

# Shareholder Activism and Acting in Concert during Takeovers under the Companies Act 71 of 2008

Madimetja Phakeng\*

## Abstract

*This article discusses the interaction between shareholder activism and the concept of acting in concert as applied under the takeover provisions of the Companies Act 71 of 2008. The takeover provisions are aimed at protecting minority shareholders during takeovers. Shareholder activism is on the increase throughout the world. It is viewed both positively and negatively. Shareholder activism is on a wide spectrum. Shareholder activists may seek to bring about a number of changes in a company, including better performance, change in management or even a takeover. This article discusses shareholder activism, focusing on the change of control transactions in companies – takeovers of companies. This is particularly relevant in view of the assertions that the application of acting in concert rules under the takeover provisions may deter shareholder activism. The article proceeds as follows: it provides an introductory remark on shareholder activism and its interaction with the takeover provisions; briefly deals with takeover transactions and defines the concept of acting in concert; as well as exploring how this concept is applied during takeovers, both in South Africa and in the United Kingdom. The article concludes by highlighting how acting in concert provisions seeks to strike a balance between shareholder activism and the powers of directors to manage the company's affairs. Finally, it makes suggestions on how shareholder activists should proceed so as to avoid falling foul of the takeover provisions.*

## Keywords

acting in concert; Companies Act 71 of 2008; shareholder activism; takeover provisions; Takeover Regulation Panel

‘[T]akeover law is an intensely practical topic.’<sup>1</sup>

1 Payne, J *Takeovers in English and German Law* (1st Ed., Hart Publishing 2002) 6.

\* LLD (Stellenbosch University, South Africa), LLM, MBL (University of South Africa). Executive Director, Takeover Regulation Panel, South Africa. <<https://orcid.org/0000-0002-6761-2840>>  
Email: madimetjaphakeng@yahoo.com



## 1. Introduction

Globally, shareholder activism is on the rise.<sup>2</sup> In South Africa, 'following global trends attributable to an increasingly internationalised shareholder base [...] shareholder activism has been on the rise, and the market has started to take note of the influence shareholders can wield.'<sup>3</sup> A number of companies listed on the JSE Limited have recently experienced this phenomenon.<sup>4</sup> Shareholder activists question managerial decisions and demand corporate accountability.<sup>5</sup> Their motivation and tactics are different. Some are in pursuit of better financial returns from the investee company, while others are motivated by a prospect of achieving objectives that are socially beneficial to the community at large. Shareholder activists who seek increased financial returns may put pressure on directors to sell loss-making divisions to improve the company's financial performance, request directors to increase the dividend payout ratios, or request directors to consider payment of a dividend if a company has a policy of not paying a dividend. On the other hand, social activists seek to influence corporate decision-making to achieve a more just society.<sup>6</sup> Some activists are aggressive, mounting a number of public campaigns that may include hostile press releases. Others may adopt a 'friendly' approach, discreetly approaching companies and putting various proposals for consideration by the board.<sup>7</sup>

Shareholder involvement in corporate affairs can be viewed as a continuum of possibilities.<sup>8</sup> It ranges from those shareholders who invest without involving themselves in the company and those in the middle whose activism try to influence rules of the game (in investing) to those activists at the extreme end who seek to 'take an active role in the day-to-day business of the firm.'<sup>9</sup> The latter are activists who may be aiming to take operational control of a company. They are often motivated by short term financial gains. Such activists seek to take control of a company and are unlikely to declare their intentions at an early stage of a takeover as these could make it difficult to succeed. Hence, in some countries, takeover provisions require disclosures of the acquisition of shares above a certain percentage.<sup>10</sup>

---

2 Viviers, S 'Executive remuneration in South Africa: Key Issues Highlighted by Shareholder Activists' (2015) *African Journal of Business Ethics* 6.

3 Davids, E and Ntamane, X 'Shareholder Rights and Activism Review-South Africa' (2017) *The Law Reviews* 100.

4 Paxton S 'Shareholder Activism and the Role of the Company Secretary' (2020) 6-11 <<https://bit.ly/3EN45jG>> accessed 3 September 2021. In the guide, the author discusses a number of instances where shareholder activists raised their displeasure against companies. The issues raised are varied. They include climate change, as in the case of *Standard Bank of SA Limited*, and directors' remuneration policies in the case of *Tongaat Hulett Limited*.

5 Viviers (n 2) 5.

6 *Ibid* 6.

7 Davids and Ntamane (n 3) 109, indicate that one of the large asset managers, as part of shareholder activism, suggested that shareholders must approve certain payments, such as golden handshakes of a regulated listed company.

8 Nili, Y 'Missing the Forest for the Trees: A New Approach to Shareholder Activism' (2014) 4 *Harvard Business Law Review* 169.

9 *Ibid* 169-170.

10 Section 122 of the Act requires disclosures of acquisitions of 5% or more of shares of a regulated company. Such disclosures assist in revealing any potential stake building at an early stage of a transaction.

It appears that takeover regulators regard activists who aim to take control of a company with suspicion. Regulators suspect that an activist who wants to take control of a company is likely to attempt to avoid compliance with the takeover provisions as compliance with these provisions may cost a substantial amount of money and reduce the financial gains from the takeover.<sup>11</sup> Some takeover provisions have been put in place to regulate the conduct of this type of activist. This article focuses on shareholder activism aimed at acquiring control of a regulated company. It also provides advice on how some of the actions of shareholder activists may be affected by the takeover provisions.

An overview of research suggests that there is a dearth of scholarly articles on shareholder activism and its interaction with the takeover provisions of Chapter 5 of the Companies Act 71 of 2008 (hereinafter “the Act”), and the regulations in Chapter 5 of the Companies Regulations 2011 (hereinafter “the Regulations”). The purpose of this article is to add research to this area of corporate law. The article provides a highlight of some of the issues involved in shareholder activism and the supervision of takeovers under the Act.

For the sake of brevity, in this article, the provisions of Chapter 5 of the Act and the Regulations are jointly referred to as the ‘takeover provisions’. The takeover provisions and the Regulations govern how affected transactions should be undertaken. And ‘affected transactions’, as defined in the Act, are referred to as ‘takeovers’. The article is structured as follows: it provides a brief overview of the takeover provisions and the concept of acting in concert during a takeover. The article then discusses how the concept is applied, both in South African and in the United Kingdom. Finally, the article concludes with suggestions as to how shareholder activists should proceed during takeovers to avoid breaching the takeover provisions.

## **2. An overview of the takeover provisions**

The takeover provisions apply to regulated companies when these companies undertake affected transactions. These are public companies, state-owned companies unless exempted, and private companies which had 10% or more of their issued securities transferred between unrelated parties within a period of 24 months immediately prior to the date of the particular affected transaction or offer, or if the memorandum of incorporation of a private company provides that the company is subject to the takeover provisions.<sup>12</sup> Affected transactions include a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking; amalgamations or mergers; a scheme of arrangement between a regulated company and its shareholders; the acquisition of, or announced intention to acquire a beneficial interest in any voting securities; the announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert; a mandatory offer; as well as the compulsory acquisition of shares.<sup>13</sup>

---

11 See discussions under para 3.2 below and the extract from the United Kingdom Panel Statement 1989/13 3.

12 Sections 118 (1) and (2) of the Act.

13 Section 117(1)(c) of the Act.

The takeover provisions are enforced by the Takeover Regulation Panel (the Panel) that has been established in terms of section 196 of the Act. Affected transactions give rise to a number of potential conflicts.<sup>14</sup> Hence the need for supervision. Conflicts include the fact that the offeror may want to pay the lowest price to buy the shares while existing shareholders want to sell at the highest price.<sup>15</sup> Conflicts could also arise between the major shareholder and minority shareholders.<sup>16</sup> The main aim of the regulatory activity of the Panel is to protect minority shareholders during a takeover. This is done by enforcing a number of provisions, including disclosures during a takeover, thereby enabling shareholders to make an informed decision about a takeover. The Panel seek to foster fairness, equity and orderly takeovers.<sup>17</sup>

The takeover provisions are based on the United Kingdom Takeovers Code (commonly referred to as the City Code),<sup>18</sup> and therefore, a brief excursion into the application of the concept of 'acting in concert' is undertaken in paragraph 4.2 underneath. As indicated on the United Kingdom Takeovers and Mergers' Panel website:

The City Code on Takeovers and Mergers (the "Code") has been developed since 1968 to reflect the collective opinion of those professionally involved in the field of takeovers as to appropriate business standards and as to how fairness to shareholders and an orderly framework for takeovers can be achieved.<sup>19</sup>

It is generally accepted that takeover provisions are important and are necessary to foster investment on the stock markets.<sup>20</sup> The takeover provisions, amongst others, promote integrity in financial markets and fairness to shareholders.<sup>21</sup> They also ensure transparency, provision of relevant information to shareholders and equality of treatment between shareholders.<sup>22</sup> The takeover provisions also set out certain conduct which may not be undertaken during a takeover, unless shareholders have approved the transactions and the Panel has approved such a transaction.<sup>23</sup>

In addition, certain dealings between shareholders are not allowed during a takeover or prior to a takeover, unless certain prerequisites are met.<sup>24</sup> In this manner, minority shareholders are protected because activists aiming for short term gains are not without any restrictions where these gains are to be realised through a takeover. Fair treatment

---

14 Luiz, S 'Protection of Holders of Securities in the Offeree Regulated Company During Affected Transactions: General Offers and Schemes of Arrangements' (2014) 26 *SA MERC LJ* 560.

15 *Ibid* 560.

16 *Ibid*.

17 Section 119(1) and 119(2) of the Act.

18 Luiz, S *An evaluation of the South African Securities Regulation Code on Takeovers and Mergers* LLD Thesis (Unisa 2003) 573-1022. Luiz, in the thesis, comprehensively traces the development of takeover laws in South Africa.

19 The Takeover Panel 'The Takeover Code' (n.d.) <<https://bit.ly/2XLbWNy>> accessed 13 August 2020.

20 Stein, C *The New Companies Act Unlocked* (2011) 23.

21 Section 119(1) (a) of the Act.

22 Section 119(1) (b) of the Act.

23 Section 126 of the Act.

24 Section 127 of the Act.

of shareholders translates into equal treatment or equitable treatment of shareholders.<sup>25</sup> The Panel is limited in what it must regulate. In terms of section 119(1) of the Act, when regulating affected transactions, the Panel must not have regard to commercial advantages or disadvantages of any transaction or the proposed transaction. Further, section 201(3) of the Act provides that, in exercising its powers and performing its functions, the Panel must not express any view or opinion on the commercial advantages or disadvantages of any transaction or proposed transaction.

### 3. Acting in concert during takeovers

Rules dealing with parties that act in concert to acquire control of a company are necessary to protect minority shareholders against abuse. These rules are in accordance with the principles of takeover laws that seek to protect minority shareholders during a takeover. It is suggested that the rules dealing with acting in concert are intended to curb the actions of shareholders who want to acquire or assist in acquiring control of a regulated company without adhering to the takeover provisions.

For the purposes of the takeover provisions, control of a company is defined with reference to a holding of 35% or more of the voting securities of a regulated company.<sup>26</sup> Parties acting in concert who acquire this threshold may be obliged to acquire the shares of the remaining shareholders, even if they did not want to acquire all the shares of the regulated company, as provided for, in terms of the mandatory offer section.<sup>27</sup> In terms of section 115(4) of the Act, parties acting in concert may be precluded from voting when a regulated company proposes a fundamental transaction.<sup>28</sup>

Under section 117(1)(b) of the Act, to act in concert refers to any action pursuant to an agreement between or amongst two or more persons, in terms of which any of them cooperate for the purpose of entering into or proposing a takeover. The section must be read with sections 117(2) and 118(5) of the Act, as well as with Regulation 84, dealing with presumptions that certain persons act in concert during takeovers. During a proposal for a takeover, the definition of parties acting in concert should closely be considered. This is because a declaration by the Panel that parties acting in concert may have adverse financial consequences for the parties. The phrase 'acting in concert' is used to describe parties who co-operate or act together to achieve a particular end or object.<sup>29</sup> Therefore, there must be an understanding or agreement between the parties as to their common purpose and, pursuant to which they so cooperate.<sup>30</sup> The separate shareholdings of parties

---

25 Luiz, S 'Protection of Holders of Securities in the Offeree Regulated Company During Affected Transactions: General Offers and Schemes of Arrangements' (2014) 26 *SA MERC LJ* 564.

26 Sections 123(1) and 123(5) read with Regulation 86(1).

27 Section 123 of the Act.

28 Fundamental transactions are dealt with under Part A of Chapter 5 of the Act. These transactions are: a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking under section 112, amalgamations or mergers under section 113 and a scheme of arrangement between a regulated company and its shareholders under section 114.

29 Yeats, J et al *Commentary on the Companies Act of 2008* (Juta 2018) 5-47.

30 *Ibid.*

who are considered to be acting in concert in relation to a takeover are aggregated.<sup>31</sup> Not all parties acting in concert have to be shareholders for the concept to apply to them.<sup>32</sup> In this context, it is not surprising that advisers may be included as parties acting in concert.<sup>33</sup> Henochsberg indicates as follows:

Three or more persons act in concert with one another, operate with any of the others for stated purposes; thus, e.g., where A, B, C and D agree with one another to propose an affected transaction, D will act in concert, in this context, with A, B and C notwithstanding that he is to remain entirely passive in relation to the actual proposal or the entering into such in this context, even if one (or more) of them in fact is (are) not to co-transact.<sup>34</sup>

According to Henochsberg,<sup>35</sup> acting in concert has two distinct parts based on the definition. First, the cooperation between the parties must be pursuant to an agreement. Secondly, the cooperation between the parties, or any of them, must have as its purpose the entering into or proposal of an affected transaction or offer.

It appears that the legislature sought to expand the application of acting in concert. The takeover provisions intend to make the category of parties who may act in concert to be broad.<sup>36</sup> Section 117(2) of the Act adds that for the purpose of the takeover provisions, two or more related or inter-related persons are regarded to have acted in concert unless there is satisfactory evidence that they acted independently in any particular matter. In addition, section 118(5) provides that a person who has been granted an option to acquire shares that have voting rights in a regulated company is presumed to have acted in concert with the grantor of the option, unless the grantor retains the voting rights.

The Regulations also provide that certain persons are presumed to be acting in concert with one another in addition to those referred to in section 118(5). It is presumed that a company is acting in concert with any of its directors.<sup>37</sup> Further, it is presumed that a company is acting in concert with any company controlled by one or more of its directors.<sup>38</sup> In addition, it is presumed that a company is acting in concert with any trust of which any one or more of its directors is a beneficiary or a trustee.<sup>39</sup> The final presumption is that any of the company's pension funds, provident funds or benefit funds and share incentive schemes are acting in concert with one another.<sup>40</sup>

It is notable that the takeover provisions create presumptions about parties acting in concert. This suggests that the drafters created the presumptions to assist in the enforce-

---

31 Ryde, A and Turnbull, R 'Share Dealings: Restrictions and Disclosure Requirements' in Button, M (ed) *A Practitioner's Guide to The City Code on Takeovers and Mergers* (City & Financial Planning [2006/2007]) 78.

32 Yeats et al. (n 29) 5-50.

33 *Securities Regulation Panel v MGX Limited*, (WLD) Case Number 16026/03, 23 June 2004 (Unreported), para 17.

34 Delpont, PA and Vorster, O *Henochsberg on the Companies Act 71 of 2008* (2012) 426(4).

35 *Ibid.*

36 *Ibid.*

37 Regulation 84(1)(a)(i).

38 Regulation 84(1)(a)(ii).

39 Regulation 84(1)(a)(iii).

40 Regulation 84(1)(b).

ment of this concept and reduce avoidance of the takeover provisions by persons acting in concert. It is arguable that the presumptions may make it easier for regulators to prove that certain persons are acting in concert for the purposes of a takeover. Parties who are said to be acting in concert would then have an obligation to prove that their actions do not fall within the meaning intended by the takeover provisions.

Shareholder activists are often concerned (in my view, rightly so) that they may be declared to be acting in concert when pursuing shareholder activism in a regulated company.<sup>41</sup> According to the activists, the acting in concert provisions makes it difficult to cooperate with other shareholders to initiate some actions or transactions in regulated companies.<sup>42</sup> It appears that these concerns are not limited to shareholder activists in South Africa, as indicated above in paragraph 4.2.

However, it should be noted that acting in concert on its own does not necessarily mean that such parties will be required to make a mandatory offer to other shareholders. It is suggested that the actions of parties acting in concert, and the consequences thereof, if any, should be considered on a case-by-case basis. In some instances, the obligation of parties who acted in concert may be to disclose the concert party relationship in the appropriate form and file it with the Panel.<sup>43</sup> Persons acting in concert are also required to notify the Panel that they have ceased to act in concert within five days of such arrangement or agreement.<sup>44</sup> The notification assists the Panel in monitoring and regulating the conduct of such persons, including any acquisition of further securities by any of the concert parties.<sup>45</sup> This may result in enforcement action by the Panel of the relevant takeover provision. In serious cases, parties acting in concert may be required to make a mandatory offer,<sup>46</sup> or the voting rights of parties acting in concert may be restricted when a regulated company undertakes relevant transactions.<sup>47</sup>

It is submitted that in the main, the concept of acting in concert is aimed at activists who seek to acquire control and not those shareholders who may want to dispose of their shares. For instance, a major shareholder indicating that it proposes to accept an offer does not act in concert with the offeror.<sup>48</sup> It is suggested that even if such a person signs an undertaking to accept an offer, it does not act in concert with the offeror unless the undertaking goes beyond a mere acceptance of the offer. The purpose of signing the undertaking to accept an offer is to facilitate the offer to purchase the shares. It provides assurance to the offeror and a shareholder that, if and when the offer is made, the sale of the shares will be achieved between the parties, in accordance with the terms of the undertaking. Such an undertaking facilitates the disposal of the shares to the new

---

41 Mans-Kemp, N and Van Zyl, M 'Reflecting on the Changing Landscape of Shareholder Activism in South Africa (2021) *The South African Journal of Economic and Management Sciences* 24(1) 8 <<https://doi.org/10.4102/sajems.v24i1.3711>> accessed 25 June 2021.

42 *Ibid* 8.

43 Regulation 84(5).

44 Regulation 86(5). The reporting is done on Form TRP 84.

45 Section 119(1) of the Act provides, amongst others, that the Panel must regulate affected transaction as defined in the Act, which includes disclosures relating to such transactions.

46 Section 123 of the Act.

47 Section 115(4) of the Act.

48 Yeats et al. (n 29).

shareholder even if by so doing, the new shareholder may obtain control of a company. Similarly, an undertaking to vote in favour of a resolution proposing a takeover does not make the parties to act in concert for the purposes of a takeover.

The Regulations explain some instances where acting in concert on its own does not lead to an obligation to make a mandatory offer.<sup>49</sup> These include where: (a) at the time of coming into concert, each of the concert parties was entitled to exercise voting rights which were less than the prescribed percentage; (b) as a result of coming into concert, they are entitled, in aggregate, to exercise voting rights exceeding the prescribed percentage and (c) none of them has acquired any further voting securities in the regulated company. In these instances, shareholder activists need not be concerned that their collective actions, such as voting together to remove a director or to propose a value-enhancing transaction in a regulated company, may lead to unfavourable consequences under the takeover provisions. Provided the activists adhere to the takeover provisions, such actions should not have major consequences.

## 4. Application of acting in concert to shareholder activism

### 4.1 Introductory comments

Shareholders are likely to be deterred from collective action to influence the board if they fear that they will be required to make a general offer for all the shares of the company.<sup>50</sup> One of the strategies of activists is to acquire shares in the company before they start their activism intervention but after a decision to intervene has been made so that they may benefit since successful activism will increase the share price.<sup>51</sup> Restriction on acquisitions may also have a negative impact on willingness of shareholder activists to engage in value-enhancing activism.<sup>52</sup> Free-riders may benefit from increased share price brought about by the actions of activists.<sup>53</sup>

Comprehensive general rules for application to the concept of acting in concert appears to be futile. It has been pointed out that '[a]n exhaustive definition [of acting in concert] would be difficult.'<sup>54</sup> Perhaps it is for this reason that acting in concert rules include presumptions, as discussed above. The complexity of the acting in concert rules often make them difficult to interpret and apply to the ever-evolving and fast-moving corporate takeover transactions. The Panel may also not be able to immediately issue a ruling as to whether particular conduct and act taken by activists constitutes acting in concert. This is due to the legal implications of such pronouncements. Such rulings may be classified as administrative actions, and, therefore, the rulings must be issued

49 Regulation 84(7).

50 Davies, PL and Worthington, S *Gower's Principles of Modern Company Law* (10th Ed., Sweet & Maxwell 2016) 966.

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

54 Statement of the United Kingdom Takeover Appeal Board in Rangers International Football Club PLC & Mr David Cunningham King 'Decision of the Takeover Appeal Board' para 103 <<https://bit.ly/39z5LyP>> accessed 3 September 2019.

lawfully, reasonably and with due regard to procedural fairness, unless they are merely clerical steps.<sup>55</sup>

It is suggested that the impact of collective voting may be influenced by the type of shareholders a company has. Are the shares tightly held or widely held? Shareholders with fewer shares are generally apathetic due to a number of factors, including lack of resources.<sup>56</sup> Apathetic shareholders have also been referred to as 'lazy investors'.<sup>57</sup> It is arguable that because of shareholder apathy, where the company's shares are widely held, fewer voting rights are necessary to influence voting in a particular direction. Therefore, the collective actions of shareholder activists may have a deciding influence under those circumstances. Collective voting may also result in shifting control to the activists. Lack of interest in the governance of the regulated company, as indicated by shareholder apathy at meetings of regulated companies, may inadvertently hand over control of the company to shareholder activists. There is a concern about giving controlling voting power to the chairperson or another party through non-directional proxies at the general meetings of regulated companies.<sup>58</sup>

In takeovers, shareholder activism and acting in concert is of particular importance as few shareholder activists may change the course of a takeover to their advantage. This may be prejudicial to the independent minority shareholder. Some of the important questions for shareholder activists are the circumstances that may support a view that they are acting in concert, and if so, the penalties that they may be liable to, if any. The penalties may be an obligation to make an offer under section 123 of the Act – the mandatory offer<sup>59</sup> or a restriction on their voting right when a regulated company undertakes a fundamental transaction.<sup>60</sup> As discussed underneath, these questions do not have easy answers and depend on each case's facts.

#### 4.2 A brief discussion of acting in concert and shareholder activism in the United Kingdom

As indicated above,<sup>61</sup> the takeover provisions under the Act are based on the City Code. Therefore, a brief excursion into the City Code rules dealing with acting in concert is appropriate at this stage. Acting in concert under the definitions of the City Code is defined in the following way:

Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control (as defined below) of a company or to frustrate the successful outcome of an offer for a company.<sup>62</sup>

55 Yeats et al. (n 29) 8-22.

56 Esser, I & Havenga, M 'Shareholder Participation in Corporate Governance' (2008) *Speculum Juris* (1) 78.

57 Weidemann, R 'Shareholder Activism – The Activist Revolt' *Directorship* (2015) 7.

58 Rayner, KAR & Connellan, RJ *Commentary on South African Takeover Law* (2015) 92.

59 Section 117(1)(c).

60 Section 115(4).

61 See n 16 above.

62 City Code, C1 definitions on Acting in Concert.

The explanatory notes further provide a non-exhaustive list of persons deemed to be acting in concert.<sup>63</sup> These include affiliates and a company, its parent, subsidiaries and fellow subsidiaries and their associated companies. An overview of the United Kingdom Panel on Takeovers and Merger (UK Panel) Practice Statements, based on the City Code and explanatory notes on acting in concert, suggests that applying acting in concert to actions of shareholder activists is not easy. The UK Panel, in an explanatory note to rule 9 of the City Code,<sup>64</sup> states that the majority of questions that arise in the context of rule 9 relates to ‘persons acting in concert.’<sup>65</sup> Further, it is indicated that the debates on how to apply acting in concert have a long history.<sup>66</sup> The difficulty in interpreting and applying the acting in concert provisions of the City Code has been aptly indicated in the reasons of the UK Panel in the matter of *Guinness Plc and The Distillers Company Plc*.<sup>67</sup> In its reasons for the ruling, the UK Panel indicated as follows:

The nature of acting in concert requires that the definition be drawn in deliberately wide terms. It covers an understanding as well as an agreement, and an informal as well as a formal arrangement, which leads to cooperation to purchase shares to acquire control of a company. This is necessary, as such arrangements are often informal, and the understanding may arise from a hint. The understanding may be tacit, and the definition covers situations where the parties act on the basis of a “nod or a wink”. Unless persons declare this agreement or understanding, there is rarely direct evidence of action in concert, and the Panel must draw on its experience and common sense to determine whether those involved in any dealings have some form of understanding and are acting in cooperation with each other. In a typical concert party case, both the offeror and the person alleged to be acting in concert with it are declaring that, notwithstanding the circumstances, they have no understanding or agreement. The Panel has to be prepared realistically to recognise that business men may not require much by way of formal expression to create such an understanding. It is unnecessary for the Panel to know everything that actually passed between the parties in a take-over. In addition, the judgment required in an acting in concert issue must usually be made in the context of the assertions and arguments of persons whose interests will not be served by a finding of acting in concert – this is because such a finding inevitably entails consequences under the Code, often to the benefit of offeree company shareholders, which is the object of the concept, with a cost to the offeror.<sup>68</sup>

Guinness Plc appealed against the decision of the Divisional Court of the Queens’ Bench Division that dismissed their application for a judicial review of the Panel’s decisions. A subsequent appeal to the Court of Appeal, Civil Division, was dismissed.<sup>69</sup> The inter-relationship between shareholder activism and the mandatory bid rule has received

63 *Ibid.*

64 Rule 9 of the City Code deal with mandatory offers in the United Kingdom in a similar manner as section 123 of the Act.

65 City Code (12th Ed., 2016), Notes under rule 9.1 Acting in Concert.

66 United Kingdom Panel ‘Panel Statement 1989/13’ <<https://bit.ly/3o5Kwxg>> accessed 3 September 2019.

67 *Ibid* para 3.

68 *Ibid* para 3.

69 *R v Panel on Takeover and Mergers, ex parte Guinness plc*. [1989] 1 All ER 509.

specific attention from UK Panel.<sup>70</sup> The UK Panel does not seek to place obstacles to shareholder activism.<sup>71</sup>

In terms of the City Code, the day-to-day work of takeover supervision and regulation is carried out by the Executive (the Executive).<sup>72</sup> In carrying out these functions, the Executive operates independently of the UK Panel.<sup>73</sup> In this article, reference to the UK Panel refers to the Executive of the UK Panel, unless the context indicates otherwise. To assist in interpreting and applying the concept of acting in concert in the City Code, the UK Panel has issued a Practice Statement.<sup>74</sup> This is in addition to extensive explanatory notes provided under rule 9.1(2) of the City Code to deal with shareholder activism. The Practice Statement is more detailed than the explanatory notes under rule 9.1(2) of the City Code.

The Practice Statement deals with the concerns that the provisions of the City Code, dealing with actions of concert parties and the enforcement of the mandatory rule, act as a barrier to cooperative actions by fund managers and institutional shareholders.<sup>75</sup> The Practice Statement clarifies how the Executive is likely to apply the relevant provisions of the City Code.<sup>76</sup> In the Practice Statement, the Executive indicates that it does not normally regard the action of shareholders voting together on a particular action as an action which itself indicates that parties are acting in concert, but a presumption will be made that parties who requisition a 'board control-seeking' resolution as acting in concert with each other and the proposed directors.<sup>77</sup>

According to the Practice Statement, a mandatory offer may be triggered by shareholder activists if both the following are met: firstly, the concert parties request a general meeting at which meeting a resolution seeking board control is passed or is threatened; secondly, after such an agreement or understanding, is reached between the activists that a resolution for board control should be passed, or making such a threat, the activists acquire interests in shares which shares together carry 30% or more of the voting rights in the company (the threshold at which a mandatory offer is required in terms of the City Code), in the case where the concert parties have less than 30% of the voting rights, or where the concert parties acquire further shares which, if added to the already held shares, carry more than 30% of the voting rights.<sup>78</sup>

A question may be asked as to how one is to determine whether a resolution is 'board control-seeking'. In this regard, the UK Panel has given some indications on certain factors they consider relevant.<sup>79</sup> The factors include whether there is a significant relationship

---

70 Davies, PL & Worthington, S *Gower's Principles of Modern Company Law* (10th Ed., Sweet & Maxwell 2016) 966.

71 *Ibid.*

72 City Code, para 5 of the Introduction.

73 *Ibid* para 5.

74 Practice Statement No 26 (Practice Statement) (2009) <<https://bit.ly/2XYf16T>> accessed 3 September 2019.

75 Practice Statement para 1.1.

76 *Ibid* para 1.2.

77 *Ibid* para 2.3 (b).

78 *Ibid* para 1.3.

79 *Ibid.*

between the activists and the proposed directors such that the activists are likely to control the board.<sup>80</sup> A resolution would not be regarded as seeking to control the board where the board to be appointed is independent of the activists or where the activists seek to appoint additional non-executive directors so as to improve the company's corporate governance.<sup>81</sup>

The UK Panel, in the notes to rule 9.1 of the City Code, provides detailed factors that the UK Panel may take into account before concluding that a proposal by shareholder activists seek to acquire board control.<sup>82</sup> The factors considered by the UK Panel are, by their nature, not exhaustive. They include: (a) significant relationship between the proposed directors and the activist shareholders and supports. It appears that a significant relationship is important in determining whether a proposed resolution seek board control;<sup>83</sup> (b) the number of the proposed directors to be appointed or replaced in comparison to the existing total size of the board. In this instance, the removal of the chief executive does not necessarily support the view that it is a board-seeking resolution.

However, the replacement of the majority board members with the concert party appointees may well support the view that the resolution in question was board control-seeking; (c) the position held by the board members to be replaced and to be held by the proposed directors is also considered. The replacement of the chief executive officer, the financial director, and the chairman is likely to support the view that the resolution in question is a board control-seeking resolution;<sup>84</sup> (d) the nature of a mandate given to the new proposed directors is also considered. Where the new proposed appointees are non-executive directors to improve corporate governance, it will be acceptable;<sup>85</sup> (e) whether the concert parties will benefit from implementing their proposals other than through their shareholding. If so, this may be considered to be a board control-seeking resolution;<sup>86</sup> (f) any relationship between the existing directors and the proposed directors, even if the proposed directors are not in the majority<sup>87</sup> and (g) other proposals relating to the management of the company, including proposals to dispose of the business of the company, are carefully considered by the Executive.

For instance, if shareholder activists indicate that the company's initial proposals do not implement their initial proposals, they will seek board control, then the Executive could determine that a concert party exists between the activists.<sup>88</sup> Therefore, it appears that proposals from shareholder activists on how a company should be managed in addition to the appointment of representatives of shareholder activists on the board of a company should be considered with extra caution. It may raise a concern that parties are acting in concert.

---

80 *Ibid.*

81 *Ibid.*

82 City Code, rule 9.1.

83 Practice Statement, paras 3.1-3.3. Under these paragraphs, the Executive provide detailed explanations including examples. This suggest that a relationship between parties is one of the most important factors considered by the panel when considering acting in concert.

84 Practice Statement, para 3.7.

85 *Ibid* para 3.8

86 *Ibid* para 3.9.

87 *Ibid* para 3.10

88 *Ibid* paras 3.11-3.12.

Even if, at the end of the enquiry as to whether parties have come together to act in concert and have acquired interests in shares that could oblige parties to make a mandatory offer, it does not necessarily follow that the concert parties must make a mandatory offer. There is still a leeway for concert parties to avoid the obligations to make a mandatory offer as indicated by the Practice Statement. The Executive may dispense with the mandatory offer if the acquisitions were made inadvertently, the interests acquired were disposed of within a limited period after acquisition, and appropriate voting restrictions were put in place pending the completion of the disposals of the interests so acquired.<sup>89</sup> Rule 9.1 further clarifies the consequences of the transfer of the voting rights within members of the concert party.<sup>90</sup>

The UK Panel may in appropriate circumstances waive the requirement to make an offer, taking into consideration a number of factors, including the price paid to acquire the interest; whether the leader of the group or the member with the largest individual interest in shares has changed and whether the balance between the interests in the group has changed significantly; as well as the relationship between the persons acting in concert and how long they have been acting in concert.<sup>91</sup>

Rule 9.1 of the City Code provides that ‘any person,’ or ‘any person, together with persons acting in concert with him’ may be obliged to make a mandatory offer. A question may well arise as between the activists as to who must make the mandatory offer. These persons may be seen as lead activists. Rule 9.2 of the City Code refers to ‘principal members’ [in the concert party relationship], depending on the circumstances. The prime responsibility to make the mandatory offer will be on ‘the person who makes the acquisition which imposes the obligation to make an offer.’<sup>92</sup>

The UK Takeover Appeal Board, in the matter of *Rangers International Club PLC & Mr David Cunningham King*,<sup>93</sup> considered an appeal against a ruling of the UK Hearings Committee that certain persons, acting in concert, acquired interests in shares that carried more than 30% of the voting rights in Rangers International Football Club PLC (Rangers).<sup>94</sup> In terms of the ruling of the Hearings Committee, the acquisition of the voting rights triggered an obligation to make a mandatory offer under rule 9.1 of the City Code to the shareholders of Rangers on the same terms and conditions as prescribed by the rules of the City Code.<sup>95</sup> The UK Appeal Board confirmed the ruling of the Hearings Committee.

As indicated in the case heading, the main issue was acting in concert. The announcement in compliance with the ruling of the Hearings Committee indicates that the shareholdings of the concert parties were aggregated as the parties acted in concert.<sup>96</sup>

89 *Ibid* para 4.3.

90 City Code, rule 9.1, para 4.

91 *Ibid* para 4.

92 City Code, rule 9.2, under notes on rule 9.2; Prime responsibility.

93 UK Takeover Appeal Board ‘Decision of the Takeover Appeal Board’ 2017/1. <<https://bit.ly/3AE9nLL>> accessed 3 September 2019.

94 *Ibid*.

95 City Code, rules 9.3 and 9.5.

96 Rangers Football Club ‘Announcement by Laird Investments (Proprietary) Limited’ (28 March 2018) <<https://bit.ly/3o0tjVT>> accessed 3 September 2019.

The principal concert party complied with the ruling and made a mandatory offer to the shareholders of Rangers through a company.<sup>97</sup>

The Practice Statement indicates that, since 2002, the Executive has not required any person to make a mandatory offer in the context of a 'board control-seeking resolution'.<sup>98</sup> However, it should be noted that the Practice Statement is issued for guidance, and accordingly, is not binding on the Executive and the Panel. As indicated in the above case, it is clear that in certain cases, the Executive of the Panel may make a ruling that parties have acted in concert in the context of a board control-seeking resolution and, therefore, should make an offer to acquire the shares of other shareholders in accordance with the rules of the City Code.

### 4.3 A brief discussion on acting in concert and shareholder activism in South Africa

Interpreting and applying the concept of acting in concert to shareholder activism is not easy, as indicated by the discussion in respect of the UK City Code in paragraph 4.2 above. These difficulties are also applicable to the takeover provisions. It should be noted that the definition of acting in concert in the takeover provisions under the Act are not identical to those of the Companies Act 61 of 1973 (1973 Act) and Securities Regulation Code (SRP Code).<sup>99</sup> However, it is asserted that the same concerns and difficulties on the interpretation and application of acting concert under the 1973 Act and the SRP Code apply to the takeover provisions under the Act.<sup>100</sup>

Section 123 of the Act, amongst others, provides that persons acting in concert for the purpose of acquiring control of a company (defined as the acquisition of 35% or more of the voting securities of a regulated company) must make a mandatory offer to acquire all the shares of the other shareholders of the regulated company once they cross the prescribed threshold.<sup>101</sup> Therefore, the actions of persons acting in concert may cost activist shareholders a considerable amount of money if their actions fall within the requirements of this section. This brings us to a question of how the takeover regulator is likely to interpret and apply the acting in concert rules found in the takeover provisions in relation to shareholder activism. One needs to consider previous rulings and any practice notes that the Panel may have issued. If any, the rulings or practice notes may guide how the regulator is likely to rule on shareholder activism and acting in concert during a takeover.

In the matter which appeared before the Executive Committee of the Panel (the Committee), in the matter of *Comparex Holdings Limited*, the Committee had to decide whether certain asset managers were 'acting in concert' as defined in the 1973 Act and the SRP Code.<sup>102</sup> After considering the arguments, the Committee indicated that a mere agreement, arrangement or understanding between the parties to vote at a meeting in

97 *Ibid.*

98 Practice Statement para 1.7.

99 Yeats et al. (n 29) 5-50.

100 *Ibid* 5-51.

101 Section 123 of the Act read with the Takeover Regulations, in particular Regulation 111(2).

102 Takeover Regulation Panel Ruling in terms of section 440 of the Companies Act and the rules of the SRP in the matter of *Comparex Holdings Limited* (The Takeover Regulation Panel, *Comparex* ruling), dated 3 December 2003. <<https://bit.ly/3AFaviq>> accessed 10 September 2019.

a particular way does not in itself suffice for the purposes of an affected transaction (in this context, a mandatory offer).<sup>103</sup> The view of the Committee was affirmed by the High Court in the matter of *Randgold & Exploration Company Limited v Fraser Alexander Limited* (*Randgold* case).<sup>104</sup>

In the *Randgold* case, the court also dealt with the affected transaction under the 1973 Act and the SRP Code.<sup>105</sup> Briefly, the applicants brought an urgent application for an interim order to prohibit the holding of a general meeting of the shareholders of Randgold, at which meeting the shareholders were to vote on certain transactions. Prior to approaching the court, the parties had approached the panel to decide whether one of the proposed transactions constituted an affected transaction. Both the Executive Director and Executive Committee of the Panel ruled that it did not.<sup>106</sup> The court had to be satisfied that the proposed transaction was indeed an affected transaction within the meaning of the SRP Code.<sup>107</sup> Before issuing its ruling, the court pointed that it would be absurd to dismiss the matter as lacking urgency after hearing arguments between the parties on the merits of the case for a number of hours.<sup>108</sup> The court dealt with the definition of affected transaction and indicated:

a transaction is affected if, taking into account any securities held before such transaction, it has or will have the effect of vesting control of any company in any person, or two or more persons acting in concert, in whom control did not vest prior to such transaction.<sup>109</sup>

Further, the court indicated that it is important to appreciate that for the purposes of affected transactions, control means that the collection of shares will be used in a particular way, 'at meetings of that company'.<sup>110</sup> The court then indicated:

In other words, the present applicants have to satisfy me that there was some agreement, arrangement or understanding between several of the respondents that beyond tomorrow's meeting they would exercise control at future meetings of the company. If they are unable to satisfy me in that regard it is not an affected transaction.<sup>111</sup>

The court concluded:

The fact that the respondents have formed an alliance in order to achieve a passing of the resolutions tomorrow which will give them management control and which will result in them holding 40% of the shares is not enough. They have to go further ...<sup>112</sup>

103 The Takeover Regulation Panel, Comparex ruling, para 5.

104 [1994] ZAGPHC1 (17 Aug 1994). <<https://bit.ly/3CXzbUf>> accessed 10 September 2019.

105 The provisions of the 1973 Act and those of the SRP Code have been replaced by Chapter 5 of the Act and Chapter 5 of the Regulations and in some respect word for word.

106 *Randgold* case, para 4.

107 *Ibid* para 4.

108 *Ibid* para 4.

109 *Randgold* case, para 5.

110 *Ibid* para 5.

111 *Ibid*.

112 *Ibid* para 6.

In another matter of *Securities Regulation Panel v MGX Limited*,<sup>113</sup> the court dealt with the definition of acting in concert. The facts were that the SRP claimed that MGX Limited (the first defendant) and others while acting in concert, acquired more than 35% of the shares of EC-Hold Limited.<sup>114</sup> The parties had acquired the shares at different stages, but their combined acquisitions amounted to more than 35% of the shares of EC-Hold Limited.<sup>115</sup> The SRP contended that the parties acted in concert as defined in section 440A 1(1) of the 1973 Act. Before the court proceedings, the parties had several legal skirmishes before the internal bodies of the SRP, including its Executive Committee and Appeal Committee,<sup>116</sup> where they denied that they acted in concert and contended that no affected transaction had taken place. The parties argued that they are not obliged to make a mandatory offer to the shareholders of EC Hold Limited as asserted by the SRP. The SRP brought an action at the High Court to enforce the obligation of the parties to make a mandatory offer to the shareholders of EC Hold Limited.

The SRP sought an order that an affected transaction occurred and, therefore, the parties are liable to make a mandatory offer to the shareholders of EC Hold in terms of the SRP Code.<sup>117</sup> The parties raised objections against the SRP's particulars of claim on various grounds, including that they: (a) failed to allege the term of the 'agreement, arrangement or understanding' which is necessary to hold the defendants as persons 'acting in concert' in relation to an 'affected transaction'; (b) failed to allege that the defendants acquired shares in or control over the offeree company as contemplated by the definitions of acting in concert and affected transaction in section 440A and (c) the particulars of claims are vague and embarrassing.<sup>118</sup>

In this case, the decision of the court related to an interlocutory application brought by the parties when the SRP sought to amend its particulars of claim. Nevertheless, the court dealt with the relevant provisions of the SRP Code.<sup>119</sup> The court referred to the definition of 'acting in concert' and concluded that it is wide enough to include acts of cooperation that do not entail holding or acquiring shares.<sup>120</sup> The court considered the elements for 'acting in concert'. It indicated that on its face, the act of cooperation is not limited to the acquisition or holding of securities and should not be so restricted.<sup>121</sup> Further, the court indicated that an act of cooperation involved the combination of securities holdings or acquisition of securities and the funding, planning facilitating of the acquisition or the master-minding, initiating, advising and securing the cooperation of others.<sup>122</sup>

The court also indicated that the real issue is whether a party to an agreement, arrangement or understanding' who does not himself acquire shares in the offeree company can

113 Unreported, WLD case no 16026/03, 23 June 2004.

114 *Ibid* paras 9-11.

115 *Ibid* para 10.

116 Ruling of the Securities Regulation Panel 2 March 2002. 20 MGX 2018. <<https://bit.ly/3u9Tf2m>> accessed 20 June 2021.

117 *Ibid* (n 33) para 2.

118 *Ibid* para 6.

119 Yeats et al. (n 29) 5-50.

120 *Ibid* (n 33) para 18.

121 *Ibid* para 17.

122 *Ibid*.

be a concert party if other parties cooperate to acquire shares.<sup>123</sup> The question depends on the definition of acting in concert.<sup>124</sup> The court also indicated that the agreement, arrangements or understanding covers a whole range of agreements and other acts falling short of legally binding contacts.<sup>125</sup> The court distinguished the decision in the *Randgold* case and pointed that it did not deal with acting in concert.<sup>126</sup> The court indicated that the ‘mere voting agreement’ does not have the effect of vesting control, and thus, it did not establish an affected transaction *per se*.<sup>127</sup> This is because the voting agreement did not necessarily vest control of the company where it did not previously exist.<sup>128</sup> The court allowed the SRP to amend its particulars of claim.<sup>129</sup> Subsequently, MGX Limited made a mandatory offer to the remaining shareholders of EC-Hold limited in accordance with the ruling of the SRP.<sup>130</sup>

## 5. Conclusion

In seeking guidance on how the Panel may interpret and apply acting in concert rules in relation to shareholder activism, it may be useful to consider the UK Panel rulings and Practice Statements on the concept. However, the differences between the UK City Code and the takeover provisions must also be considered before relying on such rulings and statements. Notably, the City Code ‘is not as precise or legalistic in its language as that of a statute’.<sup>131</sup> The UK Panel applies a purposive approach when it interprets and applies the City Code.<sup>132</sup> It ‘has applied the “spirit” principle to cases where any provision in the Code does not specifically cover actions or to apply a general principle where there is no specific rule’.<sup>133</sup>

This overview of shareholder activism and acting in concert during takeovers indicates that where in doubt, shareholder activists should obtain expert advice before embarking on shareholder activism that may expose them to the risk of breaching the takeover provisions. It may also be useful to consult with the Panel.<sup>134</sup> A breach of the takeover provisions may result in an obligation to make a mandatory offer to other shareholders of the relevant company. This may be costly. A concert party relationship may also prevent parties from voting during a fundamental transaction. A perception that shareholder activists are trying to avoid complying with the takeover provisions may provide ammunition to those who view shareholders negatively.

123 *Ibid* para 28.

124 *Ibid*.

125 *Ibid* para 25.

126 *Ibid* para 28.

127 *Ibid*.

128 *Ibid*.

129 *Ibid* para 35.

130 EC Hold Limited. Announcement, dated 20 April 2006, relating to the results of the mandatory offer as reproduced by JSE Limited SENS Department.

131 Palmer, R *Company Law* 6 (2011) 12090 para 12.287.

132 *Ibid* 12.287.

133 *Ibid*.

134 Section 201(2)(a) of the Act provides that the Panel may consult with any person with a view to advising such a person on application of the takeover provisions.

Shareholder activism has an important role to play in the proper governance of companies. Amongst others, it promotes good governance and curbs abuse of director discretion in the management of the affairs of a company. Shareholder activism may also serve as a general protective layer for minority shareholders who may not have readily accessible and effective means to hold directors accountable. It should be encouraged and promoted. However, some actions of shareholder activists are viewed with concerns due to the possible erosion of directors' discretionary powers. There is a concern that giving too much say to shareholders in the running of a company may tip the balance of power in the company's governance structure.<sup>135</sup> Accordingly, a balance is required. Those who are charged with administering a company and are bound by their fiduciary duties should not find their powers negated by shareholder activism.

It is suggested that the takeover provisions on acting in concert should be interpreted and applied to create a balance between shareholder activism and directors' discretionary powers. This would assist in achieving some of the objectives of the Act.<sup>136</sup> However, activists who are intent on acquiring control of a regulated company may be caught by the acting in concert rules and may be required to make a mandatory offer in terms of section 123 of the Act, due to the change of control in the company rather than the activism.<sup>137</sup> Shareholder activists who exercise their voting rights to influence the good governance of the regulated company should not be required to make a mandatory offer. In certain instances, there is a fine line between the actions of those who want to take control of the regulated company and those who seek improvements in the governance of a regulated company.

Takeover laws should not be static but should develop and be adaptable to accommodate new practices, such as the actions of hedge fund activists, who may agitate for better financial performance by regulated companies or changes in the management of companies. Takeover laws should promote good corporate governance and should not be a hindrance to the proper management and oversight of companies. The rules on acting in concert seek to protect the interests of minority shareholders and avoid unfair treatment of minority by majority shareholders. However, the rules should also accommodate the interests of other stakeholders of the company. A balancing of interests is required.

Shareholder activism is growing at a tremendous rate. The issues raised by shareholder activists are becoming more diverse, ranging from climate change to management compensation. It is important that all those charged with the management of companies understand what shareholder activism entails and how to engage with shareholders continuously meaningfully.<sup>138</sup>

135 Weidemann, R 'Shareholder Activism – The Activist revolt' *Directorship* (2015) 7.

136 Section 7(i) of the Act which indicates that one of the objectives of the Act is to balance the rights and obligations of shareholders and directors within companies.

137 Section 123 of the Act.

138 See Paxton (n 4) 25.

#### How to cite:

Phakeng, M 'Shareholder Activism and Acting in Concert during Takeovers under the Companies Act 71 of 2008' (2021) 1(1) *Turf Law Journal* 63-80.