# A COMPARATIVE STUDY BETWEEN SECTION 163 OF THE 2008 COMPANIES ACT AND SECTION 252 OF THE 1973 COMPANIES ACT

Submitted in partial fulfilment of the requirements for the degree LLM with Specialisation in Corporate Law at the Faculty of Law, University of Pretoria

By

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# CHAPTER 1: INTRODUCTION AND BACKGROUND

## 1.1 Introductory company law principles relating to minority protection

Company law is based on the principle of separate legal personality. At the heart of modern company law is the fact that the duly registered company or, for the time being, close corporation gains a legal personality which is separate from that of its individual members.

The well known case of *Salomon v Salomon & Co Ltd*[1] entrenched this basic principle relating to the separate legal personality of a company and is arguably one of the most important cases relating to company law.

The fact that a company is given legal personality has many effects, one of which being that the company can sue and be sued.

The supposed fiction of legal personality, while helpful and necessary, often has the effect that wrongdoers or controllers use the company to commit wrongs. This is possible because the company has a separate legal personality but is still managed by natural persons who may use the company for their own benefit.

The separate legal personality of a company has the result that a company is able to act through its representatives, being its directors and shareholders.

The day to day management and decision making for a company is done by its board of directors. The shareholders are therefore not tasked with the management of the company. What is very important to keep in mind, especially in as far as it related to minority protection, is that the board of directors has a responsibility to act in the best interest of the company. This is the so called fiduciary duty of directors. It is worth mentioning at this point already that the fiduciary duty that directors have exists mainly against the company and not

[1] (1897) AC 2 (HL).

against shareholders. Shareholders are not burdened by the fiduciary duty and may as a general rule act in their own best interest.[2]

As mentioned in the often quoted phrase of the *Lord Chancellor Thurlow*:

> *'Corporations have neither bodies to be punished nor souls to be condemned, they therefore do as they like'*[3]

Shareholders and directors act by way of majority decision making. The majority rule is therefore of the utmost importance when a company has to make a decision.[4] The rule implies that the affairs of the company are decided by the majority and the minority is generally subservient to the wishes of the majority.[5] Case law has confirmed that the principle op majority rule in an integral part of modern company law.[6]

In substantiation of the above mentioned one can be referred to the judgment in *Donaldson Investments (Pty) Ltd & others v Anglo-Transvaal Colliers Ltd and others*[7] where the court found that:

> *'It is well established that, in general, minority shareholders must defer to the wills of the majority and that the supremacy of the majority is essential to the proper functioning of companies, provided they act fairly'*

As with most doctrines, the doctrine of majority rule is not absolute. Certain acts, although approved by the majority, will not be condoned and may lead to recourse for the minority.

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[2] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* (2014) 5 SA 179 (WWC).
[3] This is said to be the exact phrase used by the Lord Chancellor as quoted in *Literary Extracts* (1844) Volume 1 Poynder; at 268.
[4] *PA Delport The New* Companies Act *Manual 2 ed (2011)*at 156.
[5] HS Cilliers, ML Benade, JJ Hening, JJ du Plessis, PA Delport, L de Koker & JT Pretorius *Cilliers & Benade Corporate Law* 3 ed (2000) at 296.
[6] *Sammel v President Brand Gold Mining Co Ltd* (1969) 3 SA 629 (A) (hereinafter *Sammel v President Brand*) *'by becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder'.*
[7] (1979) 3 SA 713 (W) at 719, while this case was decided under the 1973 Companies Act, the principle still remains relevant and must be born in mind whenever dealing with a company.

In light of what has been mentioned briefly above, it will always be of critical importance to take into account whether the conduct which is being complained of can be easily ratified. Shareholders have impliedly or explicitly agreed to be bound by the decisions of the majority and may not run to the courts for interference for every difference of opinion that arises. A shareholder must always remember that the court must not be unnecessarily burdened.[8] The court must further not be called in to take over the internal management of lightly.[9]

The majority rule is subject the acts which are lawful. In certain circumstances even unlawful action may be ratified by a simple majority. There are a number of acts which may not be ratified.[10] The unratifyable wrongs do not form part of this study.[11]

The fact that the company has separate legal personality also creates a situation where the company itself must institute legal proceedings against wrongdoers. This creates potentially undesirable circumstances as the wrongdoers are often the majority and will therefore be unwilling to bring legal action against their own conduct.

Despite the above mentioned principles, a wronged member of the minority is not without recourse for wrongs done against him which have certain negative effects on his rights as such.

This dissertation will focus primarily on the protection provided for minorities as well as the development of minority protection under the Companies Act 52 of 1973 in comparison to the Companies Act 71 of 2008.

The scope of this dissertation will not attempt to cover the entire scope of minority protection. Minority protection has a lengthy history and has developed substantially over the last one hundred years. Where reference is made to the development of remedies available to aggrieved minorities, one should keep in mind that this study does not explain the entire history.

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[8] The English law case of *Carlen v Drury* (1812) 35 ER 61 provides some guidance in this regard when it states that '*the court is not to be required on every occasion to take the management of every playhouse and brewhouse in the kingdom*'.

[9] *Yende v Orlando Coal Distributers* (1961) 3 SA 314 (W) at 316.

[10] PA Delport *The New Companies Act Manual* 2 ed (2011) at 157.

[11] In the recent case of *Visser Sitrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd* (2014) 5 SA 179 (WWC), *Rogers J* emphasises the difficulty experienced where the act by the company is lawful. Therefore where directors have complied with the requirements the 2008 Companies Acting as much as it relates to their fiduciary duties, the court will have difficulty finding that the requirements for an application under the oppression remedy have been met.

Where previous company law legislation is discussed it should be born in mind that the specific details which are discussed are not complete and are mentioned merely to explain the current functioning interpretation of our current company law climate.

A brief legal comparison between South African and foreign law will also form part of this study. The reasoning behind this comparison is merely because South African law has borrowed heavily from foreign jurisdictions. Whilst comparing South African law to foreign law specific reference will only be made to parts of foreign law which has contributed towards the development of the South African law minority protection.

## 1.2 The rule in *Foss v Harbottle*[12]

Arguably the most influential case regarding minority protection is *Foss v Harbottle*. The rule is basically founded on the principle that the court is inclined to act cautiously in matters where it is asked to interfere in internal company matters, especially when the alleged wrong could easily be ratified by the majority of shareholders.

The rule basically entails that the minority does not have any recourse against a majority vote where the wrong can be condoned by an ordinary resolution.

It is suggested that the *Foss v Harbottle* case centred around two key principles, firstly, 'the proper plaintiff rule' which has already been discussed and secondly, 'the internal management rule'.[13]

The *'Proper plaintiff'* rule further entails that where a wrong is done against the company, it is the company that must act to address the wrong or to hold the guilty parties responsible. A minority shareholder therefore has the added hurdle of no apparent *locus standi* and may further struggle to prove that the majority shareholders had an obligation to act in the best interest of the minority shareholders. This is as a result of the fact that the company is given separate legal personality from that of its individual members and as such is able to act on its own behalf.

[12] (1843) 2 Hare 461; 67 ER 189 (Hereinafter *Foss v Harbottle*).
[13] Vuyani Ngalwana *'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring'* (1996) 527 SALJ

It is suggested that the basic principle underlying the 'Proper plaintiff' rule is misleading as practically and factually the company acts by way of majority voting power.[14] The responsible shareholders are in fact possibly the company decision makers.

These rules are crucial to the day-to-day running of a company and further assist the court as it limits the circumstances in which the court will be required to interfere in a company's management.

Another possible explanation for the courts' hesitation to interfere in the internal management of a company may be the fact that supposed wrongs committed by the company can be easily ratified by majority decision and as a result the 'wrong' will cease to exist.[15]

That being said, the rule established in *Foss v Harbottle* has also been abused and lead to unjust consequences.[16]

Acts which are *ultra vires* fall within the scope of the exceptions to the rule of majority rule which was established in *Foss v Harbottle*. The problem that arises when determining the scope of the exception already starts with the possible definition of *ultra vires*. It is quite uncertain which acts will be acts which are *ultra vires* and this leads to greater uncertainty regarding when minority shareholders will be entitled to bring, for example, a derivative action.[17]

*Ngalwana* submits that perhaps the phrase *ultra vires* in as far as it relates to an exception to the rule, is not the best way to view those acts. He offers the opinion that one might rather view certain so called *ultra vires* acts as acts which fall outside the rule.[18]

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[14] Vuyani Ngalwana *'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring'* (1996) 527 SALJ at 529.
[15] Vuyani Ngalwana *'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring'* (1996) 527 SALJ at 528.
[16] In this regard see the English case of *MacDougall v Gardiner* (1875) 1 ChD 13 (CA) where the rules established in *Foss v Harbottle* were interpreted in a way that had the result of depriving a shareholder of his right to a personal action.
[17] Vuyani Ngalwana *'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring'* (1996) 527 SALJ at 530.
[18] Vuyani Ngalwana *'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring'* (1996) 527 SALJ at 530.

In light of the above mentioned principles which clearly establish and affirm the importance of protection of a company's separate legal personality as well as some of the general rules relating to modern company law , like majority rule, the protection of minority shareholders becomes all the more relevant.

Minority protection principles will apply to all forms of companies, but is especially relevant to private companies where limitations are placed on the free transferability of shares. A shareholder with as much as 49.9 % shareholder may still find himself in the precarious position of being constantly outvoted by the majority whilst being unable to leave the company.[19]

*Oosthuizen* submits that the problems relating to private companies are worsened firstly by the restriction on the free trade of shares and secondly by the probability that private companies are often the product of familial or personal relations.[20] These types of situations often make it difficult for a dissatisfied minority to leave the company especially in so far is he will in all probability not be able to receive fair compensation for his shares from the existing shareholders.

## 1.3 Common law relief

The relief discussed below is merely mentioned as a result of the historical development of minority protection in South African law and will not be discussed in detail.

### 1.3.1 Personal action

While the general rule is that the minority should be bound by the conduct of the majority, it is not an absolute rule. Once the conduct of the majority has exceeded the scope of the rule, the aggrieved minority may institute proceedings.[21] Hereunder follows a brief discussion of the possible actions available to the minority member.

[19] M J Oosthuizen *'Statutêre Minderheidsbeskerming in die Maatskappyereg'* (1981) 105 TSAR at 105.
[20] M J Oosthuizen *'Statutêre Minderheidsbeskerming in die Maatskappyereg'* (1981) 105 TSAR at 105.
[21] HS Cilliers, ML Benade, JJ Hening, JJ du Plessis, PA Delport, L de Koker & JT Pretorius *Cilliers & Benade Corporate Law* 3 ed (2000) at 300.

The personal action may be instituted by the member in his own name when a wrong has been done to him in his personal capacity as a member of the company.[22]

Illegal conduct which is unratifyable by way of ordinary resolution may also lead to a personal action.[23]

The personal action may also be instituted where there is fraud on the minority. According to Van der Merwe, the fraud in this sense is wider than fraud in the ordinary sense of the word. It is stated that fraud on the minority refers to an abuse of fiduciary duty.

Determining what may be proper grounds for a personal action is unfortunately not certain. *Ngalwana* submits that an expenditure of company funds which is not in accordance with the companies object and memorandum will almost definitely be grounds for this action.[24]

#### 1.3.1.1 Representative action

An action may be instituted by way of representation where a group of minority members have been wronged by the conduct of the majority and decide to institute action together.

The Plaintiff here shares a common interest with other members of the company and institutes action by way of the representative action.[25]

#### 1.3.1.2 Individual action

[22]HS Cilliers, ML Benade, JJ Hening, JJ du Plessis, PA Delport, L de Koker & JT Pretorius *Cilliers & Benade Corporate Law* 3 ed (2000) at 300.
[23] HS Cilliers, ML Benade, JJ Hening, JJ du Plessis, PA Delport, L de Koker & JT Pretorius *Cilliers & Benade Corporate Law* 3 ed (2000) at 300.
[24] Vuyani Ngalwana *'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring'* (1996) 527 SALJat 529.
[25] Vuyani Ngalwana *'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring'* (1996) 527 SALJat 529.

Where an individual member has suffered at the hands of the majority, he may institute action on his own in his personal capacity.

### 1.3.2 Derivative action

A number of circumstances exist where the majority act to the detriment of the company. In such cases the company is the aggrieved party and therefore the authorised Plaintiff is also the company.[26]

In order to succeed with the derivative action a Plaintiff must prove that the alleged wrongdoers are also the persons who are in control of the company and secondly that the act of the alleged wrongdoer is an act equal to fraud.[27]

Determining the scope of so called 'fraud' is extremely difficult although it has been submitted that 'fraud' would be an act which could not be ratified by a simple majority. Here reference is made to the unratifyable wrong.[28]

The difficulty that arises when the wrong has been done to the company is that the majority that reached the decision are also often the controllers of the company and will therefore not institute proceedings in the name of the company. The minority therefore would have very little recourse.

In these circumstances the derivative action may be utilised in order to correct the wrong done. The derivative action is instituted by members and shareholders. Although the company is the aggrieved party, it is not referred to as a Plaintiff and must therefore be added as a Defendant.[29]

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[26] HS Cilliers, ML Benade, JJ Hening, JJ du Plessis, PA Delport, L de Koker & JT Pretorius *Cilliers & Benade Corporate Law* 3 ed (2000) at 302.
[27] Vuyani Ngalwana *'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring'* (1996) 527 SALJ at 531.
[28] Vuyani Ngalwana *'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring'* (1996) 527 SALJ at 5.
[29] HS Cilliers, ML Benade, JJ Hening, JJ du Plessis, PA Delport, L de Koker & JT Pretorius *Cilliers & Benade Corporate Law* 3 ed (2000) at 303.

The common law derivative action has been abolished by section 165 of the Companies Act, 71 of 2008.[30]

The derivative action has not received much application in South Africa. The major deterrent for this type of action under common law was the serious risk it posed to the person instituting the action as the matter is conducted at personal risk while any possible benefits fall to the company.[31] The derivative action further has practical problems in so far as it related to the fact that the company will need to be a party to the application. As the majority wrongdoers are in control of the company and obviously will not consent to the company being the Plaintiff, the company will need to be cited as a Defendant. A situation where the company is a Defendant is curious when one takes into consideration the fact that the Plaintiff is using the derivative action with the explicit view to protect the companies'[32] interest.

It is submitted that the derivative action is the only real exception to the rule in *Foss v Harbottle* in that it provides the Plaintiff the opportunity to protect the rights of the company rather than the rights of individual shareholders rights.[33]

*Ngalwana* submits that the viewpoint exists that the derivative action applies in cases where acts were *ultra vires* the company and where the act lead to what can be seen as a fraud on the minority.[34] Despite the above, he contends that the derivative action is not truly an exception to the rule in *Foss v Harbottle* the wrong has not in actual fact been committed against the company. The party who has most probably been injured or suffered damages is the minority shareholder.

It is submitted that the phrase fraud on the 'company' would be preferable to fraud on the 'minority'.[35]

Although there is no precise definition of what exactly will constitute a fraud on the minority or alternatively a fraud against the company, it is submitted that one

[30] Hereinafter 'the 2008 Companies Act'.
[31] HS Cilliers, ML Benade, JJ Hening, JJ du Plessis, PA Delport, L de Koker & JT Pretorius *Cilliers & Benade Corporate Law* 3 ed (2000) at 305.
[32] Vuyani Ngalwana *'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring'* (1996) 527 SALJat 532.
[33] Vuyani Ngalwana *'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring'* (1996) 527 SALJat 529.
[34] Vuyani Ngalwana *'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring'* (1996) 527 SALJat 530.
[35] Vuyani Ngalwana *'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring'* (1996) 527 SALJat 529.

viewpoint may be taken that it occurs where the majority whilst exercising its rights at general meeting in a manner that has the result to deprive or change the rights of the minority. Another view may be taken that it occurs when the controlling majority makes decisions which negatively affect the company and as a consequence of the factual situation regarding the majorities control over the company, they ensure that the company will not seek redress for the wrong done.

*Ngalwana* further suggests that the above mentioned *'management-fraud'* is the only real exception to the *Foss v Harbottle* rule.[36]

## 1.4 Statutory intervention

As set out above the common law derivative action has not often been used, this is most probably due to its obvious risks. Section 166 of the Companies Act, 61 of 1973,[37] provided for a statutory derivative action. The statutory derivate action does not form part of this study and is mentioned merely to take note of. Section 166 of the 1973 Companies Act finds its amended equivalent in section 165 of the 2008 Companies Act.

An aggrieved shareholder may also institute proceedings against the wrongdoer directors of a company. The difficulty herein would be proving the elements needed for delictual liability. The 2008 Companies Act specifically provides for the fact that directors owe a fiduciary duty towards the company and not towards the individual shareholders.

## 1.5 Contractual remedies

Of relevance to the shareholder is the fact that the memorandum of incorporation is a legally binding contract between the company and its shareholders. In certain circumstances a shareholder may therefore also rely on the provisions of the memorandum of incorporation to protect his interests.

[36] Vuyani Ngalwana *'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring'* (1996) 527 SALJ at 530.
[37] Hereinafter 'the 1973 Companies Act'.

# CHAPTER 2: STATUTORY PROTECTION FROM OPPRESSIVE OR PREJUDICIAL CONDUCT UNDER THE 1973 COMPANIES ACT

## 2.1 Section 252 of the 1973 Companies Act

Section 252 of the 1973 Companies Act at subsection (1) reads as follows:

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

Under the 1973 Companies Act sections 252 – 268 dealt with remedies of members, arguably the most popular remedy which serve before the court is that offered by section 252 under the broad heading 'relief from oppression'.

This dissertation aims primarily to draw a comparison between the improvements made to section 252 of the 1973 Companies Act in the drafting of section 163 of the 2008 Companies Act. A brief discussion of both section 252 and section 163 will follow. In order to properly discuss section 252 one must also take into account the history which lead to section 252 being incorporated in the 1973 Companies Act as it was.

It is noteworthy that South African corporate law was largely borrowed from English law. Section 111 of the 1953 Companies Act, the predecessor to the 1973 Companies Act, is almost entirely a copy of the English law oppression remedy.

*Preiss J* in *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd*[38] provides an accurate summary of section 111 of the 1953 Companies Act. He mentions that section 111 applied where *'a member of a company could obtain relief from the court if the affairs of the company were being conducted in a manner oppressive to some part of the members'.*

*Oosthuizen* submits that despite the high hopes for section 111 of the 1953 Companies Act, its practical application was stinted.[39]

[38] (1979) 3 SA 713 (W).
[39] M J Oosthuizen *'Statutêre Minderheidsbeskerming in die Maatskappyereg'* (1981) 105 TSAR at 107.

In light of the above, the Van Wyk de Vries Commission[40], submitted proposals for the improvement of the oppression remedy. The proposals were then duly incorporated in section 252 of the 1973 Companies Act and the enforcement of section 252 will now be discussed in greater detail.

## 2.2 Requirements to establish *locus standi*

### 2.2.1 General principles relating to applicant

It is clear from the wording in the 1973 Companies Act that you must be a member of the company to qualify for the relief offered in section 252. A person is only deemed to be a member of the company under the 1973 Companies Act once that persons' name has been entered into the shareholder register.

It has been confirmed under the 1973 Companies Act that the company may not be the applicant in so far as it relates to the relief offered in section 252.[41]

The protection provided by the section was solely for the member of the company. It goes even further to state that the member must be the registered members, i.e. the member whose name is recorded in the company records. This approach may be seen as highly formalistic and, as discussed below relating to section 163 of the 2008 Companies Act, it may lead to unfairness especially in executor/curator type of situations where a right exists although it has not been formally transferred yet.[42]

Despite the stringent application of the section to registered member case law has alluded to the possibility of a more lenient application when an act has prejudices a member in another capacity than that of member. Here the court conceded that certain acts might have aimed at, in the end, prejudicing a member even thought the act was committed against him in another capacity.[43]

The basic principle is therefore that the wrong must have been done to the member in his capacity as member, although the courts have applied a more lenient approach. The facts of

[40] *Die kommissie vir die ondersoek na die Maatskappywet*, lead by Justice Van Wyk de Vries RP45/1970.
[41] *Ex Parte Avondzon Trust (Pty) Ltd* (1968) 1 SA 340 (T).
[42] M J Oosthuizen *'Statutêre Minderheidsbeskerming in die Maatskappyereg'* (1981) 105 TSAR at 109.
[43] See *Aspek Pipe Co (Pty) Ltd v Mauerberger* (1968) 1 SA 517 (C).

the matter will be crucial in this regard. The requirement for a member to be a registered member and could be unnecessarily restrictive, especially in light of the purpose for with the oppressive remedy was enacted.

As it is common practice in private companies to place a restriction on the transferability of shares, the problem regarding *locus standi* is aggravated. Some companies also require a transfer of shares to be approved by the majority before consenting to the registration. In the event of not obtaining approval for the transfer, as buyer of shares may find himself unable to take possession of his shares.

It is clear that an application may be brought by a single member of the company, which is a helpful provision as a member is no longer obliged to obtain a certain percentage of support before it may bring its application.[44]

The 1973 Companies Act directly addressed this issue by determining that the company is compelled to enter the name of a person acting in an official capacity into the register by providing for a member *nomine officio*.[45] Such a member will be presumed to be a member in so far as it affects the relief offered by the section.

A director, creditor, employee and other stakeholders were therefore not entitled to act as an applicant under section 252. Furthermore the 1973 Companies Act only provided a shareholder with the necessary *locus standi* against conduct committed by the company to which it was a member. A shareholder therefore had no recourse against the conduct of holding or subsidiary companies.[46]

## 2.3 The wrongdoers

It is clear from the wording of section 252 that both acts and omissions were properly under the scope of minority protection. Therefore one can easily imagine a situation where a failure to act by the company may have some detrimental result to a minority shareholder. The act or omission that is being complained of must be an act or omission committed by the company of which the complainant is a member.

[44] M J Oosthuizen *'Statutêre Minderheidsbeskerming in die Maatskappyereg'* (1981) 105 TSAR at 121.
[45] M J Oosthuizen *'Statutêre Minderheidsbeskerming in die Maatskappyereg'* (1981) 105 TSAR at 110.
[46] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 758.

This section implies that related persons, namely holding and subsidiary companies do not fall within the scope of section 252 of the 1973 Companies Act.

English case law has however been insightful regarding the position of holding and subsidiary relationship. In *Scottish Co-operative Wholesale Society Ltd v Meyer*[47] the court rejected the holding companies argument that the oppression did not occur as a result of the management of the subsidiary company as required by the act. The court found that the holding companies had an obligation to ensure that the conducting of its own business was not to the detriment of the subsidiary company.

It is submitted that each case must be weighed on its own facts and merits and that a number of criteria will need to be met before a holding/subsidiary relationship will be brought within the scope of the section.[48]

The wrongdoer here is the company in so far as it acts on the instructions of its shareholders by way of majority voting power. It has been submitted that acts by shareholders acting outside of the general meeting will also be deemed to fall within the section.[49]

*Oosthuizen* further submits that in certain cases *de fact* control will also be relevant in determining who the wrongdoer is and that relief may also be sought where the *de facto* control wrongdoer has committed the complained of act.[50]

## 2.4 Certain types of acts or omissions

Subsection 2 of section 252 of the 1973 Companies Act reads as follows:

> *'where the act complained of related to-*
>
> *a) any alteration of the memorandum of the company under section 55 or 56;*
>
> *b) any reduction of the capital of the company under section 83;*

[47] *(1958) 3 ALL ER 66 (HL).*
[48] M J Oosthuizen *'Statutêre Minderheidsbeskerming in die Maatskappyereg'* (1981) 105 TSAR at 120.
[49] For a discussion on the facts which may play a role in the determination, *see M J Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg'* (1981) 105 TSAR at 120.
[50] M J Oosthuizen *'Statutêre Minderheidsbeskerming in die Maatskappyereg'* (1981) 105 TSAR at 119.

*c) any variation of rights in respect of shares of a company under section 102; and*

*d) a conversion of a private company into a public company or of a public company into a private company under section 22,'*

It is clear from the wording of the section that not all conduct, be it acts or omissions, will be actionable under this section.

The act specifically mentions certain aspects which will lead to the protection offered. A shareholder that believes that he suffered at the hands of the majority from some other form of conduct will have to ventilate the issue in some other way and will not be able to use section 252.

While the specific categories that are mentioned are quite wide, one can easily imagine aspects which fall outside this scope which could objectively be viewed as oppressive conduct.

Whilst section 252 was mainly focussed on protecting a member's right as he was granted in the articles of association of the company, the possibility did exist that the protection offered was wider and extended to the so called legitimate expectation which a shareholder may have had.[51]

In order for the protection of section 252 to apply to an applicant, the conduct must have already occurred. The provision does not protect against threatened conduct. The remedy cannot be used in order to obtain an interdict before the act or omission takes place.[52]

## 2.5 Unfairly prejudicial, unjust or inequitable

Acts or omissions that are unfairly prejudicial, unjust or inequitable fall within the scope of section 252.

[51] See the discussion of section 163 of the 2008 Companies Act below. The 2008 Companies Act greatly improved on its predecessor with regards to the protection of members' interests.
[52] This view was confirmed in *Porteus v Kelly* (1975) 1 SA 219 (W) where *Nicholas J* confirmed that threatened conduct was not classified as an *'act'*.

It is noteworthy that the word oppressive, whilst appearing in the heading of the section, is not contained in the body of the provision. This may have been due to an error rather than with the view of excluding oppressive conduct.

The word *'unfairly'* is said to qualify only the word *'prejudicial'*.[53] *Preiss J* was however of the opinion that 'unfairly' did not also qualify *'unjust'* and *'inequitable'*. One must consider that standpoint, especially when taking into account that the words unjust and inequitable in their ordinary meaning already imply the word unfair.

If one agrees with the view of *Preiss J* it becomes critical for courts to consider, when applying the oppression remedy contained in the 1973 Companies Act, whether the conduct which is being complained about is indeed unfair. It is therefore clear that not all conduct which is prejudicial falls within the protection of section 252.

*Preiss J* refers, with approval to the opinion that oppressive conduct could reasonably be interpreted to be conduct which:

> *'involved no more than a lack of probity or fair dealing, or a visible departure from the standards of fair dealing, or a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely'.*[54]

The Appellate Division further confirmed that the motive underlying the complained of conduct will be especially relevant when determining whether a specific act or omission is 'unfairly prejudicial, unjust or inequitable'.[55]

It is extremely interesting to note that a shareholder applicant seeking relief in terms of section 252 must not only prove that a particular act or omission has a result that is unfairly prejudicial, unjust or inequitable but must further prove that the act or omission in itself is unfairly prejudicial, unjust or inequitable.[56]

Whilst in some instances it may be difficult to draw the line between conduct that is and is not oppressive, it can be stated that the relief offered in section 252 implies more than mere dissatisfaction with the management of the company. Whether dissatisfaction amounts to unfairly prejudicial, unjust or inequitable conduct will be a question of facts.

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[53] *Preiss J* in *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd* (1973) 3 SA 713 (W).
[54] *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd* (1973) 3 SA 713 (W).
[55] *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd (1983) 3 SA 96 (A)* judgment by *Galgut AJA.*
[56] See *Garden Province Investment v Aleph (Pty) Ltd (1979) 2 SA 525 (D)* judgment by *Friedland J* at 531.

## 2.6 Relief offered

Section 252(3) bestows on the court a wide discretion when it comes to the type of orders it may grant.[57]

In this regards see R C Beuthin's comment on the case of Bader v Weston:[58]

> *'With a view of bringing to an end the matter complained of, the court may make such order as it thinks fit, including an order for the future regulation of the company's affairs.'*[59]

The section does however qualify the order made by the court, in that it must bring an end to the matter which is complained of. It can therefore be argued that relief which is only granted on an interim basis will not permanently bring an end to the matter and may lead to further litigation.

Judges who interpreted the section must however have been mindful of presidents which have been set. Giving judges a wide discretion and the right to apply their minds to appropriate relief against the backdrop of each set of facts is commendable, but may also have lead to legal uncertainty.

It is further submitted that as a result of the fact that, in principle majority rule should be upheld, the decision made by the court should be final and binding on the parties. *Oosthuizen* submits that the minority cannot be allowed to indefinitely hold the majority in uncertainty.[60] She further submits that this is the reason why only four categories are created with regards to minority protection.

The 1973 Companies Act was especially prone to situations where minority shareholders would be locked in as a result of the restriction on the free transferability of shares. This matter was addressed in the well known case of *Bayly v Knowles*.[61]

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[57] Section 252(2) *'the Court may, with a view of bringing to an end the matters complained of, make such order as it think fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital'*.
[58] (1967) 1 SA 134 (C).
[59] RC Beuthin (1967) 84 SALJ 405 at 411.
[60] M J Oosthuizen *'Statutêre Minderheidsbeskerming in die Maatskappyereg'* (1981) 105 TSAR at 121.
[61] (2010) 4 SA 548 (SCA ) at paragraph 23 where *Hofman J* stated that *'fairness requires that the minority shareholder should not have to maintain his investment in a company managed by the majority with whom he*

An applicant under section 252 has to establish two elements before he would be able to succeed with an application in terms of the section. Not only must the applicant prove that the act or omission was unfairly prejudicial, unjust or inequitable. He must further establish that the order which is sought would be equitable.[62] This is clear in terms of the wording in the act where the word 'and' expressly creates an additional requirement.[63]

As mentioned above under the heading of 'unfairly prejudicial, unjust or inequitable', the courts may also consider the motive for an act or omission when it determines the suitable relief.[64]

*Cassim* states that while the just and equitable consideration has been dispensed with, it may still find application in so far as the courts may find it helpful in considering matters under the oppression sections in the 2008 Act.[65]

It has further been submitted, that when applying section 252 of the 1973 Companies Act that the remedy provided by the section must be interpreted and applied in a manner that expands and advances the protection of the section rather than limiting its application.[66]

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*has fallen out.'* He does however qualify the statement by mentioning that where the majority has offered fair remuneration for his shares, and he has refused to sell, he will have to bear the so-called oppression as he did not take the relief which was offered to him.

[62] See *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd* (1973) 3 SA 713 (W) where Preiss J submits that this additional element that must the proven by the applicant is reasonable and logical when taking into account the facts that acts may be ratified or otherwise so small that the order sought is not truly necessary.

[63] Section 252(3) of the 1973 Companies Act.

[64] *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd (1983) 3 SA 96 (A)* judgment by *Galgut AJA.*

[65] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 764.

[66] *Preiss J* in *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd* (1973) 3 SA 713 (W).

# CHAPTER 3: STATUTORY PROTECTION FROM OPPRESSIVE OF PREJUDICIAL CONDUCT UNDER SECTION 163 OF THE 2008 COMPANIES ACT

## 3.1 Section 163 of the 2008 Companies Act: Relief from oppressive or prejudicial conduct or from abuse of separate legal personality of a company.[67]

Section 163 of the 2008 Companies Act at sub section (1) reads as follows:

*'a shareholder or a director of a company may apply to a court for relief if:*

*a) any act or omission of a company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or*

*b) the business of a company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interest of the applicant; or*

*c) the powers of a director or prescribed offices of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant.'*

## 3.2 Requirements to establish *locus standi*

### 3.2.1 General principles relating to applicant

A clear improvement in the 2008 Companies Act is the explicit inclusion of protection and the extension of the *locus standi* to include directors. Creditors, employees and other potential stakeholders are not included within the ambit of section 163.

[67] The heading of section 163 of the 2008 Companies Act appears to be misleading. It is worth mentioning that the last part of the heading was perhaps incorrectly left in the heading after the amendment to section 163 was completed in terms of section 102 of the Companies Amendment Act, 3 of 2011. PA Delport, Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) at 567. The authors suggest on at 567 that the fact that the title still makes provision for the abuse of a separate juristic personality is due to an oversight and contend that it must not be interpreted that the relief offered by section 163 should be so extended.

An applicant under section 163 will also be entitled to apply for protection against the conducts of a related party. This is another inclusion which is in the 2008 Companies Act which was not in the 1973 Companies Act.

An applicant who wishes to seek relief from oppressive conduct may also do so under common law.[68]

#### 3.2.1.1 Requirements for shareholders to establish *locus standi*

The 2008 Companies act establishes clearly that a shareholder is someone who is entered into the securities register.[69]

The fact that only persons who have been entered into the securities register will be viewed as shareholders may lead to practical problem. Such a formalistic and strict interpretation may have serious negative effects on, for example, heirs of deceased estates. These people undoubtedly have interest in the affairs of the company, but may now have to wait for the entire estate to be administered before they can assert their rights in terms of this section.[70]

Exceptions to this interpretation do however exist.[71] *Cassim* argues that while specific exceptions were conceded under the 1973 Companies act, they may likewise apply to the 2008 Companies act.[72]

The wording of section 163 emphatically applies to all shareholders as defined in section 1 of the 2008 Companies act. This leaves the backdoor open for a situation

[68] PA Delport, Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) at 567 draws a distinction between section 165 and section 163 of the 2008 Companies Act and emphasises that section 163, unlike section 165 relating to the statutory derivative action, will not replace the right of an applicant under common law. The applicant will therefore still have the right to institute a personal action. Whether such an action is more desirable than the relief offered by section 163 is debatable.
[69] Section 1 of the 2008 Companies Act defines a shareholder as '*the holder of a share issued by the company and who is entered as such in the certificated or uncertificated securities register as the case may be*'.
[70] In this regard refer to *Lourenco v Ferela (Pty) Ltd* (1998) 3 SA 281 (T).
[71] See the case of *Barnard v Carl Brokers (Pty) Ltd* (2008) 3 SA 663 (C) where principles for the exception to the general rule were laid down. It must be kept in mind that this case was decided under the 1973 Companies act.
[72] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 759.

where majority shareholders may also apply for relief in terms of section 163.[73] It is therefore likely that while a majority shareholder is strictly speaking entitled to bring an application, the chances of success are quite small.[74]

#### 3.2.2.2 Requirements for directors to establish *locus standi*

In this regard one must simply refer to the definition of a director as described in section 1 of the 2008 act.[75]

## 3.3 Section 163(1)(a)[76]

### 3.3.1 Acts or omissions

*Cassim* refer to acts or omissions broadly as 'conduct' and deems the following to be included in the broad term; acts, omissions, the conducting of business, or the exercise of powers.[77]

The fact that a company has failed to act and the failure has led to some negative result is also cause for an application under this section.

The company acts in numerous ways, for example resolutions, acts of managing directors, acts by the board of directors and acts by individuals where the board of directors has delegated their powers to the individual.[78]

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[73] Cases decided under the 1973 Companies Act may still be useful relating to this question. It would appear from a number of judgments that the courts were not agreeable to granting the relief sought where the application was brought by a majority shareholder.
[74] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 760.
[75] *'means a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated'.*
[76] Exact wording of section 163(1)(a) above at paragraph 3.1.
[77] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 763.
[78] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 764.

Shareholders also commit acts which may be viewed as acts of the company by exercising their resolutions taken at general meeting.[79] It is important to make a distinction between the resolutions taken by shareholders and the acts of shareholders when conducting their own affairs. Where a shareholder acts in a personal capacity while conducting its own affairs it cannot be seen as company conduct.[80]

In terms of section 163(1)(a) the act or omission that is being complained of must be an act or omission of the company or a related person. The scope of related person will be discussed separately below. With regard to the word company, it can be said that the company is the vessel used to commit the complained of conduct. Of course one is well aware of the fact that a company cannot act on its own and is powered by its shareholders and directors.

### 3.3.2 Conduct of related persons

This is a new provision in the 2008 Companies act. A shareholder or director may now also apply for relief where an act or omission of a related person has had the required result.[81]

A related person includes a holding and subsidiary company relationship. The definition of related persons in the 2008 Companies act goes further to also include relationships where control is relevant.[82] In this regard section 2 of the 2008 Companies act defines related persons and control.[83]

It is assumed that this section will mostly apply to the holding subsidiary relationship, but in light of the wide definition of related persons in section 2 of the 2008 Companies Act, a related party can have a very wide scope.[84]

[79] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 764 and 765.
[80] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 765.
[81] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 767.
[82] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 768.
[83] See section 2 of the 2008 Companies Act under the heading *'Related and inter-related persons, and control'.*
[84] PA Delport *The New Companies Act Manual* 2 ed (2011) at 159.

### 3.3.3 The result must have occurred

It is interesting to note that the section only provides recourse and protection for acts or omissions which have already had a result. The fact that some action or failure to act is threatening will not be sufficient grounds under section 163(1)(a).

It is clear that this section is not meant to be seen as in interdict to stop conduct before it has occurred. This section finds no application where potentially oppressive and unfair conduct might occur in the future.[85]

The focal point is on the result that the action has had. The relevant criterion is therefore not the necessarily the act or omission in so much as one views the result that occurred.[86]

This element may be problematic for the so called wrongdoer majority as they may not have foreseen or intended a particular result.

It is also unfortunate that threatened conduct is not somehow brought within the ambit of the oppression remedy. Numerous foreign jurisdictions have applied the remedy to threatened conduct as well as to conduct which has already occurred and produced a result. The situation in foreign jurisdictions will be discussed in greater detail below.[87]

### 3.3.4 Conduct that qualifies as oppressive, unfairly prejudicial or that unfairly disregards the applicants' interests.

In terms of the 2008 Companies Act, the conduct that is complained of must be oppressive; unfairly prejudicial of it must unfairly disregard the interests of the Applicant.

[85] *Porteus v Kelly* (1975) 1 SA 219 (W). This case was decided under the 1973 Companies Act, but is still relevant when one considers that both the 1973 Companies Act and the 2008 Companies Act only apply to a result which has already occurred.
[86] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 764.
[87] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 765, Cassim submits that the approach in the English Companies Act2006 which includes conduct which is actual or proposed is the preferable approach.

In order to bring conduct within the protection provided for under the oppression remedies, one of the three elements must be wrong. The conduct must be either oppressive, unfairly prejudicial or it must unfairly disregard the interest of the applicant. Therefore if only one of these broad elements can be proven, the remedy may apply.

Authority suggests that the terms oppressive, unfairly prejudicial or unfairly disregarding the interests of the applicant may be considered compound of may be viewed as alternatives to one another.[88] It is therefore possible that all phrases may find application or that only one may be relevant.

Australian authority however suggests that the different phrases contained in the oppression remedy should be viewed as together as a:

> *'Composite whole and the individual elements mentioned in the section should be considered merely as different aspects of the essential criterion, namely commercial unfairness'.*[89]

As a general rule the courts are expected to give the interpretation to words and phrases contained in legislature that would extend the remedy rather than to limit its application.[90]

Generally the motive for the offensive conduct will not of critical importance, although in some cases it may be relevant and the court has discretion to consider motive.[91]

#### 3.3.4.1 Oppressive

[88] Cases in foreign jurisdictions which support this theory are *Thomas v HW Thomas Ltd* (1984) 1 NZLR 686 CA (NZ) and *Fexuto (Pty)* Ltd v Bosnjak Holdings (pty) Ltd (2001) 37 ACSR 672 as referred to in FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 769.
[89] See the Australian case of *Morgan v 45 Flers Avenue (Pty) Ltd* (1986) 10 ACLR 692; 5 ACLR 222; where the judgment of Young J was referred to in PA Delport, Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) at 569.
[90] This approach has been followed was confirmed in 1962 in the judgement of Cillier J in *Livanos v Swartzberg* (1962) 4 SA 395 (W).
[91] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 772.

The phrases mentioned above have been the topic for discussion and debate since the oppression remedy first appeared in the Companies Act, 46 of 1926.[92] The interpretation of the oppression remedy under the 1926 Companies Act was often used when interpreting the 1973 Companies Act and will similarly will be relevant under the 2008 Companies Act, this is especially true as these words are not defined in the 2008 Companies Act itself and external elements will be used to guide the courts.[93]

The writers of *Henochsberg* support this view and submit that cases decided under section 252 of the 1973 Companies Act may be useful when interpreting some concepts under section 163 of the 2008 Companies Act.[94]

For an interpretation of the term oppressive it may therefore be most useful to study the 1929 Companies Act. Unfortunately no South African caselaw specific deals with this phrase.[95]

In *Scottish Co-Operative Wholesale Society Ltd v Meyer*[96] the word 'oppressive' was defined as conduct which is:

*'burdensome, harsh and wrongful'*

Cassim submits that in order for an applicant to succeed with an application under section 163 of the 2008 Companies Act, he will have to prove that the conduct which is complained of departs from the accepted standards of fair play of that the conduct unfairly discriminates against the minority.[97]

In light of the fact that South African case law does not provide sufficient guidance relating to this concept it may also be necessary to refer to the Australian oppression remedy. The Australian remedy will be discussed in greater detail below. It is however

[92] Hereinafter the 1926 Companies Act. The oppression remedy found its way into section 111 of the 1926 Companies Act.
[93] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 769.
[94] PA Delport, Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) at 568.
[95] PA Delport, Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) at 568.
[96] (1959) AC 324.
[97] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 769. It is important to take note that the relevant conduct must be unfair rather than just being unlawful. The determining word is the unfairness of certain conduct.

relevant to mention that Australian Courts have interpreted oppressive to include unfairness which resulted from majority rule.[98]

It is furthermore interesting to note that the word oppressive has been used in the 1926 Companies act as well as in the 2008 Companies Act, although the term did not find its way into section 252 of the 1973 Companies Act. In section 252 the word oppressive was merely referred to in the heading, but not mentioned again in the content.

#### 3.3.4.2 Unfairly prejudicial

Debate has been ongoing for some time regarding the meaning of this part of the oppression remedy. It has been accepted that the word unfairly qualifies the word prejudicial. It can therefore be argued not all prejudicial conduct will lead to the availability of the oppression remedy. The prejudicial conduct must be unfair in order to qualify under the section.[99]

It has been inferred that the word unfairly may be tantamount to *'unreasonably'*.[100]

It is interesting to note that the courts in Britain have gone as far as finding that conduct which is technically within the powers of the majority may still be unfair where the conduct may lead to prejudice for the minority.[101]

As with most legal considerations, reasonableness plays an important role when determining what conduct will be viewed as unfair.[102]

In this regard the courts will pay special attention to the so called quasi partnership relationships where shareholders enter into the company with the understanding that

[98] *Jenkins v Enterprise Gold Mines NL* (1992) 6 ACSR 539.
[99] *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd* (1980) 4 SA 204 (T).
[100] PA Delport, Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) at 569 where it is submitted that conduct that is prejudicial may not be seen as unreasonable.
[101] *Lord Hoffman* in *O'neill v Phillps* (1999) 2 ALL ER (HL).
[102] In this regard refer to the Australian High Court decision in the case of *Wayde v NSW Rugby League Ltd* (1985) 180 CLR 459 on at 472 where *Brennan J* stated that *'The court must determine whether reasonable directors, possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate object on the one hand and the disadvantage, disability or burden which their decision will impose on a member on the other, would have decided that is was unfair to make the decision'.*

all partners will contribute towards the management of the affairs of the company. These types of partnership commonly exist in smaller private companies and may lead to the minority being locked into the company and constantly being outvotes by the majority with no recourse in light of the restrictions on the transferability of shares.[103]

*Cassim* once again confirms that while most decided cases which dealt with unfairness were decided under the 1973 Companies Act, they will still be relevant in interpreting the meaning under the 2008 Companies act.[104] This is especially true when considering the absence of definitions in the 2008 Companies Act.

#### 3.3.4.3 Unfairly disregard the interest of the applicant

*Cassim* contents that the inclusion of protection for the interest of directors and shareholders is innovative.[105]

Caselaw supports the view that interests are wider than rights and may include a number of different aspects relating to an individual's shareholding or directorship in a company.[106]

Foreign jurisdictions, as will be seen below, also support the view that interests are wider than rights. English company law similarly allows for the specific inclusion of interest in the wording of the English Companies Act.[107]

The interests that are disregarded are not specifically limited in the act and it can therefore be interest of the applicant in its capacity as director or shareholder.[108] It almost goes without saying that of course an applicant who is a director or shareholder may not seek relief where the interests that are affected are interests in his capacity as a creditor or an employee.

[103] This was the case in *Louw v Nel* (2011) 2 SA 172 (SCA) where the relationship between the shareholders, who were also directors soured and led to the minority seeking relief in terms of section 252 of the 1973 Companies Act.
[104] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 771.
[105] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law 2* ed (2011) at 770.
[106] *Utopia vakansie oorde Bpk v Du Plessis* (1974) 3 SA 148 (a).
[107] Section 994(1) of the *English Complanies Act* of 2006 (c46).
[108] PA Delport, Q Vorster *Henochsberg on the* Companies Act*71 of 2008* (2011) at 568.

The 2008 Companies Act unfortunately does not provide a definition of interest. Although it may be accepted that interests are wider than rights, the concept is undefined and will need to be interpreted by the courts.

Uncertainty exists regarding whether a financial detriment will be needed in order to qualify as an interest that needs to be protected or whether it would simply be a proprietary right.[109]

### 3.4 Section 163(1)(b)[110]

Section 163(1)(a) was discussed in great detail above and for the sake of brevetity the concepts which overlap will not be discussed. It is relevant to mention that subsection (1)(b) refers to a situation where the business of the company or a related party as opposed to the act or omission as stated in subsection (1)(a).

It is submitted that the distinction is merely made to widen the scope of protection offered. The concept of the business of the company is quite wide and could encompass a wide variety of activities.

I respectfully submit that it is of great relevance that the business of a subsidiary also falls within the ambit of this subsection. One can easily imagine a situation where related company is being used to channel business from another company which of course would lead to wrongful conduct toward the shareholders and directors of the latter company.

The rest of section 163(1)(b) does not differ materially from subsection (1)(a).

### 3.5 Section 163(1)(c)[111]

Section 163(1)(c) is merely mentioned for the sake of being complete. It is, like subsection 163(1)(b), almost exactly the same as subsection (1)(c). The only material difference with

[109] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 770.
[110] Exact wording of section 163(1)(b) above at paragraph 3.1.
[111] Exact wording of section 163(1)(c) above at paragraph 3.1.

subsection (1)(c) if the fact that it refers to the power of a director, not a shareholder, or a prescriber officer.

## CHAPTER 4: RELIEF OFFERED UNDER SECTION 163 OF THE 2008 COMPANIES ACT

### 4.1 Possible Court orders[112]

4.1.1 Restraining the conduct complained of.

4.1.2 Appointing a liquidator.

The above mentioned order is subject to the insolvency act and the fact that the company must appear to be insolvent with no other remedy at its disposal.

4.1.3 Place company under supervision and commencing business rescue proceedings in terms of Chapter 6 of the 2008 Companies Act.

4.1.4 Regulating the companies' affairs by amending its memorandum of incorporation or creating or amending a unanimous shareholders' agreement.

Where the court uses its discretion and orders that the companies' memorandum of incorporation must be amended, a notice of amendment must be filed with the Companies and Intellectual Properties Commission.[113]

4.1.5 Directing the issue or exchange of shares.[114]

4.1.6 Appointing directors in place of, or in addition to, all or any of the directors then in office or the court may make an order that any person be declared delinquent in terms of section 162 of the 2008 Companies Act.

This is an important change from section 252 of the 1973 Companies Act in that the Court is now allowed to interfere in the running of the corporation.[115]

4.1.7 Directing the company or another person to restore to a shareholder any part of the consideration that was paid for the shares or to pay the equivalent value.

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[112] Section 163 of the 2008 Companies Act subsection (2)(a) – (l)
[113] PA Delport *The New Companies Act Manual* 2 ed (2011) at 159 where it is emphatically stated that no other provisions except those specifically authorised in the court order may be altered.
[114] See the case of *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* (2014) 5 SA 179 (WCC) where the court refused to order that the company be compelled to register a shareholder into the register after a sale of shares. The court found that the applicant had not proven that other attempts had been made to sell its shareholding. The potential buyer was deemed to be undesirable by the company and posed a risk of being in competition with the company.
[115] PA Delport *The New Companies Act Manual* 2 ed (2011) at 160.

*Delport* contends that this remedy may be unclear in that it remains uncertain whether this is a repurchase of shares. He contends further that the relief offered in this section must be viewed in light of the solvency and liquidity test.[116] This order is only possible if the company possesses sufficient money and/or assets in order to repay the consideration.

4.1.8 An order verifying or setting aside a transaction.

An order granted under this heading does not only affect the shareholders and directors of the company. The court orders therefore not only apply to majority abuse. It also affects agreements which the company entered into with third parties consensually.[117]

4.1.9 An order requiring the company to produce financial statements.

4.1.10 An order to pay compensation.

4.1.11 An order for rectification of the registers or other records.

4.1.12 An order for the trial of an issue.

It is worth mentioning that the above mentioned orders do not represent a closed list. The act specifically makes provision that the court may make any order, whether final or interim, which it thinks fit. The list provided merely sets out examples of orders which may be made.

[116] PA Delport *The New Companies Act Manual* 2 ed (2011) at 160.
[117] PA Delport, Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) at 573.

# CHAPTER 5: A BRIEF COMPARISON BETWEEN SECTION 252 OF THE 1973 COMPANIES ACT AND SECTION 163 OF THE 2008 COMPANIES ACT – IMPROVEMENT FOR MINORITY PROTECTION AND DISSENTING SHAREHOLDER RIGHTS

## 5.1 The Applicant

Section 252 of the 1973 Companies Act provided protection for members only. More specifically it only provided protection for members who were registered as such in the company's records. While the stringent application of section 252 only on registered members was interpreted leniently by the courts, it still was not applied to all persons who may have a right although not duly registered and created application problems, especially for shareholders in private companies.

Section 163 of the 2008 Companies Act commendably applies to shareholders and directors of the company.

Whilst the inclusion of the protection provided for directors is a commendable improvement, the oppression remedy under section 163 still requires that the shareholder be registered as such. Therefore a person who has an interest will not possess the necessary *locus standi* until such time as he is officially registered as a shareholder.[118]

In this regard reference must be made to the recent case of *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd*[119] where a shareholder brought an application in order to compel registration of a sale of shares which the company has refused to register. The applicant who possessed the necessary *locus standi* was the current shareholder and not the person to who the shares had been sold.

It is respectfully submitted that the lack of protection provide for persons who may have a beneficial interest is unfortunate. However the inclusion of protection for directors is an improvement on section 252 of the 1973 Companies Act.

[118] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 759.
[119] (2014) 5 SA 179 (WCC).

A further point worth mentioning is the inclusion of related persons. *Cassim* is of the opinion that the inclusion represents a *'distinct improvement'* on it predecessor.[120] The concept of related persons includes subsidiary and holding company relationships, as well as control by another company. The inclusion of related persons is commendable, especially in the current economic climate where a large number of businesses are affected by these types of relationship and especially where foreign jurisdictions come into play.

It is interesting to note that, as oppose to the possible interpretation under the 1973 Companies Act, an applicant will be able to establish *locus standi* even where he is the only person who was affected. Section 252 of the 1973 Companies Act submitted that where all members had been influenced by certain conduct, that an aggrieved member could not seek the relief of the section. *Cassim* submits that this represents an improvement in the 2008 Companies Act.[121]

## 5.2 Rights and interest

A similarity in the wording of the 1973 and the 2008 Companies Act seem to indicate that a shareholder (under the 1973 Companies Act) and a shareholder and director (under the 2008 Companies Act) need to have been affected in that capacity.[122]

As mentioned above the courts have interpreted this provision of the section leniently if the intent had been to prejudice the shareholder in his capacity as such even though the act had been prejudicial to him in another capacity.

Section 252 specifically refers to shareholders' rights which have been affected. Whilst some case law refers to some beneficial interest which may have fallen under the protection provided by section 252, section 163 goes further and emphatically includes the protection for a shareholder of directors' interest.[123]

[120] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 759.
[121] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 772.
[122] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 761.
[123] For caselaw where this possibility was discussed see *Aspek Pipe Co (Pty) Ltd v Mauerberger* (1968) 1 SA 517 (C) at 525.

*Cassim* remarks that this inclusion of interest could even be applied where no rights (in terms of the 2008 Companies Act or even those granted in the company's memorandum of incorporation) have been affected.[124]

It is important to emphasise that interests are wider than rights and therefore an application will be able to seek relief in terms of the 2008 Companies Act more easily than when it had to prove that a right had been prejudiced.[125]

What should be borne in mind when interpreting the section is that the 2008 Companies Act does not provide a definition for the word *'interest'*. It therefore remains to be seen what the court will interpret to fall within the meaning of the word.

### 5.3 Conduct that is falls within the oppression remedy

Section 252 merely mentioned oppression in its heading. The wording was not contained in the content of the act. In contrast section 163 at subsection (1) specifically includes the words oppressive. This is an additional ground on which wrongful conduct is measurable and may be helpful in interpreting the oppression remedy.

Rogers J in *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd*[126] comments that he does not believe the difference in wording truly affects the meaning of the provisions.

The 1973 Companies Act refers to situations where the *'affairs'* of the company were conducted in a manner that fell under the oppression remedy while the 2008 Companies Act refers to the situations where the *'business'* of the company is conducted in a certain manner.[127]

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[124] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 772.
[125] *Cassim* discusses the position relating to quasi partnerships. It is submitted that the word *'interest'* could also include '*an expectation that he or she would hold the office of director*', FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 763.
[126] (2014) 5 SA 179 (WWC).
[127] *Cassim* comments on whether the *'business'* of the company will be interpreted by the courts to mean the same as the '*affairs*' of the company. The speculation is answered in the negative and *Cassim* submits that the act suggests that *'affairs'* has a distinct meaning to *'affairs'*. FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 765.

The applicant under section 163 must prove that the conduct which is complained of has had a result that is oppressive, or which is unfairly prejudicial to, or which has unfairly disregarded the interest of the applicant.

Foreign caselaw suggests that these phrases may be regarded as alternatives to one another, although there are suggestions that the words may be interpreted together.[128]

It is submitted that the approach followed when interpreting the phrases will be much the same as under the 1973 Companies Act.[129]

Notice should however be taken of the fact that the wording in section 163 seem to broaden the oppression remedy and that new interpretations are therefore possible.

It is further submitted that the focus of the current oppression remedy seems to be the test for fairness rather than the test for unlawfulness.[130]

### 5.4 Powers of directors and prescribed officers

A new provision under the 2008 Companies Act's oppression remedy is the inclusion of the relief offered for oppressive conduct from the companies' directors or prescribed officers.[131]

This is a new remedy which did not form part of the 1973 oppression remedy. *Cassim* submits that this new extension of the provision is an improvement; especially in situations where the director or prescribed officer acted in such a manner that it cannot fall within the scope of proper conduct of the business, the company or a related person.[132]

[128] See *Thomas v HW Thomas Ltd* (1984) 1 NZLR 686 CA (NZ), as referred to in FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011)at 769.
[129] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 769.
[130] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 769.
[131] *Rogers J* in *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* (2014) 5 SA 179 (WWC) states that *'in most if not all cases the exercise by a director or prescribed officer of a corporate power will also be an act of the company'.*
[132] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 767.

## 5.5 A result must have occurred

Section 252 emphasises the act or omission as well as the result while section 163 of the 2008 Companies Act emphasises the result. This is clear from the wording contained in section 163 *'has had a result'*.

One can imagine a situation where, while the conduct may seem oppressive, the result that it has is not oppressive, unfairly prejudice or unfairly disregard any right.

Allowing a remedy where no result has occurred seems useless and may lead to unnecessary litigation where the court is burdened with personal bickering in a company.

Setting a clear standard that the court may only interfere where the result which has occurred must meet the oppression standards is certainly an improvement on section 252 of the 1973 Companies Act.

It is further submitted that under the current oppression remedy isolated conduct as well as conduct which is committed on an ongoing basis will be protected against.[133]

## 5.6 Section 252 only applies to four categories of acts which may be complained of

Section 252(2)(a) – (d) sets out four broad headings which fall within the scope of the 1973 Companies Act.

Section 163 of the 2008 Companies Act may be applied much wider than its predecessor. This is clear from the onset at subsection (1)(a) with the use of the words '*any* act or omission'.[134]

It is further submitted that the extent of section 163 is wider due to the fact that 'shareholder voting power and directors powers' is included.[135]

[133] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 765.
[134] My emphasis.
[135] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 764.

## 5.7 Just and equitable

An applicant under section 252 of the 1973 Companies Act had to prove, in addition to proving that conduct was unfairly prejudicial, unjust or inequitable, that the order sought was just and equitable.

This formalistic approach has been removed from the 2008 Companies Act, but, as with most provisions now contained in section 163, the 1973 Companies Act will still be useful when interpreting the provisions of section 163.

*Cassim* submits that although this additional burden of proof has been removed from the 2008 Companies Act, the courts may still take into account whether the order sought will be just and equitable when making an order.[136]

## 5.8 Interim or final relief

Section 163 of the 2008 Companies Act bestows a wide power on the court when it comes to the relief which it may grant. A list of possible court order is provided, but the section specifically mentions that the list is not numerous clauses and that the court may grant *'any order which it thinks fit'*. As mentioned above, this wide power must be exercised with caution.

In the recent judgement of *Kudumane Investment Holding Ltd v Northern Cape Manganese Co (Pty) Ltd*[137], the court granted an order which basically had the effect of overriding the companies' existing shareholders agreement. The order was however only temporary in that it determined that it would be temporary 'pending the final outcome of the litigation' which was pending in another court.[138]

Here it is interesting to note that section 252 of the 1973 Companies Act specifically bestowed on the court the power to grant an order which it thinks fit with a *'view of*

[136] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 764. In this regard Cassim refers to the judgement delivered in *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd* (1973) 3 SA 713 (W).
[137] (2012) ZAGPJHC 116.
[138] It is therefore possible that the court may grant interim order.

*bringing to an end'* the complained of conduct. Interim relief could therefore be interpreted as not having finalised the dispute.

Section 163 provides for the possibility of the court interfering quite extensively with the management of the company or for very little interference. In short, the section grants the court the power to decide which order would be most suitable when applying the facts of each matter rather than limiting the power of the court with possible damning effects.

## CHAPTER 6: FOREIGN LEGISLATION

The purpose of this dissertation, as mentioned above is to draw a comparison between section 252 of the 1973 Companies Act and section 163 of the 2008 Companies Act. The purpose is not to draw a complete legal comparison between minority protection provided in different countries. The brief discussions of certain foreign jurisdictions and their laws in so far as it related to minority protection and the oppression remedy should not be viewed as a comprehensive discussion.

The sole purpose for briefly comparing the South African oppression remedy with similar provisions in other countries is that the South African remedy has been largely developed by foreign jurisdictions. The jurisdictions that had the most pronounced influence on South African corporate law will be discussed.

When discussing the countries below, it is important to take cognisance of the differences and similarities which affect the legal climate in each country. What is especially important to take note of is the fact that England does not have a constitution, while Canada is governed, much like South Africa, by its constitution as its highest legal authority against which all conduct must be measured.

### 6.1 Canadian Company law

#### 6.1 Canada Business Corporations Act[139]

It is interesting to note that both South African and Canadian company law have English law roots. Both followed the English example as set out in the English Companies Act of 1948. However for the rest of the 19th century the oppression remedies in Canada and England were quite different and South Africa at his point still followed the English act. With the advent of the 2008 Companies Act legislatures turned their attention to the Canada Business Corporations Act.

Canadian law also recognised the difficulty in establishing minority rights as it also values the principle of majority rule. This is clear from the following extract:

[139] RSC 1985, CC-44 (Hereinafter referred to as 'CBCA').

> *'Judges adopted a hands-off approach, saying that they were powerless to deal with the internal management of corporations. Ironically, their attitudes were formed by principles that had nothing to do with the individual shareholders rights; they had to do with a mistaken view of the relationship between majority rule and corporate personality'*[140]

It is submitted that section 163 of the 2008 Companies Act is similar to the oppression remedy under Canadian law. The oppression remedy is contained in section 241 of the Canada Business Corporations Act.

For purposes of this dissertation the Canadian oppression remedy will only be discussed briefly and focus will be placed mostly on similarities and differences.

Both the Canadian and South African oppression remedies refer to *'acts or omissions'*.[141] The wording is likely to have similar meaning and interpretation under both jurisdictions.

The CBCA refers to complainants, while the 2008 Companies Act refers to applicants. It is interesting to note that the Canadian oppression remedy is extended to security holders. Corporate creditors may therefore also receive protection under Canadian law in so far as they fall within the definition of security holders.[142] The protection for security holders is provided for in the wording of section 238 of the CBCA. Section 238(d) goes even further and proved that a potential complainant may be *'any other person who, in the discretion of a court, is a proper person to make an application under this Part'*. This discretion of the court is not available in the 2008 Companies Act when it comes to potential applicants. The South African oppression remedy is obviously more limited in its scope of potential applicants who will have *locus standi*.

The Canadian remedy provides protection from acts and omissions of what it refers to as *'affiliate'* corporations. It is submitted that this may have the same meaning as the South African *'related party'*.

Canadian law interpret the three criterion, namely oppressive, unfairly prejudicial of unfairly disregarding the interest of the applicant, as a general standard against which fairness must be evaluated. It is submitted that the oppression remedy under Canadian law not only

[140] B Welling *Corporate Law in Canada: The Governing Principles* 3 ed (1991) at 534.
[141] Section 241(2)(a) and section 163(1)(a) of the 2008 Companies Act.
[142] PA Delport, Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) at 568.

protects legal rights, but that it goes so far as to protect an expectation held by the complainant.[143]

While the exact wording differs, both South African and Canadian Company law make provision for actions taken by the board of directors. Both use the words *'power of directors'*.[144]

Neither the CBCA or the 2008 Companies Act provide protection for conduct which is merely threatening and has not yet occurred. However in the case of *820099 Ontario Inc. v Harold E. Ballard Ltd*[145] which fell under the jurisdiction of the Ontario Court, it was conceded that threatened conduct could be protected against but that the remedy would only be provided if the conduct would in all probability truly take place.

It is interesting to note that both Canadian and South African law gives the courts quite a bit of leeway when it comes to the type of orders that it may grant. While some of the remedies which are explicitly mentioned in the 2008 Companies Act overlap with Canadian remedies, the Courts are granted the further indulgence of being able to take into account foreign legislation when considering possible orders.[146] The possibility therefore exists that Canadian legislation and case law could become ever more relevant to South African courts that are tasked with interpreting the provisions of section 163 of the 2008 Companies Act.

## 6.2 English Company law

From what has been mentioned above it is clear that English law was very much a part of the historical development of minority protections and the oppression remedy in South Africa.

The court has further, on numerous occasions, showed its willingness to refer to interpretations of section 252 of the 1973 Companies Act when considering how section 163 of the 2008 Companies Act should be applied.

That being said, and as a result of the fact that section 252 was still largely based on the English example of minority protection it is submitted that English law will still be relevant under the 2008 Companies Act.

[143] PA Delport, Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) at 569.
[144] Section 241(1)(C) of the CBCA and section 163(1)(C) of the 2008 Companies Act.
[145] (1991), 3 BLR (2d) 113 at 123.
[146] See section 5(2) of the 2008 Companies Act.

It is interesting to note the, contrary to the South African oppression remedy, the English Companies Act[147], protects against threatened conduct which has not yet occurred. This is clear by the words *'actual or proposed'* conduct.

[147] Act 2006 at section 994(1).

## CHAPTER 7: CONCLUSION

From what has been said above it is clear that section 163 of the 2008 Companies Act represents a significant change from the content of section 252 of the 1973 Companies Act.

It would also appear that the drafters of the 2008 Companies Act moved away from merely copying English examples and instead applied their minds in order to mould the 2008 Companies Act, at least in so far as it applies to minority protection, into a more widely applicable set of rules. It is clear that the main focus of the changes which have been made to section 163 of the 2008 Companies Act aims to broaden the protection provided for minority shareholders and directors.

While English law and interpretation under section 252 of the 1973 Companies Act will still provide significant guidance to courts when deciding on cases under section 163, they are aided by the fact that they will be able to consult foreign jurisdictions for interpretation and guidance.

Arguably the most important aspects which have been incorporated into section 163 is the fact that it applies to shareholders and directors alike and further that a applicant will also be able to institute proceedings for the oppression of related persons.

Minority protection has come a long way since the ruling of *Foss v Harbottle* and one can imagine that further changes could be made in future in order to broaden the scope of the section even further.

The fact that, for example, the CBCA provides protection to a larger class of possible applicants and that English law provides for relief against threatened conduct, leaves the door open for possible expansion of the South African oppression remedy.

A final aspect that shareholders and directors must always keep in mind is that despite the protection that is provided to them under certain circumstances, a company is still driven by the actions of the majority. The relevance and importance of the majority rule was once again confirmed in the case of *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd.*[148] It should therefore always be borne in mind that the relief offered by section 163 should not be lightly applied for.

[148] (2014) 5 SA 179 (WWC).

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