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Comparative Analysis of the Utility of Current Remedies under South African Corporate Law

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COMPARATIVE ANALYSIS OF THE UTILITY OF CURRENT REMEDIES UNDER THE SOUTH AFRICAN CORPORATE LAW

by

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DECLARATION

I, 2515424, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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ABSTRACT

The Companies Act 71 of 2008 has made significant developments and changes to the statutory protection awarded to minorities through the section 163 statutory oppression remedy and the section 165 derivative action. Although the statutory remedies contain commendable provisions and intentions, this report launches an investigation into their pragmatic position as well as their interrelationship with other company law principles.

Contents

I. INTRODUCTION 1
a) Oppression Remedy 1
b) Derivative Action 2
c) Statutory Remedies 3
II THE NATURE OF THE STATUTORY REMEDIES 3
a) The history and development of The Statutory Oppression Remedy 3
b) The history and development of The Statutory Derivative Action 5
c) Comparative analysis of the nature of the Statutory Remedies 6
III. ENFORCEABILITY OF THE STATUTORY REMEDIES 7
a) The Practical Application of the Statutory Oppression Remedy 7
b) The Practical Application of the Statutory Derivative Action 12
c) Comparative Analysis on the enforcement of The Statutory Remedies 16
IV EFFICACY OF THE STATUTORY REMEDIES 19
a) Criticisms of The Statutory Remedies 19
b) Barriers To The Practical Use of The Statutory Remedies 20
i) Extended Legal Standing And Costs In Respect Of The Statutory Remedies 20
ii) Access to information In Respect Of The Statutory Remedies 23
iii) General Aspects To The Practical Use of The Statutory Remedies 24
V CONCLUSION 26
BIBLIOGRAPHY 28

I. INTRODUCTION

Some legal principles have established themselves as the cornerstones of South African Company Law, notably, the majority rule[1] and the separate legal personality principle.[2] As with any rule, these legal principles are susceptible to abuse. Accordingly, to counter abuse, the legal system has developed appropriate remedies.[3] This report will focus on the oppression remedy and the derivative action as set-out in the Companies Act 71 of 2008 (hereinafter referred to as the 'Statutory Remedies').

a) Oppression Remedy

Decisions of the majority become binding on the minority whether at a shareholder or board level.[4] Although the majority rule aims to enhance corporate democracy, it is susceptible to abuse.[5] More often than not, individual shareholders vote in their own interests,[6] sometimes, the majority votes to the detriment and oppression of the minority shareholders.[7] It is not only the actions of the shareholders that may become oppressive to the minority but also the actions of the board and the overall actions of the company management.[8]

When such occurs, should the majority rule be strictly followed, the minority shareholders would find themselves unfairly without appropriate recourse, more so when the majority's actions are lawful.[9] Even in abuses of the majority rule the chances of judicial intervention in lawful company decisions would most likely fail.[10] This is because when one becomes a

[1] Majority rule highlighted as a founding principle by Natasha Bouwman 'Majority rule and minority protections' (2010) 10(9) *Without Prejudice* 12.
[2] Rehana Cassim 'The legal concept of a company' in Farouk HI Cassim (ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) 29 read with 31. The separate legal personality case of *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL) is identified as cornerstone of company law.
[3] Maleka Femida Cassim 'The doctrine of contemporaneous share ownership and aspects of locus standi in new derivative action' (2018) *SALJ* 101.
[4] Maleka Femida Cassim 'Shareholder Remedies and Minority Protection' in Cassim et al op cit note 2 at 757—58.
[5] Bouwman op cit note 1.
[6] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* (15854/2013) [2014] ZAWCHC 95 para 66.
[7] Minorities bear the brunt when the majority rule is abused. See Bouwman op cit note 1.
[8] MF Cassim op cit note 4 at 758.
[9] Bouwman op cit note 1.
[10] Ibid.

shareholder, they agree to be bound by the decisions of the majority even if such decisions are not in that shareholder's personal favour.[11]

As a solution to the oppression of the minority, the Companies Act 71 of 2008 ('Companies Act') introduced s 163 oppression remedy ('Statutory Oppression Remedy') which extended the statutory protection awarded to the minority in various ways,[12] including expanding the locus standi to oppressed minority directors and broadening the definition of conduct that qualifies under the statutory oppression remedy.[13] From now any reference to 'section' or 's' without accompanying clarity as to the relevant act refers to sections of the Companies Act.

b) Derivative Action

The separate legal personality principle establishes a company as an entity with its own legal personality.[14] Consequentially, a company is the only entity with locus standi when it comes to its matters.[15] It is a juristic person,[16] therefore it needs representatives to act in its name[17] and this power normally lies with the board of directors.[18] As part of their fiduciary duties, the board is to act in the best interests of the company.[19] Directors owe their fiduciary duties to the company only,[20] they do not owe such to the individual shareholders.[21] Due to the separate legal personality principle, individual shareholders do not have direct rights to institute legal proceedings, seek redress for the company's harm or enforce any contractual rights of the company.[22]

[11] A Sibanda 'The statutory remedy for unfair prejudice in South African company law' (2013) 38(2) *Journal for Juridical Science* 58 at 67.
[12] Ibid at 71.
[13] Section 163(1). See MF Cassim op cit note 4 at 758.
[14] Adopted into South African law through *Dadoo Ltd and others v Krugersdorp Municipal Council* 1920 AD 530. See s 19(1)*(b)* of the Companies Act.
[15] *Four Wheel Drive CC v Leshni Rattan NO* (1048/17) [2018] ZASCA 124 para 8 the SCA emphasised that a remedy may only be claimed by persons who have a direct interest in the relief sought.
[16] Section 1.
[17] Farouk HI Cassim 'Corporate Capacity, Agency and the Turquand Rule' in Cassim et al op cit note 2 at 188—89.
[18] Section 66(1).
[19] Farouk HI Cassim 'The Duties and the Liability of Directors' in Cassim et al op cit note 2 at 512—14 & 523—24 notes that the fiduciary relationship requires directors to act in good faith for the benefit of and in the interests of the company. See ss 76(3)*(a)* & *(b)*.
[20] Ibid at 516.
[21] Ibid.
[22] R Cassim op cit note 2 at 40.

Sometimes the board fails to act in the best interests of the company.[23] This failure happens when the wrongdoers are the directors themselves, or those with close ties to the directors, or litigation would be against their personal interests.[24] When such arises, if one was to follow the principles of separate legal personality the company would be left with little to no channels for appropriate recourse although actionable wrongs have been committed against it.[25] The statutory derivative action contained in s 165 of the Companies Act ("Statutory Derivative Action") provides relief by widening the scope of persons with locus standi to bring action on behalf of a company.[26]

c) Statutory Remedies

The Statutory Remedies provide noteworthy protections.[27] This report aims to compare the practical usage of the Statutory Remedies.

This comparative analysis will be carried out in the following manner: Part II of the report will focus on the nature of the Statutory Remedies. This will be done by considering their history and evolution. Part III of the report will analyse the enforceability and effectiveness of the Statutory Remedies by exploring their usage as documented through case law. Part IV of this report will consider the efficacy of the Statutory Remedies. Part V will be the conclusion.

II THE NATURE OF THE STATUTORY REMEDIES

The Companies Act has improved and advanced the protection that the Statutory Remedies provide.[28]

a) The history and development of The Statutory Oppression Remedy

[23] MF Cassim op cit note 4 at 776 acknowledges that the separate legal personality principle and majority rule may lead to inaction against the wrongs when the wrongdoers are in control.
[24] Darren Subramanien '"Legal Standing" and "the demand" in section 165 of the Companies Act 71 of 2008: A Comparative Discussion' (2022) 43(2) *Obiter* 46 at 63.
[25] Ibid.
[26] Ibid.
[27] MF Cassim op cit note 4 at 756.
[28] See *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013(2) SA 331 para 59. See MF Cassim op cit note 4 at 777.

There will be a brief consideration of the oppression remedy in terms of the repealed Companies Act 61 of 1973 ("Old Act"). Although the oppression remedy in terms of s 252 of the Old Act provided protection to minority shareholders,[29] it had restricted application.[30]

The oppression remedy in terms of the Old Act was applicable only to shareholders.[31] This restrictive locus standi failed to protect other groups of persons in need such as those in quasi-partnerships[32] who as the owners of the company also participate in its management.[33] With the Old Act, when a board member (who is also a shareholder) ends up receiving unfair and oppressive conduct, they could not rely on the statutory oppression remedy in their capacity as a director.[34] Taking into consideration the limitations on the transfer of shares, this left such shareholder in a state of oppression without fair recourse.[35] The widening of locus standi to include directors is a welcome change.

The application of the oppression remedy in the Old Act has been widened by the introduction of protection of interests of the applicant.[36] Although not defined in the act, interests has been established as a term much wider than rights.[37] This addresses the protection gap that existed when implicit understandings between shareholders were unfairly undermined at board level thus affecting the interests of the shareholder.[38]

In terms of the Old Act, applicants could only seek relief for conduct connected to the company in which they were a member.[39] The Companies Act has widened the availability of the Statutory Oppression Remedy to conduct connected to persons related to the company.[40] I agree that this expansion addresses the uncertainty that existed when the conduct of group

[29] Sibanda op cit note 11 at 64.
[30] Ibid further highlights that the Companies Act widened the application of the oppression remedy.
[31] Section 252 of Old Act refers to members.
[32] MF Cassim op cit note 4 at 760, quasi-partnerships formed considerable bulk of applications under the Old Act.
[33] Sibanda op cit note 11 at 71.
[34] MF Cassim op cit note 4 at 761.
[35] Ibid at 760.
[36] Ibid at 757.
[37] Sibanda op cit note 11 at 71.
[38] Ibid.
[39] Section 252(1) of the Old Act.
[40] Section 163(1). Definition of related persons as per s 2 is applicable.

companies were the subject of unfair prejudice cases.[41] This protection encourages fair and just dealing which the courts have encouraged.[42]

In terms of the Old Act the applicant had to prove that it was 'just and equitable' for the court to grant the relief sought.[43] This is not required in the Companies Act,[44] the burden on the applicant is therefore lighter. Although the applicant no longer bears to prove that it is just and equitable for relief to be granted, courts are likely to view it as one of the considerations during deliberations on judgment.[45]

In terms of the Old Act, the relief was available in circumstances where the complaint arose from illegal conduct.[46] Today as long as the conduct is oppressive or unfairly prejudicial to or unfairly disregards the interests of the applicant, the applicant will be entitled to protection.[47]

b) The history and development of The Statutory Derivative Action

Similar to the Statutory Oppression Remedy, the Companies Act reforms the statutory derivative action from what it was in terms of the repealed Old Act.[48] In terms of the Old Act, the usage of the old statutory derivative action ("Old Statutory Derivative Action") was limited.[49] The usage was not only restricted to the type of wrong but it was also restricted to the type of wrongdoer.[50] The Old Statutory Derivative Action was only applicable where the company had suffered due to wrongful conduct committed by a director or officer and only a member of the company could initiate derivative proceedings.[51]

The situation differs in terms of the Statutory Derivative Action. The above mentioned limitations do not exist, instead, a Statutory Derivative Action may be brought 'to protect the

[41] MF Cassim op cit note 4 at 761.
[42] Sibanda op cit note 11 at 72—3 mentions the English case of *Scottish Cooperative Wholesale Society Limited v Meyer and Another* [1957] All ER 66 (HL).
[43] Ibid at 65.
[44] Ibid at 72.
[45] MF Cassim op cit note 4 at 764.
[46] Sibanda op cit note 11 at 64, the explanation is done at foot note 31.
[47] MF Cassim op cit note 4 at 757.
[48] Ibid at 777.
[49] Section 266 of the repealed Old Companies Act.
[50] MF Cassim op cit note 4 at 777.
[51] Section 266(1) Old Act.

legal interests' of the Company.[52] Although the term 'legal interests' has not been defined in the Companies Act, it introduces protection that goes beyond the company's rights.[53] This wider net substantively decreases the chances that wrongdoers have in escaping accountability.[54] The Companies Act further significantly expands the list of persons who may initiate the Statutory Derivative Action proceedings.[55]

Because the Old Companies Act did not abolish the common-law derivative action,[56] when it came to the other causes of action which did not fall within the narrow provisions of s 266, members had to rely on the problematic common-law.[57] The minority could bring derivative actions when fraud existed,[58] however, the majority shareholders could suspend any derivative action through ratification.[59] The Companies Act has abolished and replaced all derivative action rights in common law with the rights contained in the Statutory Derivative Action.[60] Shareholder ratification may only be taken into account by the court when deciding on the granting of leave.[61]

c) Comparative analysis of the nature of the Statutory Remedies

The Statutory Remedies protect different interests, with the Statutory Oppression Remedy existing to protect the personal interests of the one bringing the action,[62] in contrast to the Statutory Derivative Action existing purely for the protection of the company's interests.[63] Although the two remedies exist for different purposes, in my opinion, there are similarities in the methods used by the Companies Act to broaden the level of protection they provide as will be shown in the paragraphs that follow.

[52] Section 165(2).
[53] Subramanien op cit note 24 at 66.
[54] Ibid.
[55] Section 165(2).
[56] Subramanien op cit note 24 at 47.
[57] MF Cassim op cit note 4 at 777.
[58] *Roestorf NO and Another v Johns* (12037/07) [2012] ZAKZDHC 39 para 6.
[59] Ibid.
[60] Section 165(1).
[61] Section 165(14).
[62] MF Cassim op cit note 4 at 757.
[63] Ibid at 775 for emphasis that derivative action differs from actions where shareholders enforce their own rights.

The Companies Act has expanded the locus standi further than just members, with the Statutory Oppression Remedy, locus standi has been extended to directors,[64] with the Statutory Derivative Action, other persons, including individual directors, shareholders and registered trade unions now have locus standi to apply for leave to bring an action on behalf of the company.[65] By widening protection to 'interests' the Statutory Remedies' protection spreads wider than the previous limitations.[66]

The paragraphs above show that the Companies Act has made an effort to remove the restrictive barriers to the access and therefore usage of the Statutory Remedies in general. Successful practical use will therefore now depend on the attitude of the courts at the implementation stage.[67]

III. ENFORCEABILITY OF THE STATUTORY REMEDIES

The attitude the courts adopt when interpreting provisions of the Companies Act will determine the usage and the effectiveness of the Statutory Remedies.[68] I support a permissive interpretation over a restrictive one.[69] The interpretation should encourage our company law to become facilitative, enabling and flexible as per the intentions set-out in the *DTI Policy Document*.[70]

a) The Practical Application of the Statutory Oppression Remedy

When there is conduct that is oppressive or unfairly prejudicial to or unfairly disregards the interests of an applicant by a company or its related person, or the business of such company or its related person is conducted in such a way that is oppressive or unfairly prejudicial to or unfairly disregards the interests of an applicant or the powers of a director or prescribed officer

[64] Section 163(1).
[65] Section 165(2).
[66] See MF Cassim op cit note 4 at 767. See Sibanda op cit note 11 at 71. See Subramanien op cit note 24 at 66.
[67] Maleka Femida Cassim *The Statutory derivative action under the companies Act of 2008, Guidelines for Exercise of the judicial discretion* (unpublished PhD thesis, University of Cape Town, 2014) at 9 indicates that the application of the derivative action will be 'fleshed out' by the courts.
[68] Ibid at 21. See also *Grancy Property Limited v Manala* (605/12) [2013] ZASCA 57 para 26.
[69] MF Cassim op cit note 67 at 97 encourages a robust approach for effective derivative action usage.
[70] Department of Trade and Industry Policy Document 'South-African Company Law for the 21st Century: Guidelines for Corporate Reform' (GN1183 in GG 26493 of 23 June 2004) para 3.3.

of the company or its related person are conducted in such a way that is oppressive or unfairly prejudicial to or unfairly disregards the interests of the applicant, such applicant, who maybe a shareholder or director has locus standi to make a Statutory Oppression Remedy application for relief from the court.[71] The courts have confirmed that interpretation of the Statutory Oppression Remedy should advance it rather than limit it.[72]

CONDUCT ELEMENT

The applicant bears the duty to prove that the act/omission complained of was oppressive or was unfairly prejudicial to or unfairly disregarded their interests.[73] What it takes for conduct to be oppressive or unfairly prejudicial has not been defined in the Companies Act.[74] The Statutory Oppression Remedy turns on unfairness not unlawfulness.[75]

In *Grancy Property Limited v Manala*[76] ('*Grancy Property*') the SCA highlights accepted interpretations on what type of conduct would qualify for protection under the Statutory Oppression Remedy. These include describing oppressive conduct as wrongful conduct which lacks good faith and probity of fair dealing to the prejudice of others.[77] Taking guidance from Australian Law, the court in *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others*[78] ('*Peel*') highlighted that the phrases should not be considered in isolation, instead they should be considered as part of a whole indicating commercial unfairness.[79] An act/omission may be oppressive or prejudicial to or disregard the interests of the complainant applicant, however it may in the end not be unfair.[80] An evaluation of the conduct of all the parties involved, including conduct of the minority can reveal fairness/unfairness.[81]

RESULT ELEMENT

[71] Section 163(1).
[72] *Grancy Property Limited v Manala* (605/12) [2013] ZASCA 57 para 26.
[73] MF Cassim op cit note 4 at 756.
[74] Ibid at 769.
[75] Ibid at 769—70.
[76] [2013] ZASCA 57.
[77] Ibid para 23.
[78] 2013 (2) SA 331 (GSJ).
[79] Ibid para 50 references the Australian case of Morgan v 45 Flers Avenue Pty Ltd (1986) 10 ACLR 692(1987) 5 ACLC 222.
[80] *Grancy* supra note 76 para 32.
[81] Ibid para 25.

The courts will place attention on the result of the unfair conduct,[82] the motive for the conduct does not become relevant, the resultant effect of the conduct takes centre stage.[83] In the case of *Kudumane Investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd & 2 others,*[84] ('*Kudumane*') the court stated that an act must have already taken place.[85] Requiring conduct to have already been performed does not exclude conduct that is ongoing, there is therefore no requirement that the conduct be completed, one result is sufficient.[86] There is argument that a reading of the Statutory Oppression Remedy gives the impression that both the conduct and the result should be oppressive or unfairly prejudicial.[87] I support the idea that taking this position would be unnecessarily restrictive.[88] Conduct qualifying for relief does not include conduct that is yet to happen.[89] The oppression remedy does not come to aid in respect of threatened conduct that may or may not come to fruition.[90]

After the *Kudumane* case, Beukes and Swart were of the opinion that although the court in *Kudumane* correctly set out the principles related to the result requirement of the Statutory Oppression Remedy, it erred in concluding that 'lack of confidence and uncertainty' was a result in accordance with the Statutory Oppression Remedy.[91] The argument is that lack of confidence in a court order was not reason enough to constitute a result under the remedy.[92] I humbly agree because the rule nisi was issued by a court, the root cause of the uncertainty itself does not hold enough substance to warrant swaying the court in the way that it did.[93]

DISCRETION OF THE COURT

[82] Sibanda op cit note 11 at 72.
[83] *Grancy* supra note 76 para 27.
[84] 2012 SA (GSJ).
[85] Ibid para 52.
[86] Ibid para 52 & 55.
[87] MF Cassim op cit note 4 at 764.
[88] Shandukani Muthungulu-Ugoda 'Siblings But Not Twins: The Oppression Remedy and the Derivative Action- Larett v Coega Development Corporation (Pty) Ltd 2015 (6) SA 16 (ECG) in Retrospect' (2021) 1(2) *Turf Law Journal* 29 at 32.
[89] MF Cassim op cit note 4 at 765.
[90] Sibanda op cit note 11 at 72.
[91] HGJ Beukes & WJC Swart 'Blurring the dividing line between the oppression remedy and the derivative Action: Kudumane Investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd and Others' (2012) 24 *SA Merc LJ* 467 at 470.
[92] Ibid.
[93] Ibid at 471—72.

Provided the requirements in s 163(1) have been met,[94] the Companies Act has an expansive list of remedies that the court may provide.[95] This list is not a closed one, the court has the discretion to grant any other order that it deems fit. [96]

There is a clear intention to widen the relief under the remedy,[97] however, this does not mean that the court's discretion should be uncontrolled without any guiding principles.[98] Control of the court's discretion prevents a situation where the remedy for unfair prejudice itself becomes a tool for oppression.[99]

In the *Grancy Property* case, the SCA specifically mentions that the discretion of the court to grant relief does not come about if the statutory criteria has not been met.[100] The *Kudumane* case has been criticised for providing relief when some of the requirements under s 163(1) had not been met, particularly the result element and the alleged fact that the applicant did not bring the application in their capacity as a shareholder but instead brought it in their capacity as a financier.[101]

The criticism faced by the *Kudumane* case was subsequently faced by the *Peel* case. According to Beukes and Swart, the applicants failed to show that a result had occurred in the first place.[102] The applicants merely showed an exposure to a future business risk which may or not happen.[103] In its judgment, the court remained mute on whether or not such exposure was oppressive or unfairly prejudicial to the applicants.[104] For the result element to be completed, a detrimental effect of the conduct should have manifested.[105] I agree with the above expressed view that possible exposure to business risk in the future is threatened conduct when the risk

[94] MF Cassim op cit note 4 at 756.
[95] Ibid at 757.
[96] Ibid.
[97] *Peel* supra note 78 para 52.
[98] Ibid para 47—53 the court discusses the various guiding principles.
[99] *Grancy* supra note 76 para 32 cautions against the discretion of the court being used as a means of oppression under the Old Act.
[100] Ibid para 25.
[101] Beukes & Swart op cit note 91 at 471—72.
[102] HGJ Beukes & WJC Swart '"Peel v Hamon J&C Engineering (Pty) Ltd: Ignoring the result-requirement of section 163(1)*(a)* of the Companies Act and extending the oppression remedy beyond its statutorily intended reach' (2014) 17(4) *PER/PELJ* 1691.
[103] Ibid at 1694 and 1703.
[104] Ibid at 1695.
[105] Ibid at 1702.

has not materialised and therefore currently does not qualify under the Statutory Oppression Remedy.

The *Peel* case has cautioned that when deliberating applications, the courts are to partake in a balancing of interests, taking into consideration not only the interests of the applicant but also the interests of other shareholders and the company as well.[106]

Although the courts have an unlimited discretion to grant a variety of orders,[107] the court in *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others*[108] ("*Visser Sitrus*") has cautioned that the unfair prejudice remedy is not a green light for courts to simply impose their will while disregarding other company law principles such as the majority rule and shareholder compacts as per the company constitutional documentation.[109] According to Sibanda, taking the majority rule into consideration, should it be appropriate, courts may opt for remedies involving minimal judicial intervention.[110] This view has been solidified by the courts.[111] The courts may protect the minority's interests in other ways which do not necessarily do away with the decisions of the majority.[112]

Further guiding principles on the court's discretion, *Inhouse Venue Technical Management (Pty) Ltd v Omar; In Re: Omar v Inhouse Venue Technical Management (Pty) Ltd*[113] highlighted that the Statutory Oppression Remedy is not a punitive remedy therefore the court does not have jurisdiction to impose punishments on the parties found to have acted unfairly.[114]

From my observation of the literature that I have discussed up to this point, requiring the courts to first ensure that the requirements in s 163(1) are met before granting an order,[115] balancing rights of different parties,[116] and considering other applicable company law principles and

[106] *Peel* supra note 78 para 44.
[107] Sibanda op cit note 11 at 74.
[108] 2014 (5) SA 179 (WCC).
[109] Ibid para 61 and 64.
[110] Sibanda op cit note 11 at 74.
[111] *Business Doctor Consortium Limited and Another v Old Mutual Finance (RF) (Pty) Limited and Others* (18535/2021) [2022] ZAWCHC 196 para 54.
[112] Cassim et al op cit note 2 at 757 read with 774.
[113] 2016 ZAWCHC 18.
[114] Ibid para 25.
[115] Cassim op cit note 2 at 756.
[116] *Peel* supra note 78 para 44.

holistically considering the facts of each case[117] constitute helpful counter-measures to the potential misuse of the Statutory Oppression Remedy and ensuring that it does not become a tool for oppression itself.

b) The Practical Application of the Statutory Derivative Action

The courts should follow the permissive approach when interpreting the provisions of s 165.[118]

SERVICE OF THE DEMAND

Section 165(2) requires the applicant to first serve a demand on the company, either demanding that the company commence or continue legal proceedings or take related steps to protect the legal interests of the company. According to the court in the *Mouritzen* case,[119] serving of the demand is a peremptory provision without which a person is basically denied the action of launching an application in terms of s 165.[120] For the purposive interpretation of s 165(2) any manner of service that is legally recognizable should be sufficient, provided that the court using its discretion is satisfied that the demand has been properly served.[121]

CONTENTS OF THE DEMAND

In *Lewis Group Limited v Woollam and Others*[122] ('*Lewis Group*') the court indicated that the aim of the demand is to give the company a chance to make an informed choice on the issue of litigating or taking the appropriate steps in the proposed derivative proceedings.[123] Although not with the standards applicable to pleadings, the demand should clearly set-out the basis of the proposed derivative proceedings, failing which such demand would be vexatious.[124]

SETTING ASIDE THE DEMAND

[117] *Visser-Sitrus* supra note 108 para 61 & 64.
[118] MF Cassim op cit note 4 at 777.
[119] *Mouritzen v Greystone Enterprises (Pty) Ltd* 2012 (5) SA 74 (KZD).
[120] Ibid para 24.
[121] Ibid para 33.
[122] (9900/2016) [2016] ZAWCHC 130.
[123] Ibid para 47.
[124] Ibid.

After receiving a demand the company is in terms of s 165(3) provided with an opportunity to approach the court within 15 business days to request that the demand be set aside only on the premises that said demand is frivolous, vexatious and without merit. I view this as an important aspect to consider since it has the potential of bringing an early ending to the proposed derivative proceedings.

According to *Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd*[125] ('*Amdocs*'), a demand qualifies as frivolous, vexatious and without merit if the court determines that the demand is without merit in the sense that it cannot succeed, this determination will be based on the consideration of available evidence.[126] The applicant bears an onus to clearly indicate the lack of merit in the demand.[127]

Contrary to the statement made by *Amdocs* to the effect that the company bears a heavier onus, the later *Lewis Group* Case pointed out that the normal onus applicable in civil cases of a balance of probabilities was applicable in terms of s 165(3).[128] The applicant will have to, on a balance of probabilities, prove its case.

In concurring with *Amdocs* and the *Lewis Group* cases, the court in *Marib Holdings v Parring No and others*[129] ('*Marib Holdings*') further added that for a matter to be regarded as frivolous and vexatious, it must appear to be factually so and not be a matter of preponderance of probabilities.[130]

When it comes to the nature of the s 165(3) onus, the *Marib Holdings* case concurred with the *Lewis Group* Case.[131]

GRANTING LEAVE

[125] *Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd* 2014 (5) SA 532 (GJ).
[126] Ibid para 14—5.
[127] Ibid para 15.
[128] *Lewis Group* supra note 122 para 55.
[129] (22058/2019) [2020] ZAWCHC 74.
[130] Ibid.
[131] Ibid para 33.

The Statutory Derivative Action requires the court to grant leave to a person in order for said person to either continue or bring proceedings in the company's name, or to take related steps to protect its legal interests.[132] The court then exercises its discretion on whether or not to grant such leave.[133] When exercising its discretion, the court is guided by s 165(5)*(b)* stating that the court may grant leave only if -

'(b) the court is satisfied that-

(i) the applicant is acting in good faith;

(ii) the proposed or continuing proceedings involve the trial of a serious question of material consequence to the company; and

(iii) it is in the best interests of the company that the applicant be granted leave to commence the proposed proceedings or continue the proceedings, as the case may be.'

The interpretation can either restrict or broaden access to usage of the derivative action.[134] In *Mouritzen*,[135] the court dealt with the interpretation of two guidelines contained in s 165, being the good faith criterion and the requirement that leave be granted when it is in the best interests of the company.

With the requirement that leave be granted when it is in the best interests of the company, the court emphasised that it is to satisfy itself that the proposed action is in actual fact in the best interests of the company, not that it '*may be, appears to be, or is likely to be in the best interests of the company'*.[136] In determining this, it is to consider if there is existence of alternative measures to acquire the same relief that do not involve pressuring the company into litigation.[137]

The points in *Mouritzen* as far as they relate to the good faith criterion (later discussed further) and the requirement to satisfy all the requirements in s 165(5)*(b)* were later solidified in *Mbethe v United Manganese of Kalahari (Pty) Ltd*[138] ('*Mbethe High Court*'). The *Mbethe High Court* case added that the requirements of s 165(5)*(b)* are conjunctive,[139] thus, contrary to opposing

[132] Section 165(5).
[133] MF Cassim op cit note 4 at 777.
[134] Ibid indicates that a permissive interpretation can increase usage while a narrow one can stunt it.
[135] *Mouritzen* supra note 119.
[136] Ibid para 62.
[137] *Mbethe v United Manganese of Kalahari (Pty) Ltd* (503/2016) ZASCA 67 (30 May 2017) para 33.
[138] *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2016 (5) SA 414 (GJ).
[139] Ibid para 53.

evidence, there is a high probability that if one is met, then the other requirements would be met.[140]

Mbethe High Court case raised the question on whether or not the court has discretion to not grant leave when all three requirements have been met?or is the court bound by the provisions of s 165(5)*(b)* to always grant leave once the requirements are met?[141] According to Cassim, the use of *'may*' provides the court with the discretion to deny leave even if all three of the requirements are met.[142] The provisions of s 165(5)*(b)* are meant to prevent the use of unfettered discretion, they are not meant to totally remove the courts' discretion.[143] The *Mbethe High Court* interpretation was later rejected on appeal.[144]

The *Mbethe High Court* case was taken on appeal and heard by the SCA in *Mbethe v United Manganese of Kalahari (Pty) Ltd.*[145] ('*Mbethe SCA*'). In this case, the court focused on the nature of the onus that has to be discharged by an applicant with regard to the good faith criterion.[146] Instead of following Australian law like the courts in *Mouritzen* and *Mbethe High Court* did with *Swansson*[147], the court in the *Mbethe SCA* case did not agree that proving good faith requires the satisfaction of two steps as reported in *Swansson*.[148] The *Mbethe SCA* Case instead simply stated what it would entail in our South African law for an applicant's honesty assertions to be believed.[149] The test would involve an objective evaluation of the applicant's subjective belief.[150] The SCA stated that the *Mbethe High Court* case was incorrect in requiring the applicant to prove that they were not acting for an ulterior purpose as part of the good faith criterion.[151] In South African jurisdiction the onus to prove that the applicant is not acting for an ulterior purpose falls under the requirement that the proposed or continuing proceedings

[140] Ibid.
[141] Ibid para 190.
[142] Maleka Femida Cassim 'The Statutory Derivative Action under the Companies Act of 2008: The Role of Good Faith' (2013) 130 *SALJ* 496 at 502.
[143] Brighton M Mupangavanhu 'Evolving Statutory Derivative Action Principles in South Africa: The Good Faith Criterion and Other Legal Grounds' (2021) 65(2) *Journal of African Law* 293 at 303.
[144] *Mbethe v United Manganese of Kalahari (Pty) Ltd* (503/2016) ZASCA 67 (30 May 2017) para 18.
[145] (503/2016) ZASCA 67 (30 May 2017).
[146] Ibid para 8.
[147] *Swansson v Pratt* 29 [2002] NSWSC 583 (3 July 2002).
[148] *Mbethe SCA* supra note 145 para 20.
[149] Ibid.
[150] Ibid.
[151] Ibid para 11.

ought to involve a trial of material consequence to the company,[152] hence there is no need to include it under the good faith requirement.[153]

The s 165(5)(b) requirement that the proposed derivative proceedings should involve the trial of a serious question of material consequences to the company has not been sufficiently dealt with by the courts.[154] Yes, the SCA in the *Mbethe SCA* case has indicated that an applicant has to show lack of an ulterior motive under this requirement,[155] however, it was hoped that the court could have gone further into the interpretation of the requirement seeing that the lower courts had failed to do so. According to Mupangavanhu, simply interlinking the requirement to the other two sufficiently interpreted requirements does not solve the gap that exists as a result of lack of clear criteria for the interpretation of this s 165(5)*(b)(ii)* requirement.[156]

c) Comparative Analysis on the enforcement of The Statutory Remedies

The *Mbethe High Court* case discusses that the Statutory Derivative Action fills the void and is available to directors and shareholders who are not restricted to remedies in terms of the Statutory Oppression Remedy in circumstances where there is abuse of power by the controllers of the company.[157] Where third parties are involved, the powers given to the courts in terms of the Statutory Oppression Remedy do not extend to authorisation of actions against third parties by the company when the board fails to resolve to do so.[158]

The Statutory Oppression Remedy addresses internal disputes between the ownership and the management,[159] in contrast to the Statutory Derivative Action which, in its aims of protecting the legal interests of the company, extends the courts powers to deal with matters involving third parties.[160] The Statutory Oppression Remedy does not provide the courts with power to authorise the institution of actions by shareholders,[161] this would fall under the Statutory

[152] Ibid.
[153] Ibid.
[154] Mupangavanhu op cit note 143 at 310 indicates that a gap exists in respect of interpretation of this requirement.
[155] *Mbethe SCA* supra note 145 para 11.
[156] Mupangavanhu op cit note 143 at 307 & 310.
[157] *Mbethe HC* supra note 138 para 58.
[158] Ibid para 75.
[159] Ibid para 76.2.
[160] Section 165(7) deals with the rebuttable presumption created when third parties are involved.
[161] *Mbethe HC* supra note 138 para 77.

Derivative Action. The legislature could not have intended for the two Statutory Remedies to have parallel powers.[162]

In analysing the *Larrett* case,[163] Muthugulu-Ugoda highlights that although the Statutory Remedies may be mutually inclusive, only one of the two remedies may be pursued at one time.[164] To ensure success in whatever relief an applicant requests they must discharge the onus required of them in terms of that remedy.[165] There have been other cautionary statements made about selecting the appropriate Statutory Remedy.[166]

In the *Mbethe High Court* case, the applicant sought a remedy through the Statutory Derivative Action.[167] The court stated that in its s 163(2) powers it has authority to direct the company to amend the company's shareholder's agreement, an action which would be in favour of the applicant, however this relief was never sought by the applicant.[168] I believe by mentioning this, the court signalled that the wrong remedy was sought. On appeal, this was confirmed when The SCA indicated that the capacity of the applicant as an outnumbered director qualifies for relief under the Statutory Oppression Remedy.[169]

Lastly, *Business Doctor Consortium Limited v Old Mutual Finance*[170] clarified that one cannot circumvent the line between the remedies by bringing an application under the Statutory Oppression Remedy but then try to obtain a remedy that belongs to the Statutory Derivative Action.[171]

In my opinion, when deciding on which remedy to choose, it is safer to go for the Statutory Oppression Remedy to the extent that it is applicable because should the applicant go straight to the Statutory Derivative Action, the courts have to consider the best interests of the company.[172] If alternative measures to acquire the same relief that do not involve the company

[162] Ibid para 75.
[163] *Larett v Coega Development Corporation (Pty) Ltd* 2015 (6) SA 16 (ECG).
[164] Shandukani op cit note 88 at 29.
[165] See *Mbethe HC* supra note 138 para 45. See also MF Cassim op cit note 4 at 757.
[166] Beukes & Swart op cit note 102 at 1704.See also Beukes & Swart op cit note 91 at 472.
[167] *Mbethe HC* supra note 138 para 94.
[168] Ibid para 104.
[169] *Mbethe SCA* supra note 145 para 36.
[170] (18535/2021) [2022] ZAWCHC 196.
[171] Ibid para 108—10.
[172] Section 165(5)(*b*)(iii).

being pressured into litigating against itself exist, this may negatively impact the granting of leave as was seen in the *Mbethe SCA* case.[173]

From my analysis of the Statutory Remedies so far, the Statutory Oppression Remedy seems to be more frequently used as compared to the Statutory Derivative Action.[174] This might be because although the Statutory Derivative Action has broader locust standi than the Statutory Oppression Remedy,[175] the requirements for a successful application under the former are more stringent than those under the latter.[176] The strict requirements are welcome considering the invasive nature of the Statutory Derivative Remedy.

Since the Companies Act came into effect, based on my interpretation of the cases that I have read through, safe for the Statutory Derivative Action cases that have been discussed in this report, the courts do not seem to be focused on the development of the remedy as seen in some judgements.[177] I have noted that, in contrast to the Statutory Derivative Action, the Statutory Oppression Remedy has seen significant usage with some cases being as recent as 2024. I have further realised that in addition to frequent use, decisions under the Statutory Oppression Remedy provide comprehensive judgments that provide analysis on its status, for example, the SCA in *Parry v Dunn-Blatch and others*[178] went into great detail on the principles of the Statutory Oppression Remedy and made extensive commentary on what an applicant would be required to do to discharge the onus placed in terms of the remedy.[179] This is a common trend that I have noted under the judgments of the Statutory Oppression Remedy.[180]

[173] *Mbethe SCA* supra note 145 para 33.
[174] MF Cassim op cit note 67 at 156 comparisons with foreign jurisdictions also indicate a preference for the oppression remedy.
[175] Shandukani op cit note 88 at 36.
[176] MF Cassim op cit note 3 at 108—10. Tests contained in s 165(b) shield against abuse.
[177] See *Nebavest 1 (Pty) Ltd t/a Minster Consulting v Plaza Investments 202 (Pty) Ltd and Others* [2023] 2 All SA 795 (WCC). *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* (219/2021) [2022] ZASCA 24. *Opperman v De Klerk N.O and others* (48920/2020) [2022] ZAGPPHC 48. *Herpes N.O and others v Ward and others* (10711/19) [2019] ZAGPPHC 1102. *Remgro Limited and another v Unilever South Africa Holding (Pty) Limited* (8835/2015) [2015] ZAKZPHC 54.
[178] (394/2022) [2024] ZASCA 19.
[179] Ibid para 13, 20—6 & 37—9.
[180] See *Armittage No v Valencia Holdings 13 (Pty) Ltd and Others* (638/2022) [2023] ZASCA 157. *Van Der Watt v Schoeman and Others* (3393/2022) [2023] ZAECQBHC 61. *Edery N.O Brands 2 Africa Proprietary Limited and Others* (2021/58016) [2023] ZAGPJHC 85.

IV EFFICACY OF THE STATUTORY REMEDIES

This section considers the effectiveness of the Statutory Remedies. Are they practically achieving the goals for which they were created? To determine this there will be consideration of the criticisms of the Statutory Remedies, consideration of the practical blocks to their use and comparison of general elements in their practical use.

a) Criticisms of The Statutory Remedies

The Statutory Oppression Remedy not providing relief in cases of threatened conduct has been viewed as a shortcoming.[181] Sibanda believes that the remedy is not only meant to make right unfair prejudice but it is also meant to prevent it.[182] I agree with his proposal that the systems in foreign law which recognise threatened oppression such as Australia and England be taken as guides.[183] Having to wait until the injury has been experienced is not a preferable situation.[184]

In respect of the Statutory Derivative Action, the rebuttable presumption in s 165(7) that granting leave is not in the best interests of the company was specifically created for actionable wrongs against the company caused by third parties.[185] This presumption extends to wrongs committed by directors because they are not considered as related or interrelated persons to the company, they are therefore third parties in their dealings with the company.[186] This is an undeserved leniency as most wrongdoings against the company result from their actions.[187] To the extent that they do not vote on resolutions affecting them, they are likely to have a personal relationship with the remaining members.[188] Boards may be reluctant in pursuing matters where one of them is involved.[189] I support the view that our Statutory Derivative Action should follow the Australian law approach which regards directors as related persons for purposes of the rebuttable presumption, effectively excluding them from the accompanying benefits.[190]

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[181] Sibanda op cit note 11 at 75—6.
[182] Ibid. See also MF Cassim op cit note 4 at 764—65.
[183] Ibid at 76.
[184] MF Cassim op cit note 4 at 764—65.
[185] Ibid para 88.
[186] Section 165(8) defines third parties as persons who are not related/interrelated to the company. S 2 defines natural persons as related to the company if they hold control of majority voting rights in the securities register.
[187] Maleka Femida Cassim 'When companies are harmed by their own directors: The defects in the Statutory derivative action and the cures (Part 1)' (2013) *SA Merc LJ* 168 at 180.
[188] Ibid.
[189] Mupangavanhu op cit note 143 at 294.
[190] MF Cassim op cit note 4 at 789.

b) Barriers To The Practical Use of The Statutory Remedies

i) Extended Legal Standing And Costs In Respect Of The Statutory Remedies

It has been established that the Companies Act has extended locus standi in respect of the Statutory Remedies.[191] It is reasonable to assume that the extension of locus standi is to increase access to and usage of the Statutory Remedies.[192] Does the Statutory Remedies' extended legal standing offer the desired results?

The Statutory Derivative Action extends locus standi from just members to a wider array of persons.[193] Are there any roadblocks to the practical use of the remedy? I put forth that the issue of costs is a noteworthy barrier to the practical use of the Statutory Derivative Action.[194] Not only may the applicant be burdened with a cost order or be required to furnish security, but the applicant has to worry about costs in respect of both the leave application and the substantive matter should leave be granted.[195] Even in cases of success there is possibility of no full recovery of costs in line with cost taxation procedures.[196] This position on costs becomes a strong deterrent against applications more so because the direct benefit falls on the company should there be success.[197] There is therefore too much risk involved even for a well-intentioned applicant with a valid claim.[198]

The approach the courts take when exercising their discretion when awarding costs carries weight on the effectiveness of the Statutory Derivative Action.[199] Considering that courts have a wide discretion on the matter of awarding costs,[200] the courts should save the liberal spirit of the action and aim to promote the use of the Statutory Derivative Action.[201] Indemnification

[191] MF Cassim op cit note 3 at 112 in respect of the Statutory Derivative action. MF Cassim op cit note 4 at 758 in respect of the Statutory Oppression Remedy.
[192] MF Cassim op cit note 3 at 120 & 112 mentions that the expansion increases chances of combating abuse of the derivative action. See MF Cassim op cit note 4 at 763 in respect of the expansion of the oppression remedy being used to solve the problem of excluded quasi-partnership directors.
[193] MF Cassim op cit note 3 at 112.
[194] Maleka Femida Cassim 'Cost Orders, obstacles and barriers to the derivative action under section 165 of the Companies Act 71 of 2008 (part 1)' (2014) *SA Merc LJ* 1.
[195] See ss 165(9), 165(10) and 165(11).
[196] MF Cassim op cit note 194 at 12.
[197] Ibid at 9 & 12. See also MF Cassim op cit note 4 at 792.
[198] Ibid at 12.
[199] MF Cassim op cit note 4 at 793.
[200] Section 165(10).
[201] MF Cassim op cit note 194 at 14. See also MF Cassim op cit note 4 at 793.

from costs in respect of the substantive matter should be awarded at the granting of leave.[202] This is a balanced approach as the requirements for leave would have been successfully passed and it is not unreasonable to as a general rule expect the direct beneficiary of the action to bare some of the risks involved.[203] I agree with Cassim that the courts should also deviate from this in exceptional cases such as lack of funds.[204]

Once leave has been granted, Statutory Derivative Actions may involve a lengthy process[205] in respect of the substantive action, it is therefore recommended that courts use their wide discretion on costs to award interim cost orders in favour of the ones awarded leave and not stifle their efforts with requiring security for costs.[206]

I understand that the reluctance to relax cost requirements from the courts might stem from the need to shield against potential misuse of the remedy, [207] however I agree with Cassim that the Companies Act has disproportionately overdone it and that the courts are being overly restrictive despite the existence of other precautionary measures in the Statutory Derivative Action. [208] It is unfortunate that some court decisions seem to be taking a conservative approach to costs[209] and I would hope that the future will see progress in the direction of the recommendations as the issue of costs is the biggest obstacle to use of this remedy.[210]

According to Cassim the practical issues relating to the legal standing in terms of the Statutory Derivative Action are important to consider.[211] Cassim brings up the issues of contemporaneous ownership, minimum threshold shareholding and continuing interest which have not been expressly dealt with in the Companies Act.[212] With contemporaneous ownership, one asks if it should be a requirement for an applicant to act only in respect of a cause of action

[202] Ibid at 16 & 18.
[203] Ibid at 16.
[204] Ibid.
[205] Ibid at 20.
[206] Ibid at 19—20.
[207] Ibid at 9.
[208] Ibid.
[209] *Mouritzen* supra note 119 at 70 the court granting leave reserved order on costs for the substantive matter. See *Mbethe SCA* supra note 145 para 40 & *Mbethe HC* supra note 138 para 194 where both were dismissed with costs.
[210] Maleka Femida Cassim 'Cost Orders, obstacles and barriers to the derivative action under section 165 of the Companies Act 71 of 2008 (part 2)' (2014) *SA Merc LJ* 228 at 246.
[211] MF Cassim op cit note 3 at 102, 109 & 110.
[212] Ibid at 104.

that happened before they became a shareholder.[213] With the minimum threshold shareholding one asks if there should be limitations imposed to prevent abuse by those who purchase a small number of shares and immediately bring a derivative action.[214] With continuing interests, the question is asked if one is required to have continuous ownership of their shares from start to finish in a derivative action.[215] As pointed out by Cassim, the Companies Act contains various in-built mechanisms to counter such.[216] When it comes to these practical issues, I agree that the s 165(5)*(b)* preliminary tests of best interests of the company, trial of serious and material consequence and acting in good faith are adequate in shielding against misuse.[217] With the continuous ownership issue, the Statutory Derivative Action further makes provisions for substitution of qualifying applicants.[218]

From my analysis of the Statutory Derivative Action in the paragraphs above, I find it reasonable to conclude that the absence of a leave requirement removes potential cost barriers to the practical use of the Statutory Oppression Remedy, therefore placing the Statutory Oppression Remedy in a more advantageous state.[219] Considering that the direct beneficiary of an oppression remedy is the applicant, it is reasonable for me to conclude that an applicant has lower chances of being deterred from using the Statutory Oppression Remedy compared to a Statutory Derivative Action user.[220]

When it comes to the Statutory Oppression Remedy, the issue is whether or not the remedy goes far enough with its expansion of locus standi and does it go far enough in protecting minorities.[221] One idea is that the Statutory Oppression Remedy excludes certain persons who may benefit from it such as directors and shareholders who may experience unfairness in other capacities besides their official capacities as shareholders or directors.[222] In the *Kudumane* case, the court was criticised for erroneously granting relief where the applicant failed to bring

[213] Ibid at 103.
[214] Ibid at 109.
[215] Ibid at 110.
[216] Ibid at 102, 107.
[217] Ibid at 108—10.
[218] Section 165(12), 165(13).
[219] MF Cassim op cit note 194 at 9—10.
[220] Ibid at 12.
[221] Michael Lehloenya & Tshegofatso Kgarabjang 'Defining the limits of the "oppression remedy" in the wake of section 163 of the Companies Act 71 of 2008 Grancy Properties Limited v Manala [2013] 3 All SA 11 (SCA)' (2015) 36(2) *Obiter* 511.
[222] Beukes & Swart op cit note 102 at 1704 state that applicants have locus standi only in their capacities as shareholders and directors of the company.

the application in their capacity as a shareholder but did so in their capacity as a financier of the company with the court supposedly proceeding as if the application was brought by a shareholder.[223]

I accept the opinion that South Africa should take note from other jurisdictions and expand the oppression remedy to cover other stakeholders.[224] However, I support the expansion in respect of persons with shares received by operation of law who have not yet become shareholders in terms of having their shares registered in accordance with the Companies Act.[225] I am of the opinion that pending their registration, they may find themselves in vulnerable situations such as facing difficulties with registering their shares.[226] Other stakeholders, for example creditors are not devoid of protection, they receive multiple protections in various areas of the Companies Act.[227] According to certain academics, whenever there is suggestions of expanding the locus standi there will be arguments of concern centred on chaos and possible influx of applications.[228] Other jurisdictions which have a widened range of applicants, have not seen an uncontrollable influx of futile claims,[229] it is therefore reasonable to support extension of legal standing.

ii) Access to information In Respect Of The Statutory Remedies

Cassim further puts forth that one of the greatest blocks to the practical use of the Statutory Derivative Action is the lack of access to information.[230] Section 165(9)(e) entitles access to the books of the company for a person who has already been granted leave to bring the Statutory Derivative Action. The section however, does not award the same privileges to an applicant approaching the courts for leave.[231] Company information that is not easily available to the public is usually in the hands of the controllers of the company who are less likely to hand it

[223] Beukes & Swart op cit note 91 at 472.
[224] Lehloenya & Kgarabjang op cit note 221 at 518.
[225] Sibanda op cit note 11 at 75.
[226] MF Cassim op cit note 4 at 756.
[227] MF Cassim op cit note 3 at 115.
[228] Tshepo H Mongalo 'Possible Contribution of Corporate Law Remedies To Curbing Illicit Financial Outflow of Capital From Africa' (2015) 1(1) *Journal of Corporate and Commercial Law & Practice* 1 at 22. See MF Cassim op cit note 202 at 9 for confirmation that comparable jurisdictions have not experienced the misguided Concerns. See also Subramanien op cit note 24 at 61.
[229] MF Cassim op cit note 194 at 9—10.
[230] MF Cassim op cit note 210 at 241.
[231] Section 26(2) only gives access to very limited information.

over when they are in the wrong.[232] This lack of information at this stage effectively has the ability of crippling a potential derivative action from the go.[233] They might be unable to prove an existence of a serious question to be tried.[234] According to Cassim, relying on the appointed investigators in terms of s 165(4) raises questions on their reliability as they are company appointed and ultimately first report to the board.[235] I support the assertion that there should be an amendment to the Companies Act which will enable the inspection of company books for purposes of the derivative action by a person yet to apply for leave.[236] Guidelines may be taken from Australian law where there has been creation of a statutory right to apply to the court for an order granting access to the relevant information upon proving "proper purpose".[237]

Taking note of *Motale v Ahlobo Transport Services (Pty) Ltd and Others*[238] ('*Motale*') access to information may also become a hindrance in respect of the Statutory Oppression Remedy. Just like in *Motale* those in control of company information may in spite of continued requests deny someone access despite an existence of a right of access.[239] When such occurs, an applicant would now be frustrated into seeking additional steps to obtain information such as through filing complaints with the CIPC or approaching the court as was done in *Motale*.[240] Without the necessary information to support what an applicant alleges, they may be unable to prove their case.

iii) General Aspects To The Practical Use of The Statutory Remedies

When it comes to the practical usage of the Statutory Remedies, according to Cassim, there are certain preferable aspects contained in the procedure of the Statutory Oppression Remedy over the Statutory Derivative Action.[241]

It is easier to discharge the onus required of the applicant in terms of the Statutory Oppression Remedy.[242] Cassim highlights that even when an applicant does have the company information

[232] MF Cassim op cit note 4 at 791.
[233] MF Cassim op cit note 210 at 242.
[234] MF Cassim op cit note 67 at 187.
[235] MF Cassim op cit note 210 at 242.
[236] Ibid.
[237] Ibid reference is made to The Australian Corporations Act, 2001.
[238] (2015) JOL 34696.
[239] Ibid at 2 & 11.
[240] Ibid at 8.
[241] MF Cassim op cit note 194 at 9—10.
[242] Ibid.

it may be hard for an outsider to decipher and show the wrongful activities,[243] I therefore agree with Cassim that it is likely simpler to prove unfairness of conduct than it is to do so with a corporate right violation under the Statutory Derivative Action,[244] taking into consideration that the onerous evidential 'just and equitable' requirement was removed for the Statutory Oppression Remedy.[245]

In comparison, the Statutory Oppression Remedy is less burdensome, preferred by minorities and offers a more expansive range for relief.[246] The Statutory Derivative Action involves a process that is complicated, costly and lengthy.[247] When dealing with the Statutory Derivative Action, one has to first apply for leave of court to bring the Statutory Derivative Action in terms of s 165(5). In order to be successful, they have to comply with the procedural elements such as serving a demand,[248] the lengthy time frames allowed in between the procedural steps at s 165(5)(3) & 165(4)(b) and they also have to satisfy the court that they meet the pre-emptive requirements for leave in terms of s 165(5)(b). Only after the successful granting of leave may one proceed with the substantive matter. The Statutory Oppression Remedy has no requirement to obtain leave of court,[249] without this requirement, an applicant is not subjected to the more stringent filtering processes comparable to those contained in s 165(5)(b) before their subjective matter is heard.[250]

Cassim highlights that the solution to some of the problems faced by the Statutory Remedies shown above may be found in the public enforcement provisions of the Companies Act.[251] The CIPC [252] possesses powers to investigate complaints brought to it.[253] Following the receipt of a complaint, the CIPC can then use its discretion to decide whether or not to pursue the matter.[254] Should the CIPC decide to investigate the complaint, this solves the issue of access to information as the complainant may have access to the investigation report[255] and should the

[243] MF Cassim op cit note 67 at 188.
[244] MF Cassim op cit note 194 at 9—10.
[245] Sibanda op cit note 11 at 72.
[246] MF Cassim op cit note 67 at 156, indicates that the oppression remedy is procedurally better. See also 157.
[247] Cassim op cit note 194 at 20.
[248] Section 165(2).
[249] MF Cassim op cit note 194 at 9—10.
[250] *Business Doctor Consortium* supra note 170 para 109.
[251] MF Cassim op cit note 210 at 243—244.
[252] Companies and Intellectual Property Commission
[253] MF Cassim op cit note 210 at 243.
[254] Ibid.
[255] Ibid at 244.

CIPC choose to bring an action on behalf of the complainant this solves the cost burden.[256] Cassim however highlights that total reliance on public enforcement is unrealistic therefore a dual system might be better.[257]

V CONCLUSION

The Companies Act has significantly expanded protection given to minorities through the use of the Statutory Remedies.[258] The role of the courts in interpreting the provisions of the Statutory Remedies determines their usage and effectiveness.[259] The interpretations seem to be permissive as opposed to being restrictive[260] in line with the aims of the Companies Act.[261] The interpretations are done holistically in a balanced manner for example by considering different stakeholders,[262] taking legal principles into consideration[263] and following guidelines on the exercise of discretion.[264]

Practical hindrances to the effective use of the Statutory Remedies exist, for example, with the Statutory Derivative Action, the inclusion of directors as third parties under the s 165(7) rebuttable presumption makes it harder for the remedy to be used,[265] and the Statutory Oppression Remedy excludes certain persons like some beneficial holders.[266]

With regards to the Statutory Derivative Action, the requirement to obtain leave has the possibility of bringing even well intentions applications to an early stop.[267] The applicant (who is not the direct beneficiary of the remedy) not only has the possibility of being burdened with a cost order and being required to provide security for costs but they may also not be able to recoup the full amount in case of a successful application.[268]

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[256] Ibid 243—244.
[257] MF Cassim op cit note 67 para 192.
[258] See Sibanda op cit note 11 at 71. See Subramanien op cit note 24 at 66 & s 165(2).
[259] MF Cassim op cit note 67 at 9.
[260] See *Grancy* supra note 76 para 26. See MF Cassim op cit note 4 at 777.
[261] DTI Policy Document op cit note 70 para 3.3.
[262] *Grancy* supra note 76 para 25. See also *Peel* supra note 78 para 44.
[263] *Visser-sitrus* supra note 108 para 61 & 64.
[264] *Inhouse Venue Technical* supra note 113 para 25.
[265] MF Cassim op cit note 67 at 18.
[266] Sibanda op cit note 11 at 75.
[267] MF Cassim op cit note 67 at 9.
[268] See ss 165(9), 165(10) and 165(11). See MF Cassim op cit note 194 at 12.

Applicants may be faced with lack of access to information which might be vital to proving their matter, more so because those in the wrong may be in control of the information.[269]

Provided that leave is now granted, the Statutory Derivative action is known to be a lengthy, costly and complicated action[270] that proceeds by trial. Unlike the Statutory Derivative Action, when it comes to the Statutory Oppression Remedy, there is no need for the court to grant leave,[271] therefore the accompanying procedures, time and costs and potential denial of leave related to the leave application will not be applicable to the Statutory Oppression Remedy. Civil litigation in general is a lengthy and costly process.

It is hoped that change for the Statutory Remedies based on the suggestions and recommendations provided in this report may be followed. The main identified barriers to the effective use of the Statutory Remedies which do not align with the aims of extended legal standing should be addressed. Costs is a strong deterrent to the use of the Statutory Derivative Action.[272] Courts should not lean towards a conservative approach with costs, instead, they should promote its use[273] through indemnification of costs in respect of the substantive matter at the granting of leave[274] and awarding interim cost orders in favour of the applicant should leave be granted.[275] With the Statutory Oppression Remedy, a barrier to use may be that the expansion of locus standi does not go far enough in protecting minorities.[276] I accept that the Statutory Oppression remedy should expand to cover persons with shares received by operation of law who are yet to become shareholders through registering their shares in terms of the Companies Act.[277] To combat the lack of access to information barrier, a statutory right to apply to court for an order granting access to relevant information upon proving proper purpose should be introduced for an applicant who intends to bring a Statutory Derivative Action.[278] The investigative powers of the CIPC may be used by a complainant to gain access to information through an investigation report to then be used for the Statutory Remedies.[279]

[269] MF Cassim op cit note 210 at 241 & MF Cassim op cit note 4 at 791.
[270] MF Cassim op cit note 67 at 168.
[271] Section 163 has no leave requirements.
[272] MF Cassim op cit note 194 at 9 &12. See also MF Cassim op cit note 4 at 792.
[273] MF Cassim op cit note 194 at 14. See also MF Cassim op cit note 4 at 793.
[274] Ibid at 16 & 18.
[275] Ibid at 19—20.
[276] Lehloenya & Kgarabjang op cit note 221.
[277] Sibanda op cit note 11 at 75.
[278] MF Cassim op cit note 210 at 242.
[279] MF Cassim op cit note 210 at 243—244.

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