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Exploring The Concept of Unfairly Prejudicial Conduct as A Minority Shareholder Remedy Under the South African Company Law

LLM dissertation submitted to the School of Law, University of Venda

BY

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DECLARATION

I, **Mathabi Livhuwani (Student No. 150003367),** hereby declare that this dissertation, for the LLM degree at the University of Venda, is my own work and has not been submitted previously at this university or any other university, and that it is my own work. All reference material contained herein has been duly acknowledged.

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DEDICATION

This is dedicated to Tsireledzo Edmond Ndou; thank you for believing in me.

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TABLE OF CASES

CASE LAW

- *Aspek Co. Ltd v Mauerberger and Others* 1968 (1) SA 517 (C).
- *Anderson v Hogg* 2000 SLT 634.
- Atlasview Ltd v Brightview Ltd [2005] EWHC 1056 Ch 35.
- *Bayly v Knowles* 2010 (4) SA 548 (SCA).
- BCE Inc v 1976 Debentureholders 2008 SCC 69.
- *Budd v Gentra inc* 1998 43 B.L.R (2d) 43.
- Civils 2000 Holdings (Pty) Ltd v Black Empowerment Partner Civils 2000 (Pty) Ltd [2011] 3 All SA 215 (WCC).
- *Cinematic Finance Ltd v Ryder* [2010] EWHC 3387 (Ch).
- Constable v Executive Connections Limited 2005 EWHC 3 (Ch).
- *Cotter v National Union of Seamen* (1927) 29 LI.L. Rep 61.
- *Cook v Deeks* [1916] 1 AC 554.
- *Dadoo Ltd v Krugersdrop Municipal Counci* 1920 AD 530 at 550.
- *Daniels v Daniels* [1978] Ch 406.
- *Desousa and Another v Technology Corporate Management (Pty) Ltd and Others* [2017] 3 ALL SA 47 (GJ).
- *De Villiers v Kapela Holdings (Pty) Ltd and Others* [2016] ZAGPJHC 278 (14 October 2016).
- De Klerk v Ferreira and Others 2017(3) SA 502 (GP).
- *Edwins v Halliwell* [1950] 2 ALL ER 1064.
- Elder v Elder & Watson Ltd [1952] SC 49.
- Foss v Harbottle (1843) 2 Hare 461.
- Garden Province Investment v Aleph (Pty) Ltd 1979 (2) SA 525 (D).
- *Gay v Gay Supermarkets Inc* 343 A.2d 577 (1975).
- *Geffen and Others v Martin and Others* [2018] 1 ALL SA 21 (WCC).
- Grancy Property Ltd v Manala 2015 (3) SA 313 (SCA).
- *Goodall v Hoogendoorn Ltd* 1926 AD 11 at 16.
- *Hillcrest Village (Pty) Ltd and Another v Nedbank Limited and Others* [2008] ZAGPHC 134
- *Hlumisa Investments Holding Limited and Another v Kirkins and Others* (2019) (4) SA 569 (GP).
- *Hoole v Greta Western Railroad Co* (1867) 3 Ch App 262.
- In Re Autobody Rinyway Limited (2018) EWHC 2336 (Ch).
- *Itzikowits v ABSA Bank Ltd* 2016 (4) SA 432 (SCA).
- *Jesner v Jarrod Properties* [1992] BCC 807.

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- *Johnson v Gore Woods & Co* [2000] 2 AC 1.
- *Khan and Another v Communicare and Others* [2011] ZAWCHC 392.
- *Kudumane Investment Holding Ltd v Northern Cape Manganese Co (Pty) Ltd* [2012] ZAGPJHC 116 C
- *Ko¨nig v Hobza* (2014), 326 O.A.C. 213, 2014 ONCA 691.
- Labuschagne v Denny 1963(3) SA 538 (A)
- *Lewis Group Limited v Woollman and Others* [2017] ZAWCHC 15.
- Letseng Diamonds Ltd v JCI Ltd and Investec Ltd [2007] ZAGPHC 119.
- London and Others v Department of Transport Roads and Public Workers of Northern Cape and Others [2018] ZANCHC 32.
- MacDougall v Gardiner (1875) 1 Chd 13.
- Manning River Co-operation Diary Co Ltd v Shoesmith & Another [1915] 19 (LR 714 (HC).
- *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA).
- *McLelland v Hulett and Others* 1992(1) SA 456 (A &CLD) at 467I.
- *Minister of Law & Order v Kadir* 1995 (1) SA 303 (A).
- Morgan v 45 Fiers Avenue (Pty) Ltd 1986 ACLC 222.
- Motale v Abahlobo Transport Services (Pty) Limited and Others (2015) JOL 34696 (WCC).
- *Mouritzen v Greystone Enterprise (Pty) Ltd* [1980] 2 ALL ER 841.
- Oakland Nominees (Pty) Ltd v Gelvia Mining & Investment Co (Pty) Ltd 1976 (1) SA 441 (A)
- *O'neill v Phillips* [1999] WLR 1092, 1098.
- *Pavlides v Jensen* [1956] 2 ALL ER 518.
- *Peel v Hamon J&C Engineering (Pty) Ltd* 2013 (2) SA 331 (GSJ).
- *Pender v Lushington* 1877) 6 Ch D 70.
- *Prudential Assurance Co Ltd v Newman Industries Ltd (NO:2)* 1982.
- *RA Noble & Sons Clothing Ltd* [1983] BCLC 273 at 290.
- Re a Company 007828 (1986) BCC.
- *Re a Company* [1983] 2 All ER
- Re Dinglis Properties Ltd, Dinglis v Dinglis [2020] EWHC 1363 (Ch).
- Re Spargos Minining NL (1990) 3 ACSR 1.
- Re Tobian Properties Ltd, maidment v Attwood (2015) 2 567 CA.
- *Rock Nominees Ltd v RCO (Holdings) Ltd* [2004] 1 BCLC 439 CA.
- *S v Makwanyane* 1995(6) BCLR 665.
- *Salmon v Salmon* [1896] UKHL 1.
- Scottish Co-operative Wholesale Society Ltd v Meyer [1959] A 324 HL.
- Smith v Croft (no 2) [1988] CH 114.
- *Smuts v Booysens* 2001(4) SA 15 (SCA).
- Smyth and Others v Investec Bank Limited and Another [2018] 1 all SA 1 (SCA).

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- Standard Bank Nominees Rf (Pty) Ltd and Others v Hospitality Property Fund Ltd 2020 (5) SA 224 (GJ).
- Sammel & Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 679F-H.
- *Tahir v Faizi* [2019] EWHC 1627 (QB).
- *Trinity Asset Management and Others v Investec Bank* 2009 (4) SA 89 (SCA).
- *TWK Agriculture Ltd V NCT Forestry Co-operative Ltd and Others* [2006] ZAKZHC 17.
- Utopia Vakansie-Oorde Bpk v Du Plessis 1974 (3) SA 148 (A).
- Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others 2014 (5) SA 179 (WCC).
- *Westerhuis v Whittaker and Others* (4145/2017) [2018] ZAWCHC 76 (26 April 2018).
- Wilson v Alharayeri 2017 SCC 39.
- *Zempilas v J N Taylor Holding Ltd (in liq) (No 6)* (1991) 5 ACSR 28.

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TABLE OF STATUTES

- Companies Act of 2006
- Companies Act 46 of 1926.
- Companies Act 61 of 1973.
- Companies Act 71 of 2008
- Corporation Act 2001.
- Close Corporation Act 64 of 1984.
- The Constitution of the Republic of South Africa Act 108 of 1996.
- The Promotion of Administrative Justice Act 3 of 2002.

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Contents

DECLARATION ii

ACKNOWLEDGEMENTS iii

DEDICATION iv

TABLE OF CASES v

TABLE OF STATUTES viii

1. Introduction 1

  1.1 Brief background 1

2. Statement of the problem 2

3. Hypothesis 3

4. Aim 3

5. Objectives 3

6. Research Questions 4

7. Proposed Methodology 4

8. Scope of the work 5

9. Justification for the work 6

10. Literature Survey 6

11. Definition of Key Concepts 18

  11.1 Directors 18

  11.2 Majority shareholder 18

  11.3 Minority shareholder 18

  11.4 Unfair prejudicial conduct 18

  11.5 Proper plaintiff 19

  11.6 Memorandum of incorporation 19

  11.7 Majority rule 19

12. Proposed Structure 19

13. Limitations of The Study 21

14. Ethical Considerations 21

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15. Research Timeline **22**

16. Budget **22**

Chapter Two: The Rule in *Foss v Harbottle* **27**

2.1 Introduction **27**

2.2 The Rule in *Foss v Harbottle* **28**

2.3 Dissecting the Judgment in *Foss v Harbottle* **32**

2.3.1 The Proper Plaintiff Rule **32**

2.3.2 The Majority Rule **35**

3. Justification for the rule in *Foss v Harbottle* **37**

3.1 Double Jeopardy or Double Recovery **37**

3.1.1 Reflective loss 39

3.2 Ratification Principle **42**

3.3 Multiplicity of Action **42**

3.4 Judicial Non-interference in the internal affairs of a company **43**

4. Exceptions to the Rule in Foss v Harbottle **45**

4.1 The Derivative Action **45**

4.1.1 The requirements of a derivative action 48

Good faith 48

The best interest of the company 50

4.2 Ultra Vires **52**

4.3 Special Resolution **53**

4.4 Fraud on the minority **54**

4.5 Injury to personal rights **56**

5 Conclusion **56**

Chapter 3: The Minority Shareholder Remedy **58**

3.1 Introduction **58**

3.2 The History of Minority Protection **58**

3.3 Minority Shareholder Remedies **60**

3.3.1 Dissenting Shareholder Appraisal Rights **61**

3.3.2 Relief from Oppressive or Prejudicial Conduct or from Abuse of Separate Juristic Personality of Company. **63**

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3.3.2.1 What Has Changed 64

3.3.3 Prohibited Conduct Under Section 163 65

3.3.3.1 What is meant by Conduct? 66

3.3.3.2 Oppressive Conduct 66

3.3.3.3 Unfairly Prejudicial Conduct 68

3.3.3.4 Conduct That Unfairly Disregards the Interest of the Shareholder 74

3.4 Conclusion 76

Chapter 4: Comparisons of Judicial Pronouncements and laws in relation to the unfair prejudicial conduct as a shareholder remedy. 78

4.1 Introduction 78

4.2 Comparisons of Laws 79

4.2.1 Australia 79

4.2.2 United Kingdom 83

4.2.3 Canada 90

4.3 Conclusion 95

Chapter 5: Conclusion and Recommendations 96

5.1 Conclusion 96

5.2 Recommendations 98

5.3 Suggestion for Future Research 98

6. Bibliography 99

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Abstract

The South African Constitution recognises freedom of association. Generally, persons associate to form a company, but not all those that form a company are involved in the management of a company. Instead, management decisions are taken by the board of directors, and in some cases by the majority shareholders. It is a well-known principle that when one intends to be a shareholder in a company, he/she agrees to be bound by the decisions of the board or the majority of the members. In the corporate world, the directors of a company are faced with decision-making on a daily basis. Some of these decisions may not be favourable to the interests of the minority shareholders and the company. However, the law insists that only the company, through the board or the majority shareholders, can seek relief. That is the stringent common law rule in *Foss v Harbottle*. The quest to mitigate the burden placed on the minority shareholders by the application of that rule has led to the evolution of the remedy against oppression, which is now codified in section 163 of the Companies Act 71 of 2008.

This research examines the efficiency of section 163 of the Companies Act 71 of 2008 in ensuring the protection of minority shareholders' interests with regards to unfair and oppressive conducts of the majority in the conduct of a company's affairs. The researcher adopted a doctrinal approach in this work, which requires a focus on existing literature to discover the extent to which the interests of the minority shareholders are protected in a company's affairs. A comparison is made between the South African Companies Act provision in section 163 and that of the other countries as well as judicial pronouncements in these jurisdictions, to determine the advances which the South African law has made in affording protection to minority shareholders beyond the common law precept.

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CHAPTER ONE

1. Introduction

1.1 Brief background

A company is formed by persons who contribute to the assets of the company. However, not all of them are involved in the management of the company. In the corporate world, directors, who are very often among the majority shareholders or appointed by such shareholders, are vested with the powers of conducting the company's affairs, which invariably involves decision making on a daily basis. This often leads to a conflict between minority shareholders and majority shareholders' interest. It is common cause that the majority will always prevail in decision making;[1] and often leaving the minority shareholders running the risk of having their interest trampled upon by the majority.[2] A company is "a separate entity having the capacity to sue and be sued".[3] This means that the company is the *proper plaintiff* to complain of a wrong done to it.[4] The directors of a company are controllers of the company and very often hold the majority of the shares. Therefore, the minority shareholders are again faced with a possible prejudice or unfair conduct towards their interests.[5]

At common law, only the company can complain of a wrong done to it.[6] However, later stage was section 252 of the 1973 Companies Act introduced.[7] This section was the first attempt in providing relief for the minority shareholders outside the common law.[8]

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[1] It is a well-known principle in company law that by becoming a shareholder one is bound by the decisions of the majority. See Westerhuis v Whittaker and Others (4145/2017) [2018] ZAWCHC 76 (26 April), See also *Sammel & Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A).

[2] FHI Cassim, MK Cassim, R Cassim, R Jooste & J Shev Yeats, The Law of Business Structures (2016) Juta & Company (Pty) 444.

[3] FHI Cassim, MK Cassim, R Cassim, R Jooste & J Shev Yeats, The Law of Business Structures (2016) Juta & Company (Pty) 456.

[4] *Foss v Harbottle* (1863) 2 Hare 461.

[5] FHI Cassim, MK Cassim, R Cassim, R Jooste & J Shev Yeats, The Law of Business Structures (2016) Juta & Company (Pty) 458.

[6] *Foss v Harbottle* (1863) 2 Hare 461 see also the proper plaintiff rule.

[7] Companies Act 61 of 1973.

[8] The section provided that, "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

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That section was followed by section 163[9], which provides for a remedy against unfairly prejudicial conduct. This section was a move towards providing some relief to the stringent application of the common law majority rule, the harsh impact of which the parliament had sought to mitigate by the concept of a derivative action, as provided in section 165 of the Act.

When a minority shareholder initiates a derivative action ,under section 165,[10] such a shareholder in a way protects his/her interests indirectly, in that if the wrong done to the company is remedied so are his/her interests are remedied too. However, the derivate action is not the only weapon a minority shareholder can use; there is section 163[11], which provides for personal action against any oppressive or prejudicial conduct. Section 163 forms the crux of this dissertation.

2. Statement of the problem

At common law the test for relief for a minority shareholder's action was based on oppression. How the courts applied or interpreted what constitutes an oppression made it difficult for the minority shareholders to prove their claims, in order to get relief under the common law precepts. The Companies Act has now broadened the scope of the wrongs that could give rise to a minority shareholder's action by including unfair prejudice and disregard of interest. However, these terms have been left undefined in the Act. They are therefore, left to be interpreted in each case, whether a particular conduct against the shareholder falls within the meaning of the given categories. In those circumstance, the law has created some level of uncertainty in the exercise of the minority shareholder's right to action, as the fate of such action rests on the discretion of the courts.

The second gap identified is that in terms of section 163(1)[12] which states that a shareholder can only apply for relief under this section in his/her capacity as a shareholder. As such a person affected in any other capacity (for example as a beneficial owner of shares), cannot seek relief under that provision.

company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him may…make an application to the Court for an order under this section."

[9] Companies Act 71 of 2008.

[10] Companies Act 71 of 2008.

[11] Companies Act 71 of 2008.

[12] Companies Act 71 of 2008.

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In addition to the above restrictions, for the South African law to apply, it must relate to a wrong already done to a shareholder or a continuing wrong. It does not include a for a proposed wrong, for example, if a company is about to take an injurious decision towards a shareholder, a shareholder cannot approach the court to prevent the proposed wrong, and this becomes a problem because the remedy sought after the materialisation of the act may not be adequate.[13]

3. Hypothesis

The Oxford Dictionary[14] defines a hypothesis as, "an idea or an explanation of something that is based on a few known facts that have not yet proven to be true or correct". It provides a second meaning as "guesses and ideas that are not based on certain knowledge." This dissertation is based on the hypothesis that section 163[15] is a better way to protect the minority shareholders in a company than the common law rules. However, it would appear that the courts will be faced with a challenge with regards to identifying the element of unfair prejudice, given the fact that the phrase has been left undefined in the Act. It is a section that needs more scrutiny, given the vast remedies available under it. Due to the wide remedial avenues available, this may create gaps and loopholes that may leave the minority shareholders without recourse.

4. Aim

The aim of this research was to examine the extent that section 163 of the Companies Act 71 of 2008 affords in ensuring protection to minority shareholders in relation to unfair prejudice and oppressive conduct in company operations.

5. Objectives

In her pursuit of the above aim the researcher seeks to achieve the following objectives:

- Trace the history of minority protection from the common law position.
- Justify the need for the protection of minority shareholders in contemporary corporate practices.

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[13] Hence a comparison will be made with section 994 of the UK Companies Act of 2006.
[14] Oxford Dictionary (2012) Oxford University Press 1178.
[15] Companies Act 61 of 1973 see section 252.

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- To determine whether section 163 is effective to protect minority shareholders.
- Compare South Africa's company law with reference to unfair prejudice as a minority shareholder remedy with that of other jurisdictions.

6. Research Questions

Feldt defines research questions, as questions that your research study/project sets out to answer. He contends further that the importance of research questions cannot be overlooked, as they are the focus of one's research, answering one's questions is the main aim of one's study and everything else follows from there.[16]

Having made all the observations given in the brief background above, from the common law provision to recent statutory intervention, the research sought to answer the following questions:

- What was the position in common law with regards to minority shareholder position?
- Why is there a need for minority shareholders in company operations?
- Does a comparison of South Africa and the other jurisdictions, show that section 163 affords sufficient protection to minority shareholders or not?
- How should the judiciary interpret section 163(1) to protect minority shareholders?

7. Proposed Methodology

A methodology is a pathway in which the researcher wishes to conduct his/her research. There are different types of research methodology. Qualitative research methodology, according to Babie & Earl, "emphasises objective movements and the statistical, mathematical, or numeral analysis of data collection through questionnaires and surveys."[17] On the other hand, quantitative research methodology is the converse of qualitative research methodology, "it focuses on gathering numerical data and

[16] Robert Feldt, "Guide to research questions" available at http://www.robertfeldt.net/advice/guide_to_creating_research_questions.pdf (accessed on 12 June 2019).
[17] Babbie, Earl R. *The Practice of Social Research*. 12th ed. Belmont, CA: Wadsworth Cengage, 2010; Muijs, Daniel. *Doing Quantitative Research in Education with SPSS*. 2nd edition. London: SAGE Publications, 2010 also see https://libguides.usc.edu/writingguide/quantitative.

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generalising it across groups of people or to explain a particular phenomenon".[18] Doctrinal methodology, as another form, is concerned with legal prepositions and doctrines. Empirical methodology, as opposed to doctrinal methodology, involves the process of testing a hypothesis using experimental direct or indirect observation and experience.[19]

In doing this dissertation, the researcher made use of the desktop approach which is commonly known as the doctrinal method. This methodology looks at primary and secondary sources, such as case law, statutes, journal articles, books and internet sources etc. A comparison is made between South Africa and other jurisdictions in terms of minority shareholder protection, with particular reference to unfair prejudicial conduct. This comparison extends to judicial pronouncements in these jurisdictions to determine the advances which the South African law has made in affording protection to the minority shareholders beyond the common law principle. In addition, this comparison sought to determine if some of these other jurisdiction provisions cannot be incorporated in the Companies Act 71 of 2008, to best protect minority shareholders.

8. Scope of the work

This research fundamentally speaks to minority shareholder protection and emphasises the need to balance the interests of the majority shareholders with those of minority shareholders in relevant cases. In that sense, the courts should be vigilant to ensure that minority shareholders are protected within the broader corporate interests.

In addressing unfair prejudicial conduct provided for in section 163 of the Act, precedence is drawn from the common law principles; a comparison will be made amongst the Australia, Canada and the United Kingdom frameworks on minority protection as well as South African company law. The chosen jurisdiction for comparisons was done solely because they have similar company operations/legislative pieces like the one in South Africa especially the United

[18]Robert Feldt, "Guide to research questions" available at http://www.robertfeldt.net/advice/guide_to_creating_research_questions.pdf (accessed on 12 June 2019).
[19] Lyndsay T Wilson "Empirical Research" available at https://explorable.com/empirical-research (accessed on 29 July 2019).

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Kingdom, furthermore it is a known fact that English law has been consulted in many occasion to aid where the South African law was silent on a particular aspect. This work seeks to add value in existing literature however it differs completely from other written pieces in that:

- It focuses solely on section 163 whilst other theses focus on minority shareholder protection in general.
- This dissertation seeks to advance incorporation of the advanced provisions of other jurisdiction such as Australia, Canada and the United Kingdom on the protection of minority shareholder to South Africa's company law framework.
- In addition, this research advocates for an amendment in the definitional section to include unfair prejudicial conduct, since it is not defined.

All these shall be done with the primary purpose of discovering the extent of protection that a minority shareholder has under the existing Companies legislation in South Africa.

9. Justification for the work

There is a tendency for majority shareholders to abuse their powers in corporate operations by suppressing the interests of minority shareholders. When the interests of the minority are no longer served, Wang says, "the trust and confidence between the members are irretrievably damaged, the co-operative foundation is undermined."[20] When such 'trust and confidence' is broken, minority shareholders' interests become suppressed as such the law should empower the minority shareholders to seek legal relief. This work has interrogated the adequacies of such relief as provided by the law.

10. Literature Survey

A literature review can be described as a "search and evaluation of the available literature in your given subject or chosen topic area. It documents the state of the art with respect to the subject or topic you are writing about".[21] The importance of the literature review is to "critically analyse the information collected by identifying gaps in

[20] D Wang, Shareholder Oppression (2015) 24.
[21] Fidgety Lizard "Royal Literary Fund" available at https://www.rlf.org.uk/resources/what-is-a-literature-review/ (accessed on 31 July 2019).

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current knowledge; by showing limitations of theories and points of view; and by formulating areas for further research and reviewing areas of controversy."[22]

A number of writers have written on minority protection in company law. In his thesis Mukondo contends that minority shareholders have a slim chance to succeed in seeking redress in relation to the wrongs done to them personally or the company.[23] He obseves that in combating the problem, the 2008 Companies Act introduced derivative action and oppression remedies to protect minority shareholders.[24] His thesis focuses purely in derivative action and oppression remedies in both the United Kingdom and South African frameworks. However, this research focuses solely on section 163 and will only mention derivative action as an exception to the rule in *Foss v Harbottle*, rather than it forming the crux of this work.

Most previous research on this subject advocates for the betterment of minority shareholder protection in the context of company law. The 2008 Act has an exhaustive list of remedies available to minority shareholders. In fact, these remedies are intertwined. For instance, Christodoulou[25] writes the following on the reorganisation of share capital and says:

> It may be fair to suggest that changes to share rights might be considered materially adverse to rights or interest of shareholders for the purpose of the appraisal remedy if these changes would have been considered unfairly prejudicial, unjust or inequitable for the purpose of the oppression.

In his conclusion, he makes a distinction on which remedy would best be applicable given each circumstance. This dissertation's argument is that section 163 should be applicable in cases of oppression without necessarily weighing it with other remedies available under the Act. In his oppressive remedy discussion Christodoulou's work was limited to the history of the 1973 Act; he did not trace it back from the common law precepts, the 1926 to 1973 and ultimately to the 2008 Act. He also does not cater for

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[22] Fidgety Lizard "Royal Literary Fund" available at https://www.rlf.org.uk/resources/what-is-a-literature-review/ (accessed on 31 July 2019).

[23] V.J Mukondo 'A Comparative Discussion of the Regulatory Provisions for The Protection of Shareholders in The United Kingdom and South Africa', unpublished MA dissertation University of Witwatersrand, 2016.

[24] It is a well-known principle in company law that by becoming a shareholder one is bound by the decisions of the majority. See Westerhuis v Whittaker and Others (4145/2017) [2018] ZAWCHC 76 (26 April), See also *Sammel & Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A).

[25] D Christodoulou 'The Protection of Minority Shareholders During a Reorganisation of Share Capital Within a Company', unpublished MA dissertation University of Johannesburg, 2016.

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improvements in the 2008 Act with regards to shareholder protection as compared to its preceding documents.

This dissertation begins by discussing the famous rule in *Foss v Harbottle*.[26] That case upheld the subordination of the interests of the minority shareholders to those of the majority shareholders. The rule laid down *Foss v Harbottle*[27] that case made it possible for the majority shareholders to commit wrongs against a company with the knowledge that the courts would not interfere with the affairs of the company ,irrespective of the wrong done to the company. The only possible remedy a minority shareholder was to seek for the winding up of the company when it was just and equitable.[28]

However, scholars are of the view that such a relief was "inappropriate as the break-up value of the assets might be small or the only available purchaser might be the very majority whose oppression had driven the minority to such redress."[29] The winding up of a company in those circumstances has been depicted as not providing the most appropriate remedy for the minority shareholders. This work, however, will focus primarily on section 163 provision as a remedy to the minority shareholder as opposed to winding the up of a company.

In England, the House of Lords justified the rule in *Foss v Harbottle*[30] from three perspectives. Firstly, in *MacDougall v Gardiner*,[31] the court reiterated that "it is undesirable to have a multiplicity of actions for the same wrong."[32] Secondly, "it may be pointless to allow an action to be brought to redress a wrong which could cease to be wrong if it is ratified by the majority shareholders."[33] Another reason is provided by Richard R Lee, who points out that, the real reason behind the refusal of a minority shareholder to bring a claim on an injury done to a company is that, "the results of such recovery is a return of the company's assets to shareholders without first satisfying

[26](1863) 2 Hare 461.
[27] (1863) 2 Hare 461
[28] Section 111(g) of the Companies Act 46 of 1926.
[29] Notes on Cases p126.
[30] V.J Mukondo 'A Comparative Discussion of the Regulatory Provisions for The Protection of Shareholders in The United Kingdom and South Africa', unpublished MA dissertation University of Witwatersrand, 2016.
[31] (1875) 1 Chd 13 see also *Goodall v Hoogendoorn Ltd* 1926 AD 11 at 16.
[32] *MacDougall v Gardiner* (1875) 1 Chd 13 at 228.
[33] IT Pretorius, PA Delport, M Havenga, M Vermaas 6th ed (1999) Juta & Co *South African Company Law: through the cases* page 381.

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corporate creditors."[34] Another justification is based on the proper plaintiff rule, as emphasised in *Foss v Harbottle*.[35]

Although the rule had such rigid application, it could not insulate the general law from exceptions. As such, the rule in *Foss v Harbottle*[36] is subject to exceptions. There are four main common exceptions to the rule; namely, personal injuries, ultra vires, illegality and or fraud on the minority. The latter is actionable through a derivative action.[37] It is the view of this researcher that these exceptions were aimed at protecting minority shareholders regardless of the stringent rule. This could be viewed as a gradual shift from the oppressive rule because shortly thereafter, the 1926 Act was enacted.

It was then time for statutory intervention. The remedy was first introduced in South Africa in the 1926 Act,[38] followed by the 1973 Act[39] and lastly the current 2008 Companies Act.[40] The 1926 Act attempt was provided for in section 111 *bis*, which provided that:

> Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself), may make an application to the Court by petition for an order under this section; and in a case falling within subsection (2) of section ninety- five the Minister may make the like application.

The 1973 Act repealed section 111*bis* and introduced section 252[41], which provided that;

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, subject to the provisions of subsection (2), make an application to the Court for an order under this section.

Lastly, the Companies Act of 2008 provides for oppressive remedy in this manner;

A shareholder or a director of a company may apply to a court for relief if;

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[34] Richard R Lee (1957) 35 *North Carolina* LR 279-284.
[35] FHI Cassim, MK Cassim, R Cassim, R Jooste & J Shev Yeats, The Law of Business Structures (2016) Juta & Company (Pty) p458.
[36] FHI Cassim, MK Cassim, R Cassim, R Jooste & J Shev Yeats, The Law of Business Structures (2016) Juta & Company (Pty) p458.
[37] FHI Cassim, MK Cassim, R Cassim, R Jooste & J Shev Yeats, The Law of Business Structures (2016) Juta & Company (Pty) p382.
[38] Companies Act 46 of 1926.
[39] *Foss v Harbottle* (1863) 2 Hare 461 see also the proper plaintiff rule.
[40] Companies Act 61 of 1973 see section 252.
[41] FHI Cassim, MK Cassim, R Cassim, R Jooste & J Shev Yeats, The Law of Business Structures (2016) Juta & Company (Pty) p458.

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> (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) 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 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 has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.
> (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.

The three frameworks surprisingly made use of the same words; namely, oppression and unfairly prejudicial. It would be ideal to illustrate with case laws how the courts have interpreted those essential words when a minority shareholder seeks relief for a particular prejudice. In *Aspek Co. Ltd v Mauerberger and Others*[42]*,* which was adjudicated under the 1926 Act,[43] the court held that;

> Section 111*bis* applies only to those cases in which the facts would justify the making of a winding-up order under the just and equitable rule and which have in them the requisite element of abuse. Mere lack of confidence or harmony while relevant to a winding up order, would not be relevant to relief under section 111*bis* unless such lack of confidence resulted from oppressive conduct.[44]

Recently in *Smyth and Others v Investec Bank Ltd and Another*[45] the appellants sought an order for the company to purchase their shares. The appellants were not registered members of the second respondent but beneficial owners. The main issue was whether the appellants could invoke the application of section 252.[46]
The court held that,

> if they wished to avail themselves of the remedy provided for in section 252 in their own names, they had to terminate the nomination of their respective nominees so as to procure the entry of their names in the register of members. For as long as the nominees' names remained in the register of members, the beneficial owners lacked a legal interest in the subject-matter of the litigation.

This case strengthen the gap identified earlier, that the restriction in *locus standi* could be detrimental to the minority shareholder as the court in this case made it clear that beneficial owners are not protected under section 163.

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[42] 1968 (1) SA 517 (C).
[43] Cassim *et al* p458.
[44] *Aspek Co. Ltd v Mauerberger and Others* 1968 (1) SA 517 (C) citing *Foss v Harbottle* (1863) 2 Hare 461 at para c.
[45] 2018 (1) SA 494 (SCA); [2018] 1 ALL SA 1 (SCA).
[46] Cassim *et al* p458.

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Similarly, in *Geffen and Others v Martin and Others*[47] , the applicants, who were minority members, held 20% of the shares, whilst the respondents held the remaining 80%. The dispute was whether the appellant may bring an application in terms of section 49 of the Close Corporation Act as well as Section 163 of the Companies Act. The court found in favour of the respondent and Davis J held that;

> The use of the words oppressive or unfairly prejudicial or unfair disregard of the interest of the applicants was significant. Not only had the conduct to be prejudicial, but it had to be unfairly so or at the very least unreasonable or unethical. The inquiry was then to question if the applicants had suffered prejudice, which had to be extracted from the conduct of the majority shareholders and which was, at least, unreasonable or unethical.

Matlala adds that;

> The conduct of the majority shareholders had to be weighed in the light of a fundamental principle of company law, ie that by becoming a shareholder, the latter undertook to be bound by the decisions of the majority of shareholders. Not all acts which prejudicially affected a minority shareholder or which disregarded their interests would entitle a minority group to the relief set out in the section. The consequence of the act or omission had to be either oppressive or unfairly prejudicial which, at the very least, connoted a significant element of unfairness.[48]

The findings in this judgment may be contrasted with those in *De Villiers v Kapela Holdings (Pty) Ltd and Others*[49], in which the Court reiterated that;

> an offer by the majority shareholders to buy out a minority shareholder at a fair value does not prevent a minority shareholder from seeking legal relief. There is no principle of fairness to determine whether an offer to purchase a minority shareholder's shares prevents a relief in terms of section 163, and the discretion of the court remains in this regard. Minority shareholders are well advised to regulate their rights contractually, whether that be to participate in the management of the company or to obtain certain financial and other information about the company. Failure to do so may leave shareholders subject to the whims of others and unable to meet section 163's stringent requirements for proving oppressive or prejudicial conduct.[50]

The wording of the Act's provisions may seem to be clear and straight forward. However, from the courts' lenses, the converse applies. The reason for such a

[47] [2018] 1 ALL SA 21 (WCC).
[48] David Matlala The Law Reports April-2018 Available at http://www.derebus.org.za/the-law-reports-april-2018/ (accessed date 20 May 2019).
[49] [2016] ZAGPJHC 278 (14 October 2016).
[50]Gasant Orrie & Georgia Speechly Minority Shareholder Protection available at https://withoutprejudice.co.za/article/6380/view (access date 12 June 2019).

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conclusion is that any prejudiced minority shareholder may make an application in terms of section 163 but, how the courts apply and interpret such section is still limited.[51] In the sense that one may not only have to prove prejudice but also have to prove unfairness and therefore made a conclusion that the act or omission complained of resulted in abuse and oppression.

In addition, words such as ‘unfair prejudicial’ as well as ‘oppressive’ are used in a recurring manner in all the three frameworks. Although used in a recurring manner, unfortunately, the Act[52] does not provide any definition of such words. However, the Act requires that a minority shareholder seeking relief in terms of section 163 have to prove unfairness and prejudice. The challenge is that the definition of such words is left entirely to the court’s discretion, which raises question regarding the extent of justice to which the judicial interpretation has done to ensure protection for the interests of the minority shareholders?

Since the Act had not define these crucial words an attempt by scholars has been ongoing to define the concepts of unfair prejudicial and oppression. Benjamin uses ‘shareholder oppression’ instead of oppression. He notices that shareholder oppression occurs:

> when the majority shareholders in a corporation take action that unfairly prejudices the minority. It most commonly occurs in close corporations, because the lack of a public market for shares leaves minority shareholders particularly vulnerable since minority shareholders cannot escape mistreatment by selling their stock and exiting the corporation.[53]

While Meakin apprehends unfairness (in this context it shall be understood as unfair prejudicial) as:

> To be confirmed as unfair, the action taken must amount to a breach of the shareholders’ agreement with regard to the way in which the company is run. The action must also be proved to have affected the shareholder in their capacity as a shareholder. The idea of affecting your capacity as a shareholder has been given an extremely wide definition, ranging from a reduction in your voting rights to a majority shareholder exploiting his power.[54]

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[51] De Villiers v Kapela Holdings (Pty) Ltd and Others [2016] ZAGPJHC 278 (14 October 2016).
[52] Cassim *et al* p382.
[53] M Benjamin A Voice-Based Framework For Evaluating Claims of Minority Shareholder Oppression In The Close Corporation, Georgetown Law Journal, *ssrn 1285204* (2008), 97.
[54] Emma Meakin Shareholders Rights And Unfair Prejudice Recourse For A Shareholder In Light of A Prejudice Decision Available at https://fleximize.com/articles/001348/shareholders-rights-unfair-prejudice (accessed date 23 may 2019).

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In addition to the requirement of proving unfairness and prejudice, the Act has other requirements that could be beneficial to the minority shareholders. The court in Peel *v Hamon J&C Engineering (Pty) Ltd*[55] is of the view that the Act provides for this benefit in the following way:

(a) Conduct that unfairly disregards the interests of the applicant;
(b) the *locus standi* which has been extended to the directors of the company,
(c) In addition, relief can now be sought based on the conduct of a person related to the company and;
(d) The fact that section 163 now contains a wide range of open-ended reliefs that a court may grant.

It appears that it is the intention of the legislature to widen the scope of the relief available to the minority shareholders under section 163. However, it should be borne in mind that relief will not be "available to applicants in circumstances where the requirements of section 163(1) are not satisfied."[56]

A closer look at section 163 depicts three major components that would trigger the relief. There must be an applicant, conduct and injury. An applicant is understood to mean a shareholder, director or any interested person. However, the Act does not mention whether one should have been a shareholder during the occurrence of the conduct of oppression. Like the previous Act provided in section 252(3), it mandated that there be control of the *locus standi,* to avoid the section being used as a means of oppression. Such mandate was carried out in *Garden Province Investments v Aleph (pty) Ltd*[57]*,* where the court stated that an applicant had to prove that the conduct is prejudicial to him.[58] Scholars such as Beukes & Swart are also of the view that the *locus standi* should not be extended than what it already is.[59] However, it is the view of this researcher that restricting *locus standi* has proved to be problematic and is prejudicial to the minority shareholder,r as was seen in the case of *Smyth and Others v Investec Bank Ltd and Another.*[60]

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[55] 2013 (2) SA 331 (GSJ).
[56] 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 Statutorily Intended Reach PELJ 2014(17) 4 1696.
[57] 1979 (2) SA 525 (1).
[58] Garden Province Investments v Aleph (pty) Ltd at 531.
[59] 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 Statutorily Intended Reach PELJ 2014(17) 4 1696.
[60] [2018] 1 All SA 1 (SCA).

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We now look at the second trigger mechanism, which is conduct. Conduct can either be an act or an omission or a continuing act. This can be best illustrated with an example; if the board decides not to pay dividends when the company is making profits, such conduct could become prejudicial to the minority shareholder, but what about acts which the company may be proposing and had not actually occurred? There seems to be no cause of action in such circumstances. This certainly limits the scope of the relief available to the minority shareholder, unlike for instance, the wide scope of the United Kingdom's provision.[61]

A claim may satisfy the first and second requirements but may not satisfy the third requirement, which is the end result. In other words, the effects must have been prejudicial to the applicant. In interpreting section 163, the court in *Geffen and Others v Martin and Others*[62] reinforced the fundamental principle of company law, that by becoming a shareholder, one undertakes to be bound by the decisions of the majority shareholders. The court held that, "accordingly, not all acts which prejudicially affect a minority shareholder or disregard their interests will entitle them to the relief set out in section 163."[63] This is because in the case of *Geffen,* a minority shareholder refused to take an offer from another shareholder to buy his share at a fair value and had no prior right to participate in the management of the company. With that in mind, the court ultimately held that the applicant had no valid claim for relief under section 163.

Minority protection in South Africa has been there for almost a century. However, a number of scholars have questioned whether the development of the remedy from its initial introduction in South Africa has been beneficial to such shareholders. Relying on the *Geffen* case again, where the Court came to the conclusion that the conduct of the respondents could not be seen as unethical, unreasonable and essential elements to the conduct being assessed as unfairly prejudicial.[64] Jurgen Henry is of the view that, "the above decision could certainly lead minority shareholders to believe that their interests are at risk from the actions of majority shareholders."[65] This dissertation takes

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[61] See a comparison made under section 994 of the UK Companies Act of 2006 in chapter 4.
[62] [2018] 1 ALL SA 21 (WCC).
[63] Geffen and Others v Martin and Others at 9.
[64] Geffen and Others v Martin and Others at para 20, see also Count Gotthard SA Pilati v Wilfontein Game Farm (Pty) Ltd [2013] 2 ALL SA 190 GNP at para 90.5.
[65] Jurgen Henry Potgieter "Protection of Minority Shareholders Against Unfairly Prejudicial Conduct By The Majority Shareholders" available at https://www.mlvlaw.co.za/Resources/2018-04_Protection_of_Minority_Shareholders.pdf (accessed on 18 June 2019).

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the debate further by showing that the development has been shown to be beneficial at some point to the minority shareholders who seek relief under section 163.

Aslam Moosajee has written that section 163 is not wide enough to allow a shareholder to bring an action on behalf of the company. He contends that,

> In one of the first High Court judgments dealing with the interplay between Section 163 and Section 165 of the Companies Act, 2008, the East London High Court held that Section 163 of the Companies Act is designed to deal with internal strife amongst shareholders and/or directors of a company and is not designed to deal with the company's relationship with external parties. Section 163 of the Companies Act does not give a court the power to authorise shareholders to institute action in the name of the company. Section 165 of the Companies Act provides a statutory derivative action.[66]

It is submitted that Aslam Moosajee view that section 163 should be wide enough to bring an action on behalf of the company is misplaced. Section 163 deals strictly with unfair prejudice. Therefore, any other claims on behalf of the company should be ventured through section 165. In addition, section 163 could be seen as a safe haven, should the relationship between the minority and majority shareholders deteriorate or becomes deadlocked. This would be triggered, of course, after all internal remedies have been exhausted.[67]

Of importance is,that minority shareholders should not just raise the red flag, in vain when they allege that the conduct complained of was prejudicial or disregarded the applicant's interest. In order to succeed, the applicant must go further, to demonstrate that the prejudice in question was unfair.[68] However, in early judgments such as in *Morgan v 45 Fiers Avenue (Pty) Ltd* ,[69] it was held that, "it is inconceivable to think of cases in which conduct complained of would be oppressive but not unfair. The conclusion that the conduct is oppressive presupposes that it is unfair." It is the view of this researcher that there is adequate protection for the minority shareholders but

[66] Aslam Moosajee (Za) Section 163 Of Companies Act Not Wide Enough To Allow A Court To Authorise A Shareholder To Institute Action In The Name of The Company Available At Https://Www.Financialinstitutionslegalsnapshot.Com/2015/03/Section-163-Of-Companies-Act-Not-Wide-Enough-To-Allow-A-Court-To-Authorise-A-Shareholder-To-Institute-Action-In-The-Name-Of-The-Company/ (Accesses on 18 June 2019).
[67] Section 7(2) of The Promotion of Administrative Justice Act 3 of 2002.
[68] Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd &Others 2015 (3) SA 313 (SCA) at para 54.
[69] 1986 ACLC 222.

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the test has been set a bit high, making its accessibility too stringent for those it seeks to protect.

It is acknowledged that the dissertation is primarily focused on the protection of minority shareholders in terms of section 163. However, one may question how the court strikes a balance between majority and minority shareholder interests. Is it always the case that the minority are oppressed or can the converse also be true? This was the question the court had to answer in *Civils 2000 Holdings (Pty) Ltd v Black Empowerment Partner Civils 2000 (Pty) Ltd*[70], where a group of majority shareholder, holding 70% of the shares and voters rights was unable to vote out directors appointed by the minority shareholder on the board.

The reason of wanting to vote those directors out of the board was that it was believed that those directors had engaged in unlawful competition. However, the shareholder's agreement terms stood as a stumbling to the aggrieved majority shareholders. In pursuit of justice, the majority shareholders applied to the court for relief under the oppression section of the Companies Act. As such,

> The essence of the application was to convince the court to make an order that the minority shareholders must transfer their shares to the company – and thereby cease to be shareholders, leaving the company under the full control of the majority.[71] The court held that a breach of fiduciary duty on the part of the directors of the company amounted to the conduct of the company as contemplated in section 252.[72]

The South African Constitution mandates courts to take cognisance of foreign law; hence in line with the next discussion, the researcher compares South African law with other foreign jurisdictions. English law has always been influential to the South African company law. As such, where a concept is unknown in South African law, English law has always been consulted. The English company law history shows that courts favoured the just and equitable winding up of a company, as opposed to providing

[70] [2011] 3 All SA 215 (WCC).
[71] The Companies Act tries to protect minority shareholders from unfair treatment available at http://www.roodtinc.com/archive/newsletter97.asp (accessed date 18 June 2019).
[72] Civils 2000 Holdings (Pty) Ltd v Black Empowerment Partner Civils 2000 (Pty) Ltd at para 21.

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relief for oppressive behaviour.[73] Only at a later stage was a petition section (namely section 994)[74] made available for shareholders. The section provides that;

> a member of a company may petition the court on the grounds that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself); or an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

Again, the words, 'unfairly prejudicial' also appear as well in the English law. Dov Ohrestein notes that unfairness and prejudice are two distinct features.[75] The English Courts in the case of *Jesner v Jarrod Properties*[76] reiterated that;

> The mere fact that respondents have caused prejudice to the petitioner does not always mean that there has been unfairness. So where two companies were always run as a single unit in disregard of the constitutional formalities of both of them but with the acquiescence and knowledge of the petitioners there was prejudice but no unfairness.

In another case of *Rock Nominees Ltd v RCO (Holdings) Ltd*[77] the court held that;

> …Conversely, reprehensible conduct by those in control of a company may be unfair and reprehensible but not prejudicial. So where directors entered into transactions pursuant to which (despite obvious conflicts of interest) they purchased company assets, this was unfair but no s.994 remedy was granted as the price paid by the directors was not less than the company would have obtained from an arm's length purchaser.

With such broad meaning, the question then becomes, what is the test used for unfair prejudicial conduct. In *RA Noble & Sons Clothing Ltd*[78], the court cited an unreported case, which suggests that the test used is objective. This was the case of *Re Bovey Hotel Ventures Ltd*[79], in which the court observed that;

> ... it is not necessary for the petitioner to show that the persons who have de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test, I think, is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests.

In conclusion, the researcher would like to highlight that the development of the remedy

[73] Dov Ohrenstein Minority Shareholders & Unfair Prejudice A Seminar For The Thames Valley Commercial Lawyers Association 1
[74] Companies Act of 2006 (UK).
[75] Dov Ohrenstein Minority Shareholders & Unfair Prejudice A Seminar For The Thames Valley Commercial Lawyers Association 1
[76] [1992] BCC 807.
[77] [2004] 1 BCLC 439 CA.
[78] [1983] BCLC 273 at 290.
[79] unreported case.

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is to be appreciated. There is indeed protection but can one say that the protection is sufficient? The legislature created uncertainties in the law by leaving words such as oppression, unfairly prejudicial and disregard of interest undefined in the Act. This omission implies that each judge has a discretion to give any meaning to the two fundamental concepts that trigger the remedy. This is like opening a can of worms, because when each judge is given discretion it leaves minority shareholders not knowing which decision should take precedence over the other. It is arguable that such an omission may leave the minority shareholder with inadequate relief. The words ‘unfair’ and ‘prejudicial conduct’ act as a trigger mechanism to a remedy in section 163. However, is it not ideal for such crucial words be defined? The researcher argues that South Africa should follow suit in the broadness and detailed framework made for minority shareholders protection in other developed and advanced jurisdictions such as the Australia, Canada and United Kingdom.

11. Definition of Key Concepts

11.1 Directors

> It Means a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated…[80]

11.2 Majority shareholder

It is someone who owns and control most of the company’s assets. These are people who own more than 50 percent of the company’s asset.[81]

11.3 Minority shareholder

A minority shareholder is the opposite of the majority shareholder. They usually own less than 50 percent of the company’s assets, have no voting control over the company. They often rely on what is known as a majority rule. [82]

11.4 Unfair prejudicial conduct

[80] See sec 1(a) of the Companies Act 71 of 2008.
[81]“Majority Shareholder Law and Legal Definition” available at https://definitions.uslegal.com/m/majority-shareholder/(accessed 25 June 2019).
[82]“Majority Shareholder Law and Legal Definition” available at https://definitions.uslegal.com/m/majority-shareholder/(accessed 25 June 2019).

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Unfair prejudicial conduct generally arise when majority shareholders, who in most circumstances are also directors, "use or abuse their powers to promote their own interests to the detriment of the minority."[83]

11.5 Proper plaintiff

This is the procedural aspect of majority rule. It is that elementary principle that X cannot as a general rule, bring a lawsuit against Y to recover damages on behalf Z for a wrong done by Y to Z.[84]

11.6 Memorandum of incorporation

> This means the document, as amended from time to time— (a) that sets out rights, duties and responsibilities of shareholders, directors, and others within and in relation to a company, and other matters as contemplated in section 15…[85]

11.7 Majority rule

This a principle which allows or affords "those who hold majority of shares to make ultimate decisions for the company." [86]

12. Proposed Structure

In pursuit of the objectives set above, this dissertation will be divided into five chapters;

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[83]Dominic Blakeley, "Unfair Prejudice - A Quick Guide" available at https://www.clarionsolicitors.com/blog/unfair-prejudice-a-quick-guide(accessed date 25 June 2019).
[84] Rahmani Ataollah Majority Rule and Minority Shareholder Protection in Joint Stock Companies in England and Iran. (2007) 37 also available at http://theses.gla.ac.uk/1848/
[85] Companies Act 71 of 2008 at sec 163 (1) (c).
[86] It is a well-known principle in company law that by becoming a shareholder one is bound by the decisions of the majority. See Westerhuis v Whittaker and Others (4145/2017) [2018] ZAWCHC 76 (26 April), See also *Sammel & Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A).

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Chapter One: Background

This chapter covers the background to the rule in *Foss v Harbottle*.[87] It highlights the basis for reliefs available to protect the interests of minority shareholders. Furthermore, it provides the scope of the research, justification for the work, research methodology, statement of problems, aim and objectives of the research, research questions, as well as the hypothesis on which the work is based. It also presents literature review, limitation of study, ethical consideration and the general structure of the work.

Chapter Two: The Rule in *Foss v Harbottle*

The work in this chapter interrogates the history of the rule in *Foss v Harbottle*. It goes further by taking a closer look at how such a rule was interpreted by the courts then and up to day.

Chapter Three: The Minority Shareholder Remedy

The chapter focuses on the impact brought by the rule in *Foss v Harbottle*. In so doing, the researcher shows how statutory intervention came to the rescue of minority shareholders by affording them relief when a company is run in an unfairly prejudicial manner.

Chapter Four: Comparison of Judicial Pronouncements and Laws in relation to the Unfair Prejudicial Conduct as a Shareholder Remedy.

This chapter focuses primarily on comparing South Africa's position with that of different jurisdictions. The basis of this chapter is founded on section 39(2) of the constitution,[88] specifically the provision that mandates that courts should take cognisance of foreign law. In this chapter such appreciation of foreign law will be important because when a comparison is made to English law as it has always been a bedrock for the South African company law jurisprudence.

Chapter Five: Conclusions and Recommendations

[87] *MacDougall v Gardiner* (1875) 1 Chd 13 at 228.
[88] The Constitution of the Republic of South Africa Act 108 of 1996.

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This chapter includes the conclusion, emphasizing the main parts of the research and provides the recommendations.

13. Limitations of The Study

A limitation can be viewed as anything that bars your research together with its findings. For example, a student from a rural backdrop and a disadvantage university, having to travel long costly trips to access the university library whilst resources themselves in the library are not regularly updated, can be problematic. For instance, the methodology used in conducting this research is based on the doctrinal approach. Such a methodology creates limitations because some cases are unreported and therefore inaccessible. The research theme also limited this research as it was solely based on section 163 only and not on the entire minority shareholder protection remedies that are available under the Companies Act. Time constraints: this is one of the most serious limitation as students are always faced with deadlines and have to strictly comply to such or they run the risk of penalties. Access to available literature, as well as financial constraints have proven to be limits too.

14. Ethical Considerations

Ethics are the rules or standards governing the conduct by which one lives and makes decisions.[89] Research ethics speak to the application of ethical principles or values to the numerous matters and fields of research.[90]

The University of Venda has its evolved institutional research ethics, which stipulate that the rights and welfare of those who take part in a way of interviews in university research undertakings are of utmost importance. Therefore, it is obligatory that the participants be protected from their identity, should the need arise and should take part in the research only through prior consent. This dissertation did not involve human participants or interviews. It only focused on primary and secondary data. As mentioned in the research methodology, the sources of information that shall be used

[89] All About Philosophy available at https://www.allaboutphilosophy.org/what-are-ethics-faq.htm (accessed date 04 June 2019).
[90] What Is Research Ethics available at http://eneri.eu/what-is-research-ethics/(accessed date 04 June 2019).

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were premised on case law, statutes, journal articles, books, internet source and so on. The researcher also strictly guarded against plagiarism. All materials referred to and used in the research was duly acknowledged.

15. Research Timeline

This research work schedule is as follows:

- May 2019 submission of first draft of the proposal.
- June-August 2019 submission of corrected proposal.
- October 2019 proposal defence and submission of Chapter 1.
- November 2019 submission of Chapter 2.
- January 2020 correction of Chapter 2.
- February 2020 submission of Chapter 3.
- March 2020 correction of Chapter 3.
- March 2021 submission of Chapter 4.
- April 2021 correction of Chapter 4.
- April 2021 submission of Chapter 5.
- April 2021 correction of Chapter 5.
- April 2021 submission of final work

16. Budget

ACTIVITIES	ITEMS	COSTS	TOTAL
1.STATIONERY			
	Highlighting pens	R12 each x 10	R120
	Assorted pens	R15 each x 7	R105
	Examination pads	R40 each x 8	R320
	Diary book	R150	R150

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	College notebooks	R42 x 5	R210
	External hard drive	R1 800 each x 1	R1 800
	Stapler	R150 each x 1	R150
	Staples	R 100 per box x 3	R300
	Puncher	R 150 x 1	R150
	Dividing papers	R60 per pack x 5	R300
	Cover papers	R200 per pack x 2	R400
	Assorted pencil case	R180 each x 1	R180
	Ruler	R12 each x 1	R12
	Sticky notes	R70 each x 6	R420
	Pocket files	R50 x 8	R450
	Lever Arch files	R150 each x 4	R600

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SUBTOTAL			**R 5 367**
2.TECHNICAL ASPECT			
	Proposal typing	R12 per page x 31 pages	R372
	Proposal printing	R8 per page x 31 pages x 10 copies	R2 480
	Proposal editing and proof reading	R900 x 5 copies	R4 500
	Proposal proof reading certificate	R700	R700

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	Printing cases selected articles, thesis and relevant court cases	R5 per page x 800 pages	R3 400
	Spiral proposal binding	R250 x 6 copies	R1 500
	Final dissertation typing	R12 per page x 150 pages	R1 800
	Final dissertation Printing	R8 per page x 150 pages (6 copies)	R7 200
	Final dissertation Editing and proof reading	R40 per page x 150 pages	R6 000
	Spiral bringing final dissertation	R450 x 6 copies	R2 700
		R2 000 x 1	R2 000

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	Research Assistant Book binding final research	R1 500 x 2	R2 450
SUBTOTAL			**R35 102**
3.INFORMATION RESOURCES	Photo-coping of relevant pages in library books Internet connection (data bundles) Airtime for communi-cating	R1 381 R500 per month x 12 months R 250	R1 381 R 6 000 R 250
SUBTOTAL			**R 7 631**
GRAND TOTAL			**R 48 100**

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Chapter Two: The Rule in *Foss v Harbottle*

2.1 Introduction

It is trite law that the rule in *Foss v Harbottle*[91] prevents a shareholder from assuming the company's position, as the plaintiff. It is also a general principle that courts distance themselves from the management of the company. This rule has for over a century been used as an instrument of oppression by the directors against the minority shareholders. Although the rule does not prevent a minority shareholder from pursuing justice for his or her personal interests, it certainly prevents the pursuit of such claims in the interests of the company. Cases have arisen where those in power and in the majority would not want to institute legal proceedings for wrongs done to the company because they were the wrongdoers, thus the minority shareholders could not institute an action to vindicate the wrongs done to the company.[92]

A company as an association, does not only involve the relationship that exists between the minority and the majority shareholders, but also evokes the managerial role of the directors, which imposes duties on the directors to act in the best interests of the company. Pennington[93] observed in that context that:

> In addition to their statutory duties, directors owe their company a number of fiduciary duties similar to those owed by an agent to a principal and also at common law and in equity to take reasonable care in the management of the company.

The refusal by courts to allow shareholders to vindicate by legal action wrongs done to a company reinforces the separate legal personality that a company bears from its members. In *Dadoo Ltd v Krugersdrop Municipal Council*[94] the court emphasised that a company has both rights and duties, as follows:

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[91] 2 Hare 460.
[92] See for example; Macdaugal v Gardiner (1867) 1 Chd 13, Edwards v Halliwell [1950] 2 ALL ER 1064, Prudential Assurance v Newman Industries No 2 1982.
[93] R Pennington Pennington's Company Law (1996) 3778.
[94] 1920 AD 530 at 550.

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> A company has neither body parts, nor passions, but it can have rights and duties of its own. And such duties do not attach to the members of the company but to the company itself.

Since the company has no 'body parts', the process of electing a director to act on behalf of the company becomes relevant. However, before these directors assume their offices, they are voted in by both the minority shareholders and the majority shareholders, with the belief that these directors will carry out the corporate mandates. Questions have arisen in situations where some of those shareholders, especially those in the minority, are dissatisfied with the way in which the directors are running the company[95] such questions include do minority shareholders have any legal recourse against such delinquent director/s? This was one of the questions which Sir Wigram VC set out to answer in *Foss v Harbottle* and which has over the years metamorphosed into a doctrine in this field of law. The rule has received a lot of attention both academically and judicially. This chapter explores that rule from its inception, and examines the justifications proffered by courts and writers for the application of the rule prior to statutory interventions.

2.2 The Rule in *Foss v Harbottle*

This researcher is of the view that a proper understanding of the rule should proceed from the essential facts of that case which are as follows:
There were a total of eight majority shareholders. The first five were the directors. The company had been set up in September 1835, and this was named as Victoria Park; subsequently, the company was incorporated. Turton and Foss were the only two minority shareholders.

The minority shareholders instituted legal action against the directors/defendants of the company. They alleged that the company's assets had been misapplied, wasted and a lot of mortgage bond were enlisted over the company's assets. In their

[95] RC Bob Williams, 'Can Shareholders aggrieved at the way the directors are running the company, ask the court to intervene?' (2008) Professional Accountant 2008 (1) 24.

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submission, the plaintiff put forward that the company character was that of a partnership and as such:

> The directors were trustees for the plaintiff to the extent of their shares in the company and the fact that the company had taken the form of a corporation would not deprive the *cestui que trusts* of a remedy against their trustees for the abuse of their powers.[96]

In rebuttal, the defendants averred that:

> The suit for a complaint to the corporation was misplaced because it was not the corporation itself that is before the court, but some members of the corporation and mere addition of the corporation as a defendant cannot remedy such irregularity.[97]

When Sir James Wigram begun his reasoning, he reckoned that this case is based on several complaints grounds of importance' where the minority shareholders alleges that:

1.The directors of Victoria Park purchased their own lands for themselves for the use of the company. In doing so they had paid themselves monies belonging to the company;
2.The defendants have raised money in a manner not authorised by their powers in the Bill/Act and;
3. The defendants have also encumbered the lands and property of the company.

The court relied on the dictum laid down in *Hichens v Congreve*[98] (but cautioned that the case at hand does not fall entirely to this dictum) wherein property was sold to a company by the directors; in so doing the conveyancers said that E25 000 had been paid, whilst in actual fact only E10 000 had been paid to the company, with the remainder of E15 000 to be paid to the persons in fiduciary character. Sir Wigram further expressed the view that an invitation to the public for a common goal that is, to

[96] *Foss v Harbottle* (1863) 2 Hare 461 ER para 486.
[97] *Foss v Harbottle* (1863) 2 Hare 461 ER at 485.
[98] 1829 1 Russ M 50.

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form a company; the fiduciary nature of the projector, begins the day he makes an invitation to the public. In that regard, the court reiterated, however, that:

> If persons, on the other hand, intending to form a company, should purchase land with a view to the formation of it, and state at once that they were the owners of such land, and proposed to sell it at a price fixed, for the purposes of the company about to be formed, the transaction, so far as the public are concerned, commencing with that statement, might not fall within the principle of Hichens v Congreve.

The court expresses the view that in the given matter, a case is also established that a company as the matter stands, is to complain of the translation mentioned in the Bill. This is because The Victoria Park Company is an incorporated body, and the conduct with which the Defendants are charged in this suit is an injury not to the plaintiffs exclusively: it is an injury to the whole corporation by individuals whom the corporation entrusted with powers to be exercised only for the good of the corporation. In addition, one can rely on the case of *The Attorney General v Wilson*[99], which stated as undoubted law that, a bill or information by a corporation will lie to be relieved in respect of injuries which the corporation has suffered at the hands of persons standing in the situation of the directors upon this record.

Sir Wigram went on further to say this bill/case, however, differs from that in *The Attorney General v Wilson*[100]. The difference was that, instead of the corporation being formally represented as plaintiffs, the bill in this case was brought by two individuals. These were professedly on behalf of themselves and all the other members of the corporation, except those who committed the injuries complained of by the plaintiffs by assuming to themselves the right and power in that manner to sue on behalf of and represent the corporation itself.

It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation; thus, assuming to themselves the right of suing in the name of the corporation. In law the corporation and the aggregate members of the corporation are not the same thing, for purposes like these; and the only question can be whether the facts alleged in this case justify a departure from the rule which, *prima facie*, would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its

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[99] 878 S W. 2d 690.
[100] The Attorney General v Wilson 878 S W. 2d 690.

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representative?[101]

Of importance, the court in *Foss* found that the plaintiff before court was not the right one; the court acknowledged that there may be a situation that a member may sue on behalf of a company. In his words Sir Wigram stated that:

> If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham in wallworth v holt and other cases would apply.[102]

The court went on further to aver that there may be situations that allow a departure from the normal rules. A question should then be, in this present case, has a case been made that requires a deviation from the rules? The court answered that question in this fashion:

> On the first point it is only necessary to refer to the clauses of the Act to show that, whilst the supreme governing body, the proprietors at a special general meeting assembled retained the power of exercising the functions conferred upon them by the Act of Incorporation, it cannot be competent to individual corporators to sue in the Manner proposed by the Plaintiffs on the present record. This in effect purports to be a suit by *cestui que trusts* complaining of fraud committed or alleged to have been committed by persons in a fiduciary character. The complaint is that those trustees have sold lands to themselves, ostensibly for the benefit of the *cestui que trust* the proposition I have advanced is that, although the Act should prove to be voidable, the *cestui que trusts* may elect to confirm it.[103]

However,the court reiterated that it may find that the act complained of is void. The difficulty is that. At a special resolution meeting such proprietors may confirm those acts, thereby binding even the reluctant minority shareholder. Also there is no evidence that avers that a meeting has been proposed to revoke the acts complained of. In conclusion, the court held that, “the foundation upon which I consider that can the plaintiff alone have a right to sue in the form of this bill must wholly fail if there has been a governing body of directors *de facto*.” In so ruling, the court dismissed the case.

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[101] *Foss v Harbottle* (1863) 2 Hare 461 ER at 491.
[102] *Foss v Harbottle* (1863) 2 Hare 461 ER para 492.
[103] *Foss v Harbottle* (1863) 2 Hare 461 ER para 494.

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2.3 Dissecting the Judgment in *Foss v Harbottle*

There are vital deductions that have been made by writers from the pronouncement of Wigram VC as set down above. Du Plessis,[104] for instance, stated that the decision in *Foss* laid down the following rules:

> 1.The rule of non-interference in internal company matters by the court, is important;
> 2.The rule that courts will not take over the responsibility to manage the business of a company;
> 3.The rule that courts should respect the outcome of the decisions taken by the majority of shareholders is crucial;
> 4.That the company as a separate legal entity, is the proper plaintiff when it comes to wrongs done to it.

The two cardinal rules, established in that case, are the proper plaintiff rule[105] and the majority rule[106]. There is also the ancillary rule, which is the rule against judicial interference in the internal affairs of a company. These rules are discussed in greater details below.

2.3.1 The Proper Plaintiff Rule

The proper plaintiff rule is the first derivative from Sir Wigram VC's pronouncement in *Foss v Harbottle*. This concept is now contained in company's legislation in different jurisdictions, including South Africa. The proper plaintiff rule can be defined by breaking the rule into two words; namely, proper and plaintiff. The Oxford Dictionary defines a

[104] Jean J Du Plessis, 'Revisiting The Judge Made Rule of Non- Interference in Internal Company Matters', (2010) The South African Law Journal 27 (2) 304.
[105] Sir Wigram VC held at para 494 that "the proprietors at a special meeting assembled retain the power of exercising the function conferred upon them by the Act of Incorporation, it cannot be competent to individual corporators to sue in the manner proposed by the plaintiff on the present record".
[106] Sir Wigram VC held at para 494 that "The corporation, in a sense, is undoubtedly the cestui que trust, but the majority of the propriators at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound."

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plaintiff as “a person who makes a formal complaint against somebody in court”[107] whilst *proper* means “right or appropriate or correct in terms of the rules.”[108] Therefore, a ‘proper plaintiff’ would be the correct person to complain before a court. It is undoubted law that the company enjoys a form of separate legality/persona from its shareholders, employees or members.[109] Therefore, it is only appropriate that should a company be injured, only the company should sue, thereby evoking the concept of proper plaintiff.[110]

Authors like Don Mahon have explained that the proper plaintiff:

> The rule dictates that in any action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself. A claim does not lie with the company’s shareholders, regardless of whether the wrong has caused a diminution of the value of their shares.[111]

The principle of proper plaintiff should be contrasted with that of corporate personality. When people associate to form a company it is their intention that a company retain its own separate legal personality. This would mean a company has perpetual succession: it may own property, make a profit, or acquire debts and liabilities. However, there may be malice where the company’s property/assets entrusted in the hands of the directors are misapplied, and that is the has been the reason as to why over the years, the courts have developed an exception to corporate personality, known as piercing the corporate veil. The corporate personality features are briefly explained below:

1. **Limited liability**

The amount the shareholder used to purchase his share implies that he/she is only liable to that extent. In this regard, the shareholder is not liable for the debts of the company.[112]

2. **Perpetual succession**

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[107] A S Hornby, Oxford Advanced Learner’s Dictionary of Current English, 8th ed Oxford: New York (2010) p 116.
[108] A S Hornby, Oxford Advanced Learner’s Dictionary of Current English, 8th ed Oxford: New York (2010) p1176.
[109] This is affirmed by the heading of section 163 of the Companies Act, which talks about the separate juristic nature of a company.
[110] See Mwenda & Wiseberg ‘Corporate Law Safeguards Against Oppression of Minority Shareholders (1999) 11 South African Mercantile Law Journal.
[111] Don mahon, ‘Not absolute’ (2014) Without Prejudice 16; see also *Hlumisa investment Holding Limited and Another v Kirkins and* Others (2019) (4) SA 569 (GP) at para 16.
[112] Cassim et al, The Law of Business Structures 64.

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This means notwithstanding the unanimous changes that may exist during the company existence; a company will not cease to exist because for example a director died.[113]

3. The company owns property and assets

The property is that of the company. *Cassim et al* connoted that "even a shareholder holding all the shares in a company [such] property still belongs to the company."[114]

4. Profits and debts

The profits made belong to the company and not the shareholders. Shareholders are only entitled to what is known as dividends. It should follow that, if profits belong to the company, debts also should belong to the company, as was in the case of *Salomon v Salomon & Co Ltd*[115]. The court held that, "the secured debentures issued by the company to Salomon as part of the purchase price for his business were valid as against the company's creditors, and that the business belonged to the company and not Salomon, who was not liable for the debts of the company."[116]

5. Company can sue or be sued

If the company sustain a loss; a shareholder of the company does not have a direct right of action for the loss. This was the case in *Foss v Harbottle*[117]. It can therefore be concluded that there is a relationship between the proper plaintiff rule and the principle of corporate personality through this feature.

The present, courts are still faced with the determination of the proper plaintiff as is evident from the case of *Letseng Diamonds Ltd v JCI Ltd and Investec Ltd*[118], where there was an issue of locus standi/proper plaintiff. In this case shareholders complained of a breach of fiduciary duties by the directors of the company and that the contract entered into by the said directors with the defendant be declared void. The contract dealt with the advance of loan to the company to revive its business and to enable it to trade more profitably." Blieden J held that:

> The true position is that where directors contract on behalf of a company and

[113] Cassim et al, The Law of Business Structures 64.
[114] Cassim et al, The Law of Business Structures at p 65, See also Dadoo Ltd v Krugersdrop Municipality Council 1920 AD 530.
[115] *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL).
[116] *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL) at 50-1.
[117] *Foss v Harbottle* (1863) 2 Hare 461 ER at 494.
[118] [2007] ZAGPHC 119.

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> do so in breach of their fiduciary duties, as is claimed in the present case, and the other contracting party was aware that the directors were acting in breach of their fiduciary duties, the legal consequence is that the company, and only the company, at its election, may avoid the contracts because the directors owe their fiduciary duties to the company and not to individual shareholders.

From this case, it can be submitted that the courts still uphold the rule established in *Foss v Harbottle*[119].

2.3.2 The Majority Rule

The majority rule is the second leg to the rule in *Foss v Harbottle*[120]*.* It is a well-known principle in company law that by becoming a shareholder, one is bound by the decisions of the majority.[121] Natasha warns of possible abuse of the majority rule by alluding that "the majority rule conforms to 'corporate democracy'. This rule can be abused and this abuse is at the expense of minority shareholders."[122]Gibson[123], on the other hand, explains this second leg by indicating that;

> where the alleged wrong is a transaction that may be made binding on the company and all its members by a simple majority of members. No individual member may maintain an action in respect of the matters, for the simple reason that if a mere majority of members is in favour of what has been done then that is the end of the story.

The majority rule has found favour in many cases after its recognition in *Foss v Harbottle*. Similarly, in the case of *Sammel & Others v President Brand Gold Mining Co Ltd*[124]*,* Trollip JA expressed the following:

> 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 of the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder…that principle of the supremacy of the majority is essential to the proper functioning of companies.

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[119] *Foss v Harbottle* (1863) 2 Hare 461 ER at 494.
[120] *Foss v Harbottle* (1863) 2 Hare 461 ER at 494.
[121] See Westerhuis v Whittaker and Others (4145/2017) [2018] ZAWCHC 76 (26 April), See also *Sammel & Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A).
[122] Natasha Bouwman, 'Majority Rule and Minority Protections' *Without Prejudice* 10 (9) (2010) 12.
[123] Gibson JTR, South African Mercantile and Company Law (2003) 370.
[124] 1969 (3) SA 629 (A).

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Of concern is that this extract, from the judgment, "***even where they adversely affect his own rights as a shareholder***" appears with respect that the such conclusion is problematic, because it can be construed that the courts would not interfere even in dire situations where the minority shareholder's rights have been affected personally, simply because the majority should prevail. This debate will be taken further below when dealing with the principle of double jeopardy, as one of the justification to the rule in *Foss*.

Pennington[125] is opinionated is this regard;

> Cases like *Foss v Harbottle*, *Mozley v Aston* and *Lord v The Governor and Company of Copper Miners* made it clear that separate legal entities could only act through the medium of human beings, and that such human beings assemble as company organs to take decisions on behalf of these entities. These organs take decisions based on the fundamental principle of majority rule. That simply means it is either the board of directors that takes decisions on behalf of the company, or the general meeting of shareholders. Any individual shareholder who was not satisfied with the way a company was governed internally should first exhaust all his or her internal remedies. One very important such internal remedy was to convene a general meeting and to put the matter complained about to the vote. At this forum the will of the majority must prevail…

Pennington's view is at least probable, because he acknowledges the importance of exhausting internal remedies, which is a requirement in the Promotion of Administrative Justice Act.[126] The concept of exhausting all internal remedies is therapeutic to a minority shareholder since it may be possible that relief granted through the conveyance of a general meeting. As Natasha viewed the majority rule as a concept of 'corporate democracy'[127], the same approach that individuals have towards political democracy should be applied to corporate democracy, in the sense that all matters should have been arrived at fairly and in accordance with the law, where a concept will be so prejudicial to the minority then the majority rule should be relaxed.

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[125] R Pennington Pennington's Company Law (1996) at 312.
[126] Act 3 of 2002.
[127] Natasha Bouwman, 'Majority Rule and Minority Protections' *Without Prejudice* 10 (9) (2010) 12.

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3. Justification for the rule in *Foss v Harbottle*

3.1 Double Jeopardy or Double Recovery

It has always been reiterated that the company is the one that holds the right to sue. This does not end there; there is also a concept known as double recovery/double jeopardy which has extent to a concept of reflective loss. A number of case laws have dealt with this principle. Recently, in *London and Others v Department of Transport Roads and Public Workers of Northern Cape and Others*[128] a company was under liquidation. The cause of the liquidation was alleged to be due to the department's failure to give consent to a certain "Financial Direct Agreement". The applicants/shareholders argued that such omission rendered the company insolvent and unable to pay its debt and ultimately rendering their shares in the company worthless. As usual, the department challenged the applicants on the concept that only the company is the proper plaintiff to sue in fact it owes no duty to the applicants. In arriving at its decision, the court quoted an extract from *Foss* and said:

> In *Foss v Harbottle* it was held that a company as a legal person, separate and distinct from its directors and shareholders with its own rights and interests to which it alone is entitled, is the only person to sue for the damage should a wrong be done to it. It was further held that a shareholder should not be allowed to institute action where he complains that as a result of the wrong done to the company, his shares have diminished in value, if the company itself has a claim against the wrongdoer for the loss suffered by it as a result of the wrong. The rule in Foss v Harbottle is aimed at preventing the risk of double jeopardy or double recovery which is clearly unacceptable and contrary to all basic principles of justice.[129]

The court noted further that:

> In Mclelland v Hullett and Others 1992 /1) SA 456 /D & CLO) at 467 B-H, it was held that the rule in Foss v Harbottle is however not absolute and is subject to considerations of justice. It was held that where the risk of double jeopardy is non-existent and the shareholder is left with diminished patrimony, the continued application of the rule in Foss v Harbottle would amount to an unwarranted and technical obstruction to the course of justice.[130]

It was the agreement of both parties that the applicant case was more delictual base and not contract based. The court having that in mind, reiterated that:

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[128] [2018] ZANCHC 32.

[129] London and Others v Department of Transport Roads and Public Workers of Northern Cape and Others 2018] ZANCHC 32 para 12.

[130] London and Others v Department of Transport Roads and Public Workers of Northern Cape and Others 2018] ZANCHC 32 para 19.

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> I am of the view that since the plaintiffs instituted their action not on behalf of the company based on the agreement, but in their personal capacities and in delict, for the losses they alleged to have suffered as a result of the alleged breach of the duty of care by the first defendant towards them, the company's shareholders, that neither does their claim amount to a derivative action entitling them to the Foss v Harbottle principle nor the provisions of section 165 of the Companies Act.[131]

Furthermore, from the facts, the liquidators of the company had made it clear in writing that they were not prepared to bring an action against the defendant therefore the risk of double recovery becomes of non-existent; as such the court held that:

> Curtly, I am of the view that the plaintiffs' particulars of claim establish a cause of action … I am of the further view that despite the Foss v Harbottle rule being confirmed by the SCA in Itzikowitz v ABSA Bank Limited given that the plaintiffs' action is a derivative one, the latter can rely on the exception created in Mclelland v Hullett and Others above in the interest of justice.

The following are submissions by the researcher. First, it is worth appreciating the phenomenal aspect of this case because it allowed a shareholder to recover from a third party in relation to a diminution of shares. However, it is not clear whether this case has become precedent or not when dealing with cases of loss in share value. This case may lead to questions such as the following:

1. Does this case imply that in cases where the shareholder suffers a loss as a result of a third party, s/he should proceed by way of delict and not contract?
2. The conclusion drawn by the court, that since the liquidators did not intend to proceed against the defendants, then the risk of double recovery is of non-existence, does this mean had the liquidators intended to proceed against the defendant, then such risk would exist?
3. If so, would the applicant be able to sue and recover their damages?

On a scholarly note, Don views the rationale of this concept as "… [to avoid] the risk of placing a third party in jeopardy of double litigation and double payment, the mischief of allowing a shareholder to recover for twice – personally and through the company – must be prevented."[132] Cassim *et al*[133] adds that there may be an overlap of action that is where a wrong done to a company is also a wrong done to the shareholder.

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[131] London and Others v Department of Transport Roads and Public Workers of Northern Cape and Others 2018] ZANCHC 32 para 26
[132] Mahon (note 14 above) 17.
[133] FHI Cassim, MK Cassim, R Cassim, R Jooste & J Shev J Yeats The Law of Business Structures (2016) 38, see also *Stein v Blake* [1998] 1 ALL ER 724 (CA).

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However, where both wrongs are against the directors the shareholder's loss in share value, for instance, loss of dividends, means such shareholder cannot recover his or her loss. This is because the shareholder's loss is viewed merely as a reflection of the loss suffered by the company.

It is the view of the researcher that the submission by Don is faulted. In chapter one of this dissertation it was submitted that, general people associate to form a company. One would like to think/view a company as a 'family'. It therefore would not make sense that laws were/are designed in ways that put a third party at a better position than a member of this so called 'family'. This is so because how can one make a conclusion that where a shareholder has a claim against a third party that should be construed as a *mischief*?

Of course, one may argue that, but an aggrieved shareholder may proceed derivatively, caution must be borne in mind because such an action is to recover what is 'due to the company' and not to the shareholder 'personally'. It is submitted furthermore that, it seems that as a shareholder in a company such shareholder is expected to just waiver his/her rights, even though you may have a valid 'personal' claim. The recognition of double jeopardy was as a result of the *Foss* case which means that the case still finds favour in our courts[134]

3.1.1 Reflective loss

When an individual purchases shares in a company they take a leap of faith although at the back of their mind he/she has the knowledge that economic uncertainty may cause fluctuations in share prices. This can happen to any company, regardless of the number of years they have been in business. Corsi[135] says,

> Any reduction in the value of their shares will be of concern to shareholders particularly if they perceive the cause to be actions or decisions of the company with which they do not agree. As such, the continued climate of economic uncertainty, exacerbated by Brexit, is likely to give rise to an increase in shareholder activism and potential disputes.

The origins of the rule can be traced back to the decision of *Prudential Assurance v*

[134] See Minister of Law & Order v Kadir 1995 (1) SA 303 (A).
[135] Antony Corsi 'Corporate and commercial disputes review' Norton Rose Fulbright (2018) 16.

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Newman Industries[136], in which the court said:

> What [the shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a three per cent shareholding.

Similarly, in *Johnson v Gore Wood & Co*[137]*,* the court reinforces the sentiments in Prudential case in this regard:

> The rule against reflective loss is justified by the need both to prevent double recover and to provide protection for the company's creditors, who might be prejudiced if the shareholder's claim were to succeed.

As a general rule, a principle is not without an exception. This is true also true of the reflective loss principle, in *Giles v Rhind*[138] it was held that, "the rule will not apply where the wrongdoing means that the company is itself unable to pursue an action against the wrongdoer (for example, because the wrongdoer controls the company)".[139]

Do South African courts apply an exception to reflective loss?

A recent case of *Hlumisa Investment Holdings (RF) Limited & Another v Kirkinis & Others*[140] suggests that this is not so. The case involved appellants who sought relief in terms of section 218(2) of the Act against directors of the company in respect of losses to their share prices/value. After a careful consideration of the facts, the court reiterated that "it cannot be said that there is anything in section 218(2) to indicate that the legislature intended to alter the common law and allow reflective loss claims to be brought under that section."[141] This means that even if the plaintiffs could prove that

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[136] (No. 2) [1982] 1 Ch 204.
[137] [2002] 2 AC 1.
[138] [2002] EWCA Civ 1428.
[139] Dentons "Rule against relective loss found to limit claims by unsecured creditors as well as shareholders"https://www.dentons.com/en/insights/newsletters/2018/october/23/uk-corporate-briefing/uk-corporate-briefing/rule-against-reflective-loss-found-to-limit-claims (accessed on 26 November 2019).
[140] 2019 (4) SA 569 (GP).
[141] Hlumisa Investment Holdings (RF) Limited & Another v Kirkinis & Others 2019 (4) SA 569 (GP) para 30.

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section 76(3) had been breached, and therefore allows for a claim under section 218(2) they had to show that section 218(2) had altered the common law, to allow a reflective loss. The court's sentiments extend further in this regard:

> One of the principles that underpins [reflective loss] doctrine is the fact that in law a company has a legal personality distinct from its shareholders and that accordingly a loss to the company which causes a fall in its share price is not a loss to the shareholder. To use the words of section 218, the shareholder cannot be said to have suffered a loss as a result of a breach of duties owed to the company simply because "as a result" its share price has fallen. In short, our courts have determined that there is an insufficient causal link between harm suffered by a company as a result of a breach of a duty owed to it and any loss suffered by its shareholders in consequence of a fall in the company's share price. There is no reason to suppose that the legislature intended, by enacting section 218, to depart from that judicially sanctioned approach.[142]

John Bell remarked that this judgment "has accordingly set down an important precedent in applying section 218(2) as well as the reflective loss principle and has sought to reaffirm the trite principles of statutory interpretation in South African law."[143] I agree with him.

This judgment should be contrasted with that of *Itzikowitz v Absa Bank Ltd.*[144] This case was as a result of Mr Itzikowitz being an indirect shareholder in a number of companies. The shares stood as surety. When one of the companies became insolvent, the bank claimed the debt amount from Mr Itzikowits. However, his contention was that the bank was wrong by its continued advancement of loans to the said company.

He argued that section 22 of the Act places a duty on a company not to trade recklessly, which this the bank failed to do. Furthermore, the bank knew that he was a surety, that meant he has a financial interest as an indirect shareholder; in addition, it knew (or more accurately foresaw) that a winding-up of the company would materially impact on the value of his shares. Mr Itzikowits contended that, the devaluation of his shares qualified as 'any loss or damage,' provided for in section 218(2) of the Act. One

[142] Hlumisa Investment Holdings (RF) Limited & Another v Kirkinis & Others 2019 (4) SA 569 (GP) para 50.
[143] John Bell, "Reflecting on the Concept of "Reflective Losses" in Company Law" https://www.polity.org.za/article/reflecting-on-the-concept-of-reflective-losses-in-company-law-2019-08-15 (accessed on 26 November 2019).
[144] 2016 (4) SA 432 (SCA).

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would notice that this is an interesting case because the appellant is not suing the company but a third party dealing with the company (being the bank). The court put this matter to rest in this matter as follows:

> … It found no facts to have been pleaded that established a separate and independent duty owed to the appellant… and that Absa's knowledge of his shareholding did not establish such duty. Consequently, the court correctly found that the appellant could not proceed against Absa for wrongs done to [the company].

3.2 Ratification Principle

The third justification to the rule in Foss can be seen from the judgment of *MacDougall v Gardiner.*[145] The chairperson of the company had adjourned the meeting at his discretion without the opportunity of casting a vote whether or not to allow for the adjournment. The dissenting shareholder argued that the chairperson had conducted himself improperly. The court held that:

> the basis of the complaint was something that in substance the majority of the shareholders were entitled to do and there was no point in suing where ultimately a meeting has to be called at which the majority will, in any case, get its way.

The understanding is that it would not be wise to have courts gates flooded for something that can be corrected(ratified) by convening a general meeting.

3.3 Multiplicity of Action

Although courts act as emperors, one cannot shy away from the fact that law suits are costly. Another justification to the rule in *Foss* is to limit the possible multiplicity of individual shareholders to pursue wrongs on behalf of the company. Since a company has a board of directors; certain matters do not to reach the court but may be remedied by assembling of a general meeting. It therefore, would not make sense for an individual shareholder to bring an action on the basis of an irregularity. It has always been the courts' averment that they seek not to interfere with the management of the company. It is also a waste of the court's time for it to rule on a matter that may *prima*

[145] (1875) 1 chd 13.

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facie be void but can be ratified by the shareholders in a meeting and thereby leaving the court's decisions to remain futile.[146]

3.4 Judicial Non-interference in the internal affairs of a company

It is also the view of the researcher that the proper plaintiff rule extends to another factor known as the non-interference rule. This is submitted for the simple reason that, if the courts have emphasised that a shareholder does not have the *locus standi,* irrespective of a proper wrong properly perpetuated on the minority shareholder, and the court elects not to bend the rule but insist on the proper plaintiff rule, that implies that the courts are unwilling to infer in the business of the company. The non-interference rule finds place in the Companies Act under section 66(1).[147] It provides as follows:

> The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or company's memorandum of incorporation provides otherwise.

In practice, this section, together with the proper plaintiff rule, gives rise to difficulties and injustices. *Desousa and Another v Technology Corporate Management (Pty) Ltd and Others*[148] involved a dispute over a purchase of shares. Seeing that the purchaser was unable to pay the costly price tag attached to them, the majority shareholders proposed to amend the articles of the memorandum, to reduce the price of the shares. Desousa and company resisted this and argued that it was not in the best interests of the company nor the shareholders. Although the court found in favour of the applicants Boruchowitz J still recognised the non-interference rule as he remarked that "our courts will be slow to interfere in the management of companies."[149]

[146] See MacDoughall v Gardiner (1875) 1 Chd 13 at 13; see also N Bourne, *Bourne on Company Law* Routledge: New York (2016) p254.
[147] Companies Act 71 of 2008.
[148] [2017] 3 ALL SA 47 (GJ).
[149] Desousa and Another v Technology Corporate Management (Pty) Ltd and Others [2017] 3 ALL SA 47 (GJ) para 49.

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The case of *Khan and Another v Communicare and Others*[150] involved an allegation of non-compliance with the companies articles in terms of the elections of new directors when their term ends. However, the respondents' contention was that "even if the election procedure had been irregular, a court had no standing to interfere" Binns-Ward J remarked that "…however, as the judgment in *Foss v Harbottle* itself admits, the rule against shareholders litigating individually for the benefit of the company is not inflexible one."[151] It can be submitted that at least this case relaxes the strict approach of non-interference that the courts recognise each time a minority shareholder brings a claim.

Since the company is not 'a person' per se' the directors act on behalf of the company and may adhere to the business judgment rule. What is business judgment rule? It is a presumption that implies that in decision-making of the business, the directors acted in honesty and in good faith. In South African law, this is codified under section 76(3) the section, provides that, "… a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director in good faith and for a good cause and in the best interest of the company." What can be of concern is how the business judgment rule is tested. Section 76(4) makes a list as to what could be viewed as a test. A question may be posed that, in the context of shielding a director through the business judgment rule wont minority shareholders be aggrieved/harmed? Ralph questioned this as well and drew a conclusion that "… the lack of attention to the issue is not surprising because the cases themselves seldom suggest any problem with the use of the business judgment rule in close corporations."[152]

In the case of *Gay v Gay Supermarkets Inc*[153] the company had fired a minority shareholder, following after the board decided not to declare/pay dividends for the previous year. The court dismissed the application by the minority shareholder and indicated that there was no fraud nor bad faith or even abuse was present and, therefore, the claim was without merits. It is submitted that in circumstances like those in *Gay* it is evident that the business judgment rule is designed to allow directors to

[150] [2011] ZAWCHC 392.
[151] Khan and Another v Communicare and Others [2011] ZAWCHC 392 at para 4.
[152] Ralph A. Peeples, 'Use and Misuse of Business Judgment Rule in Close Corporation' Notre Dame Law Review 60 (3) (1985) 467.
[153] 343 A.2d 577 (1975).

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'clothe' with the business judgment principle to continue to defraud or injure both the company and minority shareholders.

4. Exceptions to the Rule in Foss v Harbottle

4.1 The Derivative Action

It is evident that the proper plaintiff rule is still as rigid as its first introduction in *Foss* this is because the only instance which a shareholder could bring an action on behalf of the company then, was through the common law derivative action.[154] According to the Oxford Dictionary[155] the term derivate means "derived or obtained from another". The same applies when one talks about derivative action: a shareholder derives the right to bring an action on behalf of the company from the company itself, since the company is regarded as the proper plaintiff for a wrong done to it.

At common law, a derivative action brought by an applicant required that two things should be proved 1. That there was wrongdoer control; and

2. That the wrong cannot be remedied by a simple majority.

On the wrongdoer control, the minority shareholder, had to prove that the wrongdoers are controllers of the company. In essence the applicant had to prove that those who wronged the company are the same people as those who have failed to institute proceedings on behalf of the company, because such action would be against themselves.

In *Pavlides v Jensen*[156] the court expressed the view that to qualify as wrongdoer control the wrongdoers should possess de jure control or more than 50% of the company's voting shares. In mitigating this strict approach the court in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*[157] concluded that, it was necessary that wrongdoers have *de jure* control but also *de facto* control was sufficient to prove

[154] *Prudential Assurance Co Ltd v Newman Industries Ltd (NO:2):* CA 1982 wherein it was stated that, "A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested."

[155] A S Hornby, Oxford Advanced Learner's Dictionary of Current English, 8th ed Oxford: New York (2010) p394.

[156] [1956] 2 ALL ER 518.

[157] CA ([1982] Ch 204).

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wrongdoer control. In addition the second ground suggests that courts had to ascertain whether a wrong would remain unremedied if a derivative action is not brought, a test of 'fraud on the minority' has frequently been used.[158]

The derivative action proved to be difficult as there were many hurdles that minority shareholders faced when proceeding derivatively. For instance, the minority shareholder had to bear costs of the suit although a successful suit would also entitle the company of the proceeds. In order to make a valid and strong case the applicant had to go to the wrongdoers to obtain information he/she sought to use against them. Common sense would make one understand how difficult that task had been. Therefore, satisfying the court onus was not easy. As connoted in *McDougall v Gardiner,*[159] actions on behalf of the company proved to be useless with the sudden decisions by the majority to ratify what was a void action. Not only is this a waste of the courts time but of costs too, on the applicant who proceeded derivatively.

Common law derivative action should be contrasted with statutory derivative action under section 165 of the Companies Act. This section provides that:

> (1) Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.
> (2) A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person—
> (a) is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;
> (b) is a director or prescribed officer of the company or of a related company;
> (c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or
> (d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.

As noted by Cassim that, "the modernised statutory derivative action under section 165 is much wider. It extends to wrongs done by the outsiders or third parties. This includes outsiders against whom the company's controllers refuse to act because they

[158]Derivative action and what it entails https://www.eversheds-sutherland.com/global/en/what/publications/shownews.page?News=en/ireland/derivative-actions (accessed on 28 March 2020).
[159] See *MacDoughall v Gardiner* (1875) 1 Chd 13 at 13; see also N Bourne, *Bourne on Company Law* Routledge: New York (2016) p254; see also Alexandra Stylianou 'Evolution of The Derivative Action as an Enforcement of Rights Mechanisms Under the Companies Act 71 of 2008' unpublished MA dissertation, University of Pretoria, 2016 8.

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desire to shield those outsiders or because they are related to or associated with the outsiders."[160] This finds support by the case of *Lewis Group Limited v Woollman and Others*[161] where the court held that:

> It bears nothing at once that it has already been remarked in a judgment of appeal court that the abolition of common law in terms of section 165(1) has left unaffected the standing of shareholders to litigate directly in respect of matters affecting them personally.

The court went further to reiterate that:

> This is to underscore the enduring distinction between the nature of derivate action and that of personal action. The former is a remedy to be exercised in the defence or advancement of the company's rights or interests, and not the personal rights of the plaintiff.[162]

What then is a statutory derivative action? The provision in section 165, suggests that "any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished." It now allows also for a person to serve a demand upon the company to commence legal proceedings in order to protect the legal interests of the company.[163] Failure by those in power is the ticket for a shareholder to derive powers from the company and bring derivative action.

Derivative action can be seen as the first statutory remedy against the rule. In *Foss* although, there are exceptions to this rule, however these are common law grounded and not statutorily regulated. The use of the derivative action is seen often when it relates to wrongs done to the company typically by its directors. If the company cannot or will not act against those who wronged it. Derivative action on behalf of the company may be instituted in those circumstances. Such an action will have to be instituted against the wrongdoers by somebody acting on behalf of himself and all the shareholders, other than the wrongdoers i.e. the minority shareholder. This would imply that the company being unable to act as plaintiff, must be joined as a nominal

[160] MF Cassim, 'When Companies Are Harmed by Their Own Directors: The Defects in The Statutory Derivative Action and The Cure (Part 1*)'* (2013) 25 South African Mercantile Law Journal 170.
[161] [2017] ZAWCHC 15.
[162] See also Oliver Schreiner, 'The Shareholder's Derivative Action: A Comparative Study of Procedures' (1979) The South African Law Journal 209.
[163] See section 165(2) of the Companies Act 71 of 2008.

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defendant so that it is a party to the proceeding and any order of the court can be made applicable to it.[164]

Concerns have been that it is absurd that the company is joined as a defendant. However the justification is that "the company cannot be made a plaintiff unless the board of directors or the general meeting have consented to the proceedings,"[165] common sense will show that the board will not agree to the plaintiff proceeding by derivative action and therefore if consent is given a claim founded as a derivative action cannot stand.

4.1.1 The requirements of a derivative action

In order to succeed there are certain requirements that a concerned shareholder should satisfy. In terms of section 165(5)(b) of the Act, the Act makes a list of the requirements that the court must be satisfied with; namely, that,

> (i) the applicant is acting in good faith;
> (ii) the proposed or continuing proceedings involve the trial of a serious question of material consequence to the company; and
> (iii) it is in the best interests of the company that the applicant be granted leave to commence the proposed proceedings or continue the proceedings, as the case may be.

Good faith

It is trite law that all dealings must be lawful and conducted in good faith, the same is true for the requirement of good faith under section 165(5)(b)(i) of the Act. Courts have developed an approach in establishing the element of good faith on the part of the applicant under this section. With that in mind this begs the question, how does one prove good faith, what does the requirement of good faith mean? Recently the Supreme Court has dealt with a case of *Mbethe v United Manganese of Kalahari (Pty) Ltd.*[166] In this case Mbethe was an applicant, who was both the chairperson and director of United Manganese (the company). His case was founded on section 165(5) of the Act, that is, he wanted to institute a derivative action on behalf of the company.

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[164] Tim Miller 'Derivative Action in South Africa' available at https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2010/derivative-action-in-south-africa.html (accessed on 06 November 2019).
[165] AO Nwafor 'A Commentary on the Derivative Action under the Lesotho Draft Companies Bill of 2006' University of Botswana Law Journal (2007) 83.
[166] 2017 (6) SA 409 (SCA).

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In his application Mbethe challenged the company's decision to terminate a contract with Zastrospace, a crushing company for manganese ore. For Zastrospace to even earn a contract with the company was because there came a time when there was a demand in the market for manganese. Later, when the market declined the company terminated Zatrospace's contract.

Mbethe alleged that such was not in the best interests of the company and that the Kuruman community had suffered loss of employment. When the court examined the evidence in its totality, it found that, firstly, Zatrospace would give 30% of its profit to another company. This fee was claimed to be a fee for management processes for Zatrospace, but when asked to show record indicating such, Zastrospace failed.

Secondly, the court found that the owner of the company dealing with Zastrospace was a close friend of Mbeth'se and thirdly the employment issue was, "although dressed up in the noble cause of promoting good corporate governance and the upliftment of the Kuruman community,'' such contention was rejected by the court as only twelve people were employed by Zastrospace. Therefore, no BEE justification could stand.

As reasoned by the *court a quo* the derivative action is required "to protect the company from (wrongdoing by) those who control the running of its affairs."[167] Furthermore, the modern rationale of the derivative action is that such an "action is not only a remedy by means of which minority shareholders may obtain redress for the company, but is also a fundamental tool to enforce good corporate governance."[168]

As a result, the court a quo, dismissed Mbethe's application on the basis that he failed to prove that he acted in good faith. Courts have developed a test for good faith; the courts have understood this to be two-legged. In *Mouritzen v Greystone Enterprises (Pty) Ltd*[169]*,* it was held that :

> [T]here are two inter-related questions in determining good faith. First, the applicant must honestly believe that a good cause of action exists and that it has a reasonable prospect of success…. (Secondly) the applicant must also show that the application is not brought for a collateral purpose.

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167 Mbethe v United Manganese of Kalahari (Pty) Ltd 2017 (6) SA 409 (SCA) para 63–66.
168 MF Cassim 'Untangling the Requirement of Good Faith in he Derivative Action in Company Law' (part 1) (2018) 39 (2) Obiter 367.
169 [1980] 2 All ER 841.

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It can therefore be said that the requirement of good faith is dealt with subjectively. It must be what the applicant had in mind when he/she instituted the derivative action.

The best interest of the company

A presumption occurs that it will not be in the best interest of the company that leave be granted. This is intertwined with provision of section 165(7) and (8) of the Act. Section 165(7) of the Act attempts to justify instances wherein it would not be in the interests of the company. Such can be summed up as follows:

(i) The proposed or continued proceedings are against third parties;
(ii) It was the decision of the company not to bring proceedings; and
(iii) Directors of the company – acted in good faith, had no personal/financial interest and had informed themselves about the subject matter.

It is important to understand that leave granted by the court is the first and that a second step; that is, the actual derivation is evoked only after leave is granted. In *Lewis Group Limited v Woollam*[170] the court reasoned that:

> [t]he presumption that leave to proceed derivatively (against a wrongdoing directors of the company) should not be granted when the company elects not to proceed against (the said director) … [this] amounts to no more than a reiteration …of the common law requirement… (of wrongdoer control.) It indicates an intention by the legislature to keep the codified derivative action remedy within recognisably similar bounds to those that delimits availability under the common law.

Justification to the three-fold requirement, as set in section 165(5)(i) – (iii) has been that it is aimed at protecting "the company against frivolous or vexatious claims or claims that are without merit."[171] However Cassim[172] does not agree with the finding in the Lewis group case. He says the following:

> Startlingly, however, for the purposes of the presumption, the directors of a company fall within the ambit of the definition of "third parties", not "related parties" to the company. The effect of this egregious error is that the

[170] 2017 1 ALL SA 192 (WCC).
[171] MF Cassim, The New Derivative Action under the Companies Act: Guidelines for Judicial Discretion (2016) 32.
[172] Cassim et al, The Law of Business Structures 369.

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> presumption operates in favour of directors, and thus inappropriately shields directors who have wronged the company on whose board they serve.

I agree with Cassim: the rationale for denying leave simply because the wrongdoers have decided not to proceed should not be a ground for doing so; in fact, their denial should be compelling proof to eliminate the breeding ground for abuse done by wrongdoers. Allowing such presumption, continues to put a strain on minority shareholders and this resurfaces the difficulty a common law applicant encountered because the provision or requirements placed the wrongdoer at a safer place than the minority shareholder.

It is submitted that there is divergence in the interpretation of the law and the law itself (the section). Relying on *Lewis* case the judge welcomes derivative action, without imposing the strict and hideous burden of proof that the section requires in order for a shareholder to embark on derivate action, this is proof that the section still contains remnants of the rule laid down in *Foss* because if leave is not granted, then the minority shareholder is without recourse.[173]

As professor Nwafor stated, "…the effects of those statutory provisions on the rule itself is not too significant as would justify the suggestion that the rule is now extinct."[174] Judicial decisions reinforce that the proper plaintiff rule is still in force as it was in the case of *Cinematic Finance Ltd v Ryder*[175] wherein Roth J reiterated that, "the general rule is that a cause of action vesting in a company should be pursued by the company and not by its shareholder."[176] Similarly, in *Hillcrest Village (Pty) Ltd and Another v Nedbank Limited and Others*[177] the court made a ruling that "save for certain exceptions, in general, when a wrong is alleged to have been done to a company the proper plaintiff to sue the wrongdoers is the company itself."[178]

The stringent application of the rule laid down in *Foss* seems to be too harsh and unfair towards the minority shareholders, although minority shareholders may have certain

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[173] *Foss v Harbottle* (1863) 2 Hare 461 ER para 486.
[174] AO Nwafor, 'Enforcement of Corporate Rights The Rule in *Foss v Harbottle:* Dead or Alive' (2016) 12 (1) Corporate Board: Role, Duties & Composition 1.
[175] [2010] EWHC 3387 (Ch).
[176] *Cinematic Finance Ltd v Ryder* [2010] EWHC 3387 (Ch) at para 9.
[177] [2008] ZAGPHC 134.
[178] Hillcrest Village (Pty) Ltd and Another v Nedbank Limited and Others [2008] ZAGPHC at para 5.2.

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rights they are still barred under the rule to pursue justice directly, as such they have to succumb to the wrongs and ill-treatment done by those in the majority.

In order to cure this strictness, four common exceptions to the rule have been established, namely ultra vires, fraud to the minority, special resolution and injury to personal interest. The court in *McLelland v Hulett and Others*[179] held that, "There is no basis for saying that the rule in *Foss v Harbottle* has been received in our law without the exceptions together with which it is framed" these exceptions shall be discussed as well as weighed against the relevant provisions of the Act, in order to deduce whether the rule in *Foss* is still applicable or not.

4.2 Ultra Vires

The principle of ultra vires can be explained as any act that is not permissible by law. Davies & Sarah[180] averred that:

> A company was required by the early legislation to include a statement of its objects in it memorandum of association and from that the courts deduced that the company did not have legal capacity to act outside its objects. Any such act in principle will be void.

However, in terms of section 20(4) of the Act, provision is made that "one or more shareholders or directors or prescribed officers of the company, or a trade union representing employees of the company, may apply to the High Court for an appropriate order to restrain the company from doing anything inconsistent with the act. Since section 20(4) only provides for an action where there has been inconsistency with the Act, what is the case where there has been a breach in terms of the memorandum of incorporation? such is provided for by section 20(5); it provides that "one or more shareholders, directors or prescribed officers of a company may apply to the High Court for an appropriate order to restrain the company or the directors from doing anything inconsistent with any limitation, restriction or qualification contemplated in subsection (2)…" The court in *Hoole v Greta Western Railroad Co*[181] held that;

> A court will not hesitate to inference with a decision taken by any company organ (board of directors or general meeting of shareholder), even on

179 1992(1) SA 456 (A &CLD) at 467I.
180 Paul L Davies & Sarah Worthington, Gower's Principle of Modern Company Law (2016) 173.
181 (1867) 3 Ch App 262.

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> application of one shareholder only, if the decision taken by that company organ was ultra vires or altogether beyond [that organ's] power.

Therefore, the ultra vires principle would be evoked when the board of directors took a decision or acted contrary to that which is in the memorandum of incorporation or the Act.

4.3 Special Resolution

A special resolution is defined in terms of section 1 of the Act as:

> A resolution adopted;
> (a) At a shareholders meeting, with the support of at least 75% of the voting rights exercised on the resolution, or a lower percentage as contemplated in section 65(10); or
> (b) By holders of a company's securities acting other than at a meeting, as contemplated in section 60."

A special resolution is a prerequisite, required by both the Act as well as the memorandum of incorporation. It is only fair that parties abide by the terms of the 'contract'. Similarly, in terms of section 65(10), a company's memorandum of incorporation may permit:

(a) A different percentage of voting rights to approve any special resolution or;
(b) One or more different percentages of voting rights to approve special resolutions concerning one or more particular matters, respectively.

There are two kinds of resolutions. A special resolution which requires at least two thirds of the votes or 75% and then there is an ordinary resolution, which needs at least 51%. The case of *Edwards v Halliwell*[182] illustrates this except well, a special resolution to pass or approve an increase of remunerations was sought in this case. The court relied on the case of *Cotter v National Union of Seamen*[183] to arrive at its decision it reasoned that;

> As Romer J. pointed out, the reason for that exception is clear, because otherwise, if the rule were applied in its full rigour, a company, which, by its directors, had broken its own regulations by doing something without a special resolution which could only be done validly by a special resolution could assert that it alone was the proper plaintiff in any consequent action and the effect would be to allow a company acting in breach of its articles to do *de facto* by ordinary resolution that which according to its own regulations could only be done by special resolution. That exception exactly fits the present case inasmuch as here the act complained of is something which could only have

[182] [1950] 2 ALL ER 1064.
[183] (1927) 29 Ll.L. Rep 61.

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> been validly done, not by a simple majority, but by a two thirds majority obtained by ballot vote. In my judgment, therefore, the reliance on the rule in Foss v Harbottle in the present case may be regarded as misconceived on that ground alone.

In most cases, the terms to the contract may stipulate that should there be an irregularity, how can that be remedied either through arbitration and so on. However, in company law if a member is aggrieved by a breach on special resolution, s/he can apply for relief under section 65 of the Act.[184]

Of concern is that the same weapon that the majority may elect to contravene may be used to ratify the same wrong that the minority shareholder has complained of, which strengthens the majority rule principle. Reference is drawn from section 20(2) which provides that:

> If a company's Memorandum of Incorporation limits, restricts or qualifies the purposes, powers or activities of that company, or limits the authority of the directors to perform an act on behalf of the company, the shareholders, by special resolution, may ratify any action by the company or the directors that is inconsistent with any such limit, restriction or qualification, subject to subsection (3).

4.4 Fraud on the minority

The third exception to the rule in *Foss v Harbottle* is fraud on the minority. What does this concept entail? In *TWK Agriculture Ltd v NCT Forestry Co-operative Ltd and Others*,[185] the court remarked that:

> This exception is generally described as the "fraud on the minority" exception. The terminology is somewhat misleading as it is clear from the authorities that "fraud" is not used in the technical sense but in the sense of misuse or abuse of power by those in control.[186]

Therefore, from the judgment above this exception also relates to the use of corporate opportunity doctrine. It is the view of the researcher that when directors are entrusted

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[184] This section deals specifically with the concept of special resolution, therefore any concern should be remedied through this section.
[185] [2006] ZAKZHC 17.
[186] TWK Agriculture Ltd v NCT Forestry Co-operative Ltd and Others [2006] ZAKZHC at para 11 see also Sammel & Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 679F-H.

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to act in the best interests of the company, but instead use the company opportunities for their own personal interests, in that sense they defraud the minority shareholders. It is evident that, that stolen corporate opportunity no longer serves the company thus then the company will not be doing well then shareholders would no longer receive their returns in a form of dividends. Kathy Idensohn[187] acknowledges that the rule in *Foss* has never prevent a shareholder from litigation in adverse situations furthermore:

> Nor did it deny an individual shareholder the right to bring a personal action where the majority in general meeting committed a 'constitutional fraud on the minority' by altering or affecting that shareholder's rights in an unfairly discriminatory manner.

As a result, a number of cases have dealt with this exception. In *Menier v Hooper's Telegraph Works* (1874) a claim was founded on the complaint that there was collusion between majority shareholders. The court held that such a claim was properly founded. In *Cook v Deeks*[188] the claim was premised on the fact that those in the majority had accrued corporate opportunities to themselves. However, this exception did not apply to cases of negligence as was the case in *Parlides v Jensen*[189] which involved a negligent sale of an asbestos mine but the case of *Daniels v Daniels*[190] brought challenges, as a director had bought property from the corporation for £4,250 and resold it by £120 000. Surprisingly the court ruled this as a case of negligence rather than fraud, however Templeman J connoted that;

> To put up with foolish directors is one thing; to put up with directors who are so foolish they make a profit of £115,000 odd at the expense of the company is something entirely different.

It is the view of the researcher that when the courts are faced with an action founded on fraud on the minority, the courts should always pierce the corporate veil in order to hold those in the wrong accountable.

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[187] Kathy Idensohn, 'The Fate of *Foss* Under the Companies Act 71 of 2008: analyses' *SA Mercantile Law Journal* (2012) 24 (3) 357

[188] [1916] 1 AC 554.

[189] [1956] 2 ALL ER 518.

[190] [1978] Ch 406.

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4.5 Injury to personal rights

If for one reason the company deprives a shareholder of his/her rights properly and clearly stated in the company's constitution, the injured shareholder is allowed to bring a claim on his or her behalf for such gross and ill treatment. However, most authors have observed that this exception is at the crossroads with derivative action. In certain cases, this may be viewed as an overlap between a shareholder's actions and corporate action. Similarly, the court in *Lewis Group* questioned if one is allowed to proceed by derivative action even after the Act has given him/her the right to do so personally In *Trinity Asset Management and Others v Investec Bank*[191] it was held that the rule in *Foss v Harbottle* was of no application. This was because the relief sought in those cases arose from rights that were personal in nature.

5 Conclusion

Although the rule in *Foss v Harbottle* has received justification, its stringent application forced the development of some exceptions. These exceptions, together with the statutory derivative action in section 165, aid in protecting the minority shareholders. There has been adverse change, however the continued prerequisite to have leave granted first, when seeking to proceed through the derivative action, has proven to be a stumbling block to minority shareholders, that since leave is only a first step to seeking a derivative action therefore the rationale for such a procedure cannot be justified.

It can also be submitted that there is still some confusion with regards to the exception "injury to personal right" of concern is that this exception overlaps with the corporate action, therefore this becomes problematic in that this guards against the principle of double recovery which is one of the justifications in *Foss.*

In addition, a special resolution claim can be properly established but the majority may elect to ratify the wrong. This goes back to the judgment in *Foss* that state that the majority rules.

With regards to ultra vires, although the Act provides for statutory remedy, by bringing a law-suit to the High court in terms of section 20(5) of the Act. Cassim *et al* alluded

[191] 2009 (4) SA 89 (SCA)

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that "section 20(5) does not apply to all contraventions of the memorandum but is limited to the company's capacity and authority of its directors." Would this not mean that directors would still be able to take unilateral decisions and bring the board to ratify them in terms of section 20(2)?

Throughout this dissertation, it was shown that there are barriers dressed and clothed in the form of either presumptions or principles, and such have proven to be the reason as to why minority shareholders are often faced with difficulties in getting the relief they want, this is aided with tests set so high that it makes it impossible to satisfy them when seeking relief. As such, it cannot be assumed that the rule in *Foss* has been abolished. It can only be accepted that the rule in certain instances will/can be relaxed as the court in *Prudential Assurance Co Ltd v Newman Industries Ltd* (no 2) 1982 remarked that:

> if the minority shareholders were denied the right to approach the court on behalf of themselves and all others, their grievance could never reach the court because the wrongdoer themselves, being in control, would not allow the company to sue.

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Chapter 3: The Minority Shareholder Remedy

3.1 Introduction

The rule in *Foss v Harbottle*[192] (*Foss* case) was extensively discussed in the previous chapter. It is through this majority rule that the minority protection becomes relevant. As was discussed in chapter two that the main exception to the rule in the *Foss* case, was the derivative action. However, such avenue was sought or relied on only when it was in the best interests of the company to do so, and not for the protection/benefit of the minority shareholders, per se. With this background, the researcher in this chapter aims to question what happened after the passing of the judgment in the *Foss* case specifically with regards to minority protection. The question is whether with the strict application of the derivative action, were the minority shareholders indeed protected? This chapter also examines the development of the oppressive and unfairly prejudicial conduct relief in South African, from inception to the current legislation. In conclusion, the researcher shows whether the current legislative arrangement is sufficient or not in protecting the minority shareholders.

3.2 The History of Minority Protection

In all associations, it is a norm to have two sides; namely, those in the minority and those in the majority. For the purpose of this work, reference will be made from time to time to the rule that was laid down in *Foss'* case. It is through this judgment that the majority rule and the principle of non-interference were made law. With this judgment in place, minority protection became the most spoken subject with scholars interrogating whether or not there is or has been adequate minority protection. Sir Wigram said the following regarding the judgment in *Foss* case:

> …instead of the corporation being formally represented as plaintiffs, the bill in this case is brought by two individual corporators, professedly on behalf of themselves and all the other members of the corporation except those who committed the injuries complained of by the plaintiffs assuming to themselves the right and power in that manner to sue on behalf of and represent the corporation itself. It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation…[193]

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[192] (1843) 2 Hare 461.
[193] *Foss v Harbottle* (1843) 2 Hare at 491.

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What does this mean or what effects do this rule have with regards to minority protection? Does it imply that minority shareholders are less protected, as there are precedents favouring majority rule? Moreover, do those precedents stand unshaken even when the majority shareholders act contrary to the dictates of justice?

Although there are recognised exceptions, these are considered in some quarters as "too old fashioned and rigid".[194] It is the view of this researcher that such a conclusion by Sheik[195] was reached based on the many requirements that one had to satisfy in order for the exceptions to apply.

However, to answer the question of why there is a need for minority protection, this should be viewed from the English law footing, as this is the heart of common law and corporate law. Cassim *et al* note that "The need for minority protection arises from the consideration that the business and acts of a company are generally conducted by its board of directors and by majority vote of its shareholders in general meeting."[196] In addition, "by becoming a shareholder one undertakes to be bound by the decisions of the majority shareholders."[197] Other scholars[198] have indicated that:

> Britain codified only very basic investor protections into statutes and there were also very few judge-made precedents relating to investor protection. The approach that was taken in this era [1800s] was to suggest a default template of rules, but to ultimately leave the matter between the corporation and its shareholder.

From Graeme et *al*'s[199] reasoning, it is no surprise that the court in the *Foss* case gave a rule of non-interference. Graeme et *al*[200] added that the legislature by then, rather than creating and codifying rules, it instead gave companies the freedom on how it should run itself. This freedom is fine, but also leaves room for a breeding ground for

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[194] Saleem Sheik, A guide to Companies Act 2006 (2013) p 55.
[195] Saleem Sheik, A guide to Companies Act 2006 (2013) p 55.
[196] FHI Cassim, MK Cassim, R Jooste, J Shev & J Yeats, "The Law of Business Structures" (2016) Juta & Company (Pty) Ltd p 417.
[197] FHI Cassim, MK Cassim, R Jooste, J Shev & J Yeats, "The Law of Business Structures" (2016) Juta & Company (Pty) Ltd p 417.
[198] Graeme G. Acheson, Gareth Campell & John. D Turner, *Common law and the Origin of Shareholder Protection*, Working Paper Series (2016) also available at http://www.quceh.org.uk/working papers at 1.
[199] Graeme G. Acheson, Gareth Campell & John. D Turner, *Common law and the Origin of Shareholder Protection*, Working Paper Series (2016) also available at http://www.quceh.org.uk/working papers at 2.
[200] Graeme G. Acheson, Gareth Campell & John. D Turner, *Common law and the Origin of Shareholder Protection*, Working Paper Series (2016) also available at http://www.quceh.org.uk/working papers at 2.

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so many corporate injustices to those who are in the minority. This caution was also recognised by Louw & Theodosiou as follows:

> The Companies Act 2008 provides for the business and affairs of a company to be managed by or under the direction of its board (and not its shareholders). The reasons for this are self-explanatory as the identities of the shareholders are constantly changing, and it would be impossible to get a majority shareholder body together for every business decision that has to be taken. However, one must be cognisant of the fact that the majority shareholders usually control the board with the power to appoint the majority of board members and, seeing shareholders owe no fiduciary duty to the company or to other shareholders, they are entitled to act in their own interests, even where it is detrimental to the minority shareholders.[201]

The dominant position of the majority shareholders, therefore, formed the basis upon which protection is sought for the minority shareholders.

3.3 Minority Shareholder Remedies

In the corporate world, the directors of a company are entrusted with decision-making on a daily basis.[202] Some of these decisions may not be favourable to the interests of the minority shareholders and the company. However, the law insists that only the company, through the board or the majority shareholders, can seek relief where wrongs are done to the company. However, one of the avenues available to the minority shareholder for seeking reliefs is provided in section 163 of the Act[203]. The other channels for the minority shareholder reliefs are derivative action, as provided in section 165[204] and the dissenting shareholder appraisal right, as provided in section 164[205]. However, section 163 relief is the crux of this chapter.

The previous chapter has dealt extensively with derivative action and has shown both its advantages and shortfalls and shall not be repeated here. Therefore, this chapter deals specifically with minority protection, and although other identified remedies do not form the focus of this work, they still overlap with the notion of unfair prejudicial conduct. For instance, when referring to appraisal right as one of the identified

[201] Louw & Theodosiou, Minority Shareholders Protection and Share Buy Back As A Remedy https://www.financialinstitutionslegalsnapshot.com/2017/11/minority-shareholder-protection-and-share-buy-back-as-a-remedy/(accessed on 14 May 2020).
[202] See s 66 of the Companies Act of 2008.
[203] The Companies Act 71 of 2008.
[204] The Companies Act 71 of 2008.
[205] The Companies Act 71 of 2008.

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remedies, this is because in terms of section 163(2)(e)[206], exchange of shares is one of the relief that a court may order when a minority shareholder approaches the court on the basis of an unfairly prejudicial conduct. It is for this reason that dissenting shareholder relief will be discussed in brief below.

3.3.1 Dissenting Shareholder Appraisal Rights

Following the stringent common law rule laid down by the court in the *Foss case,* when development for the purposes of minority protection progressed, it seems minority shareholders have only two options; namely, to ask that the unfair prejudice be addressed[207] or have their shares purchased, a concept embedded in section 164,[208] which provides as follows:

> A shareholder may demand that the company pay the shareholder the fair value for all the shares of the company held by that person if:
>
> a) The shareholder-
>   i. Sent the company a notice of objection, subject to subsection 6; and
>   ii. In the case of an amendment to the company's Memorandum of Incorporation, holds shares of a class that is material and adversely affected by the amendment,
>
> b) The company has adopted the resolution contemplated in subsection 2; and
>
> c) The shareholder-
>   i. Voted against that resolution; and
>   ii. Has complied with all of the procedural requirements of this section.[209]

This concept has the effect of painting an image to the minority shareholders that, one has to either accept the injustice or leave the company through share buy backs. In addition, it also opens a room for questioning whether the buying out of a minority shareholder's shares, although said to be done at a fair value, whether a test was/is used to determine the concept of 'fair value'. This is Bearing in mind that "it is difficult for a dissatisfied minority shareholder to voluntarily exit the company by selling his or her shares, because a purchaser of minority stake in a private company is hard to come by."[210] As noted by Sibanda[211] that there has been no universal application for

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[206] The Companies Act 71 of 2008.
[207] This could be done by evoking the provisions of section 163 of the companies Act 71 of 2008 or its equivalent ie section 252 of the Companies Act 61 of 1973.
[208] The Companies Act 71 of 2008 see sec 66.
[209] See section 164(5) of The Companies Act of 2008.
[210] See section 164(5) of The Companies Act of 2008.
[211] A Sibanda, *The Statutory Remedy For Unfair Prejudice in South African Company Law* (2013) Journal for Juridical Science 38 (2) 67.

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the valuation of shares as the 1973 Act did not provide explicit guidelines which the courts were to apply. This again evokes to the question of whether minority shareholders are adequately protected or not.

Inferences are drawn from the case of *Bayly v Knowles*[212] to illustrate this point. That case concerns the acquisition of shares offered to Knowles at the value of R2 million. Realising that he would not be able to meet the purchase price, he introduced Bayly to the offer. In terms of the agreement, Bayly was to be the managing director whilst Knowles was the sales and marketing director. Each maintained a 25,5% of the shares at the company.

The relationship between Knowles and Bayly broke down so did the trust and confidence. This led to a cut in Knowles allowances and salary, and ultimately an offer by Bayly ensued to buy Knowles shares. Instead of Knowles taking the offer, he made a counter-offer to buy Bayly's shares instead. When this application was made in the court a quo, Knowles prayed for the sale of Bayly's shares and the winding up of the company altogether.

The Supreme Court of Appeal noted that when Knowles made the counter-offer, in a way it was to show his refusal to have his shares bought. The court reasoned that Knowles views on the matter were not without justification: it was he who brought Bayly into the company, built up its business through his sales acumen and then unfairly shut him out.[213]

The court relied further on the dictum of Hoffman J in *Re Company (NO 606834 of 1988)*, which was cited by the court of first instance as follows:

> …This is an ordinary case of breakdown of confidence between the parties. In such circumstances, fairness requires that the minority should not have to maintain his investment in a company managed by the majority with whom he has fallen out. But the unfairness disappears if the minority is offered a fair value for his share.[214]

Following the dictum of Hoffman J, the court reiterated that:

> in the context of section 252 the failure of a minority shareholder to accept a reasonable offer for his shares in the company in the hands of the majority is,

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[212] 2010(4) SA 548 (SCA).
[213] *Bayly v Knowles* 2010(4) SA 548 (SCA) at para 21.
[214] *Bayly v Knowles* 2010(4) SA 548 (SCA) para 23.

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> at least, strong evidence of a willingness to endure treatment which is prima facie inequitable despite the choice of a viable alternative. If that is so it would not or ordinarily behove him to continue to complain about oppression.[215]

However, the court did say that the above rule is not absolute, especially in scenarios where the "offer is tainted by bad faith or ulterior motive as to excuse non-acceptance."[216] The court maintained that "I think it must be very unusual for the court to order a majority shareholder check? when he is willing and able to buy out a minority shareholder at a fair price."[217] Given that Bayly "maintained the essential level of co-operation and goodwill between the company and its suppliers… the effect of forcing Bayly out and placing Knowles in a position of control would have had effects on the company which could only be guessed at."[218]

Ultimately, the court held that:

> it follows from all these considerations that the only practicable order that could have been made in the circumstance was one which directed Bayly to acquire Knowles shares [liquidation] would destroy a perfectly viable company… [a]nd it would have provided no redress to Knowles for such oppression as he may have suffered.[219]

The concept of buying out, in this researcher's view, still reinforces the principle of majority rule, in that a dissatisfied minority shareholder will still not have his wishes upheld instead the majority will always prevail. The minority is offered an exit for disagreeing with the decisions of the board, especially in small company operations, where there is a possibility that a majority shareholder is also the director of the company. With this probability, the likelihood of the occurrence of prejudice cannot be ignored.

3.3.2 Relief from Oppressive or Prejudicial Conduct or from Abuse of Separate Juristic Personality of Company.

Section 163 of the 2008 Act provides for this relief; it appears broad when compared with its predecessor, provided for in section 252 of the 1973 Act. The current provision is divided into subsections that deal extensively with the requirements of the remedy.

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[215] *Bayly v Knowles* 2010(4) SA 548 (SCA) para 24.
[216] *Bayly v Knowles* 2010(4) SA 548 (SCA) para 24
[217] *Bayly v Knowles* 2010(4) SA 548 (SCA) at para 27.
[218] *Bayly v Knowles* 2010(4) SA 548 (SCA) at para 27.
[219] *Bayly v Knowles* 2010(4) SA 548 (SCA) at para 29.

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Under the 2008 Act, provision is made for persons who may be eligible to rely on the remedy, in addition two requirements must be satisfied; namely, the conduct must be oppressive or prejudicial conduct.

3.3.2.1 What Has Changed

Since the 2008 Companies Act is not the first legislation that deals with company law, a comparison is made between the 1973 Companies Act and the current legislation. Under the 1973 Act, oppressive relief was catered for under section 252 which provides that:

> 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, subject to the provisions of subsection (2), make an application to the Court for an order under this section.

From this passage, one can deduce that an applicant must be a 'member' and can only approach the court in their capacity as a member only.[220] The equivalent of section 252 of the 1973 Act is section 163 of the 2008 Act, which provides as follows:

> (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.

Compared to its predecessor, section 163 encompasses a much wider ground in that *locus standi* is now extended; that is, directors and shareholders or a related person can now seek relief under section 163, as opposed to section 252 of the previous Companies Act, which offered relief only to members in their capacity as members only. The extended *locus standi* is beneficial to the minority shareholders in cases where the director has been put in that position by the wishes of the minority

[220] Msomi, The –Tovim War, S252 and the new Companies Act Without Prejudice (2009) 32.

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shareholders. In *Motale v Abahlobo Transport Services (Pty) Limited and Others,*[221] a case that allowed a director to rely on section 163, the facts involved the applicant timeously requesting access to certain company information/record in his capacity as a director and shareholder. The court had to determine whether the other directors, being the respondents in this matter, acted in a manner inconsistent with their obligations as directors. The court held that refusal to grant access to the information amounted to unfairly prejudicial conduct.[222]

Besides the extension of *locus standi* to directors and related persons, the Act also expands the type of reliefs that may be granted when an applicant has met the requirements in section 163(1), as opposed to the applications brought under the old law that mostly favoured liquidation and winding up of the company.[223] Some of the relief that could be granted by the court under the present law include an order restraining the conduct complained of, appointing a liquidator, placing the company under supervision and commencing business rescue proceedings in terms of chapter 6 and so on.[224] Moreover, such relief is granted upon the court being satisfied that the 'interest' as opposed to the 'right' of the shareholder is prejudiced by the conduct. In *Utopia Vakansie-Oorde Bpk v Du Plessis*[225] in recognition of the use of interest in the new Companies Act as opposed to rights, it was stated that:

> The concept of 'interests' … is much wider than the concept of 'rights'. Accordingly, there is much to be said for the proposition that s 163 must be construed in a manner that will advance the remedy that it provides rather than limit it.

3.3.3 Prohibited Conduct Under Section 163

There are three broad categories of conduct that could give rise to relief under section 163 of the Act; namely, oppressive conduct, unfairly prejudicial conduct, conduct that unfairly disregards the interest of the shareholder.

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[221] (2015) JOL 34696 (WCC).
[222] Motale v Abahlobo Transport Services (Pty) Limited and Others (2015) JOL 34696 (WCC) para 17.
[223] See also section 111bis of the 1926 Act; this was introduced as an alternative remedy to winding up of the company where members complained of oppression. See also *Elder v Elder & Watson Ltd* [1952] SC 49.
[224] See section 163(2) (a)-(l).
[225] 1974 (3) SA 148 (A) at 170H-171D.

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3.3.3.1 What is meant by Conduct?

Conduct it is inclusive of the acts, omission and continuing acts. However, an interesting factor is that focus here is not the conduct itself but rather on the 'end-result' of the conduct. With this structuring, it closes doors for a minority shareholder to approach court, where there may be a proposed wrong. Such a 'conduct' may not be brought under section 163 because not only is it a future event, but rather the results of that 'proposed wrong/conduct' have not yet manifested and as such relief cannot be sought in those circumstances.[226]

However, a question may arise as to why the focus is on the result and not the conduct itself. The researcher is of the view that this is because a conduct's result may not always be unfair. For instance, when the majority shareholders adopt a resolution that the minority shareholders may be dissenting to in a general meeting where the odds were fair; this is a conduct and falls within the armbit of section 163 but can it be said that the 'result' of the conduct in this regard were unfair? Certainly not. Likewise, the court in *Visser Sitrus Pty Ltd v Goede Hoop Sitrus Pty Ltd*[227] questioned that:

> If the directors exercise a power conferred on them by the company's constitution (now styled as the Memorandum of Incorporation), and in so doing meet the standard imposed by s 76, they act lawfully. Can a shareholder who is prejudiced by the decision then complain that the decision is 'unfairly' prejudicial to him?

3.3.3.2 Oppressive Conduct

After the applicant has satisfied that there was a conduct, he/she should prove that the conduct **resulted** to an oppressive, unfairly prejudicial manner. It is unfortunate that this long and tangled concept of "**oppressive, unfairly prejudicial or unfairly disregards the interest of the applicant**" has been made a requirement that one has to satisfy yet has been left undefined. As such courts rely on old cases to draw definitions of what unfair prejudice mean or at least entails. Drawing inference from Sibanda's writing, he referred to a list of English case laws that aided in providing what would constitute oppressive conduct; he opines that:

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[226] The 2008 Companies Act does not provide for proposed acts.
[227] 2014(5) SA 179 (WCC).

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> In the leading English case of Elder v Elder & Watson Ltd, oppression was defined as conduct involving "a visible departure from the standards of fair dealing and a violation of the definitions of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely." Likewise, in Re Harmer Limited, oppression was described as "an unfair abuse of powers and impairment in the probity with which a company's affairs are being conducted". In Scottish Cooperative Wholesale Society Limited v Meyer and Another, the court defined oppression to be "lack of probity and fair dealing in the affairs of the company to the prejudice of some portion of its members."[228]

Sibanda adds that there are many tests which have been adopted by the South African regime from the English precedents to help when confronted with cases that required an interpretation of oppressive conduct. He reiterated that:

> First, the court would consider whether the conduct complained of involved "a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely". It was also considered whether the conduct revealed "a lack of probity and fair dealing" or whether it could be described as "burdensome, harsh and wrongful". Another test was the one used in Aspek Pipe Co (Pty) Ltd v Mauerberger, where it was stated that an applicant was to establish that "the majority shareholders are using their greater voting power unfairly in order to prejudice him, or are acting in a manner which does not enable him to enjoy a fair participation in the affairs of the company". The test used in the Aspek Pipe Ltd decision was easier to apply, considering that it focused mainly on an abuse of voting power by majority members that prejudiced their minority counterparts rather than directly attacking a particular act which could have been endorsed by majority shareholders.[229]

One of the judicial attempts in the South African law at defining the concept of oppressive conduct, was in *Aspek Pipe Co (Pty) Ltd v Mauerberger,*[230] where the court gave meaning to the words 'oppressive conduct' or 'unfair disregard of interest,' as follows:

> 'I turn next to a consideration of what is meant by conduct which is "oppressive", as that word is used in sec. 111 bis or sec. 210 of the English Act. Many definitions of the word in the context of the section have been laid down in decisions both of our Courts and in England and Scotland and as I feel that a proper appreciation of what was intended by the Legislature in affording relief to shareholders who complain that the affairs of a company are being conducted in a manner "oppressive" to them is basic to the issue which presently lies for decision by me, it is necessary to attempt to extract from such definitions a formulation of such intention. "Oppressive" conduct has been defined as "unjust or harsh or tyrannical" . . . or "burdensome, harsh and wrongful" . . . or which "involves at least an element of lack of probity or fair dealing" . . . or "a visible departure from the standards of fair dealing and a

[228] A Sibanda, The Statutory Remedy for Unfair Prejudice in South African Company Law (2013) Journal for Juridical Science 38 (2) 60.
[229] Utopia Vakansie-Oorde Bpk v Du Plessis 1974 (3) SA 148 (A) at 61.
[230] 1968 (1) SA 517 (C) at 525H-526E.

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> violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely" . . . It will be readily appreciated that these various definitions represent widely divergent concepts of "oppressive" conduct. Conduct which is "tyrannical" is obviously notionally completely different from conduct which is "a violation of the conditions of fair play". "[T]yrannical" conduct represents a higher degree of oppression than conduct which is "harsh" or "unjust". The Shorter Oxford Dictionary defines "tyrannical" as "severely oppressive; despotically harsh or cruel". For reasons which I shall now set out I do not think it is necessary for an applicant to have to go to the lengths of establishing conduct of such a nature before he is entitled to relief under sec. 111 bis.'

There is also the decision by the House of Lords in *Scottish Co-operative Wholesale Society Ltd v Meyer*[231] where the court held that;

> … 'oppressive' denotes conduct that is 'burdensome, harsh and wrongful' and that such conduct would include lack of probity or good faith and fair dealing in the affairs of a company to the prejudice of some portion of its members.

3.3.3.3 Unfairly Prejudicial Conduct

The courts have also been engaged on many occasions by parties that seek judicial pronouncements on issues of unfair prejudice both under the present and the old statutory dispensation. Of importance when analysing these cases is that one would notice that the matters before courts are not based strictly/purely on section 163. A number of them are founded on the breaches of ancillary provisions, such as the refusal of the transferability of shares, contravention of the memorandum of incorporation or misuse of company assets or monies which ultimately are sought under section 163 to be declared unfairly prejudicial. That would suggest that the concept of unfair prejudice is not even specifically statutorily defined, as it is sufficiently broad to cut across various infringements of a shareholder's rights and interests in the company's operations.

In *Garden Province Investment v Aleph (Pty) Ltd*[232] Friedman J held that:

> It seems to me that a minority shareholder seeking to invoke the provisions of s 252(1) of the Companies Act must establish not only that a particular act or omission of a company results in a state of affairs which is unfairly prejudicial, unjust or inequitable to him, but that the particular act or omission itself was one which was unfair or unjust or inequitable. Similarly, looking at the second part of the section, where the complaint relates to the manner of conduct of the business, it is the manner in which the affairs have been conducted as well as

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[231] [1959] A 324 HL at 342.
[232] 1979 (2) SA 525 (D) at 531.

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> the result of the conduct of the business in that manner which must be shown to be unfairly prejudicial, unjust or inequitable.

In De *Klerk v Ferreira and Others*[233] Mr De Klerk and Mr Ferreira held equal shares in two companies. One company was a nursery (Plantsaam) and the other was an asset-holding company which was a farm (Benjo). Mr De Klerk had an interest in farming but had a stable job as a medical practitioner and was out of the country most of the time. As such, he appointed Mr Ferreira as his employee in Plantsaam also Mr Ferreira wanted to be a business partner with Mr De Klerk but at the time had no financial means to meet the purchase price of shares as such a loan agreement was entered into between the two in favour of Mr Ferreira. The relationship between the two deteriorated over time and Mr De Klerk sought an order that Ferreira transfers the shares held in the two companies to him. The relief was sought under the section 163[234] as well as section 49.[235]

Amongst the many allegations, it was alleged that Ferreira paid himself double salaries, misused company funds and had used the farm for his own personal use. The respondent/Mr Ferreira denied that De Klerk was entitled to the relief but did not dispute that their relationship has broken down, Ferreira prayed the court to wind up the company or on the alternative, that De Klerk transfer his shares to him.

When weighing the evidence before it, the Court was satisfied that Ferreira had conducted himself in a manner that had the effect of being oppressive and unfairly prejudicial to De Klerk. The Court stated that:

> [There is a doubt about Ferreira's] integrity to the extent that the continuation of a relationship with De Klerk will be difficult, if not intolerable. His actions clearly disregarded the interests of De Klerk, are unfairly prejudicial and an abuse of his position of trust.

The court held that:

> …Given the fundamental breach of trust and confidence by Ferreira, it is no longer reasonably practicable for De Klerk to carry on the business of Plantsaam with Ferreira in the sense envisaged in section 36(1)(c) of the CC

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[233] 2017(3) SA 502 (GP).
[234] Msomi, The –Tovim War, S252 and the new Companies Act Without Prejudice (2009) 32.
[235] Close corporation Act 64 of 1984.

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> Act. It is thus appropriate to make an order that Ferreira shall cease to be a member of Plantsaam in terms of section 36 of the CC Act and a further order for the acquisition of his interest in terms of either section 36(2)(a) or 49(2) of the CC Act.

The case of *Visser Pty Ltd v Goede Hoop Sitrus (pty) Ltd*[236] involved the refusal by the board of Goede Hoop Sitrus (GHS) to transfer shares belonging to Visser Sitrus (VS) to an existing shareholder of GHS ie Mouton Sitrus (MS). The focus of GHS is primarily to receive citrus from producers and to grade, store, pack, market, sell and deliver the fruit on an agency basis. MS was the largest delivery producer to GHS, on the other hand, VS had used the packing and marketing services of GHS in the past. However, since 2011 season, VS has had no business dealings with GHS. In November 2012 VS decided, in light of the cessation of its dealings with GHS, to dispose of its shares, thus informed that its transfer has been refused but reasons were not given. In those circumstances VS sought a relief directing GHS to amend its constitution to allow for transferability of shares.

Roger J began his introduction by stating that what VS, as the applicant, sought to have GHS' memorandum of incorporation (MOI) amended had the effect of taking away the powers granted to the board of directors of GHS and having the court stepping into the affairs of GHS an act overly stressed to be in conflict with the principles of company law.

The learned Judge went further and relied on earlier authority laid down in cases such as *Smuts v Booysens; Markplaas (Edms) Bpk & 'n Ander v Booysens.*[237] Roger J reiterated that the matter before him was a common one, especially in private operations; as such, GHS was in no wrong to have a restriction on the transferability of shares.[238] In fact, from inception of the principle, "The validity of such a clause has never been challenged…"[239] instead what can now be questioned is whether the restriction in this case was unfair and could it be tested within the ambits of section 163?[240]

[236] 2014(5) SA 179 (WCC).
[237] 2001 (4) SA 15 (SCA) at para 15.
[238] Smuts v Booysens; Markplaas (Edms) Bpk & 'n Ander v Booysens 2001 (4) SA 15 (SCA) para 44.
[239] Smuts v Booyens para 44.
[240] Smuts v Booyens at para 45

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Roger J again borrowed from the dictum in the *Manning River Co- operation Diary Co Ltd v Shoesmith & Another*[241] to stress out that:

> [If] directors as business men, and with a faithful desire to protect the interests of the Company, determine under such a power, upon some ground on which fair-minded men in such a situation might reasonably consider registration detrimental to the interests of the Company, that a particular transfer should not be registered, their decision cannot be questioned or overruled in a Court of law…[242]

In support of this foreign judgment Roger J alluded that there have been earlier transfers in favour of MS. It cannot therefore, be held that GHS had ulterior purpose not to register shares to MS in fact if GHS had a problem with MS, the initial transfer of 3,2% to 11,9% would have been denied. It therefore does not or would not make sense for GHS to deny an increase of MS's now 8,5% share to 11.9% after the transfer is registered had it was not for the best interest of the company.[243] The court thus held that:

> This leaves the question whether the refusal was nevertheless 'unfairly' prejudicial to VC. I have explained why I consider that a court should be wary of making such a finding where directors have complied with their fiduciary duties. If there could be exceptional cases where, despite such compliance, a board decision might be found to be 'unfairly' prejudicial to a particular shareholder, this is not such a case.[244]

Comments on this case are submitted as the researcher's view. The learned Judge made comparisons with the English law, indicating that history depicts that the principle of common law and had been practiced in most commonwealth countries, without being challenged. However, The United Kingdom, as it stands now, in terms of section 771(1) now requires that where directors refuse a transfer of shares, they are required to furnish reasons, a provision lacking in the South African law.

In terms of section 7[245] provision is made with regards to the interpretation of the Act that "The purpose of this Act are to promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law."[246] In terms of the

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[241] [1915] 19 (LR 714 (HC) at 723.
[242] Visser Pty Ltd v Goede Hoop Sitrus (pty) Ltd 2014(5) SA 179 (WCC) at para 77.
[243] Visser v Goede Hoop Sitrus (pty) Ltd at para 93.
[244] Visser v Goede Hoop Sitrus (pty) Ltd at para 96.
[245] The Companies Act 71 of 2008.
[246] The Companies Act 71 of 2008 see section 7(a).

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Constitution courts are mandated to develop the common law.[247] It is submitted with respect that Roger J's judgment falls short of this element "developing the common law." Roger J did indicate that he had found no case law that challenged the refusal of the transfer of shares without giving reasons. On the contrary, before him was a case that required a development of such long standing company law principle, there was an opportunity to make a ground breaking precedent and he failed to cease such moment.

Scholars have shown their discomfort in this common law principle, For instance, Mupangavanhu reckons that without any given reasons a shareholder whose property is in the form of share(s) in a given company, have his/her freedom limited by the "restriction on the transferability of shares" with no reasons furnished there is no way of ascertaining whether the decision was arrived at bona fide or for a collateral purpose.[248]

It makes no sense that courts may make an order of a buyout[249] even in cases where the minority shareholder did not pray for such; such should be construed as if the minority shareholder who sought relief, still wants to continue their investments with the said company. In this regard it would have made sense since the fear was a potential risk to GHS' business, if the transfer was to be registered in favour of MS, at least the company should have to buy-back VS's shares rather than refusing both the transfer of shares to MS or buying-back.

This clearly was a prejudice on VS's account, especially after VS had ceased using services of GHS. In fact, VS itself made submissions that "If two parties' priorities differ so drastically, it is better for them to part ways…" with Roger J's dictum the understanding is that the majority rule is evidently still in full force, along with its common law principles as:

> It is not clear to what extent the court attempted to resolve the tension between a shareholder's right to freely deal with his property embodied in a share and to transfer it to whatsoever he/she chooses on the one side the board's unfettered discretion to refuse to register a transfer of shares on the other side.[250]

[247] The Constitution of the Republic of South Africa Act 108 of 1996, see section 39.
[248] BM Mupangavanhu, *The Lawfulness of a Memorandum of Incorporation Clause that Permits a Company Board to Refuse Transfer of Shares Without Reasons: Analysis of Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* (2017) Speculum Juris 31(2) 197.
[249] The Companies Act 71 of 2008 at section 162(2)(c).
[250] Visser Sitrus Pty Ltd v Goede Hoop Sitrus Pty Ltd 2014(5) SA 179 (WCC) at 192.

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In *Garden Province Investment and Others v Aleph (Pty) Ltd and Others*[251] the respondent was a property-owning company in the form of a building. The majority shareholder voted that the said asset that the company owned should be sold to a third party. The minority shareholders were against this sale and wished to retain their investment by challenging this and alleged that the sale was unfairly prejudicial, unjust and inequitable to them. Their application was dismissed and the court alluded that:

> when a person acquires shares in a property-holding company as a minority shareholder, he or she knows that he or she is a minority shareholder and it is not unfairly prejudicial, unjust or inequitable to him or her if his or her investment is sold against his or her wishes, provided that it is sold at a fair and reasonable price.

In *Grancy Property Ltd v Manala*[252] the case involved a dispute which ensued during 2011. The appellant brought an interlocutory application, in the application it was sought that there be an appointment of new independent directors, whilst the appellant made this application Grancy was and still is a minority shareholder in the company called Seena Marena Investments (SHI).

The case was founded on malice between the first and third respondent whom by the time were directors of SHI, amongst the many allegations the directors were accused of "breaches of their fiduciary duties, misappropriation and use of the company assets, fraud, unauthorised use of the company's funds and denying the appellant its entitlement as a shareholder in SHI."

It rejecting Grancy's claim the court aquo stated that Grancy/appellant had other available options it could have ventured before approaching the court that in any event, Grancy's application was not urgent, moreover the first and third respondent had refused allegations made against them on a balance of probabilities so Grancy case should fail in this regard.[253]

[251] 1979 (2) SA 525 (D).
[252] 2015 (3) SA 313 (SCA).
[253] Grancy Property Ltd v Manala 2015 (3) SA 313 (SCA) 13.

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The SCA approached the matter from the urgent basis and it stated that:

> The sole purpose of that application… was to arrest the continuation of the oppressive and unfairly prejudicial conduct that unfairly disregarded the interests of Grancy as a minority shareholder in SMI perpetrated by Manala and Gihwala. This would be achieved by the court itself appointing directors either in place of or in addition to those directors in office to ensure that SMI was not exposed to further risks.[254]

Therefore, the only issue/question was whether Grancy had made out a case in terms of section 163. The court stated that:

> [I]n determining whether the conduct complained of is oppressive, unfairly prejudicial or unfairly disregards the interests of Grancy it is not the motive for the conduct complained of that the court must look at but the conduct itself and the effect which it has on the other members of the company.[255]

The court furthermore said that:

> …[I]t is, however, manifest from the record that neither the payments made by them to themselves which Grancy claims constituted a diversion of moneys destined for SMI (and thus the ultimate benefit of all its shareholders) nor the irregularities reported on by SMI's internal auditors are in dispute. Accordingly, in the circumstances of this case Grancy's assertions against Manala and Gihwala have to be accepted as correct. To my mind not only is the respondents' evidence on this score untenable but its shortcomings are exacerbated by the absence of a cogent explanation as to why such payments were made in the first place.[256]

Ultimately the Supreme Court of Appeal held that:

> To my mind it is only fair that all of SMI's shareholders should be allowed the right to nominate one director who would serve on the Board in collaboration with the two independent and objective directors appointed by this court. But given that we are satisfied that Grancy has made out a case under s 163 of the Act, care must be taken to ensure that the directors appointed by this court are not hamstrung in their task in determining whether or not there has been any malfeasance concerning SMI's corporate affairs.

3.3.3.4 Conduct That Unfairly Disregards the Interest of the Shareholder

The fault of not defining what unfair prejudice or oppression is, has often led to a clash of company principles and shareholder remedies.[257] As the court in *Geffen and Others*

[254] Grancy Property Ltd v Manala at para 15.
[255] Grancy Property Ltd v Manala at para 27.
[256] Grancy Property Ltd v Manala at para 35
[257] Visser Sitrus Pty Ltd v Goede Hoop Sitrus Pty Ltd 2014(5) SA 179 (WCC).
at para 57.

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v Martin and Others[258] reckoned that "accordingly, not all acts which prejudicially affect a minority shareholder or disregard their interests will entitle them to the relief set out in section 163."[259] Cassim *et al* also note that without a definition this would mean that principles established under the 1973 Act will still be applicable under the 2008 Act as:

> Relief would be granted under the oppression remedy if the applicant is able to establish 'a lack of probity or fair dealing, or a visible departure from the standards of fair dealing, or a violation of the conditions of fair play on which every shareholder is entitled to rely… The emphasis is on the unfairness of the conduct complained of. It must be conduct which departs from the accepted standards of fair play, or which amounts to an unfair discrimination against the minority.'[260]

With Cassim *et al*'s connotation, can one say that minority shareholders are protected with principles established prior to democracy and are they still enforceable to date?

In *Westerhuis v Whittaker and Others*[261] the company is involved in rental business. The founder was the sole employee and shareholder of the company. As her health began to fail, she introduced the first respondent as a co-director and ultimately the founder died. After her death, the respondents became majority shareholders holding 75% of the shares, whilst the applicant, being the minority shareholder, held the remaining 25%. This action was brought on the grounds that the two respondents had been advancing unauthorised remunerations to themselves as well as running their personal expenses using company money.

What the applicant averred was that the remunerations advanced to the two respondents should not have occurred since, in terms of the company's constitution a special resolution had to approve such remunerations. The two respondents being the majority shareholders meant they had a substantial interest in the matter. As such they should and could not deliberate on the issue. The court rejected this statement and held:

> In my view [a] company requires someone to fulfill the administrative duties and functions of a landlord and management agent, and that someone is charged to administer those functions on behalf of the company. I have to accept that First Respondent administers this function. Against that backdrop, one must accept further that First Respondent carries out this function in a position as an

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[258] [2018] 1 ALL SA 21 (WCC).
[259] Geffen and Others v Martin and Others [2018] 1 ALL SA 21 (WCC) at 9.
[260] FHI Cassim, MK Cassim, R Jooste, J Shev & J Yeats, "The Law of Business Structures" (2016) Juta & Company (Pty) Ltd at 420.
[261] [2018] ZAWCHC.

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> employee of the Company notwithstanding the fact that she is also a shareholder. Put differently, the mere fact that she is a shareholder does not preclude her from being an employee of the company as well.

It is submitted by the researcher that how Murphy J came to his conclusion was profound, in that it was unreasonable for the applicant to assume that the respondents, because they are operating a family business should, continue doing so without remuneration.

3.4 Conclusion

Many gaps have been identified in this chapter. These include the fact that there is a problem with the following undefined essential words: oppression, unfairness and prejudice. This has led to questions such as whether the remedy is sufficient in protecting minority shareholders or not. This problem of non-definition of the essential terms poses difficulties in determining how a particular case may be dealt with by the court.

The courts therefore had to draw inferences from cases that were decided under the old law and some English authorities, to deal with some of the challenges posed by the lack of the definition of the essential elements in section 163 of the 2008 Act. However, some of those cases may not have met the demands of the constitutional values, as promoted in the Bill of Rights which is recognized by the 2008 Act.

Although the 2008 Act has extended the *locus standi* to seek relief for unfair prejudice to directors, there is still some room for improvement with regards to the beneficial owner of shares who is not necessarily a member or director. This would accord with the definition of share by the Act, as one of the units into which the propriety interest in a profit company is divided.[262] The beneficial owner of shares has proprietary interest in a company and should therefore be in a position to protect such interest by way of unfair prejudice action.

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[262] The Companies Act 71 of 2008 at Section 1.

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In *Oakland Nominees (Pty) Ltd v Gelvia Mining & Investment Co (Pty) Ltd*[263] Holmes, AJ recognized the interest of a beneficial owner of shares in a company, where he stated that:

> A nominee is an agent with limited authority; he holds shares in name only. He does this on behalf of his principal from whom he takes his instruction … the principal, whose name does not appear on the register, is usually described as a beneficial owner… ownership of shares doesn't depend upon registration.[264]

However, in Smyth *and Others v Investec Bank Ltd and Another*[265] the *locus standi* of the beneficial owner of shares was denied, where the court held that:

> if they wished to avail themselves of the remedy provided for in section 252 in their own names, they had to terminate the nomination of their respective nominees so as to procure the entry of their names in the register of members. For as long as the nominees' names remained in the register of members, the beneficial owners lacked a legal interest in the subject-matter of the litigation.

Such inconsistencies in judicial pronouncements demand urgent legislative intervention to straighten the law on the right of a beneficial owner of shares to protect his interests under the law.

The Act does not allow action to be brought on account of a conduct that is proposed or future conduct that has not manifested. The legal focus is on the materialisation of the conduct. Should the board propose an act that in the eyes of the minority shareholder is unfairly prejudicial or oppressive, such a minority shareholder cannot seek an "interdict" to prevent such conduct. This is because there is no guarantee that the minority shareholder will have adequate recourse upon completion of such conduct. Therefore, the law should be revisited, to protect the minority shareholders against proposed conduct, as is the case under the United Kingdom legislation on a similar subject matter. The next chapter will show how this can be achieved, then a comparison will be made between South African Companies Act provision in section 163 and that of other jurisdictions as well as judicial pronouncements in these jurisdictions to determine the advances which the South African law has made in affording protection to the minority shareholders beyond the common law precept.

[263] 1976 (1) SA 441 (A)
[264] Oakland Nominees (Pty) Ltd v Gelvia Mining & Investment Co (Pty) Ltd 1976 (1) SA 441 (A) at 453.
[265] 2018 (1) SA 494 (SCA); [2018] 1 ALL SA 1 (SCA).

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Chapter 4: Comparisons of Judicial Pronouncements and laws in relation to the unfair prejudicial conduct as a shareholder remedy.

4.1 Introduction

The case of *S v Makwanyane*[266] was a landmark democratic case that enabled the South African courts to consider foreign law. In that case, the court stated that, “We can derive assistance from public international law and foreign case law, but we are in no bound to follow it.”[267] The authorisation also finds favour from the retained provision of the interim Constitution currently contained in section 39(2). It reads; “when interpreting any legislation and developing the common law or customary law every court, tribunal or forum must promote the spirit, purport and objectives of the Bill of Rights.”[268] And more specifically is section 5(2) of the Companies Act of 2008 which provides that a court interpreting or applying this Act may consider foreign law to the extent appropriate. Hanibal Goitom[269] gave justification for a comparative interpretation as one based on the fact that South Africa’s past; namely, apartheid, did not or had little domestic jurisprudence to aid the interpretation of the current Constitution. From a company or corporate perspective, comparative interpretation is defined as:

> Primarily a method or a way of observing legal problems, legal institutions and the entire legal systems. By the use of that, it becomes easy to make observations and gain insights which would be denied to one who limits his study to the law of a single country.[270]

It is submitted that comparative law plays or can play an important role in shaping/reforming national or state law. With that backdrop, judges have adopted a system of relying on case law to give meaning to some of the legal corporate problems they are confronted with on daily basis. In most cases, South African courts find

[266] 1995(6) BCLR 665.
[267] *S v Makwanyane* 1995(6) BCLR 665 para 456.
[268] See section 39(2) of The Constitution of the Republic of South Africa Act 108 of 1996.
[269] Hannibal Goitom The Impact of Foreign law on Domestic Judgements https://www..loc.gov/law/help/domestic-judgment/south africa.phd accessed date (01 November 2020).
[270] Hannibal Goitom The Impact of Foreign law on Domestic Judgements https://www..loc.gov/law/help/domestic-judgment/south africa.phd accessed date (01 November 2020).

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persuasion from the English case law.

This chapter will follow a comparative approach of international jurisprudence not only from the United Kingdom perspective but other jurisdictions, such as Australia and Canada, with the aim to allow South Africa room for improvement in its flawed/deficient provisions.

4.2 Comparisons of Laws

4.2.1 Australia

The Australian company law regulatory regime is codified in the Corporation Act of 2001. Under this Act, the statutory provision for remedies available to the shareholders, including that of oppressive conduct, is regulated by sections 232 to 235. For instance, in terms of section 232 provision is made for relief if one of the following exists:

> (a) the conduct of a company's affairs; or
> (b) an actual or proposed act or omission by or on behalf of a company; or
> (c) a resolution, or a proposed resolution, of members or a class of members of a company; is either:
> (d) contrary to the interests of the members as a whole; or
> (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.
> For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company.

Once an applicant has made out a case in terms of section 232[271] he/she will be entitled to the following relief to be ordered by the court under section 233 among which are:

> (a) that the company be wound up;
> (b) that the company's existing constitution be modified or repealed;
> (c) regulating the conduct of the company's affairs in the future;
> (d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;
> (e) for the purchase of shares with an appropriate reduction of the company's share capital;
> (f) for the company to institute, prosecute, defend or discontinue specified proceedings;
> (g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend

[271] Corporations Act 2001.

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or discontinue specified proceedings in the name and on behalf of the company;
(h) appointing a receiver or a receiver and manager of any or all of the company's property;
(i) restraining a person from engaging in specified conduct or from doing a specified act;
(j) requiring a person to do a specified act.

Issues of *locus standi* are dealt with in section 234. In terms of the Act, eligible people are the following:

(a) a member of the company, even if the application relates to an act or omission that is against:
(i) the member in a capacity other than as a member; or
(ii) another member in their capacity as a member; or
(b) a person who has been removed from the register of members because of a selective reduction; or
(c) a person who has ceased to be a member of the company if the application relates to the circumstances in which they ceased to be a member; or
(d) a person to whom a share in the company has been transmitted by will or by operation of law; or
(e) a person whom ASIC thinks appropriate having regard to investigations it is conducting or has conducted into:
(i) the company's affairs; or
(ii) matters connected with the company's affairs.

4.2.1.1 *Locus Standi* under the Corporations Act of Australia

(a)Wide ground for *locus standi*

Although the South African Companies Act has received praises for extending *locus standi* beyond its predecessor,[272] there is still room for reform. The Australian provision provides valuable lessons in this regard. Paying particular attention to section 234(1)(b)[273] this section recognises that there may be members who are removed from the register of members as an incidence of capital reduction, such persons will have *locus standi* to bring an action for unfair prejudice. Capital reduction refers to the "process of decreasing a company's shareholder equity through share cancellations and share repurchases, also known as share buybacks."[274] This phenomenon is also

[272] Companies Act 61 of 1973.
[273] Corporations Act 2001.
[274]Alicia Tuolivia, Capital Reduction https://www.investopedia.com/terms/c/capitalreduction.asp (access date 7 October 2020).

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recognised in the South African Companies Act[275] yet relief is not provided for in those circumstances.

Similarly, in South Africa, the worst-case scenario was seen in the case of *Visser Pty Ltd v Goede Hoop Sitrus (pty) Ltd.*[276] This case involved the refusal by the board of Goede Hoop Sitrus (GHS) to transfer shares belonging to Visser Sitrus (VS) to an existing shareholder of GHS; namely, Mouton Sitrus (MS). The focus of GHS is primarily to receive citrus from producers and to grade, store, pack, market, sell and deliver the fruit on an agency basis. MS was the largest delivery producer to GHS, on the other hand, VS had used the packing and marketing services of GHS in the past. However, since 2011 season, VS has had no business dealings with GHS. In November 2012 VS decided, in light of the cessation of its dealings with GHS, to dispose of its shares, but was informed that its transfer had been refused but reasons were not given. In those circumstances, VS sought relief directing GHS to amend its constitution to allow for transferability of shares.

Roger J borrowed from the dictum in the *Manning River Co-operation Diary Co Ltd v Shoesmith & Another*[277] to stress that:

> [If] directors as businessmen, and with a faithful desire to protect the interests of the Company, determine under such a power, upon some ground on which fair-minded men in such a situation might reasonably consider registration detrimental to the interests of the Company, that a particular transfer should not be registered, their decision cannot be questioned or overruled in a Court of law…[278]

In support of this foreign judgment, Roger J alluded that there have been earlier transfers in favour of MS. It cannot, therefore, be held that GHS had ulterior motives not to register the shares to MS. In fact, if GHS had a problem with MS, the initial transfer of 3,2% to 11,9% would have been denied. It, therefore, does not or would not make sense for GHS to deny an increase of MS's now 8,5% share to 11.9% after the transfer is registered, it was not in the best interests of the company.[279] The court thus held that:

> This leaves the question whether the refusal was nevertheless 'unfairly'

[275] See sections 164(5) and 163(2)(e) of the Companies Act of 2008.
[276] 2014(5) SA 179 (WCC).
[277] [1915] 19 (LR 714 (HC) at 723.
[278] Visser Pty Ltd v Goede Hoop Sitrus (pty) Ltd 2014(5) SA 179 (WCC) para 77.
[279] Visser v Goede Hoop Sitrus (pty) Ltd para 93.

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> prejudicial to VC. I have explained why I consider that a court should be wary of making such a finding where directors have complied with their fiduciary duties. If there could be exceptional cases where, despite such compliance, a board decision might be found to be 'unfairly' prejudicial to a particular shareholder, this is not such a case.[280]

The Corporations Act has also extended *locus standi* to include standing in cases of liquidation. This becomes relevant where the court has ordered that the company be wound up under section 233. The Act restricts a minority shareholder from bringing a suit against the company. Instead, the position is assumed by a liquidator.[281] It is submitted that in cases of this nature, the Corporations Act is flexible and allows for the law of insolvency and company law to be dealt with interchangeably, solely for the purposes of affording minority shareholder protection.

(b) *Locus standi* and retrospective effect

Drawing inferences from the Corporations Act again, the *locus standi* provision applies retrospectively. This would mean that it would allow an applicant so identified to bring an action, even when, by the time the initial event occurred the applicant was not a member but is a member when the application is brought. Likewise, the court in *Re Spargos Mining NL*[282] allowed for a retrospective application and went further to grant an order that the company's memorandum be amended as well as a directive that the company's board report to the court every three months.[283]

4.2.1.2 Requirements to be satisfied

As in section 163,[284] one has to satisfy that the affairs of the company have been or are being conducted in a manner that is unfairly prejudicial to the member of the company, however the difference is that under the Australian Corporations Act, the provision does not stop there. Rather it went further to define or elaborate on what may be classified as "affairs of the company". Affairs of the company includes (but is not limited to) the following business or trading transactions: ascertainment of the identity

[280] Visser v Goede Hoop Sitrus (pty) Ltd para 96.
[281] See *Zempilas v J N Taylor Holding Ltd (in liq) (No 6)* (1991) 5 ACSR 28 at 30.
[282] (1990) 3 ACSR 1.
[283] Re Spargos Minining NL (1990) 3 ACSR 1.
[284] Companies Act 71 of 2008.

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of persons whilst dealing with trusts, internal management, any act done on behalf of the company, and matters arising from audits, among others.[285]

Under section 163[286] what amounts to "affairs of the company" has not been properly defined, either thus, section 163 has proven to have many short-falls when it is compared to its Australian counterpart. Additionally, section 163 is more of an ancillary provision to other provisions and not a stand-alone clause. Thus, an applicant is required to prove a breach of other provisions of the Act before invoking section 163 to find a relief.

The Australian Corporations Act caters for past acts, while the South African Companies Act does not cater for past oppressive conduct that occurred before a person became a member. Neither does it cater for proposed/future wrongs, a provision embedded in the Corporations Act.

It is submitted that this wide ground for remedy offered by the Corporations Act illustrates a better and more reformed way of protecting minority shareholders in company operations. The researcher's view is that if prior acts are protected then directors or those in the majority will not have a platform to hide their illicit doings as such should the South African regime follow suit in advancing its 2008 Act, in this regards a lot of problems could be avoided such as, courts no longer being flooded with cases of unfair prejudice; minority shareholders will now receiving adequate relief when they approach court with the intention to "interdict" or stopping unfairly prejudicial proposed acts/conducts from manifesting.

4.2.2 United Kingdom

South Africa shares many ties with the United Kingdom, not only from a political sense but also from a legal point of view. It is trite fact that English law has exerted much influence on the South African law right from the evolutionary courses. In this regard, comparisons will be made. The extent of United Kingdom company law is embodied in

[285] See section 53 of the Corporations Act 2001.
[286] Companies Act 71 of 2008.

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the Companies Act of 2006. Under this Act reference shall be made from sections 994 to 999, which encapsulate the provisions on the concept of unfair prejudice.

Unfair prejudice as a remedy in the United Kingdom, is provided for in section 994, which reads as follows:

> (1) A member of a company may apply to the court by petition for an order under this Part on the ground—
> (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

Like any other statute, the section has requirements that need to be satisfied in order for a petition to be allowed under this section. These are the following:

(i) one needs to be a member

(ii) the affairs of the company are conducted in an unfairly prejudicial manner

(iii) that an actual or proposed act or omission of the company would be prejudicial to persons including the member.

¶a) What is meant by a Member

It is evident from the above provision that a person has to be a member before he/she may utilise the provision. Deductions as to who is a member of a company could be made from section 112 of the UK Companies Act, which provides as follows:

> (1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.
> (2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company.

The above provision shows two categories of member; namely, persons who have subscribed to the memorandum, and others who have agreed to become members, and are entered in the register of members. This provision is similar to the South African provision, which provides that, a member is a person who is a constituent part of that entity.[287]

[287] Section 1 Companies Act 2008.

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It is not in dispute that the United Kingdom and the South Africa provisions are strict in their definitions of what and who is a member or a shareholder. However, one submits that should the law be applied as strict as it is a beneficial owner of shares cannot have legal standing to petition under section 994. However, the court in the United Kingdom have not been so strict in construing the concept of a member. In *Atlasview Ltd v Brightview Ltd*[288] the court held that "the interest of a nominee shareholder may include the economic and contractual interests of the relevant beneficial shareholder." However, Roger Blears contends that:

> The beneficial owner behind a nominee or trustee cannot bring a direct claim because such person is neither a member nor a person to whom shares have been transferred or transmitted by operation of law. With that said in an APPROPRIATE case it may be possible for a beneficial owner behind a trust to bring a derivative trust claim joining the trustee as the defendant, if the trustee refuses to take steps in relation to unfair prejudicial conduct.[289]

Although this is not a petition in terms of section 994,[290] but a petition in a derivative action, it, at least, recognises a beneficial owner's standing in exceptional circumstances. Under the South African perspective, case laws have emphasised that beneficial owners do not have *locus standi* under section 163. This was demonstrated by the Supreme Court of Appeal in a recent decision in *Smyth and others v Investec Bank Ltd and Another*,[291] where the court held that should the appellant seek refuge under section 163 then they should have their names registered in the company's register, irrespective of them being beneficial share-owners.[292]

Drawing inference from an English case of *Tahir v Faizi*[293] the facts were as follows: Tahir purchased property on behalf of Faizi who at the time had no proper documentation to allow him a sale of property and was registered as the full legal owner. Faizi moved into the property and continued making payments for the mortgage bond to Tahir. However, by 2015, their relationship deteriorated and Faizi stopped making payments.

[288] [2005] EWHC 1056 Ch 35.
[289] Roger Blears, Majority Rule Shareholders https://www.lawteacher.net/free-law-essays/company-law/majority-rule-shareholders.php (accessed date 2 December 2020).
[290] Companies Act of 2006.
[291] [2018] 1 All SA 1 (SCA).
[292] *Smyth and Others v Investec Bank Limited and* Another [2018] 1 All SA 1 (SCA) para 22.
[293] [2019] EWHC 1627 (QB).

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Tahir argued that he was the legal owner of the property, and Faizi was a mere tenant. On the contrary, Faizi argued that the intention of the purchase was that the property would be transferred to him when his immigration status allows. In any event he was the beneficial owner.

The court held that:

> The intention at the time of purchase was that Faizi would assume responsibility for all payments and that legal title was only meant to remain with Mr Tahir on a temporary basis. Despite being the registered legal owner, therefore, Mr Tahir held 0% of the beneficial ownership, but instead held the property as a trustee for Faizi only. As a trustee Mr Tahir was entitled to be indemnified in respect of any expenses, mortgage payments, etc. that he had made in relation to the property, furthermore that the legal ownership of the property should be transferred to Faizi.

It is evident that a denial of *locus standi* to beneficial owners may cause problems in cases where the transfer of shares was effected by the operation of law.[294] In the United Kingdom, the earlier courts recognised that there may be a possibility of a transfer of share by the operation of law.[295] In *Re a Company 007828 of 1985*[296] the court held that the definition of transfer of shares by operation of law means:

> a legal process by which the legal title passes even though some further act such as registration is still to be done. The use of the remedy by personal representatives without being registered as members of the company also circumvented difficulties which they encountered in becoming members of the company as they were often denied registration as such.[297]

From the above definition, it is obvious that it is not unusual for problems to arise between a nominee and a beneficial owner. Harney observed that there may be a possibility where a beneficial owner of shares may want to bring action for unfair prejudice, when at the same time the "legal/ registered shareholder holds share for his or her own benefit, as well as for the benefit of another" – this may be the case especially in family operations.[298] A recent South African case that illustrated the status of a beneficial owner is *Standard Bank Nominees RF (Pty) Ltd And Others v Hospitality*

[294] See section 51(6)(b) of the Companies Act 71 of 2008.
[295] Re a Company 007828 of 1985.
[296] (1986) BCC at 98, 951, 954.
[297] *Re a Company* [1983] 2 All ER at 36, 43
[298] Harney, British Virgin Islands: Unfair Prejudice and Beneficial Shareholder: A Confused Case 2016 https://www.mondaq.com/shareholders/548428/unfair-prejudice-and-beneficial-shareholders-a-confused-noise accessed date 20 September 2020.

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Property Fund Ltd.[299] The decision in that case suggests that a beneficial owner may have rights worthy to be protected, but would still not be able to enforce such rights as they do not hold the proper title. As such he or she will have to use/rely on other principles that may give him/her a recognised standing, otherwise he/she shall not have standing.

It is, therefore, submitted that beneficial owners of shares are likely to be exposed to unfair prejudice conducts. In that regard, South Africa should adopt a flexible approach in which would define a member or shareholder in terms of section 163 to include beneficial owners of shares.

(b) Affairs have been conducted in an unfairly prejudicial manner

A petition under this section should prove both unfairness and prejudice. As in the South African provision, there are no clear and precise terms to what amounts to prejudice or unfairness. This makes it difficult to ascertain what falls within unfairly prejudicial conduct and what does not. It is submitted that there is a thin line between prejudice and unfairness. This submission is premised on the notion that what may be prejudicial may not necessarily unfair. The recent judgment of *Re Dinglis Properties Ltd, Dinglis v Dinglis*[300] is somewhat helpful in providing a list of what unfairness is. It was held in that case that:

> (i) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association. And any collateral agreements and understandings between shareholders which identify their rights and obligations as members of the company;
>
> (ii) These are the terms upon which the parties agreed to do business together, which include applicable rights conferred by statute, the starting point therefore is to ask whether the exercise of the power or rights in question would involve a breach of these terms;
>
> (iii) These terms include, by implication, an agreement that any party who is a director will perform his duties as a director;

[299] 2020 (5) SA 224 (GJ).
[300] [2020] EWHC 1363 (Ch).

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> (iv) These terms are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable;
>
> (v) Agreements and understandings do not have to be contractually binding in order to be enforceable in equity;
>
> (vi) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement; unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, "consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith"…the conduct need not therefore be unlawful but it must be inequitable…although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;
>
> (vii) To be unfair the conduct complained of need not be such as would have justified the making of a winding up order on just and equitable grounds;
>
> (viii) It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder."

From the court's reasoning, it is not in doubt that section 994[301] is a more detailed and well-rounded provision unlike the South African section 163 remedy which is an ancillary provision and almost a mirror/replica of section 252 of the 1973 Companies Act. The cases discussed below further strengthen the submission that English Courts are more advanced in giving meaning to what and how unfair prejudice remedy should be handled in that jurisdiction.

In, *In Re Autobody Rinyway Limited,*[302] is a case bordering on circumstantial factual similarity as that of the South African case of *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others,*[303] except that in *Re Autobody* the petition was founded on exclusion from management while in *Visser* it involved a petition for refusal by the company to buy back shares. Hodge J, presiding in the case of *Re Autobody*, held that "although the exclusion was justified, it was unfair prejudice for the respondent to continue to run, the company without offering a buy out to the petitioner." It is submitted

[301] Companies Act of 2006.
[302] (2018) EWHC 2336 (Ch).
[303] 2014 (5) SA 179 (WCC).

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that this judgment speaks to one of the famous company law rules that allows the company the right of refusal without giving reasons. Although it is an accepted company law norm, the reasoning by Hodge J in *Re Autobody* exposes the prejudice associated with that principle; that is, refusal to give reasons.

In *Constable v Executive Connections Limited*,[304] the case involved a petition to stop the alteration of the company's article as well as to oblige a member to sell his/her shares where 75% of the board agrees. This 75% requirement is not foreign in the corporate world in fact, this was an internal management matter in which the court could not readily substitute its own judgment. However, the court held that "it is arguable that the amendment was an impermissible use of majority shareholder power and that the balance of convenience favoured an injunction." Unfortunately, although the court made this interesting observation, the case did not proceed further, what one can ask is what could the court have ruled given the observation? The question relates to whether there is going to be a deviation from the normal company law rules of judicial non-interference in matters of internal management. Would the court have interfered in the management of the company?

Although the majority rules in a company's operation, where there is a breach of fiduciary duty, Blears contends that "articles of association may release the directors from the breach of their fiduciary duties but [the mere act] of ratification may itself amount to unfair prejudice."[305] Likewise, the court in *Re Tobian Properties Ltd, Maidment v Attwood*[306] held that "the unfair prejudice remedy is a means of encouraging proper corporate behaviour in the management of smaller companies and in the building up of the confidence of investors in them." From the court's reasoning, it is submitted that this goes back to the observations that English company law evolves from the law of partnership; partnerships are deemed to be contracts founded on good faith.[307] Therefore, there should be a good working relationship amongst shareholders.

(c) That an actual or proposed act or omission of the company would be prejudicial.

[304] 2005 EWHC 3 (Ch).
[305] Roger Blears, Majority Rule Shareholders https://www.lawteacher.net/free-law-essays/company-law/majority-rule-shareholders.php (accessed date 2 December 2020).
[306] (2015) 2 567 CA.
[307] *O'neill v Phillips* [1999] WLR 1092, 1098.

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There is a common understanding that by becoming a shareholder, one undertakes to be bound by the decisions of the board.[308] But in most cases, minority shareholders have been exposed to abuse which is shielded by the fact that the majority rules. A minority shareholder sitting in those round tables discussion may encounter decisions on proposed acts or omissions that are prejudicial to him or other members. Under this provision, he can interdict the implementation of such decisions. The case of *Re a Company*[309] confirmed that a petition "may be based on past, present or even anticipated future events, and the conduct may be unfairly prejudicial to all of the members or to only one or some of them."[310]

Justification has been given under the South African perspective for not allowing future acts that would be unfairly prejudicial to a shareholder. This is based on the narrative that when interpreting the term 'conduct' under section 163[311] it is said that by conduct it is inclusive of the acts, omission and continuing acts.[312] However, the focus here is not the **conduct** itself, but rather on the '**end-result**' of the conduct. With that construction, it closes doors for a minority shareholder to approach the court, where there may be a proposed wrong; such 'conduct' may not be brought under section 163 because not only is it a future event, but rather the results of that 'proposed wrong/conduct' have not yet manifested and, as such, relief cannot be sought in those circumstances.[313]

In chapter one the researcher made submissions to the dangers that may likely occur if a proposed prejudicial conduct is allowed to manifest fully than to extinguish it before it manifests. Amongst others, it was the submission that the relief granted once the proposed act has materialised may not be as beneficial as it would be to a minority shareholder, as compared to the moment when such prejudicial conduct was still a proposed act.

4.2.3 Canada

In Canada, the company regulations are governed by the Canada Business

308 *Salmon v Salmon* [1896] UKHL 1.
309 *(No 004175 of 1986)* [1987] 1 WLR 585
310 Re a Company (No 004175 of 1986) [1987] 1 WLR 585.
311 Companies Act 71 of 2008.
312 See section 163(1)(a) of the Companies Act 71 of 2008.
313 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 Statutorily Intended Reach PELJ 2014(17) 4 1696.

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Corporations Act[314] (CBCA). Canada is no exception in having a provision that protects minority shareholders. Dave Morin Pelletier observes that "the idea of treating everyone in your corporation with respect is more than just about being nice or courteous. Oppression remedy exists to help give anyone at the table a voice if they feel their rights are being dismissed or taken for granted."[315]

Before discussing how the Canadian courts have dealt with cases of oppression, it is prudent to examine the statutory requirements for a petition under the oppression remedy. Section 241 of the CBCA provides as follows:

> (1) A complainant may apply to a court for an order under this section.
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates:
> (a) any act or omission of the corporation or any of its affiliates effects a result,
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner;
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

Should the applicant satisfy the court that the section 241 criteria have been breached in those circumstances, the court may order almost similar remedies to those contained in section 163(2) of the South African counterpart.[316] The only noticeable difference is in the following orders:

> (b) an order appointing a receiver or receiver-manager;
> …
> (j) an order compensating an aggrieved person;
> (k) an order directing rectification of the registers or other records of a corporation under section 243;
> (l) an order liquidating and dissolving the corporation;
> (m) an order directing an investigation under Part XIX to be made; and
> (n) an order requiring the trial of any issue.[317]

The famous case of *BCE Inc v 1976 Debentureholders*[318] shall be the first point of reference under this jurisdiction. Amongst other things, this case stands out for

[314] RSC 1985 c.C-44.
[315] Dave Morin Pelletier 'What oppression remedy means for your business'https://www.sicotte.ca/en/news/article/what-oppression-remedy-means-for-your-business (accessed date 23 March 2021).
[316] The Companies Act 71 of 2008.
[317] Please note that some remedies have been omitted as there are similar to those in section 163(2) of The Companies Act.
[318] 2008 SCC 69.

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formulating what amounts to oppression, which includes:

(a) appropriating a corporate opportunity;
(b) defensive tactics employed to defeat a hostile takeover bid;
(c) squeezing out a minority shareholder;
(d) failing to disclose related party transactions;
(e) changing corporate structure to drastically alter debt ratios,
(f) paying dividends without a formal declaration;
(g) preferring some shareholders with management fees and paying directors' fees higher than the industry norm;
(h) favouring a director by failing to properly prosecute claims; improperly reducing a shareholder's dividend;
(i) or failing to deliver property belonging to the claimant.

The facts of this case are that the directors wanted to get court approval for a plan of arrangement that involved a leverage buyout. This would mean that BCE would be required to incur more debt, which would reduce the value of the plaintiff's debentures. The legal question was whether there has been a breach of fiduciary duties or not. The court held that there had been no breach and reasoned that:

> The Corporation is entitled to maximize profit and share value, but cannot do this by treating individual stakeholders unfairly. The duty to act in the best interests of the corporation involves a duty to treat individual stakeholders equitably and fairly. Question in each case is whether the director acted in the best interests of the corporation and this includes the need to treat the stakeholders in a fair manner.

Similarly, in *Ko¨nig v Hobza*[319] it was held that, "shareholders have a reasonable expectation that executives will not unfairly maximize their own interests at the expense of other stakeholders by awarding themselves "excessive" compensation that is not necessary."[320] From these two precedents, it is submitted that-unlike the South African perspective that focuses on the "end-results" and whether or not the conduct is unfair the Canadian courts go the extra mile, by ascertaining what were or could have been the reasonable expectations of the parties in the relevant situation.

It is trite law that a company enjoys separate legal personality from its shareholders. That position is not different in the Canadian perspective. This would therefore mean that directors or those in managerial position do not owe fiduciary duties to the shareholders, but to the company. However, the case of *Budd v Gentra*[321] suggested

[319] (2014), 326 O.A.C. 213, 2014 ONCA 691.
[320] *Ko¨nig v Hobza* (2014), 326 O.A.C. 213, 2014 ONCA 691.
[321] 1998 43 B.L.R (2d) 27.

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otherwise. This case was brought due to the decline in Gentra Inc's share value. Budd, as a minority shareholder, brought the application under section 241 of the CBCA. The court held that there is no doubt that a director can be held personally liable under this provision, as it confers broad powers to the courts and provides an impressive number of remedies in favour of the complainant. The Court added, however, that section 241 does not identify the situations in which an order for compensation may properly lie against the corporate directors personally, as opposed to the corporation itself.

Grounds for holding a director personally liable were set down by the court, as follows:

> "(a)That the oppressive conduct be properly attributable to the director because of his/her action or inaction; and
>
> (b) That the imposition of personal liability be fit in all the circumstances."[322]

In relation to the second leg, the court added four general principles. These are the following:

> (a) The oppression remedy request must in itself be a fair way of dealing with the situation. Indicia of fairness include, but are not limited to where directors have derived a personal benefit, in the form of an immediate financial advantage or increased control of the company; where directors have breached a personal duty they owe as directors or have misused a corporate power; where a remedy against the corporation would unduly prejudice other security holders; and where a director has acted in bad faith and has obtained a personal benefit.
> (b) Any order made under section 241(3) should not go further than necessary to rectify the oppression.
> (c) Any order made under section 241(3) may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders.
> (d) A court should consider the general corporate law context in exercising its remedial discretion under section 241(3). Director liability cannot be a surrogate for other forms of statutory or common law relief, particularly in circumstances where other such relief would be more appropriate.

In Wilson *v Alharayeri*[323] the scope of the application of the oppression remedy was extended. The facts of the case were that Alharayeri was a minority shareholder, the CEO and director of Wi2Wi Corporation. He held Class A and B preferred shares at Wi2Wi. If the financial targets were met it was possible to convert the said shares into

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[322] *Budd v Gentra Inc* 1998 43 B.L.R (2d) 43.
[323] 2017 SCC 39.

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common shares. Wilson held Class C shares; these were granted to persons responsible for the financing of the company and allowed a conversion into common shares such as the Class A and B shares. Later on, the company proposed a merger with Mitec Telecom Inc. This was done by Alharayeri without consulting the board. He also proposed a sale of his shares to Mitec. This did not sit well with the board and ultimately Alharayeri resigned.

After Alharayeri's resignation, the board decided to have what is known as private placement, which had the effect of offering existing shareholders a conversion of their secured notes into common shares. All this was done with the purpose to ''substantially dilute the proportion of common shares held by any shareholder who did not participate in it."[324]

Of concern was that before the introduction of the private placement, the Board expedited the conversion of class C shares into common shares in favour of Wilson. Furthermore, this was done despite doubts expressed by the company's auditors as to whether the test for the conversion had been met. In addition, the Board (including Wilson) never approved the conversion of Alharayeri Class A and B shares into common shares, despite the company's auditor demonstrating that "on the basis of the financial test laid out, such a conversion could occur at the option of the holder."[325] Alharayeri's proportion of common shares and the value were drastically reduced. Thus, Alharayeri petitioned for the oppression remedy against the company's directors.

The Court started off by confirming that the oppression remedy test set twenty years ago in *Budd* at Ontario Court of Appeal was still effective. Since then, *Budd* has been used as a point of reference by being "applied and endorsed by courts across the country." In *this case*, however, the Court provided clarity on the application of the test and factors considered in *Budd,* that is, *the* personal liability test. It did not introduce a new personal liability test or lower the bar for personal liability. The court held as follows:

> … s. 241 's remedial purpose lies in applying general standards of commercial fairness given that the sometimes "clumsy tools" of the common law failed to promote such standards … Realizing this purpose may require imposing

[324] *Wilson v Alharayeri* 2017 SCC 39at para 9.
[325] *Wilson v Alharayeri* 2017 SCC 39 para 11.

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> personal liability on a director where the director is not a controlling shareholder but is nevertheless implicated in the oppression. For example, where otherwise fit, it may be open to a court to impose liability on a director who strongly advocates for an oppressive decision motivated by a personal gain unique to that director, despite lacking control. But adopting the appellant's [Wilson] proposed control criterion would preclude this.

4.3 Conclusion

It has been noted that the South African Companies Act recognises the possibility of shares acquired by operation of law, but does not provide guidelines on how the executor or the trustee can approach the court should an oppressive conduct occur. One cannot overlook the decision in *Smuts v Booysens,*[326] which approves the right of pre-emption. With this in mind, there may be a possibility that majority shareholders may then stall the transfer of shares or sell the said shares at an under-value, which is recognised as an unfair prejudice. In the likelihood that this possibility occurs, such a harm under the South African Companies Act will not be remedied as beneficial owners lack standing to approach the court.

It is further submitted that shares may be acquired by the operation of law, for example, by inheritance as envisaged in terms of section 51(6)(b) of the Act. As such a beneficial owner could have interests worthy of protection, even without presently holding a title to the shares.

In light of how strong the majority rule is upheld in company operations, in addition to the common practice of the court's reluctance to interfere in the management of a company, it is necessary that the oppression remedy under the South African provision should be reformed to enhance minority shareholder's protection. The comparisons amongst different jurisdictions showed vividly that section 163 of the South African Companies Act is still behind its counterparts in the cognate jurisdictions.

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[326] 2001(4) SA 15 (SCA).

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Chapter 5: Conclusion and Recommendations

5.1 Conclusion

The main idea of this research was to examine the extent that section 163 of the Companies Act 71 of 2008 affords in ensuring protection to minority shareholders in relation to unfair prejudice and oppressive conduct in company operations following the decision in Foss v Harbottle.

A company is a juristic person. However, for it to act it needs natural persons that have associated or come together to create the corporation. In this set up, there will be directors who are tasked with the running of the company on daily basis. In the course of discharging this duty, it may happen that there is a clash, of rights between those in the majority and those in the minority, besides the clash there is always the tendency for the majority shareholders to abuse their powers in the corporate operations by suppressing the interests of the minority shareholders. They often do this with ease, as they are both controllers and wrongdoers at the same time.

The case of Foss v Harbottle is common in company law. It has the effect that the proper plaintiff is a company for wrongs done to the company. The majority rule should take preference and, furthermore, courts cannot and may not interfere in the management of the corporation. There has also been justification for the rule, such as, to guard against double jeopardy or double recovery, ratification principle, multiplication of actions.

It has been noted that at common law the test for relief for a minority shareholder's action was based on whether or not there was oppression. How the courts applied or interpreted what constitutes oppression made it difficult for the minority shareholders to prove their claims in order to get relief under the common law precepts. In fact, a minority shareholder had to rely on the 'exceptions' to the rule in *Foss v Harbottle*. These exceptions include, ultra vires, special resolution, fraud on the minority, injury to personal rights and derivative action – which required an applicant to prove that there was wrongdoer control and that the wrong cannot be remedied by a simple majority. Although there were these exceptions minority protection was still slim.

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In South Africa, the remedy was first legislated upon in the 1926 Act, followed by the 1973 Act, and lastly the 2008 Act. The Companies Act 71 of 2008 has now broadened the scope of the wrongs that could give rise to a minority shareholder's action, by including unfair prejudice and disregard of interest, as opposed to the test of oppression, as was required in common law. Unfortunately, these 'concepts' still remain undefined in the current Act.

It is therefore at the court's discretion to decide and to give meaning in each case whether a particular conduct complained of by the minority shareholder falls within the meaning of section 163. In this regard, the legislator has created some level of uncertainty in the exercise of the minority shareholder's remedy, as the fate of such actions rests on the discretion of the courts, and not necessarily on what the applicant in those circumstances proves.

For one to rely on section 163(1), a shareholder can only apply for relief under this section in his/her capacity as a shareholder. As such, a person affected in any other capacity (for example as a beneficial owner of shares), cannot seek relief under that provision. In addition, in so far as section 163 of the Companies Act 71 of 2008 is concerned, the conduct complained of must be a wrong that has already materialised or a continuing wrong. The section does not cater for a proposed wrong; for example, if a company is about to take an injurious decision towards a shareholder, a shareholder cannot approach the court to prevent the proposed wrong.

The remedy for unfair prejudice has been dealt with in great detail throughout this research. Since its inception, it has been shown where the remedy has done remarkable changes. However, some concepts have remained a mirror image of the previous legislation. Furthermore, there are barriers dressed and clothed in a form of either presumptions or principles. In addition, the tests have been set very high. Thus, it becomes a hassle and strenuous when a shareholder seeks reliefs under that provision.

These identified gaps have led to questions, such as whether the remedy is sufficient in protecting the minority shareholders or not in South Africa. It has further revealed problems wherein the courts have had to draw inferences from cases that were

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decided under the old law, and some English authorities to deal with some of the challenges posed or to give meaning to the key terms of section 163 of the 2008 Act. It has also been shown that some of those cases may not meet the demands of the constitutional values, as promoted in the Bill of Rights, which is also recognised by the 2008 Act.

5.2 Recommendations

In evaluating the South African provision on unfair prejudice, a comparison was made between Australia, Canada and the United Kingdom. It was noted that there is a noticeable difference that each jurisdiction has. For instance, the Australian Corporations Act has section 234(b), which recognises that there may be members who are removed from the register of members due to a concept know as capital reduction. Such persons will have *locus standi* to bring action for an unfair prejudice remedy. The Canadian courts have shown that when interpreting the unfair prejudice provisions in that country's Act they take into account the reasonable expectations of the complainant. Lastly, the United Kingdom allows for a relaxed interpretation, for instance it recognises that although a beneficial owner is not a member of a company, such a person has standing under section 994 of the Companies Act. It is therefore recommended that the South African company law should follow suit by adopting the broad approach in these cognate jurisdictions, that is Australia, Canada and the United Kingdom in order to provide broaden the protection for minority shareholders under the Companies Act 71 of 2008.

5.3 Suggestion for Future Research

This research was conducted to examine the extent that section 163 of the Companies Act 71 of 2008 affords in ensuring protection to minority shareholders in relation to unfair prejudice and oppressive conduct in company operations. This aim has been achieved as it has been shown that the statutory provisions are not sufficiently broad to provide adequate protections for the minority shareholders. A future research undertaking could explore the reasons why the legislature in South Africa has adopted a narrow approach to unfair prejudice remedy unlike what is obtainable in the cognate jurisdictions.

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6. Bibliography

ACTS

- Companies Act of 2006.
- Companies Act 46 of 1926.
- Companies Act 61 of 1973.
- Companies Act 71 of 2008
- Corporation Act 2001.
- Close Corporation Act 64 of 1984.
- The Constitution of the Republic of South Africa Act 108 of 1996.
- The Promotion of Administrative Justice Act 3 of 2002.

Books

- FHI Cassim, MK Cassim, R Jooste, J Shev & J Yeats, "The Law of Business Structures" (2016) Juta & Company (Pty) Ltd.
- Saleem Sheik, "A guide to Companies Act 2006" (2013) Routledge.
- IT Pretorius, PA Delport, M Havenga, M Vermaas 6th ed (1999) Juta & Co *South African Company Law: through the cases*.

CASE LAW

- *Aspek Co. Ltd v Mauerberger and Others* 1968 (1) SA 517 (C).
- *Anderson v Hogg* 2000 SLT 634.
- Atlasview Ltd v Brightview Ltd [2005] EWHC 1056 Ch 35.
- *Bayly v Knowles* 2010 (4) SA 548 (SCA).
- BCE Inc v 1976 Debentureholders 2008 SCC 69.
- *Budd v Gentra inc* 1998 43 B.L.R (2d) 43.
- Civils 2000 Holdings (Pty) Ltd v Black Empowerment Partner Civils 2000 (Pty) Ltd [2011] 3 All SA 215 (WCC).
- *Cinematic Finance Ltd v Ryder* [2010] EWHC 3387 (Ch).
- Constable v Executive Connections Limited 2005 EWHC 3 (Ch).
- *Cotter v National Union of Seamen* (1927) 29 LI.L. Rep 61.
- *Cook v Deeks* [1916] 1 AC 554.
- *Dadoo Ltd v Krugersdrop Municipal Counci* 1920 AD 530 at 550.
- *Daniels v Daniels* [1978] Ch 406.
- *Desousa and Another v Technology Corporate Management (Pty) Ltd and Others* [2017] 3 ALL SA 47 (GJ).
- *De Villiers v Kapela Holdings (Pty) Ltd and Others* [2016] ZAGPJHC 278 (14 October 2016).

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- De Klerk v Ferreira and Others 2017(3) SA 502 (GP).
- *Edwins v Halliwell* [1950] 2 ALL ER 1064.
- Elder v Elder & Watson Ltd [1952] SC 49.
- Foss v Harbottle (1843) 2 Hare 461.
- Garden Province Investment v Aleph (Pty) Ltd 1979 (2) SA 525 (D).
- *Gay v Gay Supermarkets Inc* 343 A.2d 577 (1975).
- *Geffen and Others v Martin and Others* [2018] 1 ALL SA 21 (WCC).
- Grancy Property Ltd v Manala 2015 (3) SA 313 (SCA).
- *Goodall v Hoogendoorn Ltd* 1926 AD 11 at 16.
- *Hillcrest Village (Pty) Ltd and Another v Nedbank Limited and Others* [2008] ZAGPHC 134
- *Hlumisa Investments Holding Limited and Another v Kirkins and Others* (2019) (4) SA 569 (GP).
- *Hoole v Greta Western Railroad Co* (1867) 3 Ch App 262.
- In Re Autobody Rinyway Limited (2018) EWHC 2336 (Ch).
- *Itzikowits v ABSA Bank Ltd* 2016 (4) SA 432 (SCA).
- *Jesner v Jarrod Properties* [1992] BCC 807.
- *Johnson v Gore Woods & Co* [2000] 2 AC 1.
- *Khan and Another v Communicare and Others* [2011] ZAWCHC 392.
- *Kudumane Investment Holding Ltd v Northern Cape Manganese Co (Pty) Ltd* [2012] ZAGPJHC 116 C
- *Ko¨nig v Hobza* (2014), 326 O.A.C. 213, 2014 ONCA 691.
- Labuschagne v Denny 1963(3) SA 538 (A)
- *Lewis Group Limited v Woollman and Others* [2017] ZAWCHC 15.
- Letseng Diamonds Ltd v JCI Ltd and Investec Ltd [2007] ZAGPHC 119.
- London and Others v Department of Transport Roads and Public Workers of Northern Cape and Others [2018] ZANCHC 32.
- MacDougall v Gardiner (1875) 1 Chd 13.
- Manning River Co- operation Diary Co Ltd v Shoesmith & Another [1915] 19 (LR 714 (HC).
- *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA).
- *McLelland v Hulett and Others* 1992(1) SA 456 (A &CLD) at 467I.
- *Minister of Law & Order v Kadir* 1995 (1) SA 303 (A).
- Morgan v 45 Fiers Avenue (Pty) Ltd 1986 ACLC 222.
- Motale v Abahlobo Transport Services (Pty) Limited and Others (2015) JOL 34696 (WCC).
- *Mouritzen v Greystone Enterprise (Pty) Ltd* [1980] 2 ALL ER 841.
- Oakland Nominees (Pty) Ltd v Gelvia Mining & Investment Co (Pty) Ltd 1976 (1) SA 441 (A)
- *O'neill v Phillips* [1999] WLR 1092, 1098.
- *Pavlides v Jensen* [1956] 2 ALL ER 518.
- *Peel v Hamon J&C Engineering (Pty) Ltd* 2013 (2) SA 331 (GSJ).

© University of Venda

- *Pender v Lushington* 1877) 6 Ch D 70.
- *Prudential Assurance Co Ltd v Newman Industries Ltd (NO:2)* 1982.
- *RA Noble & Sons Clothing Ltd* [1983] BCLC 273 at 290.
- Re a Company 007828 (1986) BCC.
- *Re a Company* [1983] 2 All ER
- Re Dinglis Properties Ltd, Dinglis v Dinglis [2020] EWHC 1363 (Ch).
- Re Spargos Minining NL (1990) 3 ACSR 1.
- Re Tobian Properties Ltd, maidment v Attwood (2015) 2 567 CA.
- *Rock Nominees Ltd v RCO (Holdings) Ltd* [2004] 1 BCLC 439 CA.
- *S v Makwanyane* 1995(6) BCLR 665.
- *Salmon v Salmon* [1896] UKHL 1.
- Scottish Co-operative Wholesale Society Ltd v Meyer [1959] A 324 HL.
- Smith v Croft (no 2) [1988] CH 114.
- *Smuts v Booysens* 2001(4) SA 15 (SCA).
- Smyth and Others v Investec Bank Limited and Another [2018] 1 all SA 1 (SCA).
- Standard Bank Nominees Rf (Pty) Ltd And Others v Hospitality Property Fund Ltd 2020 (5) SA 224 (GJ).
- Sammel & Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 679F-H.
- *Tahir v Faizi* [2019] EWHC 1627 (QB).
- *Trinity Asset Management and Others v Investec Bank* 2009 (4) SA 89 (SCA).
- *TWK Agriculture Ltd V NCT Forestry Co-operative Ltd and Others* [2006] ZAKZHC 17.
- Utopia Vakansie-Oorde Bpk v Du Plessis 1974 (3) SA 148 (A).
- Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others 2014 (5) SA 179 (WCC).
- *Westerhuis v Whittaker and Others* (4145/2017) [2018] ZAWCHC 76 (26 April 2018).
- Wilson v Alharayeri 2017 SCC 39.
- *Zempilas v J N Taylor Holding Ltd (in liq) (No 6)* (1991) 5 ACSR 28.

Journal articles

- Antony Corsi ‘Corporate and commercial disputes review’ Norton Rose Fulbright (2018) 16.
- A Sibanda, *The Statutory Remedy For Unfair Prejudice in South African Company Law* (2013) Journal for Juridical Science 38 (2).
- BM, Mupangavanhu, *The Lawfulness of a Memorandum of Incorporation Clause that Permits a Company Board to Refuse Transfer of Shares Without Reasons: Analysis of Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* (2017) Speculum Juris 31(2) 197.
- Bob Williams RC, ‘Can Shareholders aggrieved at the way the directors are running the company, ask the court to intervene?’ (2008) 2008 (1) *Professional Accountant*.
- Cassim MF, ‘When Companies Are Harmed by Their Own Directors: The Defects in The Statutory Derivative Action and The Cure (Part 1)’ (2013) 25 South African Mercantile Law Journal 170.

© University of Venda

- Cassim MF 'Untangling the Requirement of Good Faith in he Derivative Action in Company Law' (part 1) (2018) 39 (2) Obiter 367.
- Consultation Paper no 142, paras 1.6 and 14.1-14.4.
- Don mahon, 'Not absolute' (2014) Without Prejudice 16.
- Dov Ohrenstein Minority Shareholders & Unfair Prejudice a Seminar for The Thames Valley Commercial Lawyers Association
- FHI Cassim, MK Cassim, R Cassim, R Jooste & J Shev J Yeats The Law of Business Structures Juta & Company Ltd: South Africa 2016.
- Gibson JTR, South African Mercantile and Company Law Juta & Company Ltd: South Africa 2003.
- 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 Statutorily Intended Reach Potchefstroom Electronic Law Journal 2014 (17) 4 1696.
- Jean J Du Plessis, 'Revisiting The Judge Made Rule of Non- Interference in Internal Company Matters', (2010) 27 (2) *The South African Law Journal* 304.
- Kathy Idensohn, 'The Fate of *Foss* Under the Companies Act 71 of 2008: analyses' *SA Mercantile Law Journal* (2012) 24 (3) 357.
- L Shealy & S Worthington Cases and Materials in Company Law Oxford University Press: South Africa 2007.
- MF Cassim, The New Derivative Action under the Companies Act: Guidelines for Judicial Discretion Juta & Company Ltd: South Africa 2016.
- M Benjamin A Voice-Based Framework For Evaluating Claims of Minority Shareholder Oppression In The Close Corporation, Georgetown Law Journal, *ssrn 1285204* (2008), 97.
- Msomi, The –Tovim War, S252 and the new Companies Act Without Prejudice (2009) 32.
- Natasha Bouwman, 'Majority Rule and Minority Protections' *Without Prejudice* 10 (9) (2010) 12.
- Nwafor AO, 'Enforcement of Corporate Rights-The rule in Foss v Harbottle: Dead or Alive' (2016) 12 (1) Corporate Board: Role, Duties & Composition.
- Nwafor AO 'A Commentary on the Derivative Action under the Lesotho Draft Companies Bill of 2006' University of Botswana Law Journal (2007) 83.
- Oliver Schreiner, 'The Shareholder's Derivative Action: A Comparative Study of Procedures' (1979) *South African Law Journal* 209.
- Notes on Cases 126.
- *North Carolina* LR 279-284.
- Paul L Davies & Sarah Worthington, Gower's Principle of Modern Company Law Sweet and Maxwell: London 2016.
- Pennington R, Pennington's Company Law Butterworths: London 1996.
- Peeples Ralph A., 'Use and Misuse of Business Judgment Rule in Close Corporation' Notre Dame Law Review 60 (3) (1985) 467.
- Richard R Lee (1957) 35.

© University of Venda

- R P Austin and I M Ramsay, *Ford's Principles of Corporations Law*, (LexisNexis Butterworths, 15th ed, 2013) 709 [10.430].
- Rahmani Ataollah Majority Rule and Minority Shareholder Protection in Joint Stock Companies in England and Iran. (2007) 37

INTERNET SOURCES

- All About Philosophy available at https://www.allaboutphilosophy.org/what-are-ethics-faq.htm (accessed date 04 June 2019).
- Aslam Moosajee (Za) Section 163 Of Companies Act Not Wide Enough To Allow A Court To Authorise A Shareholder To Institute Action In The Name of The Company Available at https://www.financialinstitutionslegalsnapshot.com/2015/03/Section-163-Of-Companies-Act-Not-Wide-Enough-To-Allow-A-Court-To-Authorise-A-Shareholder-To-Institute-Action-In-The-Name-Of-The-Company/ (accessed on 18 June 2019).
- Babbie, Earl R. *The Practice of Social Research*. 12th ed. Belmont, CA: Wadsworth Cengage, 2010; Muijs, Daniel. *Doing Quantitative Research in Education with SPSS*. 2nd edition. London: SAGE Publications, 2010 also see https://libguides.usc.edu/writingguide/quantitative Lyndsay T Wilson "Empirical Research" available at https://explorable.com/empirical-research (accessed on 29 July 2019).
- Dentons "Rule against relective loss found to limit claims by unsecured creditors as well as shareholders" https://www.dentons.com/en/insights/newsletters/2018/october/23/uk-corporate-briefing/uk-corporate-briefing/rule-against-reflective-loss-found-to-limit-claims (accessed on 26 November 2019).
- David Matlala "The Law Reports April-2018" Available at http://www.derebus.org.za/the-law-reports-april-2018/(accessed date 20 May 2019).
- Dominic Blakeley, "Unfair Prejudice - A Quick Guide" available at https://www.clarionsolicitors.com/blog/unfair-prejudice-a-quick-guide(accessed date 25 June 2019).
- Emma Meakin Shareholders Rights And Unfair Prejudice Recourse For A Shareholder In Light of A Prejudice Decision Available at https://fleximize.com/articles/001348/shareholders-rights-unfair-prejudice (accessed date 23 may 2019).
- Fidgety Lizard " Royal Literary Fund" available at https://www.rlf.org.uk/resources/what-is-a-literature-review/ (accessed on 31 July 2019).
- Gasant Orrie & Georgia Speechly "Minority Shareholder Protection" available at https://withoutprejudice.co.za/article/6380/view (access date 12 June 2019).

© University of Venda

- Harney, British Virgin Islands: Unfair Prejudice and Beneficial Shareholder: A Confused Case 2016 https://www.mondaq.com/shareholders/548428/unfair-prejudice-and-beneficial-shareholders-a-confused-noise accessed date 20 September 2020.
- https://www..loc.gov/law/help/domestic-judgment/south africa.phd accessed date (01 November 2020).
- https://www..loc.gov/law/help/domestic-judgment/south africa.phd accessed date (01 November 2020).
- https://www.google.com/search?client=safari&rls=en&q=capital+reduction&ie= UTF-8&oe=UTF-8 (access date 7 October 2020).
- IT Pretorius, PA Delport, M Havenga, M Vermaas 6th ed (1999) Juta & Co *South African Company Law: through the cases* page 381.
- John Cohen "Newsletter" http://www.roodtinc.com/archive/newsletter96.asp (accessed 12 June 2019).
- Jurgen Henry Potgieter "Protection of Minority Shareholders Against Unfairly Prejudicial Conduct by The Majority Shareholders" available at https://www.mlvlaw.co.za/Resources/201804_Protection_of_Minority_Shareholders.pdf (accessed date 18 June 2019).
- John Bell, "Reflecting on the Concept of "Reflective Losses" in Company Law" https://www.polity.org.za/article/reflecting-on-the-concept-of-reflective-losses-in-company-law-2019-08-15 (accessed on 26 November 2019).
- Robert Feldt, "Guide to research questions" available at http://www.robertfeldt.net/advice/guide_to_creating_research_questions.pdf (accessed on 12 June 2019).
- Louw & Theodosiou, Minority Shareholders Protection and Share Buy Back As A Remedy https://www.financialinstitutionslegalsnapshot.com/2017/11/minority-shareholder-protection-and-share-buy-back-as-a-remedy/(accessed on 14 May 2020).
- Rahmani Ataollah Majority Rule and Minority Shareholder Protection in Joint Stock Companies in England and Iran. (2007) 37 available at also http://theses.gla.ac.uk/1848/
- Roger Blears, Majority Rule Shareholders https://www.lawteacher.net/free-law-essays/company-law/majority-rule-shareholders.php (accessed date 2 December 2020).
- Roger Blears, Majority Rule Shareholders https://www.lawteacher.net/free-law-essays/company-law/majority-rule-shareholders.php (accessed date 2 December 2020).
- Tim Miller 'Derivative Action in South Africa' available at https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2010/derivative-action-in-south-africa.html (accessed on 06 November 2019).
- What Is Research Ethics available at http://eneri.eu/what-is-research-ethics/ (accessed date 04 June 2019).

Theses

© University of Venda

- Alexandra Stylianou 'Evolution of The Derivative Action as an Enforcement of Rights Mechanisms Under the Companies Act 71 of 2008' unpublished MA dissertation, University of Pretoria, 2016 8.
- D Christodoulou 'The Protection of Minority Shareholders During A Reorganisation Of Share Capital Within A Company', University of Johannesburg, 2016.
- D Hutchison, C Pretorius, J Duplesis S Elselen, T Floyd L Hawthorne B Kuschke, C Maxwell,T Naude & E De Stadler The Law of Contract in South Africa, 7 Oxford University Press Sourthern Africa (Pty) Ltd (2012).
- V.J Mukondo 'A Comparative Discussion of the Regulatory Provisions For The Protection Of Shareholders In The United Kingdom And South Africa, University of Witwatersrand, 2016.

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