an investigation by the company whether it should apply for a declaration of delinquency against the four directors.[159] The court consequently set aside Woollam's demand in terms of section 165(3) of the Companies Act on the ground that it was vexatious.[160]

It is also essential that shareholder activists ensure that, when engaging in shareholder activism, they comply fully and properly with the procedural requirements of the Companies Act. For example, while the procedures under the appraisal mechanism in section 164 of the Companies Act are complex and technical, shareholders will not be successful in exercising their appraisal rights unless they fully comply with such procedures.[161] A further example relates to proposing resolutions under section 65(3). In terms of section 65(4), the proposed resolution must be expressed with sufficient clarity and specificity, and it must be accompanied by sufficient information or explanatory material to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of

155 Section 165(3) of the Companies Act. In *Amdocs SA Joint Enterprise (Pty) Ltd* v. *Kwezi Technologies (Pty) Ltd* 2014 (5) SA 532 (GJ), at [15] the court held that a demand would be 'without merit' if the demanded proceeding was so bad in law or so at odds with the facts that it could not succeed.

156 *Supra*, note 144.

157 Under section 162 of the Companies Act a director may be declared delinquent in specific instances, such as a gross abuse of his or her position, breach of fiduciary duties, gross negligence, wilful misconduct or breach of trust. A delinquency order may be unconditional and may subsist for the director's lifetime, or it may be conditional and subsist for seven years or longer, as determined by the court (section 162(6)).

158 *Supra*, note 145, at [45–49]. For a critique of this decision see R. Cassim, 'The Launching of Delinquency Proceedings Under the Companies Act 71 of 2008 by means of the Derivative Action*: Lewis Group Limited v Woollam* 2017 (2) SA 547 (WCC)', 38 (3), *Obiter* (2017): 673–88.

159 *Ibid*., at [65].

160 *Ibid*., at [52].

161 *Standard Bank Nominees (RF) (Pty) Ltd and others v. Hospitality Property Fund Ltd* [2019] 4 All SA 561 (GJ), at [2].

the vote on the resolution. If a director believes that the resolution does not meet these requirements, he or she may seek leave to apply to court for an order either restraining the company from putting the proposed resolution to a vote until the requirements have been satisfied, or requiring the shareholders to alter the resolution so that it satisfies the requirements.[162] Moreover, the director may request the court to make an order to compensate him or her for the costs of these proceedings, if successful.[163] Consequently, if shareholder activists do not fully and properly comply with the requirements of the Companies Act when proposing resolutions, it may have a significant cost implication for them.

Another suggestion to enhance shareholder activism is for institutional investors to improve their level of compliance with the principles of CRISA. While CRISA has increased awareness of ESG issues and the implementation of the CRISA principles is gradually increasing, it has regrettably not substantially changed the manner in which institutional investors make investment decisions and has not placed sufficient pressure on service providers to integrate environmental and social factors into the investment decision-making process.[164] One reason for the poor implementation of CRISA is due to the poor disclosure of information by institutional investors and the inconsistent manner of reporting on the compliance with CRISA principles.[165] Since the disclosure is not standardised, it is challenging for stakeholders to access the relevant information.[166] The low levels of independent monitoring by stakeholders has resulted in some institutional investors failing to take any concrete steps to comply with the CRISA principles.[167] It would be useful if industry guidelines and practice notes which promote standardised disclosure on the implementation of the CRISA were made available to institutional investors.[168] Likewise, there is insufficient participation and adherence to the principles of the UK Stewardship Code, as a result of which a strategy of naming and shaming failure to meet reporting expectations has been adopted in order to apply market pressure on companies to improve their reporting practices.[169] Even though compliance with the CRISA principles is voluntary, institutional shareholders must pay more heed to ESG considerations as opposed to focusing predominantly on financial considerations.

162 Section 65(5) of the Companies Act. See further *Juspoint Nominees (Pty) Ltd and Others* v. *Sovereign Food Investments Limited and Others (BNS Nominees (Pty) Ltd and Others Intervening)*, *supra*, note 147, at [84].

163 Section 65(5)(b)(ii) of the Companies Act.

164 Goldstuck and Naidoo, *supra*, note 35, at 23.

165 *Ibid*., at 25.

166 *Ibid*.

167 *Ibid*.

168 *Ibid*.

169 See P. L. Davies and S. Worthington, *Gower Principles of Modern Company Law*, 10th edn (Sweet & Maxwell 2016), at 419.

In a similar vein, while Regulation 28 has impressed on pension funds that considering ESG factors is part of their fiduciary responsibilities, only a few pension funds have effectively applied the principles of Regulation 28.[170] This is partly due to weak monitoring and enforcement of compliance with Regulation 28.[171] In order to improve compliance with Regulation 28, a stronger stance on the monitoring of compliance with Regulation 28 should be adopted.[172]

Another suggestion to improve shareholder activism is for shareholder activists to use public media platforms to a greater extent in order to voice their concerns about unsustainable practices by companies. This strategy is low in costs and uncomplicated for individual shareholder activists to use. Shareholder activists must, however, be responsible in using the media as a strategy to promote their concerns and must not abuse this strategy. It is imperative for shareholder activists to be cognisant of the legal principles regulating defamation law so that they do not risk legal action being brought against them for causing unlawful reputational harm to companies.[173] In certain circumstances it may be necessary for shareholder activists to seek legal advice in order to ensure that their statements made on various media platforms are not defamatory.

It is also important for shareholder activists to take steps to educate themselves about their legal rights and powers under the Companies Act. Awareness of their legal rights and powers would equip shareholder activists with the skills to engage in effective shareholder activism and empower them to ask pertinent questions of directors at meetings.

V. CONCLUSION

There has been a progressive shift in shareholder activism in South Africa as shareholder demands for greater levels of accountability, reasonable executive remuneration and disclosure and transparency are increasing. As discussed, South African shareholders have far more rights under the Companies Act than ever before, which has recently resulted in increased levels of shareholder activism. This growing increase in shareholder activism should be welcomed since shareholder activists may curb director excesses and ensure that companies comply with good corporate governance practices.

Nevertheless, it is disappointing that in South Africa environmental issues receive the least attention from shareholder activists. While South Africa has recently witnessed the first climate change resolutions proposed by shareholder activists, much more progress in this regard must be made, particularly in light of the fact that South Africa is one of the world's largest carbon emitters and many of

170 Goldstuck and Naidoo, *supra*, note 35, at 18.

171 *Ibid*.

172 *Ibid*., at 19.

173 On the requirements for a defamation action see *Khumalo and Others* v. *Holomisa* 2002 (5) SA 401 (CC), at [17] and *Le Roux and Others* v. *Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC), at [84].

the largest JSE-listed companies are highly carbon-intensive.[174] South Africa still has a long way to go compared to the level of shareholder activism in the USA, UK and Australia. It is hoped that the current shareholder activism movement will continue to develop in South Africa and that it serves to bring about positive changes in the corporate environment.

174 Media Release, 'Standard Bank AGM – SA's First Climate Risk-related Shareholder Resolution', 28 May 2019, available at < https://www.ebnet.co.za/single-post/2019/05/28/Standard-Bank-AGM–-SA%E2%80%99s-first-climate-risk-related-shareholder-resolution > (accessed 25 May 2020).