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An Overview Analysis of the Challenges Posed by the COVID-19 Pandemic on Shareholder Activism in South Africa

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Abstract

The article unpacks the effects of the corona virus (COVID-19) pandemic on shareholder activism in public companies in South Africa. In this regard, the adequacy of the relevant provisions of the Companies Act 71 of 2008, that indirectly deal with shareholder activism is discussed in the context of the COVID-19 pandemic challenges. Accordingly, challenges that affected the promotion of shareholder activism during and post-COVID-19 pandemic such as COVID-19 pandemic restrictions challenges; the lack of a comprehensive legal framework for shareholder activism in South Africa; inconsistent enforcement of alterable provisions during electronic shareholder meetings; shareholder salience challenges;

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shareholder passivity; and the adoption of flawed measures to promote shareholder activism are examined. Thereafter, the measures adopted to mitigate the effects of covid-19 on shareholder activism in South Africa, especially during virtual meetings and electronic voting are explored.

Keywords: public companies; shareholder activism; shareholder salience; shareholder passivity; COVID-19 pandemic.

1 INTRODUCTION

Shareholder activism generally refers to the actions undertaken by shareholders to influence the management of their companies on various issues relating to, *inter alia*, profitability, ethical standards, and corporate performance.¹ It must be noted that shareholder activism is currently not expressly and adequately regulated in South Africa. Therefore, adequate statutory measures should be introduced to create a conducive environment where shareholders actively participate in the proper governance of their companies effectively.² Shareholders should have various avenues that enable them to effectively engage with the company management or directors on any issues affecting their companies. In this regard, shareholder activism and engagement refers to the use of different strategies by shareholders to communicate with, and/or positively influence the management of their relevant companies.³ Shareholder activism empowers shareholders to hold corporate managers and/or directors accountable for their negligence and wrongdoing.⁴ Shareholder activism is one of the ways which allow shareholders to engage in the responsible investment of financial resources in their companies.⁵ Put differently, shareholder activism enables shareholders to engage with company directors on how to responsibly invest company money and how shareholders themselves can lawfully and ethically invest in their companies.

The advent of the COVID-19 pandemic has negatively affected the global health system, global

- 1 Goranova and Ryan "Shareholder Activism: A Multi-Disciplinary Review" 2013 *Journal of Management* 1230 1246; Cziraki, Renneboog and Szilagyi "The Success and Relevance of Shareholder Activism through Proxy Proposals: The European Perspective" 2010 *European Financial Management* 738 742; Viviers, Bosch, Smit and Buijs "Responsible Investing in South Africa" 2009 *Investment Analysts Journal* 3 7; Gillian and Starks "The Evolution of Shareholder Activism in the United States" 2007 *Journal of Corporate Finance* 55 56.
- 2 Rademeyer and Holtzhausen "King II, Corporate Governance and Shareholder Activism" 2003 *SALJ* 767 768; Mongalo "The Myth of Director Appointment by Shareholders and Shareholder Activism in Listed Companies" 2004 *TSAR* 96 97; Viviers "Executive Remuneration in South Africa: Key Issues Highlighted by Shareholder Activists" 2015 *African Journal of Business Ethics* 1 3; Karpoff, Malatesta and Walkling "Corporate Governance and Shareholder Initiatives" 1996 *Journal of Financial Economics* 365 366.
- 3 Mans-Kemp and Van Zyl "Reflecting on the Changing Landscape of Shareholder Activism in South Africa" 2021 *South African Journal of Economic and Management Sciences* 1 4; Kraik "Environmental, Social and Governance Issues: An Altered Shareholder Activist Paradigm" 2020 *Vermont LR* 493 493; McNulty and Nordberg "Ownership, Activism and Engagement: Institutional Investors as Active Owners" 2016 *Corporate Governance: An International Review* 346 352.
- 4 Viviers and Mans-Kemp "Successful Private Investor Activism in an Emerging Market" 2020 *Corporate Governance International Journal of Business in Society* 92; Goranova and Ryan 2013 *Journal of Management* 1246; Viviers "Individual Shareholder Activism in South Africa: The Case of Theo Botha" 2016 *Journal of Economic and Financial Sciences* 348.
- 5 Viviers, Smit and Buijs "Is Responsible Investing Ethical" 2008 *South African Journal of Business Management* 16; Viviers and Els "Responsible Investing in South Africa: Past, Present and Future" 2017 *African Review of Economics and Finance* 123; Viviers and Smit "Institutional Proxy Voting in South Africa: Process, Outcomes and Impact" 2015 *South African Journal of Business Management* 24; Yamahaki and Frynas "Institutional Determinants of Private Shareholder Engagement in Brazil and South Africa: The Role of Regulation" 2016 *Corporate Governance: An International Review* 513; Mans-Kemp and Van Zyl "Reflecting on the Changing Landscape of Shareholder Activism in South Africa" 2021 *South African Journal of Economic and Management Sciences* 3.

economy, and the global business community. The COVID-19 pandemic has also greatly affected the way in which shareholders engage with directors of their companies. This follows the fact that most companies listed on the Johannesburg Stock Exchange Limited (JSE) were forced to postpone in-person Annual General Meetings (AGMs) owing to the challenges associated with the COVID-19 pandemic.⁶ These challenges include social distancing, lockdown restrictions, and other COVID-19 preventative measures which resulted in logistical problems for companies to conduct in-person AGMs.⁷ The AGM is an important measure of shareholder activism because it is a platform for shareholders to participate and actively deal in the corporate affairs of their companies. For instance, AGMs provide an opportunity for shareholders to bring forward grievances about corporate performance, election and removal of directors, appointment of auditors, as well as the voting on corporate transactions and company reports.⁸ Shareholders of companies in South Africa, like their counterparts in other countries globally, were negatively affected by the postponement of AGMs since it is the only platform for shareholders to effectively promote shareholder activism in South Africa. The postponement of AGMs occurred at the inception of the COVID-19 pandemic when restrictive measures were adopted to control the spread of the coronavirus. During that period, most companies had not put in place alternative systems for holding AGMs. Accordingly, South African policymakers should consider adopting measures that could adequately facilitate shareholder activism during a pandemic as well as after a pandemic to circumvent the aforesaid challenges in the future.

This article focuses on the effect of the COVID-19 pandemic on shareholder activism in public companies in South Africa. In this regard, the adequacy of the relevant provisions of the Companies Act that indirectly deal with shareholder activism is discussed.⁹ This is done in the context of the COVID-19 pandemic and its negative effects on shareholder activism in South Africa. Furthermore, the adequacy of the measures adopted by the JSE to enable listed companies to host virtual meetings and conduct electronic voting during the COVID-19 pandemic is explored.

The consistency and robustness of engagement between listed companies and their relevant shareholders are analysed in this article to expose various challenges posed by the COVID-19 pandemic on shareholder activism in South Africa. It is submitted that the COVID-19 pandemic has adversely affected shareholder activism by creating barriers to genuine and active shareholder participation in companies they have invested in during the pandemic.

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- 6 Deloitte “Post COVID-19: The Benefits and Challenges of Virtual Shareholder General Meeting (Annual General Meetings)” www.deloitte.com/za/en/pages/africa-centre-for-corporate-governance/post/article/covid-19.html (accessed 20-10-2021); Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 5; Schwartz-Ziv “How Shifting from In-Person to Virtual-Only Shareholder Meetings Affects Shareholder Voice” 2021 *Hebrew University of Jerusalem and ECGI Finance Working Paper* 10.
 - 7 Koevski, Gavrilovik and Spasevski “Twenty Years After the First Virtual-Only Annual Shareholders Meeting: Can the Virtual-Only Meeting Be a Solution During the Time of COVID-19” 2020 *Iustinianus Primus LR* 14; Khatib and Nour “Impact of Corporate Governance on Firm Performance During the COVID-19 Pandemic: Evidence from Malaysia” 2021 *Journal of Asian Finance, Economics and Business* 943 944; Bussin and Swart-Opperman “COVID-19: Considering Impacts to Employees and the Workplace” 2021 *South African Journal of Human Resource Management* 3 5.
 - 8 See s 61(8) of the Companies Act 71 of 2008 (Companies Act); Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 5; Cassim, Cassim M, Jooste, Shev and Yeats *Contemporary Company Law* (2012) 370; Mongalo 2004 *TSAR* 102.
 - 9 See ss 51, 61, 65, 68, 71 159, 161, 163 and 165 of the Companies Act; Mans-Kemp and Van Zyl 2021 *South African Journal of Economic and Management Sciences* 4; Esser and Delpont “Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008” 2016 *THRHR* 29; Gillian and Starks 2017 *Journal of Applied Corporate Finance* 59.

2 BACKGROUND ON SHAREHOLDER ACTIVISM IN SOUTH AFRICA

Shareholder activism is one of the ways that institutional and retail shareholders may engage in the decision-making in their companies regarding environmental, social, and governance considerations. In this regard, retail shareholders refer to individual shareholders who invest in companies in their personal capacity.¹⁰ On the other hand, institutional shareholders are asset managers responsible for investing money on behalf of their clients.¹¹ These asset managers include mutual funds, pension funds, banks, collective investment schemes, foreign companies, and insurance companies.

Shareholder activism is not statutorily and expressly regulated in South Africa. It is poorly and indirectly provided under the Companies Act.¹² The relevant shareholder rights provided under the Companies Act enable shareholders to engage with their company management through public and private mechanisms.¹³ Private mechanisms refer to private discussions with management, writing letters to company management, or undertaking legal proceedings to enforce shareholder rights.¹⁴ In relation to this, it is important to note that legal proceedings include enforcement remedies such as the application to declare directors delinquent,¹⁵ the personal action,¹⁶ the oppression remedy,¹⁷ the appraisal remedy,¹⁸ and the derivative action.¹⁹ In addition, shareholders may also utilise public mechanisms which include filing shareholder resolutions,²⁰ participating in discussions at AGMs, voting during the AGM,²¹ and raising concerns through various media platforms.²² Additional legislation that could be utilised to

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- 10 Gillian and Starks 2007 *Journal of Corporate Finance* 56; Judge, Gaur and Muller-Kahle “Antecedents of Shareholder Activism in Target Firms: Evidence from a Multi-Country Study” 2010 *Corporate Governance: An International Review* 258 259; Goranova and Ryan 2014 *Journal of Management* 1233; Viviers “Individual Shareholder Activism in South Africa: The Case of Theo Botha” 2016 *Journal of Economic and Financial Sciences* 347 350; Viviers 2016 *Journal of Economic and Financial Sciences* 347 348.
 - 11 Çelik and Isakson “Institutional Investors and Ownership Engagement” 2013 *OECD Journal: Financial Market Trends* 93 96; Viviers 2015 *African Journal of Business Ethics* 5; Kraik 2020 *Vermont LR* 503.
 - 12 See ss 51, 61, 65, 68, 71, 159, 161, 163 and 165 of the Companies Act which indirectly deal with shareholder activism in South Africa. The authors argue that this approach is flawed, see the discussion in heading 3 below; Aquila “The Shareholder Rights and Activism Review” https://www.bowmanslaw.com/wp-content/uploads/2017/10The-Shareholders-Rights-and-Activism-Review-South-Africa_Chapter.pdf 126; Mans-Kemp and Van Zyl 2021 *South African Journal of Economic and Management Sciences* 3; Yamahaki and Frynas 2016 *Corporate Governance: An International Review* 509 513.
 - 13 See s 51, 61, 65, 68, 71 159, 161, 163 and 165 of the Companies Act; Viviers and Smit 2015 *South African Journal of Business Management* 23 24; McNulty and Nordberg 2016 *Corporate Governance: An International Review* 348; Goodman, Louche, Van Cranenburg and Arenas “Social Shareholder Engagement: The Dynamics of Voice and Exit” 2013 *Journal of Business Ethics* 193 195.
 - 14 See s 161 of the Companies Act; Mans-Kemp and Van Zyl 2021 *South African Journal of Economic and Management Sciences* 4; Viviers 2015 *African Journal of Business Ethics* 3; Viviers and Mans-Kemp 2020 *Corporate Governance International Journal of Business in Society* 92 93.
 - 15 See s 162 of the Companies Act; Esser and Delpont 2016 *THRHR* 19; Esser 2014 *THRHR* 48.
 - 16 See s 163 of the Companies Act; Esser and Delpont 2016 *THRHR* 19; Esser 2014 *THRHR* 48.
 - 17 See s 163 of the Companies Act; also see Esser and Delpont 2016 *THRHR* 19; see also Esser 2014 *THRHR* 48.
 - 18 See s 164 of the Companies Act; see comments by Esser and Delpont 2016 *THRHR* 19; Esser 2014 *THRHR* 48.
 - 19 See s 165 of the Companies Act; Esser and Delpont 2016 *THRHR* 19; Esser 2014 *THRHR* 48.
 - 20 See s 65 of the Companies Act; Esser and Delpont 2016 *THRHR* 19; Esser 2014 *THRHR* 48.
 - 21 See s 61(8) read with ss 65 and 115 of the Companies Act; Viviers 2015 *African Journal of Business Ethics* 3; Viviers and Mans-Kemp 2020 *Corporate Governance International Journal of Business in Society* 93; Goodman *et al* 2013 *Journal of Business Ethics* 193.
 - 22 See ss 60, 61 and 65 of the Companies Act; Viviers 2015 *African Journal of Business Ethics* 3; Viviers and Mans-Kemp 2020 *Corporate Governance International Journal of Business in Society* 93; Goodman *et al* 2013 *Journal of Business Ethics* 193.

regulate and promote institutional shareholder activism includes Regulation 28 of the Pension Funds Act.²³ The King IV Report,²⁴ the JSE Listing Requirements, and the Code for Responsible Investing in South Africa (CRISA) may also guide and regulate the responsible investment strategies of institutional shareholders in South Africa.²⁵

The shareholder activism regime in South Africa can be exercised through various campaigns initiated by shareholders who wish to effect change in their companies in relation to areas such as governance and corporate social responsibility. The different shareholder activism campaigns include the say-on-pay campaign, which essentially provides shareholders with an advisory vote on directors' remuneration policies.²⁶ Shareholders may also utilise vote-no campaigns, which refer to shareholders withholding their votes to elect directors while lobbying other shareholders to do the same.²⁷ Furthermore, shareholders may utilise shareholder resolutions to propose a specific course of action regarding any matter that they are entitled to vote on.²⁸ Stimulation of debate on social media is considered as a last resort by most shareholder activists when other attempts at engagement with the company directors have failed.²⁹ This follows the correlation between the negative publicity generated by shareholder activism campaigns and the drop in the share price of the companies targeted by shareholder activists.³⁰ Media tactics are used in order to bring the attention of directors to corporate issues and/or to bring relevant changes to directors' corporate behaviour.

The outcome of successful shareholder activism campaigns is beneficial to the company, the shareholders, and the society at large. This may be visible through increased financial performance and improvements in compliance with corporate governance principles.³¹ The benefits that could accrue to shareholder activists include financial benefits, increased information disclosure from

- 23 See s 3 of Pension Funds Act 24 of 1956: Amendment of Regulation 28 of the Regulations Made Under section 36 (GN No.R.183 GG No 34070 of 4 March 2011); Viviers and Els 2017 *African Review of Economics and Finance* 122 132; Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 3; Yamahaki and Frynas 2016 *Corporate Governance: An International Review* 513.
- 24 The Institute of Directors in Southern Africa *King IV Report on Corporate Governance for South Africa 2016* (King IV Report) 1 20-120.
- 25 Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 3; Viviers 2015 *African Journal of Business Ethics* 8; Esser 2014 *THRHR* 46; Viviers and Els 2017 *African Review of Economics and Finance* 132.
- 26 See Thomas, Palmitter and Cotter "Dodd Frank's Say on Pay: Will it Lead to a Greater Role for Shareholders in Corporate Governance" 2012 *Cornell LR* 1213 1218; Viviers 2015 *African Journal of Business Ethics* 11; Viviers, Mans-Kemp, Kallis and McKenzie "Public 'Say on Pay' Activism in South Africa: Targets, Challenges, Themes and Impact" 2019 *South African Journal of Economics and Management Sciences* 1 2.
- 27 Etimur, Ferri and Mislu "Shareholder Activism and CEO Pay" *The Review of Financial Studies* 535 540; Goranova and Ryan 2014 *Journal of Management* 1247; Stathopoulos and Voulgaris "The Importance of Shareholder Activism: The Case of Say-on-Pay" 2016 *Corporate Governance: An International Review* 359 360; Viviers and Smit 2015 *South African Journal of Business Management* 29.
- 28 See s 65(3) of the Companies Act; Cassim *Contemporary Company Law* 387; Esser 2014 *THRHR* 48; Viviers and Smit 2015 *South African Journal of Business Management* 24.
- 29 See Mans-Kemp and Van Zyl 2021 *South African Journal of Economic and Management Sciences* 9; also see related comments by Uysal, Yang and Taylor "Shareholder Communication and Issue Salience: Corporate Responses to Social Shareholder Activism" 2018 *Journal of Applied Communication Research* 179 187; see further Viviers and Mans-Kemp 2020 *Corporate Governance International Journal of Business in Society* 96.
- 30 Uysal *et al.* 2018 *Journal of Applied Communication Research* 179 187; Mans-Kemp and Van Zyl 2021 *South African Journal of Economic and Management Sciences* 9; Viviers and Mans-Kemp 2020 *Corporate Governance International Journal of Business in Society* 96.
- 31 Uysal *et al.* 2018 *Journal of Applied Communication Research* 183; Goranova and Ryan 2014 *Journal of Management* 21; Reid and Toffel "Responding to Public and Private Politics: Corporate Disclosures of Climate Change Strategies" 2009 *Strategic Management Journal* 1157 1171.

directors, and improved influence and legitimacy in their companies.³² The aforementioned benefits may only be attained if there is a conducive environment for robust shareholder activism to take place in companies. Accordingly, policy-makers should consider adopting adequate statutory measures and other appropriate awareness measures to promote shareholder activism in all public companies in South Africa. The general society and community where the relevant company operates may also benefit from successful shareholder activism campaigns which promote and enforce corporate social responsibility initiatives and other appropriate environmental initiatives.³³

3 SELECTED CHALLENGES AFFECTING THE PROMOTION OF SHAREHOLDER ACTIVISM DURING THE COVID-19 PANDEMIC IN SOUTH AFRICA

The COVID-19 pandemic has caused various challenges on the promotion of shareholder activism in South Africa. Accordingly, challenges that affected the promotion of shareholder activism during and post-COVID-19 pandemic are scrutinised below.

3.1 COVID-19 Pandemic Restrictions Challenges

The COVID-19 virus was initially discovered in the Hubei province of China in 2019 and was declared a global pandemic by the World Health Organisation (WHO) on 11 March 2020.³⁴ On 26 March 2020, the South African government introduced national lockdown measures and regulations aimed at curbing the spread of the COVID-19 virus.³⁵ These regulations included travel restrictions, a national curfew, the shutting down of non-essential services such as places of worship, schools, universities, businesses, and other measures such as social distancing.³⁶ While these measures were essential for curbing the spread of COVID-19, it is submitted that these measures were rigidly enforced without much consideration for the effect of such measures on the economy and the governance of public companies. The enforcement of lockdown regulations led to the cancellation and postponement of AGMs of many publicly listed companies in South

32 Uysal *et al.* 2018 *Journal of Applied Communication Research* 184; Goranova and Ryan 2014 *Journal of Management* 23; Thomas and Cotter "Shareholder Proposals in the New Millennium: Shareholder Support, Board Response and Market Reaction" 2007 *Journal of Corporate Finance* 389.

33 Uysal *et al.* 2018 *Journal of Applied Communication Research* 184; Goranova and Ryan 2014 *Journal of Management* 23; Thomas and Cotter 2007 *Journal of Corporate Finance* 368 389.

34 Munzhedi "Analysing the Application of Governance Principles in the Management of COVID-19 in South Africa: Lessons for the Future" 2021 *Africa's Public Service Delivery and Performance Review* 1 1; Chitimira and Animashaun "The Adequacy of Nigeria, South Africa and Other Sub-Saharan Countries' Response to the COVID-19 Pandemic and Unemployment" 2021 *Acta Universitatis Danubius Juridica* 36 44; Staunton, Swanepoel and Labuschaigne "Between a Rock and a Hard Place: COVID-19 and South Africa's Response" 2020 *Journal of Law and Bioscience* 1 1.

35 See ss 3 and 27 of the Disaster Management Act 57 of 2002 (Disaster Management Act); see also South African Government "Regulations and Guidelines - Coronavirus COVID-19" <https://www.gov.za/covid-19/resources/regulations-and-guidelines-coronavirus-covid-19> (accessed 11-09-2022); Munzhedi 2021 *Africa's Public Service Delivery and Performance Review* 1; Chitimira and Animashaun 2021 *Acta Universitatis Danubius Juridica* 44; Staunton, Swanepoel and Labuschaigne 2020 *Journal of Law and Bioscience* 1; Bose, Shams, Ali and Mihret "COVID-19 Impact, Sustainability Performance and Firm Value: International Evidence" 2021 *Accounting and Finance* 1 2.

36 See ss 3 and 27(2) of the Disaster Management Act; see also South African Government "Regulations and Guidelines - Coronavirus COVID-19" Munzhedi 2021 *Africa's Public Service Delivery and Performance Review* 1; Chitimira and Animashaun 2021 *Acta Universitatis Danubius Juridica* 44; Staunton *et al.* 2020 *Journal of Law and Bioscience* 1; Bose, Shams *et al.* 2021 *Accounting and Finance* 1 2.

Africa.³⁷ This impeded shareholder activism since shareholders were left without a platform to participate in the governance of their companies. Put differently, the lockdown measures such as the suspension of formal business gatherings impeded shareholders from actively participating in the corporate affairs of their companies.³⁸ It is submitted that this negative *status quo* was caused by the lack of effective informal engagement platforms and other appropriate measures outside of the AGM to afford shareholders their right to participate in the governance of their relevant companies. Moreover, the Companies Act does not provide for any robust framework or guidelines for the development and/or adoption of rules by companies to promote effective shareholder activism and engagement outside the AGM. The authors argue that although companies may develop their own rules regarding the development of informal engagement platforms, the Companies Act as the overarching legislation should provide a framework or guidelines within which such rules may be developed and adopted. For instance, the Companies Act does not provide for other measures or informal engagement platforms such as quarterly reviews and post-AGM sessions to afford shareholders an opportunity to be kept abreast with the developments in their companies. In this regard, it is evident that the COVID-19 pandemic restrictions have negatively affected the promotion of shareholder activism in South Africa since AGMs are the main platform where shareholders gather to participate in the governance of their relevant companies.

3 2 The Lack of a Comprehensive Legal Framework for Shareholder Activism in South Africa

The AGM is indirectly provided as the foremost important platform for shareholder activism and engagement under the Companies Act.³⁹ Public companies are obliged to convene AGMs and important matters pertaining to the company such as the financial statements, annual reports, and any matters raised by the shareholders are discussed during AGMs.⁴⁰ The Companies Act provides further that a shareholders' meeting may be called at any time by the board or a person authorised in the Memorandum of Incorporation (MOI) and when directors are required to refer a matter to shareholders for a decision.⁴¹ The Companies Act allows shareholders holding at least ten per cent of the voting rights to demand the convening of a shareholders' meeting and to determine the specific purpose for that particular meeting.⁴² It is submitted that the shareholders' AGM and the general meeting of shareholders are not sufficiently promoting shareholder engagement and/or shareholder activism in South Africa. This is owing to the fact that the AGM is an annual event and the company's directors may validly deny shareholders

37 Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 3; Larkin "JSE Launches Virtual AGMs – Historic First for SA" <https://www.iol.co.za/business-report/jse-launches-virtual-agms-historic-first-for-sa-45767901> (31 May 2020); Schwartz-Ziv 2021 *Hebrew University of Jerusalem and ECGI Finance Working Paper* 10.

38 See ss 3 and 27(2) of the Disaster Management Act; see also South African Government "Regulations and Guidelines - Coronavirus COVID-19"; Munzhedi 2021 *Africa's Public Service Delivery and Performance Review* 1; Chitimira and Animashaun 2021 *Acta Universitatis Danubius Juridica* 44; Staunton *et al.* 2020 *Journal of Law and Bioscience* 1; Bose, Shams *et al.* 2021 *Accounting and Finance* 1 2.

39 Section 61(7) and (8) of the Companies Act; Cassim *et al.* *Contemporary Company Law* 370; Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 5; Van der Elst "Shareholder Activism in Good and Bad Economic Times" 2011 *Corporate Ownership and Control* 32 34.

40 Section 61(7) and (8) of the Companies Act; Cassim *et al.* *Contemporary Company Law* 370; Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 5; Van der Elst 2011 *Corporate Ownership and Control* 34.

41 Section 61(1) and (2) of the Companies Act; Delpont, Vorster and Henochsberg *Henochsberg on the Companies Act 71 of 2008* (2011) 230; Cassim *et al.* *Contemporary Company Law* 370; Esser 2014 *THRHR* 40.

42 Section 61(3) of the Companies Act; Delpont *et al.* *Henochsberg on the Companies Act 71 of 2008* (2011) 230; Cassim *et al.* *Contemporary Company Law* 370; Esser 2014 *THRHR* 40.

the opportunity to convene a general meeting of shareholders. The Companies Act does not contain any express provision relating to a time or period by which the board of directors that receive a notice in the prescribed form must call a general meeting.⁴³ Although the courts may be approached for guidance, it is submitted that this gap is affecting shareholder activism. This follows the fact that the board of directors may be reluctant to call a general meeting of shareholders if there is no time or period statutorily prescribed to do so.⁴⁴

The Companies Act does not expressly provide for the protection and promotion of shareholder activism apart from AGMs and general meetings of shareholders. The authors argue that this *status quo* exacerbated shareholder passivity during the COVID-19 pandemic.⁴⁵ In relation to this, shareholder passivity refers to the shareholders' lack of participation or control in the corporate affairs of the companies they have invested in.⁴⁶

Furthermore, the Companies Act does not have clear guidelines or measures on how to promote awareness to shareholders about their rights and how to exercise them effectively so as to actively participate in the governance of the companies they have invested in.⁴⁷ The COVID-19 pandemic has presented unprecedented challenges in most sectors, including the corporate sector regarding the governance of corporations and companies in South Africa. Notwithstanding that shareholders have a right to seek access to company information or be provided with company information, the Companies Act does not have flexible and adequate measures to educate shareholders on how to utilise that information to their benefit. It is the authors' view that the Companies Act should contain educational provisions to equip shareholders on how to effectively participate in the corporate affairs and related issues of their companies. Accordingly, the authors submit further that the relevant provisions of the Companies Act should be amended to effectively promote shareholder activism in South Africa, especially during the ongoing COVID-19 pandemic.⁴⁸ For instance, it is submitted that section 63(3) of the Companies Act which relates to electronic meetings should be amended to enact a provision on educational training regarding the participation of shareholders in a meeting through electronic communication.⁴⁹ This could improve the confidence of shareholders and promote shareholder activism effectively. Additionally, it is submitted that section 163, which deals with relief from oppressive or prejudicial conduct, should be amended to provide awareness programmes as part of the list of remedies a court may order after considering the application of a director or

43 Section 61(3) of the Companies Act; Delpont *et al. Henochsberg on the Companies Act 71 of 2008* (2011) 230; Cassim *et al. Contemporary Company Law* 370; Esser 2014 *THRHR* 40.

44 Section 61(12) of the Companies Act; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2018] 1 All SA 450 (GJ); Delpont *et al. Henochsberg on the Companies Act 71 of 2008* (2011) 231; Cassim *et al. Contemporary Company Law* 371.

45 See related comments by Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 5; also see more related comments by Van der Elst 2011 *Corporate Ownership and Control* 34.

46 Fairfax "From Apathy to Activism" 2019 *Boston University LR* 1301 1307; Stout "On the Rise of Shareholder Primacy, Signs of its Fail and the Return of Managerialism" 2013 *Seattle University L R* 1169 1182; Hernandez-Lopez "Bag Wars and Bank Wars the Gucci and Banque National de Paris Hostile Bids: European Corporate Culture Responds to Active Shareholders" 2003 *Fordham Journal of Corporate and Financial Law* 127 127.

47 Viviers 2013 *Journal of Economic and Financial Sciences* 753; Viviers and Smit 2015 *South African Journal of Business Management* 31; Rademeyer and Holtzhausen 2003 *SALJ* 776; Mans-Kemp and Van Zyl *South African Journal of Economic and Management Sciences* 4.

48 See ss 63(2), 66(8), 163, 165 and 166 of the Companies Act; Esser and Delpont 2016 *THRHR* 29; Mans-Kemp and Van Zyl 2021 *South African Journal of Economic Management and Science* 9; Viviers 2017 *African Journal of Business Ethics* 17.

49 See ss 63(2) and (3) of the Companies Act; Esser and Delpont 2016 *THRHR* 29; Mans-Kemp and Van Zyl 2021 *South African Journal of Economic Management and Science* 9; Viviers 2017 *African Journal of Business Ethics* 17.

shareholder in respect thereof.⁵⁰ These proposed amendments to the Companies Act should be introduced to enhance shareholder activism and active participation of shareholders in public companies.

3.3 Inconsistent Enforcement of Alterable Provisions on Electronic Shareholder Meetings

While the Companies Act provides for electronic shareholder meetings, prior to the COVID-19 pandemic, most JSE-listed companies had opted for in-person AGMs.⁵¹ Section 63(2) of the Companies Act which provides companies with the flexibility to decide whether or not to allow electronic meetings has been problematic during the COVID-19 pandemic. This follows the fact that most companies that had opted for in-person meetings prior to the COVID-19 pandemic had to incur additional costs to either adopt and/or implement the necessary platforms or facilities and licenses to host virtual or hybrid meetings during this pandemic.⁵² Public companies that specifically prohibited virtual meetings through their MOIs had to amend their MOIs or make exceptions regarding such meetings during the COVID-19 pandemic.⁵³ The lack of technological advancement in South African public companies at the beginning of the pandemic affected the promotion of shareholder activism. In other words, it was very difficult for most public companies to mitigate the costs involved in promoting shareholder activism and hosting virtual or hybrid meetings. It is worth mentioning that most companies have adapted to the hosting of electronic meetings and hybrid meetings, but some public companies are still lagging behind. It is submitted that the COVID-19 pandemic has exposed the need for public companies to continually adopt adequate and appropriate measures to mitigate the effect of extraordinary circumstances caused by such pandemics on shareholder activism and engagement in public companies in the future.⁵⁴ This follows the fact that most public companies failed to adopt appropriate mitigating actions since they did not anticipate all the technological challenges and financial risks that were posed by the COVID-19 pandemic.⁵⁵

Prior to the COVID-19 pandemic, there was a lot of hesitation to host virtual or hybrid meetings owing to various concerns raised by shareholders and proxy advisory firms. These concerns include the fact that there was no guarantee that directors would answer all shareholders' questions

50 See ss 163(1) and (2) of the Companies Act; Esser and Delport 2016 *THRHR* 29; Mans-Kemp and Van Zyl 2021 *South African Journal of Economic Management and Science* 9; Viviers 2017 *African Journal of Business Ethics* 17.

51 Section 63(2) and (3) of the *Companies Act*; see also Esser 2014 *THRHR* 48; Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Science* 5; Koevski *et al.* 2020 *Iustinianus Primus LR* 5.

52 Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 5; see Esser 2014 *THRHR* 44, for related comments regarding the enforcement of electronic meetings before the COVID-19 pandemic; see more related comments by Viviers 2015 *South African Journal of Business Management* 31.

53 Koevski *et al.* 2020 *Iustinianus Primus LR* 4; Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 5; Kennedy-Good and Chalwin-Milton "Electronic AGMs in South Africa: Reacting to a Pandemic" <https://www.financialinstitutionlegalsnapshot.com/2020/03/electronic-agms-in-south-africa-reacting-to-a-pandemic> (accessed 25-11-2021).

54 Kumar and Rao "Challenges are Thrown in Corporate Governance during COVID-19" 2019 *Academia Letters* 1 2; Khatib and Nour 2021 *Journal of Asian Finance, Economics and Business* 945; Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 5.

55 Kumar and Rao 2019 *Academia Letters* 2; Khatib and Nour 2021 *Journal of Asian Finance, Economics and Business* 945; Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 10.

during virtual meetings.⁵⁶ Additionally, there was apprehension over the fact that there would be no adequate monitoring of the placing and removal of shareholders' contributions during the virtual meetings.⁵⁷ The technological challenges such as poor connection, broadcasting issues, data protection, and cyber-security problems were further concerns that were raised by the relevant stakeholders during the pandemic.⁵⁸ However, these concerns could be mitigated in the future by ensuring that virtual meeting platforms are able to accommodate a large number of participants connecting simultaneously. Additionally, public companies should acquire and implement appropriate software that combat hacking and enhances the secure processing of the participants' personal data when participating in virtual meetings.⁵⁹

3 4 Shareholder Salience Challenges

Shareholder salience refers to the degree and/or extent at which shareholders or relevant stakeholders are visible, vocal, and important to their companies.⁶⁰ In order to be considered a salient shareholder, a shareholder must possess three attributes, namely legitimacy, power, and urgency.⁶¹ In this context, power has to do with the influence of the shareholder or the extent to which the shareholder can gain access to company management in order to impose their will.⁶² Legitimacy refers to the reputation of the shareholder and the assumption that their actions are appropriate according to societal norms.⁶³ Urgency refers to the degree to which the shareholders' claims require immediate attention.⁶⁴ Accordingly, retail shareholders and institutional shareholders with insignificant shareholding or who lack one or the other of the aforementioned attributes are not considered salient shareholders.⁶⁵ The aforementioned challenge of shareholder salience results in unequal and/or inadequate access to the corporate management of companies for non-salient shareholders. This restricts non-salient shareholders

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- 56 Deloitte "Post COVID-19: The Benefits and Challenges of Virtual Shareholder General Meeting (Annual General Meetings)" www.deloitte.com/za/en/pages/africa-centre-for-corporate-governance/post/article/covid-19.html (accessed 30-10-2021); Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 5; Koevski *et al.* 2020 *Iustinianus Primus LR* 5.
- 57 Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 5; Deloitte "Post COVID-19: The Benefits and Challenges of Virtual Shareholder General Meeting (Annual General Meetings)"; Koevski *et al.* 2020 *Iustinianus Primus LR* 5.
- 58 Deloitte "Post COVID-19: The Benefits and Challenges of Virtual Shareholder General Meeting (Annual General Meetings)"; Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 5; Koevski *et al.* 2020 *Iustinianus Primus LR* 5.
- 59 Deloitte "Post COVID-19: The Benefits and Challenges of Virtual Shareholder General Meeting (Annual General Meetings)"; Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 9.
- 60 Uysal *et al.* 2018 *Journal of Applied Communication Research* 184; James and Gifford "Effective Shareholder Engagement: The Factors that Contribute to Shareholder Salience" 2010 *Journal of Business Ethics* 79 80; Viviers 2016 *Journal of Economic and Financial Sciences* 350; Goranova and Ryan 2014 *Journal of Management* 1244.
- 61 Uysal *et al.* 2018 *Journal of Applied Communication Research* 184; James and Gifford 2010 *Journal of Business Ethics* 80; Viviers 2016 *Journal of Economic and Financial Sciences* 350; Goranova and Ryan 2014 *Journal of Management* 1244.
- 62 James and Gifford 2010 *Journal of Business Ethics* 79; Viviers 2016 *Journal of Economic and Financial Sciences* 350; Uysal *et al.* 2018 *Journal of Applied Communication Research* 182; McNulty and Nordberg 2016 *Corporate Governance: An International Review* 353.
- 63 James and Gifford 2010 *Journal of Business Ethics* 80; Viviers 2016 *Journal of Economic and Financial Sciences* 350; Goranova and 2014 *Journal of Management* 1248; McNulty and Nordberg 2016 *Corporate Governance: An International Review* 353.
- 64 James and Gifford 2010 *Journal of Business Ethics* 80; Viviers 2016 *Journal of Economic and Financial Sciences* 351; Goranova and 2014 *Journal of Management* 1248.
- 65 James and Gifford 2010 *Journal of Business Ethics* 82; Viviers 2016 *Journal of Economic and Financial Sciences* 348; Esser 2014 *THRHR* 43; McNulty and Nordberg 2016 *Corporate Governance: An International Review* 353.

to public mechanisms of shareholder activism. Shareholders are generally hesitant to engage with companies through public mechanisms such as legal proceedings which may generate negative publicity for the company and adversely affect the share price.⁶⁶

The lack of guidelines or a framework setting out effective communication strategies between shareholders and their relevant companies, coupled with the postponement of AGMs at the beginning of the COVID-19 pandemic resulted in little or no access to company management for non-salient shareholders and poor shareholder activism in most public companies in South Africa. Ultimately, most shareholders were left without a platform to participate in the governance of their companies and engage with company management during the COVID-19 pandemic. In this regard, the advent of the COVID-19 pandemic has exposed the paucity of practical measures that integrate non-salient shareholders and provide them with platforms to promote shareholder activism and have access to company management under the Companies Act.

3 5 Shareholder Passivity Challenges in South African Public Companies

Shareholder passivity has been deemed by legal and business scholars as a rational choice of shareholders rather than a condition exacerbated by inadequate promotion of shareholder activism under the Companies Act.⁶⁷ Shareholder passivity usually emanates from dispersed retail and institutional shareholders who do not have sufficient shareholding or voting rights to exercise sufficient control over their companies and/or justify shareholder activism.⁶⁸ The challenges impeding the promotion of shareholder activism such as limited financial costs and the lack of knowledge on the part of retail shareholders regarding their rights and responsibilities were amplified during the COVID-19 pandemic.⁶⁹ The challenges faced by institutional shareholders include fears over acting in concert, the free-rider problem, conflict of interests between institutional shareholders and the companies they have invested in, and the scarcity of resources due to diversification.⁷⁰ These impediments to shareholder activism existed before the pandemic and worsened during the pandemic. This is owing to the fact that the aforementioned challenges to retail and institutional shareholders are not adequately addressed under the Companies Act.⁷¹ The Companies Act does not provide measures to address challenges faced by institutional shareholders. For instance, the Companies Act does not have any measures aimed at curbing the free-rider problem and related conflict of interests between institutional shareholders and their

66 See related comments by Barko, Cremers and Renneboog “Shareholder Engagement on Environmental, Social, and Governance Performance” 2021 *Journal of Business Ethics* 1 4; Uysal *et al.* 2018 *Journal of Applied Communication Research* 184; James and Gifford 2010 *Journal of Business Ethics* 80; Viviers 2016 *Journal of Economic and Financial Sciences* 350; Goranova and Ryan 2014 *Journal of Management* 1244.

67 See ss 51, 61, 65, 68, 71 159, 161, 163 and 165 of the Companies Act; Black “Shareholder Passivity Re-examined” 1990 *Michigan LR* 523; Velasco “The Fundamental Rights of the Shareholder” 2006 *University of California Davis LR* 407 417; Velasco “Taking Shareholder Rights Seriously” 2007 *University of California Davis LR* 605 622.

68 Mongalo 2004 *TSAR* 98–99; Strätling “How to Overcome Shareholder Apathy in Corporate Governance – The Role of Investor Associations in Germany” 2012 *Annals of Public and Cooperative Economics* 143 144; Harber “The Role of Institutional Investors in Promoting Long Term Value Creation: A South African Perspective” 2017 *African Review of Economics and Finance* 272 283.

69 Esser and Havenga “Shareholder Participation in Corporate Governance” 2008 *Speculum Juris* 74 78; Esser 2014 *THRHR* 41; Kastiel and Nili “In Search of the “Absent” Shareholders: A New Solution to Retail Investor Apathy” 2016 *Delaware Journal of Corporate Law* 56 57.

70 Ivanova “Institutional Investors as Stewards of the Corporation: Exploring the Challenges to the Monitoring Hypothesis” 2016 *Business Ethics: A European Review* 175 185; Goranova and Ryan 2014 *Journal of Management* 1244; Harber 2017 *African Review of Economics and Finance* 282.

71 See ss 51, 61, 65, 68, 71 159, 161, 163 and 165 of the Companies Act; Rademeyer and Holtzhausen 2003 *SALJ* 769; Esser and Havenga 2008 *Speculum Juris* 78; Viviers 2014 *Journal of Economic and Financial Science* 749; Viviers and Smit 2015 *South African Journal of Business Management* 24.

companies.⁷² The authors submit that shareholder activism decreased in most public companies during the early stages of the COVID-19 pandemic in 2020.⁷³ For instance, shareholders were generally hesitant to support public shareholder activism campaigns that targeted companies that were already struggling due to the effects of the COVID-19 pandemic.⁷⁴

3 6 Adoption of Flawed Measures to Promote Shareholder Activism

The COVID-19 pandemic has played a major role in exposing the flaws in the Companies Act in relation to the promotion of shareholder activism in most companies, especially public companies. For instance, there were various challenges involving executive remuneration, the dissemination of accurate financial information, and poor shareholder engagement during the COVID-19 pandemic.⁷⁵ These issues have been previously identified as difficult and contentious by shareholder activists. As a result, they provided the basis for various shareholder activism campaigns such as the say-on-pay campaign. For instance, the furlough of staff and other financial difficulties made directors not to receive their usually exorbitant bonuses. Most directors had to temporarily reconsider their executive pay structures.⁷⁶ Furthermore, companies had to reconsider their dividend policies in the face of competing interests such as the expectations of shareholders, pressure from the government to cancel or reduce dividends, and the company's cash position in the wake of the COVID-19 pandemic uncertainties.⁷⁷ Accordingly, it is submitted that the COVID-19 pandemic exposed that the South African policy-makers adopted flawed measures to effectively promote shareholder activism under the Companies Act.

4 THE MEASURES ADOPTED TO MITIGATE THE EFFECTS OF COVID-19 ON SHAREHOLDER ACTIVISM IN SOUTH AFRICA

The JSE in partnership with the Meeting Specialist (TMS) introduced virtual meeting services in 2020, which cater for instant and accurate electronic voting.⁷⁸ In this regard, it is important to note that the biggest obstacle to virtual meetings and electronic voting prior to the COVID-19 pandemic included fears over the moderation of shareholder questions by directors through

72 Ivanova 2016 *Business Ethics: A European Review* 185; Goranova and Ryan 2014 *Journal of Management* 1244; Harber 2017 *African Review of Economics and Finance* 282.

73 See related comments by Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 5; Deloitte "Post COVID-19: The Benefits and Challenges of Virtual Shareholder General Meeting (Annual General Meetings)"; Koevski *et al.* 2020 *Iustinianus Primus LR* 5.

74 Gotfried and Donahue "The Impact of COVID-19 on Shareholder Activism" <https://corpgov.law.harvard.edu> (accessed 24-11-2021); Mans-Kemp and Van Zyl 2021 *South African Journal of Economics and Management Sciences* 5; Orol "Activist investing Today: V&E's Elbaum on Covid-19 vs 2008" <https://www.thedeal.com/podcasts/activist-investing-today-elbaum-on-covid-19-ve-2008> (accessed 24-11-2021).

75 Lateef and Akinsulore "COVID-19 Implications for Corporate Governance and Corporate Social Responsibility (CSR) in Africa" 2021 *Beijing LR* 139 154; Koutoupis, Kyriakogkonas, Pazarskis and Davidopoulus "Corporate Governance and COVID-19: A Literature Review" 2021 *Corporate Governance International Journal of Business in Society* 969 974.

76 Koutoupis *et al.* 2021 *Corporate Governance International Journal of Business in Society* 974; Rodley "Corporate Governance in the Post Pandemic World" www.financierworldwide.com (accessed 30-10-2021); Gelter and Puaschunder "COVID-19 and Comparative Corporate Governance" 2021 *Journal of Corporate Law* 557 612.

77 Rodley "Corporate Governance in the Post Pandemic World"; Khatib and Nour 2021 *Journal of Asian Finance, Economics and Business* 949; Gelter and Puaschunder 2021 *Journal of Corporate Law* 582.

78 Mans-Kemp and Van Zyl 2020 *South African Journal of Economic ad Management Sciences* 5; Johannesburg Stock Exchange "Annual General Meetings" www.jse.co.za/services/annual-general-meetings (accessed 25-11-2021).

cherry-picking favourable questions and rephrasing or ignoring unfavourable questions.⁷⁹ An additional obstacle to virtual meetings prior to, and during the COVID-19 pandemic was the fear that shareholders will be unduly restricted on their ability to adequately engage, express concerns, and/or raise questions against the board of directors of their companies.⁸⁰ This fear was premised on the shareholders' perception that they would not be able to participate actively and in real-time without any interference or suppression from directors during virtual meetings. The difference between virtual meetings and face-to-face meetings is that with the latter, it is easier to engage more meaningfully and express one's views more clearly without being misconstrued, as is likely with virtual meetings.

The TMS facilitates shareholder activism in public companies and it helps to minimise director interference by ensuring that there is full compliance with the electronic meeting provisions of the Companies Act. The JSE provides measures for real-time shareholders' participation in companies from any location through their technological devices. This enables them to effectively participate in the governance of public companies, especially during the pandemic.

The JSE and the Financial Sector Conduct Authority (FSCA) offered companies an extension on the period in which they are required to report on their financial statements to ensure that shareholders and directors are able to issue relevant accurate information pertaining to their companies.⁸¹ This follows the fact that most public companies were not able to timeously and accurately provide their financial forecasts during the COVID-19 pandemic.⁸² Many companies have welcomed this offer and have disclosed their intention to utilise the extension period.⁸³ Accurate information disclosures promote shareholder confidence and enables them to make informed decisions on whether to invest or divest in the relevant public companies. In this regard, it is crucial to note that the COVID-19 pandemic resulted in the bankruptcy of many companies and the volatility of stock markets in South Africa and other countries.

The payment of dividends as well as profit maximisation of the company are some of the ways in which shareholders are rewarded for their activism. Banks and other financial institutions in South Africa restricted dividend payouts in most companies so as to overcome the harsh challenges of the COVID-19 pandemic.⁸⁴ The restriction of dividends in companies was

79 Koevski *et al.* 2020 *Iustinianus Primus Law Review* 5; Mans-Kemp and Van Zyl 2020 *South African Journal of Economic and Management Sciences* 5; Just Share "Best Practices for South African Virtual Annual General Meetings" <https://justshare.org.za/wp-content/uploads/2020/05/Just-Share-Virtual-AGM-Guide.pdf> (accessed 25-11-2021).

80 Koevski *et al.* 2020 *Iustinianus Primus LR* 5; Mans-Kemp and Van Zyl 2020 *South African Journal of Economic and Management Sciences* 5; Just Share "Best Practices for South African Virtual Annual General Meetings".

81 University of the Witwatersrand "Accounting, Governance and Integrated Thinking in the Context of COVID 19" 11 <https://www.wits.ac.za/covid19/covid19-news/latest.accounting-governance-and-integrated-thinking.html> (accessed 25-11-2021).

82 OECD "The Future of Corporate Governance in Capital Markets Following the COVID-19 Crisis" <https://doi.org/10.1787/efb2013c-en> (accessed 09-12-2021) 71; University of the Witwatersrand "Accounting, Governance and Integrated Thinking in the Context of COVID 19"; Koutoupis *et al.* 2021 *Corporate Governance International Journal of Business in Society* 974.

83 University of the Witwaterstand "Accounting, Governance and Integrated Thinking in the Context of COVID 19"; Koutoupis *et al.* 2021 *Corporate Governance International Journal of Business in Society* 974; OECD "The Future of Corporate Governance in Capital Markets Following the COVID-19 Crisis" 71.

84 OECD "The Future of Corporate Governance in Capital Markets Following the COVID-19 Crisis" 76; Koutoupis *et al.* 2021 *Corporate Governance International Journal of Business in Society* 974.

recommended by the Prudential Authority (PA).⁸⁵ The restriction of dividend payouts in financial institutions was generally aimed at enabling them to extend credit to other persons and curb any potential losses that could be triggered by the effects of the COVID-19 pandemic.⁸⁶ For instance, the research by the University of the Witwatersrand, School of Accountancy found that 24 companies that were listed on the JSE deferred their dividends to combat the effects of the pandemic.⁸⁷ Although financial gain through dividends is one of the primary outcomes of shareholder activism, the COVID-19 pandemic forced companies and their shareholders to reconsider the distribution of the companies' profits in order to safeguard the continuity and resilience of their companies during the pandemic.

5 CONCLUDING REMARKS

Various effects of the COVID-19 pandemic on shareholder activism, especially in public companies were discussed above. In this regard, the adequacy, applicability and enforcement of the relevant provisions of the Companies Act to effectively promote shareholder activism during the ongoing COVID-19 pandemic was explored. Additionally, the adequacy of the measures adopted by the FSCA and the JSE to enable listed companies to host virtual meetings and conduct electronic voting during the COVID-19 pandemic was also examined. It was noted that more needs to be done to effectively promote shareholder activism through technological advancement in public companies. In this regard, policy-makers and the government should provide sufficient resources and the relevant political will to enhance the promotion of shareholder activism in public companies. Moreover, public companies should be encouraged to employ sufficient and appropriate technological measures to advance and promote shareholder activism. Public companies should provide appropriate training for their employees, especially directors and shareholders, on how to utilise technology to promote and protect shareholder activism. Public companies should have adequate measures in place to facilitate informal engagement processes to ensure robust shareholder participation in the governance of such companies.⁸⁸ Furthermore, policy-makers should consider amending the Companies Act to enact provisions that expressly provide for the promotion of shareholder activism and the use of technology to enable shareholders and directors to robustly engage in the governance matters of their companies effectively.⁸⁹

85 See Reserve Bank of South Africa "GN 4 of 2020 Dividends and Bonus Payments in Response to Covid-19" <https://www.resbank.co.za/content/dam/sarb/publications/prudential-authority/pa-deposit-takers/banks-guidance-notes/2020/9845/GN4-of-2020---Dividends-and-bonus-payments-in-response-to-Covid19.pdf>; also see University of the Witwatersrand "Accounting, Governance and Integrated Thinking in the Context of COVID 19"; Koutoupis *et al.* 2021 *Corporate Governance International Journal of Business in Society* 974; Dowling "The Role of the Company in the Time of Covid-19" 2021 *King's LJ* 37 41.

86 OECD "The Future of Corporate Governance in Capital Markets Following the COVID-19 Crisis" 76; Dowling 2021 *King's LJ* 41; Koutoupis *et al.* 2021 *Corporate Governance International Journal of Business in Society* 974.

87 University of the Witwatersrand "Accounting, Governance and Integrated Thinking in the Context of COVID 19" 12; Koutoupis *et al.* 2021 *Corporate Governance International Journal of Business in Society* 974; Dowling 2021 *King's LJ* 37 41.

88 Viviers and Smit 2015 *South African Journal of Business Management* 31; Viviers and Els 2017 *African Review of Economics and Finance* 143; Mans-Kemp and Van Zyl 2021 *South African Journal of Economic and Management Science* 8; Esser 2014 *THRHR* 45.

89 Esser and Havenga 2008 *Speculum Juris* 84; Esser 2014 *THRHR* 44; Mans-Kemp and Van Zyl 2021 *South African Journal of Economic and Management Sciences* 9; Viviers and Smit 2015 *South African Journal of Business Management* 31.