

**THE BINDING EFFECT OF THE MEMORANDUM AND  
ARTICLES OF ASSOCIATION: s 65(2) OF THE COMPANIES  
ACT 61 OF 1973...A COMPARATIVE STUDY.**

by

**TEBOGO CHARLOTTE PAPO**

submitted in part fulfillment of the requirements for the degree of

**MASTER OF LAWS**

at the

**UNIVERSITY OF PRETORIA**

**SUPERVISOR : Prof. P.A. DELPORT.**

Date : February 2000

## INDEX:

|  |    |
|--|----|
| <b>Acknowledgements</b>  | i  |
| <b>Preface</b>   | ii |
| <b>Chapter 1: Introduction</b>   |    |
| 1.1 Subject of study   | 1  |
| 1.2 Purpose of study   | 1  |
| 1.3 Scope of study   | 2  |
| <br><b>Chapter 2: Membership in a company</b>  |    |
| 2.1 Introduction   | 3  |
| 2.2 Acquisition of membership  | 3  |
| 2.3 Member versus shareholder  | 8  |
| 2.4 Directors  | 18 |
| 2.5 Conclusion   | 19 |
| <br><b>Chapter 3: The nature and effect of the memorandum and articles of association</b>                                |    |
| 3.1 Introduction   | 21 |
| 3.2 Brief historical background of the memorandum and articles   | 22 |
| 3.3 The nature and effect of the memorandum and articles   | 23 |
| 3.4 Conclusion   | 33 |
| <br><b>Chapter 4: The binding effect of the statutory contract</b>   |    |
| 4.1 Introduction   | 34 |
| 4.2 Contracts arising out of the statutory contracts   | 35 |
| 4.3 Conclusion   | 48 |
| <br><b>Chapter 5: The enforcement of rights and obligations flowing from the memorandum and articles of association.</b> |    |
| 5.1 Introduction   | 49 |
| 5.2 Extent of enforcement of the rights and obligations  | 50 |
| 5.3 Conclusion   | 61 |
| 5.4 Foss v Harbottle rule  | 63 |
| 5.5 Conclusion   | 73 |
| <br><b>Chapter 6: Remedies for breach of a statutory contract</b>  |    |
| 6.1 Introduction   | 75 |
| 6.2 Available remedies   | 75 |
| 6.3 Other remedies   | 78 |
| 6.4 Conclusion   | 81 |



**Chapter 7: Conclusion**

82

**Bibliography**

85



### **ACKNOWLEDGEMENTS:**

My sincere gratitude to my supervisor Prof. P.A Delpont for the guidance he gave me in conducting this research. To my parents and twin-brother for the emotional support they gave me. And to Technikon North West and FRD for the financial support they gave me in undertaking my studies. I would also like to thank the Unisa Librarians for the assistance they gave me in conducting literature search for this research paper.

## **PREFACE:**

S 65(2) of the Companies Act<sup>1</sup> binds the company and its members to observe all of the provisions of the memorandum and articles of association subject to the provisions of the Companies Act. It is now settled that this section amounts to a contract between the company and its members and between the members inter se<sup>2</sup>. Third parties like directors are not parties to this contract.

It is judicially settled that this contract binds the members in their capacity as members<sup>3</sup>. This concept of ‘a member in his capacity as such’ is a difficult concept, for courts have not carried it out to its logical conclusion<sup>4</sup>. The reason for this difficulty is that courts have on occasion held that the memorandum and articles of association amount to a contract between the company and a shareholder<sup>5</sup>. It will be submitted in this research paper that the concept of ‘a member in his capacity as such’ cannot be associated with one’s shareholding for s 65(2) applies to all types of companies and not only to companies with share capital and that reference to ‘member’ in the section refers to a member as such and not as a shareholder<sup>6</sup>.

---

<sup>1</sup> 61 of 1973 herein referred to as the Companies Act.

<sup>2</sup> *Hickman v Kent or Romney marsh Sheep- Breeders Association* [1915] 1 Ch 881, *Gohlke & Schneider v Westies Minerale* 1970 (2) SA 685 (A).

<sup>3</sup> Ibid.

<sup>4</sup> Gower: “*Gower’s Principles of Modern Company Law*”, 5<sup>th</sup> ed, 1992, at 285; Blackman: “*What Rights can a Company’s Memorandum and Articles of Association Confer on a Member*” 1992(4) SA Merc. LJ p2.

<sup>5</sup> *Rosslare v Registrar of Companies* 1972 (2) SA 542 D.

<sup>6</sup> See 4.2 (a) below.

iii.

It will also be submitted that the rights and obligations arising from the statutory contract are conferred on members, if they are granted to them in their capacities as members and if they are membership rights and obligations. It will further be submitted that the Companies Act regulates the rights and duties of members and also regulates the rights and duties that can be conferred on a member by the articles<sup>1</sup>. It will further be submitted that the nature of a company determines what are membership rights and not<sup>2</sup>.

It will further be submitted that the extent to which the members can enforce the statutory contract is affected by the nature of the contract arising out of the company constitution. This contract is a creature of statute and it is therefore not governed by the general principles of law of contract. Both Common Law and the Companies Act impinge upon this contract and leave it with strange features. Consensus ad idem is not a requirement of this contract; the contract can be altered without the consent of parties to it; the court does not have the power to order rectification of this contract; the contract cannot be nullified on the ground of an improperly obtained consensus and damages cannot be awarded against the company<sup>3</sup>.

It will also be submitted that the 'outsider rights rule' considerably affects the extent to which the members can enforce this contract. This is so for the rights granted to one in his capacity not as a member cannot be enforced<sup>4</sup>. The 'principle of majority rule' also limits the extent to which the members can enforce the statutory contract when a matter complained of is subject to 'majority rule'. This is so for a person, on becoming a member of a company, undertakes by his contract to be bound by the decisions of the

---

<sup>1</sup> See 2.3 (e) below.

<sup>2</sup> *Heron v Port Huon Fruitgrowers Association* (1922) 30 CLR 315.

<sup>3</sup> See 3.3.2 (a-e) below.

<sup>4</sup> See 5.3 below.

majority, if those decisions are arrived at in accordance with the law, even when they adversely affects his rights as a member<sup>1</sup>.

Courts have applied the '*Foss v Harbottle* rule' to defeat a member's action when a wrong is done to the company and when a matter complained of is subject to 'majority rule'. It will be submitted that the rigidity of this rule is limited by the established exceptions to the rule, which are meant to protect minority members against abuse of power by the majority.

It will be submitted that the memorandum and articles of association confer restricted rights on parties to it, and that the 'outsider rights rule', the 'qua member test', the nature of this contract and the 'principle of majority rule' restrict these rights<sup>2</sup>. These restrictions can be overcome with the shareholders' agreements and the service agreements that are independent of the statutory contract. However these agreements have their own disadvantages. It will be submitted that what is needed is a re-draft of our statutory contract, alternatively a consideration of a simplified method of incorporation, similar to the one followed by the American corporations<sup>3</sup>.

---

<sup>1</sup> Trollop JA in *Sammel v President Brand Gold Mining Co.* 1969 (3) SA 629 (A) at 678.

<sup>2</sup> See chapter 7 below.

<sup>3</sup> Ibid.

## **CHAPTER 1: INTRODUCTION.**

### **1.1. Subject of study:**

The main subject under study is the legal binding effect of the statutory contract arising out of the memorandum and articles of association. It is important to look at the nature of this contract in order to understand the extent to which it has a legal binding effect on the parties to it. S 65(2) of the Companies Act<sup>1</sup> gives the memorandum and articles of association a contractual binding effect on the company and its members. It is further important to understand who the members in the company are, how membership is acquired and what are membership rights and obligations.

The contracts arising out of the memorandum and articles of association and the extent to which the parties to these contracts can enforce them will be discussed in order to understand the extent to which these documents have a legal binding effect. The impact of the 'outsider rights rule' and the '*Foss v Harbottle* rule' will also be looked at as a way of determining the extent to which these documents are legally binding.

### **1.2. Purpose of study:**

A detailed research is done on the statutory contract arising out of the memorandum and articles of association as a way of determining whether these documents serve the rights and obligations of participants in the company in an efficient manner. It will be submitted that the statutory contract has restrictions that limit the extent to which the members can enforce the rights and obligations flowing from it. It will therefore be submitted that what is needed is a redraft of the present statutory contract section or a consideration of a simplified method of incorporation followed in the American system, which regulates the relationship amongst participants in a corporation in an efficient way.

---

<sup>1</sup> 61 of 1973, herein referred to as the Companies Act.



### **1.3 Scope of study:**

The statutory contract of a company incorporated under the South African law is the main subject under study. The statutory contracts of systems following incorporation by way of the corporate constitution i.e. the English and the Australian systems will also be studied. The reason for considering the English system is because our company law is English based. The Australian system is considered for the developments that have taken place with regard to their statutory contract. Incorporation under these systems will be contrasted to that under the American system. The common law and statutory law positions and views of the judiciary and academic writers in our law and the other systems on the subject will be looked at.

## **CHAPTER 2: MEMBERSHIP IN A COMPANY:**

### **2.1. INTRODUCTION:**

A company is in law a legal person, and legal personality is conferred upon it on its incorporation<sup>1</sup>. Even if it is a person in law, separate from its members, it is also an association of human functionaries comprising of members, shareholders, directors etc. Some human functionaries are bound to the company and to each other contractually in their capacities as members, to observe all the provisions of the articles and memorandum of association<sup>2</sup>.

Acquisition of membership in a company is provided for under s 103(1)-(4) of the Companies Act. Depending on the type of company one is faced with, membership may be associated with the proprietary interest that a member has in the form of shares. In a company with share capital, membership is associated with one's shareholding, in that all the members are also shareholders<sup>3</sup>. However, in a company with no share capital, membership is independent of one's shareholding for the company has no shareholders.

### **2.2. ACQUISITION OF MEMBERSHIP:**

#### **2.2. (a) The subscribers of a company's memorandum.**

In terms of s 103(1) of the Companies Act, the subscribers of a company's memorandum are deemed to have agreed to become members of the company upon its incorporation and their names must be entered in the register of members. The effect of the deeming

---

<sup>1</sup> s 64 of the Companies Act 61 of 1973, herein referred to as the Companies Act.

<sup>2</sup> s 65(2) of the Companies Act which states that "[t]he memorandum and articles shall bind the company and members thereof to the same extent as if they respectively had been signed by each member, to observe all the provisions of the memorandum and articles, subject to the provisions of this Act".

<sup>3</sup> s 52(2)(b) of the Companies Act requires the memorandum to state the number of shares that each subscriber undertakes to take up. See also s105(1)(a) of this Act which requires every company with share capital to enter in its register of members, the names of members and a statement of shares issued

provision is that the subscribers become members even where the company omitted to add their names in the register of members and even before shares have been allotted to them, for neither entry in the register nor allotment of shares is a condition precedent to becoming a member<sup>1</sup>. This is the case even if the register of members serves as prima facie proof of one's membership<sup>2</sup>, for the Companies Act allows for its rectification e.g. where the name of a member was without sufficient cause entered in or omitted from the register<sup>3</sup>.

The deeming proviso has the same effect in other systems. The effect of the deeming provision has in English law been held to make a subscriber a member even where the company omitted to include him in the register of members<sup>4</sup>. In *Alexander v Automatic Telephone Co.*<sup>5</sup> it was held that a subscriber would still be a member even if the company neglected to enter his name in the register of members<sup>6</sup>.

The subscribers of a company's memorandum are required by the Companies Act to subscribe for a certain number of shares<sup>7</sup>. It is submitted that signing the memorandum imposes an obligation on them to take up the shares subscribed for<sup>8</sup>. Upon allotment of shares, the subscribers, who became members upon incorporation, become both members

---

to each member.

<sup>1</sup> See *Moosa v Lalloo* 1957 4 SA 207 D and *Sweet v Finbain* 1984 (3) SA 441 (W).

<sup>2</sup> s 109 of the Companies Act.

<sup>3</sup> s 115 of the Companies Act. See also *Botha v Fick* 1995 (2) SA 750 (A) where the court ordered rectification of the register and in considering the application for rectification, the court regarded itself as having a wide discretion in ensuring that fairness and justice are upheld by fixing the obligations of membership upon persons whom such obligation justly and equitably rest. At 780C-E.

<sup>4</sup> *Baytrust Holdings Ltd. v I.R.C.* [1971] 1333 at 1355-1356, See also Gower: "Gower's Principles of Modern Company Law", 3<sup>rd</sup> ed. 1969 at 373.

<sup>5</sup> [1900] 2 Ch. 56.

<sup>6</sup> At 445B-E.

<sup>7</sup> s 52(2)(b) requires each subscriber to take not less than one share.

<sup>8</sup> *Long 's Executrix v Rosemount Gold Mining Syndicate Ltd.* 1905 TS 563, where it was held that "when a person signs the articles of association of the company he undertakes to take up the shares for which he subscribes, and if the company is afterwards placed in liquidation, and his obligation has not been discharged, he is liable in respect of those shares and must be placed upon the list of contributories in regard to such of them as have not been paid for" at 565. Note that the case was decided before the 1973 Companies Act and s 92(1) of this Act prohibits a company from allotting shares before their full issue price or some other consideration has been paid.

and shareholders. “But if the company allots all its authorised share capital to others, the subscribers do not become members nor shareholders”<sup>1</sup>

**2.2. (b) Agreeing to become a member and have one’s name entered in the register of members:**

Membership can also be acquired in terms of s 103(2), after acquiring shares through transfer or allotment, by simply agreeing to become a member and have one’s name entered in the register of members<sup>2</sup>. Unlike the subscribers who become members upon incorporation of a company irrespective of whether they have been included in the register or not, a person who become a member in terms of s 103(2) does so once he has consented to membership and his name has been included in the register of members<sup>3</sup>.

Even if both consent and entry in the register are requirements for membership in terms of s 103(2), where entry was omitted, the register can be rectified in terms of s 115. But where an express or implied consent was not obtained, the person cannot be said to be a member. Therefore “the unilateral act of the company in wrongfully placing a person in the register of members does not make one a member”<sup>4</sup>. A person who never consented to become a member can nevertheless be estopped from denying being a member, if he was aware that his name was placed in the register without his consent and if he failed to take reasonable steps to rectify the register<sup>5</sup>.

---

<sup>1</sup> *Baytrust Holdings v I.R.C.* op cit. where Plowman J referred to Gower who stated that a subscriber automatically becomes a member and a holder of shares except where “the company not only fails to allot any shares to the subscriber but allots them all to other persons. Clearly these other persons cannot be deprived of their shares- in any case which of them should be deprived?..” at 79.

<sup>2</sup> For allotment and transfer of shares, see 2.3(c)(i)-(ii) below

<sup>3</sup> *Doornkop Sugar Estate Ltd. v Maywell & Others* 1926 WLD 127, *Waja v Orr and Another* 1929 T.P.D. 865.

<sup>4</sup> Blackman: “*Joubert*”, LAWSA, vol.4, part2, par. 1 F.N 5.

<sup>5</sup> Blackman: *Ibid*, Beuthin, “*Basic Company Law*”, 127 who stated that such a person can even be denied the right to rectify the register.

**2.2. (c) A ‘nomine officii’ member:**

In terms of s 103(3) a company shall enter in the register as a member, ‘nomine officii’, of a company, the name of any person who submits proof of his appointment as the executor, administrator, trustee etc. A ‘nomine officii’ member is not defined in the Companies Act, but its meaning can be derived from the provisions of s 103(3). For the purpose of s103(3) a ‘nomine officii’ member is a person in a representative capacity who acquires shares and therefore membership through the operation of the law e.g. as an executor of the deceased member’s estate. Even though a ‘nomine officii’ member is a member in terms of s 103(3), true ownership of shares vests with the represented minor, insolvent or the deceased estate as the case may be.

To become a member, a ‘nomine officii’ member is required to submit proof of his appointment as an executor, curator, guardian, or trustee as the case may be, and upon submission of such proof, the ‘nomine officii’ member will be entered in the register of members and be deemed to be a member for the purpose of the Act<sup>1</sup>. In terms of s 103(3) a ‘nomine officii’ member can only be a member subject to the provision of the Companies Act and the articles of a company. It has been submitted that the proviso cannot be interpreted to mean that the articles of a company can completely override the provisions of s 103(3)<sup>2</sup>. It has also been held, where articles place discretion on the part of directors to register a ‘nomine officii’ member, that the discretion should be exercised bona fide in the interest of the company as a whole<sup>3</sup>.

---

<sup>1</sup> s 103(3) of the Companies Act.

<sup>2</sup> Milne et al: “Henochsberg on Companies Act,” at 203.

<sup>3</sup> Treasure Trove Diamond Ltd v Hayman 1928 AD 464 at 479.

## **2.2 (d) Share warrants:**

In a public company with share capital, the holder of a share warrant can also acquire membership<sup>1</sup>. In terms of s 101(1) a public company with share capital may, if so authorised by its articles, issue share warrants in respect of its fully paid up shares<sup>2</sup>. A share warrant is a form of a negotiable instrument entitling the holder thereof to shares or stock specified therein and is transferable by mere delivery<sup>3</sup>. A holder of a share warrant has to be a holder in good faith and will therefore be a legal owner irrespective of whether the predecessor had a defective title or no title at all<sup>4</sup>.

The holder of a share warrant shall upon surrender of it, be deemed to be a member of a company and the previous owner of shares shall be struck out of the register of members<sup>5</sup>. A holder of a share warrant will become a shareholder on its delivery and a member only when his name is entered into a register of members<sup>6</sup>.

The position in English law on share warrants is provided for in s 188 of the Companies Act 1985. This section, like the South African s 101(1), provides for the issue of share warrants in respect of fully paid up shares. However share warrants are in English law hardly ever issued for they are seen as unpopular by companies and investors and their issue is seen to conflict with the provisions of the Companies Act e.g. the provisions requiring disclosure of share ownership<sup>7</sup>.

In Australian Law the issue of share warrants is prohibited by s189 of the Corporations

---

<sup>1</sup> s 103(4) of the Companies Act. Share warrants cannot be issued in a private company with share capital for s20(1) of the Companies Act requires the articles to restrict free transferability of shares.

<sup>2</sup> s 92(2) prohibits the allotment of shares before they are fully paid up for. Shares mentioned in the share warrant have to be fully paid up for, because mere delivery of a share warrant passes ownership in shares.

<sup>3</sup> s 101(2) of the Companies Act. See also *Randfontein Estate Gold Mining Co. Ltd. v Custodian of Enemy Property* 1923 AD 576 at 582.

<sup>4</sup> *Randfontein Estate Gold Mining Co. Ltd. v Custodian Enemy Property*, op cit. at 582.

<sup>5</sup> s 103(4) of the Companies Act.

<sup>6</sup> Note that in terms of s 103(4), a holder of a share warrant can acquire membership for all purposes or membership for the purposes specified in the articles.

<sup>7</sup> Gower: "Gower's Principles of Modern Company Law", 5<sup>th</sup> ed. at 384-5.

Law<sup>1</sup>. It is submitted that our Companies Act, like the Australian Corporations Law, should prohibit the issue of share warrants, for their negotiability can enhance avoidance of payment of stamp duty as required by the Stamp Duty Act<sup>2</sup>. However the legislature has given the Treasury authority to make regulations in regard to matters having direct or indirect bearing upon currency, banking or exchanges in terms of the Currency Exchange Act<sup>3</sup>. The regulations include the blocking, attachment, interdict or forfeiture of money or goods as referred to in the regulations<sup>4</sup>. “Some doubts have been expressed as to the validity of the relevant regulations, but inasmuch as there is no outright prohibition against the issue of share warrants, but only a qualified prohibition, it would seem that there is no irreconcilable conflict between s 101 of the Companies Act and the exchange control regulations”<sup>5</sup>. It is thus submitted that an outright legislative prohibition on the issue of share warrants, like in the Australian system, would be the better solution.

### **2.3 MEMBERS VERSUS SHAREHOLDERS.**

In a company with share capital the terms ‘member’ and ‘shareholder’ have been used interchangeably in that a member has been referred to as a person whose legal relationship with the company arises by virtue of his shareholding<sup>6</sup>. Gower defines a shareholder as “someone who holds shares in a company and who is therefore a member of a company”<sup>7</sup>. The question that arises here is whether a member and a shareholder refer to one and the same person and if this is the case, then reference to ‘members’ in s 65(2) would also refer to ‘shareholders’.

---

<sup>1</sup> Of 1985. See also Ford & Austin: “Principles of Corporation Law”, 7<sup>th</sup> ed. at 787.

<sup>2</sup> 77 of 1968.

<sup>3</sup> 9 of 1933

<sup>4</sup> s 9(2)(b)(i) of the Currency Exchange Act.

<sup>5</sup> Cowen: “The Law of Negotiable Instruments in South Africa”, 5<sup>th</sup> ed. at 257-8.

<sup>6</sup> Cilliers et al: “Corporate Law”, 2<sup>nd</sup> ed. at 234.

<sup>7</sup> Gower: op cit. glossary of terms, xciii.

It will be submitted in this thesis that this is not the case, for even if members in a company with share capital are also shareholders, shareholders are not necessarily members<sup>1</sup>.

### **2.3. (a) Acquisition of shareholding:**

In a company with share capital, shares can be acquired in two ways i.e. through a contract of allocation (herein referred to as allotment of shares) and through purchase or donation (herein referred to as the transfer of shares). It is important to understand the nature of a share before addressing the ways on acquisition of shares.

### **2.3. (b) The nature of a share:**

In terms of s1 of the Companies Act, a share “in relation to a company, means a share in the share capital of a company and (it) includes stock”. To have a share in the share capital of a company does not imply ownership of the assets, for such ownership vests with a company as a legal person, separate from members who comprise of it<sup>2</sup>.

Courts on the other hand, have defined a share as “a bundle, or conglomerate of personal rights entitling the holder thereof to a certain interest in the company, its assets and dividends”<sup>3</sup>. In *Borland Trustee v Steel Brothers & Co. Ltd*<sup>4</sup> 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 interest in the second...”<sup>5</sup>. The definition by Farwell J is said to reflect “the dual nature of a shareholder’s position” which on one hand consists of the shareholder’s obligation to pay the share price before allotment of

---

<sup>1</sup> See 2.3. (e) below.

<sup>2</sup> *Standard Bank of Ltd. v Ocean Commodities Inc.* 1983 (1) SA 276 (A) at 289H-290A, see also *Attorney for Ireland v Jameson* [1904] 2 I.R 644 where Kenny J stated that “no shareholder has a right to any specific portion of the company’s property ..” at 671.

<sup>3</sup> *Standard Bank of SA v Ocean Commodities Inc.* op cit. at 288H, *Randfontein Estate v The Master* 1909 TS 978 at 981, *Liquidators Union Share Agency v Hatton* 1927 AD 240 at 250-251, *De Leef Family Trust & Others v CIR* 1993 (3) SA 345 (A) at 356G-J.

<sup>4</sup> [1901] 1 Ch. 279.

<sup>5</sup> At 288.



shares, and on the other hand the shareholder's interest in the form of rights e.g. the right to receive dividends when declared<sup>1</sup>.

Farwell J in *Borland Trustee*' case also pointed out that an interest in a share is made up of "a series of mutual covenants entered into by all shareholders inter se... (and that) the contract contained in the articles of association (and memorandum) is one of the original incident of a share"<sup>2</sup>. Reference to this contract as the original incident of a share is misleading, for it implies that this contract applies only to companies with share capital and binds parties to it in their capacities as shareholders. It is submitted that this is not the case, for s 65(2) of the Companies Act specifically makes reference to 'members' and not 'shareholders'.

Perhaps a better definition of a share, which will embrace the rights and obligations flowing from the statutory contract in the memorandum and articles of association, is that of Lord Russell of Killowen in *I.R.C. v Crossman*<sup>3</sup>. He defined a share as "the interest of a person in the company, that interest being composed of rights and obligations which are defined by the Companies Act and by the memorandum and articles of the company"<sup>4</sup>. The rights and duties accruing to a shareholder and arising out of the nature of a share will, if defined in terms of the Companies Act, articles and memorandum of association, include the rights and duties flowing from the statutory contract as contained in s 65(2) and will bind shareholders only in their capacities as members.

---

<sup>1</sup> *Beuthin*: op cit. at 133.

<sup>2</sup> At 288.

<sup>3</sup> [1937]A.C 26.

<sup>4</sup> At 66.

### **2.3. (c) Ways of acquisition of shares:**

#### **2.3. (c) i. Allotment of shares:**

A contract in terms of which members of the public acquire shares from the company is referred to as a contract of allotment of shares. This contract is governed by general principles of law of contract and allotment of shares is by way of offer and acceptance. Allotment is defined as “neither more or less than the acceptance by the company of the offer to take shares”<sup>1</sup>.

The procedure for allotment of shares is that the company invites members of the public to subscribe for shares and the invitation can be in form of an application form attached to a prospectus<sup>2</sup>. A prospectus is merely an invitation to subscribe for shares and it does not amount to an offer to purchase shares, for “it does not contain all the terms of the proposed contract. The identity of the applicant is still unknown, and it is not known how many shares ... he will apply for”<sup>3</sup>. An application by one to subscribe for a number of shares is merely an offer, and if the company accepts it, a binding contract will exist once acceptance by the company comes to the notice of the applicant, even before the issue of shares to him<sup>4</sup>.

Allotment of shares does not “make the person who has thus agreed to take shares, a member from that moment (i.e. moment of conclusion of the contract of allotment), all that it does is simply this- it constitutes a binding contract under which a company is bound to make complete (the) allotment of specified number of shares”<sup>5</sup>. The allottee only acquires the right to be included in the company’s register of members and can exercise this right by consenting to membership and by agreeing to be included in the

---

<sup>1</sup> *Nicol’s case: Tufnell & Ponsoby’s case (In re Florence Land and Public Works Co. (1885) 29 ChD. 421.*

<sup>2</sup> See Cilliers et al: op cit. at 241.

<sup>3</sup> Pennington: “Company Law”, 4<sup>th</sup> ed. at 256.

<sup>4</sup> *Moosa v Lalloo*: op cit. at 219.

<sup>5</sup> *Nicol’s case: Tufnell & Ponsoby’s case*, op cit. at 426.

register of members<sup>1</sup>. Therefore upon conclusion of a contract of allotment of shares, the applicant will be allotted a certain number of shares and will acquire the position of a shareholder. It is only once the allottee has consented to be included in the register of members that he will become a member.

### **2.3. (c) ii. Transfer of shares:**

Shares can also be acquired from an existing shareholder, either through purchase or donation. A share is a movable property and is freely transferable<sup>2</sup>, except where restrictions are provided for in the articles. In a public company with share capital, the transfer of shares can be restricted but this is not normally done. A private company with share capital is required to place restrictions on transfer of shares, but the Companies Act does not specify how the restrictions should be done<sup>3</sup>. Restrictions in articles can be in such a way that the directors are given discretionary powers to accept or refuse registration of a transfer of shares, or the articles can contain a right of pre-emption or of first refusal, in terms of which a member is required to offer shares to an existing member before offering them to an outsider<sup>4</sup>.

Where directors are given discretionary powers, they have to exercise their power bona fide in the interest of the company as a whole<sup>5</sup>. Where the articles contain a right of pre-emption or first refusal and a member acts contrary to the provision by transferring shares to an outsider, then the transaction will be in breach of the statutory contract contained in s 65(2) and the transfer will therefore be void.<sup>6</sup>

“ In regard to shares, the word transfer, in its full and technical sense, is not a single act but consists of series of steps namely, an agreement to transfer, the execution of the deed

---

<sup>1</sup> Pretorius et al: “Hahlo’s South African Company Law Through The Cases”, 5<sup>th</sup> ed. at 249.

<sup>2</sup> s 91 of the Companies Act.

<sup>3</sup> Beuthin: op cit. at 27-28.

<sup>4</sup> Table A, Schedule 1, art. 11- 13, & Table B, Schedule 1, art. 13-14.

<sup>5</sup> *In re Smith & Fawcett Ltd.* [1942] Ch. 304 at 308.

<sup>6</sup> Gower: op cit. at 399, *Hunter v Hunter* [1936] A.C 222 HL.

of transfer, and finally the registration of the transfer by the company”<sup>1</sup>. A company shall not register a transfer of shares unless a proper instrument of transfer has been delivered<sup>2</sup>. The duty to register a transfer lies with the transferee who after signing the instrument, is to deliver it with a share certificate to the company for registration<sup>3</sup>, but s 133(3) of the Companies Act also empowers the transferor to register the transfer so as to release himself from any obligations attached to the shares.

The question that is to be addressed here is, what is the position of the transferor and the transferee before registration of the transfer and when does the transferee become a member. A company shall in terms of s 133(1) of the Companies Act register a transfer of shares by entering in the register of members, the name and address of the transferee and the description of shares transferred to him. It seems that the implication of s 133(1) is that prior to registration of the transfer, the transferor continues to be a member and a shareholder and only ceases to do so once the transfer is registered. However this is not the case, for ownership in shares passes by way of cession independent of registration.

In *Botha v Fick*<sup>4</sup> it was held that the cession of rights which exist independently of a written instrument recording it, may as a rule be effected without either physical delivery of a share certificate to the cessionary nor proof that the cedent has exerted all effort to divest himself of the right<sup>5</sup>.

<sup>1</sup> *Inland Property Development Corp. v Cilliers* 1973 (3) SA 245 (A) at 251. See also Blackman: op cit. par 225.

<sup>2</sup> S 133(2) of the Companies Act.

<sup>3</sup> Cilliers et al: op cit. at 280.

<sup>4</sup> 1995 (2) SA 750 (A)

<sup>5</sup> At 778 G-F. See also Van Der Merwe & Pienaar: “The Law of Property”, Annual Survey, 1995 at 316-7 for a discussion on the case; See also *Kalil v Decotex* 1988 (1) SA 943 (A) where Corbett JA pointed out that ownership in shares can be transferred by way of cession provided that there is necessary intent to pass ownership, at 970-971; See also *Standard Bank of SA v Ocean Commodities*, op cit. at 180. Note that it was once necessary that a share certificate be delivered with the transfer form. Thus the rule in *Labuschagne v Denny* 1963 (3) SA 538 to this effect was reaffirmed in *Trust Bank of Africa v Standard Bank of SA* 1968 (3) SA 166 at 185.

It follows therefore that, once an agreement to transfer shares is concluded, the transferee becomes a shareholder independent of delivery of the share certificate or registration of the transfer<sup>1</sup>. However it is only once the transferee has consented to be included in the register of members that he will become a member<sup>2</sup>.

### **2.3. (d) Beneficial shareholder and Nominee shareholder:**

The terms ‘beneficial and ‘nominee’ holders of shares are not defined in s1 of the Companies Act, but s 140A(1) of the Companies Amendment Act<sup>3</sup> defines beneficial interest in relation to a security as, “the right or entitlement to receive any dividend or interest payable in respect of that security”. From the provision of s 140A(1), it is clear that the beneficial shareholder is the true owner of shares and has an entitlement to receive dividend when declared. Trollip JA defined a nominee shareholder in *Sammel v President Brand Gold Mining Co. Ltd.*<sup>4</sup> as a person who is nominated by the transferee to hold shares in his own name, on behalf of the transferee and as an agent of the transferee<sup>5</sup>. In *Oakland Nominees (Pty) Ltd. v Gelria Mining & Investment (Pty) Co. Ltd.*<sup>6</sup> a nominee shareholder was defined as “an agent with the limited authority: He holds (shares) on behalf of his nominator or principal, from whom he takes instructions... The principal whose name does not appear on the register is usually described as the beneficial owner”<sup>7</sup>. Only the nominee shareholder appears in the company’s register of allotment of share. But with s 140A(3) of the Companies Amendment Act, the nominee shareholder is required to disclose to the company the identity of the beneficial

---

<sup>1</sup> *Botha v Fick*, op cit. at 778G-I.

<sup>2</sup> s 103(2) of the Companies Act.

<sup>3</sup> 17 of 1999.

<sup>4</sup> 1969(3) SA 629 (A).

<sup>5</sup> At 666D.

<sup>6</sup> 1976 (1) SA 441 A.

<sup>7</sup> At 453A.

shareholder and the number and class of shares held on his behalf, at the end of every three months period after the 30<sup>th</sup> June 1999<sup>1</sup>.

The question that arises here is, who between the nominee and beneficial holder of shares is the company's shareholder and member. The relationship between the two is that of an agent and principal. The nominee shareholder will be the registered holder of shares, but true ownership will vest with the beneficial holder of shares. In terms of s 255 of the Companies Act, the Minister of Trade & Industry can go behind the register to determine the true owner of shares, but with s 140A(3) of the Companies Amendment Act the company will know who the true owner of shares is, for the nominee shareholder is required to disclose such information. Failure to disclose such information by the nominee shareholder renders him guilty of an offence<sup>2</sup>. It follows that a nominee shareholder is only a registered holder of shares, who exercises rights attaching to shares as an agent on behalf of the beneficial shareholder. The true owner of shares, who will now be known to the company, is the beneficial holder of shares.

As to membership, all members in a company with share capital are shareholders in that the Companies Act requires such companies to enter in their register of members, the names, address and a statement of shares issued to each member<sup>3</sup>. It follows therefore that a nominee shareholder, if registered in the company register of members, will be a

---

<sup>1</sup> The information is required to be in writing and to be furnished within seven days of the end of the three month period. Note that prior to the Companies Amendment Act, companies only concerned themselves with registered shareholders and had no association nor knowledge of beneficial shareholders. See *Sammel v President Brand Gold Mining Co. Ltd.* 1969 (3) SA 629 (A). at 666F, see also *Oakland Nominees Ltd. v Gelria Mining & Investment (Pty) Co. Ltd* 1976 (1) SA 441 (A) at 453A.

<sup>2</sup> S 140A (9) of the Companies Amendment Act. "An obligation on nominee companies to identify beneficial shareholders is essential in the maintenance of free, fair and acceptably regulated securities markets. It is wholly consistent with South Africa's progress from a secretive and narrowly empowered society to an open market democracy where transparency and accountability have become of paramount importance" This will also do away with problems of non disclosure e.g. inability of minority shareholders to detect a change of a controlling shareholder and could be prejudiced if a new controlling shareholder is an asset stripper. See The Memorandum on the objects of the Companies Amendment Bill, 1999 on Disclosure of beneficial interests in securities.

<sup>3</sup> See s 105(1)a & s 52(2)b.

member, but exercise membership rights and duties as an agent on behalf of the principal beneficial shareholder.

**2.3. (e) Rights of a members \ shareholders:**

One is a member of a company if his name is included in the register of members with his consent, except for subscribers of the memorandum, who become members upon incorporation of the company even before entry of their names in the register. A shareholder on the other hand, is someone who holds shares in the company and the rights in shares have passed to him either through subscription, allotment or transfer of shares.

The Companies Act and articles of association regulate the rights and duties enjoyed by members and shareholders. A member in a company has the following rights and duties:

- i. The right to receive notices of meetings : s185 (1) a.
- ii. The right to call meetings : s 180(2).
- iii. The right to attend meetings in person  
or by proxy representation : s 189.
- iv. The right to vote at meetings : s 193(1)
- v. The right and duty to enforce all the  
provisions of the memorandum and articles : s 65(2)

The Companies Act clearly states that these rights are of a member and not of a shareholder.

A shareholder on the other hand has the following rights and duties:

- i. The right to receive dividends when declared. : Table A, Schedule 1 art. 85 &  
Table B, Schedule 1 art. 84.
- ii. The right to participate in the distribution of : Table A, Schedule 1 art. 107 &  
assets upon liquidation of a company. : Table B, Schedule 1 art. 105
- iii. The duty to fully pay up for shares before  
allotment . : S 92.

It is submitted that members and shareholders in a company are not necessarily one and the same person. Members are also shareholders in that members are required to hold shares. But shareholders (true owners of shares) are not necessarily members in that the true owner of shares can appoint someone as the registered holder of shares. Even if members are also shareholders in a company with share capital, reference to the term 'member' in s 65(2) of the Companies Act does not refer to a member in his capacity both as a member and shareholder, but it refers to a member in his capacity only as a member.



## **2.4 DIRECTORS:**

### **2.4. (a) Definition & Nature of office:**

Every company is required by the Companies Act to have a director. A public company is required to have at least two directors and at least one director for a private company<sup>1</sup>. For the purpose of the Companies Act, a director “includes any person occupying the position of a director, or alternate director of a company, by whatever name he may be designated”<sup>2</sup>. Although the definition serves to identify a director, it says very little about the director’s duties<sup>3</sup>.

The directors are from time to time referred to as agents, trustees or managing partners of the company<sup>4</sup>. They are referred to as agents for they act on behalf of the company and thus incur no liability except where they act outside their scope of power or where they expressly assume liability<sup>5</sup>. Their position is similar to that of a managing partner for they are empowered to manage the company’s business, and they are referred as trustees for they must apply the company’s property for a specified purpose and for the company’s benefit<sup>6</sup>.

Directors are divided into the executive (inside, management) directors, who are under a service contract to work full time for the company, and the non- executive (outside or non management) directors, who are not under a service contract and work part time for the

---

<sup>1</sup> s 208 of the Companies Act.

<sup>2</sup> s 1 of the Companies Act.

<sup>3</sup> Milne et al: op cit. at 364, Benthin: op cit. at 203.

<sup>4</sup> Pretorius et al: op cit at 327.

<sup>5</sup> Blackman: op cit. at par. 52.

<sup>6</sup> Ibid.

company<sup>1</sup>. The terms of appointment of directors are contained in the articles of association or in a service contract in the case of full time directors.

#### **2.4. (b) Contractual relationship between the company and its directors:**

Although the terms of appointment of directors are contained in articles of association, neither the articles nor memorandum of association constitute a contract between the company and directors as such<sup>2</sup>. The only time a contract exists between the company and a director in his position as such is when the two entered into a contract of employment or a service contract. The service contract is independent of the articles except where a term in the articles is incorporated in the service contract. Where this is the case, and a company breaches the terms incorporated in the service contract, a director can then sue the company for breach of the service contract and not for breach of the contract arising out of the articles.

It is therefore submitted that even if directors can hold shares in a company and consent to membership, they are not parties to the statutory contract arising out of s 65(2) when they act in their capacities as directors, unless when they act in their capacities as members and not shareholders.

#### **2.5 CONCLUSION:**

A member in a company is person<sup>3</sup> who with his consent, has been entered in the register of members, except for subscribers of the memorandum, who are in law members upon incorporation of a company even where their names have been omitted from the register

<sup>1</sup> Pretorius et al: op cit. at 344, Beuthin: op cit. at 209.

<sup>2</sup> *De Villiers v Jacobsdaal Saltworks* 1959 3 SA 873 (O) at 877.

<sup>3</sup> A company cannot be a member of itself, see *Trevor v Whitworth* (1887) 12 App Cas. 409 (HL) and a company cannot be a member of a company which is its holding company, see s 39(1) of the Companies Act, but a company can be a member of another company, see *Re Bamed's Banking Co. Ex*

of members. In a company with share capital, members are also shareholders but it does not necessarily follow that shareholders are members. One can be a true holder of shares (beneficial shareholder) without being in the company's register of members.

Membership in a company with share capital can be acquired by subscribers of the memorandum, the allottees and transferees who consented to be included in the register of members and the 'nominee officii' members who received membership through the operation of the law. Members in a company with no share capital are the subscribers to the memorandum and persons who with their consent are included in the register of members. The statutory contract that arise out of the articles and memorandum of association, binds the company and its members in their capacities as such and not in their capacities as shareholders or directors.

## **CHAPTER 3: THE NATURE AND EFFECT OF THE MEMORANDUM AND ARTICLES OF ASSOCIATION.**

### **3.1. INTRODUCTION:**

S 65(2) of the Companies Act provides that “the memorandum and articles of association shall bind the company and members thereof to the same extent as if they respectively had been signed by each member, to observe all the provisions of the memorandum and articles, subject to the provisions of this Act”. This section and its resembling sections in other systems<sup>1</sup> have been subject to considerable judicial and academic controversy without difficulties inherent in their interpretation being removed<sup>2</sup>.

It was pointed out in the previous chapter that s 65(2) binds the company and members thereof to observe all the provisions of the memorandum and articles of association, and the concept of membership was looked into to determine who the members in a company are and how membership is acquired. It is important in this chapter to look at the controversy surrounding the interpretation of the nature and effect of the memorandum and articles of association before an analysis is given on the binding effect of the documents.

---

<sup>1</sup> S 14 of the English Companies Act of 1985, previously s 20(1) of the 1948 Companies Act & s 33(1) of the Australian Uniform Companies Act of 1961, presently s 180(1) of the Australian Corporations Law of 1985.

<sup>2</sup> Astbury J in *Hickman v Kent or Romney Marsh Breeder's Association* 1915 1 Ch 881 at 890 pointed out that the exact nature of the covenant arising out of s 14 has given rise to considerable discussion and that it is even now difficult to define. Refer also to *Browne v La Trinidad* (1887) 37 ChD 1(CA) at 14, and *Beattie v E & F Beattie Ltd.* 1938 Ch. 708 (CA) at 721 where Lord Greene MR said that s20 of the Companies Act has been the subject of considerable controversy in the past and may well be that

### **3.2 BRIEF HISTORICAL BACKGROUND OF THE MEMORANDUM & ARTICLES OF ASSOCIATION.**

The memorandum and articles of association originate from the English “deed of settlement”, i.e. a written document in terms of which an unincorporated company was constituted and if signed by all members, the deed would bind them contractually to each other<sup>1</sup>. The deed of settlement was later abandoned and the memorandum and articles of association became the constitution of an incorporated company, and when registered, the documents bound the company and members thereof as if they had been signed and sealed by each member and contained covenants by each to observe the provisions of the memorandum and articles of association<sup>2</sup>.

The English model of the memorandum and articles of association as the constitution of an incorporated company, served as an example of the South African company legislation and the corporate legislation of other systems, which derived their statutes from the English model<sup>3</sup>. In all the systems which followed the “contractarian - model of corporate constitution”<sup>4</sup>, the memorandum determines the nature and scope of the company whereas the articles determine the manner in which the internal affairs of the company are to be administered<sup>5</sup>. The constitution of a company as a contract is, in our law, contained in s 65 (2) of the Companies Act.

As opposed to the “contractarian - model of corporate constitution”, incorporation in other systems has been simplified and is not a matter of corporate constitution as a

---

there will be controversy about it in the future.

<sup>1</sup> Cilliers et al: “Corporate Law”, 2<sup>nd</sup> ed. at 73, Gower: “Gower’s Principles of Modern Company Law”, 5<sup>th</sup> ed. at 283 & Pennington: Company Law, 4<sup>th</sup> ed. at 56. S7 & 8 of the Joint Stock Companies Act of 1844 which introduced incorporation of companies by simple registration and retained the deed of settlement.

<sup>2</sup> The Joint Stock Companies Act of 1856 s17 & 20.

<sup>3</sup> Refer to footnote 1 on page 21 above.

<sup>4</sup> A phrase used by Welling to refer to systems which follow incorporation by way of corporate constitution as a contract, in “Corporate Law in Canada, The Governing principles”, 2<sup>nd</sup> ed. 1991, at 60

<sup>5</sup> Cilliers, op cit. at 61, Beuthin: “Basic Company Law”, 2<sup>nd</sup> ed. at 65, Pretorius et al, “Hahlo’s cases and materials on company law”, 3<sup>rd</sup> ed. 1987, at 104, Gower, op cit. 14-15, Pennington, op cit. at 31, Ford & Austin: “Principles of Corporation Law”, 7<sup>th</sup> ed. 1995, at 158.

contract. Incorporation in these systems requires only the filing of articles of incorporation, which are public documents and are general in nature, and the adoption of the bylaws, which are not public documents and are a set of rules governing the internal affairs of a corporation<sup>1</sup>. It is the bylaws rather than the articles of incorporation that are often been referred to as the contract between the company and its members and among members themselves<sup>2</sup>. A comparison of these different systems of incorporation will be addressed in the last chapter of this thesis.

### **3.3. THE NATURE AND EFFECT OF THE MEMORANDUM AND ARTICLES OF ASSOCIATION.**

#### **3.3.1. Contractual in nature :**

It has already been settled in our law, both by courts and academic writers, that the memorandum and articles of association are contractual in nature<sup>3</sup>. Potgieter J in *De Villiers v Jacobsdal Saltworks (Pty) Ltd.*<sup>4</sup> pointed out that “ the articles constitutes a contract between the members inter se and between the company and members, but only in their capacity as members”<sup>5</sup>. The contractual force of the documents was also

---

<sup>1</sup> Waterman III & Carroll Jr. “The Iowa Business Corporation Act: Corporate Governance Through The Articles Of Incorporation & Bylaws”, Drake Law Review, 1991 , 805 at 806 -7 & 809, Naffziger, “The Law of American Business Organisation”, 1984, at 295, Hamilton, “The Law of Corporations”, 1986, at 47. This form of incorporation is followed in America by the states that are incorporated under the Model Business of Incorporation Act of 1079 , recently as the Revised Model Business Corporation Act of 1984 e.g. Delaware, Iowa etc. and in Canada under the Canadian Business Corporation Act of 1995.

<sup>2</sup> Hamilton , *ibid.* , *Elsie D Parmer v S. E. Chamberlin* 27 ALR 2d 416 ( 5<sup>th</sup> Cir. 1951) at 422 & 423, *Bechtold v Coleman Realty* 79 A. 2d 661 (1951) at 663.

<sup>3</sup> *De Villiers v Jacobsdal Saltworks (Pty) Ltd.* 1959 (3) SA 873(O) at 876H, *Grundling v Beyers & Others* 1967(2) SA 131(W) at 138G, *Gohlke & Schneider v Westies Minerale (Edms) Bpk* 1970 (2) SA 685 (A) at 692 E-F, *Rosslare (Pty) Ltd. v Registrar of Companies* 1972 (2) SA 524 (D) at 528C & Cilliers et al, *op cit.* at 61, Buethin, *op cit.* at 65, Blackman: “Joubert”, LAWSA, vol. 4 part 1, para. 73.

<sup>4</sup> *Ibid.*

<sup>5</sup> At 876 H- 877 .

confirmed by A.D (now the Supreme Court of Appeal) in *Gohlke & Schneider v Westies Minerale (Edms) Bpk & Another*<sup>1</sup> where Trollip JA regarded the articles as having the same force as a contract between the company and each member to observe the provisions of the articles<sup>2</sup>.

The South African academic writers have also affirmed the contractual nature of the documents. Cilliers and other authors cited have confirmed the contractual nature of the documents and have pointed out that our law is based on the contractual nature of the company constitution<sup>3</sup>. It is clear in our law that the difficulties inherent in the interpretation of s 65(2) are not centered on the contractual nature of the documents<sup>4</sup>.

English law and Australian law also recognises the contractual nature of the articles and memorandum of association. In English law, the contractual force of the documents was recognised since 1889 in the case of *Wood v Odessa Waterworks*<sup>5</sup> where Stirling J held that the “articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other”<sup>6</sup>. The Appeal court in *Salmon v Quin & Axtens, Limited*<sup>7</sup> approved Stirling J’s decision as correct.

The Australian corporate statute unlike the South African and English statutes deems the memorandum and articles of association to be a contract. S 180(1) of the Australian Corporations Law provides that “subject to this law, the constitution of the company has

---

<sup>1</sup> Op cit. Refer to footnote 3 on page 23.

<sup>2</sup> At 692 E-F. This case and *De Villiers v Jacobsdal Saltworks*’ case were concerned with the articles and not the memorandum, but the decision has been said to apply with equal force to the memorandum.

See Blackman, op cit. par. 73 F.N. 4

<sup>3</sup> Cilliers et al, op cit. at 61.

<sup>4</sup> Blackman, op cit. par. 73 footnote 5 where he points out that the contractual nature of these documents is not difficult to interpret based on the historical evolution in English and South African law.

<sup>5</sup> (1889) 42 ChD 636.

<sup>6</sup> At 642. Note that Stirling J made reference to shareholders and not members. It has already been submitted in the previous chapter that a shareholder (i.e. a true holder of shares) is not necessarily a member in a company, and that in a company without share capital, a member will not be a shareholder and that the Companies Act makes reference to members and not shareholders.

<sup>7</sup> (1909) 1 Ch 311 at 318. See also *Hickman v Kent or Romney Marsh Sheepbreeders Association* [1915] 1 ChD. 881 at 897, *Beattie v E & F Beattie Ltd.* (1938) ALL ER 214 (CA) at 217 F-G, *Re*

the effect of a contract under seal”. It is submitted that, though the contractual nature of the documents is confirmed in our law and in English law, the Australian model is, on this aspect, the better model, for it avoids any possible interpretation of the section as falling short of making the memorandum and the articles a statutory contract<sup>1</sup>.

### **3.3.2. Creature of statute:**

The contract arising out of the memorandum and articles of association is a statutory contract of a strange nature, deriving its force from statute and not from an agreement reached between parties to it<sup>2</sup>. This contract is of a peculiar nature, for it is not governed by the general principles of law of contract, but both common law and the Companies Act impinge on the contract and leaves it with special features:

#### **3.3.2 (a) Lack of consensus ad idem:**

Consensus ad idem is not a requirement for validity of a statutory contract arising out of the memorandum and articles of association. With ordinary contracts, the general principles of law of contract requires parties to a contract to be of the same mind, ad idem, as to the terms of a contract and to mutually agree and intent to create an obligation with specific contents<sup>3</sup>. The statutory contract lacks consensus ad idem, for parties to the contract, e.g. the members are in terms of s 65(2) deemed to be bound by the contract as

---

*Greene (deceased). Greene v Greene & Others* [1949] 1 ALL ER 167 ChD at 170D.

<sup>1</sup> Ford & Austin, op cit. at 160, Reference was made by these authors to the case of *Oswald v Bailey* (1987) 11 NSWLR 715, a case decided before s180(1) and a case in which the documents were held not to amount to a contract.

<sup>2</sup> Blackman, op cit. par. 73, Beuthin, op cit. 69, Gower, op cit. 283, Palmer et al, “Canadian Company Law, Cases, Notes & Material”, 2<sup>nd</sup> ed. 1978 at 2-8.

<sup>3</sup> Blackman, vol. 5 part 1, par. 124 & 5, Christie, “Law of contract in South Africa”, 3<sup>rd</sup> ed. 1996 at 12- 14.



if they had signed the memorandum and articles of association and they are also deemed to be abreast with the terms of the contract through the doctrine of constructive notice<sup>1</sup>.

The statutory contract has correctly been submitted as an “undoubtedly obscure” section, for it says that the members are bound as if the memorandum and articles of association have been signed by each one of them, but it does not say that the company is bound as if it has signed the documents<sup>2</sup>. In reality the only subscribers to the documents are the seven subscribers in a public company and one or two subscribers in a private company and they sign the documents as a mode for incorporation of a company as provided for in terms of s 54(2) and s 60(2) of the Companies Act. It can be argued that the signatories, through their signatures, consented to be bound by the contents of the memorandum and articles of association, following the principle of *caveat subscripto*<sup>3</sup>.

The post incorporation members are not obliged to sign the articles and memorandum of association as they are deemed to have signed the documents in terms of s 65(2). It has been pointed out in chapter two of this thesis that, to qualify for membership, the post incorporation members are required to consent to become members and have their names entered into the register of members<sup>4</sup>. It has been argued that the members’ consent to membership carries the necessary implication of their undertaking to be bound to the contract, yet the contract section deems them to be bound to the statutory contract as if they had signed it<sup>5</sup>.

---

<sup>1</sup> A doctrine that requires people dealing with the company, including the members in a company, to be fully acquainted with the contents of the statutory contract, for the statutory contract is regarded as a public document with the doctrine of disclosure. See Cilliers et al, op cit. at 183-4, Beuthin, op cit. at 73-4, Gower, op cit. at 170.

<sup>2</sup> Fredman, “Company constitution as a contract with emphasis on outsider rights rule”, 1979, at 10

<sup>3</sup> A principle that makes signatories to the document to be bound by the contents of what they signed. See *Burger v Central SAR* 1903 TS 571 at 578 where the principle was stated to be a sound principle of law. See also Christie, op cit. at 194-5.

<sup>4</sup> See 2.2 above.

<sup>5</sup> Fredman, op cit. at 11. Reference here was to s 20(1) of the English Companies Act of 1948, but the author submitted that the founding placed forward as to the meaning and import of s 20(1) apply equally to s65(2) of the Companies Act 61 of 1973. Note also that the underlined words refer to the author’s reference of the section on the company constitution as the contract section.

It is submitted that mere consent to membership is not sufficient to make the post incorporation members bound by the statutory contract. Their consent to membership only entitles them to rights and duties flowing from membership<sup>1</sup>. Thus a statutory contract is required to warrant them an entitlement to enforce the rights and duties flowing from the memorandum and articles of association, as between themselves and against the company.

The other party to the contract, i.e. the company, is not deemed by s 65(2) to be a signatory to the statutory contract. Gower, when commenting on a similar provision in the English Companies Act, pointed out that “unhappily full account was not taken of the fundamental change which had come about, namely, that the incorporated company now constitutes a legal person entirely distinct from its members<sup>2</sup>. Pennington submitted that the legislature in deeming members and not the company as signatories, made an oversight in translating the covenant in the deed of settlement into terms of law for a modern incorporated company, for the deed could not be entered into by an unincorporated company<sup>3</sup>. Fredman has argued that, the absence of a company as a signatory is not an oversight, but that a company could not sign at that stage as it was not in existence, and that this obviates the necessity of a company signing the document every time a new member is admitted<sup>4</sup>.

The question that arises here, is whether lack of deeming a company as a signatory was an oversight on the legislatures part and whether legal personality of a company was overlooked or whether the company could not sign at that stage as it was not in existence? To put the question differently, can a company sign the statutory contract concluded prior to its incorporation?

The common law position in our law on pre-incorporation contracts is that, an agent cannot contract on behalf of a non existing principal, and the principal upon his \ her

---

<sup>1</sup> See 2.4 above.

<sup>2</sup> Gower, “Gower’s Principles of Modern Company Law”, 2<sup>nd</sup> ed. 1957, at 252.

<sup>3</sup> Pennington, op cit. 56

<sup>4</sup> Fredman, op cit. at 10.

existence, is not competent to ratify the contract<sup>1</sup>. However the Companies Act provides an exception to the common law position. S 35 of the Companies Act, allows a company to adopt as its own or to ratify a contract entered into on its behalf by an agent prior to its incorporation<sup>2</sup>. It is submitted, relying on the requirements of a pre-incorporation contract in s 35 as outlined in footnote two below, that the legislature in drafting s 35, did not have in mind the statutory contract as a pre incorporation contract. The requirements in s 35 differ from the requirements for registration of the memorandum and articles of association as outlined by the Companies Act. While s 35 requires two copies of the pre-incorporation contract to be lodged with the registrar, one of which must be certified by the notary public, and that the contracts must be lodged together with the memorandum and articles of association, s 63 requires the memorandum and the articles of association plus two copies thereof certified by the notary public to be lodged with the registrar. It is therefore submitted that the statutory contract is not a pre-incorporation contract for the purpose of s 35.

Alternatively the human functionaries acting on behalf of a company, can sign the statutory contract on the company's behalf by way of a 'stipulatio alteri' i.e. a common law contract entered into for the benefit of a third party and the third party need not be existing upon conclusion of the contract, but should accept benefits flowing from the contract upon its existence<sup>3</sup>. A 'stipulatio alteri' as an alternative measure to pre incorporation contracts is a possible solution for public companies but not for a one man

---

<sup>1</sup> Mcculloch v Fernwood Estate Ltd. 1920 AD 204 at 207-8, Sentrale Kunsmisverspreiders (Edms.) Bpk. v NKP Kunsmisverspreiders (Edms.) Bpk. 1070 3 SA 367 (A) at 396, Commissioner for Inland Revenue v Friedman 1993 1 SA 353 (A) 337. The same principle applies in English law, see Kelner v Baxter (1866) LR 2 CP 174.

<sup>2</sup> The requirements that have to be complied with under s 35 are: a. the memorandum on its registration must contain as an object the acquisition of rights and obligations in respect of pre incorporation contract, b. lodging of two copies of the pre incorporation contract with the registrar, one of the copies signed by the notary public, c. the agent must profess to act as an agent or trustee and .d. the pre incorporation contract must be in writing or if it is an oral contract, it must subsequently be converted into writing (Pledge Investment (Pty) Ltd. v Kramer : in re Estate Selesnik 1975 3 SA 696 (A) at 703.

<sup>3</sup> Sentrale Kunsmisverspreiders (Edms) Bpk. v NKP Kunsmisverspreiders (Edms) Bpk. op cit. at 403-404, Nine Hundred Umgeni Road (Pty) Ltd. v Bali 1986 1 SA 1 (A), Trever Investments (Pty) Ltd. v Friedhelm Investments (Pty) Ltd. 1982 1 SA 7 (A) at 16

private company, for a stipulatio alteri requires two persons to contract for the benefit of a third party<sup>1</sup>.

Since actual signing of the statutory contract by the company, either by way of statutory law pre-incorporation contract or by way of common law 'stipulatio alteri', poses some difficulties, perhaps the better view is that, the exclusion of deeming a company as a signatory is an oversight on the part of the legislature for a company as a legal person can contract through the human functionaries acting on its behalf. And to deem a company bound to the contract as if it has signed the contract, would only be an acknowledgment by the legislature of the company's legal personality and would not require actual signing on the part of a company. An argument that, lack of deeming a company as a signatory is because of the fact that a company could not sign at that stage as it was not in existence, carries no substantiality, for the same argument can equally be applied to post-incorporation members, who are deemed to be signatories yet, like the company, they were also not members prior to incorporation.

### **3.3.2. (b) Factors affecting consensus ad idem :**

The statutory contract, is in the second place, a contract of a special nature in that, unlike an ordinary contract, it cannot be defeasible on the basis of mistake, misrepresentation, duress or undue influence<sup>2</sup>. The statutory contract cannot be annulled on the basis of an improperly obtained consensus, for as it is already pointed out, consensus ad idem of parties, is not a requirement for validity of a statutory contract<sup>3</sup>.

### **3.3.2 (c) . Rectification :**

An ordinary contract, governed by general principles of law of contract, can be rectified where the written part of the contract does not reflect the true intentions of parties to the

---

<sup>1</sup> Fredman, op cit. at 27, Blackman, op cit. par. 62, Beuthin, op cit. 44.

<sup>2</sup> *Bratton Seymour Co. Ltd. v Oxborough* 1992 BCLC 693 (CA) at 698.

<sup>3</sup> See 3.3.2 (a) above

contract<sup>1</sup>. With a statutory contract, rectification is not possible. Coetze J in *Ex Parte Premier Paper Ltd.*<sup>2</sup> said that, the court has no power to rectify the articles of association of a company even if the articles do not reflect the concurrent intentions of the signatories and that the power to rectify the statutory contract does not exist in our law<sup>3</sup>.

### 3.3.2 (d). Alteration:

#### (d) i. By way of special resolution:

The statutory contract is in the fourth place, peculiar in nature in that, it binds the parties to it, subject to the provisions of the Companies Act. The provisions include those on alteration of the statutory contract. Unlike an ordinary contract that requires the consent of all the parties in order to be altered, the statutory contract can be altered without the consent of some or all of the parties, as it is altered in the manner provided by the Companies Act i.e. by way of special resolution<sup>4</sup>. Special resolution is in terms of s 199(1) of the Companies Act, defined as, a resolution passed at “a general meeting of which not less than twenty one clear days notice has been given specifying the intention to propose the resolution as a special resolution, (and) the terms and effect of the resolution and the reason for it...” has been given.

The question that arises here is whether the statutory contract is alterable only through the manner provided in the Companies Act or whether the use of the word ‘may’<sup>5</sup> implies that the legislature stipulated only one manner for alteration of the statutory contract and did not prohibit other ways.

<sup>1</sup> Christie, op cit. at 370, Kerr, “The Principles of Law of Contract”, 5<sup>th</sup> ed. 1998, at 142- 143.

<sup>2</sup> 1981 (2) SA 612 (W).

<sup>3</sup> At 615 H - 616A, See also *Konyn v Viedge Bros. (Pty) Ltd.* 1961 2 SA 816 (F) & *Scott v Frank Scott (London), Limited & Others* [1940] Ch 794 at 801 where it was held per Luxmore LJ that the general jurisdiction of the court to rectify the contract has no application to the memorandum and articles of association.

<sup>4</sup> S 55- 71 on the memorandum & s 62(1) on the articles. See also Blackman, op cit. par. 73.

<sup>5</sup> Refer to s 62(1) or s 55(1) which state that “subject to the provisions of this Act.... a company may by

### 3.3.2(d) ii By unanimous assent of all members:

“Although generally company decisions are arrived at by means of formal resolutions taken at properly constituted meetings of the company, the courts have recognised that unanimous assent of all the members when fully aware of what is been done, is an alternative method of passing valid company resolutions”<sup>1</sup>. Trollip JA in *Gohlke & Schneider & Another v Westies Minerale (Edms) Bpk & Another*, saw no reason why “as with any other contract, (the statutory contract) cannot be departed from by a bona fide agreement concluded between the company and all its members to do something intra vires of the company’s memorandum but in a manner contrary to the articles”. The agreement could bind the members for as long as they remained the only members and for “it to bind new members and affect outsiders, [it] would probably have to be incorporated into the articles by special resolution which [has] to be registered”<sup>2</sup>.

Trollip’s obiter dictum in *Gohlke’s case*, has been cautioned against by Beuthin, who stated that, “if a contract purported to bind the company in such a way that the actual appointment of its directors is no longer to be governed by regulations set out in its duly registered articles, but by some other conflicting set of regulations or rules... then it is difficult to avoid the conclusion that [the set of rules or regulation have] in some way or another altered or added to the duly registered articles”, and “this is something which can only be done by special resolution”<sup>3</sup>.

---

special resolution alter or add to its articles ....” (or memorandum).

<sup>1</sup> Blackman, op cit.vol.4 part 2 at par. 40, See also *Gohlke & Schneider & another v Westies Minerale (Edms) Bpk & another*, op cit., *Delfante v Delta Electrical Industries Ltd. & Another* 1992 (2) SA 221(C), *SA Iron & Steel Industrial Corp. Ltd. v Molly Copper Mining & Exploration Co. (SWA) Ltd. & Others* 1993 (4) SA 705 (Nm)

<sup>2</sup> At 692G-H, See also *Delfante v Delta Electrical Industries Ltd.* op cit. where it was held that, the articles of association may be departed from by a subsequent agreement between the members of a company and that where there is conflict between this agreement and the terms of the articles, then the terms of the agreement will prevail over the terms of the articles. At 230D-F. Also in *SA Iron & Steel Industrial Corp. v Molly Copper Mining & Exploration*, op cit. at 712. See also *Levy and others v Zalrut Inv.*, 1986 (4) SA 479 (W) at 485D-E& *Sudgen & others v Beaconhurst Dairies (Pty) Ltd.* 1963 (2) SA 174 (E) at 180H-181.

<sup>3</sup> Beuthin, “Appointment of Directors and the Legal Effect of Articles”, SALJ (1970) 87, 395 at 398.

An informally obtained unanimous assent, written or oral, cannot in our law be said to qualify as a special resolution<sup>1</sup>. This is so for s 200(1) of the Companies Act requires registration with the registrar, of a copy of a special resolution with either a copy of the notice convening the meeting or a copy of the consent contemplated in s 199(3A), within one month of passing of a resolution. In terms of s 203(1), the special resolution shall not take effect until it has been duly registered in terms of s 200 of the Companies Act<sup>2</sup>.

It has been correctly submitted, relying on the provisions of both s 200 and s 203, that “in the absence of registration the special resolution must be regarded as being incapable of having any legal effect whatsoever as a formulation and expression of the corporate will... and this is believed to be so even merely as between the company and the assenting members themselves”<sup>3</sup>. “To permit an unregistered unanimous assent to have any effect at all in those cases where it is quite clear that an unregistered special resolution could have none, would be to fly in the face of, and defeat, what is submitted to be the clear intention of the legislature to the contrary”<sup>4</sup>.

Registration of a special resolution is intended to benefit the third parties i.e. the potential shareholders, creditors and members of the public, who are entitled to read the memorandum and articles of association and to rely on them before investing in the company, and to allow matters requiring special resolution to be passed by unanimous assent without registration, will have a prejudicial effect towards the third parties<sup>5</sup>.

It is therefore submitted that the statutory contract can only be altered in a manner as provided for by the Companies Act i.e. by way of special resolution, except where the

---

<sup>1</sup> Beuthin, “The Principle of Unanimous Assent”, SALJ (1974) 91, 2 at 12, Blackman, op cit. par. 40 F.N. 7.

<sup>2</sup> See also s 143 of the English Companies Act of 1948 & s 380 of the 1985 English Companies Act which also requires lodging with the registrar of copies of either a special or extraordinary resolution within fifteen days of passing of the resolution. See also Gower op cit. at 219 & 235 & 529. But see Fredman, op cit. who pointed out that there is no need to register a special resolution under the 1948 English Companies Act, at 74.

<sup>3</sup> Beuthin, op cit. at 14 & Blackman op cit. par. 40 footnote. 7, But see cases cited under footnote 1 & 2 on p31.

<sup>4</sup> Beuthin, op cit. at 16.

<sup>5</sup> See Beuthin & Blackman as cited in F.N 3 above. Members of the public and potential investors are also protected in English law under s 380 of the 1985 Companies Act, but see Fredman who submitted that because there is no need for registration of the special resolution, there is therefore no policy for

court makes an order for alteration or addition under the provisions of s 252 of the Companies Act. Members cannot through their unanimous assent or through a special agreement, act contrary to the provisions of the Companies Act on alteration of the statutory contract. It has correctly been pointed out that the use of the word ‘may’ in statutory provisions on alteration of the statutory contract, does not mean that the legislature prescribed only one manner for alteration and did not prohibit other methods, but that “the word ‘may’ in this context means no more than ‘if the company wishes to do so’, i.e. what is permitted is not the means [special resolution] but the end [alteration of the memorandum, articles]”<sup>1</sup>.

### **3.3.3 (e) Remedies for breach of the statutory contract:**

The statutory contract is furthermore peculiar from an ordinary contract in that damages as a remedy for breach of the contract cannot be awarded to a member who sues the company in his capacity as a member<sup>2</sup>. The only remedies for breach of contract that are available to a member suing in his capacity as such, are either an interdict \ injunction \ declaratory order to prevent the company or a member from acting contrary to the provisions of the statutory contract, or specific performance as a remedy to compel the company or a member to perform as stipulated in the statutory contract<sup>3</sup>.

Courts have refused to award damages as a remedy for breach of the statutory contract, against the company, on the ground of ‘capital maintenance rule’ i.e. a rule that an award of damages against the company by a member would result with the company’s capital not been maintained; because of the hierarchy of claims against the company i.e. a members claim cannot be elevated above those of creditors and because an award of

---

protection of creditors or members of the public, at 75.

<sup>1</sup> Blackman, op cit. par.40 F.N7.

<sup>2</sup> *Pathescope (Union) of SA Ltd. v Mallinick* 1927 AD 292, *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas. 317.

<sup>3</sup> Blackman, op cit. par. 73, Gower, op cit. at 283, Ford & Austin ,op cit. at 165-166.



damages would prejudice the member himself and other members<sup>1</sup>. Remedies for breach of a statutory contract will be discussed in chapter six of this research paper.

### **3.4 CONCLUSION:**

The memorandum and articles of association are in our law and other systems following the “contractarian - model of corporate constitution”<sup>2</sup>, generally accepted to amount to the constitution of the company and to a contract between the company and its members and between members inter se. The contract arising out of the memorandum and articles of association is a statutory contract, arising out of s 65(2) of the Companies Act.

It has been submitted that this contract is a peculiar one, different from an ordinary contract, governed by the general principles of law of contract. The peculiar features of the contract include: lack of consensus ad idem<sup>5</sup>, impossibility to nullify the contract for an improperly obtained consensus<sup>6</sup>, lack of courts’ power to rectify the contract<sup>7</sup>, alteration of the contract without the consent of parties<sup>8</sup> and lack of damages as a remedy for breach of contract against the company<sup>9</sup>. This contract is peculiar, for both common law and the Companies Act impinge upon it and leaves it with these special features.

---

<sup>1</sup> Blackman, par.73 F.N.12, Ford & Austin, op cit. 165-6.

<sup>2</sup> See 3.2 above.

<sup>5</sup> See 3.3.2 (a) above.

<sup>6</sup> See 3.3.2 (b) above.

<sup>7</sup> See 3.3.2 (c) above.

<sup>8</sup> See 3.3.2 (d) above.

<sup>9</sup> See 3.3.2 (e) above.

## **CHAPTER 4: THE BINDING EFFECT OF THE STATUTORY CONTRACT.**

### **4.1. INTRODUCTION:**

The memorandum and articles of association are in our law and in other systems following the “contractarian -model of corporate constitution”<sup>1</sup>, referred to as the constitution of a company and the statutory contract with strange features. These peculiar features were addressed in the previous chapter that focused on the nature of the statutory contract. This chapter focuses on the binding effect of the contract arising out of the memorandum and articles of association.

It is now judicially settled that the parties to the contract arising out of the memorandum and articles of association are the company and its members<sup>2</sup>, members inter se<sup>3</sup> and that non-members are not parties to this contract<sup>4</sup>. These parties are bound by the statutory contract to observe the provisions of the memorandum and articles subject to the provisions of the Companies Act<sup>5</sup>.

### **4.2 CONTRACTS ARISING OUT OF THE STATUTORY CONTRACT:**

#### **4.2. (a) Contract between the company and its members.**

Originally in English law there were doubts as to the parties to the statutory contract. The uncertainties centered around the question of whether the company was a party to the contract arising out of its own constitution or whether the contract bound members only. With earlier case law, it was held that the company was not a party to the statutory

---

<sup>1</sup> See 3.2 FN4 above.

<sup>2</sup> See 4.2 (a) below.

<sup>3</sup> See 4.2 (b) below.

<sup>4</sup> See 4.2(c) below.

<sup>5</sup> S 65(2) of the Companies Act 61 of 1973 referred to as the Companies Act.

contract and that the contract bound only the members inter se<sup>1</sup>. It was held in one earlier case that “the articles of association are simply a contract between the shareholders inter se in respect of their rights as shareholders”<sup>2</sup>. It is submitted that the reason behind this statement might have been influenced by the fact that the English corporate constitution and the corporate constitutions of other systems that followed the English model, were based on the deed of settlement of an unincorporated company. The deed only bound the members inter se and thus the company, which is not a signatory to its constitution, was neither held to be a party to the statutory contract nor to be bound by it<sup>3</sup>.

The earlier uncertainties as to the parties to the statutory contract were settled in the case of *Hickman v Kent or Romney Marsh Sheep Breeders Association*<sup>4</sup>, where Astbury J stated that “much of the difficulty is removed if the company be regarded, as framers of the section may very well have so regarded it, as being treated in law as a party to its own memorandum and articles”<sup>5</sup>. He therefore held that the “articles regulating the rights of members generally as such do create rights and obligations between them and the company respectively”<sup>6</sup>. In South African law the existence of a contract between the company and its members has been approved by the A.D in *Gohlke v Schneider v Westies Minerale*<sup>7</sup>, where Trollip JA held that “the articles (and memorandum) merely have the same force as a contract between the company and each and every member as such to

<sup>1</sup> *In Re Tavorne Mining Co. Prichard's* (1873) 8 Ch App 956, *Melhardo v Porto Alegre Ry Co.* (1874) 1 R 9 Ch 503, *Eley v Positive Government Security Life Assurance Co.* (1876) 1 FxD 88, *Brown v La Trinidad* 1887) 37 ChD 1 (CA), *Baring Gould v Sharpington Combined Pick & Shovel Syndicate* 1892 2 Ch 80 (CA), *Borland Trustee v Steel Bros. & Co. Ltd.* 1901 1 Ch 279.

<sup>2</sup> Per Sir Mellish LJ in the case of *In Re Tavorne Mining Co. Prichard's* case, op cit at 960. See also *Borland Trustee v Steel Bros.* op cit. where Farwell J held that the “the articles are nothing more or less than a personal contract between Mr Borland (a shareholder) and other shareholders in a company” at 290. Note that reference is made in these cases to a contract between shareholders as such and not between members. It will submitted that the statutory contract binds members as such and not as shareholders

<sup>3</sup> See Gower, op cit. who pointed out that the drafters of the corporate constitution overlooked the legal personality of a company in basing the constitution on the deed of an unincorporated company, at 252. See also Fredman, op cit. at 32, Blackman, op cit. par. 73.

<sup>4</sup> [1915] 1 Ch 881.

<sup>5</sup> At 897.

<sup>6</sup> At 900. See also *Wood v Odessa Waterworks Co.* (1889) 42 ChD 636, *Beattie v E & F Beattie Ltd.* [1938] 3 All ER 214 (CA), *Salmon v Quin & Axtens Ltd.* 1909 1 Ch.

<sup>7</sup> Op cit.

observe their provisions”<sup>1</sup>. The Australian system has amended their corporate statute by entrenching the existence of a contract between the corporation and its members in their corporate statute. S 180(1)(a) of the Corporations Law specifically provides that the corporate constitution forms a contract between the corporation and each member. This amendment has done away with any doubts as to the existence of a contract between the corporation and its members

The implication of the existence of a statutory contract between the company and its members is that the members can compel the company to observe the provisions of the memorandum and articles of association. In *Wood v Odessa Waterworks Co*<sup>2</sup> a provision in the articles of the company empowered the directors to pay a dividend to the shareholders. Instead of paying the dividend, the company passed an ordinary resolution to give the shareholders debenture bonds bearing interest and redeemable at par. It was held that a member was entitled to an injunction to restrain the company from acting on the proposed resolution that was contrary to the provisions of the company’s articles<sup>3</sup>.

Not only are members entitled to enforce the statutory contract, but the company can also enforce the contract as against its members and restrain breaches of the contract by members. In *Hickman v Kent or Romney Marsh Sheep Breeders Association*<sup>4</sup> a provision in the articles of the company required any dispute arising between the company and its members to be referred to arbitration. Hickman, a member, sought to sue the company without referring the matter to arbitration. It was held that the articles create rights and obligations enforceable as between the company and its members respectively and that Hickman was bound by the provision in the articles to refer the dispute to arbitration<sup>5</sup>.

---

<sup>1</sup> At 692 F.

<sup>2</sup> Op cit.

<sup>3</sup> At 646.

<sup>4</sup> Op cit.

<sup>5</sup> At 903.

The statutory contract has been held to bind the company and members only in their capacity as members and not in some other capacity<sup>1</sup>. The question that arises is when are rights and obligations flowing from the statutory contract granted to a member in his capacity as such. The concept of a member in his capacity as such has been said to be a difficult concept “for it has not been carried by courts to what might be its logical conclusion”<sup>2</sup>. This is so for courts have regarded the memorandum and articles to constitute a contract between the company and the shareholders<sup>3</sup>.

In *Rosslare (Pty) Ltd. v Registrar of Companies*<sup>4</sup> Milne J stated that “it seems clear... that what is meant by a contract with a member in his capacity as such, is a contract between him and the company which is connected with the holding of shares.”<sup>5</sup>. And in *Heron v Port Huon Fruitgrowers Association*<sup>6</sup> Isaacs J stated that “the purpose of the memorandum and the articles is to define the position of the shareholder as a shareholder and not to bind him in his capacity as an individual”<sup>7</sup>. It is submitted that it is incorrect to associate the concept of the “capacity of members as such” with a member’s holding of shares. This is so because a shareholder is not always a member in a company, and s 65(2) and similar provisions in other systems apply to all types of companies and not only companies with share capital. Therefore the concept of “member in his capacity as such” cannot refer to shareholders, as this will exclude companies without share capital.

In *Eley v Positive Government Security Life Assurance*<sup>8</sup> the articles of the company provided that Eley shall be a solicitor of the company and shall not be removed except for misconduct. Eley, who subsequently became a shareholder, sued the company for breach

---

<sup>1</sup> See *Hickman v Kent or Romney Marsh Sheep Breeders Association*, op cit. 897&900, *Beattie v E & F Beattie*, op cit. 218B, *Bratton Seymour Service Co. Ltd.* op cit.689 C-E *De Villiers v Jacobsdaal Saltworks*, op cit. 874.

<sup>2</sup> Gower, op cit. at 258, Blackman, “What rights can a company’s memorandum and articles of association confer on a member”, 1992 (4) SA Merc I.J 1, who pointed out that the question of when are rights

granted to a member in his capacity as such has received less attention. at p2.

<sup>3</sup> *Salmon v Quin & Axtens Ltd.* op cit. at 318, *Borland Trustee v Steel Bros.* op cit. at 960.

<sup>4</sup> 1972 (2) SA 524 D.

<sup>5</sup> At 528.

<sup>6</sup> (1922) 30 CLR 315.

<sup>7</sup> At 338.

<sup>8</sup> Op cit.

of a contract arising out of the articles, due to its failure to employ him as a solicitor. It was held that the articles did not constitute a contract between the company and Eley in his capacity as a solicitor<sup>1</sup>.

But in *Rayfield v Hands*<sup>2</sup>, a case on the contractual relationship between members inter se, the directors were regarded as members of the company and were therefore held to be bound by the articles to take shares equally among themselves, where a member intended to transfer his shares<sup>3</sup>. It has been pointed out that the decision in *Rayfield's* case might be reconciled with earlier cases if the test of whether the articles constitute an enforceable contract or not, “depends not on the capacity of those on whom it purports to confer rights and duties, but on whether its exercise affects them as members”. And that even if in *Rayfield's* case, the obligation to take shares was conferred on directors as such, its exercise affected them as members, since it operated to increase their shareholding and left their position as directors unchanged<sup>4</sup>.

It is submitted that the test for the enforceability of the articles and memorandum is the capacity of persons on whom rights are conferred and not that the exercise of rights and obligations should affect such persons as members. It is further submitted that it is incorrect to say that the obligation imposed on directors in *Rayfield* affected them as members and left their positions as directors unchanged, for an increase in shareholding can affect directors as such<sup>5</sup>. The question that has to be addressed is when are rights granted to a member in his capacity as such.

It has correctly been submitted that the rights and obligations will be conferred to a member in his capacity as such if in the first place the rights and obligations are conferred

---

<sup>1</sup> At 897.

<sup>2</sup> 1960 Ch 1.

<sup>3</sup> At 6, where Vaisey J referred to Pearson J in the case of *In Re Leicester Club & Racecourse Co.* (1885) 30 Ch.D 629 at 633 where the directors were said “to continue (to be) members of the company... and working members of the company... (who)... cannot divest themselves of their character of members of the company.

<sup>4</sup> Gower, “The contractual effect of the articles of association”, (1958) 21 MLR, 401 at 402.

<sup>5</sup> An increase in shareholding can affect directors as such, for they can exercise control over the general meeting through ownership of the required majority of shares. See Buckland: “Shareholders rights and the acquisition of control in a company”, 1992 at 8.

on a member by reason of his membership and secondly if the right relates to one's membership in a company i.e. the rights are membership rights<sup>1</sup>. The two requirements must be complied with before the rights and obligations are conferred on one in his capacity as a member<sup>2</sup>. Therefore a member in a company will not be able to enforce the rights and obligations granted to him, if the rights or obligations do not relate to his membership in the company. Thus Eley was not able to enforce the right to be a company solicitor, for even if the right was given to him by virtue of his membership, the right to be a solicitor is not a membership right. And a membership right will not be enforced if it is not granted by virtue of one's membership. But in *Rayfield's* case a membership right to take shares of another was granted to directors as such and not as members<sup>3</sup>.

A right is granted to a member by virtue of his membership if the right is given to one as a member. A member is a person who has subscribed to the memorandum in terms of s103(1) or has consented to be included in the register of members in terms of s 103(2)-(4)<sup>4</sup>. But what are membership rights? It has already been pointed out that the Companies Act regulates the rights and duties of members in a company and the Act also determines the rights and duties that the memorandum and articles confer on a member as such<sup>5</sup>. The nature of a company is also vital in determining whether rights are membership rights or not<sup>6</sup>. In *Magill v Satina (Pty) Ltd.*<sup>7</sup> it was pointed out that "the nature of a company is relevant to the question of whether a right or duty is conferred on a member in his capacity as a member"<sup>8</sup>.

The rights of members in a company with share capital differ from those of members in a company without share capital. A member in a company without share capital only enjoys the rights that are general to members i.e. to receive notices of meetings, to attend

---

<sup>1</sup> Blackman , op cit. at p5.

<sup>2</sup> Ibid.

<sup>3</sup> Gower op cit. at 402.

<sup>4</sup> See 2.2 (a) - (d) above.

<sup>5</sup> See 2.3 (e) above, *Bisgood v Henderson's Tvl Estate Ltd.* 1908 1 Ch 743 (CA) at 758-9.

<sup>6</sup> Blackman, op cit. par 73, *Bisgood v Henderson's Tvl Estate* , op cit. at 759; *Heron v Port Huon Fruitgrowers Co-operative Association Ltd.* op cit. at 339- 342, *New South Wales Medical Defence Union Ltd. v Crawford* (1993) 11 ACSR 406 CA at 453.

<sup>7</sup> (1983) 8 ACLR 289 SC (NSW)

<sup>8</sup> At 292.

meetings in person or by proxy representation, to vote at meetings etc<sup>1</sup>. A member in a company with share capital enjoys the rights that are general to members and also enjoys the rights that are associated with his shareholding i.e. the right to receive a dividend when declared, the right to buy shares of an existing member through a pre-emption agreement, the right to participate in the distribution of the assets upon liquidation of the company etc<sup>2</sup>. A shareholder will not always enjoy the rights general to members as one can be a shareholder without being a member<sup>3</sup>. A shareholder will not be a member where he acquired shares through purchase from an existing member and his name is not yet included in the register of members, or where a nominee shareholder holds the shares of behalf of a beneficial true owner of shares whose name is not included in either the register of members nor a share register. It was held in *Rosslare's* case that membership rights are conferred as “part of a general regulation applicable alike to all shareholders”<sup>4</sup>. It is submitted that the rights of shareholders are not applicable alike to all of them; for different classes of shareholders enjoy different rights e.g. the preferential shareholders have a preferential right to dividend<sup>5</sup>.

S180 of the Australian Corporations Law has deleted the common law requirement that the memorandum and articles bind a member only ‘in his capacity as such’. The new section, binds a member ‘so far as those provisions (of the statutory contract) are applicable to that person’. This raises a question of whether the common law position has been changed so as to warrant non-members the right to enforce the statutory contract against the company and members.

It has been submitted that the traditional requirement of ‘member in his capacity as such’ still applies to the current position under s180 (1), so that no rights and obligations are

---

<sup>1</sup> See 2.3 (e) above.

<sup>2</sup> Ibid.

<sup>3</sup> See 2.3 (d)-(e).

<sup>4</sup> At 528.

<sup>5</sup> On different classes of shares, see Cilliers et al, op cit. at 219-227 and Pretorius et al, op cit. at 193-205.



created for outsiders, for s180 (1) simply denies enforcement of rights and obligations to outsiders<sup>1</sup>.

Therefore a member in Australian law as in South African and English Law will be able to enforce the rights and duties flowing from the statutory contract, if they are granted to him in his capacity as a member. Both the company and members in their capacity as such, are bound by the statutory contract to observe the provisions of the memorandum and articles of association. Thus both of them can compel each other to observe the provisions of the statutory contract and they can restrain each other from any breach of the constitution.

#### **4.2. (b) Contract between members inter se.**

The uncertainties in English Law as to the parties to the statutory contract centered also around the question of whether the memorandum and articles bound the members inter se. In *Welton v Saffrey*<sup>2</sup> Lord Hershell held that “it is quite true that the articles constitute a contract between each member and the company, and that there is no contract between the individual members of the company. [That the rights of members inter se] can be enforced by or against a member through the company”<sup>3</sup>. These uncertainties were settled in *Rayfield's* case. Vaisey J in this case held that the members inter se without the intervention of the company could enforce a contract which is not by or with the company, but which is for the benefit of the members inter se<sup>4</sup>.

In South African law, the existence of a statutory contractual relationship between members inter se was approved in *De Villiers'* case where Potgieter J held that the

---

<sup>1</sup> Ford & Austin, op cit. at 161, but see H.L French , “The Guide to Corporations Law”, 4<sup>th</sup> ed., 1994, at 54, who pointed out that it is not clear whether the restrictions that existed under common law of the capacity of a member as such, has been removed under s180(1).

<sup>2</sup> [1897]AC 299.

<sup>3</sup> At 315.

<sup>4</sup> At 6. Note that there were other cases before Rayfield which upheld the contractual rights and duties between the members inter se e.g. in *Eley v Positive Life Assurance Co.* op cit. at 89-90, *Wood v Odessa* op cit. at 642, *Salmon v Quin & Axtens*, op cit at 318.

articles create a contract between members inter se<sup>1</sup>. The doubt as to the existence of a statutory contract between members inter se, in the Australian system, was finally put to rest by s 180(1)(c) of the Corporations Law.

The implication of the existence of a statutory contract between members inter se is that members can compel each other to observe the provisions of the memorandum and articles of association. The scenario, in which the members will most likely enforce the statutory contract against each other, is when the contract contains a right of pre-emption, obliging a member to offer his shares to existing members before offering them to outsiders. Members can prevent each other from committing any breach of the statutory contract by making use of specific performance compelling another member to act in accordance with the provision of the statutory contract, or by making use of an interdict restraining a member from acting contrary to the provisions of the statutory contract. A member who wishes to transfer his shares can also compel existing members to act in accordance with the statutory contract if it imposes a duty on them to buy his shares. In *Rayfield's* case, the directors were compelled to exercise a duty imposed on them by the articles i.e. to take a member's shares equally among themselves<sup>2</sup>.

The statutory contract will bind members as against each other only if the rights and duties are conferred on them in their capacities as members. It has already been submitted that the rights and duties will be granted to a member in his capacity as such if they are membership rights and duties and if they are granted to a member by virtue of his membership<sup>3</sup>.

It has already been submitted that *Rayfield's* case is not a good authority here, for the obligation to take a member's shares, even though a membership duty, was not granted

---

<sup>1</sup> At 876H.

<sup>2</sup> Refer also to *Estate Milne v Donohoe Investment Ltd.* 1967 (2) SA 359 (A) where it was pointed out that there is nothing wrong for the articles of a private company to include a right of pre-emption and for the right to be exercised against members, at 370 F-F, See also *Borland Trustee v Steel Bros.* 1901 Ch 279.

<sup>3</sup> See 4.2.(a) above.

by virtue of one's membership but by virtue of one's directorship<sup>1</sup>. In the Australian case of *In Re Caratti Holding Co. (Pty) Ltd.*<sup>2</sup> the articles provided for the compulsory purchase of shares, in terms of which a founder was given the right to purchase shares of members "whilst he [was] a registered holder of Life Governors share[s]..." It was held that the right was granted to the founder, who was also a director, in his capacity as a shareholder and member, for the right was granted to him whilst he was a registered holder of shares<sup>3</sup>.

It is therefore submitted that the right \ obligation in *Caratti's* case as in *Rayfield's* case was a membership right \ obligation i.e. the right to buy the members' shares in *Caratti* and the duty to take a member's shares in *Rayfield*. However in *Caratti* unlike in *Rayfield*, the right was granted to a director and a founder in his capacity as a member, for the right was granted to a founder whilst he was a registered holder of shares. A registered holder of shares, who holds shares in his own name and not on behalf of a beneficial holder of shares, is also a member in the company<sup>4</sup>.

In Australian law, s 180(1)(c) of the Corporations Law, binds members as against each other 'so far as the provisions (of the articles and memorandum) are applicable to that person'. It has already been pointed out that the inclusion of these words in s 180(1) has not done away with the common law restriction of a 'member in his capacity as such'<sup>5</sup>.

Another implication of the existence of a statutory contractual relationship between members inter se is that members can sue each other directly without the intervention of the company. In this way a possibility of multiplicity of actions involving the company

---

<sup>1</sup> See 4.2 (a) above.

<sup>2</sup> (1975) 1 ACLR 87.

<sup>3</sup> At 99 par. 40.

<sup>4</sup> See 2.3(d) above. Refer also to s52(2) (b) and s 105(1) (a) of the Companies Act, which requires companies with share capital to write in their register of members the names of members and the number of shares held by each. Thus a registered holder of shares who holds shares in his own name would also be a member.

<sup>5</sup> See 4.2 (a) above.

on one hand and members on the other, enforcing similar rights has been avoided<sup>1</sup>. Therefore a member is the proper plaintiff to sue when a right is conferred on him in his capacity as such and a corresponding duty is imposed on other members.

The practical significance of enforcing the statutory contract between members will differ according to different types of companies. In a private company with share capital, the members will be able to know other members who are in a contractual relationship with them. In a public company with share capital, on the other hand, the members might encounter difficulties in identifying other members who are deemed to have a contractual relationship with them, for a public company has no limitation on the number of members, as opposed to members in a private company who are restricted to fifty<sup>2</sup>.

#### **4.2. (c) Contract between the company and non- members.**

It is judicially accepted that the memorandum and articles of association do not constitute a contract between the company and non-members \ outsiders. Astbury J in *Hickman's* case held that “no article... constitute[s] a contract between the company and a third person... [and that] no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as for instance, solicitor, promoter, director, can be enforced against the company”<sup>3</sup>.

The rights and obligations are granted to non-members if they are granted to them in some other capacities and not in one's capacity as a member. It has already been pointed out that rights are granted in one's capacity as a member if they are granted by virtue of one's membership i.e. if they are granted to one in his capacity as a member. A member is a person who has subscribed to the memorandum in terms of s 103(1) or who has consented to be included in the register of members in terms of s 103(2)-(4). And secondly if they are membership rights i.e. rights and duties of a member as regulated by

---

<sup>1</sup> Gower, op cit. at 284.

<sup>2</sup> s 20(1) (b) & s 32 of the Companies Act, See also Tomasic & Bottomley: “Corporations Law in Australia”, 1995 at 220.

<sup>3</sup> At 900, See also *Beattie v E & F Beattie*, op cit. at 218B, *Grundling v Beyers* 1967 (2) SA 137 (W) at

the Companies Act and as conferred on a member in his capacity as such by the memorandum and articles of association<sup>1</sup>. Therefore a person who is not a member in a company cannot enforce the statutory contract against the company nor can a member enforce rights that are not membership rights. Thus Astbury J in *Hickman's* case held further that “an outsider to whom rights purport to be given by articles in his capacity as such outsider, whether he is or subsequently becomes a member cannot sue on those articles treating them as a contract between himself and the company to enforce those rights”<sup>2</sup>.

The Australian system has modified the common law position of a ‘member in his capacity as such’. S 180(1)(b) of the Corporations Law provides for a statutory contractual relationship between the company and each ‘eligible officer’. An ‘eligible officer’ is defined in s 180(5) to include a director, a principal executive officer and a secretary of the corporation.

The implication of s 180(1)(b) is that directors and other officers can now enforce the rights and duties arising out of the statutory contract even when they are not granted to them in their capacities as members but as officers<sup>3</sup>. With s 180(1)(b), the drafters of the articles of an Australian corporation will have to exercise some care in drafting them, for a director appointed for life in terms of the articles can enforce such a right.

It has been submitted that s 180(1)(b) would not seem to cover *Eley's* case, for the right to be a company's solicitor was not granted to Eley in his capacity as an ‘eligible officer’<sup>4</sup>. The question of the capacity of an ‘eligible officer’ as such is a question that is still to be addressed by Australian courts<sup>5</sup>. Would Eley succeed with his claim if he was a director who was given the right to become a company's solicitor or would the directors

---

138H-139, *Bratton Seymour Service Company Ltd. v Oxborough*, op cit. 698C- E.

<sup>1</sup> See 4.2 (a) above.

<sup>2</sup> At 897.

<sup>3</sup> Tomasic, Jackson and Woellher: “*Corporation Law: Principles, Policy & Process*”, 2<sup>nd</sup> ed. 1992 at 194-5.

<sup>4</sup> Ibid. at 195.

<sup>5</sup> See also Afterman & Baxt: “*Afterman and Baxt's Cases and Material on Corporations and Associations*”, 6<sup>th</sup> ed. 1992 at 239-240 who stated that the full implication of s180(1)(b) has yet to be

in *Rayfield's* case succeed under s 180(1)(b) when they were given membership rights? S180 (5) only directs that the right must be given to e.g. a director but it does not indicate whether the right must be a directorship right or not.

The other question that needs to be addressed by the Australian courts, with s 180(1)(b) relates to alteration of the memorandum and articles. Presently companies can freely alter their articles and memorandum without the consent of some parties, as long as alteration is in accordance with the provisions of the Companies Act<sup>1</sup>. The question that needs to be addressed is whether 'eligible officers' e.g. directors can interdict the company from acting contrary to the provisions of the articles and thus prevent alteration of the articles or would directors only be entitled to damages as a surrogate of an interdict or specific performance, for the company can freely alter its articles<sup>2</sup>? It seems that the latter will be the best remedy for a company cannot be prevented from altering its memorandum and articles.

It has been submitted that s 180(1)(b) creates no contractual relationship between eligible officers and members of the company. The reason is that the relationship between the members and directors as eligible officers is governed by fiduciary duties that are owed the members as a whole<sup>3</sup>. The implication is that the proper plaintiff to sue the eligible officer under s 180(1)(b) is the company and members can sue a director derivatively for breach of their fiduciary duties.

#### **4.2. (d) Incorporation of terms of the statutory contract into a separate contract.**

It has already been pointed out that non-members are not parties to the statutory contract, except for eligible officers under the Australian system. The question that arises here is whether non members can be made parties to the statutory contract by allowing them to enforce the rights and duties from the statutory contract that are incorporated into a

---

determined.

<sup>1</sup> See 3.3.3 (d)i. Above.

<sup>2</sup> Baxt & Fletcher, *op cit.* at 240.

<sup>3</sup> Tomasic and Bottomley, *op cit.* at 220.

separate contract. It has been held that a non-member can enter into a separate contract with the company, based on the terms of the articles and be able to enforce the rights arising from the separate contract<sup>1</sup>. It has also been held that the separate contract would be based on terms of the articles, which are freely alterable and that a person affected by alteration will have no valid ground to complain about alteration, except that he can sue the company for damages, if alteration is inconsistent with the terms of the separate contract<sup>2</sup>. The action for damages will not be for breach of the statutory contract, but it will be for breach of the separate contract.

Therefore the company and non-members can freely enter into separate contracts that incorporate the terms of the articles or memorandum, and be able to enforce the rights through the separate contracts. The non-members will not, through incorporation of terms of the articles or memorandum, be regarded as parties to the statutory contract.

#### **4.3 Conclusion.**

The memorandum and articles of association constitute a statutory contract between the company and its members and between members inter se in their capacities as members. The rights and duties are granted to members in their capacities as such if they are granted to them by virtue of their membership and if they are membership rights. The non members or members who are granted non-membership rights in terms of the statutory contract, will not be able to enforce them. The implication of the statutory contractual relationship is that parties to the contract can compel each other to observe the provision of the memorandum and articles of association and they can also prevent each other from committing any breach of the contract.

---

<sup>1</sup> *De Villiers v Jacobsdal Saltworks*, op cit. at 874 A-B

<sup>2</sup> *De Villiers v Jacobsdal Saltworks*, op cit. at 874 C-E

**CHAPTER 5: THE ENFORCEMENT OF RIGHTS AND OBLIGATIONS  
FLOWING FROM THE MEMORANDUM AND ARTICLES OF  
ASSOCIATION.**

**5.1 INTRODUCTION:**

It is now settled in our law and in other legal systems which follow the “contractarian - model of corporate constitution” that the memorandum and articles of association, as the constitution of the company, amount to a statutory contract between the company and its members and between the members inter se<sup>1</sup>. The members who seek to enforce this contract are faced with various limitations. First the ‘outsider rights rule’ allows them to enforce only the rights and obligations that are conferred on them in their ‘capacity as members’<sup>2</sup>. Secondly the *Foss v Harbottle*<sup>3</sup> rule in principle denies the members the right to enforce corporate wrongs and to complain of internal procedural irregularities.

This chapter addresses the question of the extent to which the members can enforce the rights and obligations flowing from the statutory contract. In addressing this question, two related questions will be handled i.e. whether the members can enforce the rights and obligations that are conferred on them in some other capacity and not in their capacity as members, and whether they can enforce all or only some of the provisions of the articles and memorandum of association.

---

<sup>1</sup> See 4.2 (a-b) above.

<sup>2</sup> *Eley v Positive Government Security Life Assurance Co.*(1876)1 ExD 88, *Browne v La Trinidad* (1887) 37 Ch1 (CA) 14, *Hickman v Kent or Romney Marsh Sheepbreeders Association* 1915 1 Ch 881, *Beattie v E & F Beattie* 1938 Ch 708 (CA), *Bratton Seymour Service v Oxborough* 1992 BCI.C 693 (CA), *De Villiers v Jacobsdaal Saltworks (Pty) Ltd.* 1959(3) SA 873 (O), *Grundling v Beyers & Others* 1967 (2) SA 131 (W), *Gohlke & Schneider v Westies Minerale* (Edms)Bpk 1970(2) SA 685(A), *Rosslare (Pty) Ltd. v Registrar of Companies* 1972 (2) SA 542(D).

<sup>3</sup> (1843) 2 Ha. 461(The rule is discussed at 5.4 below)



## **5.2 THE EXTENT OF ENFORCEMENT OF THE RIGHTS & OBLIGATIONS FLOWING FROM THE STATUTORY CONTRACT.**

### **5.2.1 ENFORCEMENT OF OUTSIDER RIGHTS:**

The phrase ‘outsider rights’ is used here to refer to the rights and obligations flowing from the statutory contract, that are conferred on one not in one’s capacity as a member but in some other capacity e.g. as director<sup>1</sup>. The question of whether outsider rights are enforceable or not is addressed here to determine the extent to which the statutory contract is enforceable. In handling this question, different views as expressed by the courts and academic writers in our law, the English and Australian systems will be addressed.

#### **5.2.1 (a) Judicial view:**

In terms of the orthodox view, members can enforce only the rights and obligations that are conferred on them in their capacity as members. The cases that are frequently cited as authority for this view are the earlier cases of *Eley v Positive Government Security Life Assurance Co.*<sup>2</sup> and *Browne v La Trinidad*<sup>3</sup> as decided by the English Court of Appeal. In *Eley’s* case, a member was denied a right to rely on an article that purported to grant him a right to become the company’s solicitor. And in *Browne’s* case, a director failed to obtain an injunction restraining the company from passing a resolution removing him as a director, on the ground that the resolution was contrary to an article which appointed him as a director until the prescribed period.

---

<sup>1</sup> See Goldberg: “The Enforcement of Outsider Rights under s 20(1) of the Companies Act 1948” (1972) 35 MLR 362 at 364.

<sup>2</sup> Op cit.

<sup>3</sup> (1887) 37 ChD1.

Astbury J in *Hickman v Kent or Romney Marsh Sheepbreeders Association*<sup>1</sup> cited *Eley* and *Browne's* cases as authority for the proposition that "... an outsider to whom rights purport to be given in his capacity as an outsider, whether he is or subsequently becomes a member, cannot sue on such articles... [And that] first, no articles can constitute a contract between the company and a third person, secondly that no right merely purported to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as for instance, solicitor, promoter, or director, can be enforced against the company, and thirdly, articles regulating the rights and obligations of members generally as such do create rights and obligations between them and the company respectively"<sup>2</sup>. It has been submitted that Astbury J's reliance on *Eley's* and *Browne's* cases is erroneous as these cases were decided at a time when the English court of Appeal "incorrectly believed that there was no statutory contract between a company and its members"<sup>3</sup> and that the cases were decided mainly on lack of existence of such a contract and not because of the 'capacity test' or the 'qua member test'<sup>4</sup>.

Subsequent cases followed the orthodox view as outlined by Astbury J to grant members enforcement of only the rights and obligations that are conferred on them qua members. In *Beattie v E & F Beattie*<sup>5</sup> Lord Greene MR denied a director, who was also a member, a right to rely on the provision in the articles, which required any dispute between the company and its members to be referred to arbitration. The learned judge held that "the contractual force given to the articles of association by the section is limited to such provisions of the articles as apply to the relationship of members in their capacity as members"<sup>6</sup>.

The 'qua member test' applies not only to the contract between the company and members, but also to the contract between the members inter se. Thus Vaisey J in

---

<sup>1</sup> Op cit.

<sup>2</sup> At 896-7 ??(900)

<sup>3</sup> J Hambrook: "Australian Corporation Law: Principles & Practice", vol.1 1991, 2.4.0150 at 24,169.

<sup>4</sup> Fredman: op cit. at 250-1.

<sup>5</sup> Op cit.

<sup>6</sup> At 721.

*Rayfield v Hands*<sup>1</sup> held that the directors who were also members were bound by the provision in the articles which required them to buy shares of the members who intended to transfer them and that the obligation to take such shares fell on directors in their capacity as members and not in their capacity as directors.<sup>2</sup> It has already been submitted that *Rayfield's* case is not good authority on the subject for the obligation to take one's shares, even if it is a membership obligation, it was not conferred on the directors in their capacity as members<sup>3</sup>.

Not all the judges in English law, allowed the members to enforce only the rights and obligation that were conferred on them qua members. In *Imperial Hydrophatic Hotel Company v Hampson*<sup>4</sup>, the directors were allowed to enforce an article that granted them the right to remain in office. Also in *Pulbrook v Richmond Consolidated Mining Company*<sup>5</sup>, a director obtained an injunction restraining his fellow directors from excluding him from the board meetings. And in *Hayes v Bristol Plant Hire Ltd*<sup>6</sup> a director who was wrongly excluded from the board meeting was successful in obtaining a declaration that the resolution passed at the time when he was excluded was invalid.

In all the three cases mentioned above, no reference was made to the enforcement of outsider rights, instead the judges emphasised on a proper compliance with the provisions of the statutory contract. For example the learned judge in *Imperial Hydrophatic* case emphasised on the passing of a proper resolution altering the articles and addition of a new clause providing for removal of directors<sup>7</sup>. Despite these three cases, the English court of Appeal in *Bratton Seymour v Oxborough*<sup>8</sup> has recently approved the orthodox theory as correct. Steyn LJ held that the statutory contract "... is binding only in so far as it affects the rights and obligations between the company and the members acting in their

---

<sup>1</sup> 1960 Ch1.

<sup>2</sup> See 4.2 (a) above.

<sup>3</sup> See also Bastin : The Enforcement of a Member's Right, J.Bus. Law, 1977, 17,26 F.N 56 who also submits that *Rayfield's* case is open to criticism for the learned judge brushed aside the argument that the obligation to take shares was imposed on directors qua directors and not qua members.

<sup>4</sup> 23 ChD1.

<sup>5</sup> (1878) 9 ChD 610.

<sup>6</sup> (1957) 1 AllER 685 ChD.

<sup>7</sup> See p7,10 &11 of the case.

<sup>8</sup> [1992] BCLC 693.

capacity as members. If it contains provisions conferring rights and obligations on outsiders, then those provisions [are not] part of the contract between the company and the members, even if the outsider is coincidentally a member”<sup>1</sup>.

The extent to which a member can enforce the rights and obligations flowing from the statutory contract, has in our law, also been influenced by the orthodox view. In *De Villiers v Jacobsdaal Saltworks*<sup>2</sup>, Potgieter J stated that “the articles constitute a contract between members inter se and between the company and members, but only in their capacity as members. They do not for instance constitute a contract between the company and a director in his capacity as such”<sup>3</sup>. And in *Grundling v Beyers & Others*<sup>4</sup>, Trollip J also followed the same theory to hold that “the constitution (of the union) itself does not form any legal relationship between the union and the general secretary as such. The only relationship it creates is that between the union and its members in their capacity as outsiders”<sup>5</sup>. The Appellate Division (now the Supreme Court of Appeal) affirmed this approach as correct, where Trollip JA pointed out in *Gohlke & Schneider v Westies Minerale*<sup>6</sup> that “the articles, therefore, merely have the same force as a contract between the company and every member as such”<sup>7</sup>.

The Australian system introduced some changes to their common law statutory contract. S 180(1) of the Australian Corporations Law clearly provides that “subject to the provisions of this Act, the constitution of the company has the same effect of a contract under seal:

- (a) between the company and each member.
- (b) between the company and each eligible officer and
- (c) between a member and each other member

under which the above mentioned persons agree to observe and perform the provisions of the (constitution) as in force for the time being so far as those provisions are applicable to

---

<sup>1</sup> At 698.

<sup>2</sup> Op cit.

<sup>3</sup> At 876H-877 & 874A.

<sup>4</sup> 1967(2) SA 131(W).

<sup>5</sup> At 138G-H

<sup>6</sup> Op cit.

<sup>7</sup> At 692. See also *Rosslare v Registrar of Companies*, op cit.

that person”. S 180(1) changed the common law position in that it introduced a new proviso which requires the company’s constitution to be observed and performed by parties “so far as those provisions are applicable to that person” and it does not state that the requirement of ‘capacity of members as such’ applies<sup>1</sup>.

This proviso introduces new uncertainties of what is meant by “so far as the provisions are applicable to that person”. The Explanatory Memorandum to the Corporation Bill states with regard to s 180(1) that: “It is intended that the memorandum and articles will constitute a contract between the company and its members and as between the members themselves in their capacity as members”<sup>2</sup>. It is therefore submitted that the traditional requirement of a member in his capacity as such still applies to the present s 180(1) so that only membership rights and obligations are created and neither rights nor obligations are created for outsiders<sup>3</sup>.

Unlike the statutory contracts in our law and the English Law, which exclude directors as parties to the statutory contract, s 180(1)(b) provides that ‘eligible officers’ are parties to the statutory contract with the company. An ‘eligible officer’ is defined in s 180(5) to include a director, principal executive officer and a secretary of the corporation. The implication is that ‘eligible officers’ would under s 180(1)(b) be able to enforce the statutory contract despite the fact that they are not members of the company. The provisions of the statutory contract applies to ‘eligible officers’ also “so far as those provisions are applicable (such) person(s)”.

It has been argued that s 180(1)(b) may not produce different results to *Beattie’s* case, since the arbitration article in that case referred to disputes involving members and the company and not disputes between the company and directors, which would be covered

---

<sup>1</sup> R Tomasic & S Bottomley, op cit. at 219. See also J Hambrook, op cit. at 2.4.0150 at 24,170.

<sup>2</sup> Explanatory Memorandum to the Corporation Bill 1988, vol1, par 630. See also J Hambrook, op cit. 2.4.0150 at 24,170, who makes reference to this Explanatory Memorandum.

<sup>3</sup> See 4.2(a) above where the same submission is made. See also Ford & Austin, op cit. at 161.

under s 180(1)(b)<sup>1</sup>. It appears that s 180(1)(b) would reverse the decision in *Browne's* case, for a provision in the articles which conferred on Browne a right to remain a director until a prescribed period, is a provision which is applicable to an 'eligible officer' despite the fact that he was not a member<sup>2</sup>.

It is further submitted that the traditional requirement of capacity of a member as such would under s 180(1)(c) apply to a contract between the members inter se as it applies to a contract between the company and members "so far as the provisions are applicable to (such) person(s)". S 180(1)(c) only creates a contract between the members inter se and none between 'eligible officers' and members. The implication is that an obligation placed on a director or rights granted to a director in his capacity as such, can only be enforceable against the company and not against members. Therefore the test of a member as such will still apply to *Rayfield's* case under s 180(1)(c)<sup>3</sup>.

It has been submitted that it is a regrettable outcome that members cannot under s 180(1)(c) enforce the statutory contract against the directors, for the minority shareholders are faced with the problem of getting the company to sue the directors<sup>4</sup>. Hambrook argues that the reason for not making a contract between members and 'eligible officers' lacks merit for it is based on fear of multiplicity of actions against the directors, which can easily be avoided with a representative action<sup>5</sup>. It is submitted that lack of a contract between 'eligible officers' and members lies on the ground that the relationship between directors and members is governed by director's fiduciary duties, which are owed to members as a whole<sup>6</sup>. Thus the proper person to sue the directors for breach of their fiduciary duties is the company or the members through a representative action.

---

<sup>1</sup> J Hambrook, op cit. 2.4.0155 at 24, 182.

<sup>2</sup> See also Boros: "Minority Shareholder's Remedies", 1995 at 71.

<sup>3</sup> See also J Hambrook, op cit. 2.4.0165 at 24, 185 & Boros, op cit. at 71.

<sup>4</sup> J Hambrook, op cit. 2.4.0165 at 24, 186.

<sup>5</sup> J Hambrook, op cit. 2.4.0165 at 24, 186.

<sup>6</sup> See R Tomasic & S Bottomley op cit. at 220 who made the same submission.

### 5.2.1(b) Academic views:

Academic writers have advanced conflicting arguments on the question of the extent to which the members can enforce the rights and obligations flowing from the statutory contract. The orthodox view, as espoused by Astbury J in *Hickman v Kent or Romney Marsh Sheepbreeders Association*<sup>1</sup>, found support from certain but not all academic writers. In English law, Professor Gower supports this view with the proposition that “the memorandum and articles have no direct contractual effect in so far as they purport to confer rights and obligations on a member otherwise than in his capacity of a member”<sup>2</sup>. Pennington and Schmitthoff also support this view as advanced in *Hickman’s* case<sup>3</sup>.

Professor Wedderburn who based his proposition on the case of *Salmon v Quin & Axtens Ltd.*<sup>4</sup> advanced a different view. His proposition is that “a member can compel the company not to depart from the contract with him under the articles, even if that means indirectly the enforcement of outsider rights vested either in third parties or himself, so long as he sues qua member and not qua outsider”<sup>5</sup>. He proposed further that “a shareholder over and above his specific right under the articles (to dividend, share certificate etc.) has a personal right to have the company administered according to the terms of the articles”<sup>6</sup> and that the personal right extends to “a general right to have the articles observed... subject only to those matters of internal management on which the courts have seen fit to displace (a member’s) contractual right in favour of majority rule”<sup>7</sup>.

In *Salmon’s* case, the articles of association delegated the management of the company’s business to the directors. Article 80 provided that no resolution of the directors for acquisition or letting of premises would be valid if any of the managing directors

---

<sup>1</sup> Op cit.

<sup>2</sup> L.C.B. Gower: “*Gower’s Principles of Modern Company Law*”, 2<sup>nd</sup> ed. at 252.

<sup>3</sup> Pennington, “*Company Law*”, at 284; Schmitthoff, “*Company Law*”, 24<sup>th</sup> ed. at 177.

<sup>4</sup> [1909] 1 Ch 311 affirmed by the House of Lords as *Quin & Axtens v Salmon* 1909 AC 442 HL.

<sup>5</sup> K. Wedderburn: “*Shareholder’s Rights and the Rule in Foss v Harbottle*” [1957]15 C.L.J 194 at 212-3.

<sup>6</sup> K. Wedderburn: “*Contractual Rights under the Articles of Association- An overlooked principles illustrated*”, [1965] 28 MLR 347 at 348.

<sup>7</sup> K. Wedderburn: op cit. at 349 & 350, See 5.4.3 below for a discussion on *Foss v Harbottle*.

dissented. The directors passed a resolution to this effect and Salmon, a managing director, dissented. Subsequently the members in the general meeting passed a resolution to confirm the director's decision. Salmon then brought a representative action, restraining the company from acting on the member's resolution, because of its inconsistency with article 80. Farwell J held that the purported resolution was "an attempt to alter the terms of the contract between the parties by a simple resolution instead of by a special resolution"<sup>1</sup>.

Wedderburn interpreted *Salmon's* case as granting a member a general right to enforce all the provisions of the statutory contract even if that results in the indirect enforcement of outsider rights, provided that a member sues qua member and not qua outsider. Thus he pointed out that "As a member, [Salmon] had no right of veto, the articles purported to give that right to him in his capacity as managing director and not as member. [He therefore] sued as a shareholder to protect a right personal to him, but common to all members. Hence a representative action... [That right] could not be a right vested in him qua managing director. In such capacity (as outsider) he could not enforce the contract arising from the articles. It is therefore obvious that Salmon enforced the right of a member to have the articles observed by the company"<sup>2</sup>.

It is submitted that *Salmon's* case was correctly decided, but not on the interpretation as provided by Wedderburn<sup>3</sup>. Farwell J in passing his judgement never referred to a member's general right to have the articles observed, instead his judgement focused on the improper resolution that was used as an attempt to alter the articles. Article 80 provided that the management of the company's business should be done by directors and

---

<sup>1</sup> At 319.

<sup>2</sup> K. Wedderburn, op cit. 212.

<sup>3</sup> See also G. Prentice: "The Enforcement of Outsider Rights, (1980)1 Co. Lawyer 197; Blackman: "The Company Contract: Lord Wedderburn and the Enforcement of Outsider Rights", (1992) 109, SALJ 225 at 228.



not by members in the general meeting. Any alteration of that article could only be done by way of special resolution and not by an ordinary resolution<sup>1</sup>.

A member's right to enforce 'outsider rights' indirectly has also been supported by Goldberg<sup>2</sup> and Prentice<sup>3</sup>. Both of these authors, unlike Wedderburn, argue that *Salmon's* case is not authority for a wide proposition that a member has a general right to have all the provisions of the company constitution observed<sup>4</sup>. Goldberg's view attempts to reconcile the two conflicting theories by proposing a middle-way between Astbury J and Wedderburn's views. His comment on the two theories is that the orthodox view as advanced by Astbury J is very narrow whereas Wedderburn's view is too wide<sup>5</sup>.

Goldberg's view is that 'outsider rights' can be enforced provided that their enforcement is incidental to a member's "right to have any affairs of the company conducted by a particular organ of the company specified in the Act or company's memorandum or articles and provided that a member sues qua member and not qua outsider"<sup>6</sup>. He referred to *Eley's* case and other cases<sup>7</sup> to illustrate his view. He argues that the court in *Eley's* case held that "on the proper construction of the articles when read as a whole, the power to appoint the company's solicitor still resided in the board of directors, and it was the board which appointed new solicitors. Therefore the organ of the company in which by the articles it was vested had exercised the power of appointment. Since it follows that the enforcement of the plaintiff's outsider right under the articles to be the company's solicitor would have been not incidental, but rather contrary, to the enforcement of the member's right and obligation to have that part of the company's affairs relating to the

---

<sup>1</sup> *Salmon V Quin & Axtens Ltd.* op cit. per Farwell J at 319.

<sup>2</sup> Goldberg: "The Enforcement of Outsider Rights under s20(1) of the Companies Act 1948", op cit.

<sup>3</sup> Prentice: "The Enforcement of Outsider Rights", op cit.

<sup>4</sup> Prentice, op cit. At 180 & Goldberg, op cit. at 368.

<sup>5</sup> At 363.

<sup>6</sup> Ibid.

<sup>7</sup> Reference was also made to the case of *Browne v La Trinidad*, op cit.; *Re Dale Plant Ltd.*(1887) 61 L.T 206; *Beattie v E & F Beattie*, op cit.

engagement of its solicitors conducted by the organ of the company entrusted therewith under the articles, the plaintiff's suit was bound to be dismissed"<sup>1</sup>.

In illustrating his view, Goldberg referred also to the cases of *Pulbrook v Richmond Consolidated Mining Co.*<sup>2</sup> and *Hayes v Bristol Plant Hire Ltd.*<sup>3</sup>. He argues that in both cases 'outsider rights' were enforced and that their enforcement was incidental to a member's right to have the affairs of the company conducted by an organ specified in the articles<sup>4</sup>. It is submitted that this interpretation as offered Goldberg is not the one made in those cases. In all these cases he referred to, there was no mention of 'outsider rights' nor of the organ of the company in which by the articles its power was vested<sup>5</sup>.

In *Eley's* case, a member could not enforce his right to be the company's solicitor not because the right was not incidental to a member's right to have the proper organ conduct its affairs, as argued by Goldberg. Eley failed to enforce a right to become the company's solicitor because the case was decided at the time when the English Court of Appeal incorrectly believed that a statutory contract did not exist between the members inter se<sup>6</sup>. And in the *Pulbrook* and *Hayes* cases an emphasis was placed on the proper compliance with the provisions of the articles<sup>7</sup>.

Prentice argues that it is misleading to ask whether a member does sue qua member or qua outsider, nor to examine the organ of the company concerned<sup>8</sup>. He suggests that the question should be taken one step further by asking "whether the provision in question affects the power of the company to function"<sup>9</sup>. His view is that "a member only has rights granted by the memorandum or articles so far as their provisions restrict or relate to the power of the company to function" and that 'outsider rights' are enforceable if a

---

<sup>1</sup> Goldberg, op cit. at 366.

<sup>2</sup> Op cit. referred to at 5.2.1(a).

<sup>3</sup> Ibid.

<sup>4</sup> Goldberg, op cit. at 369.

<sup>5</sup> See also Fredman, op it. at 242.

<sup>6</sup> See 5.2.1(a) above.

<sup>7</sup> *Pulbrook v Richmond Consolidated Mining Co.*, op cit. and *Hayes v Bristol Plant Hire Ltd.* op cit.

<sup>8</sup> Prentice, op cit. at 179.

<sup>9</sup> Ibid.

member has “an independent cause of action over and above that granted by s 20(1)”<sup>1</sup>. He referred to Asbury J’s second and third principle in *Hickman’s* case and argues that the two principles may be condensed in his proposition that “s 20(1) contract extends to membership rights, membership rights being rights relating to the manner in which the company may function”<sup>2</sup>.

It is submitted that membership rights cannot be restricted to the manner in which the company may function. It has already been submitted that a membership right is a right that is given to one as a member. A member being a person who has subscribed to the memorandum in terms of s 103(1) or who has consented to be included in the register of members in terms of s 103(2)-(4)<sup>3</sup>. It is further submitted that Prentice’s theory like that of Goldberg, never prevailed in the minds of judges who decided the cases that they both referred to<sup>4</sup>.

The South African academic writers like our judiciary, support the orthodox view, to grant members the right to enforce only the rights and obligations that are conferred on them in their capacity as members. According to Cilliers and other authors mentioned, “it is generally accepted today that the memorandum and articles constitute a contract between the company and its members to the extent that the provisions thereof affect the members in their capacity as members”<sup>5</sup>. Pretorius and other authors mentioned are of the same view. They argue that the articles and memorandum “constitute a contract between the members inter se; a non member acquires no rights under the articles”<sup>6</sup>. Blackman argues that “in so far as [the articles and memorandum] purport to confer or impose rights or obligations on persons who are members of the company, their provisions are binding only so far as they purport to confer or impose these rights or obligations on these

---

<sup>1</sup> Prentice, op cit. at 182.

<sup>2</sup> Ibid.

<sup>3</sup> See 2.2(a)-(d) above.

<sup>4</sup> Drury; “The Relative Nature of a Shareholder’s Right to Enforce the Company Contract”, (1986)45 CLJ 219 at 229; Fredman, op cit. 242.

<sup>5</sup> Cilliers et al, “Corporate Law”, 2<sup>nd</sup> ed. at 74.

<sup>6</sup> Pretorius et al: “Hahlo’s South African Company Law Through the Cases”, 5<sup>th</sup> ed. at 113.

persons in their capacity as members”<sup>1</sup>. It is commonly agreed in our law that the memorandum and articles do not constitute a contract between the company and a director, solicitor or employee in his capacity as such<sup>2</sup>.

In Australian law, s 180(1) is silent about the requirement of a ‘member in his capacity as such’. The section binds members “so far as those provisions [of the statutory contract] are applicable to that person”. Ford and Austin have submitted that the traditional requirement of a ‘member in his capacity as such’ still applies under s 180(1) so that no rights and obligations are created for outsiders<sup>3</sup>. The non enforcement of ‘outsider rights’ does not extend to directors, for s 180(1)(b) deems ‘eligible officers’ to be parties to a contract between the company and members, and ‘eligible officers’ are in terms of s 180(5) defined to include a director, principal executive officer and a secretary.

### **5.3 CONCLUSION:**

The extent to which a member can enforce the rights and obligations flowing from the statutory contract is considerably limited by the orthodox view as advanced by Astbury J in *Hickman*'s case. This view allows the enforcement of only the rights and obligations that are conferred on a member in his capacity as such. The difficulty with this view is that the “concept of ‘member in his capacity of member’ has not been carried by courts to what might be its logical conclusion”<sup>4</sup>. The non-clarity arising from this concept raises the question of whether the word member includes shareholders and outsiders e.g. directors.

It has been held that the concept of a ‘member in his capacity as such’ refers to “a contract between him and the company which is connected with the holding of shares and which confers rights which are part of a general regulation of the company applicable

---

<sup>1</sup> Blackman: op cit. vol. 4 par 73 at 126.

<sup>2</sup> *De Villiers v Jacobsdaal Saltworks*, op cit. at 877.

<sup>3</sup> Ford & Austin, op cit. at 161.

<sup>4</sup> Gower, op cit. 6<sup>th</sup> ed. at 119.

alike to all shareholders”<sup>1</sup>. It has already been submitted in this research paper that it is incorrect to associate the concept of ‘capacity of member as such’ with a member’s holding of shares, for the statutory contract applies to all types of companies and not only to companies with share capital<sup>2</sup>.

The nature of a company may circumscribe what may fairly be referred to as membership rights or obligations.<sup>3</sup> Thus it has been submitted that in a company with share capital, “a member need not be a shareholder or more rarely a shareholder a member... (but that) happily it has never been doubted that the statutory contract applies to all these (parties)”<sup>4</sup>. It is submitted here that despite the fact that shareholders have been allowed to enforce the statutory contract, the literal meaning of the word member does not mean a shareholder, but members in a company with share capital are shareholders for they are required by the Act to hold a certain number of shares, and shareholders are not always members for they can hold shares as nominee shareholders on behalf of a beneficial true owner of shares<sup>5</sup>.

It is further submitted that ‘outsider rights’ cannot under the existing statutory contract section in our system, nor the English or Australian systems, be enforced directly nor indirectly. This is so for judgments that are cited as authority for the enforcement of ‘outsider rights’ never made reference to the enforcement of such rights and the principles enunciated by academic writers in support of the enforcement of ‘outsider rights’ never formed part of such judgments<sup>6</sup>.

It will be submitted in this research paper that what is needed is a re-draft of the statutory contract sections of countries following the ‘contractarian -model of corporate

---

<sup>1</sup> *Rosslare v Registrar of Companies*, op cit. at 528D.

<sup>2</sup> See 4.2(a) above.

<sup>3</sup> *Magill v Satina (Pty) Ltd.* op cit. at 292; See also J Hambrook, op cit. at 24,170 who made the same submission.

<sup>4</sup> Gower, op cit. at 119 & 120.

<sup>5</sup> See s 52(2) b of the South African Companies Act 61 of 1973 & see 2.3(d) above.

<sup>6</sup> See 5.2.1(b) above.

constitution’ and that what is needed is a section that clearly indicates the extent to which the statutory contract is enforceable by parties to it<sup>1</sup>.

#### 5.4. ‘FOSS v HARBOTTLE RULE’:

##### 5.4.1 Introduction:

Member’s ability to enforce the rights and obligations flowing from the statutory contract is in the second place limited by the rule in *Foss v Harbottle*<sup>2</sup>. This rule is based on the two principles of company law i.e. the ‘corporate (proper) plaintiff principle’ and the ‘internal management principle’ as stated by Jenkins LJ in *Edwards v Halliwell*<sup>3</sup>. The ‘corporate plaintiff principle’ is based on the separate legal personality of a company while the ‘internal management principle’ is based on the ‘principle of majority rule’.

Jenkins L.J in Edwards’ case stated that “the proper plaintiff in an action in respect of a wrong alleged to be done to the company or association of persons is prima facie the company or association itself [and that] where the alleged wrong is a transaction which might be binding on the company or association and all its members by a simple majority of members, no individual member of the company is allowed to maintain an action in respect of that matter for a simple reason that, if a mere majority of members of the company or association is in favour of what has been done then cadit quaestio [the matter ends]”<sup>4</sup>

The effect of the rule in *Foss v Harbottle* on a member’s standing to bring an individual action requiring the company to strictly observe all the provisions of the memorandum and articles of association and a member’s ability to bring an action concerning the internal procedural irregularities will be addressed here as a way of determining the

---

<sup>1</sup> See chapter 7 below.

<sup>2</sup> (1843) 2 Ha. 461.

<sup>3</sup> [1950] 2 All ER 1064 (CA)

<sup>4</sup> At 1066.

extent to which the statutory contract is enforceable. In addressing this question, different views as expressed by the judiciary and academic writers in our law, the English and the Australian systems will be looked into.

A member's ability to bring an individual action requiring the company to strictly observe all the provisions of the statutory contract has long been a source of controversy due to the two conflicting principles in company law i.e. in the first place "the articles of association constitute a contract between the shareholders and the company, so that failure to observe the articles is, prima facie actionable... On the other hand, the rule in *Foss v Harbottle* requires that corporate litigation be in the company's name"<sup>1</sup>.

A member's individual action is a source of controversy because when an irregularity occurs in the conduct of the company's internal affairs, the result is that, in the first place a wrong is done to the company and it can be set aside or ratified by the majority in the general meeting. In the second place a breach of the statutory contract is committed and parties to the contract are entitled to sue the wrongdoers. Members have in certain cases been denied the right to sue the wrongdoers due to the 'rule in *Foss v Harbottle*'. "But how can the 'rule in *Foss v Harbottle*' defeat the member's rights against the company?"<sup>2</sup> And as phrased differently by Smith, "How can one justify ratification by the company so as to preclude a personal action... here ratification is by a party in breach of the duty (i.e. the company)"<sup>3</sup>. This question will be addressed here after looking at the views of the judiciary and academic writers on the subject.

---

<sup>1</sup> Smith: "Minority Shareholders and Corporate Irregularities", (1978)41, 1978,147.

<sup>2</sup> Blackman: Member's Rights Against the Company and Matters of Internal Management, (1993)110 SALJ,473 at 475.

<sup>3</sup> Smith, op cit. at 155.

#### 5.4.2 Judicial view:

Courts have applied the two principles in the ‘rule in *Foss v Harbottle*’ to deny members unrestricted rights in enforcing the provisions of the statutory contract. In English law in the case of *Foss v Harbottle*<sup>1</sup>, Wigram VC applied the ‘corporate plaintiff’ principle to hold that the proper person to sue the directors, who fraudulently misapplied the funds of the company, is the company itself and not its members<sup>2</sup>. The same principle was followed in *Mozley v Alston*<sup>3</sup> where the complaint brought by two shareholders against the directors for their illegal exercise of power was held to be an injury to the corporation itself and not to the plaintiffs personally<sup>4</sup>. And in *Prudential Assurance v Newman Industries Ltd.(No 2)*<sup>5</sup> the Court of Appeal held that theft of the corporate funds is injurious to the corporation itself and it does not entitle a member a right to sue<sup>6</sup>.

The ‘internal management principle’ has in English law been applied in the case of *MacDougall v Gardiner*<sup>7</sup> to deny a shareholder a right to compel the company to hold a meeting in accordance with the provisions of the articles requiring the taking of a poll. James LJ held that the ‘internal management principle’ covers not only irregularities in the boardroom but also irregularities in the conduct of the general meeting, and if the internal affairs of the company are not properly managed, then the company is the proper plaintiff to complain<sup>8</sup>. It was also held in the case per Mellish LJ that “if the thing complained of is a thing which in substance the majority of the company are entitled to do, [then] ... there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called and then ultimately the majority gets its wishes”<sup>9</sup>. The ‘internal management’ principle was affirmed by the English Court of Appeal in

---

<sup>1</sup> Op cit.

<sup>2</sup> At 203-4.

<sup>3</sup> (1874) 1 Ph 790.

<sup>4</sup> Per Cottenham LC at 791.

<sup>5</sup> [1982] 1 CH. 204

<sup>6</sup> At 222H-223B.

<sup>7</sup> (1875) 1 ChD 13.

<sup>8</sup> At 22-23.

<sup>9</sup> At 25.



*Prudential Assurance Co. Ltd. v Newman*<sup>1</sup> where it was pointed out that “The rule in *Foss v Harbottle* also embraces a related principle, that an individual shareholder cannot bring an action in the courts to complain of an irregularity (as distinct from an illegality) in the conduct of the company’s internal affairs if the irregularity is one which can be cured by a vote of the company in the general meeting”<sup>2</sup>.

The South African courts have also applied the ‘*Foss v Harbottle* rule’, to deny members unrestricted rights in enforcing the statutory contract. In *Vrede Gold Exploration Ltd. v Lubner & Others*<sup>3</sup> the proper plaintiff to redress the wrong done to the company, was held to be prima facie the company itself<sup>4</sup>. The Appellate Division in *Francis George Hill Family Trust v SA Reserve Bank*<sup>5</sup> affirmed the ‘corporate plaintiff’ principle. Hoexter JA in the case pointed out that “It is trite that a company with limited liability is an independent legal person and separate from its shareholders or directors. In general, therefore, when a wrong is alleged to have been done to a company the proper plaintiff to sue the wrongdoer is the company itself”<sup>6</sup>

South African courts have also applied the ‘internal management’ principle to limit the extent to which members can enforce the statutory contract. Vermooten J in *Investors Mutual Funds Ltd. v Empisal (SA) Ltd.*<sup>7</sup> pointed out that “It is a well known principle that the Court will not normally intervene in the internal domestic affairs of a company and will not enquire into the commercial wisdom of a particular transaction which is left to the decision of the shareholders”<sup>8</sup>. The same principle was affirmed by the Appellate Division in *Sammel v President Brand Gold Mining Co. Ltd.*<sup>9</sup>, where Trollip JA said that “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

---

<sup>1</sup> Op cit.

<sup>2</sup> At 210.

<sup>3</sup> 1973(2) SA 331 (C).

<sup>4</sup> At 336 (C).

<sup>5</sup> 1992(3) SA 91(A).

<sup>6</sup> At 97 B-C.

<sup>7</sup> 1979(3) SA 170(W).

<sup>8</sup> At 175 G.

<sup>9</sup> 1969(3) SA 629 (A)

the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own right as a shareholder. That principle of supremacy of the majority is essential to the proper functioning of companies”<sup>1</sup>.

The Australian courts have also applied the rule in *Foss v Harbottle* to limit the extent to which a member can enforce the statutory contract. In *Stanham v The National Trust of Australia (NSW)*<sup>2</sup> it was pointed out that a member cannot enforce all the provisions of the statutory contract. Young J in the case said that “If one elevated every matter in the articles of association of a company to a status of a contractual right vested in each and every member the rule in *Foss v Harbottle*... would be able to be completely disregarded”<sup>3</sup>.

A different line of cases exist where members have been allowed to require enforcement of the statutory contract and the ‘rule in *Foss v Harbottle*’ was held to be of no application. These cases fall within the established exceptions to the ‘*Foss v Harbottle* rule’. These exceptions are meant to protect minority shareholders against abuse of power by directors\ majority shareholders. In *Wallersteiner v Moir (No 2)*<sup>4</sup> Lord Denning MR highlighted the need for the exceptions to this rule, by stating that “suppose [a company] is defrauded by insiders who control its affairs-by directors who hold a majority of the shares-who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified”<sup>5</sup>.

---

<sup>1</sup> At 678 G-H.

<sup>2</sup> (1989)15 ACLR 87.

<sup>3</sup> At 90.

<sup>4</sup> [1975] 1 ALL ER 849.

<sup>5</sup> At 857 E-F.

The '*Foss v Harbottle* rule' will have no application where:

- the transaction entered into is ultra vires.
- the transaction requires approval of the special majority.
- personal rights of members are infringed.
- the transaction amounts to a fraud on the minority.
- (and recently<sup>1</sup>)-where the interest of justice requires non-application of the rule.

It has correctly been submitted that these exceptions apart from the fifth one can be reduced to one exception by stating that “an individual shareholder can always sue, notwithstanding the rule in *Foss v Harbottle* when what he complains of could not be validly effected or ratified by an ordinary resolution”<sup>2</sup>. This is so for the majority cannot by an ordinary resolutions ratify or condone these following acts: an ultra vires transaction, an act that requires approval of a special resolution, an act which amount to an infringement of a member’s personal right, nor can an ordinary resolution condone an act which amounts to a fraud on the minority<sup>3</sup>. Emphasis will be placed on the second and the fifth exceptions as all the exceptions, apart from the fifth exception can be reduced to the special majority exception i.e. the second exception.

The fifth exception has recently been established as a way of increasing protection of minority shareholders against abuse of the majority and as submitted by Hargovan<sup>4</sup>, this “illustrate the movement away from the marked judicial antipathy towards the minority shareholder”<sup>5</sup>. Support for the fifth exception had long been referred to in English law by Wigram V-C in the case of *Foss v Harbottle*<sup>6</sup> by stating that “... I cannot but think that the principle so forcibly laid down by Lord Cottenham in *Wallworth v Holt* (1841) 4 Myl

<sup>1</sup> See below footnotes 3-6 on page 69 for a discussion of the recent Australian and South African cases on the subject.

<sup>2</sup> Gower: “*Gower’s Principles of Modern Company Law*”, 5<sup>th</sup> ed. 658, See also Pretorius et al, op cit. at 513 for a submission that the rule in *Foss v Harbottle* has no application when the wrong in question cannot be ratified or condoned by the majority in the general meeting.

<sup>3</sup> Ibid. See Blackman, op cit at 483 who submitted that denying a member an action when a special resolution is required would be to “enable the majority to do indirectly what they are denied the power to do directly”.

<sup>4</sup> A Horgavan: “*Under Judicial and Legislative Attack: The Rule in Foss v Harbottle*”, (1996)113 SALJ 631.

<sup>5</sup> At 631.

<sup>6</sup> Op cit.

& Cr 619 at 635[41 ER 238]... and other cases would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue”<sup>1</sup>. However, the English Court of Appeal held that the fifth exception couldn’t be founded merely on the ground that the interest of justice so requires<sup>2</sup>.

In South African law, authority for the existence of the fifth exception can be found in the case of *McLelland v Hulett & Others*<sup>3</sup>. Booysen J in the case held that “The rule in *Foss v Harbottle* is not an absolute rule... [and] [W]here, as in the present case, the risk of [multiplicity of actions] is non-existent, and a shareholder is left with a diminished patrimony, the continued application of the rule would amount to an unwarranted and a technical obstruction to the course of justice”<sup>4</sup>.

The Australian system follows the same approach. In *Biala Pty Ltd v Mallina Holdings Ltd. (No 2)*<sup>5</sup> Ipp J held that “Equity is concerned with substance and not form, and it seems to me to be contrary to the principles to require wronged minority shareholders to bring themselves within the boundaries of the well-recognised exceptions and to deny jurisdiction to a court of equity even when an unjust or unconscionable result may otherwise ensue”<sup>6</sup>.

With the second exception, the ‘rule in *Foss v Harbottle*’ will have no application when an action complained of is a wrong that can be ratified by the majority in the general meeting<sup>7</sup>. The difficulty with this exception is drawing a line between ratifiable and non-ratifiable wrongs. This difficulty is evident in the two English cases of *MacDougall v*

---

<sup>1</sup> At 492.

<sup>2</sup> *Prudential Assurance Co. Ltd. v Newman Industries Ltd. (No 2)* op cit. at 224.

<sup>3</sup> 1992(1) SA 456(D).

<sup>4</sup> At 457B-D.

<sup>5</sup> 1993 11 ACLC 1082.

<sup>6</sup> At 1102.

<sup>7</sup> See footnote 2 on page 68

*Gardiner*<sup>1</sup> and *Pender v Lushington*<sup>2</sup>. In *MacDougall's* case, a shareholder's demand that a vote be counted by poll rather than by show of hands failed, for the irregularity in question was held to be a wrong to the company<sup>3</sup>. But in *Pender's* case, a member was allowed to bring an action enforcing his right to vote. Jessel MR held that "this is an action of Mr Pender for himself. He is a member of the company, and whether he votes with the majority or the minority he is entitled to have his vote recorded-an individual right in respect of which he has a right to sue. That has nothing to do with the question like that raised in *Foss v Harbottle* and that line of cases<sup>4</sup>. The question that arises here is why is the right to poll ratifiable and therefore not enforceable whereas the right to vote is non ratifiable and enforceable<sup>5</sup>. This question will be addressed after views of academic writers on the subject have been looked at.

#### **5.4.3 Academic writers:**

Different propositions have been advanced on the question of the extent to which a member can enforce the statutory contract with the effect of the '*Foss v Harbottle* rule'. In English Law, Wedderburn advanced a wide proposition on the subject. Relying on the case of *Salmon v Quin & Axtens*<sup>6</sup>, he argues that a member has a general right to enforce every provision of the statutory contract-"subject only to those matters of internal management on which the court has seen fit to displace his contractual right in favour of majority rule"<sup>7</sup>.

---

<sup>1</sup> Op cit.

<sup>2</sup> (1877)6 ChD 70.

<sup>3</sup> At 25.

<sup>4</sup> At 80-81.

<sup>5</sup> Wedderburn, op cit. at 214.

<sup>6</sup> Op cit.

<sup>7</sup> Wedderburn, op cit. at 214-5.

He argues further that the mere fact that a wrong is an internal irregularity does not necessarily mean that a member has to be denied a personal action. What is required, according to Wedderburn is that “a line has to be drawn through the articles. On one side stand clauses the breach of which cannot be ratified, on the other stand those in grip of the ordinary majority-and that matters of internal management ought to be confined to matters already covered by judicial pronouncement”<sup>1</sup>. On this proposition he argues that *MacDougall's* case was wrongly decided for it overlooks a member’s general right to enforce all the provisions of the statutory contract<sup>2</sup>. Smith has advanced the same view by arguing that allowing personal actions to be unfettered would be an important step towards safeguarding the rights of minority shareholders<sup>3</sup>.

Wedderburn’s view has been criticised as too wide by authors who advanced a narrow view. Authors who support this view argue that a member does not have a right to have all the provisions of the statutory contract observed. Gower supports this view by arguing that a member cannot be afforded an action when the wrong complained of can be put right by an ordinary resolution of the company and that this restriction will not apply when his personal right has been infringed<sup>4</sup>. Pennington also supports the same view. He argues that “a member is not invested with a personal right to have all the provisions of the company memorandum and articles duly observed” and that what poses a difficulty is drawing a line between personal rights and corporate rights<sup>5</sup>. He argues further that “perhaps the most that can be said is that the court will incline to treat a provision in the memorandum or articles as conferring a personal right on a member only if he has a special interest in its observance distinct from the general interest which every member has in the company adhering to the terms of its constitution”<sup>6</sup>.

---

<sup>1</sup> Ibid.

<sup>2</sup> Ibid.

<sup>3</sup> Smith: “*Minority Shareholders and Corporate Irregularities*”, (1978)41 MLR 149 at 160.

<sup>4</sup> Gower, op cit. 4<sup>th</sup> ed. at 318-9. See also Farrar: “*Farrar’s Company Law*”, 3<sup>rd</sup> ed, 1991. at 447.

<sup>5</sup> Pennington, op cit, 4<sup>th</sup> ed. at 588.

<sup>6</sup> Ibid.

It has been submitted that a special interest exists if the articles confers rights of property on a member and that the right of property is a right which is connected to the value and marketability of a share<sup>1</sup>. It has already been submitted in this research paper that it is incorrect to associate the personal rights of a member with his holding of shares, for a member's rights arising from the company constitution apply to all types of companies and not only to companies with share capital<sup>2</sup>.

It has already been pointed out in chapter two of this research paper that the company constitution and the Companies Act regulate a member's personal rights<sup>3</sup>. It is submitted that even if the line between ratifiable and non-ratifiable wrongs is difficult to draw, the company constitution itself does stipulate when a wrong is a matter of internal management and therefore ratifiable. It has correctly been submitted that "the main thrust of the decision [in *MacDougall's* case] was both clear and correct. [This is so for] where the enforcement of a procedural provision is a matter for the majority decision, the individual member can neither (a) enforce that provision against the company nor (b) restrain the company from acting pending a decision of the majority whether or not to enforce the company's right"<sup>4</sup>

Academic writers both in South African and Australian Law support the narrow approach on the subject. Blackman has pointed out that "it is certain that [a member] can compel the company to observe some procedural provisions. [And that] It is equally certain that he cannot compel it to observe them all"<sup>5</sup>. Ford and Austin also argue that a members has no personal right to enforce every provision of the statutory contract and that he cannot complain of irregularities which can be ratified by a majority of members<sup>6</sup>.

---

<sup>1</sup> Bastin: "The Enforcement of a Member's Rights", (1977) JBL 17 at 21.

<sup>2</sup> See 2.3.e above & 5.3 above.

<sup>3</sup> See 2.3(e) for examples of a member's rights arising from the company constitution and the Act.

<sup>4</sup> Blackman: op cit. at 483.

<sup>5</sup> Blackman, op cit. at 473.

<sup>6</sup> Ford & Austin, op cit. at 443. See also J Hambrook, op cit. at 24,169.

## **5.5 CONCLUSION:**

The parties to the statutory contract are required by the company constitution to comply with all the provisions of the memorandum and articles of association<sup>1</sup>. An application of the literal interpretation to this provision implies that parties to the statutory contract have unrestricted rights to enforce the provisions of the memorandum and articles of association. However this is not the case.

It is submitted that a member does not have unrestricted rights to enforce all the provision of the statutory contract. This is so for the rights of a member in a company cannot be looked at in isolation, but must be considered subject to the rights of other parties to this contract<sup>2</sup>. The company constitution does provide that certain matters are subject to majority rule. In such instances a member cannot be afforded a right of action, for it is the majority who can decide whether to restrain the wrongdoers or to ratify their actions. This is so for on becoming a member in a company one “undertakes by his contract to be bound by the decision of the prescribed majority... if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affects [a member’s] own rights”<sup>3</sup>.

It is thus submitted that the constitution itself defeats a member’s right of action when a matter complained of is subject to majority rule<sup>4</sup>. However courts have applied the *Foss v Harbottle* rule to deny a member an action when the wrong complained of is a wrong to the company and when the majority of the members are empowered to ratify or condone a transaction entered into on the strength of an irregular resolution. The rigidity of this rule has been limited by the established exceptions to it and with the statutory derivative

---

<sup>1</sup> S 65(2) of the South African Companies Act 61 of 1973, S 14(1) of the English Companies Act of 1985, S 180(1) of the Australian Companies Act of 1985.

<sup>2</sup> See Drury, op cit. at 238 for the same submission.

<sup>3</sup> Trollop JA in *Sammel v President Brand Gold Mining Co.* op cit. at 678.

<sup>4</sup> See Blackman, op cit. at 481, for the same submission.



action, a member is afforded an action when a wrong has been done against the company and proceedings have not been instituted against the wrongdoers<sup>1</sup>.

The 'outsider rights rule' and the '*Foss v Harbottle* rule' have been applied by courts to limit the extent to which the members can enforce the provisions of the memorandum and articles of association. However, when a breach of the statutory contract is committed, members are afforded the remedies for breach of this contract. These remedies will be addressed in the next chapter of this research paper.

---

<sup>1</sup> See s 266 of the SA Companies Act 61 of 1973, s 245A of the Australian Companies & Securities Advisory Committee (CASAC): 1993. Note that s266 has no counterpart in the English Companies Act,

## **CHAPTER 6: REMEDIES FOR BREACH OF A STATUTORY CONTRACT.**

### **6.1. INTRODUCTION:**

The constitution of companies incorporated under the systems following the 'contractarian-model of corporate constitution'<sup>1</sup>, amount to a statutory contract between the company and its members and between the members inter se. Third parties e.g. directors are not parties to this contract, but directors under the Australian system, are parties to a statutory contract with the company and not with the members<sup>2</sup>. Parties to the statutory contract are bound to observe its provisions so that failure to do so affords an innocent party with a right of action and with remedies for breach of contract. This chapter focuses on the remedies available to a party suing in terms of the statutory contract.

### **6.2. Available remedies:**

It has already been submitted in this paper that although the memorandum and articles of association have a contractual effect, their nature differs from that of an ordinary contract governed by general principles of law of contract<sup>3</sup>. A party suing to enforce the rights arising from the statutory contract cannot be afforded all of the normal contractual remedies.

#### **6.2. (a) Contract between the company and members:**

A member suing in his capacity as such can be granted an interdict\ declaratory order\ an injunction to restrain the company from acting contrary to the provisions of the memorandum and articles of association. However a member can only restrain the company if the transaction in breach of the statutory contract cannot be ratified or

---

<sup>1</sup> See footnote 4 on p 22 . Reference here is to the South African, English and Australian systems.

<sup>2</sup> S 180(1) b of the Australian Corporations Law of 1985.

<sup>3</sup> See 3.3.2 a-e above.

condoned by the majority in the general meeting<sup>1</sup>. A member can also restrain the company if the company's breach of the statutory contract relates to a member's personal right or falls within the exception to the '*Foss v Harbottle* rule'<sup>2</sup>.

Furthermore, a member suing to enforce the statutory contract cannot claim damages against the company. The House of Lords established the authority for refusal of a claim for damages in the English law case of *Houldsworth v City of Glasgow Bank*<sup>3</sup>. Damages as a remedy for breach of the statutory contract have since been denied because of (a) the 'capital-maintenance rule', (b) the hierarchy of claims against the company denies payment of damages to a member in competition with creditors and because (c) payment of damages will result with an indirect loss to a member and prejudice other members<sup>4</sup>.

In English law, the position with regard to an award of damages to a member has changed. S 111A of the English Companies Act<sup>5</sup> provides that "a person is not debarred from obtaining damages or other compensation by reason only of his holding or having held shares in the company..." The implication is that a member can now be awarded damages as a remedy for breach of the statutory contract while he remains a member of the company<sup>6</sup>.

In the Australian system, judicial authority exists for an award of damages to a member. In *Ardletham Options Ltd v Easdown*<sup>7</sup> a member was awarded damages resulting from the failure of a company to issue such a member with a share certificate as required by the contract arising from the articles<sup>8</sup>. However the legislature in Australia has evidenced

---

<sup>1</sup> See 5.4 above.

<sup>2</sup> See *Pender v Lushington*, op cit. & *Wood v Odessa*, op cit. for a personal right exception; *Edwards v Halliwell*, op cit. for a special resolution exception; *Daniels v Daniels* [1978] Ch 406 for fraud on the minority exception; *Biala Pty Ltd v Mallina Holdings Ltd* (No2), op cit. & *McLelland v Hulett* and others, op cit. for the interest of justice exception.

<sup>3</sup> (1880) 5 App Cas 317.

<sup>4</sup> Blackman, op cit. par. 73 footnote 12; R Tomasic & S Bottomley, op cit. at 220-221; Gower op cit, 4<sup>th</sup> ed. at 316; Ford & Austin, op cit. at 165-166.

<sup>5</sup> Act of 1989. See Gower, op cit. 5<sup>th</sup> ed. at 284 footnote 46 for reference to this section.

<sup>6</sup> Gower: op cit. 5<sup>th</sup> ed. at 284.

<sup>7</sup> (1915) 20 CLR 285.

<sup>8</sup> At 294.

an intention that a company can only pay damages to its members if in doing so, it would not bring about its insolvency nor reduce its paid up shares<sup>1</sup>.

It has correctly been submitted that it is not only members who can enforce the statutory contract against the company, but that the company can also enforce this contract against its members<sup>2</sup>. Thus where a member sought to sue the company without referring the dispute to arbitration, it was held that the company could enforce the arbitration clause against the member<sup>3</sup>.

#### **6.2. (b) Contract between members inter se:**

Members can compel each other to observe the provisions of the statutory contract and restrain each other from committing breach of this contract. A member can be granted an interdict to restrain other members from committing a breach of the statutory contract. An interdict can be granted against a member who intends to transfer his shares to an outsider contrary to the pre-emption right as provided for in the articles<sup>4</sup>. A member can also be awarded specific performance as a remedy for breach of contract to compel another member to offer shares to him before offering them to an outsider<sup>5</sup>.

It follows that a member can claim damages from another member for his breach of the statutory contract<sup>6</sup>. This is so for payment of damages by a member will not deplete the funds of the company, as damages will be paid from the assets of a member and not of the company. However, a member's claim for damages will only succeed if such a member can prove that the actions of another member made him to suffer a financial loss.

---

<sup>1</sup> S 563A of the Australian Corporations Act that makes a debt of a member subordinate to the debts of creditors on winding up of a company; See J Hambrook, op cit. at 24,190 for a reference to this section.

<sup>2</sup> Gower, op cit. 4<sup>th</sup> ed. at 316.

<sup>3</sup> *Hickman v Kent or Romney Marsh Sheep-Breeders' Association*, op cit.

<sup>4</sup> *Grant v John Grant & Sons Ltd* [1950] 82 CLR 1 & *Curtis v J Curtis Co Ltd* [1984] 2 NZCLC 99.

<sup>5</sup> See *Rayfields v Hands*, op cit. where the directors were compelled to exercise a duty imposed on them by the articles to take shares of a member equally among themselves.

<sup>6</sup> See Ford and Austin, op cit. at 166.

### 6.2. (c) Contract between the company and non-members:

It is judicially accepted in our law and in the English law that the memorandum and articles of association do not constitute a contract between the company and non-members e.g. directors, nor between the members and directors<sup>1</sup>. The implication is that the directors cannot sue the company for its breach of the statutory contract. However, directors acting in breach of the statutory contract, breach their fiduciary duties and the company can claim damages against them if their actions made it to suffer a loss. Alternatively, a company can be awarded an interdict restraining a director from committing a breach of his fiduciary duties.

A director owes his fiduciary duties to the company as whole and not to individual members<sup>2</sup>. Thus a director who breaches his fiduciary duties commits a wrong to the company and the company is the proper person to redress the wrong. Individual members can only enforce the corporate wrong with a derivative suit or they can sue the directors if their breach of articles falls within the exceptions to the '*Foss v Harbottle* rule'<sup>3</sup>.

A director under the Australian system is a party to the statutory contract with the company<sup>4</sup>. The implication is that the company can sue the directors for breach of the statutory contract and the directors can also enforce the statutory contract against the company irrespective of whether the rights were granted to them in their capacity as directors. Therefore a director suing under s 180(1)(b) can be awarded specific performance to compel the company to employ him as a director until the period prescribed under the articles<sup>5</sup>.

---

<sup>1</sup> *Hickman v Kent or Romney Marsh Sheep Breeders' Association*, op cit. *Bratton Seymour Service Company Ltd v Oxborough*, op cit. & *De Villiers v Jacobsdal Saltworks*, op cit.

<sup>2</sup> *Percival v Wright* [1902] 2 Ch 421.

<sup>3</sup> See 5.4 above.

<sup>4</sup> S 180(1) b of the Australian Corporations Act of 1985.

<sup>5</sup> See Boros: op cit. at 71 for a submission that S 180(1)(b) would produce a different result to *Brown's*

### **6.3 Other remedies:**

A statutory contract can be supplemented by directors' service agreements\ employment contracts and by shareholders' agreement. Directors can enter into service agreements that incorporate the terms of the statutory contract. Shareholders can also enter into an agreement regulating the internal corporate affairs. A company can also be included as a party to a shareholders' agreement only if the agreement does not include a company's agreement not to alter its articles<sup>1</sup>.

#### **6.3. (a) Service agreements:**

Directors can enter into service agreements that incorporate the terms of the statutory contract. These agreements unlike the articles of association derive their enforceability from common law of contract and not from a statute. An alteration of the articles by the company may result with a breach of the service contract, entitling a member with a right to sue the company for breach of the service agreement.

Therefore a director can be awarded damages as a remedy for breach of a contract separate from the articles but incorporating the terms of the articles<sup>2</sup>. A director suing the company under s 180(1)(b) can also claim damages as a remedy for breach of contract. It has been submitted that a claim of a director arising out of a service agreement or out of statutory contract arising from s 180(1)(b) differs from a member's claim in that it is not deferred to the claims of the other creditors on winding up of a company<sup>3</sup>.

---

case.

<sup>1</sup> *Russell v Northern Bank Dev. Corp. Ltd* [1992] 1 WLR 588 (HL) cited by Boros: op cit. at 64.

<sup>2</sup> See *De Villiers v Jacobsdal Saltworks*, op cit.

<sup>3</sup> J Hambrook, op cit. at 24,203 who cited s 563A of the Corporations Act and the case of *Re Dale and Plant Ltd* (1889) 43 Ch D 255, see also *Webb Distributors (Aust.) Pty Ltd v State of Victoria* (1993) 117 ALR at 331 as authority for the submission made.

### 6.3. (b) Shareholders' Agreement:

Shareholders' agreements like service agreements exist independent of the articles and are governed by the general principles of law of contract. The shareholders' agreement can be used as a voting agreement requiring parties to it to vote in a particular way at a general meeting<sup>1</sup>. It can also be used to impose restriction on transfer of shares<sup>2</sup>. The agreement can also be used as a useful means of supplementing the articles where it is not appropriate to utilize the articles e.g. by conferring rights to parties to it otherwise than in their capacities as members<sup>3</sup>.

Shareholders' agreements, unlike the statutory contracts, are advantageous to parties to it in that they are confidential as they are not open for public inspection; their alteration requires the consent of all the parties to it; they are not attached to shares but to shareholders, thus a new shareholder who acquires shares through a transfer will not be bound by the agreement and their enforceability does not require the qua membership test<sup>4</sup>. Members suing to enforce the shareholders' agreement can be awarded all contractual remedies including damages and rectification of the agreement can be obtained<sup>5</sup>.

The use of shareholders' agreements in our system and the Australian system has not seen much judicial attention<sup>6</sup>. Shareholders' agreement was given effect to in our law in the case of *Stewart v Schwab*<sup>7</sup> where an applicant was granted an interdict restraining the respondents from voting contrary to the provisions of their agreement. But the court in *Swerdlow v Cohen*<sup>8</sup> refused to interfere with the defendant's statutory right to remove a director from office. It has been submitted that another disadvantage of the shareholders'

---

<sup>1</sup> Boros: op cit at 95.

<sup>2</sup> R Tomasic & S Bottomley: op cit. at 305.

<sup>3</sup> G Stedman & J Jones: "Shareholder's Agreements", 2<sup>nd</sup> ed. 1990, at 54- 64.

<sup>4</sup> Boros: op cit. at 93-95 & G Stedman & J Jones: op cit. at 54-64.

<sup>5</sup> Boros: op cit. at 96.

<sup>6</sup> See R Tomasic and S Bottomley: op cit at 306 for the Australian position. For the English law position, see *Greenwell v Porter* (1902) 1 Ch 530; *Greenhalgh v Mollard* [1943] 2 ALLER 234 (CA); *Cane v Jones*: [1980] 1 WLR 1451.

<sup>7</sup> 1956 (4) SA 771 (T), affirmed by AD in *Desai v Greyridge Inv. (Pty) Ltd* 1974 (1) SA 509 A.

<sup>8</sup> 1977 (3) SA 1050 (T), 1977 (1) SA 178 (W).

agreement apart from its legal uncertainty is that it involves transaction costs and that each agreement has to be negotiated and monitored by participants<sup>1</sup>.

#### **6.4. Conclusion:**

Members suing to enforce the statutory contract are afforded some but not all the normal contractual remedies. This is so for the statutory contract is not governed by the general principles of law of contract. Thus damages cannot be awarded to a member suing under the statutory contract due to the capital maintenance rule. Directors in the South African and English system are not parties to the statutory contract and cannot therefore sue the company for breach of the statutory contract. They can however, be sued for breach of the articles, because their action in breach of the articles amounts to a breach of their fiduciary duties.

Both the members and the directors can circumvent the limitations they encounter under the articles. Members can do so by entering into shareholders' agreements. These agreements are independent of the articles and afford parties to it with all the normal contractual remedies. Directors can enter into service agreements that incorporate the terms of the articles. An alteration of the articles that amounts to breach of a service agreement will warrant directors with a right to sue the company for breach of the service agreement.

---

<sup>1</sup> R Tomasic & S Bottomley: op cit. at 366.



## **CHAPTER 7: CONCLUSION.**

It is submitted that the statutory contract arising out of s 65(2) grants parties to it i.e. the members restricted rights. These rights are restricted by the 'qua member test' and the 'outsider rights rule' which entitle members to enforce only the rights that are granted to them in their capacity as members and only the membership rights. The 'principle of majority rule' also limits the extent to which the members can enforce the statutory contract. This rule makes internal procedural provisions matters of majority decision and a member is therefore not entitled to enforce such provisions or to restrain the company from acting pending the decision of the majority.

It is also submitted that the extent to which the statutory contract binds parties to it is considerably affected by the judiciary's failure to provide logical explanations of concepts e.g. the 'capacity of a members as such'. Courts have on occasions allowed enforcement of the statutory contract between the company and shareholders<sup>1</sup>. It has been submitted that even if shareholders have been allowed to enforce the statutory contract, the concept of a 'member as such' cannot be associated with one's shareholding. This is so for s 65(2) applies to all types of companies and not only to companies with share capital.

Members and directors can circumvent the restrictions they are faced with, by entering into separate contracts that are independent of the articles. Members can enter into shareholders' agreements that can be useful in regulating their relationship as shareholders. Directors can enter into service agreements that incorporate the terms of the articles. These agreements have their own disadvantages. It has been submitted that even though shareholders' agreements can be useful, they have legal uncertainties, as they have not received much judicial attention and that the agreements also involve transaction costs as each agreement is negotiated and monitored by parties to it<sup>2</sup>. Service agreements will not entitle directors to enforce the provisions of the articles, but will only afford them

---

<sup>1</sup> *Rosslare v Registrar of Companies*, op cit. *Heron v Port Huon Fruitgrowers Association*, op cit.

<sup>2</sup> R Tomasic & S Bottomley: op cit. at 306.

damages as a remedy for breach of the service agreement e.g. when the company alters its articles contrary to the provision of the service agreement. Another disadvantage with these agreements is that not all directors can enter into them. It is only executive (full time) directors who can enter into service agreements with the company.

It is submitted that these limitations call for the redraft of the statutory contract section that will do away with the above restrictions. Professor Gower has long called for a redraft of the English s 20(1) of the Companies Act<sup>1</sup>. The Australian legislature has redrafted their statutory contract section to expressly state who the parties to the statutory contract are and to include directors as parties to the statutory contract with the company<sup>2</sup>. It is submitted that what is required in our system added to a section similar to the Australian one, is a section that will clearly indicate the extent to which parties to the statutory contract can enforce it and the capacity in which they can enforce the contract.

It is further submitted that alternatively a simple way of incorporation as followed in the American system should be considered. Incorporation under the Revised Model Business Corporation Act<sup>3</sup> requires only the signing and delivery of articles of incorporation to the Secretary of the State for incorporation of the document<sup>4</sup>. It is the bylaws rather than the articles that are often been referred to as a contract between the company and the members<sup>5</sup>. Bylaws are defined as “rules and regulations or private laws enacted by the corporation to govern and control its own actions, affairs and concerns and its shareholders, directors and officers”<sup>6</sup>.

---

<sup>1</sup> Gower, op cit. at 286.

<sup>2</sup> S 180(1) (a)-(c) of 1985.

<sup>3</sup> Of 1984.

<sup>4</sup> Hamilton: “Law of Corporations: In a Nutshell”, 1987, at 47.

<sup>5</sup> Ibid.

<sup>6</sup> Henn & Alexander: “Law of Corporations” 3<sup>rd</sup> ed, 1983, at 306.

Unlike the articles, bylaws are advantageous in that they are usually not filed and are therefore not subject to public scrutiny; they are initially formulated by shareholders or board of directors and the power to adopt or alter them vests with the shareholders or board of directors<sup>1</sup>. Like the articles, bylaws must be consistent with the applicable statutory and constitutional provisions, but they can become valid when adopted by all stakeholders even when they are void for inconsistency with the applicable statutory and constitutional provisions<sup>2</sup>.

---

<sup>1</sup> Henn & Alexander: op cit. at 307-8.

<sup>2</sup> *Elsie Dupre Palmer v S Chamberlin et al.* 27 ALR 2d 416.

**BIBLIOGRAPHY:**

**A. TABLE OF CASES:**

**SOUTH AFRICAN CASES:**

1. Botha v Fick 1995 (2) SA 750 (A)
2. Burger v Central SAR 1903 TS 571
3. CIR v Friedman 1993 (1) SA 353 (A)
4. De Leef Family Trust & Others v CIR 1993 (3) SA 345 (A)
5. De Villiers v Jacobsdaal Saltworks 1959 (3) SA 873 (O)
6. Delfante v Delta Electrical Industries Ltd & Another 1992 (2) SA 221 (C)
7. Desai v Greyridge Investment (Pty) Ltd 1974 (1) SA 509 (A)
8. Doornkop Sugar Estate Ltd v Maywell & Others 1926 WLD 127.
9. Estate Milne v Donohoe Investment Ltd 1967 (2) SA 359 (A)
10. Ex Parte Premier Paper Ltd 1981 (2) SA 612 (W)
11. Francis George Hill Family Trust v SA Reserve Bank 1992 (3) SA 91 (A)
12. Gohlke & Schneider v Westies Minerale (Edms) Bpk 1970 (2) SA 685 (A)
13. Grundling v Beyers & Others 1967 (2) SA 131 (W)
14. Inland Property Development Corp. v Cilliers 1973 (3) SA 245 (A)
15. Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A)
16. Konyn v Viedge Bros. (Pty) Ltd 1961 (2) SA 816 (E)
17. Labuschagne v Denny 1963 (3) SA 538 (A)
18. Levy & Others v Zalrut Investment Pty Ltd 1986 (4) SA 479 (W)
19. Liquidators Union Share Agency v Hatton 1927 AD 240.
20. Long Executrix v Rosemount Gold Mining Syndicate Ltd 1905 TS 563.
21. McCulloch v Fernwood Estate Ltd 1920 AD 204
22. Milne v Donohoe Investment ltd 1967 (2) SA 359 (A)
23. Moosa v Lalloo 1957 (4) SA 207 (D)
24. Nine Hundred Umgeni Road (Pty) Ltd v Bali 1986 (1) SA 1 (A)
25. Oakland Nominees (Pty) Ltd v Gelria Mining & Investment (Pty) Co. Ltd 1976 (1) SA 441 (A)
26. Pathescope (Union) of SA Ltd v Mallinick 1927 AD 292.
27. Pledge Investment (Pty) Ltd v Kramer: In re Estate Saksnik 1975 (3) SA 696 (A)
28. Randfontein Estate v The Master 1909 TS 978.
29. Randfontein Estate Gold Mining Co. Ltd v Custodian of Enemy Property 1923 AD 576
30. Rosslare (Pty) Ltd v Registrar of Companies 1972 (2) SA 524 (D)
31. SA Iron & Steel Industrial Corporation Ltd v Molly Copper Mining Exploration Co. (SWA) Ltd & Others 1993 (4) SA (Nm)
32. Sammel v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A)
33. Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk 1970 (3) SA 367 (A)

34. Standard Bank of SA Ltd v Ocean Commodities Inc. 1983 (1) SA 276 (A)
35. Sugden & Others v Beaconsburst Dairies (Pty) Ltd 1963 (2) SA 174 (E)
36. Sweet v Finbain 1984 (3) SA 441 (W)
37. Swerdlow v Cohen 1977 (3) SA 1050 T / 1977 (1) SA 178 (W)
38. Treasure Trove Diamond Ltd v Hyman 1928 AD 464
39. Trevor Investment (Pty) Ltd v Friedhelm Investments (Pty) Ltd 1982 (1) SA 7 (A)
40. Trust Bank of Africa v Standard Bank of SA 1968 (3) SA 166
41. Vrede Gold Exploration Ltd v Lubner & Others 1973 (2) SA 331 (C)
42. Waja v Orr & Another 1929 TPD 865

### **ENGLISH LAW CASES:**

1. Alexander v Automatic Telephone Co. [1900] 2 Ch 56
2. Attorney for Ireland v Jameson (1904) 2 I.R. 644
3. Baring Gould v Sharpington Combined Pick & Shovel Syndicate [1892] 2 Ch 80 (CA)
4. Baytrust Holdings Ltd v I.R.C [1971] 3 All E.R. 76
5. Beattie v Beattie Ltd [1938] Ch 708 (CA)
6. Bisgood v Henderson Tvl Estate [1908] 1 Ch 743 (CA)
7. Borland Trustee v Steel Brothers & Co. Ltd [1901] 1 Ch 279
8. Bratton Seymour Co. Ltd v Oxborough 1992 BCLC 693 (A)
9. Browne v La Trinidad (1887) 37 Ch.D. 1 CA
10. Cane v Jones [1980] 1 WLR 1451
11. Daniels v Daniels [1978] Ch 406
12. Edwards v Halliwell [1950] 2 All E.R. 1064 (CA)
13. Eley v Positive Government Security Life Assurance Co. (1876) 1 Ex.D. 88
14. Foss v Harbottle (1843) 2 Hare 461
15. Greenhalgh v Mallard [1943] 2 All E.R. 234 (CA)
16. Greenwell v Porter [1902] 1 Ch. 530
17. Hayes v Bristol Plant Hire Ltd [1957] 1 All E.R. 685 Ch.D.
18. Hickman v Kent or Romney Marsh Sheepbreeders Association [1915] 1 Ch. 881
19. Houldsworth v City of Glasgow Bank (1880) 5 App Cas 317
20. Hunter v Hunter [1936] A.C. 222 H.L.
21. In re Leicester Club & Racecourse Co. (1885) 30 ChD 629
22. In re Tarvorne Mining Co. Prichard's case (1873) 8 Ch App 956
23. In re Smith & Fawcett Ltd [1942] Ch 304
24. Imperial Hydrophatic Hotel Co. v Hampson 23 ChD 1
25. I.R.C v Crossman [1937] A.C. 26
26. Kaye v Croydon Tramways [1898] 1 Ch 358

27. *Kelner v Baxter* (1866) L.R. 2 C.P 174
28. *MacDougall v Gardiner* (1875) 1 Ch.D. 13
29. *McLelland v Hulett & Others*
30. *Melhardo v Porto Alegre RY Co.* (1874) LR 9 Ch 503
31. *Mozley v Alston* (1874) 1 Ph. 789
32. *Nicol's case; Tufnell & Ponsoby's case ( In re Florence Land & Public Works Co.)* (1885) 29 ChD 421
33. *Pender v Lushington* (1877) 6 Ch.D 70
34. *Percival v Wright* [1902] 2 Ch 421
35. *Prudential Assurance v Newman Industries Ltd (No 2)* [1982] 1 Ch 204
36. *Pulbrook v Richmond Consolidated Mining Co.* (1878) 9 ChD 610
37. *Quin & Axtens v Salmon* 1909 AC 442 H.L.
38. *Rayfiel v Hands* 1960 Ch. 1
39. *Re Bamed's Banking Co. Ex Parte Contract Corp.* (1867) 3 Ch App 105
40. *Re Dale Plant Ltd* (1887) 61 L.T 206
41. *Re Greene (deceased) Greene v Greene & Others* [1949] 1 AllER 167 ChD
42. *Re Leicester Club v Racecourse Co.* (1885) 30 ChD 629
43. *Russel v Northern Bank Dev. Corp. Ltd* [1992] 1 WLR 588 (HL)
44. *Salmon v Quin & Axtens, Limited* (1909) 1 Ch 311
45. *Scott v Scott (Frank F.) (London) Limited & Others* [1940] Ch 794
46. *Short v Treasury Commissioners* [1948] 1 K.B 1116
47. *Smith & Fawcett Ltd.,Re* [1942] Ch 304
48. *Trevor v Whitworth* (1887) 12 App. Cas. 409 H.L
49. *Wallersteiner v Moir (No.2)* [1975] All E.R 849
50. *Welton v Saffrey* [1897] AC 299

#### **AUSTRALIAN LAW CASES:**

1. *Baila (Pty) Ltd v Malina Holdings Ltd (No.2)* (1993) 11 ACLC 1082
2. *In re Caratti Holding Co. (Pty) Ltd* (1975) 1 ACLR 87
3. *Magill v Satina (Pty) Ltd* (1983) 8 ACLR 289 SC (NSW)
4. *New South Wales medical Defence Union Ltd v Crawford* (1993) 11 ACSR 406 (CA)
5. *Oswald v Bailey* (1987) 11 NSWLR 715
6. *Stanham v The National Trust of Australia (NSW)* (1989) 15 ACLR 87
7. *Webb Distributors (Aust.) (Pty) Ltd v State of Victoria* (1993) 117 ALR

#### **CANADIAN LAW CASES:**

1. *Ardletham Options Ltd v Easdown* (1915) 20 CLR 25.
2. *Grant v John Grant & Sons Ltd* [1950] 82 CLR 1.

3. Heron v Port Huon Fruitgrowers Association (1922) 30 CLR 315.

**NEW ZEALAND LAW CASES:**

1. Curtis v J Curtis Co. Ltd [1984] 2 NZCLC 99.

**AMERICAN LAW CASES:**

1. Betchtold v Coleman Realty 79 A.2d 661 (1951)
2. Elsie D. Palmer v S.E Chamberlin 2d 416 (5<sup>th</sup> Cir. 1951)

**B.BOOKS & JOURNALS:**

**SOUTH AFRICAN:**

1. Beuthin R.C : Basic Company Law, 2<sup>nd</sup> ed., 1992, Durban: Butterworths.
2. Beuthin R.C : Appointment of Directors & the Legal Effect of Articles, (1970) 87 SALJ, 395.
3. Beuthin R.C : The Principle of Unanimous Assent, (1974) 91 SALJ, 2.
4. Blackman M.S : Joubert, LAWSA, vol.4 (part 1 & 2) & vol. 5 (part 1)
5. Blackman M.S : The Company Contract: Lord Wedderburn & The Enforcement of Outsider Rights, (1992) 109 SALJ 225.
6. Blackman M.S : Members Rights Against the Company & Matters of Internal Management, (1993) 110 SALJ, 473.
7. Blackman M.S : What Rights Can a Company's Memorandum & Articles of Association Confer on a Member, 1992 (4) SA Merc LJ 1.
8. Buckland J.L : Shareholder's Rights & Acquisition of Control in a Company, 1992 (thesis).
9. Christie R.H : Law of Contract in SA, 3<sup>rd</sup> ed. 1996, Durban: Butterworths.
10. Cilliers H.S et al : Corporate Law, 2<sup>nd</sup> ed. 1992, Durban: Butterworths.
11. Cowen D.V : Law of Negotiable Instruments in SA: General Principles, 5<sup>th</sup> ed. 1985, Cape Town: Juta.
12. Fredman M.G : Company Law as a Contract: With Emphasis on Outsider Rights rule, 1979.
13. Horgavan A : Under Judicial & Legislative Attack: The Rule in Foss v Harbottle (1996) 113 SALJ 631



14. Kerr A.J : The Principles of Law of Contract, 5<sup>th</sup> ed. 1998, Durban: Butterworths.
15. Henochsberg E.S. : Henochsberg on Companies Act, 3<sup>rd</sup> ed. 1975, Durban: Butterworths.
16. Pretorius J.T et al : Hahlo's SA Company Law Through the Cases, 5<sup>th</sup> ed. 1991, Cape Town: Juta.
17. Van Der Merwe C : Law of Property, Annual Survey, 1995, Johannesburg: Juta.

### ENGLISH:

1. Bastin N.A : The Enforcement of a Member's Right, (1977)J. Bus. Law,17.
2. Boros E.J : Minority Shareholder's remedies, 1995, New York: Oxford University Press.
3. Drury R.A : The Relative Nature of a Shareholder's Right to Enforce the Company Contract (1986) CLJ 219.
4. Farrar J.H : Farrar's Company Law, 3<sup>rd</sup> ed, 1991, London: Butterworths.
5. Goldberg G.D : The Enforcement of Outsider Rights under s 20(1) of the Companies Act 1948, (1972) 35 MLR 362.
6. Gower L.C.B : Gower's Principles of Modern Co. Law 2<sup>nd</sup> ed., 1957: 4<sup>th</sup> ed. 1979: 5<sup>th</sup> ed. 1992, London: Stevens & Sons.
7. Gower L.C.B : The Contractual Effect of Articles of Association,(1958)25 MLR, 401
8. Schmitthoff C : Palmer's Company Law, 24<sup>th</sup> ed, 1987, London: Stevens.
9. Pennington R : Company Law, 4<sup>th</sup> ed. 1979 : 5<sup>th</sup> ed. 1985, London: Butterworths.
10. Prentice : The Enforcement of Outsider Rights. (1980)1 Co. Lawyer 197.
11. Stedman G et al : Shareholder's Agreement, 2<sup>nd</sup> ed. 1990, London: Longman.
12. Smith R.J : Minority Shareholders & Corporate Irregularities, (1978)41 MLR,148.
13. Wedderburn K : Shareholder's Rights and the Rule in Foss v Harbottle (1957)15 CLJ 194.
14. Wedderburn K : Contractual Rights Under the Articles of Association – An Overlooked Principle Illustrated, (1965)28, 347.

### AUSTRALIAN & CANADIAN:

1. Afterma A.B et al : Afterman & Baxt Cases and Material on Corporation And & Association, 6<sup>th</sup> ed, 1992: Sydney: Butterworths.
2. Australian Corporation Law : Principles & Practice, 1991, vol 1: Sydney: Butterworths.





3. Ford H.J : Principles of Corporation Law, 7<sup>th</sup> ed. 1995, Sydney: Butterworths.
4. French H.L : The Guide to Corporations Law, 4<sup>th</sup> ed. 1994 Sydney: Butterworths.
5. Palmer E : Canadian Company Law Cases, Notes & Material, 2<sup>nd</sup> ed.1978, Toronto: Butterworths.
6. Tomasic R et al : Corporations Law in Australia, 1995, Sydney: Federation Press.
7. Tomasic R et al : Corporation Law: Principles, Policy & Process, 1992, 2<sup>nd</sup> ed. Sydney: Butterworths.
8. Welling B : Corporate Law in Canada, The Governing Principles, 2<sup>nd</sup> ed.1991, Toronto: Butterworths.

#### **AMERICAN:**

1. Hamilton R : The Law of Corporations in a Nutshell, 1987, United States: West Publishing Co.
2. Henn G et al : The Law of Corporations & Other Business Enterprises, 3<sup>rd</sup> ed.1983, New York: West publishing Co.
3. Wolfe A et al : The Law of American Business Organisation: An Enviromental Approach, 1984, New York: Wiley.
4. Waterman III C et al : The Iowa Business Corporate Act: Corporate Governance Through the Articles of Incorporation & Bylaws, (1991) 40 Drake Law Review, 1991.

#### **C.TABLE OF STATUTES:**

##### **SOUTH AFRICAN:**

1. Companies Act 61 of 1973.
2. Companies Amendment Act 17 of 1999.
3. Currency & Exchange Act 9 of 1933.
4. Stamp Duty Act 77 of 1968.
5. The Memorandum on the Objects of the Companies Amendment Bill of 1999.

##### **ENGLISH:**

1. Joint Stock Companies Act of 1844 & 1856.
2. Companies Act of 1948.
3. Companies Act of 1985.