

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

by

2515424

Submitted in partial fulfilment of the requirements for the degree of
Master of Laws by Coursework and Research Report
at the University of the Witwatersrand, Johannesburg

Date: 31 OCTOBER 2025

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.

Word Count: 10 412

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 rule¹ 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 name¹⁷ 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-partnerships³² 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 Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others*¹⁰⁸ (“*Visser Citrus*”) 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 case¹¹⁷ 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 Parrington 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 *Mbethhe v United Manganese of Kalahari (Pty) Ltd*¹³⁸ (*'Mbethe High Court'*). The *Mbethhe 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 *Mbethhe v United Manganese of Kalahari (Pty) Ltd* (503/2016) ZASCA 67 (30 May 2017) para 33.

¹³⁸ *Mbethhe 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 *Mbethhe 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 *Larrett v Coega Development Corporation (Pty) Ltd* 2015 (6) SA 16 (ECG).

¹⁶⁴ Shandukani op cit note 88 at 29.

¹⁶⁵ See *Mbethhe 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 *Mbethhe HC* supra note 138 para 94.

¹⁶⁸ Ibid para 104.

¹⁶⁹ *Mbethhe 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 locus 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, save 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. *Edey 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

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 process²⁰⁵ 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 costs²⁰⁹ 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 Lehloeny & 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 CIPC²⁵² 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 report²⁵⁵ 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 restrictive²⁶⁰ 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 consideration²⁶³ 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

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 action²⁷⁰ 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 use²⁷³ through indemnification of costs in respect of the substantive matter at the granting of leave²⁷⁴ 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.

BIBLIOGRAPHY

CHAPTERS IN BOOKS

Cassim FHI 'Corporate Capacity, Agency and the Tarquand Rule' in Farouk HI Cassim (ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) Juta: Cape Town.

Cassim FHI 'The Duties and the Liability of Directors' in Farouk HI Cassim (ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) Juta: Cape Town.

Cassim MF 'Shareholder remedies and minority protection' in Farouk HI Cassim (ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) Juta: Cape Town.

Cassim R 'The legal concept of aa company' in Farouk HI Cassim (ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) Juta: Cape Town.

CASE LAW

Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd 2014 (5) SA 532 (GJ)

Armittage No v Valencia Holdings 13 (Pty) Ltd and Others (638/2022) [2023] ZASCA 157 (23 November 2023)

Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited (219/2021) [2022] ZASCA 24 (9 March 2022).

Edery N.O Brands 2 Africa Proprietary Limited and Others (2021/58016) [2023] ZAGPJHC 85 (3 February 2023).

Four Wheel Drive CC v Leshni Rattan NO (1048/17) [2018] ZASCA 124 (26 September 2018).

Grancy Property Limited v Manala (605/12) [2013] ZASCA 57 (10 May 2013)

Herpes N.O and others v Ward and others (10711/19) [2019] ZAGPPHC (7 March 2019)

Inhouse Venue Technical Management (Pty) Ltd v Omar; In Re: Omar v Inhouse Venue Technical Management (Pty) Ltd (13902/2015) [2016] ZAWCHC 18.

Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd & 2 others 2012 SA (GSJ).

Larett v Coega Development Corporation (Pty) Ltd 2015 (6) SA 16

Lewis Group Limited v Woollam and Others (9900/216) [2016] ZAWCHC 130.

Marib Holdings v Parring No and others (22058/2019) [2020] ZAWCHC 74 (7 August 2020).

Mbethhe V United Manganese of Kalahari (Pty) Ltd (503/2016) [2017] ZASCA 67 (30 May 2017).

Mbethhe V United Manganese of Kalahari (Pty) Ltd 2016 (5) SA 414 (GJ) para 190.

Mouritzen v Greystone Enterprises (Pty) Ltd 2012 (5) SA 74 (KZD).

Nebavest 1 (Pty) Ltd t/a Minster Consulting v Plaza Investments 202 (Pty) Ltd and Others [2023] 2 All SA 795 (WCC)

Opperman v De Klerk N.O and others (48920/2020) [2022] ZAGPPHC 48 (25 January 2022)

Parry v Dunn-Blatch and Others (394/2022) [2024] ZASCA 19 (28 February 2024).

Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others 2013 (2) SA 331 (GSJ)

Remgro Limited and another v Unilever South Africa Holding (Pty) Limited (8835/2015) [2015] ZAKZPHC 54 (23 November 2015).

Roestorf NO and Another v Johns (12036/07) [2012] ZAKZDHC 39.

Van Der Watt v Schoeman and Others (3393/2022) [2023] ZAECQBHC 61 (12 October 2021).

Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others (15854/2013) [2014] ZAWCHC 95.

JOURNAL ARTICLES

Beukes HGJ and Swart WJC ‘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) *SA Merc LJ*.

Beukes HGJ and Swart WJC ‘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*.

Bouwman N ‘Majority rule and minority protections (2010) 10(9) *Without Prejudice*.

Cassim MF ‘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*.

Cassim MF ‘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*.

Cassim MF ‘The doctrine of contemporaneous share ownership and aspects of locus standi in the new derivative action’ (2018) *SALJ* 101.

Cassim MF ‘The statutory derivative action under The Companies Act of 2008: The role of good faith’ (2013) 130 *SALJ*.

Cassim MF ‘When companies are harmed by their own directors: The defects in the statutory derivative action and the cures (Part 1)’ (2013) 168 *SA Merc LJ*.

Lehloenya M & Kgarabjang T ‘Defining the limits of the “oppression remedy” in the wake of section 163 of the Companies Act 71 of 2008 *Grancy Properties Limited v Manala* [2013] 3 ALL SA 111 (SCA)’ (2015) 36(2) *Orbiter*.

Mongalo TH ‘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*.

Mupangavanhu BM ‘Evolving Statutory Derivative Action Principles in South Africa: The Good Faith Criterion and Other Legal Grounds’ (2021) 65(2) *Journal of African Law*.

Muthungulu-Ugoda S ‘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*.

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

Subramanien D ““Legal Standing” and “the demand” in section 165 of the Companies Act 71 of 2008 Comparative Discussion’ (2020) (43)2 *Orbiter*.

LEGISLATION

Companies Act 61 of 1973.

Companies Act 71 of 2008.

POLICY

DTI ‘South-African Company Law for the 21st Century: Guidelines for Corporate Reform’ (GN 1183 in GG 26493 of 23 June 2004)

THESIS

Cassim MF *The statutory derivative action under the Companies Act of 2008: Guidelines for the exercise of the judicial discretion* (unpublished PhD thesis, University of Cape Town, 2014)