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ANALYSIS OF THE EVOLUTION OF THE APPRAISAL AND OPPRESSION REMEDY
AND ITS ADOPTION UNDER THE COMPANIES ACT IN SOUTH AFRICA.

A mini-dissertation submitted in partial fulfilment of the requirements for the degree of

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In the Graduate School of Law

Supervisor: Darren Subramanien

DECLARATION

I, Suhaifa Essop, hereby declare that the work contained herein is entirely my own, except where indicated in the text itself, and that this work has not been submitted in full or partial fulfilment of the academic requirements of any other degree or qualification at any other University.

I further declare that this dissertation reflects the law as at the date of signature hereof.

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ABSTRACT

The Companies Act 71 of 2008 encapsulates the economic sphere, its procedures, problems and possible resolutions to such issues on a wide scale. It allows a litigant a basis and a guideline when dealing with corporate law in relation to the corporate sector. The main idea is to allow free, fair and prosperous trade not only for the majority shareholders but also for the minorities and the financial environment as a whole. Every shareholder who has invested in a company needs to be given the opportunity to be a part of a concern in which (s)he has full confidence and reliance on the controlling members. The issue arises when the aforementioned is not complied with whether it is a large corporation or a small start-up business. There are several remedies which can be used as a means of restitution, however, for purposes of this dissertation we shall analyse two controversial and expanded remedies, namely the Appraisal and Oppression remedies. This dissertation focuses on the two by analyzing the introduction of the Appraisal remedy and its source of adoption and the development of the Oppression remedy with the main aim of answering the questions of whether, firstly, these remedies are warranted in South Africa and, secondly, whether or not further expansion is required for their proper functioning.

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CHAPTER 1: INTRODUCTION

It was stated by Samuel Adams that

*It does not require a majority to prevail but rather an irate, tireless minority keen to set fires in peoples mind.*¹

People venture into business with the goal of acquiring profit to acquire a better quality of life. It allows them to be a part of a greater purpose and influence the business sector they intend entering. All companies are uniquely designed and structured to suit the needs and wants of the different shareholders, dependent on their respective buy-in capabilities and financial contribution(s).²

Once the purchase of shares is concluded, each shareholder is broadly divided into two categories; namely, the Majority and Minority shareholder(s). This then creates a power struggle between them, either on an individual or a collective level when dealing with the running of the company and the principles and policy decisions that are incorporated to do so.

Companies are being incorporated on a daily basis and the desire for the furtherance of one's own needs can make a person who has ultimate power, in this case the majority shareholder(s), to make decisions that adversely affect the minority. This gain comes at a heavy cost as shareholders lose faith not only in the company, but the law itself.

The New Companies Act 71 of 2008 (hereinafter referred to as the “the New Act”) sought to redress the problems that have plagued the corporate sector when dealing with the relief that can be sought by aggrieved minority shareholders. It sets out several actions that can be taken against the oppressive, unfair or prejudicial conduct or omission by the majority.

The aim of this research was to set out the remedies and go into detail when dealing with two very important remedies that have an adverse effect on not only the member(s) but also the company and the economic sector as a whole.

¹ Quote by Samel Adams available at https://www.goodreads.com/author/quotes/31693.Samuel_Adams, accessed on 23 October 2018.

² FHI Cassim et al *Contemporary Company Law* 2 ed (2012) 3-8.

The need for such protection arises from the fact that South Africa is an emerging third-world country that has foreign investors and shareholders, whether it is by a majority or the minority shareholding. Thus, the protection of the minority and the control of the majority's action are very important for continuous, stable and progressive economic growth.

This dissertation gives a brief history of the Companies Act in South Africa and how it was incorporated by looking briefly at English law and the Oppression remedy as well as critically analysing two remedial actions that are available to a minority shareholder; namely, the Appraisal remedy found in the New Act³ section 164 and the Oppression remedy under section 163 and comparing the changes and amendments made from its predecessor acts; namely Companies Act⁴ (hereinafter referred to as “the Old Act”) s252 and its earliest foundation in section 111*bis* the Companies Act⁵ (hereinafter referred to as the “ the 1926 Act”).

The rationale behind this study was to give an in-depth analysis of the evolution of the Companies Act with regards to the protection that it affords the minority shareholder. It will endeavor to clearly outline two remedies available and the problems that are associated with them. The research briefly touches on the position in English law and Canadian law to discern if the Oppression remedy that was copied from the English law is warranted in South Africa.

The conclusion of this study sought to provide a brief outline of any problems that the remedies still encounter as stated by academic writers and whether or not there is a need for legislature to step in and develop the law further and/or give clarity to these problems.

³ Companies Act 71 of 2008.

⁴ Companies Act 61 of 1973.

⁵ Companies Act 46 of 1926.

1.1. Brief background of the past and future protection under the Appraisal and Oppression remedy

The current position in South African company law can be seen as a step in the right direction as it provides minority shareholders a number of remedies that can be found in the New Act.⁶ The two remedies that this research explores are the Appraisal⁷ and the Oppression⁸ remedies.

The Appraisal right has been introduced for the first time under the New Act.⁹ It affords a minority shareholder to offer the majority an opportunity to buy out his/her shares when (s)he does not agree to a resolution that is to be passed if (s)he feels that the passing of the resolution will adversely affect his/her rights or interests in the company.¹⁰

Once the resolution has been passed, it must be communicated, within ten days, after it was taken to all shareholders, including those who objected to the resolution, and within that time frame, have neither withdrawn the notice nor voted in favour of the resolution.¹¹

Thereafter, the minority shareholder may exercise this right by demanding the company to purchase his/her shares within twenty days of receiving communication of the resolution being passed¹² or if this was not communicated, within twenty days of becoming aware of the resolution.¹³

As can be deduced from above, company law not only regulates the formation of a company but caters for the situation of dissatisfaction in various ways.¹⁴ It allows for the restitution of those aggrieved individuals or collectives who have been metaphorically ‘shut out’ of crucial or mundane decision making by the majority vote.¹⁵

The research looks at the evolution of the remedies and the way courts have interpreted it and briefly touches on the intention of legislature when drafting the New Act. It will further evaluate

⁶ Companies Act 71 of 2008.

⁷ Section 164 of Act 71 of 2008.

⁸ Section 163 of Act 71 of 2008.

⁹ Companies Act 71 of 2008.

¹⁰ Sections 164 (1)-(3) of Act 71 of 2008.

¹¹ Section 164(4) of Act 71 of 2008.

¹² Section 164(5) of Act 71 of 2008.

¹³ Section 164(7) of Act 71 of 2008.

¹⁴ FHI Cassim et al op cit note 2 at 8.

¹⁵ Ibid at 796.

how academic writers and courts have interpreted the requirements of the section dealing with the Oppression remedy¹⁶ and the Appraisal remedy when defining fair market value.¹⁷ This will lead to the conclusion which seeks to address the question of what aspects of the two sections need further development and/or clarification by legislature.

The starting point for determining protection of minority shareholders would be to critically analyse the rules set out by the New Act and the Memorandum of Incorporation (MoI) of the company which will provide details as to the class of shares and preferences, the rights and limitations and other terms associated with the class of shares or, in the event that a company has a shareholder's agreement, the shareholder agreement.¹⁸

The 1926 Act required there to be a breakdown of the relationship between the parties, as this was seen as a good cause for winding up the business however, winding up was the only remedy available to the shareholders. Other factors that were taken into consideration were the merits of the matter, law justice and equity.¹⁹ This was problematic when it came to public companies as opposed to private companies who had a strong relationship that was easily determinable and so was the breakdown. The 1926 Act was later repealed and the Oppression remedy had seen substantial development.²⁰

The position under the Old Act was rather onerous on the minority shareholder, and in order to elicit any relief the Act of 1973 stated the following:

‘Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, make an application to court for an order under this section’.²¹

Apart from the court not willing to grant these orders readily, this section was onerous and limited due to the wording, as the minority shareholder bore the onus of proof to be able to attain

¹⁶ Section (1) (a)-(c) of Act 71 of 2008.

¹⁷ Section 164(5) of Act 71 of 2008.

¹⁸ FHI Cassim et al op cit note 2.

¹⁹ A Sibanda ‘Advancing the statutory remedy for unfair prejudice in South African company law: Perspectives from international jurisprudence’(2015) 27(3) *SA Mercantile Law Journal* 405.

²⁰ Ibid.

²¹ Section 252(1) of Act 61 of 1973.

satisfaction from the court to prove that the conduct was unfair or prejudicial to him by the majority as the minority.²²

In the *Garden Province Investment and Others v Aleph (Pty) Ltd and Others (Garden Province)*²³, the court further held that apart from proving the conduct and the effect of the conduct, s252 of the Old Act required the applicant be a member of the company at the time of the alleged conduct. This had caused problems for applicants who were not members at the time but who were aware of unfair practices by the majority pending his/her appointment.

The Oppression Remedy under s163 of the New Act is broader and allows the court to make any order in terms of s163(2)(a) -(i) which will be explained fully in the dissertation. The requirements for relief under this section have now developed drastically as it now allows an applicant to seek court assistance even if the conduct is not only unfair and/or prejudicial to the minority shareholders but, now includes the applicant solely. This leads to the next remedial process that a minority shareholder can procure.

The Appraisal remedy under s164 of the New Act allows a minority shareholder to avoid further prejudice by affording the majority an opportunity to ‘buy him out’ purchasing his shares for a fair market value. There has been debate as to the determination of fair market price which will be addressed further in the dissertation.

The New Act sought to address the need for broader more effective protection for the minority, notwithstanding the need for discretion and certainty. Therefore, several remedies which can be used against oppressive majority rule behavior have been put into place by the legislature.

The exercise of the Appraisal right requires the company to make offers, of a fair market value, to all shareholders who objected to the passing of the resolution, and these offers should last for a period of 30 days. Failing acceptance, within the time frame, the offer lapses.²⁴

In a policy paper that was published by the Department of Trade and Industry the main emphasis of the New Act was echoed. The paper titled *South African Company Law for the 21st Century*:

²² Ibid.

²³ *Garden Province Investment & others v Aleph (Pty) Ltd & others* 1979 (2) SA 525 (d) 531.

²⁴ Section 164(11) of Act 71 of 2008.

*Guidelines for Corporate Law Reform*²⁵ stated that the main aim was to afford the minority shareholder the exercise of their basic right and the ability to exit a company, after making an informed decision, by allowing the majority the opportunity to buy his shares when he/she is unable to influence the decisions of the majority.²⁶

The Appraisal remedy is considered by some as a means of softening the provisions in company legislation which allow majority shareholders, or a group of connected shareholders, to effect fundamental changes²⁷ however, these changes will come at the fair price of buying out the minority for a fair market value.

The above illustrates a fair and fundamental change brought about by the New Act and even though the intention of protection is heavily emphasized upon, this draws towards the research question as to how a fair market value is determined and how courts have interpreted this when dealing with cases.

The Oppression remedy in the New Act has seen much development since its predecessor Act.²⁸ The remedy is now broader as it allows minority shareholders seeking relief to apply to the court for an appropriate order by placing a less onerous requirement on the applicant.

In terms of the New Act, a shareholder or director may apply to the court if any act or omission of the company or any related person has had a result that is:

- 1) oppressive or unfairly prejudicial to or that unfairly disregards the interest of the applicant;
- 2) or the business is being conducted in a manner that is oppressive or prejudicial to the applicant;
- 3) or the powers of a director or prescribed officer is being exercised in a manner that is oppressive or prejudicial to the applicant.²⁹

²⁵ South African company law for the 21st century guidelines for corporate law reform in GN 1183 GG 2649 3 of 23 June 2004.

²⁶ Ibid.

²⁷ B Manning ‘The shareholder’s appraisal remedy: An essay for Frank Coker’ (1962) 72(22) *Yale Law Journal* 226.

²⁸ Section 252 of Act 61 of 1973.

²⁹ Section 163 (a)- (c) of Act 71 of 2008.

As a comparison to the Old Act, there is a less onerous requirement for the applicant to prove to the court to find redress under this section. The applicant only has to prove that the conduct is prejudicial to him/her and his/her interests and not that the conduct or omission brought about by the majority is directed at him as a minority.³⁰

The New Act's development now offers a wide-range of relief in the event of oppressive or unfairly prejudicial conduct in two ways. It makes provisions for not just a shareholder but also for a director to complain and access the remedy in respect of oppressive conduct³¹ and allows a court to make a wide range of orders that it deems appropriate in the circumstance, which is a far more extensive list³² than those found in s252 of the Old Act.³³

The above brings us to the research question of how courts have interpreted the requirements and its application when dealing with a specific set of facts and whether its inclusion is warranted in South African law.

³⁰ Section 252(1) of Act 61 of 1973.

³¹ Section 164 (2) of Act 71 of 2008.

³² Sections 163(2) (a)- (l) of Act 71 of 2008.

³³ Companies Act 61 of 1973.

CHAPTER 2: OPPRESSION REMEDY

The writer submits that one might argue when a shareholder buys or invests in the title of being a minority shareholder, that she expressly and/or tacitly binds themselves to the idea that (s)he will have minimal input and/or influence when it comes to decision making process. Thus, (s)he shall be a so-called ‘silent investor’ in the eyes of the majority, due to their inability and lack of voting capacity to challenge a majority resolution.

The above is not as far-fetched as it seems. The objective of the New Companies Act³⁴ was to counter the above idea and make the economic environment accessible to all companies regardless of size and to ensure that they are adaptive, innovative and internationally competitive.³⁵

Company law is premised on the grounds that those who have controlling powers in a company need to carry on business and conduct its affairs in a manner that is not prejudicial or unfair to those shareholders or members that lack such capacity.³⁶

It should be noted at the forefront that when the majority makes a decision and it is done in accordance with the law³⁷ it is not challengeable and the shareholders cannot unilaterally withdraw solely on the basis that their personal expectations are not met.³⁸ This, in essence, means that the majority needs to act bona fide and in a manner that has the outcome of benefitting the company as a whole.³⁹

2.1. The Need for Reform

South African Company law has existed since 1861, dating back to a predecessor piece of legislation, the Joint Stock Companies Limited Liabilities Act no 23 of 1861 of the Cape Colony, which was equivalent to English law.⁴⁰ Since then, the Companies Act in South Africa has seen development and reform as well as individuality, thus distancing itself from English law by

³⁴ Act 71 of 2008.

³⁵ South African company law for the 21st century guidelines for corporate law reform op cit note 25 at 8.

³⁶ *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (c) at 525.

³⁷ *Ben-Tovim v Ben-Tovin* 2001 (3) SA 1074 (ac) at 1092; see *Donaldson Investments (Pty) Ltd & others v Anglo-Transvaal Colliers Ltd & others* 1980 (4) SA 204 (T) at 209.

³⁸ *Barnard v Carl Greaves Brokers (Pty) Ltd* 2008 (3) SA 663 (c) at 526.

³⁹ *Gunderfinger v African Textile Manufacturers Ltd* 1939 AD 314 at 324-325.

⁴⁰ South African company law for the 21st century guidelines for corporate law reform op cit note 35.

finding its own, more appropriate, direction. Using English law as a guide instead of a precedent.⁴¹

The largest departure from English law can be seen by the enactment of the Close Corporation Act, No 69 of 1984.⁴² This was an English Policy paper that was never used in the UK but was adopted in South Africa, which shows not only development in our law but further illustrates the economic differences between the two countries.⁴³ The aim of the Close Corporation Act⁴⁴ was to assist smaller businesses by means of an affordable yet effective alternative to ensure economic growth for our country by encouraging and equipping entrepreneurs with an inexpensive legal framework.⁴⁵

Individuality and appropriateness are vital and crucial based on South Africa's economic, social and political differences when it comes to legislating in a country.

2.2. The Aim and Purpose of Legislature

Drafters of the New Company Act⁴⁶ encountered, as stated above, the task of balancing the encouragement of foreign investment while offering shareholders every possible form of protection should their rights be infringed.⁴⁷

Shareholder remedies can be found in Chapter 7 of the New Companies Act,⁴⁸ however, for purposes of this dissertation two remedial actions were analyzed; The Appraisal and Oppression remedies.

The Appraisal and Oppression remedies are two remedial actions that can be found under sections 164 and 163 of the New Companies Act.⁴⁹ These are the most used remedies by minority shareholders and authors have stated that the reason for this is that it finds application by smaller private companies whereby shareholders play a more active role in the running of the

⁴¹ South African company law for the 21st century guidelines for corporate law reform op cit note 25 at 12.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Close Corporation Act 69 of 1984.

⁴⁵ South African company law for the 21st century guidelines for corporate law reform op cit note 41.

⁴⁶ Act 71 of 2008.

⁴⁷ J Yeats 'Putting appraisal rights into perspective' 2014 *Stell LR* 331.

⁴⁸ Act 71 of 2008.

⁴⁹ Ibid.

company.⁵⁰ This shall therefore be discussed in detail and analysed to answer the research question as to whether such protection is sufficient and warranted in South Africa.

We start looking at the Oppression remedy, as this can also be found in the Old Act⁵¹ and has seen much development under the New Act⁵² due to its previous stringent requirements and narrow application.

The existence of minority shareholders gives rise to the remedies in company law at their disposal. As stated above, the purpose of these remedies is to protect and enforce their rights as shareholders and as being part of a decision-making process, which can be undermined by a majority.⁵³ This protection is afforded if they have reasonable grounds to believe that their interests have been violated or oppressed by the directors or by the majority shareholders.⁵⁴

The reason behind the abuse of minority shareholders can be found in the Majority Rule principle in the governance of companies.⁵⁵ This is what company law in South Africa seeks to address. It seeks to provide a statutory medium for court intervention and a solution to the non-judicial intervention principle in corporate management, thus causing the majority rule principle to be subject to judicial intervention.⁵⁶ However, it should be noted that courts will not likely interfere with managerial operations of a company - instead, electing to allow the controlling members to operate with minimal unwarranted minority interference.⁵⁷

Courts have followed the view that the conduct the applicant complains of needs to be weighed up against the majority rule principle to ascertain whether or not the conduct falls within the definition of unfairly prejudicial, inequitable or unjust.⁵⁸

⁵⁰ FHI Cassim et al op cit note 2 at 758.

⁵¹ Section 252 of Act 61 of 1973.

⁵² Act 71 of 2008.

⁵³ A Sibanda op cit note 19 at 401.

⁵⁴ Ibid.

⁵⁵ A Sibanda op cit note 53.

⁵⁶ Ibid

⁵⁷ MJ Oosthuisen ‘Statutere minderheidsbeskerming in die maatskappyereg’ 1981 *Journal of South African Law* 105.

⁵⁸ Aspek supra note 36 at 529.

2.3. Oppression Remedy

2.3.1. Overview of the Oppression Remedy Under the 1926 Act and the Old Companies Act

The need for protection of shareholders has always been a concern and the efforts to address this in South African law dates back to 1926.⁵⁹ This was when s111bis of the 1926 Act⁶⁰ was enacted and was adopted from English law; namely, s210 of the English Companies Act of 1948.⁶¹ The Oppression remedy is also prevalent in other jurisdictions with the main focus on protecting the minority and aggrieved shareholders who have little to no recourse.⁶²

Prior to the Oppression remedy, aggrieved parties used s117 of the 1926 Act,⁶³ however, the use of this section meant that the company would be under compulsory winding-up if the applicant was successful. This did not only have repercussions for the majority but for the minority as well.⁶⁴

This form of remedial action was also found under s111bis and its application can be found in the *Moosa NO v Mayjee Bhawan (Moosa)*⁶⁵ case whereby the court stated:

‘An irreparable breakdown of a personal relationship between shareholders was noted as providing a good cause for winding-up of a company. The granting of a winding-up order under s111bis involved not only a consideration of the merits of the matter but a broad conclusion of the law, justice and equity.’⁶⁶

From the above we can see that not only were the requirements onerous in that it required the applicant to prove ‘oppressive conduct’ and to prove that this conduct justified the winding-up of the company but it also gave the applicant, if successful, very limited recourse as the courts were restricted to winding-up of the company.

⁵⁹ A Sibanda op cit note 53.

⁶⁰ Section 111bis of Act 46 of 1926.

⁶¹ A Sibanda op cit note 19 at 403.

⁶² Section 994 of the English Companies Act 2006 and section 241 of the Canadian Business Corporation Act R.S.C. 1985. c.C – 44 .

⁶³ Act 46 of 1926.

⁶⁴ *Elder v Elder & Watson Ltd* 1952 SC 49 at 54 per L Cooper.

⁶⁵ *Moosa NO v Mayjee Bhawa* [1967] (3) SA 131 (T).

⁶⁶ *Moosa* supra note 65 at 136H-I.

The Companies Act of 1926⁶⁷ required there to be a breakdown of the relationship between the parties as this was seen as a good cause for winding up the business. However, winding-up was the only remedy available to the shareholders.⁶⁸ Other factors that were taken into consideration were the merits of the matter, law justice and equity.⁶⁹ This was problematic when it came to public companies as opposed to private companies who had a strong relationship that was easily determinable and so was the breakdown. The 1926 Act was later repealed and the Oppression remedy had seen substantial development.⁷⁰

The conduct that courts were inclined to approve of as being oppressive had to follow the specific requirement of being either ‘unjust, harsh or tyrannical’.⁷¹

The above section was repealed and now found its application under S252 of the Old Act of 1973. The reason for this was, as stated above, its restrictive nature in application and interpretation from its foundation found in the English Companies Act.⁷²

The Old Act⁷³ had broadened the scope of conduct that can be challenged by a disgruntled shareholder, however, s252 was still restrictive. The position under the Old Act still placed a heavy burden on the minority shareholder to elicit any relief. The 1973 Act stated the following:

‘Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, make an application to court for an order under this section.’⁷⁴

In *Garden Province* Friedman J. points out that the minority shareholder seeking redress under s252(1) needed to establish, not only that the act or omission was unfairly prejudicial on him but,

⁶⁷ Act 46 of 1926.

⁶⁸ A Sibanda op cit note 19 at 405.

⁶⁹ Ibid.

⁷⁰ A Sibanda op cit note 68.

⁷¹ Aspek supra note 36 at 526; see also *Marshall v Marshall (Pty) Ltd & others* 1954 (3) SA 571 (N) at 580.

⁷² A Sibanda op cit note 19 at 404.

⁷³ Act 61 of 1973.

⁷⁴ Section 252(1) of Act 61 of 1973.

further, that it was inequitable.⁷⁵ This, however, is a less onerous requirement than proving that the conduct complained of by the applicant was ‘oppressive’ as required by the 1926 Act.⁷⁶

Apart from the court not willing to grant orders readily, this section was rather onerous and limited due to the wording. For the minority shareholder to be able to attain satisfaction from the court, they would bear the onus of proof to prove that the conduct was ‘unfair or prejudicial’ to them by the majority as the minority.⁷⁷ The main issue with this section was its limited applicability, as it could only be used by applicants who were ‘members’ at the time of the alleged misconduct.⁷⁸ The New Act replaced the word ‘member’ with ‘shareholder’ as defined in s1 of the New Act, however, the terms can be used interchangeably and still have the same meaning.⁷⁹

The major shortcoming in the Old Act was the requirement of locus standi. The Old Act required that, at the time of the alleged misconduct the applicant had to have been a member, as defined by section 103 of the Old Act. This was attained by being registered and appearing on the members register.⁸⁰

The above, in terms of court acceptance, was applicable unless the non-member found difficulty in attaining such registration due to frustration by the existing members and thus, could apply under s252 despite this.⁸¹

Despite the above, a person who has an interest in a share, whether in a personal or representative capacity, will not be able to bring an application under s252 due to lack of locus standi.⁸²

The Old Act, despite its flaws, allowed for further application in certain instances, however, as can be seen, it did not fulfil the true nature of the Oppression remedy and its intended purpose. In

⁷⁵ *Garden Province* supra note 23 at 531.

⁷⁶ *Ibid* at 527.

⁷⁷ Section 252(1) of Act 61 of 1973.

⁷⁸ The 1973 Act used the word ‘member’ as defined in section 103.

⁷⁹ Delport et al *Henochsberg on the Companies Act 71 of 2008* (2011) 206.

⁸⁰ *Doornkop Sugar Estates Ltd v Maxwell* 1926 WLD 127 134.

⁸¹ *Barnard v Carl Greaves Brokers (Pty) Ltd* 2008 (3) SA 663 (c) 41.

⁸² *Lourenco v Ferela (Pty) Ltd* 1998 (3) SA 281 (T) 294 – 295.

*Bayly v Knowles (Bayly)*⁸³, the court pointed out a very significant diversional approach the courts took, under s252, as opposed to liquidation by stating:

‘...the way the court can achieve the objects of s252 without taking the drastic step of liquidation is to order that the majority shareholders purchase the shares of the minority shareholder or for the minority shareholder to purchase the shares of the majority...’⁸⁴

S252⁸⁵ eliminated the burden placed on the minority shareholder to prove that the conduct complained of justified the winding-up of a company, it also allowed a court to make an order if it was satisfied that the conduct complained of warranted the granting of the relief under the provision with the view of bringing it to an end.⁸⁶ The courts under s252 would only intervene if it was just and equitable to do so, which is illustrated in *Donaldson Investments(Pty) Ltd & others v Anglo-Transvaal Colliers Ltd and others*⁸⁷ whereby the court stated:

‘...this is perfectly logical; for instance, an act which is unjustly prejudicial may be subsequently rectified or balanced by subsequent conduct or else it may fall within the provision of the *de minimis* principle. Accordingly, an applicant must not only establish that the conduct is unjustly prejudicial, unjust or inequitable, but also that it is just and equitable that the court should come to his relief...’⁸⁸

The court could also impose an order that it deems ‘fit’.⁸⁹ The definition of fit, as defined by the courts, was taken to be wide and with the purpose of bringing an end to the conduct complained of and have a consequence on the oppressor.⁹⁰

2.3.2. Oppression Remedy Developed Under the Company Act 71 of 2008

The amendment of the Companies Act has seen many changes from s252 of the Old Act⁹¹ which can now be found under s163 of the New Act.⁹²

The s163 now reads as follows:

⁸³ *Bayly v Knowles* (ZASCA) unreported case no 174/09 of 18 March 2010.

⁸⁴ *Ibid* para 19.

⁸⁵ Act 61 of 1973.

⁸⁶ A Sibanda op cit note 19 at 406.

⁸⁷ *Donaldson Investments (Pty) Ltd & others v Anglo-Transvaal Colliers Ltd & others* 1980 (4) SA 204 (T).

⁸⁸ *Ibid* 209.

⁸⁹ Section 252(3) of Act 61 of 1973.

⁹⁰ *Donaldson Investments* supra note 87 at 209.

⁹¹ Act 61 of 1973.

⁹² Act 71 of 2008.

- ‘(1) A shareholder or a director of a company may apply to a court for relief if:
- (a) Any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant;
 - (b) The business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or
 - (c) The powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.’⁹³

Before looking at the new requirements critically, it is important to note the wide array of remedies under this section for a successful applicant to see what the courts can now do under the New Act. Under s163 (2)⁹⁴ it provides the court the ability to make various orders that it deems fit in the circumstance to rectify the oppressive or unfairly prejudicial conduct that the applicant has complained of. These remedies are more extensive than the ones that were provided for in s252 of the Old Act and include the following interim and final orders:

- ‘(a) an order restraining the conduct complained of;
- (b) an order appointing a liquidator, if the company appears to be insolvent;
- (c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131(4)(a) apply;
- (d) an order to regulate the company’s affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;
- (e) an order directing an issue or exchange of shares;
- (f) an order—
 - (i) appointing directors in place of or in addition to all or any of the directors then in office; or

⁹³ Sections 163 (1) (a) – (c) of Act 71 of 2008.

⁹⁴ Ibid; see also sections 163 (2) (a) – (l) of Act 71 of 2008.

- (ii) declaring any person delinquent or under probation, as contemplated in section 162;
- (g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;
- (h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;
- (i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;
- (j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;
- (k) an order directing rectification of the registers or other records of a company; or
- (l) an order for the trial of any issue as determined by the court.⁹⁵

From the above we can see the type of remedies are extremely comprehensive and involve minimal judicial intervention but also, they allow the court to make any decision that the court deems appropriate if the relief is not found under this section.⁹⁶ This allows the court to decide each case on a case-by-case basis and, as is known, legislature does not always provide for every case or situation that the court may face, thus granting the court the opportunity and discretion that it requires to make a fair and just order.⁹⁷

The order(s) which a court can/will grant is discussed later on in this chapter. However, for a court to grant any order it deems fit, the applicant will first have to satisfy the requirements that are set out s163 (1).⁹⁸

In *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd (Count Gotthard)*⁹⁹ case, the court in summary emphasised the need for all the requirements under the section to be fulfilled

⁹⁵ Sections 163 (a) - (l) of Act 71 of 2008; see also FHI Cassim et al op cit note 2 at 773.

⁹⁶ A Sibanda op cit note 19 at 409; see also FHI Cassim et al op cit note 2 at 759.

⁹⁷ Ibid.

⁹⁸ Section 163(1) of Act 71 of 2008.

⁹⁹ *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* [2013] 2 All SA 190 (GNP) 28 para 17.6.

for the applicant, including the requirement that the applicant needed to be a shareholder or a director, to find success when applying to the court.¹⁰⁰

The amendments that are brought about by the New Act have also seen some critical review by academic writers. One article which was helpful in assisting in the amendments and the problems associated with the requirements was the critical analysis of the *Peel v Hamon J&C Engineering (Pty) Ltd (Peel)*.¹⁰¹ This case was the second case that dealt with the Oppression remedy and the court was faced with a complex set of facts and needed to answer questions regarding the application of s163 and the requirements that needed to be satisfied to be successful under this section.¹⁰²

To understand the reasoning behind the problems noted by the authors, we looked at the amendments that the New Act incorporated. There are many distinctions between the Old Act and the New. These distinctions relate to the requirements that need to be met in order for an applicant to be successful.

2.3.2.1 Applicants Who Can Apply Under s163

The first distinction is the extension of locus standi. The amendment to the wording of the New Act allows for broader application. The term ‘member’ which was found in the Old Act was the reason for limited application.¹⁰³ This is now replaced with the word ‘shareholder’ and is applicable to not only shareholders of the company but also directors of the company.¹⁰⁴ Despite the fact that the requirements for locus standi have broadened, it is still restrictive in the sense that the applicant still is required to be a registered shareholder. Thus, a party who has simply an interest will not have the required locus standi to be an applicant under s163.¹⁰⁵ This can be seen as a means of Oppression on individuals who are not registered members but have an interest through a will or in the capacity of an executor or trustee.¹⁰⁶

¹⁰⁰ HGJ Beukes & WJC Swart ‘Peel v Hamon J&C Engineering (Pty) Ltd: Ignoring the result requirement of section 163(1)(a) of the Companies Act and extending the oppression remedy beyond its statutory intended reach’ (2014) 17(4) *Potchefstroom Electronic Law Journal* 1697-1698.

¹⁰¹ *Peel v Hamon J&C Engineering (Pty) Ltd* [2013] 2 SA 331 (GSJ).

¹⁰² HGJ Beukes & WJC Swart op cit note 100 at 1691.

¹⁰³ A ‘member’ as defined by section 103 of the Company Act 61 of 1973.

¹⁰⁴ Section 163(1) of Act 71 of 2008.

¹⁰⁵ FHI Cassim et al op cit note 96.

¹⁰⁶ MJ Oosthuisen op cit note 57 at 109.

The above extension was overdue in South African law, taking into consideration that other jurisdictions have incorporated it into their scope. Such as England, which South Africa has followed because there are many similarities between s994 of the English Companies Act and s252 of the Old Act and s163 of the New Act.¹⁰⁷

The main argument *Sibanda* makes for the extension is that many directors, in majority of the cases in South Africa, found themselves having no recourse against oppressive conduct under the Old Act,¹⁰⁸ which only catered for minority shareholders and were forced to leave their positions making the Oppression remedy not very effective in assisting the disgruntled shareholders.¹⁰⁹ Cassim also points out that a de facto¹¹⁰ director will now be able to utilise this remedy.

The New Act further allows an applicant to bring a single application whereas the Old Act required there be more than one applicant.¹¹¹

The writer is in agreement with the above submissions as minority shareholder(s) do not always find themselves in dispute with the majority. There are instances whereby the shareholder forming part of the majority does not agree or fails to vote in favour of a resolution thus making them their own minority. This was not thought of when legislature was drafting the 1926 Act¹¹² or the Old Act.¹¹³ The inclusion of ‘any shareholder’ and the removal of the requirement that the conduct must be done to them as a minority is a step in the right direction. It not only broadens the scope but takes away the stigma that only minority shareholders are faced with problems in a company.

Authors such as Cassim¹¹⁴ expand the scope of applicant further and imply that even if the applicant is not a shareholder or director at the time of the alleged misconduct, but become so after, they may still apply to court for relief under this section.

Beukes and Swart¹¹⁵ highlight and make a valid point on limiting the interpretation of locus standi to apply to current directors and shareholders at the time of the misconduct. Their

¹⁰⁷ *Gower and Davies' Principles of Modern Company Law* 8 ed (2008).

¹⁰⁸ Section 252 of Act 61 of 1973.

¹⁰⁹ A Sibanda op cit note 96.

¹¹⁰ FHI Cassim et al op cit note 2 at 761.

¹¹¹ MJ Oosthuisen op cit note 57 at 121.

¹¹² Act 46 of 1926.

¹¹³ Act 61 of 1973.

¹¹⁴ FHI Cassim et al op cit note 96.

reasoning behind it is the unfortunate event of allowing each and every individual shareholder (or not) to apply to court under this section and thus opening the ‘flood gates’ and burdening courts with unfounded claims.¹¹⁶ They are of the opinion that legislature extended locus standi to shareholders and directors and/or affected parties are correct but further expansion is not their intention.¹¹⁷

In *Lourenco and Others v Ferela (Pty) Ltd (Lourenco)*,¹¹⁸ the applicants were denied *locus standi*, even though they were owners of the shares by means of a will, because they had not yet become members of the company.¹¹⁹ This can be seen as a huge disadvantage to people who are aware of unfair and prejudicial conduct occurring prior to their appointment as members. The writer submits that this is correct as individuals who have still not joined the company may be unaware of the company’s reasons and rationale when the decision was made which can create unfounded claims on insufficient facts. The purpose of legislature was to allow a shareholder recourse which, in essence, means that they were a part of the decision-making process and at the time they were fully aware factually of the reasons and motives of such a decision.

Authors such as *Sibanda* are of the view that the above is incorrect and that current shareholders may commit acts that are to the detriment of pre-registered shareholders.¹²⁰ He also points out that the process of obtaining a shareholders’ certificate is long and tedious and thus, future shareholders should be afforded protection under this section and, if not, the purpose and aim of the New Act¹²¹ are not fulfilled.¹²² This can be seen in private companies whereby the majority may frustrate and cause internal frustration by disallowing the registration of shares.

Cassim¹²³ points out an important analysis that the court may deviate from the requirement should the court be shown that the shareholders would have been registered had it not been for the frustration caused by the current shareholders or controlling powers. It is noteworthy that the

¹¹⁵ HGJ Beukes & WJC Swart op cit note 100 at 1699.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ *Lourenco & others v Ferela (Pty) Ltd* [1998] (3) SA 281 (T).

¹¹⁹ A Sibanda op cit note 19 at 410.

¹²⁰ A Sibanda op cit note 96.

¹²¹ Act 71 of 2008.

¹²² A Sibanda op cit note 119.

¹²³ FHI Cassim et al op cit note 96; see also *Barnard v Carl Greeves (Pty) Ltd* 2008 (3) SA 663 – a case pointed out by Cassim to show that the principle that was once decided under the old Act may still be applicable under the New Act.

New Act allows judicial discretion for these types of situations and to avoid a block-out due to the non-shareholders facing the element of exclusion under the Act, even though not due to their doing.

Another great development that the extension of standing brought about is the ability for ‘related persons’ to apply.¹²⁴ This extends not only to the shareholders of the affected company but also to ‘subsidiary company’.¹²⁵

Beukes and Swart disagree with the above and point out on this aspect that the remedy itself needs to be protected from misuse and ‘as a means of Oppression’.¹²⁶

The question of whether or not locus standi extends to non-members or future shareholders is still unanswered and unclear¹²⁷ and is open to interpretation and legislative guidance.

2.3.2.2. Conduct – Analysis of Domestic and International Legislature

The next change that was brought about was the relaxation of what shareholders had to prove. Cassim¹²⁸ has defined conduct as including ‘acts, omissions, the conducting of business or the exercise of power.’

The ‘oppressive conduct’ has now been broadened to also include ‘unfairly disregards’ his or her interest.¹²⁹ Sibanda points out that ‘the inclusion of a member’s interest in the provision enables the remedy to now address instances involving an infringement of enumerated rights of shareholders.’¹³⁰ He goes on further to state that now rights also include ‘legitimate expectations’ and that English case law has confirmed this.¹³¹

¹²⁴ FHI Cassim et al op cit note 2 at 761.

¹²⁵ Ibid.

¹²⁶ HGJ Beukes & WJC Swart op cit note 100 at 1700.

¹²⁷ Ibid.

¹²⁸ FHI Cassim et al op cit note 2 at 760.

¹²⁹ HGJ Beukes & WJC Swart op cit note 126.

¹³⁰ A Sibanda op cit note 19 at 408.

¹³¹ Ibid.

Canadian exercise of the Oppression remedy is broader in all senses. It allows shareholders who are not only disgruntled by an act or omission but includes the event of their expectations not being met.¹³²

In regards to Canadian Corporations, Ben-Ishai is of the opinion that the Oppression remedy has great potential when dealing with unequal power relations in both private and publicly-traded companies, provided that the litigants and judiciary extend their knowledge when dealing with such cases.¹³³ Under Canadian law, the controlling members are given extensive power which allows them to realise the best interest of the company.

Ben-Ishai claims that, if the protection of shareholders is not matched with equivalent remedial action, this may create the opportunity for purposeful exploitation by the corporation of shareholders and thus, could create the eventuality of disregarding the interests of non-shareholders altogether.¹³⁴

There is much appeal in restricting the Oppression remedy to minority shareholders of private companies rather than expanding it further to encompass both private and public and non-shareholders, due to procedural issues. However, its expansion will give broader application and reflect the intention of the Oppression remedy and allow protection of interests to all shareholders.¹³⁵

Ben-Ishai gives an explanation as to why, generally, there is an inapplicability of the Oppression remedy to public companies by highlighting the power disparity between the board of directors and shareholders. The power that the board of directors' holds is equivalent to that of a majority whom have little shareholder intervention whereas, in a private company, the board is often answerable to or dependent on the shareholders. Thus, majority shareholders may be able to make decisions that the board has to follow, which may adversely affect the minority.¹³⁶

¹³² B Welling *Corporate Law in Canada – The Governing Principles* 3 ed (2006) 535.

¹³³ S Ben-Ishai 'The promise of the oppression remedy: A review of Markus Koehnen's oppression and related remedies' (2005) 42(3) *Canadian Business Law Journal* 451.

¹³⁴ Ibid at 452.

¹³⁵ S Ben-Ishai op cit note 133 at 462.

¹³⁶ Ibid at 455.

The main argument against reasonable expectations is its inability to provide a concrete method of application and form an objective basis. It can be used as a means of understanding a problem or a conflict. It is an open-ended concept that cannot be restricted to allow application in law.¹³⁷

Conduct as defined in the New Act¹³⁸ is broader and allows for further application. In terms of the New Act, the ‘act or omission must be oppressive, unfairly prejudicial and/or unfairly disregard the interests of the applicant’.¹³⁹

This shows development compared to the Old Act which stated that for the applicant to find success, (s)he needed to prove that the conduct was unfairly prejudicial to them as a minority, which placed less focus on the conduct and the effect but gave an eventuality which needed to be fulfilled, thus narrowing its application.¹⁴⁰

The above is confirmed in *Louw v Nel (Louw)*¹⁴¹ whereby the court stated that under s252 of the Old Act an applicant needed to prove that the act or omission was committed or the affairs of business was done in a way that had the effect of being unfairly prejudicial, unjust or inequitable to him or some part of the members of the company.¹⁴²

The New Act further expands conduct to business of the company or by any related person and even the powers of the directors that are being carried on in a manner that is unfairly oppressive and/or unfairly prejudicial to the applicant.¹⁴³ As can be seen from the wording of the New Act, the requirements don’t place emphasis on the conduct but rather the outcome of such conduct.

In *Grancy Property Ltd v Manala (Grancy)*¹⁴⁴ the court, when determining conduct, stated that it is not the motive of the conduct that is important but rather the effect that such conduct has had on the shareholder, thus allowing the court to have wider discretion when determining conduct.¹⁴⁵

¹³⁷ H Bailey Kuklin ‘The plausibility of legally protecting reasonable expectations’ (1997) 32 (1) 61-66.

¹³⁸ Act 71 of 2008.

¹³⁹ Section 163(1) (a) of Act 71 of 2008.

¹⁴⁰ Section 252(1) of Act 61 of 1973.

¹⁴¹ *Louw v Nel* 2011 2 SA 172 (SCA) para 19; 19.1.

¹⁴² HGJ Beukes & WJC Swart op cit note 100 at 1697.

¹⁴³ Ibid; see also sections 163 (1) (a)-(c) of Act 71 of 2008.

¹⁴⁴ *Grancy Property Ltd v Manala* 2015 (3) SA 313 (SCA).

¹⁴⁵ Ibid para 27.

The above is a Supreme Court judgment and has shown that the need for protection is far greater than the reasons as to why such conduct, whether it was an act or an omission, was committed.

Sibanda has alluded to the fact that inclusion of ‘unfairly disregards the interest of the applicant’ brings about wider application and was not available under the Old Act¹⁴⁶ and further states that this shows the importance of shareholders interest which are ‘wider’ than shareholders rights and thus, includes legitimate expectations of shareholders.¹⁴⁷

In *Ebrahim v Westbourne Galleries (Ebrahim)*,¹⁴⁸ the court stated that ‘legitimate expectations’ are a *sui generis* class of rights that go beyond the scope of shareholders and that it is a relationship, of a personal nature, between individuals which will cause an unfair prejudice if it is not honored.¹⁴⁹

‘In Canada, federal and provincial statutes provide for dramatically broader Oppression remedies against Canadian corporations to address a potentially unlimited array of unfair conduct. Oppression claims can be asserted by practically any ‘stakeholder’ for corporate actions that infringe on the stakeholder’s legitimate expectations’.¹⁵⁰

From this, we can see that other jurisdictions place high importance on the protection of shareholders by allowing broader application so that applicants stand a better chance of succeeding in their claims. This shows the broad application of the requirements in other jurisdictions that aim to encompass all situations which arise in a company relating to shareholders. The writer agrees with this insight and submits that it is a step to formulating a broad but controlled statute that will allow all parties to seek relief under the Act.

With regards to the requirement of conduct, authors believe that the result should be a single result and not a multitude of results that need to occur.¹⁵¹ Here, the authors agreed with the court in *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd*

¹⁴⁶ Act 61 of 1973.

¹⁴⁷ A Sibanda op cit note 19 at 407.

¹⁴⁸ *Ebrahim v Westbourne Galleries* [1972] 2 All ER 492.

¹⁴⁹ A Sibanda op cit note 19 at 408.

¹⁵⁰ See <https://mcmillan.ca/101573>, accessed on 15 September 2018.

¹⁵¹ Ibid.

(*Kudumane*),¹⁵² which stated that the courts do not require that all results need to be eventuated, but just one is fulfillment of the requirements to seek remedial action under the New Act.¹⁵³

2.3.2.3. Remedies Available to the Court to Rectify the Misconduct

Lastly, one of the major advances in the New Act¹⁵⁴ is the extensive list of remedies that can be found under S163 (2).¹⁵⁵ Sibanda points out that even though most of the remedies found therein involve minimal court intervention, it still allows the court to make decisions based on the facts before it.¹⁵⁶ The court is also now able to grant interim orders pending finalization of a matter which the Old Act did not cater for.¹⁵⁷

In *Louw*,¹⁵⁸ the court alluded to the fact that s252¹⁵⁹ allowed courts wide discretionary abilities when it came to rectifying the wrong done to the applicant.¹⁶⁰ The court further mentions that the relief that the court will grant must have the eventuality of ‘putting an end’ to the conduct complained of.¹⁶¹

The above, it is submitted shows that remedy placed its application in the hands of the court and lack of business skills and training on the part of the judiciary was never questioned. Each case was dealt with on a case-by-case basis and what one court could have found as justified may not have been the case by another.

Under the Canada Business Corporations Act,¹⁶² the Oppression remedy grants courts discretionary capabilities to go beyond the technical legal rules which binds corporate shareholders and considers whether a complainant’s reasonable expectations have been defeated.¹⁶³ The discretion reaches as far as allowing the court to order that the corporation or

¹⁵² *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd* [2012] 4 All SA 203 (GSJ).

¹⁵³ HGJ Beukes & WJC Swart op cit note 100 at 1702.

¹⁵⁴ Act 71 of 2008.

¹⁵⁵ Ibid.

¹⁵⁶ A Sibanda op cit note 96.

¹⁵⁷ Ibid.

¹⁵⁸ *Louw & others v Nel* 2011 (2) SA 172 (SCA).

¹⁵⁹ Act 61 of 1973.

¹⁶⁰ *Louw & others v Nel* 2011 (2) SA 173 (SCA).

¹⁶¹ Ibid.

¹⁶² Canada Business Corporation Act R.S.C. 1985 C. c-44.

¹⁶³ S Ben-Ishai op cit note 133 at 450.

any other person, purchase securities, compensate an aggrieved person or order an appropriate remedy to rectify the contested issue by the oppressed party.¹⁶⁴

2.4. Conclusion

Under s163 of the New Act¹⁶⁵ not only encompasses protection for minority shareholders but also embraces the change that has been occurring in other, more progressive, jurisdictions.¹⁶⁶ It shows growth and intention of legislature to bring South Africa's Company law on-par with other legal systems.¹⁶⁷ The Oppression remedy has found itself developing and advancing, which shows the need and want for it to be a successful remedial action for disgruntled members of every rank and level.

¹⁶⁴ Ibid.

¹⁶⁵ Act 71 of 2008.

¹⁶⁶ A Sibanda op cit note 96.

¹⁶⁷ Ibid.

CHAPTER 3: APPRAISAL RIGHTS AND DISSENTING SHAREHOLDERS

3.1. Introduction and Origin

Dissenting shareholders' Appraisal right may be defined as

'the right of dissenting shareholders who do not approve of certain triggering events to have their shares bought out by the company in cash, at a price reflecting the fair value of the shares, which value in certain cases may be determined by the judiciary.'¹⁶⁸

The review of current domestic company law was inevitable and much needed. The Department of Trade Industry brought about such review and proposed changes for company law that has not been changed since 1973 Old Act.¹⁶⁹ One of South Africa's newest additions, in terms of minority protection, was the Appraisal right. It is adopted from developed jurisdictions such as the United States, New Zealand and, its most recent influencer, Canada.¹⁷⁰ The need for protection of minority shareholders is ever-growing and developing to ensure that a majority decision, which may have adverse effects or cannot be stopped by a minority, has consequences in the eyes of the law.

Prior to the enactment of the New Act,¹⁷¹ disgruntled minority shareholders found themselves in a dangerous position. The court in *Sammel v President Brand Gold Mining Co Ltd (Sammel)*¹⁷² set out the common law position which applied in South Africa as follows:

'By becoming a shareholder in a company, a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder. The principle of the supremacy of the majority is essential to the proper functioning of companies'¹⁷³

The above reasoned the reluctant attitude courts adopted when it came to interfering or involving itself in the internal management of any company.¹⁷⁴ The granting of an Appraisal right sought to balance the unfair restriction placed on a company when deciding to make any fundamental

¹⁶⁸ FHI Cassim et al op cit note 2 at 796.

¹⁶⁹ FHI Cassim 'Unravelling the obscurities of section 38(2)(d) of the Companies Act' (2005)122 (3) *South African Law Journal* 493.

¹⁷⁰ Ibid.

¹⁷¹ Act 71 of 2008.

¹⁷² *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) 678.

¹⁷³ Ibid 678 G-H; see also J Yeats op cit note 47 at 336.

¹⁷⁴ *Communicare v Khan* 2013 (4) SA 482 (SCA) para 10.

change. It was previously required that there is not only a majority vote but a ‘unanimous vote’,¹⁷⁵ for such change to be implemented.¹⁷⁶ The law now allows the rights attached to the initially purchased shares be held in sanctity and allows the shareholder the right to protect such investment interest and the economic risk associated with such share.¹⁷⁷ This equalises the economic arena by not only protecting critical economic change but allowing those involved in such change the choice to be attached or detached from such.¹⁷⁸

The once historical requirement of a ‘unanimous vote’ was required for mergers and other fundamental transactions and was finally replaced by ‘majority vote’ as the new standard.¹⁷⁹ The majority approval sufficed and, as a quid pro quo,¹⁸⁰ the dissenting or disgruntled shareholders are afforded the Appraisal right.¹⁸¹ This can be seen as a remedy to their inability to refuse or object to being a part of the majority decision.¹⁸²

The ‘defeated expectations’¹⁸³ view was a consequence that many dissenting shareholders endured if they were unable to leave the company amicably, by having their shares bought out, but was forced into the new transaction.¹⁸⁴ The introduction of cash-out as a merger consideration also prevents the dissenting shareholders from being inadequately paid out and thus, can be seen as a ‘remedy-for-unfairness’ justification.¹⁸⁵

The Appraisal remedy now gives the minority an option, one which they were previously not entitled to, to have their shares bought out for a ‘fair value’ and allow themselves the freedom to be in a business that they wish to be a part as opposed to being forced due to financial differences.¹⁸⁶ The Appraisal right not only protects the minority, but also allows internal management the tractability it requires to adapt to the ever-changing economic environment and

¹⁷⁵ H Kanda & S Levmore S ‘The appraisal remedy and the goals of corporate law’ (1985) 32 at 430.

¹⁷⁶ B Manning op cit note 27 at 226-227.

¹⁷⁷ FHI Cassim et al op cit note 2 at 796.

¹⁷⁸ Ibid.

¹⁷⁹ FHI Cassim et al op cit note 2 at 797.

¹⁸⁰ J Yeats op cit note 47 at 335.

¹⁸¹ Ibid.

¹⁸² BM Wertheimer ‘The purpose of the shareholders’ appraisal remedy’(1998) 47 (4) *Duke Law Journal* 66.

¹⁸³ MF Cassim ‘The introduction of the statutory merger in South African corporate law: Majority rule offset by the appraisal right’ (2008) 20 (2) *SA Merc LJ* 158.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ AR Pinto et al *Understanding Corporate Law* 2ed (1999)127-128.

thus, protects the majority, the decision making process of such majority and their voted decision.¹⁸⁷

The Appraisal right can be seen as a defense for dissenting shareholders, but also as a benchmark for directors or controlling majorities to be wary and avoid making risky business decisions that may eventually have consequences on the minority.¹⁸⁸ It should be recognised by directors or majority shareholders that the dissenting vote is also of importance when making business decisions. A company should pay attention to not only the majority way of thinking but the minority as well, as majority shareholders may have money to lose but a minority may not and thus, if there is a greater number of dissenting shareholders votes than there are majority shareholders votes, this should be a warning beacon to the majority of the decision that is going to made and that it needs to be reviewed.¹⁸⁹

The above indicates the three main objectives of the Appraisal right;

1. Facilitates the market for conducive mergers;
2. provides liquidity for dissenting shareholders; and
3. serves as a check on opportunism by the directors and the controlling shareholders.¹⁹⁰

From the above there are three main objectives that can be deduced; namely, the option of having shares bought for a ‘fair market’ value provided all the requirements under the Appraisal right are complied with.¹⁹¹ The second objective enables the once-feared judicial intervention should the value be inadequate or the shareholder require the court to determine ‘fair market value’.¹⁹² The third objective is to disallow a director from making decisions that may have an adverse effect on the minority, by curtailing the freedom that a director can attain by title.¹⁹³

It has been stated that, provided the majority follow the correct protocols and pay the dissenting shareholders, they can implement any fundamental change with impunity. As the minority would be able to avoid being party to change that they don’t agree with, however, if enough shareholders objected to the resolution being passed they can actively ‘force-stop’ the change

¹⁸⁷ WD Gray *The Annotated Canada Business Corporations Act* 2 ed (2002) 372.

¹⁸⁸ MF Cassim op cit note 183 at 159.

¹⁸⁹ Ibid.

¹⁹⁰ MF Cassim op cit note 188.

¹⁹¹ FHI Cassim et al op cit 179; J Yeats op cit note 47 at 334.

¹⁹² Ibid; see also H Kanda & S Levmore op cit note 175 at 429.

¹⁹³ Ibid.

from occurring.¹⁹⁴ The above could be possible, as the obligation to purchase the shares could inevitably drain the company's funds.¹⁹⁵ The Appraisal right has been said to have many concerns on the part of majority shareholders such as 'frightful drain, burden and nuisance' that comes with the remedy.¹⁹⁶

The Appraisal statutes can be seen as a 'barricade' for minority rights or as a tool to enable a faster means of 'majoritarianism' all dependent on its application and management.¹⁹⁷ It also encourages investors with small capital input to invest knowing that they would be adequately protected against a majority reign.¹⁹⁸

3.2 Appraisal Remedy and its Application Under s164

The Appraisal right makes its first appearance in domestic company law under the New Act.¹⁹⁹ It has seen long-standing application under many foreign jurisdictions and has recent application in Canada and New Zealand.²⁰⁰

The Appraisal remedy, as stated above, is a crucial remedy for dissenting shareholders who are challenged with unfairness in a company.²⁰¹ Hence, if a dissenting shareholder is offered an amount for their shares in a company and is dissatisfied with said amount, (s)he may now challenge the fair value of the offer judicially.²⁰² As with every piece of legislature, there is a downside for applicants seeking relief under this section, as the remedy has been criticised for being expensive, time-consuming and procedurally dreadful.²⁰³ The remedy is based on strict compliance and is technical in nature.²⁰⁴

¹⁹⁴ JG MacIntosh 'The shareholders' appraisal rights in Canada: A critical reappraisal' (1986) Vol 24(2) *Osgoode Hall Law Journal* 205.

¹⁹⁵ B Manning op cit note 27 at 241.

¹⁹⁶ Ibid at 234; see also J Yeats op cit note 47 at 331.

¹⁹⁷ B Manning op cit note 27 at 230.

¹⁹⁸ J Yeats op cit note 196.

¹⁹⁹ MF Cassim op cit note 183 at 19.

²⁰⁰ Ibid.

²⁰¹ FHI Cassim et al op cit note 179.

²⁰² Ibid.

²⁰³ FHI Cassim et al op cit note 2 at 798; see also J Yeats op cit note 47 at 332; see also V Bradney & MA Chirelstein 'Fair shares in corporate mergers and takeover' (1974) 88 (2) 304.

²⁰⁴ Ibid.

Due to this, there is a fine line between effectiveness and, essentially, from the protection that it should be able to afford the minority.²⁰⁵ It has been argued that the Appraisal procedure needs to be followed meticulously to find application and this can be seen as a deterrent to potential applicants.²⁰⁶

Despite the above, the Appraisal remedy is seen as a means of not only protecting the minority but, allowing the majority the freedom it requires to conclude desired transactions without having to avoid potential successes due to fear of the minority rising up for reasons unbeknown or that are personal in nature.

To find application under s164, it is a pre-requisite that certain triggering events need to unfold before this right is applicable, as it does not have general application.²⁰⁷ An Appraisal right is triggered when a notice is given by a company to shareholders indicating that a meeting will be held to adopt a crucial change.²⁰⁸ Included in such a notice should be an indication of the shareholders' rights possessed under this section.²⁰⁹ It should be noted that business rescue procedures are exempt under this section.²¹⁰

Under Canadian corporate law, the Appraisal right is addressed as the 'Procedural Morass'.²¹¹ Its adoption was also founded on the new merger provisions and to enable flexible and an efficient economy.²¹² Legislature has borrowed a large part of the Canadian jurisprudence when drafting the Appraisal right under the New Act.²¹³ The CCBA²¹⁴ created the equivalent Appraisal right on the basis that it not only protect the minority against discrimination, but also conserves flexibility

²⁰⁵ FHI Cassim et al op cit note 203.

²⁰⁶ MF Cassim op cit note 183 at 160.

²⁰⁷ FHI Cassim et al op cit note 2 at 796.

²⁰⁸ Sections 164 (2) (a) and (b) of Act 71 of 2008.

²⁰⁹ Sectio 164 (2) (b) of Act 71 of 2008.

²¹⁰ Section 164 (1) of Act 71 of 2008.

²¹¹ B Welling op cit note 132 at 568.

²¹² Notice of intention to introduce a Bill into Parliament; Explanatory Summary of Bill General Notice 166 of 2007; page 13

²¹³ Canada Business Corporation Act RSC 1985 c. C – 44 s190.

²¹⁴ Canada Business Corporation Act.

in order to facilitate company change.²¹⁵ We find great similarity in terms of legal principles set out under of s190 of the CBCA and in s164 regarding locus standi.²¹⁶

The Appraisal remedy does have initial safe-guards that need to be met prior to the Appraisal right being applicable. This can be seen as a preliminary enquiry before the penultimate right can be activated. The Applicant, in essence, needs to ‘perfect’ the Appraisal right in order to find application under this section.²¹⁷ This entails that the dissenting shareholder actually votes against the resolution and, thereafter, is required to provide written demand that his/her shares be bought out at a fair market value.²¹⁸ This is done once the resolution has been implemented and all procedural requirements, in terms of this section, are complied with.²¹⁹

The additional requirement, which was called the ‘no Appraisal threshold’,²²⁰ stated that there needed to be an approved majority vote of less than 75 percent.²²¹ This had been criticised as being a vehicle towards unfairness against the dissenting shareholder(s). For example, the majority shareholder has controlling shares of 75 percent or more to be voted.²²² This had detrimental effects to the Appraisal right by giving no application to the Appraisal right for a dissenting shareholder, hence the abandonment of the requirement.²²³

3.3 Trigger Events to Initiate the Appraisal Right

The Appraisal right is not a general right and is only triggered in certain circumstances. The Appraisal right is only triggered under circumstances when the company proposes to pass a special resolution to:

1. ‘Dispose of all or the greater part of its assets or undertaking;
2. Enter into an amalgamation or merger;
3. Implement a scheme or arrangement; or

²¹⁵ JG MacIntosh op cit note 194 at 205.

²¹⁶ HGJ Beukes ‘An introduction to the appraisal remedy in the Companies Act 2008: Standing and the appraisal procedure’ (2010) 22 SA *Merc LJ* 178.

²¹⁷ FHI Cassim et al op cit note 2 at 799.

²¹⁸ Ibid at 798.

²¹⁹ Ibid.

²²⁰ FHI Cassim et al op cit note 203.

²²¹ Ibid.

²²² MF Cassim op cit note 183 at 161.

²²³ Ibid.

4. Amend its Memorandum of Incorporation by changing the preferences, rights, limitations or other terms of any class of its shares in any manner materially adverse to the rights or the interests of holders of that class of shares (as contemplated in Section 37(8) of the Act').²²⁴

The Appraisal right is not driven by ‘fault or unfairness’,²²⁵ as seen with the Oppression remedy under s163 of the New Act. It is important to note that the dissenting shareholder is only entitled to demand the fair value of his shares if a resolution which effects change is adopted. However, a dissenting shareholder has the responsibility of making his objection to a proposed resolution, known to the company, as soon as he is aware of the said proposed resolution.²²⁶ Surprisingly, there is no differentiation between public and private companies, even considering the fact that a dissenting shareholder of a public company has the option of selling their shares on an open market. Section 164(1) read with Section 152 of the act specifically excludes any transaction, agreement or offer which relates to a business rescue plan that has been approved by the shareholders of the company.²²⁷

3.4 Procedural Requirements of the Appraisal Remedy

As elaborated on above, for successful application of the Appraisal right certain requirements need to be complied with as set out in s164 of the New Act.²²⁸ It requires meticulous timing, accuracy and full compliancy. In terms of the CBCA, it is fundamental that the shareholder comply with all the requirements which include notices and deadlines; failure results in the shareholders being ‘disentitled’ from finding application in terms of his or her Appraisal right.²²⁹

²²⁴ FHI Cassim et al op cit note 217; see also J Yeats op cit note 191.

²²⁵ Ibid.

²²⁶ Section 164 of Act 71 of 2008.

²²⁷ Ibid.

²²⁸ Section 164 of Act 71 of 2008.

²²⁹ JG MacIntosh op cit note 194 at 257.

3.4.1 Legal Standing

It should be common cause but noteworthy that Beukes points out, for a shareholder to find application under s164 (s)he needs to be a shareholder and has to dissent.²³⁰ In terms of s1 of the New Act, a shareholder is defined as a ‘holder of a share issued by a company’,²³¹ and a share is defined as ‘one of the units into which the proprietary interest in a profit company is divided’.²³² The New Act does not include in the term shareholders, a member of non-profit organisation’s (hereinafter referred to as NGOs), however, it will apply to the non-profit organisation should such an organisation have shares in a profit company.²³³

The final requirement relates to one of the trigger events, the alteration of a class of rights in the Memorandum of Incorporation and the shareholders need to be holders of the class of rights that will be affected by the alteration.²³⁴

Under Canadian jurisprudence, it is a general rule that in order to use the Appraisal right the person needed to be a registered shareholder at the time the resolution is passed.²³⁵ Courts have not followed this rule strictly and have taken a relaxed approach when dealing with legal standing.²³⁶ One such case is *Silber v BRG Precious Metals Inc (Silber)*,²³⁷ whereby the court granted the dissidents the Appraisal right even though the court was mindful of the fact that they had attained the title of shareholder after the notice of the proposed meeting had already been handed. Hence, it was argued that the Appraisal right was not correctly applicable.²³⁸ This is a clear example of court discretion and judicial interpretation which gives effect to the Appraisal right; however, it can be seen as way of distorting the principle and allowing unsuccessful, meritless claims instead of being an effective mechanism of governing corporate authority.²³⁹

²³⁰ HGJ Beukes op cit note 216 at177.

²³¹ Ibid.

²³² HGJ Beukes op cit note 230.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ DH Peterson *Shareholder Remedies in Canada* 2 ed (1989) 15.2.

²³⁶ *Bathurst Norsemines Ltd (NPL) v Pitfield Mackay Ross Ltd* (1984) 52 BCLR 115 (BC SC).

²³⁷ *Silber v BGR Precious Metals Inc* (1998) 41 OR (3d) 147 (Gen Div).

²³⁸ Ibid at 157.

²³⁹ GS Geis ‘An appraisal puzzle’ (2011) 105 Northwestern U LR 1639.

Canadian courts have followed the view that, should the directors of controlling powers intend on limiting the Appraisal right to shareholders at the time the notice is sent out, they should actively take steps to indicate such intention in the notice.²⁴⁰

In comparison to domestic corporate law, the New Act is very specific and limits the Appraisal right to shareholders that are in the share register and/or the record date, allocated by the company, for determining the standing that shareholders may or may not have.²⁴¹ Thus, if a shareholder becomes registered after the notice, but before the resolution is passed, the shareholder fulfils the requirements under s164.²⁴² For example, which shareholders are entitled to receive notice of meetings and are competent to participate in such a meeting.²⁴³ Should the board fail to set such a date, the court will determine the date as being the last date by which the company needs to give notice.²⁴⁴ It should be noted that shareholders who have acquired a beneficial interest subsequently are entitled to vote provided the shareholder's name is in the share register.²⁴⁵

A noteworthy domestic case is *Abraham Albertus Cilliers v LA Concorde Holdings Ltd.*²⁴⁶ Here the court was required to determine the ability of a holding company to make an application under s164, should the subordinate company 'dispose of all of a greater part of its assets'.²⁴⁷

A brief factual background to the case involved Mr. A. Cilliers, a minority shareholder in La Concorde Holdings Ltd an application against Respondent and its wholly-owned subsidiary, KWV South Africa (Pty) Ltd among others, in terms of which he sought to enforce his attempted exercise of his Appraisal rights against La Concorde.²⁴⁸ KWV wished to dispose of all its operational assets to a third party.²⁴⁹ This constituted the disposal of all or the greater part of the assets of both KWV and La Concorde. Accordingly, in terms of the New Act, the proposed disposal needed to be approved by special resolutions of the shareholders of both the holding

²⁴⁰ *Silber v Pointer Exploration Corp* (1998) 42 BLR (2d) 149 (Alta QB) at 157.

²⁴¹ Section 59(1) of the Act 71 of 2008.

²⁴² HGJ Beukes op cit note 216 at 178.

²⁴³ Ibid.

²⁴⁴ Section 59(3) of Act 71 of 2008.

²⁴⁵ Section 56(9) of Act 71 of 2008.

²⁴⁶ *Cilliers v LA Concorde Holdings Ltd* (ZAWCHC) unreported case no 23029/2016 of 14 June 2018.

²⁴⁷ Ibid.

²⁴⁸ *Cilliers* supra note 246 at paras 4, 5, 6.

²⁴⁹ Ibid para 7.

company and its subsidiary. Cilliers objected and voted against the proposed disposal. Cilliers then sought to exercise his Appraisal rights under s164 of the New Act and demanded that La Concorde pay the fair value for his shares in La Concorde. La Concorde refused to do so. La Concorde argued that the Appraisal rights in s164 did not extend to the shareholders of the holding company who voted against the proposed disposal and that s164 remedies were only available to the shareholders of the company disposing of all or the greater part of its assets, namely KWV. The court, in reaching its decision, took into consideration the interpretation of statutes and quoted the *Natal Joint Municipal Pension Fund v N Endumeni Municipality (Natal Joint Municipal Pension Fund)*²⁵⁰ case. The court, in coming to its conclusion, made noteworthy remarks regarding the applicability of the Appraisal remedy and its application by clearly stating the need for growth and fairness as stated in the constitution makes it imperative that the words of legislature are read to give effect to such objectives.²⁵¹ The court also took into consideration the mere intention of legislature and pointed out the following:

‘In my view, as a starting point, the only sensible meaning to be ascribed to the phrase, ‘the holder of any voting rights in a company’, taking into account its context, purpose, and background of the Act, is exactly what it says, in plain language, and must be what the legislature intended it to mean. If the legislature intended the meaning of ‘the holder of any voting rights in a company’ to be limited to ‘the holder of voting rights in the disposing company’, it would have simply said so. There is in my view, no ambiguity in the Section, nor is there any uncertainty about it that requires an interpretation, other than the plain meaning. It is more the correct application than the interpretation of the law’.²⁵²

The above is a clear indication of the courts focus on adequate and effective application of the Appraisal remedy. It also points out an important aspect of proper protection of all shareholders who might be affected by a decision they voted against. The court rightfully allowed the applicant relief under the Appraisal remedy and this is not only an expansion on the requirements set out in the New Act but also a message to all controlling companies regarding the importance of proper decision making and decision-making information that needs to be given to not only the company to which the proposed change is aimed at but all the companies that may be

²⁵⁰ *Natal Joint Municipal Pension Fund v N Endumeni Municipality* 2012 (4) SA 539.

²⁵¹ *Cilliers* supra note 246 para 34 – 45.

²⁵² *Ibid* para 22.

affected by such change. The court indicated an outstanding reason for this by stating the following:

In the 2007 Company's Bill, published by the Department of Trade and Industry, the intention of the Legislature is recorded in the following terms:

'3. Corporate efficiency ... (c) there should be a remedy to avoid locking in minorities shareholders in inefficient companies. ...

4. Transparency ... (c) the law should protect shareholder rights, advance shareholder activism, and provide enhanced protections for minority shareholders...'²⁵³

The above case illustrates the immense want for the successful and all rounded application of the Appraisal right rather than limiting it to such an extent that the purpose and aim is partially or completely lost.

3.4.2 Notice of the Right

In terms of s164 of the New Act, it does not require the company to give prior notice of the place where the meeting will be held to discuss the proposed resolution, however, it does require that the company, in terms of s164(2), indicate the right that the shareholder has in terms of the Appraisal remedy.²⁵⁴ This is not as simple when the company intends on disposing of all or a greater part of the assets and/or undertakings of a company.²⁵⁵

The New Act does not give a prescribed form of notice that must be followed, however, s65(4) of the New Act indicates that the proposed resolution needs to be set out 'clearly, sufficiently and include sufficient material to enable the shareholders to vote on said resolution'.²⁵⁶ In terms of s6(4)(b), if there is no prescribed form for the notice, it must be done so in 'plain language'.²⁵⁷ Plain language is competent for 'prospectus, notice, disclosure or a document, if the company's

²⁵³ *Cilliers* supra note para 45.

²⁵⁴ FHI Cassim et al op cit note 2 at 800; see also HGJ Beukes op cit note 216 at 174.

²⁵⁵ HGJ Beukes op cit note 216 at 180.

²⁵⁶ Section 65(4) of Act 71 of 2008.

²⁵⁷ Section 6(4) (a) of Act 71 of 2008.

shareholders who shall read such are reasonably expected to understand and comprehend such language'.²⁵⁸

If the company fails to give reference to s164 or does not fulfil the requirements set out in s6(4), the notice will be materially defective, however, be that as it may, all shareholders who had accepted the notice and are present at the meeting do possess the capability of ratifying such defect and the meeting will continue as planned.²⁵⁹ Should the risk arise that a dissenting shareholder not be willing to ratify such defect, and the defect is with regards to a certain aspect, such defect can be removed in accordance with s62(5)(a), and the notice will remain valid.²⁶⁰

In relation to Canadian Jurisprudence, s190(5) of the CBCA requires adequate information on the Appraisal right to be given to the shareholders and one of the important aspects that needs to be pointed out clearly is the right to cash-out element.²⁶¹ Canadian courts have further pointed out that giving an indication that the shareholders are allowed to vote against the resolution does not qualify as sufficient notice.²⁶²

3.4.3 Notice of Objection by Dissenting Shareholder(s)

Once notice has been sent out and shareholders have intention of voting against the resolution, there is an obligation placed on such dissenting shareholders to indicate such intention, in terms of s164(3), by way of 'written' notice, prior to the resolution being voted on.²⁶³

Academics have pointed out that in terms of s164(5)(a)(i), a dissenting shareholder is allowed to demand payment if the notice of objection was 'sent', this makes no indication of the requirement that notice has to be 'written'.²⁶⁴ This is a strange analysis as it is further pointed out that the notice can also be sent via voice message.²⁶⁵ One of the reasons given for the suggested 'written notice' of objection is mere courtesy, on the part of both parties, whereby the dissenting

²⁵⁸ Section 6 (5) of Act 71 of 2008.

²⁵⁹ HGJ Beukes op cit note 216 at 181.

²⁶⁰ Ibid.

²⁶¹ Section 190 (5) of the Canadian Business Corporation Act.

²⁶² *Fitch v Churchill Corp* (1990) 4 WWR 256.

²⁶³ Section 164 (3) of Act 71 of 2008.

²⁶⁴ HGJ Beukes op cit note 259.

²⁶⁵ Ibid.

shareholders has adequately informed the majority and the majority in return will notify the dissenting shareholders when the resolution has been passed.²⁶⁶

In terms of Canadian jurisprudence, it has been stated that there is a possibility that if the notice is given after the fact, shareholders might be influenced or intimidated by the number of votes for the resolution and eventually back out of objecting.²⁶⁷ In terms of s190(5) of the CBCA the objection needs to be done at the proposed meeting or prior to the proposed meeting being held.²⁶⁸

In terms of s164(3), written notice ‘may’ be given prior to the meeting and even though the requirement seems laidback, it should not be overlooked as, should the dissenting shareholders fail to give such notice, they may stand the possibility of losing the Appraisal right.²⁶⁹ An explanation for the word ‘may’ could be found in the mere fact that the dissenting shareholders have not received the notice or that they cannot make such a decision because they are simply unaware of their rights under s164.²⁷⁰ If the dissenting shareholders fail to give the required notice of objection, they are obliged to do so at the earliest time before the resolution is to be put to a vote.²⁷¹

A dissenting shareholder’s presence at the proposed meeting is not required by s164, however, in terms of s37(8)(b), it is mandatory due to the nature and effect of the meeting’s agenda.²⁷² It is important to note that if a dissenting shareholder intends on objecting, they should do so in full. The New Act makes no provision for ‘partial dissent’ and thus, is unclear. However, legislature has worded s164(5) to mean ‘all shares’ which may indicate that the shareholder may not be allowed to demand that certain shares of theirs are to be bought and not in its entirety.²⁷³ Thus, a

²⁶⁶ HGJ Beukes op cit note 216 at 182.

²⁶⁷ *Denischuk v Bonn Energy Corp* (1983) 30 Sask R 37 (QB) 39.

²⁶⁸ Section 190 (5) of the Canadian Business Corporation Act.

²⁶⁹ FHI Cassim et al op cit note 254; see also section 164(5), and section 37(8) which indicates that the dissenting shareholder needs to give advance notice of their intention to object and section 115(8) notice is required before any further action can be taken in terms of any other triggering events.

²⁷⁰ HGJ Beukes op cit note 216 at 182; see also FHI Cassim et al op cit note 2 at 801.

²⁷¹ FHI Cassim et al op cit note 254.

²⁷² HGJ Beukes op cit note 266.

²⁷³ Section 164(5) of Act 71 of 2008; see also HGJ Beukes op cit note 270.

shareholder may not be able to use some of his voting rights for the resolution and some against.²⁷⁴

In terms of Canadian jurisprudence, it is quite the opposite. The CBCA authorises partial dissent, as s190(4) stipulates that a dissident may be able to dissent on a class of shares. Thus, if shareholders have other class shares, the Appraisal right will be operable only on the class that the shareholders choose to appraise.²⁷⁵ Some case considerations have allowed an ‘informal letter’ as a means of notifying the company of the objection and found in favour of dissidents.²⁷⁶

3.4.4. Notice of Adoption of the Resolution

The Appraisal right is only afforded if there is a trigger event. In terms of the New Act under s164(9)(c) a company can revoke the resolution at any time and thus, the right will no longer be applicable.²⁷⁷ The right also is subsequently no longer applicable if at the meeting the dissenting shareholders decide that they will no longer be objecting or withdraws their demand.²⁷⁸ Canadian jurisprudence requires a simple ‘stop’ in any further Appraisal proceedings on the part of dissent.²⁷⁹

Once the meeting has finalised and the resolution has been adopted, the New Act requires that notice be given within ten business days.²⁸⁰ This notice also needs to be circulated amongst those shareholders who have either objected, withdrew the notice or voted in favour of the resolution.²⁸¹ However, should notice not be given the company will not endure any adverse effects.²⁸²

3.4.5. Demand

At this stage, the dissenting shareholders would have complied with all the procedural requirements relating to the Appraisal right. The resolution, in theory, has been adopted and the dissenting shareholders can now demand that the company buy them out by purchasing the

²⁷⁴ Ibid.

²⁷⁵ Section 190 (4) of the Canadian Business Corporations Act.

²⁷⁶ *Jepson v. The Canadian Salt Company Ltd* (1979), 7 B.L.R. at184.

²⁷⁷ Section 164 (9) (c) of Act 71 of 2008.

²⁷⁸ Section 164 (9) (b) of Act 71 of 2008; see also FHI Cassim et al op cit note 2 at 803.

²⁷⁹ KP McGuinness *The Law and Practice of Canadian Business Corporations* 2 ed (2007) 1037.

²⁸⁰ Section 164 (4) of Act 71 of 2008; see also FHI Cassim et al op cit note 2 at 801.

²⁸¹ Ibid.

²⁸² FHI Cassim et al op cit note 280.

shares they acquired. To be successful in the demand process, the dissenting shareholders must have complied with the following:

1. ‘The shareholder must have sent a notice of objection;
2. Subsequent to the above, the resolution must have been adopted by the company;
3. The dissenting shareholder must have voted against the resolution, as abstinence in the voting process will not suffice;
4. The dissenting shareholder must have complied with all the procedural requirements of Section 164; and
5. In the event of an amendment of the company’s Memorandum of Incorporation in order to alter a class of rights, the dissenting shareholder must hold shares of a class that is materially and adversely affected by the amendment’.²⁸³

It is noteworthy that prior to the enactment of the New Act the draft bill required, as stated earlier in this chapter, a less than 75 percent support of the resolution threshold and thus, if this was exceeded, the dissenting shareholders had lost all right to make such demand.²⁸⁴ Once the abovementioned requirements are fulfilled in its entirety, the dissident, in terms of s 164(7), must deliver the demand to the company within twenty business days after receiving a notice of adoption of the resolution or failing receipt of same by the shareholder, within twenty business days after learning of the adoption of such a resolution.²⁸⁵

It should be clear at this stage that the dissident has no intention to be party to the company’s transactions and thus, legislature has stated that once the demand has been given, the dissident ceases to have any rights with regards to the shares, other than to be paid out a fair market value.²⁸⁶ Canadian courts have allowed shareholders the right to challenge oppressive actions.²⁸⁷ It has been suggested that, should domestic legislature incorporate this view, dissenting shareholders may still be able to apply for s163 ‘Oppression remedy’ recourse, even after the demand is given.²⁸⁸

²⁸³ Ibid.

²⁸⁴ GN 166 GG 29630 of 12 February 2007, clause 165(4)(c); see also FHI Cassim et al op cit note 280.

²⁸⁵ FHI Cassim et al op cit note 280; see also HGJ Beukes op cit note 216 at 160.

²⁸⁶ Section 164(9) of Act 71 of 2008.

²⁸⁷ *Brant Investments Ltd v Keeprite Inc* (1983) 44 OR (2d) 661 (Ont HC) at 664.

²⁸⁸ HGJ Beukes op cit note 216 at 187; see also FHI Cassim et al op cit note 2 at 802.

3.4.6. Offer by the Company

Once the demand is sent, the company needs to revert to the dissenting shareholders, within a period of five days, preceding the demand with an offer that is to be determined by the directors at a fair market value price. Such price will use the date and time prior to which resolution was passed and afforded the dissenting shareholders the Appraisal right.²⁸⁹ The offer needs to be specific to the shares that are demanded to be purchased by the company.²⁹⁰ The offer, if made, lapses within a period of 30 days from the date after the offer is made.²⁹¹

Canadian case law has pointed out a crucial aspect with regards to the offer that is given to the dissident. The offer needs to be a true fair value offer and not what the company views as a minimum value. Thus, the value needs to be appropriate in accordance with the economic standpoint at the time that the offer is made.²⁹²

It is noteworthy, as stated before, that the company suffers no consequence should written notice not be adequately sent to dissenting shareholders, if at all.²⁹³ This shows a legislative oversight or an ‘imbalance’ of requirements. The right in itself offers no protection against unfairness and deliberate hindrance on the part of the controlling parties of the company.²⁹⁴

The disadvantage that the company suffers is the eventuality of not being able to afford the amount that the dissenting shareholders are entitled to for a number of reasons.²⁹⁵ If the offer is inadequate, the dissenting shareholders may apply for judicial intervention for the determination of fair market value, provided that the offer has not prescribed.²⁹⁶ The right to appear before a judicial officer is not automatic and only occurs when conflict arises between the dissenting shareholders and the company when determining what fair market value should be.²⁹⁷ It has been suggested by Cassim²⁹⁸ that this is one of the ‘finer structures’ available with the Appraisal right.

²⁸⁹ Section 164 (11) of Act 71 of 2008 subject to the provisions contemplated in section 164 (16).

²⁹⁰ MF Cassim op cit note 183 at 160.

²⁹¹ FHI Cassim et al op cit note 2 at 804.

²⁹² *Ford Motor Company of Canada Ltd v Ontario Municipal Employees Retirement Board* (1997) 36 OR (3d) 384 (Ont CA) at 401.

²⁹³ MF Cassim op cit note 183 at 164.

²⁹⁴ Ibid.

²⁹⁵ HGJ Beukes op cit note 216 at 187- 188; see also J Yeats op cit note 47.

²⁹⁶ MF Cassim op cit note 183 at 160.

²⁹⁷ FHI Cassim et al op cit note 2 at 805.

²⁹⁸ Ibid.

This application will be curtailed if the offer was duly accepted, however, the dissenting shareholders that did not accept it will join the application and the court may also instruct that certain parties be joined, even after the application has been moved.²⁹⁹

The above is a great possibility and legislature does afford the company adequate protection against such eventuality. The offer needs to be a fair market value, regardless of the company's ability to pay, however, once the offer is accepted, the company may apply to court to have the obligation varied on reasonable grounds that the company is unable to pay its debts within the next year.³⁰⁰ We can see at this stage that there are a limited number of outcomes when the offer is made and should the offer be adequate it will be accepted and, if not, the dissenting shareholders do have the option of judicial intervention for determination of such.

3.4.7. Acceptance of the Offer

Once an offer is made, provided that the dissenting shareholders find the offer appropriate and suitable to the fair market value, the offer must be duly accepted.³⁰¹ At this point the dissenting shareholder has accepted his/her exit and upon doing so needs to give to the company what was purchased. There are in fact two eventualities that will follow dependent on the type of shares the dissenting shareholders obtained by becoming a shareholder of said company.

In terms of s164(13)(a); the shareholder must either in the case of-

- (i) shares evidenced by certificates, tender the relevant share certificates to the company or the company's transfer agent; or
- (ii) uncertified shares, take the steps required in terms of section 53 to direct the transfer of those shares to the company or the company's transfer agent.³⁰²

From the wording set out in the New Act and judicial interpretation, we can deduce that the offer need not be accepted via written notice but rather by the handing over of the once-acquired shares.³⁰³ It should be duly noted that courts will not endorse the Appraisal right of dissenting

²⁹⁹ Sections 164 (15) (a), (b), (c) (i) of Act 71 of 2008.

³⁰⁰ HGJ Beukes op cit note 216 at 188; see also J Yeats op cit note 47 at 334.

³⁰¹ FHI Cassim et al op cit note 2 at 805; see also section 164 (13) read with ss 12.

³⁰² Sections 164 (13) (a)(i) and (ii) of Act 71 of 2008; also see FHI Cassim et al op cit note 2 at 805; see also J Yeats op cit note 47 at 334, 335.

³⁰³ *Justpoint Nominees (Pty) Ltd & others v Sovereign Food Investments Limited & others (BNS Nominees (Pty) Ltd and Others Intervening)* 2016 ZAACOEHc para 5.

shareholders who use the remedy to frustrate the ‘Sovereigns legitimate business strategies and initiatives.³⁰⁴ If this is found to be the issue, the court will order that the shares be reinstated to the dissenting shareholders.³⁰⁵

The dissenting shareholder upon acceptance will have to tender their shares, within a period of 30 days, in order for the offer to not lapse.³⁰⁶ The company, once notified of the acceptance, will have a period of ten days to pay out the amount that was offered if not the offer will lapse and the dissenting shareholders will be put in the same position they were in prior to the dissent.³⁰⁷

The next part of this dissertation shall explore the scenario of the offer not being accepted by the dissenting shareholders as the amount that is offered by the company is seen as inappropriate, insufficient or not made at all.

3.4.8 Determination of ‘Fair Market Value’

The point of the Appraisal right is to allow the dissenting shareholders the ability to avoid a risk that they no longer want to be associated with.³⁰⁸ If the Appraisal right allows risks in the application of the right the intention and purpose of the remedy would be, in effect, futile. Hence, legislature when drafting afforded the appraiser the right to approach courts, prior to the offer lapsing,³⁰⁹ for a determination of what the offer can be and not what the offer is. The New Act further iterates that importance of ‘fair’ by allowing the courts to make an order that shall affect the payment and avoid any further detriment or frustration on the part of the dissenting shareholders.³¹⁰

It should be noted at the start that there is no standard method that the court may apply when determining ‘fair value’. It has been suggested that ‘fair value’ is not one value but comprises of numerous values and the court will determine, in terms of legislature, ‘a fair value’ and not ‘the fair value’.³¹¹ This illustrates the lack in definition with regards to what can be regarded as a ‘fair

³⁰⁴ Ibid para 26.

³⁰⁵ Ibid para 26.

³⁰⁶ FHI Cassim et al op cit note 2 at 804; see also section 164 (12) (b) of Act 71 of 2008; see also J Yeats op cit note 47 at 335, 336.

³⁰⁷ Ibid.

³⁰⁸ V BrudneMA Chirelstein op cit note 203 at 299.

³⁰⁹ FHI Cassim et al op cit note 291.

³¹⁰ Section 164 (14) of Act 71 of 2008.

³¹¹ FHI Cassim et al op cit note 2 at 808.

value'. It has been stated by authors such as Yeats³¹² that the burden of proving that the value made is in actual fact fair, is in the controlling hands of the company and this has to be shown to the court.

The court, in addition, will have to make further orders, relating to the shareholders, when required to determining fair value. These orders will comprise of the following:

- 'requiring the dissenting shareholders to either accept the 'fair value' determined and execute due transfer or withdraw their demands;
- requiring the company to pay such 'fair value' to each dissenting shareholder who has accepted the determination and transferred their respective shares back to the company'.³¹³

The above shows the mutual relationship that the company and shareholders have, which is founded on the acquisition of shares. Even though the court will make a determination on the requested 'fair value', should there be an unwillingness of the part of all or some of the dissenting shareholders to accept such determined value, they will be reinstated as shareholders of the company as it has been reconstructed and with that will be the associated risks and changes the dissenting shareholders sought to avoid.³¹⁴ Thus, concluding the objection on the part of the dissenting shareholders.

The Appraisal remedy is a very well-constructed but inadequately legislated piece of work. It has the ability to be a great source of protection for dissenting shareholders, however, the lack of proper direction may lead to its inevitable detriment.

3.5. Conclusion

As seen above, the Appraisal right is a fairly new and 'interpretive' piece of legislation. It is a first-world remedy that now finds its application in our domestic law. Its procedure is technical and rigid and allows no flaws however, it is not widely used in South Africa yet, and hopefully

³¹² J Yeats *The Effective and Proper Exercise of Appraisal Rights under the South African Companies Act, 2008: Developing a Strategic Approach through a Study of Comparable Foreign Law* (unpublished PhD thesis, UCT 2016) 30.

³¹³ FHI Cassim et al op cit note 2 at 805.

³¹⁴ Ibid.

the courts and the legal minds will be able to make its application easy, efficient and less restrictive.

The positive aspect of its introduction into our domestic law is the ‘option’ that it now gives shareholders. In some cases, a company will not be able to function if shareholders had not invested and seen hope and a good market choice when investing. This now allows shareholders the ability to remove themselves from a once good investment to a current bad investment based on eventualities that investors hate to predict.

The Appraisal right shows promise however, it does not cater for all-round protection. The remedy, as seen above, places very little to no consequences on a company as a whole and yet this is what the purpose of the remedy is - to make the controlling parties answerable and liable for their misdemeanors and cut-throat business attitudes.

The other problem with the Appraisal right is the notice requirements it lacks rigidity and is too broad. It allows room for frustration and encourages futile time wastage on the part of either party. The notice requirements should be the most stressed function of any right as this allows the other party to adequately prepare and from the name itself, ‘appraise themselves’ on the progress of their right application.

The remedy, as stated above, is new and its development shall be shown in time and practice, however, the real question still remains as to whether it is warranted in our domestic law or not.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

The economic environment is complex and competitive however, fair competition and decision making is crucial for its well-balanced existence. The Companies Act 71 of 2008 sought to combine both fair conduct and beneficial gain by providing a comprehensive and detailed set of rules and procedures to govern such conduct. The corporate sector in South Africa is ever-growing hence the need for a diverse and inclusive legal system that allows for wide application. This can be seen by the extension of the Oppression remedy under section 163 and the inclusion of the Appraisal remedy under section 164.

The application and content of the two remedial processes have been discussed in the previous chapters thus leading to two critical questions:

- 4.1.1 Is the extension of the Oppression remedy found under section 163 of the New Companies Act warranted in South Africa? and
- 4.1.2 Is the inclusion of the Appraisal remedy found under section 164 of the New Companies Act warranted in South Africa?

4.1. The Extension of the Oppression Remedy

The extension of Oppression remedy is warranted and much needed. The problem arises when applied. Its predecessor Acts have been seen as restrictive, narrow and not accommodating to all shareholders that have been wronged or experienced foul-play during the decision-making process. The New Act not only encompasses the need for local trust between shareholders but also allows foreign shareholders, future or current, to feel protected and thus encourages foreign investment and faith in our legal system.

The above is true and reflected the need for reform. As stated in chapter two the Oppression remedy is now far-reaching, not only in its application, but in the wording that forms part of the New Act. This shows growth and understanding on the part of legislature of the economic sphere. It has now realised the reality that not only minority shareholders can experience unfairness but also those who form part of the majority but who are not in agreement with the rest of the board. Thus, the extension of locus standi to not just members but broadly shareholders inclusive of directors of a company, who may utilise this remedial process, if they

find themselves disgruntled. One of the first cases to deal with the Oppression remedy is the *Peel* case.³¹⁵ Here the court dealt with a unique and complex set of facts which lead to authors³¹⁶ disagreeing with the court's findings.

The facts, in summary, dealt with the applicants contending that the respondents had conducted themselves in a manner that was unfairly prejudicial and had a result that disregarded their interests. The crux of the matter dealt with Black Economic Empowerment (BEE). The Applicants intended to join the respondent's business which was to be beneficial for both parties. The respondent also had a good reputation preceding them with regards to BEE compliance. The relationship deteriorated to such an extent that both parties no longer wanted to be in business together. The dispute arose from a number of 'sham transactions'³¹⁷ that the respondent concluded to attain a BEE score card. The court then had to determine on what basis s163 applied.

Legal Scholars such as Beukes, HGJ and Swart³¹⁸ disagree with the finding by the court in relation to the application of s163. They are of the opinion that the applicants did not prove that the conduct complained of had the result of unjustly disregarding their interests, which is required by s163(1) of the New Act. This, in summary, meant that the applicants did not abide by the requirements that are set out in the New Act.

The court, however, took a different approach to the above and found the following:

1. Credibility is vital to ensure that a business continues as a successful concern and that the respondents did not dispute the allegation made by the applicant that the BEE transaction was a sham.³¹⁹
2. Non-disclosure of the improper BEE transaction and the fact that it has not been resolved meant that the respondents conduct was unfairly prejudicial to applicants and unfairly disregarded their interests.³²⁰

³¹⁵ *Peel* supra note 101.

³¹⁶ HGJ Beukes HGJ & WJC Swart op cit note 100 at 1690.

³¹⁷ *Peel* supra note 101 para 19.

³¹⁸ HGJ Beukes HGJ & WJC Swart op cit note 316.

³¹⁹ *Peel* supra note 101 para 57.

³²⁰ Ibid para 59.

3. The fact that the BEE transaction was a sham meant that the applicants' reputation would be tainted should they continue business with the respondents and thus, the exposure to such serious risks on the applicants amounted to an unfair prejudice or disregard of the applicant's interests.³²¹

On the face of it, it would seem that the court had applied s163 correctly however, after further analysis by academic authors it would not seem so apparent. The court broadly applied s163 and stated ‘...broaden relief rather than limit it’³²² and this is what the abovementioned authors disagreed with. These scholars are of the opinion that even though the court was correct in broadening the remedy, it was incorrect by applying it to applicants who failed to prove the requirements set out in s163(1). They stated the following:

The Oppression remedy is available only if an act or omission by a company or a person related to the company has had a result that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a shareholder or a director of the company; or if the carrying on of the business of the company, or the exercising of the powers of a director or a prescribed officer of the company is oppressive or unfairly prejudicial to a shareholder or a director of the company. Relief cannot be granted in terms of subsection (2) where the requirements of subsection (1) – the specified statutory criteria - have not been satisfied.³²³

From the above, it is deduced that these legal scholars felt that the court had erred in finding application of s163 in this case and the fact that it is legislatives intention to broaden relief, the requirements that need to be met to find such application should not be ignored. The reason for the authors' disagreement is twofold;

1. The applicants were not shareholders or directors at the time that the conduct complained of occurred and that they had joined after the fact.³²⁴
2. The result that the court felt unfairly disregarded the applicant's interests did not occur but was a speculation on future events should the applicants stay in business with the respondent, such result was not apparent but as stated speculative. The authors also felt that the fact that the court considered serious risk as a result could have detrimental

³²¹ Ibid para 22.

³²² Ibid para 52.

³²³ HGJ Beukes HGJ & WJC Swart op cit note 100 at 1697.

³²⁴ Ibid at 1700.

effects on the proper functioning of the remedy.³²⁵ This meant that the applicants had relied on misrepresentation on the part of the respondent and this did not fulfill the requirements under s163.³²⁶

In conclusion, these legal scholars felt this case should not be regarded as authority for shareholders who want to find application under the Oppression remedy as it clearly indicates that the applicant is not required to be a shareholder or director at the time the conduct complained of is committed. This is rather an example of how a company can be exposed by a related person how important it is for the company to assess how the conduct of other companies in the group will impact it.

Cassim³²⁷ is also of the opinion that in order for an applicant to find success under this remedy, the conduct that is complained of needs to be either, conduct that has already occurred or conduct which has been occurring and that there is no room under this section for conduct that is yet to be done.³²⁸

The above shows consistency in the way academic writers interpret the New Act and that the court, in some instances, may apply it incorrectly. This not only shows the need for clearer legislative writing but also the need for proper guidance and training on judicial level to ensure that acts are being applied correctly and not misinterpreted.

In more recent case law, it has been stated that the court is not required to look at the motive of the alleged conduct but rather the conduct itself and examine the effect that such conduct has had on the applicants or other members of the company.³²⁹ It has further been stated that the applicant cannot found his or her allegation on grounds that are not founded or leave the court to determine the risks associated with such anticipated Oppression.³³⁰ The courts have integrated the interpretational approach of the word ‘conduct’ which previous courts dealing with the remedy, under the Old Act, took. In *Re Five Minute Car Wash Service Ltd (Five Minute Car*

³²⁵ HGJ Beukes HGJ & WJC Swart op cit note 100 at 1701.

³²⁶ Ibid.

³²⁷ FHI Cassim et al op cit note 2.

³²⁸ Ibid at 766.

³²⁹ *Grancy Property Limited v Manala* (665/12) [2013] ZASCA 57 13] ZASCA 57 para 27.

³³⁰ *Louw v Nel* 2011 (2) SA 172 (SCA) para 23.

*Wash)*³³¹ the court stated that the loss of confidence in a company's dealings does not render the company acting in a manner that is unfairly prejudicial or oppressive.³³²

The above shows the court following a restrictive approach to the Oppression remedy by envisioning the thoughts of various academic approaches to the remedy's requirements. It also shows that judicial certainty is attained by continuous and consistent application and interpretation. It further indicates the unwillingness of courts to accept anticipated Oppression and their willingness to restrict the remedy to avoid misuse.

The Oppression remedy in other jurisdictions is far wider in application than the remedy found under our New Act however, it is, in my opinion, that time and thorough juristic application will either insist on further extension or approve of its current standing in our law. The current position needs to however, be applied with accuracy and ensure that the intention of legislature is met. The courts should not allow the remedy to be misused and the floodgates to be opened to persons who cannot be rightful applicants just because legislature intended the New act to be broader than its predecessor acts. There are certain requirements and guidelines which need to be complied with first.

4.1.2 Recommendations

The Oppression remedy has undergone much development in terms of the New Act. The writer is of the view that there need not be any further changes to the act but rather clarity with regards to issues such as locus standi, and the concept of anticipated Oppression. It seems as though legislature had an idea of how to correct the Oppression remedy but not on how judiciary may apply it. As can be seen above too much judicial discretion may lead to much uncertainty, as what one may court may deem as falling within the scope of the remedy, another may not.

The writer submits that should the remedy be available to non-members/shareholders it would lead to external interference on the controlling parties. As the controlling members have more factual knowledge on the daily running of the business and the reasons behind their decisions, which may not always be accompanied by immediate gain. This will lead to companies opening up their decision-making process to the public for scrutiny.

³³¹ *Re Five Minute Car Wash Service Ltd* (1966) 1 All ER 242.

³³² Ibid at 246.

The concept of anticipated Oppression is a term that cannot be tamed. There are always risks involved in the business sphere and for the New Act to cover all such eventualities is near impossible and would detract from the remedy's main purpose and aim, which is to protect shareholders when they are disgruntled and not when they think they 'may be' disgruntled. This will allow numerous claims to be lodged and extensive court investigation into matters that may not have any cause. This will again lead to misuse and abuse of the remedy and eventually a nuisance for judicial officers and the applicants.

If an applicant wants to exit a business or claim damages from a company, they will eventually be a part of there are other legal avenues such as contract, delict and other remedial actions that may be instituted other than the expansion of one remedy to encompass all.

4.2. The Inclusion of the Appraisal Remedy

This type of remedy is an extremely new addition to our law. It is a facet of law that has been adapted by legal system from far more advanced countries, thus its inclusion has brought differing opinions. In my opinion, this is a big leap of faith in our judicial system. Successful application will depend on experience and judicial discretion. Proper application will depend on research over foreign legal systems that have long-standing experience when adjudicating matters using the Appraisal remedy.

The writer concurs with legal scholars³³³ who are of the view that the inclusion of such a remedy, even though noteworthy, is risky and its overall use may vary depending on the economic environment in which it is sought and the availability to disgruntled shareholders. This type of remedial action would work well in advanced financial environments whereby there is no fear on the part of companies when this type of remedy is sought. The Appraisal remedy has one main aim and that is to determine the fair value of the shares to be bought.³³⁴ Foreign jurisprudence have not given a precise definition as to what can be regarded as 'fair value' but rather courts use

³³³ B Manning op cit note; see also J Yeats op cit note 47 at 328; see also M Siegel 'Back to the future: Appraisal rights in the Twenty-First Century' (1995) Vol 32, *Harvard Law Journal*; see also E Davids et al 'A microscopic analysis of the new merger and amalgamation provisions in the Companies Act 71 of 2008' in Tshepo Mongalo (ed) *Modern Company Law for a Competitive South African Economy* at 360-361.

³³⁴ JC Coates IV "Fair value" as an avoidable rule of corporate law: Minority discounts in conflict transactions' (1999) 147 (6) *University of Pennsylvania Law Review* 1257.

a host of methods and valuation techniques introduced either by legal counsels or legal scholars.³³⁵ Thus, following this way of drafting legislature, under domestic law, have not given direction as to what can be determined as fair value, but rather allows the court power to appoint appraisers for assistance.³³⁶

Lack of application to court under this section in South Africa leaves very little case evaluation³³⁷. However, the recent *Loest v Gendac (Pty) Ltd and another (Loest)*³³⁸ judgment has shed some light on the application of the Appraisal right in terms of allowing the applicants access to certain financial records for the proper determination of the share value and successful execution of the Appraisal right.

The writer opines that the court had correctly evaluated whether or not s164 allows an applicant access to financial records, prior to making a court application, for the determination of ‘fair value’. The court by indicating that the applicant did not lose his right as a shareholder by mere election to engage in the protection afforded under the section³³⁹ showed understanding and correct interpretation of s164. The court however had shown relaxation on the requirements, prior court intervention, which needed to be complied with for the dissenting shareholder to be a valid applicant.³⁴⁰ Even though the court’s reasoning was founded on the fact that it was not required, it is still an important aspect that needs to be complied with for the s164 dissenting shareholder to be a valid applicant. The court further pointed out that the requirements found under s164 is ‘...cumbersome’,³⁴¹ however it did not lose sight of the fact that the applicant tried to engage action against the respondents as a ‘...pre-action discovery’.³⁴²

The above case demonstrates the courts unwillingness to allow misuse of the Appraisal remedy. This is a clear indication of the strict and narrow approach the court will take when determining what is allowed and disallowed under the section.

³³⁵ Ibid at 1251; see also *Weinberger v. UOP, Inc.* 457 A.2d 701,713 (Del. 1983).

³³⁶ FHI Cassim et al op cit note 2 at 805.

³³⁷ J Yeats op cit note 47 at J 339.

³³⁸ *Loest v Gendac (Pty) Ltd & another* 2017 (4) SA 187 (GP).

³³⁹ Ibid para 13.

³⁴⁰ *Loest v Gendac (Pty) Ltd & another* 2017 (4) SA 187 (GP) para 15.

³⁴¹ Ibid para 20.

³⁴² *Loest v Gendac (Pty) Ltd & another* 2017 (4) SA 187 (GP) para 35.

The lack of judicial application, in essence, indicates that courts will have to consult foreign judgments in order to hone application skills and knowledge on how such a determination is to be made and the methods that can and should be used in order to arrive at a fair and just value.

Under Canadian Jurisprudence *Cyprus Anvil Mining Corp. v. Dickson (Cyprus)*³⁴³ is the leading case when determining fair value. The court points out the following on the aspect of fair value:

‘... the problem of finding fair value of stock is a special problem in every particular instance. It defies being reduced to a set of rules for selecting a method of valuation, or a formula or equation which will produce an answer with the illusion of mathematical certainty. Each case must be examined on its own facts, and each presents its own difficulties. Factors which may be critically important in one case may be meaningless in another. Calculations which may be accurate guides for one stock may be entirely flawed when applied to another stock. The one true rule is to consider all the evidence that might be helpful, and to consider the particular factors in the particular case, and to exercise the best judgment that can be brought to bear on all the evidence and all the factors. I emphasize: it is a question of judgment. No apology need be offered for that. Parliament has decreed that fair value be determined by the courts and not by some formula that can be stated in the legislation... In summary, it is my opinion that no method of determining value which might provide guidance should be rejected. Each formula that might prove useful should be worked out, using evidence, mathematics, assessment, judgment or whatever is required. But when all that has been done, the judge is still left only with a mixture of raw material and processed material on which he must exercise his judgment to determine fair value...’³⁴⁴

The writer submits that the main problem besides lack of experience on the part of the judiciary, is the Rand value when compared to other countries. South Africa has many foreign investors who, at any time, may pull out from their investments based on our social and political standings. This would not only set South Africa back economically, but also has a huge impact on the common man who already finds himself living beyond his means. The success of this remedy or, rather, the use of this remedy may not be a first choice, if ever, when companies are dealing with

³⁴³ *Cyprus Anvil Mining Corp. v. Dickson* (1986), 8 B.C.L.R. (2d) 145 (C.A.).

³⁴⁴ Ibid at 652; see also J Yeats *The Effective and Proper Exercise of Appraisal Rights under the South African Companies Act, 2008: Developing a Strategic Approach through a Study of Comparable foreign Law* (unpublished PhD thesis, UCT 2016) 110 – 111.

shareholders, thus placing pressure on the controlling parties to maintain good relationships between all shareholders, which can be seen as a positive.

The main idea legislative sought to encapsulate when drafting the New Act is the need for sufficient and adequate protection for shareholders. However, there are gaps and uncertainty when dealing with the Appraisal remedy and this will only be rectified in time or end up making the remedy redundant. The Oppression remedy however, shows promise and sends faith to existing shareholders in our legal system and the way that it intends on developing however, judicial officers need to be mindful when interpreting its scope of application to avoid the remedy being misused and abused.

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