

**AN ANALYSIS OF THE OPPRESSION REMEDY UNDER THE SOUTH AFRICAN
COMPANIES LEGISLATION**

BY

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SUMMARY

It is trite law that minority shareholders are subordinate to the will of the majority in the company structure. However, the majority may not exercise this power in a manner which is oppressive or unfairly prejudicial to the minority. The statutory oppression remedy was first inserted into the Companies Act 46 of 1926 in an attempt to provide minority shareholders who wanted to exit a company an alternative to making an application for winding up of that company. With the repeal and replacement with the Companies Act 61 of 1973, this provision was widened so as to apply to any fact pattern so long as the minority shareholder had suffered unfair prejudice. Finally, with the implementation of the Companies Act 71 of 2008, the remedy was further widened as to the class of applicants, the alleged conduct suffered, and perhaps with regard to the relief available to reflect the changing attitude toward the oppression remedy in South Africa and in other jurisdictions. This research firstly maps the important development changes between the three different South African acts and discusses whether such development, based on judicial interpretation and academic analysis, is being done in a manner to make this valuable remedy easier for the affected applicants to access. Secondly, the South African remedy has been compared with that in Australia, Canada and England to determine how the remedy follows international consensus and in what way the remedy may be improved with foreign jurisdictions as a goalpost.

Annexure G

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Chapter 1: Introduction

I INTRODUCTION AND RATIONALE

It is a well-known principle of company law that a company is governed by majority rule.¹ This has the effect that the minority must abide by the decisions taken by the majority, whether at the level of shareholders in a general meeting, or by directors in a meeting of the board of directors so long as the decisions have been made lawfully.² The reasoning is that a company can be seen as an autonomous unit, which must be governed in a fair and just manner (similarly in a country), which is most effectively implemented via a democracy (similarly in the political sphere).³ However, not all decisions of the majority must be tolerated: there must be an overarching rule of law governing all decisions (similar to democracies, not all decisions of the majority in Parliament are necessarily lawful).⁴ The creation of the oppression remedy serves to prevent the rule of tyranny.⁵ The implementation of the oppression remedy has not been simple, mostly focusing on three questions: firstly, who qualifies to apply for the oppression remedy – only shareholders, or also directors; secondly, what conduct will trigger the oppression remedy; and thirdly, what intervention can be ordered by the courts taking into account the ‘Non-Intervention Rule’.⁶

The legislature has attempted to construct a statutory remedy to help gain relief against oppressive conduct.⁷ The point of interest is the evolution of the remedy through the repeal of old Acts and the introduction of new Acts. This study chiefly aims to determine whether the remedy is being developed in a manner which advances its underlying philosophy and purpose, or whether the remedy falls to be too narrow or too wide in its application. It is through the research and analysis of the sub-questions that the main research question may be properly answered.

¹ *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 678.

² PA Delpont (ed) *Henochsberg on the Companies Act 71 of 2008* (Service Issue 17) 574(12) and the authorities there cited.

³ JT Pretorius (ed) *Hahlo's South African Company Law through the Cases* 6 ed (1999) 380.

⁴ Delpont (ed) op cit note 2 at 574(12). The standard in company law is that the majority must take decisions bona fide in the best interests of the company as a whole.

⁵ Although the standard of ‘oppression’ is no longer the only standard in terms of this remedy, in this dissertation, the remedy will be referred to as the ‘oppression remedy’.

⁶ Maleka Femida Cassim ‘Shareholder remedies and minority protection’ in Farouk HI Cassim (ed) *Contemporary Company Law* 2 ed (2012) 757-75.

⁷ A Sibanda ‘The statutory remedy for unfair prejudice in South African company law’ (2013) 38(2) *Journal for Juridical Science* 58 at 59.

(a) The Companies Act 46 of 1926⁸

In terms of the unamended 1926 Act, the only remedy which an oppressed shareholder could seek was the winding-up of the company, based on just and equitable grounds.⁹ The wronged party could not seek derivative relief as there was no duty owed by or to the company which the majority had breached.¹⁰ The philosophy, thus, of introducing section 111*bis* into the 1926 Act was to provide an alternative to winding-up in those circumstances where winding-up would not benefit the minority shareholder due to the lesser value which his shares would realise in winding-up when compared to a sale as a going concern, or when the only prospective purchaser would be the majority shareholder complained of.¹¹ However, the introduction of the oppression remedy did not usurp winding-up when the circumstances of the case justified such an order.¹² A winding-up order was not co-extensive with a section 111*bis* order.¹³ The oppression remedy was only available upon circumstances justifying a winding up under section 111(g) and not based on the other grounds listed in subsections (a) to (f) thereof.¹⁴ The extra element which had to be proved beyond section 111(g) was the presence of oppressive conduct.¹⁵

The section was liberally interpreted so as to give a ‘construction such as to advance the remedy’.¹⁶ Furthermore, in *Aspek* the court held that when the facts were considered in terms of the requirement of fulfilling a section 111(g) the court should ‘not adopt too legalistic, rigid or technical an approach to the question’.¹⁷

⁸ Hereafter the ‘1926 Act’.

⁹ *Bader v Weston* [1969] 1 All SA 269 (C) at 277. See also Sibanda (2013) op cit note 7 at 60. Not only would this remedy prevent a company which is otherwise being conducted profitably from being wound up, it would also allow the shareholder to exit the company with a fair price being paid for his shares. This is in contrast to fire sale prices that the shareholder would get during a forced sale of the assets following compulsory liquidation. See *Elder v Elder & Watson Ltd* 1952 SC 49 at 54 where Cooper LJ famously said that the cure (winding-up) would be worse than the disease. See also Aubrey Sibanda ‘Advancing the statutory remedy for unfair prejudice in South African company law: perspectives from international jurisprudence’ (2015) *SAMLJ* 401 at 404 fn16 for other economic disadvantages of winding up companies in profitable circumstances.

¹⁰ Sibanda (2015) op cit note 9 at 403.

¹¹ Edgar S Henochsberg assisted by WJG Fairburn *Henochsberg on the Companies Act* (1953) 313. Section 111*bis* was introduced in s 90 of the Companies Amendment Act 46 of 1952 and was titled ‘Alternative remedy to winding-up in cases of oppression’.

¹² *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (C) at 526H-527A. See also Sibanda (2013) op cit note 7 at 60.

¹³ *Aspek* supra note 12 at 526H.

¹⁴ *Irvin and Johnson Ltd v Oelofse Fisheries Ltd; Oelofse v Irvin and Johnson Ltd* 1954 (1) SA 231 (E) at 240E. Reynolds J later remarked at 243G-H that subsection (g) was only usually associated with the internal workings of the company and was independent from and not overlapping with subsections (a) to (f).

¹⁵ *Aspek* supra note 12 at 526H-527B. Thus, even though elements of loss of confidence, distrust and deadlock which would justify an order in terms of s 111(g) may be present, these would have been irrelevant if they were a result of some oppressive conduct on behalf of the majority aimed at those without the controlling power in the company.

¹⁶ *Livanos v Swartzberg* 1962 (4) SA 395 (W) at 396G-H citing *Scottish Co-operative Wholesale Society Ltd v Meyer* 1958 (3) All ER 66 at 89.

¹⁷ *Aspek* supra note 12 at 527C. This approach considers what Viscount Simonds in *Meyer* supra note 16 at 71 termed the ‘business realities’ of the situation and not just a legalistic view of the situation.

(b) The Companies Act 61 of 1973¹⁸

In 1973, the 1926 Act was repealed and replaced with the 1973 Act wherein the oppression remedy was laid out in section 252 thereof.¹⁹ The new provision was a significant development which widened the ambit of the statutory oppression remedy.²⁰ Section 252 was also a general simplification over section 111*bis* in that the prerequisite winding-up no longer had to be proved; conduct could be a single act or a course of conduct, and the ground of ‘oppression’ was replaced with ‘unfairly prejudicial, unjust or inequitable’.²¹ The section was aimed at judicial intervention in institutional governance, specifically at providing the courts with the statutory authority to provide equitable relief in circumstances of unfairly prejudicial conduct on behalf of the company.²² The amendment further sought to intervene to prevent a similarly restrictive and narrow interpretation of the wording of the analogous remedy in England.²³ As was the case with regard to the 1926 Act, the court interpreted the provision so as to advance the remedy rather than limit it.²⁴ Thus we can say that the philosophy of the oppression remedy in the 1973 Act was to reduce the evidentiary burden necessary to access relief as well as to address the narrow interpretation which the courts in the United Kingdom and South Africa had applied to section 111*bis* of the 1926 Act.²⁵

(c) The Companies Act 71 of 2008²⁶

Section 252 of the 1973 Companies Act had several shortcomings.²⁷ Firstly, it was solely used by shareholders of the company and no other stakeholders such as directors.²⁸ Secondly, only shareholders that appeared in the company’s members register could exercise this remedy.²⁹ Thirdly, it did not provide for cases of future or threatened prejudicial conduct.³⁰ Finally, the applicant had the hurdle of proving it was ‘just and equitable’ to grant relief.³¹

¹⁸ Hereafter the ‘1973 Act’.

¹⁹ Sibanda (2013) op cit note 7 at 64.

²⁰ *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd* 1979 (3) SA 713 (W) at 719H-720; *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd* 1980 (4) SA 204 (T) at 209B-F.

²¹ A Milne (ed) *Henochsberg on the Companies Act* 3 ed (1975) 432.

²² *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd* 2017 (5) SA 9 (CC) para 28. The minority did not have a legal right within the company’s memorandum of incorporation (hereafter ‘MOI’) to remove the prejudice and thus the courts needed to have the necessary authority to intervene and resolve the unfair prejudice.

²³ Sibanda (2015) op cit note 9 at 405.

²⁴ *Donaldson (W)* supra note 20 at 719H; *Donaldson (T)* supra note 20 at 209B-F; *Off-Beat Holiday Club* supra note 22 para 27.

²⁵ Sibanda (2015) op cit note 9 at 405.

²⁶ Hereafter the ‘new Act’.

²⁷ Carl Stein & GK Everingham *The New Companies Act Unlocked a Practical Guide* (2011) 367 describe s 252 as ‘ineffectual’ because of its narrow scope and stringent requirements.

²⁸ Sibanda (2015) op cit note 9 at 406.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

The oppression remedy may be found at section 163 of the new Act, the title of which specifies ‘Relief from oppressive or prejudicial conduct’.³² In the first place, in any case where section 163 relief is requested the facts of the particular case are of specific importance.³³

By exclusion, section 163 protects the common law remedies which may be available to a shareholder or director in similar circumstances.³⁴ These may include the shareholder’s personal action (individual or representative).³⁵

In interpreting the new Act, the courts have held that reference may be made to case law decided in terms of the old Act, specifically Moshidi J remarking that:

‘In resolving the issue as to the correct construction and interpretation to be placed on the provisions of s 163 of the new Companies Act, reference to case law in which s 252 of the old Companies Act was interpreted is rather instructive’.³⁶

Taking this into account, if we look at the different provisions embodying the oppression remedy, there is definitely a move by the legislature to broaden relief, rather than limit it.³⁷

Additionally, the interpretation of the remedy must consider the definition of terms contained within the remedy such as ‘related persons’, ‘directors’ and ‘shareholders’ and the

³² The title of s 163 also refers to relief from ‘abuse of separate juristic personality’. However, s 163(4) which detailed such relief was deleted by s 102 of Act 3 of 2011 and inserted at s 20(9) by s 13(d) of the same Act: Cassim (2012) op cit note 6 at 757 fn 1.

³³ *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 (3) 146 (WCC) para 5. This approach is contrary to a ‘no-fault’ approach, such as found in South Africa divorce law, where conduct of the parties is not taken into account. In such a case a mere allegation of a breakdown of trust would be necessary to request relief. The ‘no-fault’ approach was rejected in the House of Lords in the case of *O’Neill v Phillips* [1999] 2 All ER 961 at 972g-j where Hoffmann LJ stated: ‘I did not think that there is any support in the authorities for such a stark right of unilateral withdrawal ... that does not mean that a member who has not been dismissed or excluded can demand that his shares be purchased simply because he feels that he has lost trust and confidence in the others.’ Hoffmann LJ continued by quoting the English Law Commission at 973a-b: ‘In our view there are strong economic arguments against allowing shareholders to exit at will. Also, as a matter of principle, such a right would fundamentally contravene the sanctity of the contract binding the members and the company which we considered should guide our approach to shareholder remedies’. If we apply Lord Hoffmann’s words to the South African oppression remedy the ‘no-fault’ approach has been excluded by virtue of the ‘fairness test’ incorporated in s 163, and s 252 and s 111*bis* before it.

³⁴ Delport (ed) op cit note 2 at 574(1).

³⁵ *Ibid.*

³⁶ *Peel v Hamon J&C Engineering (Pty) Ltd* 2013 (2) SA 331 (GSJ) para 43. See further para 46 where Moshidi J notes that although the facts involved in that s 163 application were different to a s 252 application, the legal principles involved in deciding the latter ‘largely remain a relevant consideration’. In *Grancy Property Ltd v Manala* 2015 (3) SA 313 (SCA) para 22, Petse JA stated that ‘there is a benefit to be derived from considering the jurisprudence developed over the years as to what constitutes oppressive or unfairly prejudicial conduct’. See further *De Villiers v Kapela Holdings (Pty) Ltd* 2016 JDR 1942 (GJ) para 63 where van der Linde J comments that when the legislature decides to repeal and re-enact legislation it is taken to be aware of the body of case law decided on the particular provision.

³⁷ *Peel* supra note 36 paras 52-3. See para 53 of this judgment where Moshidi J lists several differences between the old and the new Acts. However, with specific reference to para 53.1, Rogers J in *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 (5) SA 179 (WCC) para 54 respectfully disagreed with the contention by Moshidi J that the phrase ‘unfairly disregards the interests of’ indicates ‘a far wider basis upon which relief may be sought’. This was owing to the ability, as Rogers J saw it, of s 252 covering ‘interests’ as well as ‘rights’, as s 252 was interpreted to be consistent with other ‘Commonwealth jurisdictions’. See also Michael Lehloeny and Tshegofatso Kgarabjang ‘Defining the limits of the “oppression remedy” in the wake of section 163 of the Companies Act 71 of 2008 *Grancy Properties Limited v Manala* [2013] 3 All SA 111 (SCA)’ (2015) 36(2) *Obiter* 511 at 513-4 for a brief description of the increased scope of s 163 versus the previous provisions.

preamble of the new Act.³⁸ One aim of the new Companies Act is to ‘provide appropriate legal redress for investors and third parties with respect to companies’.³⁹

A third guide to the interpretation of section 163 of the new Act is foreign case law:

‘A proper construction and interpretation of s 163 cannot be achieved lightly and without reference to similar authorities in foreign jurisdictions’.⁴⁰

This is reinforced by section 5(2) of the new Act stating that ‘to the extent appropriate, a court interpreting or applying this Act may consider foreign company law’.⁴¹

As stated above with regard to both of the previous oppression remedies, when interpreting the specific provision dealing with the oppression remedy one rule has been repeated several times by the courts and academics, namely, that ‘[s]ection 163 must be construed in a manner that will advance the remedy that it provides rather than limit it’.⁴²

A final rule of interpretation which is pertinent in South African jurisprudence is that of interpreting legislation to promote the spirit, purport and objects of the Bill of Rights.⁴³ This rule has been internalized in the new Companies Act as one of its purposes is the promotion of the compliance of company law with the Bill of Rights.⁴⁴

Additionally, it is pertinent here to address the philosophy underpinning section 163 of the new Act. It is quite clear that the legislature intended to widen the scope of the remedy in the type of applicant, the qualifying conduct and the relief available upon a successful

³⁸ *Peel* supra note 36 para 46. The definition of ‘related persons’ leads directly to the reader analyzing additionally the definitions of ‘subsidiary’ and ‘control’ in ss 2 and 3 of the new Act.

³⁹ Preamble of the new Act, as referred to in *Peel* supra note 36 para 46.

⁴⁰ Per Moshidi J in *Peel* supra note 36 para 48. In this case Moshidi J referred to comparable legislation and case law in Australia and Canada at paras 49-51.

⁴¹ Section 5(2) new Act. Potterill J in *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* [2013] 2 All SA 190 (GNP) para 17.9 stated that s 163 ‘closely resembles’ s 241 of the Canadian Business Corporations Act, RSC 1985, CC-44; and ‘resembles’ s 232 of the Australian Corporations Act 2001 (Cth). See also Delpont (ed) op cit note 2 at 574(4)-(5) for similar comments with respect to the Australian and Canadian legislation as well as a warning as to the broadness of the Canadian oppression remedy.

⁴² *Grancy Property Ltd* supra note 36 para 26. See further *De Villiers* supra note 36 paras 62-3 where van der Linde J remarks that s 163 is particular with regard to its ‘absence of limiting language’. No limiting words were introduced into s 163 notwithstanding a body of case law decided under s 252 of the old Act which would have influenced the legislature regarding its drafting of s 163 of the new Act. This serves to confirm that the judiciary was correct in applying this approach to its interpretation of the statutory oppression remedy. See further para 75 where van der Linde J makes a few final remarks which are key in affording a proper interpretation to s 163: ‘Concluding on the question of limitations to the reach of s. 163, it is in my view fair to say of the section: that its reach is expressly and deliberately wide, both as regards jurisdiction and as regards remedy; that it stands not apart from its history nor of that of its predecessors; that well-trodden fundamental principles of our company law remain the prism through which it must be regarded; but that those principles include notions of *bona fides*, probity, fair dealing, and respect for clear and legitimate understandings between company members’ (footnotes omitted). This statement correctly, it is submitted, summarises the judicial approach towards the general interpretation of s 163 in a manner which advances rather than limits the remedy.

⁴³ Section 39(2) Constitution of the Republic of South Africa, 1996 (hereafter, the ‘Constitution’).

⁴⁴ Section 7(a) new Act. This does not have the effect that cases decided under the old Act are not of assistance in interpreting the new Act. Cases decided under the old Act after the Constitution of 1996 was promulgated would have taken s 39(2) thereof into account, and thus taken the Bill of Rights into account: *Count Gotthard SA Pilati* supra note 41 para 17.11.

application.⁴⁵ This should be placed on the foundation that the new Act has firmly moved away from being contractarian in nature to a hybrid statute consisting partly of contractarian provisions and partly reflecting a division of powers within the company.⁴⁶ This is no more clearly seen than the origin of the powers of directors being statutory and not being derived from the memorandum of incorporation of the company.⁴⁷ To put this into perspective with regard to the oppression remedy, the remedy is aimed at curtailing the abuse of majority power by the company or by a person acting in relation to or on behalf of the company, such as a director or prescribed officer.⁴⁸ The complement of the wide relief is that the remedy is only put into the hands of those who qualify on the basis of status or locus standi as described in section 163 of the new Act.⁴⁹ Thus, as Oosthuizen and Delpont state ‘[t]he Companies Act of 2008 provides specific remedies to specific persons’.⁵⁰

II RESEARCH QUESTIONS AND SUB-QUESTIONS

1. How has the oppression remedy been developed so as to widen the ambit of the ‘applicant’ for this specific remedy?
 - a. What is the development, if any, with regard to the ‘unregistered applicant’ being a shareholder or beneficial owner in the general meaning of the phrase who is not registered in the company’s share register?
 - b. What manner of reform – considering judicial decisions, academic opinion and foreign law – if any would enhance minority shareholder protection with regard to ‘unregistered applicants’ and the oppression remedy?
2. How has the oppression remedy been developed so as to widen the ambit of the ‘conduct’ requirement with regard to this remedy?
 - a. What type of ‘acts’ or ‘omissions’ are included and excluded in the scope of the conduct requirement of this remedy?
 - b. What manner of reform of this part of the remedy would be necessary to properly protect minority shareholder interests considering local and foreign law and academic opinion?
3. How has the remedy been developed so as to allow for the courts to properly remedy the situation which has been found to be oppressive to the applicant?

⁴⁵ See Cassim (2012) op cit note 6 at 757-75.

⁴⁶ JS Oosthuizen & PA Delpont ‘Rectification of the securities register of a company and the oppression remedy’ 2017 *THRHR* 228 at 244-5.

⁴⁷ Delpont (ed) op cit note 2 at 250(3)-(4).

⁴⁸ S 163(1)(a)-(c) new Act.

⁴⁹ Oosthuizen & Delpont op cit note 46 at 245.

⁵⁰ *Ibid.*

- a. Considering the increased scope of the successive Acts with respect to the Court's power to intervene in oppressive matters, can the applicant properly expect the Court to bring an end to the oppression of the applicant?
 - b. Has the increased scope thrown aside the non-intervention rule which was part of the common law, and should this be remedied?
4. Is a claim in terms of the oppression remedy capable of prescription?
- a. How can the legal nature of the oppression remedy be defined with regard to the type of right which it entails?
 - b. How does the prescription of the underlying oppressive conduct influence the ability of the court to make a determination in terms of the oppression remedy?
 - c. Should there be a time limitation, regardless of whether such a claim may prescribe, considering South African and foreign law and academic opinion, as to the bringing of an application for relief in terms of the oppression remedy such as that found in the 1973 Act?

III RESEARCH METHODOLOGY

There is an advantage to performing this research at the current junction as there are at present cases being decided in the courts both on the old and the new Acts. This is a result of the transitional provisions contained in the new Act, which repeals the old Act, but any proceedings initiated using the previous Act must be concluded using such Act.⁵¹

The research proposed has been carried out via a review of the existing materials relevant to the topic. This included, but was not limited to, the following sources:

- (a) South African Legislation: the 1926, 1973 and 2008 Companies Acts;
- (b) South African Case Law: case law involving the application and interpretation of the oppression remedy in terms of the 1926, 1973 and 2008 Companies Acts;
- (c) South African Company Law Textbooks and Journal Articles: the academic position and arguments about the 1926, 1973 and 2008 oppression remedies was reviewed through both textbooks and journal articles discussing this topic;
- (d) Foreign Legislation and Case Law: This was important to the extent that South African case law has considered foreign case law in developing their approach to the various concepts included in the statutory remedies found in the 1926, 1973 and 2008

⁵¹ Schedule 5 Item 10 new Act.

Companies Acts. This may be supplemented by academic opinion on the outcomes of such foreign case law as well as foreign academic opinion on South Africa's own oppression remedy. Specifically, the foreign jurisdictions that have been considered are Australia, Canada and England,⁵² which have all been influenced by the same English common law and have developed similarly worded oppression remedies.

IV CHAPTER OUTLINE

In the body of this dissertation the author will analyse issues currently relevant to the interpretation and application of the oppression remedy in the South African legal system. In chapter 2, the question to be discussed is the protection of the 'unregistered applicant' in terms of the current oppression remedy with reference to the previous iterations thereof, and the equivalent provisions in the foreign jurisdictions listed above. The focus of chapter 3 is the requirement of section 163(1)(a) for the conduct to have consisted of 'an act or omission of the company' and how this may be fulfilled with regard to the current companies legislation. Of specific importance will be what can be considered an act or omission of the company and what types of such conduct may qualify in terms of section 163. In chapter 4, the author will analyse the interplay between the relief provision of section 163 and the general principle of judicial non-intervention with reference to the ambit of relief the courts may grant to successful applicants. Finally, in chapter 5, the issue of prescription with regard to oppression claims will be analysed in the context of current jurisprudence in the Constitutional Court. The conclusion, in chapter 6 will sum up the findings of the research and recommendations as improvements of the oppression remedy to properly balance protection of the minority shareholder on the one hand, and the interests of the majority shareholder and the company on the other hand.

⁵² As Oosthuizen & Delpoit op cit note 46 at 230 comment, English law is the origin of South African law and has been relied upon by South African courts in deciding company law cases. Further, the new Act has become more in sync with the Canadian Business Corporations Act (CBCA) and thus Canadian law is a good comparison. Finally, Australian law also has its roots in English company law and has been referred to by the South African judiciary and academia.

Chapter 2: The Unregistered Applicant

I INTRODUCTION

The issue of the ‘unregistered applicant’¹ claiming relief in terms of the oppression remedy has come to the fore in South African law in recent years with the Supreme Court of Appeal (the ‘SCA’) being asked to make a definitive ruling with regard to section 252 of the Companies Act 61 of 1973 (hereafter the ‘1973 Act’).² This issue is of importance due to the principle that generally only a registered shareholder may exercise the rights of a shareholder vis-à-vis the company.³ In this chapter the author will analyse the development of the unregistered applicant in terms of the oppression remedy in the 1926, 1973 and 2008 Companies Acts as well as in the foreign jurisdictions of Australia, Canada and England to determine what the position currently is regarding the unregistered applicant and whether the legislation may be reformed to further protect minority shareholders.

II THE COMPANIES ACT 46 OF 1926⁴

In terms of section 111*bis* (1) of the 1926 Act it stated that the remedy was only available to ‘any member of a company’.⁵ The use of the term ‘member’ in this context referred to registered members who had been entered in the members register of the relevant company.⁶ The applicant must have been a present member of the company.⁷ The remedy thus already excluded beneficial owners of shares who held shares via nominees or trusts in terms of the first South African statutory oppression remedy as well as former members of the company.⁸

III THE COMPANIES ACT 61 OF 1973

¹ In this chapter, the term ‘unregistered applicant’ will be used to refer to an applicant in terms of the oppression remedy that is not registered as a shareholder in the share or securities register of the respective company.

² *Smyth v Investec Bank* [2018] 1 All SA 1 (SCA). In this case the Appellants, who were beneficial owners of shares in Randgold & Exploration Company Limited (‘Randgold’), sought a declaratory order in the court *a quo* that agreements concluded between Randgold and two other companies were ‘unfairly prejudicial, unjust or inequitable’ in terms of section 252 of the 1973 Act. This was opposed on the basis that the beneficial owners did not qualify as ‘members’ of Randgold and thus did not have *locus standi* to seek such relief.

³ Richard Rachlitz ‘Disclosure of ownership in South African company law’ (2013) *Stell LR* 406 at 408.

⁴ Hereafter the ‘1926 Act’.

⁵ Section 111*bis* (1) 1926 Act; *Ex parte Avondzon Trust (Edms) Bpk* 1968 (1) SA 340 (T) at 342H.

⁶ A Sibanda ‘The statutory remedy for unfair prejudice in South African company law’ (2013) 38(2) *Journal for Juridical Science* 58 at 61. See s 24 of the 1926 Act where members were defined as subscribers of the memorandum or any other person who had agreed to become a member, *and* whose name has been entered in the register of members of that company.

⁷ *Bader v Weston* [1969] 1 All SA 269 (C) at 277.

⁸ Sibanda (2013) op cit note 6 at 61-2.

The oppression remedy provided in the 1973 Act similarly required that an applicant must have been a member of the company with regard to which he was seeking relief.⁹ The term ‘member’ was in turn defined in section 103 of the 1973 Act as (1) subscribers of the memorandum of the company, and every other person who had agreed to become a member of the company, and (2) who had been entered as a member in the company’s register of members.¹⁰ This register was prima facie evidence of the matters entered in it in terms of the Act.¹¹ Thus, to become a member of a specific company a necessary prerequisite was that the name of the person must have been entered in that company’s register as a member.¹² Section 252 thus appeared to be no different to section 111*bis* of the 1926 Act in its requirement for the applicant to be a member of the company, which in turn required that the applicant had been entered in the share register of the company as a member of that company.¹³

However, the courts have been required to rule on whether a beneficial owner of shares is effectively barred from being an applicant in terms of the 1973 Act.¹⁴ The concept of beneficial owners goes hand in hand with nominee holders. A nominee is a person, correctly described as an agent, who has been appointed or nominated by the beneficial owner, the principal, to hold the shares in name and thus appear on the register of members of the company concerned, and to take instructions from the beneficial owner.¹⁵ The nominee and not the beneficial owner was entitled to appear on the register, and once entered, to become a member of the company.¹⁶ This fact of nominee and beneficial owner did not appear on the company’s register and the company was blind as to who the actual owner of the shares was.¹⁷ The courts recognised this dichotomy and stated that ‘the policy of the law is that a company shall concern itself only with the registered holder and not the owner or beneficial owner of the shares’.¹⁸ This resulted in only nominee shareholders, and not beneficial owners, being permitted to make

⁹ Section 252(1) 1973 Act. *Lourenco v Ferela (Pty) Ltd (1)* 1998 (3) SA 281 (T) at 294-294A. In accordance with s 103(2) of the 1973 Act a person’s name must have been entered in the company’s member register before he could have been called a ‘member’ of that company. See *Doornkop Sugar Estates Ltd v Maxwell* 1926 WLD 127 at 134; *Waja v Orr, Orr NO v Dowjee Co Ltd* 1929 TPD 865 at 875; *Smyth* supra note 2 at 9b-c for authority on this principle. This requirement goes to the *locus standi* of the applicant and a failure to prove this point could result in the application being refused on a point in limine.

¹⁰ Sections 103(1) and (2) 1973 Act.

¹¹ Section 109 1973 Act.

¹² *Smyth* supra note 2 at 9c.

¹³ HS Cilliers, ML Benade & JJ Henning et al *Cilliers & Benade Corporate Law* 3 ed (2000) 314.

¹⁴ E.g. *Smyth* supra note 2.

¹⁵ *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 666C-D; *Oakland Nominees (Pty) Ltd v Gelia Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) at 453A-B; *Dadabhay v Dadabhay* 1981 (3) SA 1039 (A) at 1047D. It must be noted that registration as a member is not needed to be an owner of the shares, only to be recognised as such by the Company and the Johannesburg Stock Exchange (if the company is listed).

¹⁶ *Smyth* supra note 2 at 10b-c.

¹⁷ PM Meskin (ed) *Henochsberg on the Companies Act 61 of 1973* 5 ed (Service Issue 33) 477-8.

¹⁸ *Sammel* supra note 15 at 666D-E; *Oakland Nominees* supra note 15 at 453A-B; *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A) at 289.

a section 252 application before court.¹⁹ Beneficial owners did not have the legal interest necessary to implement the claim, being a ‘member’ of the company as was evident when reading section 252 together with section 103 of the Act, which was the position the legislation intended.²⁰ Beneficial owners thus had the choice of either instructing their nominees to make the application as members of the company, or terminating the nominee’s nomination and applying to be entered themselves as members in the register.²¹ Additionally, the memorandum of incorporation (‘the MOI’) of the company could provide that persons entitled to shares or having a vested interest in shares in a representative capacity but not registered in the share register as members of the company would qualify as ‘shareholders’ for the purposes of the Act.²² However, where a person who was entitled to register but was unable to achieve registration as a member due to opposition or lack of co-operation by the company or other shareholders, such person was allowed to apply in the same application to be enrolled as a member and for oppression relief in terms of section 252.²³

In terms of persons to whom shares had been transferred by operation of law, section 103(3) of the 1973 Act mandated that the company must enter into its register of members *nominee officii* (‘NO’s’) who submitted proof of their appointment as such, and that that person would then be deemed to be a member of the company for the purposes of the Act.²⁴ These NO’s would thus also have had locus standi with regard to section 252.²⁵

IV THE COMPANIES ACT 71 OF 2008²⁶

It is apposite now to turn to the oppression remedy in the new Act. In the new Act the oppression remedy is available to ‘a shareholder or director of a company’.²⁷ A shareholder is ‘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’.²⁸ The definition seems to differentiate between a ‘shareholder’ on the one hand and a ‘holder of a

¹⁹ *Smyth* supra note 2 at 19f.

²⁰ *Ibid.*

²¹ *Ibid* at 19f-h.

²² Meskin (ed) op cit note 17 at 477-8. Such holders in a representative capacity include executors of deceased estates and trustees of insolvent estates.

²³ *Barnard v Carl Greaves Brokers (Pty) Ltd, Carl Greaves Brokers (Pty) Ltd v Barnard, Barnard v Bredenhann* 2008 (3) SA 663 (C).

²⁴ Meskin (ed) op cit note 17 at 205-6.

²⁵ *Ibid.*

²⁶ Hereafter the ‘new Act’.

²⁷ Section 163(1) new Act.

²⁸ Section 1 new Act at ‘shareholder’. With regard to a non-profit company, Maleka Femida Cassim ‘Shareholder remedies and minority protection’ in Farouk HI Cassim (ed) *Contemporary Company Law* 2 ed (2012) 759 submits with reference to s 10(4) of the new Act that only voting members and directors will have standing in terms of s 163.

share' on the other.²⁹ A person will only be a shareholder if that person is both the holder of the share and has been registered as such, i.e. a registered shareholder.³⁰ The definition makes reference to section 57(1) which includes in the definition of a shareholder for the specific context of Chapter 2, Part F those persons who are 'entitled to exercise 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'.³¹ Thus with respect to matters of voting in terms of that Part of the new Act, beneficial shareholders specifically with the beneficial interest of a shareholder's vote are included as a 'shareholder' in terms of the Act. But only for that Part of the Act.³² Thus, in summation, with regard to the oppression remedy it appears that only a shareholder registered as such in terms of section 50 will qualify as an applicant.³³

With reference to the above discussion of nominee and beneficial shareholders it would appear again in the new Act that only the nominee or registered shareholder, and not the beneficial owner, would have *locus standi* to apply for relief in terms of this remedy.³⁴ The suggested manners of relief in this situation would be either, (a) the nominee shareholder transfers the share/s to the beneficial owner,³⁵ or (b) the nominee shareholder must bring the

²⁹ PA Delpont (ed) *Henochsberg on the Companies Act 71 of 2008* (Service Issue 17) 32(2)-(3).

³⁰ *Ibid.*

³¹ Section 57(1) new Act. Ch 2F of the new Act contains the provisions regarding corporate governance including voting at meetings of shareholders.

³² JS Oosthuizen and PA Delpont 'Rectification of the securities register of a company and the oppression remedy' (2017) 80 *THRHR* 228 at 247; Delpont (ed) *op cit* note 29 at 574(18). However, see Jackwell Feris 'The extended application of the oppression remedy' (2013) 13(4) *Without Prejudice* 37 at 38 where the author there argues that the inclusion of those persons with voting rights as 'shareholders' for the purposes of that Part of the new Act serves to extend the definition of 'shareholder' also for the purposes of s 163, i.e. the oppression remedy, in terms of oppressive acts with regard to their entitlement to vote. This approach would be inconsistent with general rules of statutory interpretation. The definitions section of the new Act (s 1) applies to the entire Act, except where otherwise stated in other definitions clauses such as s 57(1). Those sections apply only to the Parts specified by that section and not generally to the entire new Act. In this case, the suggested approach would leave those beneficial shareholders who have no voting rights as well as other rights such as a right to dividend but not registered in the register who have not been oppressed with regard to their voting rights without a remedy. It would also have the anomalous consequence of giving securities holders other than shareholders the right to a remedy which is beyond the express reading of s 163. It is further submitted that a securities holder with voting rights only who has been prejudiced with regard to its exercise may use the common law personal action to achieve relief: *Communicare v Khan* 2013 (4) SA 482 (SCA) para 20. Additionally, the securities holder may apply to court in terms of s 161(1) of the new Act to have the court determine his rights and make a declaration thereon.

³³ Cassim (2012) *op cit* note 28 at 759.

³⁴ *Ibid.* See Ch. 2.III above. See *Lourenco* *supra* note 9 with regard to the 1973 Act where this principle was established in South African law. Cf. Rachlitz *op cit* note 3 at 409-11 where the author distinguishes between certificated and uncertificated shares and concludes that it would not be possible in terms of uncertificated shares to have one owner and a different registered shareholder because the uncertificated securities register is managed not by the company but by a third party who allocates both ownership and registration. However, it is still possible for another person to have a beneficial interest in such uncertificated securities.

³⁵ Cassim (2012) *op cit* note 28 at 759 fn 11 suggests that the 'conduct' which the applicant complains of may have occurred before the applicant became a shareholder or director of the company, provided that such conduct complies with the further tests built into s 163. See also HGJ Beukes and WJC Swart '*Peel v Hamon J&C Engineering (Pty) Ltd*: ignoring the result-requirement of section 163(1)(a) of the Companies Act and extending the oppression remedy beyond its statutorily intended reach' (2014) 17(4) *PER* 1691 at 1699 where it is argued that *locus standi* under s 163 should be limited to shareholders and directors that were such at the time the alleged oppressive conduct occurred. The authors there argue that controlling the court's discretion in a similar manner

application before court.³⁶ Beneficial owners cannot be co-applicants or co-plaintiffs together with the registered shareholder.³⁷ However, a person entitled to registration as a shareholder, but due to opposition or lack of co-operation by the company or existing shareholders cannot obtain such registration, may have standing to bring this application.³⁸ The position has thus not changed as to beneficial owners of shares in terms of the new Act. Only those persons who have been registered as shareholders in the company's share register in terms of section 50 have locus standi to apply for relief in terms of section 163.³⁹

The exclusion of beneficial owners from the oppression remedy may be argued against on the basis that the new Act prescribes that nominee holders in public companies must disclose certain information including the identity of all persons with beneficial interests in the security for which the nominee is the registered shareholder.⁴⁰ This information, as well as a change in such information must be communicated in writing to the company within five business days after the end of the month within which such change occurred, or as a central securities depository may require.⁴¹ Further, a company may, by written notice, if it knows or has reasonable cause to believe that there is a nominee holder and beneficial owner relationship with respect to a security, require either of the parties in such relationship to confirm or deny such, provide particulars of the beneficial interest held during the previous three years, and disclose the identity of all beneficial owners of the security which the nominee holds.⁴² Finally, a 'regulated company' in terms of section 117(1)(i) must establish and maintain a register containing all such disclosures of beneficial interests, and if it is required to have its annual financial statements audited, it must publish a list of beneficial owners of at least 5% of the total number of securities of that class issued by the company, and the extent of such beneficial

as it was under s 252 of the 1973 Act would prevent an opening of the 'floodgates' which could lead s 163 itself being a source of oppression. The authors further argue at 1700 that this question cannot be seen as settled even after the case of *Peel v Hamon J&C Engineering (Pty) Ltd* 2013 (2) SA 331 (GSJ) which may be held as implicit authority for this principle.

³⁶ Cassim (2012) op cit note 28 at 759 fn 11 states that this is the English law position with authority being *Atlasview Ltd v Brightview Ltd* [2004] 2 BCLC 191.

³⁷ Delpont (ed) op cit note 29 at 574(18).

³⁸ Cassim (2012) op cit note 28 at 759 referring to *Barnard* supra note 23 para 41. If such a person did not have standing it would prevent the person from using the s 163 remedy including requesting a rectification of the share register in terms of s 163(2)(k): Delpont (ed) op cit note 29 at 574(18).

³⁹ Delpont (ed) op cit note 29 at 574(18). See also Oosthuizen & Delpont op cit note 32 at 245 where the authors describe that the remedies described in ss 160-164 of the new Act 'are about standing and not about substantive rights'.

⁴⁰ Section 56(3) new Act. This was regulated in terms of s 140A of the 1973 Act to a much more limited degree in that it only applied to listed companies. Further, it was only inserted via s 16 of the Companies Amendment Act 37 of 1999. It seems that the policy of identifying beneficial owners has been expanded in the new Act as the legislature gets to terms with regulating it. See SM Luiz 'The Companies Act 71 of 2008 and the disclosure of and Rights of Access to information about securities' (2014) *SAMLJ* 167 and Rachlitz op cit note 3 for a full discussion of the s 56 disclosure and the issues revolving around the wording of the section.

⁴¹ Section 56(4) new Act; Luiz op cit note 40 at 173.

⁴² Section 56(5) new Act; Luiz op cit note 40 at 174-5. According to s 56(6) new Act this information must be provided within 10 business days of receiving such notice.

interests.⁴³ All of the abovementioned requirements under section 56 of the new Act point to the fact that certain companies are required to know the identity and extent of all owners of beneficial interests in its securities.⁴⁴ It is submitted that if the Act wishes to recognise such owners in terms of protecting the company from disguised shareholders, the beneficial owners should be able to be recognised by the company when the company acts in an oppressive manner and thus that the beneficial owners should be protected within the full scope of the new Act, including oppression relief.

The question thus arises whether beneficial owners of shares should be protected. Related to that is whether other classes of unregistered applicants who have an interest in the shares of the company but are not registered members or shareholders of the company, should have *locus standi* in terms of the oppression remedy. Such unregistered persons include those to whom shares have been ‘transmitted by operation of law’. This method of share transfer is recognised in the Act and is usually associated with shares transferred in cases of deceased estates and insolvent estates in terms of which NO’s are appointed to administer the estate.⁴⁵ The ability of such NO’s to make an oppression application is not stated in the Act expressly.⁴⁶ The downside of such lack of locus standi arises in private companies where a pre-emption right in terms of the MOI prevents a transfer of shares to outsiders and thus can force the NO to sell the shares below market value.⁴⁷ To determine whether such persons can be protected and indeed if it is desirable and recommended, the position in Australia, Canada and England will be surveyed.

V FOREIGN JURISDICTIONS

(a) Australia

The Australian Corporations Act, 2001(Cth) at section 234 lists those persons that qualify as applicants with regard to the equivalent oppression remedy, including members and those to whom shares have been transmitted ex lege or by will, including administrators of deceased estates, and trustees of bankrupt estates.⁴⁸ Members are, in terms of Australian law, persons registered as such on the corporation’s register of members when the oppression application

⁴³ Section 56(7) new Act; Luiz op cit note 40 at 175-6. Such regulated companies are all public companies and certain private and state-owned companies.

⁴⁴ Luiz op cit note 40 at 167-8.

⁴⁵ Aubrey Sibanda ‘Advancing the statutory remedy for unfair prejudice in South African company law: perspectives from international jurisprudence’ 2015 *SAMLJ* 401 at 412 referring to s 51(6)(b). See also s 53(6) with regard to uncertificated securities.

⁴⁶ *Ibid.*

⁴⁷ *Ibid* referring to the mandatory s 8(2)(b) restriction on transferability of private company shares.

⁴⁸ Sections 234 (a) and (d) Australian Corporations Act, 2001 (Cth).

was made.⁴⁹ Nominee members do have standing to protect the interests of beneficial owners.⁵⁰ The position is thus similar to South African law.

The important question of unregistered or beneficial owners, which are not listed in section 234, has been considered in Australian law. Unregistered purchasers do not have locus standi in terms of Pt 2F.1.⁵¹ However, a holder of share certificates which are in a holder's name after lodging a valid transfer form, but whose name has not been entered into the members register, is a member in terms of Pt 2F.1.⁵² The members register thus does not give conclusive proof of a lack of membership.⁵³

(b) England

The oppression remedy as laid out in section 994 of the English Companies Act, 2006 is available for applicants who are 'members' of the company.⁵⁴ The term 'member' is defined at section 112 of the English Act as a registered shareholder including a person who has assented to be registered as a shareholder.⁵⁵ This also includes those persons with perfect transfer of shares to them in equity.⁵⁶ The petitioner must be a member at the time of presenting the petition.⁵⁷ The petitioner cannot be a trust beneficiary in terms of which the registered member is the trust.⁵⁸ Even if the petitioner is not a member, that person may qualify if the shares had been transmitted to him via operation of law, such as the executor of a deceased estate or the trustee of an insolvent estate.⁵⁹ A non-member may also qualify if the shares have been transferred to him in terms of a proper instrument of transfer which has been executed and delivered to the transferee but not registered by the company.⁶⁰ These two extensions to

⁴⁹ Roman Tomasic & Stephen Bottomley *Corporations Law in Australia* (1995) 434 citing *Niord Pty Ltd v Adelaide Petroleum NL* (1990) 2 ACSR 347.

⁵⁰ RP Austin & IM Ramsay *Ford's Principles of Corporations Law* 15 ed (2013) 715 relying on the English case of *Atlasview Ltd* supra note 36 decided in terms of the equivalent English Act.

⁵¹ *Ibid* at 718 citing *Niord Pty Ltd* supra note 49 at 347.

⁵² *Ibid* referring to *Re Independent Quarries Pty Ltd* (1993) 12 ACSR 188.

⁵³ *Ibid* referring to *Directors of the Reese River Silver Mining Company Ltd v Smith* (1869) LR 4 HL 64.

⁵⁴ Section 994(1) English Companies Act, 2006.

⁵⁵ *Re Nuneaton Borough Association Football Club Ltd* [1989] BCLC 454 (CA).

⁵⁶ *Re Quickdome Ltd* [1988] 1 BCLC 370. This refers to cases, such as transfer of property via trusts, where legal title is not transferred until a third party has 'perfected' the transfer. In the specific case of shares, the transfer of shares from a transferor to a transferee will not be perfected until the third party, i.e. the company, registers the transferee as a member in its register of members, preceded by the execution of a form of transfer and delivery of the share certificate(s): Jill E Martin *Hanbury and Martin Modern Equity* 16 ed (2001) 123. Wenwen Liang *Title and Title Conflict in Respect of Intermediated Securities under English Law* (2013) 125 identifies the difference between receiving an equitable title which occurs on completion of the transfer form and delivery of the share certificate, and obtaining legal title which only occurs on registration by the company.

⁵⁷ *Lloyd v Casey* [2002] 1 BCLC 454.

⁵⁸ *Re A Company* [1986] BCLC 391.

⁵⁹ Paul L Davies & Sarah Worthington *Principles of Modern Company Law* 9 ed (2012) 720-1; Oosthuizen & Delpont op cit note 32 at 235.

⁶⁰ Davies & Worthington op cit note 59 at 720-1; Oosthuizen & Delpont op cit note 32 at 235 referring to *Re A Company* supra note 58 and *Re Quickdome Ltd* supra note 56.

unregistered claimants is particularly useful in small companies where the MOI may contain a clause granting the discretion of registering new members to the board of directors.⁶¹ A nominee shareholder qualifies as a petitioner because its' interests include the 'economic and contractual interests of beneficial owners of shares'.⁶² Should the beneficial owner wish to terminate the nominee registration and apply for himself to be registered as a member, he would still be able to make an oppression petition as the conduct to be complained of includes conduct occurring before he became a member.⁶³

Thus, upon analyzing the Australian and English positions on the unregistered applicant it is apparent that in terms of the definition of a member of the company, the definition is the same in both jurisdictions. Both jurisdictions do provide for nominee shareholders to apply for oppression relief on the instruction of the beneficial owners of the shares. Also, germane to both is the ability for holders of share certificates with signed transfer forms to be considered as members despite the board of the relevant company refusing to register them as such or being delinquent in registering the members. Furthermore, both jurisdictions provide explicitly for persons to whom shares have been transferred or by operation of law to be able to apply for oppressive relief. Thus, in these cases the analogous provisions in these jurisdictions is at least wider than the oppression remedy in South Africa with regard to the applicant in the matter. This extension doubtlessly provides protection to those persons who have not had the time to be registered as members in the relevant share registers and to thus provide for additional protection in these specific cases. However, both jurisdictions recognise that by choosing not to be registered in the share register, the beneficial owner can only proceed with this application through instructing his nominee to do so, or for the nominee to be deregistered and the beneficial owner to obtain registration.

(c) Canada

The last jurisdiction I will analyse in this matter is that of Canada, firstly because much of the new Act and specifically the oppression remedy therein has been imported from this

⁶¹ Davies & Worthington op cit note 59 at 721.

⁶² Ibid citing *Altasview Ltd* supra note 36.

⁶³ Ibid fn 7 citing *Lloyd v Casey* supra note 57. A similar rule applies in Australian law: see Austin & Ramsay op cit note 50 at 715, 718 citing *Re Spargos Mining NL* (1990) 3 ACSR 1. The authors there argue that the applicant has locus standi simply because he has an interest as a member of the company. Neither the fact that he could have purchased his shares at a discount, nor that the company may consider him to be meddling in the company's affairs by purchasing the shares, have any effect on the member being able to complain about the historic oppressive conduct.

jurisdiction, but also because the locus standi provided by the Canadian oppression remedy is so much wider than the South African one.⁶⁴

The Canadian oppression remedy is set out in section 241 of the Canada Business Corporations Act, 1985 (CBCA) in terms of which only a ‘complainant’ may apply to court for relief under the section.⁶⁵ The term ‘complainant’ is defined in section 238 of the CBCA as:

‘(a) a registered holder⁶⁶ or beneficial owner, and a former registered holder or beneficial owner, of a security or a corporation or any of its affiliates’.

On a prima facie basis, the Canadian provision has a much wider *locus standi* provision. In fact, the Canadian remedy has been described as ‘the broadest, most comprehensive and most open-ended shareholder remedy in the common law world’.⁶⁷ Section 238 provides complainant status for beneficial owners⁶⁸ as well as former holders and beneficial owners.⁶⁹ Most noticeably, the court has a discretion to allow any person who qualifies as a ‘proper person’ to make an application for oppression relief.⁷⁰

One issue which has come before the courts in Canada is that of unregistered complainants.⁷¹ In *Lee* it was held in the Appeals Court that it was not proper for a judge to use the statutory discretion to grant locus standi to such a complainant when the oppressive conduct complained was the denial of being registered as a member of the company.⁷² The complainant’s right to be registered must be the subject of a separate proceeding.⁷³

⁶⁴ Maleka Femida Cassim *The New Derivative Action Under the Companies Act Guidelines for Judicial Discretion* (2016) 182 fn 10 ‘closely resembles’.

⁶⁵ Section 241(1) CBCA, RSC 1985, c C-44. The focus of this comparison will be the federal statute. It must be noted that each Canadian province has its own Corporations Act, but the provisions therein are materially similar to the federal model. See J Anthony VanDuzer ‘Who may claim relief from oppression: the complainant in Canadian corporate law’ *Ottawa Law Review* (1993) 25(3) 463 at 467 n8 for the oppression remedy provision in the various provincial statutes.

⁶⁶ This term has been specifically used to limit the securities for which holders of debt obligations may use this remedy to holders of registrable obligations. However, holders of other debt obligations, such as ordinary trade creditors may apply for status in terms of s 238(d): VanDuzer op cit note 65 at 472-3; Bruce Welling *Corporate Law in Canada The Governing Principles* 3 ed (2006) 504.

⁶⁷ VanDuzer op cit note 65 at 465.

⁶⁸ *Fedel v Tan* 2010 ONCA 473 para 70. Lane J in *Csak v Aumon* (1990) 69 DLR (4th) 567 at 572 defines a beneficial owner as ‘one who does not have legal title’ to the shares in question. The court there interpreted beneficial owners to include those to whom shares ought to have been issued.

⁶⁹ Section 238(a) CBCA.

⁷⁰ This may be compared to a similar discretion in terms of s 165(2)(d) of the new Act where in terms of applications for leave to pursue a derivative action the court has a similar discretion to permit other persons besides those expressly listed to launch such legal proceedings.

⁷¹ See e.g. *Lee v International Consort Industries* 1992 63 BCLR (2d) 119, and *Newcastle Projects Inc v Percon Projects Inc* 2010 BCCA 563.

⁷² *Lee* supra note 71 as confirmed in *Percon Projects* supra note 71 paras 29-30.

⁷³ *Lee* supra note 71 para 17; JS Oosthuizen & PA Delpoort op cit note 32 at 238.

We can thus see two major extensions of the Canadian provision compared to the South Africa, Australian and English provisions. Firstly, beneficial owners and even former beneficial owners are given express locus standi. Furthermore, even if such unregistered applicant could not apply as a shareholder or beneficial owner or a former shareholder or beneficial owner, such person could apply in terms of section 238(d) to be allowed as a ‘proper person’ to make such application. This is considerably wider than the South African provision and would probably have allowed the applicants in *Smyth* to apply for oppressive relief in terms of the oppression remedy.

VI CONCLUSION

This chapter has specifically analysed the ability of the ‘unregistered applicant’ to seek oppressive relief in terms of South African company law. The locus standi of such applicant was traced from the 1926 Act to the 1973 Act and finally to the new Act. Although, the former two Acts used the term ‘member’ and the latter uses the term ‘shareholder’ the definition in all cases is materially identical in that both holding the share and registration in the register of the company is necessary to qualify as a ‘member’ or ‘shareholder’ in terms of the relevant Act.⁷⁴ This means that an unregistered applicant such as an owner of a beneficial interest in a share has no locus standi himself to bring an application for oppression relief.⁷⁵ Furthermore, in contrast to the 1973 Act there is no longer any express provision for holders of shares through the operation of law or through transfer of shares to be able to similarly apply.⁷⁶ The exclusion of these three groups of ‘non-nominee’ holders would seem to be contrary to the purpose of the new Act that there be a balance between the rights and obligations of directors and shareholders,⁷⁷ although the deficiency it is submitted would be in the definition of a ‘shareholder’ itself.⁷⁸

However, foreign jurisdictions have shown to be more lenient and have a wider ambit in this regard. In Australia and England, holders via operation of law and transfer of shares are given express locus standi in their respective company law legislation.⁷⁹ When turning to Canadian company law it becomes obvious that non-registered owners in all their guises may

⁷⁴ See 2.II, 2.III, and 2.IV supra.

⁷⁵ Ibid with particular reference to *Smyth* supra note 2.

⁷⁶ See 2.III and 2.IV supra.

⁷⁷ Section 7(i) new Act. As discussed in 2.IV supra, many companies are well aware of beneficial holders of shares due to statutory disclosure requirements, yet they will continue to avoid accountability vis-à-vis these beneficial holders due to the principle laid down, inter alia, by *Sammel* supra note 15 that the company only has to concern itself with its registered shareholders.

⁷⁸ See 2.IV supra for a discussion of the definition of ‘shareholder’ in the new Act. It is the definition itself which excludes beneficial holders of shares, those who hold shares by operation of law or via share transfer.

⁷⁹ See 2.V(a) and (b) supra.

be effectively protected by express legislative provisions. The legislature there has not only protected beneficial owners but a variety of other persons who could be subject to oppressive conduct, and even allows the court the discretion to grant locus standi to any ‘proper person’ for relief.⁸⁰

The South African provision could, firstly, be amended to expressly provide for the two exceptions to the registered shareholder provision of the current oppression remedy, and secondly, that it could be amended to allow for beneficial owners of shares to have locus standi in such matters.⁸¹ If the legislature was willing to protect non-registered applicants in the broadest manner, it could even give a similar judicial discretion as that found in Canadian law to the courts to determine whether any person could properly bring an oppression application as already provided for with regard to the derivative action.⁸² This would accord with the purpose of the provision to protect the rights of minority shareholders. To consider beneficial owners of shares not to be shareholders in terms of this provision would be highly formalistic and would ignore those persons who ultimately benefit from the ownership of the shares and not the registered shareholders who may only be holders of empty titles and not receiving any actual benefit of share ownership.

⁸⁰ See 2.V(c) supra.

⁸¹ Sibanda (2013) op cit note 6 at 75.

⁸² Ibid.

Chapter 3: An Act or Omission of the Company

I INTRODUCTION

The conduct which gives rise to the oppression remedy is of importance in providing legal certainty as to the threshold beyond which relief may be sought by an affected person. The development of this jurisdictional fact has been quite extensive when comparing the 1926 Act to the 1973 Act, and especially with the new Act. The scope has widened from merely the ‘affairs of the company’,¹ to an ‘act or omission of the company’ and the ‘affairs of the company’,² and finally the ‘result of an act or omission of the company’ and the ‘conduct or the carrying out of the business of the company’ and the ‘exercise of powers of a director or a prescribed officer’.³ This Chapter will specifically look at the conduct requirement in terms of the ‘act or omission’ heading which has been the subject of recent case law in terms of its development from the 1926 Act until the new Act, its interpretation in South African law and by academia, and in comparison with the equivalent provisions in the foreign jurisprudence of Australia, Canada and England to determine the actual boundaries of this requirement and thus the qualifying act or omission in terms of the current oppression remedy.

II THE COMPANIES ACT 46 of 1926

According to the 1926 Act, the remedy could only be sought when the affairs of the company had been conducted in a manner which was oppressive to some part of the members of the company, including the complaining member.⁴ This was a question of fact based on the circumstances of the case.⁵ There were thus three components to the conduct requirement: (1) the conduct must have related to the affairs of the company (2) this conduct was oppressive in nature (3) specifically, the oppression was suffered by a part of the members of the company, including the complainant.⁶ The oppression remedy was thus originally narrow in scope only

¹ Section 111*bis*(1) Companies Act 46 of 1926 (hereafter the ‘1926 Act’).

² Section 252(1) Companies Act 61 of 1973 (hereafter the ‘1973 Act’).

³ Section 163(1)(a)-(c) Companies Act 71 of 2008 (hereafter the ‘new Act’).

⁴ Section 111*bis* (1) 1926 Act. See *Marsh v Odendaalsrus Cold Storages Ltd* [1963] 2 All SA 213 (W) at 219 where it is stated that ‘it must be established as a *sine qua non* that those responsible for conducting the affairs of the Company have embarked on a course of conduct which is oppressive to those who do not possess controlling powers.’

⁵ *Benjamin v Elysium Investments (Pty) Ltd* 1960 (3) SA 467 (E) at 476H.

⁶ It is the conduct itself and its effect on other members of the company which must be examined, and not the motive therefor: *Livanos v Swartzberg* 1962 (4) SA 395 (W) at 399H. However, see *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (C) at 529D-E where the court held that when considering the question of whether the conduct was oppressive, the motive for such conduct may have some relevance. The court held at 529A that the phrase ‘affairs of the company are *being conducted*’ should be interpreted to mean that the course of conduct as a whole must be examined and not any one piece of conduct in isolation. Additionally, it was necessary to prove that the majority performed such conduct with the aim of personal or pecuniary advantage. The majority may face a commercial loss but the desire for power or the prejudice of the minority may be his overwhelming goal.

referring to the affairs of the company and how they were being carried on.⁷ Conduct of the company itself in terms of an isolated act or omission was not regulated in terms of the 1926 Act and thus members could not seek oppressive relief unless this conduct fell under the ‘affairs of the company’.⁸

III THE COMPANIES ACT 61 OF 1973

The 1973 Act was developed so that the conduct requirement included that an act or omission of the company had been committed, or that the affairs of the company were being conducted in a particular manner.⁹ The ‘act’ defined there must have been something which had been done or performed.¹⁰ Something which could still happen was not yet an ‘act’ in terms of section 252.¹¹ The Van Wyk de Vries Commission had, in reforming section 111*bis* of the 1926 Act, rejected the recommendation of the Jenkins Committee that the remedy should cover those acts which were proposed to be committed at a future time, but which would fulfil the requirements of an application for oppression relief.¹² The Jenkins Committee had also proposed that the remedy allow the court to restrain the continuance of any such prejudicial conduct.¹³ The Commission had to balance the interests of the minority shareholders whose interests would be unfairly prejudiced and that of the majority who should not have the minority’s views imposed on them, as well as the courts not unduly interfering in the management of the company by the directors or controlling shareholders with regard to conduct which had been authorized by the majority of shareholders in the company.¹⁴ Acts or a course of conduct which would in the normal running of the company be beneficial to the company and its shareholders should not be restrained until the *results* of those acts have proven to be unfairly prejudicial to the minority.¹⁵

⁷ A Sibanda ‘The statutory remedy for unfair prejudice in South African company law’ (2013) 38(2) *Journal for Juridical Science* 58 at 64.

⁸ *Aspek Pipe Co (Pty) Ltd* supra note 6 at 529A.

⁹ See Van Wyk de Vries Commission of Enquiry into the Companies Act *Main Report* RP 45/1970 para 43.04b where the Commission recommended, based on the Jenkins Committee recommendations in the United Kingdom, that the 1926 Act be amended so that the remedy clearly encapsulates isolated acts *and* a course of conduct by the company. The addition of this qualifying conduct in the 1973 Act must thus be a result of that recommendation. See also HS Cilliers, ML Benade & JJ Henning et al *Cilliers & Benade Corporate Law* 3 ed (2000) 315.

¹⁰ *Porteus v Kelly* [1975] 1 All SA 176 (W) 180.

¹¹ *Ibid*; Cilliers, Benade & Henning et al op cit note 9 at 317. Nicholas J commented there that this may have been an omission by the legislature but that a Court does not have the power to supplement an Act to remedy such omission as per Watermeyer, CJ in *Walker v Carlton Hotels (SA) Ltd* 1946 AD 321 at 330. In *Porteous* Nicholas J ruled that an ‘act’ did not include a shareholder resolution that would be proposed at a future shareholder meeting.

¹² Van Wyk de Vries Commission op cit note 9 para 43.04(d).

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ *Ibid*.

It was also held that the act or omission itself must have been unfair or unjust or inequitable.¹⁶ A resolution passed at a general meeting of shareholders could be a qualifying act of the company.¹⁷ Whether conduct of individual members was an act of the company was a question of fact dependent on the particular circumstances.¹⁸ The applicant must have been a member of the company to which the complained conduct related.¹⁹

The conduct may have adversely affected the applicant's financial interests such as a serious diminution in, or threat to, the value of his shareholding in the company.²⁰ Even if the alleged conduct had been discontinued, so long as the prejudicial effect thereof continued, relief under section 252 could have been sought.²¹ Thus, the 1973 Act broadened the scope of conduct from a course of conduct to include isolated acts and omissions committed by the company. However, the 1973 still had the implied requirements that the conduct must have already occurred and must have affected the applicant in his capacity as a shareholder and not in another capacity.²² This thus excluded conduct which effected the shareholder in his capacity as a director or creditor or employee and excluded threatened or future conduct from the scope of the oppression remedy.²³

IV THE COMPANIES ACT 71 OF 2008

The new Act lists three grounds in terms of which relief may be pursued by an 'applicant'.²⁴ The first form of conduct is any positive act or omission of the company, or a related person, which has resulted in the proscribed effect.²⁵ The act must be completed.²⁶ It is clear from the wording that the focus of the court must be on whether the complained conduct has resulted in the proscribed effect.²⁷ The Act places emphasis on the 'result' requirement having already

¹⁶ *Garden Province Investment v Aleph (Pty) Ltd* 1979 (2) SA 525 (D) at 531C et seq. The approach of proving that the act or omission of, or the conduct of the affairs of the company, and the result thereof were unfair has been criticized as unduly restricting the efficacy of s 252: MJ Oosthuizen 'Die statutêre minderheidsbeskerming in die maatskappyereg' 1981 *TSAR* 223 at 231-2; E Hurter 'Unfairly prejudicial, unjust or inequitable conduct by members in a close corporation' (1997) 9 *SAMLJ* 207 at 208-9.

¹⁷ Maleka Femida Cassim 'Shareholder remedies and minority protection' in Farouk HI Cassim (ed) *Contemporary company law* 2 ed (2012) 765.

¹⁸ *De Sousa v Technology Corporate Management (Pty) Ltd* [2017] 3 All SA 47 (GJ) para 53 citing *Astec (BSR) plc* (1998) 2 BCLC 556 at 585A-I.

¹⁹ Cilliers, Benade & Henning et al op cit note 9 at 315.

²⁰ De Sousa supra note 18 para 43.

²¹ Ibid para 57.

²² Sibanda (2013) op cit note 7 at 65.

²³ Ibid at 65, 69.

²⁴ Sections 163(1)(a)-(c) new Act. Maleka Femida Cassim *The New Derivative Action Under the Companies Act Guidelines for Judicial Discretion* (2016) 186 comments that the range of conduct described could entail the general conduct of corporate affairs.

²⁵ Section 163(1)(a) new Act; Cassim (2012) op cit note 17 at 765.

²⁶ Piet Delpont *The New Companies Act Manual* (2009) 119 fn11; PA Delpont (ed) *Henochsberg on the Companies Act 71 of 2008* (Service Issue 17) 574(3).

²⁷ Cassim (2012) op cit note 17 at 764. HGJ Beukes & WJC Swart '*Peel v Hamon J&C Engineering (Pty) Ltd*: ignoring the result-requirement of section 163(1)(a) of the Companies Act and extending the oppression remedy

occurred prior to an application to court.²⁸ Seeing that the terms ‘act’ and ‘omission’ are not defined in the Act but the proscribed effect is detailed it may be argued that the specific form of the ‘act or omission’ is of lesser importance than the result.²⁹ The act does not have to be oppressive to comply with the requirement.³⁰ However, it has been suggested that the courts may require that both the act and the result be oppressive due to the similarity in wording of sections 252 and 163 of the 1973 and new Acts respectively.³¹ This is contrasted with the requirements in section 163(1)(b) and (c) which do require that both the act or omission complained of and the result or manner requirement detailed in those subsections must be oppressive to comply with the requirements for relief.³²

The motive of the offending party is not important in determining whether the alleged conduct has had the proscribed effect.³³ It is the act or omission itself and its effect on the applicant which must be analyzed by the court.³⁴

Bearing the above in mind, it still must be proved that there has been an act or omission of the company, or a related person.³⁵ Furthermore, both isolated conduct and continuing conduct is included in this subsection.³⁶ The subsection does not appear to include threats of such conduct owing to the use of the wording ‘has had a result’.³⁷ This indicates that the conduct and thus also the result must already have occurred, and not be a future threat.³⁸ This

beyond its statutorily intended reach’ (2014) 17(4) *PER* 1691 at 1702 argue that this is not an additional requirement in terms of s 163 as the court in *Garden Province Investment* supra note 16 at 531 ruled that in terms of s 252 of the 1973 Act, an applicant had to prove that both the conduct that had been complained of, and the effect (result) which the conduct resulted in, was unfairly prejudicial to the applicant. However, it is submitted that an effect and a result are not synonymous, e.g. if person A hits person B, the result is that there is a bruise, but an effect of the conduct is a feeling of pain on behalf of person B. In other words, a result is something tangible, whereas an effect is something abstract in nature.

²⁸ Beukes & Swart op cit note 27 at 1702; Cassim (2016) op cit note 24 at 186. This would include that the result had the proscribed effect, e.g. unfairly disregarding the applicant’s interests.

²⁹ Cassim (2012) op cit note 17 at 764.

³⁰ Delpont (2009) op cit note 26 at 119 fn11; Delpont (ed) op cit note 26 at 574(3). Cf Michael Lehloeny and Tshogofatso Kgarabjang ‘Defining the limits of the “oppression remedy” in the wake of section 163 of the Companies Act 71 of 2008 *Grancy Properties Limited v Manala* [2013] 3 All SA 111 (SCA)’ (2015) 36(2) *Obiter* 511 at 513. The SCA in *Grancy Property Ltd v Manala* 2015 (3) SA 313 (SCA) cited the *Garden Province Investment* supra note 15 dictum wherein the court held with regard to the 1973 Act that both the act itself and its effect must be unfairly prejudicial. Besides quoting the dictum, the SCA made no further comment on whether this would apply to the new Act. It thus remains to be seen whether only the result or both the act and the result must be oppressive, unfairly prejudicial or unfairly disregard the interests of the applicant in terms of the new Act.

³¹ Delpont (ed) op cit note 26 at 574(3).

³² *Ibid* at 574(7)-(8).

³³ Lehloeny and Kgarabjang op cit note 30 at 513.

³⁴ *Ibid*.

³⁵ Cassim (2016) op cit note 24 at 186.

³⁶ *Ibid* considering the usage of ‘any act omission’; *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd* [2012] 4 All SA 203 (GSJ) para 53. Satchwell J here makes the pertinent comment that: ‘after all an act may be repeated; an omission may be enduring; the current state of affairs will certainly have commenced in the past and continue indefinitely’.

³⁷ Cassim (2012) op cit note 17 at 765.

³⁸ *Ibid*; *Kudumane Investment Holding Ltd* supra note 36 para 52. However, see *Peel v Hamon J&C Engineering (Pty) Ltd* 2013 (2) SA 331 (GSJ) para 61 where Moshidi J held that s 163(1) covers both ‘past and future conduct’.

includes past conduct which is not being persisted with, and present conduct.³⁹ More specifically, even if an act or omission has had, or may have, many results the section merely requires that the act or omission has had *a* result with the proscribed effect.⁴⁰

The failure of the oppression remedy contained in the new Act to protect against threatened or future conduct has been criticized as the applicant should not have to wait for the harm to be inflicted.⁴¹ It has even been suggested that the failure to prevent future prejudicial conduct could render the section partially nugatory in that one of the objectives of the oppression remedy is to prevent misconduct, that is the remedy has a deterrent purpose.⁴²

Once it has been determined that future or threatened conduct is not protected under the new Act, it falls to the courts to interpret the legislation in a manner which could protect against such oppressive conduct.⁴³ Whereas proposing a shareholder resolution to be voted on at a meeting cannot in itself constitute oppressive conduct in terms of section 163(1)(a), a circular detailing such resolution which has already been distributed to the shareholders may qualify as oppressive conduct having the proscribed effect.⁴⁴ This type of purposive and wide interpretation may be compared to a ‘restrictive and narrow’ interpretation wherein it is determined that it would be premature to base an oppression application on the mere distribution of a circular notice and not following the actual voting at the shareholders meeting.⁴⁵ Following on from the former type of liberal interpretation any threat made by the company in any form could constitute an ‘act’ by the company the result of which would be analysed to determine if it has had the proscribed effect.⁴⁶ A liberal interpretation would also have the result that the court is upholding its imperative in terms of section 158(b) of the new Act to promote the spirit, purpose and objects of the new Act.⁴⁷ Finally, section 158(b) also mandates the court to interpret a provision of the new Act, where it may have reasonably been construed to have more one than interpretation in a given context, in a manner which ‘best promotes the spirit and purpose of this Act, and will best improve the realization and enjoyment

In *Peel*, the Court did not have to decide on future conduct, and it is thus submitted that the learned Judge mistakenly referred to *future* conduct instead of *present continuing* conduct.

³⁹ *Peel* supra note 38 para 61; Maleka Femida Cassim ‘The appraisal remedy and the oppression remedy under the Companies Act of 2008, and the overlap between them’ 2017 *SAMLJ* 309 at 310.

⁴⁰ *Kudumane Investment Holding Ltd* supra note 36 para 55.

⁴¹ Cassim (2012) op cit note 17 at 765.

⁴² Aubrey Sibanda ‘Advancing the statutory remedy for unfair prejudice in South African company law: perspectives from international jurisprudence’ 2015 *SAMLJ* 401 at 416-17 and the authority there cited: James Farley, Roger J Chouinard & Nicholas Daube ‘Expectations of fairness: the state of the oppression remedy in Canada today’ (2007) 33(3) *The Advocates’ Quarterly* 261 at 290-1 citing Markus Koehnen *Oppression and Related Remedies* (2004) 51.

⁴³ Cassim (2017) op cit note 39 at 309-10.

⁴⁴ *Ibid* citing *Juspoint Nominees (Pty) Ltd v Sovereign Food Investments Ltd* (876/16) [2016] ZAECPEHC 15.

⁴⁵ *Ibid* at 310.

⁴⁶ *Ibid*.

⁴⁷ *Ibid* citing s 158(b)(i) new Act.

of rights'.⁴⁸ Thus, a liberal interpretation may actually be best in keeping with the provisions of the new Act.⁴⁹

The court in *Peel* appears to have ruled that a company being exposed to serious business risks is a result that would fall within section 163(1)(a).⁵⁰ The court went further and seemed to also rule that a potential business risk would also be a satisfactory result.⁵¹ This has been criticized as it creates an impression 'uncertainty whether a specific event may materialize or not' would comply with a section 163(1)(a) result.⁵² Thus, a risk or even a possibility of a risk would be sufficient.⁵³

Specific acts of a company may be subdivided into those occurring at (1) board level, (2) by a person authorized by the board to act in a certain manner or to whom powers of the board have been delegated which may include managing directors,⁵⁴ or (3) shareholders in general meeting acting as a collective body.⁵⁵ The board is the company when it passes resolutions as the board of directors as well as when it acts on the company's behalf.⁵⁶ However, the last grouping – shareholders in general meeting – may no longer be an 'act of the company' with reference to section 66(1) of the new Act which gives original powers to the board of the directors to manage the 'business and affairs' of the company.⁵⁷ The board is now the 'ultimate' organ of the company and thus when the Act speaks of 'the company' the default reference is to the board, and not to the shareholders in general meeting, subject to the Act referring otherwise and/or whether the Memorandum of Incorporation (the 'MOI') of a company specifically provides otherwise.⁵⁸ The new Act appears to be dividing the powers

⁴⁸ Ibid citing s 158(b)(ii) new Act.

⁴⁹ Ibid.

⁵⁰ *Peel* supra note 38 para 62.1. The court did not expressly rule as such.

⁵¹ Beukes and Swart op cit note 27 at 1703 referring to *Peel* supra note 38 para 55.

⁵² Ibid. The authors argue there that a risk may be materially distinguished from an eventuality on the grounds that the former may not happen. As the new Act is concerned with a concrete result, the application must concern an event that has actually happened and not that which may happen. This line of reasoning by Moshidi J would only be available if the new Act concerned results which could happen in the future, which it is submitted it does not.

⁵³ Ibid. However, the authors at 1705 appear to retract that a 'risk' cannot be a result, and state that only a potential risk would not be a sufficient result.

⁵⁴ Cassim (2012) op cit note 17 at 764; Delpont (ed) op cit note 26 at 250(4). See also JL Yeats (ed) *Commentary on the Companies Act 71 of 2008* (2018) at 2-1249 where it is argued that the new Act also contemplates that the board's powers may be delegated and as such the company would still be managed 'under the direction of the board'.

⁵⁵ Ibid at 764-5 and the authorities there cited. It may not be the majority of shareholders who vote in a matter but the person who controls the votes of such majority, e.g. by proxy or beneficial owners of voting interests: Delpont (ed) op cit note 26 at 574(14).

⁵⁶ Cassim (2016) op cit note 24 at 186.

⁵⁷ Delpont (ed) op cit note 26 at 250(3)-(4).

⁵⁸ Ibid. The implied notion is that any powers or functions to be exercised in relation to the business or affairs of the company is ultimately exercised by the board and not the shareholders who as a default position have no authority to exercise such powers or functions. Thus, unless the shareholders have amended the MOI to curtail the board's authority in terms of s 66(1) or the Act provides otherwise, it is impossible for the shareholders in a general meeting, i.e. as a collective body, to perform an oppressive act as contemplated by s 163(1)(a) in relation

associated with the management of a company between the board and the shareholders in general meeting with the former conducting the business and affairs of the company and the latter only have powers expressly provided for by the Act or where the MOI gives the general meeting such powers.⁵⁹ This alters the position with regard to the 1973 Act where the shareholders were ultimately in charge of the company, and in their position as such delegated their powers to manage the business of the company to the board of directors.⁶⁰ Thus, the board is, in the default position, acting as ‘the company’.⁶¹ What is clear is that the performance of acts by any shareholder in his private capacity, regardless of being a minority or majority shareholder, will not be an act of the company.⁶² An act in a private capacity, such as voting at a general meeting, becomes an act of the company when it is transformed by a counting of votes into an act of the shareholders as a collective organ.⁶³

Finally, any of the conduct outlined in section 163(1)(a) to (c) may be performed by the company of which the applicant is a shareholder or director, *or a related person*.⁶⁴ The new Act defines ‘related’ with regard to the control which one person may have over another.⁶⁵ A few relevant examples include: (1) a holding-subsidary relationship⁶⁶; (2) where a natural person directly or indirectly controls a juristic person⁶⁷; (3) where a juristic person directly or indirectly controls another juristic person, or the business thereof; or (4) where a natural or juristic person directly or indirectly controls each of them, or the business of each of them.⁶⁸

to the business or affairs of the company. See also Carias Tererai Chokuda *The Protection of Shareholders’ Rights versus Flexibility in the Management of Companies: A Critical Analysis of the Implications of Corporate Law Reform on Corporate Governance in South Africa with specific reference to protection of shareholders’* (unpublished PhD thesis, University of Cape Town, 2017) 20-33 where the author analyses s 66(1) with regard to the desirability and legal possibility of altering it in the company’s MOI to restrict or modify the board’s powers and functions. The author at 30 submits that the default position of board authority may only be found wanting in smaller companies where the shareholders and directors are the same persons.

⁵⁹ Yeats (ed) op cit note 54 at 2-1249.

⁶⁰ Ibid 250(3). See Rehana Cassim ‘Governance and the Board of Directors’ in Farouk HI Cassim (ed) *Contemporary Company Law* 2ed (2012) 403 where the author describes how the authority was delegated via the company’s memorandum of incorporation or by shareholders in a general meeting. See also MS Blackman, RD Jooste, GK Everingham et al *Commentary on the Companies Act* (Service 9) ch8-p293-9 where the authors describe how directors obtained powers in terms of the 1973 Act, what powers could be delegated to the directors and the relationship between the powers of the directors and those which could be exercised by the shareholders in general meeting.

⁶¹ Yeats (ed) op cit note 54 at 2-1249-50. As RC Williams there argues that despite the use of the term ‘authority’ in s 66(1) of the new Act, the board is still an organ of the company and thus acts as the company, and has not been converted into an agent of the company who would be distinguishable from its principal – the company.

⁶² Cassim (2016) op cit note 24 at 186. A private act would include a purchase or sale of shares or casting votes at a general meeting.

⁶³ Ibid.

⁶⁴ Section 163(1); Cassim (2012) op cit note 17 at 767.

⁶⁵ Section 1 new Act defines a ‘person’ as including natural persons and juristic persons.

⁶⁶ Section 2(1)(c)(ii).

⁶⁷ The two methods of control are (1) being able to appoint directors of the board who control more than 50% of the votes of the board; (2) having more than 50% of the voting power of shareholders in a general meeting: See s 2(a)(ii) new Act.

⁶⁸ Section 2(1) new Act. See further s 2(2) as to the manner in which ‘control’ must be established in terms of s 2(1) to qualify as a ‘related person’.

The extension of the new Act to include ‘related persons’ with regard to the oppression remedy importantly indicates that the legislature has taken into account case law regarding the control which one person may exercise in and over another person and which may have the proscribed effect.⁶⁹ The most notable case in this regard is *Scottish Co-operative Wholesale Society Ltd v Meyer* where the minority shareholders of the subsidiary company complained successfully of oppressive conduct on the part of the holding company via its control over the board of directors of the subsidiary company.⁷⁰ Thus the Act clearly provides for holding and subsidiary relationships and the possible abuses thereof with regard to oppressive conduct.⁷¹

The new Act thus expressly widened the ambit of the conduct requirement of the oppression remedy in the new Act with regard to an ‘act’ or ‘omission’ in that, firstly, the new Act seems to have cleared the uncertainty that existed after the *Garden Province* case whether the act itself must be oppressive in that the act itself does not have to be oppressive as long as the result which it has it oppressive.⁷² Secondly, the act or omission may be committed by the company of which the applicant is a shareholder or director, or by a related company.⁷³ It is especially this second aspect which dramatically widens the scope to include holding and subsidiary relationships and other positions of control of one person (natural or legal) over a company.⁷⁴

Although the above highlights that the oppression remedy does extend the ambit of the conduct which may be complained of, there is one area which is still lacking being the lack of application to future conduct. An examination of the related foreign jurisdictions of Australia, Canada and England will shed light on whether this would be a pertinent recommendation for the reform of the current oppression remedy.

⁶⁹ Cassim (2012) op cit note 17 at 767-8 and fn 48.

⁷⁰ [1959] AC 324. The holding company’s nominee directors on the board of the subsidiary were held to have acted in the best interests of the holding company and not in those of the company in which they had been appointed, disregarding the duty of a director to act in good faith in the best interests of the company in which he has been appointed. Further, in the Australian case of *Re Dernacourt Investments Pty Ltd* (1990) 2 ACSR 553 at 561, Powell J held that: ‘first, that, in an appropriate case, the conduct of a holding company, or of such of its directors who happen to be directors of the relevant subsidiary, towards a subsidiary, may constitute conduct in the affairs of that subsidiary ... and, secondly, that, in an appropriate case, the conduct of a subsidiary, or of some or all of its directors who happen as well to be directors of the holding company, may be regarded as part of the conduct of the affairs of the holding company’. In the more recent case of *Citybranch Group Ltd, Gross v Rackind* [2004] 4 All ER 735 para 33 the England and Wales Court of Appeal referred with approval to the high court’s conclusion that: ‘there is no authority which forces me to hold that conduct of a subsidiary’s affairs can never also be conduct of the parent company’s affairs’.

⁷¹ Cassim (2012) op cit note 17 at 768. See further Cassim (2016) op cit note 24 at 190 for a brief discussion of *Peel* supra note 38 with regard to the ‘related person’ concept and its application to the conduct requirement.

⁷² Cassim (2012) op cit note 17 at 764.

⁷³ *Ibid.*

⁷⁴ *Ibid* at 768.

V FOREIGN JURISDICTIONS

(a) Australia

Section 232 of the Australian Corporations Act, 2001 lays out the grounds for relief in terms of the oppression remedy including the ‘conduct of a company’s affairs’ in the proscribed manner or with the proscribed effect.⁷⁵ The term ‘affairs of the company’ is defined in section 53 of the Australian Act but it is not an exhaustive list.⁷⁶ The issue of whether the affairs of a related company are within the ambit of the affairs of the company concerned has been answered positively with regard to a wholly-owned subsidiary,⁷⁷ and to a subsidiary with a common board of directors.⁷⁸ Conduct includes any act on the part of a director which does not breach a fiduciary or other duty which the director owes *as* a director.⁷⁹ The focus of the enquiry is on the effect of the conduct and not on the motive of the wrongdoer.⁸⁰ The effect of the conduct as a whole must be determined in the context of the specific facts and circumstances before the court.⁸¹ The effect may or may not be continuing at the time of the application or the hearing thereof.⁸²

Section 232 of the Australian Act includes past, present and future acts or omissions, regardless of whether they are continuing at the time of the application or of hearing the application.⁸³ Thus the Australian oppression remedy applies equally to prevent conduct which may damage a shareholder’s interests and to remedy oppressive conduct which has already occurred.⁸⁴ This applies as much to isolated serious acts, as to a course of conduct.⁸⁵ In the absence of one of the above, the application may be dismissed.⁸⁶

⁷⁵ Section 232(a) read with ss 232(d) and (e) Australian Corporations Act, 2001 (Cth) (hereafter the ‘Australian Act’).

⁷⁶ RP Austin & IM Ramsay *Ford’s Principles of Corporations Law* 15 ed (2013) 719.

⁷⁷ *Australian Securities Commission v Lucas* (1992) 7 ACSR 676; *Re Dernacourt Investments Pty Ltd* supra note 70.

⁷⁸ *Re Norvabron Pty Ltd (No 2)* (1986) 11 ACLR 279.

⁷⁹ *Gerard Cassegrain & Co Pty Ltd Cassegrain* [2011] NSWSC 1156 para 49.

⁸⁰ Austin & Ramsay op cit note 76 at 726; See *Campbell v Backoffice Investments Pty Ltd* (2009) 73 ACSR 1 para 176 and *RBC Investor Services Australia Nominees Pty Ltd v Brickworks Ltd* [2017] FCA 756.

⁸¹ *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (2011)* 84 ACSR 121.

⁸² Austin & Ramsay op cit note 76 at 727. The authors comment there that the presence or absence thereof will be considered in granting appropriate relief.

⁸³ *Ibid* at 720.

⁸⁴ Roman Tomasic and Stephen Bottomley *Corporations Law in Australia* (1995) 436.

⁸⁵ Austin & Ramsay op cit note 76 at 720 citing *Re Norvabron Pty Ltd* supra note 78.

⁸⁶ *Ibid*. These do not include an article in the MOI of a company: *Medical Research & Compensation Foundation v Amaca Pty Ltd* (2005) 51 ACSR 587.

(b) Canada

According to section 241(2) of the Canadian Business Corporations Act, 1985 there are three possible qualifying forms of conduct, materially corresponding to those in the Companies Act 71 of 2008, including:

‘(a) A corporate act or omission effects a result;

Which is oppressive of [someone]; is unfairly prejudicial to [someone]; or unfairly disregards the interests of [someone]. This person so affected was ‘any security holder, creditor, director or officer’.⁸⁷

The difference between section 241(2)(a) versus (b) and (c) of the CBCA lies in the difference between a ‘result’ and the ‘manner’ of the conduct.⁸⁸ It is these two concepts which are looked at in determining whether the ‘conduct’ has had the proscribed effect.⁸⁹ The courts do not take into account the motive of the alleged wrongdoers.⁹⁰ This (consequences) approach corresponds with the judicial approach to statutory corporate intervention being ‘shareholder expectations’.⁹¹

The key point in proving section 241(2)(a) conduct is proving the wrongfulness of the *result* of the corporation’s conduct.⁹² Proving a corporate act is a question of fact which did or did not occur.⁹³ However, the proof of a corporate omission within section 238 of the CBCA is more cumbersome.⁹⁴ The complainant is required to prove that the omission ‘effects a result’.⁹⁵ This may be easier where it was an omission to perform an act required in terms of the CBCA or a contract between the parties which had the proscribed effect.⁹⁶

⁸⁷ Section 241(2) Canadian Business Corporations Act, R.S.C. 1985, c. C-44 (hereafter the ‘CBCA’). The applicant must pick one from each of the above three lists to fulfil a cause of action. The onus is on the complainant to prove each element on a balance of probabilities: Bruce Welling *Corporate Law in Canada The Governing Principles* 3 ed (2006) 535.

⁸⁸ Welling op cit note 87 at 537 referring to *Brant Investments Ltd v KeepRite Inc* 3 OR 3d 289 (Ont CA) at 305. The ‘manner’ is tested objectively.

⁸⁹ Ibid.

⁹⁰ Ibid. This is not a subjective test. The early notion of the complainant having to prove ‘bad faith’ by the wrongdoer was abandoned in the Ontario Court of Appeal case of *Brant Investments* supra note 88.

⁹¹ Ibid at 537-8. See also at 499-503 for a more detailed analysis of this approach.

⁹² Ibid at 537.

⁹³ Ibid at 538.

⁹⁴ Ibid states that not every omission would qualify within s 241(2)(a) of the CBCA.

⁹⁵ Ibid at 538-9. See e.g. *Ford Motor Co of Canada v Ontario (Municipal Employees Retirement Board)* (2004) 41 BLR 3d 74 (Ont) where the court held that a failure to renegotiate an agreement which resulted in inequitably benefiting the majority shareholder to the detriment of a minority shareholder was oppressive and unfairly prejudicial.

⁹⁶ Ibid at 539.

The effect of the conduct must ‘exist at the time of the application or is contemplated to be done at a meeting at which notice is given’.⁹⁷ The Act does not allow for ‘anticipatory oppression’.⁹⁸

(c) England

The alleged conduct must relate to the ‘affairs of the company’.⁹⁹ It is a question of fact whether actions of the holding company can amount to the conduct of the affairs of the subsidiary company.¹⁰⁰ It has also been said that the term ‘affairs’ is ‘one of the widest import’ which could include the affairs of a subsidiary company of the holding company.¹⁰¹ The affairs of a company include acts of the board as a whole and a resolution passed by the shareholders in general meeting.¹⁰² Shareholder agreements and other agreements may be relevant depending on the context.¹⁰³

The oppression remedy may also be sought where an actual or proposed act or omission is unfairly prejudicial to the members, generally or to some part thereof.¹⁰⁴ The protection against anticipated oppression was the result of a recommendation of the Jenkins Committee in reforming the 1948 Act as described above.¹⁰⁵ An order may still be granted where the prohibited effect has been remedied.¹⁰⁶

VI CONCLUSION

An analysis of foreign jurisdictions clearly indicates the departure between South Africa and Canada on the one hand in rejecting future oppression, and Australia and England on the other hand allowing such conduct to found an oppression application. This has already been noted above where the recommendation of the Jenkins Committee regarding this specific point was rejected by the Van Wyk de Vries Commission in its recommendations re the 1973 Act. This was obviously carried through from English law into Australian law, but not into Canadian law which is where parts of the South African oppression remedy have clearly been derived. It has been submitted that threats of future oppression should be included as part of a reform of the

⁹⁷ H Sutherland *Fraser & Stewart Company Law of Canada* 6 ed (1993) 721. If this has already been remedied before the hearing this will be relevant in determining an appropriate order to protect the applicant in terms of future conduct.

⁹⁸ *Ibid.*

⁹⁹ Stephen Girvin, Sandra Frisby & Alastair Hudson *Charlesworth’s Company Law* 18 ed (2010) 534.

¹⁰⁰ *Ibid* citing *Nicholas v Soundcraft Electronics Ltd* [1993] BCLC 360.

¹⁰¹ *Gross v Rackind* supra note 70. This is especially so where the directors of the holding company constitute a majority of the board of directors of the subsidiary company.

¹⁰² Girvin, Frisby & Hudson op cit note 99 at 534.

¹⁰³ *Re A Company* [1997] 2 BCLC 1.

¹⁰⁴ Cassim (2012) op cit note 17 at 765.

¹⁰⁵ Board of Trade *Report of the Company Law Committee* (1962) para 212(d).

¹⁰⁶ Austin & Ramsay op cit note 76 at 727.

oppression remedy which would prevent affected applicants from having to undertake a lengthy and expensive legal procedure to enforce the law ex post facto where the courts could have the power to prevent specific future oppressive conduct in the same manner as Australian and English law.¹⁰⁷

¹⁰⁷ Cassim (2012) op cit note 16 at 765.

Chapter 4: Oppression Relief and the Judicial Non-Intervention Rule

I INTRODUCTION

The result of a successful application in terms of the oppression remedy is an order of court to relieve the oppressive effects of any such conduct.¹ This ability of the court to make such orders stands in stark contrast to the general principle of judicial non-intervention in company matters and thus has to be balanced considering the interests of the applicant and those of the company.² The rule may succinctly be stated as meaning that ‘the courts will not interfere in the domestic affairs of companies at the behest of discontented minority shareholders’.³ However, there are exceptions to this, such as the oppression remedy, which empower the courts in certain situations to ‘interfere’ as such.⁴ Thus, it will be important to also look at academic opinions regarding the principle and the court’s actual use of its statutory powers. Finally, the interpretation and use of similar empowering provisions in Australian, Canadian and English law may provide a guide as to the ambit of the relief which jurisdictions working on a common company law regime are satisfied in ordering.

II THE COMPANIES ACT 46 OF 1926⁵

Section 111*bis* (2) governed the nature of the order which the court could make.⁶ The court was granted with a wide and unfettered discretion as to the order it could make, qualified by the requirement that the order would be able to bring to an end the matters complained of.⁷ These were expressly described, wide, drastic powers dealing only with ‘matters affecting the future working of the company in its internal affairs in removing something there that has affected it in the past’.⁸ The court would not interfere with a creditor’s rights vis-à-vis the

¹ HS Cilliers, ML Benade & JJ Henning et al *Cilliers & Benade Corporate Law* 3 ed (2000) 317.

² Maleka Femida Cassim ‘Shareholder remedies and minority protection’ in Farouk HI Cassim (ed) *Contemporary Company Law* 2 ed (2012) 774.

³ JT Pretorius (ed) *Hahlo’s South African Company Law Through the Cases* 6 ed (1999) 403 citing *Yende v Orlando Coal Distributors (Pty) Ltd* 1961 (3) SA 314 (W) at 316 where Dowling J states: ‘In general, the policy of the courts has been not to interfere in the internal domestic affairs of a company, where the company ought to be able to adjust its affairs itself by appropriate resolutions of a majority of the shareholders’.

⁴ Ibid citing additional examples at common law and in legislation. These include a deadlock in the affairs of the company, an unconstitutional or illegal act or proposed act of the directors, an unconstitutional or illegal resolution or proposed resolution of the company, or when such constitutes a fraud on the minority.

⁵ Hereafter the ‘1926 Act’.

⁶ Edgar S Henochsberg assisted by WJG Fairburn *Henochsberg on the Companies Act* (1953) 313.

⁷ *Benjamin v Elysium Investments (Pty) Ltd* 1960 (3) SA 467 (E) at 475A-B. Generally, the aim was achieved in that the order directly or indirectly affected the ‘author of the oppression’: *Bader v Weston* [1969] 1 All SA 269 (C) at 281.

⁸ *Irvin and Johnson Ltd v Oelofse Fisheries Ltd; Oelofse v Irvin and Johnson Ltd* 1954 (1) SA 231 (E) at 243F-G; *Bader* supra note 7 at 283.

company as this would be even more drastic than the powers given to it by the provision.⁹ This ability could neither be inferred from the wording of the provision, nor necessarily implied from the phrase ‘as it thinks fit’, which rather referred to other orders which the court could make with regard to the internal affairs of the company.¹⁰ Additionally, the provision did not hint at the court having the power to affect third parties to the company such as creditors.¹¹ Finally, taking into consideration that such an order to suspend creditors’ rights extended with regard to judicial management, a failure by the legislature to expressly enumerate such a power in the oppression remedy inferred that the intention to include such power there was not present.¹² Thus, the court would not read into section 111*bis* (2) the power to interfere with or suspend creditors’ right vis-à-vis the company.¹³

An additional qualification which the court considered was whether the desired relief would result in the company being able to operate in the future as a going concern.¹⁴ This position was criticized as being ‘unnecessarily restrictive and may lead to abuse’.¹⁵

The court in *Bader supra* held that the words ‘or otherwise’ were to be interpreted widely and not to be interpreted *eiusdem generis* with the preceding items.¹⁶ The presence of words granting the court a wide discretion before and after the list of available orders was an indication that the legislature did not intend for it to be an exhaustive list but rather examples of possible orders.¹⁷ However, it was held *obiter dictum* that the court could not appoint directors in terms of the provision as this was not authorized therein.¹⁸ However, despite the court’s wide powers in terms of the provision, the applicant in his petition must have specified the nature of the relief that he sought.¹⁹

The Act expressly provided for the court to regulate the future conduct of the internal affairs of the company, and the purchase of shares by one member from another, or by the company from a member.²⁰ The Act also implied that the court may alter the Memorandum of

⁹ *Irvin supra* note 8 at 243G. As a starting point this power is not a general power of the court and must be granted by the provision.

¹⁰ *Ibid* at 243H.

¹¹ *Ibid* at 243H-244.

¹² *Ibid*.

¹³ *Ibid* at 244A..

¹⁴ Cilliers, Benade & Henning et al op cit note 1 at 318.

¹⁵ *Ibid*. The authors there comment that such a restriction is not found in the English equivalent on which s 111*bis* was based. Consequently, it would seem that South African courts imposed a restriction inconsistent with common law or statute.

¹⁶ *Bader supra* note 7 at 283, referring to *Re Hannelta Ltd* (1953) 216 L.T.Jo. 639.

¹⁷ *Ibid* at 284.

¹⁸ *Ex parte Avondzon Trust (Edms) Bpk* 1968 (1) SA 340 (T) at 343A-B. The reasoning given was that the court was limited to orders relating to the internal affairs of the company. Such a power of appointment was so exceptional that the legislature would have had to expressly indicate such intention in the provision.

¹⁹ *Breetveldt v Van Zyl* 1972 (1) SA 304 (T) at 315D-E.

²⁰ Section 111*bis* (2) 1926 Act.

Incorporation (the ‘MOI’) of the company, which had the effect as if the members of that company had authorized such an amendment via special resolution.²¹

The relief provision of the 1926 Act was thus relatively narrowly interpreted to refer to orders affecting the internal functioning of the company. Despite the courts interpreting the provision to grant it a wide discretion, there were limits as to its implementation. The courts were not ready to affect a relationship with a third party, such as a creditor. Nor were the courts comfortable with interfering with the composition of the directors of the company. This must reflect the courts’ inherent anxiety to overstep its boundary in terms of the judicial non-intervention rule. Granted that the 1926 Act expressly allowed the court to make any order, the courts did not abuse this power and sought to erect a boundary beyond which it would not pass.

III THE COMPANIES ACT 61 OF 1973²²

The court’s conclusion on the type of oppression which occurred would inform the nature of the relief it would grant.²³ Similar to the 1926 Act, the 1973 Act via section 252 thereof granted the court a wide and unfettered discretion to order fair and equitable relief to cure the unfair prejudice complained of and the general principles of ordering relief were carried over from the jurisprudence of cases involving the 1926 Act.²⁴ The applicant must have formulated the nature of relief sought as part of the application.²⁵ When the court found that it was just and equitable to do so, the court was empowered to make an order as it deemed meet.²⁶ However, this order must have taken into account the type of oppression at play and been fair to both sides.²⁷

Included in the available relief was an order to compel the company or another shareholder to buy out the minority shareholder’s shares at a fair price.²⁸ In fact the discretion included, in the appropriate circumstances, orders that the majority shareholder sell his shares.²⁹ This discretion included the option of the court not granting relief even if all the

²¹ Section 111*bis* (3) 1926 Act.

²² Hereafter the ‘1973 Act’.

²³ *Louw v Nel* [2011] 2 All SA 495 (SCA) at 512.

²⁴ *Heckmair v Beton & Sandstein Industrieë (Pty) Ltd (1)* 1980 (1) SA 350 (SWA) at 350D; *Louw* supra note 23 at 507; *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd* 2017 (5) SA 9 (CC) para 28.

²⁵ Cilliers, Benade & Henning et al op cit note 1 at 318.

²⁶ *Heckmair* supra note 24 at 350D. Whether a court can make an order regulating the future management of the affairs of the company was not settled. In *Investors Mutual Funds Ltd v Empisal (South Africa) Ltd* [1979] 4 All SA at 157 ruled that the provision does not allow for this situation. However, in *Heckmair* supra note 24 it was held that a court can make such an order.

²⁷ PA Delpont (ed) *Henochsberg on the Companies Act 71 of 2008* (Service Issue 17) 574(19).

²⁸ *Gatenby v Gatenby* 1996 (3) SA 118 (E) 123E (decided with regard to the equivalent s 49 of the Close Corporations Act 69 of 1984).

²⁹ Cilliers, Benade & Henning et al op cit note 1 at 319 fn 120.

requirements had been met.³⁰ The discretion depended on the prerequisites that the court considered it just and equitable to do so, and that it would bring matters to an end.³¹ The court must have not only taken into consideration the interests of parties to the application but also those of the other shareholders and the best interests of the company itself.³² However, the court would at almost all costs have avoided liquidating a viable company, and in all cases placed reason above revenge.³³ The order must have been appropriate at the time of the hearing.³⁴

To conclude, the 1973 Act was interpreted generally in line with the 1926 Act bearing in mind that the relief provisions of both were similarly worded. The courts did not further their interpretation of the discretion granted to them or take leaps and bounds in the orders it granted. The courts were still dissuaded from overstepping the non-intervention rule too far and were thus conservative in nature. However, it must be remembered that the bar was set high to actually prove oppression and thus very few cases actually received the attention of the bench in terms of addressing remedying the complained of oppression.

IV THE COMPANIES ACT 71 OF 2008³⁵

The court may order wide relief to an applicant in terms of section 163(2), which allows a court to make *any* interim or final order ‘it considers fit’.³⁶ Following directly from this is that despite an applicant being required to formulate the relief it desires, the court has the discretion to make an order which it considers to be appropriate in the circumstances.³⁷ It has been submitted that the new Act has expanded the court’s discretion in making an order in terms of the oppression remedy as well as listing the example orders in clearer terms than in the previous Acts.³⁸ What is expressly evident is that the new Act does list a number of available relief mechanisms – several more than in the previous Acts – but this is not a *numerus clausus*, as

³⁰ Ibid at 318.

³¹ Ibid at 317.

³² *Bayly v Knowles* [2010] 3 All SA 374 (SCA) at 381.

³³ Ibid at 382.

³⁴ *Off-Beat Holiday Club* supra note 24 para 28. The order must have been capable of being carried out and correcting the prejudice suffered. The date when the application or action was instituted was not the relevant time point: *De Sousa v Technology Corporate Management (Pty) Ltd* [2017] 3 All SA 47 (GJ) para 58.

³⁵ Hereafter the ‘new Act’.

³⁶ Section 163(2) new Act. *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd* [2012] 4 All SA 203 (GSJ) para 61 where Satchwell J opines that the relief has been constructed in the new Act in the ‘broadest of terms’. See also *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 (3) 146 (WCC) para 50.

³⁷ Maleka Femida Cassim *The New Derivative Action Under the Companies Act Guidelines for Judicial Discretion* (2016) 199.

³⁸ Michael Lehloeny and Tshogofatso Kgarabjang ‘Defining the limits of the “oppression remedy” in the wake of section 163 of the Companies Act 71 of 2008’ *Grancy Properties Limited v Manala* [2013] 3 All SA 111 (SCA) (2015) 36(2) *Obiter* 511 at 511.

seen from the section's use of the term 'including'.³⁹ One form of relief not mentioned is that of a compulsory purchase of a shareholder's shares by other shareholders or the company which was expressly included in the 1926 and 1973 Acts.⁴⁰

The inclusion of s 163(2)(f) disposes of the *dictum* in *Ex parte Avondzon Trust (Edms) Bpk* 1968 (1) SA 340 (T) 342-3 where the court held that in the 1926 Act did not empower the court to appoint directors in terms of the oppression remedy.⁴¹ Regardless, the number and variety of example orders coupled with the general discretion certainly gives the impression that the court has access to a wide ambit in terms of available orders.⁴²

Cassim submits that section 163 is a flexible mechanism for remedying oppression in the manner to which it departs from the general principle of judicial non-intervention in the manner in which a company is managed.⁴³ The various orders listed range in effect from leaving the company's existing power structure and rules intact to realigning the balance of power established by the MOI or orders that actually change the rules of the company themselves.⁴⁴

In *Kudumane Investment Holding* an order in terms of section 163(2)(f) was successfully sought in terms of which the court may appoint directors in place of or in addition to directors already in office.⁴⁵ This shows a departure of the courts in its conservative handling of the previous Acts, wherein it was even held obiter that appointing directors was not included in a court's discretion.⁴⁶ The express inclusion as an example order most likely settles the court's nervous predilection to interfering in a company's internal affairs.

The remedies listed in s 163(2) may affect not only the company and its shareholders and directors, but also third parties, such as persons contracting with the company.⁴⁷ Delpont argues that this remedy would not only cover the standard case of 'majority abuse' but also standard creditor/debtor contracts and shareholder agreements and other consensual

³⁹ Cassim (2012) op cit note 2 at 772. *Kudumane Investment Holding Ltd* supra note 36 para 61. Carl Stein & GK Everingham *The New Companies Act Unlocked a Practical Guide* (2011) 369 comment that the example orders were given in such clear terms to make it express that the court could make even what would historically seem 'quite extraordinary'.

⁴⁰ Cassim (2012) op cit note 2 at 774. Cassim (2016) op cit note 37 at 201 comments that this has been the most common form of relief in terms of the previous Acts. Despite this, the Courts will still be able to use this remedy considering that s 163(2) is not a closed list.

⁴¹ Cassim (2016) op cit note 37 at 200 citing the SCA in *Grancy Property Ltd v Manala* 2015 (3) SA 313 (SCA) para 40.

⁴² Cassim (2012) op cit note 2 at 769-75; *Grancy Property Ltd* supra note 41 paras 29, 31.

⁴³ *Ibid* at 774.

⁴⁴ *Ibid*. There the author identifies which orders have lesser or more severe effects on the internal functioning of the company.

⁴⁵ *Kudumane Investment Holding Ltd* supra note 36 paras 61-2.

⁴⁶ See *Avondzon Trust* supra note 18.

⁴⁷ See e.g. s 163(2)(h) where the applicant may apply for 'an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement'.

agreements.⁴⁸ Delport concludes that such a remedy ‘introduces a new dimension to contracts, which must upon conclusion, also be tested against the criteria of “oppressive or unfairly prejudicial” conduct’.⁴⁹ In other words, the parties to a contract may be expected to determine, when concluding a contract whether the contract has the proscribed effect on a shareholder or director of the company or related person, which may in itself, on the part of a third party but not the company, be seen as conduct not to be expected when concluding a contract.

It is required in law that an applicant details the relief that he or she seeks when making an application.⁵⁰ However, section 163(2) specifically provides for the court to make an order ‘it considers fit’.⁵¹ The Court may thus grant relief which it considers appropriate in the circumstances, which may be different to that which the applicant specifically seeks.⁵² However, the Act does not provide the court with the ability to punish or penalize a party found to have committed oppressive conduct.⁵³

The previous Companies Act had the inbuilt limitation that the court could only make an order if it was ‘just and equitable to do so’, ‘with a view to bringing to an end the matters complained of’.⁵⁴ Cassim submits that these considerations will still form part of the courts’ decision-making process, such as in cases where the conduct could be de minimis or where subsequent conduct has balanced or rectified oppressive conduct.⁵⁵ The inclusion of these considerations is also a consequence of the aim of section 163 being the remedying of ‘unfair’ acts.⁵⁶

V FOREIGN JURISDICTIONS

(a) Australia

The wide discretion granted to the court is to make any order ‘it consider appropriate’.⁵⁷ The examples listed in section 233(1) of the Australian Corporations Act, 2001 (Cth) are not an exhaustive list, and the court can make another order it consider appropriate.⁵⁸ The applicant

⁴⁸ Delport (ed) op cit note 27 at 574(20).

⁴⁹ Ibid at 574(16).

⁵⁰ Cassim (2012) op cit note 2 at 774.

⁵¹ Section 163(2) new Act.

⁵² Cassim (2012) op cit note 2 at 774. This eventuality is considered in the majority of litigation where the final prayer is usually for ‘further and/or alternate relief’.

⁵³ Delport (ed) op cit note 27 at 574(19).

⁵⁴ Section 252(3) 1973 Act. See *Ben-Tovim v Ben-Tovim* 2001 (3) SA 1074 (C) where the court held that this was the overwhelming consideration when making any order.

⁵⁵ Cassim (2012) op cit note 2 at 775 and fn 85.

⁵⁶ Delport (ed) op cit note 27 at 574(19).

⁵⁷ Section 233(1) Australian Corporations Act, 2001 (Cth); *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corporation Pty Ltd* (2004) ALR 136 para 70 citing *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* (2003) 47 ACSR 514; [2003] NSWCA 910 paras 34-8.

⁵⁸ RP Austin & IM Ramsay *Ford’s Principles of Corporations Law* 15 ed (2013) at 737, e.g. set aside and substitute a resolution: *The Food Improvers Pty Ltd v BGR Corp Pty Ltd (No 4)* (2007) 25 ACLC 177 [10].

must set out the relief he desires.⁵⁹ The court must consider the issue of relief as at the date of application being heard.⁶⁰ The nature of the relief depends on the conclusions that the court makes on the type of oppression present.⁶¹ The court should first consider that remedy which would be the least intrusive manner of curing the oppression.⁶² The option of winding up an otherwise solvent company is to be utilized only as a last resort.⁶³

The general principle in determining relief is that it must be able to terminate the oppressive effects.⁶⁴ Consequentially, if there is no continuing oppression the court will general exercise its discretion in refusing what would be inappropriate relief.⁶⁵

The most common order when the member desires to exit the company is a compulsory purchase by the majority or the company.⁶⁶ However, the court may also order that the oppressor (majority) sell his shares to the oppressed (minority).⁶⁷ The court will favour a compulsory purchase over a winding up order to give the applicant the advantage of selling shares in a going-concern.⁶⁸

(b) Canada

If a complainant proves the requirements in terms of section 241 of the Canada Business Corporations Act, 1985, the judge has extensive discretion to give relief.⁶⁹ The relief must rectify the matters complained of which underscores that the judicial discretion must (a) be limited to only *rectifying* the oppressive conduct, and (b) be limited to only protecting the interests of the protected person, and thus not a tool for punishment or rebalancing in the complainant's favour.⁷⁰ The examples provided are not exhaustive due to the preceding words 'without limiting the generality of the foregoing [discretion]'.⁷¹ Welling submits that the power of the judiciary in terms of the relief is 'legislative overkill' due to the provision of 'sample orders for selection' which may tempt a judge 'to become a regulatory authority overseeing corporate affairs' and which overlaps with other minority remedies.⁷² Welling further

⁵⁹ Ibid.

⁶⁰ *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672 para 159.

⁶¹ *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688 at 742.

⁶² Austin & Ramsay op cit note 57 at 737.

⁶³ *Fexuto supra* note 61 at 742.

⁶⁴ *Nassar v Innovative Precasters Group Pty Ltd* (2009) 71 ACSR 343 para 125.

⁶⁵ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 para 182.

⁶⁶ Austin & Ramsay op cit note 58 at 739 – ss 233(1)(d) and (e) Australian Corporations Act, 2001.

⁶⁷ *Munstermann v Rayward* [2017] NSWSC 133 para 22(12) citing *Re a company; ex parte Shooter (No 2)* [1991] BCLC 267.

⁶⁸ *Re a Company* (No 002612 of 1984) (1986) 2 BCC 99,453.

⁶⁹ Bruce Welling *Corporate Law in Canada The Governing Principles* 3 ed (2006) 550.

⁷⁰ Ibid and at fn187.

⁷¹ Ibid. See there further at 551-5 for a detailed discussion of the different types of orders that the judge may grant and examples of each in case law.

⁷² Ibid at 555.

comments that the legislature has ‘abandoned the non-interventionist tradition, inviting judges to make orders “to regulate a corporation’s affairs by amending the [corporate constitution]”’.⁷³ This anxiety regarding the disregard of non-intervention should apply similarly in South African law where the courts have equally been empowered to make extraordinary orders in granting redress.

(c) England

In English law, the judicial non-intervention rule may be traced to the case of *Foss v Harbottle*^{74, 75} The rule has been described as the refusal of the courts to interfere in company management as a result of minority shareholders being dissatisfied in the manner in which the board of directors or shareholders with controlling votes are conducting the affairs of the company.⁷⁶ This generally has the necessary effect of preventing the courts from substituting its own opinion as to the management of the company in place of those who have been appointed to make such decisions or those with the ability to control the company actually taking those decisions.⁷⁷ Pennington further argues that any attempt by the court to interfere in company management would be futile as the majority would pass an ordinary resolution to nullify such interference.⁷⁸ However, this rule would not be applicable where the majority could not rectify the conduct which the minority has complained of by an ordinary resolution.⁷⁹

The common-law rule above has been statutorily overruled in that once the court is satisfied regarding the proof of the requirements, it may make such order as it thinks fit.⁸⁰ This includes the court’s power to amend the company’s MOI.⁸¹ A petitioner does not need to make a specific request in advance.⁸² The most common order made is that of a purchase of the minority shareholder’s shares by another shareholder or by the company itself.⁸³

⁷³ Ibid at 554.

⁷⁴ (1843) 2 Hare 461.

⁷⁵ Robert R Pennington *Pennington’s Company Law* 8 ed (2001) at 791.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid 792-3.

⁷⁹ Ibid 793.

⁸⁰ Section 996(1) English Companies Act, 2006. See ss 996(2)(a)-(e) for five specific orders which can be requested. This intention of the legislation to grant the judiciary increased powers to interfere in corporate affairs is evident in the statutory derivative claim which may be found in Pt 11 of the English Companies Act, 2006: Paul L Davies and Sarah Worthington *Principles of Modern Company Law* 9 ed (2012) 652. As the authors comment further at 656: ‘The rule in *Foss v Harbottle* is thus consigned to the dustbin’.

⁸¹ S 998. See also Pennington op cit note 75 at 833.

⁸² Stephen Girvin, Sandra Frisby & Alastair Hudson *Charlesworth’s Company Law* 18 ed (2010) 548.

⁸³ Ibid at 549.

VI CONCLUSION

The relief provision of the statutory oppression remedy has remained largely unmodified from its creation in the 1926 Act through the 1973 Act and now in the new Act. The section has always granted the court a wide discretion to make any order it deems fit to remedy the complained of situation.⁸⁴ This can be seen both from the wording of the various oppression remedies in the 1926, 1973 and 2008 Acts and from the orders the courts have been willing to grant to remedy oppression by the majority.⁸⁵ However, the amendment of the example orders part of the provision has sought to give the courts assurances as to how far they may go in remedying the oppression by making an order which they deem appropriate. Where originally, the courts were nervous even to make orders so as to interfere with the future conduct of the affairs of the company, the courts now have no qualms with such and even removing and appointing directors is a common occurrence. Although this may appear to undermine the judicial non-intervention rule, it must be remembered that in all occurrences the courts need to have the statutory power to do that which is forbidden at common law and overcome the will of the majority to give equitable redress to the minority shareholders. As such, the courts must perform their duty to this point and no further and must not push the boundaries of the non-intervention rule further than the particular circumstances require.

⁸⁴ Supra 4.II, 4.III, 4.IV.

⁸⁵ See PM Meskin (ed) *Henochsberg on the Companies Act 61 of 1973* 5 ed (Service Issue 33) 483-484(1) re the 1926 and 1973 Acts and Delpont (ed) op cit note 27 at 574(18)-(23) re the 2008 Act.

Chapter 5: Prescription of Oppression Claims

I INTRODUCTION

It is trite that all claims which can be described as ‘debts’ can prescribe.¹ The length of time necessary for prescription is laid out in statute, generally in the Prescription Act,² and more specifically in other pieces of legislation such as the Road Accident Fund Act.³ As it is termed, prescription will begin to ‘run’ from the time that the debt was incurred, or from the time when the creditor became aware or reasonably should have been aware of the facts creating the debt.⁴ However, the term ‘debt’ is not defined in the Prescription Act.⁵ In this chapter, the author will analyse whether a claim by an applicant in terms of the oppression remedy can correctly be characterized as a ‘debt’ and thus whether such a claim can indeed prescribe. The reference material will include the recent Constitutional Court case of *Sanbonani*.⁶ Also, a comparison will be made to foreign law and the position there as to the time duration within which such a claim may be made, whether by common law or by legislation. This comparison will inform whether the position currently in South Africa needs to be reformed to balance the interests of all interested parties.

II *OFF-BEAT HOLIDAY CLUB v SANBONANI SPA SHAREBLOCK LTD*

(a) Facts of *Off-Beat Holiday Club*⁷

In this matter the first respondent operated a share block scheme that was developed by the second respondent. The third respondent – Harri – was the original investor and controlling mind of both the first and second respondent. Harri, together with related parties, owned 80% of the second respondent’s shares. Harri also was the largest shareholder in the first respondent owning 46.7% of its shares. The applicants were timeshare clubs that effectively controlled 29,14% of the shares in the first respondent, which shares were purchased in 1991. Prior to that, in 1988, the Memorandum of Incorporation (the ‘MOI’) of the first respondent had been amended giving special rights to the second respondent. The applicants launched the section 252 application,⁸ among others, complaining of oppressive conduct by Harri in amending the articles in 1988 and the allocation of shares in the first respondent to the second respondent in 2000.

¹ JS Saner ‘Prescription’ in WA Joubert (founding ed) *The Law of South Africa* vol 23 2 ed (2010) para 123.

² Prescription Act 68 of 1969 (hereafter the ‘Prescription Act’).

³ 56 of 1996.

⁴ Saner op cit note 1 para 125 citing s 12(2) of the Prescription Act.

⁵ John Saner *Prescription in South African Law* (Service 26) 3-58.

⁶ *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd* 2017 (5) SA 9 (CC).

⁷ See *Off-Beat Holiday Club (CC)* supra note 6 paras 2-8 and *Off-beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd* 2016 (6) SA 181 (SCA) paras 2-18.

⁸ The application was launched in 2008 in terms of section 252 of the Companies Act 61 of 1973.

(b) High Court⁹

In the High Court, Bertelsmann J dismissed the section 252 application ruling that the claim had prescribed on two bases. Firstly, the claim constituted a ‘debt’ in terms of the Prescription Act and as the applicants had known of the cause of action for many years, the claim had thus prescribed. Secondly, it was incorrect to characterise the impugned actions as ‘continuing wrongs’. They should rather be thought of as ‘single acts, albeit with long-term consequences’ which had prescribed as above. There is an important distinction between the prescription of single, completed acts and that of continuing wrongs, which has been acknowledged by the courts.¹⁰ Brand JA in *Barnett* identified the distinction as follows:

‘In accordance with this concept, a distinction is drawn between a single, completed wrongful act – with or without continuing injurious effects, such as a blow against the head – on the one hand, and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment, as long as the wrongful conduct endures.’¹¹

The importance of the distinction between a single act giving rise to a single debt and a continuing wrong resulting in a ‘series of debts’ is essentially that prescription would begin to run in the former case from the time the act was completed and the creditor had knowledge of the facts, whereas in the latter, there is a new cause of action which arises from each of the debts as it occurs and thus prescription must be calculated on each of these causes of action.¹² Thus, to summarise the defendant argued that the acts were single, completed acts which had prescribed after the three year period, and the plaintiff argued that the acts were continuing wrongs giving rise to new causes of action and thus not having prescribed at the time of issuance of summons.

(c) Supreme Court of Appeal (the ‘SCA’)¹³

On appeal, the SCA ruled that the term ‘debt’ had a wide and general meaning, including ‘an obligation to do or refrain from doing something that entails a right on one side and a

⁹ See *Off-Beat Holiday Club (CC)* supra note 6 paras 9-11.

¹⁰ See *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) 331F-G and *Barnett v Minister of Land Affairs* 2007 (6) SA 313 (SCA) paras 20-1. The latter was cited with approval in the minority judgment of Froneman J in *Off-Beat Holiday Club* supra note 6 paras 92-3.

¹¹ *Barnett* supra note 10 para 20.

¹² *Slomowitz* supra note 10 at 330A-331E; *Lombo v African National Congress* 2002 (5) SA 668 (SCA) para 19. An example of a continuing wrong may be found in *Symmonds v Rhodesia Railways Ltd* 1917 AD 582 where the plaintiff incurred new expenses for every day that the defendant failed to take back sheep that it had delivered to the plaintiff.

¹³ See *Off-Beat Holiday Club (CC)* supra note 6 paras 12-15 and *Off-Beat Holiday Club (SCA)* supra note 7.

corresponding obligation on the other'.¹⁴ The SCA further held that the claims against the respondents involved personal rights and were thus capable of prescription.¹⁵ The SCA rejected the applicants' argument that the claims were based on rectification and thus real rights.¹⁶ The SCA saw this argument as an attempt to seek a new contract between itself and the first respondent which the court would not concede to.¹⁷ The court thus held that the claim has prescribed.¹⁸

(d) Constitutional Court

In the Constitutional Court, the applicants argued that the SCA's interpretation of the term 'debt' was too wide and inconsistent with that interpretation given in the more recent case of *Makate*^{19,20} The appellants submitted that the CC there gave the narrower meaning of 'a claim for the payment of money or a claim for the delivery of something'.²¹ The argument followed that if their section 252 claims were neither, they were not debts and thus could not prescribe.²² The appellants alternatively argued that the claims were based on continuing wrongs which were not capable of prescription.²³ The respondents submitted that the claims would still fall under the narrower interpretation of *Makate* as the claims could be characterized as claims for performance of an obligation, especially with the focus on the ultimate aims of the relief the appellants sought.²⁴ The respondents also rebutted the 'continuing wrong' argument with the submissions that, firstly, the appellants were parties to such wrongs, and secondly, that the mere continuous existence of the MOI since before they became members cannot give rise to a claim of continuous oppression.²⁵

The CC overturned the SCA's ruling and held that a section 252 claim did not constitute a debt in terms of the Prescription Act.²⁶ The CC identified the issue at hand being whether a claim in terms of section 252 was capable of prescription, and not whether the claims founding the application were susceptible of prescription.²⁷ The basis of this decision lies in the wording

¹⁴ *Off-Beat Holiday Club (SCA)* supra note 7 para 32.

¹⁵ *Ibid* para 35.

¹⁶ *Ibid* paras 36-8.

¹⁷ *Ibid* para 38.

¹⁸ *Off-Beat Holiday Club (CC)* supra note 6 para 15.

¹⁹ *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC).

²⁰ *Off-Beat Holiday Club (CC)* supra note 6 para 17.

²¹ *Ibid* para 17.

²² *Ibid*.

²³ *Ibid* para 18. The appellants thus submitted that the continuing effect of the unlawful amendment of the company's constitution, the manipulation of the share blocks, and the building of a hotel on common property had a continuing effect which would prevent prescription from running.

²⁴ *Ibid* paras 19-20.

²⁵ *Ibid* para 21.

²⁶ *Ibid* para 53.

²⁷ *Ibid* para 29.

of the section and the procedural necessities to enforce the remedy. There were no rights and obligations for any parties until a court had made an equitable judicial determination that the requirements of the section had been proven, and that the court should grant appropriate relief.²⁸ Only at that point could the parties have been aware that they had obligations to discharge.²⁹ A delay in bringing the application, in any case, would inevitably be considered as part of the requirement that it be ‘just and equitable’ to grant relief.³⁰ Save for claims under section 252(2) there is no internal time limitation in the Companies with regard to section 252 claims.³¹ Additionally, a distinction should be drawn between a debt owed by one person to another which could have prescribed, and the claim in terms of section 252, which would determine that conduct giving rise to the debt was unfairly prejudicial, having prescribed.³²

In order that a court is able to correctly characterize the claim in terms of the Prescription Act, ‘there is a need for there to be an objective characterization of the claim independent of the averments of the parties that can be easily identified by a court and that advances rather than diminishes the purposes of the Prescription Act’.³³ That characterization is limited to the one which is found in the relevant legal provisions on which the claim is based even if that may be contrary to the characterization found in the applicant’s cause of action.³⁴

The court linked this with the wording of the section: specifically, the present-tense focus thereof.³⁵ The wording thus indicates that a court is allowed to remedy complaints which may be founded on prescribed or non-prescribed debts.³⁶ In this manner prescribed debts will not be revived.³⁷ Rather, they are taken into account in deciding whether it is in the interests of governance to allow for a just and equitable remedy now.³⁸ A remedy which incorporates such facts may be difficult to practically formulate but this should not be a bar to being able to found a claim on them at all.³⁹ This characterization of the section furthers the aim of countering

²⁸ Ibid paras 29-30. Mhlantla J emphasised that this was an ‘equitable’ remedy because such a remedy depends on the circumstances of the particular case. It follows that what could give rise to rights and obligations in one set of facts would not under another situation.

²⁹ Ibid. As the results of an equitable determination are not certain in advance it cannot be said that any rights or obligations exist or could be known to exist pending such determination.

³⁰ Ibid para 32.

³¹ Ibid para 35 read with s 252(2) of the 1973 Act.

³² Ibid paras 35-7. Froneman J in his minority judgment para 60 took issue with this point holding that the applicants had not sought a declaration that their oppression claim was not a debt. Thus, the court a quo and the SCA had correctly approached the case as one where it needed to decide whether each conduct complained of had prescribed. The judge there held that each was a debt in terms of the Prescription Act.

³³ Ibid para 33.

³⁴ Ibid paras 34-5.

³⁵ Ibid para 40.

³⁶ Ibid paras 39-40.

³⁷ Ibid para 41.

³⁸ Ibid.

³⁹ Ibid paras 41-2.

‘corporate bullying’ and as such complies with the much-repeated dictum that the remedy should be advanced and not limited.⁴⁰

The Court then turned to whether a section 252 claim is a ‘debt’ at all. This was informed by its decision in *Makate*⁴¹ where the court had to consider the opposing dicta of *Escom*⁴² and *Desai*.⁴³ In *Makate* the court held that ‘debt’ does not have a wide and general meaning which, when considering section 39(2) of the Constitution of the Republic of South Africa, 1996 (the ‘Constitution’) must be the one which is the least intrusive on a person’s right of access to courts under section 34 of the Constitution.⁴⁴ Thus, the court overturned the decision in *Desai* and the meaning under *Escom* is the prevailing one.⁴⁵ Thus, prescription does not apply to rights or obligations the objects of which are not money, goods or services.⁴⁶ Within this narrow meaning a section 252 claim would fall outside the term ‘debt’ in terms of the Prescription Act and thus would not be able to prescribe.⁴⁷ This is because a claim in terms of section 252 is a ‘far cry from something owed or due, or an obligation to pay money, deliver goods or render services to another’ but rather ‘it is the right to seek a judicial determination as to whether the applicants are entitled to a statutory remedy, the entitlement of which is determined on equitable grounds, and thus allows the court to consider the applicants’ tardiness, what may or may not have prescribed and whether a just and equitable relief in relation to the operation of the company may be justified’.⁴⁸ Furthermore, the section 252 remedy may be compared favourably with the statutory right granted in section 115 of the 1973 Act to apply to the court to rectify a members’ register which right has been declared not to be a ‘debt’ within the meaning of the Prescription Act.⁴⁹ Given this conclusion, the court did not decide whether the acts were continuing wrongs capable of prescribing or not, and thus that question remains unanswered.⁵⁰

⁴⁰ *Ibid* para 42.

⁴¹ *Makate* supra note 19.

⁴² *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A). The Court there gave a narrow meaning to debt at 344F: ‘that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another.’

⁴³ *Desai NO v Desai* 1996 (1) SA 141 (A). In this case the Court held that debt had ‘a wide and general meaning, and includes an obligation to do something or refrain from doing something’.

⁴⁴ *Off-Beat Holiday Club (CC)* supra note 6 para 44.

⁴⁵ *Saner* op cit note 5 at 3-61.

⁴⁶ *Ibid*.

⁴⁷ *Off-Beat Holiday Club (CC)* supra note 6 para 49.

⁴⁸ *Ibid*.

⁴⁹ *Ibid* paras 50-52.

⁵⁰ *Ibid* para 54.

III ANALYSIS

Although this case was decided in terms of section 252 of the 1973 Act the principles with regard to prescription will most probably be applicable to section 163 of the new Act.⁵¹ On a prima facie analysis of section 163, it is clear that there is no time limit within which to bring an application in terms of the section as there was in section 252(2) of the 1973 Act.⁵² However, Delpont submits that the principles of prescription should apply to oppression claims in terms of the new Act.⁵³ Prescription would be approached in a similar manner to that used in section 424 of the 1973 and the analogous sections 63, 64 and 65 of the Close Corporations Act 69 of 1984.⁵⁴ With regard to those cases the courts had ruled that the right to seek such a declaration was subject to prescription in terms of sections 10, 11 and 12 of the Prescription Act.⁵⁵ This would subject to the dictum in *Benson v Walters* 1984 (1) SA 73 (A) at 82A-D where Van Heerden JA held that there was a difference between when a debt becomes due and when it arises.⁵⁶ The difference being that the creditor may not know who the debtor is and what are the facts giving rise to the debt.⁵⁷ In those cases the court also cited *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) where it was stated that ‘a right and a debt are, after all merely opposite poles of one and the same obligation’ and ‘[e]ssentially, therefore, claiming payment of the debt is no different in principle from enforcing the right to payment of the debt’.⁵⁸ If this principle is applied to oppression claims the right to seek a declaration in terms of section 163 would be subject to prescription just as though it had already been declared oppressive conduct.

Consistent with the above, Delpont submits that this was in effect what Froneman J was considering in his minority judgment in *Sanbonani (CC)*.⁵⁹ Froneman J disagreed with the majority and held that oppression claims were subject to prescription.⁶⁰ Therein the judge claimed that oppression claims were no different to, for example, delictual claims in that certain elements were necessary to be proved before a court could rule that a delict had occurred.⁶¹

⁵¹ Delpont & Esser ‘Corporate law’ in Pretorius et al (eds) *Annual Survey of South African Law* (2016) 271. See *Grancy Property Ltd v Manala* 2015 (3) SA 313 (SCA) para 22 where the court held that the jurisprudence developed in terms of section 252 of the 1973 Act could apply to the interpretation and application of section 163 of the new Act.

⁵² Delpont (ed) *Henochsberg on the Companies Act 71 of 2008* (Service Issue 17) 574(2).

⁵³ *Ibid.*

⁵⁴ *Ibid.*; PM Meskin (ed) *Henochsberg on the Companies Act 61 of 1973* 5 ed (Service Issue 33) 915. These detailed the liability which directors and members (of close corporations) could face for fraudulent business conduct.

⁵⁵ Meskin (ed) op cit note 54 at 914 citing *Burley Appliances v Grobbelaar* [2003] 3 All SA 505 (C) 514-6 and *Barnard NO v Bzuidenhout en Andere* 2004 (3) SA 274 (T).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* at 915.

⁵⁸ *Ibid.* at 914-5.

⁵⁹ Delpont (ed) op cit note 52 at 574(2).

⁶⁰ *Off-Beat Holiday Club (CC)* supra note 6 paras 76, 84.

⁶¹ *Ibid.* para 77.

However, this only converted a debt into a judgment debt, and did not in effect create a debt *ab initio*.⁶²

The judge also took issue with the ‘just and equitable remedy’ solving the problem in that similar powers with regard to section 172(1) of the constitution would mean other statutory prescription provisions might not bear constitutional muster which is inconsistent with the case law.⁶³ Compounding this situation is that both discretionary remedies and statutory obligations have been held to be able to prescribe.⁶⁴

There may be an additional argument against the approach in the majority judgment in the approach to determining whether a claim in terms of section 252 (and section 163) could prescribe. The majority judgment analysed the nature of the relief sought in terms of section 252(3).⁶⁵ Rather, as per the minority judgment of Madlanga J, the focus should be on the conduct and the resultant claim.⁶⁶ In this manner the conduct will be tested against the definition in *Makate* and therein a determination will be made whether the Prescription Act applies.⁶⁷ This would prevent claims based on the same conduct unjustly having different prescription outcomes due to differing bases of the claims, and differing available remedies.⁶⁸

The Constitutional Court has thus left the following problem: how can an unreasonable delay in prosecuting a claim be countenanced by the courts if that claim deserves to be limited due to delay but does not fall under the Prescription Act or other statutory prescription.⁶⁹ There must be a mechanism to fill this hole so as to prevent those matters which would contravene the principle of *interest rei publicae ut sit finis litum*.⁷⁰

(a) Foreign Jurisdictions

In light of *Sanbonani*, and the question as to whether a claim with regard to oppression relief can prescribe, it would be insightful to consider how similar foreign jurisdictions deal with this matter, specifically Australia, Canada and England.

In Australian law, there is no uniform position, firstly, as to the presence of a limitation period, and secondly, as to the length of such limitation period as there is no Commonwealth statutory provision providing for a limitation period for oppression claims, both in terms of a

⁶² Ibid.

⁶³ Ibid para 78 and fn 60 and the authorities there cited.

⁶⁴ Ibid para 78.

⁶⁵ Ibid para 101.

⁶⁶ Ibid para 105.

⁶⁷ Ibid para 105.

⁶⁸ Ibid paras 100, 104, 106.

⁶⁹ F Snyckers ‘Prescription under siege time for wolgroeiens’ (2017) 30(2) *Advocate* 29 at 30.

⁷⁰ Ibid at 31 translating this maxim as providing a manner in which the courts can halt legal claims which are too old to be dealt with.

general ‘prescription’ statute or a provision within the Australian Corporations Act, 2001. It must be remembered that oppression claims are claims in equity.⁷¹ Thus, in states where there are no limitations on equitable claims, the delay in bringing the claim will influence the court’s discretion in granting relief.⁷² In other states, equitable claims may be included in the limitation period provided under that State’s Limitation Act if it may be included by analogy.⁷³ In yet other States, claims in equity are expressly included in the Limitation Act.⁷⁴ Australian law thus leaves it to each State to determine its method of determining the prescription of claims.

The Canadian equivalent of the Prescription Act is the Limitations Act, 2002.⁷⁵ The statute of limitations in Ontario is two years after the day on which the claim was discovered.⁷⁶ A defendant in an oppression claim may seek a motion to dismiss the claim on the basis that the claim was outside the limitation period. In such a case it falls to the respondent in such a motion to prove that the claim was initiated within the applicable limitation period.⁷⁷ The only prima facie difference between the South African and Ontario Acts is the difference in time period being 3 years in South Africa and 2 years in Ontario.

The predominant position in Canada is that the date of the claim is determined from the date on which the oppression was discovered to have occurred.⁷⁸ The continuation of such oppressive conduct does not extend the limitation period further than two years from such discovery.⁷⁹

However, there have been cases where continuing oppressive conduct was held not to activate the statute of limitations.⁸⁰ The court there held that the oppressive act continues until it is rectified.⁸¹ Koehnen submits that the proper approach is the former one as it is a general

⁷¹ *BCE Inc v 1976 Debentureholders* 2008 SCC 69 para 68; *Off-Beat Holiday Club (CC)* supra note 6 para 28.

⁷² Sections 10, 43 Limitation of Actions Act, 1974 (Queensland).

⁷³ Section 23 Limitation Act, 1969 (New South Wales); Section 5 Limitation of Actions Act, 1958 (Victoria). The application of prescription to an equity matter by analogy has been described by Meagher JA in *Gerace v Auzhair Supplies Pty Ltd* [2014] NSWCA 181 para 70 as follows: “The authorities referred to above, and in particular *R v McNeil*, show that in purely equitable proceedings, where there is a corresponding remedy at law in respect of the same matter and that remedy is the subject of a statutory bar, equity will apply the bar by analogy unless there exists a ground which justifies its not doing so because reliance by the defendant on the statute would in the circumstances be unconscionable”. The original principle was described by Lord Westbury LC in *Knox v Gye* (1872) LR 5 HL 656, 674-5. For further discussion of this principle see Natalie Skead ‘Limitation Act 2005 (WA) and equitable actions: a fatal blow to judicial discretion and flexibility – how other Australian jurisdictions might learn from Western Australia’s mistakes’ (2009) 11 *University of Notre Dame Australia Law Review* 1.

⁷⁴ Section 27 Limitation Act, 2005 (Western Australia).

⁷⁵ Limitations Act, 2002, SO 2002, c 24 (‘Ontario Limitations Act’). There is no uniform statutory limitation period across Canada. Rather, each Province legislates regarding this aspect of the law, the example here used being the Ontario Limitations Act.

⁷⁶ Section 4 Ontario Limitations Act. The details as to the day on which the claim is determined to have been discovered is found in s 5 of the Ontario Limitations Act.

⁷⁷ *Maurice v Alles* 2015 ONSC 1671 para 43 citing *McSween v Louis OJ No 2076* (CA) para 76.

⁷⁸ *Ibid* paras 56-7.

⁷⁹ *Ibid* para 55; *Fracassi v Cascioli* 2011 ONSC 178.

⁸⁰ *Hart Estate v Legacy Farms Inc* [1999] BCJ No 312.

⁸¹ *Ibid*.

principle that '[l]imitation periods begin when the cause of action arises, not when it is remedied'.⁸²

In English law, there is no statutory limitation with regard to a section 994 petition for unfair prejudice. However, a period of delay between the unfairly prejudicial conduct and the institution of the petition will be taken into consideration in the court's granting relief.⁸³ This principle follows on from the unfair prejudice remedy being an 'equitable remedy'.⁸⁴ The principle of prescription by analogy also applies in English law and has been applied in unfair prejudice cases.⁸⁵ English common law also contains the principle of laches which can be described as an equitable defense by a defendant where there has been an inordinate delay.⁸⁶ However, this principle has been held to be inapplicable in South African law.⁸⁷ It was found not to be part of South African law.⁸⁸ This was held to be because there existed the *exceptio doli* which prevented claims prosecuted in unconscionable circumstances including unreasonable delay.⁸⁹ However, the *exceptio* was also ruled not to be part of South African law in the case of *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A) at 607B.⁹⁰ Additionally, the defenses of waiver and estoppel are not suitable to be applied in all cases which the court might want to exclude from hearing.⁹¹

An analysis of foreign law thus shows two possible methods of dealing with delayed oppression claims. Firstly, the fact of delay may be considered in determining the appropriate relief to be granted.⁹² The other approach is to specifically provide for prescription in a prescription statute.⁹³ The second approach would be more consistent with South African law, especially since South Africa has, firstly, a Prescription Act, and secondly, because as recently

⁸² Markus Koehnen *Oppression and Related Remedies* (2004) 57.

⁸³ *Re Grandactual Ltd* [2005] EWHC 1415 (Comm) para 20.

⁸⁴ *BCE Inc* supra note 71 para 68; *Off-Beat Holiday Club (CC)* supra note 6 para 28.

⁸⁵ See Liam Tolen 'Unfair prejudice, excessive directors' remuneration and delay' available at:

<https://www.ashfords.co.uk/news-and-events/general/unfair-prejudice-excessive-directors-remuneration-and-delay>, accessed on 19 October 2018 where Tolen discusses the case of *Re CF Booth Limited* [2017] EWHC 657 (Ch) in which it was decided that despite there not being a limitation period for unfair prejudice claims in the United Kingdom, where there had been an unreasonable delay and specifically statutory directors duties had been contravened, which conduct did have a limitation period, it could be limited by analogy to the six year limitation period for breach of directors duties.

⁸⁶ *Snyckers* op cit note 69 at 31 citing *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A). In such cases there was no applicable prescription period and the opposing party had between the claim arising and prosecuting it in some manner changed its position. See also Clare Stanley & Michael J Ashdown 'Laches and limitation' (2014) 20(9) *Trusts and Trustees* 958 for a discussion of this principle.

⁸⁷ *Ibid* at 29, 31.

⁸⁸ *Ibid* at 31.

⁸⁹ *Ibid*.

⁹⁰ *Ibid* at 29, 31.

⁹¹ *Ibid* at 31.

⁹² As is the case in English law and in some Australian States.

⁹³ As is the case in Canada and in other Australian States.

as the 1973 Act, there was an internal prescription period for specific conduct which may be termed ‘oppressive’.⁹⁴

(b) The ‘delay rule’

One last mechanism, as considered by Snyckers, is the adoption of the ‘delay rule’ as applied in *Wolgroeiens Afslaaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A).⁹⁵ The rule was applied in the administrative law setting before there was a statutory provision regulating the position of a delay in bringing a review in that sphere of law.⁹⁶ The rule was applied in two stages.⁹⁷ Firstly, it was determined if indeed there was an unreasonable delay before instituting legal proceedings.⁹⁸ If so, the court had the discretion of nevertheless condoning the delay.⁹⁹ The Appellate Division in *Wolgroeiens* held that it had the inherent jurisdiction to regulate its own process, including time periods, where statute or the common law did not do so.¹⁰⁰ Furthermore, unlike the special plea of prescription, the court can even *mero motu* raise the ‘delay rule’ during the legal proceedings.¹⁰¹ Finally, the ‘delay rule’ would have the advantage in that it does not have to be pleaded in the same manner prescription must.¹⁰² This would have to be balanced with the disadvantage of trading the legal certainty surrounding the principles of prescription with the inherently uncertain principles involved whenever a discretionary power is exercised.¹⁰³

Snyckers argues that there should be no barrier to implementing this rule in regulating procedural law in private law disputes given that the two rationales as cited by the courts for using the rule being, firstly, the maxim quoted above which has been said to underpin prescription and laches, and secondly, the avoidance of prejudice to the other litigants, can apply equally to a private defendant as to the state or public administration.¹⁰⁴ Furthermore, this mechanism would only apply so long as there is no statutory period of prescription, which admittedly it would be difficult to legislate for given that the Constitutional Court has

⁹⁴ Meskin (ed) op cit note 54 at 477.

⁹⁵ Snyckers op cit note 69 at 31.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid, i.e. a ‘reasonableness’ enquiry.

⁹⁹ Ibid. A court could thus condone such delay even if there had been an unreasonable delay.

¹⁰⁰ Ibid at 31-2. This rule as such only applies to procedural rules of legal practice. It would also be consistent with the powers granted to the courts in s 173 of the Constitution.

¹⁰¹ Ibid at 32 comparing the delay rule to the prohibition of the court raising prescription *mero motu* found in s 17 of the Prescription Act.

¹⁰² Ibid.

¹⁰³ Ibid at 33.

¹⁰⁴ Ibid at 32.

determined that a section 252 (and a section 163) claim cannot prescribe.¹⁰⁵ That period would have to be an internal limitation of section 163 similar to that found in section 252 of the 1973.

IV CONCLUSION

As a result of the Constitutional Court's judgment in *Off-Beat Holiday Club*, claims for relief in terms of the oppression remedy do not prescribe. Thus, it will remain up to the courts to take the delay into account when determining the appropriate relief, or, as suggested, to develop its procedural rules so as to disallow claims which have been unreasonably delayed in terms of the above-mention 'delay rule'. The alternative is for the legislature to act and create a statutory prescription requirement, either in the oppression remedy itself in the Companies Act or to amend the Prescription Act itself to provide for oppression claims. Whether it is the courts or Parliament that does act, the result must be to create legal certainty as to the position with regard to unreasonably delayed claims for oppressive relief and the length of time which will be allowed to lapse before the claimant will be barred from making such a claim.

¹⁰⁵ Ibid at 33.

Chapter 6: Recommendations and Conclusion

This dissertation has analysed several issues key to the effective and efficient operation of the statutory oppression remedy in South African company law. This has been done through the lens of following the development of the remedy from the 1926 Act, through the 1973 Act and now the 2008 Act. Additionally, the author has sought to identify whether shortcomings identified in the current operation of the oppression remedy may be overcome when putting the South African position next to those of foreign jurisdictions, specifically Australia, Canada and England which have been said to contain similar provisions in their oppression remedies to that of the South African version.

The unregistered applicant is in a particularly vulnerable position in South African law due to the definition of a ‘shareholder’ in terms of all three South African Companies Acts wherein no locus standi is provided for a beneficial owner of an interest in a share.¹ This position was slightly different with regard to the 1973 Act where *Nomine Officii* could demand entry onto the members’ register.² However, currently the only shareholders granted access to apply for oppression relief are those who have been entered as such in the shareholders register. After looking at the broad Canadian remedy, and the slightly narrower Australian and English remedies it has been recommended that, firstly, the position with regard to *nomine officii* be restored to that found in the 1973 Act, and secondly, to provide greater protection to minority shareholders in the broadest manner possible, to entitle all beneficial owners status in terms of section 163.³ This could be through an amendment to the definition of ‘shareholder’ or through an extension of the express applicants in section 163(1).⁴

The new Companies Act provides that an applicant may seek relief when an ‘act or omission of the company’ has had the proscribed effect.⁵ The author analysed what is included in ‘an act or omission’ specifically as it must have had a ‘result’ which was oppressive. The courts have determined that past and continuing conduct is included. However, threatened or future oppressive conduct has been ruled throughout the various iterations of the South African Companies Acts to be excluded from the ambit.⁶ This is especially prejudicial to minority shareholders who must wait for actual harm to be incurred before they can apply for relief.

¹ Supra Ch 2.II-IV.

² PM Meskin (ed) *Henochsberg on the Companies Act 61 of 1973* 5 ed (Service Issue 33) 205-6.

³ A Sibanda ‘The statutory remedy for unfair prejudice in South African company law’ (2013) 38(2) *Journal for Juridical Science* 58 at 75.

⁴ Aubrey Sibanda ‘Advancing the statutory remedy for unfair prejudice in South African company law: perspectives from international jurisprudence’ (2015) *SAMLJ* 401 at 409-16.

⁵ Section 163(1)(a) Companies Act 71 of 2008.

⁶ Supra Ch 3.III-IV.

This position may be remedied by the legislature through amending section 163 to expressly include threatened oppression in a similar manner to Australian and English law.⁷ However, in the interim it may be left to the courts to adopt a liberal interpretation of the section together with associated provisions in the new Companies Act to give such shareholders access to the invaluable relief which appears to be included in section 163 specifically to counter future oppressive conduct.⁸ Additional points which the courts will need to provide finality on include whether the act or omission itself must be oppressive, and not only the result, and also the effect which section 66(1) will have on what conduct can actually be said to be acts or omissions ‘of the company’.

In Chapter 4, the author reflected on the interaction between the oppression remedy and the judicial non-intervention rule, which generally requires the courts to stand back when requested to interfere in the internal management of a company.⁹ This rule was traced back to the English case of *Foss v Harbottle*¹⁰ which was received as part of the common law regarding companies in South Africa. This non-interventionist approach was abandoned in part in 1952 with the introduction of the statutory oppression remedy, firstly, to intervene when it would be more burdensome to wind-up a company than providing an exit for the minority shareholder, and secondly, for the courts to generally provide relief to minority shareholders where the majority shareholders or the company had been acting ‘oppressively’ in any manner which it considers appropriate.¹¹ This form of judicial intervention has been broadly followed in the jurisdictions analysed in this dissertation and appears to be in line with those jurisdictions. However, it falls to the court to use its discretion judiciously and only to remedy the oppression present in the company and not to overstep its bounds and act to punish or penalize the other actors.¹²

Finally, the issue of whether a claim in terms of the oppression remedy can prescribe has gained the attention of the Constitutional Court which ruled that such claims in terms of the 1973 Act do not prescribe.¹³ The court was cognizant that the conduct giving rise to the claim could have already prescribed and sought to differentiate this from the right to claim in and of itself.¹⁴ This situation was said to be relieved in the discretion that the court has to give

⁷ Ibid Ch 3.VI.

⁸ Maleka Femida Cassim ‘The appraisal remedy and the oppression remedy under the Companies Act of 2008, and the overlap between them’ 2017 *SAMLJ* 309 at 310.

⁹ JT Pretorius (ed) *Hahlo’s South African Company Law Through the Cases* 6 ed (1999) 403.

¹⁰ (1843) 2 Hare 461.

¹¹ Supra Ch 4.II-IV.

¹² PA Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (Service Issue 17) 574(19).

¹³ Ibid Ch 5.II.

¹⁴ *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd* 2017 (5) SA 9 (CC) para 29.

relief it considers appropriate in the circumstance.¹⁵ The legislature would be wise to take note of the lack of prescription of these claims in light of the principle of legal certainty with regard to conduct which occurred in the distant past. An analysis of foreign jurisdictions has identified possible methods of dealing with prescription. The English courts have adopted the South African approach but also have the common law doctrine of laches to support the courts in cases of unreasonable delay of bringing an application.¹⁶ In Australia and Canada, there are statutory time limits as to the bringing of oppression claims, either at federal or state/province level.¹⁷ However, there is one additional rule which could aid the courts in such cases, being the ‘delay rule’ which was applied in administrative law cases before there was a statutory time limit imposed.¹⁸ It is submitted that the ideal position would be to provide a statutory time limit as there previously was in the 1973 Act as this would be ideal in terms of legal certainty. Judicial discretion could be a subordinate method, but it is submitted that this would have the disadvantage of the uncertainty of judicial discretion.¹⁹ Whichever method is ultimately utilized, it should be comprehensive and provide legal certainty.

¹⁵ *Ibid* para 32.

¹⁶ *Supra* Ch 5.III.(a).

¹⁷ *Ibid*.

¹⁸ *Ibid* Ch 5.III.(b).

¹⁹ F Snyckers ‘Prescription under siege time for wolgroeiens’ (2017) 30(2) *Advocate* 29 at 33.

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