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Editor
Petra Zijp

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THE CORPORATE GOVERNANCE REVIEW

TWELFTH EDITION

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PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this 12th edition, we are seeing that corporate governance has become an even more vital and all-encompassing topic, especially this second year after the start of the covid-19 pandemic – a year in which we have continued to see climate issues, political instability, technological change, a steady increase in attention to environmental, social and corporate governance (a stakeholder model to which many countries are moving), green finance and the demand from both employees and customers for a sound reputation for the best personal health and moral responsibility. As this Review's previous editor mentioned in his preface, we all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, and most of us work for them. Most corporations aim to add value to society, and they very often do. There is increasing emphasis on this. Some, however, are exploiting, polluting, poisoning and impoverishing us, which can create a depressed reputation for business. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards, management and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? And how do corporations report? It has become increasingly relevant that corporations report on not only financial information, but also on reliable and comparable sustainability information – non-financial information that investors and other stakeholders need.

We fortunately continue to see proposals for new laws, regulations and other initiatives for a global framework of sustainability disclosure that is based upon the needs of investors and the financial markets. I should like to highlight two developments in this respect. First, the EU Corporate Sustainability Reporting Directive (CSRD) proposal of April 2021. It forms part of the European Green Deal. This proposal should assist companies in meeting the increasing demands for sustainability information. Companies within the scope of the CSRD proposal would have to report on a whole range of sustainability issues relevant to the company's business. Sustainability information would cover not just environmental factors but also social and governance factors. Governance factors encompass the role of the corporation's administrative, management and supervisory bodies (including with regard to sustainability matters and their composition; business ethics and corporate culture, including anti-corruption and anti-bribery; the corporation's political engagements, including its lobbying activities; the management and quality of relationships with business partners, including payment practices; and the corporation's internal control and risk management systems, including for the reporting process). The EU has indicated that it is clearly in the

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interest of the EU and European companies and investors to have standards that are globally aligned, and has indicated that EU standards should aim to incorporate the essential elements of globally accepted standards currently being developed.

This touches upon the second development I want to mention. The trustees of the IFRS Foundation announced the formation of the International Sustainability Standards Board (ISSB) on 3 November 2021 at COP26 in Glasgow. The ISSB will develop – in the public interest – standards that will result in a high-quality, comprehensive global baseline of sustainability disclosures focused on the needs of investors and the financial markets. The aim of the ISSB's standards is to cover important sustainability topics (environmental, social, governance – ESG) on which investors would like to be informed. Climate-related information will be dealt with first, given the urgency in this field. The ISSB has indicated that it will build on the work of existing investor-focused reporting initiatives to become the global standard-setter for sustainability disclosure for the financial markets. These two initiatives – on a regional and a global scale – may prove to bring about a sea change in the way corporations report and – maybe – conduct their business.

Each country has its own laws, codes and measures; however, the chapters in this Review also show a convergence. Understanding differences leads to harmony. The concept underlying the book is that of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, when a quick first look at key issues would be helpful to general counsel and their clients.

My aim as the new editor of this Review will continue to be to achieve a high quality of content so that the Review will be seen as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I would like to thank my partner and wonderful colleague Willem Calkoen for his outstanding work over the past years as editor of this Review. It is an honour to take over from him, and I fully realise that I have some big shoes to fill. For now, I would like to thank all the contributors who have helped with this project. I hope this book will give you food for thought. Further editions of this work will obviously benefit from the thoughts and suggestions of its readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Petra Zijp
NautaDutilh
Amsterdam, The Netherlands
March 2022

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Chapter 18

SOUTH AFRICA

Ezra Davids and Ryan Kitcat[1]

I OVERVIEW OF GOVERNANCE REGIME

Listed companies in South Africa operate within a robust and flexible governance framework comprising statutes, regulations, common law, and both international and South African codes of best practice.[2]

The Companies Act 71 of 2008 is the primary source of company law. Each public company is constituted in accordance with the Companies Act and its constitutional document, the memorandum of incorporation (MOI), which establishes the company's capacity, legal powers and governance.[3]

Public companies whose securities are listed on the Johannesburg Stock Exchange (JSE),[4] South Africa's main securities exchange, must adhere to various requirements imposed on them by the JSE Listings Requirements. Given the high levels of public interest in these companies, the Companies Act and the Listings Requirements together impose a demanding accountability and transparency regime.

Insofar as 'good practice' standards are concerned, the King IV Code on Corporate Governance (the King Code), which is recognised as one of the world's leading corporate governance codes,[5] sets out principles and recommended practices that an organisation should apply to demonstrate good governance, reflected in four outcomes: ethical culture, good performance, effective control and legitimacy.[6] Certain recommended practices in the King Code are incorporated into the Listings Requirements.

1 Ezra Davids and Ryan Kitcat are partners at Bowmans.
2 The Companies Act recognises two types of company: profit company and non-profit company. A profit company may be a private company (whose securities may not be offered to the public), state-owned company, personal liability company or public company. This chapter focuses on public companies whose securities are listed on the Johannesburg Stock Exchange (JSE).
3 An object of the Companies Act is to create a facilitative and enabling corporate law regime. As such, companies are subject to certain 'unalterable' provisions of the Companies Act that prescribe core company law rules applicable to a company, with the remaining provisions being 'alterable' default provisions that apply to a company only to the extent that the memorandum of incorporation (MOI) does not vary them. There is a lot of flexibility, therefore, in incorporating a company in South Africa.
4 The JSE is operated by JSE Limited.
5 See, for example, American Bar Association – BLT, 20 July 2017, Michael Judin, Leigh Roberts, Ramani Naidoo, 'Corporate Governance . . . Innovative Thinking In South Africa's Latest Code', available at www.americanbar.org/groups/business_law/publications/blt/2017/07/01_judin/.
6 The King IV Code on Corporate Governance forms part of the King IV 'Report on Corporate Governance for South Africa', 2016, issued by the Institute of Directors in Southern Africa NPC (IoDSA), available

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The King Code is informed by and recognises three paradigm shifts that appear to be taking place globally:

a from financial capitalism towards more inclusive capitalism, which takes account of all sources of capital – financial, manufactured, intellectual, human, social, relationship and natural – involved in the value-creation process;

b from short-term capital markets towards long-term, sustainable capital markets;[7] and

c from silo reporting towards integrated reporting, based on integrated thinking, which takes into account the connectivity and interdependencies between a range of exogenous factors (e.g., the economy, society and environment) and endogenous factors that affect a company's ability to create value over time.[8]

II CORPORATE LEADERSHIP

i Board structure and practices

The business and affairs of a company must be managed and directed by the board, which has the authority to exercise all the powers and perform all the functions of the company, except to the extent that the Companies Act or the company's MOI provides otherwise.[9] Although shareholders still retain ultimate authority in respect of specific reserved matters[10] (including the right to reconstitute the board), the Companies Act vests the board with original statutory authority regarding the conduct of the company's business. This power may only be exercised collectively by way of majority vote; in the absence of a specific delegation from the board, individual directors do not have the power to bind the company.

The traditional structure of a South African board is unitary, with no separation between executives and non-executives. The King Code contains various recommendations on board composition, including that the board should comprise a majority of non-executives, most of whom should be independent. The Listings Requirements provide that independence be determined holistically on a 'substance over form' basis, which takes into consideration various interests, positions and relationships listed in the Companies Act and the King Code that might reasonably call the integrity or objectivity of the director into question.

Typically, the board delegates the responsibilities of day-to-day operational management to an executive team, whose members are subject to board oversight. The board may appoint committees and may delegate to those committees any of its authority; however, the directors retain ultimate responsibility for the committees' decisions and actions.

The Companies Act requires public companies to constitute an audit committee.[11] Public companies and private companies that have a certain 'public interest score' derived from factors such as annual turnover, workforce size and nature and extent of activities are required to appoint

at www.iodsa.co.za/page/KingIVReport. The IoDSA owns all copyright and titles in the 'King IV Report on Corporate Governance for South Africa', 2016. Note: King IV, King IV Report and King IV Code are trademarks of the IoDSA.

7 The King Code recognises that companies (and other organisations) are an integral part of society: they both contribute to and are dependent on society, and are affected by and have an effect (both positive and negative) on the societies in which they operate.

8 The King IV Report, at 4 to 5 (Foreword).

9 Companies Act, Section 66.

10 See Section V.i.

11 See Section III.

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a social and ethics (S&E) committee.[12] Under the Listings Requirements, King-compliant audit, remuneration and S&E committees are mandatory. Risk and nomination committees are only encouraged, although JSE-listed companies constitute these committees in practice.

JSE-listed companies must appoint a chair or a lead independent director to lead the board, as well as a chief executive officer (CEO) to lead management. As independence is considered essential to the proper fulfilment of the chair's role, the Listings Requirements insist that these positions be held by separate individuals. However, in certain limited instances, a dispensation may be granted by the JSE allowing an executive chair to be appointed temporarily.

ii Directors

Appointment, nomination, removal and term of office

In the case of a profit company, at least 50 per cent of the directors must be elected by shareholders. For the remainder, the MOI may include a right in favour of a person named in, or determined in terms of, the MOI to appoint a director; certain persons who hold office are also recognised as *ex officio* directors.

Under the Companies Act, directors are appointed for an indefinite term, unless the MOI provides otherwise. However, the King Code recommends that arrangements for periodic, staggered rotation be put in place. These arrangements should strike a balance between retention of valuable knowledge and experience on the one hand, with the need to infuse fresh ideas and perspectives into board decision-making on the other. As such, companies often provide in their MOIs for staggered retirement by rotation, whereby certain classes of directors (usually non-executives) retire at each annual general meeting (AGM), and then stand for re-election by shareholders. To prevent this process from becoming a mere formality, some companies have adopted policies limiting the duration for which non-executives may hold office. For JSE-listed companies, the annual retirement of at least one-third of non-executive directors is mandatory. The board will recommend whether each of those directors is eligible to stand for re-election, taking into account past performance and contributions made.

Shareholders have the right to remove a director for any reason by way of an ordinary resolution (approved by simple majority) adopted at a shareholders' meeting by those entitled to exercise voting rights in the election of the director. This shareholder right prevails despite anything to the contrary contained in a company's MOI or rules, or in any other agreement.[13]

The board is also empowered to remove a director by way of resolution, but only on prescribed grounds pertaining to the director's fitness to hold office, namely if the director has:

a become ineligible or disqualified in terms of the Companies Act (e.g., if the director is labouring under a legal disability, or has been convicted of a dishonesty-related offence);

b become meaningfully incapacitated; or

c been neglectful or derelict in the performance of his or her functions as a director.[14]

---

12 See Section IV.

13 Moreover, although the MOI may ordinarily set a higher percentage of voting rights to approve a resolution, the simple majority threshold cannot be varied in the case of a resolution effecting the removal of a director.

14 Regardless of circumstances, before any vote is cast on his or her removal, a director is afforded certain procedural rights under the Companies Act (and in accordance with common law rules of natural justice). These include the right to receive reasonable notice of the resolution, and a reasonable opportunity to make representations in his or her defence at the meeting.

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The Companies Act also permits various constituencies to apply for an order declaring a director delinquent in certain prescribed instances of substantial misconduct by a director. Examples of this misconduct include gross abuse of the position of director, and inflicting harm on the company or a subsidiary wilfully or by gross negligence. In these circumstances, a company, shareholder, director, company secretary, prescribed officer or employee representative may apply to a court for an order declaring a person a delinquent director. If the relevant substantial misconduct can be demonstrated, a court must make an order declaring the relevant person delinquent.[15]

Directors' duties

The fiduciary duties of directors, and the duty of care and skill, have been partially codified in the Companies Act. However, the common law principles are preserved, informing the interpretation and application of the statutory provisions.

All directors, be they executive or non-executive, owe the same fiduciary duties individually and directly to the company. A 'director' must exercise his or her powers and functions in good faith and for a proper purpose, and in the best interests of the company.[16] At common law, the duty to act in good faith and in the best interests of the company is the overarching fiduciary duty from which all others flow. These duties are to:

a act within designated powers;

b maintain and exercise unfettered discretion and independent judgement; and

c avoid conflicts of interest.

The Companies Act also prescribes that directors must:

a not use their company position, or any information obtained while acting in that capacity, to gain a personal advantage or knowingly cause harm to the company or a subsidiary thereof;[17] and

b fully disclose any material personal financial interest that they may have in respect of any matter to be considered at a board meeting and, if present at the meeting, recuse themselves so as not to take part in the deliberation of the matter.[18]

Although South African courts draw no distinction between executive and non-executive directors when applying fiduciary duties, the duty of care and skill provides a court with scope to weigh a director's specific role and function within a company. Section 76 of the Companies Act requires that a director should at all times act with the degree of care, skill and diligence that may reasonably be expected of a person who is carrying out the same functions and with the general knowledge, skill and experience of that director.

The Companies Act also adopts a US-style business judgement rule, which guards against court interference in directors' honest errors of judgement. In essence, the rule

15 Companies Act, Section 162. Also see judgments involving declarations of delinquency: *Organisation Undoing Tax Abuse and Another v. Myeni and Others* [2020] 3 All SA 578 and *Gihwala v. Grancy Property Ltd* [2017] (2) SA 337 (SCA).

16 ibid., at Section 76.

17 ibid.

18 ibid., at Section 75.

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provides that a director is deemed to have satisfied his or her duties if that director made an informed, unconflicted decision that he or she genuinely and rationally believed was in the best interests of the company.

Liability

Directors, prescribed officers and board committee members may be held jointly and severally liable for any loss, damage 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 company's MOI.

Section 77 lists specific instances where a director may incur liability, including when a director knowingly:

a acted without authority on behalf of the company;
b acquiesced in the reckless trading of the company's business;
c carried out an act calculated to defraud stakeholders; or
d was party to false or misleading communications to the market.

In limited instances, directors may also be subject to criminal penalties, particularly in instances involving fraud or dishonesty.

Requirements and diversity

Directors are not legally required to possess any special qualifications, skills, business acumen or experience in the company's business to hold office. That said, the duty of care and skill is such that directors cannot avoid liability by remaining culpably ignorant of company affairs or blindly deferring to other board members or experts.

The King Code recommends that the board should comprise the appropriate balance of knowledge, skill, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively. In light of these recommendations, as informed by global trends, board diversity is becoming an ever-greater priority for South African companies, particularly in light of the nation's unique history and the prevalent role that Broad-Based Black Economic Empowerment (B-BBEE) plays in the corporate environment.[19] The Listings Requirements have long required the adoption of policies that promote racial and gender diversity at board level, and in 2019 expanded on these diversity attributes to include culture, age, experience and skill set, in line with the King Code.

III DISCLOSURE

The Companies Act's purposes include encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation.[20] It requires all companies to report to shareholders annually on the state of the company. Public companies are required to hold an AGM at which certain minimum business must be conducted, including elections of directors elections and appointment of auditors. Public companies must also have their annual financial statements (AFS) audited, and present the AFS to the first shareholders' meeting after the board has approved them.

19 See Section IV.
20 Companies Act, Section 7.

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The AFS must include a detailed directors' report on the business and financial condition of the company is required, such that shareholders are able to appreciate the state of the company affairs. Further, audited AFS must include a host of particulars regarding the emoluments received by directors – on an individual basis, and not as an aggregate amount – including all fees, bonuses, options, pension contributions and any non-financial benefits.

Responding to growing calls for transparency on director remuneration, the King Code includes a recommendation (which has been incorporated into the Listings Requirements) that companies should produce and disclose, in respect of a reporting period, a remuneration policy and a report on the implementation of that policy.[21] This report must be tabled annually for a separate non-binding advisory vote by shareholders at the AGM. If 25 per cent or more of voting rights are exercised against any part of this remuneration policy, the board must engage with shareholders in good faith to understand shareholder dissatisfaction and the reasons for dissenting votes. The board is required to appropriately address reasonable and legitimate concerns raised in the evaluation of performance.

The Companies Amendment Bill, published for comment in 2021, contemplates disclosure of:

a the total remuneration (salary, benefits and other incentives) settled in favour of the highest paid employee and the lowest paid employee as recorded on a company's payroll;

b the average and median remuneration of all employees; and

c the gap, expressed as a ratio, between the remuneration of the top 5 per cent highest paid employees and the bottom 5 per cent lowest paid employees.

The Bill also proposes much expanded disclosure obligations in respect of beneficial ownership of securities, and contemplates requirements for companies to establish who their beneficial shareholders and ultimate beneficial or 'true owners' are.

The Listings Requirements contain various continuing disclosure obligations and General Principles[22] regarding disclosure by listed entities to their securities holders and the general public, including to ensure that:

a full, equal and timely public disclosure is made regarding activities that are price sensitive;

b full information is given regarding substantial changes in business operations and matters affecting the MOI;

c the highest standards of care are adhered to when disseminating information into the market; and

d the Listings Requirements promote investor confidence in disclosure standards and corporate governance. Accordingly, JSE-listed entities are subject to stringent financial reporting and disclosure requirements in key areas, including:
  - year-end and interim financial results and trading statements;
  - price-sensitive information;
  - profit forecasts;

21 The King Code recommends further detailed disclosures regarding: (1) each board committee, (2) the chief executive officer, (3) risk management and governance, (4) stakeholder arrangements and (5) inspections by environmental regulators, and any related findings of non-compliance or criminal sanctions.

22 The General Principles are set out in the introduction to the Listings Requirements and may be applied by the JSE in circumstances not otherwise covered by the Listings Requirements. The JSE has discretion to modify the application of any requirement in the main body of the Listings Requirements when the strict application thereof would conflict with the General Principles.

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- directors' dealings; and
- significant corporate actions.

In December 2021, the JSE published draft Sustainability and Climate Change Disclosure Guidance with a view to promoting transparency and good governance and to guide listed companies on best practice in environmental, social and governance (ESG) disclosure.

Insofar as the application of the King Code is concerned, good corporate governance outcomes may be achieved through the King Code's 'apply and explain' application and disclosure regime. That is, a company should:

a consider and apply the recommended practices that underpin the King Code principles proportionally in line with the company's size, resources, and the extent and complexity of its activities, and

b provide a narrative account of that application, with reference to the recommended practices.[23]

This approach is intended to generate an account that allows stakeholders, including shareholders, to evaluate and independently assess the extent to which the company and its group is applying the principles and recommendations in the King Code. This account should be contained in an integrated report prepared by the company,[24] which the King Code defines as a 'concise communication about how an organisation's strategy, governance, performance and prospects, in the context of its external environment, lead to the creation of value in the short, medium and long term'.[25]

IV CORPORATE SOCIAL RESPONSIBILITY / ESG

i Corporate citizenship

Reflecting the growing awareness of the integral societal role companies occupy, the Companies Act essentially promotes the 'enlightened shareholder value' approach: boards are permitted to take broader stakeholder interests into account, while remaining cognisant of their principal duty of maximising shareholder value.

The King Code adopts an approach to corporate citizenship based on the view that an organisation has rights, obligations and responsibilities in the society in which it operates. That is, a company is 'licensed to operate by its internal and external stakeholders, and by society in the broad sense'.[26] In recognition of the interdependent relationship between a company, its stakeholders and the company's ability to create value, the King Code recommends a stakeholder-inclusive approach 'in which the [board] takes into account the legitimate and reasonable needs, interests and expectations of all material stakeholders in the execution of

23 Earlier iterations of the King Code imposed a binary 'apply or explain' regime.

24 In practice, JSE-listed companies tend to take into account the King Code, Global Reporting Initiative standards and International Integrated Reporting Council (IIRC) guidance in preparing annual integrated reports.

25 King IV Report at 13 (Glossary of Terms).

26 King IV Report at 25 (Corporate citizenship).

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its duties in the best interests of the [company] over time'.[27] Consequently, directors must grapple with finding the right balance between these approaches when making decisions in the best interests of the company.[28]

ii S&E committee

The Companies Act requires public companies to appoint an S&E committee, which is meant to guide the organisation in fulfilling its role as a responsible corporate citizen. The S&E committee's functions include:

a monitoring the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, including the King Code, with regard to matters relating to:
- social and economic development;
- good corporate citizenship, including issues of discrimination, corruption and development of local communities;
- the environment, health and public safety, including the impact of the company's activities and of its products or services;
- consumer and employee relationships;

b reporting on matters within its mandate to the board as occasion requires; and

c reporting to shareholders on matters within its mandate at the company's AGM.[29]

The Companies Amendment Bill contemplates changes to the appointment, composition and reporting rules applicable to S&E committees, which are beyond the scope of this chapter to go into.

iii Risk management

The board is ultimately responsible for the company's overall approach to risk, as expressed in a board-approved risk policy. The King Code embraces the modern approach to risk governance, which requires boards to appreciate not only the downside of risk, but also the upside, as materialised in potential opportunities and rewards. In this regard, the board should approve both the company's risk appetite and the limit of the potential loss the company can tolerate.

The board must ensure that systematic, formal risk assessments are performed annually to identify, quantify, evaluate and prioritise risk. The annual report should incorporate a risk management statement that includes details of key risks relevant to the company and the steps taken to mitigate these risks. The board should allocate the oversight of risk governance to a dedicated committee, which should comprise executive and non-executive directors (with the latter forming the majority).

---

27 King IV Report at 17 (Glossary of Terms).

28 South African courts have been known to take corporate governance practices recommended by the King Code into account when rendering judgment against errant directors: see, for example, *South African Broadcasting Corporation Ltd and Another v. Mpofu* [2009] 4 All SA 169 (GSJ) and *Minister of Water Affairs and Forestry v. Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W).

29 Companies Regulations, 2011, Regulation 43.

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iv Broad-Based Black Economic Empowerment

As a measure to redress the legacy of apartheid, the legislature adopted the Broad-Based Black Economic Empowerment Act 53 of 2003 (the B-BBEE Act) to increase levels of economic participation by previously disadvantaged race groups. Other than in certain state licensing, permitting and authorisation processes, there is no 'hard law' requiring any private entity to meet specific B-BBEE targets. However, various codes of good practice under the B-BBEE Act must be taken into account by government entities when dealing with the private sector (e.g., selling state-owned assets and entering into public-private partnerships). As such, a low B-BBEE rating may constrain an entity's ability to compete for business from the government, organs of state and even private sector customers (who, in turn, may be required to adhere to certain B-BBEE requirements – for instance, by ensuring that their own procurement is sourced from suitably empowered suppliers).

v Whistle-blowing

Under the Protected Disclosures Act 26 of 2000 (PDA), employees who make certain disclosures of unlawful or irregular conduct by employers or fellow employees are protected against victimisation or any 'occupational detriment' (such as dismissal, demotion or harassment). Section 159 of the Companies Act, which is intended to complement the PDA, provides safeguards to company stakeholders, including shareholders, directors and employees, who make good faith disclosures of specific wrongful or unlawful acts of a company, director or prescribed officers. Whistle-blowers are immune from civil, criminal or administrative liability and have qualified privilege in relation to the disclosure.

V SHAREHOLDERS

i Shareholder rights and powers

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).

Shareholders have the ability to requisition a shareholders' meeting by delivering signed demands to the company, specifying the purpose for which the meeting is proposed. If the company receives, in aggregate, demands from holders of at least 10 per cent of the voting rights entitled to be exercised in relation to the matter proposed, it must call a meeting unless the company or another shareholder successfully applies to court to set aside the demand on the grounds that it seeks only to reconsider a matter that has already been decided by shareholders, or is frivolous or vexatious.

Any two shareholders of a company may propose that a resolution concerning any matter in respect of which they are each entitled to exercise voting rights (e.g., the removal of a director) be submitted to shareholders for consideration at the next shareholders' meeting, at a meeting demanded by shareholders or by written vote.

Although the board has wide-ranging statutory powers to manage company affairs,[30] it must defer to shareholders on certain prescribed matters requiring their approval, either by way of an ordinary resolution or special resolution (requiring a 75 per cent approval). Examples of matters requiring ordinary resolutions are the appointment and removal of

30 See Section II.i.

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directors, and entry into a Category 1 transaction (principally substantial acquisitions and disposals) under the Listings Requirements. Special resolutions are required for fundamental matters, such as amending the MOI or entering into a fundamental transaction (e.g., statutory mergers, schemes of arrangement, and disposals of all or a greater part of a company's assets or undertaking).[31] The Listings Requirements also specify matters that require special resolutions (e.g., the carrying-out of a general repurchase of securities).

The Companies Act contains a range of remedies and protective mechanisms for shareholders. The statutory derivative action contained in Section 165 enables a shareholder (among other stakeholders) to demand that the company bring or continue proceedings, or take related steps, to protect the legal interests of the company.[32] A company may apply to court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit.

In extreme cases, a shareholder may apply to court for an order necessary to protect any right of the shareholder, or rectify any harm done to the shareholder, by:

a the company owing to an act or omission that contravened the Companies Act, the MOI or the shareholder's rights; or

b any director of the company, to the extent that he or she is or may be liable for a breach of fiduciary duties.

Similarly, a shareholder may apply to court for appropriate relief if any act or omission of the company has had a result, or the powers of directors are being exercised in a manner, that is oppressive, unfairly prejudicial, or unfairly disregards the interests of that shareholder.

Having considered the application, the court may make any interim or final order it considers fit, including an order restraining the conduct complained of, ordering a compensation payment, or varying or setting aside an agreement or transaction.

Shareholders also have the right to bring a claim for damages against any other person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with the Companies Act.

Dissenting minority shareholders may, in certain prescribed circumstances (e.g., fundamental transactions), force the company to purchase its shares in cash at a price reflecting fair value.[33] This is a 'no fault' appraisal right that enables a shareholder to sell all its shares and exit the company.

If 15 per cent or more of shareholders vote against a resolution proposed for implementing a fundamental transaction, any dissenting shareholder may require the company, at its expense, to obtain court approval before implementing the resolution.[34] A single dissenting shareholder

31 In certain instances, the Companies Act and the Listings Requirements impose more stringent requirements for passing a special resolution. For instance, resolutions proposing fundamental transactions require that shareholder approval be obtained at a quorate meeting of 75 per cent of disinterested shareholders present and voting (i.e., excluding voting rights of the acquirer and related or concert parties). Similarly, in respect of JSE-listed companies undertaking related party transactions, the votes of related parties and their associates will not be taken into account in the approval of any resolution in connection with the related party transaction.

32 A trade union or employee representative may also bring a statutory derivative action to protect the company's legal interests.

33 Companies Act, at Section 164, provides for appraisal rights.

34 ibid., at Section 115.

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may also apply to court, at its expense, to have a resolution set aside. A court may only set aside the resolution if it is satisfied that there is manifest unfairness to shareholders or a material procedural irregularity.

ii Shareholder duties and responsibilities

Shareholders, be they controlling or otherwise, owe no fiduciary or statutory duties 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 a shareholder 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.

The Companies Act contains disclosure obligations affecting on-market or off-market stake-building by shareholders. Persons who acquire or dispose of a beneficial interest in securities, such that they hold or no longer hold 5 per cent or any further multiple of 5 per cent of the voting rights attaching to a particular class of securities, must notify the issuer within three business days thereof.[35] This applies irrespective of whether the acquisition or disposal was made directly, indirectly, individually or in concert with any other person, and options and other interests in securities must be taken into account.

Institutional investors, such as pension funds, mutual funds and insurers, may be required to engage in stewardship activities by virtue of obligations to responsibly manage their investments in JSE-listed companies – particularly insofar as sustainability and ESG factors are concerned. For example, pension funds in South Africa are obliged, before making an investment in and while invested in an asset, to consider any factor that may materially affect the sustainable long-term performance of the asset, including any of an ESG character.[36] A recent guidance note issued on this requirement by the Financial Sector Conduct Authority – the body responsible for enforcing the market conduct rules of financial institutions under the Financial Markets Act 19 of 2012 (FMA) – contemplates 'active ownership' by pension funds, being the prudent fulfilment 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 in respect of the asset when concerns have been identified.[37]

iii Shareholder activism

Shareholder activism has gradually been on the rise in South Africa. This trend can be attributed to numerous factors, including South Africa's regulatory and corporate governance framework, which creates an enabling environment for shareholder activism or

35 The issuer then has 48 hours to disclose the acquisition or disposal to the market and shareholders.

36 Pension Funds Act 24 of 1956, Regulation 28.

37 Financial Sector Conduct Authority, Guidance Notice 1 of 2019 (June 2019): Sustainability of investments and assets in the context of a retirement fund's investment policy statement.

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activist-like interventions.[38] In addition to the array of shareholder rights and protections under the Companies Act,[39] each iteration of the King Report has included ever-increasing recommendations regarding greater shareholder participation, thereby entrenching the position that shareholders have an active role in policing good governance.

Historically, most shareholder campaigns in South Africa have focused on executive compensation and board composition. On remuneration, following the introduction of 'say-on-pay' rules, certain JSE-listed companies have had to reconsider their remuneration policies following significant shareholder opposition to such policies or implementation reports. On board composition, campaigns have forced companies to take steps to change the make-up of their boards or pushed for the resignation of the CEO. A notable example of this was in 2014, involving PPC (a cement manufacturer), where activists sought to remove the entire board.[40]

In the merger and acquisition (M&A) context, the influence of shareholder activism is also gradually increasing. Shareholders have intervened to block or force M&A activity.

JSE-listed companies that are involved in or fund carbon-intensive industries are experiencing increased shareholder activism in respect of sustainability and ESG issues, from both institutional investors and non-governmental organisations (such as Just Share, the Raith Foundation and the Centre for Environmental Rights). Recent instances of this activism have sought to compel companies to:

a report on and disclose information on their assessment of greenhouse gas emissions attributable to their activities or portfolio;

b develop policies on the funding of carbon-emitting operations; and

c develop and disclose plans to protect shareholder value in the face of climate-related 'transition risks'.

Insofar as debates around 'short-termism' versus the creation of long-term shareholder value are concerned, the King Code encourages boards to avoid prioritising narrow, short-term objectives at the expense of the company's prospects for growth and profitability in the long term.

iv Takeover defences

Takeovers and 'affected transactions' (e.g., statutory mergers, schemes of arrangement and disposals of all or a greater part of a company's assets or undertaking) are regulated under Chapter V of the Companies Act and the Takeover Regulations promulgated under that Act. In the context of these types of transactions, the Takeover Regulation Panel (TRP) is

38 Other factors include: (1) the influence of shareholder activism in other jurisdictions, mainly the United States and Europe, (2) a widely held market with an internationalised shareholder base, and (3) a greater tendency towards active engagement by institutional and other investors, as facilitated by more efficient media platforms and other technological advancements that aid communication.

39 See Section V.i.

40 During 2014, a group of shareholders requisitioned a special shareholders' meeting to consider the removal of the entire board of PPC and to replace it with the nominees of the requisitioning shareholders. These measures successfully forced the board to engage with the requisitioning shareholders' concerns.

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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.[41]

The Companies Act contains a 'catch-all' rule that restricts 'frustrating action' in the context of an offer.[42] If the board of a regulated company has received a bona fide offer (or believes one may be imminent), it may not, without the approval of each of the TRP and the holders of the relevant securities,[43] take any action in relation to the affairs of the company that could effectively result in a bona fide offer being frustrated or the relevant securities holders being denied an opportunity to decide on the merits. Examples of 'frustrating action' under the Companies Act include:

a issuing or granting options in respect of unissued securities;
b disposing of or acquiring a material asset;
c making an abnormal distribution; and
d entering into contracts outside the ordinary course of business.

The rule against 'frustrating action', therefore, makes it difficult for a board to ward off a hostile bidder by adopting takeover defences, as are common in the United States, such as a shareholder rights plan (poison pill). However, there are various steps that the board could legitimately take, which would have the effect of creating hurdles in the implementation of the hostile bid, without necessarily constituting 'frustrating action' – for instance, mobilising opposition by key stakeholders with respect to the takeover.

v Contact with shareholders

Contact with shareholders is an important feature of corporate governance in South Africa. Shareholders regularly pursue one-on-one or collaborative engagement with listed companies on a range of issues. Good practice codes such as the United Nations-supported Principles for Responsible Investment (UN-PRI) and the Code for Responsible Investment in South Africa promote active ownership, responsible stewardship and collaborative engagement by institutional investors, particularly in respect of ESG issues.

The FMA includes rules prohibiting insider trading and market abuse. Shareholders must adhere to these provisions when engaging with management or pursuing stewardship activities, whether engaging with management one-on-one or collaboratively with other shareholders. A shareholder may become an 'insider' by becoming privy to inside information[44] for the purposes of the FMA, at which point insider trading rules would apply to it.[45]

41 The Takeover Regulation Panel (TRP) has the power to initiate or receive complaints, conduct investigations and issue compliance notices.

42 Companies Act, Section 126.

43 Unless such action was taken in terms of a pre-existing obligation/agreement.

44 The FMA defines 'inside information' as 'specific or precise information, which has not been made public and which – (1) is obtained or learned as an insider, and (2) 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'.

45 There are three broad categories of insider trading offences under the FMA: (1) dealing offences (e.g., when an insider, who knows he or she has inside information relating to listed securities, deals in those securities to benefit himself or herself or another person); (2) disclosure offences (e.g., when an insider knowingly discloses inside information); and (3) influencing offences (e.g., when an insider knowingly encourages another person to deal in listed securities likely to be affected by inside information).

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Collaborating shareholders should take into account 'acting in concert' rules under the Companies Act and Takeover Regulations.[46] As a general principle, provided the collaboration is not for the purpose of proposing or entering into an 'affected transaction' or offer, the collaboration would not amount to acting in concert. As such, there is considerable scope for shareholders to come up with collaborative engagement plans to conduct stewardship and other activities. We expect a significant amount of contact with shareholders in relation to ESG and sustainability issues going forward.[47]

The King Code promotes proactive shareholder engagement through a number of its recommendations. Among other things, the King Code recommends that the board encourage shareholders to attend the AGM, at which all directors should be available to respond to shareholders' queries. In line with the 'stakeholder inclusive' approach, the King Code recommends the adoption of comprehensive policies on stakeholder relationship management, and that engagement take place through media platforms designed to facilitate access by a broad range of stakeholders, such as websites, advertising and press releases.

VI OUTLOOK

The proliferation of high-profile corporate governance failures in South Africa – notably the 2017 saga involving alleged accounting irregularities at Steinhoff and those at various state-owned companies, described in the Zondo Commission of Inquiry into allegations of State Capture – has intensified public interest in, and regulatory scrutiny of, corporate governance. Listed companies that simply pay lip service to corporate governance, viewing compliance as a 'tick box' approach unconnected to the long-term viability of their businesses, will undoubtedly experience increased levels of activism and calls from shareholders for ever-greater levels of accountability and transparency from the companies in which they are invested.

We expect issues relating to diversity, remuneration, sustainability and ESG to feature high on the corporate governance agenda in the coming years, for boards and shareholders (particularly institutional investors) alike.[48] Noteworthy developments in this regard include the JSE's draft Sustainability and Climate Change Disclosure Guidance (mentioned above) and the recent publication of a revised draft Code for Responsible Investing in South Africa (CRISA 2.0), which seeks to guide institutional investors in developing and implementing sustainable, responsible and long-term investment strategies. The revised draft CRISA sets out principles and practice recommendations with a clear emphasis on ESG and broader sustainable development issues. It also proposes a shift from an 'apply or explain' to an

46 The Companies Act regards concert party conduct as any action pursuant to an agreement between or among two or more persons, in terms of which any of them cooperate for the purpose of entering into or proposing an affected transaction or offer.

47 In March 2010, the Principles for Responsible Investment (PRI) published guidance on this particular issue, following engagements between the PRI South Africa Network Engagement Working Group and the TRP, available at https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/58CA7BC8-8C67-4CF7-A644-0EDB06165C8B/2013.05.14_PRI_Collaborative_Engagement_Guidance.pdf.

48 See, for example, UN-PRI and United Nations Environment Programme Finance Initiative, Final Report: Fiduciary Duty in the 21st Century, available at www.unpri.org/download?ac=1378. See also www.unpri.org/fiduciary-duty/fiduciary-duty-in-the-21st-century/244.article. See also M Isa, 'Ignore sustainable investment at your own peril', *FinWeek*, 6 November 2019, available at www.fin24.com/Finweek/Investment/ignore-sustainable-investment- at-your-own-peril-20191105.

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outcomes-based 'apply and explain' application regime. Principle 1 of the revised draft CRISA contemplates: 'Investment arrangements and activities reflect a systematic approach to integration of sustainable finance practices, including the identification and consideration of materially relevant ESG and broader sustainable development considerations.' Principle 2 places a greater emphasis on the diligent discharge of stewardship activities: 'Investment arrangements and activities demonstrate the acceptance of ownership responsibilities (where applicable) and enable diligent discharge of stewardship duties through purposeful engagement and voting.'

The Companies Amendment Act, when it does come into force, will have an impact on aspects of corporate governance, and the development of the Companies Amendment Bill will be closely watched. In addition to the proposed changes already mentioned above, the Bill notes that government and Specialist Committee on Company Law is considering requirements for worker representation on company boards and the extension of directors' duties in favour of a multiplicity of stakeholders (as opposed to the present position of directors owing duties to the company), and suggests that these issues will be dealt with in a further Bill to be introduced later this year after appropriate consultation.

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Appendix 1

ABOUT THE AUTHORS

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Ezra Davids is chairman and senior partner of Bowmans. He specialises in M&A, capital markets and securities law.

Ezra is a member of the governing Council of the University of Cape Town. He is a member of the board of trustees of the Legal Resources Trust (a non-profit human rights organisation using the law as an instrument of justice); a director of Freedom Under Law (a non-profit organisation dedicated to the promotion of the rule of law in Southern Africa); and a patron of the Student Sponsorship Programme (a non-profit organisation that enables academically talented, low-income students to excel in South Africa's best high schools). He is also a former chairman of the Recent Developments in M&A Subcommittee of the Corporate and M&A Committee of the International Bar Association and is a regular contributor to international M&A and equity capital markets publications.

Ezra was recently named by the New York-based Global M&A Network as one of the Top 50 Global M&A Dealmakers, and South African Lawyer of the Year at the Chambers Africa Awards 2022. Ezra was the first practising African lawyer to be featured on the cover of *The American Lawyer*.

RYAN KITCAT

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Ryan Kitcat is a partner in the corporate services department at Bowmans, and a member of the mergers and acquisitions (M&A) practice area.

Ryan specialises in public and private M&A. He has advised JSE-listed and multinational clients on a variety of national and cross-border mandates. He has worked in particular in the energy and natural resources, education, mining, hospitality, telecoms and private security sectors. His expertise extends to takeovers, B-BBEE transactions, corporate reorganisations, corporate governance and shareholder activism.

In 2018, Ryan went on a *StrongerTogether* secondment to the London office of Freshfields Bruckhaus Deringer. In 2019, he completed the 'Impact Investing in Africa' course at the University of Cape Town Graduate School of Business.

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