

14 NOVEMBER 2018



CORPORATE & COMMERCIAL ALERT

IN THIS ISSUE

SHAREHOLDER ACTIVISM, HERE TO STAY

"Shareholder activism is not a privilege – it is a right and a responsibility. When we invest in a company, we own part of the company and we are partly responsible for how that company progresses. If we believe there is something going wrong with the company, then we, as shareholders, must become active and vocal" – renowned emerging markets investor, Mark Mobius, 2014.

SHAREHOLDER ACTIVISM, HERE TO STAY

Historically, shareholder activism has not been as aggressive in South Africa as in the US and the UK.

Recently, shareholder activism has been on the rise in South Africa and the main catalysts appear to be the minority protection rights contained in the Companies Act, No 71 of 2008.



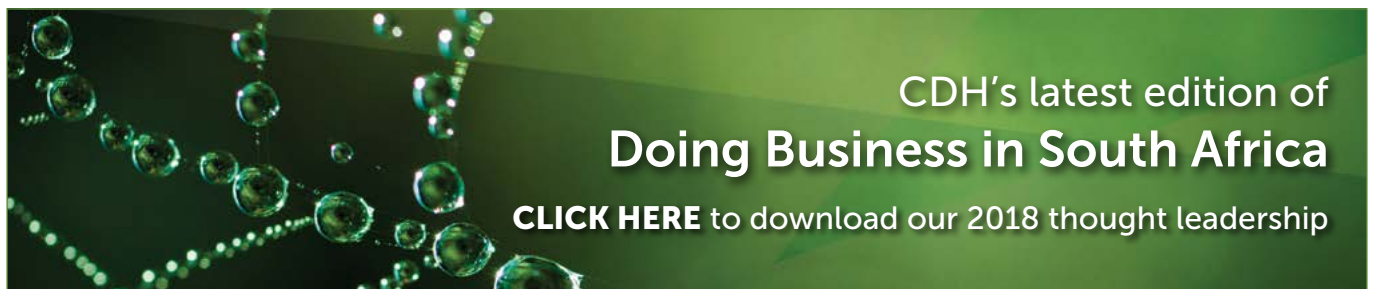
“Shareholder activism is not a privilege – it is a right and a responsibility. When we invest in a company, we own part of the company and we are partly responsible for how that company progresses. If we believe there is something going wrong with the company, then we, as shareholders, must become active and vocal” – renowned emerging markets investor, Mark Mobius, 2014.

An activist shareholder is a shareholder that uses its equity stake to exercise its ownership rights in a company to put pressure on its management. Shareholder activism allows shareholders to take greater ownership and responsibility of the company and to voice their disapproval on issues ranging from “non-financial” issues (such as environmental, social and governance (ESG) issues) to unlocking additional value and earning a better return on their investment.

Historically, shareholder activism has not been as aggressive in South Africa as in the US and the UK. In particular, shareholder activism in the US is widely acknowledged as an alternative investment class, and there has been significant M&A activity resulting from shareholder activism. One of the most notable examples of this is the shareholder-driven merger of Dow Chemical Co. and DuPont Co., which led

to the creation of a giant worth more than USD120 billion. Here, shareholders of each entity actively engaged the boards and forced the creation of a new entity to maximise shareholder value by merging the two entities and then restructuring commercial operations into three distinct units.

Recently, shareholder activism has been on the rise in South Africa and the main catalysts appear to be the minority protection rights contained in the Companies Act, No 71 of 2008 (Companies Act) coupled with the need for good corporate governance and increased transparency. Furthermore, international trends and influences have seeped into the South African market as a result of the shift in the shareholder base of local companies to one that is more diverse and international, leading to increased shareholder activism.



CDH's latest edition of
Doing Business in South Africa

CLICK HERE to download our 2018 thought leadership

SHAREHOLDER ACTIVISM, HERE TO STAY

CONTINUED

Shareholder activists looking to engage with companies or in lobbying support of co-shareholders need to do so within the prescribed legal framework.



While the majority of recent publicised shareholder activism in South Africa has focused on executive compensation, remuneration policies and the reshuffling of boards, there seems to be an increase in the drive by shareholder activists to unlock a greater underlying value in their shareholding and by doing so, shareholder activists may, in turn, trigger movement within the South African M&A market in the not-too-distant future.

Of course, shareholder activists looking to engage with companies or in lobbying support of co-shareholders need to do so within the prescribed legal framework. Consequently, it is important for shareholder activists to be cognisant of the legal minefield to be navigated, which includes the provisions of the Companies Act, the Competition Act, No 89 of 1998 and the JSE Listings Requirements (in particular, the provisions relating to

insider trading). This is also important as shareholders (and in particular minority shareholders) enjoy additional remedies under the Companies Act, which include, amongst other things:

- section 161, which entitles shareholder (i) to apply to court for an order determining its rights, (ii) to apply for the necessary protection of such rights or (iii) to apply for rectification of any harm done to that shareholder by the company (as a consequence of an act or omission that violated any such right or contravened the Companies Act or the memorandum of incorporation) or by any of the directors (to the extent that they are liable or may be held liable in terms of s77, which section deals with the liability of directors and prescribed officers);

2017 1ST BY M&A DEAL FLOW FOR THE 9TH YEAR IN A ROW.

2017

2nd by M&A Deal Value.
1st by General Corporate Finance Deal Flow for the 6th time in 7 years.
1st by General Corporate Finance Deal Value.
2nd by M&A Deal Flow and Deal Value (Africa, excluding South Africa).
2nd by BEE Deal Flow and Deal Value.

2016

1st by M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
3rd by General Corporate Finance Deal Value.

2015

1st by M&A Deal Flow.
1st by General Corporate Finance Deal Flow.

2014

1st by M&A Deal Flow.
1st by M&A Deal Value.
1st by General Corporate Finance Deal Flow.

2013

1st by M&A Deal Flow.
1st by M&A Deal Value.
1st by Unlisted Deals - Deal Flow.

DealMakers®

2012

1st by M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
1st by General Corporate Finance Deal Value.
1st by Unlisted Deals - Deal Flow.

SHAREHOLDER ACTIVISM, HERE TO STAY

CONTINUED

Shareholder activism is on the rise in South Africa and is gaining traction from both institutional and non-institutional investors.



- section 163, which provides, amongst other things, that a shareholder may apply to a court for relief where any act or omission by the company or related person has had a result that is oppressive or unfairly prejudicial to, or unfairly disregards the interests of, the shareholder; and
- section 164, which provides for appraisal rights that allow dissenting minority shareholders to require the company to purchase such dissenting minority shareholders' shares at fair value, in circumstances where the shareholders of the company pass a special resolution to amend the rights of a class of shares in terms of its memorandum of incorporation or to undertake a fundamental transaction.

Shareholder activism is on the rise in South Africa and is gaining traction from both institutional and non-institutional investors. The yard-stick for measuring the performance of an investment is no longer dictated solely by the profitability of the company, as shareholders, now more than ever, are alive to broader issues such as remuneration policies, lack of transparency and communication, and the lack of good corporate governance. Companies should not underestimate the potential impact of shareholder activism and should actively look to engage with their shareholders to ensure that value creation is sparked collectively.

"Boards of directors are like subatomic particles; they behave differently when observed" – Nell Minow, corporate governance expert.

Anthony Harvett and Ayanda Mhlongo



OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:



Willem Jacobs
National Practice Head
Director
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com



David Thompson
Regional Practice Head
Director
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com

Mmatiki Aphiri
Director
T +27 (0)11 562 1087
M +27 (0)83 497 3718
E mmatiki.aphiri@cdhlegal.com

Roelof Bonnet
Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

Tessa Brewis
Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Etta Chang
Director
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Clem Daniel
Director
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Jenni Darling
Director
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@cdhlegal.com

André de Lange
Director
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Werner de Waal
Director
T +27 (0)21 481 6435
M +27 (0)82 466 4443
E werner.dewaal@cdhlegal.com

Lilia Franca
Director
T +27 (0)11 562 1148
M +27 (0)82 564 1407
E lilia.franca@cdhlegal.com

John Gillmer
Director
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Sandra Gore
Director
T +27 (0)11 562 1433
M +27 (0)71 678 9990
E sandra.gore@cdhlegal.com

Johan Green
Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@cdhlegal.com

Allan Hannie
Director
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@cdhlegal.com

Peter Hesselting
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesselting@cdhlegal.com

Quintin Honey
Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Roelf Horn
Director
T +27 (0)21 405 6036
M +27 (0)82 458 3293
E roelf.horn@cdhlegal.com

Yaniv Kleitman
Director
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige
Director
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Johan Latsky
Executive Consultant
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Giada Masina
Director
T +27 (0)11 562 1221
M +27 (0)72 573 1909
E giada.masina@cdhlegal.com

Nkcubeko Mbambisa
Director
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

Nonhla Mchunu
Director
T +27 (0)11 562 1228
M +27 (0)82 314 4297
E nonhla.mchunu@cdhlegal.com

Ayanda Mhlongo
Director
T +27 (0)21 481 6436
M +27 (0)82 787 9543
E ayanda.mhlongo@cdhlegal.com

William Midgley
Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Tessmerica Moodley
Director
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@cdhlegal.com

Anita Moolman
Director
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Jo Neser
Director
T +27 (0)21 481 6329
M +27 (0)82 577 3199
E jo.neser@cdhlegal.com

Francis Newham
Director
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

Gasant Orrie
Cape Managing Partner
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@cdhlegal.com

Verushca Pillay
Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@cdhlegal.com

David Pinnock
Director
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid
Director
T +27 (0)11 562 1222
M +27 (0)72 190 9071
E allan.reid@cdhlegal.com

Ludwig Smith
Director
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Ben Strauss
Director
T +27 (0)21 405 6063
M +27 (0)72 190 9071
E ben.strauss@cdhlegal.com

Tamarin Tosen
Director
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum
Director
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Deepa Vallabh
Head: Cross-border M&A,
Africa and Asia
Director
T +27 (0)11 562 1188
M +27 (0)82 571 0707
E deepa.vallabh@cdhlegal.com

Roux van der Merwe
Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Charl Williams
Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2018 7385/NOV

