Rectification of the securities register of a company and the oppression remedy

JS (Schoeman) Oosthuizen
B Com B Jur LLB LLM
Practising attorney, Schoeman Oosthuizen Incorporated, Port Elizabeth
Doctoral candidate, University of Pretoria

PA Delport
LLB LLD H Dip Tax Law
Professor of Mercantile Law, University of Pretoria

OPSOMMING
Rektifikasie van die sekuriteiteregister van ‘n maatskappy en die onderdrukkingsremedie
Beide die Maatskappywet 46 van 1926 en die Maatskappywet 61 van 19731 het voor- siening gemaak vir ‘n summieré statutêre remedie om die lederegister van ‘n maatskappy reg te stel. Hierdie remedie was handig vir persone wat aanspraak gemaak het op aandele in en lidmaatskap van ‘n maatskappy, veral waar die direksie geweier het om aandelesertifikate aan sodanige persone uit te reik en/of om hul name in die lederegister aan te bring.

Hierdie remedie is egter nie oorgedra na die Maatskappywet 71 van 20082 nie. Een van die bevele waarvoor die onderdrukkingsremedie in artikel 163 van die Maatskappywet van 2008 egter nou spesifiek voorsiening maak, is die regstelling van ‘n maatskappy se (sekuriteite-) register. Die vraag ontstaan oor die toepassingsgebied van die onderdrukkingsremedie van die Maatskappywet van 2008 ten opsigte van die regstelling van die sekuriteiteregister van die maatskappy en of daar alternatiewe is vir die summieré statu- têre remedie soos in die Maatskappywet van 1973.

Histories kon slegs lede, soos in die lederegister van ‘n maatskappy, aansoek doen vir regshulp ingevolge die onderdrukkingsremedie. Ons howe het egter al by geleenthed ‘n aandeelhouer wat nie as lid in die lederegister ingeskryf is nie, toegelaat om in dieselfde proses aansoek te doen vir die inskrywing van sy naam in die lederegister en, in anti- sipasie van so ‘n bevel, aansoek te doen vir regshulp ingevolge die onderdrukkingsremedie.3

Die onderdrukkingsremedie waarvoor nou voorsiening gemaak word in artikel 163 van die Maatskappywet van 2008 is beskikbaar aan aandeelhouders, soos omskryf in die Maat- skappywet van 2008, en direkteure. ‘n Aandeelhouer word in artikel 1 van die Maatskappywet van 2008 omskryf as, behoudens die bepalings van artikel 54(1), die houer van ‘n aandeel in ‘n maatskappy uitgereik wat as sodanig in die sekuriteiteregister ingeskryf is. Dus het slegs ‘n “geregistreerde” aandeelhouer bevoegdheid om aansoek te doen vir regshulp ingevolge die onderdrukkingsremedie.

Beide die Kanadese federale Maatskappywet en die Maatskappywet van die Verenigde Koninkryk bevat ‘n statutêre remedie vir die regstelling van die lederegister van ‘n

1 Hierna die Maatskappywet van 1973.
2 Hierna die Maatskappywet van 2008.
3 Die betekenis van die begrippe “aandeelhouer” en “lid” in die Maatskappywet van 2008 verskil van dié ingevolge die Maatskappywet van 1973, soos hieronder bespreek.
maatskappy asook ‘n onderdrukkingsremedie. In beide hierdie jurisdiksies word die bevoegdheid om aansoek te doen vir regshulp ingevolge die onderdrukkingsremedie aan ‘n groter groep persone verleen as in die Maatskappywet van 2008. Desnieteenstaande is die reg-spraak in hierdie jurisdiksies relevant by die uitleg van ons onderdrukkingsremedie, mits die verskille in die onderskeie wette deeglik in ag geneem word.

Dit blyk uit ‘n historiese en regsvergelykende onderzoek dat die summiere statutêre remedie om die lederegister van ‘n maatskappy reg te stel nie as sodanig in die onderdrukkingsremedie van die Maatskappywet van 2008 opgeneem is nie. Hierdie twee remedies het verskillende doelstellings en vereistes. Alhoewel ‘n persoon aansoek kan doen vir die regstelling van die sekuriteiteregister ingevolge die onderdrukkingsremedie, sal daardie persoon moet bewys dat hy ‘n geregistreerde aandeelhouer of direkteur is van die maatskappy en dat daar onderdrukking was. Die gemeenregtelike remedies om die sekuriteiteregister reg te stel is natuurlik steeds beskikbaar.

’n “Ongeregistreerde” aandeelhouer kan onder gepaste omstandighede ook aansoek doen om die sekuriteiteregister reg te stel ingevolge die nuwe artikel 161 van die Maatskappywet, wat aan die houers van uitgereikte sekuriteite ‘n statutêre prosessuele regsmiddel verleen om die Wet, die akte van oprigting of enige van die maatskappy se reëls af te dwing. Daar moet egter in gedagte gehou word dat daar belangrike verskille tussen die ou summiere statutêre remedie om die lederegister reg te stel en die prosessuele regsmiddel in artikel 161 van die Maatskappywet van 2008 bestaan.

1 INTRODUCTION

Section 115 of the Companies Act 61 of 1973\(^4\) contained a summary remedy for the rectification of the register of members of a company. It provided that the person concerned, the company or any member of the company could apply to court for the rectification of the register of members of a company if the name of that person was, without sufficient cause, entered into or omitted from the register of members; or if there was a default of or unnecessary delay in removing the name from the register if that person had ceased to be a member. The remedy in section 115 was useful to a person claiming a right to be a member, especially where the directors refused to issue share certificates to that person or to enter that person’s name in the register of members.\(^5\)

The summary remedy in section 115 of the Companies Act of 1973 for the rectification of the register of members was not carried over to the Companies Act of 2008. However, one of the competent orders specifically listed in the new

\(^4\) Hereafter the Companies Act of 1973, repealed in part by s 224(1) of the Companies Act 71 of 2008 (hereafter the Companies Act of 2008).

\(^5\) The remedy could be used in a wide variety of circumstances, eg, where the name of one person was mistakenly entered into the register instead of that of another; where registration of transfer was effected by a person without authority to do so; where the name of a member was removed by means of a forged transfer form; where the allotment of shares to the applicant was void, or was voidable because of misrepresentations made by the company to induce the applicant to subscribe; where there were rival claims to the same shares by different persons; where a company wrongfully refused or neglected to register the transferee of shares as a member; to enable the holding of shares held jointly to be split into two holdings and the names of the joint holders to be registered in a different order; to implement an effective repudiation, or exercise the right to repudiate, a contract to take shares; or to remove from the register the name of a person to whom shares have been illegally issued. See Williams “Companies” 4(2) LAWSA (2012) para 25 (hereafter LAWSA); Delport (ed) Henochsberg on the Companies Act 71 of 2008 (2011 (updated April 2016)) (hereafter Henochsberg on the Companies Act 71 of 2008) 208(8)–208(9).
oppression remedy is an order directing the rectification of the registers or other records of a company. The question arises as to whether the summary remedy in section 115 of the Companies Act of 1973 for the rectification of the register of members was integrated in the new oppression remedy. If not, is there some other remedy in the Companies Act of 2008 that serves the same purpose? More specifically, does the new remedy of a securities holder to protect his or her rights in section 161 of the Companies Act of 2008 serve the same purpose? This article specifically focuses on the question whether a person claiming a right to be entered as shareholder in the securities register, but who is not indicated as such a shareholder (hereafter referred to as an “unregistered claimant”), has locus standi to bring an application for the rectification of the securities register to reflect his or her shareholding in terms of the new oppression remedy. If not, is there an alternative statutory remedy available to an unregistered claimant?

Section 5(2) of the Companies Act of 2008 provides that, to the extent that it is appropriate, a court interpreting or applying the Act may consider foreign law. This article firstly analyses how the aforesaid issues are approached in the United Kingdom and Canada. The United Kingdom was chosen because our company law originates from there and our courts have traditionally relied extensively on English authorities. However, it is argued that the Companies Act of 2008 is now more aligned with Canadian corporate law. The comparative analysis focuses on the question whether an unregistered claimant has locus standi to bring an application for the rectification of the securities register to reflect his or her shareholding in terms of the statutory oppression remedy. Consideration is also given to whether these jurisdictions have statutory remedies to rectify the register of members of a company (similar to section 115 of the Companies Act 61 of 1973) and to protect the rights of a securities holder (similar to section 161 of the Companies Act of 2008).

The historical position that prevailed in our company law prior to the promulgation of the Companies Act of 2008 is considered next. Reference is briefly made to the common-law remedies of an unregistered claimant. The standing of an unregistered claimant to apply for relief in terms of the statutory remedy to rectify the register of members and the oppression remedy are discussed. This is followed by a consideration of the current position under the Companies Act of 2008. Finally certain conclusions are drawn.

2 COMPARATIVE LAW

The application of foreign company law should be approached carefully, with due consideration of the similarities between the bases of the jurisdictions and the particular provisions that are compared. It is important to establish what model or type of company constitution the particular jurisdiction adopts. From

---

6 The oppression remedy is contained in s 163 of the Companies Act of 2008.
7 S 162(2)(k).
9 Henochsberg on the Companies Act 71 of 2008 36 36(1).
10 Companies can be classified into different types of companies in terms of a number of criteria, including their size, structure, organisation, profitability, culture and goal. Some commentators, especially some Canadian commentators, prefer to classify companies according to their models or types of company constitutions. On this basis they distinguish between charter corporations, special act corporations, letters of patent corporations, contractarian companies and division of power corporations. See, eg, Welling Corporate law in Canada continued on next page
a South African perspective it is particularly important to establish whether the particular jurisdiction adopts a contractarian model or type of company or a division of powers corporation. Contractarian companies (also referred to as “English model companies” or “memorandum and article companies”) are based on a statutory contract and are rights-orientated. They are based on societas (partnership) rather than universitas (corporation). A number of difficulties in the application of this statutory contract have seriously eroded the contractual rights of shareholders in a contractarian model company. One difficulty that has plagued contractarian companies is the question of redress to secure compliance with the company constitution. Under a contractarian model one would assume that any breach of the company constitution can be redressed by an action for breach of contract. However, the contract is a statutory contract and the parties are bound only to the extent that the statute says they are bound. The statute normally provides that the shareholders and the company are bound to the contract. The directors and officers are normally not bound thereto. The problem is that an individual may act in several different capacities. This has been a source of difficulty and considerable debate. Some suggest that a shareholder who brings an action for breach of the statutory contract must show that the breach affected him or her “as a shareholder”. Professor Lord Wedderburn warned that the cases in this area are a mess.

Division of power companies derive from the United States model and were created in an attempt to rationalise corporate law and remove some of the difficulties that had developed in interpreting the contractarian model. They are called division of power corporations because legislation expressly divides powers within the corporate constitution among the participants (directors, officers, shareholders and, to a limited extent, creditors and employees) in the internal business and affairs of a corporation. This model is status and remedy-orientated. Every person attaining a specific status (for example director, officer, shareholder, creditor or employee), is assigned statutory powers, obligations and remedies. The corporate constitution is not a contract among the participants. 


11 Welling 59.
12 Ibid. See Abbey 50–92 for a comprehensive discussion of these difficulties.
13 Welling 65–66; Welling, Smith and Rotman 116.
14 Welling 68; Welling, Smith and Rotman 116. Welling points out that proponents of this view often rely on Beattie v E & F Beattie Ltd [1938] Ch 708 (CA). However the case does not stand for this principle. It was decided on the technicalities of civil procedure, not abstract theorising about the nature of the corporate constitution. See Welling 68–70 for a discussion of this case.
16 Welling 59–60; Welling, Smith and Rotman 116; Abbey 20; Delport “The division of powers in a company” in Visser and Pretorius (eds) Essays in honour of Frans Malan 89–91 (hereafter Delport Essays).
contractarian companies, division of power corporations are based on *universitas* (corporation).

This distinction not only reflects fundamentally different approaches, but also removes some conceptual difficulties.\(^{17}\) It is important to bear this in mind in considering and placing foreign case law in its proper perspective. For example, the judicial approach to resolving disputes in those jurisdictions which adopted a division of power model (including Canada, the United States of America and Germany) will differ fundamentally from those that adopted the contractarian (English) model. It is also important to establish what model or type of constitution the South African Companies Act of 2008 adopted and whether it differs from the model that was implicit in its predecessors. If there is a fundamental difference, it will need to be borne in mind, not only in interpreting the Companies Act of 2008, but also in considering and placing South African case law before this Act came into effect on 1 May 2011 in its proper perspective.

### 2.1 United Kingdom

United Kingdom company law is comparatively unique in providing express quasi-contractual status and effect to a company’s constitution.\(^{18}\) From this situation the courts have concluded that standard contract law should apply to the contract, subject to certain qualifications.\(^{19}\) The statutory contract clause is a legacy of the unincorporated deed of settlement companies that became prevalent after the promulgation of the Bubble Act\(^ {20}\) in 1820. These deed of settlement companies were a cross between the partnership and trust concepts. They were not true corporations but were in fact creatures of contract.\(^ {21}\) The deeds of settlement of these companies were essentially partnership agreements that mimicked the provisions found in charters of incorporation. When the Joint Stock Companies Act 1844 made it possible to incorporate companies through registration alone, the deed of settlement was retained as the constitutive document of the company.\(^ {22}\) The Joint Stock Companies Act 1856\(^ {23}\) substituted the memorandum and articles for the deed of settlement. The Act specifically provided that the memorandum and articles were contractually binding.\(^ {24}\) This statutory contract clause was retained in all the succeeding Acts until the present Companies

---

17 Welling 44. See also Gower “Some contrasts between British and American corporate law” 1956 *Harvard LR* 1376–1377. Cf further the “technique of governance” approach proposed by Wishart “A reconfiguration of company and/or corporate law theory” 2010 *J of Corporate Law Studies* 151.

18 S 33 of the Companies Act 2006 (hereafter the Companies Act 2006). See also Moore *Corporate governance in the shadow of the state* (2013) 137.

19 See Davies and Worthington *Gower Principles of modern company law* (2016) 61–70.

20 6 Geo 1 c 18.

21 Welling 66–67 points out that the deed of settlement was of course contractually binding as it was under seal. The Joint Stock Companies Act 1856 specifically provided that the memorandum and articles were contractually binding (ss 7 10). The Act did not specifically state that the company was also bound thereto as if it too had signed and sealed it, as these companies were not yet fully appreciated as having legal personality on their own until the decision of *Salomon v Salomon & Co Ltd* 1897 AC 22 (HL). See also Davies and Worthington 62–63; Abbey 15–18.


23 19 & 20 Vict c 47.

24 Ss 7 and 10 of the Joint Stock Companies Act 1856.
Act of 2006. This basic contractarian notion of private ordering lies at the very heart of company law in the United Kingdom, where shareholders constitute the ultimate source of managerial authority within the company. Shareholders are positioned “inside” the company from a governance perspective. The directors obtain their powers by a process of delegation from the shareholders through the constitution. The contractarian model or type of company constitution originated in the United Kingdom.

The statutory oppression (unfair prejudice) remedy in the United Kingdom, section 994(1) of the Companies Act 2006, provides that a member of a company may apply to a court for an order under Part 30 of the Act on the ground that the company’s affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least the applicant member himself), or that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. The right to petition for relief under section 994 is conferred upon the members of a company. Section 112 defines the members of a company as follows:

“(1) The subscribers of a company’s memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company.”

However section 994(2) extends the right to apply for relief in terms of the oppression remedy to non-members to whom shares have been transferred, or to whom shares were transmitted by operation of law.

How the courts in the United Kingdom treat the standing of non-members to apply for relief in terms of the oppression remedy are illustrated in the three cases referred to below. In the first case, Re a Company (No 003160 of 1986), the petitioner had set up a company with three others with the intention that all four would play an equal role in the company’s affairs. The petitioner’s wife was appointed director and made a shareholder instead of the petitioner himself in order to avoid the contravention by the petitioner of a covenant in restraint of trade. Relationships between the petitioner and his co-venturers deteriorated and he was dismissed from his employment with the company. His wife was removed from her position as director. The petitioner and his wife petitioned for relief under the oppression remedy contained in section 519 of the previous Companies Act of 1985. The applicants sought to have the petitioner’s name removed from the petition on the ground that he had no locus standi. Hoffmann J held that the petitioner did not have locus standi. He was not a member of the company and shares had also not been transferred or transmitted to him by operation of law as envisaged in section 994(2).

25 Companies Act 2006. S 33 of the Companies Act 2006 provides that the “provisions of a company’s constitution bind the company and its members to the same extent as if there were covenants on the part of the company and each member to observe its provisions”.
26 Davies and Worthington 58–59 356.
27 1986 BCLC 391.
29 1986 BCLC 391 393.
In the second case, *Re Quickdome Ltd*, a certain Mr O’Callaghan and a certain Mr Palmer formed a company as a joint venture between them with a view to the acquisition and running of a public house in Cardiff. They agreed that the two subscriber shares would be transferred, one to the petitioner (the wife of Mr O’Callaghan) and the other to the wife of Mr Palmer, the petitioner to hold her share as nominee for Mr O’Callaghan and Mrs Palmer to hold her share as nominee for Mr Palmer. The petitioner applied for relief in terms of the oppression remedy on the basis that her husband was excluded from the management of the company. The respondents sought to have the petition struck out on the grounds that it showed no reasonable cause of action. The only question before the court was whether the petitioner had standing to present a winding-up petition or seek relief under the oppression remedy. Davies J referred with approval to *Re a company (No 003160 of 1986)* and held that, for purposes of the extended right to apply for relief in terms of the oppression remedy, the word “transferred” requires at least that a proper instrument of transfer should have been executed and delivered to the transferee or the company in respect of the shares in question. It is not sufficient that there should be an agreement for transfer. He held that a proper instrument of transfer had not been executed. The transfer relied on was in blank as to the name of the transferee. As a result the petition was dismissed.

In the last case, *Re McCarthy Surfacing Ltd*, the company had five equal shareholders who were also the only directors of the company. Tension developed amongst the five shareholders. A certain Mr Hecquet and Mr Hoare sided with each other against the other three shareholders. At one stage Mr Hecquet and Mr Hoare each executed a transfer of their shares to a certain Mr Marsden. Mr Marsden submitted the transfers to the company and requested to be registered as a shareholder. The directors decided not to register the transfers. Subsequent to this, bankruptcy orders were made against Mr Hecquet and Mr Hoare. Their receivers or trustees purported to sell their shares in the company to one of the other shareholders. However, Mr Hecquet and Mr Hoare remained the registered shareholders in respect of the shares which they held before the disputes arose. Subsequently Mr Hecquet and Mr Hoare obtained their discharge from bankruptcy and, together with Mr Marsden, presented a petition under section 459 of the Companies Act of 1985 (the previous oppression remedy) based on an alleged failure on the part of those in control of the company to consider making distributions to shareholders. The respondents challenged the standing of the petitioners.

The court considered various authorities and concluded that as Mr Hecquet and Mr Hoare were still the registered shareholders, they had *locus standi*. The court held that Mr Marsden also had *locus standi* under the extended standing contained in section 459(2) of the then applicable Companies Act of 1985 which read as follows:

“The provisions of this part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law, as those provisions apply to a member of the company; and reference to a member or members are to be construed accordingly.”

30 1988 BCLC 370.
31 *Idem* 374–375.
32 2006 EWHC 832 (Ch).
The court held that section 459(2) applies only to a person who is not a member of a company, that is, to a person who does not have standing to petition by virtue of section 459(1), and embraced two categories, namely, persons to whom shares have been transferred and persons to whom shares have been transmitted by operation of law. The latter category includes persons such as trustees in bankruptcy or personal representatives who have become entitled to shares in that capacity but have not had their names entered in the company’s register of members. This category is self-explanatory. It consists of persons in whose favour a transfer of shares has been executed.\(^3^3\)

To summarise, in the United Kingdom the right to petition for relief under section 994 is conferred upon the members of a company. However, the right to apply for relief in terms of the oppression remedy is extended to two categories of persons who are not members of the company. The first category is persons to whom shares were transferred. This would include shareholders who have not yet been registered in the register of members (in other words unregistered claimants). However, an agreement to transfer is not enough. A proper instrument of transfer must have been executed and delivered to the transferee.\(^3^4\) The fact that the directors may have refused to register the transfer does not deny the transferee standing provided that a proper instrument of transfer had been executed.\(^3^5\) Davies and Worthington state that the extended standing contained in section 994(2) makes the oppression remedy useful in small companies, where directors of the company may exercise the power they have under the articles to refuse to register as a member a person to whom the shares have been transferred.\(^3^6\) The second category is persons to whom shares have been transferred or transmitted by operation of law. This would, for example, include the executors of a deceased estate or the trustees of an insolvent estate.

Unregistered claimants in the United Kingdom have a further remedy at their disposal. The Companies Act 2006 provides for a summary remedy for the rectification of the register of members of a company. Section 125 of the Act provides that “a person aggrieved, or any member of the company, or the company” may apply to court for rectification of the register of members of the company. The Act does not provide shareholders with a remedy to protect their rights that is comparable to section 161 of the South African Companies Act of 2008. This is a consequence of the quasi-contractual status and effect of the company’s constitution. Shareholders may enforce their rights in terms of the company’s constitution contractually and do not require a procedural mechanism to do so.

### 2.2 Canadian Law

Canadian law adopts a fundamentally different approach than that of the United Kingdom. Canada is a federal state consisting of ten provinces, each with its own sphere of legislative powers, three territories with limited self-government and a central (federal) Parliament. Each state has its own corporations Act. The legal reforms in Canada in the 1970s and 1980s rejected the legal contractarian model in virtually every Canadian jurisdiction.\(^3^7\) With the exception of British Columbia

---

33 Idem para 6.
34 *Re a Company (No 003160 of 1986)* 1986 BCLC 391; *Re Quikdome Ltd* 1988 BCLC 370.
35 *Re McCarthy Surfacing Ltd* 2006 EWHC 832 (Ch); Davies and Worthington 662.
36 Davies and Worthington 662.
37 Welling 80.
and Nova Scotia, the corporation law statutes of the other Canadian provinces and the federal Canada Business Corporations Act do not contain a statutory contract clause (similar to section 33 of the United Kingdom Companies Act of 2006). The corporate constitution is not a contract among the participants. Canadian corporation law is firmly based on universitas (corporation). A corporation has the rights, powers and privileges of a natural person. The division of powers model or type of company constitution is the dominant model in Canada.

The Canada Business Corporations Act invokes a statutory division of powers amongst the participants (directors, officers, shareholders and, to a limited extent, creditors and employees) in the internal business and affairs of a corporation. The directors are granted an original power to manage or supervise the management of the business and affairs of the corporation. The Act is status and remedy-orientated. It provides extensive remedies for shareholders and other complainants. The remedies are about standing, not about substantive rights.

The oppression remedy is contained in section 241 of the Canada Business Corporations Act. It has been described as the broadest, most comprehensive and most open-ended shareholder remedy in the common-law world. Section 241 provides that a “complainant” may apply to court for an order under this section. If the court is satisfied that, in respect of a corporation or any of its affiliates, any act or omission of the corporation or any of its affiliates effects a result, that the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner, that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

“Complainant” is defined in section 238 of the Canada Business Corporations Act as:

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(c) the Director, or

(d) any other person who, in the discretion of a Court, is a proper person to make an application under this Part.”

There does not appear to be unanimity in Canadian case law on the question whether a person claiming a right to be a shareholder (an unregistered claimant)

---

38 RSC 1985, c 44.
40 Idem 59–60; Welling, Smith and Rotman 116; Abbey 20; Delport Essays 89–91.
41 S 15(1) of the Canada Business Corporations Act; Welling 81–157; Welling, Smith and Rotman 127–226.
42 Welling 59–64; Welling, Smith and Rotman 110–118.
43 S 102(1) of the Canada Business Corporations Act.
44 See part XX of the Canada Business Corporations Act. These remedies include a derivative action (ss 239–240), an oppression remedy (s 241), an application to rectify the records of the company (s 243) and a right to apply for a restraining or compliance order (s 247).
45 Welling 62–64.
46 See, eg, Welling 555; Van Duzer “Who may claim relief from oppression: The complainant in Canadian corporate law” 1993 Ottawa LR 465.
can be a complainant in oppression proceedings. Each case must of course be carefully scrutinised with reference to the provisions of the specific corporate statute that was considered and applied. However, two decisions of the Court of Appeal for British Columbia bear mention. The first is Lee v International Consort Industries. In this case Mr Lee, who had no shares in the company, commenced oppression proceedings in terms of section 224 of the then applicable British Columbia Company Act in which he, inter alia, claimed that shares be transferred to him. Section 224 provided that “a member” had locus standi to apply for relief in terms of the oppression remedy. Section 1 defined a “member” as “a subscriber of the memorandum of a company, and includes every other person who agrees to become a member of a company and whose name is entered in its register of members or a branch register of members”. Section 224(6) extended the definition of a member and provided as follows:

“(6) For purposes of this section, a member includes –
(a) a beneficial owner of a share in the company; and
(b) any other person who, in the discretion of the court, is a proper person to make an application under this section.”

The court a quo exercised its discretion to grant Mr Lee leave to bring the application in terms of section 224(6)(b). The Court of Appeal did not agree and held as follows:

“I think a finding that Lee is a proper person to apply under the section goes beyond the area of the judge’s discretion. If he is included there is the anomalous situation that he is given the status of a member able to complain about oppressive conduct by those in control of the company when the oppressive conduct he complains of is denial of his status as a member. If indeed he has a right to the shares his claim can be made in another proceeding.”

The second is the decision of the Court of Appeal for British Columbia in Newcastle Projects Inc v Percon Projects Inc. In this case, the plaintiffs sought leave to amend their pleadings by joining two new defendants, adding many new allegations to their earlier allegations of breach of contract, advancing a claim of oppressive or unfairly prejudicial conduct under section 227(1) of the British Columbia Business Corporations Act and seeking new forms of relief contemplated by that section. The defendants denied that the plaintiffs were entitled to the shares or that they had locus standi to invoke section 227. Section 1(1) of the Act defines a “shareholder” generally as a registered member of the company. Section 227(1) provides as follows:

“(1) For the purposes of this section, ‘shareholder’ has the same meaning as in section 1(1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.”

47 See, eg, Van Duzer 1993 Ottawa LR 463 470–471; Welling, Smith and Rotman 459.
48 It must be noted that British Columbia enacted a statute that incorporates most of the remedies that the Canada Business Corporations Act provides, but also retained the statutory contract clause. It is therefore a hybrid model (similar to the South African Companies Act of 2008). Nova Scotia is the only other province in Canada that retained a statutory contract clause. See Welling 65–67.
50 RSC 1979, c 59.
51 1992 CanLII 1076 (BCCA) 17.
52 2010 BCCA 563; 2010 CanLII 563 (BCCA).
53 SBC 2002, c 57. This Act apparently replaced the previous British Columbia Companies Act.
After discussing the relevant case law the court held as follows:

“Counsel for the plaintiffs submits that as suggested in Chernoff, the ratio of Lee is that where the only ‘oppressive’ conduct complained of is the denial of the plaintiff’s status as a shareholder, his or her entitlement to advance a case of oppression must be determined before the court will embark on a hearing of the petition under s. 227. . . I agree with the plaintiffs’ description of the ratio of Lee, although one should not overlook its more general rejection of a broad approach to the ambit of the ‘appropriate person’ category in what is now s. 227(1) . . . In the case at bar, Lee is not strictly applicable because oppressive conduct other than the failure to transfer or issue shares to the plaintiff has been clearly alleged.”

The standing to apply for relief in terms of the oppression remedy in Canada is substantially broader than in the United Kingdom. A complainant generally includes any other person who, in the discretion of the court, is a proper person. This may include creditors and employees. But at least in British Columbia a person claiming a right to be a shareholder (an unregistered claimant) cannot be a complainant in oppression proceedings if the very relief that he or she claims is to be granted the status of a shareholder.

However, an unregistered claimant claiming rectification of the register of members to reflect his or her shareholding will not be without remedy. The Canada Business Corporations Act provides for a summary remedy for the rectification of the register of members of a company. Section 243 of the Act provides that a “security holder of the corporation or any aggrieved person” may apply to a court that the registers or records of the company be rectified.

Section 247 of the Canada Business Corporations Act provides that where a corporation or any director, officer, employee, agent or mandatary, auditor, trustee, receiver, receiver-manager, sequestrator or liquidator of a corporation does not comply with the Act, the regulations, articles, by-laws, or a unanimous shareholder agreement, “a complainant” (as defined section 238) or creditor of the corporation may, in addition to any other remedy that they may have, apply to a court for an order directing any such person to comply with, or restraining any such person from acting in breach of, any provisions thereof, and on such application the court may so order and make any further order it thinks fit. This remedy is known as a compliance remedy and provides “a complainant” or creditor with a procedural vehicle to enforce the corporate constitution. It is necessary to provide such a remedy because generally the company’s constitution does not have quasi-contractual status and effect. The members may accordingly not enforce it contractually.

3 HISTORICAL POSITION IN SOUTH AFRICAN LAW

3.1 Common law

The emphasis of this article is on the statutory remedies of an unregistered claimant, but it must be borne in mind that there are a number of common-law

54 Paras 29 and 30.
56 See Welling 528–533; Welling, Smith and Rotman 478–490; McGuinness Halsbury’s Laws of Canada (2013) 941 for a more comprehensive discussion of the compliance order in Canadian law.
57 Welling 59 529. This remedy is inappropriate in contractarian companies, which are based on a statutory contract and are rights-orientated rather than status and remedy-orientated.
remedies that an unregistered claimant may potentially employ to rectify the register of members (or securities register). In certain circumstances, for example where a dispute of facts is foreseen, these remedies may be more appropriate. An unregistered claimant who relies on an underlying obligatory agreement may, for example, institute an action for specific performance. An unregistered claimant may also under appropriate circumstances apply for a declaratory order and/or an order directing the company to register his or her shares. The unilateral act of a company in removing a person’s name from the register of members (or securities register) may constitute spoliation. A company may also institute interpleader proceedings where there are rival claimants for registration in respect of the same shares.

### 3.2 Companies Act of 1926

The Companies Act of 1926 was the first post-union South African companies Act. It was based on the Transvaal Companies Act of 1909 and therefore on the English Companies (Consolidation) Act of 1908. It is therefore not surprising that the Act was firmly rooted in the contractarian model or type of company constitution of the United Kingdom.

Section 32 of the Companies Act of 1926 provided that an aggrieved person, the company or any member of the company could apply to court for the rectification of the register of a company. An aggrieved person was “a person whose title to a share is in some way in question, and who complains that his name is either improperly included in or improperly omitted from the register”. An unregistered claimant would clearly qualify as an “aggrieved person”. The court held in *Orr v Hill* that the term “rectification” covers an alteration of the register so as to make it reflect the state of affairs which the applicant is entitled to claim that it ought to reflect, in particular a case where it was impossible for the persons who ought to be on the register to be properly placed there “owing to the want of the necessary machinery”. The applicant bore the burden to prove that the register of members was not accurate. The remedy in section 32 did not exclude the common-law remedies of an unregistered claimant.

---

58 Cf, eg, *Cape Pacific Ltd Limited v Lubner Controlling Investments (Pty) Ltd* 1993 2 SA 784 (C); *Botha v Fick* 1995 2 SA 750 (A).
59 Cf, eg, *Oakland Nominees (Pty) Ltd v Gertia Mining & Investment Co (Pty) Ltd* 1976 1 SA 441 (A).
60 Cf, eg, *Adam v Central India Estates Ltd and The Directors* 122 WLD 135.
61 *Rooibokoord Sitrus (Edms) Bpk v Louw’s Creek Sitrus Koöperatiewe Maatskappy Bpk* 1964 3 SA 601 (T) 605; *Watt v Sea Plant Products Ltd* 1999 4 SA 443 (C) 453; confirmed on appeal: 2000 4 SA 711 (A); *Tigon Ltd v Bested Investments (Pty) Ltd* 2001 4 SA 634 (N) 645; *Xsinet v Telkom SA Ltd* 2002 3 SA 629 (C) 637.
63 46 of 1926 (hereafter the Companies Act of 1926).
64 De la Rey “Aspekte van die vroeë maatskappiereg: ‘n Vergelykende oorsig (slot)” 1986 *Codicillus* 24; Henning and Wandrag “‘n Oorsig van die herkoms van die private maatskappy en die huidige posisie in enkele regstelsels”1993 *De Jure* 25–26.
65 *Waja v Orr, Orr and Dowjee Co Ltd* 1929 TPD 865 871–872. See also *Henochsberg* 223.
66 1929 TPD 885
67 Ibid 892.
68 Ibid 893.
69 *Reese River Silver Mining Co Ltd v Smith* (1869) LR 4 HL 64; *Re Clifton Springs Ltd* 1939 VLR 27.
In *Verrin Trust & Finance v Zeeland House*\(^\text{70}\) the applicant brought an application to rectify the first respondent’s share register by restoring the applicant’s name to it, on the ground that it had been removed therefrom without sufficient cause. The application was brought in terms of section 32 of the Companies Act of 1926. The applicant alleged that the transfer out of the applicant’s name had been effected by means of false or fraudulent share certificates. Corbett J held, with reference to *Jeffery v Pollak and Freemantle*,\(^\text{71}\) that an application in terms of section 32 is concerned with title to be on the register and not with the ownership of shares in issue. The court described the remedy as a discretionary and summary remedy analogous to a spoliation order. As with its English equivalent, the court should not exercise its jurisdiction without the consent of the parties where intricate, difficult or complicated questions of title arise.\(^\text{72}\)

The statutory oppression remedy was first introduced in South African company law with the adoption in 1952 of section 111bis in terms of an amendment to the Companies Act of 1926.\(^\text{73}\) Section 111bis(1) provided that:

> “Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) may make an application to the court by petition for an order under this section; and in the case falling within sub-sec. (2) of sec. 95 sext, the Minister may make the application.”

As was the case with section 210 of the English Companies Act of 1948, section 111bis was introduced as an alternative remedy to winding-up the company where a member(s) complained of oppression.\(^\text{74}\) Although it was primarily aimed at protecting the rights of minority shareholders, it could also be brought by a member who shared voting control equally with another member.\(^\text{75}\) Only registered members had *locus standi* to apply for relief.\(^\text{76}\)

### 3.3 Companies Act of 1973

With the introduction of the Companies Act of 1973 South African company law started to gradually part with English company law.\(^\text{77}\) However, the Act remained firmly rooted in the contractarian model or type of company constitution of the United Kingdom.

The summary remedy for the rectification of the register of members was carried over to the Companies Act of 1973. Section 115 provided as follows:

> “(1) If –
>     (a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or
>     (b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member, the person

---

\(^{70}\) 1973 4 SA 1 (C).

\(^{71}\) 1938 AD 1.

\(^{72}\) *Idem* 9H–10H.

\(^{73}\) See also Sibanda “The statutory remedy for unfair prejudice in South African company law” 2013 *JJS* 59.

\(^{74}\) *Idem* 60.

\(^{75}\) *Benjamin v Elysium Investments* 1960 3 SA 467 (E) 475–477; *Livanos v Swartzberg* 1962 4 SA 395 (W) 396–397.

\(^{76}\) *Bader v Weston* 1967 1 SA 134 (C) 140A–143E; *Ex parte Avondzon Trust* 1968 1 SA 340 (T) 342H; Sibanda 2013 *JJS* 61.

\(^{77}\) De la Rey 1986 *Codicillus* 24.
concerned or the company or any member of the company, may apply to
the Court for rectification of the register.

(2) The application may be made in accordance with the rules of Court or in such
other manner as the Court may direct, and the Court may either refuse it or may
order rectification of the register and payment by the company, or by any
director or officer of the company, of any damages sustained by any person
concerned.

(3) On any application under this section the Court may decide any question
relating to the title of any person who is a party to the application to have his
name entered in or omitted from the register, whether the question arises
between members or alleged members or between members or alleged mem-
bers on the one hand and the company on the other hand, and generally may
decide any question necessary or expedient to be decided for the rectification
of the register.”

The application could be brought by the person concerned, the company or any
member of the company.78 A “person concerned” had the same meaning as “the
person aggrieved” in section 32(1) of the Companies Act of 1926 and accordingly
included an unregistered claimant.79 The term “rectification” had the same mean-
ing as in section 32 of the Companies Act of 1926, namely, to alter the register
so as to make it reflect the state of affairs which the applicant is entitled to claim
that it ought to reflect.80 An application in terms of section 115 was essentially
concerned with title to be on the register of members and not with ownership of
shares as the right to be on the register could be independent of ownership.81
However, the court could decide any question relating to the title of any person
who is a party to the application and any question necessary or expedient to be
decided for the rectification of the register.82 It could also order the company or
any director or officer of the company to pay damages to any person concerned.83
It did not matter whether the issue relating to the title to be on the register of
members arose between members or alleged members, or between members or
alleged members on the one hand and the company on the other hand.84 The
court had a wide equitable discretion to ensure that fairness and justice prev-
vailed.85 Section 115 did not exclude the common-law remedies of an unregis-
tered claimant.

79 Henochsberg 223.
80 Botha v Fick 1995 2 SA 750 (A) 780; Watt v Sea Plant Products Ltd 1999 4 SA 443 (C)
453; confirmed on appeal: 2000 4 SA 711 (A); Henochsberg 223. In the context of an
agreement, rectification does not alter the rights and obligations of the parties in terms of
the agreement to be rectified; their rights and obligations are no different after rectification.
Rectification does therefore not create a new contract, but merely serves to correct the writ-
ten memorial of the agreement. It is a declaration of what the parties to the agreement to be
rectified agreed. See Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd 2009 3
SA 447 (SCA) para 13.
81 Waja v Orr, Orr and Dowjee Co Ltd 1929 TPD 865 871–872; Jeffery v Pollak and Free-
mantle 1983 AD 1 18; Verrin Trust & Finance Corporation (Pty) Ltd v Zeeland House (Pty)
Ltd 1973 4 SA 1 (C) 9; Henochsberg 220(2)–221.
82 S 115(3) of the Companies Act of 1973. See also Verrin Trust & Finance Corporation
(Pty) Ltd v Zeeland House (Pty) Ltd 1973 4 SA 1 (C) 9–10; Botha v Fick 1995 2 SA 750
(A); Koen v Ban (2007) JOL 19306 (C); Henochsberg 221.
83 S 115(2). See also Henochsberg 223.
84 S 115(3).
85 Orr v Hill 1929 TPD 885 829—893; Davis v Buffelsfontein Gold Mining Co Ltd 1967 4 SA
631 633; Bauermeister v CC Bauermeister (Pty) Ltd 1981 1 SA 274 (W) 277–278; Botha v
continued on next page
In Botha v Fick\(^{86}\) the appellant applied for, ***inter alia***, an order that the first respondent sign transfer forms to transfer certain shares in a company to the appellant, alternatively for a declaratory order that the appellant is the owner of certain shares in the company, further alternatively that the register of members of the company be rectified in terms of the provisions of section 115. The case dealt primarily with the requirements for a valid cession of shares.\(^{87}\) The court held that it has a wide discretion to ensure that fairness and justice are done in an application in terms of section 115 for the rectification of the register of members of a company “to make it reflect the state of affairs which the appellant is entitled to claim that it ought to reflect”.\(^{88}\)

The oppression remedy was also carried over to the Companies Act of 1973. Section 252(1) of the Companies Act of 1973 provided that:

> “Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, subject to the provisions of sub-section (2), make an application to the court for an order under this section.”

Only a member could seek relief under section 252. The concept of membership under section 252 was interpreted in the light of the provisions of sections 103 and 104 of the Companies Act of 1973. The mere fact that someone was a shareholder in a company did not make that person a member of the company.\(^{89}\)

In Lourenco v Ferela (Pty) Ltd (No 1)\(^{90}\) the applicants claimed to be “beneficial shareholders” of the company on the basis of the fact that they were intestate heirs. They relied only on the liquidation and distribution account of the estate of the deceased in order to show that they had been awarded shares. The applicants did not rely on an agreement in terms of which the shares were transferred to them. It appeared that the one respondent did not assist in having the shares and interests transferred to the applicants and, in fact, may have deliberately delayed the transfer.\(^{91}\) Southwood J held that the applicants did not have ***locus standi*** to bring an application in terms of section 252 of the Companies Act of 1973 as their names were not entered as members in the register of members. Even if the respondents had in some way prevented registration of the transfer of shares, it

---

\(^{86}\) Fick 1995 2 SA 750 (A) 780; Gaffoor v Vangates Investments 2012 4 SA 281 (SCA) para 40; Henochsberg 220(1) 221–222.

\(^{87}\) At common law the term “transfer” is not a single act but consists of a series of steps, namely, an agreement to transfer (the obligatory agreement), the execution of a deed of transfer (the transfer agreement) and finally, the registration of transfer. See Inland Property Development Corporation (Pty) Ltd v Cilliers 1973 3 SA 245 (A) 251C; Smuts v Booyens; Markplais (Edms) Bpk v Booyens [2001] 3 All SA 536 (SCA). The delivery of a share certificate or registration in the securities register is not a requirement to become the owner of a share, but a person who asserts ownership of a share must at least prove a transfer agreement in terms of which the share was ceded to him. See Botha v Fick 1995 2 SA 750 (A) 778–779; Henochsberg on the Companies Act 71 of 2008 211–212(1).

\(^{88}\) Botha v Fick 1995 2 SA 750 (A) 780C.

\(^{89}\) Sibanda 2013 JJS 65; Henochsberg 205 479; Cilliers, Benade (et al) Cilliers and Benade Corporate law (2000) 240.

\(^{90}\) 1998 3 SA 281 (T).

\(^{91}\) 294B–D.
would not have assisted the applicants. They should have obtained registration of their names in the register of members before launching the application against the respondents.92

In Barnard v Carl Greaves Brokers (Pty) Ltd93 Binns-Ward AJ held on the particular facts before him that he did not consider the fact that the applicant was not yet registered as a member an obstacle to his resort to section 252. He held that

“it is competent for a shareholder who has not obtained registration of his membership of the company because of opposition or lack of co-operation by the company or his fellow shareholders, but is entitled to such registration, to apply in the same proceedings for an order directing his enrolment on the register of members and, in anticipation of the grant of such an order, as a member for relief in terms of s 252”.94

In the recent decision of Smyth v Investec95 the main issue was whether a beneficial shareholder of shares in a company, who has chosen to have those shares held through a nominee, was entitled to invoke the oppression remedy in section 252 of the Companies Act of 1973. The court held that the term “member” is restricted to registered shareholders and does not include a beneficial shareholder.96 It found support for this conclusion in section 103 of the Act which provided that the members of the company are the subscribers of the memorandum of the company, who shall be deemed to have agreed to become members upon the company’s incorporation and who shall be entered as members in the register of members; as well as any other person who agrees to become a member of a company and whose name is entered into its register of members.97 The court also relied heavily on English law in support of this conclusion.98 Rabie J held:

“Where errors occur in a company’s register of members, possibly as a result of the action or inaction of the majority shareholders who are oppressing a minority, the English courts will not bend the requirements for standing under s 994 [the oppression remedy]. Instead, it will usually be necessary, before presenting a petition, to bring an action for specific performance of a subscription agreement or an action for rectification of the register of members. See Re Clearsprings (Management) Ltd [2003] EWHC 2516 (Ch). A similar approach was adopted in South Africa in Barnard v Carl Greaves Brokers (Pty) Ltd and Others and Two Other Cases 2008 (3) SA 663 (C) ([2008] 2 All SA 272). See also Lourenco supra at 294.”99

92 The court distinguished the case of Kalil v Decotex (Pty) Ltd 1988 1 SA 943 (A), where it was held that the court is entitled to go behind the register of members in order to ascertain the identity of the true owner of the shares. Kalil was an application for the liquidation of the respondent company. In Sweet v Finbain 1984 3 SA 441 (W) 445D–E it was said obiter that “an [a]pplicant cannot be in a worse position when the management of a company unlawfully deletes his name from the register of members, or causes his shares to be transferred to another – a matter to which the Court cannot be required to shut its eyes”. But this case also dealt with an application for a winding-up order.

93 2008 3 SA 663 (C).
94 Para 41.
95 2016 4 SA 363 (GP).
96 Paras 67 71 76.
99 Para 29.
The historical position is therefore that unregistered claimants could invoke the statutory summary remedy for the rectification of the register of members of a company. They could also rely on their common-law remedies. However, unregistered claimants were not members of the company and could not invoke the oppression remedy. At the very least they had to apply in the same proceedings for an order directing their enrolment on the register of members and, in anticipation of the grant of such an order, as a member for relief in terms of the oppression remedy.

4 COMPANIES ACT OF 2008

Before the statutory remedies of an unregistered claimant in terms of the Companies Act of 2008 are considered, reference must be made to two important differences between the Companies Act of 2008 and its predecessor. First, there are clear indications that the Companies Act of 2008 moved away from a contractarian statute to a division of powers statute. The Companies Act of 2008 provides that the company is a separate juristic person which has all of the legal powers and capacity of an individual, except to the extent that a juristic person is incapable of exercising any such power, or having any such capacity, or the memorandum of incorporation provides otherwise. The powers of the directors to manage the business and affairs of the company are now original and not delegated from the shareholders through the memorandum of incorporation as it was in the Companies Act of 1973 (through the articles of association). The managerial obligations and duties of directors are public in nature.

---

100 Abbey 49.
102 S 66(1). The significance of this section is the following: First, the powers of the directors are now original and not delegated from the shareholders through the memorandum of incorporation as it was in the Companies Act of 1973 (through the articles of association). The powers and duties of the directors thus have a constitutional (or statutory) and not a contractual base. Secondly, the ultimate power in the company now vests with the board of directors and not the shareholders. Unless the qualifications of s 66(1) apply, the board of directors is the ultimate organ of the company. The only control that the shareholders have over the directors, other than the power to appoint or remove them, is if the shareholders act unanimously. See Pretorius v PB Meat (Pty) Ltd (1057/2013) [2013] ZAWCHC 89 (14 June 2013); Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd [2014] JOL 32101 (WCC) para 31; Cassim MF in Contemporary company law (2012) 123–124 (hereafter Contemporary company law); Henochsberg on the Companies Act 71 of 2008 250(3); Delport Essays 90–92. Thirdly, it confirms that a company is an institution rather than a contractual arrangement (a universitas rather than a societas). Cf De Jongh Between societas and universitas. The listed company in historical perspective (Tussen societas en universitas. De beursvennootskap en haar aandeelhouers in historisch perspectief) (2013) Supreme Court of Netherlands Research Department (available at http://bit.ly/ZPls9n, accessed on 9 April 2014) 561–562. Cassim R in Contemporary company law 412 states that even the analogy of a director as an agent of the company (as opposed to the shareholders) is not as strong as in the Companies Act of 1973.

103 Eg, s 15(6)(c) of the Companies Act 2008 provides that the memorandum is binding on directors, prescribed officers and each person serving the company as a member of a committee of the board. S 77 provides for the personal liability of directors and prescribed officers under a number of circumstances. S 218(2) also provides that any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.
Companies Act of 2008 provides specific remedies to specific persons. These remedies are about standing and not about substantive rights. The standing of a person to apply for a remedy is thus fundamental. The Act is status and remedy-orientated. The Act further makes provision for the board of directors to make, amend and repeal rules (by-laws) subject to the approval of the shareholders. It recognises a shareholder agreement as a constitutional document. All these provisions signify a fundamental shift in the underlying philosophy and approach to the company constitution away from a contractarian (or English model) company to a division of powers corporation. The company is conceptualised as an institution rather than a contractual arrangement (a universitas rather than a societas) under the Companies Act of 2008.

Yet the Companies Act of 2008 contains a statutory contract provision whereby certain elements of the contractarian model or type of company were retained. In this sense the Companies Act of 2008 is a hybrid model similar to the British Columbia Business Corporations Act. It is difficult to perceive why the legislature deemed it necessary to retain the statutory contract in the Companies Act of 2008, despite the fact that the statutory contract has been questioned in the country where it originated and is also strained in its application. It would have been better and in line with a division of powers model to rather have made provision for a restraining or compliance remedy similar to section 247 of the Canada Business Corporations Act. Such a remedy would have allowed prescribed persons (for example, shareholders, directors and prescribed officers) to apply to court for an order directing other shareholders, directors, prescribed officers or members of board committees to comply with the Companies Act of 2008, the memorandum of incorporation or any rules of the company, if they failed to do so. Whilst the Companies Act of 2008 already provides for certain restraining or compliance remedies, these remedies arguably do not go far enough.

Secondly, the terms “member” and “shareholder” have different meanings in the Companies Act of 2008 and cannot be seen as synonyms as was the case with the Companies Act of 1973. In terms of the Companies Act of 2008, a “member” is only used in respect of a non-profit company. However, under the Companies Act of 1973 a “member” was every “other person” who acquires shares

104 Cf, eg, the specific remedies provided for in ss 160–164. See also Davis *Companies and other business structures* (2013) 294–306 for a general discussion of these remedies.
105 S 15(3)–(5A) of the Companies Act 2008.
106 S 15(7).
107 Cassim MF in *Contemporary company law* 123–124.
108 S 15(6).
109 S 20(4) read with s 20(5) provides that a shareholder, director or prescribed officer may institute proceedings to restrain a company from performing any action that is in breach of the Act or a specified limitation under the memorandum of incorporation. S 161 also allows the holder of issued securities to apply to court for a declaratory order regarding the rights that the person may have in terms of the Act, the memorandum of incorporation, any rules of the company or any applicable debt instrument. These remedies can be compared with s 247 (restraining or compliance order) of the Canada Business Corporations Act that allows for shareholders to remedy breaches of the Act, the regulations, articles, by-laws or unanimous shareholder agreement with leave of the court.
110 See the definition of “member” in s 1 of the Companies Act of 2008.
111 That is a person who becomes a member by acquiring shares, either through subscription or purchase, and not by virtue of being a subscriber to the memorandum of incorporation: s 103(2) of the Companies Act of 1973.
and agrees to become a member of a company and whose name is entered in its register of members,\textsuperscript{112} and was preceded by a similar provision in section 24 of the Companies Act of 1926.\textsuperscript{113} No particular form of agreement was required: it could have been express or implied and either oral or in writing.\textsuperscript{114} A person could therefore be a shareholder, without (agreeing to) being a member, but the opposite was not possible.\textsuperscript{115}

The equivalent of “membership” in terms of the Companies Act 1973 in the Companies Act of 2008 may be the entering of the name of the holder of shares in the securities register.\textsuperscript{116} The company “must enter in its securities register every transfer” of securities.\textsuperscript{117} The significance of this obligation, and the right of the holder of securities, lie in section 37(9) of the Companies Act of 2008 that provides that a person will only acquire the rights associated with a particular security (including shares) if that person’s name is entered in a particular securities register.\textsuperscript{118}

As indicated before, the summary remedy to rectify the register of members (or securities register in the case of the Companies Act of 2008) was not carried over to the Companies Act of 2008. However, an “unregistered claimant” may still apply that the securities register be rectified in accordance with common-law principles and the inherent jurisdiction of the superior courts.\textsuperscript{119}

One of the competent orders specifically listed in the new statutory oppression remedy contained in section 163 of the Companies Act of 2008 is an order directing the rectification of the registers or other records of a company.\textsuperscript{120} The question arises whether an unregistered claimant may bring an application for the rectification of the securities register to reflect his or her shareholding in terms of the new oppression remedy. One difficulty with the application of the new oppression remedy in this instance is the fact that it is only available to a shareholder, or otherwise to a director of the company,\textsuperscript{121} whereas any person claiming a right to be a shareholder had standing to apply for the rectification of the register of members in terms of the provisions of section 115 of the Companies Act of 1973. The term “shareholder” is defined in section 1 of the Companies Act of 2008 as “subject to section 57(1), means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register as the case may be”. The term “shareholder” is given an extended meaning for purposes of Part F of Chapter 2 of the Act (which deals with the governance of companies) by also including “a person who is entitled to exercise

\textsuperscript{112} Ibid.
\textsuperscript{113} S 24.
\textsuperscript{114} Henochsberg 208; Universal Non-Tariff Fire Insurance Co; Ritso’s Case (1877) 4 Ch 774 (CA) 782; Moosa v Lalloo 1957 4 SA 207 (D) 219.
\textsuperscript{115} See Cilliers and Benade Corporate law (2000) 240.
\textsuperscript{116} Ss 50 and 51 of the Companies Act of 2008.
\textsuperscript{117} S 51(5) of the Companies Act of 2008.
\textsuperscript{118} S 37(9) of the Companies Act of 2008 suggests that any transfer of shares will only be effective if it is registered by the company by entering the relevant information of the transferor and transferee into the securities register. For a transfer to be lawfully registered a proper instrument of transfer must be delivered to the company unless the transfer is by operation of law. See Henochsberg on the Companies Act 71 of 2008 212(1)–213.
\textsuperscript{119} LAWSA para 25.
\textsuperscript{120} S 162(2)(k) of the Companies Act of 2008.
\textsuperscript{121} Or of a related company.
any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached". However, the extended meaning does not apply to the statutory oppression remedy contained in section 163. It would therefore appear that only a shareholder who is registered in the securities register has standing to apply for relief in terms of the oppression remedy. An unregistered claimant cannot bring an application for the rectification of the securities register to reflect his or her shareholding in terms of the new oppression remedy.

In contrast to the position in the United Kingdom, the oppression remedy in section 163 is not available to persons to whom shares have been transferred or transmitted by operation of law. In this sense section 163 is narrower than the oppression remedy in the United Kingdom. On the other hand, section 163 is broader than the oppression remedy of the United Kingdom in the sense that the Companies Act of 2008 now also gives standing to a director to apply for the oppression remedy.

The wording of section 163(1) of the Companies Act of 2008 is similar to that of section 241(2) of the Canada Business Corporations Act. But the standing to institute oppression proceedings under section 241 of the Canada Business Corporations Act is substantially broader compared to section 163 of the Companies Act of 2008. Whereas the Companies Act of 2008 limits standing to a shareholder or a director, section 241 of the Canada Business Corporations Act is available to a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates; a director or an officer or a former director or officer of a corporation or any of its affiliates; the Director; or any other person who, in the discretion of a Court, is a proper person. But, at least in British Columbia, a person claiming a right to be a shareholder (an unregistered claimant) cannot be a complainant in oppression proceedings if the very relief that he or she claims is to be granted the status of a shareholder.

The Companies Act of 2008 provides a remedy to security holders to protect their rights. Section 161 of the Act provides as follows –

"(1) A holder of issued securities of a company may apply to a court for –

(a) an order determining any rights of that securities holder in terms of this Act, the company’s Memorandum of Incorporation, any rules of the company, or any applicable debt instrument; or
(b) any appropriate order necessary to –

(i) protect any right contemplated paragraph (a); or
(ii) rectify any harm done to the securities holder by –

122 S 57(1) of the Companies Act of 2008.
123 Cf also Feris “The extended application of the oppression remedy” 2013 Without Prejudice 37.
124 See Cassim MF in Contemporary company law 759; Sibanda 2013 JJS 71; Feris 2013 Without Prejudice 38–39; Henochsberg on the Companies Act 2008 208 574(4)–674(5).
125 The term “director” is defined in s 1 of the Companies Act of 2008 to mean “a member of the board of a company, as contemplated in s 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”.
126 See, generally, Abbey; Welling, Smith and Rotman 490–525.
(aa) the company as a consequence of an act or omission that contravened this Act or the company’s Memorandum of Incorporation, rules or applicable debt instrument, or violated any right contemplated in paragraph (a); or

(bb) any of its directors to the extent that they are or may be held liable in terms of section 77.

(2) The right to apply to a court in terms of this section is in addition to any other remedy available to a holder of a company’s securities –

(a) in terms of this Act; or

(b) in terms of the common law, subject to this Act.\textsuperscript{127}

Any “holder of issued securities of a company” has standing to apply for relief in terms of section 161. This term “securities” means any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company.\textsuperscript{128} Section 3(3) provides that, for purposes of section 3(2) “hold”, or any derivative of it, refers to the direct or indirect beneficial holder of securities conferring a right to vote.\textsuperscript{129} A holder of issued securities would include, but not be limited to, a shareholder.\textsuperscript{130} In other words, in order to establish \textit{locus standi} under section 161 it is sufficient for the applicant to show that he or she is the holder of issued securities. It is not necessary for the applicant to show that his or her holding of issued securities is recorded in the securities register of the company. In this sense the standing to apply for relief in terms of section 161 is wider than that of section 163.\textsuperscript{131} Section 161 is therefore available to an unregistered claimant.\textsuperscript{132}

There are a number of important differences between section 115 of the Companies Act of 1973 and section 161 of the Companies Act of 2008. First, the persons who have \textit{locus standi} to apply under the two sections differ. Section 115 was available to “the person concerned” (the person whose title to a share is in some way in question, and who complains that his name is either improperly included in or improperly omitted from the register), the company or any member of the company. In contrast, section 161 is available to the holder of issued securities of a company. Secondly, the focus of the two sections differs. Section 115 was concerned with title to be on the register of members. Section 161 is focused on any rights of a security holder in terms of the Companies Act of 2008, the company’s memorandum of incorporation, any rules of the company, or any appropriate debt instrument. Thirdly, the purpose of the two sections differs. The purpose of section 115 was the rectification of the register of members of the company, in other words to alter the register so as to make it reflect the state of affairs which the applicant is entitled to claim that it ought to reflect. It was concerned with title rather than rights. The purpose of section 161 is to provide the holder of issued securities of a company with a procedural vehicle to enforce

\textsuperscript{127} The Companies Act of 1973 did not have a corresponding provision.

\textsuperscript{128} S 1 of the Companies Act of 2008.

\textsuperscript{129} The term “holder of securities” is also used in the definition of “nominee” in s 1 and in s 54(2)(b).

\textsuperscript{130} As indicated above, a shareholder is defined in s 1 of the Companies Act of 2008 as the holder of a share issued by the company and who is entered as such in the certificated or uncertificated securities register.

\textsuperscript{131} On the other hand, the standing to apply for relief in terms of s 163 is wider than that of s 161 in the sense that a director may also apply for relief under s 163.

\textsuperscript{132} See also Henochsberg on the Companies Act 71 of 2008 28(4) 33 558(2).
rights of that securities holder in terms of the Act, the company’s memorandum of incorporation, any rules of the company, or any applicable debt instrument. Section 161 is comparable with the compliance remedy in section 247 of the Canada Business Corporations Act.

The rights of unregistered claimants to apply for rectification of the securities register in terms of the Companies Act of 2008 was considered in Du Plooy v De Hollandsche Molen Share Block Ltd.133 The facts were that one of the applicants, the NJ du Plooy Trust (“the trust”), was at all relevant times since 2004 recognised by the first respondent, a share block company in terms of the Share Block Control Act,134 and its board of directors (“the board”) as the majority shareholder of the first respondent and the owner of all the class B to F shares. A feud arose between the third applicant (who was a director of the first respondent) personally as well as in his capacity as a trustee and representative of the trust on the one hand and the board on the other. In 2014 the board, in what represented a complete volte-face, adopted the position that the trust was not a shareholder of the first respondent because its name did not appear in a document which the board contended was the share register of the first respondent.135

The applicants136 then approached the court for relief. It appears that the applicants relied on sections 161 and 163 of the Companies Act of 2008.137 The nature of the relief that the applicants sought is set forth as follows in the judgment:

“In essence, the first and second applicants138 seek an order that the trust, as a registered owner of a series of shares of the first respondent,139 and alternatively, in the event of it being found that the trust has not been entered into the security register of the first respondent as the owner of these shares, that the first respondent be ordered to enter the name of the trust in the first respondent’s security register as the owner of all the shares referred to as the class B-F shares. In the alternative, applicants seek an order that the trust is entitled to exercise voting rights in respect of the shares at any meeting of the shareholders of the first respondent.”140

The court found on the facts that the trust was the holder of the share certificates in respect of all the class B to F shares of the first respondent.141 That being the case, the trust had standing to apply for relief in terms of section 161 and the

---

133 [2016] 1 All SA 748 (WCC).
135 It is not entirely clear from the judgment what exactly the situation was regarding the first respondent’s share register. Although the board adopted the position since 2014 that the trust’s name did not appear in the document which it contended was the share register of the first respondent, it appears that the trust’s shareholding was at some stage prior to this recorded in the first respondent’s share register. See paras 9–13, 141 of the judgment.
136 The applicants were the trust, the third applicant and two other shareholders of the first respondent.
137 Para 49.
138 The trustees of the trust.
139 Ownership in shares vests in a person on the execution of a deed of transfer. Registration in the context of the “transfer” of a share means registration in the securities register and is not a requirement to become the owner of a share. If the trust was already the “registered owner” of the series of shares of the first respondent, why was it necessary to seek an order to enter its name in the first respondent’s security register as the owner of those shares?
140 Para 2.
141 Share certificates were even issued to the trust. See paras 42–47, 48.
court could (and did) grant the applicants’ relief in terms of this section. It was not necessary for the court to deal with section 163.

The court did, however, deal with section 163. In the process the court unfortunately obfuscated the distinctions between section 161 and section 163. Section 161 is not available only to a “shareholder” to protect his or her rights. It is available to any “holder of issued securities”. Once the court found that the trust was the holder of issued securities, it was unnecessary to determine whether or not the trust’s shareholding was registered. The fact that the trust was the holder of shares was sufficient to establish its *locus standi*. The court referred to section 252 of the Companies Act of 1973 as the predecessor of section 161 of the Companies Act of 2008. Section 252 is in fact the predecessor of section 163, not section 161 of the Companies Act of 2008. The *Carl Greaves* case is furthermore not, as the court appears to have accepted, authority for the proposition that unregistered holders of shares could apply for relief under the oppression remedy. The court held in *Carl Greaves* that an owner of shares could apply in the same proceedings for an order directing his or her enrolment in the register and, in anticipation of the grant of such an order, apply for relief in terms of the oppression remedy as a member.

Davis J appreciated the importance of an applicant establishing his or her *locus standi* to apply for relief in terms of section 163. In holding that the respondents had not brought a legally competent application in terms of section 163 he remarked that “[a] competent application would require it to be brought by an applicant as specified in the section and would provide for a precise formulation of the relief sought”. It is submitted that this is fundamentally important in any division of powers model of statute, which is status and remedy-orientated. However, Davis J then went on to state that “by contrast, in terms of s163(2)(k), the first applicant is entitled, as it sought in its papers, for an order directing first respondent to reflect first respondent as the shareholders of the class B-F shares”. The third applicant, in his capacity as director, had *locus standi* to bring an application in terms of section 163. However, any argument that the trust had standing to bring an application in terms of section 163 would be anomalous or circular as described in the *Lee* case. The trust would then need to succeed in the very relief that it was claiming in order to establish its *locus standi*.

Davis J *inter alia* granted a declaratory order that the trust is the “registered owner” of the class B to F shares. In doing so he invoked the provisions of

---

142 The relief that a court may grant under s 161 appears to be wide enough to include a declaratory order that the holder of issued shares is a registered owner (or shareholder as defined in s 1 of the Companies Act of 2008).
143 Para 50.
144 *Ibid*.
145 *Barnard v Carl Greaves Brokers (Pty) Ltd* 2008 3 SA 663 (C).
146 *Idem* para 41.
147 Para 56, own emphasis.
148 Presumably the trust or the first and second applicants (as the trustees of the trust) and not the first applicant.
149 Presumably the trust and not the first respondent.
150 Para 57.
151 Para 62.
section 161 of the Companies Act of 2008 and the remarks about section 163 are accordingly *obiter*. However, it was not indicated in terms of which subsection of section 161 the order was granted. It is presumed that it was made in terms of section 161(1)(b)(ii)(aa) due to the fact that the right of a holder of securities to be entered into the securities register is a right in terms of the Companies Act of 2008. In this respect section 50(2) requires that after issuing securities a company *must* enter the name of that person in the register and section 51(5) provides that the company *must* register the transfer in the name of the transferee.

5 CONCLUSION

Historically only a registered member of a company had standing to apply for relief in terms of the oppression remedy. The mere fact that someone owned shares in a company was not enough. The furthest that our courts went was in the *Carl Greaves* case, where the court allowed a shareholder to apply in the same proceedings for an order directing his enrolment on the register of members and, in anticipation of the grant of such an order, as a member for relief in terms of the oppression remedy. Even if this approach is correct, it can only find application in the clearest of cases where there is no doubt that the applicant is a shareholder.

Section 163 of the Companies Act of 2008 is clear – only a shareholder or a director may apply for relief. A shareholder is defined in section 1 as the holder of a share and who is entered as such in the securities register. Our legislature elected not to provide for an extended definition of a member or a discretionary standing as in Canada and the United Kingdom. Whilst the legislature extended standing to directors, it did not go any further. The wording of section 163 leaves no scope for extending the meaning of “shareholder” to an unregistered claimant.

The argument that an unregistered claimant will not have standing to utilise the oppression remedy is further corroborated by a comparison of the standing under section 163 of the Companies Act of 2008 with the class of persons who may apply for leave to institute a derivative action in terms of section 165 of the Act. The class of persons who may apply for leave to institute a derivative action has been substantially widened in the Companies Act of 2008. Section 165 gives standing not only to registered shareholders but also to a person entitled to be registered as a shareholder, directors or prescribed officers as well as registered trade unions and other representatives of employees of the company. In addition, the court is given a discretion to grant standing to other persons where it is satisfied that it is necessary or expedient to do so to protect a legal right of that other person. This discretionary standing is similar to that contained in section 238(d) of the Canada Business Corporation Act. Our legislature elected not to go as far in the case of the oppression remedy.

The oppression remedy has not been extended to persons who are not yet shareholders or who have a legitimate dispute with a company (or other shareholders) relating to the issue (or transfer) of shares and the registration of their details in the company’s securities register. Any argument that such persons have standing would be circular or anomalous as described in the *Lee* case. In other words, in order to establish their standing such persons must succeed in the very relief that they are claiming.

---

152 Paras 58 and 61.
It is inconceivable that the legislature intended the new section 163 of the Companies Act of 2008 to incorporate the summary remedy for the rectification of the register of members. These two remedies serve different purposes. The criteria that must be satisfied to succeed also differ. It should be borne in mind that the statutory summary remedies for the rectification of the register of members that were contained in the Companies Acts of 1926 and 1973 never excluded the ordinary common-law remedies. These remedies remain available to a person claiming a right to be a shareholder today. It may in any event be more appropriate to proceed by way of action proceedings in terms of these common law-remedies where there are disputes of fact.

That is not to say that a court may not direct the rectification of the securities register of a company in section 163 of the Companies Act of 2008 proceedings. It clearly may and is specially authorised to do so where oppression is established. However, that does not extend standing to unregistered claimants. The court’s jurisdiction to make any order under section 163 of the Companies Act of 2008, including an order directing the rectification of the securities register, does not arise until the specified statutory criteria have been satisfied. This includes that the applicants must prove their *locus standi*. This is especially so since the Companies Act of 2008 has now moved away from a contractarian statute to a division of powers statute. The Act is now status and remedy-orientated. Specific persons are provided specific remedies. The standing of a person to apply for a remedy under the Act is thus fundamental.

The summary remedy for the rectification of the register of members was also not incorporated in the new remedy of security holders to protect their rights in section 161 of the Companies Act of 2008. There are a number of important differences between section 115 of the Companies Act of 1973 and section 161 of the Companies Act of 2008. First, the persons who have *locus standi* to apply under the two sections differ. Secondly, the focus of the two sections differs. Thirdly, the purposes of the two sections differ. The purpose of section 115 of the Companies Act of 1973 was the rectification of the register of members of the company, in other words to alter the register so as to make it reflect the state of affairs which the applicant is entitled to claim that it ought to reflect. The purpose of section 161 of the Companies Act of 2008 is to provide the holder of issued securities of a company with a procedural vehicle to enforce the rights of that securities holder in terms of the Act, the company’s memorandum of incorporation, any rules of the company, or any applicable debt instrument. Section 161 of the Companies Act of 2008 is comparable with the compliance remedy in section 247 of the Canada Business Corporations Act. But an unregistered claimant may under appropriate circumstances bring an application for the rectification of the securities register to reflect his or her shareholding in terms of section 161 of the Companies Act of 2008.