



Chartered  
Governance  
Institute of  
Southern Africa

Formerly Chartered Secretaries Southern Africa



**CGISA Best Practice Guide**  
**SHAREHOLDER ACTIVISM AND THE**  
**ROLE OF THE COMPANY SECRETARY**

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May 2020

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Published: May 2020  
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Southern Africa 2020  
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be reproduced, stored in a  
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*“Shareholder activism is not a privilege – it is a right and a responsibility. When we invest in a company, we own part of that company and we are partly responsible for how that company progresses. If we believe there is something going wrong with the company, then we, as shareholders, must become active and vocal” – Mark Mobius.<sup>1</sup>*

Shareholders are one of the key stakeholders of a company, and it goes without saying that their interest in the operations of the company, as a whole, are of paramount importance. Accountability, transparency and open disclosure with shareholders are key to maintaining good relations, and ultimately determine the long-term success and sustainability of a company. Saying the sum of all parts is greater than the whole, is never more relevant than when referring to shareholders. Though many shareholders have a significant interest in the finances of the company and how they are managed, environmental, social and governance interests have significantly increased. Questions on the ethical culture of a company, the manner in which the company is handling the issue of climate change, and governance issues including executive remuneration, are critical and form a significant part of shareholder activism.

The company secretary and governance professional, in many companies, play a key role in maintaining good relations with shareholders. Some companies have an investor relations officer that deals with shareholders. Though responsibility lies with the board, the company secretary often communicates and liaises with shareholders regarding decisions taken by the company. The company secretary co-ordinates shareholders' meetings and often maintains the shareholder registry. Given that the company secretary is at an arms-length relationship with the board, and is privy to all board decisions, the company secretary is well-positioned to communicate with shareholders.

This guide will look at shareholder activism in general and the regulatory landscape in which shareholder activism operates. The different forms of shareholder activism will be addressed with specific reference to the impact on corporate governance. The role of the company secretary and the governance professional will be discussed with reference to various examples of shareholder activism. Comparative trends in different jurisdictions will be highlighted. Opinions expressed by South African activists following interviews held with them will be included. These interviews focused on specific issues including the impact of shareholder activism on corporate behaviour, the rise of shareholder activism in South Africa and the role of the company secretary and the governance professional.

<sup>1</sup> <http://www.morefamousquotes.com/topics/quotes-about-shareholder-activism/>

All shareholders, whether in the minority or in the majority, share the common purpose of ensuring the success of the company. Some shareholders will have a greater interest in the financial performance of the company, yet some will focus more on ethics and ensuring that the company is a good corporate citizen. We can thus identify economic activists and governance activists.<sup>2</sup> Economic activists comprise mainly of institutional investors (including, asset managers, collective investment schemes, hedge funds, insurers, retirement and pension funds), whose activism is mainly directed at creating shareholder value.<sup>3</sup> Governance activists focus their attention on governance related issues. When these two principles of shareholder activism are successfully integrated, a full 360 degree view of effective shareholder activism begins to emerge.

A degree of autonomy is associated with all shareholders. However, it is important to note that shareholders are bound by certain legal provisions present in various statutes including the Companies Act 71 of 2008, as amended, (the Companies Act), the JSE listings requirements, and also corporate governance best practice as outlined in King IV™.

## 2.1 The Companies Act

Where directors act negligently, including where they do not act in the best interests of the company and its shareholders, they will face severe consequences. Shareholders are afforded several protections to help ensure that the value of their shareholding is maintained relative to other shareholders in the company. S39 of the Companies Act, dealing with preemptive rights, provides that each shareholder of a private company has a right before any other person who is not a shareholder of that company, to be offered and to subscribe for a percentage of the shares to be issued equal to the voting power of that shareholders general voting rights immediately before the offer was made, where the company is then compelled to make an offer to all of its voting shareholders pro rata to their respective percentages of the total number of voting rights, before it may issue any shares to a third party.<sup>4</sup>

Shareholders are entitled to attend, speak at and vote at a meeting, either themselves or via proxy. 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 demands from holders of at least 10% 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.<sup>5</sup>

Some decisions taken by the company require shareholder approval. In certain instances an ordinary resolution (50% plus one) will suffice and in others a special resolution (75% plus one) is required. Some matters that require ordinary resolutions include the following: removal of a director; ratification of resolutions of the board in contravention of the provisions of the Act regarding personal financial interest; approving rules by the board; and appointment of an auditor and approval of financials.<sup>6</sup> S65(11) of the Companies Act provides for the instances that require special resolutions and include amending the Memorandum of Incorporation (Mol); approving an issue of shares; authorising the board to grant financial assistance; approving any proposed fundamental transaction, among others listed. In addition to those listed in s65(11), the company's Mol may require a special resolution to approve any other matter.

Ordinarily, where the company has erred, action will be brought by the company itself and not by the shareholders. However, s165 of the Companies Act is an exception to this and allows statutory derivative action to be instituted against the wrongdoers by somebody acting on behalf of himself and all the shareholders, other than the wrongdoers.<sup>7</sup> S165 provides that the action may be used to protect the legal interests of the Company. The section does not specify the causes of action for which the derivative action can be used, but provides a wide description that allows use of the action to protect a wide range of legal interests.<sup>8</sup> A shareholder or a person entitled to be registered as a shareholder (and others listed in the section) is entitled, in terms of s165 to initiate proceedings.<sup>9</sup>

<sup>2</sup> <https://thelawreviews.co.uk/edition/the-shareholder-rights-and-activism-review-edition-4/1197511/south-africa>

<sup>3</sup> <https://thelawreviews.co.uk/edition/the-shareholder-rights-and-activism-review-edition-4/1197511/south-africa>

<sup>4</sup> S39 of the Companies Act.

<sup>5</sup> <http://financialregulationjournal.co.za/2020/02/13/the-legal-and-regulatory-framework-surrounding-shareholder-activism-in-south-africa/>

<sup>6</sup> <https://webcache.googleusercontent.com/search?q=cache:3ZsLHYDlBzAJ:https://www.ibanet.org/Document/Default.aspx%3FDocumentUid%3D4033152E-198A-415A-A634-63980BF13E4E+&cd=1&hl=en&ct=clnk&gl=za>

<sup>7</sup> <https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2010/derivative-action-in-south-africa.html>

<sup>8</sup> <https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2010/derivative-action-in-south-africa.html>

<sup>9</sup> <https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2010/derivative-action-in-south-africa.html>

## 2. Regulatory landscape of shareholder activism *(continued)*

As the custodian of derivative actions under s165, the courts play a vital role in the exercise of its discretion to grant or refuse permission to a minority shareholder to pursue derivative litigation on behalf of the company, when those in control of it improperly fail or refuse to do so.<sup>10</sup> A company may apply to court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit.<sup>11</sup>

### High court brings chartered accountant to book (Extract)

The high court found against Zwane in terms of parts one and three of the CIPC's application.

The judgment is significant because it clearly sets out that removal from an office of trust takes effect immediately. This means Zwane should not have been appointed a director from the point of delivery of the first judgment against him. The judgment sends out a strong message to state-owned enterprises (SOEs) that directors must understand their fiduciary duties and their responsibilities. In addition, the judgment reinforces the fact that appointees to SOE boards are rendering a public service: being on an SOE board is not merely a matter of accruing personal benefits and collecting fees. It was the first successful delinquency application against an SOE director. History shows that the majority of delinquency applications have been instituted against directors serving in the private sector. Mind you, s165 of the Companies Act empowers the shareholder representative of SOEs and registered unions, among other parties, to institute delinquency proceedings against directors whose conduct is unbecoming. However, the record shows that none of these parties has made use of this empowering provision, even though the environment is awash with instances that warrant invoking s165.



Source: <https://www.dailymaverick.co.za/opinionista/2019-08-26-high-court-brings-chartered-accountant-to-book/>

S163 of the Companies Act states that a director or a shareholder may apply to court for relief if:

- ▶ any act or omission of the company or a related person has had a result that is oppressive or unfairly prejudicial to or has unfairly disregarded the interests of the applicant;
- ▶ the business of the company or a related person is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to or that disregards the interests of the applicant; or
- ▶ where the powers of a director or prescribed officer of the company or a person related to the company are being or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the applicant.

The shareholder must evidence a lack of fair dealing on the part of the company or the majority, or a visible departure from the standards of fair dealing, or a violation of the conditions of fair play, or unfair discrimination against the minority in order to succeed in terms of s163.<sup>12</sup>

<sup>10</sup> [https://open.uct.ac.za/bitstream/handle/11427/12762/thesis\\_hum\\_2014\\_cassim\\_mf.pdf?sequence=1&isAllowed=y](https://open.uct.ac.za/bitstream/handle/11427/12762/thesis_hum_2014_cassim_mf.pdf?sequence=1&isAllowed=y)

<sup>11</sup> <http://financialregulationjournal.co.za/2020/02/13/the-legal-and-regulatory-framework-surrounding-shareholder-activism-in-south-africa/>

<sup>12</sup> <https://www.fdccentre.co.za/2017/05/11/shareholder-rights-companies-act/>

## 2. Regulatory landscape of shareholder activism *(continued)*

### ACSA: Time now to flush out this cannibalistic capitalism (Extract)

In July 2015 African Harvest Strategic Investments and Up-front Investments approached the courts, arguing that the offer made on its shares was grossly undervalued. And rightly so. In January 2016 the then-transport minister supported a buy-back limited at R22 per share. That compared to the shareholders' interest of R29.7 per share at the time. The offer represented a massive discount of 26% based on shareholders' interest in 2014/15 financial year. It would have been value-enhancing for the government to the tune of nearly R3.9 billion. Naturally, the minorities would not accept the offer as it was an insult. The important role of the shareholders' agreement and its inclusion in the company's memorandum of incorporation should never be ignored. From the application by African Harvest et al in 2015 it emerged that in terms of s163 (2) of the Companies Act, 71 of 2008, that the shareholders' agreement entailed that the one acquiring the others to be absolved, is directed to acquire the seller's shareholding of the issued share capital at fair value, to be settled in cash. In August 2017 the high court in Johannesburg granted African Harvest Strategic Investments (Pty) Ltd and Up-Front Investments 65 (Pty) Ltd a court order whereby a referee was to be appointed to value its shareholding in Airports Company South Africa SOC Limited, following which Airports Company South Africa was to buy back the shareholding at the value to be determined by the referee. Minorities and the company approved the appointment of joint valuator RisCura in September last year. The referee concluded its valuation on February 26, 2018. African Harvest Strategic Investments (Pty) Ltd and Upfront Investments 65 (Pty) Ltd have subsequently brought an application to make the valuation an Order of Court. The apparent value placed on a share was 7 800c per share. Acsa and its major shareholder, the South African government, opposed this application on the basis of it being fundamentally flawed, irrational and detrimental to other shareholders. The matter is to be heard in October 2019.



Source: <https://www.iol.co.za/business-report/opinion/acsa-time-now-to-flush-out-this-cannibalistic-capitalism-33480612> (Sep 23, 2019)

S164 provides for appraisal rights that allow dissenting minority shareholders, in the context of a scheme of arrangement, a merger or a sale of all or a greater part of the assets or undertaking of the target, to require the target company to purchase such dissenting shareholders' shares at fair value. These appraisal rights are available to dissenting shareholders that have objected to a resolution to approve such a transaction in advance of it being voted on, and that have voted against the resolution.<sup>13</sup> If 15% or more of the shareholders vote against a resolution proposed for implementing a scheme of arrangement, a merger or a sale of all or a greater part of the assets or undertaking of a target company, any dissenting shareholder may within five days of the resolution being passed require the company, at its expense, to obtain court approval before implementing the resolution. Even if less than 15% of the shareholders vote

against such resolution, a shareholder who can satisfy a court that there is a prima facie case for review, may within 10 days apply to court for a review of the resolution. Such shareholder should first have indicated prior to the meeting that it intended voting against such resolution and subsequently indeed voted against such resolution. A court may only set aside the resolution if it is satisfied that there is manifest unfairness to shareholders or a material procedural irregularity.<sup>14</sup>

Chapter 5 of the Companies Act Regulations, 2011 deals with takeover and "affected transactions" and states that the Takeover Regulation Panel (TRP) is mandated to ensure the integrity of the marketplace and fairness to securities holders. The TRP ensures, among other things, that shareholders have the same information from an offeror during the course of an

<sup>13</sup> <https://www.bowmanslaw.com/wp-content/uploads/2017/10/The-Shareholder-Rights-and-Activism-Review-South-Africa-Chapter.pdf>

<sup>14</sup> <https://www.bowmanslaw.com/wp-content/uploads/2017/10/The-Shareholder-Rights-and-Activism-Review-South-Africa-Chapter.pdf>

## 2. Regulatory landscape of shareholder activism *(continued)*

affected transaction and are afforded enough time to consider the information in order to make an informed decision.<sup>15</sup> The TRP has the power to initiate or receive complaints, conduct investigations and issue compliance notices.<sup>16</sup>

The listings requirements provide for the fair and equal treatment of shareholders, access to information, certain voting thresholds and pre-emptive rights.<sup>17</sup>

### 2.2 King IV™

The King IV™ Report on Corporate Governance promotes a stakeholder-inclusive approach to corporate governance, 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.<sup>18</sup> Shareholder activism and shareholder engagement are supported in the principles of King IV™ via recommendations. For example, King IV™ recommends that the board encourages shareholders to attend general meetings and engage with shareholders through various means such as websites, advertising and press releases.<sup>19</sup> Shareholders are increasingly demanding greater accountability and transparency from companies. Companies which choose to ignore shareholders face the risk of reputational damage as well as financial loss. Shareholders have access to many channels including social media to vent their frustrations with uncooperative and

unethical companies. Adequate disclosure and engagement with shareholders are critical in maintaining good relations with all shareholders, whether the minority or the majority.

King IV™ recommends that shareholders of companies be given the opportunity to pass non-binding advisory votes on the remuneration policy and its implementation report. The report states that “the remuneration policy should record the measures that the board commits to in the event that either the remuneration policy or the implementation report, or both, have been voted against by 25% or more of the voting rights exercised by shareholders”.<sup>20</sup> Mervyn King has stated that “if there were a significant number of shareholders who voted against directors’ remuneration, the board should go back and hold discussions with the dissenting shareholders and then disclose the nature of these engagements” and that “the overarching objective of King IV™ is to make corporate governance more accessible and relevant to a wider range of organisations, and to be the catalyst for a shift from a compliance-based mind-set to one which sees corporate governance as a lever for value creation”.<sup>21</sup>

Regarding director independence, King IV™ recommends that the independence of directors be reviewed after nine years. Where directors are not independent, their duty to act in the best interests of the company (and in the interest of shareholders) is compromised.

<sup>15</sup> <https://www.bowmanslaw.com/wp-content/uploads/2017/10/The-Shareholder-Rights-and-Activism-Review-South-Africa-Chapter.pdf>

<sup>16</sup> <http://financialregulationjournal.co.za/2020/02/13/the-legal-and-regulatory-framework-surrounding-shareholder-activism-in-south-africa/>

<sup>17</sup> <https://www.bowmanslaw.com/wp-content/uploads/2017/10/The-Shareholder-Rights-and-Activism-Review-South-Africa-Chapter.pdf>

<sup>18</sup> <https://thelawreviews.co.uk/edition/the-shareholder-rights-and-activism-review-edition-4/1197511/south-africa>

<sup>19</sup> <https://thelawreviews.co.uk/edition/the-shareholder-rights-and-activism-review-edition-4/1197511/south-africa>

<sup>20</sup> The King IV™ report.

<sup>21</sup> <https://www.fin24.com/Economy/king-iv-emphasises-accessible-governance-20161104>

## 2. Regulatory landscape of shareholder activism *(continued)*

### Comair comes under fire for corporate governance mess (Extract)

But in recent years, Comair has come under fire for the composition of its board, with some directors overstaying their welcome, which compromised their independence. At Comair's AGM in October 2019, Bidvest CEO and incoming Comair board chair, Lindsay Ralphs, faced tough questions from a minority shareholder, Danny Tuckwood, about the independence of long-serving board members. Bidvest, which is Comair's 27% shareholder, expressed concerns about the lack of independence among some Comair board members, Ralphs reportedly told shareholders at the AGM, promising a board shakeup. This has happened.

About the dangers of not having independent board members, Theo Botha, a shareholder activist at Proxy View, said: "once you have the same directors on the board for more than 15 years, they build strong relationships with each other. Once you have someone who has been there for a long time, they start to become a dominant role player on the board." Then a network of friends on the board is created, making it difficult for any new board member to ask tough questions and hold fellow board colleagues accountable about the company decisions they make. This was what probably happened at accounting fraud-hit Steinhoff and Tongaat Hulett. Botha said lax corporate governance standards, mainly King IV™, paves the way for directors to stay too long on boards. King IV™ requires the independence of directors to be reviewed after they serve for nine years by the company or externally by a governance expert. The findings of the expert can be ignored. A resolution was passed at Comair's AGM, whereby the company's MOI was changed, paving the way for a non-executive director – with more than nine years' service – to automatically stand for re-election every year. Botha believes after nine years, a director would lose their independence. "But we, as Proxy View, would say that after 15 years, which is a long time, a director should not be on the board. That would be a fair enough time for an individual to serve on a board.



Source: <https://www.dailymaverick.co.za/article/2020-01-16-comair-comes-under-fire-for-corporate-governance-mess/>



This section discusses some of the forms of shareholder activism that have seen an increase in South Africa and that have had an effect on the overall corporate governance success of South African companies. Of note, is that the most extreme form of shareholder activism, is where a shareholder simply divests. This could be the end result of a series of unsuccessful engagements with the company or extreme frustration or disappointment on the part of the shareholder in regard to the management, governance or performance of the company.

### 3.1 The non-binding advisory shareholder votes on remuneration

This is an area where shareholders have been most active. A number of remuneration resolutions have not found favour with shareholders. This is also an example of how the company secretary plays a pivotal role with shareholders in regard to the non-binding advisory shareholder vote on remuneration. King IV™ recommends that separate non-binding advisory shareholder votes be cast annually on the remuneration policy and implementation report of the company. The remuneration policy must disclose the

measures that the relevant company will commit to if either, or both, of these documents are voted against by 25% or more of the relevant voting rights. In listed companies where this is mandatory, the company secretary is often charged with managing and coordinating this process.

Listed companies are required to table the non-binding advisory shareholder votes on remuneration at their annual general meetings. The JSE also requires listed companies to engage with dissenting shareholders, and the manner and timing of such engagement must be disclosed. Though the manner of engagement is not defined in the JSE Listings Requirements, the company secretary will often be the central point of engagement between the shareholders and the company on this issue. Recent examples of such engagement have included:

- (i) invitations for written submissions by dissenting shareholders;
- (ii) invitations for meetings with dissenting shareholders; and
- (iii) e-conferences with dissenting shareholders.<sup>22</sup>

<sup>22</sup> <https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Corporate/corporate-and-commercial-alert-6-february-a-stronger-say-on-pay-for-south-africa-.html>

### 3. Forms of shareholder activism (continued)

#### Shareholders vote against Tongaat Hulett remuneration policy (Extract)

Tongaat Hulett shareholders have voted against a non-binding advisory resolution endorsing the company's remuneration policy at its Annual General Meeting. The AGM was held in Amanzimnyama, Tongaat, in KwaZulu-Natal earlier on Wednesday. In a note to investors, Tongaat Hulett said that only 40.64% of votes were in favour of the non-binding remuneration resolution; 59.36 were against it and 9.04% abstained.

The only other resolution that failed to achieve a 75% threshold of votes cast was a non-binding advisory vote endorsing the company's implementation report. The company said it would meet with shareholders who voted against the non-binding advisory votes to hear their views. The remuneration vote applied to Tongaat Hulett's remuneration report contained in the company's latest integrated annual report.

According to the report, the group's longtime CEO Peter Staude earned R10.1 million in the year ended 31 March 2018 – which included a cash package of R8.79 million and retirement and medical contributions of R1.3 million. Murray Munro, the group's Chief Financial Officer, earned a cash package of R5.19 million and retirement and medical contributions of R779 000, for a total of R5.97 million. Neither received a cash bonus, as they had in 2017.



Source: <https://www.fin24.com/Companies/Agribusiness/shareholders-vote-against-tongaat-hulett-remuneration-policy-20180808>

In February 2020, Nampak shareholders put the company's board under scrutiny over loss of value in the stock and the execution and size of capital expenditure and remuneration of directors.<sup>23</sup> Speaking at the annual general meeting (AGM), prominent South African shareholder activists, Theo Botha and Chris Logan, were critical of the company's performance and decisions, with Botha stating that "since the last AGM, shareholders have lost 70% of their investment (and) over five years the shareholders have lost 90% of their investment. Five years ago, we paid the chairman of the group R1.5 millions."<sup>24</sup> Logan also criticised Nampak's investment in capital projects. Between 2011 and 2019, the company had spent more than R11 billions on capital projects, he said. He accused the company of "misallocation" of money.<sup>25</sup>

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.<sup>26</sup> The remuneration committee of the company is responsible for setting its remuneration policy. The duties of the remuneration committee require measures to be taken that shareholders will understand and find meaningful in order to prevent undue shareholder activism.<sup>27</sup> Shareholders are also likely to compare the company's key performance measures against those of its competitors.<sup>28</sup> Committee members should also be able to effectively apply key performance measures to short- and long-term incentives.<sup>29</sup> The company secretary's role on this committee, apart from taking minutes and serving as the secretary for the committee, includes keeping the committee informed of all share transactions and shareholdings of all executive directors of the company.<sup>30</sup> Where shareholders vote against the remuneration policy, the company secretary is often involved in revising the remuneration policy.

<sup>23</sup> <https://www.businesslive.co.za/bd/companies/industrials/2020-02-11-shareholders-grill-nampak-at-agm/>

<sup>24</sup> <https://www.businesslive.co.za/bd/companies/industrials/2020-02-11-shareholders-grill-nampak-at-agm/>

<sup>25</sup> <https://www.businesslive.co.za/bd/companies/industrials/2020-02-11-shareholders-grill-nampak-at-agm/>

<sup>26</sup> <https://www.bowmanslaw.com/wp-content/uploads/2017/10/The-Shareholder-Rights-and-Activism-Review-South-Africa-Chapter.pdf>

<sup>27</sup> <https://insights.diligent.com/compensation-committee/role-of-the-remuneration-committee-in-corporate-governance>

<sup>28</sup> <https://insights.diligent.com/compensation-committee/role-of-the-remuneration-committee-in-corporate-governance>

<sup>29</sup> <https://insights.diligent.com/compensation-committee/role-of-the-remuneration-committee-in-corporate-governance>

<sup>30</sup> <https://www.wbho.co.za/downloads/governance/WBHO-20-Remuneration-Committee-Charter.pdf>

### 3. Forms of shareholder activism (continued)

It is also in times of crisis that executive remuneration comes into the spotlight. This has been the case with the Covid-19 pandemic that has engulfed the globe. Many executives have taken a pay-cut to ensure that all staff can continue to receive their remuneration. Mr Price had announced on 26 March 2020 that “annual salary increases for head office associates have been delayed until further notice” and that its “executive management and board of directors have committed to a cut in salaries and fees.”<sup>31</sup> Woolworths announced on 6 April 2020 that senior executives had decided to forego up to 30% of their fees and salaries for three months until the end of June.<sup>32</sup> On 8 April 2020 Sappi announced that “the board of directors and the group and regional leadership teams... have volunteered a 10% reduction in salaries or fees for the three months ending June 2020”, and that “the leadership teams will receive no short-term incentive bonuses for 2020 financial year”.<sup>33</sup> Tracey Davies, director of shareholder activist NGO Just Share, stated that “this rush of salary “sacrifices” by extraordinarily highly paid executives should focus our minds on how to permanently change the system that supports such extreme wage inequality, a system that desperately needed reform long before the onset of the coronavirus.”<sup>34</sup>

#### 3.2 Climate change

Climate change has become a critical issue for many shareholders, who are demanding greater disclosure by companies on efforts undertaken to combat the potential risks to climate and the environment as a whole. One of the ways in which a company discloses this to shareholders is via the integrated annual report. In many companies, the company secretary is actively involved in the preparation of the integrated annual report and as such, the company secretary must ensure that climate change is discussed at board level and that adequate disclosure is made in the company's integrated annual report on this issue. A failure to do so can be catastrophic for the company and can lead to a tarnished reputation and a loss of investment.

Companies must show what risks to the climate are present and what mitigation measures are in place to safeguard against such risks. Shareholders have great influence in the corporate environment and are able to incite action through various mediums, including engaging in dialogue with the management team of the companies or filing resolutions to be voted at the shareholders' AGM.<sup>35</sup> Companies that disclose climate risk information following environmental shareholder activism achieve a higher valuation post disclosure. This suggests that shareholders value the voluntary disclosure of climate risk information.<sup>36</sup> Active shareholders can generate greater climate risk disclosure, thereby improving the governance of their portfolio companies.<sup>37</sup>

At its AGM in 2018, the Sasol board was criticised for its lack of climate change disclosure. With the board trying to limit the number of questions asked, retired judge Kathy Satchwell, who was in attendance at the AGM, expressed her dissatisfaction and stated that “this is the one opportunity in the year for shareholders to ask questions and you are limiting the number of questions.”<sup>38</sup> Tracey Davies, who was also in attendance, added that “Sasol is a major greenhouse gas (GHG) emitter. “After Eskom, Sasol is South Africa's biggest GHG emitter,” she said. “In 2018, Sasol's total GHG emissions were over 67 megatons, more than the combined GHG emissions of the next 30 biggest emitters on the JSE that publicly disclose their carbon emissions. Sasol is therefore significantly exposed to climate transition and liability risks.”<sup>39</sup> In terms of Sasol's 2018 integrated annual report, Davies stated that “it only mentions climate change in the context of other environmental sustainability risks and talks vaguely about improved disclosure. These reports do not mention that all credible modelling shows that Sasol's Secunda plant must be decommissioned long before 2050 if South Africa is to meet its climate commitments, and that Secunda is therefore at serious risk of becoming a stranded asset.”<sup>40</sup>

<sup>31</sup> <https://allafrica.com/stories/202004160441.html>

<sup>32</sup> <https://allafrica.com/stories/202004160441.html>

<sup>33</sup> <https://allafrica.com/stories/202004160441.html>

<sup>34</sup> <https://allafrica.com/stories/202004160441.html>

<sup>35</sup> <http://www.lccge.bbk.ac.uk/publications-and-resources/docs/Andrea-Marandino.pdf>

<sup>36</sup> <https://www.unpri.org/pri-blog/shareholder-activism-and-firms-disclosure-of-their-exposure-to-climate-change-risks/5142.article>

<sup>37</sup> <https://www.unpri.org/pri-blog/shareholder-activism-and-firms-disclosure-of-their-exposure-to-climate-change-risks/5142.article>

<sup>38</sup> <http://www.writersroom.co.za/judge-kathy-satchwell-interrupts-sasol-board-lunch/>

<sup>39</sup> <http://www.writersroom.co.za/judge-kathy-satchwell-interrupts-sasol-board-lunch/>

<sup>40</sup> <http://www.writersroom.co.za/judge-kathy-satchwell-interrupts-sasol-board-lunch/>

### 3. Forms of shareholder activism *(continued)*

#### Investec ups climate investment, clarity as pressure grows (Extract)

Investec is increasing its focus on environmental, social and governance issues to bolster its profit and address concerns raised by investors over climate change.

South African companies are coming under increasing pressure from shareholders to improve their disclosure around greenhouse gas emissions. While the country has some of the world's worst air pollution, many businesses have paid more attention to addressing issues of inequality and racial and gender diversity, because of the nation's history of racial segregation.

Last year, FirstRand, Africa's biggest bank by market value, committed to disclosing its fossil fuel-related assets. Standard Bank, the second-biggest bank by market capitalisation, had earlier in 2019 agreed to table climate risk-related resolutions at its annual general meeting. Sasol, a company that makes fuel and chemicals out of coal, refused.

Nedbank, another South African bank, has had a carbon-neutral footprint on its own operations since 2010. Investec doesn't yet disclose its fossil-fuel lending exposure while Nedbank does. South Africa's three biggest banks – Standard, FirstRand and Absa – do not.

"We have numbers internally that show we have substantially less exposure than most of our international peers," said Titi, one of 30 global CEOs to sit on the Global Investors for Sustainable Development Alliance, a group convened by the United Nations to advise on financing sustainable development.

#### 'Not enough'

"It's great that Investec is committing to taking climate action in the context of its own direct operational footprint," said Tracey Davies, director of Cape Town-based shareholder activist organisation Just Share. "Until we can see how much money banks are lending to fossil fuels, and what their plans are to end that financing, operational carbon reduction commitments will not be enough to convince stakeholders that these companies are taking climate risk seriously."



Source: <https://www.fin24.com/Companies/Financial-Services/investec-ups-climate-investment-clarity-as-pressure-grows-20200212>

### 3. Forms of shareholder activism (continued)

#### Standard Bank says it is not legally obliged to have voting on proposed climate resolutions (Extract)

Standard Bank has decided to not table proposed climate change risk resolutions for voting by shareholders at its annual general meeting (AGM) in May, following pressure from non-profit shareholder activism organisations Just Share and Raith Foundation to do so.

Just Share executive director Tracey Davies believes the bank's climate change resolutions acknowledge the material financial risks posed by climate change and says the bank has improved its disclosure and management of those risks, but that there are still significant gaps in the disclosure. She adds that there is also a lack of alignment between the bank's recognition of climate risks and its actions to mitigate these risks. The co-filers of the resolution had asked Standard Bank to provide them with the legal basis for their view on not tabling their climate change resolutions for shareholder voting.

In response, Standard Bank says Just Share's proposed resolutions do not meet the requirements of Section 65 of the Companies Act and that the bank is, therefore, not required to table the resolutions at its AGM. The bank motivates that the proposed resolutions do not relate to matters on which shareholders are entitled to vote.



Source: [https://www.engineeringnews.co.za/article/standard-bank-says-it-is-not-legally-obliged-to-have-voting-on-proposed-climate-resolutions-2020-04-16/rep\\_id:4136](https://www.engineeringnews.co.za/article/standard-bank-says-it-is-not-legally-obliged-to-have-voting-on-proposed-climate-resolutions-2020-04-16/rep_id:4136)

In its recognition of the importance of climate change, Absa Bank in April 2020 published an updated sustainability policy and standard for financing coal.<sup>41</sup> Absa CEO, Daniel Mminele, stated that "as a leading African bank, we recognise the impact of climate change and believe that we can play a shaping role in enabling sustainable economic and social development for the societies in which we operate. Through this policy and standard, and by working together with our customers, we will continue to integrate sustainability into our strategy and operations to drive positive change."<sup>42</sup>

#### 3.3 Board performance and composition

The company secretary contributes to the effectiveness and performance of the board. Board evaluations are either conducted by the company secretary or by an external service provider. A board evaluation may lead to the identification of areas that require improvement so that the board can function at its best. The company secretary may compile the questions to be asked, and draft a comprehensive set of responses.

Where the evaluation is not conducted effectively by the company secretary or the external service provider, inadequate attention may then be given to critical issues that could lead to shareholder activism. Areas for improvement that can arise, and that shareholders have an active interest in, include, board performance, board composition, board diversity and strong and ethical leadership.

With regard to board diversity, it has been stated that shareholders can contribute to diversity in a number of ways. These may include, voting in favour of the appointment or re-appointment of female director nominees, by filing shareholder resolutions in which they propose their own female candidates and by engaging in private with nomination committees on the eligibility of certain candidates.<sup>43</sup> The Broad-Based Black Economic Empowerment Act contributes to the participation of women of colour at board level.<sup>44</sup> Listed companies are expected to report on their B-BBEE compliance on an annual basis.<sup>45</sup>

<sup>41</sup> [https://www.engineeringnews.co.za/article/absa-imposes-strict-new-coal-project-financing-criteria-2020-04-16/rep\\_id:4136](https://www.engineeringnews.co.za/article/absa-imposes-strict-new-coal-project-financing-criteria-2020-04-16/rep_id:4136)

<sup>42</sup> [https://www.engineeringnews.co.za/article/absa-imposes-strict-new-coal-project-financing-criteria-2020-04-16/rep\\_id:4136](https://www.engineeringnews.co.za/article/absa-imposes-strict-new-coal-project-financing-criteria-2020-04-16/rep_id:4136)

<sup>43</sup> <https://actacommercii.co.za/index.php/acta/article/view/489/728>

<sup>44</sup> [https://www.researchgate.net/publication/319651709\\_Mechanisms\\_to\\_promote\\_board\\_gender\\_diversity\\_in\\_South\\_Africa](https://www.researchgate.net/publication/319651709_Mechanisms_to_promote_board_gender_diversity_in_South_Africa)

<sup>45</sup> [https://www.researchgate.net/publication/319651709\\_Mechanisms\\_to\\_promote\\_board\\_gender\\_diversity\\_in\\_South\\_Africa](https://www.researchgate.net/publication/319651709_Mechanisms_to_promote_board_gender_diversity_in_South_Africa)

### 3. Forms of shareholder activism (continued)

At Remgro's AGM in 2019, All Weather Capital chief investment officer Shane Watkins urged chair Johann Rupert to take the necessary steps to address the performance of Remgro operating subsidiary RCL Foods' performance, which he described as a "catastrophic disappointment".<sup>46</sup> As a result of underperformance, shareholders of RCL believe that there is no justifiable reason for bonuses to be paid, with Theo Botha stating that South African companies have to stop bailing out their executives, adding that "it sends out the wrong message, especially in these times."<sup>47</sup>

In 2019, shareholders of Google together with employees, wrote a resolution to the board calling for reform in areas including racial and gender diversity, and asking the board to consider tying these metrics to executive bonuses.<sup>48</sup> "The tech diversity crisis threatens worker safety, talent retention, product development, and customer service," the shareholder resolution stated. It also criticised the treatment of contract staff and asked the company to address the displacement of poorer residents where it buys real estate.<sup>49</sup> "We believe executives are out to lunch on several key social risks facing the company," said Pat Tomaino, director of socially responsible investing for Zevin Asset Management, who collaborated with the employees. His firm is the lead filer of the shareholder proposal.<sup>50</sup> Talking to employees and community activists and following headlines about Google, he said, "it's a picture of unmanaged risk."<sup>51</sup>

#### Apple shareholders are demanding more diversity, but the company is fighting back (Extract)

Silicon Valley has a long way to go on diversity, but most tech companies would argue that they're making progress. Apple also claims to have removed pay disparities and has made slight gains on hiring women and people of color. It's even launched an "Inclusion & Diversity" page with visualisations of its hiring data. But a small group of Apple investors believe the company isn't making progress fast enough, and they're trying to force the company to pick up the pace. "Some of the excuses given by Apple and others - there's not sufficient people in the pipeline, this and that," says investor Tony Maldonado. Maldonado is leading an effort to mandate that Apple accelerate its work toward becoming a more diverse company. For the second year in a row, he's submitted a shareholder proposal asking that Apple "adopt an accelerated recruitment policy to increase the diversity of senior management and its board of directors."

If approved, Apple would have to prioritize diversity at the top levels of its organization. How exactly it accomplishes that, and on what timeline, would be entirely up to Apple — but it'd have to do something. Maldonado says that could include tying executive pay to diversity goals, as Intel and Microsoft have done, or adopting a board refreshment policy, requiring the company to regularly explore potential new board members from diverse backgrounds.



Source: <https://www.theverge.com/2017/2/15/14614740/apple-shareholder-diversity-proposal-opposition>

<sup>46</sup> <https://www.moneyweb.co.za/news/companies-and-deals/underperforming-rcl-execs-in-line-for-generous-payout/>

<sup>47</sup> <https://www.moneyweb.co.za/news/companies-and-deals/underperforming-rcl-execs-in-line-for-generous-payout/>

<sup>48</sup> <https://www.fin24.com/Companies/ICT/google-shareholders-call-on-board-to-fix-diversity-crisis-20190130>

<sup>49</sup> <https://www.fin24.com/Companies/ICT/google-shareholders-call-on-board-to-fix-diversity-crisis-20190130>

<sup>50</sup> <https://www.fin24.com/Companies/ICT/google-shareholders-call-on-board-to-fix-diversity-crisis-20190130>

<sup>51</sup> <https://www.fin24.com/Companies/ICT/google-shareholders-call-on-board-to-fix-diversity-crisis-20190130>

### 3. Forms of shareholder activism (continued)

#### Ethical leadership is key to better corporate governance (Extract)

Corruption and poor ethics are often associated with the public sector. Unethical behaviour by business damages not only a company's health but also public virtues. Reputational capital is difficult to repair once it has been damaged. One of the reasons why many corporates that still behave badly, with leaders that don't take ethics seriously, is that sometimes shareholders and boards place singular emphasis on competence and quantitative results at the expense of good behaviour. There are leaders who are competent technically, who get the job done, and show good quantitative results, yet are found wanting when it comes to ethics. Hardly a year after the Steinhoff scandal, the sugar behemoth Tongaat Hulett announced that it would have to restate its 2018 financials owing to an inexplicable accounting hole. The same auditing firm, Deloitte, had signed off on these financials. The main issue here was that the previous financial statements had inflated the company's earnings by about R4.5 billions, essentially deceiving shareholders and the public.

Companies engage in this deception to avoid shareholder scrutiny that is occasioned by decline in earnings, and which often negatively impacts the company's share price. The thrust of shareholder capitalism is a singular focus on the metrics of maximising shareholder value above all else.

It is assumed that the managers exercising stewardship over companies are competent and capable of delivering value to shareholders. Companies hardly place any ethical test other than the perceived reputation of its executives or board members. When management fails to produce the expected results, they use all manner of trickery to hide their incompetence or the fact that they are not all-knowing. When profitability declines and the managers' magic potion proves to be nothing more than ephemeral luck, they get embarrassed. The incentive structure of corporates is tied to profitability rather than a set of values or a maximisation of broader stakeholder outcomes. Given the structure of incentives, it should not be surprising that a singular focus on shareholder value is bound to lead to a dark alley. Accounting firms that should uphold high ethical standards have done their fair share in eroding corporate governance. They are positioned to play a powerful assurance role, which they abuse. Despite various governance regulations, such as the King codes of corporate governance (King IV™), international financial reporting standards (IFRS), and the Companies Act, ethical behaviour in corporates does not seem to improve. Ethical leadership is key to good governance. This is more of an internal imperative and has to be wired into the normative make-up and organisational culture in companies. Responsible corporate citizenship, which assumes inter-dependence between corporates and citizens, imposes responsibility on corporates to act in ways that reinforce society's ethical standards.



Source: <https://www.businesslive.co.za/bd/opinion/2019-10-31-ethical-leadership-is-key-to-better-corporate-governance/>

In terms of board composition, one of the most well-known examples of shareholder activism unfolded at PPC Limited (PPC), the largest cement company in South Africa, where during 2014 a group of shareholders called 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.<sup>52</sup> The board had refused to back the decision of the then chief executive officer to dismiss PPC's chief financial officer. The chief financial officer had been appointed by and reported to the board.<sup>53</sup> Certain minority shareholders of PPC collectively met the minimum threshold required to force a special shareholders' meeting in terms of the Companies Act and called a meeting of the shareholders for 8 December 2014.<sup>54</sup> The aim of the meeting was to remove the existing board by a majority vote of the shareholders and then appoint new directors.<sup>55</sup> In the interim, the board, mindful of key corporate governance principles and

<sup>52</sup> <https://www.bowmanslaw.com/wp-content/uploads/2017/10/The-Shareholder-Rights-and-Activism-Review-South-Africa-Chapter.pdf>

<sup>53</sup> <https://www.bowmanslaw.com/wp-content/uploads/2017/10/The-Shareholder-Rights-and-Activism-Review-South-Africa-Chapter.pdf>

<sup>54</sup> <https://www.bowmanslaw.com/wp-content/uploads/2017/10/The-Shareholder-Rights-and-Activism-Review-South-Africa-Chapter.pdf>

<sup>55</sup> <https://www.bowmanslaw.com/wp-content/uploads/2017/10/The-Shareholder-Rights-and-Activism-Review-South-Africa-Chapter.pdf>

### 3. Forms of shareholder activism (continued)

led by the acting executive chairman, engaged with a number of shareholders, including the requisitioning shareholders, and decided to embark on the process of reconstituting the board at the next annual general meeting, thus cancelling the meeting called by the requisitioning shareholders.<sup>56</sup>

The Covid-19 pandemic will have long lasting effects on environmental, social and corporate governance practices adopted by companies. The discussion on environmental and social issues will be adjusted to take into account the impact of the crisis and there will be an increased focus on topics such as human capital, supply chain, remuneration, work environment etc.<sup>57</sup> The Covid-19 crisis is likely to increase pressure on companies to improve their resilience and sustainability and take meaningful actions to minimise the effects of the transition.<sup>58</sup> Whilst management is responsible for navigating the operations of the company during Covid-19, issues like board expertise and director time commitment are likely to gain more attention even after the Covid-19 crisis.<sup>59</sup>

#### 3.4 Resolutions

The company secretary is responsible for drafting all resolutions. This includes proposed resolutions to be voted

upon by shareholders at the AGM. Many company secretaries have started to include reasons behind the proposed resolutions in the AGM notice. This shows a greater level of transparency and disclosure and enables shareholders to fully understand the proposed resolutions. In some cases, the proposed resolutions are sent to shareholders for comment in advance of being included in the notice of AGM. However, only minor changes can be made if the AGM notice has already gone out. This prevents embarrassment to the company at the meeting and also prevents shareholders having to wait another year for revised resolutions to be passed.<sup>60</sup> The company secretary would facilitate discussions between shareholders and the board and would communicate the outcome to shareholders. An example of where resolutions were withdrawn was in the case of Steinhoff, where resolutions in favour of additional payments to board members were withdrawn in advance due to shareholder engagement before the event.<sup>61</sup> Company secretaries must ensure that all proposed resolutions, and the implications thereof if passed, are fully understood by the board before having shareholders vote on them.

#### Clarkson Withdraws Dividend Proposal from AGM on Covid-19 Uncertainty (Extract)

Clarkson PLC on Friday said it has withdrawn its annual general meeting resolution proposing a final dividend and is deferring a dividend decision until it better understands the impact of Covid-19 on its business. Shares in Clarkson were down 1.4% at 2,239.25 pence in London in morning trading. The integrated shipping services firm said it is deferring its decision on the amount and timing of the dividend "until later in the year once the impact of Covid-19 on maritime markets and Clarksons' business becomes clearer". Clarkson said it still believes the outlook for shipping markets is favourable in the medium-term, given improving dynamics in terms of supply and demand as well as regulatory changes. However, the company's performance in the first half of 2020 will "inevitably" be hurt by Covid-19. "Currently the Broking division continues to trade effectively across all market verticals, Research continues to provide valuable insights and much needed data and analytics to clients, Financial is currently experiencing challenges from a lack of primary activity due to the extensive impact on financial markets, and Support is continuing servicing its extensive customer base through their short-term operational challenges," Clarkson said.



Source: [https://www.morningstar.co.uk/uk/news/AN\\_1585303430635717900/clarkson-withdraws-dividend-proposal-from-agm-on-Covid-19-uncertainty.aspx-2020-03-27](https://www.morningstar.co.uk/uk/news/AN_1585303430635717900/clarkson-withdraws-dividend-proposal-from-agm-on-Covid-19-uncertainty.aspx-2020-03-27)

<sup>56</sup> <https://www.bowmanslaw.com/wp-content/uploads/2017/10/The-Shareholder-Rights-and-Activism-Review-South-Africa-Chapter.pdf>

<sup>57</sup> <https://boardagenda.com/2020/04/20/will-Covid-19-accelerate-the-shift-towards-stakeholder-governance/>

<sup>58</sup> <https://boardagenda.com/2020/04/20/will-Covid-19-accelerate-the-shift-towards-stakeholder-governance/>

<sup>59</sup> <https://boardagenda.com/2020/04/20/will-Covid-19-accelerate-the-shift-towards-stakeholder-governance/>

<sup>60</sup> <https://1of1privatecollection.co.za/investments/sa-companies-feeling-the-force-of-shareholder-activism/>

<sup>61</sup> <https://1of1privatecollection.co.za/investments/sa-companies-feeling-the-force-of-shareholder-activism/>



### 3. Forms of shareholder activism (continued)

An example of where a lack of detail led to shareholders voting against a proposed resolution was evident in the case of Rebois, where more than 73% of ordinary shareholders voted against the implementation report and an overwhelming 94.99% of ordinary shareholders voted against the remuneration policy itself.<sup>62</sup> A spokesperson for Rebois said “shareholders did not support the resolution as they require more detail on key performance areas. It should be noted that shareholders did not object to the actual remuneration, as the directors’ emoluments were passed, but rather to the policy due to the lack of detail.”<sup>63</sup>

#### 3.5 Annual general meetings (AGMs)

The company secretary is responsible for planning the AGM, developing a chair’s guide and taking minutes at the AGM, but is also usually responsible for engaging with shareholders and addressing their queries prior to the meeting. The company secretary must ensure that the required quorum is present and that votes are captured accurately. Where shareholders cannot attend the meeting in person, the company secretary would collate all proxies received and ensure that they are captured among the votes. In our current digital era, the company secretary should propose to the board different ways of allowing shareholders who cannot be

present physically, to attend the meeting by holding virtual meetings as an example. The AGM is the platform that allows shareholders to ask meaningful questions and to request explanations from the board and management, and thus every effort should be made by the company to allow all shareholders to participate. Some companies send a letter from the board chairman encouraging shareholders to attend the AGM, or if they cannot, to send a proxy form. Also, some companies include a form inviting shareholders to send questions ahead of the AGM.

With the Covid-19 global pandemic, many companies will be moving to virtual AGMs during this period. Having an electronic platform avoids the shareholder having to physically attend the AGM and may open the opportunity for more questions to be asked. In other words, they can attend from the convenience of their home. With virtual AGMs, it may be easier for companies to avoid addressing shareholder concerns, and this should be avoided. “The corona crisis may be a catalyst to modernise AGMs,” said Wolfgang Gross, a securities law specialist at German law firm Hengeler Mueller.<sup>64</sup> Gross added that “a big challenge for any virtual AGM is how to set up a fair and efficient process for shareholders to ask questions and note objections” and that “there needs to be an electronic equivalent for this.”<sup>65</sup>



<sup>62</sup> <https://www.businesslive.co.za/bd/companies/property/2020-02-04-irked-shareholders-vote-against-rebois-pay-policy/>

<sup>63</sup> <https://www.businesslive.co.za/bd/companies/property/2020-02-04-irked-shareholders-vote-against-rebois-pay-policy/>

<sup>64</sup> <https://www.ft.com/content/c6c69607-5e18-4bb8-8140-78457d1823fc>

<sup>65</sup> <https://www.ft.com/content/c6c69607-5e18-4bb8-8140-78457d1823fc>

### 3. Forms of shareholder activism *(continued)*

#### SC unveils AGM checklist to enhance activism (Extract)

Shareholders will now have a checklist that can guide them in raising issues for discussion at corporate AGMs.

In a move to promote meaningful dialogues and discussions between shareholders and board of directors at AGM, the Securities Commission (SC) yesterday announced the release of the AGM corporate governance checklist for shareholders (AGM CG Checklist).

Developed in collaboration with the Institutional Investors Council Malaysia (IIC) and the Minority Shareholders Watch Group (MSWG), the checklist would serve as a guide to shareholders on issues that could be raised for discussion at general meetings, the capital market regulator said.

MSWG CEO Devanesan Evanson said the initiative was all about encouraging shareholder activism.

"The checklist jointly issued by the SC, IIC and MSWG, is to encourage shareholder activism. It is a summary of some of the questions that shareholders can ask at the AGM, especially focused on the resolutions that public listed companies propose at the general meetings. It is not an exhaustive list," he told StarBiz.

"Now shareholders can use the checklist as a guide while perusing the annual reports and the CG reports," he said.



Source: <https://www.thestar.com.my/business/business-news/2020/02/06/sc-unveils-agm-checklist-to-enhance-activism>

The company secretary or governance professional should ensure that the board understands fully the risks of not addressing shareholder complaints or queries adequately. Many dissatisfied shareholders have access to a number of social media platforms and this poses a serious risk to the reputation of the company, which can be tarnished very quickly. Activist campaigns have also made use of social media platforms such as YouTube to promote their causes and highlight grievances.<sup>66</sup> Even if shareholders are not successful in the issues they raise via social media, the long-lasting effects of raising their voice on these publicly available channels will undoubtedly have an impact on the company's reputation.



<sup>66</sup> <https://www.bennettjones.com/Blogs-Section/Shareholder-Activism-in-a-Time-of-Covid-19-Uncertainty>

### 3. Forms of shareholder activism (continued)

#### Minority Shareholders Flex Muscles through Social Media (Extract)

Social media is used in everyday life by millions of people throughout the world. Throughout the day people post pictures on Instagram, send tweets on Twitter and update their Facebook statuses. It has been integral in many people's lives but is largely seen as a recreational activity. This short article will discuss how a recreational activity such as social media can be used by minority shareholders to influence how a company is run. The instant nature of social media coupled with its worldwide reach makes it an attractive tool for shareholder activism. Whistleblowing is more effective through the use of social media as it encourages discussion. It gives shareholders an electronic voice to raise their concerns. Because of the public nature of Twitter and Facebook, a tweet or post can reach millions of people and help the shareholder activist reach his objectives faster. An example of this effect is the case of Carl Icahn's complaints against Lions Gate. He posted his dissatisfaction with the directors and how he wanted a new board to be elected, on a website. He wasn't successful but this became a template for other shareholder activists. An example of a successful shareholder activist is Erik Jackson. In 2007 he had a mere 96 shares in Yahoo stock. He posted his dissatisfaction regarding the performance of the CEO on his blog. His post was seen by many people who shared his sentiments. Eventually, he received the approval of shareholders who collectively owned millions of shares. As a result of this pressure, the CEO resigned. LinkedIn is also a very important form of social media in the business sector. Unlike Twitter, Facebook and Instagram, LinkedIn is a social networking site that is designed for business. A LinkedIn profile allows you to post articles. These articles could be used to put pressure on directors.

The use of modern technology in shareholder activism is encouraged by the Companies Act 2008. Section 63(2) of the Act provides that meetings and shareholder participation thereof may be held electronically. This encourages shareholder activism as it is less time to consume and more affordable because time and money on traveling are saved. Proxy forms may be submitted electronically. This leads to an increase in the use of proxy forms which in turn promotes shareholder activism. Further, whistleblowers are protected in terms of section 159 of the Companies Act 2008. This is an example of how shareholders need not fear if they are not happy with the state of a company. Relief could literally just be a click away.



Source: <https://www.businessessentials.co.za/2018/10/12/minority-shareholders-flex-muscles-through-social-media/>

#### 3.6 The role of the company secretary and governance professional

The company secretary and the governance professional play an essential role in the corporate governance of a company. In addition to the company secretary the governance professional such as compliance officers, risk managers, investor relations specialists, legal counsel etc. also plays a key role in shareholder management. Apart from administrative tasks, the company secretary's role is complex and vital and includes advising the board on all legal, governance and regulatory changes to ensure compliance. Where the company fails to adhere to all legislative requirements, the company secretary has a duty to disclose this at shareholder

meetings. Thus the company secretary can be seen as the necessary link between the company and its shareholders in providing adequate disclosure and transparency. Effective communication by the company secretary to shareholders is of paramount importance. As part of communication efforts, one of the suggestions would be to engage with shareholders via roadshows, where the company secretary would assist the chairperson with the preparation in relation to addressing key governance queries and concerns. Also linked to effective communication is ensuring that the company's integrated annual report, and governance section of the report, consist of accurate and relevant information, especially in relation to committee reports which detail the information that is most

### 3. Forms of shareholder activism *(continued)*

often considered as part of shareholders' decision-making in relation to voting, such as the audit, remuneration, social and ethics and nominations committee reports.

The company secretary provides guidance to directors regarding their duties and responsibilities. Part of the advisory role of the company secretary is the duty to guard against insider trading and ensure directors do not deal in shares during closed periods, such as the end of the financial year until dividends are declared, and the end of the half-year when interim dividends are declared. The company secretary must also ensure that directors and other employees do not pass on price sensitive information to other people.

In many companies, the company secretary is responsible for ensuring that dividends get paid to shareholders, and is also often involved in share allotments, issuing of share certificates and managing share transfers and the security register. The co-ordination of shareholder meetings, the taking of minutes of such meetings and the handling of queries in regard to such meetings often rests on the company secretary. The company secretary can be seen as the voice between the board and the shareholders and as such, the position provides an important linkage between the company, its directors, shareholders and regulators such as the Companies and Intellectual Property Commission (CIPC).<sup>67</sup>

Shareholder activism has been and continues to be a key feature in enhancing a company's responsiveness to environmental, social and governance initiatives. The company secretary plays a critical role in responding to issues relating to governance not only in terms of ensuring the company's practices are benchmarked against best practice as prescribed by governance codes but also specific institutional shareholder requirements. The latter is generally communicated via shareholder voting policies and ongoing engagement. It is essential that company secretaries are fully acquainted in respect of these expectations as they relate to, for example, independence of directors, diversity on boards, appropriate disclosure on remuneration and keeping the channels of engagement open to ensure appropriate responses to these concerns are made or timelines agreed to ensure these responses are implemented and communicated

accordingly. This will ensure appropriate understanding of the company's governance policies and ensure positive voting at an AGM. The same applies to social and environmental issues. The company secretary's role is therefore to ensure activities of the company are fully aligned to good practice and ensure engagement with shareholders are maintained to improve such alignment.

#### 3.7 Questions company secretaries and governance professionals should ask

When it comes to shareholder activism, company secretaries and governance professionals need to be informed and should ask themselves the following questions as a means to ensure as much as possible that shareholders are kept satisfied:

- Is the board aware of what shareholder activism entails and of the laws and regulations related to shareholder activism?
- Does the company's strategic plan and risk register cater for shareholder activism?
- Are all shareholder roles catered for in the company's current setup?
- Has the board adequately addressed areas of concern raised by shareholders?
- Is there ongoing communication and engagement with shareholders?
- Does the company afford shareholders the opportunity to provide feedback on key issues?
- Is performance aligned with executive remuneration, and is this adequately shown in the company's integrated report?
- Is the board being transparent in communicating with shareholders via the integrated report, disclosing both positives and negatives i.e. both successes and areas where the company has not performed?
- Does the company have a response policy in place should activism ensue?
- Does the company's MOI provide for director retirement after a certain period to ensure independence of directors is maintained?
- Is the board focused on environmental, social and governance issues in addition to financial management?
- Are board evaluations effective and transparent and are mechanisms in place to deal with issues raised?
- Is the board focused on achieving diversity?

<sup>67</sup> <https://www.iol.co.za/business-report/opinion/company-secretaries-take-the-legal-helm-800152>

Historically, shareholder activism has not been of paramount force in South Africa. More recently, however, shareholder activism has been on the rise, in line with global trends.<sup>68</sup> As evident in the content above, South African shareholder activism is gaining traction, particularly in the context of corporate governance practices. Activism campaigns directed at European and Asian companies continue to make up a large share of global activism.<sup>69</sup> According to research conducted, in the first half of 2019, roughly 40% of capital deployed by activists was used to target non-U.S. companies and this included \$4.4 billion of capital deployed in Europe and \$3.9 billion in Asia.<sup>70</sup>

The UK continued to be the largest target market for activists in Europe with 52 campaigns taking place and a record 147 investors launching new campaigns, including 43 “first timers” with no previous activism history.<sup>71</sup> In Europe in the first half of 2019, of the demands made by activists over 50% related to the board (for example, removal or appointment of directors, gaining board representation or changing the board composition); M&A made up just over 15% of activists’ demands.<sup>72</sup> In the first half of 2019, new activist campaigns in the US included 57 ESG-driven demands.<sup>73</sup> In the UK, shareholder activism has been focused on board-related matters such as executive remuneration and requests for board representation. According to the Investment Association, 42% of UK asset managers made a voting decision based on a company’s gender diversity in 2018, while 56% had engaged with companies on the subject.<sup>74</sup> For UK-based companies in the first half of 2019, 19 of a total of 70 activists’ demands were partially or completely successful.<sup>75</sup> Responding to the Covid-19 pandemic, in the

banking sector, the European Central Bank and the Bank of England have requested banks to halt distribution to shareholders and focus their resources on supporting the economy.<sup>76</sup>

In the US, a record 147 investors launched new campaigns in 2019, including 43 “first timers” with no prior activism history.<sup>77</sup> In 2018, there were a record number of 226 companies targeted by 247 activist campaigns, leading to a record number of 161 board seats claimed by activists.<sup>78</sup> In the US, shareholder activists have focused on a wide variety of capital structure changes, such as increasing leverage, stock splits, dividends and repurchases, and strategic changes, such as a company sale or breakup or other operational changes, including changes to management and boards of directors.<sup>79</sup> With the Covid-19 pandemic, US companies receiving federal funds from the \$2.3 trillion stimulus package will have to suspend share buybacks.<sup>80</sup>

Australia has increasingly seen resolutions concerning ESG matters brought by environmental or social activist groups at companies’ AGMs and this trend has continued during the most recent AGM season.<sup>81</sup> Activist Insight data suggests that there was a 10 per cent increase in 60 Australian listed companies facing board related activism during 2019.<sup>82</sup> Directors are said to be more vulnerable in Australia than they are in other jurisdictions. In Australia, shareholders with a 5% stake or more have rights to propose resolutions to remove directors and nominate candidates for appointment as directors even if that director’s position is not up for re-election and even without cause.<sup>83</sup>

<sup>68</sup> <https://thelawreviews.co.uk/edition/the-shareholder-rights-and-activism-review-edition-4/1197511/south-africa>

<sup>69</sup> <https://www.sullcrom.com/siteFiles/Publications/2019ShareholderActivismAnnualReport.pdf>

<sup>70</sup> <https://www.sullcrom.com/siteFiles/Publications/2019ShareholderActivismAnnualReport.pdf>

<sup>71</sup> <https://equiniti.com/media/5996/equiniti-agm-forecast-2020.pdf>

<sup>72</sup> <https://practiceguides.chambers.com/practice-guides/shareholders-rights-shareholder-activism-2019/uk>

<sup>73</sup> <https://www.mondaq.com/unitedstates/shareholders/847562/shareholder-activism-trends-in-2019>

<sup>74</sup> <https://www.herbertsmithfreehills.com/the-shareholders-rights-activism-review-%E2%80%93-edition-4-united-kingdom>

<sup>75</sup> <https://practiceguides.chambers.com/practice-guides/shareholders-rights-shareholder-activism-2019/uk>

<sup>76</sup> <https://boardagenda.com/2020/04/20/will-Covid-19-accelerate-the-shift-towards-stakeholder-governance/>

<sup>77</sup> <https://corpgov.law.harvard.edu/2020/01/30/2019-review-of-shareholder-activism/>

<sup>78</sup> <https://gettingthedealthrough.com/area/84/jurisdiction/23/shareholder-activism-engagement-2019-united-states/>

<sup>79</sup> <https://gettingthedealthrough.com/area/84/jurisdiction/23/shareholder-activism-engagement-2019-united-states/>

<sup>80</sup> <https://boardagenda.com/2020/04/20/will-Covid-19-accelerate-the-shift-towards-stakeholder-governance/>

<sup>81</sup> <https://thelawreviews.co.uk/edition/the-shareholder-rights-and-activism-review-edition-4/1197498/australia>

<sup>82</sup> <https://thelawreviews.co.uk/edition/the-shareholder-rights-and-activism-review-edition-4/1197498/australia>

<sup>83</sup> [https://www.hoganlovells.com/~/\\_/media/hogan-lovells/pdf/featured-items/australia/perlib011236v1/australiagrowingemergenceofshareholderactivismhkglib01v2.pdf](https://www.hoganlovells.com/~/_/media/hogan-lovells/pdf/featured-items/australia/perlib011236v1/australiagrowingemergenceofshareholderactivismhkglib01v2.pdf)

# 5

## South African shareholder activists

A series of relevant questions pertaining to shareholder activism have been directed to key locally positioned individuals whose responses and feedback received are contained in the content below. There is no doubt that Theo Botha is a key shareholder activist but unfortunately was not available to contribute to this publication. However, his published views are captured in other sections of this publication.

### 5.1 Tracey Davies – on behalf of Just Share and the RAITH Foundation



Davies, speaking on behalf of Just Share and the RAITH Foundation, says that the impact that shareholder activism has on corporate behaviour depends very much on the company. Some companies embrace shareholder activism as a way to better understand the views and concerns of stakeholders, and to inform improvements in environmental, social and governance practices. Others view shareholder activism as at best an irritation, and at worst a challenge to the authority of the board and management which must be shut down as fast as possible. Speaking on why Just Share and the RAITH Foundation took an interest in shareholder activism, Davies says that the South African corporate sector wields enormous power in our society, but is not subjected to the same levels of scrutiny, or held to the same standards of accountability, as government. Shareholders have the ability – and the obligation – to ensure that the companies they are invested in are not exacerbating inequality, injustice and environmental degradation, but in South Africa they seldom exercise their powers. Civil society in South Africa focuses predominantly on the state, and they believed that there was an urgent need to start to fill the large gap in corporate accountability.

Davies states that shareholder activism has increased in South Africa only incrementally, and mostly as a result of increased activity by NGOs and philanthropists, rather than as a result of a change in behaviour by institutional investors. In comparing South Africa to Europe and the USA, Davies

highlights that South African society is extremely deferential to the corporate sector, and the rich and powerful executives who run listed companies are revered as an antidote to an ineffective and corrupt government. She adds that there is very little understanding amongst investors of how companies contribute to societal problems, and very little appetite to speak up publicly about corporate failings. Pension fund trustees, who in fact have legal obligations to be responsible investors, abdicate their responsibilities to asset managers who are focused almost exclusively on short-term returns. In Europe and the USA, Davies says there is a much stronger culture of questioning corporate power, and of taking bold, public, collaborative action.

In reacting to shareholder activism, Davies says that the board should respect and understand the rights of shareholders to scrutinise their actions – shareholders are, after all, the owners of their companies. She adds that the board should engage with activists transparently and in good faith. On the role that the company secretary and the governance professional play, Davies says that the company secretary should be the conduit between management and the board, and shareholder activists, and should ensure that communication is respectful and transparent. She adds that in their experience, company secretaries at best relay information between stakeholders, and do not take any active role in ensuring that engagement is professional and productive.

In looking at the future of shareholder activism and what it could resemble, Davies states that as more social and environmental justice activists realise the power of shareholder activism, and as more individual savers and investors understand the role that their investments can play in improving or harming our society, the pressure on companies to behave as responsible corporate citizens will increase. She says that in South Africa we're only at the very beginning stages of what we believe will be a significant increase in shareholder activism in the years to come.<sup>84</sup>

<sup>84</sup> Written interview with Tracey Davies on behalf of Just Share and the RAITH Foundation, 29 April 2020.

## 5. South African shareholder activists *(continued)*

### 5.2 Chris Logan – Owner, Opportune Investments



Logan says that shareholder activism has a positive effect on corporate behaviour in South Africa. Logan's journey in shareholder activism started in the 1990s where he worked with BOE asset management. He advises that his work back then included lobbying against pyramid structures to unlock shareholder value. In a South African context, Logan states that there has been a slight increase in shareholder activism and that it is not yet at the level evident in the US or Europe because "institutions are often jellyfish and it's a small universe."

Logan states that the board and the company should engage with shareholders if there is merit in what the activist is advocating. In terms of the role that the company secretary and governance professional play, Logan is of the opinion that they play key if not pivotal oversight roles. With the future of shareholder activism in South Africa, Logan advises that it needs to increase to mitigate against more Steinhoffs, Tongaats, Nampaks and poor corporate performance.<sup>85</sup> He concludes that we need to restore the excellent reputation that the JSE and South African companies once had.

### 5.3 Angelique Kalam – Manager Sustainable Investment Practices, Futuregrowth Asset Management

In addressing why she got involved in shareholder activism, Kalam states that institutional investors have a fiduciary responsibility in terms of how they exercise their rights on behalf of their clients and that there are consequences in terms of how they vote or choose not to vote on key matters that could affect the long-term performance and sustainability of the investments they hold. She says that the consideration of non-financial risks such as environmental, social and

governance issues (which incorporate shareholder activism), is a key factor in terms of their responsible investment philosophy and approach at Futuregrowth. Active ownership, bondholder activism and engagement are key components of their responsible investment approach. Kalam adds that this is supported by the regulatory requirements outlined in Regulation 28 of the Pension Funds Act (Regulation 28 (2) (c) (ix) of the Pension Funds Act 24 of 1956 as amended), which requires pension funds to give appropriate consideration to any factor that may materially affect the sustainable long-term performance of a fund's assets, including ESG. She states that institutional investors have the power to affect change because of the capital they hold, but, sadly, this is not used effectively in South Africa. Through their vote as shareholders and their engagement, they can affect change by highlighting weak governance standards in the companies in which they invest. She states that actively exercising their rights through active ownership activities is an effective way of enhancing value on behalf of their client funds.

In terms of the impact that shareholder activism has on corporate behavior, Kalam advises that shareholder activism encourages corporates to think beyond mere short-term profits. It provides a mechanism to hold company boards and management accountable by highlighting shareholder rights and responsibilities. Companies are motivated to take responsibility for their role as part of a larger interconnected economy and society.

Kalam highlights that she has seen a gradual increase in shareholder activism in South Africa, especially since 2011, when the stronger responsible practices outlined in Regulation 28 came into effect. More notably, since 2016, she has seen a considerable increase in activism in general, from a range of stakeholders – including ordinary South Africans who want to see a change, civil society, and both institutional and non-institutional investors. This is due to a prevalence of corporate failures due to fraud, corruption and general poor governance practices, prompting South Africans across the board to become more vocal on these issues. This has given rise to institutional shareholder activism, but at a more contained pace, reflecting a misalignment of convictions and actions. In general, institutional investors have shied away from any public scrutiny and limited their activism to voting, more

<sup>85</sup> Written interview with Chris Logan, 22 April 2020.

## 5. South African shareholder activists *(continued)*

recently tabling resolutions relating to non-financial issues but with limited private engagement. Kalam states that in recent years, she has seen shareholder activism extend from minority protection rights and remuneration to an increased focus on the impact of climate change – and requiring more transparency and disclosure. She adds that hopefully this has shifted the perceptions of institutional investors and companies around the power of capital to affect change, and encouraged companies to start paying attention, to be more open to engage and to be held accountable.

Kalam states that shareholder activism is not yet at the level evident in the US or Europe because Europe and the US have a larger shareholder base with a deeper history of shareholder activism historically than South Africa. She goes on to state that this has since slowly been changing, with institutional investors now requiring more transparency and greater adherence to global best practice. This promotes a shift from short-term profits towards a more sustainable economy and a society that holds corporates accountable. The introduction of Regulation 28 shines a light on responsible investment practices locally and is an enabler for greater shareholder activism in South Africa.

In engaging with shareholder activists, Kalam states that companies should have an engagement strategy in place, clearly outlining the delegated levels of authority and their position on material matters that affect their business, stakeholders, the economy and society. This is not always the case, with many companies caught on the back foot on matters of materiality. That said, companies should be open and express a willingness to engage on matters. They should be able to address the issues at hand and express the company's view on these matters, and how the issues are being addressed. Engagement with shareholder activists could provide an opportunity to explore options for sustainable change – and to come up with agreed outcomes within a mutually agreed timeframe.

In regard to the role of the company secretary and governance professional, Kalam provides that the role has evolved from being a broad compliance function that ensured companies met their statutory and regulatory requirements to being the custodian of governance. She adds that King IV™ points out that we are seeing a departure from the past, when the role promoted an adherence to “practices”, and now promotes

“outcomes” instead. There is also more flexibility in terms of the structure of the role, with some companies able to choose not to have a company secretary. In this instance, best practice is to employ the services of a corporate governance professional who can provide independent guidance on corporate governance and legal matters to the governing body, being the board. For companies to reap the benefits of the role of “custodian of governance”, we need to ensure that the person in that capacity is empowered with the necessary authority; otherwise, the role reverts to a mere compliance function once again.

Looking ahead at the future of shareholder activism in South Africa, Kalam states that shareholder activism will become bolder as ordinary South Africans and institutional investors recognise that they have a greater role and responsibility to affect change. The potential that the power of capital affords institutional investors is still largely unrealised – but not for long, as there is growing pressure from pension funds on managers to demonstrate that they are being active shareholders and ensure that the companies they invest in are held accountable, transparent and open to engage. She adds that moving beyond shareholder activism, she sees an upsurge in bondholder activism in the market. Kalam advises that Futuregrowth, in this instance, has been vocal on many non-financial issues affecting clients' funds within the capital market, seeking, for example, greater transparency and negotiation in setting bond terms. In addition, wider bondholder engagement is being directed through the Association for Savings and Investment South Africa (ASISA), which represents the majority of the country's fixed income managers, to drive sustainable change in terms of amending the JSE's debt-listing requirements.

Kalam concludes that the reality is that institutional investors have a fiduciary responsibility to act on behalf of shareholders and bondholders. To give credence to the popular phrase “with great power comes great responsibility,” they need to heed the call to promote greater activism across asset classes. This means that they cannot sit by any longer and wait for someone else to carry the mantle; it is up to everyone as individuals and institutional investors to promote greater corporate transparency and engagement on issues that affect client funds, as well as the broader impact on society and the economy as a whole.<sup>86</sup>

<sup>86</sup> Written interview with Angelique Kalam, 29 April 2020.



## 5. South African shareholder activists *(continued)*

### 5.4 Ann Crotty – Financial Mail journalist



When addressing the impact that shareholder activism has on corporate behaviour, Crotty highlights that it makes corporates concerned about their short-term public profiles. Crotty became involved in shareholder activism as she felt activists were raising very valid issues which usually are not dealt with by traditional corporate governance.

Crotty agrees that shareholder activism has increased in South Africa but adds that shareholder activism is not as prominent in South Africa as it is in the US or Europe in that in South Africa, the large institutional fund managers are too powerful and have developed close ties with the companies

in which they're invested. Crotty states that the manner in which the board and the company should react to shareholder activism is to engage with the issues and not feel personally threatened by the activists.

With regard to the role that company secretaries and governance professionals play, Crotty advises that they should assist the board and the company to engage effectively with the activist and the issues being raised, and should discourage any tendency to side-step the issue. As far as the future of shareholder activism in South Africa is concerned, Crotty is not certain and says it may stumble along as it is – relying on a few essential individuals or increasing numbers of fund managers might see the need and benefit of becoming active. Crotty further adds that shareholder activism has picked up because of a suspicion or fear that companies have embraced 'the form' of corporate governance but not its 'substance'. All the various codes and regulations have enabled them to do this. It really has become a box-ticking exercise – and there are so many boxes. She further states that "sadly, anyone who doesn't tick these boxes and yet has sound corporate governance standards, is deemed flawed."<sup>87</sup>

### 5.5 Robert Lewenson – Head of ESG engagement, Old Mutual Investment Group



Lewenson states that the impact of shareholder activism on corporate behavior, and how boards respond to shareholders differs from one company to the next. He states that some companies are willing to engage with shareholder activists and others remain reluctant to do so, advancing legal avenues to try and prevent engagement with activists. Lewenson states that shareholder activism has increased in South Africa, but even more so, has the willingness of activists to make a public statement around their activity increased. He

states that NGO's want their voices to be heard and that where institutional investors have usually discussed matters "behind closed doors", the rise in the importance of ESG has led to more institutional investors adopting a public position around key issues. Lewenson highlights that since the Steinhoff debacle and the like, there has been far more shareholder activism evidenced in South Africa.

In engaging with shareholder activists, Lewenson states that the board should adopt an open mind approach with activists. He adds that some activists would be interested in the short-term strategic objectives of the company whilst others would be interested in the long-term value creation strategy adopted by the company. Lewenson says that the manner of engagement adopted would depend on a number of factors such as the activist's objective in approaching the company and who they are representing.

In regard to the role of the company secretary and the governance professional in managing shareholder activism,

<sup>87</sup> Written interview with Ann Crotty, 22 April 2020.

## 5. South African shareholder activists *(continued)*

Lewenson states that they are the “crucial gate-keepers” and they play a vital role in alleviating tension between activists and management so that a clear message is communicated at board level. Lewenson sees the future of shareholder activism as an outcomes-based and collaborative approach to achieve results with the largely interested asset owner community, and that like-minded people will follow in each other’s footsteps.<sup>88</sup>

### 5.6 Albie Cilliers – Activist Investment Manager, Cilandia Capital



Cilliers states that shareholder activism serves as a check on management and the board of companies. In responding to the question of why he became involved in shareholder activism, Cilliers says that it was not an active decision in the sense of, “I am now going to get involved in shareholder activism”. He adds that his personality type has always been not to just accept the status quo, to always question the narrative, to think critically, to find the truth, rather than just to fall in line like everyone else. It was, however in 2016, when he was a shareholder in Sovereign Foods when management tried to push a “bad deal” through to prevent a takeover and, which would have entrenched them, that he was forced to seek ways to protect his rights as a minority shareholder. Reading the circular, he says that for the first time he saw the appraisal rights mentioned and he tried to exercise those. He states that the company then abused that process to prevent him from voting on a new transaction, which forced him to approach the court for relief of oppression or prejudicial conduct as set out in s163 of the Companies Act. The court found in his favour and his involvement in shareholder activism officially “started”.

Cilliers highlights that shareholder activism has increased in South Africa, but adds that South Africa has a very small financial community where a lot of people know each other. People are hesitant to go against the herd and/or step on another’s toes so to speak, he says. He adds that many fund managers rely on their contacts, which includes access to

managements and directors of companies for information. Cilliers further states that many of these directors also sit on the boards of multiple companies, or they are friends and/or associates of others that do, and states that it creates a network effect in a small financial community where it does not generally pay to criticise or upset the status quo publicly.

Cilliers says that boards should embrace shareholder activism and states that it is part of an open democratic society and that the board should accept that there are different opinions and ideas. He adds that companies should “pick up the phone and talk to them or have a video chat, or better go see them in person to hear their concerns”. He highlights that most boards react extremely defensively and bring in the lawyers immediately, which then changes the tone, and instead of engaging interaction, it usually creates an adversarial environment, which isn’t conducive to a positive collaborative outcome. According to Cilliers, there is a very small minority of companies that do not react negatively or act “knee jerk” defensively when engaged by shareholder activists. He says that these companies often times accept some or all of the points of shareholder activists and try to work with them in trying to find solutions and maybe implement some of the ideas forwarded by these activists.

In regard to the role that company secretaries and governance professionals play, Cilliers states that this role is extremely important. He adds that they are supposed to be independent of the board, but his experience has been too often that they are merely a proxy for the CEO’s views. According to Cilliers, where the company secretary or governance professional truly understand their statutory role, and have been given the freedom by the board to act accordingly, independent of the CEO, the results are mostly satisfactory. Concluding on his thoughts for shareholder activism in the future, Cilliers says that he sees shareholder activism continuing to grow and going from strength to strength as more and more investors and people realise what their rights are and what options are available to influence corporate behaviour.<sup>89</sup>

<sup>88</sup> Telephonic interview with Robert Lewenson, 29 April 2020.

<sup>89</sup> Written interview with Albie Cilliers, 11 May 2020.

# 6

## Conclusion

There is no doubt that shareholder activism is gaining momentum in South Africa and will continue to grow in the coming years. It is vital that all companies understand what shareholder activism entails, and how to meaningfully engage with shareholders on a continuous basis. As part of being a good corporate citizen, companies need to ensure that governance practices are of the highest possible standard. Open communication needs to exist between the board and the shareholders of the company, and the company secretary or governance professional needs to play a vital role in the communication channels. Shareholder activism should not be viewed as a negative force, but as a positive driving force in the quest for good corporate governance and ethical behaviour by all companies. As seen above, shareholders have an interest in a multitude of areas of operation and the company needs to ensure that its level of detail, transparency and compliance in all facets of operation are given adequate attention.

**110**  **YEARS**

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