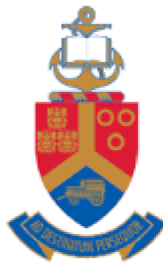

The rights of shareholders to actively participate in corporate governance in terms of South African company law

Submitted in partial fulfilment according to the requirements for the degree

MASTER OF LAWS (CORPORATE LAW)

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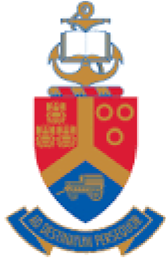

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"*Show me who you hang around and I will tell you your future*". I believe I have been blessed in meeting superb people in my life. I appreciate your presence in my life guys.

This LLM is especially dedicated to the memories of my late mother;

Nomampondo Hazel Letuka

And

Brother;

Moroka Letuka

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CHAPTER 1 INTRODUCTION

Overview

It is common cause that shareholders are not involved in the daily running of companies, although they are the owners of the company.[1] Instead, these powers have been granted to the board of directors.[2] The board has a substantial amount of power in deciding how a company conducts its daily commercial activities.[3] In larger, listed companies, there are so many shareholders that there is an inevitable detachment between the manner in which the board runs the company and the means through which shareholders are able to participate in corporate governance issues.[4] Shareholders who do not hold voting securities or who hold minority stakes are even further distanced.[5] They have no say whatsoever in how the companies they invested in are run. When giant companies like Steinhoff collapse overnight under the care of the board, serious questions are raised about the extent to which the shareholders are aware of the state of affairs of the companies in which they are so heavily invested. Were shareholders quietly cognizant of the issues, but remained passive? Were they fed false information? Did they even have a say in the running of the company and, if so, was sufficient weight attached to their collective voice to prevent a catastrophic situation or abuse of power by the board?

At the outset, this research paper will discuss the duties resting on the board as the steward that is entrusted in leading a company to greater success. This discussion is followed by the rights and remedies that shareholders have if, and when, the board fails to act properly for the best interests and benefit of the company. Specifically, emphasis is placed on shareholder participation within key commercial transactions, such as mergers and acquisitions as well as the disposal of greater parts of a company's assets.

In essence, the objective of this dissertation is to determine whether the current company law legislation in South Africa has progressed sufficiently in ensuring an improvement in

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[1] *Kaimowitz v Delahunt and others* 2017 (3) SA 201 (WCC) para 12.

[2] Hereafter "the Board".

[3] *Kaimowitz v Delahunt and others* 2017 (3) SA 201 (WCC) para 12.

[4] Goroforth C "Proxy Reform as a Means of Increasing Shareholder Participation in Corporate Governance: Too Little, But Not Too Late" *The American University Law Review* (1994) 401-402.

[5] Section 115(3) of the 2008 Act provides for minority protections in voting situations. It provides for the majority voting shareholders to obtain permission from the courts in certain instances where the minority has opposed a resolution.

shareholder participation, taking into account the modern economic climate that is largely influenced by the fourth industrial revolution. Lastly, a comparative study between the United Kingdom company law practices and South African company law is conducted to determine the manner in which these jurisdictions currently approach shareholder activism. Recommendations are put forward from the lessons that can be learnt from that jurisdiction, highlighting how the approach could be incorporated or even tailored to suit the South African business climate.

The relevance of this research lies in that it seeks to address the concerns raised by a recent and newsworthy issue, the unresolved Steinhoff scandal. Optimistically, the avenues explored possess the potential to provoke a lobbying campaign to amend the company laws and other regulations existing in the corporate sphere. Shareholder activism is also a hotly-contested topic in a number of jurisdictions, including first world countries.[6] These jurisdictions include countries like Australia, France, Germany, the United States of America, and the United Kingdom. At the very least, this research report provides an indication of the adequacy of shareholder rights under South African legislation.

Sources used range from previous and current company legislation, right through to case law, journal articles by academics and practitioners, textbooks and, academic writings.

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[6] Aquila "The Shareholder Rights and Activism Review" 2018 3 ed.

1.2 A summation of the fiduciary duties of directors and day-to-day running of companies under the Companies Act 71 of 2008

The Companies Act 71 of 2008 (the 2008 Act) stipulates that a company's day-to-day affairs must be managed and run by its board.[7] The 2008 Act further empowers the board to manage and facilitate all other ancillary conduct pertaining to the functionality of the company,[8] save rights limited by the Act or the company's Memorandum of Incorporation (the MOI). It should be noted from the onset that the 2008 Act does not distinguish between an executive and non-executive director.[9] Directorship is indeed an achievement and honour. It is a senior position with the perks of high salaries, a sense of respect, and all the benefits associated with being on the board. However, it comes with tremendous responsibilities as it represents the highest form of leadership in a company. People like the chief executive officer, chief financial officer, chairman and various heads of departments more often than not act in capacities of directorship in companies.[10]

Directors have fiduciary duties that are codified in section 76 of the 2008 Act. These duties include the duty to always act in the best interests of a company, and not to place one's own interest above the company's.[11] In *Canadian Aero Service Ltd v O'Malley*[12] the court held that persons exercising a fiduciary position should utilise their powers for the benefit of the company and not towards self-enrichment at the expense of the company.[13] In *Robinson v Randfontein Estates Gold Mining Co Ltd*[14] the court held that where a person acts in a position of representation of another, that person should always avoid a conflict of interest. Similarly in *Regal (Hastings) Ltd v Gulliver,*[15] the court emphasised the principle that directors stand in a fiduciary position to the company and cannot use their position to further their own personal interests. This case involved a director who made a profit by virtue of using his position as a director of a company to acquire the profit. The court went a step further to stipulate that even if the company could not have acquired the opportunity that the

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7 Section 66(1) of the 2008 Act.

8 Section 15(3) of the 2008 Act.

9 Section 1 of the 2008 Act.

10 Goroforth C "Proxy Reform as a Means of Increasing Shareholder Participation in Corporate Governance: Too Little, But Not Too Late" *The American University Law Review* (1994) 381.

11 Section 76(2) of the 2008 Act. Other duties according to section 76(3) include acting in good faith and for a proper purpose, acting in the best interests of the company, and acting with the reasonable care, skill, and diligence.

12 Cassim *et al Contemporary Company Law* 2012 539.

13 Cassim *et al Contemporary Company Law* 2012 539.

14 1921 AD 168.

15 [1942] 1 All ER 378 (HL).

director has used to make such profit, the fact that such a director had used his or her position to acquire the opportunity was a breach of fiduciary duties.[16]

In *Kaimowitz v Delahunt & others*[17] the court discussed the role of directors in participating in the daily activities of a company. There the issue to be determined was the essential duties of a director, and the extent to which they involved the day-to-day running activities in a company.[18] The court made reference to section 66(1) of the 2008 Act that essentially entrenches the notion that companies are run by the board, deriving its powers from the Act and Memorandum of Incorporation.[19] These powers encompass the power and responsibility to manage the affairs of the company. This position was synonymous with the one applied in the United States of America.[20] The court held that directors are appointed by the shareholders and they are responsible for practically running the company.[21] This office is quite burdensome as it is coupled with the common law fiduciary duties.[22] The duties they owe to the company can be compared with those an agent owes to a principal, a trustee owes to the beneficiaries of a trust or an employee owes to an employer.[23] Directors ought to utilise their powers *bona fide* and in the best interest of the company.[24] Entangled in these powers are the duties to act with the precise care, skill, and diligence of the relevant director with the requisite experience.[25] This standard is met when a director acts according to the confines of the company's Memorandum of Incorporation and the 2008 Act. It is quite clear that these duties are owed to the company and not the shareholders.[26] Thus, even if the board takes decisions that do not please the shareholders but prove to be advantageous for the company, such decisions would have met the standard as fiduciary duties are not owed to shareholders but the company.[27]

From the above, it is clear that shareholders do not necessarily have a say in what happens in the daily activities of companies they invested in. The *Visser Sitrus (Pty) Ltd v Goede*

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16 Cassim *et al Contemporary Company Law* 2011 515.

17 2017 (3) SA 201 (WCC) para 12.

18 *Kaimowitz v Delahunt & others* 2017 (3) SA 201 (WCC) para 5.

19 *Kaimowitz v Delahunt & others* 2017 (3) SA 201 (WCC) para 7.

20 *Kaimowitz v Delahunt & others* 2017 (3) SA 201 (WCC) paras 11-12.

21 *Kaimowitz v Delahunt & others* 2017 (3) SA 201 (WCC) para 10.

22 *Kaimowitz v Delahunt & others* 2017 (3) SA 201 (WCC) para 11.

23 *Kaimowitz v Delahunt & others* 2017 (3) SA 201 (WCC) paras 10-15.

24 *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & others* 2014 (5) SA 179 (WCC) para 25.

25 *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & others* 2014 (5) SA 179 (WCC) para 25.

26 Cassim *et al Contemporary Company Law* 2011 515.

27 *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & others* 2014 (5) SA 179 (WCC) para 28.

Hoop Sitrus (Pty) Ltd and others[28] was a classic example of the board exercising their discretion of running a company in making a decision that they believed was good for the company, much to the discontent of a number of shareholders. In this case, Visser wanted to transfer its shareholding in Goede Hoop Sitrus (GHS) to Mouton Sitrus (MS).[29] The board of GHS refused this transfer on the basis of a clause in the MOI empowering them to deny such a transaction.[30] The real question here was whether such a clause empowering the board not to give reasons for refusal was permissible or not.[31] Rogers J held that fiduciary duties do not include a responsibility to disclose why something was done.[32] When a fiduciary accounts to whomever the duties are owed to, he has to stipulate what he has done and not the reasons for the what.[33] Such a clause is not *contra bonis mores*.[34]

The court held that the running of companies by the board would become burdensome if the board was obligated to disclose reasons for their actions.[35] There are viable commercial reasons for withholding some information to the shareholders which include the protection of business strategies.[36] Visser did not accuse the board of GHS of acting *mala fide* in this proposed transaction.[37] The board *bona fide* believed that allowing the shareholding of MC to increase in GHS was not in the best interest of the company.[38] No malice or abuse of power was alleged or proven against the board of GHS.[39] One can be forgiven to think that the shareholders were hard done by that decision. It appears as if they had no say or they were prejudiced by the conduct of the board. It is evident from the above that directors enjoy a lot of power in a company. The shareholders do not have powers, unless stipulated in the

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[28] 2014 (5) SA 179 (WCC).

[29] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & others* 2014 (5) SA 179 (WCC) paras 2-10.

[30] Paragraph 7. Clause 6.1.7.1 and 6.1.7.3 stipulated that:

> "No shareholder may transfer the registered or beneficial ownership of any Ordinary. Shares in the Company to any other party without first-
>
> 6.1.7.1.1 complying with the requirements for the transfer as set out in the Act and in this MOI; and
>
> 6.1.7.1.2 obtaining the approval of the board for such transfer.
>
> 6.1.7.3 The board may, at any time, decline to register any transfer of Ordinary Shares in the securities register of the Company without giving reasons therefore and the directors shall be deemed to have so declined until they have resolved to register the transfer."

[31] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & others* 2014 (5) SA 179 (WCC) para 14.

[32] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & others* 2014 (5) SA 179 (WCC) para 15.

[33] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & others* 2014 (5) SA 179 (WCC) para 15.

[34] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & others* 2014 (5) SA 179 (WCC) para 15.

[35] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & others* 2014 (5) SA 179 (WCC) para 16.

[36] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & others* 2014 (5) SA 179 (WCC) para 16.

[37] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & others* 2014 (5) SA 179 (WCC) para 28.

[38] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & others* 2014 (5) SA 179 (WCC) para 29.

[39] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & others* 2014 (5) SA 179 (WCC) para 29.

Memorandum of Incorporation or any relevant law, to direct the board to enter or refrain from entering into certain contracts.[40] The power to run companies is ultimately placed under the care of the board of directors.[41]

This dissertation seeks to establish if shareholders have been given enough rights to participate in the running of companies, cognizant of the fact that their rights do not impede on the well-established rights of directors to run companies. Where it appears that shareholders have indeed been granted such rights, a further analysis is done to determine their effectiveness and practicality.

1.3 Rights of shareholders to appoint the board: adequate compromise?

Although shareholders may not be actively involved in the day-to day nuances of running of companies, they do have a say in who will get to run the companies they invested in.[42] Shareholders must be furnished with all the relevant details of the prospective candidates to serve as directors to enable them to make an informed decision.[43] Central to the issues of corporate governance is the relationship between the owners of the company and the managers thereof.[44] It is submitted that the power to appoint directors who in turn run the company are relatively substantial powers that will echo the voices of the shareholders in how a company is run. There is an undeniable power that comes with the ability of being able to influence who will run a company.

As an example, the Constitution of the Republic of South Africa, 1996 (the Constitution) directs that judicial appointments are to be made by the president in conjunction with the recommendation of the Judicial Service Commission (JSC).[45] Although the judiciary is independent and the president cannot influence judicial independence (in a comparable way shareholders do not run companies), by choosing who sits on the bench the president can indirectly influence day to day court judgments. By appointing liberal judges this can yield liberal jurisprudence, similarly with conservative judges. This power of appointment can be

[40] Delport *et al Henoschberg on the Companies Act 71 of 2008* 240(4).

[41] Delport *et al Henoschberg on the Companies Act 71 of 2008* 240(4).

[42] Section 67(2) of the 2008 Act mandates the board to call a shareholders meeting to fill in a vacant directorship post.

[43] Cassim *et al Contemporary Company Law* 2011 441.

[44] Cassim *et al Contemporary Company Law* 2011 452.

[45] Section 174(3) of the Constitution.

compared with the power that lies in the hands of voters when they cast their vote in elections. By strategically selecting and voting for a certain party to have a seat in Parliament, voters are effectively ensuring that their voices will be heard, even though they will never set foot in parliament themselves. The example of the Economic Freedom Fighters' stance on the issue of land expropriation is representative of ordinary citizens' views on Julius Malema who believed that by voting for his party that issue could be addressed. Through people like Julius Malema, the land debate has gained so much traction and aroused much interest that it forms the basis of many discussions in South Africa in our daily lives. With this train of thought, shareholders can do the same by choosing precisely and strategically who will run the daily activities of the company as those directors will represent the interests of the shareholders.

The same way choosing an incompetent board can hurt the company whereas an outstanding board can benefit the company. The right under section 67 is not to be taken lightly. This right is bolstered by the fact that most of the shares on the Johannesburg Stock Exchange Ltd (the JSE) are in the hands of institutional investors.[46] Institutional holders are often sophisticated and have the resources needed to make commercially sound decisions.[47] With this in mind, they can strategically appoint the best directors that will represent their best interests. This is an advantage that would not be available to an ordinary shareholder with no corporate expertise. This advantage also gives the shareholders a chance to reject the appointment of a director that will not advance their interests.

The prominent shareholder activism Australian matter of *Ardent Leisure and Ariadne* is an example of what having the right person on the board means to shareholders.[48] This case concerned an accident that had occurred at Dreamworld theme park where a mechanical fault on one of the rides resulted in a fatal accident.[49] As a result of this, the theme park was temporarily shut down and this had a negative impact on the share price as one would expect.[50] Ariadne was a minority shareholder (around 10 percent representation) and commenced an activism campaign that would make sure it made it to the board and thus

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[46] Rademeyer C & Holtzhausen J. "King II, Corporate Governance and Shareholder Activism" *South African Law Journal* 768.

[47] Rademeyer C & Holtzhausen "King II, Corporate Governance and Shareholder Activism" *South African Law Journal* 768.

[48] Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 10. This is not a court case but something akin to a public activism campaign.

[49] Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 10.

[50] Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 10.

had a voice.[51] This campaign resulted in Dr Gary Weiss of Ariadne ultimately becoming chairman and another Mr Richmond being elevated as a director to the board.[52] This campaign is described as one of the biggest shareholder activism drives for years in Australia.[53] Such changes of personnel are the types of changes that can boost investor confidence and ultimately restore the share price to where it was or even take it to even higher value.

The importance of having the right representation at board level can never be over-emphasised as the board effectively decides how the company will operate and with whom it will enter into dealings with. The United Kingdom's *Electra Private Equity* activism campaign is one of a number of examples where shareholders fought hard to ensure that they had the right type of people at board level.[54] This case was a classic example of a fight for shareholders to have the personnel at the board in order to effect a turnaround business strategy.[55] Here the shareholders were of the view that the board had overlooked certain business opportunities that could have been explored in the Electra portfolio.[56] This was brought to the attention of the board by the shareholders at a general meeting but was subsequently dismissed by the board as they believed that their own business judgment was correct.[57] The shareholders were not hard done by this refusal and called for another general meeting in November 2015 with the aim of appointing two new directors to the Electra board and removing one.[58] The voting in the second general meeting resulted in the appointment of two new directors to the board of Electra.[59] It is safe and reasonable to assume that these two new appointments had a mandate from the shareholders to influence the revisiting of the missed business turnaround strategy that the original board initially missed. This power of appointing and removing directors is synonymous to a chess game wherein the players strategically choose which warriors will go into battle, and retract those they feel are useless or have some weaknesses in them.

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51 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 10.

52 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 10.

53 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 10.

54 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 143. This is not a court case but something akin to a public activism campaign.

55 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 143.

56 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 143.

57 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 143.

58 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 143.

59 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 143.

1.4 The power of shareholders to dismiss directors

The Act stipulates that a director may be removed from the board by an ordinary shareholders resolution taken by shareholders who have voting rights.[60] This provision must be read in conjunction with other rights contained in the Memorandum of Incorporation, or other agreements governing removals of directors. A director can also be removed by the board.[61] Directors cannot conclude agreements with the shareholders that exclude a provision that shareholders have rights to dismiss directors.[62] In other words this power to remove directors is unalterable. The fact that this cannot be changed entrenches the importance of this right. The power to appoint and dismiss directors is very important in the context of controlling a company.[63] It is submitted that the power to appoint directors as already discussed above is as equally important as the power to remove. The powers to appoint and dismiss were emphasized more in South Africa in the sporting arena of the Springbok national rugby team. Although this was in a sporting context, it nonetheless stresses the impact that can be achieved by having the ability to place and remove a person that runs a particular entity.

Allister Coetzee was appointed as the coach of the Springboks in 2016 succeeding coach Heyneke Meyer.[64] Amongst his duties of building a formidable Springbok team was the task to facilitate transformation by affording players of different races a chance to be a part of the team that was and has been previously white dominated. The Chief Executive Officer of South African Rugby stipulated that Allistair was carefully selected and recommended by a High Performance Committee that believed that he is the right man for the job to restore SA Rugby to its former glory.[65] What both these articles alluded to was the plausible style of play of Allister Coetzee, which it was hoped he could feed into the Springbok team. The selection panels nor the shareholders of SA Rugby have no say in how the team goes about its daily business (its style of play, the team selected, the training methods, etcetera). However, they indirectly have a say in how all these will play out by having "their man" that will ensure that their policies and beliefs are implemented. In the same breath, the removal

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60 Section 71(1) of the 2008 Act.

61 Delport *et al Henochsberg on the Companies Act 71 of 2008* 273.

62 Delport *et al Henochsberg on the Companies Act 71 of 2008* 273.

63 Ncube CB "You're fired! The removal of directors under the Companies Act 71 of 2008" *South African Law Journal* 33.

64 "South Africa: Allister Coetzee appointed as head coach" 12 April 2016 https://www.bbc.com/sport/rugby-union/36024870 (14 May 2019).

65 "Allister Coetzee appointed as new Springbok coach" 12 April 2016 http://www.rugby15.co.za/allister-coetzee-appointed-as-new-springbok-coach/ (14 May 2019).

of Coetzee was also a way in which the stakeholders could have a say in how the team is run. This was an example of the importance of having the ability to select the right person to run a particular enterprise.

The power of shareholders to remove directors is not a new phenomenon as it was also recognized under section 220 of the Companies Act 61 of 1973 (the 1973 Act). The provisions of the 1973 Act are similar to that of the 2008 Act. There was also a process to be followed when removing such a director wherein representations had to be made by the director concerned and that such director still retains their common law and other remedies.[66] In the case of *Amoils v Fuel Transport (Pty) Ltd & others*,[67] the applicant sought an interdict preventing the respondents from adopting a resolution (to be voted on in a meeting) that would result in the removal of the applicant as a director of one of the respondents. The court held that section 220 of the 1973 Act granted a company statutory rights to remove a director, regardless of any agreement that stipulates otherwise.[68] Shareholders who have contractually bound themselves to vote to retain a director do not have a right to breach their contract.[69] Shareholder agreements concerning their rights to exercise voting rights in meetings are valid and do not take away from the rights of a company to remove a director upon satisfying the voting threshold.[70] In this case the interdict was granted. This case seems quite odd in the sense that it appeared to differentiate between the company and shareholders and stipulated that only the company can remove directors.[71] However, the position under the 1973 Act was that shareholders could adopt a resolution at a shareholders meeting to remove a director.[72] This could be done notwithstanding any agreement between the company and a director, or the company and its shareholders or even anything in the MOI.[73]

An example of shareholders using their influence in changing the composition of the board was also seen in the *PPC Limited* case.[74] In this matter, certain shareholders called a special

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66 Section 220(3) & 220(7) of the 1973 Act.

67 1978 (4) SA 343 (W).

68 Section 220 of the 1973 Act reads: “A company may, notwithstanding anything in its memorandum of articles or in any agreement between it and any director, by resolution remove a director before the expiration of his period of office”.

69 *Amoils v Fuel Transport (Pty) Ltd & others* 1978 (4) SA 343 (W) 344.

70 *Amoils v Fuel Transport (Pty) Ltd & others* 1978 (4) SA 343 (W) 347.

71 *Amoils v Fuel Transport (Pty) Ltd & others* 1978 (4) SA 343 (W) 344.

72 *Amoils v Fuel Transport (Pty) Ltd & others* 1978 (4) SA 343 (W) 344.

73 *Amoils v Fuel Transport (Pty) Ltd & others* 1978 (4) SA 343 (W) 344.

74 Aquila “The Shareholder Rights and Activism Review” 2018 3 ed 110.

shareholders' meeting in an attempt to discuss the removal of the entire board of PPC.[75] They sought to replace the board with nominees of the requisitioning shareholders.[76] During 2018, Prudential Investment Managers and Value Capital Partners applied pressure to the PPC board on the matter (which concerned a merger which the shareholders contended it undervalued their shares).[77] The intensity of the pressure from the shareholders resulted in the chairman of the board resigning.[78] Value Capital Partners subsequently replaced the vacant positions on the board with their own directors to the board of PPC.[79] While the shareholders did not end up firing the members of the board, their relentless pressure ensured that they had a voice in the proposed merger transaction. It can be safely assumed that the new replacement directors were strategically selected and appointed to represent the best possible interests of the shareholders (they could directly or indirectly fulfil the mandate given by the shareholders).

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75 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 109.

76 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 110.

77 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 110.

78 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 110.

79 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 110.

CHAPTER 2 THE IMPORTANCE OF BEING HEARD AS A SHAREHOLDER

2.1 Introduction

Accountability is fundamental in arrangement where one party has to represent the interests of the other party. Corporate governance is no exception as directors should be held accountable by the shareholders of a company. One of the ways through which shareholders can communicate with the directors on issues concerning the company is through attending general meetings.[80] Although they do not run companies themselves, it is through such meetings that the shareholders can call directors to order and demand better performance standards pertaining to companies they invested in.[81] The right to call a shareholders' meeting can be either authorised in a company's Memorandum of Incorporation or through section 61 of the 2008 Act. Some of the important matters to be discussed at such a meeting any matters mandated by the 2008 Act and other important company decisions to be made like the appointment of new directors.[82]

The annual general meeting[83] is another platform where shareholders can engage with the directors on company related issues.[84] At the annual general meeting, directors present reports and accounts to the shareholders wherein the shareholders can scrutinise the reports and enquire on any questions or concerns they may have.[85] This direct access to the affairs of the company not only promotes accountability but ensures that shareholders' concerns are heard by those that run the company.[86] In such meetings, new and effective methods can be discussed on how the directors and shareholders can in future, up and above the annual general meeting, communicate.[87] Matters such as the performance of the directors can be discussed and reviewed and shareholders can robustly assess the performance of the company holistically. These direct engagements with the company are

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[80] Hendrikse JW & Hefer L *Corporate Governance Handbook Principles and Practice* (2019) 170.

[81] *ibid*.

[82] Section 61(2)(b).

[83] Also generally known as the AGM.

[84] Hendrikse & Hefer *Corporate Governance Handbook Principles and Practice* (2019) 170.

[85] *ibid*.

[86] Hendrikse & Hefer *Corporate Governance Handbook Principles and Practice* (2019) 170.

[87] Hendrikse & Hefer *Corporate Governance Handbook Principles and Practice* (2019) 171.

commendable as they ensure that directors know exactly what the shareholders want and they can accordingly perform in alignment with those expectations.

The participation and voicing of concerns in meetings can prove to be a futile exercise when it comes to the practical application of such matters, particularly where a shareholder is not a sophisticated person.[88] It has been argued before and could still be the position that where shareholders are individual personnel, they generally become passive and take anything that the directors give.[89] Such shareholders are generally detached as they lack the experience, expertise, money, time, and the encouragement to actively pursue how the directors run the companies they invested in.[90] These shareholders are more interested in dividends, having hoped that they will get a better return on their investments.[91] This situation is further worsened in situations where the headquarters of a company are in distant geographical proximity to the residence of the shareholder. A shareholder in a small rural town in the Eastern Cape may not necessarily be in touch with what is happening in the busy business hub of Sandton. It is submitted that even though this argument is valid, this situation hardly exists in the South African context and, if indeed it does exist, it exists in very limited circumstances and will inevitably fade. The argument is again based on the influence that can and has been exerted by institutional shareholders, who are in a much stronger position than an individual shareholder.

The challenges of attending and participating in meetings are further mitigated by section 61(10) of the 2008 Act. This section in essence stipulates that all the shareholder meetings of public companies must be reasonably accessible with the country so that the shareholders can at least participate electronically. Moreover, section 58 of the 2008 Act caters for a situation where a shareholder can be represented in meetings by proxy. A proxy can participate by speaking and voting at a shareholders meeting on behalf of a shareholder, even if that proxy is not themselves a shareholder.[92] Such representation by proxy could alleviate the challenges that a shareholder that is unable to attend a meeting previously faced. A shareholder is also given the opportunity to send a proxy that is suitably qualified so that the participation can be meaningful and effective, especially where the matters to be

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88 Goroforth "Proxy Reform as a Means of Increasing Shareholder Participation in Corporate Governance: Too Little, But Not Too Late" *The American University Law Review* (1994) 401-402.

89 *ibid.*

90 Goroforth "Proxy Reform as a Means of Increasing Shareholder Participation in Corporate Governance: Too Little, But Not Too Late" *The American University Law Review* (1994) 401.

91 *ibid.*

92 Section 58(1)(a) of the 2008 Act.

discussed are not within the expertise or know-how of the relevant shareholder. This mechanism somewhat promotes activeness by the shareholders by attempting to remove the logistical barriers discussed above. In the case of *Barry v Clearwater Estates NPC & others*[93] the court had to deal with a proxy situation as envisaged by section 58 of the 2008 Act that was limited by a time-bar in the MOI. In holding that certain clauses in the MOI were void, the court reasoned that the purpose of appointing proxies was to enhance the participation of shareholders in shareholders' meetings.[94] Where a time bar as envisaged by section 58(3)(c)[95] hamstrings the operation of the proxy, then the practical validity of the appointment becomes questionable.[96] Appointing a proxy that is practically unable to perform their duties due to certain constraints goes against the purpose of this provision, which is unalterable.[97]

2.2 The power of the vote

The importance of voting has been underscored in democratic political elections, especially in the South African context where not everyone previously had the right to vote.[98] As already alluded to, shareholders have the right to vote in corporate governance issues. The next step is to ascertain exactly the significance of these voting rights in situations where the company is run by the board. Section 65 deals with shareholder resolutions and stipulates that such resolutions can either be ordinary or special.[99] An ordinary resolution is one that is voted on by more than 50 percent of the persons entitled to vote on that resolution[100] and a special one has to be voted by at least 75 percent of the persons entitled to vote on that resolution for it to be passed.[101] In the next part of this dissertation important commercial transactions that need shareholder engagement before they can be pursued are scrutinised.

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93 2017 (3) SA 364 (SCA) para 1.

94 *Barry v Clearwater Estates NPC & others* 2017 (3) SA 364 (SCA).

95 "Except to the extent that the Memorandum of Incorporation of a company provides otherwise-
(c) a copy of the instrument appointing a proxy must be delivered to the company, or to any other person on behalf of the company, before the proxy exercises any rights of the shareholder at a shareholders meeting".

96 *Barry v Clearwater Estates NPC & others* 2017 (3) SA 364 (SCA) para 6.

97 *Barry v Clearwater Estates NPC & others* 2017 (3) SA 364 (SCA) para 6.

98 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) & others* 2005 (3) SA 280 (CC) paras 64-66.

99 Section 65(1) of the 2008 Act.

100 Section 65(7) of the 2008 Act.

101 Section 65(9) of the 2008 Act.

The aim is to determine how much importance or relevance has been placed in the voting right in ensuring meaningful participation by the shareholders. This importance will be assessed in the context of fundamental transactions. The reasoning is that if shareholders have been given a voice in fundamental transactions, then their participation could be perceived to be meaningful, and the converse is also true. Mergers are discussed as mergers are one of the most important aspects of not only company transactions, but also economic growth.

2.3 Fundamental transactions and takeovers: the importance of mergers

The Competition Act 89 of 1998 defines instances under which a merger occurs.[102] Mergers or amalgamations are also recognised and regulated under section 112 read with section 115 of the 2008 Act. In a merger there can be a survival of one or more of the merging parties, or the creation of totally new companies depending on the strategies adopted by the merging parties.[103] The net effect of mergers is that there is a change in control of the company being acquired and there is a moving of assets and liabilities and even shareholders.[104] Mergers have a broader societal impact hence they are regulated by the competition authorities.[105] There is a significant amount of business risk which underscores mergers.[106] Mergers are also regulated by antitrust laws in many jurisdictions and more African jurisdictions now have merger regulation legislation.

Mergers have a very significant impact on the structure of a business. Staff reduction can be one of the consequences of a merger transaction.[107] This has to be carefully considered

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102 Section 12(1)(a) reads:

"For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.

(b) A merger contemplated in paragraph (a) may be achieved in any manner, including through-

(i) purchase or lease of the shares, an interest or assets of the other firm in question; or

(ii) amalgamation or other combination with the other firm in question."

103 Davis D *et al Companies and other business structures* (2019) 231.

104 Davis *et al Companies and other business structures* (2019) 232.

105 Davids *et al* "A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008" (2010) in Mongalo T *Modern Company Law for a Competitive South African Economy* 337.

106 Davids *et al* "A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008" (2010) in Mongalo T *Modern Company Law for a Competitive South African Economy* 337.

107 Somdaka MM "Motivating factors behind mergers and acquisitions in emerging markets: Analysis of activities in Brazil, South Africa and Russia" LLM Thesis, University of Cape Town (2013) 11.

and any oversight may end up being in violation of employment legislation and expose the company to undesirable litigation proceedings, which could end up being detrimental to even the shareholders as well. Companies also engage in merger activity as a means of diversifying their lines of business.[108] Studies have shown that European and American companies have achieved success by diversifying through merger and acquisitions transactions.[109] Manufacturers have also increased their market share or even entered into new markets by merging with other companies or acquiring other entities. An example is the merger of Daimler-Benz and Chrysler which was implemented to increase the market scope of the merging entities.[110] Another notable example is that of Ford, which acquired Jaguar, Volvo and Land Rover as a means of business expansion.[111] All these brands are well established and respected in the motoring industry.

As the managers of companies and being the people who are best suited to know the intricacies of the business, the decision to consider a merger would most likely flow from the board itself and not the shareholders.[112] The decision to merge has to be done in accordance with the Memorandum of Incorporation and the law.[113] Mergers are regulated under section 113 of the 2008 Act, read with section 115. Since a merger is a transaction that has the effect of a change of control in a company,[114] shareholder cooperation should be sought by the board before such a transaction is pursued.[115] Shareholder participation features through the special resolution that needs to be voted on by shareholders in such a situation.[116] Section 115(2)(a) stipulates that a merger contemplated in terms of section 113 of the 2008 Act must be authorised by a special resolution voted on by the shareholders entitled to vote on the resolution, at least 25 percent of the voting rights that are entitled to vote on the proposed transaction. The fact that the wording of the provision uses "must" indicates that it is an unalterable provision and cannot be circumvented. The interpretation lessons learnt in the *Natal Joint Municipal Pension Fund v Endumeni Municipality*[117]

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108 Kangueehi NC "Mergers and acquisitions as a strategy for business growth: A comparative overview" Masters' Thesis, University of the Western Cape (2015) 44.

109 *ibid.*

110 Kangueehi NC "Mergers and acquisitions as a strategy for business growth: A comparative overview" Masters' Thesis, University of the Western Cape, (2015) 44.

111 *ibid.*

112 Van Dorsten JL *The Law of Company Directors in South Africa* 1999 2 ed 3.

113 Van Dorsten above 330.

114 Van Dorsten *The Law of Company Directors in South Africa* 1999 2 ed 338.

115 Van Dorsten *The Law of Company Directors in South Africa* 1999 2 ed 331.

116 Section 115(2)(a) of the 2008 Act.

117 2012 (4) SA 593 (SCA) para 23.

judgment teach of interpreting legislation in a way that promotes the purpose of the relevant law. Any attempt to circumvent the special resolution would defeat the purpose of enabling the shareholders to participate in this regard.

This power to pass a special resolution serves as a tool that shareholders have in their arsenal to approve or disapprove a merger, and other fundamental transactions for that matter. This power of being able to 'okay' or totally collapse an important transaction such as a merger or a disposal of a company's greater assets ensures that they have a voice in corporate governance in the companies they invested in. This provision not only gives shareholders a voice, but also effectively protects the interests of shareholders by ensuring that directors do not unilaterally make such big and important decisions by themselves which will have a ripple effect on the interest of shareholders.[118] It gives the shareholders a chance to carefully consider the proposed transaction and apply their minds on its implications. The board would have to substantiate and account to the shareholders why they believe that the proposed transaction would be in the best interest of the company. Robust discussions would have to be had and this level of engagement does indeed ensure participation by shareholders. It is submitted that this in no way undermines the autonomous duties of directors to run companies. In fact it does the opposite, it enhances these duties by promoting accountability and transparency by requiring the board to apply its mind and act for the best interests of the company. It must be noted though that sometimes unreasonable shareholders can frustrate the directors' duties by unduly withholding the consent required, to the detriment of the company. However, this dissertation submits that such a situation is unlikely where the shareholders would refuse an objectively advantageous transaction for the company, which will inevitably end up increasing their profit share. This is boosted by the fact that majority shareholders in listed companies are institutional shareholders, who are sophisticated and are at a better chance of making commercially sound decisions.

A concern has been raised regarding the information which is made available to the shareholders on which they base their decisions on. Authors have argued that the board only has to submit a summarised version of the proposed merger transaction and need not fully explain the detailed intricacies of the proposed merger.[119] This is further exacerbated

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[118] Boardman N "A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008" (2010) in Mongalo T *Modern Company Law for a Competitive South African Economy* 308.

[119] Davids *et al* "A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008" (2010) in Mongalo T *Modern Company Law for a Competitive South African Economy* 358-359.

by the fact that mergers are very complicated transactions which require a certain level of expertise to understand and contextualise.[120] A suggestion is that perhaps lessons can be taken from foreign jurisdictions which have mechanisms against this potential problem.[121] In France and Germany, for example, independent experts are appointed to compile a comprehensive report of the proposed merger transaction and submit it to the shareholders unpacking the nitty-gritty parts needed to be understood.[122] In the United States, the board is required to make a recommendation to the shareholders on how to vote.[123] This recommendation may be rendered useless where the board and shareholders have opposing views and it can be used by an unscrupulous board to the detriment of shareholders. Although the author is not opposed to the notion of the adoption of these foreign policies in appointing an independent expert to draft a report, it is imagined that such may come with its own challenges. For example, confidentiality of sensitive issues may be compromised and issues such as the review of the independent report can be contentious. As mentioned, majority shareholders in South Africa are institutional shareholders who are substantially sophisticated and can understand even complicated mergers. Another avenue to be explored by the shareholders is to seek legal advice on the implications of the proposed merger. Issues like the protecting of confidential information can be covered by legal and professional privilege.

It is submitted that institutional shareholders such as insurance companies and financial services providers have sufficient expertise to be able to scrutinise a proposed merger based on the information provided by the board. These institutions employ accountants, lawyers, actuaries, economists and the like, all who sit on their boards of directorship and can be able to ensure that the special resolution is well-informed. As an example, Naspers Limited (Naspers) (the largest listed company on the Johannesburg Stock Exchange by market capitalisation) was involved in a dispute with its shareholder who wanted a disclosure of certain information related to the board's management of the company.[124] The shareholder engaged the services of a lawyer after being threatened to be excluded from a

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120 Davids *et al* above 359.

121 *ibid.*

122 Davids *et al* "A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008" (2010) in Mongalo T *Modern Company Law for a Competitive South African Economy* 359.

123 *ibid.*

124 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 110.

meeting by Naspers.[125] Naspers ended up succumbing to the demands of the shareholders and confirmed that it would ultimately make disclosure of the information in question.[126]

There are further protective measures which have been built into takeover laws under the 2008 Act. The special resolution has to be specific and authorise a particular transaction.[127] A blanket resolution cannot be accepted. This does away with the possibility of an abuse of a blanket resolution which can be used to authorise transactions which were not contemplated to begin with.[128] Critics argue that this infringes on the powers of the directors to manage companies.[129] However, its positive outcomes are that the shareholders are provided with enough information to make an informed decision about a particular merger or any other takeover transaction that they need to approve.[130] In other words it contributes to their meaningful participation. Minority shareholders who have voted against the special resolution still have some recourse under the Act.[131] The 2008 Act empowers a party to approach a court if the voting on the special resolution was opposed by at least 15 percent of the voting rights that were exercised on that resolution.[132] The court can then set aside the resolution if it was manifestly unfair to any class of shareholders.[133]

The judicial review process is not without its own challenges and difficulties. It has been well-argued that court proceedings may very well discourage shareholders from exercising their rights.[134] It is common cause that litigation is expensive, time-consuming and it trumps confidentiality as court proceedings are matters of public interest. Another consideration is

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125 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 110.

126 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 110.

127 Boardman N "A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008" (2010) in Mongalo T *Modern Company Law for a Competitive South African Economy* 308.

128 Boardman "A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008" (2010) in Mongalo T *Modern Company Law for a Competitive South African Economy* 308.

129 Boardman "A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008" (2010) in Mongalo T *Modern Company Law for a Competitive South African Economy* 308.

130 Boardman "A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008" (2010) in Mongalo T *Modern Company Law for a Competitive South African Economy* 308.

131 Section 115(3)(a) of the 2008 Act.

132 Section 115(3)(a) of the 2008 Act.

133 Boardman "A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008" (2010) in Mongalo T *Modern Company Law for a Competitive South African Economy* 309.

134 Davids *et al* "A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008" (2010) in Mongalo T *Modern Company Law for a Competitive South African Economy* 360.

that this court remedy can only be used by parties who voted against the resolution.[135] Parties that did not vote, such as shareholders who do not hold voting rights, do not have *locus standi* under this provision.[136] This is a weakness as it excludes those shareholders who do not have voting rights but would nonetheless be affected by a proposed transaction.[137]

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135 *ibid*.

136 Davids *et al* "A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008" (2010) in Mongalo T *Modern Company Law for a Competitive South African Economy* 360.

137 *ibid*.

CHAPTER 3 COMPARATIVE PERSPECTIVES

3.1 Brief Introduction

This chapter will briefly assess the comparison on shareholder participation in corporate governance between the United Kingdom and South Africa. The aim is to ascertain if South Africa is on par, slacking behind, or even ahead of the United Kingdom. If South Africa is indeed behind then lessons could be learnt, and if it is on par or ahead of the United Kingdom then other improvements could be further explored that will further suit the economy going forward into the next industrial revolution.

3.2 A brief summation of directors' duties in the United Kingdom

Even though there may be other laws that deal with company law such as insolvency laws and other financial regulatory laws, company law in the United Kingdom is primarily regulated under the Companies Act 2006. As a point of departure, directors (not shareholders) have the power to bind a company in any dealings that the company undertakes.[138] These binding powers strengthen the notion that has been argued by this dissertation in that directors are responsible for the daily activities of a company, not the shareholders. Similar to section 76 of the 2008 Act, directors' duties and standards of behaviour are also codified under the Companies Act 2006.[139] These duties are owed to the company[140] and should be applied in a similar manner to common law from which they are derived from.[141] Similar to section 76(3) of the 2008 Act, section 172(1) of the Companies Act 2006 requires directors to act in good faith and to always promote the best interests of the company. Section 76(3) of the 2008 Act dealing with acting with the proper care, skill, and diligence is captured under section 174 of the Companies Act 2006.

In *Bhullar v Bhullar*[142] a director of a company was found to have been conflicted when he set up a business that directly competed with the one in which he held directorship. This was a clear breach of fiduciary duties.[143] This case emphasised the principle of avoiding a

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138 Section 40 of the Companies Act 2006.

139 Sections 171-177 of the Companies Act 2006.

140 Section 170(1) of the Companies Act 2006.

141 Section 170(3) of the Companies Act 2006.

142 [2003] 2 BCLC 241.

143 [2003] 2 BCLC 241.

conflict of interest at all costs, something mirrored in section 76(2) of the 2008 Act.[144] In *Robinson v Randfontein Estates Gold Mining Co Ltd*[145] the court held that a director was not entitled to keep a profit that was supposed to belong to the company. These sentiments have been echoed in a number of recent South African judgments including *Da Silva v CH Chemicals (Pty) Ltd*.[146] Case law quoted in the first chapter of this dissertation has also shown that South Africa and the United Kingdom have similar jurisprudence when it comes to the duties and behaviour of directors in companies. In *Bristol and West Building Society v Mothew*[147] the court held that loyalty to the company was central in exercising fiduciary duties. The expectations and standards of performance are aligned as they have been borrowed from common law and codified in the modern company laws of both jurisdictions.

As is evident under United Kingdom company law that companies are run and controlled by directors,[148] the next step is to ascertain how shareholders feature in corporate governance matters and to contrast that with South Africa.

3.3 Shareholders' role in the appointment and removal of directors

It is a prerequisite under the Companies Act 2006 for all private and public companies to have and appoint a director(s).[149] In terms of section 160 of the Companies Act 2006, a resolution can be taken at a general meeting of a public company to appoint a director(s) in compliance with section 154(2).[150] However, this resolution must not be taken unless there was an initial meeting in which it was discussed and where there was no vote against such resolution.[151] An ordinary resolution is one that is passed by more than 50 percent of the persons entitled to vote[152] while a special resolution is one passed by no less than 75 percent of the voting rights exercised on that resolution.[153] Similar to the Memorandum of Incorporation, a Company's Articles also serves as a source from where the affairs of the

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144 Section 76(2)(a) captures the notion that directors may not pursue any opportunity that they gained as a result of their directorship.

145 1921 AD 168.

146 2008 (6) SA 620 SCA).

147 [1996] 4 All ER 698 (CA) 711.

148 Cabrelli D "The Reform of the Law of Directors' Duties in UK Company Law" 2008 10.

149 Section 154(1) and (2).

150 This is the provision that mandates companies to have directors.

151 Section 160(1) of the Companies Act 2006.

152 Section 282(1) of the Companies Act 2006.

153 Section 283(1) of the Companies Act 2006.

company are to be decided, including the appointment of directors.[154] Members of a company (shareholders in the South African context) have the power to ask the directors to call a meeting to discuss any issues they want dealt with, including issues surrounding directors.[155] The directors of the company then have a corresponding duty to call and convene a meeting as required by the members under section 303.[156] An aggrieved member can also approach the court seeking relief that a meeting be held between the directors and members.[157]

Similar to the appointment of a director, an ordinary resolution may be brought by a company to have a director removed before their tenure comes to an end.[158] The removed director has recourse to protest their removal should they feel aggrieved.[159] This mechanism that enables shareholders to bring a motion either to appoint and/or remove the directors that run companies is one of the biggest ammunition, If not the biggest that shareholders have in their arsenal.[160] It presents an opportunity to manoeuvre who runs the company and thus can be used as a strategy in who will best articulate and advance the best interests of the shareholders.[161] Similar to the South African context, it is an opportunity to appoint the best directors and to remove underperforming ones. It is submitted that this power to cherry-pick and to remove is not one to be taken lightly, in fact it is comparable to the right to vote in democratic elections. This power to call on meetings to take resolutions compares favourably with the ones found in section 67 of the 2008 Act (dealing with the appointment of directors by the shareholders) and section 71 of the 2008 Act (dealing with the removal of directors by shareholders). South African and English law are thus synchronised in this regard and although there may be nuances when it comes to procedure, the notion is captured by both statutes and the interests of the shareholders are adequately protected, *vis-à-vis* considering the rights of directors to act independently and for the utmost benefit of the company.

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154 Section 300 of the Companies Act 2006.

155 Section 303(1) and 303(4) of the Companies Act 2006.

156 Section 304 of the Companies Act 2006.

157 Section 306(2) of the Companies Act 2006.

158 Section 168(1) of the Companies Act 2006.

159 Section 169 of the Companies Act 2006.

160 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 135.

161 Aquila F "The Shareholder Rights and Activism Review" 2018 3 ed 135.

ValueAct Capital Partner[162] and *Rolls-Royce Holdings Plc*[163] serve as interesting and effective illustrations of how far a shareholder's voice in the board of directors can go.[164] In July 2015 ValueAct invested in Rolls-Royce and subsequently became the largest shareholder in Rolls-Royce.[165] ValueAct began to put pressure on Rolls-Royce to make certain changes in how the company was to be run going forward.[166] ValueAct wanted to have a say on matters including mergers and acquisitions, transactions that result in the change of control in a business, and also wanted to have a seat on the board of Rolls-Royce through their own nominated director.[167] ValueAct was successful in getting some of their demands, and today they have a seat on the board of Rolls-Royce.[168] Although it is one seat, it is submitted that this was an important seat as it gives ValueAct shareholders ears and eyes in the intricate undertakings of a company as prominent as Rolls-Royce. Through that one seat their interests and concerns are voiced. It goes without mention that the ValueAct chosen representative on the board is someone with the relevant expertise and experience who can meaningfully participate and engage to make sure that this representation is not merely a sham or scheme just to please the shareholders whilst there is no power attached to it.

The London Stock Exchange matter is another example of using voting rights to influence the composition of the board.[169] In late 2017 the London Stock Exchange had announced that its Chief Executive Officer would leave at the end of the following year and that a replacement was already being considered.[170] TCI Management Limited subsequently sent a letter to the London Stock Exchange asking for a general meeting to consider and vote on some of the matters concerning the departure of the current and searching of a new Chief Executive Officer.[171] TCI Management Limited put forward a resolution to remove the Chair

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162 (Hereafter "ValueAct"). This was not a court case but something akin to a public activism campaign.

163 (Hereafter "Rolls-Royce"). This was not a court case but something akin to a public activism campaign.

164 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 142.

165 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 142.

166 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 142.

167 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 142.

168 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed 142.

169 https://thelawreviews.co.uk/edition/the-shareholder-rights-and-activism-review-edition-3/1173736/united-kingdom (16 July 2019). This was not a court case but something akin to a public activism campaign.

170 https://thelawreviews.co.uk/edition/the-shareholder-rights-and-activism-review-edition-3/1173736/united-kingdom (16 July 2019).

171 https://thelawreviews.co.uk/edition/the-shareholder-rights-and-activism-review-edition-3/1173736/united-kingdom (16 July 2019).

of the Board.[172] Some 79 percent of the shareholders that were present at the general meeting voted against the removal of the Chair and thus the move that TCI Management Limited tried to achieve failed.[173] Again this underscores that importance of being able to influence that appointment and removal of board members.

Considering similar rights of appointment and removal under South African company law, there seems to be alignment in terms of substance and procedure between both jurisdictions. Shareholders in both jurisdictions have to a large extent similar protections and rights in this regard and they have relatively worked through the examples provided.

3.4 The rights of shareholders to have access to company information

The right to access information in any corporate arrangement can prove to be very important in determining how the shareholders engage with the directors. A limited access can inhibit accountability while a substantial amount of transparency can promote good corporate governance, taking into account the need to protect certain sensitive company information and trade secrets. In the South African case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others*[174] the court gave an indication of what constitutes meaningful engagement between a municipality and the people it contemplated evicting.[175] The court held that meaningful engagement was a two-way street in which both parties involved hold talks to find the best solution.[176] These talks cannot thrive where parties are not willing to make certain disclosures and produce certain documentation. With this notion in mind, section 808 of the Companies Act 2006 mandates a company to keep a register of interests disclosed under section 793 (Notice by company requiring information about interests in its shares). This register should be made available for inspection.[177] Similarly, section 116 of the Companies Act 2006 stipulates that the

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172 https://thelawreviews.co.uk/edition/the-shareholder-rights-and-activism-review-edition-3/1173736/united-kingdom (16 July 2019).

173 https://thelawreviews.co.uk/edition/the-shareholder-rights-and-activism-review-edition-3/1173736/united-kingdom (16 July 2019).

174 2008 (3) SA 208 (CC).

175 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* 2008 (3) SA 208 (CC) para 10.

176 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* 2008 (3) SA 208 (CC) para 10.

177 Section 809(1) of the Companies Act 2006.

register and index of the shareholder's names must be open to inspection by any other shareholder free of charge.[178]

This access to information allows shareholders to monitor and be aware of the current state of affairs in a company. This makes it easy for shareholders to be identified and approached to be able to enforce rights collectively.[179] For example, section 305 empowers shareholders to call a meeting at a company's expense where the directors ought to do so and subsequently have failed.[180] Easier access to information can make it less burdensome for shareholders to communicate to one another and mobilise for the purpose of calling a meeting and enforcing their rights.[181] Inadvertently, they would be holding directors liable for their failure to convene such a meeting and thus enhancing accountability and transparency. The fact that the costs of calling a meeting (which should have been called by the directors) would be borne by the company is an incentive in one's exercising their rights.

South African company law is similar to the United Kingdom company law in that it also allows shareholders to have access to company records.[182] Shareholders are also entitled to receive financial statements from companies on how the company has performed.[183] The same argument can be raised in that access to information gives the shareholders a better understanding of the performance of the company, and subsequently encourages robust discussions in meetings and better informs the resolutions to be taken going forward. However, one must be mindful of things like the Promotion of Access to Information Act 2 of 2000. The United Kingdom equivalent is the Data Protection Act 2018. Data protection legislation could be an impediment in obtaining certain sensitive information such as identification numbers and personal addresses and this dissertation cautions that access to information in company law should be approached cognisant of this fact, as certain rights may not be absolute and can be constitutionally protected. Directors might also be less reluctant to share certain company information with the shareholders, as they could argue that doing so would not be in the best interest of the company and would be a violation of the fiduciary duties. It has been alluded to earlier on in this dissertation that shareholders do not owe any fiduciary duties to the company. Some shareholders could be competitors of

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178 Section 116(1)(a).

179 Aquila "The Shareholder Rights and Activism Review" 2018 3 ed) 136.

180 *ibid*.

181 Aquila "The Shareholder Rights and Activism Review" 2018 (3 ed) 136.

182 Section 26 of the 2008 Act.

183 Section 31 of the 2008 Act.

the company and withholding certain information from them could be well justified and reasonable.

As an example, the case of *Nova Property Group Holdings v Cobbett*[184] dealt with a situation where a company sent requests for access to security registers in terms of section 26(2) of the 2008 Act.[185] When these requests were denied legal action was taken to compel the company to oblige.[186] The court discussed that the right of access to company information was crucial in promoting transparency and accountability in the corporate sphere.[187] The company can regard things such as identity numbers and email addresses as confidential information for the purposes of protecting privacy.[188] The court held that section 26(2) of the 2008 Act preferred upholding the rights to access information more than protecting the rights to privacy, thereby granting an unqualified right to access the securities register.[189] This position is somewhat different from the one in the United Kingdom. Section 116(4)(c) and (d) of the Companies Act 2006 stipulates that a person that seeks to access the register must among other things, disclose the purpose for which the information is sought and whether it will be shared with anyone else. This requirement of establishing the purpose has been omitted in South Africa.[190] The point is that seekers of information must not get carried away as there could be justifications to deny the disclosure of the information. On the whole, both jurisdictions allow for shareholder participation through the access of company information, with South Africa being less burdensome with the absence of the qualified purpose needed to be established.

3.5 The right to have a voice in important transactions

Takeover law in the United Kingdom is regulated under The City Code on Takeovers and Mergers.[191] The Code was primarily designed for the fair treatment and protection of shareholders in an offeree company by granting them a say in the transaction and ensuring

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184 [2016] 3 All SA 32 (SCA).
185 It stipulates that access requests must be done in consideration of data protection laws.
186 *Nova Property Group Holdings v Cobbett* [2016] 3 All SA 32 (SCA) para 3.
187 *Nova Property Group Holdi*ngs v *Cobbett* [2016] 3 All SA 32 (SCA) para 22.
188 *Nova Property Group Holdings v Cobbett* [2016] 3 All SA 32 (SCA) para 24.
189 *Nova Property Group Holdings v Cobbett* [2016] 3 All SA 32 (SCA) para 24.
190 *Nova Property Group Holdings v Cobbett* [2016] 3 All SA 32 (SCA) para 27.
191 Hereafter ("The Code").

that there is no unfair treatment between the different classes of shareholders.[192] It is administered by the Panel on Takeovers and Mergers.[193] The Code does not deal with the merits of a takeover, but rather provides for a procedure through which they may be conducted.[194] The Code applies only to public companies and not private companies in the United Kingdom, the Channel Islands, and the Isle of Man.[195]

Rule 21.1 of The Code stipulates circumstances under which shareholder approval should be sought before any transactions can be finalised. It stipulates that when a takeover offer is made, or where an offer can be reasonably be foreseeable by the board of directors, the board must not without the consent of the shareholders in a general meeting participate in any conduct that will repel the offer away or do anything that will deny the shareholders the chance to deliberate on the contents of such an offer.[196] The board may not also without shareholder consent "issue any shares or transfer or sell, or agree to transfer or sell, any shares out of treasury or effect any redemption or purchase by the company of its own shares;[197] issue or grant options in respect of any unissued shares;[198] sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount;[199] or enter into contracts otherwise than in the ordinary course of business".[200] Restrictions on frustrating actions are also recognised in the South African context wherein directors are prevented from frustrating bona fide offers.[201] This was recently seen in a decision by the Takeover Special Committee wherein Murray & Roberts was held to have frustrated ATON by offering to sell shares to Aveng all in a bid to frustrate the takeover by ATON.[202]

Furthermore, the board of the offeree company is required to send a notice to shareholders within a reasonable timeframe from the moment the announcement of the proposed takeover was made.[203] Amongst other things, the notice has to be detailed on the proposed transaction, has to contain the opinion of the board, and has to be sufficiently informative to

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192 Rule 2 of The Code.
193 Rule 1 of The Code.
194 Rule 2 of The Code.
195 Rule 3(e) of The Code.
196 Rule 21.1(a) of The Code.
197 Rule 21.1(a)(i) of The Code.
198 Rule 21.1(a)(ii) of The Code.
199 Rule 21.1(a)(iv) of The Code.
200 Rule 21.1(a)(v) of The Code.
201 Section 126(1)(a) of the 2008 Act.
202 Takeover Special Committee 31 October 2018.
203 Rule 21.1 (d)(iii) of The Code.

enable the shareholders to make an informed decision.[204] The notification should also grant the shareholders adequate time to reach a decision and pertinent information should not be withheld from them.[205] The offeror is obligated to treat the shareholders of the offeree company on the same footing as they would to the shareholders of their own company.[206] Takeover is used in a wider sense and is not only limited to mergers, but could include other takeover techniques like a scheme of arrangement.[207]

This protection surrounding takeovers recognises the role of shareholder participation in important or fundamental transactions. The fact that permission has to be sought by the board from shareholders is perhaps the biggest and most important inclusion of the shareholders. The full and adequate disclosure of the transaction information by the board to the shareholders bodes well with transparency and also gives the shareholders an opportunity to make an informed decision on that particular transaction, thereby rendering the participation meaningful too. Another commendable aspect is the role played by the Panel on Mergers and Takeovers. As alluded to earlier, it does not deal with the merits of the case, but rather focuses on the procedure of the proposed transaction. This non-infringement on the merits is desirable as it ensures that the board can still exercise their autonomy on how they believe a company is to be run. On the other hand, the safeguard of procedural fairness ensures that the powers a board has are not exercised to the detriment or exclusion of shareholders. This position is similar to that of South Africa wherein a fundamental transaction has to be approved by a special resolution of the board. Similar to the United Kingdom, a special resolution is needed to authorise a particular transaction, after the relevant information has been disclosed and the shareholders have applied their mind.[208] However, there is a weakness in South Africa given that the board only has to provide a summary of the transaction, and are not obliged to give the shareholders any further advice in this regard.[209] This potential negative is mitigated by the sophistication of institutional shareholders that would be able to detect any bad deals proposed by the board.

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[204] Notice on Rule 21.1.

[205] Rule 23.1 of The Code.

[206] Rule 23.1 of The Code.

[207] Luiz S "Using a scheme of arrangement to eliminate minority shareholders" (2010) *SA Merc Law J* 445.

[208] Davids *et al* "A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008" (2010) in Mongalo T *Modern Company Law for a Competitive South African Economy* 358-359.

[209] Davids *et al* "A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008" (2010) in Mongalo T *Modern Company Law for a Competitive South African Economy* 358.

CHAPTER 4 REMEDIES AVAILABLE TO SHAREHOLDERS

4.1 Introduction

In this chapter the remedies or recourse that shareholders may have if and when the directors of companies have engaged in or are about to engage in behaviour or activities that the shareholders disapprove of are assessed. Section 163 of the 2008 Act deals with relief from oppressive or prejudicial conduct or an abuse of separate juristic personality of a company. A shareholder of a company is given *locus standi* to approach a court for relief where any act or omission of the company has resulted in oppressive or unfairly prejudicial effects to the shareholder.[210] A shareholder can bring such an application where the business of the company has been exercised in a way that does not regard the interests of shareholders,[211] and also where directors have exercised their powers in a similar way that disregards shareholder interests. The court can make an appropriate order including an order that prohibits the continuation of the conduct in question.[212] It must be cautioned that section 163 deals with conduct that unfairly disregards the interests of shareholders, and not conduct that simply disregards shareholder interests. As was alluded to in *Sammel & others v President Brand Gold Mining Co Ltd*[213] that by becoming a minority shareholder in a company, a person subjects themselves to the wishes of the majority as companies are democratically run. Parties should, therefore, think twice before approaching the court as a disagreement will not necessarily invoke section 163.

The case of *Grancy Property Limited v Manala*[214] dealt with the application of section 163 of the 2008 Act. The main issue to be determined was whether the appellant had sufficient grounds to invoke the oppression remedy.[215] Grancy Property limited (Grancy) had made allegations of malfeasance and moral degeneration against the directors of the respondent.[216] Grancy was a shareholder in the company which the respondents were directors of.[217] To determine whether Grancy had made out a case in terms of section 163

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210 Section 163(1)(a) of the 2008 Act.

211 Section 163(1)(b) of the 2008 Act.

212 Section 163(2)(a) of the 2008 Act.

213 1969(3) SA 629 (A) 645.

214 [2013] ZASCA 57 (10 May 2013).

215 *Grancy Property Limited v Manala* [2013] ZASCA 57 (10 May 2013) para 11.

216 *Grancy Property Limited v Manala* [2013] ZASCA 57 (10 May 2013) para 3.

217 *Grancy Property Limited v Manala* [2013] ZASCA 57 (10 May 2013) para 11.

of the 2008 Act, the court embarked on an exercise of determining the of “oppressive or unfairly prejudicial conduct”.[218] References were made to the Oxford Dictionary and foreign case law and the central theme was that conduct is oppressive where it is harsh or unjust, lacks good faith and is burdensome.[219] The court accepted the interpretation that the words “unfair disregard of the applicant’s interests” suggested that section 163 should be read in a manner that widens the remedy as opposed to an interpretation that limits it.[220] The court also held that the motive is not determinative, rather it is the conduct together with its effect on the members of the company that will be given weight.[221] In this case, Grancy had brought an application to have objective and independent directors appointed in Seena Marena Investments (Pty) Ltd (SMI).[222] There were reports by SMI’s auditors that the respondents had acted unlawfully; evidence that the directors had paid themselves steep remunerations that were unfounded; admissions by the respondents of the failures to justify directors’ payments amongst other things. The court found that Grancy had made a compelling argument, which was not adequately defended by the respondents.[223] The court granted the section 163(2)(f)(i) remedy and appointed new directors to the board.

The case of *De Klerk v Ferreira & others*[224] also dealt with the application of section 163 of the 2008 Act. The plaintiff and the first defendant held equal membership in a close corporation.[225] The plaintiff sought a section 163 order compelling the first defendant to transfer its membership interest and shares to him for payment of fair compensation.[226] There were concessions that the relations between the parties had broken down.[227] The court discussed the meaning of section 163 of the 2008 Act and held that it was empowered to make an order compelling an exchange of shares as a remedy.[228] Evidence lead implicated the first defendant in a number of bookkeeping irregularities.[229] He had used the business accounts for his own personal gains and endeavours.[230] The court was convinced

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218 *Grancy Property Limited v Manala* [2013] ZASCA 57 (10 May 2013) para 12.
219 *Grancy Property Limited v Manala* [2013] ZASCA 57 (10 May 2013) para 13.
220 *Grancy Property Limited v Manala* [2013] ZASCA 57 (10 May 2013) para 15.
221 *Grancy Property Limited v Manala* [2013] ZASCA 57 (10 May 2013) para 15.
222 *Grancy Property Limited v Manala* [2013] ZASCA 57 (10 May 2013) para 3.
223 *Grancy Property Limited v Manala* [2013] ZASCA 57 (10 May 2013) para 19.
224 2017 (3) SA 502 (GP).
225 *De Klerk v Ferreira & others* 2017 (3) SA 502 (GP) 505.
226 *De Klerk v Ferreira & others* 2017 (3) SA 502 (GP) 505.
227 *De Klerk v Ferreira & others* 2017 (3) SA 502 (GP) 506.
228 *De Klerk v Ferreira & others* 2017 (3) SA 502 (GP) 506.
229 *De Klerk v Ferreira & others* 2017 (3) SA 502 (GP) 519.
230 *De Klerk v Ferreira & others* 2017 (3) SA 502 (GP) 520.

that the first defendant conducted himself in an unfairly prejudicial manner that contravened section 49 of the Close Corporations Act and section 163 of the 2008 Act.[231] With regards to the question of whether the first defendant was a related person, the court looked at what type of control he exerted on the business.[232] If he could materially influence the affairs of a business, then control is established.[233] It was found that he had exclusive control of the finances of the businesses in question and oversaw their running.[234] The plaintiff had limited access to such information.[235] The first defendant was ordered to transfer his membership interest to the plaintiff and amongst other things removed as a director.[236]

The court in *Larret v Coega Development Corporation (Pty) Ltd & others*[237] cautioned against the instances in which section 163(2)[238] will not find application. The applicant in this matter instituted proceedings in her capacity as director of a company.[239] She instituted section 163 proceedings on behalf of the company without the requisite approval from the board.[240] The court held that it could not have been the intention of the legislature that section 163 could be read to undermine the requirement of obtaining board resolutions when acting for a company.[241] Persons who have not been granted authority are well-catered for under section 165 of the 2008 Act.[242] Derivative actions cannot be made part of section 163 as they stand alone.[243] What the above cases show is that shareholders do indeed have adequate remedies under section 163 to prevent abusive unfairly prejudicial conduct. This section has been substantially applied and enforced by South African courts with appropriate remedies being granted too.

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231 *De Klerk v Ferreira & others* 2017 (3) SA 502 (GP) 523.
232 *De Klerk v Ferreira & others* 2017 (3) SA 502 (GP) 525.
233 *De Klerk v Ferreira & others* 2017 (3) SA 502 (GP) 525.
234 *De Klerk v Ferreira & others* 2017 (3) SA 502 (GP) 526.
235 *De Klerk v Ferreira & others* 2017 (3) SA 502 (GP) 526.
236 *De Klerk v Ferreira & others* 2017 (3) SA 502 (GP) 538.
237 2015 (6) SA 16 (ECG).
238 This provision empowers a court to make any order it deems fit.
239 *Larret v Coega Development Corporation (Pty) Ltd & others* 2015 (6) SA 16 (ECG) 17.
240 *Larret v Coega Development Corporation (Pty) Ltd & others* 2015 (6) SA 16 (ECG) 17.
241 *Larret v Coega Development Corporation (Pty) Ltd & others* 2015 (6) SA 16 (ECG) 19.
242 *Larret v Coega Development Corporation (Pty) Ltd & others* 2015 (6) SA 16 (ECG) 19.
243 *Larret v Coega Development Corporation (Pty) Ltd & others* 2015 (6) SA 16 (ECG) 20.

4.2 Derivative actions

Section 165(2)(a) of the 2008 Act permits a shareholder of a company to demand the company to institute legal proceedings, failing which the shareholder can apply to court for permission to institute legal proceedings on behalf of the company.[244] This remedy that such a shareholder would have is known as the derivative action as it seeks to address harm inflicted directly to the company, and inevitably indirectly to the shareholder.[245] Similar to the piercing of the corporate veil, the derivative action is an extreme remedy as it violates the "proper plaintiff" principle.[246] As the running of companies is premised on majority voting rights, derivative actions would ordinarily be brought by minority shareholders to guard against the actions of the majority which have a negative impact on the company.[247] This dissertation will dissect the intricacies surrounding the derivative action in an attempt to determine the practical applicability and effectiveness of such a remedy, and whether indeed it is useful in assisting shareholders (especially the minority ones) in enforcing their rights.

A party pursuing the derivative action remedy must follow the procedure set out in section 165 of the 2008 Act. This dissertation will not discuss the procedures in detail, but intends in critiquing certain flaws found in the procedures. In summary, if a demand has been made on a company, the company has to appoint an independent party to investigate the demand and decide if there is merit in pursuing the claim.[248] Should the company fail to conduct such an investigation or if the applicant is not satisfied with the outcome of the investigation, he/ she can apply to court for leave to institute the claim on behalf of the company.[249] The court would then grant leave to sue if it is satisfied that the application is brought in good faith, there are serious questions to be evaluated, and the suit is brought in the best interests of the company.[250]

Cassim identifies a concern where the applicant applies for leave to sue, and that is the good faith criterion.[251] Evidentiary questions arise when it comes to the proving of good faith. The applicant would have to prove actual good faith or the court could presume that the

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244 Section 165(5) of the 2008 Act.

245 Cassim "The New Derivative Action Under the Companies Act" (2016) 5.

246 Cassim "The New Derivative Action Under the Companies Act" (2016) 5.

247 Cassim "The New Derivative Action Under the Companies Act" (2016) 5 and 6.

248 Section 165(4) of the 2008 Act.

249 Section 165(5) of the 2008 Act.

250 Section 165(5)(b)(i)-(iii).

251 Cassim "The New Derivative Action Under the Companies Act" (2016) 51.

applicant is acting in good faith absent any indication of bad faith.[252] Cassim suggests that applicants be presumed to act in good faith as the alternative could prove onerous and discourage potential litigants.[253] This dissertation further shares Cassim's sentiments in that good faith is highly subjective and unpredictable.[254] In the case of *Mouritzen v Greystones Enterprises (Pty) Ltd & Another*[255] it was held that in determining good faith, the applicant should honestly believe that there is a case to be tried and there must be no other ulterior motives for bringing the suit.[256] There is still some uncertainty where the applicant is acting in bad faith but for the good of the company.[257] Would the court deny an existing objective case and allow corporate misconduct to continue simply because the applicant is in bad faith? Again this largely seems to depend on the type of judge one is likely to get and echoing Cassim's concerns, it is very much uncertain and can be discouraging to litigants.

In *Mbethe v United Manganese of Kalahari (Pty) Ltd*[258] (Mbethe) the court dealt with the derivative action. The court highlighted that determining good faith did not depend on the state of mind of the applicant, but rather objective facts.[259] There has to be enough evidence to show that the applicant was in good faith.[260] Not only does this sound onerous for the applicant, it leads into another challenge presented by this remedy, which is the collection of adequate evidence. In order for a shareholder to prove that they were acting in good faith, they would need a substantial amount of company information. Without such information, they cannot even prove the second leg of showing that there is a serious issue to be determined.[261] Directors can rely on their fiduciary duties and best interests of the company in refusing to disclose certain information to shareholders, especially as shareholders do not owe any fiduciary duties to the company as alluded to earlier in this dissertation. It is unimaginable that directors will willingly incriminate themselves by adequately disclosing information in a lawsuit that would potentially hold them accountable. This lack of information would inevitably mean that the shareholder would have difficulty in setting the suit in motion,

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252 Cassim "The New Derivative Action Under the Companies Act" (2016) 51.

253 Cassim "The New Derivative Action Under the Companies Act" (2016) 51.

254 Cassim "The New Derivative Action Under the Companies Act" (2016) 51.

255 2012 (5) SA 74 (KZD).

256 *Mouritzen v Greystones Enterprises (Pty) Ltd & Another* 2012 (5) SA 74 (KZD).

257 Cassim "The New Derivative Action Under the Companies Act" (2016) 47.

258 2017 (6) SA 409 (SCA).

259 *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA) para 11.

260 *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA) para 11.

261 Cassim "The New Derivative Action Under the Companies Act" (2016) 168.

which is obtaining leave to sue.[262] Derivative action is again an exceptional remedy and the court ought to be convinced before granting it. The court in Mbethe dismissed the derivative action.

In *Lewis Group Ltd v Woollam & others*[263] a shareholder sought to utilise the derivative action to have a number of directors declared delinquent as contemplated under section 162 of the 2008 Act.[264] The remedy was discussed by the court and it was brought up that one of the fundamental flaws of section 165(7)[265] and (8)[266] was that these negated the fact that derivative actions were mostly brought against the directors of companies.[267] Essentially, the court held that the applicant had not produced sufficient evidence to make an arguable case.[268] Although this thesis does not suggest that the court should have found otherwise, it intends to highlight the difficulty of succeeding with the derivative action. This jurisprudence from our courts indicates that our courts have taken an approach that makes it quite challenging to obtain relief through the derivative action.

One of the biggest disadvantages to the derivative action are the cost elements associated with this remedy. A derivative action litigant brings the claim out of their own personal costs.[269] It is common cause that legal representation is expensive and lengthy, and this may be burdensome to an individual instituting proceedings against a well-resourced company, especially one that is of a blue-chip status. This is exacerbated by the fact that whatever benefit comes from the legal proceedings accrues to the company and not the party that instituted the proceedings.[270] The applicant goes through all the trouble of the section 165 procedures and bears all the risks to finally walk away empty-handed. One could argue that the applicant would indirectly benefit as the victory that goes to the company would inevitably find its way back, especially considering that the applicant would be someone that has interests vested in the company. While this may somewhat be true that through the company benefitting a shareholder would in the long-run also benefit, it still is a

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262 Cassim "The New Derivative Action Under the Companies Act" (2016) 168.

263 2017 (2) SA 547 (WCC) 547.

264 *Lewis Group Ltd v Woollam & others* 2017 (2) SA 547 (WCC) 547.

265 This contains a rebuttable presumption that leave to sue is in bad faith if it is brought by a third party, the company decided not to pursue the action, or the company decided to discontinue the action.

266 This is the presumption that a person is a third party if they are not related or interrelated to the company.

267 *Lewis Group Ltd v Woollam & others* 2017 92) SA 547 (WCC) 568.

268 *Lewis Group Ltd v Woollam & others* 2017 92) SA 547 (WCC) 583.

269 Cassim "The New Derivative Action Under the Companies Act" (2016) 24.

270 Cassim "The New Derivative Action Under the Companies Act" (2016) 24.

big enough hurdle to discourage any party that would want to pursue this remedy. The thread in the case law discussed above indicates that the courts are quite conservative in granting this remedy. Perhaps a New Zealand-like approach should be adopted which directs that costs of a derivative action be borne by the company, unless sufficient reasons exist not to.[271]

[271] Cassim "The New Derivative Action Under the Companies Act" (2016) 150.

CHAPTER 5 CONCLUSION AND RECOMMENDATIONS

This dissertation was conceived by the scandals that surrounded companies after the abrupt Steinhoff share price decline and the subsequent revelations of director misconduct under the state capture in South Africa. To this day, some shareholders of Steinhoff still do not know that they had invested in a company that was heading for turmoil. What is evident is that shareholders lost a lot of money from the decline of the share prices. It is inconceivable that the shareholders were aware that the company they invested in was not being run properly by the directors, much to their detriment. The abuse of fiduciary duties are some of the things that stand out from a number of companies that are implicated in the state capture debacle, most notably Bosasa. To this end, this dissertation is primarily based on the assumption that the shareholders were unaware of the alleged misconduct and that they are victims of calculated deception by the directors.

The main aim of this study was to assess the Companies Act and determine if indeed shareholders have a voice in companies that they invest in, lest they suffer a similar fate in the future of having their investments being squandered by errant directors. If indeed the shareholders has a voice. The next issue was to determine if it the voice of shareholders was loud enough to ensure shareholder participation and to hold the directors to high standards of corporate governance accountability.

The powers of shareholders to appoint and dismiss directors are commended and endorsed by this dissertation. The discussions have shown that these powers are very much substantive and impactful to ensure that shareholders participate in corporate governance. Moreover, they are on par with foreign law of first world countries and can be strategically used by the shareholders to make an impact. These powers are commendably balanced to prevent a violation of directors' rights to manage companies and to allow them to properly exercise their fiduciary duties. Shareholders are empowered to vote on important transactions through the use of resolutions. These voting rights are further bolstered by the sophistication of institutional shareholders. Takeovers are used as an example of the types of transactions that cannot go through without shareholder approval. United Kingdom company law principles also closely complement South African principles in a number of similar ways.

There are also remedies to ensure that shareholders have recourse whenever violations have occurred or are about to occur. However, the procedures for institution of the derivative action have hamstrung its effectiveness. The conclusion that is reached is that South African company law has provided adequate room for shareholders to actively participate in issues of corporate governance. As to the Steinhoff scandal that sparked this study, the only conclusion is that there were some corrupt activities which should be aggressively investigated to explain what had really happened. It is recommended that the derivative action ought to be revisited. It is a remedy that is practically impossible to implement, especially for a shareholder that is unsophisticated and not well-resourced financially.

Word count *** 15150 words***

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