THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

EIGHTH EDITION

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PREFACE

In the years since the financial crisis, shareholder activism has been on the rise around the world. Institutional shareholders are taking a broad range of actions to leverage their ownership position to influence public company behaviour. Activist investors often advocate for changes to the company, such as its corporate governance practices, financial decisions and strategic direction. Shareholder activism comes in many forms, from privately engaging in a dialogue with a company on certain issues, to waging a contest to replace members of a company's board of directors, to publicly agitating for a company to undergo a fundamental transaction.

Although the types of activists and forms of activism may vary, there is no question that shareholder activism is a prominent, and likely permanent, feature of the corporate landscape. Boards of directors, management and the markets are now more attuned to and prepared for shareholder activism, and engaging with investors is a priority for boards and management as a hallmark of basic good governance.

Shareholder activism is a global phenomenon that is effecting change to the corporate landscape and grabbing headlines around the world. Although shareholder activism is still most prevalent in North America, and particularly in the United States, activism campaigns directed at non-US companies now represent approximately half of global activism activity. This movement is being driven by, among other things, a search by hedge funds for diversified investment opportunities and a cultural shift towards increased shareholder engagement in Europe, Australia and Asia.

Boosted by record activity levels in the first quarter of 2022, global activism activity has returned to pre-pandemic levels despite continued market volatility and uncertain macroeconomic conditions. Looking forward, activism activity is generally expected to remain strong, particularly in Europe and Asia, and shareholder activists are expected to remain focused on environmental, social and political considerations and corporate governance as well as company operating performance.

As shareholder activists and the companies they target continue to be more geographically diverse, it is important for legal and corporate practitioners to understand the legal framework and emerging trends of shareholder activism in the various international jurisdictions facing activism. *The Shareholder Rights and Activism Review* is designed to be a primer on these aspects of shareholder activism in such jurisdictions.

My sincere thanks go to all of the authors who contributed their expertise, time and labour to this eighth edition of *The Shareholder Rights and Activism Review*. As shareholder activism continues to diversify and increase its global footprint, this review will continue to serve as an invaluable resource for legal and corporate practitioners worldwide.

Francis J Aquila
Sullivan & Cromwell LLP New York
August 2023

Chapter 12

SOUTH AFRICA

Ezra Davids and Ryan Kitcat[1]

I OVERVIEW

Historically, shareholder activism has not been prevalent in South Africa. However, in recent years, shareholder activism has gradually been on the rise in line with global trends, albeit from a relatively low base. This increase in shareholder activism can be attributed to a number of factors, including:

a the influence of shareholder activism in other jurisdictions, mainly the United States and Europe;
b a widely held market with an internationalised shareholder base – though it is declining of late;
c more active ownership and greater calls for accountability in boardrooms by institutional and other investors; and
d a regulatory and corporate governance framework that promotes and creates an enabling environment for shareholder activism or activist-like interventions.

Shareholder activism involves campaigns or proposals by one or more shareholders seeking to effect some change or reform within a company in relation to its business, governance, management or strategy, or in respect of a particular corporate action or fundamental transaction. Examples of activist proposals seen in South Africa include the following:

a reconstituting the board or replacing a CEO;
b influencing executive remuneration;
c revising corporate strategies;
d addressing operational performance issues;
e pursuing environmental, social and governance (ESG)-related agendas;
f making balance sheet proposals, such as returns of capital to shareholders through buy-backs or distributions;
g changing the capital structure or capital allocation strategy;
h monetising assets (e.g., by forcing divestitures or spin-offs); and
i facilitating or frustrating mergers and acquisitions (M&A).

1 Ezra Davids is chair and senior partner and Ryan Kitcat is a partner at Bowmans. The authors thank associate Godfree Sekgale for helpful research assistance.

II LEGAL AND REGULATORY FRAMEWORK

The primary sources of law and regulation relevant to shareholder rights and activism are the Companies Act 71 of 2008 (the Companies Act), Chapter 5 of the Companies Regulations 2011 (the Takeover Regulations), the Financial Markets Act 19 of 2012 (the Financial Markets Act) and common law.

Takeovers and 'affected transactions' such as statutory mergers, schemes of arrangement, and disposals of all or a greater part of a company's assets or undertaking are regulated under Chapter 5 of the Companies Act and the Takeover Regulations. 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 frustrate or defeat an offer or the making of fair and informed decisions by shareholders. The TRP has the power to initiate or receive complaints, conduct investigations and issue compliance notices.

The Financial Markets Act provides for the regulation of financial markets and prohibits insider trading and market abuse. The Financial Sector Conduct Authority (FSCA) is responsible for enforcing the Financial Markets Act.[2]

The Listings Requirements of the Johannesburg Stock Exchange (JSE), South Africa's primary exchange, apply to JSE-listed companies. The Listings Requirements regulate, among other things, the fair and equal treatment of shareholders, access to information, voting thresholds for certain corporate actions, and pre-emptive rights and related-party transactions. The King IV Report on Corporate Governance for South Africa 2016 (the King Code), issued by the Institute of Directors South Africa, contains various principles and recommendations intended to promote good corporate governance, many of which are relevant to shareholder rights and engagement. Certain principles in the King Code are incorporated into the Listings Requirements, making it mandatory for JSE-listed companies to comply with them, with the balance of the King Code's principles and recommendations to be implemented on an 'apply and explain' basis.

Additionally, certain other regulatory avenues, although not intended as a means for shareholder activism, indirectly create opportunities for shareholder intervention and engagement. For example, shareholders, acting alone or with other stakeholders, may use the 'public interest' considerations assessed by the competition (antitrust) authorities as part of the merger approval or clearance process as a means to delay or thwart a transaction.

Some of the legal and regulatory avenues for shareholder activism are set out below.

i Ability to influence shareholders' meetings and approvals

Shareholders are entitled to attend, speak at 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). Activists will often push their agendas at general meetings and in mainstream and social media.

2 In 2023, the FSCA reported that it had opened 481 investigations, of which 329 were ongoing, and that it had imposed a total of 153,864,300 South African rand in administrative penalties in 44 cases. See 'FSCA Press Release: Report by the FSCA on status of various investigations', dated 1 April 2022 – 31 March 2023, available at https://www.fsca.co.za/Documents/FSCA%20Regulatory%20Actions%20Report.pdf.

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.[3]

Corporate actions that require shareholder approval present opportunities for shareholder intervention. Generally, ordinary resolutions may be passed by a majority of more than 50 per cent, and special resolutions with a majority of at least 75 per cent, of the voting rights exercised on the resolution. Blocs of shareholders may therefore cooperate to block or pass resolutions. In particular, a minority shareholder or shareholders holding 25 per cent of the voting rights may block special resolutions (e.g., to approve a buy-back, an issue of securities or a fundamental transaction).

In certain instances, the Companies Act and the Listings Requirements impose special approval requirements. For example, resolutions proposing fundamental transactions (statutory mergers, schemes, certain business or asset disposals) require approval 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.

ii Access to company records and information

A shareholder can access certain company records to assist with activist proposals and seek the cooperation of other shareholders. Holders of beneficial interests in a company's securities have the right to inspect and copy the company's memorandum of incorporation (MOI),[4] securities register, register of directors, reports and minutes of annual meetings, and annual financial statements. If additional information is required for the exercise or protection of a right, a shareholder may be able to rely on the Promotion of Access to Information Act 2 of 2000, which was enacted to give effect to the constitutional right of access to information.

iii Dissenting shareholders

Dissenting shareholders may frustrate or, in limited circumstances, prevent the implementation of a proposed scheme, merger or sale of all or a greater part of the assets or undertaking. Despite shareholders having approved a special resolution in respect of such a transaction, a company may not implement it without the approval of a court if (1) the resolution was opposed by at least 15 per cent of the voting rights exercised on it, and any of the dissenting

3 Shareholders entitled to exercise at least 10 per cent of the voting rights may propose an amendment to a company's MOI.

4 This is the constitutional document of a company, which is binding among the company, its board and shareholders.

shareholders, within five business days of the vote, require the company to obtain court approval; or (2) any dissenting shareholder who voted against the resolution, within 10 business days of the vote, successfully applies to a court for a review of the resolution. A court may set aside the resolution only if it is satisfied that the resolution is manifestly unfair to a class of shareholders or the vote was materially tainted by a conflict of interest, inadequate disclosure, a failure to comply with the Companies Act or the company's MOI, or some material procedural irregularity.

iv Appraisal rights

In certain prescribed circumstances – including schemes, mergers or sales of all or a greater part of a company's assets or undertaking – a dissenting shareholder may force the company to purchase its shares in cash at a price reflecting the fair value of the shares.[5] This is a 'no fault' appraisal right that enables a shareholder to sell all of its shares and exit the company. It applies if (1) the shareholder notified the company of its objection to the resolution to approve the action or transaction and (2) the shareholder voted against the resolution (which was nonetheless approved) and complied with procedural requirements to demand that the company buy its shares for fair value. A recent High Court decision (described in Section IV) proposes a tentative definition of 'fair value' as 'the value a share would realise in an undistorted market, in the medium term, with free interaction between buyers and sellers with proper information, and without any exceptions being made for minority holdings or the effect of the corporate action which has led to the dissent'.

v Actions and remedies

In extreme cases, a shareholder may apply to court for an order necessary to protect any right of the shareholder or to rectify any harm done to the shareholder by (1) the company due to an act or omission that contravened the Companies Act, the MOI or the shareholder's rights; or (2) any director of the company, to the extent that he or she is or may be liable for a breach of fiduciary duties.[6]

Similarly, a shareholder may apply to court for appropriate relief if a company is being managed or an act or omission of the company or a director/s is oppressive or unfairly prejudicial or unfairly disregards the interests of that shareholder.[7]

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.

The Companies Act also introduced a statutory derivative action that 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.[8] A company may apply to court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit.

5 Section 164 of the Companies Act.

6 Section 161 of the Companies Act.

7 Section 163 of the Companies Act.

8 Section 164 of the Companies Act. Section 159 also provides whistle-blower protections for shareholders to make good faith disclosures of information to a relevant regulator where the shareholder reasonably believed at the time of disclosure that the company, director or prescribed officer had (1) contravened the Companies Act, (2) failed to comply with a statutory obligation, (3) engaged in conduct that endangered

vi Stakebuilding

Activists should carefully structure any on-market or off-market stakebuilding, taking into account the legal and regulatory obligations applicable to their particular circumstances.

Disclosure obligations require 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, to notify the issuer company within three business days of the acquisition.[9] 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.

If an acquisition takes the acquirer's beneficial interest in voting rights to 35 per cent or more (whether acting alone or in concert), the acquisition will trigger a mandatory offer to the remaining shareholders, unless a 'whitewash resolution' waiving the mandatory offer is approved by a majority of independent shareholders.

Where a stakebuilding involves two or more persons cooperating for the purposes of proposing an 'affected transaction' or offer, concert party rules in the Companies Act and the Takeover Regulations will apply. The latter also impose strict requirements in relation to dealings in securities before, during and after an offer period.

In addition to disclosure obligations, activists should be mindful of the insider trading offences and the broader framework regulating market abuse under the Financial Markets Act.[10]

vii Defences available to companies and directors' duties

While the Companies Act creates an enabling environment for shareholder activism, it also seeks to 'balance the rights and obligations of shareholders and directors within companies'.[11] As a general principle, it is the board that has primary legal responsibility for managing the business and affairs of the company. In doing so, the directors are subject to various fiduciary duties under the Companies Act and at common law, all of which flow from the overarching duty to act in the best interests of the company at all times. There is no list of factors that a director must consider when assessing what is in the best interests of the company. The Companies Act includes a statutory US-style business judgement rule, which affords directors some latitude and a degree of protection in responding to shareholder activism.

There are various defences available to boards and companies when faced with shareholder activism. Companies that have anticipated and prepared for activism and carried out strategic stakeholder engagements will be better placed to respond decisively and quickly to activist campaigns that may not be in the best interests of the company. In assessing an appropriate response to shareholder activism, a board needs to have regard to the interests of the company and its stakeholders writ large. In doing so, it will have to consider the short-, medium- and long-term interests of the company.

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or harmed an individual or the environment, (4) unfairly discriminated against a person or (5) contravened other legislation that could place the company at risk. These shareholders are immune from any civil, criminal or administrative liability, and the relevant shareholder has qualified privilege in relation to the disclosure made, which would encourage shareholder activists seeking to hold the board accountable for its conduct.

9 The issuer then has 48 hours to disclose the acquisition to the market and shareholders.

10 See Chapter X of the Financial Markets Act.

11 Section 7 of the Companies Act, which sets out the purposes of the Companies Act.

In a transactional context, the Companies Act contains a 'no frustrating action' rule that requires the board to refrain from taking any action with regard to the company that is directed at frustrating an offer or that could effectively result in a bona fide offer being frustrated or shareholders being denied an opportunity to decide on its merits.[12]

III KEY TRENDS IN SHAREHOLDER ACTIVISM

i Profile of activist investors

In broad terms, it is possible to distinguish between economic activists and governance activists. Economic activists in South Africa primarily comprise institutional investors (such as asset managers, collective investment schemes, hedge funds, insurers, and retirement and pension funds) whose activism is often event-driven and is generally directed at extracting greater shareholder value. Governance activists typically seek to influence board composition and company policy and to improve corporate governance.

Non-profits and non-governmental organisations such as Just Share, the Raith Foundation and the Centre for Environmental Rights have actively pursued ESG-related agendas. A number of prominent individual activists also regularly challenge companies on corporate governance, ESG and related issues.

Many institutional investors regard shareholder activism as integral to their investment strategies and will pursue both economic and governance activism. Examples of investors who have pursued both economic and governance activism include Allan Gray, Value Capital Partners and Foord Asset Management. The Public Investment Corporation, an investment management company owned by the South African government, which manages the assets of the Government Employees Pension Fund and other social security funds, holds significant stakes in a number of JSE-listed companies and exercises considerable influence as a shareholder, particularly in M&A contexts.

ii Companies targeted by activist investors

Activism in South Africa has not been restricted to any particular sectors or by company size or performance. There are many endogenous and exogenous factors that might render a company a more vulnerable target of an activist campaign.

iii Activist campaigns

The objectives of activists vary, and activists will use different tactics and strategies in pursuit of their objectives. Shareholder engagement is more often than not private, 'behind closed doors', but may play out in public.[13] Institutional investors are often very influential, particularly when acting collaboratively.

12 Section 126 of the Companies Act.

13 See Mans-Kemp, N and Van Zyl, M, 2021, 'Reflecting on the changing landscape of shareholder activism in South Africa', *South African Journal of Economic and Management Sciences* 24(1), a3711. https://doi.org/10.4102/sajems.v24i1.3711 (accessed 25 June 2021).

Historically, most 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.[14]

Regarding 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 noteworthy example of this was in 2014, when activists sought to remove the entire board of PPC, a cement manufacturer.[15]

Recent campaigns by Just Share, among others, have sought to have resolutions tabled at listed company annual general meetings (AGMs) that, if passed, would require the companies (particularly in the banking sector) to disclose or report to shareholders on climate risk, plans to address climate-related transition risks, assessments of greenhouse gas emissions in financing portfolios, and policies on lending to carbon-intensive activities and projects.

In the M&A context, shareholders may use their influence to try to block or force M&A activity. Recent examples of the former include shareholder opposition to a proposed takeover of PPC,[16] and Prudential's opposition to an attempted takeover of poultry producer Sovereign Foods by Country Bird Holdings.[17] An example of the latter is Grand Parade Investment's (GPI) disposal of its interests in certain franchises (described in Section IV).

Recent campaigns – for example, that against La Concorde (described in Section IV) – also demonstrate the potential for shareholders, in certain statutorily prescribed circumstances, to delay potential M&A transactions by requiring a company to obtain court approval before implementation or to exit their investments for fair value by exercising their appraisal rights.

14 In particular, the King Code contains recommendations relating to executive remuneration, including a 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. This remuneration policy and implementation report must be tabled annually for a separate non-binding advisory vote by shareholders at the company's AGM. If 25 per cent or more 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. Although the advisory vote given to shareholders is non-binding, this vote, coupled with increased disclosure, enables greater shareholder activism, in that it encourages the board to engage with shareholders, promotes transparency and provides shareholders with a platform to express their dissatisfaction.

15 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.

16 In 2018, PPC was the subject of a merger attempt by a consortium comprising its smaller rival AfriSam and a Canadian investment house, Fairfax Financial Holdings. This failed as a result of shareholder resistance to a perceived undervaluation of PPC. Following failure of the proposed transaction, activist shareholders pressed for the removal of the chair and reconstitution of the PPC board.

17 Chris Wood, 'Shareholder activism (2): Sovereign Foods: Defending against a hostile takeover', August 2018, available at https://prudential.co.za/insights/articlesreleases/shareholder-activism-2-sovereign-foods-defending-against-a-hostile-takeover.

iv Outcomes and the path to resolution

Recent campaigns relating to climate-related matters, particularly in the banking sector, demonstrate that activists can use a variety of different approaches to pursue the same ends, with varying degrees of success and a range of possible outcomes. Outcomes also depend to a large extent on the approach adopted by the company that is the target of an activist campaign: responses vary from summary dismissal to collaborative engagement to active opposition.

As noted above, shareholder activists who hold even nominal stakes in companies are afforded relatively strong rights and protections. Companies should focus on good corporate governance and proactively participate in appropriate levels of shareholder engagement, with particular focus on creating and unlocking shareholder value. This includes abiding by the disclosure and engagement recommendations of the King Code, particularly in the context of listed companies.

In preparing for increased shareholder activism in South Africa, companies should continually and carefully monitor their shareholder portfolios for activists, assess potential vulnerabilities, and anticipate and prepare for campaigns on a case-by-case basis. Boards and companies that can demonstrate value creation over time and adherence to principles of good governance, including careful stakeholder engagement and responsible corporate citizenship, are less likely to find themselves vulnerable to activism. They are also more likely to have anticipated and planned for activism and to be able to successfully communicate a well-articulated, carefully prepared and strategic response to particular instances of activism.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

i Arrowhead

A recent High Court judgment dealt with the question of determining fair value in the context of an exercise of appraisal rights.[18] A dissenting shareholder had given the respondent, Arrowhead, notice to pay it 'fair value' for its shares. Arrowhead offered 3.75 South African rand per share, which the dissenting shareholder rejected as not representing fair value. The dissenting shareholder then applied to the High Court under Section 164(14) and Section 164(15) of the Companies Act for a determination of the fair value of the shares.

Arrowhead argued that 3.75 rand represented fair value for the shares because it exceeded the market value of the shares on the day the relevant corporate action was approved (3.09 rand) and was based on the higher of two independent analysts' reports of the share. The applicant countered that net asset value should be used as Arrowhead is a property-holding real estate investment trust, and that fair value was 6.90 South African rand, based on Arrowhead's interim financial statements.

The High Court noted the absence of a definition of 'fair value' in the Companies Act and offered a tentative, and by no means definitive, definition in the context of the appraisal remedy:

> *Fair value is the value a share would realise in an undistorted market, in the medium term, with free interaction between buyers and sellers with proper information, and without any exceptions being made for minority holdings or the effect of the corporate action which has led to the dissent.*

18 *BNS Nominees (RF) (Proprietary) Limited and Another v. Arrowhead Properties Limited and Others* (19/39482) [2022] ZAGPJHC 848; 2023 (1) SA 478 (GJ) (25 October 2022).

The Court added that there was no single price that reflected fair value to the exclusion of others, stating that fair value may exist on a continuum of values, some higher, some lower, but none of them unfair, unless it could be shown that the departure was non-trivial and hence unfair. Moreover, a number of methodologies could be used to determine value, with no one method superior to others.

ii Capital Appreciation

In 2022, the Supreme Court of Appeal (SCA) held that a repurchase by a company of 5 per cent or more of its issued shares triggers the appraisal rights. In July 2019, Capital Appreciation completed a specific repurchase of shares in excess of the 5 per cent threshold in Section 48(8) of the Companies Act. Dissenting minority shareholders objected to the special resolution required to approve the share repurchase and exercised their appraisal rights in Section 164 of the Companies Act (described in Section II, above) to require Capital Appreciation to purchase their shares for fair value. Capital Appreciation made an offer of 0.8 rand per share to the dissenting shareholders, which the latter rejected. When the dissenting shareholders applied to the High Court for an order to determine the fair value of the shares, Capital Appreciation contended that they were not entitled to the appraisal rights. Capital Appreciation lost in the High Court and appealed to the SCA, which dismissed the appeal. The SCA essentially held that a share repurchase that is subject to Section 48(8) is a fundamental transaction that is subject to the requirements of Sections 114 and 115, which make provision for dissenting shareholders to enjoy the benefit of an appraisal right: the 'right of dissenting shareholders, who do not approve of certain triggering events, to opt out of the company by withdrawing the fair value of their shares in cash'.[19]

The Companies Amendment Bill 2021 proposes to delete Section 48(8) and replace it with a new section that does not refer to Sections 114 and 115 and therefore does not trigger any appraisal rights.

iii GPI

In 2018, GPI, a franchisee of Burger King, Dunkin' Donuts and Baskin-Robbins, was the subject of activism by a consortium of disgruntled minority shareholders.[20] The consortium requisitioned an extraordinary general meeting (EGM) to overhaul the board and appoint four of its own non-executive directors. It sent a letter to GPI detailing its grievances: doubts about the competency, skills and independence of the board; large bonuses paid to executive directors despite a collapsing share price and dwindling dividend; poor capital allocation decisions; and an exodus of key executives. After GPI failed to abide by a JSE directive ordering it to notify investors of the letter, the JSE issued the letter to shareholders directly.

An investor presentation preceded the EGM, during which GPI's interim CEO threatened 'war' against the activists, branding them 'short-termists' and 'usurpers'. At the EGM, the consortium gained sufficient shareholder support to appoint two of its preferred

19 *Capital Appreciation Ltd v. First National Nominees (Pty) Ltd and Others* (280 of 2021) [2022] ZASCA 85 (08 June 2022), available online at https://lawlibrary.org.za/za/judgment/supreme-court-appeal-south-africa/2022/85 (accessed 15 June 2022).

20 The consortium comprised Kagiso Asset Management, Denker Capital, Excelsia Capital, Westbrooke Alternative Asset Management and Rozendal Partners.

nominees to the board as non-executive directors. Days later, the CEO resigned, shortly before a vote on her appointment at the company's AGM, and shortly after Value Capital Partners, a turnaround specialist, acquired an influential stake in GPI.

In February 2019, GPI announced that it was exiting its interests in the Dunkin' Donuts and Baskin-Robbins franchises. The consortium had long pushed for GPI to exit the chains, given their track record of underperformance – since their launch in 2016, the South African outlets struggled to gain traction, incurring cumulative losses of over 96 million rand.[21]

iv La Concorde

In 2018, the High Court considered the issue of whether a dissenting shareholder in a holding company is entitled to exercise appraisal rights (mentioned above) in respect of a subsidiary's disposal of all or the greater part of its assets or undertaking.[22] Individual activist Albie Cilliers exercised his appraisal rights in respect of a sale of assets by a wholly owned subsidiary of La Concorde. After rejecting La Concorde's initial offer of 13.47 rand per share, Cilliers applied to court for a declaration that the valuation did not represent fair value. La Concorde countered by challenging Cilliers' entitlement to appraisal rights at all, arguing that Section 164 of the Companies Act granted such rights to shareholders of the disposing company only (i.e., the subsidiary, not the holding company).[23]

Notwithstanding that Cilliers did not hold shares in the subsidiary that was disposing of the assets, the High Court found in his favour, adopting a purposive approach to the appraisal right. The Court held that the appraisal right was introduced to protect minority shareholders, particularly where they are unable to effectively influence company direction or pursue private actions. To treat dissenting shareholders in a holding company any differently from those in a subsidiary, the Court reasoned, would undermine the objective of protecting minority shareholders. Correctly interpreted, the relevant provisions of the Companies Act gave appraisal rights to both sets of shareholders. Therefore, Cilliers, as a minority shareholder in the La Concorde holding company, was capable of exercising a shareholder appraisal right in relation to the subsidiary's disposal of assets.

21 *Business Insider*, 29 November 2018, Helena Wasserman, 'Amid a war over Burger King's South African owner, this investor says Dunkin' Donuts and Baskin-Robbins should be shut down', available at www.businessinsider.co.za/war-over-burger-king-may-claim-dunkin-donuts-2018-11; *Business Day*, 18 October 2018, Marc Hasenfuss, 'Hell hath no fury like Grand Parade's Hassen Adams', available at www.businesslive.co.za/fm/money-and-investing/2018-10-18-hell-hath-no-fury-like-grand-parades-hassen-adams; *Business Day*, 13 December 2018, Marc Hasenfuss, 'A revolving door of CEOs at Grand Parade', available at www.businesslive.co.za/fm/fm-fox/2018-12-13-a-grand-parade-of-revolving-ceos; and *Business Day*, 18 February 2019, Larry Claasen, 'Activist investors win as GPI closes Dunkin' Donuts and Baskin-Robbins in SA', available at www.businesslive.co.za/bd/companies/retail-and-consumer/2019-02-18-activist-investors-win-as-gpi-closes-dunkin-donuts-and-baskin-robbins-in-sa.

22 See *Cilliers v. La Concorde Holdings Ltd and Others* 2018 (6) SA 97 (WCC).

23 *Business Day*, 19 June 2017, Ann Crotty, 'Albie Cilliers steps up battle over KWV shares amid Vasari sale', available at www.businesslive.co.za/bd/companies/retail-and-consumer/2017-06-19-albie-cilliers-steps-up-battle-over-kwv-shares-amid-vasari-sale.

V REGULATORY DEVELOPMENTS

The fourth iteration of the King Code (King IV) adopts a qualitative, outcomes-based 'apply and explain' application and disclosure regime, in contrast with earlier iterations that imposed an 'apply or explain' regime. The King Code promotes a stakeholder-inclusive approach to corporate governance (as opposed to a shareholder-centric approach), which regards shareholders as an important subset of stakeholders who, by virtue of their rights as shareholders, are able to hold companies and their boards to account. The King Code therefore encourages active shareholder engagement through a number of its recommendations.[24] As such, it creates an opportunity for a framework for the responsibilities of shareholders, particularly institutional investors, to be incorporated in the corporate governance system of checks and balances.

Regulation 28 of the Pension Funds Act 1956 imposes a legal obligation on pension funds to, before making an investment in and while invested in an asset, consider any factor that may materially affect the sustainable long-term performance of the asset, including ESG factors. FSCA Guidance Notice 1 of 2019 recommends '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.

The Second Code for Responsible Investing in South Africa is a voluntary initiative that seeks to guide institutional investors in developing and implementing sustainable and long-term investment strategies, with an effective date for reporting of 1 February 2023. It sets out five principles supported by recommended practices and reporting statements, with a clear emphasis on integrating material ESG factors into investment activities. Principle 1 provides 'Investment arrangements and activities should reflect a systematic approach to integrating material ESG factors'. Principle 2 concerns stewardship: 'Investment arrangements and activities should demonstrate the acceptance of ownership rights and responsibilities diligently enabling effective stewardship.' Diligent stewardship incorporates shareholder activism and engagement.

The Companies Amendment Bill 2021 proposes changes to remuneration reporting and approval requirements for public and state-owned companies, which are designed to strengthen shareholder and stakeholder oversight of pay. The Bill contemplates a remuneration report that must comply with the prescribed format and content requirements and include a policy on remuneration of directors and prescribed officers. Notably, companies will be required to publish details of their highest-paid employee, their lowest-paid employee, their average remuneration, their median remuneration and the gap between the top 5 per cent highest-paid and the bottom 5 per cent lowest-paid employees.

The remuneration report must be approved by the board and approved by shareholders every year at the AGM by way of ordinary resolution. If the remuneration report is not

24 Among other things, the King Code recommends that the board encourage shareholders to attend general meetings and engage with shareholders through various means, such as websites, advertising and press releases. Certain parts of the King Code have been incorporated into legislation by reference. The King Code has recently been updated to introduce greater disclosure recommendations, including in respect of board committees (e.g., remuneration committees) and CEOs (e.g., in respect of notice periods, contractual conditions relating to termination and succession planning).

approved, the remuneration committee must, at the next AGM, present on how shareholder concerns have been addressed, and the non-executive directors that serve on the committee are required to stand down for re-election every year of such rejection.

The remuneration policy need be approved only every three years or where there are material changes. If the remuneration policy is not approved, special meetings may be called until it is approved. No changes may be implemented until it is approved.

VI OUTLOOK

Shareholder demands for greater levels of accountability, transparency and return on investment continue to rise steadily. A failure to engage with sophisticated activist shareholders, or provide them with the levels of transparency demanded, may leave the board exposed to shareholder disapproval sparked by shareholder activists who are armed with an increased amount of information and a variety of regulatory rights and protections.

Shareholders are becoming increasingly active on such matters as diversity, board composition, performance and tenure, executive remuneration policies, transparency and ESG issues. This is being driven in part by increasing civic action on high levels of inequality, climate change, ongoing debates about corporate purpose, and enhanced reporting and disclosure requirements.

Issues around sustainability and climate change are likely to generate increased shareholder activism going forward. In 2022, the JSE published Sustainability Disclosure Guidance and Climate Disclosure Guidance,[25] voluntary guidance for JSE-listed companies on sustainability and climate-related disclosure that draws on existing international frameworks while providing for South African context. In June 2023, the International Sustainability Standards Board issued global sustainability disclosure standards, International Financing Reporting Standards (IFRS) S1 and IFRS S2. These standards, if widely adopted, could have profound implications for companies, investors and markets. Enhanced corporate disclosures on these and other issues are likely to provide shareholder activists with new material to use in their campaigns, and the ability to compare and assess companies' performance over time.

We expect institutional investors – in particular, pension funds, mutual funds and insurers – to play an increasingly active and pivotal role in influencing corporate strategy and M&A with reference to sustainability and ESG factors.

Careful consideration of the above issues has become essential to corporate strategy and governance. Companies that pay inadequate attention to these issues are increasingly likely to become exposed to business, credit, market, reputational, legal and other risks, which could have a material adverse effect on their businesses over the medium to long term.

25 Available online at https://www.jse.co.za/our-business/sustainability/jses-sustainability-and-climate-disclosure-guidance (accessed 15 June 2022).