Corporate Governance 2020
A practical cross-border insight into corporate governance law
13th Edition

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Law Firm Neffat has a long tradition and is growing rapidly in the Republic of Slovenia. The Firm actively works in the fields of Corporate Law, M&A, Public Procurement, Waste Management and Environmental Law, Construction and Engineering Law, Real Estate, Litigation, Commercial Law, GDPR, White Collar Crime, Copyright Law and many others. In an increasingly complex economic world, we believe that our role is to assist our clients: working out the possible course of action resulting from various situations; obtaining efficient, comprehensive and tailored legal advice in various complex situations; and optimising decision-making in every way possible. In order to achieve this, our team believes that the quality of the relationship that we have with our clients is one of the key factors to the success of the legal work entrusted to us and we must understand the economic, sector-based, financial and managerial culture of our clients.

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1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

This discussion focuses on public companies whose securities are listed on the Johannesburg Stock Exchange ("JSE"), South Africa’s main exchange, which are subject to a more demanding corporate governance, disclosure and transparency regime.

1.2 What are the main legislative, regulatory and other sources regulating corporate governance practices?

The primary sources of company law regulating corporate governance practices in South Africa are the Companies Act 71 of 2008 ("Companies Act"), the Companies Regulations 2011, and the common law.

Each public company is constituted in accordance with the Companies Act and its constitutional document, the memorandum of incorporation ("MOI"), which establishes the legal powers and capacity of the company and regulates its governance. The Companies Act contains both mandatory 'unalterable' provisions and default 'alterable' provisions, the effect of which a company may vary in its MOI. Various provisions concerning corporate governance matters (in the form of annual disclosure requirements, shareholder rights, and directors' duties) are 'unalterable'.

With regard to takeovers and other 'affected transactions' (e.g., tender offers and fundamental transactions: statutory mergers, schemes of arrangement, and disposals of all or a greater part of a company’s assets or undertaking), certain rules under the Companies Act and its Takeover Regulations ("Takeover Provisions") apply. In the context of such transactions, the Takeover Regulation Panel ("TRP") is mandated to ensure the integrity of the marketplace and fairness to securities holders, and to prevent actions by offeree companies designed to impede, frustrate, or defeat an offer or the making of fair and informed decisions by securities holders.

Public companies whose securities are listed on the JSE ("issuers") are subject to the JSE Listings Requirements ("Listings Requirements"), which contain various corporate governance rules, including those regarding: (i) board composition; (ii) the appointment of various board committees; and (iii) the adoption of specific governance-related policies.

The fourth King Report on Corporate Governance in South Africa ("King IV"), issued by the Institute of Directors in Southern Africa, is South Africa’s definitive corporate governance code. King IV envisions good governance as the achievement of four outcomes: ethical culture; good performance; effective control; and legitimacy. These outcomes may be achieved by adherence to King IV’s 16 governance principles and their attendant recommended practices. Whilst compliance with King IV is voluntary, the Listings Requirements compel issuers to implement certain of its recommendations, with the balance to be adopted in accordance with King IV’s ‘apply and explain’ disclosure regime (see question 5.2).

1.3 What are the current topical issues, developments, trends and challenges in corporate governance?

As a general statement, ongoing global debates about corporate purpose, stakeholder inclusivity, sustainable long-term value creation versus short-termism, and high levels of inequality are influencing the evolution of corporate governance in South Africa. The COVID-19 pandemic, and the systemic risk that it represents, is relevant to each of these debates and will undoubtedly bring questions of corporate governance into sharp focus.

Board diversity is a topical issue, particularly in the light of evidence linking greater board diversity with better company performance, as well as the unique role that Broad-Based Black Economic Empowerment ("B-BBEE") plays in the South African economy (see question 4.4). The Listings Requirements have long required issuers to adopt policies that promote and set targets for racial and gender diversity at board level, and to report to shareholders on progress made in this regard. A recent amendment to the Listings Requirements, as informed by King IV, now requires a single policy that addresses a broader set of diversity attributes, including culture, age, experience and skillset. To the extent that issuers fail to apply any aspect of such policy, an explanation therefor must be provided to shareholders in their annual reports.

ESG and sustainability issues will feature prominently on the corporate governance agenda in the coming years. Increased...
public and investor awareness of these issues, particularly regarding climate change, is forcing companies to consider, act and report on them (see questions 2.4 and 2.8). JSE-listed companies that are involved in or fund carbon-intensive industries are experiencing increased shareholder activism in respect of ESG issues, from both institutional investors and NGOs. Recent instances of this activism have sought to compel companies to, amongst other things, disclose information on their assessment of greenhouse gas emissions attributable to their activities or portfolio, and develop plans to protect shareholder value in the face of climate-related ‘transition risks’.

Cybersecurity has become a pressing challenge for South African companies. Boards are responsible for information and technology management: this includes ensuring a robust information architecture in place that supports the integrity, confidentiality and availability of information. Furthermore, under the Protection of Personal Information Act 4 of 2013 (South Africa’s first comprehensive data protection statute), companies will be subject to a host of cybersecurity obligations, including taking reasonable, appropriate technical and organisational measures to prevent unlawful access to personal information.

Directors of South African companies have legal duties to act in the ‘best interests of the company’ (see question 3.6). Reflecting the growing awareness of the integral societal role companies occupy, the Companies Act promotes an ‘enlightened shareholder value’ approach: boards are permitted to take broader stakeholder interests into account, whilst remaining cognisant of their principal duty of maximising shareholder value.

King IV advocates a shift away from prioritising short-term objectives that serve the interests of a narrow group of stakeholders, towards focusing on sustainable performance and long-term value creation to the benefit of all material stakeholders. The philosophical underpinnings of King IV reflect three paradigm shifts that appear to be taking place globally: (i) from financial capitalism towards more inclusive capitalism, which takes account of all sources of capital – including human, social, relationship and natural capital – involved in the value-creation process; (ii) from silo reporting towards integrated reporting, based on integrated thinking, which takes into account the connectivity between a range of exogenous factors (e.g., the economy, society and environment) and endogenous factors (e.g., various operational and functional units) that affect a company’s ability to create value over time; and (iii) from short-term capital markets towards long-term capital markets, which encourages the extension of investment horizons and discourages rewarding short-term profit-making at the expense of sustainable performance.

See also question 4.1.

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Although management of the company resides with the board, which delegates day-to-day operational responsibilities to the executives (see question 3.1), ownership and control of the company resides with shareholders. Shareholders have rights and powers to appoint and remove directors (see question 3.2). In respect of significant actions affecting the company, an ordinary resolution (simple majority approval) or special resolution (75% approval threshold) of shareholders must be obtained. Under the Companies Act, the latter is required to, for example: (i) amend the MOI; (ii) enter into a fundamental transaction; or (iii) issue shares in a transaction with voting power of 30% or more of that of all the shares held immediately prior to the transaction (although in practice, institutional investors have influenced issuers to set far lower thresholds, ranging between 2.5% to 5%). The Listings Requirements also prescribe certain transactions that cannot be implemented without shareholder approval, either by ordinary resolution (e.g., a major ‘category I’ transaction or a ‘related party’ transaction) or special resolution (e.g., a share buyback). As such, significant shareholders, or shareholders who combine forces, can exert substantial influence on a company’s strategic direction through their power to block a proposed course of action.

Shareholders also have the ability, acting alone or in collaboration with other shareholders and stakeholders, to exert influence privately (e.g., through engagements with the board), and/or publicly (see question 2.3 below). Institutional investors are particularly influential in this regard and may seek to reconstitute the board and/or replace a CEO in order to bring about desired changes.

In statutorily prescribed circumstances, dissenting shareholders may frustrate or even prevent the implementation of a proposed fundamental transaction.

2.2 What responsibilities, if any, do shareholders have with regard to the corporate governance of the corporate entity/entities in which they are invested?

As a general rule, shareholders owe no legal or fiduciary responsibilities towards the companies in which they invest. That said, shareholders are generally acknowledged as having a governance role to play in supervising and monitoring management, as well as holding management accountable to shareholders and, increasingly, to other stakeholders. The Companies Act contains various provisions that enable shareholders to perform this role, such as the statutory derivative action (see question 2.5).

Institutional investors bear certain stewardship responsibilities, including regarding corporate governance, towards investee companies (see question 2.4).

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have with regard to such meetings?

Under the Companies Act, public companies must hold an annual general meeting (“AGM”) at which certain minimum business must be conducted, including: (i) presentation of the annual financial statements (“AFS”); (ii) director elections; and (iii) appointment of an auditor and audit committee (see question 5.3). Separately, shareholders’ meetings may be called to consider specific company matters, such as the approval of a fundamental transaction, as and when required, by: (i) the board; (ii) a person specified in the company’s MOI or rules; or (iii) shareholders who, in aggregate, hold at least 10% of the voting rights entitled to be exercised on the matter to be voted.
on (unless a court rules that the matter in question is frivolous, vexatious, or has already been decided by shareholders).

Shareholders are entitled to attend, speak and vote at a meeting, either themselves or via proxy. This allows shareholders to ask difficult questions of directors, express their views or lobby support from other shareholders for a particular agenda (e.g., a ‘vote no’ campaign). Further, any two shareholders may propose that a resolution concerning any matter in respect of which they are each entitled to exercise voting rights be submitted to shareholders at the next scheduled shareholders’ meeting, at a meeting demanded by the requisite percentage of shareholders, or by written vote.

**2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities? Are there any stewardship principles or laws regulating the conduct of shareholders with respect to the corporate entities in which they are invested?**

Shareholders, controlling or otherwise, do not owe any legal duties under the Companies Act or common law to the company or other shareholders. Based on the principle of separate legal personality, shareholders are not liable for the company’s acts or omissions. Only under exceptional circumstances may a court attribute personal liability to one who has abused the principle of corporate personality under the common law, or rely on the statutory mechanism in the Companies Act to ‘pierce the corporate veil’ where an ‘unconscionable abuse’ of a company’s separate juristic personality has transpired.

There are certain stewardship rules that apply to institutional investors, who owe fiduciary duties to their members or beneficiaries regarding the responsible management of their investments. A prominent example thereof is the Pension Funds Act 24 of 1956, which requires a pension fund, before making an investment and while invested in an asset, to consider factors that may materially affect the long-term performance of the asset, including those of an ESG character. This requirement has gained greater traction following a recent guidance note thereon issued by the Financial Sector Conduct Authority, the body responsible for enforcing the Financial Markets Act 19 of 2012 (the “FMA”) (which regulates financial markets and prohibits insider trading and market abuse). The guidance note contemplates ‘active ownership’ by pension funds – being the prudent fulfillment of responsibilities relating to the ownership of, or an interest in, an asset. These responsibilities include guidelines to be applied for the identification of sustainability concerns in that asset, and mechanisms of intervention and engagement with the responsible persons when concerns have been identified.

Moreover, both local and international codes encourage responsible stewardship and collaborative engagement by institutional investors, as well as the incorporation of sustainability and ESG considerations into investment processes. The 17th principle of King IV applies solely to institutional investors, requiring that they adopt responsible investment principles and practices as set out in the Code for Responsible Investment in South Africa (“CRISA”). CRISA’s principles for institutional investors, as informed by international best practice, include incorporating sustainability and ESG considerations, and demonstrating acceptance of ownership responsibilities, in their investment arrangements and activities.

**2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?**

The Companies Act provides a range of protective measures and enforcement actions to aggrieved shareholders. A shareholder who has suffered oppressive or prejudicial conduct as a result of, amongst other things: (i) an act or omission of the company; or (ii) the exercise of a director’s powers, may apply to court for relief, and a court may make any order it considers fit, including an order restraining the conduct complained of or setting aside an agreement or transaction. Shareholders may apply to court for any order necessary to protect any of their rights, or rectify any harm done to them by: (i) the company owing to a contravention of, amongst other things, the Companies Act or the MOI; or (ii) a director to the extent that such director may be liable for a breach of duty (see question 3.6). Shareholders may also apply to court for an order to restrain: (i) the company from contravening any provision of the Companies Act; or (ii) the company or the directors from violating any limitation contained in the MOI regarding the company’s capacity or the directors’ authority. Under certain circumstances, shareholders may bring a damages claim for any loss suffered, including where any person (such as a director) has contravened the Companies Act.

Whilst the Companies Act therefore permits direct recourse against directors in specific instances, a director’s breach of duty will ordinarily cause harm to the company to which such duty is owed (see question 3.6). As such, the statutory derivative action enables a shareholder to demand that the company bring or continue proceedings, or take related steps, to protect the legal interests of the company. A company may apply to court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit.

**2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?**

Under the Companies Act, any person (whether directly, indirectly, individually or acting in concert) who acquires or disposes of a beneficial interest in a class of securities of a regulated company amounting to 5%, or any further whole multiple of 5%, of the issued securities of that class, must notify the company within three business days thereof. Upon receiving the notice, the company must: (i) disclose the acquisition or disposal to the relevant security holders, typically by way of public announcement (unless the notice concerned a disposal of less than 1%); and (ii) file a copy thereof with the TRP. The Listings Requirements further require issuers to disclose holdings of 5% or more in their annual reports and circulars.

Although nominee shareholders in public companies are allowed, lack of transparency surrounding the ultimate beneficial owner of securities could keep a company and its shareholders in the dark regarding an impending ‘creeping takeover’. Therefore, the Companies Act requires that nominees disclose the identity of the person on whose behalf the securities are being held, as well as certain other prescribed information.

In addition, the Takeover Provisions provide that where a party (acting alone or in concert) makes an acquisition of securities in a regulated company that takes the acquiror’s beneficial interest in the voting rights in such company to 35% or more, a mandatory offer must be made to the remaining shareholders (unless a ‘whitewash’ resolution waiving the mandatory offer is approved by a majority of independent shareholders).
Typically, shareholders are not required to make such disclosures. However, the Takeover Provisions stipulate that a firm intention announcement must be released where: (i) a mandatory offer is required (see question 2.6); or (ii) an offeror has communicated a firm intention to the target board to make an offer, and is ready, willing and able to make such offer. The announcement must contain certain prescribed information, including full details of the terms of the offer (such as the proposed implementation mechanics and classes of securities affected). Further, persons who ‘act in concert’ (by co-operating in terms of an agreement for the purposes of entering into or proposing an affected transaction or tender offer) are required to disclose their ‘concert party’ status to both the TRP and the regulated company concerned.

Shareholder activism has increased steadily in South Africa over the past decade, partly due to: (i) the influence of activism in other jurisdictions; (ii) a liquid, widely held and internationalised shareholder base on the JSE; and (iii) a regulatory and corporate governance framework that enables activism and activist-like interventions. For example, the Companies Act contains numerous shareholder-empowering provisions (see questions 2.1, 2.3 and 2.5); further, King IV encourages greater shareholder participation in its recommendations, and envisions an active role for shareholders in policing good governance (see questions 2.4 and 4.3).

Activism in South Africa often manifests through campaigns or proposals seeking to effect governance-related changes, frequently regarding executive compensation and board composition. Following the introduction of ‘say-on-pay’ rules (see question 3.3), various JSE-listed companies have experienced significant opposition to their remuneration policies. On board composition, activist campaigns have forced companies to take steps to change the make-up of their boards, especially where non-executives are perceived as lacking independence (see question 3.1). JSE-listed companies regularly experience M&A-related activism, with shareholders seeking to either frustrate or force a company to pursue M&A activities. This is typically carried out through private engagements with the board, but may also involve public opposition to proposed transactions.

Shareholder activism is ‘regulated’ in the sense that it takes place within the legal and principled framework of the Companies Act, which seeks, among other things, to ‘encourage active participation in economic organisation management and productivity’ and ‘balance the rights and obligations of shareholders and directors within companies’. Different rules will be implicated by different activist campaigns or proposals. Shareholders need to be cognisant of these rules in pursuing activism, as do boards in responding to, and defending against, it (e.g., the statutory US-style ‘business judgment rule’, which affords directors some latitude).

See also question 1.4.

The Companies Act vests the board of directors with original authority to direct and manage the business and affairs of the company, save to the extent that the Companies Act or the MOI provide otherwise. Day-to-day decision-making is delegated to an executive team appointed by, and accountable to, a typically single-tiered, unitary board.

Under the Listings Requirements, issuers must appoint a chairperson (or a lead independent director, if the chairperson is not an independent non-executive) to lead the board, and a CEO to lead management. As independence is considered essential to the proper fulfilment of the chairperson’s role, these positions must be held by separate individuals. In this regard, the Listings Requirements require that independence be determined holistically on a ‘substance over form’ basis, which takes into consideration various interests, positions and relationships enumerated in the Companies Act and King IV that might reasonably call the integrity or objectivity of the director into question. Furthermore, the board is required to adopt a policy evidencing a clear balance of power and authority at board level to ensure that no one director has unfettered decision-making powers. This is typically effected through provisions in the MOI requiring all material matters to be passed by a simple majority of directors in accordance with a ‘one director, one vote’ policy.

King IV recommends that the majority of directors be non-executives, most of whom should be independent, and the board should comprise the appropriate balance of knowledge, skill, experience, independence and diversity (see question 1.3) for it to discharge its responsibilities objectively and effectively.

The Companies Act provides that the board may appoint any number of committees it requires and may delegate to such committees any of its authority (whilst at all times retaining ultimate responsibility for such committees’ decisions and actions). King IV recommends that the board appoint a variety of specialised committees; in this regard, the Listings Requirements mandate the appointment of ‘King compliant’ audit, remuneration and social and ethics (“S&E”) committees, and encourage the appointment of risk and nomination committees (frequently appointed by issuers in practice).

Under the Companies Act, shareholders have the right, by way of ordinary resolution, to elect at least half of the members of the board, and to remove any such elected director for any reason. The balance of board members may be appointed by persons determined in the MOI (e.g., the board, other stakeholders, or outsiders), and certain persons holding office are recognised as ex officio directors.

The board may remove any director by way of resolution in prescribed circumstances relating to a director’s fitness to hold office, including: (i) ineligibility or disqualification in terms of the Companies Act (e.g., where a director has been convicted of a dishonesty-related offence); (ii) meaningful incapacity; or (iii) neglectful or derelict performance as a director. Before being removed, the director in question is entitled to certain procedural rights, such as making verbal representations to the board meeting in his or her defence. The latter requirement renders it impermissible for the board to pass such resolution informally by written consent (see question 3.5).
King IV recommends that arrangements for periodic, staggered rotation of directors be provided for in the MOI. These arrangements should strike a balance between retention of valuable knowledge and experience on the one hand, with the need to safeguard independence and refresh the board with new ideas and perspectives on the other. The Listings Requirements require that at least one-third of non-executive directors must retire, and may choose to stand for re-election, at the AGM.

The Companies Act provides that directors may be paid for their services in such capacity only in accordance with a special resolution of shareholders, valid for a maximum of two years. Further, audited AFS must include a host of particulars regarding the emoluments received by directors and prescribed officers, including all fees, bonuses, options, pension contributions and any non-financial benefits.

The Listings Requirements have incorporated King IV’s ‘say-on-pay’ recommendation that companies should produce and disclose, in respect of a reporting period, a remuneration policy and a report on the implementation of that policy, both of which must be tabled for a separate non-binding advisory vote by shareholders at the AGM. If 25% or more of voting rights are exercised against either the policy or the report, the board must engage with dissenting shareholders in good faith in order to understand and appropriately address any reasonable and legitimate concerns raised. Although non-binding, this vote coupled with increased disclosure promotes transparency and provides shareholders with a platform to express dissatisfaction and engage meaningfully with the board.

The Companies Act requires that AFS disclose the number and class of any securities issued to a director or prescribed officer, or to any related persons, and the consideration received for those securities. Moreover, the Listings Requirements strictly regulate dealings by directors in any securities related to an issuer (“Director Dealings”). Director Dealings cannot take place unless clearance has first been received from the chairperson (or a ‘Dealing Approval Committee’, if constituted), unless the director concerned has no discretion in the transaction. Further, Director Dealings are generally banned during ‘prohibited periods’, which persist: (i) during certain ‘closed periods’ (e.g., from the end of a financial period until the publication of the relevant financials, or where the issuer is trading under a cautionary announcement); and (ii) where the company is in possession of ‘price sensitive information’ (being unpublished information of a specific or precise nature that would have a material effect on the share price if made public). Within three business days of any Director Dealings, the relevant director must disclose full details thereof to the issuer, who in turn must disclose such details to the market within 24 hours.

Insider trading is prohibited by the FMA, which defines inside information as ‘specific or precise information, which has not been made public and which: (i) is obtained or learned as an insider; and (ii) if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market’. An insider includes any person who receives or has access to inside information through his or her position as a director or employee of the relevant company. Any person who commits an insider trading offence (relating to dealing, disclosure or influencing) is subject to both criminal and civil penalties.

Under the Companies Act, a director authorised by the board may call a board meeting at any time, but must call a meeting if required to do so by any two directors or, where the board consists of 12 or more members, by 25% of directors. A majority of directors must be present before a vote is called on any matter, on which each director may cast one vote, and resolutions are passed by way of a simple majority. The MOI may vary each of the abovementioned thresholds, and will usually contain additional procedural requirements (e.g., the minimum notice period). Generally, resolutions may be passed by written consent, without the need for a physical meeting (see question 3.2).

The Companies Act, which partially codifies the common law fiduciary duties of directors, prescribes that all directors, alternate directors, prescribed officers and members of board or audit committees (“Fiduciaries”) must, amongst other things: (i) exercise their powers and functions in good faith, for a proper purpose, and in the ‘best interests of the company’; (ii) disclose personal financial interests in certain circumstances; and (iii) not use their office to gain an advantage or knowingly cause harm to the company. To the extent that the Companies Act does not specifically regulate them, directors remain subject to common law principles regarding fiduciary duties to: (i) act within designated powers; (ii) maintain and exercise unfettered discretion and independent judgment; and (iii) avoid conflicts of interest.

Further, each director should act with the degree of care, skill and diligence that may reasonably be expected of a person: (i) carrying out the same functions; and (ii) having the general knowledge, skill and experience of that director. The Companies Act includes a statutory ‘business judgment rule’, which offers directors a degree of protection.

Fiduciaries may be held jointly and severally liable for any loss, damages or costs sustained by the company as a consequence of having breached any of their duties, or for having breached the Companies Act or the MOI. Fiduciaries may also be held liable in specific instances, including where they: (i) acquiesced in the reckless trading of the company’s business; (ii) engaged in conduct calculated to defraud stakeholders; or (iii) were party to false or misleading communications to the market.

In limited instances, Fiduciaries may also be subject to criminal penalties, with more stringent penalties being reserved for offences involving false statements or reckless conduct.
and long term; (ii) managing risk; (iii) ensuring accountability to stakeholders; and (iv) driving performance by creating sustainable shareholder value in an ethical manner – namely, with integrity, competence, responsibility, accountability, fairness and transparency.

See also questions 1.3, 3.1 and 3.6.

### 3.8 Are indemnities, or insurance, permitted in relation to members of the management body and others?

A company may indemnify its Fiduciaries or provide them with insurance, provided that in doing so, they are not relieved of any fiduciary duties and subject to certain exceptions (e.g., willful misconduct or breach of trust). A company may provide its Fiduciaries with: (i) insurance cover to protect them against liability and expenses incurred in their capacity as Fiduciaries (known as ‘D&O’ insurance); and (ii) indemnification in respect of litigation expenses incurred in defending proceedings arising from their services to the company.

### 3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

See questions 2.1, 3.1 and 3.7.

## 4 Other Stakeholders

### 4.1 May the board/management body consider the interests of stakeholders other than shareholders in making decisions? Are there any mandated disclosures or required actions in this regard?

Whilst the Companies Act promotes an ‘enlightened shareholder value’ approach (see question 1.4), King IV promotes a slightly broader ‘stakeholder inclusive’ approach. This approach recognises companies as corporate citizens, with duties to act with economic, social and environmental responsibility, and appreciates the interdependent relationship between a company, its stakeholders and the ability to create value sustainably. As such, King IV recommends that boards take into account the legitimate and reasonable needs, interests and expectations of all material stakeholders (e.g., shareholders, employees, consumers and even the community at large) when acting in the best interests of their companies. The introduction by the Companies Act of a compulsory S&E committee for certain companies is further evidence of the expected recognition of stakeholder interests by companies.

### 4.2 What, if any, is the role of employees in corporate governance?

Generally, employees do not play a role in the governance of companies in South Africa. However, employees are recognised as a constituency of the company and are afforded certain rights under the Companies Act: trade unions representing employees have standing to apply to court to restrain a company from doing anything inconsistent with the Companies Act, and the statutory derivative action (see question 2.5) may be invoked by a trade union or employee representative.

In the M&A context, except where a workplace forum exists, or to the extent provided for in a collective bargaining agreement, there is no obligation to inform or consult with the employees, trade unions or employee representatives in a share sale, asset sale (unless retrenchments are contemplated) or sale of a business as a going concern. However, it is recommended, from a good industrial relations perspective, to keep employees and their representatives informed of any anticipated change in ownership – especially as disgruntled employees can rely on certain regulatory procedures (e.g., certain public interest factors that the South African competition authorities consider when granting merger approvals) to delay or thwart a transaction.

### 4.3 What, if any, is the role of other stakeholders in corporate governance?

King IV promotes proactive shareholder engagement through a number of its recommendations. For instance, the board should encourage shareholders to attend the AGM, at which all directors should be available to respond to shareholders’ queries. Further, the board should adopt comprehensive policies on stakeholder relationship management, and engage with stakeholders through widely accessible media or platforms, such as websites, advertising and press releases.

See also questions 2.4 and 2.8.

### 4.4 What, if any, is the law, regulation and practice concerning corporate social responsibility?

Public companies must constitute an S&E committee, whose functions include: (i) monitoring the company’s activities, having regard to any legal requirements or prevailing codes of best practice with regard to matters relating to (a) social and economic development, (b) good corporate citizenship, (c) the environment, health and public safety, and (d) consumer and employee relationships; and (ii) reporting on matters within its mandate to the board as occasion requires, and to shareholders at the AGM.

In order to redress the historical imbalances perpetuated by apartheid, various pieces of legislation obligate companies to take certain steps to achieve transformation targets and increase levels of economic participation by previously disadvantaged race groups. Under the Employment Equity Act 55 of 1998, companies of a certain size are required to develop an employment equity plan, and report periodically on progress made regarding the transformation and diversity objectives set out therein. Under the Listings Requirements, issuers must publish on an annual basis a scorecard detailing the level of compliance with transformation targets contained in the B-BBEE Act 53 of 2003, including those regarding black ownership, management control and socio-economic development.

## 5 Transparency and Reporting

### 5.1 Who is responsible for disclosure and transparency?

The board of directors is primarily responsible for disclosure and transparency. There are, however, certain disclosure obligations imposed on shareholders (e.g., when acting in concert, or when acquisitions or disposals of beneficial interests of multiples of 5% in a public company are made (see questions 2.6 and 2.7)).
5.2 What corporate governance-related disclosures are required and are there some disclosures that should be published on websites?

All public companies must present audited AFS at the first shareholders’ meeting after the AFS have been approved by the board. The AFS must contain certain prescribed information, including an auditor’s report (see question 5.3) and a detailed directors’ report on the business and financial condition of the company.

The Listings Requirements contain various continuing obligations regarding disclosure by issuers, including to ensure that: (i) full, equal and timeous public disclosure is made regarding price sensitive activities; (ii) full information is given regarding substantial changes in business operations and matters affecting the MOI; (iii) the highest standards of care are adhered to when disseminating information into the market; and (iv) the Listings Requirements promote investor confidence in disclosure standards and corporate governance. Accordingly, issuers are subject to stringent financial reporting and disclosure requirements in key areas, including periodic financial information, price sensitive information, profit forecasts, and significant corporate actions.

According to King IV, good governance may be achieved through its ‘apply and explain’ disclosure regime, whereby a company should: (i) apply the recommended practices thoughtfully, with common sense, and proportionally in line with the company’s size, resources, and the extent and complexity of its activities; and (ii) provide a narrative account of that application with reference to the recommended practices. This account should be published on the company’s website (or through other broadly accessible media or platforms), along with the company’s AFS (and other external reports), code of conduct and ethics policies, and integrated reports (see question 1.4).

See also questions 3.3 and 3.4.

5.3 What is the role of audits and auditors in such disclosures?

JSE-listed entities must appoint an auditor and an audit committee, both of which play a vital role in ensuring that company financial reporting is comprehensive and reliable. Auditors must review the AFS to ensure they fairly represent the position of the company and have been prepared in conformity with applicable financial reporting standards, and must report to shareholders thereon (see question 5.2).

In contrast to regular board committees, audit committees hold a special status as a statutory committee, appointed by (and by inference, accountable to) shareholders. These committees must comply with rigorous composition requirements (e.g., at least three independent, financially literate non-executives), and carry out the prescribed duties (e.g., recommending a suitably qualified auditor and financial director, and adopting an appropriate risk management policy), set out in the Companies Act and Listings Requirements.
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