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CORPORATE & COMMERCIAL ALERT

IN THIS ISSUE

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CLIFFE DEKKER HOFMEYR

A STRONGER 'SAY ON PAY' FOR SOUTH AFRICA?

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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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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.

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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.

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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 André de Lange

CDH
CLIFFE DEKKER HOFMEYR

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 Hesseling
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesseling@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)82 854 9687
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

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

CLIFFE DEKKER HOFMEYR