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THE REGULATION OF DIVIDENDS IN TERMS OF THE COMPANIES ACT 71 OF 2008: CAN A COMPANY DISTRIBUTE DISPROPORTIONATE DIVIDENDS TO SHAREHOLDERS OF THE SAME CLASS OF SHARES?

By

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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

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28 February 2018

DECLARATION

I, THANDIWE NHLAPHO,

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

This report critically analyses the current regulation of dividends in South Africa with a specific reference to disproportionate dividends. The Companies Act 71 of 2008 (the 'Companies Act') does not expressly provide for disproportionate dividends. There is equally no prohibition on declaring and distributing disproportionate dividends. The law is therefore unsettled as far as disproportionate dividends are concerned. The uncertainty requires clarification either through legislative intervention or judicial determination. The report proposes solutions to circumstances under which it is inevitable to distribute proportionate dividends to holders of shares of the same class. I argue that treating shares of the same class dissimilarly should be permitted to the extent that it is justifiable in order to achieve economic results and growth in the company. Furthermore, I recommend possible amendments to the Companies Act. Lastly, the report examines the liability for declaring dividends contrary to the Companies Act. To add a comparative perspective, I make reference to the laws in foreign jurisdictions such as, New Zealand and the United States of America. In addition, the position under the Model Business Corporation Act will be observed.

TABLE OF CONTENTS

1. DECLARATION 1
2. ABSTRACT 2
3. TABLE OF CONTENTS 3
4. INTRODUCTION 4
5. DEFINING A DIVIDEND AS A FORM OF A DISTRIBUTION 6
6. NECESSARY ACTIONS TO EFFECT A VALID DIVIDEND 9
7. PREFERENCES, RIGHTS, LIMITATIONS AND OTHER SHARE TERMS 15
8. EXPRESS INCLUSION FOR DISPROPORTIONATE DIVEDENDS IN THE MOI 23
9. LIABILITY FOR DIVIDENDS DISTRIBUTED CONTRARY TO THE COMPANIES ACT 26
10. CONCLUDING REMARKS 29
11. BIBLIOGRAPHY 31

Annexures

12. Approval of Final Submission
13. TurnItIn Report

I. INTRODUCTION

With regard to a dividend declared by a company to its shareholders, it must be borne in mind that:[1]

> 'shareholders have an expectation, but not a right, to receive a return on the share capital they contributed to the company by sharing in its profits during its existence. They also have a residual or reversionary interest in the company's net assets upon its dissolution, but no right to repayment of their contributions while the company exists'.[2]

This means that dividends paid to shareholders during the existence of a company are gratuitous dispositions by the company[3] and not a legal obligation. However, once the board of directors has exercised its discretion and resolved to declare a dividend, the pertinent questions is, do all shareholders become entitled to a dividend? More pertinently, do these dividends have to be proportional, according to each holder's shareholding? The contribution of this report lies at the heart of these questions.

The need for disproportionate dividends has come, inter alia, through the Broad-Based Black Economic Empowerment ('B-BBEE') shareholding. In practice, a company that intends to be B-BBEE compliant would grant the potential black shareholders a loan, known as financial assistance, in order to enable a subscription for shares in terms of s 44 of the Companies Act 71 of 2008 ('Companies Act'). The loan would be repaid to the company through an agreed portion of the dividends declared by the company to the black shareholders. In terms of the codes of good practice promulgated under the Broad Based Black Economic Empowerment Act 53 of 2003, the debt on the shares pursuant to a B-BBEE transaction must be repaid over a period of nine years in order for the empowered entity to be eligible for maximum points on the ownership element of the B-BBEE scorecard. This being the case, empowered entities have often declared and distributed disproportionate dividends, with waivers from other shareholders, in order to meet this target. While the ends justify the means, it remains unclear if the means are sound in

[1] Maleka Famida Cassim 'Shareholder Remedies and Minority Protection' in Farouk HI Cassim (ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) at 263.
[2] Kathleen van der Linde 'The Regulation of Distributions to Shareholders in the Companies Act 2008' (2009) 3 TSAR 484.
[3] Ibid.

law. There are a few other compelling business reasons, other than from a B-BBEE perspective, which may necessitate the declaring of disproportionate dividends.

One could argue that the express provision for disproportional dividends in respect of certain shares could be achieved through the creation of different classes of shares[4] in the Memorandum of Incorporation ('MOI'). While disproportionate dividends[5] can be achieved in this manner in terms of section s 36 read with s 37 of the Companies Act, it is submitted that this approach is not commercially practical and flexible. It is further not aligned with international standards. It is apparent that the present regulation of dividends is not adequate to facilitate disproportionate dividends. Paradoxically, the advent of the Companies Act was expected to bring about a coherent regulation of distributions and eradicate some of the problems created by the Companies Act 61 of 1973[6] ('the 1973 Act'). Instead, it has created more confusion and uncertainty with regard to the regulation of dividends as it will be shown below.

In an emerging economy such as South Africa, commercial practice is fast paced and therefore quick turnaround times are essential when doing business. While amending the Memorandum of Incorporation ('MOI') seems to be the ultimate solution in order to achieve disproportionate dividends, this approach is inflexible and defeats the objectives of the Companies Act as set out in s 7, particularly in paragraphs (b) (i)-(ii), (e) and (l). These sections provide that the Companies Act envisages 'promoting the development of the South African economy by encouraging entrepreneurship, enterprise efficiency and creating flexibility and simplicity in the formation and maintenance of companies'. Furthermore, the purpose of the Companies Act is to 'continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy and to provide a predictable and effective environment for the efficient regulation of companies'.[7]

Part I examines s 1 of the Companies Act and the meaning of a dividend as a form of a distribution. Part II analysis s 46 of the Companies Act in relation to the prerequisites to be

[4] Henochsberg on the Companies Act 71 of 2008 at 23 at 24
[5] The reference to disproportionate dividends means dividends that do not proportionally match the shareholding of a holder of a share or dividends declared to some holders of shares and not others. The dividend can, however, if it is provided in the MOI be calculated in respect of the issue price of the no-par value share instead of merely in respect of the share, which would, in effect, result in 'non-proportional' dividends. 'Non-proportional' dividends in this regard are not discussed in the context of par value shares.
[6] Van Der Linde op cit note 2 at 486.
[7] Section 7 of the Companies Act.

complied with in order to effect the payment of a dividend. Part IV explores the principle of the equality of shares read with s 36 of the Companies Act. Part V discusses s 15 of the Companies Act with regard to the express incorporation of disproportionate dividends in the MOI. Lastly part VI considers the liability for dividends paid out contrary to the Companies Act. Part VII is the conclusion.

II. DEFINING A DIVIDEND AS A FORM OF A DISTRIBUTION

Company law regulates distributions in order to ensure firstly, that the rights of creditors are not endangered and secondly that shareholders are not prejudiced by disproportionate payments either within the same class of shares or among different classes.[8] The distribution of disproportionate dividends can be inevitable under certain circumstances as indicated in part I. Therefore, it is important to have clear and express regulation in place in order to avoid undue prejudice to any shareholders. A distribution as defined in s 1 of the Companies Act can be made in any of the three forms set out in paragraph (a), (b) and (c) of the Companies Act. First, a distribution can be a transfer of money or other property of the company (other than its own shares);[9] secondly, the incurrence of an obligation;[10] and lastly the forgiveness or waiver of an obligation.[11]

In the first instance it seems, a mere obligation to transfer is not sufficient but an actual transfer is necessary. Therefore, if a dividend is declared but not distibuted, it may not be a transfer for purposes of the definition.[12] A distribution made in any form need not be made directly. Therefore, even if made indirectly, the requirements for making a distribution would still be triggered. For instance, this could be a case where the substance of a transaction is the transfer of company's property or money to a shareholder without any consideration received by the company.[13] This report focuses on a distribution made under paragraph (a), particularly in the form of a dividend declared to a holder of shares. In other words, the direct transfer by a company of money or other property of the company to or for the benefit of one or more holders

[8] Van der Linde op cit note 2 at 484.
[9] Section 1 under 'distribution' para (a).
[10] Section 1 under 'distribution' para (b).
[11] Section 1 under 'distribution' para (c).
[12] Henoschberg op cit note 4 at 23.
[13] Ibid.

of any of the shares or the holder of a beneficial interest in such shares, of that company or of another company within the same group of companies in the form of a dividend.[14]

It is important to note that the definition of distribution refers to the 'holder of a share' and not to a 'shareholder' and also includes a 'holder of a beneficial interest'.[15] It appears that the former two concepts are not synonyms. The definition of 'shareholder' in s 1 of the Companies Act provides that it is the holder of a share who is entered as such in the register. Therefore, it cannot be the holder of a beneficial interest in a share, as this type of holder is already expressly included separately in the definition of a distribution.[16] As far as the latter is concerned, a company's issued securities may be held by, and registered in the name of, one person for the beneficial interest of another person.[17] 'Beneficial interest' is defined in in the Companies Act in relation to the company's securities, to mean 'the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to receive or participate in any distribution in respect of the company's securities'.[18]

The definition of 'distribution' in s 1 includes a distribution 'to one or more holders of shares'. Therefore, there is nothing in the definition to suggest that any payment made must be to all shareholders of the same class, rather than only to one or some of them. Could this be an indication that a distribution, particularly a dividend declared to some holders of shares, to the exclusion of other holders within the same class of shares, is permissible, thereby altering the principle of equality of shares? The Companies Act fails to provide clarity in this regard. It is also unclear whether authority for disproportionate dividends granted in the MOI would suffice. Whether providing for this in the MOI is sound in law may be doubted due to the common law doctrine of equality among shares of the same class and in terms 37(1) of the Companies Act as discussed in detail below.

Similar to the Companies Act 61 of 1973 ('the 1973 Act'), the Companies Act does not define the term 'dividend'. In the absence of a plausible definition, the authors of Henochsberg define a dividend to mean any payment by the company of money or property of the company to a

[14] Section 1 under 'distribution' para (a).
[15] The term 'holder of a share' and 'shareholder' may be used interchangeably. However reference to shareholder in the context of dividends also includes a 'holder of a beneficial interest'.
[16] Henochsberg op cit note 4 at 25.
[17] Henochsberg on the Companies Act 61 of 1973 at 220.
[18] Section 1 under 'beneficial interest' para (a).

shareholder that is based purely on shareholding, and which is not a consideration for the acquisition of shares or as a result of another cause. Therefore, any repayment to shareholders, in whatever form, cash or otherwise, will fall under the definition of a distribution as being a dividend.[19] The Income Tax Act[20] defines a dividend to mean 'any amount transferred or applied by a company that is a resident for the benefit or on behalf of any person in respect of any share in that company, whether that amount is transferred or applied by way of a distribution made by or as consideration for the acquisition of any share in, that company'.[21]

Both these definitions do not expand on disproportionate dividends but merely resemble the definition of a distribution in paragraph (a) of the Companies Act. In other jurisdictions such as Delaware the term 'dividend' is used to include distributions from capital surplus as well as distributions of earnings and profits. Unlike in South Africa, with the demise of the capital maintenance principle, a growing number of jurisdictions as per the Model Business Corporation Act[22] ('MBCA') distinguish between the two types of distributions and the term 'dividend' is limited to earnings and profits.[23]

A dividend defined narrowly means, 'a proportionate payment to a class of shareholders from the profits of the company'.[24] Ordinarily the term 'dividend' is used to refer to a distribution by a company of its profits.[25] In *Hill v Permanent Trustee Co of New South Wales Ltd*[26] the English court found that 'any other payment made by [the company] by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called 'dividend' or 'bonus', or any other name, it still must remain a payment on division of profits'. From this finding a dividend is interpreted to mean a division of profit.

These definitions predate the Companies Act and therefore cannot be expected to be aligned with the reformed company law regime. For purposes of the Companies Act, such definitions no longer suffice in two respects. First, they presuppose that a dividend will always be proportional

[19] Henochsberg op cit note 4 at 24.
[20] Income Tax Act 58 of 1962.
[21] Ibid section 1.
[22] The Model Business Corporation Act, 11 BUS. LAW. 98, 100 (1956).
[23] Harry G. Henn Handbook of the Law of Corporations Other Business Enterprises (1970) at 483.
[24] Kathleen van der Linde 'The Solvency and Liquidity Approach in the Companies Act 2008' (2009) *TSAR* 224 at 487.
[25] Cassim Op cit note 1 at 266.
[26] *Hill v Permanent Trustee Co of New South Wales Ltd* [1930] AC 720 (PC) at 731 per Lord Russell of Killowen.

to shareholding and secondly, that it will be paid out only from profits. The legal position with regard to the latter is certain and express in law, however, the same cannot be said about the former. This incongruity necessitates the need for the inclusion of a definition of a dividend that is aligned with the reformed South African company law regime. This notion is supported by Van der Linde who asserts that such a definition would further facilitate the distinction between proportionate and disproportionate distributions.[27]

These above definitions are only accurate in light of the principle of capital maintenance, which was the cornerstone of South African company law prior to the 1999 amendment. The capital maintenance regime proclaimed that the only basis upon which a company could make a payment to its shareholders was by way of a dividend, declared by the company out of its profits. However, with effect from 30 June 1999 this regime was replaced with the principles of liquidity and solvency in section 4 of the Companies Act. As such a company could declare dividends to its shareholders, irrespective of its profitability.[28] To this extent, a definition of a distribution under s 1 of the Companies Act, like s 90 of the 1973 Act, makes it clear that the payment of dividends is not limited to only what constitutes profits.[29]

The concern for the financial impairment of a company's capital is now guarded by the solvency and liquidity test set out in s 4 of the Companies Act. Instead of prohibiting the payment of dividends from capital, the Companies Act allows for this, to an extent that the board is satisfied that the solvency and liquidity of the company will not be impaired from the resulting distribution. A company satisfies the solvency and liquidity test in terms of section 4 of the Companies Act if, 'considering all reasonably foreseeable financial circumstances of the company at that time' that, first, 'the assets of the company, fairly valued, equal or exceed the liabilities of the company, as fairly valued'. Secondly, particularly when paying a dividend, it must appear that the company will be able to pay its debts as they become due in the ordinary course of business in the next twelve months.[30]

[27] Van der Linder op cit note 2 at 487.
[28] Henochsberg op cit note 17 at 186.
[29] Henochsberg op cit note 4 at 24.
[30] Section 4(1)(a) of the Companies Act.

III. NECESSARY ACTIONS TO EFFECT A VALID DIVIDEND

As indicated above, a dividend whether disproportionate or not, constitutes, is a distribution as defined in s 1 of the Companies Act. Therefore, it must be declared in accordance with s 46 of the Companies Act. Section 46 of the Companies Act requires any proposed distribution to be authorised by the board of directors. The section provides for the requirements which the board of directors of a company must comply with before a distribution may be validly completed.[31] It is important to note however that this provision does not require the distribution made by the board to be proportionate in order to be considered valid. As such, it is arguable as to whether declaring disproportionate dividends would satisfy s 46. If not, a disproportionate dividend would be unauthorised and the non-compliance would trigger liability in s 46(6), which imposes liability on directors for making distributions contrary to s 46.

Section 46(1) provides:

> 'A company must not make any proposed distribution unless –
>
> (a) the distribution –
>
> (i) is pursuant to an existing legal obligation of the company, or a court order; or
>
> (ii) the board of the company, by resolution, has authorised the distribution;
>
> (b) it reasonably appears that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution; and
>
> (c) the board of the company, by resolution, has acknowledged that it has applied the solvency and liquidity test, as set out in section 4, and reasonably concluded that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution.'

Section 46(1) vests the board of directors with the discretion to decide on the authorisation of dividends. It is apparent that directors do not require any approval from shareholders of the company in order to effect a distribution. A resolution of the directors suffices in this regard. It is however questionable whether the shareholders should not be included in making such a decision, as their interests are affected.[32] One would be inclined to confer this power of

[31] Marc Cooke 'A Critical Analysis of the Regulation of distributions by a Company's Board' (2012) 24 SA Merc LJ 371–384 at 372.

[32] Richard Jooste 'Issues relating to the regulation of 'distributions' by the 2008 Companies Act' (2009) SALJ 627 at 637.

authorisation to the shareholders of the company in the MOI, since the shareholders are the persons who are affected with regard to dividends. Similarly s 170 of the Delaware General Corporation Law ('DGCL') vests the power to declare dividends exclusively in a corporation's board of directors. However, the section further provides that a corporation's certificate of incorporation may limit a board's authority to declare dividends.[33] This is not a clear cut in terms of South African company law as there is no similar qualification.

Unalterable provisions of the Companies Act may not be changed in the company's MOI or in any of its constitutional documents, if such amendment would 'negate, restrict, limit, qualify, extend or otherwise alter the substance or effect of such provision'[34] unless amended as contemplated in s 15(2)*(a)(iii)* of the Companies Act.[35] However, the Companies Act contains a caveat, which provides that the MOI may 'include any provision which imposes on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of the [Companies]Act'[36].

Notably, s 15(2)*(c)* and *(d)* provide:

> '(2) The Memorandum of Incorporation of any company may –
>
> (c) prohibit the amendment of any particular provision of the Memorandum of Incorporation; or
>
> (d) not include any provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision of this Act, except to the extent contemplated in paragraph *(a)(iii)*.'

The confusion which may exist is what type of provision will fall within the narrow ambit of ss 15(2)*(a)(iii)* and 15(2)*(d)*? The wording in s 15(2)*(a)(iii)* seems to allow only for existing provisions to be furthered in the MOI, as is implied by the phrases 'higher standard', 'greater restriction' and 'longer period of time'.

[33] The Delaware General Corporation Law (Title 8 Chapter 1 of the Delaware Code).
[34] Section 15(2)(d) of the Companies Act.
[35] Raashmi Govender 'Are some shareholders more equal than others', *Moneyweb* available at *https://www.moneyweb.co.za/investings/shareholders-equal-others/*, accessed on 6 April 2017.
[36] Section 15(2)*(a)(iii) of the Companies Act.*

Although not expressly provided for, it is submitted that s 46(1) is subject to any restrictions or conditions in terms of the MOI. Section 46 is clearly an unalterable provision. However, it can be altered nonetheless, in accordance with s 15(2)*(a)(iii)*. This is so provided that a special resolution of shareholders does not create an entirely new requirement, and therefore extending the Companies Act as is disallowed by s 15(2)*(d)*. It can be argued that a provision in the MOI that the requires dividends to be approved by shareholders would, comply with the statutory requirements as it imposes a higher standard, greater restriction or a more onerous provision than s 46(1) of the Companies Act. Therefore, this would not constitute a new or additional requirement.[37] The position is uncertain and requires clarification on whether distributions can be authorised by the board subject to provisions of the MOI[38] as is the case in s 170 of the DGCL.

Furthermore, in terms of s 46 it is not a requirement for a distribution to be declared at a uniformly holders of the same class of shares. Prior to the Companies Act coming into effect, class rights had to be strictly maintained and directors could not discriminate among shareholders of the same class regarding the distribution of dividends.[39] In *Priceville Fox Co. v Jordan*[40] the court found that, it is of essence that a dividend be applied ratably to all shareholders of the same class, except where shares are paid up in differing amounts and the by-laws make provision for dividends in proportion to the percentage paid upon shares. The court held that the resolution to declare a dividend in this regard was invalid because there was a voluntary giving away to specific shareholders of the property of the company without making any provision for other shareholders. It is not certain whether this would still be an issue even when the other shareholders have consented to such a disproportionate dividend or whether it would still be seen as giving up the property of the company illegitimately. With the advent of the Companies Act there appears to be no indication that the position has changed, although there has been critical arguments by scholars that the legal position has in fact changed.

From s 46(1) it is clear that a distribution may not be made by a company unless it is pursuant to an existing legal obligation or has been duly authorised by the company's board. The board, when contemplating a distribution, must first resolve to make the distribution ('initiating

[37] Henochsberg op cit 17 at 197.
[38] Marc Cooke op cit note 31 at 383.
[39] Cassim note 1 at 270.
[40] *Priceville Fox Co. v. Jordan* 1929 Carswell Ont 99, [1929] 3 D.L.R. 907, 64 O.L.R. 172.

resolution'), thereafter it must apply the solvency and liquidity test ('consideration resolution'). Subsequently it must acknowledge, by resolution, successful application of the solvency and liquidity test ('effecting resolution').

The distinction between consideration and acknowledgement of the solvency and liquidity test as set out in s 46(1)(b) and (c) respectively, is important [41] and that the two should not be read as a single requirement. The former, requires that all distributions be measured against s 4 of the Companies Act, as set out above. The latter imposes a check on the board's compliance with s 4 of the Companies Act by requiring acknowledgement of having applied and being satisfied of the solvency and liquidity test. The requirement of a recorded resolution not only forces the directors to apply their minds to the test at hand,[42] but it is of evidential value when the liability of directors for distributions contrary to s 46 is called into question in terms of s 46(6). A formal declaration of a company's solvency is in accordance with international best practice. In New Zealand directors are required to sign a certificate[43] and, in England,[44] a director's statement and auditors report' must acknowledge the company's continued solvency (albeit only in regard to capital payments for the acquisition of shares).

Section 46(2) provides that when directors have adopted a resolution contemplated in subsection (1)(*c*), the relevant distribution must be carried out in full, subject only to subsection (3). In the interest of shareholders, this provision ensures that distributions validly resolved are carried out by a company, although there is no express enforceability of the section. However, the lack of express enforceability seems to be acceptable in the light of s 156 read with s 157(1) which may seemingly be used to enforce the payment of distributions resolved by the board in terms of s 46.[45] On the other hand, should a company refuse to make the distribution and wait for the window period to lapse before it reconsiders the solvency and liquidity test, the company will have succeeded in nullifying the purpose of subsection (2).[46]

[41] Wording adopted from Piet Delport et al Henochsberg on the Companies Act 71 of 2008 (2011-; loose-leaf) vol 1 at 197.
[42] Van der Linde op cit note 24.
[43] Section 52(2) of the Companies Act No 105 of 1993.
[44] Section 714(3)(a) of the Companies Act 2006 c. 46.
[45] Marc Cooke op cit note 31 at 375.
[46] Ibid.

In terms of section 46(2) where the board of directors has adopted an effecting resolution, the relevant distribution must be made fully. The provision implies that a company, must continue with an authorised distribution within the 120-day window period, by virtue of a previously made acknowledgement of the board.[47] This may be problematic where it has become claer that the solvency and liquidity test will not be satisfied anymore. Furthermore, if a company makes a distribution, in compliance with subsection (2), despite its solvency becoming unfavourable, the distribution will automatically be rendered 'unauthorised' by virtue of its non-compliance with s 46. Directors would be liable for unauthorised distributions in terms of s 46(6). This unacceptable predicament and requires rectification as recommended below.[48]

Van der Linde[49] argues that where the directors become dissatisfied with the company's prospects of solvency and liquidity, the company should be 'prohibited from proceeding'. Furthermore, shareholders should be precluded from instituting action, to enforce the distribution, against the company. This is the position in the New Zealand Act,[50] directors are deemed not to have authorised the distribution, where they believe that the solvency test will not be satisfied, at any time after it has been authorised but before it has been paid. Similarly, the MBCA[51] prohibits a distribution which would cause the company to fail to pay its debts or where it would become insolvent. It is submitted that an equally effective solution should exist[52] in the Companies Act.

Furthermore, s 46(2) provides an unintended loophole. If a distribution is only partially made, it appears a director may not be held personally liable by virtue only of the fact that the distribution had not been effected in its entirety as required by s 46(2). At present directors, unconcerned with the well-being of the company, could authorise a distribution they knew would render the company insolvent. They could have a large portion of the distribution paid, stopping payment just before the resolved distribution is completed – the current loophole will aid the board in doing this.[53]

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[47] Kathleen van der Linde 'The Regulation of Distributions to Shareholders in the Companies Act 2008' (2009) *Tydskrif vir die Suid-Afrikaanse Reg* 484 at 484–5 cited in Cooke op cit note 30 at 375.
[48] Cassim op cit note 1 at 271.
[49] Van der Linde op cit note 47 at 494.
[50] Section 52(3) of the Companies Act 1993.
[51] American Bar Association Model Business Corporations Act 2005 § 6.40(c).
[52] Marc Cooke op cit note 31 at 376.
[53] Marc Cooke op cit note 31 at 382.

Section 46 (3) of the Companies Act provides:

> 'If the distribution contemplated in a particular board resolution, court order or existing legal obligation has not been completed within 120 business days after the board made the acknowledgement required by subsection (1)(c), or after a fresh acknowledgement being made in terms of this subsection, as the case may be –
>
> (a) the board must reconsider the solvency and liquidity test with respect to the remaining distribution to be made pursuant to the original resolution, order or obligation; and
>
> (b) despite any law, order or agreement to the contrary, the company must not proceed with or continue with any such distribution unless the board adopts a further resolution as contemplated in subsection (1)(c).'

Subsection (3) inadvertently allows a company to renege on a decision to effect a distribution, by allowing the period for effecting a resolution to lapse without providing for a mandatory re-passing thereof. In contrast, the MBCA[54] marks the date at which the effect of the distribution will be measured, effectively burdening the company with compliance at the marked date. However, the South African Companies Act expressly requires the test to be retaken after 120 days. The effect is the same, in that it prevents a board from escaping liability for a distribution made long after it is authorised, whereas the effect of it on the company's solvency is not considered. Cooke argues for a move toward a position akin to the English Companies Act[55] ('English Act') where strict time limits are imposed regarding the timing of distribution payments.[56] Despite the English Act being criticised,[57] he considers that this stringent position is preferable because it creates certainty and removes opportunity for abuse.

The current state of s 46 gives rise to a number of instances where the requirements surrounding distributions are far from certain as discussed above. The section neither strictly requires an authorised distribution to be effected at a specific marked date, nor does it provide for the distribution to be withdrawn should the requirements no longer be met.[58]

[54] Section 6.40(*e*).
[55] Companies Act 2006 Chapter 46.
[56] See s 723(*a*) and (*b*) where payment must be made between five and seven weeks of authorisation.
[57] Van der Linde op cit note 47 at 229
[58] Marc Cooke op cit note 31 at 382.

IV. PREFERENCES, RIGHTS, LIMITATIONS AND OTHER SHARE TERMS

The proprietary interest that a shareholder holds in a company is a 'share'.[59] It is this share that ordinarily confers a dividend upon its holder.[60] Both at common law and under the Companies Act all shares of the same class enjoy equal rights.[61] The creation of classes of shares is regulated by s 37. Therefore, evident from s 37 various classes of shares are based on the nature of the rights they grant such as dividends, voting rights and participation in a distribution on liquidation.[62] This section confirms the common law principle of the doctrine of equality between shares. In the absence of a provision in the memorandum of association ('Memorandum') and the articles of association ('Articles') in terms of the 1973 Act or terms of issue (where such power existed) assigning special rights to shares, there was equality of rights between all shares of the company. Where such power was provided for in the Articles its exercise was subject to the Memorandum. Thus, an issue of shares with special rights was invalid if the Memorandum expressly provided for equality of rights between all shares. This means that under the 1973 Act, there could be differentiation within a particular class of shares if expressly provided for. For instance, in class of 20 issued shares, 1 to 10 shares could get a dividend of x while shares 11 to 20 get a dividend of y.[63]

It is a long standing principle embedded in South African common law that holders of shares of the same class should be treated equally. In other words, shares of the same class must have equal rights attached to them. This principle has been emphasised in ss 36 and 37 of the Companies Act.[64] Section 37(1) of the Companies Act provides that 'all shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class'. This provision undoubtedly confirms the common law principle of the doctrine of equality. Similarly this notion is followed on an

[59] Cassim op cit note 1at 213.
[60] *Bradbury v English Sewing Cotton Co Ltd* [1923] AC 744 (HL) 746 cited in Cassim op cit note 1 at 213.
[61] Section 36(1) of the Companies Act; *Birch v Cropper re Bridgewater Navigation Co* (1889) 14 App Cas 525 cited in Cassim op cit note 1 at 215.
[62] Cassim op cit note 1 at 215.
[63] Henoschberg op cit note 17 at 167-168.
[64] Raashmi Govender op cit note 35.

international scale, articles 19 and 42 of the EU Second Directive provide for the rule of equal treatment of shareholders[65] of the same class.

Despite the doctrine of equality, and in light of s 37(1), the inevitable question which has been raised mostly in commercial practice is whether it is acceptable for a company to declare and distribute dividends to some and not all holders of the same class of shares. It seems the answer would be in the negative, given that declaring disproportionate dividends to shareholders of the same class would amount to an unequal treatment of shares. The immediate negative response is generally followed by the rationale that if holders of shares wished to be treated differently they would have simply acquired shares of a different class[66], with different terms and rights attached to them.

Section 37(5) creates confusion by providing that 'subject to any other law, a company's MOI may establish, for any particular class of shares preference, rights, limitations and other share terms that entitle the shareholders to distributions calculated in any manner, including dividends that may be cumulative, non-cumulative or partially cumulative subject to the requirements of ss 46 and 47'. This provision gives rise to various uncertainties. First, the provision makes reference to 'a particular class of shares', therefore a distribution calculation which is not proportional should be a term of shares of a particular class and not one share or more among other shares which receive proportionate distributions. Secondly the provision makes mention of 'distributions calculated in any manner', one cannot assume that this refers specifically to dividends as a 'distribution' can be one of three different forms contemplated in s 1 of the Companies Act. Assuming this s 36(5) provides for dividends calculated disproportionally on shares in the same class, it is submitted that the section is vague. Furthermore, the section does not for an instance where dividends are not declared nor calculated at all on certain shares.

Section 37(6) of the Companies Act, on the face of it, appears to derogate from s 37(1) in a manner that would permit the inequality of the shares. Subsection (6) provides:

> '(6) The Memorandum of Incorporation of a company may provide for preferences, rights, limitations, or other terms of any class of shares of that company to vary in response to any objectively ascertainable external fact or facts.'

[65] Second Council Directive 77/91/EEC art 19 and 42, 1976 O.J (L 26) 1 (EC), amended by Council Directive 2006/68/EC, 2006 O.J (L 264)(EU).
[66] Raashmi Govender op cit note 35.

On a close reading of this provision it appears that, it only allows for the altering of existing class rights under the circumstances where it is inevitable to maintain certain rights attached to shares of a certain class. For instance, a company may have a class of shares initially conferred to its holders the right to participate in dividends and subsequently an objectively ascertainable external fact(s) arises such that the company can no longer pay dividends. In response to an objectively ascertainable external fact(s) the MOI of the company may be amended to provide that holders of shares of this class will no longer be entitled to dividends. This limitation would apply to all the shares of that class, thereby effectively maintaining the principle of the equality of shares. Therefore, this provision is in no way an exception to the principle of equality. This is confirmed by the cross reference to s 36 in subsection (7)(b).

For purposes of 37(6) it is not clear what constitutes an 'objectively ascertainable fact'. In an attempt to provide guidance on the interpretation of phrase, subsection (7) provides—

> 'For purposes of subsection (6)—
>
> (a) 'external fact or facts' includes the occurrence of any event, a variation in any fact, benchmark or other point of reference, a determination or action by the company, its board, or any other person, an agreement to which the company is a party, or any other document;
>
> (b) the manner in which a fact affects the preferences, rights, limitations or other terms of the shares must be expressly determined by or in terms of the company's Memorandum of Incorporation, in accordance with section 36.'

It is still unclear what the legislature had intended with reference to 'objectively ascertainable external fact or facts'. This provision is open ended and creates uncertainty and could lead to possible abuse since "any fact or facts" could easily contribute to an amendment of the MOI of a company.

A proper construction and interpretation of s 37 cannot be achieved without due consideration and reference to similar authorities in foreign jurisdictions. Section 5 of the Companies Act is important in this regard in that it recognises the consideration of foreign law in interpreting and applying the Companies Act. An ideal statutory provision that could possibly address the issues relating to disproportionate dividends, is found in s 53 of the Companies Act of 1993 of New

Zealand ('New Zealand Act'). Particularly, subsections (2) and (3) of the New Zealand Act provide that:

> '(2) The board of a company must not authorise a dividend—
>
> (a) in respect of some but not all the shares in a class; or
>
> (b) that is of a greater value per share in respect of some shares of a class than it is in respect of other shares of that class,
>
> unless the amount of the dividend in respect of a share of that class is in proportion to the amount paid to the company in satisfaction of the liability of the shareholder under the constitution of the company or under the terms of issue of the share or is required, for a portfolio tax rate entity, as a result of section HL 7 of the Income Tax Act 2004.
>
> (3) Notwithstanding subsection (2), a shareholder may waive his or her entitlement to receive a dividend by notice in writing to the company signed by or on behalf of the shareholder.'[67]

In light of the above comparable provision, it is evident that the manner in which s 46 is drafted proves to be inflexible. Section 53(3) of the New Zealand Act should be instructive in amending this provision. An amendment to the Companies Act would ideally entail a subsection under s 46 expressly enunciating that 'notwithstanding subsection (1), a shareholder may waive his or her right to receive a dividend declared by the board of directors. Unlike s 46 of the Companies Act, it is worth observing that s 53(2) of the New Zealand Act prohibits a dividend declared to some but not all shareholders unless it is for a specific purpose provided for in the section or a shareholder has waived his entitlement to a dividend. Furthermore, the New Zealand Act provides for proportionality, in that it prohibits a dividend that is higher than the shareholding of a shareholder. However, one is inclined to assume that the converse is possible as the New Zealand Act is silent in this regard i.e. declaring a dividend which is lower than the shareholding of a particular shareholder.

It appears that the manner in which the Companies Act provides for disproportionate dividends, if it does at all, could be inflexible and the creation of different classes of shares may not always be viable. This is so, in the event that the need to distribute disproportionate dividends occurs as a matter of urgency and only affects some and not all holders of shares of a particular class of

[67] Companies Act 1993 No 105.

shares. The process of amending an MOI would be inexpedient in practice. To put this assertion into perspective, first the company must send a notice to convene a shareholders' meeting in terms of s 62 of the Companies Act; secondly, convene a meeting where the special resolutions will be passed in accordance with s 16 of the Companies Act (unless the MOI of a company provides for round robin resolutions); thirdly, lodge the amended MOI, accompanied by the said special resolution and a fee, with the Companies and Intellectual Property Commission ('Commission'); and lastly await for confirmation from the Commission of having approved the amendment which can take up to 30 days.[68]

Furthermore, amending the MOI for an event which is not permanent appears absurd. In other words, where a company distributes a disproportionate dividend on a once-off basis and subsequently continues to declare dividends as usual in the conventional sense it would be superfluous to amend an MOI - Similarly to instances where not all holders of shares in the same class are affected or they are affected differently with the occurrence of a certain event. To illustrate: assume a company has one class of shares, A-Shares, with fifteen shareholders, the company wishes to distribute proportionate dividends to five shareholders, disproportionate dividends to another five and no dividends to the remaining five. In terms of section 37(1), the company would have to create two further classes of shares for disproportionate dividends and no dividends, in order to maintain the equality of shares accordingly. In the event that these circumstance giving rise to different classes of shares are not recurring, the existence of the three classes of shares is superfluous. Further, this mechanism of achieving disproportionate dividends is not only impractical but can be administrative and costly to a company.

In contrast to the Companies Act, the New Zealand Act provides for a waiver from shareholders in s 53(3). This allows for flexibility in that the company does not have to go to the lengths of amending its constitutional or founding documents to facilitate disproportionate dividends. A waiver essentially serves as consent of a shareholder to receive dividends disproportional to his or her shareholding or no dividends at all as the case may be.

A further alternative to an amendment of the Companies Act is to facilitate disproportionate dividends by an agreement between shareholders. In other words, each shareholder agrees to

[68] CIPC Notice to customers 'Turnaround Time for CoR 15.2 Applications' available at *www.cipc.co.za* accessed on 17 February 2018.

waive his or her right to a proportionate dividend and consents to any dividend received. There is no indication of such an arrangement being prohibited by the Companies Act. However, in light of s 15(7) this must be done with careful consideration as the MOI will take precedence in the event of discrepancies between the MOI and the shareholders'agreement.[69]

Given that no changes are forthcoming in terms of ss 37 and 46 of the Companies Act, a waiver appears to be a practical solution around these provisions although it is not provided for in the Companies Act. In this manner, disproportionate dividends may be achieved by the board of directors while maintaining the principle of equality. In order to achieve this, the shareholders could willingly waive their rights given an instance of a greater objective. There is no provision in the Companies Act that would render a company or director liable where a shareholder has waived his or her right to receive a dividend.[70] A waiver to a dividend is not a new practice. It is recognised in terms of the Income Tax Act 58 of 1962 ('Income Tax Act'). The definition of 'disposal' in the eighth schedule of the Income Tax Act expressly includes, inter alia, the 'waiver or renunciation of an asset'. In the same vain, a shareholder can waive a vested right to a dividend once it has been declared. Such a shareholder will be regarded as having disposed of his or her right for capital gains tax purposes.[71] The disadvantage, however, is that such an approach may trigger unintended tax consequences which are not discussed in this report.

Interestingly, although the Companies Act does not expressly appear to allow for disproportionate dividends, the South African Revenue Services ('SARS') perspective seems to be that disproportionate dividends can be declared and distributed. SARS requires a justification for having declared disproportionate dividends. For instance, SARS considers disproportionate dividends in respect of management and employee share schemes.[72]

In terms of s 6 of the Companies Act it is foreseeable that public companies listed on a stock exchange would be further subjected to the strict application of the principle of the equality of shares. Stock exchanges are regulated in South Africa as self-regulatory organisations ('SRO'). This model means that the organisation must regulate the market it services by creating rules, supervision protocols and disciplinary mechanisms. Therefore, an entity listed on a stock

[69] Henochsberg op cit note 17 at 186.
[70] Ibid.
[71] *www.sars.gov.za*.
[72] Raashmi Govender op cit note 35.

exchange not only has to comply with the Companies Act as a public company but also comply with rules and listings requirements of the stock exchange under which it is listed. For example, schedule 10 of JSE Limited listings requirements provides—

> 'securities in each class for which listing is applied must rank pari passu in respect of all rights.' It must be noted that the provision that 'securities in each class [must] rank pari passu' shall be understood to mean that:
>
> (a) they are in all respects identical;
>
> (b) they are of the same nominal value, and that the same amount per share has been paid up;
>
> (c) they carry the same rights as to unrestricted transfer, attendance and voting at general/annual general meetings and in all other respects; and
>
> (d) they are entitled to dividends at the same rate and for the same period, so that at the next ensuing distribution the dividend payable on each share will be the same amount.'[73]

The principle of the equality of shares for listed companies was recently alluded in *Skywise Airline Proprietary Limited v Safair Operations Proprietary Limited.*[74] The case was a result of an alleged non-compliance with the Air Services Licensing Act[75], ('ASL Act'). Section 16(4)(c) of ASL Act provides that the Air Services Licensing Council ('Council') may only grant a licence to an applicant airline if it is satisfied that at least 75% of the voting rights in respect of the applicant are held by South African residents. Therefore, this section imposes a further requirement to a class of shares which confers voting rights. In other words, it dictates the thresholds in which voting rights must be held with respect to the nationality of the shareholders. The section makes reference to 'at least 75%' of voting rights being held by South African residents. It is not clear whether it would be permissible for South African residents to hold all 100% of voting rights while non-South African shareholders are granted other rights excluding voting rights within the same class of shares. If this is possible with regard to voting rights, the same approach of altering class rights could apply to disproportionate dividends. However, this seems impossible in light of the unalterable s 37*(3)(b)(i)*. It upholds the stringent principle of the equality of shares by providing that despite anything contrary in MOI where a company has only

[73] Schedule 10 of the JSE listings requirements issue 25 accessed at *https://www.jse.co.za/current-companies/issuer-regulation* on 18 September 2018.
[74] *Skywise Airline Proprietary Limited v Safair Operations Proprietary Limited* 2013 JDR 2310 (GNP).
[75] Air Services Licensing Act No. 115 of 1990.

one class of shares, those shares have the right to be voted on every matter that may be decided by the shareholders of the company.

It is submitted that had there been flexibility on the principle of the equality of shares, Safair would have been able to grant 75% or even all voting rights to holders of shares resident in South Africa while allowing non-South African residents to hold shares of the same class but with no voting rights without compromising its compliance with the ASL Act, JSE Listings Requirements and the Companies Act. While it may be sound to preserve the principle of the equality of shares this could result in unnecessary deadlocks as was the case in Safair.

V. EXPRESS INCLUSION FOR DISPROPORTIONATE DIVEDENDS IN THE MOI

The Companies Act introduced certain mechanisms to ensure that the legislation adheres to the aims of simplicity and flexibility as entrenched in s 7*(b)(ii)*. The use of alterable and unalterable provisions throughout the Companies Act is one of such mechanisms. These provisions create the 'opt in' or 'opt out' approach. This means a company may deviate from a number of the Companies Act provisions with a different requirement in the MOI and add matters not at all dealt with by the Companies Act.[76]

It is questionable whether a provision in the MOI authorising disproportionate dividends would be amending an unalterable provision in the Companies Act, and whether such amendment will accord with s 15 of the Companies Act. Prior to the advent of Companies Act the court in *South African Iron and Steel Industrial Corporation Ltd v Moly Copper Mining and Exploration Co (SWA) Ltd* [77] held that the manner of both declaring and payment of a dividend can be regulated by the MOI and such regulation must be consistent with the principles of company law. This approach is similar to the position in New Zealand, where the New Zealand Act allows for certain transactions only if they are expressly authorised in the constitution of a company.[78]

[76] Helena Stoop 'Alterable and Unalterable Provisions of the Companies Act 71 of 2008: Recent Changes Expose Inherent Uncertainities' Journal of Corporate and Commercial Law and Practice, Vol 2 Number 1, (2016) 40 - 51 at 40

[77] *South African Iron and Steel Industrial Corporation Ltd v Moly Copper Mining and Exploration Co (SWA) Ltd* 1993 (4) SA 705 (NmHC) at 712).

[78] ss 59(1), 60(1)(b)(ii), and 67C(3).

It is not clear whether s 37 is an alterable or unalterable provision of the Companies Act. Jooste seems to suggest that s 37(1) is alterable. He asserts that the section 'provides that all shares must be treated equally unless the MOI provides otherwise'. This suggestion seems rather flawed as there is no indication in subsection (1) that shares of the same class may be treated differently if such is provided for in the MOI. However, assuming s 37(1) can be altered, the company's MOI would have to specifically provide for a disproportionate distribution of dividends as suggested above. A mere decision by the board to limit the distribution of dividends to certain shareholders in the same class of shares would not be valid and may be impugned. While all shares of a class must be treated equally, it might be permissible for the MOI to provide otherwise. The above submission appears to be in line with s 37(1) of the Companies Act. However, at the core it derogates from the essence of the principle of equal treatment of shares of the same class.[79]

On the face of it, it appears that section 37(1) is an unalterable provision of the Companies Act. In order to provide for disproportionate dividends in the MOI, s 15(2)*(a)(iii)* of the Companies Act must complied with. Therefore, whether or not the MOI can make provision for an unequal treatment of shares with regard to dividends depends on whether such an inclusion can be interpreted as a 'higher standard' or 'greater restriction' in terms of s 15, than s 37(1) of the Companies Act.

It is arguable whether a provision in the MOI permitting the declaring disproportionate dividends would constitute 'a higher standard, greater restriction, longer period of time or similarly more onerous requirement' for purposes of s 15(2)(a)(iii). With this in mind, the MOI of a company would provide as a term of a share that the board of the company may in its discretion on an ad hoc basis, acting objectively and in accordance with its fiduciary duties, for good reason, determine the need to declare disproportionate dividends to the shareholders of a particular class. Arguably, the terms applicable to the shares would still in any event be identical as required by s 37(1) of the Companies Act in that this provision is a term of the share (equally applicable to all shareholders of that class) that the board determines the amount of the dividend to be declared and to which shareholder it will make such distribution.

It is not certain whether simply making provision in the company's MOI that shareholders may be treated differently in respect of distributions is a term imposing a greater standard or more

[79] Raashmi Govender op cit note 35.

onerous restriction than that contemplated in s 37(1) in the Companies Act and whether it would be enforceable. European courts rely on fairness as a norm rather than equal treatment. American courts require directors to pass a fairness test when there is an unequal treatment of shareholders. Therefore, in America the disparate treatment is not necessarily unfair.[80] This approach appears to be acceptable where the inequality is inevitable and can be justified on grounds of fairness. Fairness as a legal test has not received much support in South Africa in the context of contracts.[81]

In the South African context where an existing MOI is amended to provide for disproportionate dividends, it must be accompanied by a special resolution of shareholder as required in terms of s 16 read with s 65(11) of the Companies Act given that this is an amendment to the MOI. Furthermore, the provisions of s 37(8) must be observed, which provides—

> 'If the Memorandum of Incorporation of a company has been amended to materially and adversely alter the preferences, rights, limitations of other terms of a class of shares, any holder of those shares is entitled to seek relief in terms of s 164 if that shareholder—
>
> (a) notified the company in advance of the intention to oppose the resolution to amend the Memorandum of Incorporation; and
>
> (b) was present at the meeting, and voted against that resolution.'

A possible unintended consequence to the amendment of the MOI, is that it could trigger the dissenting shareholder's rights in terms of s 164 of the Companies Act. This is a remedy provided to a shareholder in the event that the company gives notice to the shareholders of a meeting to consider adopting a special resolution to amend its MOI by altering the preferences, rights, limitations or other terms of any class of shares in a manner materially adverse to the rights or interests of the holders of that class of shares.[82] Provided that the dissenting shareholder has met the requirements set out in the Companies Act, the shareholder may then demand that the company pay him or her the fair value for all the shares of the company which he or she holds. Thereafter the shareholder holds no rights in respect of those shares except to be paid fair

[80] Nicola De Luca 'Unequal Treatment And Shareholders' Welfare Growth: "Fairness" V. "Precise Equality"' 34 Del. J. Corp. L. 853 (2009) at 857.
[81] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 22.
[82] HGJ Beukes 'An Introduction to the Appraisal Remedy as Proposed in the Companies Bill: Triggering Actions and the Differences between the Appraisal Remedy and Existing Shareholder Remedies' (2008) 20 SA Merc LJ at 480.

value.[83] Therefore, should a company wish to incorporate changes to its share rights in order to effect disproportionate dividends, the existing legal framework would still be sufficient to ensure the protection of shareholders, especially minorities.

VI. LIABILITY FOR DIVIDENDS DITRIBUTED CONTRARY TO THE COMPANIES ACT

Where disproportionate dividends are not permissible such a payment would be subject to scrutiny in terms of s 46 for non-compliance. Unlike the regulation of share repurchases in terms of s 48(6) of the Companies Act where a company can apply to court for an order reversing the acquisition[84], s 46 does not have a similar provision, unless read with s 77 of the Companies Act. Section 46 when read together with s 77 enables a court to order the return of an unlawful dividend to the company.[85] Furthermore, s 46 does not expressly provide that if a company makes a distribution in contravention with s 46, such distribution is void. It is not clear why an unlawful dividend is not expressly stated to be void as is the case with financial assistance for the acquisition of securities[86] and financial assistance to directors[87] in ss 44 and 45 respectively. With lack of express voidness, s 218 of the Companies Act becomes a point of departure, it provides:

> 'Nothing in this Act renders void an agreement, resolution or provision of an agreement, resolution, Memorandum of Incorporation or rules of a company that is prohibited, void, voidable or may be declared unlawful in terms of this Act, unless a court declares that agreement, resolution or provision to be void.'

It is therefore submitted that s 46 of the Companies Act requires amending in order to address the voidness aspect and the recovery of an unlawful dividend from the recipient shareholder similar to s 90 of the 1973 Act. Although s 90 of the 1973 Act made no provision for any liability on the part of the company's directors, it expressly provided that a shareholder would be

[83] Jacqueline Yeats, 'Putting Appraisal Rights Into Perspective' STELL LR (2014) 2 at 334.
[84] Section 48(6).
[85] Richard Jooste 'op cit note 32 at 646.
[86] Section 44 of the Companies Act.
[87] Section 45 of the Companies Act.

liable for any dividend received contrary to s 90. Jooste asserts that there is no rational for omitting such a provision.[88]

However, unlike under the 1973 Act, s 46(6) of the Companies Act provides for recourse only against the directors of the company. Liability arises if a director was present at the meeting when the board approved the resolution or participated in the making of such a decision by way of a 'round robin' resolution. A director must have failed to vote against such a resolution, despite knowing that the declaring of that dividend was contrary to s 46. Liability therefore hinges on a subjective inquiry into the director's knowledge at the time.[89]

Section 1 of the Companies Act defines 'knowing', 'knowingly' or 'knows' when used with respect to a person, and in relation to a particular matter, as that the person either-

> '(a) had actual knowledge of the matter, or
>
> (b) was in position in which the person reasonably ought to have-
> (i) had actual knowledge;
> (ii) investigated the matter to an extent that would have provided the person with actual knowledge; or
> (iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter.'

A director who has breached s 46 of the Companies Act is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the voidness of the resolution or agreements.[90] Whether directors who declare disproportionate dividends contravene s 46 of the Companies Act remains to be seen. It must be noted that for the purposes of s 77 a 'director' includes an alternate director, a prescribed officer, and a person who is a member of a committee of a board of a company or of the audit committee of a company.[91]

If the board of a company has made a decision inconsistent with s 46 of the Companies Act, the company or any director who has been held liable, may apply to court for an order setting aside the decision[92] and/or reverse the transaction.[93] The court may make an order setting aside the

[88] Richard Jooste op cit note 32 at 646.
[89] Ibid at 647.
[90] Section 77(3)(e)(viii).
[91] Section 77(1).
[92] Section 77(5).

decision in whole or in part, absolutely or conditionally. Furthermore, a court may make any order that is just and equitable in the circumstances, including an order to rectify the decision, reverse any transaction, or restore any consideration paid or benefit received by any person in terms of the decision of the board.[94] Furthermore, a court could make an order requiring the company to indemnify any director who has been or may be held liable in terms of this section, including indemnification for the costs of the proceedings.[95]

In the event of the court application, in terms of s 46(6) read with s 77(3)*(e)(vi)*, to set aside the transaction for dividends declared contrary to s 46 of the Companies Act, it is questionable whether a shareholder would be able to rely on s 20(7) or the common law Turquand rule. In other words, can the recipient of a dividend that was declared in contravention of s 46 of the Companies to prevent the reversal of a dividend distributed to him or her?

The Turquand rule otherwise known as the 'internal management' rule was first developed in *Royal British Bank v Turquand*[96]. Essentially, the Turquand rule provides that a third party is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements.[97] The Turquand rule, unlike s 20(7) provides that a bona fide third party can rely on the rule if he or she is not aware of any internal irregularities that affect the validity of a transaction with the company despite the third party being a shareholder of the company.[98]

The Turquand as a defence where there was a contravention of a statutory provision was raised in *Farren v SunService SA Photo Trip Management (Pty) Ltd*[99] and *Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd v Göbel NO*[100], under the 1973 Act. The courts found that the Turquand rule does not apply where a company has failed to comply with legislative requirements.[101] In contrast in *Levy and Others v Zalrut*[102] the court supported the application of the *Turquand* rule

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[93] Henochsberg op cit note 17 at 199.
[94] Section 77(5)(ab)(ii)(bb).
[95] Section 77(5)(b)(ii)(bb).
[96] *Royal Bank v Turquand* (1885) SE & B 248
[97] Piet Delport 'The Companies Act of 2008 and the Turquand Rule' 2011(74) THRHR 132 at 136.
[98] Cassim op cit note 1 at 181.
[99] 2004 (2) SA 146 (C) para 18.
[100] *Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd v Göbel NO* 2011 (5) SA 1 (SCA)
[101] Kathleen van der Linde The validity of company actions under section 20 of the Companies Act 71 of 2008" (2015) TSAR 833 at 841.
[102] *Levy & others v Zalrut Investments (Pty) Ltd* 1986 (4) SA 479 (W) at 487B-F.

so as to negate the provisions of a statutory provision. Under the Companies Act the court in *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd*[103] found that the Turquand rule did apply to a requirement laid down by legislation. In other words, it does not matter that a requirement which has not been complied with is a statutory requirement such as s 46 of the Companies Act. Therefore, in terms of this approach, a recipient of an unauthorised dividend would still be entitled to rely on the Turquand rule. The law is not settled in this regard, however, the doctrine of stare decisis would dictate that latter decision take precedence.

On the other hand, it is clear that s 20(7) cannot come to the rescue of a shareholder who was a recipient of a dividend that was made contrary to s 46 because unlike the common law Turquand rule, s 20(7) expressly precludes a shareholder from relying on the section.[104] However, the position regarding shareholders as third parties under the common law Turquand rule, [105] is unclear and subject to debate.[106]

The reference to s 77(3)*(e)(vi)* in s 46(6) may not always be useful for purposes of liability where the director's conduct falls within the scope of s 77(4)[107], known as the business judgment rule. A director can raise s 77(4) as a defence when an action is launched and the directors' compliance with s 46 is found lacking. A director could avoid personal liability because they ensured, as part of their plot, that the distribution was not all made, placing them within the safe harbour created by s 77(4)*(a)(i)*.[108] In terms of this section, a director will only be liable if the solvency and liquidity test is not satisfied 'immediately after making all of the distribution contemplated'.[109]

VII. CONCLUDING REMARKS

This report has analysed some of the uncertainties in the framework regulating the distribution of dividends in South Africa. To this end the report has proposed amendments in light of foreign jurisdictions with similar legal systems. The report has shown the inflexibility created by the

[103] *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another* 2015 (4) SA 623 (WCC) para 55.
[104] Richard Jooste op cit note 32 at 646.
[105] See *Royal Bank v Turquand* (1885) SE & B 248.
[106] Kathleen van der Linde op cit note 101 at 841.
[107] Section 77(4)(a)(i).
[108] Marc Cooke op cit note 31 at 382.
[109] Section 77(4)(a)(i).

principle of equality and s 37 of the Companies Act. The current state of the regulation of dividends is not aligned with international standards. The current framework does not fully give effect to the objectives entrenched in s 7 of the Companies Act. Therefore, South African company law remains unsettled with regard to whether or not, shareholders can agree to receive disproportionate dividends. It seems this question may be settled and tested in light of the Companies Act once it has come before the South African courts.[110]

With regard to the inadequacies and shortfalls discussed in this report, the objective of this report is to provide a platform for regulatory re-examination and reform. For as long as there is no forthcoming legislative intervention or judicial determination with regard to disproportionate dividends, companies still have to resort to inflexible alternatives such as the amending an MOI or obtaining a waiver from its shareholders in order to achieve disproportionate dividends.

This report hopefully contributes to the effort to overcome unnecessary legislative boundaries in an increasingly distressed global economy. The unequal treatment of shares is not only sound in law but gives effect to efficient business practice. It is submitted that it would be in the interest of legal certainty if the legislature were to insert express provisions for disproportionate dividends, thereby providing clarity and giving effect to the objectives of the Companies Act.

[110] Raashmi Govender op cit note 35.

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Abstract

This report critically analyses the current regulation of dividends in South Africa with a specific reference to disproportionate dividends. The Companies Act 71 of 2008 (the 'Companies Act') does not expressly provide for disproportionate dividends. There is equally no prohibition on declaring and distributing disproportionate dividends. The law is therefore unsettled as far as disproportionate dividends are concerned. The uncertainty requires clarification either through legislative intervention or judicial determination. The report proposes solutions to circumstances under which it is inevitable to distribute proportionate dividends to holders of shares of the same class. I argue that treating shares of the same class dissimilarly should be permitted to the extent that it is justifiable in order to achieve economic results and growth in the company. Furthermore, I recommend possible amendments to the Companies Act. Lastly, the report examines the liability for declaring dividends contrary to the Companies Act. To add a comparative perspective, I make reference to the laws in foreign jurisdictions such as, New Zealand and the United States of America. In addition, the position under the Model Business Corporation Act will be observed.

TABLE OF CONTENTS

1. DECLARATION 1
2. ABSTRACT 2
3. TABLE OF CONTENTS 3
4. INTRODUCTION 4
5. DEFINING A DIVIDEND AS A FORM OF A DISTRIBUTION 6
6. NECESSARY ACTIONS TO EFFECT A VALID DIVIDEND 9
7. PREFERENCES, RIGHTS, LIMITATIONS AND OTHER SHARE TERMS 15
8. EXPRESS INCLUSION FOR DISPROPORTIONATE DIVEDENDS IN THE MOI 23
9. LIABILITY FOR DIVIDENDS DISTRIBUTED CONTRARY TO THE COMPANIES ACT 26
10. CONCLUDING REMARKS 29
11. BIBLIOGRAPHY 31

I. INTRODUCTION

With regard to a dividend declared by a company to its shareholders, it must be borne in mind that:[1]

> 'shareholders have an expectation, but not a right, to receive a return on the share capital they contributed to the company by sharing in its profits during its existence. They also have a residual or reversionary interest in the company's net assets upon its dissolution, but no right to repayment of their contributions while the company exists'.[2]

This means that dividends paid to shareholders during the existence of a company are gratuitous dispositions by the company[3] and not a legal obligation. However, once the board of directors has exercised its discretion and resolved to declare a dividend, the pertinent questions is, do all shareholders become entitled to a dividend? More pertinently, do these dividends have to be proportional, according to each holder's shareholding? The contribution of this report lies at the heart of these questions.

The need for disproportionate dividends has come, inter alia, through the Broad-Based Black Economic Empowerment ('B-BBEE') shareholding. In practice, a company that intends to be B-BBEE compliant would grant the potential black shareholders a loan, known as financial assistance, in order to enable a subscription for shares in terms of s 44 of the Companies Act 71 of 2008 ('Companies Act'). The loan would be repaid to the company through an agreed portion of the dividends declared by the company to the black shareholders. In terms of the codes of good practice promulgated under the Broad Based Black Economic Empowerment Act 53 of 2003, the debt on the shares pursuant to a B-BBEE transaction must be repaid over a period of nine years in order for the empowered entity to be eligible for maximum points on the ownership element of the B-BBEE scorecard. This being the case, empowered entities have often declared and distributed disproportionate dividends, with waivers from other shareholders, in order to meet this target. While the ends justify the means, it remains unclear if the means are sound in

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[1] Maleka Famida Cassim 'Shareholder Remedies and Minority Protection' in Farouk HI Cassim (ed), Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) at 263.
[2] Kathleen van der Linde 'The Regulation of Distributions to Shareholders in the Companies Act 2008' (2009) 3 TSAR 484.
[3] Ibid.

law. There are a few other compelling business reasons, other than from a B-BBEE perspective, which may necessitate the declaring of disproportionate dividends.

One could argue that the express provision for disproportional dividends in respect of certain shares could be achieved through the creation of different classes of shares[4] in the Memorandum of Incorporation ('MOI'). While disproportionate dividends[5] can be achieved in this manner in terms of section s 36 read with s 37 of the Companies Act, it is submitted that this approach is not commercially practical and flexible. It is further not aligned with international standards. It is apparent that the present regulation of dividends is not adequate to facilitate disproportionate dividends. Paradoxically, the advent of the Companies Act was expected to bring about a coherent regulation of distributions and eradicate some of the problems created by the Companies Act 61 of 1973[6] ('the 1973 Act'). Instead, it has created more confusion and uncertainty with regard to the regulation of dividends as it will be shown below.

In an emerging economy such as South Africa, commercial practice is fast paced and therefore quick turnaround times are essential when doing business. While amending the Memorandum of Incorporation ('MOI') seems to be the ultimate solution in order to achieve disproportionate dividends, this approach is inflexible and defeats the objectives of the Companies Act as set out in s 7, particularly in paragraphs (b) (i)-(ii), (e) and (l). These sections provide that the Companies Act envisages 'promoting the development of the South African economy by encouraging entrepreneurship, enterprise efficiency and creating flexibility and simplicity in the formation and maintenance of companies'. Furthermore, the purpose of the Companies Act is to 'continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy and to provide a predictable and effective environment for the efficient regulation of companies'.[7]

Part I examines s 1 of the Companies Act and the meaning of a dividend as a form of a distribution. Part II analysis s 46 of the Companies Act in relation to the prerequisites to be

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[4] Henochsberg on the Companies Act 71 of 2008 at 23 at 24

[5] The reference to disproportionate dividends means dividends that do not proportionally match the shareholding of a holder of a share or dividends declared to some holders of shares and not others. The dividend can, however, if it is provided in the MOI be calculated in respect of the issue price of the no-par value share instead of merely in respect of the share, which would, in effect, result in 'non-proportional' dividends. 'Non-proportional' dividends in this regard are not discussed in the context of par value shares.

[6] Van Der Linde op cit note 2 at 486.

[7] Section 7 of the Companies Act.

complied with in order to effect the payment of a dividend. Part IV explores the principle of the equality of shares read with s 36 of the Companies Act. Part V discusses s 15 of the Companies Act with regard to the express incorporation of disproportionate dividends in the MOI. Lastly part VI considers the liability for dividends paid out contrary to the Companies Act. Part VII is the conclusion.

II. DEFINING A DIVIDEND AS A FORM OF A DISTRIBUTION

Company law regulates distributions in order to ensure firstly, that the rights of creditors are not endangered and secondly that shareholders are not prejudiced by disproportionate payments either within the same class of shares or among different classes.[8] The distribution of disproportionate dividends can be inevitable under certain circumstances as indicated in part I. Therefore, it is important to have clear and express regulation in place in order to avoid undue prejudice to any shareholders. A distribution as defined in s 1 of the Companies Act can be made in any of the three forms set out in paragraph (a), (b) and (c) of the Companies Act. First, a distribution can be a transfer of money or other property of the company (other than its own shares);[9] secondly, the incurrence of an obligation;[10] and lastly the forgiveness or waiver of an obligation.[11]

In the first instance it seems, a mere obligation to transfer is not sufficient but an actual transfer is necessary. Therefore, if a dividend is declared but not distibuted, it may not be a transfer for purposes of the definition.[12] A distribution made in any form need not be made directly. Therefore, even if made indirectly, the requirements for making a distribution would still be triggered. For instance, this could be a case where the substance of a transaction is the transfer of company's property or money to a shareholder without any consideration received by the company.[13] This report focuses on a distribution made under paragraph (a), particularly in the form of a dividend declared to a holder of shares. In other words, the direct transfer by a company of money or other property of the company to or for the benefit of one or more holders

[8] n der Linde op cit note 2 at 484.
[9] Section 1 under 'distribution' para (a).
[10] Section 1 under 'distribution' para (b).
[11] Section 1 under 'distribution' para (c).
[12] Henoschberg op cit note 4 at 23.
[13] Ibid.

of any of the shares or the holder of a beneficial interest in such shares, of that company or of another company within the same group of companies in the form of a dividend.[14]

It is important to note that the definition of distribution refers to the 'holder of a share' and not to a 'shareholder' and also includes a 'holder of a beneficial interest'.[15] It appears that the former two concepts are not synonyms. The definition of 'shareholder' in s 1 of the Companies Act provides that it is the holder of a share who is entered as such in the register. Therefore, it cannot be the holder of a beneficial interest in a share, as this type of holder is already expressly included separately in the definition of a distribution.[16] As far as the latter is concerned, a company's issued securities may be held by, and registered in the name of, one person for the beneficial interest of another person.[17] 'Beneficial interest' is defined in in the Companies Act in relation to the company's securities, to mean 'the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to receive or participate in any distribution in respect of the company's securities'.[18]

The definition of 'distribution' in s 1 includes a distribution 'to one or more holders of shares'. Therefore, there is nothing in the definition to suggest that any payment made must be to all shareholders of the same class, rather than only to one or some of them. Could this be an indication that a distribution, particularly a dividend declared to some holders of shares, to the exclusion of other holders within the same class of shares, is permissible, thereby altering the principle of equality of shares? The Companies Act fails to provide clarity in this regard. It is also unclear whether authority for disproportionate dividends granted in the MOI would suffice. Whether providing for this in the MOI is sound in law may be doubted due to the common law doctrine of equality among shares of the same class and in terms 37(1) of the Companies Act as discussed in detail below.

Similar to the Companies Act 61 of 1973 ('the 1973 Act'), the Companies Act does not define the term 'dividend'. In the absence of a plausible definition, the authors of Henochsberg define a dividend to mean any payment by the company of money or property of the company to a

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[14] Section 1 under 'distribution' para (a).
[15] The term 'holder of a share' and 'shareholder' may be used interchangeably. However reference to shareholder in the context of dividends also includes a 'holder of a beneficial interest'.
[16] Henochsberg op cit note 4 at 25.
[17] Henochsberg on the Companies Act 61 of 1973 at 220.
[18] Section 1 under 'beneficial interest' para (a).

shareholder that is based purely on shareholding, and which is not a consideration for the acquisition of shares or as a result of another cause. Therefore, any repayment to shareholders, in whatever form, cash or otherwise, will fall under the definition of a distribution as being a dividend.[19] The Income Tax Act[20] defines a dividend to mean 'any amount transferred or applied by a company that is a resident for the benefit or on behalf of any person in respect of any share in that company, whether that amount is transferred or applied by way of a distribution made by or as consideration for the acquisition of any share in, that company'.[21]

Both these definitions do not expand on disproportionate dividends but merely resemble the definition of a distribution in paragraph (a) of the Companies Act. In other jurisdictions such as Delaware the term 'dividend' is used to include distributions from capital surplus as well as distributions of earnings and profits. Unlike in South Africa, with the demise of the capital maintenance principle, a growing number of jurisdictions as per the Model Business Corporation Act[22] ('MBCA') distinguish between the two types of distributions and the term 'dividend' is limited to earnings and profits.[23]

A dividend defined narrowly means, 'a proportionate payment to a class of shareholders from the profits of the company'.[24] Ordinarily the term 'dividend' is used to refer to a distribution by a company of its profits.[25] In *Hill v Permanent Trustee Co of New South Wales Ltd*[26] the English court found that 'any other payment made by [the company] by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called 'dividend' or 'bonus', or any other name, it still must remain a payment on division of profits'. From this finding a dividend is interpreted to mean a division of profit.

These definitions predate the Companies Act and therefore cannot be expected to be aligned with the reformed company law regime. For purposes of the Companies Act, such definitions no longer suffice in two respects. First, they presuppose that a dividend will always be proportional

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[19] Henochsberg op cit note 4 at 24.
[20] Income Tax Act 58 of 1962.
[21] Ibid section 1.
[22] Model Business Corporation Act, 11 BUS. LAW. 98, 100 (1956).
[23] Harry G. Henn Handbook of the Law of Corporations Other Business Enterprises (1970) at 483.
[24] Kathleen van der Linde 'The Solvency and Liquidity Approach in the Companies Act 2008' (2009) *TSAR* 224 at 487.
[25] Cassim Op cit note 1 at 266.
[26] *Hill v Permanent Trustee Co of New South Wales Ltd* [1930] AC 720 (PC) at 731 per Lord Russell of Killowen.

to shareholding and secondly, that it will be paid out only from profits. The legal position with regard to the latter is certain and express in law, however, the same cannot be said about the former. This incongruity necessitates the need for the inclusion of a definition of a dividend that is aligned with the reformed South African company law regime. This notion is supported by Van der Linde who asserts that such a definition would further facilitate the distinction between proportionate and disproportionate distributions.[27]

These above definitions are only accurate in light of the principle of capital maintenance, which was the cornerstone of South African company law prior to the 1999 amendment. The capital maintenance regime proclaimed that the only basis upon which a company could make a payment to its shareholders was by way of a dividend, declared by the company out of its profits. However, with effect from 30 June 1999 this regime was replaced with the principles of liquidity and solvency in section 4 of the Companies Act. As such a company could declare dividends to its shareholders, irrespective of its profitability.[28] To this extent, a definition of a distribution under s 1 of the Companies Act, like s 90 of the 1973 Act, makes it clear that the payment of dividends is not limited to only what constitutes profits.[29]

The concern for the financial impairment of a company's capital is now guarded by the solvency and liquidity test set out in s 4 of the Companies Act. Instead of prohibiting the payment of dividends from capital, the Companies Act allows for this, to an extent that the board is satisfied that the solvency and liquidity of the company will not be impaired from the resulting distribution. A company satisfies the solvency and liquidity test in terms of section 4 of the Companies Act if, 'considering all reasonably foreseeable financial circumstances of the company at that time' that, first, 'the assets of the company, fairly valued, equal or exceed the liabilities of the company, as fairly valued'. Secondly, particularly when paying a dividend, it must appear that the company will be able to pay its debts as they become due in the ordinary course of business in the next twelve months.[30]

III. NECESSARY ACTIONS TO EFFECT A VALID DIVIDEND

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[27] Van der Linder op cit note 2 at 487.
[28] Henochsberg op cit note 17 at 186.
[29] Henochsberg op cit note 4 at 24.
[30] Section 4(1)(a) of the Companies Act.

As indicated above, a dividend whether disproportionate or not, constitutes, is a distribution as defined in s 1 of the Companies Act. Therefore, it must be declared in accordance with s 46 of the Companies Act. Section 46 of the Companies Act requires any proposed distribution to be authorised by the board of directors. The section provides for the requirements which the board of directors of a company must comply with before a distribution may be validly completed.[31] It is important to note however that this provision does not require the distribution made by the board to be proportionate in order to be considered valid. As such, it is arguable as to whether declaring disproportionate dividends would satisfy s 46. If not, a disproportionate dividend would be unauthorised and the non-compliance would trigger liability in s 46(6), which imposes liability on directors for making distributions contrary to s 46.

Section 46(1) provides:

> 'A company must not make any proposed distribution unless –
>
> (a) the distribution –
>
> (i) is pursuant to an existing legal obligation of the company, or a court order; or
>
> (ii) the board of the company, by resolution, has authorised the distribution;
>
> (b) it reasonably appears that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution; and
>
> (c) the board of the company, by resolution, has acknowledged that it has applied the solvency and liquidity test, as set out in section 4, and reasonably concluded that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution.'

Section 46(1) vests the board of directors with the discretion to decide on the authorisation of dividends. It is apparent that directors do not require any approval from shareholders of the company in order to effect a distribution. A resolution of the directors suffices in this regard. It is however questionable whether the shareholders should not be included in making such a decision, as their interests are affected.[32] One would be inclined to confer this power of authorisation to the shareholders of the company in the MOI, since the shareholders are the persons who are affected with regard to dividends. Similarly s 170 of the Delaware General

[31] Marc Cooke 'A Critical Analysis of the Regulation of distributions by a Company's Board' (2012) 24 SA Merc LJ 371–381 at 372.

[32] Richard Jooste 'Issues relating to the regulation of 'distributions' by the 2008 Companies Act' (2009) SALJ 627 at 637.

Corporation Law ('DGCL') vests the power to declare dividends exclusively in a corporation's board of directors. However, the section further provides that a corporation's certificate of incorporation may limit a board's authority to declare dividends.[33] This is not a clear cut in terms of South African company law as there is no similar qualification.

Unalterable provisions of the Companies Act may not be changed in the company's MOI or in any of its constitutional documents, if such amendment would 'negate, restrict, limit, qualify, extend or otherwise alter the substance or effect of such provision'[34] unless amended as contemplated in s 15(2)*(a)(iii)* of the Companies Act.[35] However, the Companies Act contains a caveat, which provides that the MOI may 'include any provision which imposes on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of the [Companies]Act'[36].

Notably, s 15(2)*(c)* and *(d)* provide:

> '(2) The Memorandum of Incorporation of any company may –
>
> (c) prohibit the amendment of any particular provision of the Memorandum of Incorporation; or
>
> (d) not include any provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision of this Act, except to the extent contemplated in paragraph *(a)(iii)*.'

The confusion which may exist is what type of provision will fall within the narrow ambit of ss 15(2)*(a)(iii)* and 15(2)*(d)*? The wording in s 15(2)*(a)(iii)* seems to allow only for existing provisions to be furthered in the MOI, as is implied by the phrases 'higher standard', 'greater restriction' and 'longer period of time'.

Although not expressly provided for, it is submitted that s 46(1) is subject to any restrictions or conditions in terms of the MOI. Section 46 is clearly an unalterable provision. However, it can be altered nonetheless, in accordance with s 15(2)*(a)(iii)*. This is so provided that a special

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[33] The Delaware General Corporation Law (Title 8 Chapter 1 of the Delaware Code).
[34] Section 15(2)(d) of the Companies Act.
[35] Raashmi Govender 'Are some shareholders more equal than others', *Moneyweb* available at *http://www.moneyweb.co.za/investings/shareholders-equal-others/*, accessed on 6 April 2017.
[36] Section 15(2)*(a)(iii) of the Companies Act*.

resolution of shareholders does not create an entirely new requirement, and therefore extending the Companies Act as is disallowed by s 15(2)*(d)*. It can be argued that a provision in the MOI that the requires dividends to be approved by shareholders would, comply with the statutory requirements as it imposes a higher standard, greater restriction or a more onerous provision than s 46(1) of the Companies Act. Therefore, this would not constitute a new or additional requirement.[37] The position is uncertain and requires clarification on whether distributions can be authorised by the board subject to provisions of the MOI[38] as is the case in s 170 of the DGCL.

Furthermore, in terms of s 46 it is not a requirement for a distribution to be declared at a uniformly holders of the same class of shares. Prior to the Companies Act coming into effect, class rights had to be strictly maintained and directors could not discriminate among shareholders of the same class regarding the distribution of dividends.[39] In *Priceville Fox Co. v Jordan*[40] the court found that, it is of essence that a dividend be applied ratably to all shareholders of the same class, except where shares are paid up in differing amounts and the by-laws make provision for dividends in proportion to the percentage paid upon shares. The court held that the resolution to declare a dividend in this regard was invalid because there was a voluntary giving away to specific shareholders of the property of the company without making any provision for other shareholders. It is not certain whether this would still be an issue even when the other shareholders have consented to such a disproportionate dividend or whether it would still be seen as giving up the property of the company illegitimately. With the advent of the Companies Act there appears to be no indication that the position has changed, although there has been critical arguments by scholars that the legal position has in fact changed.

From s 46(1) it is clear that a distribution may not be made by a company unless it is pursuant to an existing legal obligation or has been duly authorised by the company's board. The board, when contemplating a distribution, must first resolve to make the distribution ('initiating resolution'), thereafter it must apply the solvency and liquidity test ('consideration resolution'). Subsequently it must acknowledge, by resolution, successful application of the solvency and liquidity test ('effecting resolution').

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[37] Henochsberg op cit 17 at 197.
[38] Marc Cooke op cit note 31 at 383.
[39] Cassim note 1 at 270.
[40] *Priceville Fox Co. v. Jordan* 1929 Carswell Ont 99, [1929] 3 D.L.R. 907, 64 O.L.R. 172.

The distinction between consideration and acknowledgement of the solvency and liquidity test as set out in s 46(1)(b) and (c) respectively, is important [41] and that the two should not be read as a single requirement. The former, requires that all distributions be measured against s 4 of the Companies Act, as set out above. The latter imposes a check on the board's compliance with s 4 of the Companies Act by requiring acknowledgement of having applied and being satisfied of the solvency and liquidity test. The requirement of a recorded resolution not only forces the directors to apply their minds to the test at hand,[42] but it is of evidential value when the liability of directors for distributions contrary to s 46 is called into question in terms of s 46(6). A formal declaration of a company's solvency is in accordance with international best practice. In New Zealand directors are required to sign a certificate[43] and, in England,[44] a director's statement and auditors report' must acknowledge the company's continued solvency (albeit only in regard to capital payments for the acquisition of shares).

Section 46(2) provides that when directors have adopted a resolution contemplated in subsection (1)(*c*), the relevant distribution must be carried out in full, subject only to subsection (3).' In the interest of shareholders, this provision ensures that distributions validly resolved are carried out by a company, although there is no express enforceability of the section. However, the lack of express enforceability seems to be acceptable in the light of s 156 read with s 157(1) which may seemingly be used to enforce the payment of distributions resolved by the board in terms of s 46.[45] On the other hand, should a company refuse to make the distribution and wait for the window period to lapse before it reconsiders the solvency and liquidity test, the company will have succeeded in nullifying the purpose of subsection (2).[46]

In terms of section 46(2) where the board of directors has adopted an effecting resolution, the relevant distribution must be made fully. The provision implies that a company, must continue with an authorised distribution within the 120-day window period, by virtue of a previously

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[41] Wording adopted from Piet Delport et al Henochsberg on the Companies Act 71 of 2008 (2011-; loose-leaf) vol 1 at 197.
[42] der Linde op cit note 24.
[43] tion 52(2) of the Companies Act No 105 of 1993.
[44] Section 714(3)(a) of the Companies Act 2006 c. 46.
[45] Marc Cooke op cit note 31 at 375.
[46] Ibid.

made acknowledgement of the board.[47] This may be problematic where it has become claer that the solvency and liquidity test will not be satisfied anymore. Furthermore, if a company makes a distribution, in compliance with subsection (2), despite its solvency becoming unfavourable, the distribution will automatically be rendered 'unauthorised' by virtue of its non-compliance with s 46. Directors would be liable for unauthorised distributions in terms of s 46(6). This unacceptable predicament and requires rectification as recommended below.[48]

Van der Linde[49] argues that where the directors become dissatisfied with the company's prospects of solvency and liquidity, the company should be 'prohibited from proceeding'. Furthermore, shareholders should be precluded from instituting action, to enforce the distribution, against the company. This is the position in the New Zealand Act,[50] directors are deemed not to have authorised the distribution, where they believe that the solvency test will not be satisfied, at any time after it has been authorised but before it has been paid. Similarly, the MBCA[51] prohibits a distribution which would cause the company to fail to pay its debts or where it would become insolvent. It is submitted that an equally effective solution should exist[52] in the Companies Act.

Furthermore, s 46(2) provides an unintended loophole. If a distribution is only partially made, it appears a director may not be held personally liable by virtue only of the fact that the distribution had not been effected in its entirety as required by s 46(2). At present directors, unconcerned with the well-being of the company, could authorise a distribution they knew would render the company insolvent. They could have a large portion of the distribution paid, stopping payment just before the resolved distribution is completed – the current loophole will aid the board in doing this.[53]

Section 46 (3) of the Companies Act provides:

> 'If the distribution contemplated in a particular board resolution, court order or existing legal obligation has not been completed within 120 business days after the board made the

[47] Kathleen van der Linde 'The Regulation of Distributions to Shareholders in the Companies Act 2008' (2009) *Tydskrif vir die Suid-Afrikaanse Reg* 484 at 484–5 cited in Cooke op cit note 30 at 375.
[48] Cassim op cit note 1 at 271.
[49] Van der Linde op cit note 47 at 494.
[50] Section 52(3) of the Companies Act 1993.
[51] American Bar Association Model Business Corporations Act 2005 § 6.40(c).
[52] Marc Cooke op cit note 31 at 376.
[53] Marc Cooke op cit note 31 at 382.

acknowledgement required by subsection (1)(c), or after a fresh acknowledgement being made in terms of this subsection, as the case may be –

(a) the board must reconsider the solvency and liquidity test with respect to the remaining distribution to be made pursuant to the original resolution, order or obligation; and

(b) despite any law, order or agreement to the contrary, the company must not proceed with or continue with any such distribution unless the board adopts a further resolution as contemplated in subsection (1)(c).'

Subsection (3) inadvertently allows a company to renege on a decision to effect a distribution, by allowing the period for effecting a resolution to lapse without providing for a mandatory re-passing thereof. In contrast, the MBCA[54] marks the date at which the effect of the distribution will be measured, effectively burdening the company with compliance at the marked date. However, the South African Companies Act expressly requires the test to be retaken after 120 days. The effect is the same, in that it prevents a board from escaping liability for a distribution made long after it is authorised, whereas the effect of it on the company's solvency is not considered. Cooke argues for a move toward a position akin to the English Companies Act[55] ('English Act') where strict time limits are imposed regarding the timing of distribution payments.[56] Despite the English Act being criticised,[57] he considers that this stringent position is preferable because it creates certainty and removes opportunity for abuse.

The current state of s 46 gives rise to a number of instances where the requirements surrounding distributions are far from certain as discussed above. The section neither strictly requires an authorised distribution to be effected at a specific marked date, nor does it provide for the distribution to be withdrawn should the requirements no longer be met.[58]

IV. PREFERENCES, RIGHTS, LIMITATIONS AND OTHER SHARE TERMS

The proprietary interest that a shareholder holds in a company is a 'share'.[59] It is this share that ordinarily confers a dividend upon its holder.[60] Both at common law and under the Companies

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[54] Section 6.40(*e*).
[55] Companies Act 2006 Chapter 46.
[56] See s 723(*a*) and (*b*) where payment must be made between five and seven weeks of authorisation.
[57] Van der Linde op cit note 47 at 229
[58] Marc Cooke op cit note 31 at 382.
[59] Cassim op cit note 1at 213.
[60] *Bradbury v English Sewing Cotton Co Ltd* [1923] AC 744 (HL) 746 cited in Cassim op cit note 1 at 213.

Act all shares of the same class enjoy equal rights.[61] The creation of classes of shares is regulated by s 37. Therefore, evident from s 37 various classes of shares are based on the nature of the rights they grant such as dividends, voting rights and participation in a distribution on liquidation.[62] This section confirms the common law principle of the doctrine of equality between shares. In the absence of a provision in the memorandum of association ('Memorandum') and the articles of association ('Articles') in terms of the 1973 Act or terms of issue (where such power existed) assigning special rights to shares, there was equality of rights between all shares of the company. Where such power was provided for in the Articles its exercise was subject to the Memorandum. Thus, an issue of shares with special rights was invalid if the Memorandum expressly provided for equality of rights between all shares. This means that under the 1973 Act, there could be differentiation within a particular class of shares if expressly provided for. For instance, in class of 20 issued shares, 1 to 10 shares could get a dividend of x while shares 11 to 20 get a dividend of y.[63]

It is a long standing principle embedded in South African common law that holders of shares of the same class should be treated equally. In other words, shares of the same class must have equal rights attached to them. This principle has been emphasised in ss 36 and 37 of the Companies Act.[64] Section 37(1) of the Companies Act provides that 'all shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class'. This provision undoubtedly confirms the common law principle of the doctrine of equality. Similarly this notion is followed on an international scale, articles 19 and 42 of the EU Second Directive provide for the rule of equal treatment of shareholders[65] of the same class.

Despite the doctrine of equality, and in light of s 37(1), the inevitable question which has been raised mostly in commercial practice is whether it is acceptable for a company to declare and distribute dividends to some and not all holders of the same class of shares. It seems the answer would be in the negative, given that declaring disproportionate dividends to shareholders of the

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[61] Section 36(1) of the Companies Act; *Birch v Cropper re Bridgewater Navigation Co* (1889) 14 App Cas 525 cited in Cassim op cit note 1 at 215.
[62] Cassim op cit note 1 at 215.
[63] Henoschberg op cit note 17 at 167-168.
[64] Yashmi Govender op cit note 35.
[65] Second Council Directive 77/91/EEC art 19 and 42, 1976 O.J (L 26) 1 (EC), amended by Council Directive 2006/68/EC, 2006 O.J (L 264)(EU).

same class would amount to an unequal treatment of shares. The immediate negative response is generally followed by the rationale that if holders of shares wished to be treated differently they would have simply acquired shares of a different class[66], with different terms and rights attached to them.

Section 37(5) creates confusion by providing that 'subject to any other law, a company's MOI may establish, for any particular class of shares preference, rights, limitations and other share terms that entitle the shareholders to distributions calculated in any manner, including dividends that may be cumulative, non-cumulative or partially cumulative subject to the requirements of ss 46 and 47'. This provision gives rise to various uncertainties. First, the provision makes reference to 'a particular class of shares', therefore a distribution calculation which is not proportional should be a term of shares of a particular class and not one share or more among other shares which receive proportionate distributions. Secondly the provision makes mention of 'distributions calculated in any manner', one cannot assume that this refers specifically to dividends as a 'distribution' can be one of three different forms contemplated in s 1 of the Companies Act. Assuming this s 36(5) provides for dividends calculated disproportionally on shares in the same class, it is submitted that the section is vague. Furthermore, the section does not for an instance where dividends are not declared nor calculated at all on certain shares.

Section 37(6) of the Companies Act, on the face of it, appears to derogate from s 37(1) in a manner that would permit the inequality of the shares. Subsection (6) provides:

> '(6) The Memorandum of Incorporation of a company may provide for preferences, rights, limitations, or other terms of any class of shares of that company to vary in response to any objectively ascertainable external fact or facts.'

On a close reading of this provision it appears that, it only allows for the altering of existing class rights under the circumstances where it is inevitable to maintain certain rights attached to shares of a certain class. For instance, a company may have a class of shares initially conferred to its holders the right to participate in dividends and subsequently an objectively ascertainable external fact(s) arises such that the company can no longer pay dividends. In response to an objectively ascertainable external fact(s) the MOI of the company may be amended to provide that holders of shares of this class will no longer be entitled to dividends. This limitation would

[66] Raashmi Govender op cit note 35.

apply to all the shares of that class, thereby effectively maintaining the principle of the equality of shares. Therefore, this provision is in no way an exception to the principle of equality. This is confirmed by the cross reference to s 36 in subsection (7)(b).

For purposes of 37(6) it is not clear what constitutes an 'objectively ascertainable fact'. In an attempt to provide guidance on the interpretation of phrase, subsection (7) provides—

> 'For purposes of subsection (6)—
>
> (a) 'external fact or facts' includes the occurrence of any event, a variation in any fact, benchmark or other point of reference, a determination or action by the company, its board, or any other person, an agreement to which the company is a party, or any other document;
>
> (b) the manner in which a fact affects the preferences, rights, limitations or other terms of the shares must be expressly determined by or in terms of the company's Memorandum of Incorporation, in accordance with section 36.'

It is still unclear what the legislature had intended with reference to 'objectively ascertainable external fact or facts'. This provision is open ended and creates uncertainty and could lead to possible abuse since "any fact or facts" could easily contribute to an amendment of the MOI of a company.

A proper construction and interpretation of s 37 cannot be achieved without due consideration and reference to similar authorities in foreign jurisdictions. Section 5 of the Companies Act is important in this regard in that it recognises the consideration of foreign law in interpreting and applying the Companies Act. An ideal statutory provision that could possibly address the issues relating to disproportionate dividends, is found in s 53 of the Companies Act of 1993 of New Zealand ('New Zealand Act'). Particularly, subsections (2) and (3) of the New Zealand Act provide that:

> '(2) The board of a company must not authorise a dividend—
>
> (a) in respect of some but not all the shares in a class; or
>
> (b) that is of a greater value per share in respect of some shares of a class than it is in respect of other shares of that class,

unless the amount of the dividend in respect of a share of that class is in proportion to the amount paid to the company in satisfaction of the liability of the shareholder under the constitution of the company or under the terms of issue of the share or is required, for a portfolio tax rate entity, as a result of section HL 7 of the Income Tax Act 2004.

(3) Notwithstanding subsection (2), a shareholder may waive his or her entitlement to receive a dividend by notice in writing to the company signed by or on behalf of the shareholder.'[67]

In light of the above comparable provision, it is evident that the manner in which s 46 is drafted proves to be inflexible. Section 53(3) of the New Zealand Act should be instructive in amending this provision. An amendment to the Companies Act would ideally entail a subsection under s 46 expressly enunciating that 'notwithstanding subsection (1), a shareholder may waive his or her right to receive a dividend declared by the board of directors. Unlike s 46 of the Companies Act, it is worth observing that s 53(2) of the New Zealand Act prohibits a dividend declared to some but not all shareholders unless it is for a specific purpose provided for in the section or a shareholder has waived his entitlement to a dividend. Furthermore, the New Zealand Act provides for proportionality, in that it prohibits a dividend that is higher than the shareholding of a shareholder. However, one is inclined to assume that the converse is possible as the New Zealand Act is silent in this regard i.e. declaring a dividend which is lower than the shareholding of a particular shareholder.

It appears that the manner in which the Companies Act provides for disproportionate dividends, if it does at all, could be inflexible and the creation of different classes of shares may not always be viable. This is so, in the event that the need to distribute disproportionate dividends occurs as a matter of urgency and only affects some and not all holders of shares of a particular class of shares. The process of amending an MOI would be inexpedient in practice. To put this assertion into perspective, first the company must send a notice to convene a shareholders' meeting in terms of s 62 of the Companies Act; secondly, convene a meeting where the special resolutions will be passed in accordance with s 16 of the Companies Act (unless the MOI of a company provides for round robin resolutions); thirdly, lodge the amended MOI, accompanied by the said special resolution and a fee, with the Companies and Intellectual Property Commission

[67] Companies Act 1993 No 105.

('Commission'); and lastly await for confirmation from the Commission of having approved the amendment which can take up to 30 days.[68]

Furthermore, amending the MOI for an event which is not permanent appears absurd. In other words, where a company distributes a disproportionate dividend on a once-off basis and subsequently continues to declare dividends as usual in the conventional sense it would be superfluous to amend an MOI - Similarly to instances where not all holders of shares in the same class are affected or they are affected differently with the occurrence of a certain event. To illustrate: assume a company has one class of shares, A-Shares, with fifteen shareholders, the company wishes to distribute proportionate dividends to five shareholders, disproportionate dividends to another five and no dividends to the remaining five. In terms of section 37(1), the company would have to create two further classes of shares for disproportionate dividends and no dividends, in order to maintain the equality of shares accordingly. In the event that these circumstance giving rise to different classes of shares are not recurring, the existence of the three classes of shares is superfluous. Further, this mechanism of achieving disproportionate dividends is not only impractical but can be administrative and costly to a company.

In contrast to the Companies Act, the New Zealand Act provides for a waiver from shareholders in s 53(3). This allows for flexibility in that the company does not have to go to the lengths of amending its constitutional or founding documents to facilitate disproportionate dividends. A waiver essentially serves as consent of a shareholder to receive dividends disproportional to his or her shareholding or no dividends at all as the case may be.

A further alternative to an amendment of the Companies Act is to facilitate disproportionate dividends by an agreement between shareholders. In other words, each shareholder agrees to waive his or her right to a proportionate dividend and consents to any dividend received. There is no indication of such an arrangement being prohibited by the Companies Act. However, in light of s 15(7) this must be done with careful consideration as the MOI will take precedence in the event of discrepancies between the MOI and the shareholders' agreement.[69]

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[68] CIPC Notice to customers 'Turnaround Time for CoR 15.2 Applications' available at *www.cipc.co.za* accessed on 17 February 2018.
[69] Henochsberg op cit note 17 at 186.

Given that no changes are forthcoming in terms of ss 37 and 46 of the Companies Act, a waiver appears to be a practical solution around these provisions although it is not provided for in the Companies Act. In this manner, disproportionate dividends may be achieved by the board of directors while maintaining the principle of equality. In order to achieve this, the shareholders could willingly waive their rights given an instance of a greater objective. There is no provision in the Companies Act that would render a company or director liable where a shareholder has waived his or her right to receive a dividend.[70] A waiver to a dividend is not a new practice. It is recognised in terms of the Income Tax Act 58 of 1962 ('Income Tax Act'). The definition of 'disposal' in the eighth schedule of the Income Tax Act expressly includes, inter alia, the 'waiver or renunciation of an asset'. In the same vain, a shareholder can waive a vested right to a dividend once it has been declared. Such a shareholder will be regarded as having disposed of his or her right for capital gains tax purposes.[71] The disadvantage, however, is that such an approach may trigger unintended tax consequences which are not discussed in this report.

Interestingly, although the Companies Act does not expressly appear to allow for disproportionate dividends, the South African Revenue Services ('SARS') perspective seems to be that disproportionate dividends can be declared and distributed. SARS requires a justification for having declared disproportionate dividends. For instance, SARS considers disproportionate dividends in respect of management and employee share schemes.[72]

In terms of s 6 of the Companies Act it is foreseeable that public companies listed on a stock exchange would be further subjected to the strict application of the principle of the equality of shares. Stock exchanges are regulated in South Africa as self-regulatory organisations ('SRO'). This model means that the organisation must regulate the market it services by creating rules, supervision protocols and disciplinary mechanisms. Therefore, an entity listed on a stock exchange not only has to comply with the Companies Act as a public company but also comply with rules and listings requirements of the stock exchange under which it is listed. For example, schedule 10 of JSE Limited listings requirements provides—

[70] Ibid.
[71] *www.sars.gov.za*.
[72] Raashmi Govender op cit note 35.

'securities in each class for which listing is applied must rank pari passu in respect of all rights.' It must be noted that the provision that 'securities in each class [must] rank pari passu' shall be understood to mean that:

(a) they are in all respects identical;

(b) they are of the same nominal value, and that the same amount per share has been paid up;

(c) they carry the same rights as to unrestricted transfer, attendance and voting at general/annual general meetings and in all other respects; and

(d) they are entitled to dividends at the same rate and for the same period, so that at the next ensuing distribution the dividend payable on each share will be the same amount.'[73]

The principle of the equality of shares for listed companies was recently alluded in *Skywise Airline Proprietary Limited v Safair Operations Proprietary Limited.*[74] The case was a result of an alleged non-compliance with the Air Services Licensing Act[75], ('ASL Act'). Section 16(4)(c) of ASL Act provides that the Air Services Licensing Council ('Council') may only grant a licence to an applicant airline if it is satisfied that at least 75% of the voting rights in respect of the applicant are held by South African residents. Therefore, this section imposes a further requirement to a class of shares which confers voting rights. In other words, it dictates the thresholds in which voting rights must be held with respect to the nationality of the shareholders. The section makes reference to 'at least 75%' of voting rights being held by South African residents. It is not clear whether it would be permissible for South African residents to hold all 100% of voting rights while non-South African shareholders are granted other rights excluding voting rights within the same class of shares. If this is possible with regard to voting rights, the same approach of altering class rights could apply to disproportionate dividends. However, this seems impossible in light of the unalterable s 37*(3)(b)(i)*. It upholds the stringent principle of the equality of shares by providing that despite anything contrary in MOI where a company has only one class of shares, those shares have the right to be voted on every matter that may be decided by the shareholders of the company.

[73] Schedule 10 of the JSE listings requirements issue 25 accessed at *https://www.jse.co.za/current-companies/issuer-regulation* on 18 September 2018.
[74] *Skywise Airline Proprietary Limited v Safair Operations Proprietary Limited* 2013 JDR 2310 (GNP).
[75] Air Services Licensing Act No. 115 of 1990.

It is submitted that had there been flexibility on the principle of the equality of shares, Safair would have been able to grant 75% or even all voting rights to holders of shares resident in South Africa while allowing non-South African residents to hold shares of the same class but with no voting rights without compromising its compliance with the ASL Act, JSE Listings Requirements and the Companies Act. While it may be sound to preserve the principle of the equality of shares this could result in unnecessary deadlocks as was the case in Safair.

V. EXPRESS INCLUSION FOR DISPROPORTIONATE DIVEDENDS IN THE MOI

The Companies Act introduced certain mechanisms to ensure that the legislation adheres to the aims of simplicity and flexibility as entrenched in s 7*(b)(ii)*. The use of alterable and unalterable provisions throughout the Companies Act is one of such mechanisms. These provisions create the 'opt in' or 'opt out' approach. This means a company may deviate from a number of the Companies Act provisions with a different requirement in the MOI and add matters not at all dealt with by the Companies Act.[76]

It is questionable whether a provision in the MOI authorising disproportionate dividends would be amending an unalterable provision in the Companies Act, and whether such amendment will accord with s 15 of the Companies Act. Prior to the advent of Companies Act the court in *South African Iron and Steel Industrial Corporation Ltd v Moly Copper Mining and Exploration Co (SWA) Ltd* [77] held that the manner of both declaring and payment of a dividend can be regulated by the MOI and such regulation must be consistent with the principles of company law. This approach is similar to the position in New Zealand, where the New Zealand Act allows for certain transactions only if they are expressly authorised in the constitution of a company.[78]

It is not clear whether s 37 is an alterable or unalterable provision of the Companies Act. Jooste seems to suggest that s 37(1) is alterable. He asserts that the section 'provides that all shares must be treated equally unless the MOI provides otherwise'. This suggestion seems rather flawed as there is no indication in subsection (1) that shares of the same class may be treated differently if

[76] Helena Stoop 'Alterable and Unalterable Provisions of the Companies Act 71 of 2008: Recent Changes Expose Inherent Uncertainities' Journal of Corporate and Commercial Law and Practice, Vol 2 Number 1, (2016) 40 - 51 at 40

[77] *South African Iron and Steel Industrial Corporation Ltd v Moly Copper Mining and Exploration Co (SWA) Ltd* 1993 (4) SA 705 (NmHC) at 712).

[78] ss 59(1), 60(1)(b)(ii), and 67C(3).

such is provided for in the MOI. However, assuming s 37(1) can be altered, the company's MOI would have to specifically provide for a disproportionate distribution of dividends as suggested above. A mere decision by the board to limit the distribution of dividends to certain shareholders in the same class of shares would not be valid and may be impugned. While all shares of a class must be treated equally, it might be permissible for the MOI to provide otherwise. The above submission appears to be in line with s 37(1) of the Companies Act. However, at the core it derogates from the essence of the principle of equal treatment of shares of the same class.[79]

On the face of it, it appears that section 37(1) is an unalterable provision of the Companies Act. In order to provide for disproportionate dividends in the MOI, s 15(2)*(a)(iii)* of the Companies Act must complied with. Therefore, whether or not the MOI can make provision for an unequal treatment of shares with regard to dividends depends on whether such an inclusion can be interpreted as a 'higher standard' or 'greater restriction' in terms of s 15, than s 37(1) of the Companies Act.

It is arguable whether a provision in the MOI permitting the declaring disproportionate dividends would constitute 'a higher standard, greater restriction, longer period of time or similarly more onerous requirement' for purposes of s 15(2)(a)(iii). With this in mind, the MOI of a company would provide as a term of a share that the board of the company may in its discretion on an ad hoc basis, acting objectively and in accordance with its fiduciary duties, for good reason, determine the need to declare disproportionate dividends to the shareholders of a particular class. Arguably, the terms applicable to the shares would still in any event be identical as required by s 37(1) of the Companies Act in that this provision is a term of the share (equally applicable to all shareholders of that class) that the board determines the amount of the dividend to be declared and to which shareholder it will make such distribution.

It is not certain whether simply making provision in the company's MOI that shareholders may be treated differently in respect of distributions is a term imposing a greater standard or more onerous restriction than that contemplated in s 37(1) in the Companies Act and whether it would be enforceable. European courts rely on fairness as a norm rather than equal treatment. American courts require directors to pass a fairness test when there is an unequal treatment of shareholders.

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[79] Raashmi Govender op cit note 35.

Therefore, in America the disparate treatment is not necessarily unfair.[80] This approach appears to be acceptable where the inequality is inevitable and can be justified on grounds of fairness. Fairness as a legal test has not received much support in South Africa in the context of contracts.[81]

In the South African context where an existing MOI is amended to provide for disproportionate dividends, it must be accompanied by a special resolution of shareholder as required in terms of s 16 read with s 65(11) of the Companies Act given that this is an amendment to the MOI. Furthermore, the provisions of s 37(8) must be observed, which provides—

> 'If the Memorandum of Incorporation of a company has been amended to materially and adversely alter the preferences, rights, limitations of other terms of a class of shares, any holder of those shares is entitled to seek relief in terms of s 164 if that shareholder—
>
> (a) notified the company in advance of the intention to oppose the resolution to amend the Memorandum of Incorporation; and
>
> (b) was present at the meeting, and voted against that resolution.'

A possible unintended consequence to the amendment of the MOI, is that it could trigger the dissenting shareholder's rights in terms of s 164 of the Companies Act. This is a remedy provided to a shareholder in the event that the company gives notice to the shareholders of a meeting to consider adopting a special resolution to amend its MOI by altering the preferences, rights, limitations or other terms of any class of shares in a manner materially adverse to the rights or interests of the holders of that class of shares.[82] Provided that the dissenting shareholder has met the requirements set out in the Companies Act, the shareholder may then demand that the company pay him or her the fair value for all the shares of the company which he or she holds. Thereafter the shareholder holds no rights in respect of those shares except to be paid fair value.[83] Therefore, should a company wish to incorporate changes to its share rights in order to

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[80] Nicola De Luca 'Unequal Treatment And Shareholders' Welfare Growth: "Fairness" V. "Precise Equality"' 34 D[illegible]. Corp. L. 853 (2009) at 857.

[81] *Bris[illegible] Drotsky* 2002 (4) SA 1 (SCA) para 22.

[82] HGJ Beukes 'An Introduction to the Appraisal Remedy as Proposed in the Companies Bill: Triggering Actions and the Differences between the Appraisal Remedy and Existing Shareholder Remedies' (2008) 20 SA Merc LJ at 480.

[83] Jacqueline Yeats, 'Putting Appraisal Rights Into Perspective' STELL LR (2014) 2 at 334.

effect disproportionate dividends, the existing legal framework would still be sufficient to ensure the protection of shareholders, especially minorities.

VI. LIABILITY FOR DIVIDENDS DITRIBUTED CONTRARY TO THE COMPANIES ACT

Where disproportionate dividends are not permissible such a payment would be subject to scrutiny in terms of s 46 for non-compliance. Unlike the regulation of share repurchases in terms of s 48(6) of the Companies Act where a company can apply to court for an order reversing the acquisition[84], s 46 does not have a similar provision, unless read with s 77 of the Companies Act. Section 46 when read together with s 77 enables a court to order the return of an unlawful dividend to the company.[85] Furthermore, s 46 does not expressly provide that if a company makes a distribution in contravention with s 46, such distribution is void. It is not clear why an unlawful dividend is not expressly stated to be void as is the case with financial assistance for the acquisition of securities[86] and financial assistance to directors[87] in ss 44 and 45 respectively. With lack of express voidness, s 218 of the Companies Act becomes a point of departure, it provides:

> 'Nothing in this Act renders void an agreement, resolution or provision of an agreement, resolution, Memorandum of Incorporation or rules of a company that is prohibited, void, voidable or may be declared unlawful in terms of this Act, unless a court declares that agreement, resolution or provision to be void.'

It is therefore submitted that s 46 of the Companies Act requires amending in order to address the voidness aspect and the recovery of an unlawful dividend from the recipient shareholder similar to s 90 of the 1973 Act. Although s 90 of the 1973 Act made no provision for any liability on the part of the company's directors, it expressly provided that a shareholder would be liable for any dividend received contrary to s 90. Jooste asserts that there is no rational for omitting such a provision.[88]

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[84] Section 48(6).
[85] Richard Jooste op cit note 32 at 646.
[86] Section 44 of the Companies Act.
[87] Section 45 of the Companies Act.
[88] Richard Jooste op cit note 32 at 646.

However, unlike under the 1973 Act, s 46(6) of the Companies Act provides for recourse only against the directors of the company. Liability arises if a director was present at the meeting when the board approved the resolution or participated in the making of such a decision by way of a 'round robin' resolution. A director must have failed to vote against such a resolution, despite knowing that the declaring of that dividend was contrary to s 46. Liability therefore hinges on a subjective inquiry into the director's knowledge at the time.[89]

Section 1 of the Companies Act defines 'knowing', 'knowingly' or 'knows' when used with respect to a person, and in relation to a particular matter, as that the person either-

> '(a) had actual knowledge of the matter, or
>
> (b) was in position in which the person reasonably ought to have-
> (i) had actual knowledge;
> (ii) investigated the matter to an extent that would have provided the person with actual knowledge; or
> (iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter.'

A director who has breached s 46 of the Companies Act is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the voidness of the resolution or agreements.[90] Whether directors who declare disproportionate dividends contravene s 46 of the Companies Act remains to be seen. It must be noted that for the purposes of s 77 a 'director' includes an alternate director, a prescribed officer, and a person who is a member of a committee of a board of a company or of the audit committee of a company.[91]

If the board of a company has made a decision inconsistent with s 46 of the Companies Act, the company or any director who has been held liable, may apply to court for an order setting aside the decision[92] and/or reverse the transaction.[93] The court may make an order setting aside the decision in whole or in part, absolutely or conditionally. Furthermore, a court may make any order that is just and equitable in the circumstances, including an order to rectify the decision,

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[89] Ibid at 647.
[90] Section 77(3)(e)(viii).
[91] Section 77(1).
[92] Section 77(5).
[93] Henochsberg op cit note 17 at 199.

reverse any transaction, or restore any consideration paid or benefit received by any person in terms of the decision of the board.[94] Furthermore, a court could make an order requiring the company to indemnify any director who has been or may be held liable in terms of this section, including indemnification for the costs of the proceedings.[95]

In the event of the court application, in terms of s 46(6) read with s 77(3)*(e)(vi)*, to set aside the transaction for dividends declared contrary to s 46 of the Companies Act, it is questionable whether a shareholder would be able to rely on s 20(7) or the common law Turquand rule. In other words, can the recipient of a dividend that was declared in contravention of s 46 of the Companies to prevent the reversal of a dividend distributed to him or her?

The Turquand rule otherwise known as the 'internal management' rule was first developed in *Royal British Bank v Turquand*[96]. Essentially, the Turquand rule provides that a third party is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements.[97] The Turquand rule, unlike s 20(7) provides that a bona fide third party can rely on the rule if he or she is not aware of any internal irregularities that affect the validity of a transaction with the company despite the third party being a shareholder of the company.[98]

The Turquand as a defence where there was a contravention of a statutory provision was raised in *Farren v SunService SA Photo Trip Management (Pty) Ltd*[99] and *Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd v Göbel NO*[100], under the 1973 Act. The courts found that the Turquand rule does not apply where a company has failed to comply with legislative requirements.[101] In contrast in *Levy and Others v Zalrut*[102] the court supported the application of the *Turquand* rule so as to negate the provisions of a statutory provision. Under the Companies Act the court in *One*

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[94] Section 77(5)(ab)(ii)(bb).
[95] Section 77(5)(b)(ii)(bb).
[96] *Royal Bank v Turquand* (1885) SE & B 248
[97] Piet Delport 'The Companies Act of 2008 and the Turquand Rule' 2011(74) THRHR 132 at 136.
[98] Sassim op cit note 1 at 181.
[99] 2004 (2) SA 146 (C) para 18.
[100] *Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd v Göbel NO* 2011 (5) SA 1 (SCA)
[101] Kathleen van der Linde The validity of company actions under section 20 of the Companies Act 71 of 2008" (2011) TSAR 833 at 841.
[102] *Levy & others v Zalrut Investments (Pty) Ltd* 1986 (4) SA 479 (W) at 487B-F.

Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd[103] found that the Turquand rule did apply to a requirement laid down by legislation. In other words, it does not matter that a requirement which has not been complied with is a statutory requirement such as s 46 of the Companies Act. Therefore, in terms of this approach, a recipient of an unauthorised dividend would still be entitled to rely on the Turquand rule. The law is not settled in this regard, however, the doctrine of stare decisis would dictate that latter decision take precedence.

On the other hand, it is clear that s 20(7) cannot come to the rescue of a shareholder who was a recipient of a dividend that was made contrary to s 46 because unlike the common law Turquand rule, s 20(7) expressly precludes a shareholder from relying on the section.[104] However, the position regarding shareholders as third parties under the common law Turquand rule, [105] is unclear and subject to debate.[106]

The reference to s 77(3)*(e)(vi)* in s 46(6) may not always be useful for purposes of liability where the director's conduct falls within the scope of s 77(4)[107], known as the business judgment rule. A director can raise s 77(4) as a defence when an action is launched and the directors' compliance with s 46 is found lacking. A director could avoid personal liability because they ensured, as part of their plot, that the distribution was not all made, placing them within the safe harbour created by s 77(4)*(a)(i)*.[108] In terms of this section, a director will only be liable if the solvency and liquidity test is not satisfied 'immediately after making all of the distribution contemplated'.[109]

VII. CONCLUDING REMARKS

This report has analysed some of the uncertainties in the framework regulating the distribution of dividends in South Africa. To this end the report has proposed amendments in light of foreign jurisdictions with similar legal systems. The report has shown the inflexibility created by the principle of equality and s 37 of the Companies Act. The current state of the regulation of

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[103] *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Another* 2015 (4) SA 623 (WCC) para 55.
[104] chard Jooste op cit note 32 at 646.
[105] See *Roya mk v Turquand* (1885) SE & B 248.
[106] Kathleen van der Linde op cit note 101 at 841.
[107] Section 77(4)(a)(i).
[108] Marc Cooke op cit note 31 at 382.
[109] Section 77(4)(a)(i).

dividends is not aligned with international standards. The current framework does not fully give effect to the objectives entrenched in s 7 of the Companies Act. Therefore, South African company law remains unsettled with regard to whether or not, shareholders can agree to receive disproportionate dividends. It seems this question may be settled and tested in light of the Companies Act once it has come before the South African courts.[110]

With regard to the inadequacies and shortfalls discussed in this report, the objective of this report is to provide a platform for regulatory re-examination and reform. For as long as there is no forthcoming legislative intervention or judicial determination with regard to disproportionate dividends, companies still have to resort to inflexible alternatives such as the amending an MOI or obtaining a waiver from its shareholders in order to achieve disproportionate dividends.

This report hopefully contributes to the effort to overcome unnecessary legislative boundaries in an increasingly distressed global economy. The unequal treatment of shares is not only sound in law but gives effect to efficient business practice. It is submitted that it would be in the interest of legal certainty if the legislature were to insert express provisions for disproportionate dividends, thereby providing clarity and giving effect to the objectives of the Companies Act.

[110] Raashmi Govender op cit note 35.

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