



## **Summary:**

# **Legal opinion on shareholders' right to file climate change-related shareholder resolutions**



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In 2018, 2019, 2020 and 2021, Sasol Limited refused to table climate risk-related resolutions filed by shareholders, including Just Share.

In 2020, despite having been the first company in South Africa to table a shareholder-proposed resolution on climate risk in 2019, Standard Bank Group Limited also refused to table a shareholder resolution filed by Just Share and the RAITH Foundation.

Sasol and Standard Bank stated that they had received legal advice that the tabling of such resolutions was impermissible.

In early 2021, Just Share received a legal opinion from Advocates **Tembeka Ngcukaitobi SC** and **Chris McConnachie**, on shareholders' rights to file climate risk-related resolutions.

### Standard Bank's and Sasol's arguments

While neither company has disclosed its legal opinion/s, the arguments of Standard Bank (prior to May 2021) and Sasol, as set out in correspondence with shareholders, can be summarised as follows:

1. In terms of the law, shareholders may not usurp (or take over) the powers vested in the board of directors, to manage the business and affairs of a company, except where the company's memorandum of incorporation (MOI) or the Companies Act provides otherwise.
2. If the proposed resolutions that had been filed by shareholders were passed, they would usurp the directors' powers to manage the business and affairs of the companies.
3. Nothing in the companies' MOIs or the Companies Act empowers shareholders to propose and pass these resolutions; and therefore, if the resolutions were passed, they would be *ultra vires* (without the required legal authority) and invalid.
4. As a result, the proposed resolutions were not matters in respect of which shareholders were "entitled to exercise voting rights", under section 65(3) of the Companies Act, and directors were entitled to refuse to circulate and table these resolutions.

### In summary, the legal opinion obtained by Just Share confirms:

- The Companies Act 71 of 2008, in section 7, specifies that the Act must be interpreted in a manner that promotes compliance with the Bill of Rights in the Constitution, and in accordance with a number of other purposes of the Act, including **encouraging transparency and high standards of corporate governance**.
- **Climate change is a serious human rights issue**, which poses particularly severe risks to South Africa's ability to develop in a sustainable and inclusive manner.



- The aims of promoting transparency, sound corporate governance, and balancing the rights of shareholders and directors, would be best promoted by allowing shareholders to call for further information, particularly on climate change and environmental, social, and governance (ESG) issues.
- The international movement towards greater corporate disclosure of greenhouse gas (GHG) emissions, climate risk, and strategies and targets for decarbonisation, shows that disclosure is viewed as a necessary requirement, both to protect human rights, and to safeguard shareholders' investments.
- Barring shareholders from proposing any resolutions on climate change and other ESG matters would not best promote the Bill of Rights or the section 7 purposes of the Companies Act, and would be out of step with the company laws in other comparable common law countries.
- Directors do not have a unilateral discretion to refuse to table shareholder-proposed resolutions on content-based grounds.
- If there are disagreements over the validity of a resolution, those disagreements should arguably be aired at the shareholders' meeting and put to a vote. At the very least, directors should go to court to seek an order blocking the resolutions.
- The courts are likely to find that **shareholders are entitled to file binding resolutions relating to disclosure** on climate change matters, and **non-binding resolutions going beyond disclosure** on climate change matters.

This opinion provides legal clarity that shareholders are indeed allowed to file and have their climate-related resolutions tabled at company annual general meetings (AGMs).

In May 2021, Standard Bank conceded that shareholders were, in fact, entitled to file non-binding resolutions on climate-related matters. Although Sasol seems also to have now conceded this, to date, neither Standard Bank nor Sasol has tabled a shareholder-proposed non-binding climate resolution.

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**End**