

THE
SHAREHOLDER
RIGHTS AND
ACTIVISM REVIEW

FOURTH EDITION

Editor
Francis J Aquila

THE LAWREVIEWS

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ACTIVISM
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This article was first published in September 2019
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK
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Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-052-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

BAKER & MCKENZIE – CIS, LIMITED

BOWMANS

CLEARY GOTTlieb STEEN & HAMILTON LLP

DARROIS VILLEY MAILLOT BROCHIER

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PREFACE

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

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

Shareholder activism is a global phenomenon that is effecting change to the corporate landscape and grabbing headlines not only in North America but also in Europe, Australia and Asia. Although shareholder activism is still most prevalent in North America, and particularly in the United States, almost half of the publicly announced activism campaigns in 2018 targeted non-US companies. This movement is being driven by, among other things, a search by hedge funds for new investment opportunities and a cultural shift toward increased shareholder engagement in Europe, Australia and Asia.

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

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

Francis J Aquila

Sullivan & Cromwell LLP

New York

August 2019

SOUTH AFRICA

*Ezra Davids and Ryan Kitcat*¹

I OVERVIEW

Historically, shareholder activism has not been an important force in South Africa. More recently, however, shareholder activism has been on the rise, in line with global trends. This increase in shareholder activism, which has been gradual rather than a surge, can be attributed to a number of factors, including:

- a* the influence of shareholder activism in other jurisdictions, mainly the United States and Europe;
- b* a widely held market with an internationalised shareholder base: as at March 2019, 52 per cent of South African equities were held by international investors;²
- c* a greater tendency towards active engagement by institutional and other investors; and
- d* a regulatory and corporate governance framework that creates an enabling environment for shareholder activism or activist-like interventions.

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

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

1 Ezra Davids is a partner and Ryan Kitcat is a senior associate at Bowmans. The authors would like to thank Lauren Midgley (associate) and Richard Griffin (candidate attorney) for helpful research assistance.

2 *Business Day*, 16 May 2019, Lisa Steyn 'Foreigners take a shine to SA precious metals shares: Analysis shows foreign investors have increased their exposure to SA-listed gold and platinum producers', available at: www.businesslive.co.za/bd/companies/mining/2019-05-16-foreigners-take-a-shine-to-sa-precious-metals-shares.

II LEGAL AND REGULATORY FRAMEWORK

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

Takeovers and other ‘affected transactions’ (e.g., statutory mergers, schemes and disposals of all or a greater part of a company’s assets or undertaking) are regulated under Chapter 5 of the Companies Act and the Takeover Regulations. In the context of such transactions, the Takeover Regulation Panel (TRP) is mandated to ensure the integrity of the marketplace and fairness to securities holders, and to prevent actions by offeree companies designed to impede, frustrate, or defeat an offer or the making of fair and informed decisions by securities holders. The TRP has the power to initiate or receive complaints, conduct investigations and issue compliance notices.

The Financial Markets Act provides for the regulation of financial markets and prohibits insider trading and market abuse. The Financial Sector Conduct Authority (FSCA) is responsible for enforcing the Financial Markets Act. Earlier this year, the FSCA reported that it and its predecessors had investigated 421 cases, taken enforcement action in 91 and imposed approximately 138 million rand in penalties since 1999.³

The Listings Requirements (the Listings Requirements) of the Johannesburg Stock Exchange (JSE), enforced by the JSE, apply to JSE-listed companies. The Listings Requirements regulate, among other things, the fair and equal treatment of shareholders, access to information, certain voting thresholds, and pre-emptive rights and related party transactions.

The King IV Report on Corporate Governance for South Africa 2016 (the King Code), issued by the Institute of Directors in Southern Africa, contains various principles and recommendations intended to promote good corporate governance, many of which are relevant to shareholder rights and engagement. Certain principles in the King Code are incorporated into the Listings Requirements, making it mandatory for JSE-listed companies to comply with them, with the balance of the King Code’s principles and recommendations to be implemented on an ‘apply and explain’ basis.

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

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

i Ability to influence shareholders’ meetings and approvals

Shareholders are entitled to attend, speak at and vote at a meeting, either themselves or via proxy. This allows shareholders to ask difficult questions of directors, express their views or lobby support from other shareholders for a particular agenda (e.g., a ‘vote no’ campaign).

3 See ‘FSCA Press Release: Report by the FSCA on status of various investigations’, dated 4 March 2019, available at: www.fsc.co.za/News%20Documents/FSCA%20Market%20Abuse%20Investigations%20Press%20Release%20-%202004%20March%202019.pdf.

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

Any two shareholders of a company may propose that a resolution concerning any matter in respect of which they are each entitled to exercise voting rights (e.g., the removal of a director) be submitted to shareholders for consideration at the next shareholders' meeting, at a meeting demanded by shareholders or by written vote.⁴

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

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

ii Access to company records and information

A shareholder can access certain company records to assist with activist proposals and seek the cooperation of other shareholders. A holder of a beneficial interest in a company's securities has the right to inspect and copy the company's MOI,⁵ securities register, register of directors, reports and minutes of annual meetings, and annual financial statements. If additional information is required for the exercise or protection of a right, a shareholder may be able to rely on the Promotion of Access to Information Act 2 of 2000, enacted to give effect to the constitutional right of access to information.

iii Dissenting shareholders

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

4 Shareholders entitled to exercise at least 10 per cent of the voting rights may propose an amendment to a company's memorandum of incorporation (MOI).

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

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

iv Appraisal rights

In certain prescribed circumstances – including schemes, mergers or sales of all or a greater part of a company's assets or undertaking – a dissenting shareholder may force the company to purchase its shares in cash at a price reflecting the fair value of the shares.⁶ This is a 'no fault' appraisal right that enables a shareholder to sell all of its shares and exit the company. It applies if (1) the shareholder notified the company of its objection to the resolution to approve the action or transaction; and (2) the shareholder voted against the resolution (which was nonetheless approved) and complied with procedural requirements to demand that the company buy its shares for fair value.

v Actions and remedies

In extreme cases, a holder of issued securities may apply to court for an order necessary to protect any right of the securities holder, or rectify any harm done to the securities holder by (1) the company due to an act or omission that contravened the Companies Act, the MOI or the securities holder's rights; or (2) any director of the company, to the extent that he or she is or may be liable for a breach of fiduciary duties.⁷

Similarly, a shareholder may apply to court for appropriate relief if (1) any act or omission of the company has had a result; (2) the business of the company is being carried on in a manner; or (3) the powers of a director, prescribed officer or related person are being exercised in a manner that is oppressive or unfairly prejudicial, or unfairly disregards the interests of that shareholder.⁸ Having considered the application, the court may make any interim or final order it considers fit, including an order restraining the conduct complained of, ordering a compensation payment, or varying or setting aside an agreement or transaction.

The Companies Act also introduced a statutory derivative action that enables a shareholder (among other stakeholders) to demand that the company bring or continue proceedings, or take related steps to protect the legal interests of the company.⁹ A company may apply to court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit.

6 Section 164 of the Companies Act.

7 Section 161 of the Companies Act.

8 Section 163 of the Companies Act.

9 Section 164 of the Companies Act. Section 159 also provides whistle-blower protections for shareholders to make good faith disclosures of information to a relevant regulator where the shareholder reasonably believed at the time of disclosure that the company, director or prescribed officer had: (1) contravened the Companies Act; (2) failed to comply with a statutory obligation; (3) engaged in conduct that endangered or harmed an individual or the environment; (4) unfairly discriminated against a person; or (5) contravened other legislation that could place the company at risk. These shareholders are immune

vi Stakebuilding

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

Disclosure obligations require persons who acquire or dispose of a beneficial interest in securities, such that they hold or no longer hold 5 per cent or any further multiple of 5 per cent of the voting rights attaching to a particular class of securities, to notify the issuer within three business days of the acquisition.¹⁰ This applies irrespective of whether the acquisition or disposal was made directly, indirectly, individually or in concert with any other person, and options and other interests in securities must be taken into account.

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

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

Activists should be mindful of the insider trading offences and the broader framework regulating market abuse under the Financial Markets Act.¹¹

vii Defences available to companies and directors' duties

There are various strategies available to companies when faced with shareholder activism. Companies that have anticipated and prepared for activism will be better placed to respond quickly, and to defend against proposals that are not, or may not be, in the best interests of the company. Strategic private engagements with various stakeholders, tactics such as 'bear hugs' and accounting for potential activist activity in the course of creating transaction timelines will also play an important role in preventing or resolving activist issues in a transactional context.

The legal and regulatory framework described above includes various rules that boards may use to defend against activism, particularly if the activism is frivolous, vexatious or without merit.

As a general principle, it is the board that has primary legal responsibility for managing the business and affairs of the company. In doing so, the directors are subject to various fiduciary duties, all of which flow from the overarching duty to act in the best interests of the company at all times. There is no list of factors that a director must consider when assessing what is in the best interests of the company. The Companies Act includes a statutory business judgement rule, which affords directors some latitude and a degree of protection in responding to shareholder activism.

Directors need to take care not to engage in any conduct that is directed at, or could have the effect of, frustrating an offer made in good faith.

from any civil, criminal or administrative liability, and the relevant shareholder has qualified privilege in relation to the disclosure made, which would encourage shareholder activists seeking to hold the board accountable for its conduct.

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

11 See Chapter X of the Financial Markets Act.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

i Profile of activist investors

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

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

Of course, many investors regard shareholder activism as integral to their investment strategies and will pursue both economic and governance activism. Examples of investors who have pursued both economic and governance activism include Allan Gray, Sygnia Asset Management, Value Capital Partners and Foord Asset Management. The Public Investment Corporation (PIC) – an investment management company owned by the South African government, which manages the Government Employees Pension Fund – holds significant stakes in a number of JSE-listed companies and exercises considerable influence as a shareholder, particularly in M&A contexts. As at 31 March 2018, the PIC reported having assets under management worth 2.08 trillion rand.¹²

ii Companies targeted by activist investors

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

iii Activist campaigns

Historically, most campaigns in South Africa have focused on executive compensation and board composition.

On remuneration, following the introduction of ‘say-on-pay’ rules, certain JSE-listed companies (including Datatec, Tongaat Hulett, Naspers and Old Mutual) have had to reconsider their remuneration policies following significant shareholder opposition to such policies or implementation reports.¹³

12 See the PIC Integrated Annual Report for the year ended 31 March 2018, available at: <https://www.pic.gov.za/DocAnnualReports1/Public-Investment-Corporation-Integrated-Annual-Report-2018.pdf>. Also see National Treasury, ‘Ownership of JSE-listed companies: Research Report for National Treasury September 2017’, which describes the Government Employees Pension Fund as the single largest major shareholder in JSE-listed companies, then accounting for around 11 per cent of the market value of the top 25 companies listed on the JSE, available at: http://www.treasury.gov.za/comm_media/press/2017/2017100301%20Ownership%20monitor%20-%20Sept%202017.pdf.

13 In particular, the King Code contains recommendations relating to executive remuneration, including a recommendation that companies should produce and disclose, in respect of a reporting period, a remuneration policy and a report on the implementation of that policy. This remuneration policy and implementation report must be tabled annually for a separate non-binding advisory vote by shareholders at the company’s annual general meeting (AGM). If 25 per cent or more voting rights are exercised against

On board composition, campaigns have forced companies to take steps to change the make-up of their boards or pushed for the resignation of the CEO. The most notable example of this was in 2014, involving PPC, a cement manufacturer, where activists sought to remove the entire board.¹⁴

In the M&A context, the influence of shareholder activism is gradually increasing. Shareholders have intervened to block or force certain M&A activity. Recent examples of the former include shareholder opposition to a proposed takeover of PPC,¹⁵ and Prudential's opposition to an attempted takeover of poultry producer Sovereign Foods by Country Bird Holdings.¹⁶ An example of the latter is Grand Parade Investment's (GPI) disposal of its interests in certain franchises (described in Section IV).

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

The objectives of activists, and the strategies and tactics employed by them in pursuit of their objectives, vary. Shareholders typically give their views on such matters by voting against resolutions at general meetings. However, some shareholders follow the strategy of proactively engaging with the board and executives of companies with the aim of shaping the relevant companies into better ones with more sustainable long-term financial prospects to unlock shareholder value. Other shareholders, particularly certain prominent individual shareholder activists, have leveraged public criticism to pressure companies into justifying, and subsequently revising, their compensation packages.

iv Outcomes and the path to resolution

Recent examples of shareholder activism indicate that shareholder activists have had an impact on the manner in which South African companies engage with their shareholders. As shareholders become increasingly concerned with executive remuneration policies, transparency and other corporate governance issues, companies will need to pay closer attention to their adherence to principles of good governance and engagement in M&A. This is especially prevalent in the context of changes introduced by the King Code.

any part of this remuneration policy, the board must engage with shareholders in good faith to understand shareholder dissatisfaction and the reasons for dissenting votes. The board is required to appropriately address reasonable and legitimate concerns raised in the evaluation of performance. Although the advisory vote given to shareholders is non-binding, this vote coupled with increased disclosure enables greater shareholder activism in that it encourages the board to engage with shareholders, promotes transparency and provides shareholders with a platform to express their dissatisfaction.

- 14 During 2014, a group of shareholders requisitioned a special shareholders' meeting to consider the removal of the entire board of PPC and to replace it with the nominees of the requisitioning shareholders. These measures successfully forced the board to engage with the requisitioning shareholders' concerns.
- 15 In 2018, PPC was the subject of a merger attempt by a consortium comprising its smaller rival AfriSam and a Canadian investment house, Fairfax Financial Holdings. This failed as a result of shareholder resistance to a perceived undervaluation of PPC. Following failure of the proposed transaction, activist shareholders pressed for the removal of the chairperson and reconstitution of the PPC board.
- 16 Chris Wood 'Shareholder activism (2): Sovereign Foods: Defending against a hostile takeover', August 2018, available at: <https://prudential.co.za/insights/articlesreleases/shareholder-activism-2-sovereign-foods-defending-against-a-hostile-takeover>.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

i GPI

In November 2018, GPI, a franchisee of Burger King, Dunkin' Donuts and Baskin-Robbins, was the subject of activism by a consortium of disgruntled minority shareholders.¹⁷ The consortium requisitioned an extraordinary general meeting (EGM) to overhaul the board and appoint four of its own non-executive directors. It sent a letter to GPI detailing its grievances: doubts about the competency, skills and independence of the board; large bonuses paid to executive directors despite a collapsing share price and dwindling dividend; poor capital allocation decisions; and an exodus of key executives. After GPI failed to abide by a JSE directive ordering it to notify investors of the letter, the JSE issued the letter to shareholders directly.

An investor presentation preceded the EGM, during which GPI's interim CEO threatened 'war' against the activists, branding them 'short-termists' and 'usurpers'. At the EGM, the consortium gained sufficient shareholder support to appoint two of its preferred nominees to the board as non-executive directors. Days later, the CEO resigned, shortly before a vote on her appointment at the company's AGM, and shortly after Value Capital Partners, a turnaround specialist, acquired an influential stake in GPI.

In February 2019, GPI announced that it was exiting its interests in the Dunkin' Donuts and Baskin-Robbins franchises. The consortium had long pushed for GPI to exit the chains, given their track record of underperformance – since their launch in 2016, the South African outlets struggled to gain traction, incurring cumulative losses of over 96 million rand.¹⁸

ii Datatec

JSE-listed ICT group, Datatec, experienced considerable activism following the publication of its financial results in May 2018, which showed that significant cash had been generated from sales of certain group assets. Shortly after publishing its results, Datatec received feedback from several shareholders indicating support for a return of capital to shareholders. Datatec responded by convening for a general meeting in July 2018, well in advance of its AGM in September, to seek shareholder authority for a buy-back.

At Datatec's AGM, shareholders voiced concerns about various issues, including the tenure of the company's non-executive directors and external auditors, and the company's executive compensation. Datatec's remuneration policy was narrowly approved (50.2 per cent) by shareholders, but 62.8 per cent voted against its remuneration implementation report. Board and committee changes and a shareholder engagement process followed.

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

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

Datatec carried out four buy-backs between August 2018 and February 2019, repurchasing approximately 615 million rand worth of shares. At another general meeting at the end of June, Datatec shareholders approved a general authority for it the company to carry out further buy-backs.

iii Standard Bank

Recently, prominent individual activist Theo Botha and the Raith Foundation, a non-profit, requisitioned two climate change-related resolutions to be considered at Standard Bank's 2019 AGM. The resolutions sought to require Standard Bank to (1) report to shareholders by November 2019 on the company's assessment of greenhouse gas emissions resulting from its financing portfolio; and (2) adopt and publicly disclose a policy on lending to coal-fired power projects and coal mining operations. Standard Bank provided a detailed response to the proposed resolutions, explaining why the board recommended that the shareholders vote against the resolutions. The board did not consider the proposed resolutions as providing shareholders with any more meaningful understanding of the company's climate change risk exposure and risk management. Moreover, given the uncertainty as to how the group would practically comply with the proposed resolutions, it did not believe them to be in the best interests of the group at the time. The first resolution did not achieve the majority vote required for approval, but nonetheless received significant shareholder support (38.18 per cent for, 61.82 per cent against, with 6.29 per cent abstaining). The second was approved (55.09 per cent for, 44.91 per cent against, with 3.95 per cent abstaining).¹⁹

iv API

In March 2019, dissenting shareholders intervened in a proposed transaction of API, an investment holding company, forcing it to obtain court approval before implementing the transaction. The shareholders relied on a previously untested provision of the Companies Act that allows a dissenting shareholder to require a company to obtain court approval before

19 See Notice of Standard Bank 2019 AGM, available at: https://thevault.exchange/?get_group_doc=18/1555481722-SBGShareholdersinfoandnoticeofAGMLORESSingles.pdf, and results of the AGM, available at: http://research.mcgregorbfa.com/NewLibraryDocuments/JSEsSens/SENS_20190530_S415606.pdf. See also www.moneyweb.co.za/news/companies-and-deals/standard-bank-shareholders-vote-down-climate-risk-resolution; and www.businesslive.co.za/bd/companies/financial-services/2019-05-30-greens-to-standard-bank-well-be-back. In April 2018, the same activists combined to propose a resolution at the AGM of Sasol, a JSE-listed energy and chemical company. The proposed resolution sought to have Sasol, currently one of the largest contributors to greenhouse gas emissions in South Africa, prepare an annual report detailing its plans for addressing climate-related 'transition risks'. However, Sasol declined to table the proposed resolution on the basis that it addressed matters falling solely within the purview of board and management, and therefore did not meet the statutory requirement of being a matter on which the proposing shareholders were entitled to vote. See *Business Day*, 26 July 2018, Tracey Davies, 'Polluter Sasol sidesteps proposal to consider a low-carbon future' available at: www.businesslive.co.za/bd/opinion/2018-07-26-polluter-sasol-sidesteps-proposal-to-consider-a-low-carbon-future. Weeks later, Tencor, a global leader in the container industry, used the same argument as Sasol to justify its refusal to table at its AGM a resolution proposed by a small group of shareholder activists. The proposed resolution sought to compel Tencor to use its position as a substantial shareholder of Textainer to, among other things, compel Textainer to remove its 'poison pill' by-laws and takeover defence provisions by making board consent a prerequisite to a third party's acquisition of control. See *Business Day*, 18 July 2018, Ann Crotty, 'Tencor rejects minorities' bid for resolutions on protection by-laws', available at: www.businesslive.co.za/bd/companies/2018-07-18-tencor-rejects-minorities-bid-for-resolutions-on-protection-by-laws.

implementing a resolution approving a fundamental transaction, if at least 15 per cent of voting rights were exercised against the resolution to approve the proposed transaction (discussed above). At its AGM, API sought shareholder approval for a preference share buy-back scheme under which API would repurchase and cancel 13.5 million preference shares at a significant discount to face value. The resolution to approve the scheme received 76.5 per cent approval, but more than 15 per cent of votes exercised were against the resolution. That entitled dissenting shareholders to send a notice to API, in terms of Section 115(3)(a) of the Companies Act, requiring API to seek court approval for the resolution and, by extension, the share buy-back scheme.²⁰ On 5 June 2019, API published an announcement notifying shareholders that it had successfully applied (unopposed) to court for approval of the contested transaction.²¹

v La Concorde

In June 2018, the High Court considered the issue of whether a dissenting shareholder in a holding company is entitled to exercise appraisal rights (mentioned above) in respect of a subsidiary's disposal of all or the greater part of its assets or undertaking.²² Individual activist Albie Cilliers exercised his appraisal rights in respect of a sale of assets by a wholly owned subsidiary of La Concorde.²³ After rejecting La Concorde's initial offer of 13.47 rand per share, Cilliers applied to court for a declaration that the valuation did not represent fair value. La Concorde countered by challenging Cilliers's entitlement to appraisal rights at all, arguing that Section 164 of the Companies Act granted such rights to shareholders of the disposing company only (i.e., the subsidiary, not the holding company).²⁴

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

V REGULATORY DEVELOPMENTS

The fourth iteration of the King Code (effective for financial years commencing on or after 1 April 2017) adopts a qualitative, outcomes-based 'apply and explain' application

20 *Business Day*, 4 April 2019, Ann Crotty, 'African Phoenix: Activist wants his share', available at: www.businesslive.co.za/fm/money-and-investing/2019-04-04-african-phoenix-activist-wants-his-share.

21 See API announcement on the JSE Stock Exchange News Service, available at: www.sharedata.co.za/v2/Scripts/News.aspx?c=AXL.

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

23 La Concorde was formerly known as KWV Holdings.

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

and disclosure regime, in contrast with earlier iterations that imposed an ‘apply or explain’ regime. The King Code promotes a stakeholder-inclusive approach to corporate governance (as opposed to a shareholder-centric approach), which regards shareholders as an important subset of stakeholders who, by virtue of their rights as shareholders, are able to hold companies and their boards to account. The King Code, therefore, encourages shareholder activism, while further developing principles such as shareholder engagement through a number of its recommendations.²⁵ As such, it creates an opportunity for a framework for the responsibilities of shareholders, particularly institutional investors, to be incorporated in the corporate governance system of checks and balances.

In November last year, following recent campaigns and disruption in the market by certain short-sellers,²⁶ the FSCA published a ‘Discussion Paper on the Implementation of a Short Sale Reporting and Disclosure Framework’.²⁷

VI OUTLOOK

Recent events, including some high-profile corporate scandals and governance failures, have resulted in (calls for) shareholder bases that are less apathetic in their approach to management accountability and the pursuit of shareholder value. Shareholder demands for greater levels of accountability, transparency and return on investment are on the rise. A failure to engage with sophisticated activist shareholders or provide them with the levels of transparency demanded, may leave the board exposed to shareholder disapproval sparked by shareholder activists who are armed with an increased amount of information and a variety of regulatory rights and protections.

As discussed above, shareholder activists who hold even nominal stakes in companies are afforded relatively strong rights and protections: as such, companies will need to ensure that they practise good corporate governance and proactively participate in appropriate levels of shareholder engagement, with particular focus on unlocking shareholder value. This includes abiding by the disclosure and engagement recommendations of the King Code, particularly in the context of listed companies.

In the course of preparing for increased shareholder activism in South Africa, companies should monitor their shareholder portfolios carefully and seek to anticipate the kinds of activists likely to emerge, as well as the types of demands they are likely to make, on a case-by-case basis.

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

26 See, in particular, the National Treasury’s media statement, ‘National Treasury’s view on Viceroy’s Capitec Report’, dated 1 February 2019, available at: www.treasury.gov.za/comm_media/press/2018/2018020201%20Media%20statement%20Viceroy%20Capitec%20Report.pdf.

27 The discussion paper is available at: www.fsc.co.za/Regulatory%20Frameworks/Documents%20for%20Consultation/Discussion%20paper%20on%20the%20implementation%20of%20a%20Short%20Sale%20Reporting%20and%20Disclosure%20framework%20-%202019%20November%202018.pdf.

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ISBN 978-1-83862-052-3