THE RIGHTS OF MINORITY SHAREHOLDERS IN FUNDAMENTAL TRANSACTIONS: A CRITICAL ANALYSIS OF THE APPRAISAL RIGHT

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This dissertation is dedicated to the loving memory of my father

Koos Hurter

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I. INTRODUCTION

(a) Introduction and Rationale

In 2003 the South African Department of Trade and Industry announced its plans to revise South African Company Law.[1] The drafters were focused on providing adequate protection to minority shareholders due to the political history of South Africa and its socio-economic commercial landscape.[2] These injustices of the past together with a feeble economy resulted in an unbalanced power battle. On one side of this power battle, we found a majority of sophisticated shareholders wielding power and on the other, we had inexperienced minority shareholders which required legislative protection.[3] A balance therefore needed to be achieved between offering shareholders the adequate protection whilst still encouraging investment.[4]

The Companies Act 71 of 2008,[5] which came into effect on 1 May 2011, has the new found purpose of achieving such a social and economic equality and necessitates the need to provide an appropriate balance between the interests of all the shareholders and directors in order to create an equal playing field.[6] Attaining this balance between the interests of all shareholders will avoid either minority oppression by the majority or minority dictation, being the inappropriate prevention of the occurrence of an equitable transaction to the detriment of either the company or majority shareholders or both.[7]

The composition of the board of directors is by appointment based on shareholders votes.[8] Therefore, the majority shareholders ultimately appoint the directors of their choice and then too

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[1] Jacqueline Yeats 'Putting appraisal rights into perspective' (2014) 25 *Stell L R* 328 at 328.
[2] Ibid at 330.
[3] Ibid. Jacqueline Yeats further elaborates in fn 13 that an example of such inexperienced minority shareholders would be the minority shareholders in transactions driven by BEE objectives.
[4] Yeats op cit note 1 at 331.
[5] The Companies Act 71 of 2008 (hereinafter referred to as 'the Act').
[6] The Department of Trade and Industry 'Notebook on the Companies Act , 2008 (Act No. 71 of 2008)' available at *https://www.thedti.gov.za/business_regulation/acts/Companies_Act_Notebook.pdf*, accessed on 12 May 2019 and Peter John Evelyn *A comparison of minority shareholder rights under the takeover regulations in South Africa and the United States of America* (unpublished LLM thesis, University of Johannesburg, 2016) 4.
[7] Maleka Famida Cassim 'Fundamental transactions, takeovers and offers' in FHI Cassim (ed) *Contemporary Company Law* 2ed (2012) 677.
[8] Section 68(1) read with section 68(2)(b)(ii). Cox Yeats Attorneys 'Circular No.5 The New Companies Act: Composing The Board Of Directors' available at *https://webcache.googleusercontent.com/search?q=cache*

control the company.[9] The need for minority protection in this instance arises from the consideration that the business, acts and affairs of a company are generally conducted by its board of directors and by its shareholders in general meetings by way of majority vote.[10] Since shareholders are bound by the resolutions of the company in general meetings the minority shareholders run the risk of oppression by majority rule and by the directors' powers.[11] These actions or decisions of the company could then alter the interests of the minority shareholder and result in the circumstance where the company no longer meets the shareholders' investment expectation.[12]

The dissenting shareholders' appraisal rights are a remedy aimed at aiding the achievement of this balance between the interests of shareholders and was introduced into South African law for the first time along with the enactment of the Act.[13] The appraisal right affords a minority shareholder the right to opt out of a company by 'cashing in' his shareholding and has introduced a new kind of statutory exit mechanism which is enforceable against the company in a range of situations.[14]

There are certain actions taken by a company which are commonly referred to as 'triggering actions' with reference to the appraisal remedy and these are the transactions against which the remedy may be used.[15] These 'triggering actions' include fundamental transactions by which mergers and acquisitions are affected and these fundamental transactions can be described as transactions that fundamentally alter a company.[16]

:sjdq96_54UJ:https://www.coxyeats.co.za/FileHandler.ashx%3Ffguid%3D13382a66-fe4f-457f-a27e-304bd2d07fc5%26download%3D1+&cd=15&hl=en&ct=clnk&gl=za accessed on 5 July 2019 and Adekunle Rotimi Olaofe *Appraisal right and fair value determination under the Companies Act no 71 of 2008 : A critical analysis* (unpublished LLM thesis, University of Cape Town, 2013) 1.

[9] Alan Dignam *Hicks and Goo's Cases and Materials on Company Law* 7ed (2011) 424.

[10] Section 66(1) and Maleka Famida Cassim 'Shareholder remedies and minority protection' in FHI Cassim (ed) *Contemporary Company Law* 2ed (2012) 757-758.

[11] Cassim (2012) op cit note 10 at 758.

[12] Barry M Wertheimer 'The shareholder's appraisal remedy and how courts determine fair value' (1998) 47 Duke Law Journal 613 at 615 and Carias Tererai Chokuda *The Protection of Shareholders' Rights versus Flexibility in the Management of Companies: A Critical Analysis of the Implications of Corporate Law Reform on Corporate Governance in South Africa with specific reference to protection of shareholders* (unpublished LLD thesis, University of Cape Town, 2017) 155.

[13] Yeats op cit note 1 at 328-332. The dissenting shareholders appraisal rights are entrenched in section 164.

[14] Ibid at 335.

[15] Cassim (2012) op cit note 10 at 796 and HGJ Beukes "An introduction to the appraisal remedy in the Companies Act 2008: standing and the appraisal procedure" (2010) 22 *SA Merc LJ* 176 at 176.

[16] G Driver & H Goolam 'Fundamental transactions and their regulation by the Companies Act No.71 of 2008' available at *http://www.companylaw.uct.ac.za/usr/companylaw/downloads/legislation/WLB_* 2011-03_Cos_Act_fundamental_transactions_GD_HG.pdf, accessed on 2 March 2018.

The Companies Act 61 of 1973[17] was governed by the principal of majority rule which consequently meant that dissenting minority shareholders were bound by the decisions of the majority.[18] This does not mean that there was no protection available for minority shareholders and the remedies that existed in the 1973 Act were to a large extent retained in the new Act.[19] These include the section 163 (relief from oppressive or prejudicial conduct), shareholders' approval[20] and court review. A significant difference between other shareholder remedies and the appraisal remedy is that in terms of the appraisal remedy no fault on the part of the majority shareholders or the company is required.[21] Could another remedy therefore be applied concurrently with the use of the appraisal remedy or are these remedies mutually exclusive?

The opinion of this dissertation will follow the course that the appraisal right has been one of the most appealing additions to the Act. However, the practicability of the right must be improved in order for the proper use thereof. The appraisal right could inhibit corporate activity in different ways relating to the time delays as well as the uncertainty surrounding the inability to quantify the risk taken by either the company in entering into a fundamental transaction or by the dissenting shareholder in terms of the possible outcome of exercising his right.[22] A further delay which is imperative in assessing the practicality of the appraisal right is the delay experienced by the dissenting shareholder once he has implemented his proceedings in terms of his appraisal right as he is deprived the use of his funds until finalisation thereof.[23]

Appraisal rights are technically complex to enforce and contain onerous time constraints and complicated procedural steps.[24] All these steps would have to be complied with in order for a shareholder to be entitled to implement the appraisal remedy. Failing to do so can result in a circumstance where a dissenting shareholder stands to lose his appraisal right altogether.[25] This

[17] The Companies Act 61 of 1973 (hereinafter referred to as 'the 1973 Act').
[18] *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) para 678 Trollip J firmly noted: 'By becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder… That principle of the supremacy of the majority is essential to the proper functioning of companies' and Yeats op cit note 1 at 335-336.
[19] Yeats op cit note 1 at 336.
[20] Section 115(2).
[21] M.F Cassim 'The introduction of the statutory merger in South African corporate law: majority rule offset by the appraisal right (part 2)' (2008) 20 *SA Merc LJ* 147 at 172 fn 306. Yeats op cit note 1 at 336.
[22] B Manning 'The shareholder's appraisal remedy: an essay for Frank Coker' (1962) 72 *Yale LJ* 223 at 232-235.
[23] Cassim (2012) op cit note 10 at 808.
[24] Ibid at 807.
[25] Cassim (2012) op cit note 10 at 807.

often results in the fact that dissenting shareholders require the assistance of legal counsel to ensure compliance with the section which results in a costly application of the shareholder's legislative right.[26] The appraisal procedure operates in favour of the company and impacts the shareholder more harshly in terms of compliance and, therefore, the balance drawn by the Act between the company and the dissenting shareholder is inappropriate.[27] The Act is further silent on whether a person has to be a registered shareholder in order to have standing, as well as whether a shareholder may validly waive his appraisal rights.[28]

The appraisal right is essentially the dissenting shareholder's right to seek professional determination of the fair value of his shares,[29] and one of the most prominent elements of the appraisal right is, therefore, the determination of fair value.[30] The method used for determining the fair value of the shares is central to the efficiency of the remedy. However, the Act is silent on the manner in which the value of the shares is to be determined and does not make provision for a specific method to be used by the courts.[31] This creates a degree of uncertainty as to the possible success or failure of the minority shareholders in approaching the court, as it must be noted that the fair value is not equivalent to market value alone.[32] In South Africa, case law has not yet emerged in which the court has had to deal with fair value. This is due to the remedy being new in the jurisdiction and it necessitates the need to derive guidance of the valuation of shares from foreign jurisdictions which have well-developed and long-standing judicial experience, such as the Delaware courts and Canada.[33]

Appraisal rights originated and developed in the United States of America (hereinafter USA) and are further recognised in Canada.[34] A comparison will be done between South African law and these foreign jurisdictions. There will be a specific emphasis on the laws of the State of Delaware. The reason for the choice of Delaware is that the appraisal rights in Delaware have been practised

[26] Cassim (2012) op cit note 10 at 807.
[27] Ibid at 807-808.
[28] Beukes op cit note 15 at 177. Cassim (2012) op cit note 10 at 810.
[29] *Loest v Gendac (Pty) Ltd and Another* unreported case no 17699/2016 (3 March 2017) at para 22-23.
[30] Section 164(5).
[31] Cassim (2012) op cit note 10 at 809.
[32] Cassim (2008) op cit note 21 at 168.
[33] Cassim (2012) op cit note 10 at 809.
[34] Cassim (2012) op cit note 10 at 796 and Yeats op cit note 1 at 328.

extensively and are a widely acknowledged.[35] Further, a comparison will be made with Canadian Law which has similar legislation to South Africa in this regard.[36]

(b) Research Problem

The problems and challenges related to the effective and proper use of appraisal rights arise from the complexity of the right itself which includes the technicalities of the procedure involved; the costs associated with the process of enforcement; the time delays occasioned by the process; and the uncertainty inherent in the process and its outcome.[37]

This dissertation will focus on the practicability of the appraisal remedy in South Africa by analysing the statute which gave rise to the remedy; the flaws which potentially inhibit the use of the remedy; the methods of calculation of fair value; as well as a comparative analysis of the functionality of the remedy in other jurisdictions such as the USA and Canada.

(c) Research Questions and Sub-questions

1. What are the 'triggering events' which give rise to the appraisal right and are there any other remedies available that can assist minority shareholders in the same context, or are these remedies mutually exclusive?
2. What flaws and uncertainties have been identified inherent to the appraisal right and do these flaws inhibit the use of the remedy?
3. What is the correct valuation methodology to determine the fair value of shares in the appraisal right action?
4. How do the appraisal provisions in the USA and Canada compare to that of South Africa?
5. How can the legislature and companies intervene to promote the effective and proper us of the appraisal right?

[35] Cassim (2012) op cit note 10 at 809.
[36] Cassim (2008) op cit note 21 at 165 fn 259.
[37] Ibid at 164. P Delport & Q Vorster *Henochsberg on The Companies Act 71 of 2008* (2015) at 578 and the authorities there cited.

(d) Methodology

The research for this dissertation will be based on desk-bound research and literature review. During this work the primary legal source will be the Companies Act.[38] Relevant case law will be discussed where applicable. This includes both domestic and foreign case laws. Secondary sources will be used in the form of textbooks, academic writings and journal articles. The Internet will be a major source of current and international sources as it is the fastest manner in which new information may be found. The South African Law Journal house-style will be used for style and referencing.

Regarding the choice of legal systems, it must be stated that although the focus of this dissertation falls on the South African legislative framework, a legal comparative study of USA and Canadian law will be incorporated and will focus mainly on how these foreign jurisdictions interpret and apply the different aspects of their respective appraisal right provisions.

(e) Chapter Outline

In this dissertation the author will focus on analysing the practicability and applicability of the appraisal remedy for the protection of minority shareholders in fundamental transactions. In Chapter 2, the question of what transactions or actions give rise to the appraisal remedy will be discussed along with possible additional remedies which may apply concurrently with the appraisal remedy. The focus of Chapter 3 revolves around the procedure involved in initiating the appraisal remedy and a critical analysis of the flaws inherent therein. In Chapter 4, the author will analyse the different methodologies used in determining fair value as this determination forms the basis of the appraisal remedy regarding the fair value of the dissenting shareholders' shares. Chapter 5 will involve a comparative study of the appraisal procedure in the USA and Canada, but only comparative provisions from such legislations will be used. And finally, chapter 6 will contain the conclusion and recommendations of the author.

[38] Both the 1973 and 2008 Act.

II. TRIGGERING EVENTS AND MINORITY PROTECTION

(a) Introduction

In terms of the Act, the board of directors has an imposed responsibility and duty to manage the activities of a company.[39] However, in certain circumstances or more specifically in terms of certain transactions, the acts of the company need to be sanctioned by the votes or decisions of the shareholders.[40] In such situations the majority shareholders who hold the most shares control the company through their votes and to their advantage.[41]

The importance of the regulation of the relationship between the majority and minority shareholders should be noted due to the fact that the majority shareholders have no duties, fiduciary or otherwise towards the minority shareholders.[42] Further, the directors of a company are elected by the persons entitled to exercise voting rights which results in the fact that the board of directors is mainly constituted by the votes and, therefore, indirectly by the interests of the majority shareholders.[43]. This often leads to a situation wherein the board, being mindful of those particular interests, would proceed to perform an act which is most suitable for the majority.[44] This is why the introduction of, and protection offered by the appraisal right is so significant. It does not have a pre-requisite of fault that needs to be proven as it is merely a protection offered to a shareholder who, due to the result of a transaction or act passed by the majority, would be in a company that no longer meets his investment expectation, that is, that the company buy back his shares held at fair value.[45] This supports the framework of a modern company where proper governance is done by allowing certain decisions to the majority and not a unanimous consent which leads to effective management where shareholders' resolutions are required.[46]

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[39] Section 66(1).
[40] Olaofe op cit note 8 at 6. This was reiterated in the New Act in terms of s115.
[41] VR Ngalwana 'Majority rule and Minority Protection in South African Company Law: A Reddish Herring' (1996) 113 *SALJ* 527 at 528 & 536.
[42] I Esser & PA Delport 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1 at 8.
[43] Section 68(1).
[44] Chokuda op cit note 12 at 155-156.
[45] Cassim (2012) op cit note 10 at 796.
[46] Albertus Ebenhaezer Smit *Compulsory Acquisitions of Minority Shareholding: A Critical Analysis* (unpublished LLM thesis, University of Cape Town, 2015) at 13.

The Department of Trade and Industry published a policy paper setting out certain guidelines for corporate reform[47] which stated that the mission should, as far as transparency is concerned, be that the law should protect shareholder rights, advance shareholder activism, and provide enhanced protections for minority shareholders.[48] In saying this, it is crucial that the protection of minority shareholders' rights must be understood within the context of the rules set by the Act, the common law, and the Memorandum of whether Incorporation of the Company and Shareholders' Agreement.[49] Therefore, an imperative first step in identifying whether shareholders are entitled to use their appraisal right is being able to identify which transactions and or actions give rise to these rights. Further, it is important to note whether, under the same circumstances, there are additional remedies which can be used by the minority shareholders for ultimate protection.

The appraisal remedy is not available in all instances to the minority shareholders. It is only available to the shareholder when the company is entering into a fundamental transaction or amending its Memorandum of Incorporation to alter the preferences and rights pertaining to a share.[50] In the absence of these events, the appraisal right cannot be invoked.[51] The focus of this dissertation falls specifically within the ambit of fundamental transaction, and therefore, will only provide a brief overview of the amendment of the Memorandum of Incorporation.

(b) Triggering Events in terms of the Appraisal Right

(i) Fundamental Transactions

Fundamental transactions are governed by Part A of Chapter 5 of the Act which expressly provides for three types of fundamental transactions that fundamentally alter a company. These comprise: (1) the disposal of all or the greater part of the assets or undertaking of a company,[52] (2) schemes

[47] South African Company law for the 21st century – Guidelines for Corporate Law Reform (GG 26493 20040623).
[48] PA Delport 'Share Issues and Shareholder Protection' (2013) 46 *De Jure* 1056 at 1059.
[49] S Mbuli 'Protection of 'minority shareholders' from oppressive or prejudicial conduct under s 163 of the Companies Act: Has anything really changed?' available at *http://www.derebus.org.za/protection-minority-shareholders-oppressive-prejudicial-conduct-s-163-companies-act-anything-really-changed/* accessed on 5 November 2018.
[50] Section 164(2).
[51] Olaofe op cit note 8 at 16.
[52] Section 112.

of arrangement, [53] as well as (3) amalgamations[54] and mergers.[55] The regulatory regime for fundamental transactions has been reformed to facilitate the creation of business combinations and is motivated by the object of promoting flexibility and enhancing efficiency in the economy.[56]

Closely associated with the new regime for fundamental transactions is the new appraisal remedy for dissenting minority shareholders which has facilitated a major reduction in the role of the court in fundamental transactions.[57] This has the effect that these transactions are no longer subject to general or automatic court involvement but rather that the involvement of the courts has been restricted to specified circumstances.[58] The shareholder approval requirements, the exceptional requirement of court approval and the appraisal rights of dissenting shareholders are largely harmonised for all three types of fundamental transactions.[59]

Disposal of all or the greater part of the assets or undertaking of a company

In terms of section 112 of the Act, a company may not dispose of all or the greater part of its assets or undertaking unless it has complied with the various requirements of sections 112 and 115.[60] The disposal must be in reference to a major part of the company's assets or business objectives so as to be regulated by this section.[61] Such a transaction can have an economic effect for shareholders that is just as fundamental as a transaction involving their shares in the company, and is one of the ways for an encroaching company to take over a business of another company.[62]

The company must, as standard practice notify the shareholders of a meeting to consider a resolution to approve the disposal.[63] This notice must be delivered within the prescribed time and manner as set out in section 62 and must include a written summary of the precise terms of the transaction to be approved as well as set out how it is going to be implemented.[64] The shareholder

[53] Section 114.
[54] Section 113.
[55] Cassim (2012) op cit note 7 at 674; J Latsky 'The Fundamental Transactions under the Companies Act: A Report Back from Practice after the First Few Years' (2014) 25 *Stell L R* 361 at 361.
[56] Cassim (2012) op cit note 7 at 675.
[57] Ibid.
[58] Ibid; Section 155(3).
[59] Cassim (2012) op cit note 7 at 716 – This harmonisation is achieved through section 115 of The Act.
[60] Latsky op cit note 55 at 363.
[61] Olaofe op cit note 8 at 17.
[62] Latsky op cit note 55 at 363.
[63] Section 112(3).
[64] Section 112(3)(a) & section 112(3)(b)(i).

should also be made aware of the procedure and rights available to him, in light of disagreeing with the decision.[65]

The item to be disposed of must be fairly valued as at the date of the proposal and must be expressly identified due to the provision that a resolution taken in terms of such a transaction is only effective to the extent that it authorises a specific transaction.[66] In other words, the directors cannot obtain a general authority to enter into agreements as they in future may deem advisable.[67] It is noted that the decision to dispose of the asset or undertaking can only be approved by a special resolution.[68] It must further be kept in mind that it is the shareholders of the disposing company whose approval is required.[69]

Court approval will be discussed below, and the appraisal right applies to all the fundamental transactions.[70]

Amalgamation or Merger

The Act has introduced a radically new concept of the amalgamation or merger in terms of a statutory merger procedure.[71] In an all-embracing description in an amalgamation or merger, the assets and liabilities of two or more companies are amalgamated into a single company, which may either be one of the combining companies (the "surviving company") or a newly formed company.[72] In other words, it is a transaction or a series of transactions which occur subsequent to an agreement between the companies involved which result in:

1. the formation of one or more new companies, which together hold all the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement and the dissolution of each of the amalgamating or merging companies; or
2. the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or

[65] Section 112(3)(b)(ii) which refers to section 115 and section 164.
[66] Section 112(4)&(5).
[67] Cassim (2012) op cit note 7 at 721.
[68] Section 115(2)(a) read with section 115(1).
[69] Cassim (2012) op cit note 7 at 721.
[70] Cassim (2012) op cit note 7 at 723 and Section 115(8).
[71] Cassim (2012) op cit note 7 at 676.
[72] Ibid.

companies, together with such new companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement.[73]

In pursuing this type of transaction, the procedure, as stated in section 113, must be adhered to. Firstly, the companies involved need to enter into a written agreement setting out the terms and means of effecting the amalgamation or merger.[74] In attempting to approve the transaction, a shareholders' meeting must be called for the consideration of that specific transaction. The notice of such a meeting must be done in accordance with section 115.[75] It is important to note that before a resolution can be implemented, the board must conduct the liquidity and solvency test and if the board reasonably believes that each proposed merged company would satisfy the solvency and liquidity test, it may submit the agreement for consideration at the shareholders' meeting.[76]

This procedure is subject to a special resolution in terms of approval by the shareholders of all the participating companies and is a court-free procedure, which is a welcome modification in assisting companies to adapt to changing business conditions in the interest of economic growth and wealth creation.[77] However, on the other hand, it creates a large need for the protection of the minority shareholders from discrimination at the hands of the majority.[78] The liberalisation in merger policy under the Act is, however, neutralised by the provision of appraisal rights to dissenting shareholders, which allows the minority to opt out of the company.[79] This aspect will be discussed further below. Dissenters in terms of this appraisal right do not generally have recourse to a court of law to prevent or frustrate such a merger if due and proper approval has been received by the prescribed majority and the appraisal right is, therefore, closely linked to the statutory merger.[80]

Although court approval is not a general requirement for statutory mergers, it is required in certain circumstances where the court is empowered to set aside a merger resolution.[81] This remedy must

[73] Section 1: definition of "amalgamation or merger".
[74] Section 113(2).
[75] Section 113(4)(b) read with section 113(5)(b).
[76] Section 113(1) read with section 4(1) and Cassim (2012) op cit note 7 at 689.
[77] Cassim (2012) op cit note 7 at 677.
[78] Ibid.
[79] Ibid.
[80] Ibid at 678.
[81] Ibid at 676-678.

be distinguished from the appraisal remedy because although they are complementary, they provide different results and apply in different circumstances.[82] However, the appraisal right is the primary safeguard for shareholders in terms of amalgamations or mergers.[83]

Schemes of Arrangement

A scheme of arrangement is a fundamental transaction and therefore must comply with the requirements of section 115. There are, however, further requirements to be met that are tailored to the transaction itself.[84] This is an arrangement between the company and the holders of shares or security of the company.[85] The Act has separated sections regulating a scheme of arrangement between a company and its shareholders from the sections regulating compromise between a company and its creditors.[86]

The board in proposing the arrangement must adhere to the procedure and mandates of section 114 of the Act. A special resolution of shareholders is also needed to approve this scheme, which brings the approval procedure on par with the other fundamental transactions.[87]

In terms of a scheme of arrangement there is a re-organisation of the company and its share capital.[88] This could be done by means of consolidation of shares into different classes; division of shares into different classes; expropriation of securities from the holders; exchanging any of its securities for other securities; a re-acquisition by the company of its securities or a combination of these methods.[89] This is not a closed list.

Further, the appraisal right applies to all fundamental transactions, including a scheme of arrangement.[90] Court approval will be discussed below.

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[82] Ibid at 701.
[83] Ibid at 698.
[84] Jacqueline Yeats 'Fundamental transactions, takeovers and offers' in FHI Cassim (ed) *Contemporary Company Law* 2ed (2012) at 725 – These include that the company must retain an independent expert to compile a report concerning the proposed scheme of arrangement.
[85] HS Cilliers, ML Benade & B Henning et al *Corporate Law* 2nd Ed (1992) 50.
[86] Yeats (2012) op cit note 84 at 726 – section 155 deals with 'Compromise between company and creditors'.
[87] Section 115 read with section 114 and Yeats (2012) op cit note 84 at 728.
[88] Olaofe op cit note 8 at 19.
[89] Section 114(1).
[90] Section 115(8).

(ii) Amending of Memorandum of Incorporation

The Memorandum of Incorporation of a company is a binding document, notably in this respect, between the company and each shareholder.[91] It is the founding document of the company which sets out the rights, duties and responsibilities of the shareholders and directors.[92]

Amendment of the memorandum must be approved by a special resolution. It is further permissible for the Memorandum of Incorporation to prohibit amendment of specific provisions.[93] According to the common law and under the 1973 Act, the power to alter the constitution of a company had to be exercised *bona fide* for the benefit of the company as a whole, and in a manner that did not constitute fraud on the part of the minority.[94] This principle may continue to apply to the new Act. Any amendment of the Memorandum of Incorporation that would alter the preferences, rights, limitations or other terms of any class of shares in any manner which would be materially adverse to the rights or interests of the holders of that class of shares will trigger the appraisal remedy.[95] If, however, the Memorandum of Incorporation is amended in terms of a court order, a special resolution of the shareholders is not needed and the amendment is simply affected by a resolution of the board of directors.[96] In this instance the appraisal rights are not triggered.

(c) General Shareholder Protection

The Act applies important and uniform approval requirements for fundamental transactions which are vital safeguards and protective measures for shareholders.[97] There are three uniform approval requirements which are shareholders' approval, court approval and the appraisal rights of dissenting shareholders.[98] Shareholders' approval and court approval will be discussed below and the appraisal rights of dissenting shareholders will be discussed in detail in Chapter 3. It is

[91] Section 15(6)(a).
[92] Maleka Famida Cassim 'Formation of companies and the company constitution' in FHI Cassim (ed) *Contemporary Company Law* 2ed (2012) at 122.
[93] Section 15(2)(c).
[94] Cassim (2012) op cit note 92 at 133 and *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 (CA).
[95] Section 164(2)(a).
[96] Section 16(4).
[97] Cassim (2012) op cit note 7 at 675-676 & 700.
[98] Ibid at 675-676.

important to note that all three apply to each fundamental transaction. However, there are some differences in the way they apply to a specific fundamental transaction.[99]

Another inherent protective measure provided by the Act is that the Takeover Regulation Panel[100] has the responsibility to regulate affected transactions in accordance with the Act.[101] An affected transaction in terms of the definition thereof includes all three of the fundamental transactions governed by sections 112, 113 and 114 as discussed above.[102] The Act specifically prescribes that a company may not enter into a fundamental transaction unless the Panel has issued a compliance certificate in respect of the transaction or has exempted the transaction.[103]

(i) Shareholders' Approval

Shareholder approval[104] is dictated by section 115. This section provides that a company may not enter into a fundamental transaction unless the requisite approval has been obtained.[105] It is important to note that the requisite approval requirements under section 115 apply despite section 65[106] and despite any contrary provisions in the Memorandum of Incorporation or any board resolutions. However, as will be discussed in Chapter 3 below, an exception is made to a transaction which is pursuant to a business rescue plan.[107]

A proposed fundamental transaction must be approved by a special resolution at a meeting of shareholders which was called for the specific purpose of voting on such a transaction.[108] The quorum for such a meeting must be in aggregate at least 25 per cent of all of the voting rights that are entitled to be exercised on that matter or any higher percentage as may be required by the company's Memorandum of Incorporation as per section 64(2).[109] Due to the addition of the words 'higher percentage' in section 115(2)(a), it is clear that the quorum requirement for the meeting

[99] Cassim (2012) op cit note 7 at 676 fn 6.
[100] Hereinafter the 'Panel'.
[101] Yeats (2012) op cit note 84 at 747.
[102] Section 117(c).
[103] Section 115(1)(b).
[104] Sections 112(2)(a), 113(4)(b) & 114(1).
[105] Section 115(1).
[106] Section 65 deals with shareholders resolutions.
[107] Cassim (2012) op cit note 7 at 690.
[108] Section 115(2)(a).
[109] Section 115(2)(a) read with section 64(2) which states: A company's Memorandum of Incorporation may specify a lower or higher percentage in place of the 25 percent. It must be noted that shareholders who do not have voting rights to vote in connection with the matter must be excluded from the quorum.

may be increased in a particular company's Memorandum of Incorporation but it may not be decreased.[110] This is further supported by the Act where it states that the Memorandum of Incorporation of any company may include any provision imposing on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of the Act.[111] Section 115 is an unalterable provision.[112]

A special resolution needs to be adopted and is approved as such with the support of at least 75 per cent of the voting rights that are exercised on the resolution.[113] Due to the fact that section 115 applies despite section 65, the 75 per cent threshold is fixed and may not be altered.[114] The present shareholder approval requirement ensures more adequate protection for minority shareholders, while at the same time preserving flexibility for companies to participate in fundamental transactions without unreasonable resistance from minorities.[115]

Shareholder apathy is a common occurrence in many companies and one of the leading reasons for this is the perception among shareholders that the exercising of their right to vote will not bring about any noticeable changes. This has been said to be attributable to the separation of ownership and control.[116] Therefore, if shareholder apathy is taken into consideration, it would take a mere 18.75 per cent of voting rights for the approval of a fundamental transaction. This is due to the fact that the minimum quorum of voting rights needed to take a resolution is 25 per cent and a special resolution is achieved if 75 per cent of the 25 per cent vote in favour of the proposed transaction (75 per cent of 25 per cent is 18.75 per cent).[117]

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[110] Section 115(2)(a) read with section 64(2) and reference to Cassim (2012) op cit note 7 at 690.
[111] Section 15(2)(a)(iii).
[112] M Burger-van der Walt 'List of alterable provisions in the Companies Act, 2008' available at *http://www.verryn.co.za/Documents/List_Of_Alterable_Provisions_CA_2008.pdf*, accessed on 5 June 2019.
[113] Section 65(9). It must be reiterated that both the quorum and approval requirement relate to the percentage of voting rights and not to the percentage of shareholders or shares.
[114] Cassim (2012) op cit note 7 at 690-691. Therefore specifically section 65(10) does not apply which reads as follows: 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 provided that there must at all times be a margin of at least 10 percentage points between the highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution on any matter.
[115] Cassim (2012) op cit note 7 at 691.
[116] R Cassim 'Corporate Governance' in FHI Cassim (ed) *Contemporary Company Law* 2ed (2012) at 497&498.
[117] Cassim (2012) op cit note 7 at 691.

In the case of a merger, each merging company must adopt a special resolution.[118] In terms of a disposal of assets or undertakings, only the disposing company must approve the transaction by special resolution.[119] However, where the transaction consists of a disposal by a subsidiary company and the assets or undertakings which are being disposed of consist of all or the greater part of the assets or undertakings of the holding company in terms of the consolidated financial statements, then a special resolution is also required from the shareholders of the holding company.[120]

Another safeguard set out by the Act is that for the purpose of the shareholders' special resolution, any voting rights controlled by an acquiring party or a person related to an acquiring party or a person acting in concert with either of them, must not be included in calculating the percentage of voting rights required to constitute a quorum or a majority vote.[121] The object of this provision is to introduce a minority protection measure that would prevent a conflict of interest in an interested transaction where the acquiring company is also a shareholder in the targeted company.[122] Shareholder approval is thus a vital safeguard for shareholders.[123]

(ii) Court Approval

The introduction of the appraisal remedy has resulted in a great reduction in the role of the court in fundamental transactions.[124] The appraisal right functions as the main protective feature for shareholders in an amalgamation or merger and disposals of assets and undertakings and, therefore, has reduced the need for general or automatic court involvement, except in specified circumstance noted by the Act.[125]

The court approval in terms of a scheme of arrangement has to been replaced with the appraisal remedy. However, in terms of the Act, a further requirement for this type of transaction is the requirement for a report from an independent expert.[126] It is interesting to note that the court-

[118] Section 113(5).
[119] Section 112(2)&(3).
[120] Section 115(2)(b).
[121] Section 115(4) –Therefore, these parties are disqualified from voting and are further excluded in calculating quorum.
[122] Cassim (2012) op cit note 7 at 692.
[123] Ibid at 700.
[124] Ibid at 675.
[125] Ibid.
[126] Ibid. Section 114 (2)&(3).

approved arrangement procedure continues to play a useful role in Canadian law as it avoids the appraisal right with its accompanying cash drain on a company. The same model should have been adopted in the Act.[127]

The general rule is that if a fundamental transaction has been approved by way of special resolution, the dissenting minority is bound by such a resolution and must rely on their appraisal rights to opt out of the company.[128] It is only in specified circumstances where a fundamental transaction may be set aside by the court, and this court approval applies equally to all fundamental transactions.[129] It must be noted that in order for shareholders to rely on this court approval, they must have voted against the special resolution and must not have merely abstained from voting.[130]

Despite a resolution having been passed by way of special resolution, a company may not proceed to implement such a resolution without the approval of the court if:

a) the resolution was opposed by at least 15 per cent of the voting rights that were exercised on that resolution and, within five business days after the vote, any person who voted against the resolution requires the company to seek court approval;[131] or
b) the court, on an application within 10 business days after the vote by any person who voted against the resolution, grants that person leave to apply to a court for a review of the transaction.[132]

In terms of the latter application, the court will grant leave if it is satisfied that the applicant is acting in good faith;[133] appears prepared and able to sustain the proceedings;[134] and has alleged facts which, if proved,[135] would support an order to set such resolution aside.[136]

Where the court's approval is required, the court will only be able to set aside the special resolution approving the transaction if the resolution is manifestly unfair to any class of holders of the

[127] Cassim (2012) op cit note 7 at 676.
[128] Ibid at 696.
[129] Ibid.
[130] Ibid at 697. As stated before, shareholders who are not entitled to vote on the necessary resolution have no recourse with respect to this protective measure.
[131] Section 115(3)(a).
[132] Section 115(3)(b). This applies regardless of the percentage support for the resolution.
[133] Section 115(6)(a).
[134] Section 115(6)(b).
[135] Section 115(6)(c).
[136] Cassim (2012) op cit note 7 at 696-697.

company's securities. Or, if the vote was materially tainted by conflict of interest, inadequate disclosure, failure to comply with the Act, the Memorandum of Incorporation or any applicable rules of the company, or other significant and material procedural irregularity.[137]

Although the appraisal remedy and the court approval remedy complement one another, it is important to distinguish between the two remedies as they apply in different circumstances, yield different results, and serve distinctly different purposes.[138] The appraisal remedy is centred around the determination of the fair value of the shares held in the company, but does not set aside or prevent the implementation of a fundamental transaction. However, in the instance of the court review of a resolution, the result could be the transaction being set aside.[139] Where there is a material procedural irregularity or a form of unfairness to a class, the appraisal remedy would be an inadequate safeguard as the appropriate relief would be to the shareholders in general and not only to the dissenting shareholders.[140] The rights of shareholders to request a court review is in addition to their appraisal rights and they are, therefore, not mutually exclusive.[141]

(iii) The role of the Takeover Regulation Panel

The Takeover Regulation Panel, established in terms of section 196 of the Act, plays a robust and helpful role in refereeing and facilitating 'affected transactions' in terms of parts B and C of chapter 5 of the Act.[142] Affected transactions, as stated before, encompass the fundamental transactions set out above.[143]

The Panel is an extremely important and powerful body in the regulatory regime established by the Act and has jurisdiction throughout South Africa.[144] The panel is independent and subject only to the Constitution[145] and the law. To the extent to which Part B and C of Chapter 5 and the Takeover Regulations apply to a company, the company may not implement a fundamental transaction unless the Panel has carried out its function.[146] In carrying out its mandate, the Panel

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[137] Section 115(7)(b).
[138] Cassim (2012) op cit note 7 at 698.
[139] Ibid at 698.
[140] Cassim (2012) op cit note 7 at 698. The resolution itself is materially flawed and should therefore be set aside.
[141] Ibid.
[142] Latsky op cit note 55 at 362.
[143] Section 117(1)(c) - provided that the transaction involves a regulated company.
[144] Yeats (2012) op cit note 84 at 745.
[145] Constitution of the Republic of South Africa, 1996.
[146] Cassim (2012) op cit note 7 at 723 and Section 115(1)(b) read with section 119(4)(b) and section 119(6).

may issue a compliance certificate if the Panel is satisfied that the offer or transaction satisfies the requirements of the Act and the Takeover Regulations.[147] Alternatively the Panel may wholly or partially, and with or without conditions, exempt an offeror to an affected transaction or an offer from the application of this provision on certain grounds.[148]

The Panel must disregard the commercial advantages or disadvantages of any transaction or proposed transaction[149] in order to protect shareholders by:

a) ensuring the integrity of the marketplace and fairness to the shareholders during affected transactions;[150]
b) ensuring that the necessary information is provided to shareholders to facilitate the making of fair and informed decisions;[151]
c) ensuring the provision of adequate time for shareholders to obtain and provide advice;[152]
d) preventing actions by a company intended to impede, frustrate or defeat affected transactions or the making of fair and informed decisions by the shareholders;[153]
e) ensuring that all shareholders are treated equally and equitably during an affected transaction; [154]
f) ensuring that all shareholders receive the same information during an affected transaction, and that no relevant information is withheld;[155] and
g) ensuring that shareholders are provided sufficient information and time[156] to enable them to reach a properly informed decision.[157]

[147] Section 119(4)(b).
[148] Section 119(6): The Panel may wholly or partially, and with or without conditions, exempt an offeror to an affected transaction or an offer from the application of any provision of this Part, Part C or the Takeover Regulations if- (a) there is no reasonable potential of the affected transaction prejudicing the interests of any existing holder of a regulated company's securities; (b) the cost of compliance is disproportionate relative to the value of the affected transaction; or (c) doing so is otherwise reasonable and justifiable in the circumstances having regard to the principles and purposes of this Part, Part C and the Takeover Regulations.
[149] Section 119(1).
[150] Section 119(1)(a).
[151] Section 119(1)(b)(i).
[152] Section 119(1)(b)(ii).
[153] Section 119(1)(c).
[154] Section 119(2)(b).
[155] Section 119(2)(c)&(d)(i).
[156] Section 119(2)(d)(ii).
[157] The Takeover Regulation Panel 'An Introductory guide to dealing with the Takeover Regulation Panel' available at http://www.trpanel.co.za/wp-content/uploads/PDFs/2016%20electronicBrochure.pdf, at 7 accessed on 12 September 2019.

Lastly, an overview of the takeover regulations shows that they assist the Panel in undertaking its mandate of protecting shareholders during an affected transaction.[158]

(d) Additional Shareholder Protection

The appraisal right is a unique remedy which, in certain circumstances, provides the dissenting shareholder with an exit mechanism and a safeguard against inadequate consideration. Unlike the other remedies available, it operates on a no-fault basis where no wrongdoing needs to be proved.[159] However, the remedy provided by the relief from oppressive or prejudicial conduct in terms of section 163 may provide a further avenue for a dissenting shareholder seeking redress in respect of a fundamental transaction.[160] Therefore, the two remedies should not be regarded as mutually exclusive and dissenting shareholders should be able to either choose or apply both remedies simultaneously, depending on the circumstances.[161]

(i) Relief from oppressive or prejudicial conduct

Section 163 of the Act provides a shareholder or a director of a company with a remedy whereby he or she may apply to court for relief in the event of oppressive or unfairly prejudicial conduct, or conduct that unfairly disregards the interest of a minority shareholder.[162] The prejudicial conduct can be in the form of an act or omission[163] on the part of the company. Alternatively, if the business of the company or a related person is being conducted or carried on in an oppressive or prejudicial manner, [164] or the powers of a director, prescribed officer of the company, or a related person of the company has been exercised in an oppressive or prejudicial manner.[165]

This section gives the court the discretion to make any interim or final order it deems fit, including, but not limited to, the non-exhaustive list of orders given in the Act.[166] In order to succeed with

[158] The Takeover Regulation Panel 'Regulations' available at *https://trpanel.co.za/regulations/*, accessed on 12 September 2019.
[159] Cassim (2012) op cit note 10 at 696-698.
[160] MF Cassim 'The Appraisal Remedy and the Oppression Remedy under the Companies Act of 2008, and the overlap between them' (2017) *SA Merc LJ* 305 at 324.
[161] Ibid at 319.
[162] Section 163(1) and Cassim (2012) op cit note 10 at 757.
[163] Section 163(1)(a).
[164] Section 163(1)(b).
[165] Section 163(1)(c).
[166] Section 163(2) and Cassim (2012) op cit note 10 at 757.

the court application, the applicant must prove that the conduct referred to was either oppressive or unfairly prejudicial to him or that the conduct unfairly disregarded his interests.[167] This, however, does not require that the conduct be unlawful and, therefore, allows the court to take a large number of equitable considerations into account in evaluating the specific claim.[168] The inclusion of 'interests' underline the principle that the remedy is not limited to the strict infringement of legal rights, but rather extends to the protection of the interests of the applicants.[169]

Majority shareholders are not excluded from relying on the section.[170] However, there have been judgements by the court which will continue under the new Act to carry persuasive force. These judgements held that majority shareholders will not be granted relief under the oppression provisions as they are able to use their voting power to eliminate the said oppression or prejudice.[171] The new Act further caters for an applicant to be a related party, which allows an applicant to complain about the conduct of a parent or subsidiary company.[172]

The applicant must establish a lack of fair dealing and unfairness in the application to the court. Such acts are easily noted in instances where the majority shareholders use their greater voting power in an unfair manner to prejudice or override the minority shareholders or such an act where the majority shareholders use their voting power to knowingly exclude the minority from the running of the business of the company.[173]

(ii) Overlap in the application of the Appraisal Right and the Oppression Remedy

The purpose of the oppression remedy is to challenge the fairness of a transaction, whereas the appraisal remedy allows the dissenting shareholders to object to the transaction and withdraw from the company while receiving the fair value of his shares.[174] It is clear that the purpose of the

[167] Cassim (2012) op cit note 10 at 757 and *Juspoint Nominees (Pty) Ltd and Others v Sovereign Food Investments Limited and Others (BNS Nominees (Pty) Ltd and Others Intervening)* unreported case 878/16 (26 April 2016) para 58.
[168] Cassim (2012) op cit note 10 at 757 and *Juspoint* supra note 168 at para 58.
[169] Cassim (2012) op cit note 10 at 770.
[170] Cassim (2012) op cit note 10 at 760; *Benjamin v Elysium Investments* (Pty) Ltd 1960 (3) SA 467 (e).
[171] Cassim (2012) op cit note 10 at 760*; Re Baltic Real Estate* (No 2) [1993] BCLC 503; *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171 (ChD and CA*); Re Polyresins Pty Ltd* (1998) 28 ACSR 671.
[172] Cassim (2012) op cit note 10 at 761.
[173] Olaofe op cit note 8 at 11.
[174] Cassim (2017) op cit note 161 at 319-320.

remedies is different, and the outcome desired by the shareholder would dictate which remedy is appropriate.[175]

The Act is silent on whether there is an overlap between the two remedies.[176] As will be discussed in full in chapter 3, when dissenting shareholders institute the appraisal remedy by sending a demand to the company, they have no further rights in respect of the shares in question other than to be paid their fair value.[177] Therefore, it has been questioned whether the power to bring an application in terms of the oppression remedy falls within the ambit of the rights that have been abandoned.[178] It is imperative here to note that the intention of section 164(9) is to detach the shareholders from their *rights* only, therefore allowing them to maintain their standing as shareholders. This would then enable them to commence with an oppression claim after instituting their appraisal remedy and have simultaneous recourse to both remedies.[179]

This approach can be seen in Canadian law where the court in the case of *Brant Investment Ltd v Keeprite Inc*[180] held that "while a dissenting shareholder may cease to have the usual rights to a dividend or a vote as a result of the wording of [the right to dissent section], such a shareholder would not lose the status to challenge oppressive actions".[181] Due to the fact that the courts may take cognisance of foreign law in interpreting or applying the Act,[182] the rules established in Canadian law regarding appraisal rights are of grave importance to our courts, considering the fact that the sections governing appraisal rights are substantially similar in the Act and the Canada Business Corporation Act.[183]

[175] Ibid.
[176] Ibid at 320.
[177] Section 164(9).
[178] Cassim (2017) op cit note 161 at 320.
[179] Ibid. This interpretation is in line with section 158 of the Act which states that: when determining a matter brought before it in terms of this Act, or making an order contemplated in this Act- (a) a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act; and (b) the Commission, the Panel, the Companies Tribunal or a court- (i) must promote the spirit, purpose and objects of this Act; and (ii) if any provision of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.
[180] *Brant Investment Ltd v Keeprite Inc* (1983) 44 OR 2d 661 (HCJ) 664.
[181] Cassim (2017) op cit note 161 at 320-321.
[182] Section 5(2).
[183] Cassim (2017) op cit note 161 at 320-321.

There are several factors which must be considered by a dissenting shareholder in determining whether to use the appraisal remedy, the oppression remedy or both.[184] A shareholder who has dissented against a resolution of a company to enter into a fundamental transaction and has exercised his appraisal right may utilise the oppression remedy in order to restrain the company from implementing the said transaction or to seek compensation for oppressive conduct by the company.[185]

In the Canadian case of *Arthur v Signum Communications Ltd,*[186] the minority shareholder was granted both the fair value of his shares in terms of the right to dissent as well as additional compensation under the oppression remedy. However, it must be noted that he did not get double compensation as the additional compensation granted under the oppression remedy was equivalent to the difference between the fair value and the loss he suffered by reason of the oppression that caused him to exit the company.[187]

Nevertheless, a shareholder should not be allowed to evade the procedural requirements set out in terms of the appraisal remedy by simply resorting to the oppression remedy to challenge fair value.[188] Therefore, if the claim is based purely on the valuation of shares or on the adequacy of the consideration in a fundamental transaction, such a claim should fall exclusively into the ambit of the appraisal remedy.[189] This would follow the approach seen in the laws of the USA.[190]

(e) Conclusion

Good and effective legal protection for minority shareholders is fundamental to a developed corporate law system.[191] It is a common fact that the affairs of a company are decided by the

[184] Cassim (2017) op cit note 161 at 321. These factors include: whether the shareholder seeks to exit the company or remain in the company but thwart the transaction; whether the shareholder's complaint is based purely on the fair valuation of shares or whether the share value has fallen due to oppressive conduct, whether the oppression claim arises out of the same conduct as the appraisal right etc.
[185] Cassim (2017) op cit note 161 at 321.
[186] *Arthur v Signum Communications Ltd* [1991] OJ No 86 (Ont Gen Div).
[187] Cassim (2017) op cit note 161 at 322-323.
[188] Ibid at 323.
[189] Ibid.
[190] Ibid. In US law the appraisal is the exclusive remedy in order to challenge fair value offered for shares.
[191] Cassim (2012) op cit note 10 at 777.

majority of shareholder votes in a company and although some matters voted on are inconsequential, others may involve changes disadvantageous to dissenting shareholders.[192]

Being a minority shareholder in a company is not a desirable position as it does not come with the power to control or influence the affairs of the company, specifically in relation to the fundamental transactions as discussed above. However, in the context of minority protection, there have been significant developments made in our law. One such development, which was drawn from foreign jurisdictions and adapted for the South African jurisdiction, is the appraisal remedy for dissenting shareholders who oppose a fundamental change in a company.[193] The introduction of the appraisal remedy is thus a welcome development and has since become one of the three key measures in protecting the interests of shareholders along with shareholder approval and court approval.[194]

If the rationale behind including the appraisal remedy in the South African Act is to protect and empower minority shareholders in certain corporate actions sanctioned by the majority, our courts should be wary of entertaining the argument that the appraisal remedy offers alternative (as opposed to additional) protection in these circumstances.[195] Thus, shareholders should still be able to seek and obtain relief in terms of section 163 in circumstances where appraisal rights also apply.[196]

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[192] HGJ Beukes 'An introduction to the appraisal remedy as proposed in the Companies Bill: Triggering Actions and the differences between the Appraisal remedy and Existing Shareholder Remedies' (2008) 20 *SA Merc LJ* 479 at 479.
[193] Smit op cit note 46 at 2.
[194] MF Cassim 'The introduction of the statutory merger in South African corporate law: majority rule offset by the appraisal right (part 1)' (2008) 20 *SA Merc LJ 1* at 19; Olaofe op cit note 8 at 8; E Davids, T Norwitz & D Yuill 'A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2006' (2010) *Acta Juridica* 337 at 355.
[195] Jacqueline Yeats *The Proper and Effective Exercise of Appraisal Rights under The South African Companies Act, 2008: Developing A Strategic Approach Through A Study of Comparable Foreign Law* (unpublished PhD thesis, University of Cape Town, 2015) at 65.
[196] Ibid at 65.

III. THE APPRAISAL RIGHT, PROCEDURES AND FLAWS

(a) Introduction

The appraisal remedy is contained in section 164 of the Act and is an exit mechanism for shareholders who feel that the actions or decisions of the company alter their interests in the company and, because of these fundamental changes, the company no longer meets their investment expectations.[197] In other words, it prevents dissenting shareholders from being locked into a drastically changed or restructured company in defeat of their expectations.[198]

The obvious solution for dissenting shareholders, once majority rule prevails, is to sell their shares. However, there is not always a ready market and therefore minority shareholders are given the right to be bought out by their companies, if they disagree with resolutions approving certain fundamental changes.[199] The shares are bought back at a price reflecting the fair value of the shares, which value may in certain instances be determined judicially.[200] Therefore, dissenting shareholders may rely on the appraisal remedy to challenge and dispute the fairness of the price offered for their shares.[201] There are, however, several requirements that have to be complied with in order for a shareholder to be entitled to have standing with regard to section 164.[202]

For shareholders to have standing in terms of the appraisal right, they have to be firstly a shareholder.[203] Secondly, they would have to dissent against a resolution taken by the company.[204] Thirdly, they need to be dissenting shareholders in a profit company and lastly, in terms only of the amendment of the Memorandum of Incorporation, they need to hold shares of a class that will be materially and adversely affected.[205]

The appraisal right is a no-fault remedy[206] and allows dissatisfied or dissenting minority shareholders to withdraw their shares instead of being compelled to go along with the decisions of

[197] Wertheimer op cite note 12 at 614 and Chokuda op cit note 12 at 155.
[198] Cassim (2008) op cit note 21 at 158.
[199] Beukes op cit note 193 at 479.
[200] Cassim (2012) op cit note 10 at 796.
[201] Cassim (2008) op cit note 195 at 19.
[202] Beukes op cit note 15 at 177.
[203] Section 164(5) and Beukes op cit note 15 at 177.
[204] Section 164(5)(c)(i) and Beukes op cit note 15 at 177.
[205] Section 164(5)(a)(ii) and Beukes op cit note 15 at 177.
[206] To trigger the appraisal right no fault, unfairness or wrongdoing need to be alleged or proved.

the majority.[207] The appraisal right is thus a remedy that balances the rights and interests of minority shareholders with those of the majority. On one hand, it provides flexibility to the majority to fundamentally change or restructure the company and, on the other hand, to allow the minority shareholders to retain their investments together with their expectations thereof.[208]

It should be noted, however, that the appraisal procedure is an intricate procedure wherein all mandatory steps must be taken and each step must be 'perfected' as required by the Act in order for the dissenting shareholders to be entitled to institute such a proceeding and eventually to be paid the fair value of their shares.[209] The appraisal procedure is complex and technical and is thoroughly examined below.[210]

(b) Procedure

The appraisal right is triggered when a shareholder is opposed to either a proposed fundamental transaction which the company plans to embark on, or a proposal to alter the Memorandum of Incorporation amending the rights of a class of shares.[211]

The company must send a written notice to all shareholders of the company informing them of a meeting to consider adopting a resolution relating to any of the triggering events and the notice should further include a statement informing shareholders of their rights under section 164.[212] If the company in question is a public company, this notice should be delivered fifteen business days prior to the meeting or alternatively ten business days prior if it involves any other type of corporation.[213] The company's Memorandum of Incorporation can, however, provide for a longer or shorter minimum notice period than that provided in the Act.[214]

A dissenting shareholder may give the company written notice objecting to the resolution any time before the resolution is voted on.[215] Although the wording of the act seems to place no emphasis on this notice by using the word 'may', it must be noted that this is one of the key elements to

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[207] Cassim (2012) op cit note 10 at 796.
[208] Ibid.
[209] Ibid at 797-798.
[210] Cassim (2008) op cit note 21 at 159.
[211] Section 164(2) – These will now be referred to as the 'triggering events'.
[212] Section 164(2) and Cassim (2012) op cit note 10 at 800.
[213] Section 62(1)(a)&(b).
[214] Section 62(2).
[215] Section 164(3).

invoking the remedy.[216] Failing to notify the company may bar the shareholder from using the appraisal right in its totality.[217] The purpose of this notice from the company's perspective is to bring to their attention the number of dissenting shareholders and to give them the insight needed to complete their due diligence on whether to move forward or not with the proposed triggering event.[218] The section does, however, state that in the instances where the company either did not provide the shareholder with the initial notice of the meeting or failed to include in such notice a statement of the shareholder's rights under section 164, then the dissenting shareholder need not to have sent a notice of objection.[219]

On the day of the meeting, it is imperative that the dissenting shareholder votes against the resolution as this is a requirement for the use of the remedy.[220] If the resolution is adopted by the majority in the meeting, the company must within 10 business days send a notice of adoption of the resolution to each dissenting shareholder who sent their notice of objection.[221]

The dissenting shareholder may within 20 business days after receiving the notice that the resolution was adopted or, in the case where such a notice was not sent, within 20 business days from becoming aware that the resolution was adopted, demand that the company pay the shareholder the fair value for all of the shares held by that shareholder in the company.[222] A copy of this demand must be delivered to the Panel.[223] The demand must be set out in accordance with section 164(8). The Act sets out the requirements that must be met in order for the shareholder to be in a position to make such a demand and they are as follows:

a. the shareholder must have sent a notice of objection (subject to the exceptions);[224]
b. in the case of the amendment of the Memorandum of Incorporation, the shareholder must

[216] Cassim (2012) op cit note 10 at 800.
[217] Section 37(8), section 115(8) and section 164(5).
[218] Cassim (2012) op cit note 10 at 800.
[219] Section 164(6).
[220] Section 164(4)(b)(i)&164(5)(c)(i).
[221] Section 164(4)(a). It is here reiterated in section 164(4)(b) that the company need not provide this notice to a 'objecting' shareholder if such a shareholder has either (i) withdrawn the notice; or (ii) voted in support of the resolution.
[222] Section 164(5).
[223] Section 164(8). This notice must state the shareholders name and address, the number and class of shares in respect of which he seeks payment as well as a demand for payment of the fair value of those shares. It must be noted that the Act does not limit or restrict this requirement to companies or transactions which are subject to the jurisdiction of the Panel.
[224] Section 164(5)(a)(i).

hold shares in the class that is materially and adversely affected;[225]

c. the company must have adopted the resolution to which the shareholder objected;[226]
d. the shareholder must have voted against such resolution and complied with all the procedural requirements of section 164.[227]

Once the shareholder has sent the demand, he or she has no further rights in respect of those shares, other than to be paid their fair value.[228]

The company must send a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares to each of the dissenting shareholders who sent a demand.[229] This offer must be sent within five business days after the later of: (i) the day on which the action approved by the resolution is effective;[230] (ii) the last day for receipt of demands; [231] or (iii) the day the company receives a demand from a shareholder[232] who did not receive a notice of adoption of resolution.[233] The offer made must be accompanied by a statement showing how that fair value was determined.[234] The fair value is determined as at the date on which, and time immediately before, the company adopted the resolution in dispute.[235] The company's offer in terms of this section lapses if not accepted within thirty business days after it was made.[236]

A shareholder who has made a demand can either accept the offer or apply to court to determine the fair value in respect to the shares.[237] If the shareholder accepts the offer, the shareholder must either tender the relevant share certificates to the company or the transfer agent (in the case where the shares are evidenced by certificates) or take the steps required in terms of section 53 of the Act to direct transfer of those shares to the company or the transfer agent (in the case where the shares are uncertified).[238] The company must pay the shareholder the agreed amount within ten business

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[225] Section 164(5)(b)(ii).
[226] Section 164(5)(b).
[227] Section 164(5)(c)(i)&(ii).
[228] Section 164(9).
[229] Section 164(11).
[230] Section 164(11)(a).
[231] Section 164(11)(b): i.e. 20 business days after shareholders received notices of adoption of the resolution.
[232] Section 164(11)(c): i.e. 20 business days after shareholders learnt of the adoption of the resolution.
[233] Cassim (2012) op cit note 10 at 803.
[234] Section 164(11)(c).
[235] Section 164(16).
[236] Section 164(12)(b).
[237] Delport op cit note 37 at 581–Provided the offer has not lapsed.
[238] Section 164(13)(a)(i)&(ii).

days after the shareholder has accepted and complied with the steps regarding the surrender or transfer of shares.[239]

In the event that the company fails to make an offer, or if the company has made an offer which the shareholder considers to be inadequate, the shareholder may apply to a court to determine the fair value of the relevant shares and an order requiring the company to pay the shareholder the fair value so determined.[240] It is clear from this that the involvement of the court is not an automatic feature of the appraisal right and thus only occurs when there is a disagreement between the company and the dissenting shareholder regarding the fair value of the relevant offer.[241] The minimal involvement of the court is one of the most engaging elements of the appraisal right.[242]

On application to court all dissenting shareholders must be joined as parties and all are bound by the decision of the court[243]. Furthermore, the company must notify each affected dissenting shareholder of the date, place and consequences of the court proceedings and their right to participate.[244]

The court **may** determine whether any other person is a dissenting shareholder who should be joined as a party;[245] **must** determine a fair value in respect of the shares of all dissenting shareholders;[246] **may** appoint one or more appraisers to assist it in determining the fair value in respect of the shares;[247]**may** allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective, until the date of payment;[248] **may** make an appropriate order of costs, having regard to any offer made by the company and the final determination of the fair value by the court;[249] **must** make an order requiring the dissenting shareholders to either withdraw their respective demands or to tender the

[239] Section 164(3)(b) and Cassim (2012) op cit note 10 at 804.
[240] The Act 164(14). It is imperative that the offer has not yet lapsed and therefore if the offer was made by the company, the shareholder must approach the court within the 30 days after the offer was made before it lapses in terms of section164(12)(b).
[241] Cassim (2012) op cit note 10 at 805.
[242] Ibid.
[243] Section 164(15)(a).
[244] Section 164(15)(b).
[245] Section 164(15)(c)(i).
[246] Section 164(15)(c)(ii).
[247] Section 164(15)(c)(iii)(aa).
[248] Section 164(15)(c)(iii)(bb).
[249] Section 164(15)(c)(iv).

relevant certificates[250] **and** an order requiring the company to pay the fair value in respect of their shares to each dissenting shareholder who complies, subject to any conditions the court considers necessary to ensure that the company fulfils its obligations under this section.[251]

(c) Analysis regarding section 164 and its flaws

It is clear that the foundation of the appraisal right is developed around the basis of three important objects. [252] Firstly, to provide an exit mechanism to avoid locking in minority shareholders as numerously mentioned. Secondly, to serve as a check against bad decisions by management and lastly, the appraisal right acts as a remedy for unfairness in that the dissenting shareholder may resort to the remedy in order to contest the fair value or price offered by the company.[253] In addition, in the case where there has been a clear breach in terms of directors' opportunistic behaviour, the shareholder could exit the company with the fair value of their investment by using the appraisal right.[254]

In terms of section Section 164(15)(c)(iii) the use of the word 'or' implies that that court may either appoint an assessor or award interest. This could not have been the intention of the legislature and the exercise of one of these discretions should not prohibit the exercise of the other.[255]

In terms of the amendment of the Memorandum of Incorporation which triggers the appraisal right, there seems to be a discrepancy between section 164 and section 37(8).[256] In terms of the latter section, the appraisal remedy is conferred in the case that the Memorandum of Incorporation has been amended to "materially and adversely alter the preference, rights, limitations or other terms of a class of share". Section 164(2)(a) provides that such an amendment must be 'materially adverse', which is wide and unclear as 'materially' qualifies the extent of the 'adverse' amendment but in section 37(8) they are independent requirements.[257]

[250] Section 164(15)(c)(v)(aa).
[251] Section 164(15)(c)(v)(bb).
[252] Cassim (2012) op cit note 10 at 797.
[253] Ibid; Cassim (2008) op cit note 21 at 158; Cassim (2017) op cit note 161 at 314; Chokuda op cit not 12 at 156.
[254] Chokuda op cit note 12 at 155.
[255] Yeats op cit note 196 at 144.
[256] Delport op cit not 37 at 578.
[257] Ibid at 578-579.

The concept of the 'no-appraisal threshold' introduced in the Companies Bill,[258] was sensibly discarded by the Act due to the fact that such a *statutory* disentitlement would be manifestly and strikingly inappropriate.[259] It has been stated that in practice, transactions which trigger the appraisal rights are usually subject to a *contractual* condition precedent that appraisal rights must not be exercised in respect of more than a specified percentage of shares.[260] It must be kept in mind that any provision in the Memorandum of Incorporation, or any contract between the shareholder and company in which the shareholders agree that they will not exercise their appraisal right is void and *contra bonos mores*.[261] Therefore, it is likely that a proposed transaction could be rendered subject to an appraisal right condition precedent, which has the effect that the content of the transaction is pending until fulfillment or non-fulfillment of the condition.[262] The validity of such a condition was not doubted in the *Juspoint* case.[263] Non-fulfillment of the condition precedent has the effect that the transaction, as well as the appraisal rights under it, has no legal effect and is rendered *void ab initio*.[264] It has been stated that such a clause is not in contravention of the Act or *contra bones mores* as no right exists before the exercise of the action by the company.[265]A further aspect seen in practice is the insertion of a clause whereby the company reserves its right to waive the condition precedent relating to the appraisal rights. It has been ruled that a condition precedent, which is for the exclusive benefit of one party can be waived, provided that such a waiver takes place before the date for fulfillment of the condition.[266] An alternative is for a company to reserve its right to abandon a transaction at any time before its implementation, regardless of shareholders' approval.[267] This is commonly seen in the USA and Canada and an

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[258] The Companies Bill of 2007 GN166 of 2007 in GG29630 of 12 February 2007.
[259] Cassim (2008) op cit note 21 at 161 and Cassim (2012) op cit note 10 at 801.
[260] P Hesseling 'Section 164 Companies Act: A guide for navigating the treacherous terrain of s164 in the era of shareholder activism and opportunism' available at *https://www.Cliffedekkerhofmeyr.com/en/news/publications/2019/Corporate/corporate-and-commercial-alert-25-february-section-164-companies-act-a-guide-for-navigating-the-treacherous-terrain-of-s164-in-the-era-of-shareholder-activism-and-opportunism.html*, accessed on 12 June 2019.
[261] Delport op cit note 37 at 579.
[262] *Juspoint* case supra note 168 at para 23 & 24.
[263] Delport op cite note 37 at 579-580 with reference to *Juspoint* case supra note 168.
[264] *Juspoint* case supra note 168 at para 32.
[265] Delport op cit note 37 at 580.
[266] Cassim (2017) op cit note 161 at 312 and *Juspoint* case supra note 168 at para 33.
[267] Cassim (2008) op cit note 195 at 17-18.

event that commonly results in such abandonment is where substantial appraisal demands have been made.[268]

As previously stated, once the dissenting shareholder has perfected his appraisal right by making a written demand for the fair value of his shares, he loses all rights with regards to his shares other than the right to be paid the fair value.[269] It must be noted that this payment is only done at the end of the proceedings and therefore the shareholder is deprived of the use of his funds and his investment is technically frozen until the procedure is complete.[270] In the case of *Loest v Gendac,* [271] the court confirms that an applicant is still a shareholder for purposes of receiving fair value for his shares and that section 164 does not deprive him of his status as a shareholder, but merely removes other trappings or privileges associated with this status, whilst the applicant as a dissenting shareholder pursues the remedy in terms of this statutory provision.[272] In terms hereof, the dissenting shareholders voting rights and rights to future dividends are forfeited.[273]

Despite the fact that the dissenting shareholder relinquishes all rights in respect of the shares held, these rights must be reinstated without interruption if: (i) the shareholder either withdraws the demand before the company makes an offer or allows an offer to lapse; (ii) the company fails to make an offer and the shareholder withdraws the demand; or (iii) the company, by way of a subsequent special resolution, revokes the adopted resolution that gave rise to the appraisal.[274] This was confirmed in the *Juspoint* case where the court held that where the source of the appraisal right ceases to exist, the rights of dissenting shareholders which have been sterilised are reinstated.[275] However, if the fundamental transaction which gave rise to the appraisal right is abandoned or rendered void, the abandonment or voiding alone is distinctly not a basis for the reinstatement of a dissenter's rights as a shareholder and in terms of the wording of the Act, either the dissenting shareholder must withdraw his demand for appraisal to have his rights reinstated, or his rights would be reinstated when a new special resolution is passed to revoke the special

[268] Ibid.
[269] Cassim (2017) op cit note 161 at 315.
[270] Cassim (2012) op cit note 10 at 808.
[271] *Loest* supra note 29.
[272] *Ibid* para13.
[273] Cassim (2017) op cit note 161 at 315.
[274] Section 164(9); *Juspoint* supra note 168 para 32 & 77; Cassim (2017) op cit note 161 at 315.
[275] *Juspoint* case supra note 168 at para 77.

resolution previously adopted.[276] However, in the recent case of *Standard Bank Nominees (RF) (Pty) Ltd v Hospitality Property Fund Ltd* [277] it was held by the court that in the absence of an acceptance of an offer by the dissenting shareholder, the offer lapses if application was not made to court within the prescribed time period regardless of whether the shareholder has actually rejected the offer or not. The court further held that section 164(10) in plain terms does not remove any rights held by a dissenting shareholder but simply aims to prescribe what the default position is in the event that a dissenting shareholder does not accept an offer for fair value and fails to institute an application to court within the prescripts of section 164(14). This default position is that section 164(10) is triggered and the shareholder is reinstated to his/her full rights.

It is clear that the consequences of non-compliance with the procedural steps of the Act are more stringent on the shareholder and have little recourse for the company.[278] A company is obliged in terms of section 164(11) to make an offer of fair value but there is no statutory sanction if the company fails or refuses to do so.[279] This is clear in terms of section 164(14)(a) where it is expressly stated that a company may fail to make an offer regardless of its obligation to do so.[280] Further, evidence of this imbalance inherent in the Act is that there are no adverse consequences if the company fails to send either the notice of the shareholders meeting to vote on a resolution with its accompanying statement,[281] or the notice to objecting shareholders of the adoption of the resolution approving the transaction.[282]

Another aspect which sheds light on the imbalance between the company and the dissenting shareholders in terms of the appraisal, is the generous timeframe awarded to the company in terms of procedure as opposed to the short and strict timeframes given to the shareholders.[283] These onerous time constraints, coupled with the loss of rights associated with the shares of the dissenting shareholder, result in the shareholder being in a twilight zone from the date that the demand is

[276] Cassim (2017) op cit note 161 at 315.
[277] *Standard Bank Nominees (RF) (Pty) Ltd v Hospitality Property Fund Ltd* [2019] ZAGPJHC 263 (12 June 2019) para 70.
[278] An example of this would be the fact that there are no consequences attached for the Company if the notice to shareholders of a meeting considering the adoption of a resolution is not sent as per section 162(2). This is confirmed in section 164(6). The noncompliance does not have any consequence for the company as opposed to the shareholder where any misstep from the procedure would cost the shareholder his right to rely on the section.
[279] Cassim (2017) op cit note 161 at 324.
[280] Ibid.
[281] Section 164(6).
[282] Section 164(7)(b).
[283] Cassim (2017) op cit note 161 at 316.

made to the date on which implementation of the fundamental transaction takes place.[284] A further result of the mentioned twilight zone is the fact that these dissenting shareholders often find themselves in the position where they are unable to apply to court for the determination of fair value in respect of their shares as section 16(14) only becomes operative if the company has failed to make an offer within the lavish time limit allowed to it.[285] Therefore, during this period these shareholders have no voting rights; no rights to dividends; no rights to receive an offer of fair value and no right to interest on the fair value[286] as this interest is only initiated in terms of the Act from the date the action approved by the resolution is effective.[287] This may discourage shareholders from exercising their appraisal rights, especially small shareholders with limited funds.[288]

The introduction of the court to remedy would have been avoided if the Act had set out the procedure, manner or method to determine or calculate the fair value. The dissenting shareholder would thereby have been able to determine the actual value and could have estimated his likelihood of success in approaching the court.[289] After the judicial appraisal of fair value, each of the dissenting shareholders can elect to either accept the court's calculation or can withdraw and be reinstated as a shareholder of the company.[290] The Act does, however try to promote settlement by allowing the shareholders to accept the company's offer any time before the court has made final determination of the fair value.[291] Although the Act is silent on the method to calculate fair value, it does allow the court to appoint an appraiser to assist with the process.[292]

In terms of the case of *Cilliers v La Concorder Holdings Ltd and Others*[293]*,* the court states that appraisal rights are available to the dissenting shareholders of a holding company where the holding company's subsidiary disposes all or the greater part of its assets or undertakings and such a disposal constitutes a disposal on the part of the holding company.[294] This view was based on the fact that a holder of any voting rights in a company is entitled to seek relief in accordance with

[284] Ibid at 317.
[285] Cassim (2017) op cit note 161 at 316-317.
[286] Section 164(15)(c)(iii)(bb).
[287] Cassim (2017) op cit note 161 at 317.
[288] Davids op cit note 195 at 360.
[289] Olaofe op cit note 8 at 3.
[290] Cassim (2012) op cit note 10 at 805.
[291] Cassim (2012) op cit note 10 at 806.
[292] Davids op cit note 195 at 361.
[293] *Cilliers v La Concorde Holdings Limited and Others* unreported case no 23029/2016 (14 June 2018) .
[294] *Cilliers* supra note 294 at 28 – Specific reference was made to section 115(2)(b) in the judgement.

the provisions of section 164.[295] However, based on the definition of 'shareholder' in section 164(5), only registered shareholders and not beneficial shareholders should be entitled to dissent.[296] This position in the Act is, however, unclear.[297] It has been argued that if the legislature had intended to expand the definition of 'shareholder' in terms of section 164 to include beneficial shareholders, it would have expressly done so, and failing to do so is indicative of its intention.[298]

Section 164(5) implies that a shareholder may not partially dissent and must institute appraisal proceedings regarding all the shares held.[299] However, the Act is silent on the effect of this provision on shareholders who hold various classes of shares in the company but only wish to exercise the appraisal right in terms of a particular class.[300] Furthermore, it is not clear whether a registered shareholder who is holding shares on behalf of a number of different beneficial shareholders will be able to exercise appraisal rights with respect to the shares of a particular class of one of the beneficial shareholders.[301]

Although the Act is silent on the matter, the legislatures of some jurisdictions have made it clear that shareholders may, in anticipation of a specific transaction waive their appraisal right.[302] The British Columbia Corporations Act[303] provides that shareholder may not generally waive his right to dissent, but he may waive the right to dissent with respect to a specific transaction.[304] However, in South Africa, the legal legitimacy of such a waiver remains to be decided upon by a court.[305]

The Act does not contain a market-out exception and the appraisal remedy applies equally to the shares of private and publicly traded companies. This includes companies listed on the JSE.[306] A market-out exception provides that if a company's shares are publicly traded; dissenting

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[295] *Cilliers* supra note 294 at 23.
[296] Cassim (2008) op cit note 21 at 159; Delport op cit note 37 at 583; Section 1 - "shareholder": subject to section 57(1), means the holder of a share issued by a company and who is entered as such in the *certificated or uncertificated securities register*, as the case may be.
[297] Chokuda op cit note 12 at 158.
[298] Ibid at 159.
[299] Cassim (2008) op cit note 21 at 159.
[300] Yeats op cit note 196 at 192.
[301]Cassim (2008) op cit note 21 at 159.
[302] Yeats op cit note 196 at 205.
[303] The British Columbia Corporations Act SBC 2002, chapter 57 section 239.
[304] Yeats op cit note 196 at 205.
[305] Cassim (2012) op cit note 10 at 810.
[306] Yeats op cit note 196 at 55.

shareholders do not have recourse in terms of an appraisal right and must sell their shares in the open market.[307]

In terms of the awarding of costs regarding appraisal proceedings, the court may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the court.[308] The court, therefore, has a wide discretion to allocate costs as it deems fit.[309] The court further has the discretion to award interest on the amount ultimately paid to the dissenting shareholder. But, this may not necessarily provide adequate compensation, especially if the shareholder is ordered to pay his own costs and consider all other factors mentioned in terms of the expense of instituting the appraisal procedure and the freezing of his investment.[310]

If cognisance is given to the view of the company which is obliged to purchase the appraised shares, one must be aware of the fact that the repurchase could cause a dramatic cash drain in the company. This could result in the abandonment of the triggering event that could have been profitable or economical for the company.[311] The company further cannot determine in advance how many dissenters there will be and therefore, cannot plan its cash flow before entering into negotiations regarding fundamental transactions accordingly.[312]

(d) Instances of Business Rescue

The Act introduces an entirely new business rescue process with the purpose of facilitating the rehabilitation and reorganisation of a company that is in financial distress.[313] The effect of the proceeding is to try and ensure that the company does not go into liquidation. Therefore, fundamental transactions are a means by which a company can embark upon to preserve the company as these transactions maximise the company's assets to bring greater results than that which it would have yielded if the company went into liquidation straight-away.[314] In business

[307] J Goetz 'A Dissent Dampened by Timing: How the Stock Market Exception Systematically Deprives Public Shareholders of Fair Value'(2009) 15 *Fordham Journal of Corporate & Financial Law* 771-806.
[308] Section 164(15)(iv).
[309] Yeats op cit note 196 at 54 fn 80.
[310] Davids op cit note 195 at 360. These include the cost of legal counsel and litigation.
[311] Cassim (2012) op cit note 10 at 798.
[312] Yeats op cit note 196 at 162.
[313] Farouk H.I. Cassim 'Business rescue and compromises' in FHI Cassim (ed) *Contemporary Company Law* 2ed (2012) at 861.
[314]Olaofe op cit note 8 at 19.

rescue proceedings, the company's greater assets or business can be disposed of so as to counter large expenses or debts of the company. Moreover, a scheme of arrangement can be entered into to re-organise the company with respect to its debt or part of the company's business can be merged with a stronger firm to keep it alive. [315]

The Act expressly states that the appraisal remedy is unavailable in the event of a business rescue.[316] This is to preserve the integrity of the business rescue processes which are subject to specific rules and procedures.[317] It is reasoned that during the business rescue process, the proposed business rescue plan, which births the events and procedures, must be approved by the shareholders if the plan alters the rights of any class of holders of the company's securities.[318] It is the business rescue plan that proposes the sale and disposal of asset or business, as well as whether some classes of shares could be re-arranged so as to cut off financial cost implications. Upon approval from the shareholders the action taken by the company is sanctioned by the shareholders involved so as to stabilise the company.[319] Likewise, the applicability of the remedy in a business rescue process would be placing the shareholders over the creditors and this would be against the intent of the Act.[320]

(e) Conclusion

Voluntary exit by a dissenting minority shareholder is difficult as a purchaser of a minority stake in a private company may be hard to come by and is further restricted in terms of the transferability of shares of such a company.[321] Minority shareholders in public companies may exit a company much more easily by simply selling their shares, particularly in listed companies, as there is a ready market for these shares.[322] However, even in such an instance, the appraisal remedy is still required because the financial markets are notoriously imperfect.[323]

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[315] Ibid.
[316] Section 164(1).
[317] Yeats (2012) op cit note 84 at 725 fn 183.
[318] Section 152(3)(c).
[319] Olaofe op cit note 8 at 20.
[320] In terms of section 152(1)(a): At a meeting convened in terms of section 151, the practitioner must- (a) introduce the proposed business rescue plan for consideration by the creditors and, if applicable, by the shareholders. Therefore creditors must always be consulted and shareholders are only consulted upon the infringement of their rights.
[321] Cassim (2012) op cit note 10 at 758.
[322] Ibid.
[323] Cassim (2008) op cit note 21 at 162.

Other remedies, as earlier discussed, only allow for relief of the minority shareholder but do not give, as a right, the opportunity to opt out of the company and, therefore, the minority shareholder is still locked in the company with the same oppressive majority.[324] The appraisal remedy now acknowledges and entitles the minority shareholder to leave the company as a right and not at the convenience or discretion of the court. [325]

The complexity, technicality and rigidity of the procedural steps are important limitations on the efficacy of the remedy for shareholders who are further burdened by the time delays and costs involved in applying the remedy.[326] The remedy involves a number of specified notices which each carry a strict prescribed time limit and all mandatory steps in terms of the right must be exercised with precision in order to qualify for the relief thereunder.[327] In order to properly enforce this right, the dissenting shareholders will often require legal assistance accompanied by legal expenses.[328]

Acknowledgment is given to the fact that the underlying purpose relating to the stringent procedure is to promote settlement between the company and the dissenting shareholders without resorting to judicial intervention. However, the balance of compliance and burden between the company and shareholder are disproportionate.[329] The appraisal procedure is skewed unfairly in favour of the company as the company does not suffer the same consequences due to non-compliance with the procedural steps of the Act, as is the case of the shareholder who will lose his right of enforcement in the same situation.[330]

In terms of the Act, the court may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the court.[331] This discretion given to the courts has been to encourage the parties to reach an agreement in good faith without resorting to the judicial intervention. Nevertheless, with the possibility existing that the costs may

[324] Olaofe op cite note 8 at 13.
[325] Ibid.
[326] Cassim (2012) op cit note 10 at 799.
[327] Ibid at 807.
[328] Cassim (2008) op cit note 21 at 164 and Cassim (2012) op cit note 10 at 807.
[329] Cassim (2012) op cit note 10 at 808.
[330] Cassim (2008) op cit note 21 at 164 and Cassim (2012) op cit note 10 at 807.
[331] Section 164(15)(c)(iv).

be ordered against the shareholders, this may discourage the dissenting shareholders from instituting the appraisal remedy at all.[332]

Due to the wording of the Act the court must determine '*a'* fair value,[333] which indicates that fair value is a range of values and not a particular figure.[334] This is due to the fact that, as discussed in chapter 4 below, the valuation of shares is not an exact science.[335] The judicial determination of fair value, with no prescribed methodology, results in uncertainty for both the shareholder and the company, accompanied by the substantial risk that the difference in the amount estimated by either party and the amount calculated by the court may be to their detriment.[336] Therefore, the risk associated with the appraisal right is unpredictable and difficult to quantify and this results in uncertainty relating to the outcome.[337] This uncertainty can either contribute to the deterrence of use by dissenting shareholders, or could inhibit corporate activity by impeding companies from entering into fundamental transactions.[338]

Legislative amendments to the procedure are necessary and inevitable in order for section 164 to be a more effective remedy for minority protection.[339]

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[332] Cassim (2012) op cit note 10 at 808 and Cassim (2008) op cit note 21 at 166.
[333] Section 164(14).
[334] Cassim (2008) op cit note 21 at 166.
[335] Ibid.
[336] Ibid.
[337] Yeats op cit note 196 at 161&165.
[338] Ibid at 158 read with fn 345.
[339] Cassim op cit note 161 at 319.

IV. DETERMINATION OF FAIR VALUE OF SHARES

(a) Introduction

The appraisal remedy requires the determination of the fair value of the shares held by the dissenting shareholders. This fair value can either be a mutually satisfactory price as determined between the company and the dissenting shareholder, or a judicially set fair value.[340] This fair value is the basis of the offer sent to the dissenting shareholders by the directors and it must further be set out in the offer how this value was determined.[341]

The time on which the said valuation must be based is "the date on which, and time immediately before, the company adopted the resolution".[342] However, there seems to be no uniform or prescribed method, manner or procedure to follow in order to calculate the fair value in terms of the appraisal rights available to minority shareholders. This creates a degree of uncertainty as to the possible success or failure of the minority shareholders in approaching the court as it must be noted that the fair value is not equivalent to market value alone.[343]

South African courts should derive useful guidance from the well-developed and long-standing judicial experience of the Delaware courts in determining fair value, which is a route previously taken by Canada.[344] It must be noted that a further similarity between these jurisdictions and that of South Africa, is that their legislation is also silent on the method of valuation in appraisal proceedings.[345]

It has been said that valuation is an art and not an exact science.[346] The substance of corporate share valuation is to determine the amount which is attributable to each shareholder's proportional interest in the company.[347] To achieve this, there needs to be a determination of the intrinsic value

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[340] Beukes op cit note 15 at 176.
[341] Section 164(11)(c).
[342] Section 164(16).
[343] Cassim (2008) op cit note 21 at 168.
[344] Cassim (2012) op cit note 10 at 809 and section 5(2).
[345] Cassim (2008) op cit note 21 at 168.
[346] *Gold Coast Selection Trust Ltd. v. Humphrey* (Inspector of Taxes), [1948] A.C. 459 at 473 and *In re Appraisal of Shell Oil Co* 607 A.2d 1213 Del (1992) at 1221.
[347] Krishna V 'Determining the Fair Value of Corporate Shares' (1987-1988) *Canada Business Law Journal* 132 at 135 – Krishna here quotes *Borland's Trustee v. Steel Bros. & Co. Ltd* [19011] 1 Ch. 279 at 288, where Farwell J defined a share as 'the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second'.

of the company and then an allocation of that value to its constituent share interests.[348] It is clear from the aforesaid that there is a two-step procedure to be followed when determining the value of shares held. Firstly, one must determine the intrinsic value of the company as a whole and secondly this value needs to be allocated to its constituent shareholdings.[349] The cornerstone of the first step in determining the intrinsic value of the company is the selection of an appropriate method of valuation suitable to the circumstances of the particular case.[350] Delaware now clearly defines the dissenting shareholder's claim as a pro rata claim to the value of the company as a going concern.[351]

A critical variable to be taken into account when determining the value of a share is the specific point in time at which the shares are valued.[352] As stated above, in the Act this critical point would be the time immediately before the resolution is adopted.[353] The rationale behind this requirement set out by the Act is that the financial effect of the resolution to which the shareholders dissent will not be considered in the calculation of the value of their shares.[354] A further aspect to be considered in the valuation of shares is that valuation is focused on valuing the company's future and not its past. Thus, past performance may be an indicator of future outcomes, however, the valuation is based on future monetary expectation.[355]

South African courts have had to consider the notion of fair value for shares in the context of compulsory acquisitions and oppressive or unfairly prejudicial conduct. These valuations were not based on a 'willing buyer'.[356] However, precedent for valuation methodology and the court's approach to the determination of a fair price does already exist and these judgments should not be completely disregarded by the courts. Instead, the courts will need to be selective and ensure that they are in fact applicable and appropriate in the unique context of appraisal rights.[357] In the

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[348] Krishna op cit note 348 at 135. The underlying principle of an appraisal proceeding is to value the corporation itself and not the shares held by a particular shareholder, and to value it on a going concern basis rather than on a liquidated basis.
[349] Ibid.
[350] Ibid.
[351] Ibid; Further in *Tri-Continental Corp. v. Battye* 74 A. 2d 71 (1950) at 72: The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz his proportionate interest in a going concern. By value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger.
[352] Krishna op cit note 348 at 136 and Delport op cit note 37 at 582.
[353] Section 164(16).
[354] Krishna op cit note 348 at 136.
[355] Ibid at 137.
[356] Cassim (2008) op cit note 21 at 168.
[357] Yeats op cit note 196 at 174.

Sammel case it was seen that our courts are opposed to taking into account any valuation based on data gained only by hindsight.[358] Hindsight is, however, to be distinguished from similar facts of comparable sales which are relevant and admissible.[359] Modern methods of valuation are centred on future expectations and are forward-looking. Therefore, the historical data of the company is seen only as an indicator in determining value.[360]

Various methods of calculation will be discussed in order to evaluate a possible option to be implemented in South Africa. Specific reference will be made to the method of calculation adopted by the courts in Delaware.[361] This is because in Delaware the task of valuation of shares in appraisal proceedings is performed by a specialist court experienced in valuation.[362]

(b) Methods of Valuation

In determining an appropriate method of share valuation, there is a mixed conundrum of fact and law which results in the modern outcome that multiple experts hold different views on valuation procedures.[363] However, with that in mind, a valuer's findings are presumed to fall within a proper bracket of valuation.[364] Therefore, the calculation of fair value should be by any techniques or methods considered suitable by the financial community.[365]

The most practised method previously used by American courts was the Delaware Block Method, which was a weighted average of three different valuation methods, namely the market value approach, the net asset value approach, and the earnings approach.[366] In terms of this method, each element of value was assigned a particular weight.[367] The Delaware Block Method was consequently abandoned in the leading case of *Weinberger v UOP Inc.*[368] The court confirmed

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[358] *Sammel* supra note 18 at 649.
[359] Krishna op cit note 348 at 138.
[360] Ibid.
[361] Specifically the Delaware Block Method and the Discounted Cash Flow technique.
[362] Cassim (2008) op cit note 21 at 167 -168 – as is the case either the oppression remedy in section 252 and mandatory acquisitions of the shares of minorities under 440K of the old Act and Cassim (2012) op cit note 10 at 809.
[363] Krishna op cit note 348 at 147 and TB Sweden 'Disputes over the valuation of shares in compulsory purchase's' (1998) 39 - 40 *International Commercial Litigation* 52 at 56.
[364] Kevin Ross Hillis *The Appraisal remedy and the determination of fair value by the court* (unpublished LLM, University of South Africa, 2014) 24 in which he references *Axa Equity & Law Home Loans Ltd v Goldsack & Freeman* 1994 1 EGLR 175.
[365] *Weinberger v. UOP Inc* 457 A. 2d 701 (Del. S.C., 1983) at 712-13.
[366] D Cohen 'Valuation in the context of Share Appraisal' (1985) 35 *Emory Law Journal* 117 at 134.
[367] Cassim (2008) op cit note 21 at 169.
[368] *Weinberger* supra note 366.

that, in essence, a dissenting shareholder is entitled to be paid for his proportionate interest in a going concern and introduced the Discounted Cash Flow methodology which became the most common valuation technique in appraisal cases in America.[369] A summary of various valuation methods which have been applied by foreign courts will follow.

The method of valuation is the centre of the efficiency of the appraisal right and the economic welfare of the individual dissenting shareholder is not the only interest at stake in choosing a valuation method.[370] The parties to a transaction could react negatively to the prospect of appraisal proceedings if the incorrect valuation methods are chosen which adds an extra element of uncertainty to the transaction.[371]

(i) **Future Earnings / Earnings Multiple Approach**

In practice, valuers use relative valuation techniques to determine the going concern value of a company.[372] The future earnings method is, by the concept on which it is based, the preferred method of valuation of a business as a going concern.[373] This method is based on the premise that the company is worth what it can earn in the future.[374]

The earning of the company is viewed as a prospect giving a trend of how future earnings would be estimated.[375] The method used here is extrapolating an average from the company's past earnings, taking into consideration any adjustments that need to be made for certain events or circumstances which occurred.[376] Therefore the method's end result is the future earnings whilst the crux of the calculation is the historical earnings.[377]

In calculating the value according to this approach, the average earning of the corporation is calculated over a set period of time, immediately before the trigger action.[378] The court in

[369] Cassim (2008) op cit note 21 at 169.
[370] Cohen op cit note 367 at 125.
[371] Cohen op cit note 367 at 126.
[372] A Hicks & A Gregory 'Valuation of shares: a legal and accounting conundrum' (1995) *Journal of Business Law* 56 at 62.
[373] Krishna op cit note 348 at 148.
[374] *Sterling v. Mayflower Hotel Corp* 33 Del. Ch. 293, 93 A. 2d 107 (1952) and *General Realty and Util Corp.*, 29 Del. Ch. 840, 52 A. 2d 6 (Ch., 1947) in Krishna op cit note 348 at 148.
[375] Olaofe op cit note 8 at 44.
[376]Krishna op cit note 348 at 148.
[377] Ibid. Cohen op cit note 367 at 139.
[378] This is in line with section164(16).

Gonsalves V Straight Arrow Publishers Incorporation[379] held that the court is not bound to adopt a set fixed period. The number of years should, however, be sufficient to result in proper representation of the company's future and viability.[380] Although there is no set rule, five years has been evaluated and considered to be an appropriate time period to represent a proper outcome.[381]

After the estimated average earning of the company is determined, the capital value of the earning stream is calculated by applying the capitalisation rate to the estimated average earning.[382] The reciprocal of the capitalisation rate is called the multiplier.[383] These are obtained through comparison with similar publicly traded companies which market capitalisation and earnings measures are publicly disclosed.[384] This rate/multiplier is usually the price to earnings ratio and is a marker of how much investors are willing to pay for expected future earnings.[385] There is no prescribed formula to determine the rate/multiplier which will be appropriate to a particular company and it can, therefore, be adjusted by the courts taking into consideration certain factors such as nature of business, degree of risk inherent to the business, stability of earnings financial capacity and so on.[386]

After determining the rate or multiplier, the average earnings will either be divided respectively by the rate or multiplied by the multiplier to get the earnings valuation.[387] The earnings valuation is added to the asset value of the company to get the total value and this total is then divided by the amount of shares in the company to produce a value per share.[388]

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[379] *Gonsalves V Straight Arrow Publishers Incorporation* 701 A.2d 357, 361-62 (Del. 1997).
[380] Krishna op cit note 348 at 149; Olaofe op cit note 8 at 45.
[381] *Tannetics Incorporation V A. J. Industry Incorporation* C.A No. 5306 (Del. Ch. July 17, 1979) para 11 and Krishna op cit note 348 at 149 in which she references *Adams v. R.C. Williams & Co*., 39 Del. Ch. 61, 158 A.2d 797 (Ch., 1960) and *Francis I. du Pont & Co. v. Universal City Studies, Inc*., 312 A. 2d 344 (Del. Ch., 1973), affd 334 A. 2d 216 (Del., 1975).
[382] Krishna op cit note 348 at 152 and Olaofe op cit note 8 at 45.
[383] Krishna op cit note 348 at 152.
[384] Olaofe op cit note 8 at 45 and *Gonsalves* supra note 380 para 12.
[385] Hicks op cit note 373 at 65 and Chartered Financial Analyst ("CFA") Program Equity and Fixed Income CFA Institute Volume 5 (2008) at 186.
[386] This is not a closed list and are just a few considerations considered in court cases; Krishna op cit note 348 at 154; Olaofe op cit note 8 at 45.
[387] Krishna op cit note 348 at 152-153.
[388] Olaofe op cit note 8 at 45.

(ii) Net Asset Value Approach

This method of valuation is based on the premise that the shares in a company signify a proportionate claim of the company's assets after the liabilities and preference equity claims have been deducted.[389] In terms of generally accepted accounting principle, assets are recorded at their book value. These values are derived by depreciating the historical cost of the asset. Therefore, the book value tends to vary from the present value of the asset.[390] This approach is therefore, inappropriate for purposes of measuring shareholder claims.[391] Other asset valuations such as liquidation values can also not be used as these are an indication that the company is not a going concern.[392] A company that is both liquid and solvent should be considered as something more substantial than just a conglomerate of its assets.[393] Therefore, it is difficult to use asset values as anything other than supplementary evidence, as these types of valuations counter the argument that an on-going business is more than just the assets of which it consists. [394]

(iii) Market Value Approach

Publicly stated market prices are used in this method to indicate the fair value of shares. These market prices are further indicative of the market's perception of the value relating to the company.[395] This could be a challenge in the case of private companies as there are no publicly traded market prices and, therefore, data relating to similar sized companies would be used as an indication towards the market price. This, of course, carries many downfalls in terms of accuracy.[396]

This method is more relevant in the context of public companies in South Africa as their shares are listed on the Johannesburg Stock Exchange, which results in the fact that the value can be

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[389] Hicks op cit note 373 at 63 and Krishna op cit note 348 at 154.
[390] J Seligman 'Reappraising the appraisal remedy' (1984) 52 *George Washington Law Review* 829 at 848.
[391] Krishna op cit note 348 at 154.
[392] Ibid at 155 and Cohen op cite note 367 at 134.
[393] *Re Domglas Inc. and Jarislowski, Fraser & Co*., 11980] Que. S.C. 925 at p. 953, 13 B.L.R. 135 para 197 Greenberg J: 'The basic concept currently accepted by valuation theorists is that a business is worth only what it can earn, except where it is worth less on an earnings basis than the amount that would be realised if it were liquidated' in Krishna op cit note 348 at 155 fn 69.
[394] Krishna op cit note 348 at 155.
[395] Krishna op cit note 348 at 156.
[396] LA Hamermesh & ML Wachter 'The Fair Value of Cornfields in Delaware Appraisal Law' (2005) 31 *Journal of Corporate Law* 119 at 132.

determined easily and at minimal cost.[397] However, although this method is a useful tool to obtain a collection of factual historical share prices, it should not be used as the only method for determining the value.

Market prices should only be used to determine fair value if they are a true representation of an active and fair market which is not influenced by irregular factors.[398] It was stated in *Chicago Corp v Munds*[399] that there are too many accidental circumstances influencing the market prices to accept that as a sure and exclusive reflector of fair value. Therefore, the market value method should only be used to ascertain a reliable value of a company in a perfect market. Where a transaction is tainted with fraud, a dominant supply or demand or any other irregularity cannot reflect the true value if the company.[400]

(iv) The Delaware Block Method

The Delaware Block Method is a doctrine of valuation developed by the Delaware courts in terms of which no single method of valuation was deemed conclusive. Instead, results were obtained by assigning a determinable weight to each of the methods discussed above to reach a weighted average share price.[401]

Therefore, the weighted factors were generally the net asset value of the company, the market value of the company, and the value determined by the earnings-multiple technique. The courts determine the weight assigned to each method and such assignment is dictated by the surrounding circumstances of each company and the manner of calculation. There are, unfortunately, hopeless inconsistencies involved in arriving at the three separate values on which this method is based.[402]

[397] Hillis op cit note 365 at 28 and Krishna op cit note 348 at 156.
[398] Krishna op cit note 348 at 157.
[399] *Chicago Corp v Munds* Del Ch 172 A 452 (1934) at 455.
[400] Cohen op cit note 367 at 148.
[401] Krishna op cit note 348 at 157.
[402] Cohen op cit note 367 at 134.

After the respective weight percentages are assigned to the specific methods, the court will calculate the weighted average value which will form the substratum of the value of the company for purposes of the appraisal value.[403]

Although the Delaware Block Method of valuation was relatively straightforward for judges to apply, it resulted in arbitrary valuations which lead to widely divergent results. It made little sense from the perspective of financial and economic theory and was in need of modernisation and replacement with other valuation methods used in modern practice.[404] This method was rejected in the *Wienberger* case as the court held the method was 'clearly outmoded'.[405]

(v) The Discounted Cash Flow Method

The discounted cash flow method has a wide variety of application and although there are other methods of valuation in modern finance, the DCF has a general approach and usage which assists in complying with the mandate of the *Weinberger* case to modernise valuation methods for appraisal proceedings.[406]

The discounted cash flow method is based on the premise that the value of a company is equal to the present value of its projected future cash flows and the basis of this valuation approach is that all assets have value because they provide a stream of future benefits.[407] Unlike the Delaware Block Method, the discounted cash flow method looks to the future prospects of a company rather than focusing on its past performance.[408] The key valuation concept is to take the future stream of benefits and convert it into a current value which is equivalent to the given stream of benefits over a given time and, therefore, as per its name, the method 'discounts' future benefits to their present value.[409] The DCF further provides a consistent measure of net asset value on a going concern basis.[410]

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[403] *Rosenblatt V Getty Oil Corporation* 493 A.2d 929, 934 n.6 (Del. 1985) - explaining that under the Delaware block Method 'elements of value, including assets, earnings and market price are given a dollar figure, assigned a percentage weights and then summed to yield a weighted average value per share'.
[404] Cassim (2008) op cit note 21 at 169.
[405] *Weinberger* supra note 366 at 713.
[406] Cohen op cit note 367 at 131.
[407] Ibid at 127.
[408] Cassim (2008) op cite note 21 at 169.
[409] Cohen op cit note 367 at 128.
[410] Ibid at 137.

(vi) Merger Price

A number of recent cases have emerged in which the courts in Delaware have relied on the merger price to determine fair value.[411] This has been based on the premise that if the merger price was produced by a thorough and effective sales process, free from self-interest or disloyalty, then such a price could be a reliable indicator of the value of shares.[412] However, the court is still required to evaluate all relevant factors and arrive at a value. The merger price is simply (where reliably derived) one of those relevant factors.[413] Therefore, where other methods of valuation are deemed to be inappropriate when applied to the specific facts, the merger price can be used to determine fair value.[414] It must be noted, however, that the merger price would only be appropriate in an arm's length transaction and further dissenting shareholders should be reminded of this that the appraisal proceedings carry significant risk and a shareholder may after all only receive the deal consideration.[415]

(vii) Canadian Approach

The judicial determination of share valuation is based on a case-by-case basis.[416] This was confirmed in the case of *Nixon v Trace*[417] where the court stated that the problem of determining fair value defies being reduced to a set of rules for selecting a method of valuation which will produce an answer with the illusion of mathematical certainty. Each case must be examined according to its own facts as each case presents its own difficulties.[418] Factors which are of importance in one case may be meaningless in another and the court must, therefore, consider all

[411] Yeats op cit note 196 at 69.
[412] Memorandum Opinion: *Huff Fund Investment Partnership v CKx Inc* 2013 WL 5878807 (Del Ch Nov 1, 2013) para 32.
[413] Yeats op cit note 196 at 70. *Huff Fund Investment Partnership v CKx, Inc,* No. 384, 2014 (Del. Feb. 12, 2015).
[414] *LongPath Capital v. Ramtron International Corp.* C.A. No. 8094-VCP (Del. Ch. June. 30, 2015). In *Merion Capital LP & Merion Capital II LP v BMC Software, Inc*. C.A. No. 8900-VCG, 2015 WL 67586 at 1-51 (Del. Ch. Oct. 21, 2015) para 48-50 the expert witnesses called by the company and the dissenters both used the DCF method but reached different valuations, the court held that the projections adopted by the dissenters were too optimistic and thereby rejected and that the merger price was the most persuasive indicator of fair value.
[415] W Savitt (2013) 'Court Holds Merger Price Is Reliable Indicator of Fair Value' Harvard Law School Forum on Corporate Governance and Financial Regulation, available at *https://corpgov.law.harvard.edu/2013/11/05/court-holds-merger-price-is-reliable-indicator-of-fair-value/*, accessed on 12 September 2019.
[416] Yeats op cit note 196 at 109.
[417] *Nixon v Trace* 2012 BCCA 48 para 652.
[418] *Nixon* supra note 418 para 652. The court here quoting from the judgement Re Cyprus Anvil Mining Corp. and Dickson 1986 811 (BC CA), (1987) 33 D.L.R. (4th) 641 (B.C.C.A).

the evidence that might be helpful, including the particular factors in the particular case. and exercise the best judgment that can be brought to bear on all the evidence and all the factors must be exercised. It is a question of sound judgement.[419]

(c) Conclusion

The Future Earnings/Earnings Multiple Approach is based on current valuation data which does not take cognisance of the fact that the market valuation may be too high or too low at the time of the valuation.[420] Furthermore, in terms of the determination of the rate or multiplier, it would be inappropriate for smaller or unlisted companies to use the same rates or multipliers of larger companies. Therefore, this method is only recommended when there is comparable information available on a similar company and if the operations of the company will not result in the company being either over- or under-valued at a specific time of valuation.[421] Where these factors are not a deterrent for the use of the method, valuations based on earnings forecasts are remarkably accurate for a substantial majority of companies.[422]

The Net Asset Method is an inappropriate method of valuation in terms of a fundamental transaction in which the goal is to carry the business on as a going concern. This method of valuation could, however, be deemed useful in situations where a company is on the brink of liquidation or business rescue. Therefore, unless the company is in dire financial stress, the net asset method of valuation will not serve the relevant purpose in terms of section 164.

The market value method should be used as a variable to determine fair value but should not be used as the sole method of determination.

The Delaware block method will be advantageous to dissenting shareholders where the company offers the market value of their shares at a time when market value is less than asset value. However, weighting can also work to the majority's advantage. The common disadvantage

[419]Ibid.
[420] Hillis op cit note 365 at 32.
[421] Chartered Financial Analyst ("CFA") Program Equity and Fixed Income CFA Institute Volume 5 (2008) at 176.
[422] DT Larrabee, JA Voss 'Valuation Techniques Discounted Cash Flow, Earnings Quality, Measures of Value Added and Real Options' *CFA Institute* 2013 at 403.

inherent in all averages is that in cases above and below, the average will penalise one party and reward the other.[423]

The Discounted Cash Flow method is difficult for judges untrained in valuation to apply. As a consequence, American courts have appointed their own experts in appraisal cases and commendably the Act in terms of section 164(15)(c)(iii)(aa), makes provision for the court to appoint an appraiser to assist in determining fair value, at the court's discretion.[424]

The Merger Price method can only be used in transactions where there is an arms-length transaction free from any self-interest or disloyalty. It cannot be an appropriate measure for *all* appraisal matters.

South African courts will have to develop a consistent, accurate and fair methodology to deal with cases where they are required to determine the fair value of shares.[425] This is not an easy task and the Act provides no guidance in this regard. The Delaware courts have struggled with this issue for years and their judgements may provide valuable guidance to South African courts.[426] A case-by-case basis could be seen to be a fair method of evaluation considering sound expert evidence.

[423] Krishna op cit note 348 at 159.
[424] Cassim (2008) op cit note 21 at 170.
[425] Yeats op cit note 1 at 341 fn 86.
[426] Ibid.

V. THE APPRAISAL RIGHT IN COMPARATIVE FOREIGN JURISDICTIONS

(a) Introduction

Appraisal rights originated and was developed in the USA and they can also be observed in the company law regime of Canada.[427] Regrettably, the efficiency of the appraisal right in South Africa is questionable if one refers to the fact that our appraisal rights are associated with practical efficacy problems in jurisdictions. These problems have existed for many years and imply that we are bound to inherit some of the problems which will ultimately influence the ambit of protection offered by appraisal rights in South Africa.[428]

(b) United States of America

In terms of the USA, an evaluation of the Model Business Corporation Act will be done.[429] This act provides for the appraisal rights in the USA. This is an influential piece of legislation which has been adopted by twenty four states.[430] It must be kept in mind that the MBCA acts only as a guide and specific state provisions could vary from those of the MBCA.[431] Therefore, the Delaware General Corporation Law will further be incorporated because in matters related to corporate law, Delaware is seen as the most influential of the states.[432]

Triggering Events

The MBCA recognises five trigger events namely: (i) mergers, (ii) share exchanges, (iii) dispositions of assets, (iv) amendments to the articles and (v) conversion of the incorporation to non-profit and into an unincorporated status by way of domestication.[433] The triggers in the Act are comparable but narrower than those in the MBCA. However, section 164 is wider than the

[427] Cassim (2008) op cit note 195 at 19 and Yeats op cit note 1 at 328.
[428] Yeats op cit note 1 at 337-338.
[429] The Model Business Corporation Act, 2006 (US American Bar Association) (Hereinafter the MBCA).
[430] M Siegel 'Back to the Future: Appraisal Rights in the Twenty-First Century (1995) 32 *Harvard Journal on Legislation* 79 at 79 - 91.
[431] A Adebanjo 'Appraising the appraisal remedy: is it really the best option for dissenting shareholders' The European Conference on Politics, Economics and Law 2014 Official Conference Proceedings; University of the Free State available at *http://papers.iafor.org/wp-content/uploads/papers/ecpel2014/ECPEL2014_00530.pdf*, accessed on 2 March 2018.
[432] JM Gorris, LA Hamermesh and LE Strine Jr 'Delaware Corporate Law and the Model Business Corporation Act: A study in Symbiosis' (2011) 74 *Law and Contemporary Problems* 107.
[433] MBCA 13.02(a)(1)-(4),(6)&(8).

provisions in the Delaware General Corporation Law.[434] In terms of the latter, the appraisal remedy is available in only one type of corporate event: certain mergers or consolidations.[435] The South African Act more closely resembles the MBCA in this regard as it also recognises multiple trigger events.[436] It can be said that section 164(2) of the Act better protects minority shareholders than section 262(6) of the DGCL,[437]. For example, the Act provides protection for minorities in terms of disposals of assets and the DGCL does not.[438]

Market-out Exception

Some states in the USA provide for a market exception whereby the appraisal right is excluded in respect of shares that have a reliable value and are traded in a liquid market (this would commonly be the case in listed companies).[439] This exception generally only applies where the consideration is liquid in that it consists of cash or other liquid securities.[440] In terms of the DGCL, the market-out exception applies to all triggering transactions.[441]

Standing/Status

In terms of the MBCA, the dissenting shareholder only loses his rights as a shareholder after the corporate action has become effective, that is, in the time period between shareholder approval and actual implementation the shareholder retains his full rights as a shareholder.[442] In the Delaware statute dissenting shareholders must make their appraisal demands after the effective date of the fundamental transaction as opposed to the date on which the resolution was passed.[443]

Registered and Beneficial Shareholders

The MBCA provides that a record shareholder may assert appraisal rights to fewer than all the shares registered in the record shareholder's name but owned by a beneficial shareholder, only if the record shareholder objects with respect to all shares of a class or series owned by the beneficial

[434] Chokuda op cit note 12 at 157. Delaware General Corporation Law (hereinafter DGCL).
[435] DGCL section 262(6).
[436] Section 164(2).
[437] Chokuda op cit note 12 at 158.
[438] Wertheimer op cite note 12 at 702-703.
[439] Cassim (2012) op cit note 10 at 799.
[440] Cassim (2008) op cit note 21 at 162.
[441] DGCL section 262(b).
[442] Cassim (2017) op cit note 161 at 317.
[443] Ibid and Section 262 of the Delaware General Corporation Law.

shareholder and notifies the corporation in writing of the name and address of each beneficial shareholder on whose behalf appraisal rights are being asserted.[444] A beneficial shareholder may assert appraisal rights as to shares of any class or series held on behalf of the shareholder only if such shareholder submits to the corporation the record shareholder's written consent to the assertion of such rights and does so with respect to all shares of the class or series that are beneficially owned by the beneficial shareholder or the voting trust beneficial owner. [445]

In terms of the DGCL, only the registered stockholder is entitled to deliver the appraisal demand to the corporation.[446] However, a person who is the beneficial owner of shares of such stock held by a nominee on behalf of such person may, in such person's own name, file a petition or request from the corporation the statement described in section 262(e).[447] Nonetheless, it is still the record holder who must comply with the statutory requirements in order for the petition to be viable.[448]

Payment

The MBCA provides that within 30 days after the demand is due, the corporation shall pay in cash to those dissenting shareholders who complied with the necessary procedure, the amount the corporation estimates to be the fair value of their shares, plus interest.[449] Therefore, the MBCA makes provision for early payment.[450] This does not apply to the Delaware statute in terms of which the dissenting shareholder must wait for the final court order before he receives any payments relating to his shares resulting in fact that, similarly to the South African provision, his investment and rights are stalled.[451] Therefore, under both DGCL and the Act, dissenting shareholders will only receive payment once the appraisal litigation proceedings are concluded or a settlement is reached avoiding litigation.[452] However, the DGCL does allow the corporation a statutory discretion to make a cash payment to dissenting shareholders in terms of section 262(h) which states that at any time before the entry of judgment in the proceedings, the surviving

[444] MBCA 13.03(a).
[445] MBCA 13.03(b)(1)-(2).
[446] DGCL section 262(d) read with section 262(a) and Chokuda op cit note 12 at 160.
[447] DGCL section 262(e). *In Re Appraisal of Ancestry.com, Inc* Civil Action No. 1554-N. (Del. Ch. 5/10/2006) – it was subsequent to and as a result of this case that the DGCL was amended to enable a beneficial owner to request the voting information statement and file the appraisal petition in its own name.
[448] Yeats op cit note 196 at 84.
[449] MBCA 13.24.
[450] Yeats op cit note 196 at 52.
[451] DGCL section 262 and Cassim (2017) op cit note 161 at 318.
[452] Yeats op cit note 196 at 52.

corporation may pay to each stockholder entitled to appraisal an amount in cash. In such cases, interest shall accrue thereafter as provided herein only upon the sum of the difference, if any, between the amount so paid and the fair value of the shares as determined by the Court, and interest theretofore accrued, unless paid at that time.[453] The difference between this section and that of the MBCA is that in terms of the DGCL, this is an optional payment whilst in terms of the MBCA, this is an obligatory payment.[454]

Costs and Expenses

In terms of the MBCA, the court in an appraisal proceeding commenced under section 13.30 determines all court costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court.[455] The court assesses the court costs against the corporation. But, the court may also assess court costs against all or some of the shareholders demanding appraisal, according to amounts which the court finds equitable, to the extent the court finds such shareholders acted arbitrarily, vexatiously, or not in good faith.[456] Further, the court in an appraisal proceeding may also assess the expenses of the respective parties in amounts the court finds equitable against the corporation and in favour of any or all shareholders demanding appraisal if the court finds the corporation did not substantially comply with the requirements. Lastly, the court may assess costs against either the corporation or a shareholder demanding appraisal, in favour of any other party, if the court finds the party against whom expenses are assessed acted arbitrarily, vexatiously, or not in good faith.[457]

The Delaware courts, as in South Africa, have a general discretion in appraisal proceedings as to how to allocate the responsibility of the costs of the proceedings to be determined as the court deems equitable in the circumstances.[458]

The appraisal provisions in the Act seem to be a hybrid of the provisions discussed above, but the Act does not strictly adhere to the legislative construct of either the MBCA or the DGCL. Therefore, where the courts interpret and apply USA case law in relation to appraisal proceedings,

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[453] DGCL section 262(h).
[454] Chokuda op cit note 12 at 164.
[455] MBCA 13.31(a).
[456] MBCA 13.31(a).
[457] MBCA 13.31(b)(1)-(2).
[458] DGCL section 262(j).

they must give recognition to the fact that the philosophy underpinning a particular statute may differ from the Act and cannot be directly applied.[459]

(c) Canada

In terms of Canada, evaluation will be made according to the Canada Business Corporations Act.[460] Section 190 of the CBCA contains an appraisal remedy comparable with the one in section 164 of the Companies Act.[461]

Triggering Events

Section 190 of the CBCA provides that, subject to sections 191 and 241,[462] a holder of shares of any class of a corporation may dissent if the corporation resolves to: (i) amend its articles to add, change or remove any provisions restricting or constraining the issue, transfer or ownership of shares of that class, (ii) amend its articles to add, change or remove any restriction on the business or businesses that the corporation may carry on, (iii) amalgamate, (iv) continue under section 188, (v) sell, lease or exchange all or substantially all its property or (vi) carry out a going-private transaction or a squeeze-out transaction.[463] There is a clear resemblance between this section and section 164 of the Act.[464]

Market-out Exception

The Canada Business Corporations Act does not contain any provision denying appraisal rights to shareholders in terms of those shares being traded in liquid markets.[465]

Standing/Status

Similar to the South African Act, the dissenting shareholder under the CBCA must make demand for payment within a specified time after the adoption of the resolution upon which his rights as a shareholder are suspended.[466] The CBCA, however, has a broader adaption in terms of rights and

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[459] Yeats op cit note 196 at 56.
[460] Canada Business Corporations Act R.S.C., 1985, c. C-44 (hereinafter the CBCA).
[461] Beukes op cit note 15 at 177.
[462] CBCA section 241 relates to the application to the court regarding oppression.
[463] CBCA section 190(1)(a)-(f).
[464] Yeats op cit note 196 at 94 and Chokuda op cit note 12 at 157.
[465] Cassim (2008) op cit note 21 at 162.
[466] Cassim (2017) op cit note 161 at 317 and CBCA section 190(11)&(12).

standing whereby section 190 can be interpreted to support the concurrent availability of the right of dissent and the oppression remedy, as was discussed in chapter 2.[467] This can be seen with regards to three specific sections in the CBCA which:

a) make the right to dissent subject to an application to court regarding oppression;[468]
b) state that the right to be paid fair value is in addition to any other rights that the shareholder may have;[469] and
c) extend the oppression remedy[470] to former shareholders.[471]

Registered and Beneficial Shareholders

In terms of the CBCA, the general rule in order for a dissenting shareholder to have standing in terms of the appraisal proceedings is that the shareholder must be the registered shareholder of the shares when the resolution approving the triggering action is approved.[472] However, it is noted that Canadian courts have made exceptions to the general rule by allowing beneficial shareholders to exercise the appraisal right in exceptional circumstances only.[473]

Due to the similarities between section 190 of CBCA and section 164 of the Act, and since section 164 does not expressly restrict standing to registered shareholders only, both registered and beneficial shareholders should have standing.[474] On the contrary, it has also been noted by some authors that Canadian authorities should not apply to the Act with reference hereto due to the differences in the definitions of 'shareholder' in the different Acts.[475]

While rationale behind the general rule is to avoid placing an onerous burden and uncertainty on the company, its appropriateness has been questioned in the context of modern capital markets

[467] Cassim (2017) op cit note 161 at 321.
[468] CBCA section 190(1).
[469] CBCA section 190(3).
[470] CBCA section 238(a) read with section 241(1).
[471] Cassim (2017) op cit note 161 at 321.
[472] Beukes op cit note 15 at 178.
[473] *Lake & Co. v Caltex Resources Ltd*. (1996) 30 BLR (2d) 186 (alta CA) : the court allowed non-registered shareholders to make use of the appraisal remedy where an information circular that was sent to the shareholders was unclear as to the rights of unregistered shareholders. The court further recognised that the general did not accord with commercial practice. In *Matre et al. v. Crew Gold Corporation* 2011 YKSC 75 : the court extended the pool of persona legally entitled to enforce appraisal rights to beneficial owners but the court did point out that this was an exceptional case and the decision was largely based on the behaviour and actions of the company.
[474] Beukes op cit note 15 at 178.
[475] Delport op cit note 37 at 583.

where shares are registered in the names of brokerage firms.[476] This same situation is witnessed in South Africa.

Payment

In terms of the CBCA, a corporation shall pay for the shares of a dissenting shareholder within ten days after an offer has been accepted, but any such offer lapses if the corporation does not receive an acceptance thereof within thirty days after the offer has been made.[477] Once again, the Canadian and South African statutes contain virtually identical provisions, including the number of days prescribed.[478]

Where a corporation fails to make an offer or if a dissenting shareholder fails to accept an offer, the corporation may, within fifty days after the action approved by the resolution is effective, or within such further period as a court may allow, apply to a court to fix a fair value for the shares of any dissenting shareholder.[479] The South African Act does not provide for application to court by the company. Furthermore, in terms of the CBCA, if a corporation fails to apply to a court, a dissenting shareholder may apply to a court for the same purpose within a further period of twenty days or within such further period as a court may allow.[480]

The addition of the wording 'as a court may allow' in the CBCA provides the assumption that the court has the discretion to extend the prescribed time limits.

Costs and Expenses

The CBCA's only reference to costs in terms of the appraisal court proceeding is that a dissenting shareholder is not required to give security for costs in an application made in terms of the section.[481]

[476] Chokuda op cit note 12 at 159.
[477] CBCA section 190(14).
[478] Yeats op cit note 196 at 100.
[479] CBCA section 190(15).
[480] CBCA section 190(16). This is an additional 20 days to the 50 days provided for in section 190(15), which provides the shareholder with 70 days from the date that the resolution is effective.
[481] CBCA section 190(18).

Due to the similarity of the appraisal provision in the CBCA and the Act, South African courts should pay regard to the judgements that have developed in the Canadian courts in the absence of legislative provisions that provide guidance to the contrary.

VI. CONCLUSION AND RECOMMENDATION

The appraisal remedy is considered an appropriate and much needed means of softening the provisions in company legislation which allow majority shareholders or a group of connected shareholders to affect fundamental changes.[482] Comparative legal research has revealed that appraisal rights are not widely used due to costs, uncertainties, time delays, onerous legislative procedures and concerns regarding the constraints on corporate activity.[483] It is respectfully submitted that the legislature reconsider the current version of section 164 by investigating the applicability of the suggestions mentioned hereunder to enhance the protection of minority shareholders. Some of the factors are alternatively directed at the company or the courts.

Due to the technical complexities and procedures involved in enforcing the appraisal right, the courts should interpret the dissenting shareholders' procedural obligations as flexibly and leniently as possible and excuse shareholders who fail to comply strictly with the procedure despite a genuine attempt to do so.[484] In other words, the Act should be amended in such a way that non-compliance of the procedural steps may be condoned by the court and the court should further be given the discretionary power to extend the prescribed time limits.[485] Further, as stated above, the appraisal procedure is skewed unfairly in favour of the company in terms of non-compliance with the procedural steps, and it is therefore advisable to insert a clause that, should the company fail to comply with the appraisal procedure, costs will be assessed against the company at the discretion of the court.[486] A further amendment to the Act could include equalising the time periods given to the company and the shareholders for compliance of the procedural steps in the Act to create a more balanced playing field.

When dissenting shareholders use their appraisal right they lose all rights attached to their shares in the company and as stated before payment in respect of the fair value of the shares is only made

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[482] Manning op cit note 22 at 226.
[483] Yeats op cit note 196 at 241.
[484] Cassim (2012) op cite note 10 at 808.
[485] Cassim (2008) op cite note 21 at 165. This approach was adopted in *Jepson v Canadian Salt Co Ltd* [1979] 4 WWR 35, 99 DLR (3d) 513(SC) in relation to the appraisal rights set out in, now s190, of the Canadian Business Corporation Act which as discussed above is similar to s164 of the Act.
[486] Cassim (2008) op cite note 21 at 165.

to a shareholder at the end of a dispute. This causes a delay between demand and payment.[487] In contradistinction, in terms of the MBCA, the company is required to make a provisional payment in respect of the amount estimated by the company to be the fair value of the shares plus interest accrued within 30 days after the due date of the demand, and thereafter the company must settle any shortfall between the amount sought and that paid.[488] The approach followed in MBCA is a better approach as it gives the shareholder the use of funds by merely allowing that a provisional payment be made. The provisional amount would be the company's estimate of the fair value of the relevant shares.[489] This would enhance minority protection by financially empowering shareholders to exercise the appraisal remedy.[490]

In terms of the Canadian approach, the Act should be interpreted by the courts to allow the appraisal remedy and the oppression remedy to co-exist in certain circumstances, alternatively the Act should be amended to clarify and expressly provide for this. Where the value of a dissenting shareholder's shares have fallen due to the oppressive conduct of the company, the shareholder should be able to rely on the oppression remedy to obtain compensation, separate from, and in addition to, the shareholder's claim for fair value.[491] As stated before, inherent in the appraisal remedy are the severe sanctions imposed on dissenting shareholders for non-compliance with the appraisal procedure, whereas on the contrary, there are no sanctions against the company for the same.[492] This recognition could assist the courts in adjusting the imbalances between the interests of the dissenting shareholders and the interests of the company by filling in the gaps with the oppression remedy.[493] In this way, the oppression remedy could be used by the courts as a consequence for the company when it has failed to comply with its obligations under the appraisal procedure as such a failure may be oppressive or unfairly prejudicial to the dissenting shareholder.[494]

Alternatively, as in the USA Model Business Corporations Act, the section could be amended or reworded to result in a situation where the dissenting shareholder only loses his rights after the

[487] Ibid.
[488] MBCA section 1.24 & 13.26.
[489] Cassim (2008) op cite note 21 at 165.
[490] Chokuda op cit note 12 at 164
[491] Cassim (2017) op cit note 161 at 323.
[492] Ibid at 323-324.
[493] Ibid.
[494] Ibid at 324.

corporate action has become effective, which would result in the shareholder retaining his full rights as a shareholder throughout the interval between shareholder approval and actual implementation of the transaction.[495] The USA approach is more even handed than the South African and Canadian approaches, in that it balances the interest of the company and the dissenting shareholders more evenly.

Additionally, the Act should confer a wider discretion on the court to assess costs against the company or the dissenter wherever the court finds that either party has acted arbitrarily, vexatiously or in bad faith.[496] This is seen in the MBCA. This will reduce the deterrence felt by dissenting shareholders when considering instituting the appraisal remedy.

As seen in the USA, South Africa should establish a court which specialises specifically in valuation. This will minimise the uncertainty surrounding the judicial valuation as these courts are empowered with the expertise of interpreting fair value as well as being well vested in the different methods of valuation. Alternatively, guidelines should be considered regarding the determination of fair value and the appointment of appraisal experts.[497]

In terms of the company itself, a further way to combat financial and legal uncertainty is to incorporate a contractual condition precedent which ensures that they are not legally bound to proceed with a transaction in certain circumstances relating to the exercise of the appraisal right or for the company to reserve its right to abandon a transaction at any time before its implementation, regardless of a shareholders' approval.

Lastly, clarity is required on the uncertainties regarding the legal position with respect to waivers and the legal position relating to the voting and exercise of appraisal rights by the registered and beneficial shareholder.

These suggestions could increase the use of the appraisal right and would be to the benefit of the shareholders and the company.

[495] Cassim (2017) op cit note 161 at 317.
[496] Cassim (2008) op cite note 21 at 166.
[497] Yeats op cit note 196 at 242.

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