COMPLAINT LODGED WITH THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION IN TERMS OF SECTION 168 OF THE COMPANIES ACT 71 OF 2008, AS AMENDED

SUPPORTING STATEMENT

CONTENTS

A. OVERVIEW OF THE COMPLAINT

1. Thungela Resources Limited ("Thungela") has twice refused to table shareholder-proposed resolutions at its annual general meeting (AGM): on 8 May 2023, and 2 May 2024 – a decision it confirmed on 10 May 2024.

2. Both shareholder resolutions were co-filed by Aeon Investment Management, Fossil Free South Africa and Just Share NPC (the "co-filers"), in terms of section 65(3) of the Companies Act 71 of 2008 (the "Companies Act"), which provides that:

> *"any two shareholders of a company:*
>
> *(a) may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights; and*
> *(b) when proposing a resolution, may require that the resolution be submitted to shareholders for consideration—*
> *…*
> *(ii) at the next shareholders meeting…".*

3. The resolutions filed by the co-filers concerned climate change and Thungela's responsibility, as a major coal mining company and significant emitter of greenhouse gases (GHGs), to take effective and transparent action to reduce its GHG emissions in line with the goals of the Paris Agreement.[1] Both proposed resolutions were framed in non-binding, advisory terms.

4. The proposed resolutions complied with all procedural and formal requirements under the Companies Act and Thungela's memorandum of incorporation (MOI).

5. Even though the proposed resolutions complied with all procedural and formal requirements, Thungela refused to circulate and table these shareholder-proposed resolutions, in breach of its obligations under the Companies Act and in breach of the rights of the co-filing shareholders.

6. As a result of this ongoing refusal – confirmed by Thungela in writing in May 2024 ahead of its latest AGM held on 4 June 2024 – Just Share (the "Complainant") is left with no alternative but to lodge this complaint in terms of section 168(1)(b) of the Companies Act. Thungela has acted in a manner inconsistent with the Companies Act, and shareholders' rights have consequently been infringed.

7. In terms of the Companies Act, the Complainant lodges this complaint in its own right, and in the interests of its fellow co-filers.

[1] https://unfccc.int/process-and-meetings/the-paris-agreement

8. The Complainant submits that the Thungela board of directors ("the Thungela board") had no right to refuse to circulate and table the proposed resolutions, which complied with the procedural and formal requirements under section 65(3). If the Thungela board wished to prevent those resolutions from being tabled, its remedy was to apply to court in terms of the procedures in sections 65(4) and (5) of the Companies Act to seek permission to prevent the resolutions from going to a vote.

9. Thungela holds a divergent position and asserts that it has a unilateral right to block shareholder-proposed resolutions on climate change and related environmental, social and governance (ESG) issues from being circulated and tabled at shareholder meetings.

10. Given Thungela's confirmed stance, there is an ongoing violation of the Companies Act and a breach of shareholders' rights that will reoccur each time that the Complainant and other shareholders propose resolutions of this nature.

11. The Complainant respectfully submits that Thungela's actions warrant an investigation by the Companies and Intellectual Property Commission (the "Commission") in terms of sections 169 and 170 of the Companies Act.

12. Furthermore, reasonable grounds exist to issue a compliance notice to Thungela, in terms of section 171 of the Companies Act, directing it to comply with its obligations under sections 65(3) and 62(3)(c) of the Companies Act by circulating and tabling future shareholder-proposed resolutions that satisfy applicable formal and procedural requirements.

B. PARTIES AND STANDING

13. As contemplated in section 168 of the Companies Act, the Complainant lodges this complaint with the Commission in respect of Thungela's contravention of sections 65(3) and 62(3)(c) of the Companies Act and shareholders' rights flowing from those provisions.

14. The Complainant holds shares in Thungela. The Complainant is a non-profit shareholder activism organisation that exercises the rights and powers of shareholders, using research, advocacy and activism, to advance social and environmental justice in South Africa. Its principal address is Unit B01, Plum Park, 25 Gabriel Road, Plumstead, Cape Town, 7800.[2]

15. Thungela is a major producer and exporter of thermal coal, the burning of which is the single largest contributor to climate change. It is listed on the Johannesburg Stock Exchange (JSE), with its principal address at 25 Bath Avenue, Rosebank, Johannesburg, 2196.[3]

[2] Non-profit company registration no. 2017/347856/08 (https://justshare.org.za/)
[3] Company registration no. 2021/303811/06 (https://www.thungela.com/)

16. The Complainant acts in its own right as a Thungela shareholder and as one of the co-filers of the shareholder-proposed resolutions at the centre of this complaint. It also acts in the interests of the other two co-filers of the proposed resolutions, Aeon Investment Management and Fossil Free South Africa, as a group of affected persons, in terms of the extended standing provision in section 157(1)(c) of the Companies Act.

17. Aeon Investment Management and Fossil Free South Africa have each authorised the Complainant to lodge this complaint on behalf of the co-filers.

C. LEGAL FRAMEWORK AND RELEVANT CONTEXT

The Companies Act and applicable constitutional provisions

18. The reforms introduced in the Companies Act 2008 included among their objectives to "*advance shareholder activism*".[4] In this context, shareholder activism should be understood as constructive efforts taken by shareholders to influence corporate behaviour, both in their own interest and for the social good. As the King IV Report on Corporate Governance for South Africa ("King IV") emphasises, shareholder activism can play an important role in promoting good governance and accountability, as shareholders are "*the ultimate compliance officers*" and have the "*power to serve as proxies for wider stakeholder interests*".[5]

19. Shareholders now enjoy a range of new or enhanced legal tools to engage in shareholder activism in a responsible manner, that enhances corporate governance and accountability.[6] These include more expansive powers to put forward shareholder-proposed resolutions.

20. Under Part F – Governance of companies – section 65 of the Companies Act regulates shareholder resolutions, including ordinary and special resolutions.

21. Section 65(2) provides that the board of directors may propose any resolution to be considered by shareholders.

22. Section 65(3) entitles two or more shareholders to propose a resolution on any matter, provided that they are each entitled to exercise voting rights in respect of that matter:

> "*any two shareholders of a company:*
>
> *(a) may propose a resolution concerning <u>any matter</u> in respect of which they are each <u>entitled to exercise voting rights</u>; and*

[4] Explanatory Memorandum to the Companies Bill [B 61D-2008] para 1.2.4(c).
[5] Institute of Directors in South Africa *King IV Report on Corporate Governance in South Africa* (2016).
[6] See, generally, Rehana Cassim 'An Analysis of Trends in Shareholder Activism in South Africa' (2022) 30 *African Journal of International and Comparative Law* 157 - 170.

(b) when proposing a resolution, may require that the resolution be submitted to shareholders for consideration—

…

(ii) at the next shareholders meeting…". (emphasis added).

23. In terms of section 65(4) of the Companies Act, a shareholder proposed resolution must be:

"(a) expressed with sufficient clarity and specificity; and

(b) accompanied by sufficient information or explanatory material

to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution."

24. This should be read together with the notice requirements in section 62. Section 62(1) requires that, unless a company's MOI provides for a different notice period, a company must deliver a notice of each shareholders meeting in the prescribed manner and form to all of the shareholders of the company as of the record date for the meeting, at least 15 business days before the meeting is to begin, in the case of a public company.[7]

25. In terms of section 62(3)(c), a notice of a shareholders meeting must be in writing, and must include:

"(c) a copy of any proposed resolution of which the company has received notice, and which is to be considered at the meeting, and a notice of the percentage of voting rights that will be required for that resolution to be adopted".

26. Section 65(5) provides for a dispute resolution mechanism, where directors or shareholders wish to object to a proposed resolution. It provides that:

"At any time before the start of the meeting at which a resolution will be considered, a shareholder or director who believes that the form of the resolution does not satisfy the requirements of subsection (4) may seek leave to apply to a court for an order—

(a) restraining the company from putting the proposed resolution to a vote until the requirements of subsection (4) are satisfied; and

(b) requiring the company, or the shareholders who proposed the resolution, as the case may be, to—

[7] The Johannesburg Stock Exchange (JSE) Listings Requirements provide (paragraph 10.11(b)) that shareholders must be notified of a resolution at least 15 business days before the AGM.

(i) take appropriate steps to alter the resolution so that it satisfies the requirements of subsection (4); and

(ii) compensate the applicant for costs of the proceedings, if successful."

27. These are unalterable provisions, meaning that the rights conferred on shareholders under section 65(3) may not be negated or restricted by a company's MOI, its rules, or its conduct.

28. Section 66(1) provides for the powers of boards of directors, including the consideration and management of proposed shareholder resolutions:

> "*(1) The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.*" (emphasis added).

29. In terms of the explicit qualification "*except to the extent that this Act . . . provides otherwise*", section 66(1) does not give company boards the power to override the rights conferred by sections 65(3) and 62(3)(c).

30. The Companies Act also imposes clear directions on how its provisions should be interpreted.

31. Sections 5(1) and 7 of the Companies Act require an interpretation that, firstly, "*promote[s] compliance with the Bill of Rights as provided for in the Constitution, in the application of company law*" and, secondly, gives effect to the further purposes of the Act listed in section 7, including:

31.1 "*encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation*";[8]

31.2 "*balanc[ing] the rights and obligations of shareholders and directors within companies*";[9] and

31.3 "*encourag[ing] the efficient and responsible management of companies".*[10]

32. Section 5(2) of the Companies Act further permits reference to foreign law in interpreting the Act's provisions, providing that "*[t]o the extent appropriate, a court interpreting or applying this Act may consider foreign company law.*" It is notable that the rights afforded

[8] Section 7(b)(iii).
[9] Section 7(i).
[10] Section 7(j)).

to shareholders under section 65(3) are considerably more generous and expansive than the rights conferred on shareholders in comparable common law countries, including the United States (US), the United Kingdom (UK), Canada, Australia and New Zealand.

33. Furthermore, section 39(2) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") requires that legislation must be interpreted in a manner that promotes the spirit, purport and object of the Bill of Rights. This means that where two or more interpretations of a statutory provision are reasonably possible, the interpretation that best promotes constitutional rights and values must be preferred.[11]

34. Three sets of constitutional rights are directly implicated in the context of this complaint:

    34.1 The section 24 environmental rights;

    34.2 The section 16 right to freedom of expression, including the right to receive and impart information and ideas; and

    34.3 The section 18 right to freedom of association.

35. These rights impose corresponding obligations on private actors, such as Thungela, in terms of section 8(2) of the Constitution.[12]

The environmental right

36. Section 24 of the Constitution provides that:

> *"Everyone has the right –*
>
> *(a) to an environment that is not harmful to their health or well-being; and*
>
> *(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –*
>
> *(i) prevent pollution and ecological degradation;*
> *(ii) promote conservation; and*
> *(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."*

[11] *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at paras 88 – 89, quoting *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC) at para 43.
[12] Section 8(2) provides: "*A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.*"

37. The High Court has already acknowledged that climate change poses a direct threat to fundamental rights, including the section 24 environmental rights.[13] The National Climate Change Adaptation Strategy, 2020, affirms that South Africa is already experiencing significant effects of climate change, particularly physical impacts as a consequence of increased temperatures and rainfall variability.[14]

38. The mining sector is identified as one of the priority sectors addressed in the National Climate Change Adaptation Strategy, due to its contribution to climate change and exposure to its impacts.[15] The International Energy Agency has further identified coal as the single largest contributor to climate change.[16]

39. From a corporate and investor perspective, climate change poses severe financial and business risks. These include *physical risks*, as the increasing frequency and intensity of natural disasters poses a risk to all businesses, their employees, and their assets; *liability risks*, as companies and directors face increasing exposure to legal claims arising from their contribution to climate change; and *transition risks*, as increased taxation, regulatory pressure, divestment, and the shift to a low-carbon economy will leave fossil fuel-exposed companies and their shareholders financially vulnerable.[17] It is notable that Thungela's 2022 and 2023 Climate Change Reports reflect and acknowledge these multifaceted risks.[18]

40. Shareholder-proposed resolutions relating to climate change seek to provide all shareholders in with an opportunity to provide input into the climate change-related strategies of investee companies. This is particularly important in the context of the fiduciary obligations of institutional investors, specifically those investing the savings of pension fund beneficiaries which must generate long-term, sustainable returns.

41. Pension fund trustees are legally obliged to consider ESG factors when making investment decisions. These include climate-related risks and opportunities.[19] The preamble to regulation 28 of the Pension Funds Act Regulations, 1962 provides that:

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[13] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) at paras 82 - 83.
[14] Department of Forestry, Fisheries, and the Environment, *National Climate Change Adaptation Strategy*, November 2019 at pages 9 and 13.
[15] Ibid at page 10.
[16] See for example: IEA Coal in Net Zero Energy Transitions (2022) available at https://www.iea.org/reports/coal-in-net-zero-transitions.
[17] Mark Carney 'Breaking the Tragedy of the Horizon' 29 September 2015 available at https://www.bankofengland.co.uk/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability
[18] See for example: Climate Change Report 2022 at pages 12-15, 19-29; and Climate Change Report 2023 at pages 15-22.
[19] https://justshare.org.za/media/news/pension-fund-boards-must-take-climate-change-into-account-or-risk-legal-action/

"*A fund has a fiduciary duty to act in the best interest of its members whose benefits depend on the responsible management of fund assets. This duty supports the adoption of a responsible investment approach to deploying capital into markets that will earn adequate risk adjusted returns suitable for the fund's specific member profile, liquidity needs and liabilities. Prudent investing should give appropriate consideration to any factor which may materially affect the sustainable long-term performance of a fund's assets, including factors of an environmental, social and governance character. This concept applies across all assets and categories of assets and should promote the interests of a fund in a stable and transparent environment*".

42. Regulation 28(2)(c)(ix) states:

"*A fund and its board must at all times apply the following principles: before making an investment in and while invested in an asset consider any factor which may materially affect the sustainable long term performance of the asset including, but not limited to, those of an environmental, social and governance character*."

<u>The rights to freedom of expression and association</u>

43. Shareholder-proposed resolutions also serve to advance the section 16 and section 18 constitutional rights to freedom of expression and association, which provide, in relevant part:

"16 Freedom of expression

(1) Everyone has the right to freedom of expression, which includes–

…

(a) *freedom to receive or impart information or ideas"*

…

18 Freedom of association

Everyone has the right to freedom of association."

44. The right to table shareholder-proposed resolutions, with explanatory statements, allows shareholders to exchange information and ideas before and during shareholder meetings and to organise around shared goals through voting. In this way, this mechanism fulfills a balancing role between shareholders and directors' rights, promoting robust debate, compliance with the Bill of Rights in accordance with section 7 of the Companies Act, and a culture of corporate democracy that is ultimately in the best interests of a company.

Shareholder activism and climate change governance

45. Globally, shareholder-proposed resolutions on ESG-related issues are common. According to the Sustainable Investment Institute's Proxy Preview, at least 527 ESG-related resolutions were filed in 2024, with the potential to reach 630 resolutions, similar to the 2023 and 2022 proxy seasons. In relation to the environment, climate change is the most common subject matter of these proposals, with 106 focused directly on corporate strategy and disclosure, and 12 more on corporate political influence about climate policy. Among the 106 proposals directly related to climate change strategy and disclosure, focal issues include GHG emission targets and reporting, climate transition planning and reporting, climate change impacts, and carbon financing.[20]

46. Since at least 2019, shareholders in South Africa have successfully filed resolutions on climate change and broader ESG issues at several JSE-listed companies. Company boards have also proposed their own resolutions on climate change and related ESG matters. As listed below, resolutions to date have entailed a combination of binding and non-binding proposals:

    46.1 1 binding resolution proposed by shareholders and tabled by Standard Bank (2019)
    46.2 2 binding resolutions proposed by shareholders and tabled by FirstRand (2019);
    46.3 2 binding resolutions tabled by Nedbank (2020);
    46.4 1 non-binding resolution tabled by Absa (2020);
    46.5 1 binding resolution tabled by Investec (2020);
    46.6 1 non-binding resolution tabled by Investec (2021);
    46.7 3 non-binding resolutions tabled by Sasol (2021, 2022, and 2023); and
    46.8 1 non-binding resolution proposed by shareholders and tabled by Standard Bank (2022).

47. These resolutions have achieved a substantial degree of success in South Africa. Where they have gone to a vote, shareholder-proposed resolutions on climate change have achieved an average favourable vote of over 70%, far above the global average for shareholder-proposed resolutions. Board-proposed resolutions on climate change have received favourable votes in the high 90%. This indicates substantial investor appetite for and interest in having input into climate change strategies, and the risks posed to investee companies by the failure to adequately manage, disclose and report on climate-related risks and opportunities.

48. Thungela and its shareholders face clear climate risks. As a major producer of thermal coal, Thungela is a direct and significant contributor to the global GHG emissions which cause climate change. The company and its shareholders also face severe financial risks,

[20] As You Sow, Sustainable Investments Institute, Proxy Impact *The Proxy Review 2024* (2024).

as the world transitions away from coal and as global pressure mounts to hold major fossil fuel companies financially liable for the harms of climate change.

49. Given these clear risks, the Complainant, together with its co-filers, Aeon Investment Management and Fossil Free South Africa, filed shareholder-proposed resolutions with Thungela's board during the preparation for both its 2023 and 2024 AGMs.

50. Notwithstanding the extensive correspondence between the Complainant and Thungela, as set out below, on both occasions, the Thungela board ultimately refused to circulate and table the proposed resolutions, disregarding its obligations under section 65(3) read with section 62(3)(c) of the Act.

D. THE RELEVANT FACTS

51. The following section details the chronology leading up to the 2023 and 2024 Thungela AGMs and the company's repeated breach of its obligations under the Companies Act.

2023 shareholder-proposed resolution filed with Thungela

52. Thungela's MOI provides that at least 15 business days' notice of an AGM should be provided to shareholders (30.1.1).[21] Clause 30.4 of the MOI also states that:

> *"Should the Board receive requests from Shareholders for the inclusion of certain resolutions in the notice prior to the dispatch of such notices, or after dispatch of such notices, but at least 15 Business Days before the Shareholders Meeting is to begin, the Board shall in good faith consider such requests and determine whether the resolution should be included in the notice of the Shareholders Meeting. Any such requests should provide the specific purpose for which the resolution is proposed, must be delivered to the Company in writing and be otherwise in compliance with the Companies Act. Requests for the inclusion of resolutions at a Shareholders Meeting receive by the Company within a period of 15 Business Days of the Shareholders Meeting shall not be considered at the Shareholders' Meeting."*

53. On 19 April 2023, the co-filers filed a shareholder resolution for consideration by Thungela's shareholders at the company's AGM to be held on 31 May 2023, in accordance with Thungela's MOI and section 62(1) of the Companies Act. The resolution was filed in terms of section 65(3) of the Companies Act. It concerned the alignment of the climate-related lobbying and policy engagement activities of Thungela, and its industry associations, with the goals of the Paris Agreement. The proposed resolution provided, in relevant part, as follows:

[21] Available here https://thungela.s3.eu-west-1.amazonaws.com/downloads/investors/Thungela-Memorandum-of-Incorporation.pdf.

"Shareholders of the Company request that, in accordance with the Global Standard on Responsible Climate Lobbying, the Board annually conduct an evaluation of and report to shareholders on the Company's lobbying and policy engagement activities including:

- *if, and how, its lobbying and policy engagement activities (both direct and indirect through industry associations, coalitions, alliances, and other organisations) align with the goals of the Paris Agreement to limit the rise of global temperatures to 1.5°C above pre-industrial levels;*
- *its framework for identifying and mitigating the risks presented by any misalignment; and*
- *the circumstances under which escalation strategies have been and will be used, including, but not limited to, making public statements challenging industry associations and other alliances, withdrawing funding, and suspending or ending membership of the industry association or alliance.*

In evaluating the degree of alignment, the Company should consider not only its policy positions and those of organisations of which it is a member, but also the lobbying and engagement activities aimed at influencing policy for the year in review."

54. A copy of the email from the Complainant's Director of Climate Change Engagement, Robyn Hugo, which included the cover letter from Just Share and the proposed resolution, is attached as **JS1**. The cover letter is marked **JS1a** and the resolution **JS1b**.

55. Receipt of the resolution was acknowledged by Thungela's company secretary, Francois Klem, in an email response on the same day to Ms. Hugo. Mr. Klem indicated that a formal response would be sent "in due course". A copy of this email is attached as **JS2**.

56. On 25 April 2023, Thungela sent further email correspondence to the Complainant. On behalf of Thungela, Mr. Klem stated that the company would, *inter alia*, release its annual reporting suite the next day and that its Climate Change Report would:

"*disclose our membership of industry associations and I expect that this will satisfy the request for the information you seek. The matter has been raised with the CEO and the Board, and the CEO (together with other relevant executives) would welcome the opportunity to engage with you should you feel that the disclosure in the Climate Change Report does not address your concerns*".

57. It was also stated in the email that Thungela "*believe[s] that continued and meaningful engagement with our shareholders and other stakeholders on important matters affecting the business is crucial to long-term value creation*" and that it "*remain[s] committed to transparent disclosure and engagement with stakeholders on the subject of climate change and other ESG-related matters*". This email is attached as **JS3**.

58. In an email reply to Thungela on 3 May 2023, Ms. Hugo set out why the reporting suite did "*not meet a single aspect of the resolution requested by the co-filers*". The correspondence goes on to that state that:

> "*In these circumstances, the co-filers again require, in terms of s65(3)(b) of the Companies Act, that the resolution be submitted to shareholders for consideration at the 31 May 2023. If Thungela persists with its refusal to table the resolution, kindly provide us with the legal basis for this refusal by the close of business on Friday, 5 May*".

59. It was also confirmed that both the Complainant and the co-filers would be happy to engage with Thungela, but first requested a response to this correspondence. This email is attached as **JS4**.

60. On 8 May 2023, Thungela responded to this request by email attached as **JS5.** Mr. Klem stated that Thungela:

> "*believe[s] that it would be most appropriate and productive to meet with you in order to have an open discussion to unpack your views, and to put across our perspective on the matter raised in your letter. Accordingly, we once again extend the invitation for an engagement on this matter and would welcome the opportunity to meet with you*".

61. In relation to the legal basis for the decision not to table the resolution, Thungela responded as follows:

> *"We are advised by our attorneys that, as a matter of company law, while styled a "resolution", the statement you propose be put to a vote of shareholders falls outside the determinative powers of shareholders and has (and, if tabled, would have) no standing in law or binding force or effect on the Company or its shareholders. Under section 65(3), 'any two shareholders' of a company may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights. This empowers shareholders to table for resolution any matters which they have a legal right to determine by a vote. For obviously sound policy reasons, it does not confer a right on shareholders to place other subject matter for a vote, whether or not such matter is expressed to be binding. The tabling of any such proposal for a vote (and the terms and timing thereof) thus falls exclusively within the power and discretion of the board of directors. The board is not supportive of the request to table the proposal and as previously advised, will accordingly not do so.*
>
> *We respect and appreciate the area of concern raised in your letter and assure you that it is one of the many and multi-dimensional aspects of running a coal-mining business that is part of the board's mandate to manage the business for the interests of the shareholders as a whole. We would also like to emphasise that this is not intended to discourage you from holding or expressing your viewpoint, or from*

engaging with others on it. It is simply that a shareholder resolution is not the appropriate approach to doing so.

62. On 9 May 2023, the Complainant responded by email confirming that the co-filers disputed this interpretation, which has no basis in the Act. Notwithstanding these divergent views, the Complainant also requested potential meeting dates. This appears from **JS6**.

63. Mr Klem proposed some meeting dates on 10 May. The meeting was subsequently scheduled for 21 June 2023. This appears from **JS7**.

64. Thungela's AGM took place on 31 May 2023. The co-filers' shareholder-proposed resolution was not circulated by Thungela in the AGM pack and was not considered at the meeting.

65. Thereafter, representatives of the three co-filers met with representatives of Thungela on 21 June 2023, as agreed. However, Thungela's refusal to table the resolution was not discussed. Given the parties' firmly-held, contrary legal interpretations of the relevant provisions of the Companies Act, this would not have been resolved at a meeting. Instead, the discussion focused on aspects such as Thungela's policy engagement, and its approach to decarbonisation.

2024 shareholder-proposed resolution filed with Thungela

66. Ahead of Thungela's AGM scheduled for 4 June 2024, the Complainant emailed Thungela on 26 April 2024. This correspondence includes a cover letter and a resolution co-filed by the co-filers, for consideration by Thungela's shareholders during the AGM. The resolution, proposed in terms of section 65(3) of the Companies Act, is related to the publication in Thungela's next reporting suite of Paris-aligned emission reduction targets for its full-range of value chain emissions, and for its global operations. The proposed non-binding resolution provided, in relevant part, as follows:

"Shareholders request that Thungela Resources Limited ("the company") adopt and publish in its 2025 suite of reports: short-, medium- and long-term greenhouse gas emission reduction targets across its full range of value chain emissions, and for its global operations, which are in alignment with the Paris Agreement's 1.5°C goal requiring net zero emissions by 2050."

67. This email from Ms Hugo, containing the covering letter and the resolution, is attached as **JS8**. The cover letter is marked **JS8a** and the resolution **JS8b**.

68. On 30 April 2024, as appears from **JS9,** Thungela's assistant company secretary, Ntombi Mphahlele, acknowledged receipt of these documents. On 2 May 2024, Ms Mphahlele responded in an email attached as **JS10**. In the letter attached to the email (**JS10a**), Thungela reiterated its legal position as expressed in May 2023:

"Thank you for your mail. We have considered the substance of your request and welcome the opportunity to engage on this in a productive manner. We are supportive of a direct discussion with Just Share where we can each share our views on this matter.

After consultation with our attorneys, the decision was taken not to table the requested resolution. In line with company law, the statement you propose be put to a vote of shareholders falls outside the determinative powers of shareholders and has (and, if tabled, would have) no standing in law or binding force or effect on the Company or its shareholders. Under section 65(3), 'any two shareholders' of a company may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights. This empowers shareholders to table for resolution any matters which they have a legal right to determine by a vote. For obviously sound policy reasons, it does not confer a right on shareholders to place other subject matter for a vote, whether or not such matter is expressed to be binding. The tabling of any such proposal for a vote (and the terms and timing thereof) thus falls exclusively within the power and discretion of the board of directors. The board is not supportive of the request to table the proposal and as previously advised, will accordingly not do so.

We respect and appreciate the area of concern raised in your letter. Thungela is committed to responsible environmental practices. Good governance principles are important in running a coal-mining business and aligns with the board's responsibility to manage the company in the best interest of all shareholders. Our response is not intended to discourage you from your viewpoint but to share the legal standing that shareholders may only require the company to place resolutions before shareholders on matters that have binding effect. As indicated earlier, we are open to and invite robust discussions between Just Share and Thungela." (emphasis added)

69. On 9 May 2024, Ms. Hugo responded by email on behalf of the Complainant, accompanied by a letter. The email is attached as **JS11** and the letter is **JS11a**. As communicated in the cover email at the time, the primary purpose of the letter was to "demand that Thungela table the resolution filed on 26 April 2024 by no later than Tuesday, 14 May 2024 in order to afford shareholders the required minimum notice period prior to the 4 June 2024 AGM". The Complainant indicated that it had been advised that Thungela's "interpretation of section 65(3) is not only inconsistent with the Companies Act, but also with constitutional rights, including those to freedom of association and expression". It states further that, "Whilst Just Share is willing to engage with Thungela to share our views, Thungela's ongoing breach of its duties under the Companies Act is not an issue that can be resolved through 'robust discussion'".

70. This letter proceeded to reaffirm the legal basis for the demand to merely table the proposed resolution for shareholder consideration in accordance relevant provisions in the Companies Act:

"6.1 There is nothing in the Companies Act that supports Thungela's interpretation that the board has unilateral power to block this proposed shareholder resolution.

6.2 The language of section 65(3) casts shareholders' rights in the broadest terms. Any two (or more) shareholders may propose a resolution 'concerning <u>any matter</u> in respect of which they are each entitled to exercise voting rights' (our emphasis).

6.3 Section 62(3) further prescribes that any notice of a shareholders meeting "must include", among other items, "a copy of any proposed resolution of which the company has received notice, and which is to be considered at the meeting". This is a mandatory duty.

6.4 Section 65 imposes no substantive restrictions on the content or subject-matter of shareholder proposals. Instead, section 65(4) merely regulates the format of resolutions, requiring that they be "expressed with sufficient clarity and specificity" and be "accompanied by sufficient information or explanatory material" that will "enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution".

6.5 Moreover, section 65 does not afford a board of directors the power to block procedurally-compliant shareholder proposals from being circulated and tabled for a vote at a meeting of shareholders merely because the board disagrees with the content of the proposal. Such unilateral power would be directly at odds with the dispute resolution procedure in sections 65(4)-(5). Even if a director objects to a resolution on the grounds of formal defects, the director is required to apply to court – he cannot unilaterally decide to prevent resolutions from being tabled. Directors also have no power to override clear statutory shareholder rights.

6.6 Section 65(3)'s reference to "each" of the co-filing shareholders being "entitled to exercise voting rights" is an eligibility requirement, determining which classes of shareholders may propose and vote on resolutions at shareholders' meetings, rather than a restriction on the content of the resolutions that may be proposed.

6.7 Tabling the proposed non-binding, advisory resolution for a vote at the AGM will not in any way undermine "the board's responsibility to manage the company in the best interest of all shareholders". There is equally no basis for the suggestion that non-binding, advisory resolutions are impermissible:

> *6.7.1 JSE-listed companies, including Thungela, annually table non-binding resolutions on executive pay.*
>
> *6.7.2 Several JSE-listed companies have tabled non-binding resolutions on climate change and related environmental, social, and governance (ESG) issues.*

6.7.3 In other common law countries, shareholders' rights to file and vote on non-binding advisory resolutions are recognised and protected, despite having company law regimes that are less progressive than our own.

6.8 The mistaken interpretation of section 65(3) now advanced by Thungela runs contrary to the aims of the Companies Act and the constitutional rights that underpin it.

6.9 Shareholders' rights to table proposals for a vote involve the exercise of their constitutional rights to freedom of expression and association within the company structure, allowing shareholders to impart and receive information and ideas and to organise around shared goals.

6.10 Thungela's refusal is an ongoing violation of these statutory and constitutional rights".

71. Thus, this letter summarised the Complainant's position as follows:

"In summary, two or more shareholders may propose resolutions on climate- and other ESG-related issues – such as the resolution in issue. Company boards have no unilateral discretion to refuse to circulate and table resolutions that comply with all the necessary procedural requirements. If boards wish to object to the resolutions, they must go to court in terms of sections 65(4) and (5) to seek permission to block the resolutions from going to a vote. The board may also advise shareholders of its objections to inform their vote."

72. The letter concluded that, should Thungela not circulate the proposed resolution by 14 May 2024, legal action would be taken - including but not limited to filing a written complaint to the Commission in terms of section 168(1) of the Companies Act.

73. On 10 May 2024, at 12h31, Ms. Mphahlele delivered a letter of response on behalf of Thungela by email. This email is attached as **JS12**, and letter (**JS12a)**, confirmed the following:

Thank you for sharing your views on the interpretation of section 65(3) of the Companies Act, which view (and supporting reasoning) are the same as those you put forward last year.

As advised in our response of 8 May 2023 and on 2 May 2024, respectfully, and based on legal advice, we do not agree with the interpretation you put forward. Our ethos is to engage, not litigate, and our offer both last year and now to engage with us on the issue remains open to you.

If, notwithstanding this, regrettably, you prefer to pursue legal action, please serve the relevant papers at Thungela Resources Limited offices, at 25 Bath Avenue, Rosebank,

for the attention the Company Secretary, with an e-mail notification to our Internal Legal Counsel, Masechaba Makgolane at masechaba.makgolane@thungela.com, and to our External Legal Counsel, Colin du Toit at colin.dutoit@webberwentzel.com.

74. On the same day, at 14h24, Ms. Mphahlele attempted to recall the above correspondence. This appears from **JS13**. To the extent that the Complainant is aware, no subsequent communication was issued by Thungela, in this regard, and it did not circulate the proposed resolution by 14 May 2024.

75. Thungela's AGM proceeded on 4 June 2024. The proposed resolution was not tabled, nor put to a vote. At the AGM, Just Share asked Thungela's board whether it would commit to *itself* tabling a resolution at its next AGM, since it continued to decline to table *shareholder*-proposed resolutions. In response, the chair indicated that the board could not make such a commitment at this stage.

76. In the circumstances, the Complainant is left with no alternative but to lodge this complaint seeking an investigation and action by the Commission based on the powers conferred under Part D of the Companies Act.

E. THUNGELA'S BREACH OF ITS OBLIGATIONS AND SHAREHOLDERS' RIGHTS

77. The Complainant stands by the legal position set out in the above letter of 9 May 2024. In order to assist the Commission in its investigation and deliberations, the following subsections briefly substantiate the Complainant's primary legal grounds in support of this complaint.

The proper interpretation of sections 65(3) and 62(3)(c)

78. As outlined above, section 65(3) casts shareholders' rights in the broadest terms. Any two (or more) shareholders may propose a resolution concerning "*any matter"* in respect of which they are each entitled to exercise voting rights.

79. Section 62(3)(c) further imposes a mandatory duty on companies, requiring that any notice of a shareholders meeting "*must include*", among other items, "*a copy of any proposed resolution of which the company has received notice, and which is to be considered at the meeting"*.

80. Aside from the formal requirements in section 65(4) of the Companies Act – requiring that a resolution is expressed with sufficient clarity and specificity and is accompanied by sufficient information or explanatory material – section 65 of the Companies Act does not impose any limitation on the subject-matter of resolutions that may be proposed by shareholders.

81. To the contrary, section 65(3) explicitly empowers any two (or more) shareholders of a company to propose a resolution concerning "any matter". The words "*any matter*" are broad and unqualified. And, as the Supreme Court of Appeal (SCA) held in *Nova Property Group*, unqualified language in the Companies Act generally leads to unqualified results.[22]

82. The only restriction in section 65(3) is that "*each*" of the shareholders proposing the resolution should be "*entitled to exercise voting rights*" on the matter. This is an eligibility requirement, determining **which classes of shareholders** may propose resolutions. It is not a restriction on the **content** of resolutions. This reflects the fact that companies' MOIs may place restrictions on the voting rights of certain *classes* of shareholders, as provided for in section 37 of the Act. For example, preference shareholders are typically excluded from exercising voting rights at a company's AGM, meaning that an ordinary shareholder and a preference shareholder could not jointly propose a resolution at an AGM.

83. Thungela has never claimed that the resolutions proposed by the Complainant and its co-filers breached the formal requirements of section 65(4) or that they were otherwise procedurally non-compliant.

84. In these circumstances, the Thungela board had no unilateral power to block the procedurally and formally compliant resolutions filed by the co-filers. On the contrary, section 65(5) requires that if a board objects to a proposed shareholder resolution, it is required to seek the leave of a court to bar that resolution from being considered at a shareholders meeting.

85. If the Thungela board disagreed with the merits of a shareholder-proposed resolution, those disagreements ought to have been aired at the shareholders meeting and put to a vote. Shareholders are entitled to hear the board's views and to exercise their own judgment when voting on the proposal.

86. This interpretation of the Companies Act, as supporting shareholder-proposed resolutions on climate change and ESG issues, is most consistent with its purposes to "*encourage transparency and high standards of corporate governance as appropriate"* recognising the *"significant role of enterprises within the social and economic life of the nation*";[23] to "*balance the rights and obligations of shareholders and directors within companies*";[24] and to "*encourage the efficient and responsible management of companies".*[25]

87. This interpretation also best promotes the constitutional rights and values outlined above, including the environmental right, freedom of expression, and freedom of association. Shareholder-proposed resolutions on climate change and related ESG issues are an important means for shareholders to impart and receive information on pressing climate

[22] *Nova Property Group Holdings v Cobbett* 2016 (4) SA 317 (SCA) paras 27 and 32.
[23] Section 7(b)(iii).
[24] Section 7(i).
[25] Section 7(j)).

change risks facing businesses and to collectively organise around the shared goal of addressing these risks, both in the companies' interests and in furtherance of the section 24 environmental rights.

88. By contrast, Thungela's actions have deprived shareholders of these rights and of an important forum for engaging on these critical issues. Thungela's stance also has the undesirable result that, despite South Africa's more progressive company law regime, its shareholders have fewer rights to propose resolutions on climate change and ESG issues than shareholders in comparable jurisdictions with far more restrictive legal provisions on the tabling of shareholder resolutions.

Thungela's grounds for refusing to table the shareholder-proposed resolution

89. In its letters dated 8 May 2023 (**JS5**) and 2 May 2024 (**JS10a**), Thungela raised three grounds for refusing to table the shareholder-proposed resolution. We address each of these grounds in turn to demonstrate why they are unfounded.

The alleged unilateral discretion

90. Thungela asserts that its board has a unilateral discretion to screen and reject proposed resolutions on climate change and ESG issues, stating that "*[t]he tabling of any such proposal for a vote (and the terms and timing thereof) … falls exclusively within the power and discretion of the board of directors.*" This is incorrect.

91. First, there is no basis in the Act for this claimed unilateral power, which is directly inconsistent with the text of sections 65(3) and 62(3)(c) of the Companies Act.

92. Second, such a unilateral power would be directly at odds with the dispute-resolution procedure prescribed in section 65(5) of the Act.

92.1 Under that provision, where directors object to the proposed resolution on purely formal grounds under section 65(4), they are required to apply to court for leave to block that resolution.

92.2 The clear effect of section 65(5) is that directors are not permitted to take the law into their own hands merely because they disagree with the merits or content of the proposed resolution.[26]

92.3 It would be a startling result that the Thungela board could unilaterally block a shareholder-proposed resolution because it disagrees with its content, in

[26] There may be extreme cases – such as hate speech, defamation, or other unlawful abuses of individuals' rights – where boards may be entitled to decline to circulate proposals without going to court, but this is clearly not such a case.

circumstances where section 65(5) would require the board to go to court to block a resolution with purely formal defects.

The alleged content restriction

93. Thungela further claims that the proposed resolutions on climate change are not matters "*which [shareholders] have a legal right to determine by a vote"*. This argument is also legally incorrect.

94. First, there is nothing in the Act or Thungela's MOI that purports to prohibit its shareholders from voting on resolutions concerning climate change and ESG-related issues. Unless a company has, in terms of section 37 of the Act, placed restrictions on the voting rights of certain classes of its shareholders in its MOI, shareholders are ordinarily free to vote on all resolutions placed before them at a meeting of shareholders.

95. Second, JSE-listed companies including Thungela have frequently tabled resolutions on ESG-related matters for a vote at shareholder meetings. If it is permissible for shareholders to vote on such resolutions when they are proposed by the company board, then it is equally permissible for shareholders to vote on those resolutions when they are proposed by fellow shareholders.

96. Third, such a far-reaching content-based restriction would be inconsistent with the Act and the rights addressed above. It would also put South African company law out of step with comparable common law jurisdictions, including the US, the UK, Canada, and New Zealand, where shareholders are entitled to file resolutions on these matters.

The alleged prohibition on non-binding resolutions

97. Thungela appears to object to the framing of the resolutions as non-binding, advisory resolutions, suggesting that this would have "*no standing in law or binding force or effect on the Company or its shareholders*". This is also mistaken.

98. The choice to frame the resolutions in this way was deliberate, to avoid any accusation that the Complainant and its co-filers were unlawfully usurping management powers (an allegation which has been leveled at the Complainant by JSE-listed companies Sasol Limited and Standard Bank Group Limited, which have also refused to table shareholder-proposed resolutions relating to climate change).

99. Such non-binding advisory votes are now a common feature of South African company law and are plainly permissible. For example:

    99.1 The JSE Listing Requirements introduced "say on pay" votes on executive pay for all JSE-listed companies. While companies are not bound by the outcome of the

vote, boards are required to table their remuneration policy and a report on its implementation at each AGM and to put these documents to a vote.

99.2 JSE-listed companies have also regularly tabled non-binding resolutions on climate change and related ESG issues, as addressed above.

100. Non-binding shareholder proposed resolutions are also a consistent feature in other jurisdictions, including Canada, the US, and New Zealand, which expressly require that shareholder resolutions may only be framed in advisory terms. In each of these jurisdictions, shareholders have used these powers to raise climate change and ESG issues at shareholders meetings.

101. The effectiveness of non-binding resolutions is perhaps best illustrated by their use in the anti-apartheid movement in the US. During the 1980s, shareholders flooded US-listed companies with non-binding shareholder proposals calling for divestment from apartheid South Africa and improved human rights practices for businesses still operating in the country. The awareness and pressure they generated contributed to the broader anti-apartheid movement and divestment campaign.[27]

102. It is inconceivable that our Companies Act, with its express commitments to constitutional values and the promotion of shareholder activism, would bar South African shareholders from engaging in similar efforts.

F. REQUEST FOR INVESTIGATION AND COMPLIANCE NOTICE

103. In terms of sections 169, 170, and 171 of the Companies Act, the Complainant understands that the Commission is empowered to exercise several different options, at its discretion, in its handling of this complaint.

104. The Complainant does not seek to direct the exercise of this discretion; however, based on the facts and primary legal grounds set out in this supporting statement, it is respectfully submitted that these allegations warrant an investigation in accordance with section 169 of the Companies Act and, on completion of the investigation, the issuing of a compliance notice.

105. Should the Commission find that there are "reasonable grounds" to issue a compliance notice in terms of sections 170(1)(g)(i) and 171(1) of the Companies Act, the Complainant proposes the following directions:

[27] See Philip Broyles and Arfa Aflatooni 'Opposition to South African Apartheid: The Impact of Shareholder Activism on US Corporations (1980 – 1988)' (1999) 31 *Peace Research* 13; Philip Broyles 'The Impact of Shareholder Activism on Corporate Involvement in South Africa during the Reagan Era' (1998) 28 *International Review of Modern Sociology* 1.

1. *Thungela Resources Limited (Thungela) is found to have breached its obligations under sections 65(3) and 62(3)(c) of the Companies Act by refusing to circulate and table the following shareholder-proposed resolutions:*

    i. *The proposed resolution dated 19 April 2023, filed by shareholders Aeon Investment Management, Fossil Free South Africa, and Just Share NPC for consideration by Thungela's shareholders at the company's AGM held on 31 May 2023; and*

    ii. *The proposed resolution dated 26 April 2024, filed by shareholders Aeon Investment Management, Fossil Free South Africa, and Just Share NPC for consideration by Thungela's shareholders at the company's AGM held on 4 June 2024.*

2. *Thungela is directed to comply with its obligations under sections 65(3) and 62(3)(c) of the Companies Act by circulating and tabling all shareholder-proposed resolutions that satisfy the formal and procedural requirements in section 65(3) read with section 65(4) of the Act.*

3. *Should the Thungela board object to a proposed resolution, it is directed to apply to court for leave to exclude the shareholder-proposed resolution in terms of the dispute resolution procedure prescribed in section 65(5) of the Act.*

106. The Complainant and its co-filers are available to provide any further information or documents that may assist the Commission in its deliberations and investigation.