Shareholder protection philosophy in terms of the Companies Act 71 of 2008

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OPSOMMING

Die filosofie van die beskerming van aandeelhouers in die Maatskappywet 71 van 2008

Die regte en remedies van aandeelhouers ingevolge die Maatskappywet 71 van 2008 word in hierdie artikel bespreek. Die doel is nie om die besonderhede van die remedies te bespreek nie, maar om ŉ hoëvlak evaluasie van die beskerming van aandeelhouers ingevolge die wetgewing te doen. So ŉ evaluasie is wenslik en noodsaaklik om te bepaal of die filosofie soos beoog in die Maatskappywet van 2008 inderdaad geïmplementeer is deur spesifieke bepalings en om te bepaal hoe hierdie filosofie verskil van dié in die Maatskappywet 61 van 1973, asook hoe dit die gemeenregtelike reëls in hierdie verband wysig. Daar word aandag gegee aan die bestuur van maatskappye deur die verhouding tussen die direksie en aandeelhouers te ondersoek en te kyk na die direksiestruktuur en die aanstelling en afdanking van direkteure. Verder word gekyk na die regte van belangehouers ("stakeholders"), remedies tot hulle beskikking en die regte van aandeelhouers ten opsigte van die vergoeding van direkteure. Daar word laastens ondersoek tot watter mate aandeelhouers bemagtig is om aktiewe aandeelhouers (in die bestuur van die maatskappy) te wees. Dit word gedoen aan die hand van die struktuur van eienaarskap van die tipies Suid-Afrikaanse maatskappy. Die agtergrond van die artikel is dus die verklaarde missie van die Maatskappywet dat dit aandeelhouersregte moet beskerm, aandeelhoueraktivisme moet bevorder en voorsiening moet maak vir beter beskerming van minderheidsaandeelhouers.

1 INTRODUCTION

South Africa follows a hybrid system of corporate governance. It is partly legislated and partly voluntary.[1] Directors' duties and the principles of good govern-

1 See in general Esser and Havenga (eds) *Corporate Governance Annual Review* (2012); Naidoo *Corporate governance. An essential guide for South African companies* (2010) and in general on corporate governance *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* [2015] JOL 33744 (WCC) and cases cited there.

ance are therefore not only regulated in terms of legislation[2] and the common law. Important recommendations are also contained in codes of best practice such as the *King report on governance, 2009* with its *Code of corporate governance*.[3]

"Corporate governance" has become an international term with various attempts being made to provide concise definitions.[4] For purposes of our discussion the following definition of corporate governance is the most apposite: "Corporate governance is a balance in which shareholders limit their right to manage the company in exchange for limited liability and the greater efficiency of centralised management."[5] This balance is allocated in various ways in different jurisdictions.[6] In this article we consider this "balance" by examining the protection that shareholders receive and whether it is sufficient, especially in view of the general philosophy of the Act.

The Department of Trade and Industry published a policy paper which envisaged the development of a "clear, facilitating, predictable and consistently enforced law" to provide "a protective and fertile environment for economic activity".[7] The vision stated by the *Policy document* was "that company law should promote the competitiveness and development of the South African economy" by

> "1. Encouraging entrepreneurship and enterprise development, and consequently, employment opportunities by—
>
> (*a*) simplifying the procedures for forming companies; and

2 In the context of corporate law the Companies Act 71 of 2008 (hereafter 2008 Companies Act) is the relevant Act (unless stated otherwise, all references below are to this Act). The Act came into operation on 1 May 2011. In February 2007 a draft Companies Bill was published. During September 2008 Parliament's Trade and Industry Portfolio Committee approved the Companies Bill of 2008. In December 2008 the Portfolio Committee amended the Bill. The 2008 Companies Act was assented to on 8 April 2009. Draft Regulations to the Companies Act were published for comment on 22 December 2009 and again on 29 November 2010. See N 1664, *GG* 32832 of 22 December 2009 and *GG* 33695 of 27 October 2010 for the Regulations and the Amendment Bill. The Companies Amendment Bill B40-2010 was approved by the Portfolio Committee on Trade and Industry on 10 March 2011. The Companies Amendment Act 3 of 2011 was signed into law on 20 April 2011; see *GG* 34243 of 20 April 2011.

3 Available at www.iodsa.co.za (hereafter the *King III report* or *King III code*). It is two separate documents, but together they are referred to as *King III*. See Loubser "The King reports on corporate governance" in Esser and Havenga (hereafter Loubser in Esser and Havenga) 22. See Naidoo 293 for a table of governance compliance and what governance action is regulated in legislation. The *King code* and the *JSE listings requirements*. *Listings requirement* 3.84 deal with the corporate governance requirements. See www.jse.co.za for the listings requirements.

4 Esser and Havenga 1.

5 Olson "South Africa moves to a global model of corporate governance but with important national variations" 2010 *Acta Juridica* 219 241–242 who also argues that the new Act is rather robust in providing shareholder protection.

6 In South Africa companies have a unitary board structure. See, eg, Naudé *Die regsposisie van die maatskappydirekteur* (1970) 208 on the differences between a unitary board structure and a two-tier board structure.

7 The *Policy document of the Department of Trade and Industry*. *The guidelines for corporate law reform, South African company law reform for a 21st Century* (*GG* 26493 of 23 June 2004, hereafter the *Policy document*).

(*b*) reducing costs associated with the formalities of forming a company and maintaining its existence.

2. Promoting innovation and investment in South African markets and companies by providing for—
   (*a*) flexibility in the design and organisation of companies; and
   (*b*) a predictable and effective regulatory environment.
3. Promoting the efficiency of companies and their management.
4. Encouraging transparency and high standards of corporate governance.
5. Making company law compatible and harmonious with best practice jurisdictions internationally."

As part of the mission it was specifically stated that "[t]he law should protect shareholder rights, advance shareholder activism, and provide enhanced protections for minority shareholders".

The purposes of the Act, stipulated in section 7, are therefore in line with the guidelines provided in the *Policy document*. The purposes of the Act[8] are to

"(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;
(b) promote the development of the South African economy by-
   (i) encouraging entrepreneurship and enterprise efficiency;
   (ii) creating flexibility and simplicity in the formation and maintenance of companies; and
   (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
(c) promote innovation and investment in the South African markets;
(d) reaffirm the concept of the company as a means of achieving economic and social benefits;
(e) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;
(f) promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;
(g) create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;
(h) provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;
(i) balance the rights and obligations of shareholders and directors within companies;
(j) encourage the efficient and responsible management of companies;
(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and
(l) provide a predictable and effective environment for the efficient regulation of companies."

The provisions of the Act have to be tested against the vision and mission as stated in the *Policy document*, but also, more importantly, against the purposes

8 See s 7.

listed in section 7 of the Act. We will conclude whether the protection afforded to shareholders in the Act is in line with these purposes and thus with the general philosophy of the Act.

The Act defines a "shareholder" as the *holder* of a share issued by the company *and* whose name is entered as such in the (certificated or uncertificated) securities register. The "holder" of shares (without it being entered as such in the (certificated or uncertificated) securities register) or of voting rights or other "beneficial interests" is used in different contexts throughout the Act. A "holder of shares" and a "shareholder" are therefore, for purposes of the Act, not synonyms.[9]

The *aim* of this article is to consider the protection that shareholders receive in the Act in respect of personal rights and corporate rights are not addressed.[10] We do this with reference to a number of selected themes taken from the Act. These themes include: the governance of companies, stakeholder protection, remedies available to shareholders, directors' remuneration and shareholder activism. The rationale for selecting these themes, namely, to assist us in reaching a conclusion on the level of protection that shareholders receive in the Act and whether these comply with the philosophy of the Act, is explained below.

In the context of our first theme, *governance of companies*, we specifically consider the division of power between the shareholders and the board of directors. The two (main) organs of the modern company are the general meeting (meeting of shareholders) and the board of directors.[11] The Act provides that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company. This is subject to the extent that the Act or the company's memorandum of incorporation[12] provides otherwise.[13] The Act therefore introduced a shift in ultimate power in the company from the shareholders to the board.[14] The board of directors now have the ultimate power in the company,

9 See the discussion of "shareholder" and of "securities" in Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2011) (hereafter *Henochsberg*) 28(3). This article is extensively based on Delport's original contributions to *Henochsberg*. This distinction is significant, especially in respect of enforcement of rights. See, eg, s 161 where reference is made to a "holder of securities", while s 163 refers to a "shareholder". See the discussion of the effect of this on these sections in *Henochsberg* 557 and 568 respectively and Cassim *et al Contemporary company law* (2012) (hereafter *Contemporary company law*) 758. The extended definition of a shareholder as in s 57 which, in essence, includes the beneficial shareholder only applies to that part, ie, in respect of the governance of companies. Unless otherwise indicated, the term "shareholder" in this article will refer to the definition in s 1.

10 See, eg, *Communicare v Khan* 2013 4 SA 482 (SCA) and *Henochsberg* 167 on personal and corporate rights.

11 *Contemporary company law* 355. See also *Henochsberg* 276 on the arguments in favour of the social and ethics committee being a company committee and not a board committee. The audit committee is also appointed by the shareholders and therefore also an organ of the company. See s 94 and *Henochsberg* 276 and on board meetings see s 73 and *Henochsberg* 280. See Cilliers *et al Cilliers and Benade Corporate law* (2000) 83 for the significance of the distinction between organs and agents.

12 Hereafter the MOI.

13 See s 66(1).

14 See s 66(1). See *Henochsberg* 250(4) for a detailed discussion of s 66. It is uncertain to what an extent management functions can be excluded in the MOI or transferred to the shareholders to perform. See s 15(1) that provides that the provisions in the MOI must be

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subject to the Act and the MOI.[15] Therefore where the Act provides that "the company" must act, that would now be the board of directors and not the shareholders (collectively), unless the Act makes it clear that the opposite will apply.[16] This provision on the shift in power from the shareholders to the board of directors has some serious consequences and we will discuss these in detail in the context of shareholder protection. We argue that, despite this shift, which is not in line with the philosophy of the Act, there are still various provisions in the Act that aim to protect shareholders.[17] We furthermore evaluate self-regulatory recommendations on the structure and composition of the board to determine whether these recommendations provide for the most appropriate board structure that will encourage good governance and ultimately benefit the shareholders. We also appraise the provisions in the Act on the appointment and removal of directors to see whether these provisions provide shareholders with sufficient rights with regard to who sit on the board of directors.

Our second theme deals with the *position of stakeholders*. This concerns the issue of the nature of the company and in whose interests directors need to manage a company. The generally accepted view has traditionally been that companies are managed primarily in the interests of their shareholders collectively. Thus the duty of directors is to maximise profits for the shareholders.[18] Over time there has been a shift in public opinion towards the recognition of a variety of other interests that should be considered by company management. These include environmental concerns and the interests of other stakeholders like investors, employees, consumers and the general public. Our view is to consider the relevant approach to stakeholder protection, as advocated by the Act and *King III*, as this will have a significant impact on the shareholders. An approach providing direct protection to other stakeholders will obviously be less beneficial to shareholders compared to an approach where shareholders are still the ultimate beneficiaries. The relevant approaches are discussed below.[19]

Our third theme is *shareholder remedies*. The aim is not to evaluate and analyse all these remedies available to shareholders in detail and to indicate specific

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in line with the Act; otherwise it would be void in so far as it is inconsistent. Also the directors owe the fiduciary duties to the company, and it will not make sense to give the shareholders the majority or all of the managerial powers because the directors can transfer their powers to the shareholders, or anybody else for that matter, but not their duties. It is also unclear how the shareholders will give effect to the full managerial function, as they will not have access to all the company records and accounts. See the discussion in *Henochsberg* 250(4).

15 See para 3 1 1 below.

16 See s 75, as one example, where the ultimate power is with the shareholders.

17 Olson 2010 *Acta Juridica* 242.

18 The interests of the company are those of the shareholders as the "corporators", both present (*Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 291) and future (*Gaiman v National Association for Mental Health* [1971] Ch 330). *Greenhalgh*, however, was not in respect of the duties of a director, but about minority protection and majority rule but is used nonetheless as authority in respect of directors' duties: see Lombard and Joubert "The legislative response to the shareholders v stakeholders debate: A comparative overview" 2014 *J of Corporate Law Studies* 212. See Davies and Worthington *Gower & Davies Principles of modern company law* (2012) 540ff for a discussion of the common-law position. See also *In re Smith & Fawcett Ltd* [1942] Ch 304 (CA) 306; [1942] 1 All ER 542 543; *SA Fabrics Ltd v Millman* 1972 4 SA 592 (A); see *Henochsberg* 295 and cases cited there.

19 See para 3 2 below.

shortcomings with some of these remedies, but rather to test it against the philosophy of the Act and to determine, based on the availability of remedies, whether shareholders are well protected or not.

Our fourth theme concerns *directors' remuneration* and to what extent shareholders have a say on it. Here we consider the provisions of the Act as well as recommendations made in *King III*.

Our final theme deals with *shareholder activism*. Shareholder activism could contribute to good corporate governance[20] which will ultimately benefit the company and thus indirectly shareholder investment in the company. We consider various provisions in the Act to determine whether there is enough scope for shareholders to be active. We also consider the recommendations in *King III* as well as the *Code on responsible investment in South Africa* (CRISA).[21]

Based on this holistic view of the selected themes we conclude on the protection that shareholders receive in the Act and whether or not this is sufficient, especially if one takes into account the typical ownership structure of a South African company as well as the general philosophy of the Act.

Our approach is based on a legal analysis of relevant legislative provisions in contrast to a leximetric, empirical or quantitative approach.[22] We thus follow a

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20 On this see Esser "Shareholder interests and good corporate governance in South Africa" 2014 *THRHR* 49. The focus of this article is therefore shareholder rights and not corporate rights.

21 See www.iodsa.co.za for the *Code* (hereafter CRISA). It was launched on 19 July 2011 with the effective date for reporting being 1 February 2012.

22 In the context of quantitative research there are various indices available that quantify the law with regard to shareholder protection. See La Porte *et al* "Law and finance" 1998 *J of Political Economy* 1113 for one of the most popular shareholder protection indices. They identified eight variables and applied it to 49 countries. These variables code the law with regard to shareholder protection. This index has, however, been criticised. See, eg, Cools "The real difference in corporate law between the United States and Continental Europe: Distribution of powers" 2005 *Delaware J of Corporate L* 697; Braendle "Shareholder protection in the USA and Germany – 'law and finance' revisited" 2006 *German LJ* 257; Spamann "On the insignificance and/or endogeneity of La Porta et al.'s 'anti-director rights index' under consistent coding" (Harvard Law School John M Olin Center Discussion Paper 2006), available at http://ssrn.com/abstract=894301 (accessed on 30 April 2015). This is discussed in detail by Lele and Siems "Shareholder protection: A leximetric approach" available at http://bit.ly/1KEwJOU (accessed on 1 May 2015). Lele and Siems argue that the selection of variables by La Porte *et al* does not capture the most significant aspects of the law. Their choice of variables is also very much drafted in favour of the position in the United States. Th fact that other issues like the difference between mandatory and default rules which have not been taken into account is also criticised as well as the definitions of the variables, which are too broad and vague. With these points of criticism in mind, Lele and Siems developed an index to measure shareholder protection in five countries over a period of three decades. They quantified legal rules by attempting to include variables which best reflect the shareholder protection in five countries. They included the UK, the US, France, Germany and India in their study. They thus made use of a leximetric approach. See Annex I of their article for the variables and sub-variables used in their index. In this publication they state that shareholder protection has increased in the past three decades in the five sample countries. They also state that minority shareholder protection against majority shareholder protection is stronger in "blockholder countries" (ie Germany, France and India in the countries selected). They did not, in this article, consider whether a better "score" received regarding shareholder protection matters in the context of good governance. In other words, whether it has a positive or negative effect on good

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doctrinal methodology.[23] In so doing we are able to evaluate whether or not shareholders receive adequate protection, keeping the ownership structure of typical South African companies in mind and especially also because the mission of the Act was stated to include that the law should protect shareholder rights, advance shareholder activism and provide enhanced protection for minority shareholders, as argued above.

2 OWNERSHIP STRUCTURE OF A COMPANY

"The nature and manner of corporate shareholding differ markedly even among the most developed market economies, and surely leave a mark on the structure of corporate law."[24] The ownership structure of a company has an impact on the orientation and efficacy of shareholder rights, remedies and activism. In the United Kingdom, for example, there are large numbers of publicly traded corporations with dispersed share ownership.[25] In other words, with dispersed share ownership no single shareholder or group of shareholders can exercise control over the corporation. In continental Europe this is often not the case. In Germany, for example, corporations usually have a controlling shareholder like a closely coordinated group of companies or even the State as in France.[26] In Italy the controlling shareholders are usually individuals or families.[27]

In South Africa the position is markedly different, because, due to historical factors, such as exchange control, the flow of capital internationally was not possible and it tended to lead to concentrated shareholding.[28] Also, the role of the institutional investor in the form of large life insurance companies, pension funds, unit trusts and even the Public Investment Commission (also called "mandated investments") has had the effect that direct shareholder control has been diluted to a large extent. There is therefore a lack of dispersed shareholding, and

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corporate governance. Siems "Working paper" 359, available at http://bit.ly/1RduY0w (accessed on 1 May 2015), then builds on the work done by himself and Lele and developed a second index. The second one deals with 20 countries instead of the original 5. It is, however, narrower in the sense that it only has 10 variables and covers at the period 1995 to 2005. He did include South Africa in the sample, but this was before the 2008 Companies Act. See further Van der Elst "Law and economics of shareholder rights and ownership structures: How trivial are shareholder rights for shareholders?" (2010), available at http://bit.ly/1O6C49t (accessed on 20 April 2015). He built on the work done by Lele and Siems and indicated that shareholder rights grew steadily in many countries over the last 15 years. His work does, however, cast some doubt on the influence of shareholder rights on ownership structures. It also shows that shareholder activism can actually have a greater influence than shareholder rights. In other words, activist shareholders can have a bigger influence than ordinary company monitoring at general meetings.

23 See Hutchinson and Duncan "Defining and describing what we do: Doctrinal legal research" 2012 *Deakin LR* 83 84.

24 See Kraakman *et al The anatomy of corporate law* (2009) 29.

25 See Coffee "Dispersed ownership: The theories, the evidence, and the enduring tension between 'Lumpers' and 'Splitters'" (2010), available at http://bit.ly/1Wh1dTg (accessed on 1 May 2015), on dispersed ownership versus concentrated ownership.

26 See La Porta *et al* "Corporate ownership around the world" 1999 *The Journal of Finance* 471, available at http://bit.ly/1k8C7Ev (accessed on 30 April 2015), on the concentration of ownership versus more dispersed ownership in large corporations around the world.

27 See Kraakman 29ff.

28 See Naudé 283 in respect of the influence of institutional investors.

the majority shareholding is either through the institutional investors or through insider shareholders[29] with as much as 52 per cent in 2002 on an equal-weighted average.[30] In respect of institutional shareholders, CRISA[31] has had an effect in respect of shareholder activism due to the fact that in terms of principle 2 of CRISA, the institutional investor should indicate to the ultimate beneficiary how the institutional investor exercises its voting rights in the companies in which it invests. Nominee shareholding could also dilute the rights of the ultimate owner of the shares, due to the fact that the nominee shareholder, as registered shareholder, would usually vote the shares in the manner that he thinks proper, if there is no instruction, as was more the rule than the exception, from the beneficial shareholder how the votes were to be exercised. The Act aims to give the beneficial shareholder a more direct influence on the actions by the nominee, which could promote shareholder participation.[32]

The protection of shareholders in a company with a dispersed shareholding is often different to that in companies where there is a dominant shareholder, whether through institutional investment, insider holding or merely large (controlling) blocks of shares. In respect of insider ownership (or block/concentrated ownership) the relationship between the majority shareholders and the minority shareholders should be sufficiently regulated as it is a basic premise of South African corporate law that the majority shareholder has no duties, fiduciary or otherwise, towards the minority shareholder.[33] In an outsider model (or dispersed shareholdings) minority shareholders should similarly be protected as the effect could be that a minority (block) holding can effect control.[34] In evaluating shareholder protection, it should also be noted that the notion of voting (or other control rights) may be outdated as the shareholder, either directly by voting with his feet or indirectly through other methods like codes, can and will influence management to an extent much greater than the threat of dismissal by an exercise of votes.[35]

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29 Statistics show that 40% of the JSE Ltd is held via pension funds and unit trusts or 61% when foreign funds are excluded (JSE 2012 from ownership presentation by Trevor Chandler). The shares in Sanlam Ltd, a major listed insurance company, are held as follows: 420657 or 86,6% of the shareholders hold between 1 and 100 shares: Sanlam Limited 2014 *Annual report* 37.

30 Stulz "The limits of financial globalization" 2005 *The Journal of Finance* 1595 1604. This is a relic of the past where large conglomerates, some established by families, such as the Anglo American corporation, were controlled by family members. See Rumney "Who owns South Africa: An analysis of state and private ownership patterns" in Daniel *et al* (eds) *State of the Nation 2004–2005* (2005) 401.

31 See para 3 5 below.

32 See para 3 5 below.

33 *Pender v Lushington* (1877) 6 ChD 70; *Sammel v President Brand Gold Mining Co Ltd* 1969 3 SA 629 (A); *Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd* 2014 5 SA 532 (GJ) and *Henochsberg* 168.

34 See, as to the different levels of control, *inter alia* Berle and Means *The modern corporation and private property* (1932) 75 and Botha *Groups in South African company law* (LLD thesis UP 1981) 142.

35 See Joubert "Reigniting the corporate conscience: Reflections on some aspects of social and ethics committees of companies listed on the Johannesburg Stock Exchange" in Visser and Pretorius (eds) *Essays in honour of Frans Malan* (2014) 184.

3 SHAREHOLDER PROTECTION IN SOUTH AFRICA

3 1 Governance of companies

3 1 1 Division of power between the shareholders and the board of directors

Ultimate (indirect) control of a company is usually in the hands of the shareholders as they have the power to appoint and remove directors.[36] The level of protection that shareholders receive in terms of the 2008 Companies Act is, however, different compared to the 1973 Companies Act as shareholders no longer have an original decision-making power.[37] This is due to the enactment of section 66. Section 66(1) apparently creates a positive duty on the board of directors to manage the company as it provides that the business and affairs of the company *must be managed* by or under the direction of its board.[38] It also means, due to the use of the words "business and affairs", that the ultimate power is no longer with the shareholders in general meeting, unless otherwise stated in the Act or the MOI. The powers of the directors are now given by statute and not delegated or derived from an agreement between the shareholders and the directors.[39] The ultimate responsibility for good corporate governance thus lies with the board of directors.[40]

The significance of the power to manage the business and affairs in terms of section 66 is twofold.[41] The power is now original and no longer delegated from the shareholders. This shift from the previous position also happened in Canada, one of the models for the Act, and the significance thereof was summarised as follows: "The directors' power is original, not delegated: as such, it is not subject to controls by the shareholders, except as specified in the applicable statute."[42] This is also true with regard to South Africa.[43] This means, *inter alia*, that the shareholders no longer have the inherent residual power to take a decision in case of a deadlock. This principle was, however, not applied consistently in the Act, and section 81(1)(d)[44] refers to the deadlock ground as a ground for the winding-up of a solvent company. In *Henochsberg* it is stated that "if the directors are in deadlock, the power to take over the powers of the directors does not

36 Kraakman 56. This is discussed in more detail below.

37 Act 61 of 1973 (hereafter the 1973 Companies Act).

38 In terms of the 1973 Companies Act the directors acted as functionaries (organs or agents) of the company. See *Henochsberg* 250(2) and *Contemporary company law* 403.

39 Delport "The division of powers in a company" in Visser and Pretorius (eds) *Essays in honour of Frans Malan* (2014) 81–92.

40 See Loubser in Esser and Havenga 30.

41 *Henochsberg* 250(3).

42 Welling *Corporate law in Canada* (2006) 315. Welling also indicates that this was a conscious movement away from the British model, as was established also in *John Shaw & Sons* (*Salford*) *Ltd v Shaw* 1935 2 KB 113 (CA) and *Scott v Scott* 1943 1 All ER 582 (Ch).

43 South Africa followed the Canadian model by giving the ultimate control to manage the company to the board (see, eg, Ontario Business Corporations Act, s 115(1) and the Canadian Business Corporations Act RSC 1985 c C-44, s 102(1)). See Delport (fn 39 above) 90.

44 This subsection makes provision for the company, one or more of its directors or one or more of its shareholders, to apply for the winding-up of a solvent company in circumstances where the parties referred to are in deadlock, or where it is "otherwise just and equitable for the company to be wound up". See the discussion in *Henochsberg* 328 and cases referred to.

transfer to the shareholders as the 'highest' authority in the company".[45] The same principle applies if the MOI or Act does not provide who must exercise the power.

Secondly, the ultimate power is now in the hands of the board of directors and no longer with the shareholders. Therefore, unless the qualifications of section 66 are complied with, the board of directors is now the ultimate organ of the company.[46] The significance of this is that the shareholders, as erstwhile ultimate holders of authority and power[47], cannot at common law ratify any actions by the directors beyond their authority or in transgression of their duties in acting on authority of the shareholders, except to the extent that the Act or the MOI expressly provides otherwise.[48]

Also, statutory provisions can provide that the company can or may do certain things. It is thus important to determine whether this falls on the board or the shareholders.[49] Based on section 66(1) it seems that the default position is that "the company" now refers to the board of directors and no longer to the shareholders. Thus, "if the board acts, the company acts".[50]

Although shareholders may have substantial protection in the Act, section 66(1) is clearly problematic.[51] This is especially the case in companies where there is more of a dispersed shareholding[52] as the board of directors will have ultimate control and the other rights and remedies provided for in the Act, and to be elaborated on below, will not necessarily be of assistance to smaller shareholders.

3 1 2 The structure of the board

South African company law has a unitary board structure. *King III* has extensive self-regulatory requirements relating to the structure and composition of the board. A brief discussion of these recommendations is necessary as shareholders will benefit mostly in a company with a proper board structure and a well composed board.

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45 *Henochsberg* 328.

46 *Ibid* 250(3). See the example given *ibid* where reference is made to the Alienation of Land Act 68 of 1981. A deed of alienation has to be signed by the parties thereto or their agents. In terms of the 1973 Companies Act this requirement would have been complied with if signed by an agent acting under the express or implied authority of the company as the company itself cannot sign (see s 69(1)). Now, in terms of the new s 66(1), the board is the highest authority. Thus, if the board acts, the company acts. The board can thus sign such a contract without any authority from the company (or any other organ like the shareholders).

47 See, eg, *John Shaw & Sons (Salford) Ltd v Shaw* 1935 2 KB 113 (CA); *Scott v Scott* 1943 1 All ER 582 (Ch) 584–585; Cilliers *et al* 21, Naudé 47; Du Plessis *Maatskappyregtelike grondslae van die regsposisie van direkteure en besturende direkteure* (LLD thesis UFS 1990) 17 and Du Plessis "Beskikkingsvryheid oor interne bestuursorganisasie, interne bevoegdheidsverdeling en die prominensie van die statute in die maatskappyereg" 1992 *TSAR* 100.

48 See, eg, s 20(2) for express authority to ratify certain *ultra vires* or unauthorised acts.

49 Delport (fn 39 above) 91.

50 *Henochsberg* 250(3).

51 See, eg, s 78(4) in respect of the indemnification of directors.

52 See Kraakman 29ff and La Porta *et al* (fn 24, 26 above) on the concentration of ownership versus more dispersed ownership in large corporations around the world; and Coffee (fn 25 above) on dispersed ownership versus concentrated ownership.

Good corporate governance, profit maximisation and the overall success of the company depend to a large extent on the board's capabilities.[53] The incentives of the board members, the size, structure and functions of the board and the role of board committees are especially relevant here.

This unitary board consists of executive and non-executive directors, which is not a requirement by law but in terms of *King III*. *King III*, which applies to all entities in the public, private and non-profit sectors, deals extensively with the structure of the board.[54]. Compliance with *King III* is voluntary unless there is a secondary basis for enforcement. This can be either in terms of legislation or contractual. Legislative enforcement is, for instance, in regulation 54(1)(b) of the Act that requires the prospectus to contain information about the application of the principles of *King III*.[55] Compliance with the *JSE listings requirements*[56] as a contract between the JSE Ltd and the listed company[57] is mandatory and compliance with *King III* is incorporated in the *JSE listings requirements*.[58] *King III*, however, operates, whatever the basis of enforcement, on an "apply or explain" approach (and not a "comply or explain" as was the case with the previous *Reports*).[59] An entity can thus adapt the recommendations and principles to its specific circumstances and apply them in a different way while achieving the same objectives. Regarding board composition *King III* recommends that there should be a balance of power between executive and non-executive directors, with the majority of the directors being non-executive directors.[60] The majority of non-executive directors should also be independent.[61] It is also recommended in *King III* that the size of the board should be determined in accordance with the knowledge, skills and resources required to conduct its business, but every board should have at least two directors.[62] *King III* recommends that non-executive directors should rotate at least every three years.[63] The independence of independent directors should also be assessed annually by the chairperson.[64]

The distinction between executive, non-executive and independent directors as dealt with in *King III* is not used in the Act in respect of directors. However, the requirements stipulated for members of the audit committee[65] clearly identify them as independent non-executive directors and the membership requirements

53 Kraakman 66.
54 *King III* principle 2.18.
55 GN R351 of 26 April 2011 in terms of s 223 (hereafter the Companies Regulations, 2011).
56 See para 8.63 of the *JSE listings requirements*. Listed companies are obliged to disclose how they have applied the *Code* and explain in their reports the reasons for any non-compliance. See Joubert (fn 35 above) 186.
57 See, eg, *Herbert Porter & Co Ltd v Johannesburg Stock Exchange* 1974 4 SA 781 (W); Pretorius *et al Hahlo's Company law through the cases* (1999) 41.
58 Loubser in Esser and Havenga 24.
59 *King III* Introduction and background 7. See also Loubser in Esser and Havenga 24ff.
60 See *King III* principle 2.18. An executive director is involved in the day-to-day management of the company and/or is a full-time salaried employee of the company and a non-executive director is not involved in the day-to-day management of the company. See Loubser in Esser and Havenga 36.
61 See *King III* ch 2 para 64.
62 See *King III* principle 2.18.3 and 2.18.4 (ch 2 para 72).
63 See *King III* principle 2.18.6 (ch 2 para 75).
64 See *King III* principle 2.18.9 (ch 2 para 78).
65 See s 94(4) that contains criteria for, it is presumed, the requirement of "independence".

for the social and ethics committee[66] also include that one director who must be classified as a non-executive director in terms of the criteria of *King III*.[67]

King III does not, subject to the above, prescribe the number of directors to serve on a board. The Act does, however, state that a private company or a personal liability company should always have at least one director and a public or non-profit company at least two, but this is in addition to the minimum number of directors necessary to satisfy a requirement in the Act or MOI to appoint an audit or social and ethics committee.[68] The Act also makes provision for four types of directors: those appointed by a person named in the MOI, *ex officio* directors, alternate directors and directors elected by the shareholders.[69]

The recommendations in *King III* in respect of the composition of the board, although not practically applicable to all companies, clearly will have the effect that the company has a more balanced board, in terms of the restriction of the influence on the board of "insider" directors. This will, in respect of corporate governance, only be for the benefit of the company and ultimately the shareholders.[70]

3 1 3 Election, appointment and removal of directors

Notwithstanding the fact that section 66(1) is clearly problematic especially regarding its implications for shareholders, as argued before, shareholders are still ultimately responsible to elect the board as they still have the right to elect[71] at least 50 per cent of the directors and alternate directors of a profit company (other than a state-owned company) and to remove those directors[72].

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66 S 72(4).

67 See reg 43(4) of the Companies Regulations, 2011.

68 See s 66(2).

69 S 66(4).

70 See, eg, *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 5 SA 333 (W); *South African Broadcasting Corporation Ltd v Mpofu* [2009] 4 All SA 169 (GSJ) and *Mthimunye-Bakoro v Petroleum Oil And Gas Corporation of South Africa (SOC) Limited* [2015] JOL 33744 (WCC).

71 See ss 66(4). "Appointment" by all the shareholders in terms of, eg, a shareholders' agreement will be the equivalent of election: *Gohlke & Schneider v Westies Minerale* (*Edms*) *Bpk* 1970 2 SA 685 (A) 689. Appointment by some of the shareholders in terms of, eg, a provision in the shareholders' agreement will still be the equivalent of election, as the other shareholders will have divested themselves of that right and this will be valid provided the terms and effect thereof is not against public policy: see, eg, *Pienaar* v *Bohbot* [2007] 3 All SA 60 (T) and *Barkhuizen v Napier* 2007 5 SA 323 (CC). The loading of votes is not restricted in the 2008 Companies Act, with the effect that it can be provided that if directors are appointed, the class A shares will have, eg, two votes while the class B shares will only have one vote. See as to the doctrine of equality also s 37(1).

72 See ss 71. Loaded voting rights are allowed, under certain circumstances, for the dismissal of directors in terms of s 71 of the 2008 Act. This loading cannot, it is submitted, be within a class due to the doctrine of equality in s 37(1). See, eg, *Bushell v Faith* 1970 AC 1099 (HL); *Stewart v Schwab* 1956 4 SA 791 (T); *Swerdlow v Cohen* 1977 3 SA 1050 (T) and Ncube "You're fired! The removal of directors under the Companies Act 71 of 2008" 2011 *SALJ* 33–51. However, there is no restriction in respect of loading as between classes. See s 37(2) where there is no restriction on loading, either express or implied. See also in respect of voting *Henochsberg* 166. In *Contemporary company law* 442 it is argued that shareholders can also remove directors not elected by them. The practical problems that this may cause are apparent.

The Act does not, however, state that there cannot be weighted or loaded votes in respect of the votes of directors.[73] Certain directors might thus have more votes than others. This can have an effect on the actual control that shareholders have in respect of the election of directors, because although the requirement is that they must elect at least 50 per cent of the directors on the board, the MOI can provide that the other (appointed or *ex officio*) directors or particular elected director/s have weighted/loaded votes, which would negate the power of the shareholder over directors.[74] This is also exacerbated by the fact that the MOI can provide for voting otherwise than on an individual basis for the election of directors, and the shareholder will therefore have no control if a director with weighted/loaded votes is included in the present structure and there is no election for that individual director, but election is for the board as a unit.[75] This, coupled with the fact that directors can serve, unless the MOI provides otherwise, for an indefinite term,[76] may leave the shareholder powerless.

In *King III* it is recommended that directors should be appointed/elected through a formal process that is transparent.[77] It is specifically recommended that a nomination committee should assist in identifying suitable people to serve on the board.[78] Background and reference checks should be done before the appointment. *King III* provides an extensive list of information that should be disclosed about each director in an integrated report.[79] This includes education, qualifications, length of service and age, significant other directorships, etcetera. This would enable shareholders to properly assess each director.[80] However, this will only enhance shareholder control if a company elects to apply *King III*.[81]

In terms of section 71, shareholders[82] may remove a director[83] from office at any time by way of an ordinary resolution.[84] This right given to shareholders is

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73 See s 73(5)(c). Each director has one vote, unless the MOI provides otherwise. S 73(5)(c) is thus an alterable provision.

74 The fact that there can be weighted/loaded votes is accepted in, eg, s 2(2)(a)(ii)(bb) and in s 3(1)(a)(ii) which regulated related parties and holding/subsidiary relationships respectively.

75 S 68(2).

76 S 68(1).

77 See *King III* principle 2.19.

78 See *King III* principle 2.23. A nomination committee must consist of a majority of non-executive independent directors. These members are, however, elected by the board of directors (see *King III*) and the input by the shareholders, other than the major shareholder, will have little effect. The nominations will be dictated by the major shareholder or, in many instances, even by the investment community. The present practice of "forced" sabbatical of a managing director, only to return as non-executive chairperson two years later will perpetuate the same management and management principles and the nomination process and makes a mockery of value of a true non-executive independent chairperson.

79 See *King III* principle 2.19 (ch 2 para 88).

80 Loubser in Esser and Havenga 39.

81 The MOI can also provide for election processes (s 68(2)) and qualification of directors (s 69(6)). Ss 29 and 30 prescribe the minimum requirements for eg the annual financial statements. Additional information can obviously be required in the MOI: see s 15(2)(d) and *Henochsberg* 71.

82 The board of directors (s 71(6)) and the Companies Tribunal (s 71(8)) may also remove a director in certain circumstances.

83 See discussion *supra*.

84 See s 65(7). The resolution has to be supported by more than 50% of the voting rights exercised on the resolution, being the votes represented at the meeting in person and proxy. In terms of s 65(8) the MOI may stipulate a higher percentage for an ordinary resolution to

continued on next page

in addition to the right to apply to place a director under probation or to declare that director delinquent.[85] The right provided for in section 71 overrides any provision of the MOI or any rule and agreement between any shareholders and a director.[86] A director has to receive notice of the meeting where the resolution to remove him will be tabled. He also has to receive a copy of the resolution. The resolution must also be accompanied by a statement setting out the reasons for the removal. This should enable the director to prepare and present a response to the removal.[87] A director is, however, not entitled to a statement of the reasons for his removal if the resolution to remove him was accepted. However, the provisions of section 60 authorising a resolution by informal vote or round-robin between shareholders does not apply. Section 71 does not state this expressly and the section 71 vote is not excluded in section 60, but by implication, due to the fact that the director has the right to address the meeting, the resolution must be taken at a formally convened meeting.[88]

In view of the above it seems that shareholders can remove a director, from a company law viewpoint at least, with relative ease, especially in respect of a non-executive director. Other legislation can have an impact on the protection available to shareholders in the context of removals of directors: In the case of an executive director, or any other director who is also in an employee relationship with the company, the labour laws will dictate the ease and efficacy of a purported removal. Therefore, if a person holds the office as director and is also an employee of the company, the dismissal as director could be constructive dismissal as employee, with extensive labour law consequences. Therefore, in such a situation, the employer/employee relationship needs to be terminated in terms of the labour laws, which could be a lengthy and complicated process; whereafter the company law process can be effected.[89]

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be successful. This is, however, not possible regarding the removal of a director. This resolution may also not be informally passed in terms of s 60 (thus in writing without holding a meeting) and also not by way of a round robin. The board of directors may also remove a director in case of a company with more than two directors. No reasons or grounds are prescribed in the Act when a director is removed by the shareholders. However, when the removal is by the director's fellow directors, the director may only be removed if he has become ineligible, disqualified, incapacitated to the extent that he cannot perform his functions and is unlikely to regain his capacity within a reasonable time, or has been negligent or derelict in the performance of the functions of a director. See s 71(3) and Ncube 2011 *SALJ* 33–51.

85 See s 162. This is discussed in more detail below in para 3 3.

86 S 71(1). Thus, an agreement between the shareholders and a director not to be removed is no longer valid. However, a shareholder agreement amongst the shareholders (and not with a director) not to remove a particular director might be valid. See *Contemporary company law* 441. Ss 157(1) and 6(1) will, however, be applicable. Any agreement concluded between the shareholders concerning a matter relating to the company has to be consistent with the Act and the MOI. A court may also declare any agreement intended to defeat the effect of a prohibition or requirement established by or in terms of an unalterable provision of the Act invalid.

87 S 71(4)(a). Directors now only have a right to make oral presentations and not written ones.

88 *Henochsberg* 271 and *Contemporary company law* 446.

89 *Henochsberg* 272 and authorities cited; *Mthimunye-Bakoro v Petroleum Oil And Gas Corporation of South Africa (SOC) Limited* [2015] JOL 33744 (WCC).

3 2 The position of stakeholders

At common law, directors have to act honestly in the best interests of the company. This has always been interpreted as the shareholders collectively, both present and future.[90]

The protection that has to be afforded to stakeholders has been widely debated in South Africa. The *Policy document*,[91] issued prior to the commencement of the recent company law reform process, referred to it as an important issue that the drafters of the new Companies Act had to consider. The *King reports* emphasise corporate social responsibility (CSR) principles and that companies must act as responsible corporate citizens.[92]

There are generally, two schools of thought on the issue of whose interests must be granted primacy when directors manage companies. In the enlightened-shareholder-value approach, the primary role of the directors should be to promote the success of the company for the benefit of the shareholders as a whole and to generate maximum value for shareholders.[93] The second school is that of plurism, which sees shareholders as one constituency among many and the interests of a number of groups are recognised.[94] Thus, a company's existence and success are seen as inextricably intertwined with the consideration of the inter-

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90 See fn 18 above. See further Du Plessis "Direkteure se pligte teenoor partye anders as die maatskappy" 1992 *De Jure* 378; Havenga "The company, the constitution and the stakeholders" 1996 (5) *Juta's Business Law* 136; Havenga "Directors' fiduciary duties under our future company-law regime" 1997 *SA Merc LJ* 317. This viewpoint was confirmed in the *Policy document* ch 3 para 3.2.2. See also Coase "The nature of the firm" 1937 *Economica* 386; Alchain and Demsetz "Production, information costs, and economic organization" 1972 *American Economic R* 777; Jensen and Meckling "The theory of the firm: Managerial behavior, agency costs and ownership structure" 1976 *J of Financial Economics* 305–360; Wishart "Models and theories of directors' duties to creditors" 1991 *New Zealand Universities LR* 323; Dine "Company law developments in the European Union and the United Kingdom: Confronting diversity" 1998 *TSAR* 245 for a discussion of the shareholder-versus-stakeholder theories.

91 The *Policy document*, preceding the company law reform process, clearly advocated for an inclusive approach and suggested the following model: "[A] company should have as its objective the conduct of business activities with a view to enhancing the economic success of the corporation, taking into account, as appropriate, the legitimate interests of other stakeholder constituencies." See ch 3 para 3.2.3.

92 The *King III Report* pays specific attention to CSR issues in ch 1 dealing with ethical leadership and corporate citizenship, ch 8 that deals with stakeholder relationships and ch 9 dealing with integrated reporting and disclosure. On CSR in general, see McBarnet "The new corporate accountability: Corporate social responsibility beyond law, through law, for law" in McBarnet, Voiculescu and Campbell (eds) *The new corporate accountability: Corporate social responsibility and the law* (2007) 1–37 and Horrigan *Corporate social responsibility in the 21 st Century. Debates, models and practices across government, law and business* (2010). On the *King III Report* see Esser and Delport "The duty of care, skill and diligence: The *King Report* and the 2008 Companies Act" 2011 *THRHR* 449 and Esser "The protection of stakeholder interests in terms of the South African *King III Report* on corporate governance: An improvement to *King II*?" 2009 *SA Merc LJ* 188. See also Olson 2010 *Acta Juridica* 221–225.

93 Cheffins "Teaching corporate governance" 1999 *Legal Studies* 515–525; Sheikh "Introduction to the corporate governance themed issues' 1998 *Int Company and Commercial LR* 267 268 and the *Policy document* 11

94 Miles "Company stakeholding" 2003 *Company Lawyer* 56; Dean "Stakeholding and the company law" 2001 *Company Lawyer* 66.

ests of its employees and other potentially qualifying stakeholders in the business, such as suppliers and customers.[95]

King III indicates that because a company is so integral to society, it should be considered as much a citizen of a country as any natural person. A company must therefore act as a responsible citizen.[96] This involves that companies must follow the triple bottom-line approach by considering, social, environmental and economic factors when managing a company.

King III opted for the so-called inclusive stakeholder value approach. This implies that the board should consider the interests of all legitimate stakeholders like employees and creditors and not just those of the shareholders. The various interests of different stakeholders are determined on a case-by-case basis to act in the best interests of the company. A certain stakeholder may receive preferential treatment if that best serves the interests of the company.[97]

Such an approach will usually be in the best interests of the shareholders, over the long term.[98] There should therefore be a (causal) link between the board decision taken and what is best for the company.[99]

CSR issues, and thus also the extent of stakeholder protection, enjoy more prominence in the Act than in any previous company legislation in South Africa.[100] Section 7(d) confirms that one of the purposes of the new Act is to reaffirm the concept of the company as a means of achieving economic and social benefit. Section 72(4) also provides for the establishment of a social and ethics committee.[101] Regulation 43 deals with the social and ethics committee as referred to in section 72 of the Act.[102] This regulation applies to all state-owned companies, public companies that are listed[103] or any other company that complies with certain criteria.[104] A public interest score of more than 500 points (in any two of the

95 *Policy document* 19.
96 *King III* Introduction and background 12.
97 *Idem* 11.
98 See also Joubert (fn 35 above) 191–192.
99 See Esser "Corporate social responsibility: A company law perspective" 2011 *SA Merc LJ* 317ff.
100 See Lombard and Joubert 2014 *J of Corporate Law Studies* 221.
101 The subject of the social and ethics committee requires a study on its own. See, however, Esser (2011) 317–335; Locke in Esser and Havenga 107–118; Kloppers "Driving corporate social responsibility (CSR) through the Companies Act: An overview of the role of the social and ethics committee" 2013 *PER* 165–199; Stoop "Towards greener companies – Sustainability and the social and ethics committee" 2013 *Stell LR* 562–582; Havenga "The social and ethics committee in South African Company law" 2015 *THRHR* 285–292; Joubert fn 35 above.
102 This requirement is in line with *King III* recommendations. Principle 1.1 of *King III* states that the board should provide effective leadership with an ethical foundation, which includes the responsibility to promote the stakeholder-inclusive model of corporate governance.
103 Reg 43(1). The fact that state-owned companies and public companies that are listed must, automatically, have a social en ethics committees seems to imply that it is accepted that these companies comply with the criteria in s 72(4)(a)-(c). While this may be true in respect of listed public companies, it does not follow logically in respect of state-owned companies. S 72(4) required expressly that the three criteria (or one of them) must be present and the type of company is irrelevant. To apply the section to certain types of companies does not seem to comply with s 72(4): See *Henochsberg* 276.
104 Reg 43(1)(c).

preceding five financial years) will be relevant in this regard. The "public interest score" is calculated at the end of a financial year as the sum of a number of things.[105] The number of employees and the turnover are some of the factors that will therefore determine whether a company is obliged to have such a committee. The public interest score is thus a method used to determine whether a company must comply with enhanced accountability requirements based on its social and economic impact. A minimum of three directors or prescribed officers must serve on a company's social and ethics committee.[106] The social and ethics committee's function is to monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice. This relates to matters concerning social and economic development, including the company's position regarding the goals and purposes as envisaged in, for example, the *OECD principles* and the *Global compact principles* as well as record of sponsorships, consumer relationships and labour and employment. The committee should also report annually to the shareholders at the company's annual general meeting on the matters within its mandate.[107]

Section 76(3)(a) and (b) of the Act deals with the issue in whose interests directors should manage a company and provides as follows: "A director of a company, when acting in that capacity, must exercise the powers and perform the functions of director (a) in good faith and for a proper purpose; (b) *in the best interests of the company*."[108]

It is our view that the inclusive approach should be followed in interpreting section 76(3)(b). As mentioned above, in terms of the inclusive approach, directors must consider the interests of various stakeholders on a case-by-case basis. In the end the decision must be in the best interests of the company, even if it is to the detriment of the shareholders.[109] The enlightened shareholder value ap-

105 Reg 26(2). Certain companies are exempted, such as when the company is required in terms of other legislation to have, and does have, some form of formal mechanism within its structures that substantially performs the function that would otherwise be performed by the social and ethics committee (s 72 (5)(a)) and if it is a subsidiary of another company (as defined in s 3 of the Companies Act) and if the holding company has a social and ethics committee that will perform the functions of the social and ethics committee for the (subsidiary) company (reg 43(2)(a)). If a company is required to appoint a social and ethics committee, it may apply to the Companies Tribunal in the prescribed manner and form for an exemption and the Tribunal can give such an exemption for five years if it is satisfied that it is not reasonably necessary in the public interest to require the company to have a social and ethics committee, having regard to the nature and extent of the activities of the company (s 72(5)(b)). This exemption is problematic as the same criteria (quantitatively) that require a company to appoint a social and ethics committee must be used to determine whether it is not necessary, in the public interest, to do so. It is suggested that the nature of the activities (ie a qualitative criterium) should be applied in the exercise of the discretion by the Tribunal, as the quantitative criteria are fixed by the public interest formula: See *Henochsberg* 277.

106 See reg 43(4). At least one must be a director who has, at least for the previous three financial years, not have been involved in the day-to-day management of the company's business

107 See reg 43(5). See also Esser in Du Plessis *et al Contemporary corporate governance* (2015) 398. See also fn 101 above.

108 Emphasis added.

109 See *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 5 SA 422 (GNP) on how the court balances the interests of shareholders and creditors in the context of the new business rescue proceedings. Employees also receive extensive protection in the 2008 Com-

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proach is more restricted: stakeholder interests must be considered but, in the long term, it must be in the best interests of the shareholders collectively. Whether one argues that section 76(3)(b) enforces the wider inclusive approach or the more restricted enlightened shareholder value approach, in the end directors have to consider the interests of stakeholders when they manage a company. They must do it in such a manner that will best address the interests of the company. There must be a causal link between the decision made by the directors and the eventual outcome which must be in the best interests of the company.

It should also be noted that section 5(1) states that the provisions of the Act must be interpreted in a way that gives best effect to the purposes listed in section 7. Section 7(d) provides that directors have to manage a company in such a manner that promotes both economic and social benefits.[110] It is doubtful that section 7(d) establishes a new, *sui generis*, duty on directors. It rather seems, against the background of the *Policy document*, that section 7(d) should also be interpreted to mean that directors must pay attention to the interests of stakeholders, but that it does not provide stakeholders with direct rights.[111] Furthermore, if the legislator wanted to create a new duty applicable to directors it would have been done explicitly (maybe by listing it in section 76 with the other duties) and not by merely incorporating it into the "purpose" provision. Section 158(b)(i) also states that if a provision in the Act, read in its context, can be reasonably construed as having more than one meaning, the meaning that best promotes the purposes of the Act must be preferred by the courts.[112]

It is therefore clear that stakeholders receive substantial protection in the Act: many of the provisions in section 7 are drafted in line with wider purposes than merely profit maximisation and the establishment of the social and ethics committee provides stakeholders with good protection and is really a way of legislating CSR. *King III*, although self-regulatory, is also clearly in favour of the inclusive approach.

In view of the above it is our view that although the interests of stakeholders have to be recognised and protected the basic principle still is that companies

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panies Act. See Katz "Governance under the Companies Act 71 of 2008: Flexibility is the Keyword" 2010 *Acta Juridica* 248 261–262 who states that employees receive, for the first time, significant rights of participation in the governance of companies. See, eg, ss 20(4), 45(5), 162(2), and 159 of the 2008 Companies Act. Employees also have extensive rights during business rescue proceedings.

110 As highlighted by Joubert (fn 35 above) 186, this objective should not be achieved to the exclusion of other objectives of the Act, such as "promotion of economic efficiency" in s 7(b)(iii).

111 Unless the duties to the company are not complied with, which would give the stakeholdera (direct) claim for damage or loss against the director: see s 218(2) and *Henochsberg* 639.

112 See, eg, *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* [2013] 2 All SA 190 (GNP); *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registration No 2007/019270/06) (Grayhaven Riches 9 Ltd and Others as Interested Parties; First Rand Bank Limited as Intervening Creditor)* [2012] 4 All SA 590 (WCC) and *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd* 2013 4 All SA 432 (GNP) for the importance of s 7 in general.

have to make a profit and shareholders must receive a return on their investments.[113]

3 3 Shareholder remedies

Shareholders[114] have substantial remedies in the Act. The new remedies provide shareholders with additional protection. See, for example, the appraisal remedy,[115] the remedy to place a director under probation or declare the director delinquent[116] and the application to protect the rights as a shareholder.[117] These are new remedies that were not applicable in terms of the 1973 Companies Act. Section 20 also provides shareholders with direct remedies against the directors and prescribed officers for damages if they acted intentionally, fraudulently or grossly negligent in contravention of the Act or against a limitation restriction or qualification of the company (that is, *ultra vires*) or their authority.[118]

In terms of section 163 a shareholder (or even a director) of a company may apply to a court for relief if any act or omission of the company, or a related person, has had[119] a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant, if 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 unfairly disregards the interests of the applicant or if 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.[120] In the case of a minority shareholder, it is accepted that many of the actions by the majority will or could be prejudicial to the minority shareholder. The test is, however, whether that action is (apart from oppressive

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113 Loubser in Esser and Havenga 20. See also Olson 2010 *Acta Juridica* 221. See Joubert (fn 35 above) 183 who states that the "main objective of companies listed on the JSE is to maximize profit and not primarily to achieve social or sustainability objectives". This fact is actually recognised in the 2008 Companies Act in the definition of a profit company in s 1 and also in s 81(1)((d)(i)(bb). Shareholders do not have fiduciary duties toward companies in which they hold shares: *Amdocs SA Joint Enterprises (Pty) Ltd v Kwezi Technologies (Pty) Ltd* 2014 5 SA 532 (GJ) para 23 and *Living Hands (Pty) Ltd v Ditz* 2013 2 SA 369 (GSJ) paras 21 22.

114 See fn 9 for the distinction between shareholders and holders of shares.

115 S 164. See generally on the appraisal remedy *Henochsberg* 574(5) and *Contemporary company law* 796ff.

116 S 162. See generally on declaring a director delinquent or to place a director under probation: *Henochsberg* 561 and *Contemporary company law* 23 and 435ff and *Msimang v Katuliiba* [2013] 1 All SA 580 (GSJ) for the application of s 162.

117 S 161. See *Henochsberg* 557 and *Contemporary company law* 817.

118 S 20(6). These remedies are problematic in a corporate law sense because, as stated in *Henochsberg* 96, it converts the shareholder's proprietary interest into a direct pecuniary interest under certain circumstances, thereby ignoring the separate legal entity of the company.

119 Under certain circumstances it is not only the act itself that must be oppressive or unfairly prejudicial to or unfairly disregard the interests of the applicant, but it must also have that effect: see *Peel v Hamon J&C Engineering (Pty) Ltd* [2013] 1 All SA 603 (GSJ).

120 See *Peel v Hamon J&C Engineering (Pty) Ltd* [2013] 1 All SA 603 (GSJ); *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 3 SA 146 (WCC) and Beukes and Swart "*Peel v Hamon J & C Engineering (Pty) Ltd*: Ignoring the result-requirement of section 163(1)(a) of the Companies Act and extending the oppression remedy beyond its statutorily intended reach" 2014 *PER* 49.

which implies unfairness) also unfair.[121] This remedy is also in respect of those acts by a related person,[122] which could be a holding company, which is an extended remedy compared to that under the common law or under the repealed 1973 Companies Act. The definition of "shareholder" restricts the ambit of the remedy, but the inclusion of "interests" of that shareholder and not only actions in respect of the rights of the shareholder extends the ambit of the remedy. In *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd*[123] "interests" were defined as to include interests not only flowing from the MOI of the company, but also from an understanding or agreement between the parties, which would mean a general fairness standard based on the reasonable expectations of the applicant and will not only be strict legal rights.[124]

The appraisal remedy is only applicable in certain circumstances.[125] In broad terms this remedy is triggered when a company passes a special resolution to amend the rights of a class of shares in terms of the MOI that materially or adversely affects the rights of that shareholder or undertakes a fundamental transaction.[126] In these circumstances dissatisfied or minority shareholders do not have to go along with the decision made by the company as they have the right of opting out of the company by withdrawing the fair value of the shares by exercising their appraisal rights. By having this remedy shareholders can indirectly influence the decisions that directors make, especially in the context of fundamental transactions. Fundamental transactions clearly have an impact on all stakeholders and it is therefore important that the outcome of the transaction is in the best interests of the company in the long term. The appraisal remedy creates a good check and balance to prevent directors (and controlling shareholders) from taking and making bad business decisions and judgments. The more shareholders who are against the triggering transaction the bigger the chance that the company will reconsider its proposed plans. On the other hand, this remedy can also have a negative effect on good corporate governance as the company might have to pay a lot of money to satisfy shareholder demands for appraisal to such an extent

121 See especially *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 5 SA 179 (WCC). This remedy applies in addition to the personal (or representative) remedy of a shareholder at common law: *Communicare v Khan* 2013 4 SA 482 (SCA). See also Beukes and Swart 2014 *PER* 49.

122 See s 2 for the definition of a related person. In essence a juristic person will be related to another juristic person if either controls the other as defined in s 2(2) or either is a subsidiary of the other (as defined in s 3) or a person directly or indirectly controls each of them or the business of each of them as defined in s 2(2). S 2(2) defines control in respect of companies as basically to include majority voting power in the company or on the board of that company or if a person is able to materially influence the policy of that company in a manner comparable to a person having such majority voting powers.

123 [2013] 2 All SA 190 (GNP) para 17.4.

124 *Henochsberg* 574(3) and especially *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 5 SA 179 (WCC) para 54.

125 See s 164. See also Beukes "An introduction to the appraisal remedy as proposed in the Companies Bill: Triggering actions and the differences between the appraisal remedy and existing shareholder remedies" 2008 *SA Merc LJ* 479 (but see Pike "An alternative view of the appraisal remedy" 2015 *SA Merc LJ* 678–687); Beukes "An introduction to the appraisal remedy in the Companies Act 2008: Standing and the appraisal procedure" 2010 *SA Merc LJ* 176 and Yeats "Putting appraisal rights into perspective" 2014 *Stell LR* 328.

126 As regulated in ch 5 of the Act.

that the company is no longer able to continue with an otherwise favourable transaction.[127]

A person may be declared delinquent to act as a director.[128] A wide range of people may apply to court to declare a director delinquent or place him under probation. A shareholder is one of those listed in section 162 that has *locus standi* to apply to court for an order declaring the director delinquent or place him under probation. Instances of delinquency include, *inter alia*, that while being a director one grossly abused his or her position as a director or acted in a manner that amounted to gross negligence. A person may also be placed under probation on a number of grounds. For example, while being a director he or she acted in a manner that is materially inconsistent with the duties of a director.[129] By being able to declare a director delinquent or place a director under probation shareholders can ensure that only prudent and appropriate directors serve on the board.

A further new remedy is the remedy given to holders of securities[130] to protect their (personal) rights. They can apply to court for a declaratory order as to their rights as well as an order to rectify any harm done to them.[131] The holder of issued securities can therefore apply to court for an order determining his or her rights in terms of the Act, the MOI, rules of the company or any applicable debt instrument as well as an order to protect any such rights. This remedy is very wide and can be used, for example, by a security holder in case of a wrongful refusal of the casting of a vote and also for an order in respect of acts by directors that are not in the best interests of the company as required by section 76(3)(b), as section 66(1)(b)(ii)(aa) clearly provides that a holder of issued securities of a company may apply to a court for any appropriate order necessary to rectify any harm done to the securities holder by any of its directors to the extent that they are or may be held liable in terms of section 77, thus also for a contravention of section 76(3)(b). Liability in terms of section 77 is in respect of fiduciary duties to the company, which should be enforced by the statutory derivative action in section 165. However, this section seems to include the personal action as a cause of action. It will, however, be difficult to indicate that the directors did not act in the best interests of the company, for example, by giving preference to the rights of employees instead of the rights of shareholders. It also provides a shareholder with direct recourse against a director to the extent that the director is liable under section 77. This section 77, however, applies in the director's breach of his or her duties which will cause harm to the company and not the individual shareholder. The link between the shareholders' loss or damage and that of the company is uncertain. It is also not clear how "rights" should be interpreted in terms of this provision. Cassim *et al* argue that it can be interpreted in a wide sense, in that every shareholder has a general right to have the MOI and rules being observed by the company. It can also be interpreted more narrowly by including the personal rights of the shareholder, but not those provisions of the MOI that place duties or obligations on the company.[132]

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127 See Esser (2014) 49.
128 S 165(5).
129 See s 162(5).
130 See s 161.
131 See s 161 and *Contemporary company law* 817–820.
132 *Contemporary company law* 819.

Section 20 also provides ample rights to shareholders to protect them in the context of company actions with third parties. Section 20(1)(a) dealing with the validity of company actions is of relevance. In terms of this section the contract concluded with the third party will be valid only if the directors had no authority to authorise the action, but only as a result of the limitation, restriction or qualification on the capacity of the company.[133] If there is a lack on the basis of authority then section 20(1)(a) will not apply and the company is subsequently not bound by the contract, based on the common-law principles of agency. Shareholders, directors, prescribed officers or a trade union representing employees of the company may apply to the High Court for an order to restrain the company from doing anything inconsistent with the limits, restriction and qualifications. This is without any prejudice to the *bona fide* third party's rights.[134] Delport argues that it is uncertain how the *bona fide* party will obtain rights if the action is restrained (before the conclusion of the contract, for example).[135] Shareholders, directors and prescribed officers of a company may also apply to the High Court for an order to restrain the company or directors from acting against any limit, restriction or qualification in the company's MOI, subject to the rights of the *bona fide* third party.[136] A shareholder will also have a claim against the directors and prescribed officers for damages if they acted intentionally, fraudulently or grossly negligent in contravention of the Act or against a limitation, restriction or qualification of the company (that is, *ultra vires*) or their authority, unless ratified by special resolution.[137] Acts in contravention of the Act cannot be ratified,[138] but those against a limitation, restriction or qualification can be ratified, apparently also if the act was fraudulent. This is a deviation from the trite common-law principle that fraudulent acts cannot be ratified and, in essence, allows the shareholders to authorise theft by the directors.[139]

The shareholder, and in some instances also the holder of shares, has extensive remedies in terms of the Act. Basically the philosophy of the Act is served by these remedies, but in some instances it may be said that the basic principles of company law may have been affected negatively,[140] while others, such as section 161, may have increased the protection of the shareholder while unfortunately transferring the deficiencies of similar remedies in terms of the 1973 Act into the 2008 Act.[141]

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133 See s 20(2). The shareholders may, by special resolution, ratify any action by the company or its directors that is inconsistent with any such limit, restriction or qualification. Such action may not be inconsistent with the Act, see s 20(3).

134 See s 20(4).

135 Delport *New entrepreneurial law* (2014) 99.

136 See s 20(5).

137 See s 20(6) and discussion *supra*.

138 S 20(3).

139 This is a deviation from the common law principle that fraudulent acts cannot be ratified and, in essence, allows the shareholders to authorise theft by the directors. See *Henochsberg* 96.

140 S 20(6) and see discussion *supra*.

141 Eg, the lack of incentive for the shareholder in the statutory derivative action as well as the paucity of inside information to effectively institute or commence the action. See Cilliers and Benade *Corporate law* 306 and authorities there cited in respect of s 266 of the 1973 Act which could be seen as the equivalent of s 163 of the 2008 Act.

3 4 Directors' remuneration

A director is not entitled to remuneration simply because he has been appointed as a director. However, a company may remunerate a director for his services, unless this is prohibited by the MOI.[142] Section 66(9) of the Act provides that remuneration may only be paid to directors for their services in accordance with a special resolution approved by the shareholders every two years.[143] Loubser[144] states that this means that at least the policy or formula of the company to determine the payment of remuneration to its directors must be approved, in advance, every two years by the shareholders. Authorisation by shareholders is thus needed and this suggests some control over the remuneration payable to directors.[145] This is, however, debatable as the question arises as to what remuneration has to be approved.[146] Luiz argues that in terms of section 66(8) read with section 66(9) "remuneration to its directors for their services as directors" has to be approved. There is, however, no definition of "remuneration" in the Act. "Remuneration" is only defined in section 30(6). This is, however, done in the context of what has to be disclosed in the annual financial statements.[147] Luiz argues further that it seems as if there is a distinction between remuneration paid for services rendered as a director to or on behalf of the company and for other remuneration like a salary, bonus and performance-related payments in section 30(6).[148] She states that it can be interpreted that fees paid to directors for services rendered to or on behalf of the company mean fees paid to a director for being a director. These fees will include, for example, to prepare for a board meeting and to give input at such a meeting.[149] This could then be viewed as different from amounts received

142 S 66(8).

143 Remuneration paid to a director for services rendered as a director without approval by way of a special resolution will result in a contravention of the 2008 Companies Act. This means that it will be possible to institute an action against the directors who authorised or made the payment based on a breach of their fiduciary duties. Any person who suffered a loss or damage due to this contravention will also be able to rely on s 218(2). See Luiz "Executive remuneration and shareholder voting" 2013 *SA Merc LJ* 292.

144 Esser and Havenga 46.

145 Luiz 2013 *SA Merc LJ* 292.

146 *Idem* 293.

147 Companies that are required to have their financial statements audited must include particulars on, *inter alia*, remuneration. See s 30(4). This includes public companies and certain other companies. See ss 30(2)(a) and 30(2)(b) and 30(2A). In the non-binding opinion of the Companies and Intellectual Property Commission in terms of s 188(2)(b) of 27 October 2011, "Interpretation of section 30 (2) and 30 (4) of the Companies Act, 2008, in relation to the disclosure of directors' remuneration in private companies", the CIPC concluded that companies whose AFS must be audited in terms of the *regulations* (eg, certain private companies), are also excluded from disclosing directors' remuneration as the audit requirement is in terms of the regulations and not in terms of the 2008 Companies Act, although the Act clearly provided in s 1 that the word "Act" includes the regulations. This opinion was, however, withdrawn with effect from 12 March 2015. See Locke in Esser and Havenga 66ff for a discussion of enhanced accountability in terms of the 2008 Companies Act.

148 Luiz 2013 *SA Merc LJ* 293.

149 See *Contemporary company law* 455–456 where this issue is discussed. They state that: "It is debatable whether it was the intention of the legislature to require approval by special resolution for board meetings only" (456). They state that until the wording of s 66(8) is clarified it is advisable to get shareholder approval by way of a special resolution for

continued on next page

as salary, bonuses, etcetera. It is debatable whether this approach should be followed, but if "remuneration to its directors for their service as directors" is interpreted in a narrow sense, the protection that shareholders have by way of a special resolution is limited. This will mean that shareholders will only have input into the amounts paid to directors in their capacity as directors and they will not have any say in the executive remuneration packages.[150] In practice this means that only the remuneration of non-executive directors are approved in terms of the Act.[151]

As stated above, disclosure of the particulars of remuneration of directors in the annual financial statements is regulated in the Act and, where applicable, in the *Listings requirements*. *King III* also has good recommendations on remuneration which are in line with international best practices. However, South Africa does not provide shareholders with "a meaningful voice" on executive remuneration based on the narrow interpretation of "remuneration to its directors for their service as directors" in section 66(8), as explained before.[152] Shareholders can vote against the remuneration policy, but they merely have an advisory vote in certain instances as discussed above, and would otherwise have to take a special resolution in terms of section 66(9). The board of directors does not have to adhere to an advisory vote and the passing of a (negative) special resolution is unduly cumbersome.[153]

King III recommends that companies remunerate directors and executives fairly and responsibly,[154] disclose the remuneration of each individual director[155] and that shareholders should approve the remuneration policy of the company.[156] With regard to non-executive directors it is recommended that their fees consist of a base-fee as well as an attendance fee per meeting.[157] Although permitted by the Act it is recommended in *King III* that the chairman and other non-executive directors should not receive share options or other incentives linked to share prices.[158] *King III* also recommends the appointment of a remuneration committee.[159] This committee has to assist the board with the drafting of the remuneration policy. Listed companies must also comply with the *Listings require-*

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board fees for attending board meetings etc as well as for executive remuneration packages under employment contracts in order to ensure that you do not contravene the Act.

150 Luiz 2013 *SA Merc LJ* 293. See also *Henochsberg* 258(6). There is no consistent application of this requirement: See the Sanlam Ltd and Steinhoff International Ltd 2014 annual financial statements.

151 For one exception see Steinhoff *International integrated report 2014*.

152 Luiz 2013 *SA Merc LJ* 296.

153 This is, however, only recommended in *King III*, recommended practice 2.27.1. See also para 8.63(a) of the *Listings requirements*. Listed companies have to comply with *King III* or explain reasons of non-compliance in the annual report.

154 *King III* principle 2.25.

155 *King III* principle 2.26. This must be done in the remuneration report and it will form part of the company's integrated report. Ch 9 of *King III* deals with integrated reporting and disclosure.

156 *King III* principle 2.27. This is by way of a non-binding, ordinary majority advisory vote.

157 See 2.25.4.

158 See Loubser in Esser and Havenga 44–46 for the recommendations on remuneration as per *King III*.

159 *King III* recommended practice 2.23.6 and 2.25.2.

ments[160] which require that certain financial information must be disclosed relating to directors' remuneration.[161] Although *King III* goes much further than the Act in respect of the "say on pay" by the shareholders, the remedies for non-compliance are limited as it is not law.[162]

3 5 Shareholder activism

From the above discussion it is clear that shareholders have ample rights and remedies in terms of the Act, even if somewhat ineffective in certain instances. The next question that has to be addressed is the extent to which the law provides auxiliary support to shareholders to realise these rights and remedies and to encourage them to use it.[163]

A number of provisions in the Act encourage shareholder activism. First, there are a number of provisions aimed at ensuring that shareholders attend more meetings. Section 64(1) provides that the quorum at a shareholders' meeting is 25 per cent "of all of the voting rights that are entitled to be exercised in respect of at least one matter to be decided at that meeting". There was no votes quorum in the 1973 Companies Act[164] and the quorum requirement may result in more shareholders attending company meetings as the company will encourage them to attend or obtain proxies in order for the meetings to be able to continue. However, the forced quorum in respect of non-quorate meetings may actually also work against shareholder attendance.[165] The fact that proxies can be submitted electronically will also contribute to reaching a quorum and having greater shareholder participation in company meetings.[166] A lower or even higher quorum percentage may, however, be stipulated in a company's MOI.[167] Meetings can be held electronically and shareholders can participate via electronic (interactive) communication.[168] This will obviously save the shareholders some travelling time and the costs associated with attending in person, which will result in overall lower costs for the shareholders.[169] Section 60 provides for the informal round-robin resolution to the effect that a resolution that could be voted on at a shareholders' meeting may instead be submitted to shareholders, who are entitled to vote on the resolution, and voted on in writing by the shareholders with the

160 See *Listings requirements*, s 8.
161 See Luiz 2013 *SA Merc LJ* 294 and especially 295–296 for a summary of the principles of remuneration of directors in South Africa.
162 See *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 5 SA 333 (W) and Esser and Delport 449.
163 See Esser (2014) for a detailed discussion of shareholder rights and activism and *idem* 43–46 for the recommendations in *King II* and *King III* on shareholder activism.
164 See s 190 of the 1973 Companies Act where the quorum was three members entitled to vote in the case of a public company and two members entitled to vote in the case of a profit company.
165 S 64(8).
166 See ss 58 and 6(11).
167 See s 64(2). Too high a quorum may frustrate the proper functioning of meetings; as it might be difficult to meet the quorum requirement. There is apparently no minimum threshold.
168 S 64(1).
169 See in general on shareholder apathy *Contemporary company law* 497–501.

same majorities applicable as for the formal resolution.[170] This must happen within 20 business days after the shareholders have received the resolution.

Secondly, the fact that the Act now specifically provides for voting rights of beneficial shareholders will also have an impact on shareholder activism. Section 56 deals with a beneficial interest in securities. The beneficial shareholder is entitled to the rights attached to the share while the registered shareholder is the person in whose name the share is registered. A company's issued securities may be held by, and registered in the name of, one person for the beneficial interest of another, unless otherwise provided in the MOI.[171] A person who holds the beneficial interest in any security may vote in a matter at a meeting of shareholders only to the extent that the beneficial interest includes the right to vote on the matter and the person's name is on the company's register of disclosures as the holder of a beneficial interest or the person holds a proxy appointment in respect of the matter from the registered holder of those securities.[172] A major new shift in corporate control has, however, been enacted in section 56(9) and (11) that *inter alia* provides that person who holds a beneficial interest which includes the right to vote[173] is entitled to vote if the name of that holder is included in the register of disclosures or if that person holds a proxy from the registered holder (the nominee). The registered holder of any securities in which any (other) person has a beneficial interest which must, it is submitted, be at least a voting right, must deliver the notice of any meeting of the company, together with a proxy appointment to the holder of a beneficial interest. The holder of a beneficial interest is entitled to demand a proxy appointment by the registered holder and the latter is obliged to provide it, to the extent of the beneficial shareholding. The beneficial holder will therefore be the proxy of the registered holder.[174] Section 56(9) to (11) is not applicable to securities that are subject to the rules of a central securities depository, which would in effect be companies that are listed on the JSE Ltd. These provisions ensure that the beneficial shareholder has knowledge of any meeting and proposed resolution, and also to actively participate as beneficial owner of the shares, other than merely giving instructions to the nominee shareholder as to the manner of voting.

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170 This is in addition to the common law unanimous consent. The requirements of notice and periods of notice are, however, uncertain. This resolution can, apparently, not be used in respect of resolution required for ss 71 and 115.

171 See s 56(1).

172 See Joubert (fn 35 above) 184 fn 6. See, however, Henderson and Van der Linde "Uncertificated shares: A comparative look at the voting rights of shareholders" 2014 *TSAR* 496 who argue that the direct relationship between the shareholder and company is diluted due to the intermediary (nominee) holdings to the detriment of the shareholder rights.

173 A beneficial interest is defined in s 1 as "when used in relation to a company's securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to – (a) receive or participate in any distribution in respect of the company's securities; (b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or (c) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities, but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002)". The disjunctive elements of this definition are unfortunate and cause uncertainty. See *Henochsberg* 220.

174 See s 58 in respect of proxy appointments.

Lastly, reference should be made to CRISA as it can have a significant impact on the role that institutional investors can play in the context of investment decisions and environmental, social and governance (ESG) issues. CRISA is a *Code on responsible investment in South Africa*.[175] Institutional investors can have a significant impact on the quality of governance in the companies that they invest in. The aim of the *Code* is to give guidance on how institutional investors should execute investment activities to promote sound corporate governance. CRISA applies to institutional investors as well as service providers of institutional investors like asset and fund managers. The *Code* operates, similar to the *King report*, on an "apply or explain" voluntary basis. CRISA recommends five guiding principles:

> "Principle 1 – An institutional investor should incorporate sustainability considerations, including environmental, social and governance (ESG), into its investment analysis and investment activities as part of the delivery of superior risk-adjusted returns to the ultimate beneficiaries.
>
> Principle 2 – An institutional investor should demonstrate its acceptance of ownership responsibilities in its investment arrangements and investment activities.
>
> Principle 3 – Where appropriate, institutional investors should consider a collaborative approach to promote acceptance and implementation of the principles of CRISA and other codes and standards applicable to institutional investors.
>
> Principle 4 – An institutional investor should recognise the circumstances and relationships that hold a potential for conflicts of interest and should pro-actively manage these when they occur.
>
> Principle 5 – Institutional investors should be transparent about the content of their policies, how the policies are implemented and how CRISA is applied to enable stakeholders to make informed assessments."

CRISA is not about sacrificing on returns; the argument is rather that by taking ESG issues into account, they will save money that will be in the best interests of their clients, in the long term. Ramalho states that "it is clear that one of the prevailing themes in CRISA is for institutional investors to look beyond short-term profit maximisation to incorporate environmental, social and governance considerations into investment analysis and investment activities and report thereon".[176] It is also stated in the foreword of the *Code* that institutional investors, as long-term investors and fiduciaries, have a responsibility to ensure that they invest in such a way that will promote long-term sustainability. Many commentators did,[177] however, argue that one of the reasons for shareholder apathy is that institutional investors first have a duty towards their clients and only then to the company. Their clients are mostly only interested in profit-maximisation, most probably in the short term. The argument held in CRISA is that by taking ESG issues into consideration the clients will benefit in any event.

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175 The Code was drafted by the Stakeholder Committee chaired by John Oliphant. CRISA aims to provide the investor community with the guidance needed to give effect to the King III report as well as the United Nations-backed Principles for Responsible Investment (PRI) initiative. CRISA has been endorsed by the Institute of Directors in Southern Africa (IoDSA), the Principal Officers Association (POA), and the Association for Savings and Investment South Africa (ASISA). The principles of CRISA are supported by the Financial Services Board (FSB) and the JSE Ltd (JSE).

176 Ansie Ramalho is the former CEO of the IODSA.

177 See generally Esser and Havenga "Shareholder participation in corporate governance" 2008 *Speculum Juris* 74 and Griggs "Institutional investors and corporate governance" 1996 *James Cook Univ LR* 4.

During September 2013 The IODSA published a research report on responsible investment: *CRISA disclosure by institutional investors and their service providers*.[178] The research on which the report is based relied on publicly available information, disclosed by institutional investors and their service providers, to evaluate the progress made towards responsible investment. It is held that a growing number of institutional investors and their service providers are integrating responsible investment principles into their investment practices. The findings do, however, indicate that disclosed data are not always properly comparable, as their format, content and intentions are too dissimilar. There is also a lot of diversity as to the quality of the disclosure and the approaches of integrating ESG factors into investment decision making. The industry is to a large extent characterised by passive and selective approaches to responsible investment. Progress seems limited as it is unclear what it really means to integrate ESG considerations into investment decision making. It must, however, be kept in mind that disclosure guidelines were only published at the beginning of 2013.[179]

CRISA is obviously important for the shareholders because although there is no remedy that can be enforced, it benefits shareholders and protects their interests as sound governance, and the monitoring thereof, will reduce any risks for the shareholder and the need to enforce rights through the application of remedies. On a next level, disclosure to the investor in respect of the voting by the institutional investor in respect of shares held on behalf of the investor, will not enable the investor to have a direct influence on the company, but dissatisfaction in the way the institutional investor voted on particular resolution could have the effect that the investor "votes with his feet" by withdrawing the investment. This will have a direct effect not only on how the institutional investor will exercise its voting rights, but also on how the company conducts it business and applies sound corporate governance.[180]

The legal framework of a specific country will ultimately determine the significance of shareholder involvement. We are of the view that the South African legal framework provides ample opportunity for shareholders to make a difference. Various provisions of the Act were looked at and it was indicated that these provisions can facilitate greater shareholder involvement in company management, which will eventually contribute to good corporate governance. Provisions relating to the conduct of meetings, shareholder remedies and the voting rights of beneficial shareholders were specifically considered in this context.

4 CONCLUSIONS

The Act has as a mission to protect shareholder rights, to advance shareholder activism and to provide enhanced protection for minority shareholders. South Africa has a concentration of shareholding, either through institutional investment or through direct blockholding of shares. However, unfortunately there does not seem to be a central theme in the Act that supports the stated mission. Section 66(1) now gives original powers to the board of directors to manage the

178 The report can be downloaded at http://bit.ly/1Wh516S (accessed on 1May 2015).

179 Recent studies show that the vast majority of respondents value ESG issues, with 84% of the South African institutional investors in this sample considering them: Van der Ahee and Schulschenk "The State of responsible investment in South Africa" Ernst & Young (January 2013), available at http://bit.ly/1LXYXWN (accessed on 10 May 2015).

180 See also Joubert (fn 35 above) 184 in respect of shareholders "voting with their feet".

business and affairs, that is the life and death, of the company. The inherent powers of the shareholders, to the extent that those existed at common law, are now abolished; so is the ultimate power to act as the company. This radical movement away from the common law seems to be at odds with the mission as stated above. In respect of direct control there remains the ultimate power to dismiss directors with an ordinary resolution. In company law this is a powerful tool, but certain aspects counter its effectiveness. When dismissing an executive director the labour laws must also be complied with. This has the effect that the swift and final result of the dismissal is excluded. Also, the fact that the dismissal cannot be effected by an informal process, such as in section 60, further diminishes its effect. So does the possibility of weighted voting rights of directors, as the removal of even all the elected directors could still have the effect that control is with the directors that cannot be removed. This is in addition to the entrenchment of elected directors due to shareholders' agreements. Dispersed shareholding can work in favour of the remedy, because the apathy of the small shareholder, who does not attend meetings, will have the effect that a small minority may be able to exercise "control" in this sense,[181] while block shareholding would clearly have the opposite effect.

Other remedies for individual shareholders, like sections 161, 163 and 164, would give the shareholder the option either to force the company, directors and even related parties to comply with their basic duties, or, under certain circumstances, elect to terminate the relationship with the company. Certain inherent inefficiencies make for a restricted application of those sections, however, with the most important arguably the restriction to shareholders as defined in the Act.

The positive effect of the Act is that although there is a concerted movement towards, at least partially, supporting the inclusive approach with emphasis on CSR, the primacy of the shareholder as in the enlightened shareholder approach is still firmly recognised.

The control by shareholders over the remuneration of directors may have an effect on compliance with the wishes and directions given by the shareholders. However, the dichotomy between the approval of the remuneration and the disclosure of that remuneration will lessen the effect of this (indirect) remedy, as approval of the remuneration of non-executive directors will have little effect on the general management of the company.

Requirements of *King III* in respect of non-executive and independent directors and the nomination of these directors could give some comfort to the shareholder. However, the nomination process is managed by the company, with little or no input from the shareholder. The "forced" sabbatical of a managing director, only to return as non-executive chairperson two years later, will perpetuate the same management and management principles.

In total it would appear that the philosophy of shareholder protection as in section 7 of the Act was extensively incorporated in the remedies of shareholders. However, certain provisions seem to militate against the clear philosophy. The profile of shareholding in South Africa can still curtail the effective use of some of the remedies, as blockholding still seem to be prevalent in South African companies. When, in contrast with the position in certain overseas jurisdictions,

181 See s 65 of the Act and *Henochsberg* 247.

the board does not have a duty towards minority shareholders per se, the exercise of the remedies by those shareholders become ineffective. In a dispersed shareholding model the apathy of the small shareholder may work in favour of the minority shareholders, but only if there is no blockholding. In totality the Act, with *King III*, give extensive rights and remedies, but with *King III* only, at best in the case of unlisted companies, indirectly enforceable, the real total protection of especially minority shareholders is not at the levels where it should have been.