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# CORPORATE & COMMERCIAL ALERT

## IN THIS ISSUE

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# A STRONGER 'SAY ON PAY' FOR SOUTH AFRICA?

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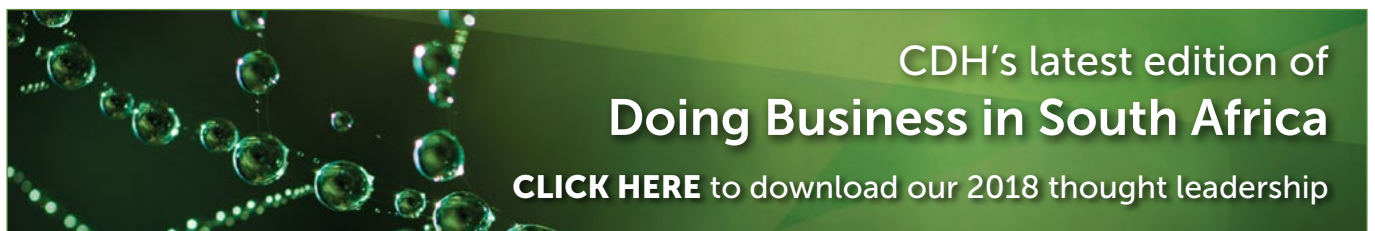
**Senior executives' remuneration remains a sensitive and somewhat controversial topic in South Africa. However, significant organisational 'pay gaps' are a global issue, as jurisdictions all over the world have adopted 'say on pay' measures to mitigate the agency problem arising between directors and shareholders; and the potential conflict of interest in directors determining the remuneration of executives.**

Recent developments in South Africa relating to the adoption of certain 'say on pay' measures create an impression that South Africa's regulation of the determination of executive remuneration is stringent. However, in contrast with other jurisdictions, it becomes apparent that South Africa lies on the softer end of the spectrum in this regard.

In terms of the South African Companies Act, No 71 of 2008 (Companies Act), non-executive directors' fees require approval by special resolution of shareholders within the previous two years (s66(9)). Shareholders are not, in terms of the Companies Act, afforded a similar vote in respect of executives' remuneration.

The King IV Code on Corporate Governance (2016) (King IV) (a voluntary set of leading principles and practices for organisations) attempts to give shareholders a 'voice' in respect of executives' remuneration, by recommending that separate non-binding

advisory shareholder votes be cast, annually, on the remuneration policy and implementation report of companies. The remuneration policy must disclose the measures that the relevant company will commit to if either, or both, of these documents are voted against by 25% or more of the relevant voting rights. King IV's 'say on pay' recommendations are not binding on companies as King IV is not law, and its application is therefore not mandatory. This may, however, not be the case for much longer as the recent draft amendment Bill to the Companies Act (2018), proposes affording shareholders scrutiny over executives' remuneration, by requiring directors of a public company to present their remuneration report for *submission* to the shareholders annually. The Bill does not stipulate that the report must be tabled for a shareholders' vote, but the proposed amendments are presumably a nod to King IV and/or current global trends.



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# A STRONGER 'SAY ON PAY' FOR SOUTH AFRICA?

CONTINUED

*In the United Kingdom, the first jurisdiction to introduce 'say on pay' regulations, the directors' remuneration report must be tabled every three years for a binding shareholders' vote.*



King IV's 'say on pay' recommendations have been made *mandatory* by incorporation in the JSE Listings Requirements, as companies listed on the JSE are required to table the non-binding advisory shareholder votes on remuneration at their annual general meetings. The JSE also requires listed companies to engage with dissenting shareholders, and the manner and timing of such engagement must be disclosed.

Put to the test, many large listed companies have recently had to engage with their shareholders on remuneration as a result of 'say on pay' advisory votes being voted against by 25% or more at their annual general meetings. The manner and form of engagement with shareholders is not prescribed in the JSE Listings Requirements and recent examples of such engagement have included:

- (i) invitations for written submissions by dissenting shareholders (which is probably the preferred option for a large company with many shareholders),
- (ii) invitations for meetings with dissenting shareholders, and
- (iii) e-conferences with dissenting shareholders.

Common complaints arising in South Africa (and globally) from company-shareholder engagement include, amongst other things, a lack of an appropriate balance between the guaranteed and variable components of remuneration

packages, the lack of individual and collective organisational performance measures informing remuneration, and large severance packages (ie 'loss of office' compensation).

Taking a look at other jurisdictions:

- In the United Kingdom, the first jurisdiction to introduce 'say on pay' regulations, the directors' remuneration report must be tabled every three years for a binding shareholders' vote. If the vote fails, a company can either continue to remunerate in accordance with the most recently approved remuneration report, or call a fresh meeting to table a new remuneration report.
- In Australia, if the directors' remuneration report is voted down twice (by way of advisory shareholder votes) at consecutive annual general meetings, a 'spill' resolution is triggered in terms of which shareholders vote on whether all persons (excluding directors who serve an indefinite term) who were directors at the relevant annual general meeting should cease holding such office immediately.
- France has arguably adopted one of the most stringent approaches to executives' remuneration, requiring two separate binding shareholder votes on a forward looking and backward looking remuneration report. Executives' variable pay, in effect, becomes subject to shareholder ratification.

# A STRONGER 'SAY ON PAY' FOR SOUTH AFRICA?

CONTINUED

*The current lack of true 'punitive' measures may result in companies merely 'ticking boxes' when it comes to engaging with dissenting shareholders.*



Even though the legislative framework in South Africa does not yet provide for a binding shareholders' vote, South Africa's reception of global market trends, and the mounting pressure from institutional investors and shareholder 'activists', indicate that a move towards a binding vote may not be far off. The current lack of true 'punitive' measures (such as the Australian 'spill vote' referred to above) may result in companies merely 'ticking boxes' when it comes to engaging with dissenting shareholders. This, in turn, may hamper the move towards closing the 'pay gap' and achieving the ideals underlying King IV's recommendations on executives' remuneration (in particular, the recommendation that executives'

remuneration should be fair and reasonable in the overall context of employee remuneration).

To weather the inevitable changes in the regulatory landscape, companies should remain mindful of global trends and the possibility of an even stricter regime in respect of executives' remuneration in the near future; and should seek to equip shareholders to make rational, informed decisions relating to remuneration by creating a positive culture of transparency and shareholder engagement.

*Christine Bodenstein and  
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