SHAREHOLDERS' GOVERNANCE AND ABUSE OF SHAREHOLDING: REMEDIES IN TERMS OF THE COMPANIES ACT 71 OF 2008

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ABSTRACT

The abuse of shareholding power in the interplay of company governance becomes a topic for academic discourse, especially where this research reveals that some of the statutory remedies apply *ex post facto*. It becomes questionable whether these remedies are sufficient to assist minority shareholders, or salvage certain losses which they may suffer in the circumstances.

Basically, a company's governance is anchored by its separate juristic personality. A company is governed by its constituent members, which are the board of directors and shareholders. Hence, shareholding is key in company governance.

In practice, the shareholding capacity acts as a major tool of governance and control in a company. Besides, contemporary realities have shown that it is possible for majority shareholders to hold a dual position of power in a company, both as directors and controlling shareholders, which may give rise to abuse if not properly managed.

In the interplay of shareholder governance, the interest of minority shareholders may be susceptible to prejudice and abuse. Such abuse may manifest in circumstances where controlling shareholders tyrannically use their shareholding power to influence decisions of the company. Thus, the abuse of shareholding power becomes inevitable where there are no proper checks and balances defining rights, duties and limitations of powers amongst the different players in company governance.

This research looks at the remedies in sections 163, 164 and 165 of the Companies Act 71 of 2008. The study evaluates whether these sections provide adequate minority protection against the abuse of shareholding power by majority shareholders in the interplay of company governance.

It becomes problematic if the provisions of sections 163 to 165 of the Companies Act 71 of 2008 are insufficient to protect minority shareholders' interest in the interplay of company governance. Therefore, these remedies are evaluated with an aim to establish whether they are preventive mechanisms, or they provide sufficient cure in their approach. This dissertation recommends alternative ways to curb the abuse of shareholding power in the interplay of company governance.

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CHAPTER 1: INTRODUCTION

1.1 Research overview

The issue of abuse of shareholding power in the interplay of company governance is both of academic and practical concern. Most often, profit companies are formed or funded through money raised from authorised issued shares to the public, or through other various forms of external loans such as debentures, or other long or short-term loans (which are outside the scope of this discourse).[1] Hence, shares and shareholding are important elements of company formation and governance.

Shareholding relates purely to profit companies.[2] The term "the company" in this work will be used for profit limited liability companies. At times, profit limited liability companies mobilise for funds internally from its shareholders in order to raise more capital to ensure business sustainability. In sequel, the rights and interests of all shareholders as financial contributors are not only to be recognised, but also to be protected within the ambits of the law and corporate governance.[3]

Besides, shareholding provides and guarantees a bundle of personal rights to the shareholders.[4] One of these rights is the right of shareholders to participate in the governance of the company.[5] Shareholders exercise this right by making decisions on behalf of the company through voting, by way of ordinary or special resolution.[6] They also elect directors, or nominate other shareholders, or their representatives to be appointed as directors where the company's Memorandum of Incorporation (MOI) prescribes.[7] In essence, the directors of the company are sometimes shareholders of the company as a result of being the company's incorporators or majority shareholders.[8]

Basically, the power to control as well as manage a company ultimately rests in the hands of the board of directors.[9] Generally, the shareholders may elect to vote for

[1] Cilliers and Benade *Corporate Law* (2000) 3rd Edition 219 - 222.
[2] S 1of the Companies Act; see Cassim *Contemporary Company Law* (2012) 2nd Edition 10; 213 - 215.
[3] Naidoo *Corporate Governance: An Essential Guide to South African Companies* (2009) 2nd Edition 10; see Cassim 473.
[4] *Cooper v Boyes* 1994 (4) SA 521 (C) 535.
[5] Part F, Chap 2 of Companies Act.
[6] S 65(1) of the Companies Act; see Cassim 355; 369 - 374.
[7] S 66(4)(a)(i) - (ii) read with 66(4)(b) of the Companies Act; see Cassim 422 - 426.
[8] S 67 of the Companies Act.
[9] S 66(1) of the Companies Act.

candidate directors that will fulfil their interests, even at the expense of competence or company's interest.[10] Consequently, such directors may serve as conduits through which majority shareholders fulfil and perpetuate their interests.[11]

Therefore, the interplay of power at different phases of company governance poses a quest to investigate whether there is adequate provision to ensure that protective measures are in place for minority shareholders. This concern is to ensure a balance of interests between the majority and the minority shareholders without compromising the separate juristic independence of the company.

1.2 Research problem

The abuse of shareholding power by majority shareholders in the interplay of company governance becomes a challenge if adequate prevention mechanisms are not put in place to protect the interests of minority shareholders.

1.3 Research question

What are the possible measures at the interplay of company governance to ensure that shareholding power is not a tool to exert undue control and undermine the power of the board and minority shareholders' interests?

1.4 Research limitation

The scope of this research is limited to review remedial aspects of sections 163, 164 and 165 of the Companies Act 71 of 2008,[12] with respect to shareholders' governance and shareholding control in a profit company. This research does not extend to the details of profit companies. The scope of this research excludes profit companies with only one shareholder, personal liability companies and state-owned companies.

Also, this research does not cover the extended definition of shareholders who are holders of other securities other than shares in terms of section 57(1) of the Companies Act.

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[10] *Re HR Harmer Ltd* (1959) 1 WLR 62 at 82; *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* (1990) 3 A11 ER 404 (PC); (1991) 1 AC 187 (PC) at 221; see Cassim 425.
[11] Ibid.
[12] Hereafter the "Companies Act" or "Act".

1.5 Research methodology

The methodology of this research is based on expository and analytical reasoning. This research involves consultation of relevant contemporary company law literature, journals and cases. It critically evaluates the possibility of shareholding being employed as a tool to exert undue corporate control in the interplay of shareholders' governance of a company.

This approach is considered appropriate to analyse aspects of the remedies in sections 163, 164 and 165 of the Companies Act, in order to establish whether these remedies serve therapeutic or preservative purpose, with respect to minority shareholders' protection during company governance. This investigation will enhance the discourse to establish other steps that may be appropriate in curbing possible abuse of shareholding power in the interplay of shareholders' governance and control.

This work uses masculine gender and references using *De Jure* style.

1.6 Structure of dissertation

Chapter 1 gives an introduction of the research.

Chapter 2 gives an exposé of a company as a juristic and separate person. It looks at its key composition and exceptions to the principle of its separate legal personality.

Chapter 3 focuses on shareholders' governance and relevant aspects of decision making at shareholders' meetings.

Chapter 4 discusses directors' governance. It analyses the synergy during the interplay of governance between the board of directors and the shareholders.

Chapter 5 discusses minority protection with respect to aspects of the remedies in sections 163, 164 and 165 of the Companies Act.

Chapter 6 gives the conclusion and recommendation.

CHAPTER 2: THE COMPANY: A JURISTIC AND SEPARATE PERSON

2.1 Introduction

The issue of abuse of shareholding power in the interplay of company governance may not be discussed in isolation from the concept of a company and its separate juristic personality. A company may be formed for the purposes of business and its expansion.[1] The formation of a company is usually financed through funds provided by the prospective or existing shareholders.[2]

The concept of a company in law is founded on its legality and the characteristics of its legal personality.[3] It is a fundamental legal principle that a company is a separate juristic person.[4] A company becomes a separate legal person after it has been incorporated in terms of the Act[5] and a certificate of registration has been issued by the Companies and Intellectual Property Commission (CIPC).[6]

The juristic personality of a company guarantees limitation of liability on the shareholders or incorporators of the company.[7] Also, part of the consequences of its separate legal personality includes perpetual succession, regardless of any change in the composition of its shareholders.[8] In addition, a company may sue and be sued using its name.[9]

In terms of section 19(1)(b),[10] an incorporated company possesses legal capacity and can exercise all legal powers due to a natural person, except those that are impracticable to be exercised by the company as a result of its innate limitation, or such constraints imposed by the company's Memorandum of Incorporation (MOI).[11] In the same vein, a company as a juristic person is entitled to be treated equally and fairly to other persons in terms of the Bill of Rights.[12]

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[1] *Salomon v Salomon & Co Ltd* (1897) AC 22 (HL).
[2] Cassim 213.
[3] Cassim 29 - 32.
[4] Ibid.
[5] S 19(1)(a) of the Companies Act.
[6] Cassim 33 - 35.
[7] *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) par 6.
[8] *Maasdorp v Haddow* 1959 (3) SA 861 (C) 866*; Stern v Vesta Industries (Pty) Ltd* 1976 (1) SA 81 (W) 85.
[9] *Magnum Financial Holdings (Pty) Ltd v Summerly* 1984 (1) SA 160 (W) 163; *Wiseman v Ace Table Soccer (Pty) Ltd* 1991 (4) SA 171 (W) 175.
[10] Companies Act.
[11] Cassim 31.
[12] S 8(4) Constitution of the Republic of South Africa, 1996 as amended.

2.2 Overview

The separate legal existence of a company is not a matter of concept but that of substance.[13] The fact that a company has a separate legal personality gives it the capacity to acquire certain legal rights and to incur corresponding legal duties.[14] However, the non-human nature of a company impedes it from exercising certain functions unlike human beings.

In terms of the Companies Act, a company subsists on the assistance of its designated representatives in carrying out certain functions in order to enjoy its rights and effectively discharge its duties.[15] Thus, a company consists of its separate legal personality, its board of directors and its shareholders.[16] Therefore, the governance of a company is administered by the two human organs of the company.[17] These two organs are its board of directors and its shareholders at shareholders' meetings.[18]

It is notable that a company does not relinquish its rights and obligations to its designated representatives, even though it acts through them.[19] That is, the rights and obligations of a company are separate from those of its shareholders and directors. This demarcation affirms the separate legal personality of a company.[20]

It is a reality that the separate legal personality of a company is susceptible to abuse, which may result from *ultra vires* exercise of power by its shareholders or directors during governance.[21]

2.3 The company as a separate juristic person

A company is defined as a legal person that is duly registered in terms of the Companies Act.[22] A company is a legal entity, which does not possess a physical body, yet functions and affects the daily lives of human beings and other legal entities.[23] The principle of a separate legal personality of a company makes it distinct from the persons of its shareholders, directors, or other prescribed officers of the

[13] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550.
[14] Cassim 31.
[15] S 57(7) of the Companies Act.
[16] Cilliers and Benade 4 - 5.
[17] Cassim 355.
[18] Ibid.
[19] Cassim 31.
[20] *Dadoo Ltd v Krugersdorp Municipal Council* supra.
[21] Cassim 29.
[22] S 1 of the Companies Act.
[23] Cassim 31.

company.[24] *Salomon v Salomon & Co Ltd*[25] established the principle of the separate legal personality of a company.[26]

It is established that shareholders or directors of a company are not liable for the liabilities of the company.[27] In the same vein, shareholders or directors of a company may not conduct the affairs of the company as if it were their personal affairs.[28] This is because the ownership of a company does not belong to its shareholders or directors. However, ownership of its properties vests in its shareholders and management rests on its board of directors.[29]

2.4 Shares and shareholders of the company

A share is "one of the units into which the proprietary interest in a profit company is divided".[30] In terms of section 35(1) of Companies Act, a company's issued share is a movable property, which may be transferred in any manner provided for by law. Therefore, shares provide the shareholders proprietary interest in a profit company.[31]

On the other hand, a shareholder is defined as the holder of an authorised and issued share of a company, whose particulars have been captured in the company's securities register,[32] whether certificated or uncertificated.[33] A registered shareholder of a profit company becomes part of the decision makers of the company by virtue of his shareholding.[34] Thus, shareholding gives the shareholders the right to participate in governance of the company.[35]

Shareholding identifies and assigns to shareholders personal rights to income or dividend where a company declares profit and guarantees dividends.[36] It also gives shareholders the right to participate in decision making of a company.[37] The class of

[24] Cassim 33.
[25] (1897) AC 22(HL).
[26] Cassim 33.
[27] Ibid 35.
[28] *Macaura v Northern Assurance Co Ltd* (1925) AC 619.
[29] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 at 552.
[30] S 1 of the Companies Act.
[31] Cassim 213.
[32] S 24(4)(a) read with S 50(1)(a) - (b) of the Companies Act.
[33] S 1 of the Companies Act.
[34] Ss 37; 61(1)-(2)(a)-(c) of the Companies Act.
[35] Oditah "Takeovers, share exchanges and the meaning of loss" 1996 112 LQR 424 at 426-427.
[36] Ibid.
[37] Ibid.

shares held affords the shareholders priority or preference in relation to capital invested, voting rights and dividend pay-outs in return for their shareholding in a company.[38]

It is important to state that shareholding in a company neither guarantees arbitrary use of power nor qualifies unauthorised management of a company's business.[39] This is because being a shareholder does not confer on a shareholder a position of agency over a company.[40]

Similarly, shareholding does not vest in shareholders the rights of ownership over a company's assets either in part or whole.[41] The ownership of a company's assets fully resides in the company itself.[42] The reason is that a company is a detached legal entity with a legal capacity to own its assets.[43]

At times, a shareholder may concurrently wear many caps on his head. In *Salomon v Salomon & Co Ltd*,[44] Mr. Aron Salomon featured as a majority shareholder, a director, an employee, and a secured creditor of the company. The House of Lords found in favour of Mr. Aron Salomon that he should not be held liable for the liabilities of the company because the company is a separate juristic person, that was validly incorporated and registered. Hence, the rights and liabilities of a company belong to the company. As a result, the liabilities of the company were not imposed on Mr. Salomon, regardless of his motive for incorporation, or connection with the company.

However, the separate legal personality of a company may at times be prejudicially exploited, especially where there are no adequate demarcating lines of control. Abuse of shareholding becomes inevitable, especially where there is concentration of power in the hands of few controlling shareholders. This brings to the fore the concern on how to maintain a balance at the interplay between shareholders' governance and company control.

[38] Ibid.
[39] Cassim 39.
[40] *Salomon v Salomon & Co Ltd* supra.
[41] *Bradbury v English Sewing Co Ltd* (1923) AC 744 (HL) 746.
[42] Cassim 213 - 215.
[43] Ibid.
[44] (1897) AC 22(HL).

2.5 The board of directors and the company

A company as a separate legal person, still needs the service of its directors to act in its stead.[45] The relationship between a company and its directors is sometimes a controversial one. [46] At times, directors exercise power in dual capacities as shareholders and directors of the company, as stated in *Salomon v Salomon*.[47] It is to be noted that the Companies Act vests original powers of management of a company in its directors.[48] However, such powers of management are exercised in a fiduciary role. In instances of abuse of office, such directors may incur liabilities, jointly and severally, which is beyond the scope of principal and agency relationship.[49]

2.6 Exceptions to the principle of separate legal personality of the company

The court, in certain circumstances of abuse or fraud, pierces the corporate veil by circumventing the separate legal personality of a company.[50] Piercing of the corporate veil removes the limited liability protection which the separate legal personality of a company affords its shareholders and directors, if they are found liable for wrongful conduct.[51] The court may pierce the corporate veil for purposes of policy consideration by construing a company as an alter ego of a controlling shareholder or director.[52] Therefore, liability will be borne by a wrongdoer, who misuses the separate legal personality of a company through the accessory of his shareholder governance, or his controlling shareholding power.[53]

2.7 Conclusion

The court and the legislature have both identified that the corporate structure is susceptible to abuse.[54] Hence, exceptions to the general principle of separate legal personality of a company is employed when the purpose of the principle is violated.[55]

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[45] Cassim 411.
[46] Cassim 412.
[47] (1897) AC 22(HL).
[48] S 66(1) of the Companies Act.
[49] Cassim 412.
[50] Cassim 41.
[51] Cassim 41 - 51.
[52] *Amlin (SA) Pty v Van Kooij* 2008 (2) SA 558 (C); *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld* (2009) BCC 687.
[53] Cassim 42.
[54] Ibid 29.
[55] Ibid 41 - 50.

The relegation of terms of engagement usually surfaces when personal interests overtake the interest of a company.[56] The piercing of corporate veil at times may not be an easy grant. It may also be a futile chase where certain losses are irrecoverable. Minority shareholders may suffer loss or irreparable damage, in a circumstance where the controlling shareholders (who at times constitute the board) make decisions that are prejudicial to the interest of the minority shareholders, in their exercise of governing powers over the affairs of the company.

The separate legal personality of a company bars shareholders or directors from acting as an agent of the company for their personal pursuits.[57] However, the House of Lords in its decision in *Salomon v Salomon & Co Ltd*[58] did say that there is no requirement in the legislation, nor the company's Memorandum that required the subscribers thereof to be unconnected with the company, or such guiding rules that require them to take considerable care and interest in the company.[59] This assertion reveals that lack of an adept governing document may bring about unintended result.

In South Africa, the court in *Dadoo Ltd v Krugersdorp Municipality Council*[60] held that the separate legal personality of a company is not superficial or mere technical term, but a material substance which exists on its own. The facts of this case established that the company is distinct from its shareholders. Hence, the statutory prohibition on acquisition of immovable property placed on the shareholders of the company did not apply to the company.[61] Therefore, a company's ownership of its asset does not vest ownership in its shareholders.[62]

In the same vein, the shareholders of a company may not override the separate legal personality of the company or arrogate the duties or rights of the company to themselves. The court highlighted the demarcation in the separate legal personality of a company from its shareholders in *Macaura v Northern Assurance Co Ltd*.[63] The court made it clear that the property of the Irish Canadian Saw-Mills Ltd.[64] belonged to the

[56] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).
[57] *Salomon v Salomon & Co. Ltd* supra at 51; Pretorius et al *HAHLO'S South African Company Law Through the Cases* (2014) 41.
[58] (1897) AC 22(HL).
[59] *Salomon v Salomon & Co Ltd* supra at 51.
[60] 1920 AD 530.
[61] Ibid; see Pretorius et al *HAHLO'S South African Company Law Through the Cases* (2014) 6th Edition 14.
[62] Ibid at 551.
[63] (1925) AC 619 (HL (Ir)).
[64] Ibid at 630.

company. Hence, Mr. Macaura, a controlling shareholder, lacked the power to insure the company's property in his personal name, except there was an underlying valid contract binding himself and the company with respect to the insured property.[65]

The court held that even though Mr. Macaura was a controlling shareholder and a creditor to the company, his status did not in the circumstance give him a legal or equitable ground over the company's asset. That is, there was no consensual legal contract between him and the company, which may have accorded him right to assume responsibility to insure the company's property in his personal name. Consequently, the insurance taken in his personal name over the company's property was of no legal consequence, neither to Irish Canadian Saw-Mills Ltd. (the company) nor to Northern Assurance Co. Ltd. (the insurance company). In the circumstances, Mr. Macaura had no justifiable legal responsibility towards the property insured.[66]

It is submitted that adequate demarcation of powers and limits of control need to be stipulated in relevant binding documents in consonance with the Companies Act. This may prevent majority shareholders or directors acting in ways that are beyond their prerogatives or mandate. This demarcation may preserve the integrity of the separate legal personality of a company, prevent loss of assets and ultimately prevent prejudice over minority shareholders' interests.

[65] Ibid.
[66] Ibid.

CHAPTER 3: SHAREHOLDERS' GOVERNANCE

3.1 Introduction

It is important to describe the concepts of a share and a shareholder before delving into shareholders' governance. A share is described as the smallest indivisible unit into which the investment interests of a profit company are distributed.[1] Shareholders are investors to whom the shares of a profit company have been issued, who are subsequently registered in the company's securities register.[2] A shareholder acquires the right to participate in company governance by virtue of his investment in the shares of the company.[3]

The two governing organs of a company are its shareholders at the general meeting and its board of directors.[4] Shareholders by virtue of their shareholding in a company have a right to take part in the governance of the company.[5] A company's governance is diarchy in structure.[6] Shareholding gives the shareholders the right to exercise certain governing power over the company.[7] The exercise of such power of governance is usually expressed at shareholders' meetings.[8]

There are prescribed essential decisions which are designated to be taken by a company's shareholders.[9] The Companies Act gives the shareholders an irrevocable right to make decisions by way of voting on any proposal to alter preferences, rights, limitations and other conditions associated to the shares held in the company, regardless of any contrary provision in the company's Memorandum of Incorporation (MOI).[10] Shareholders also enjoy certain governing powers to decide on some

[1] S 1 of the Companies Act.
[2] Ss 50 (1)(a) - (b); (2)(a) - (b)(i) - (ii); 59(1)(a) - (f) of the Companies Act.
[3] Oditah "Takeovers, share exchanges and the meaning of loss" 1996 112 LQR 424 at 426-427
[4] Cassim 355.
[5] Ss 58; 61(1) - (2)(a) - (c) of the Companies Act; see *John Shaw and Sons (Salford) Ltd v Shaw* (1935) 2 KB 113 (CA).
[6] Pretorius et al 207.
[7] S 57(7) of the Companies Act.
[8] Cassim 355.
[9] Ibid.
[10] S 37(3)(a) of the Companies Act.

matters, for instance, to elect directors,[11] to alter the company's MOI,[12] or other matters of concern to the shareholders.[13]

On the other hand, "the business and affairs of a company must be managed by or under the direction of the board of directors".[14] The board has the power to perform all authorised functions on behalf of a company, except to the extent of limitations defined in the Companies Act or the company's MOI.[15] In effect, the board of directors is the mind of a company.[16] The board is autonomous. However, in certain circumstances there are limitations to its governing power, which are generally reserved for a general meeting.[17]

A general meeting may be described as a corporate assembly of the two main governing organs of a company, for the purposes of taking major decisions on behalf of a company and for the interaction of key players of the company.[18] The general meeting is the supreme decision-making body of a company.[19] Important decisions are taken at a general meeting with respect to amendment of a company's MOI, alteration of a company's object, variation of a company's capital structure, decision on fundamental transactions, variation of shareholders' rights, removal of directors and decision on voluntary winding up.[20]

Furthermore, a general meeting may lay down rules for the board to follow.[21] Thus, the general meeting is the engine room of a company. Therefore, shareholders are a powerful unit at a general meeting, vested with default and residual powers in the governance of the company.[22] The shareholders at a general meeting, may exercise powers not conferred on the board. Also, shareholders at a general meeting may ratify or revoke the actions of the board and may elect replacements for some directors

[11] Ss 66(4)(a)(i) - (ii) read with 66(4)(b); 60(3) of the Companies Act, with respect to shareholders' election of directors by written poll.
[12] S 16(1)(c)(i) - (ii) of the Companies Act.
[13] Cassim 424.
[14] S 66(1) of the Companies Act.
[15] Ibid.
[16] Pretorius et al 207.
[17] *Automatic Self-Cleansing Filter Syndicate Co. Ltd. V Cuninghame* (1906) 2 Ch 34 (CA) at 45; see Pretorius et al 270 - 271.
[18] Pretorius et al 207.
[19] *Mayor, Constables and Co of Merchants of the Staple of England v Governor and Co. of Bank of* England (1888) 21 QBD 160.
[20] Pretorius et al 207 - 208.
[21] Ibid.
[22] Ibid.

where there are positions to be filled.[23] Thus, the shareholders' meeting is a major avenue for shareholders to participate in the decision making and governance of a company.[24]

3.2 Overview

It is established that a company is a separate legal entity from its shareholders and directors.[25] The shareholders and the board of directors are the two main support structures of a company.[26] These two main organs of the company work as a team.[27] There is a synergy that permeates the interplay of company governance between the shareholders and the directors.[28] This synergy is governed by the dictates of the company's MOI. The powers are delineated between these two main organs according to the dictates of the company's MOI.[29]

The power of management is vested in the board of directors, except to the extent that the Companies Act or a company's MOI provides otherwise.[30] The powers vested in the directors are exclusive to the directors and may not be usurped by the shareholders. In practice, could shareholders circumvent the board of directors?

The shareholders play a major role in the governance of a company alongside the board of directors. At times, the shareholders may have to ratify certain decisions taken by the board. They may do otherwise by rejecting the proposed resolution of the board through counter votes by the majority. Most often, the shareholders' meeting serves as the avenue through which the shareholders participate in the governance of the company. There are laid down procedures in terms of the Act with respect to shareholders' meeting. In effect, it appears the shareholders' meeting is the focal point of power brokage with respect to company's governance. The decisions made may be invalidated where the required formalities for shareholders' meetings are not adhered to, which may impede the actualisation of such decisions.[31] This is possible in

[23] Ibid.
[24] S 16(1)(c)(i) - (ii) of the Companies Act.
[25] *Salomon v Salomon & Co Ltd* (1897) AC 22 (HL).
[26] Cassim 355.
[27] *John Shaw and Sons (Salford) Ltd v Shaw* (1935) 2 KB 113 (CA); *Letseng Diamonds Ltd v JCI Ltd* 2007 (5) SA 564 (W); *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd* 2009 (4) SA 89 (SCA).
[28] Ibid.
[29] Ibid.
[30] S 66(1) of the Companies Act.
[31] S 64(1)(a) - (b) of the Companies Act.

circumstances where the required minimum standards to adopt ordinary or special resolutions, or quorum for commencement of shareholders' meetings are not met.[32]

3.3 The shareholders' statutory powers for company governance

The Companies Act empowers the shareholders at shareholders' meeting to exercise essential constitutional and managerial powers. These powers include the power to:

a) amend the company's MOI; [33]
b) deliberate, put to vote and subsequently approve the rules set by the board of directors with respect to the company's governance;[34]
c) fill vacancies on the board, by electing directors at a shareholders' meeting or at an annual general meeting (AGM);[35]
d) remove directors at a shareholders' meeting;[36] and
e) approve fundamental transactions with respect to approval for the disposal of all or greater part of the company's assets or undertaking, schemes of arrangement, amalgamations, or mergers by way of special resolution at a shareholders' meetings.[37]

In addition, there are instances when a company must hold a shareholders' meeting. A company must hold the shareholders' meeting when:

a) the Companies Act or the MOI requires the board to refer a matter for shareholders' decision;[38]
b) section 70(3) requires, to fill vacant positions on the board;[39]
c) one or more shareholders deliver a written and signed demand to that effect;[40]
d) an AGM of shareholders is mandatory;[41] and
e) the company's MOI stipulates.[42]

[32] *Henderson v James Louttit & Co Ltd* (1894) 21Rettie 674 -676; *Hartley Baird Ltd* (1955) Ch 143.
[33] S 16(1)(C)(i) - (ii) of the Companies Act.
[34] S 15(4) of the Companies Act.
[35] S 70(3)(b)(i) - (ii)(aa) - (bb) of the Companies Act.
[36] S 71(1) of the Companies Act.
[37] S 112(2)(a) and (3) of the Companies Act.
[38] S 61(2)(a) of the Companies Act.
[39] S 61(2)(b) of the Companies Act.
[40] S 61(2)(c)(i) read with (3) - (4) of the Companies Act.
[41] S 61(2)(c)(i) read with (7) of the Companies Act.
[42] S 61(2)(c)(ii) of the Companies Act.

3.4 The shareholders' meetings

A shareholders' meeting may be described as a formal and organised assembly, held for the purpose of deliberating on matters concerning a company by registered holders of the company's issued shares, who are entitled to exercise their rights to vote on those matters.[43] The shareholders' meetings provide the opportunity for the shareholders to exercise their statutory rights, to deliberate and cast their votes on matters of concern within the company.[44] For example, shareholders exercise power to elect directors at shareholders' meeting or at an AGM.[45]

Also, there are prescribed minimum ordinary businesses that must be executed at an AGM. The ordinary business that must be transacted include:

a) the presentation of directors' report;[46]
b) the presentation of the audited financial report for the preceding financial year;[47]
c) the presentation of audit committee's report;[48]
d) the election of required number of directors;[49]
e) the appointment of an auditor for the incoming financial year;[50]
f) the appointment of a new audit committee for the incoming financial year;[51]
g) and other matters raised by the shareholders, regardless the absence of prior notice to the company.[52]

In practice, an AGM does not always achieve the set objectives, because of inadequate attendance and lean participation from the widely dispersed shareholders peculiar to public listed profit companies.[53] In terms of sections 61 to 65 of the Act, it is important that the laid down procedures must be followed with respect to shareholders' meetings. The nullification of decisions taken at such shareholders'

[43] S 1 of the Companies Act.
[44] *Byng v London Life Association Ltd* (1990) Ch 170 at 183.
[45] S 66(4)(b) read with S 70(3)(a) - (b)(i) - (ii)(aa) - (bb) of the Companies Act; a public company must hold an AGM, while it is optional for private companies in terms of S 61(7)(a)-(b) of the Companies Act.
[46] Ss 61(8)(a)(i); 30(3)(b)(i) - (ii) of the Companies Act.
[47] Ss 61(8)(a)(ii); 30(3)(a) of the Companies Act.
[48] S 61(8)(iii) of the Companies Act.
[49] S 61(8)(b) of the Companies Act.
[50] S 61(8)(c)(i) of the Companies Act.
[51] S 61(8)(c)(ii) of the Companies Act.
[52] S 61(8)(d) of the Companies Act.
[53] *Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication* (URN 99/1144) (DTI London 1999); Cassim 369 - 373.

meeting may be on the ground of irregularity of such proceedings, or noncompliance with the procedural formalities.[54]

However, in terms of common law, there are instances where compliance with procedural rules is not sacrosanct.[55] For instance, a formal assembly of shareholders is not required where the shareholders exercise unanimous assent over a matter.[56] Also, shareholders may by way of round robin give unanimous assent, which will obviate the need to comply with the requirement for a notice.[57] This option of written resolution is available in terms of section 60 of the Companies Act. The shareholders must all be fully aware of the matter before giving their consent.[58] Also, such unanimous consensus is binding, only if all the shareholders who have a right to attend and exercise a voting right on some matters at the shareholders' meeting did give their assent.[59] In addition, such unanimous agreement has equal binding effect as a resolution adopted at a general meeting of shareholders.[60]

3.5 Conclusion

Shareholding plays a major role in the interplay of power and governance of a company. It is pertinent to say that the possibility of abuse of power may not be overruled. Shareholders are at liberty to exercise their voting power in furtherance of for their personal interests.[61] Besides, shareholders do not owe any fiduciary duty to the company.[62] Thus, the management of power in the interplay of company governance becomes essential to balance stakeholders' interests.

Such balance of interests requires assessment of possible ways shareholders could circumvent the powers of the board of directors, which is a concern raised in paragraph

[54] S 64(1)(a) - (b) of the Companies Act; Cassim 355.
[55] Cassim 362 - 364.
[56] *Parker & Cooper Ltd v Reading* (1926) 1 Ch 975 at 984; *Sugden v Beaconhurst Dairies (Pty) Ltd* 1963 (2) SA 174 (E) 180-181; *Dublin v Diner* 1964 (1) SA 799 (D) 801; *Gohlke & Schneider v Westies Minerale (Edms) bpk* 1970 (2) SA 685 (A) 693 – 694; *Advance Seed Co (Edms) Bpk v Marrok Plase (Edms) Bpk* 1974 (4) SA 127 (NC); *Quadrangle Investments (Pty) v Witind Holdings Ltd* 1975 (1) SA 572 (A); *Swanee's Boerdery (Edms) Bpk (in liquidation) v Trust Bank of Africa Ltd* 1986 (2) SA 850 (A) 858; *Levy v Zalrut Investments (Pty) Ltd* 1986 (4) SA 479 (W) 485; *Transcash SWD (Pty) Ltd v Smith* 1994 (2) SA 295 (C) 302.
[57] Ibid.
[58] *EIC Services Ltd v Phipps* (2004) BCLC 589 par 135.
[59] *In re Duomatic Ltd* (1969) 2 Ch 365.
[60] Ibid per Buckley J at 373.
[61] *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) 680 – 681.
[62] Cassim 140.

3.2 above. It is submitted that majority shareholders could sidestep the board of directors if majority shareholders adopt a resolution to alter the company's MOI. A special resolution to amend the company's MOI may be proposed by shareholders entitled to exercise at least 10% voting right with respect to such amendment.[63] However, the requirement of 10% voting right may still pose an insurmountable challenge for minority shareholders.

Besides, a special resolution is required for some decisions to be approved in certain circumstances as set out in the Companies Act.[64] A special resolution consequentially requires the approval of majority votes of at least 75%. In such circumstances, the balance of power shifts to the group of shareholders with controlling voting rights. What happens in such circumstance where majority shareholders abuse their voting power to exclude or prejudice minority shareholders? The interests of the minority shareholders may become imperiled at the instance of such shift in the power dynamics.

In conclusion, the discourse reveals that a majority shareholder may also be a director of a company, who is entitled to act in his personal capacity and interest when making decisions as a shareholder and owes no fiduciary duty to the company or co-shareholders.[65] It may be stated that such twin-capped shareholders may go overboard if adequate preventive measures are not in place to address such conflicting interests or roles. Therefore, the interests of the minority shareholders may be prejudiced if the abuse of shareholding power is not effectively managed or curbed in the interplay of shareholders' governance of a company.

[63] S 16(1)(c)(i)(bb) and (ii) of the Companies Act.
[64] S 65(11)(a) - (m) of the Companies Act.
[65] Cassim 140 - 141.

CHAPTER 4: DIRECTORS' GOVERNANCE AND THE INTERPLAY OF POWER BETWEEN THE BOARD AND THE SHAREHOLDERS

4.1 Introduction

The juristic personality of a company requires that it functions through the agency of human beings.[1] Such human intervention is required for the company to be able to exercise some of its rights and discharge corresponding duties.[2] In addition, it is imperative that companies have directors.[3] The Act stipulates that a private company must have at least one director,[4] while a public company must have at least two directors.[5]

The directors play important roles in the management and control of companies.[6] The board of directors are responsible for the daily operation and management of a company.[7] A company exercises its functions through its directors and shareholders at shareholders' meetings.[8]

4.2 Overview

It is important to decipher how shareholding power influences the decision-making process of a company, regardless of the board's control. This understanding may assist in establishing whether there is a propensity for abuse of shareholding power by those with controlling shareholding at the interplay of company governance.

4.3 Election of directors by the shareholders in terms of the Companies Act

Shareholders of a company enjoy the power to appoint directors.[9] They are entitled to elect at least 50% of the directors, as well as 50% of alternate directors of the company.[10] A company's Memorandum of Incorporation (MOI) may make provision for any determined or named person in the MOI to be appointed directly as a director

[1] Cassim 411.
[2] Cilliers and Benade 5-6.
[3] S 66(1) Companies Act.
[4] S 66(2)(a) of the Companies Act.
[5] S 66(2)(b) of the Companies Act.
[6] Cassim 403.
[7] Cassim 411.
[8] Ibid.
[9] S 66(4)(b) of the Companies Act.
[10] S 66(4)(b) of the Companies Act.

in the company, subject to the appointee giving his written consent with respect to such appointment.[11] A person becomes empowered to serve in the capacity of a director of a company when he has been appointed or elected[12] and has consented in writing to such appointment.[13]

Furthermore, incorporating shareholders of a company may serve as directors of the company, until such appointment is made permanent by election or ratification by shareholders in terms of the Companies Act 71 of 2008 or the company's MOI.[14] The election of directors may be by voting at an AGM of the company,[15] or a meeting called for that purpose,[16] or through written poll.[17]

4.4 The directors of a company

It is important to identify persons that act in the capacity of directors. The law qualifies some people to be directors by virtue of their indirect conduct or influence on the decision making of a company.[18]

A director is one of the members of the board of any company. A director may be an alternate director or a person that occupies the position of a director.[19] Regardless of the title attached to the position, a director includes anyone designated, who has authority, participates and exercises all powers and controls in order to perform all the functions assigned or due by the company, with exception of contrary provisions in the Companies Act, or in the MOI of the company.[20]

According to the Act, the definition of director is not exhaustive.[21] Therefore, a director includes those formally appointed and those that are not formally appointed, but directly or indirectly perform the functions of a director as a matter of fact (*de facto*).[22]

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[11] S 66(4)(a)(i) read with 66(7)(b) of the Companies Act.
[12] S 66(7)(a) of the Companies Act.
[13] S 66(7)(b).
[14] S 67(1)(a) - (b) and (2) read with S 66(4)(a)(i)-(iii) and (b) of the Companies Act.
[15] S 70(3)(b) of the Companies Act.
[16] S 61(1) -(2)(a) - (b); read with S 70(3)(b)(ii)(aa) of the Companies Act.
[17] S 60(3) of the Companies Act.
[18] S 1 read with S 66(1) of the Companies Act.
[19] *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236; the court held that anyone that acted in the position of a director, whether with lawful authority or otherwise is deemed to have occupied the position of a director.
[20] S 1 read with S 66(1) of the Companies Act.
[21] Cassim 404.
[22] Ibid.

At times, some majority shareholders fall into the category of *de facto* director through their exercise of real influence.[23] The directors of a company owe fiduciary duties to the company.[24] In consequence, the law holds directors accountable for breach of their fiduciary duty in the course of company governance.[25]

4.5 The board meeting

A director may convene a board meeting at any time, if he is authorised by the board of the company.[26] The formalities of a board meeting regarding notice, quorum and voting must be complied with as stipulated in the Act.[27] The board of directors exercises its own powers by passing resolutions at a board meeting.[28] Thus, the making, amendment or repeal of company rules are proposed at a board meeting.[29]

4.6 The governing documents and the interplay of power among the parties

The Companies Act provides the major company law rules.[30] These rules are classified into the categories of alterable and unalterable provisions.[31]

The MOI is the exclusive constitution of a company.[32] The MOI must be consistent with the provisions of the Act, otherwise it will be void to the extent of its inconsistency.[33] The MOI and the rules of a company are binding between the company and its shareholder,[34] amongst its shareholders[35] and between the company and its directors.[36] The shareholders of a company are at liberty to execute any agreement with one another with respect to any matter relating to the company.[37] The Companies Act does not define a shareholders' agreement. A shareholders'

[23] *Re Kaytech International plc; Portier v Secretary of State for Trade and Industry* (1999) BCC 390 at 402; *Gemma Ltd v Davies* (2008) BCC 812 par 40.
[24] S 76(3)(a) - (c)(i)-(ii) of the Companies Act.
[25] S 77(2) of the Companies Act.
[26] S 73(1)(a) of the Companies Act.
[27] S 73 of the Companies Act.
[28] S 73(5)(d) of the Companies Act.
[29] S 15(3) of the Companies Act; see Cassim 430.
[30] Cassim 12.
[31] Ibid.
[32] Ibid.
[33] S 15(1)(a)-(b) of the Companies Act.
[34] S 15(6)(a) of the Companies Act.
[35] S 15(6)(b) of the Companies Act.
[36] S 15(6)(c) of the Companies Act.
[37] S 15(7) of the Companies Act.

agreement may be described as a binding contract amongst the shareholders of a company.[38] It is a private document, binding only on shareholders who consent or are part of the contract.[39] Similarly, its amendment must be executed by all consenting parties or in accordance with the amendment clause written thereof. Also, shareholders' agreement must be consistent with both the Act and the MOI of the company.[40]

Sometimes, it may not be pragmatic to address all company governance issues in the MOI. There are certain matters of governance that may be effectively addressed in the company rules.[41] The rules of a company are essential aspects of the company's governance,[42] which address certain practical issues of a company.[43]

Company rules must be consistent with both the Companies Act and the company's MOI, otherwise such rules will be void to the extent of their inconsistencies.[44] The board of directors as the custodian of a company's management have the power to make, alter or repeal the company rules, unless the company's MOI provides otherwise.[45] Such amendment must be published as prescribed in the Act.[46]

The rules of a company have a binding effect.[47] The rules are put to vote by the company's shareholders for ratification by way of an ordinary resolution.[48] An ordinary resolution requires the support of more than 50% of shareholders.[49] At times, the MOI may stipulate a higher percentage for an ordinary resolution.[50] A non-ratified rule will be binding in the interim, even if later rejected by the shareholders at a shareholders' meeting.[51]

The powers of the directors to make, amend and repeal company rules are subject to ratification through ordinary resolution of shareholders of the company.[52] This implies

[38] Cassim 138.
[39] Ibid.
[40] S 15(7) of the Companies Act.
[41] Cassim 136.
[42] Ibid.
[43] Cassim 137 - 138.
[44] S 15(4)(a) of the Companies Act.
[45] S 15(3) of the Companies Act.
[46] S 15(3)(a) of the Companies Act.
[47] S 15(6) of the Companies Act.
[48] S 15(4)(c)(ii) of the Companies Act.
[49] S 1 of the Companies Act.
[50] S 65(8)(a) of the Companies Act.
[51] S 15(4)(c)(i) of the Companies Act.
[52] S 15(4)(c)(ii) of the Companies Act.

that the shareholders have the final say through voting at general meeting of shareholders. Also, the MOI of the company may be altered by adoption of special resolution to that effect. A special resolution requires adoption by at least 75% of shareholders.[53] It is submitted in paragraph 3.5 of chapter 3 that 75% threshold for special resolution is a substantial number of voting rights which may only be accomplished by majority shareholders. In such instance, the majority may dictate the flow of such matter in their interest. For instance, the majority may refuse to re-elect directors who do not favour their interests.[54] Thus, the voice of the majority is inevitable in the decision making of a company.[55]

4.7 Conclusion

It is submitted that greater power lies in the hands of the shareholders at the intersection of power between the board and the shareholders. For instance, half of the population of company's directors get into office through the votes of the shareholders.[56] Also, this discourse reveals that the rules of the company which are made by its directors are subject to shareholders' ratification. What happens if the majority shareholders refuse to ratify rules which do not align with their interests?

In conclusion, it is pertinent to say that there is a delicate rational connection between the interests of the majority shareholders and those of the company. Considering the directors' privilege to function and exercise powers,[57] even in dual capacities, it becomes challenging where both the company and majority shareholders accomplish their interests through the instrument of the company's directors or the majority shareholders. It is more challenging where the interests of the majority shareholders may easily be perpetuated due to their influence in appointing some directors. Also, some majority shareholders' dual capacity as shareholders and directors on the board may pose a challenge with respect to conflict of interests. It then becomes necessary to examine whether there are adequate measures in place to guide the contending interests and protect the interests of the minority shareholders. More importantly, such

[53] S 1 read with S 65(9)-(10)(a)-(b) of the Companies Act.
[54] *John Shaw and Sons (Salford) Ltd v Shaw* (1935) 2 KB 113 (CA) at 134.
[55] *Sammel v President Brand Gold Mining Co. Ltd* 1969 (3) SA 629 (A).
[56] S 66(4)(b) of the Companies Act.
[57] S 66(1) of the Companies Act.

investigation requires that remedies in terms of sections 163, 164 and 165 of the Companies Act be critically evaluated.

CHAPTER 5: MINORITY PROTECTION: THE STATUTORY REMEDIES

5.1 Introduction

The Companies Act provides some measures of protection for minority shareholders.[1] It is notable that some of these remedies are not exclusive to the use of the minority shareholders because other persons may equally employ them where the Act permits.[2] However, the focus of this chapter is on the minority shareholders' protection with respect to remedies in sections 163, 164 and 165 of the Companies Act.

5.2 Overview

The majority rule is a corporate legal principle.[3] It states that shareholders are bound by the decision of the majority in terms of the company's Memorandum of Incorporation (MOI).[4] In effect, the shareholders are bound by the provisions of the company's MOI.[5] It is stated that the principle of supremacy of majority is crucial for effective running of the affairs of a company.[6]

However, the principle of majority rule may not often be to the advantage of the minority shareholders. The reason is that the majority will always have the final say on how the company's affairs are run by the adoption of relevant resolutions.

It therefore becomes important to evaluate the minority protection in terms of remedies in sections 163, 164 and 165 of the Companies Act. This evaluation will assist to determine whether these remedies are adequate in protecting the interests of the minority in the interplay of company governance and control. Could alternative measures be put in place to address the shortfall where these remedies are insufficient?

[1] Cassim 136.
[2] Cassim 756 - 757.
[3] *Sammel v President Brand Gold Mining Co. Ltd* 1969 (3) SA 629 (A).
[4] Davis and Geach (eds) *Companies and Other Business Structures in South Africa* 5th Edition (2021) 149 - 150.
[5] S 15(6)(a) - (b) of the Companies Act.
[6] *Sammel v President Brand Gold Mining Co. Ltd* supra.

5.3 The statutory remedies

5.3.1 Section 163: Relief from oppressive or prejudicial conduct

This remedy has been stated to be a remedy that may only accommodate the truly oppressed. The reason is that the majority may not invoke this remedy. This is not because they lack legal standing as a shareholder, but because they lack the presence of unjust unfairness or oppression and prejudicial conduct by a co-majority.[7]

It is stated that the majority possess the wherewithal to liberate themselves in the circumstance of the prejudicial conduct by a co-majority.[8] This is based on the parity of shareholding power that the contending majorities both possess. Therefore, the conduct may not be said to be unfairly prejudicial at the instance of contending majorities.[9]

In terms of this remedy, a shareholder may apply to the court for a relief in the instance where the conduct of the company, a director, or a prescribed officer, or a related person has brought about a result that is oppressive or unjustifiably prejudicial to unfairly disregards the interest of a minority shareholder.[10] The court may make an appropriate order to arrest the situation or undo the wrong, depending on the circumstances.[11] Besides, the oppression remedy may be granted based on equitable considerations in circumstances of unfair use of voting right by the majority which is detrimental to the interests of minority shareholders.[12]

In *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others*,[13] the court affirmed that unfair prejudice requires an objective test.[14] In this matter, majority shareholders excluded two minority shareholders from running the affairs of the company and one of them was denied the opportunity for a buy out at a fair value.[15] It held that the conduct of the majority shareholders had compelled the minority shareholder to docility, even at apparent mismanagement of the company by

[7] *Re Baltic Real Estate (No 2)* (1993) BCLC 503; *Re Legal Costs Negotiators Ltd* (1999) 2 BCLC 171 (ChD and CA).
[8] Ibid.
[9] Ibid, see Cassim 760 -775.
[10] S 163(1)(a) - (c) of the Companies Act.
[11] S 163(2)(a) - (j) of the Companies Act.
[12] *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (C) 527.
[13] 2017 (5) SA 577 (G) par 44 - 45.
[14] Ibid.
[15] Ibid par 332.

the majority shareholders.[16] The court did not overlook the wrongful conduct of the majority shareholders in withholding Mr. De Sousa's dividends. The court construed the action as a calculated step to frustrate the minority shareholder in his pursuit of legal recourse.[17] Furthermore, the court ruled in the favour of the minority shareholder for a pay-out at fair value by the company.[18] The concept of unfairness with respect to prejudice or disregard[19] for minority interest is approached broadly in view of equitable consideration and not only on strict legal reasoning.[20]

5.3.2 Section 164: Dissenting shareholders' appraisal rights

The dissenting shareholders' appraisal right is a remedy that is sought by minority shareholders where certain decisions are found objectionable to their interests. It is to be noted that, the right of an appraisal is not a random remedy that may be sought at will by a shareholder. The right of a dissenting shareholder is activated by circumstances such as a special resolution that amends the company's MOI, in order to alter the rights of a class of shares or a company's pursuit with respect to a fundamental transaction.[21] The issue of dissenting shareholders' appraisal right applies in circumstances where minority shareholders revolt against a decision which materially adversely affects their interests.[22] This remedy also applies where minority shareholders disagree with contemplated resolutions concerning transactions such as disposals of all or greater part of the company's assets, offers, mergers or amalgamations and schemes of arrangement contemplated in sections 112, 113 and 114, which they consider may be prejudicial to their interests.[23]

In terms of section 152, this remedy excludes transactions, offers or agreements pursuant to business rescue arrangements agreed to by a company's shareholders.[24]

The appraisal right procedure anticipates dissention from the minority shareholders who may be dissatisfied with the new development in the company. Hence, the

[16] Ibid.
[17] Ibid par 347.
[18] Ibid par 349.
[19] *Stech v Davies* (1987) 53 Alta LR (2d) 373 par 379.
[20] *Re Alldrew Holdings Ltd v Nibro Holdings* (1993) 16 OR (3d) 718 (Gen Div) 732; see Cassim 771.
[21] S 164(2)(a) - (b) of the Companies Act; Cassim 796 -799.
[22] Ibid.
[23] S 164(2)(b) and (3) of the Companies Act.
[24] S 164(1) of the Companies Act.

appraisal right remedy is a statutory exit mechanism for such disgruntled minority to voluntarily divest from the company.[25] The initial requirement is that the company gives notice of scheduled meeting to the shareholders if the company considers adopting special resolution that will amend its MOI by materially altering the rights, limitations, preferences, interests of shareholders as considered in section 37(8).[26] In addition, the notice must contain a statement which notifies the shareholders of their rights under the appraisal remedy in terms of section 164.[27]

The dissenting minority shareholders, after receiving the notice and agenda of the meeting in section 164 subsection 2, must give the company a notice of objection to the proposed resolution before the resolution is voted on.[28] The company is at liberty to implement the resolution if the majority adopts it. However, within ten business days of the adoption, the company must notify all dissenting shareholders that the resolution has been adopted.[29]

A dissenting shareholder who notified the company of his objection and subsequently voted against the said resolution, may demand from the company in exchange for his shares in the company a cash payment of fair value.[30] Consequently, the directors of a company are obliged to make an offer in writing to the dissenting minority shareholder, of a cash sum that has been considered a fair value for the shares to be relinquished.[31] Where the company fails to make an offer in terms of section 164(11),[32] or the dissenting shareholder finds the offer made by the company inadequate, or not of a fair value, he may apply to the court for a determination of a fresh fair value in respect of the shares to be relinquished under the appraisal demand.[33]

The company is obliged to make payment of a fair value, if both parties agreed with the company's offer,[34] or where the court so determines the fair value to be paid.[35] However, based on reasonable grounds, with respect to the company's financial

[25] Cassim 797.
[26] S 164(2)(a) of the Companies Act.
[27] S 164(2)(b) of the Companies Act.
[28] S 164(3) of the Companies Act.
[29] S 164(4) of the Companies Act.
[30] S 164(5) read with (8)(a) - (c) of the Companies Act.
[31] S 164(11) (a) - (c) subject to the shareholder's withdrawal of such demand in terms of S164(9)(a) - (c), or company's noncompliance in terms of S 164(14)(a) - (b) of the Companies Act.
[32] S 164(14)(a) of the Companies Act.
[33] S 164(14)(b) read with (15)(c)(ii) of the Companies Act.
[34] S 164(13)(b) of the Companies Act.
[35] S 164(15)(c)(ii) and (v)(bb) of the Companies Act.

liquidity, the company has a right to apply to the court to vary its obligation to pay the court imposed fair value at a more convenient time in future.[36] The Companies Act makes it clear that the obliged fair value payment is not a distribution, and as such not subject to the company's application of solvency and liquidity test in terms of section 4.[37]

5.3.3 Section 165: Derivative action

In South Africa, the common law derivative action has been abolished and replaced by the statutory derivative action under the Companies Act.[38] Therefore, a shareholder may not bring an action on behalf of the company in terms of common law. This makes the decision in *Foss v Harbottle*[39] of less relevance in South Africa. Thus, the common law principle of ratification, which favours majority rule is no longer an impediment under the statutory derivative action. Instead, the court has the power to exercise its judicial discretion under this provision to grant leave to a willing minority who wishes to pursue a claim under the derivative action.[40]

Under the statutory derivative action, a minority shareholder[41] may demand that the company commences an action, or continues an action, or takes appropriate steps in order to protect the legal interests of the company. The court may grant leave to the applicant to serve the company the demand, where the applicant has satisfied the court that there are grounds necessary and expedient to protect the rights of the minority shareholder or that of the company.[42]

The company must appoint an independent and impartial person or a committee to investigate the matter so demanded by the minority shareholder.[43] In terms of section 165(2), the company may be served with a demand to institute legal action or continue legal action to protect the company's interest. In terms of section 165(3) the company within fifteen business days, may file a counter application at the court to set aside the

[36] S 164(17)(a) - (b)(i) - (ii) of the Companies Act.
[37] S 164(19) read with Ss 1; 4 and 48(1)(a) of the Companies Act.
[38] S 165(1) of the Companies Act.
[39] (1843) 2 Hare 461.
[40] S 165(2)(d) read with (4)(b)(i) of the Companies Act.
[41] S 165(2)(a) of the Companies Act.
[42] S 165(2)(d) of the Companies Act.
[43] S 165(4)(a) of the Companies Act.

demand, on such grounds that the demand is frivolous, vexatious or lacks merit.[44] Where the company does not bring a counter application in response to the minority shareholder's demand, or if the court did not set aside the demand as contemplated in section 165(3),[45] thereafter, the company is obliged to appoint an impartial and independent person or a committee to investigate the minority shareholder's demand.[46]

In addition, the appointed independent and impartial person or committee must give the board a comprehensive report of its findings on:

a) any facts that may warrant a legal cause of action as envisaged by the minority shareholder's demand;[47]
b) the probable cost implication, should the company embark on the proceedings;[48] and
c) whether the contemplated proceedings have any probability to serve the best interest of the company.[49]

A minority shareholder that has made such demand in terms of section 165(2) may apply for leave of the court to bring, or continue an action in the name and on behalf of the company, then, the court may grant such leave provided that:[50]

a) the company[51]
    i. fails to take appropriate step with respect to subsection (4);[52]
    ii. fails to appoint investigator or committee which is independent or impartial;[53]
    iii. accepts a report that is inconclusive, or insufficient in terms of its preparation, or irrational in its conclusion or recommendation;[54]

[44] Cassim 775 - 795.
[45] S 165(4) of the Companies Act.
[46] S 165(4)(a) of the Companies Act.
[47] S 165(4)(a)(i)(aa) - (bb) of the Companies Act.
[48] S 165(4)(a)(ii) of the Companies Act.
[49] S 165(4)(a)(iii) of the Companies Act.
[50] S 165(5) of the Companies Act.
[51] S 165(5)(a) of the Companies Act.
[52] S 165(5)(a)(i) of the Companies Act.
[53] S 165(5)(a)(ii) of the Companies Act.
[54] S 165(5)(a)(iii) of the Companies Act.

iv. acts in a manner that is inconsistent with the reasonable conclusion or recommendation, with respect to the report of an impartial and independent investigator or committee;[55]

v. serves a notice of noncompliance in terms of the demand contemplated in subsection (4)(b)(ii);[56] and

b) the court is satisfied that[57]

i. the applicant is acting in good faith;[58]

ii. the proposed or ongoing proceedings entail the assessment of crucial matter of material consequence to the interest of the company;[59] and

iii. the grant of leave to the applicant to commence or continue the proceedings is in the best interest of the company.[60]

In exceptional circumstances, the court may dispense with the requirement of the demand to be served by the applicant on the company as slated in subsection (2), and without securing a response from the company in terms of subsection (4).[61] In such exceptional circumstances, the court may grant leave to bring proceedings in the name and on behalf of the company, if the court is satisfied that:[62]

a) any delay with respect to the procedures stipulated in subsections (3) to (5) may bring about;[63]

i. irreparable damage to the company;[64] or

ii. substantial harm to the interests of the minority shareholder or another person; [65]

b) there is a strong likelihood that the company lacks capacity or may not do anything to avert the harm or prejudice that may result, or protect the company's interest as sought by the applicant;[66] and

[55] S 165(5)(a)(iv) of the Companies Act.
[56] S 165(5)(a)(v) of the Companies Act.
[57] S 165(5)(b) of the Companies Act.
[58] S 165(5)(b)(i) of the Companies Act.
[59] S 165(5)(b)(ii) of the Companies Act.
[60] S 165(5)(b)(iii) of the Companies Act.
[61] S 165(6) of the Companies Act.
[62] Ibid.
[63] S 165(6)(a) of the Companies Act.
[64] S 165(6)(a)(i) of the Companies Act.
[65] S 165(6)(a)(ii) of the Companies Act.
[66] S 165(6)(b) of the Companies Act.

c) sub section (5)(b) requirements have been met.[67]

5.4 Conclusion

The remedies considered above are quite comprehensive. However, it may not be erroneous to state that they are reactive to some extent. It becomes a practical concern as section 163 comes into activation after the prejudicial deed may have been done. Despite the wide coverage of section 163, the court may not casually overlook the principles of majority rule under corporate law.[68]

At times, an applicant runs the risk of having the matter dismissed at a cost, if he fails to present to the court concrete evidence as to facts showing prejudice or oppression in the circumstance.[69] The court maintains that matters alleging oppression or abuse of the separate juristic personality of the company are strictly considered on facts and not on vague and mere generalisation.[70] The applicant has to be specific in establishing the particular prejudicial conduct which is unjust or inequitable to his interest.[71]

Furthermore, section 164 substantially presents an exit to disgruntled minority shareholders rather than to protect their interests in the company. Moreover, the court's intervention on a fair value only ensures an equitable exit and not to protect the minority in the company's governance. What happens to the predicament of a dissenting minority shareholder in the circumstance where the company, on reasonable grounds, applies to the court to postpone the payment of a fair value?

It appears that only the derivative action of section 165 gives some room for proactive measures to avert certain pitfalls that may bring about irredeemable harm to the company or result in substantial prejudice to the interests of the minorities. However, lack of substantial evidence, or inability to satisfy the conditions of the court for leave to implement the derivative action may hinder a minority shareholder in taking steps to protect the company's interests, or ultimately his own interests.

Indeed, contemporary realities have shown that these remedies are extensively curative rather than protective. The remedies in sections 163 and 164 apply *ex post*

[67] S 165(6)(c) of the Companies Act.
[68] *Sammel v President Brand Gold Mining Co. Ltd* 1969 (3) SA 629 (A).
[69] *Genffen and Others v Dominquez-Martin and Others* (4501/2014) (2017) ZAWCHC 118; (2018) 1 AII SA 21 (WCC) par 91 (reportable case) par 91.
[70] Ibid par 23; 65.
[71] *Louw v Nel* 2011 (2) SA 172 (SCA); *Bayly v Knowles* 2010 (4) SA 548 (SCA).

facto. The interests of the minorities may have been irreparably prejudiced before these remedies may be applied.

In conclusion, shareholders' governance is a fundamental aspect of a company's affairs. It is apparent that abuse is inevitable at the interplay of company governance, where the minorities lack matching shareholding power that can favourably compete with that of their majority counterpart. The reality indicates there is no remedy in circumstance where minority shareholders are outvoted on certain issues or perpetually outvoted.[72] It appears that there is lack of substantial relief addressing the despondence or dissatisfaction of minority shareholders with respect to company's governance, except in circumstances of apparent oppression, prejudice, dissention or possibility of irreparable harm.[73] It is therefore necessary to look for alternative measures to safeguard the interests of the minorities and curb the abuse of shareholding power at the interplay of shareholders' governance of a company.

[72] *Sammel v President Brand Gold Mining Co. Ltd* supra.
[73] Ibid.

CHAPTER 6: CONCLUSION AND RECOMMENDATION

6.1 Summary of findings

Shareholding is one of the instruments used in ensuring a company's sustainability.[1] Therefore, it is important that the rights and interests of all shareholders be recognised and protected within the ambits of the law and company governance.[2]

This research indicates that shareholders' voting rights are major tools for decision making in the process of company governance.[3] The bulk of the challenge of abuse at the interplay of company governance lies with shareholding power at the polls. The court in appropriate circumstance may grant relief where such voting power is abused or unfairly used to the exclusion or prejudice of minority shareholders.[4] However, this discourse recognises that abuse is inevitable where there are no adequate measures to secure the interests of the minorities.[5]

It is submitted that the minorities lack matching shareholding power at the polls to pragmatically address the abuse of shareholding power employed by the majority shareholders in the interplay of company governance and control.[6]

It may be stated that the statutory remedies in sections 163 to 165 of the Companies Act are not sufficient to ensure that the interests of the minorities are safeguarded. This is because these statutory remedies are not sufficiently anticipatory in their approach. They do not proffer restraining measures to curb the abuse of shareholding power in the interplay of company governance.[7]

6.2 Recommendations

It is opined that preventive measures rather than curative ones may be a better option. Prevention is always better than cure. This is because there are circumstances that may be irredeemable, even when the statutory remedies are sought.

It is recommended that the minority shareholders may be better empowered by concluding an adequate and well-tailored shareholders' agreement to ensure a

[1] Chap 1 par 1.1.
[2] Ibid.
[3] Chap 3 par 3.6.
[4] Chap 5 par 5.3.1.
[5] Chap 3 par 3.6.
[6] Chap 5 par 5.4.
[7] Ibid.

balance of interests. Also, a competent and suitably adapted Memorandum of Incorporation (MOI), apt for the purpose and goals of the company as well as the interests of all the shareholders, may be concluded. It is important to state that the adapted shareholders' agreement and the MOI must be consistent with the Act.

In addition, there should be mechanisms to ensure adequate representation of the minorities on the board. This may be achieved by stipulating a standard regimen of proportional representation of both minority and majority shareholders on the board of a company. It is suggested that the minority be given adequate representation on the board irrespective of their voting power. At least, this may present a level playground for all interests.

Another recommendation is that voting rights may be apportioned in terms of a programmed capping with respect to proportion of shareholding. An example of the vote-rights-capping is presented in Table 1 below.

Table 1: Vote-capping ratio based on proportion of shareholding in a company.

	A	B	C	D	E	F	Total
% shares	51 - 60	40 - 50	31 - 39	21 - 30	11 - 20	1 - 10	100%
% vote capping	24% to - 34%	22%	18%	15%	11%	10%	100%

It is recalled that the company law principle of majority rule advocates that the decision of the majority is binding on all shareholders.[8] Thus, it is important to state that the proposed vote-capping does not intend to expropriate shareholding rights. It is rather a compromise to arrange the integers of votes. This may promote a broad representation and create an inclusive balance in the interplay of company governance. The vote-capping may also give room for emergence of new majorities. The flexibility of the vote-capping structure may also neutralise the tendency for some majority shareholders to entrench themselves as perpetual majority.

[8] Chap 5 par 5.2.

The vote-capping as proposed in the above representation on Table 1, may assist in ensuring minority protection and instill some measure of balance in the power dynamics at the polls. Thus, vote-capping may curb absolute domination by those with majority shareholding power at the polls. The minority shareholders may adequately be represented to have a voice in the interplay of the company governance, regardless of their minority status.

The minorities may collaborate through strategic alliance in order to give effect to a representation of their interests. Such coalition amongst minority shareholders may tilt the balance of power in their favour if the vote-capping mechanism is calculatedly deployed. Furthermore, stipulated rules and goals of a company may also prescribe limitations in the exercise of shareholding power in the interplay of company governance and control to ensure effective management of the company.

6.3 Conclusion

In conclusion, it is understandable that the majority shareholders have a higher investment stake in the company which is worth protecting. However, this work advocates that the minority shareholders' interests should also be given adequate protection, inclusiveness, participation and fair play in the interplay of company governance.

It is submitted that the measures suggested above may assist in curbing the abuse of shareholders' voting power in the interplay of company control and shareholders' governance. The measures proposed in this work may strategically aid the existing statutory remedies in sections 163, 164 and 165 of the Companies Act.

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