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The doctrine of contemporaneous share ownership and aspects of *locus standi* in the new derivative action

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Abstract

Bearing in mind that the purpose of the derivative action is to empower minority shareholders and other stakeholders to protect the legal interests of the company when those charged with its management wrongfully fail to do so, the class of applicants is vital to the efficacy of the statutory derivative action. This article discusses various aspects of locus standi to institute a derivative action under s 165 of the South African Companies Act 71 of 2008. These include the doctrine of contemporaneous ownership of shares, the continuing interest principle, the multiple derivative action, and the classes of applicants who are given standing to bring derivative actions, the last of which notably embraces trade unions. A comparative approach is adopted that takes into account the leading common-law jurisdictions, including Canada, Australia, the United Kingdom, New Zealand and the United States of America, as well as the laws of Nigeria, Ghana and Botswana.

I Introduction

Company law provides shareholders with a variety of protective measures that apply when their legal rights and interests have been violated by those in control of the company. If, on the one hand, the directors have violated a right owed directly to the shareholders *as individuals*, such as rights enjoyed by shareholders under the corporate constitution or derived by shareholders from companies legislation or the common law, the aggrieved shareholder could seek to enforce his or her (or its) right in an individual direct action against the alleged wrongdoers. The Companies Act 71 of 2008 ('the Companies Act') preserves the common-law personal action, in which a wronged shareholder may assert his or her individual shareholder rights by bringing an action in his or her own name. [1] On the other hand, the shareholders may claim conversely that the wrongdoing of the directors has harmed the *company* and has prejudiced the interests of shareholders only indirectly. Illustrative of such claims are the directors' breach of their fiduciary duties in fraudulently appropriating for themselves corporate opportunities or engaging in self-dealing, or an improper refusal by the directors to enforce a valid corporate claim against an outsider. The shareholder's loss in these circumstances may be a diminution in the value of

his or her shares or a loss of dividends, and derives from the fact that the alleged wrongdoing has caused loss to the company. In other words, the shareholder's loss is merely reflective of the company's loss. A shareholder in these circumstances may not pursue a direct cause of action in which the shareholder asserts his or her own personal rights based on the fall in the market value of his or her shares. [2] The shareholder may however bring a derivative action on behalf of the company, to vindicate *corporate* wrongs that the board had improperly refused to remedy. [3]

The object of the derivative action is both compensation and deterrence. It not only enables minority shareholders and others concerned with the company's welfare to obtain compensation for the company (and indirectly all its shareholders) from delinquent directors and others who cause harm to the company, but also serves as a deterrent to future wrongdoing by directors. [4] The derivative action is also very useful in promoting good corporate governance, by its effective use as an instrument for minority shareholders to hold directors and managers accountable. [5] In the light of its distinct nature and the potential for its abuse, the statutory provisions on derivative actions feature an array of procedural requirements, screening measures and threshold tests.

A key threshold issue is who may institute a derivative action. Although s 165(2)*(a)* of the Companies Act endows shareholders with standing to bring a statutory derivative action, several important — and as yet unanswered — issues of practical importance emerge. First, it is a key question whether a derivative action may be brought by a shareholder who holds only a few shares in the company that he or she acquired only recently. Secondly, is it sufficient for the applicant in derivative proceedings to hold shares in the company merely at the time that the legal action is initiated by him or her?

Or, alternatively, should the applicant be required to maintain a continuing interest by holding the shares throughout the duration of the legal action? What if the applicant sells his or her shares soon after initiating a derivative action? Thirdly, must the applicant be a contemporaneous owner, who had held his or her shares at the time of the wrong done to the company, or may any shareholder apply for leave for a derivative action irrespective of whether the wrong was perpetrated before or after he or she became a shareholder? In contrast to the previous statutory derivative action in s 266 of the Companies Act 61 of 1973, under which only the shareholders of the wronged company had standing to bring a derivative action for or on behalf of that company, the new Companies Act endows a far wider category of applicants with standing to apply to a court for leave to institute a statutory derivative action. Moreover, s 165 of the Companies Act now gives statutory recognition to the multiple derivative action, in terms of which locus standi is granted not only to shareholders of the wronged company but also to the shareholders of its holding company, subsidiaries and related companies. These fundamental issues of locus standi to bring a derivative action form the focus of this article.

A comparative approach is adopted to take into account the provisions on derivative actions in the leading common-law jurisdictions on which the South African statutory derivative action is modelled, [6] including Canada, Australia, New Zealand and the United Kingdom, as well as the laws of the United States of America. Reference is also made to the laws of Botswana, Nigeria and Ghana (including the Ghanaian Companies Bill of 2013) which, like South African law, have been strongly influenced by the common-law models of the derivative action.

II The contemporaneous ownership rule

It is patent from a literal interpretation of s 165 of the Companies Act that to bring a derivative action the shareholder must hold shares in the company at the time of initiating the procedure. In this regard, s 165(2)*(a)* confers standing on a person who is a shareholder at the time he or she serves a demand on the company requiring the company to take suitable remedial action to protect its own legal interests. Although the shareholder is plainly required by the Companies Act to hold shares in the company at the time he or she initiates the procedure for a derivative action, the question arises — may the shareholder litigate in respect of a wrong done before he or she became a shareholder? The South African courts have not yet had occasion to consider the contemporaneous ownership rule.

According to the contemporaneous ownership principle of standing, the applicant in a derivative action must have been a shareholder not only at the time of the legal proceedings, but also at the time of the wrong of which he or she complains. In general, under the laws of the United States of America

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('US'), contemporaneous ownership is essential. [7] In this regard, the derivative litigant in most US states must have been a shareholder at the time of the transaction of which he or she complains, or (exceptionally)
through inheritance from a prior owner who was a shareholder at the ti

The modern rationale behind the contemporaneous ownership rule is
opportunistic persons for the sole purpose of bringing a legal action. [9] B
claim brought by a shareholder with no real intention of obtaining recovery for the company, but of extorting a secret or collusive settlement for himself or herself based on the nuisance value of the claim. [10]

A further justification for the contemporaneous ownership principle is that shareholders who purchase their shares in the company *after* the prior wrongdoing have sustained no injury from the prior wrong; they would consequently obtain a windfall if they were permitted to seek recovery for the wrong. [11] Any recovery for prior wrongs would result in the unjustified enrichment of the shareholder, bearing in mind that he or she had purchased the shares at a discounted price that had already reflected the damage perpetrated on the company. It would also enable the shareholder to recoup a large part of the purchase price he or she had agreed to pay for the shares. [12]

There is no explicit legislative requirement of contemporaneous ownership under the South African Companies Act. A court, nonetheless, retains a discretion as to whether to introduce this restrictive rule of standing into South African law. When exercising its discretion to grant or refuse leave to a shareholder to bring a derivative action, the court arguably has a residual discretion [13] under s 165(5) to consider additional criteria over and above

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those prescribed by the subsection, such as the contemporaneous ownership principle.

It is, however, submitted that there are strong reasons for the courts to reject the contemporaneous ownership rule. On policy grounds, the windfall justification of the rule is flawed. The shareholder, who acquires his or her shares in the company after the time of the wrongdoing, makes a windfall in a derivative action only if he or she acquires the shares at a discounted price that takes into account the prior wrong perpetrated on the company. If the wrongdoing was not disclosed to the public or not otherwise known to the applicant at the time he or she acquired the shares, the share price paid by him or her would not reflect a discount and there would be no windfall for him or her in a derivative action. [14] Even where the damage done to the company is publicly disclosed, the discount to the share price would not necessarily be a full reflection of the harm. [15] This is because the price of the shares may take into account the possibility of recovery by the company in a legal action for the wrongdoing. The windfall rationale consequently is fallacious. In the absence of full public disclosure of the wrongdoing, there will usually be no windfall for the non-contemporaneous shareholder in a derivative action.

It is paradoxical that the contemporaneous ownership doctrine seeks to prevent a shareholder who acquires his or her shares after the wrong from making a windfall by bringing a derivative action, while at the same time allowing such shareholder to make such windfall by benefitting from corporate recovery in a derivative action brought by another shareholder who had held shares at the time of the wrongdoing.

The windfall argument loses sight of the foundational principle that the purpose of a derivative action is to redress a wrong done to the company, and that a shareholder who takes the initiative of bringing a derivative action acts for the company and not for himself or herself personally. Whether the shareholder makes an indirect windfall or whether the shareholder acquired the shares before or after the wrong inflicted on the company, should consequently have no bearing on the vindication of the company's right.

The contemporaneous ownership rule was held to be inappropriate in the context of the previous common-law derivative action (which in South Africa was historically based on English law). [16] As the court incisively

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proclaimed in the English case *Smith v Croft (No 2)*, [17] a shareholder in a common-law derivative action was 'able to assert a cause of action which arose before he became a shareholder because it [was] the company's and not his substantive right that [was] being enforced'. Although the South African Act has now abolished the common-law derivative action, [18] it is submitted that the underlying reasoning in *Smith v Croft* is no less relevant to the statutory derivative action under s 165 of the Act.

Despite its adoption in the vast majority of US states, the contemporaneous ownership rule has been the subject of controversy and criticism in the US on the ground that it is unduly restrictive and technical. [19] Some US states have even eased or limited the rule [20] by creating exceptions to prevent injustice, [21] while the US courts have carved out an exception in respect of 'continuing wrongs'. [22] For instance, in *Palmer v Morris*, [23] the plaintiff in a derivative action purchased his shares after the corporation had entered into the wrongful transaction but before the relevant payments under the transaction were made. In this instance, the plaintiff's standing was upheld, on the basis that the wrong was continuing in nature. The converse line of reasoning to the contemporaneous ownership rule is that a cause of action for the wrongdoing of directors is a part of the assets in which shareholders have a transferable interest. Accordingly, it is immaterial whether the shareholder

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who seeks to vindicate the right had held his or her shares at the time of the wrongful transaction. [24]

It has been contended in the US that the contemporaneous ownership rule is not necessary for the prevention of purchased litigation [25] and strike suits. [26] This argument, in the South African context and environment, is even more compelling. South Africa does not have a litigious culture akin to the US. The South African derivative litigant, unlike his or her US counterpart, is restrained or even deterred by burdensome rules on legal fees and costs such as the 'loser pays' principle and the prospect of an order of security for costs. [27] Far more shareholder-friendly rules on legal costs and fees are found in the US, such as the contingency-fee system, the rejection of the 'loser pays' rule and the common-fund doctrine, [28] all of which make the derivative action much more accessible to US litigants than to litigants in South Africa. The South African Companies Act is, furthermore, infused with a host of protective measures to deter strike suits, greenmail, [29] and other nuisance claims. The judicial control of settlements in terms of s 165(15) of the Companies Act, for instance, is directly targeted at impeding collusive or private settlements, while the prevention of strike suits and nuisance claims is the dominant purpose of the judicial control of derivative proceedings in s 165(5). [30] Section 165(5) requires a stakeholder who wishes to litigate a corporate cause of action to first obtain the leave of the court, guided by three threshold tests, namely that he or she is acting in good faith, there is a serious question to be tried, and it is in the best interests of the company. [31]

On the basis of the reasons discussed above, the preferable approach thus is for the South African courts to reject firmly the contemporaneous ownership rule. An adoption of the rule by a restrictive judicial interpretation of s 165 would frustrate rather than advance the worthy purposes of the derivative action. Not only is there no convincing rationale for the contemporaneous ownership doctrine in the broader context of South African company law,

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but the doctrine is not mandated by either the Companies Act or by common law.

Previously at common law, not only was a shareholder able to assert a corporate cause of action that arose before he or she became a shareholder, but the shareholder was able to assert the cause of action even if he or she had bought shares in the company for the very purpose of qualifying as a shareholder in order to bring a common-law derivative action. [32] As a safeguard against purchased litigation and other abuses, this was subject to his or her bona fides as a shareholder in the company [33] so that the (non-contemporaneous) shareholder could not, for instance, bring a derivative action as a strategy to further the aims of a competing company. Despite the abolition of the common-law derivative action in South Africa, these principles remain sound. For the purposes of the statutory derivative action in s 165 of the South African Act, the contemporaneous ownership rule is not needed to prevent abuse of the derivative action by litigious persons who may purchase

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a few shares in a company with the singular object of qualifying as applicants for the derivative litigation of prior wrongs. The threshold tests of good faith and the best interests of the company under s 165(5)*(b)*(i) and (iii) are sufficient shields to ward off such opportunistic shareholders.

It is notable that the United Kingdom Companies Act [34] now adop
of the contemporaneous ownership doctrine. Section 260(4) of the U
cause of action arose before or after the person seeking to bring or c
Australian, Nigerian, Ghanaian and Botswana statutes, [35] by contrast, are less progressive. Like their South African counterpart they are silent on the topic of contemporaneous ownership.

III Minimum shareholding

A fundamental question is whether a derivative action may be brought by any shareholder, even though he or she holds just a few shares in the company that he or she acquired only recently. In some jurisdictions such as Belgium, [36]

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Italy, [37] Spain, [38] and Germany, standing in a derivative suit is conditioned on holding a specified percentage of the company's shares. German law, for instance, permits a derivative action to be filed only by one or more persons holding at least 1 per cent of the company's share capital or having a nominal value of at least 100 000 euros. [39]

None of the leading common-law jurisdictions, however, has a minimum shareholding condition for derivative actions, including the United Kingdom, Australia, Canada [40] and the USA. [41] Botswana, Nigeria and Ghana also do not have a minimum, the last mentioned in terms of the current Ghana Companies Code, 1963 and as proposed in the Ghana Companies Bill of 2013, which is intended to modernise Ghanaian company law. The South African Companies Act likewise does not impose a minimum shareholding requirement. The consequence is that any shareholder in these jurisdictions has standing to apply for leave for a derivative action, regardless of whether he or she holds only a few shares in the company or merely a single share.

It is submitted that this is the correct approach. It is in keeping with the altruistic nature and purposes of the derivative action. As explained in the English case *Seaton v Grant* (in respect of the previous common-law derivative action), the size of the applicant's shareholding is irrelevant if the claim is one that should otherwise be brought in the aggregate interest of all the shareholders.

Although the absence of a minimum shareholding requirement creates some leeway for opportunistic parties to acquire a token shareholding in the company with the aim of bringing a derivative action driven by an ulterior purpose or a strike suit, this risk is neutralised by the test of good faith in s 165(5) of the Companies Act. [43] Shareholders with a negligible shareholding and therefore little incentive to sue on the company's behalf may be refused the leave of the court to institute derivative proceedings on the basis of a lack of good faith. [44] The absence of any personal interest or self-interest on the part of an applicant may be taken to show a lack of good faith. The court should thus be prudent and circumspect in assessing the good faith of applicants who hold only a few shares in the company.

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IV Continuing interest

May a shareholder who commences a derivative action continue the action if he or she ceases to be a shareholder? The South African Act is silent on whether a shareholder must maintain a continuing interest in the company, by holding his or her shares from the time that he or she initiates the derivative proceedings and throughout the duration of the litigation.

On a strict literal interpretation of s 165 of the Act, the applicant must be a shareholder at the time he or she makes a demand on the company in terms of s 165(2). However, he or she is not explicitly required to remain a shareholder until the time he or she applies to court for leave to bring a derivative action, nor is he or she explicitly required to continue to hold the shares during the pendency of the legal action. In this regard, s 165(2)*(a)* states that '[a] person may serve a demand upon a company ... *if the person is a shareholder*' while s 165(5) states merely that '*A person who has made a demand* in terms of subsection (2) may apply to a court for leave' (emphasis supplied).

Although the South African Companies Act does not stipulate any requirement of a continuous ownership of shares by the derivative litigant, there are strong reasons for the courts to impose a continuing interest requirement. An applicant who divests his or her shareholding during the course of derivative proceedings lacks a sufficient interest to enforce the rights of the company. He or she is likely to be acting for an improper purpose without a genuine intention, or for his or her own personal advantage rather than for the company's benefit. The court should accordingly debar such applicants under the screening test of good faith under s 165(5)*(b)*(i) of the Companies Act. On the grounds of an absence of good faith, the court could and should refuse to grant leave for derivative proceedings to an applicant who, after making a demand under s 165(2), has sold his or her shares in the company.

If the shareholder sells his or her shares only after obtaining leave for a derivative action or even after commencing a derivative action, the proper approach is that he or she should lose legal standing. But in these cases, the court should allow the derivative action to continue by permitting another eligible applicant, on application under s 165(12), to replace him or her. This would be in the best interests of the company whose legal rights are being enforced in the action.

An exception perhaps could be made to the continuing interest requirement in circumstances where the shareholder is forced to relinquish his or her shares in a merger to which he or she did not acquiesce, particularly where the purpose of the merger was fraudulent or illegal or where the merger was directed at ousting the shareholder and the derivative action brought by him or her. [45]

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The approach suggested above is in keeping with the former rule at common law. A common-law derivative action commenced by a shareholder could not be continued by him or her if he or she ceased to hold the shares, as proclaimed in the English case of *Birch v Sullivan*. [46] Similarly, under the previous South African statutory derivative action in terms of the former Companies Act of 1973, the applicant had to be a shareholder of the company at the time of the application for the appointment of the provisional curator ad litem. Importantly, if the applicant ceased to be a shareholder by the return day of the provisional order, this was an important factor that the court would take into account in deciding whether or not the proposed action should be instituted. [47] Parallels may also be drawn with US law. Though most US statutes do not explicitly require a continuing interest, [48] the US courts impose this requirement to ensure that the plaintiff has proper intentions in pursuing the claim. [49] The plaintiff in a derivative suit in the US must thus hold his or her shares continuously from the time the lawsuit is brought and throughout the period that the suit is pending. [50]

In contrast, in Australian law, even if a derivative litigant ceases to be a shareholder of the company, he or she nonetheless retains standing to litigate the derivative action in his or her capacity as a former shareholder. Former shareholders are permitted by the Australian Corporations Act to bring or continue derivative actions. [51] Canadian and Nigerian [52] law, likewise, are both wider than South African law, to the extent that standing is conferred not only on current shareholders but also on former shareholders. Even though, in theory, former shareholders in Canada, Australia and Nigeria have standing, in practice the judiciary has tended to grant leave mostly to current shareholders. [53] A strong reason for this consequence is that former shareholders

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in these jurisdictions may be hard-pressed to satisfy the threshold criteria for leave, particularly the hurdle of good faith. [54] Good faith, according to the leading Australian case *Swansson v Pratt*, [55] is more easily established when the applicant in a derivative action is a current shareholder in the company with more than a token shareholding. The Nigerian courts have likewise excluded former shareholders from applying

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for derivative actions by applying the requirement of a 'sufficient interest' in the outcome of the derivative action. [56] As asserted in the Canadian case *Jacobs Farm Ltd v Jacobs*, [57] 'it could not have been the intention of the Legislature ... to clothe every former shareholder ... with the status of a complainant for the purposes of bringing a derivative action'.

V Trade unions and other classes of applicants

The class of applicants who may apply for leave to institute a derivative action has been significantly expanded under the Companies Act. Under the previous statutory derivative action in terms of s 266 of the Companies Act of 1973, only shareholders had locus standi. Derivative actions are now available to shareholders, directors, prescribed officers, trade unions and others. [58]

The class of applicants is vital to the efficacy of the derivative action, bearing in mind that its purpose is to protect the legal interests of the company when those charged with its management fail to do so. The extension of the derivative action to a wider class of applicants increases the prospects of redressing wrongs done to companies, particularly directorial and managerial wrongdoing. It enables any relevant stakeholder who knows of a wrong done to the company that has not been redressed by the board of directors, to initiate the action on the company's behalf. A wider class of potential applicants also gives the derivative action more teeth as a deterrent device to rein in corporate misconduct and directorial delinquency.

(a) Shareholders

The South African Act endows current, but not former, shareholders and directors with standing. The Ghanaian Companies Bill of 2013 proposes to follow a similar approach by granting locus standi only to 'shareholders or directors', [59] but not to former shareholders or directors. The Botswana

legislation likewise excludes former shareholders and former directors. [60] Although Australian, Canadian and Nigerian law are all wider in this respect by providing standing to both former and current shareholders and directors, [61] in practice leave is rarely given in these jurisdictions to former shareholders and former directors, as discussed above.

Only registered shareholders have legal standing in South African law, but not beneficial shareholders. [62] A similar approach is adopted in the Australian, New Zealand and Botswana [63] statutes. In striking contrast, Canadian and Nigerian law confer wider standing on both registered holders and beneficial owners of securities. [64] Consequently, where shares are issued for consideration in the form of an agreement for future services, future benefits or future payment, as often occurs in Black Economic Empowerment ('BEE') transactions in South Africa, the registered shareholder with locus standi to institute a derivative action on behalf of the company would be the trustee to whom the shares are transferred to be held in trust in terms of s 40(5)*(b)* of the Companies Act. The subscribing BEE beneficiaries would not have standing to bring a derivative action under s 165(2)*(a)*.

The subscribing BEE beneficiaries may, however, have locus standi under s 165(2)*(d)*. Interestingly, even though the United Kingdom Companies Act provides standing only to registered members, [65] the court in *JKX Oil & Gas Plc v Eclairs Group* was prepared to allow beneficial shareholders to initiate a derivative action in circumstances where the matter was urgent and the

beneficial shareholders were not able to procure prompt action by the nominee shareholders. This decision is instructive to South African law, particularly since the South African courts may have recourse to the discretionary category of applicants in terms of s 165(2)*(d)* of the South African Act when deserving beneficial shareholders seek leave for derivative proceedings. [67]

Not only registered shareholders, but also persons entitled to be registered as shareholders have standing under s 165(2)*(a)* of the Companies Act. This would include persons who have acquired shares in the company by operation of law, for instance through inheritance or upon insolvency. [68]

Although the legislation grants locus standi to any shareholder on a literal interpretation, an applicant would usually be a minority shareholder in the company. A majority shareholder has other more feasible means to achieve his or her (or its) objective, for instance the majority shareholder could procure the election of a new board of directors to bring the legal action in the name of the company; or the majority shareholder could rely on the exercise of the common-law default power of shareholders in general meeting over legal proceedings (on the assumption that this reserve power still applies under the new company law dispensation). [69] The court in the United Kingdom case *Cinematic Finance Ltd v Ryder*, [70] in refusing to permit a majority shareholder to institute a derivative claim, sensibly declared that shareholders in control of a company would be granted leave 'only in very exceptional circumstances ... . For my part, I find it difficult to envisage what those exceptional circumstances might be.' In contrast to the majority shareholder, a shareholder holding exactly 50 per cent of the shares of the company could be granted leave to bring a derivative action, as occurred for instance in Canadian law in *Georbay Developments Inc v Smahel.*

(b) Creditors

Besides shareholders, the holders of other securities such as debentures or debt instruments do not have standing in South African law, although they may be granted leave by the court to proceed as discretionary applicants under s 165(2)*(d)* of the Companies Act. [72] The same applies to ordinary creditors of the company. The Canada Business Corporations Act, the Ontario Business Corporations Act and the Nigerian Companies and Allied

Matters Act, in contrast, explicitly provide standing to holders of securities generally, [73] though not to ordinary creditors.

It is submitted that in excluding creditors from the class of derivative applicants listed in s 165(2), the correct approach has been adopted in the Companies Act. Generally, it is not the purpose of corporate law to protect creditors, as creditors are no more than third parties in contractual relationships with the company. The only exception arises in circumstances where the company is in financial distress or is insolvent, in which event the interests of creditors come to the fore in corporate law, and they are given extensive rights to enforce their claims against the assets of the company in business rescue proceedings or liquidation proceedings. In solvent companies, however, creditors are usually widely and adequately protected by their contracts with the company. Creditors consequently lack a sufficient interest in the company's affairs and in its welfare to qualify as suitable applicants for derivative litigation when mismanagement or misconduct has occurred within the debtor company.

The Companies Act notably provides alternative protective measures for creditors against directorial misconduct, such as the solvency and liquidity test which governs corporate finance and which must be satisfied when the board of directors pays dividends, repurchases the company's shares or makes other distributions. [74] Additionally, there is the prospect of the imposition of personal liability on directors who make distributions without satisfying the solvency and liquidity requirements, [75] and the prohibition against reckless trading in s 22(1) of the current Companies Act and s 424 of the South African Companies Act of 1973. [76] Where a creditor is, in extraordinary circumstances, a worthy derivative litigant, he or she may resort to the discretionary category of applicants in terms of s 165(2)*(d)* to seek leave to bring a derivative action. This is discussed further below.

(c) Directors and prescribed officers

The grant of standing to directors and prescribed officers commendably facilitates whistle-blowing by management. Shareholders by and large are mere passive investors who are far removed from the day-to-day operations of the company, particularly in the case of public companies

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with widely dispersed shareholders. It is the directors and prescribed officers of the company who have inside knowledge of the company's affairs, and who are

most likely to possess the privileged or confidential information about wrongful corporate transactions that forms the basis of derivative claims. Directors and prescribed officers also have a legitimate interest in the proper conduct and management of the company's affairs, and may thus serve as effective derivative litigants when the board of directors acts against the company's best interests. Not only directors, but also alternate and de facto directors, are endowed with standing under the South African Act. [77]

(d) Trade unions and employee representatives

The recognition of trade unions as qualified applicants for derivative proceedings appears to be unique to South African law. Locus standi under s 165(2)*(c)* is granted to registered trade unions representing employees of the company and to other representatives of employees. This is a progressive and commendable innovation by the legislature that promotes social justice. Employees have a definite interest in the welfare of the company. Corporate misconduct and mismanagement puts their jobs and their livelihood in jeopardy. Their trade unions and employee representatives accordingly are worthy derivative litigants.

The inclusion of trade unions and employee representatives in the class of applicants for derivative proceedings is also in harmony with the innovative South African provisions on business rescue, which not only embraces trade unions, employees and employee representatives as 'affected persons', [78] but also protects employees of companies under business rescue from loss of employment or attrition of their employment terms and conditions. [79] Moreover, employees of South African companies under business rescue benefit from a unique super-priority status in respect of post-commencement wages, remuneration and other employment-related claims. [80] The extension of the derivative action to trade unions is also in harmony with the trend in corporate governance towards the stakeholder approach or pluralist approach. [81]

(e) Discretionary category

As stated above, s 165(2)*(d)* of the Companies Act introduces a discretionary category, in terms of which the court may grant leave to any person to protect the legal interests of the company if the court 'is satisfied that it is necessary or expedient to do so to protect a legal right of that other person'. The open-ended category of applicants in s 165(2)*(d)* is an improvement on the Australian, New Zealand, United Kingdom, Botswana and Ghanaian [82] legislation, in which the listed categories of applicants are exhaustive and

close-ended. It seems to be modelled on Canadian legislation, in terms of which the court has a discretion to permit any other 'proper person' to make an application under the section. [83] Nigerian law similarly permits any other 'proper person' to apply for a derivative action. [84]

The discretion conferred on the South African court is a useful provision which recognises that unique circumstances may arise in which a company's interests would be best served by permitting derivative litigation to be commenced by a former director or former shareholder, a creditor or a beneficial shareholder, or any other stakeholder not contemplated in the listed classes of applicants in the statutory provision. This catch-all category could be relied on, for instance, by a former shareholder who has been compelled to surrender his or her (or its) shares in the company in an illegal merger to which he or she did not consent, [85] or by a former director who in good faith and with inside information of wrongdoing is prepared to blow the whistle on improper dealings by the board that took place during his or her directorship. A creditor with a sufficient financial interest in the company's affairs and in the outcome of a derivative action may also rely on s 165(2)*(d)*. For instance, this would be the case where the creditor's complaint of mismanagement relates to the circumstances that gave rise to the granting of credit, with the result that his or her underlying expectations are breached. [86]

The discretionary category of standing ensures that the pool of derivative applicants does not become stagnant over time. This catch-all provision also promotes the deterrence objective of the derivative action. Any danger that it will open the floodgates to a multiplicity of actions, particularly frivolous and vexatious actions, is duly controlled by the proper application of the other threshold tests and criteria for the leave of the court to institute a derivative action (see s 165(5)*(b)*(i)–(iii) of the Companies Act).

It is most regrettable that the way in which s 165(2)*(d)* is drafted could render it a futile provision in practice. In stipulating that the court has the discretion to confer standing on other persons only where it is necessary or expedient 'to protect a *legal right of that other person*', the drafters have overlooked the fundamental principle that an applicant in a derivative action seeks to protect not his or her own legal rights but those of the company. [87] In its current form, s 165(2)*(d)* is illogical and wholly ineffective. It must be amended by the legislature.

VI Multiple derivative actions

A pertinent question arises whether an investor, who acquires shares in an investment holding company, may apply to a court for leave to bring a

derivative action in the name of its subsidiary company (usually, though not necessarily, a wholly owned subsidiary) in which the business is run and the assets are held. In contemporary business practice, businesses are commonly structured in multi-tiered groups of companies.

Section 165(2)*(a)* and *(b)* of the Companies Act grants standing not only to the shareholders, directors and prescribed officers of the wronged company itself, but also to those of its subsidiaries, holding companies and any other companies related to it. [88] The effect is that where a wrong is perpetrated on Company S, a shareholder in Company S may apply to institute a direct derivative action on behalf of Company S, while a shareholder in its holding Company H or in related Company R may apply to bring a multiple derivative action on behalf of Company S. A double derivative claim is one brought by a shareholder in a holding company in respect of a wrong done to the company's subsidiary, while a claim on behalf of a sub-subsidiary is a triple derivative action, and so forth.

The recognition of the multiple derivative action takes account of the modern reality that corporate group structures are widespread and that, without the possibility of multiple derivative actions, wrongdoers on the boards of parent companies (or other related companies) would be insulated from liability for self-dealing and other wrongdoing as a consequence of their control of the group structure. [89] The control exercised by one company (e g a holding company) over a related company such as a subsidiary, may influence decisions made by the board of the subsidiary, including decisions not to litigate in respect of harm perpetrated on the company by its controllers. The recognition of multiple derivative actions is patently in the interests of justice.

Multiple derivative actions are recognised in most common-law jurisdictions, including Australia, [90] New Zealand, [91] Canada, [92] the US [93] and

Botswana. [94] A multiple derivative action has also been proposed in Ghana, in terms of the Ghanaian Companies Bill, 2013. In this regard, cl 201(1)*(a)* of the Bill bestows locus standi on a 'shareholder or director to bring proceedings in the name and on behalf of the company *or its subsidiary*'. [95]

It is most surprising that the United Kingdom Companies Act recognises only direct derivative claims, but not multiple derivative claims. [96] The Nigerian statute in a similar vein fails to recognise the multiple derivative action, for s 309*(a)* of the Companies and Allied Matters Act bestows standing on a holder 'of a security of a company' only, and not on those of related or subsidiary companies. [97] The United Kingdom courts have, however, attempted to circumvent the statute by stating that multiple derivative actions were previously permitted and will continue to be permitted at common law, particularly in the absence of an express statutory provision that abolishes the common-law derivative

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action in the United Kingdom. [98] Accordingly, a shareholder of a holding company in the United Kingdom may bring a common-law derivative action on behalf of a subsidiary that is subject to the same wrongdoer control as the holding company. [99]

Where, for instance, a shareholder in a holding company applies for leave to bring a derivative action on behalf of a wronged subsidiary, it seems that both the holding company and the subsidiary should be joined as parties or defendants to the derivative proceedings. The reason is that the subsidiary is the wronged party whose legal rights form the basis of the claim, while the holding company is the holder of the derivative right that the applicant seeks to enforce. It is submitted that in deciding whether to grant or refuse leave for a multiple derivative action, an additional factor that the court must consider is whether there was an unjustified refusal to litigate the matter. This refusal to litigate extends not only to the board of directors of the harmed subsidiary company, [100] but also to the board of directors of the holding company.

VII Conclusion

The South African courts should emphatically reject the US contemporaneous ownership principle of standing, and thus refuse to disqualify a shareholder from initiating derivative proceedings simply on the basis that the wrong of which he or she complains was perpetrated on the company before he or she became a shareholder. This is in keeping with the basic tenet

that the object of a derivative action is to redress a wrong done to the company, and that the shareholder who brings the derivative action acts for the company and not for himself or herself personally. Even if the shareholder holds just a single share in the company that he or she acquired only recently, the shareholder is not for that reason alone debarred from applying for leave for derivative proceedings. This is because of the absence of a minimum shareholding requirement in the relevant statutory provisions. To safeguard against the potential for abuse of the derivative action by litigious or opportunistic persons, the court should be prudent and cautious in evaluating the good faith of applicants with a minimal shareholding.

However, once a shareholder initiates the procedure for a derivative action by making a demand on the company, he or she should be required to maintain a continuing interest in the company, by holding shares in the company from the time that he or she initiates the derivative proceedings and throughout the duration of the litigation. A shareholder who has commenced a derivative action should not be permitted to continue the action if he or she ceases to be a shareholder, for he or she would then lack a sufficient interest in enforcing the company's rights and in genuinely and honestly acting for the company's benefit. The court should allow the derivative action to continue in these cases, by permitting another eligible applicant to replace him or her, as this would be in the best interests of the wronged company. An exception could perhaps be made to the continuing interest requirement in circumstances where the shareholder is forced to relinquish his or her shares in a merger to which he or she did not acquiesce, particularly where the purpose of the merger was fraudulent or illegal or where the merger was directed at ousting the shareholder and the derivative action brought by him or her.

The class of applicants is crucial to the efficacy of the derivative action. By expanding the class of stakeholders who may initiate a derivative action, the South African Companies Act has boosted the opportunities for curbing directorial abuse and improving managerial accountability. The recognition of multiple derivative actions is in step with global trends and takes account of the modern realities of corporate group structures. The unique extension of standing to trade unions is a commendable stride by the South African legislature that promotes social justice, while the inclusion of directors and prescribed officers promotes whistle-blowing by management. The discretionary category of applicants, though founded on an excellent underlying policy, is lamentably drafted in terms that render it ineffective. Section 165(2)*(d)* of the South African Act requires urgent amendment by the legislature.

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1 *Communicare & others v Kahn*2013 (4) SA 482 (SCA) para 20, referring to the views expressed by M F Cassim in the chapter 'Shareholder remedies and minority protection' in F H I Cassim et al *Contemporary Company Law* 2 ed (2012) 821.

2 *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1981] Ch 257, [1982] 1 Ch 204 (CA); *Johnson v Gore, Wood & Co* [2002] 2 AC 1 (HL) at 62; *Stein v Blake (No 2)* [1998] 1 All ER 724 (CA). See the recent case of *Itzikowitz v ABSA Bank Ltd*2016 (4) SA 432 (SCA), which applies *Johnson v Gore Wood & Co.* See also *McLelland v Hulett*1992 (1) SA 456 (D). For further discussion of the no-reflective loss principle, the overlap between shareholder actions and corporate actions, and the exceptions to the no-reflective loss principle, see M F Cassim in F H I Cassim et al op cit note 1 at 822–3 and M F Cassim *The New Derivative Action under the Companies Act: Guidelines for Judicial Discretion* (2016) 85–8, 202–5 and 215–17.

3 See e g *Lewis Group Limited v Woollam & others*2017 (2) SA 547 (WCC) para 27, citing with approval M F Cassim op cit note 2 at 13–14.

4 See *Mbethe v United Manganese of Kalahari (Pty) Ltd*2016 (5) SA 414 paras 63, 66 and 71, quoting with approval M F Cassim 'The statutory derivative action under the Companies Act of 2008: The role of good faith' (2013) 130 *SALJ* 496 at 499, 500 and 504. See further M F Cassim op cit note 2 at 29–30, 140–3; *Frykberg v Heaven* (2002) 9 NZCLC 262; *Richardson Greenshields of Canada Ltd v Kalmacoff* [1995] BLR (2d) 197 (CA); *Diamond v Oreamuno* 24 NY 2d 494, 248 NE 2d 910, 301 NYS 2d 78 (1969); *Seinfeld v Coker* 847 A 2d 330 (Del Ch 2000) para 7; J C Coffee 'New myths and old realities: The American Law Institute faces the derivative action' (1992–1993) 48 *The Business Lawyer* 1407 at 1428–9.

5 Ibid.

6 See M F Cassim op cit note 2 at 32–4.

7 R W Hamilton & R D Freer *The Law of Corporations* 6 ed (2011) 356.

8 See e g Rule 23.1 of the Federal Rules of Civil Procedure, 1966; the Model Business Corporation Act, s 7.41(1); the Delaware General Corporation Law, s 327 (1998); the New York Business Corporation Law, s 626*(b)* (1963); Hamilton & Freer op cit note 7 at 356–7.

9 American Bar Association *Model Business Corporation Act: Official Text with Official Comment and Statutory Cross-References* (2002), official comment on s 7.41 of the Model Business Corporation Act at 7-84 to 7-85; Hamilton & Freer op cit note 7 at 356–7; J C Coffee & D E Schwartz 'The survival of the derivative Suit: An evaluation and a proposal for legislative reform' (1981) 81 *Columbia LR* 261 at 312.

10 *Cohen v Beneficial Industrial Loan Corp* 337 US 541 (1949).

11 *Bangor Punta Operations, Inc v Bangor & Aroostock R Co* 417 US 703 (1974); *Courtland Manor, Inc v Leeds* 347 A 2d 144 (Del Ch 1975); *Home Fire Insurance Co v Barber* 67 Neb. 644, 93 NW 1024 (1903).

12 Ibid.

13 Section 165(5) of the Act; M F Cassim op cit note 2 at 92–3 and 'Judicial discretion in derivative actions under the Companies Act of 2008' (2013) 130 *SALJ* 777 at 807–9. See however the obiter dictum to the contrary in *Mbethe* supra note 4 para 190.

14 Coffee & Schwartz op cit note 9 at 313; see also American Law Institute 'Principles of corporate governance: Analysis and recommendations' in M A Eisenberg *Corporations and Other Business Organizations* (2012) ('the ALI Principles'), s 7.02*(a)*(1), which have eased the contemporaneous ownership rule to embody this line of reasoning. An exception to the contemporaneous ownership rule is created under the ALI Principles in circumstances where the plaintiff purchased his or her shares before the material facts relating to the alleged wrong were publicly disclosed or were known by, or specifically communicated to, him or her.

15 Coffee & Schwartz op cit note 9 at 313.

16 *Seaton v Grant* (1867) LR 2 Ch App 459; *Smith v Croft (No 2)* [1987] 3 All ER 909.

17 *Smith* ibid at 947.

18 Section 165(1) of the Act; M F Cassim in F H I Cassim et al op cit note 1 at 778–9; *Mbethe* supra note 4 para 60, referring to the views of M F Cassim op cit note 4 at 497–8; *Lewis Group Limited* supra note 3 para 23.

19 American Bar Association op cit note 9 at 7-84 to 7-85; Coffee & Schwartz op cit note 9 at 312–13.

20 Hamilton & Freer op cit note 7 at 358.

21 See e g the ALI Principles in Eisenberg op cit note 14, s 7.02*(a)*(1), which have limited the contemporaneous ownership rule, as discussed in note 14 above. See also California General Corporation Law (1982), s 880*(b)*(1), which provides for an exception to the contemporaneous ownership rule to prevent injustice, in that it permits a (non-contemporaneous) shareholder to sue if, inter alia, there is a strong prima facie case, no similar action is likely to be instituted, and he or she acquired the shares before there was disclosure to the public or to him or her of the alleged wrongdoing. See further the Pennsylvania Business Corporation Law, s 1782*(b)*, which similarly creates an exemption to the contemporaneous ownership requirement in the interests of justice, in situations where there is a strong prima facie case in favour of the claim and where, without the action, serious injustice will result.

22 Hamilton & Freer op cit note 7 at 357. The 'continuing wrong' doctrine is an exception to the contemporaneous ownership principle that has been created by the US courts. Where a wrong is continuing in nature, the plaintiff in a derivative suit is not required to have owned shares in the company from the inception of

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the wrong. He or she will have standing if he or she had acquired the shares at any time during the continuing wrong. See for instance *Palmer v Morris* 316 F 2d 649 (5th Cir 1963). The California Corporate Code (1982), s 800*(b)*(1), notably embodies the continuing-wrong exception in legislation by permitting a shareholder to bring a derivative action if he or she owned shares at the 'time of the transaction *or any part thereof*' (emphasis supplied).

23 *Palmer* supra note 22.

24 *Jepsen v Peterson* 69 SD 388, 10 NW 2d 749 (1943).

25 American Bar Association op cit note 9 at 7-84 to 7-85.

26 See part II above for an explanation of the concepts of a strike suit and purchased litigation.

27 Section 165(11) of the Act.

28 M F Cassim op cit note 2 at 157. The common-fund doctrine requires the corporation to pay the attorney's fees of the successful derivative plaintiff.

29 The concept of a 'strike suit' in US law or claims of 'greenmail' or 'gold digging' refer to circumstances in which a shareholder (or other applicant) commences derivative proceedings with the purpose of blackmailing or ('greenmailing') the management of the company into a settlement of the claim in terms of which he or she personally obtains some private benefit for himself or herself. To express it differently, the applicant agrees to terminate the derivative litigation in exchange for a costly payment in his or her favour, or in exchange for a purchase of his or her shares at above market price (M F Cassim in F H I Cassim et al op cit note 1 at 796 and M F Cassim op cit note 2 at 39).

30 M F Cassim op cit note 2 at 32, 39–40, 144–6.

31 Section 165(5) of the Companies Act; see e g *Mbethe* supra note 4 para 53.

32 *Seaton* supra note 16; *Bloxam v Metropolitan Railway* (1868) LR 3 Ch App 377.

33 *Forrest v Manchester, Sheffield and Lincolnshire Railway Co* (1861) 45 ER 1131; *Rogers v The Oxford Worcester and Wolverhampton Railway Co* (1868) 44 ER 1146.

34 The United Kingdom Companies Act, 2006.

35 The Australian Corporations Act 50 of 2001, s 236–42; the Nigerian Companies and Allied Matters Amendment Act, 2004, s 309; the Ghana Companies Code, 1963; the Ghana Companies Bill, 2013, cl 201; the Botswana Companies Act 32 of 2004, s 164–9.

36 A derivative suit in a Belgian company can be brought on its behalf by a holder of at least 1 per cent of the voting rights or a holder of 1 250 000 euros (Code des Societes, art 562).

37 In Italian law standing in a derivative suit is conditioned on a shareholding of at least 2.5 per cent (Codice Civile art 2393bis(2)).

38 Spain conditions standing in a derivative action on owning at least 5 per cent of the share capital (Ley de Sociedades Anonimas art 134.4).

39 Aktiengesetz, s 148(1).

40 Canada Business Corporations Act, 1985; Ontario Business Corporations Act, 1990.

41 Hamilton & Freer op cit note 7 at 358.

42 Supra note 16 at 465; See also *Bloxam* supra note 32.

43 See *Mbethe* supra note 4 para 178, quoting and adopting the comments of M F Cassim op cit note 4 at 523; see further M F Cassim op cit note 2 at 53–5. See also the English case *Harley Street Capital v Tchigirinsky (No 2)* [2006] BCC 209 and the decision of the Australian court in *Swansson v Pratt* (2002) 42 ACSR 313.

44 Ibid.

45 US courts have made an exception in these circumstances. See e g *Lewis v Anderson* 477 A 2d 1040 (Del 1983). See also the ALI Principles of Corporate Governance (1994), s 7.02*(a)*(2). South African law now provides for a statutory merger procedure in terms of ss 113, 115 and 116 of the Companies Act of 2008.

46 *Birch v Sullivan* [1958] 1 All ER 56.

47 *Brown v Nanco (Pty) Ltd*1977 (3) SA 761 (W) at 765.

48 See e g Rule 23.1 of the Federal Rules of Civil Procedure, 1966; see also Model Business Corporation Act, s 7.41, which, though it contains no continuing interest provision, requires the plaintiff to 'fairly and adequately represent the interests of the corporation' in order to 'commence or maintain' a derivative proceeding. On the other hand, the ALI Principles of Corporate Governance op cit note 45, s 7.02*(a)*(2), state that a holder of an equity security has standing to commence and maintain a derivative action if the holder continues to hold the equity security until the time of judgment (subject to certain exceptions).

49 See e g *Lewis v Chiles* 719 F 2d 1044 (9th Cir 1983); *Lewis v Anderson* supra note 45; *Timko v Tsiarsi* 898 So 2d 89 (Fla App 2005); Hamilton & Freer op cit note 7 at 358.

50 Ibid.

51 Australian Corporations Act 2001, s 236(1)*(a)*(i); R P Austin & I M Ramsay *Ford's Principles of Corporations Law* 15 ed (2013) 680.

52 Section 238 of the Canada Business Corporations Act, RSC 1985; s 245 of the Ontario Business Corporations Act, RSO 1990, c B 16; s 309*(a)* of the Companies and Allied Matters Act, 2004.

53 I M Ramsay & B B Saunders 'Litigation by shareholders and directors: An empirical study of the Australian statutory derivative action' (2006) 6 *Journal of Corporate Law Studies* 397 at table 4. See *Williams v Edu* (2002) 3 NWLR (Pt 754) 400, in which the Nigerian Court of Appeal opined that a non-member cannot institute a derivative action despite the provisions of the Nigerian statute.

54 In terms of the Canada Business Corporations Act, RSC 1985 c C-44, s 239(2)*(b)*; the Ontario Business Corporations Act RSO 1990, c B 16, s 246(2)*(b)*; the Australian Corporations Act 2001, s 237(2)*(b)*.

55 *Swansson* supra note 43 para 39.

56 See e g the decision of the Supreme Court of Nigeria in *Adenuga v Odumeru* 2001 2 NWLR (Pt 696) 184.

57 (1992) OJ No 813 (Ont Gen Div).

58 Section 165(2).

59 Clause 201(1) of the Ghana Companies Bill, 2013.

60 Section 166(1) of the Botswana Companies Act 32 of 2004.

61 Section 238 of the Canada Business Corporations Act, RSC 1985; s 245 of the Ontario Business Corporations Act, RSO 1990, c B16; s 236(1)*(a)* of the Australian Corporations Act 50 of 2001; s 309*(a)* and *(b)* of the Nigerian Companies and Allied Matters Act, 2004.

62 Section 1 of the Companies Act read with s 165(2)*(a)*. A 'shareholder' is defined in s 1 of the Companies Act to mean a registered shareholder or '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'. On the basis of this definition, it seems that only a registered shareholder may bring an application in terms of s 165 of the Companies Act (M F Cassim in F H I Cassim et al op cit note 1 at 779; M F Cassim op cit note 2 at 14). A holder of a beneficial interest in any shares does not seem to have locus standi under s 165 of the Act (ibid). The concept of beneficial shareholding refers to the situation where a company's shares or securities are held by, and are registered in the name of, one person for the beneficial interest of another person. The latter person is referred to as the beneficial shareholder. The beneficial shareholder is entitled to the rights attached to the shares, while the registered shareholder is the person in whose name the shares happen to be registered (R Cassim 'Governance and shareholders' in F H I Cassim et al op cit note 1 at 357).

63 Section 166(1) read with the definition of a 'shareholder' in s 90 of the Botswana Companies Act 32 of 2004.

64 Section 238 of the Canada Business Corporations Act, RSC 1985; s 245 of the Ontario Business Corporations Act, RSO 1990, c B 16; s 309*(a)* of the Nigerian Companies and Allied Matters Act, 2004.

65 And persons to whom shares in the company have been transferred or transmitted by operation of law (United Kingdom Companies Act, 2006, s 260(5)).

66 [2014] 2 BCLC 164.

67 See further part V*(e)* below.

68 M F Cassim in F H I Cassim et al op cit note 1 at 779; see also s 164 read with s 166(1) of the Botswana Companies Act 32 of 2004, which grants standing to any person to whom shares have passed by operation of law.

69 See further M F Cassim op cit note 2 at 6–7.

70 (2012) BCC 797 paras 9–14.

71 [1990] OJ No 111, 72 OR (2d) 200 (HCJ).

72 See further part V*(e)* below.

73 Section 238 of the Canada Business Corporations Act, RSC 1985; s 245 of the Ontario Business Corporations Act, RSO 1990, c B 16; s 309*(a)* of the Nigerian Companies and Allied Matters Act, 2004.

74 Sections 46 and 48; see also s 44 in respect of financial assistance.

75 Section 77(3).

76 Section 424 of the Companies Act of 1973 remains in force and applies to companies, whether solvent or not, that are in winding-up and liquidation. If the company is not in winding-up, s 22 of the Companies Act of 2008 will apply (F H I Cassim 'The duties and the liability of directors' in F H I Cassim et al op cit note 1 at 587–8).

77 See the definition of 'director' in s 1 read with s 165(2)*(b)*.

78 Section 128(1)(1)(ii) and (iii).

79 Section 136(1).

80 Section 135(1) and (3).

81 See further F H I Cassim in F H I Cassim et al op cit note 1 at 517–21.

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82 Both the Ghana Companies Code, 1963 and the Ghana Companies Bill, 2013.

83 Section 238 of the Canada Business Corporations Act, RSC 1985; s 245 of the Ontario Business Corporations Act, RSO 1990, c B 16.

84 Nigerian Companies and Allied Matters Act, 2004, s 309*(d)*.

85 See the discussion of a continuing interest at part IV above.

86 *First Edmonton Place Ltd v 315888 Alberta Ltd* (1989) 40 BLR 28 (Alberta QB).

87 M F Cassim in F H I Cassim et al op cit note 1 at 780.

88 Related companies, in terms of s 2 of the Act, include holding and subsidiary companies, the direct or indirect control by one company of the other or the business of the other, or the direct or indirect control of each of them or the business of each of them by a third person. Control, according to s 2(2) of the Act, includes the direct or indirect control of the exercise of a majority of the voting rights of the company, or the right to appoint or elect directors who control a majority of the votes at board meetings, whether alone or together with any related or inter-related person. It also includes the ability to materially influence the policy of the company.

89 See for instance the facts and decision in *Waddington Ltd v Chan Chun Hoo Thomas* [2008] HKCU 1381.

90 Section 236 read with s 50 of the Australian Corporations Act 50 of 2001; see e g *Goozee v Graphic World Group Holdings Pty Ltd* (2002) 42 ACSR 534.

91 Section 165(1) of the New Zealand Companies Act, 1993.

92 Section 239(1) read with s 2(2) of the Canada Business Corporations Act, RSC 1985; s 245 of the Ontario Business Corporations Act, 1990.

93 See e g *Brown v Tenney*, 532 NW 2d 230 (Ill 1998); *Pessin v Chris-Craft Industries, Inc* 181 App Div 2d 66, 586 NYS 2d 584 (1992).

94 Section 166(1) read with the definition of 'subsidiary' in s 6 of the Botswana Companies Act 32 of 2004.

95 Clause 201(1)*(a)* of the Ghana Companies Bill, 2013 (emphasis supplied).

96 Section 260(1) of the United Kingdom Companies Act, 2006.

97 Nigerian Companies and Allied Matters Act, 2004, s 309*(a)*.

98 *Re Fort Gilkicker, Universal Project Management Services Ltd v Fort Gilkicker Ltd* [2013] 2 All ER 546; *Abouraya v Sigmund* [2014] EWHC 277.

99 *Re Fort Gilkicker* ibid.

100 In terms of s 165(5)*(a)* of the Companies Act.

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