THE BATTLE BETWEEN THE SHAREHOLDERS' AGREEMENT AND MEMORANDUM OF INCORPORATION: INCONSISTENCIES, EFFICIENCIES AND THE MISSING NUANCE IN SECTION 15(7) OF THE COMPANIES ACT 71 OF 2008

By

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DECLARATION

I, 1804137, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

Section 15(7) of the Companies Act 71 of 2008 radically altered the way in which the constitutional documents of a company, being the memorandum of incorporation (MOI) and shareholders' agreement interact. The primary aim of the thesis is to thus understand the 'battle' between the shareholders' agreement and MOI and to provide recommendations to settle the conflict. Section 15(7) provides that any provision in the shareholders' agreement that is inconsistent with a company's MOI is void to the extent of the inconsistency. Understanding the interaction between a company's constitutional documents is essential because of the prevalence of shareholders' agreements in private companies and the desire for certainty between shareholders. This thesis critically evaluates how the courts have interpreted section 15(7). The analysis exposes the fact that our courts do not always apply section 15(7) consistently or correctly. Where section 15(7) is applied correctly, it can lead to efficiencies in corporate governance reaffirming the corporate democracy our corporate law embraces. On the other hand, the application of section 15(7) can lead to absurd outcomes where provisions of shareholders' agreement are ignored despite all shareholders consenting to them. I recommend that section 15(7) ideally requires amendment to recognise the nuance needed to facilitate effective shareholder relationships. Namely, section 15(7) should recognise unanimous shareholders' agreements ahead of the MOI in certain contexts. Given legislative reform is not always realistic, I also make practical recommendations to legal practitioners on navigating section 15(7).

TABLE OF CONTENTS

1. INTRODUCTION

It goes without saying that when shareholders risk their capital when investing in a company, they desire both a level of certainty and flexibility regarding the regulation of that company. A measure of certainty is provided by clear legislation and its consistent application by courts and legal practitioners. Legislation cannot always adequately deal with all facets of relations between shareholders given the diverse types of businesses, their varying sizes and particular shareholder interrelations.[1] In common law jurisdictions it is thus standard to not prescribe rigid regulations on the content of a company's constitutional documents.[2] Corporate law can act as a gap filler for a company's constitutional documents by providing for a default position.[3] Shareholders' agreements further serve as a setting where shareholders can, within the confines of the law, freely govern their relationships between themselves and the company.[4] In the greater scheme, the predictability and flexibility of a shareholders' agreement and its interaction with the constitutional documents of a company can greatly influence how conducive a jurisdiction is to concerns or interests of businesses. The degree of responsiveness of the law to how businesses operate can encourage more businesses to incorporate companies within that jurisdiction,[5] indirectly encouraging economic growth.

Bearing the above context in mind, the Companies Act 71 of 2008 ('Companies Act') radically changed the nature and interplay between a company's constitutional document, being the Memorandum of Incorporation ('MOI') and its shareholders' agreement. In contrast to the Companies Act 61 of 1973 Act ('1973 Companies Act'), the effect of section 15(7) of the Companies Act is that provisions of a shareholders' agreement that are inconsistent with the MOI are void. In other words, the MOI ranks ahead of the shareholders' agreement.

The purpose of this report is to reflect on the effect of section 15(7) on shareholders' agreements and MOIs and the 'battle' between the documents. More specifically, the report

1 LS Sealy 'The Enforcement of Partnership Agreements, Articles of Association and Shareholder Agreements' in PD Finn (ed) *Equity and Commercial Relationships* (1987) 92.
2 Ibid.
3 John Armour, Henry Hansman & Reinier Kraakman 'What is corporate law?' in Reinier Kraakman, John Armour, Paul Davies et al *The Anatomy of Corporate Law* 2 ed (2009) 23.
4 Sealy op cit note 1.
5 The most notable example being the state of Delaware. Peter Molk 'Delaware's dominance and the future of organizational law' (2021) 55(3) *Georgia Law Review* 1111. Delaware's corporate law system is very reactive. For example, amendments to the Delaware General Corporation Law were signed into law in July 2024 in reaction to the judgement in *West Palm Beach Firefighters' Pension Fund v. Moelis & Company*, C.A. No. 2021-0309-JTL (Del. Ch. Feb. 23, 2024). The *Moelis* judgement found that various provisions in a stockholder agreement that restricted the board's powers, in favour of a stockholder, were invalid. The controversial amendments that followed this case essentially reversed the decision.

will critically evaluate how the courts have interpreted the section and how its application can at times assist in governance efficiencies. However, the lack of nuance in section 15(7) can also lead to absurd or 'unbusinesslike results'. The second purpose is to recommend potential reforms to section 15(7) and to provide practical guidance to legal practitioners.

The outline of this report is as follows: Section 1 sets out a brief history of the constitutional documents of a company and shareholders' agreements before the Companies Act. Section 2 explains the current position under the Companies Act. Section 3 provides the reasons why parties conclude shareholders' agreements. Section 4 examines the cases where the courts grapple with section 15(7) and the interaction between shareholders' agreements and MOIs. Section 5 advances my recommendations having considered the case law. Section 6 is the conclusion.

2. THE CONSTITUTIONAL DOCUMENTS OF A COMPANY AND SHAREHOLDERS' AGREEMENT BEFORE THE COMPANIES ACT

The constitutional documents of a company under the common law have been historically contractual in nature.[6] Even if one rejects the contractarian theory,[7] one would be hard pressed to deny the contractual origin of corporate law in common law jurisdictions and the contractual relationship of shareholders.[8] Under English law in the 18th and 19th century, a company was formed through a deed of settlement.[9] The subscribers would covenant with trustees, acting on behalf of the company, to observe the provisions of the deed.[10] The intention was to ensure that the members were in a contractual relationship and bound by their undertakings. The deed was a 'fusion' of the law of trust and partnership.[11] The Joint Stock Companies Act of 1856 changed the regime from the deed of settlement to the articles of association.[12] Despite this,

6 Paul L. Davies, Sarah Worthington & Christopher Hare *Gower Principles of Modern Company Law* 11 ed (2021) para 11-002. Beyond the constitutional documents of a company, company law itself is rooted in a 'contractarian' ecosystem or origin. Stephen M Bainbridge 'Community and statism: A conservative contractarian critique of progressive corporate law scholarship' (1997) 82 *Cornell Law Review* 859.

7 The contractarian theory explains corporate law and the relationship between managers and shareholders through contract. The contract is made up of the company's constitution and the governing law where the company is incorporated. Michael Klausner 'The contractarian theory of corporate law: a generation later' (2006) 3 *Journal of Corporation Law* 780; Michael Klausner 'Fact and fiction in corporate law and governance' (2013) 65(6) *Stanford Law Review* 1329; David Gibbs-Kneller, David Gindis & Derek Whayman 'Not by contract alone: the contractarian theory of the corporation and the paradox of implied terms' (2022) *European Business Organization Law Review* 574.

8 Robin Hollington Q.C *Hollington on Shareholders' Rights* 7 ed (2013) para 2-08.

9 LS Sealy op cit note 1 at 95.

10 Ibid.

11 Cilliers, Bernade, Henning et al *Cilliers & Benade Corporate Law* 3 ed (2000) para 2.06.

12 LS Sealy op cit note 1 at 95.

the nature of articles of association was still such to imply certainty regarding the contractual obligations of members.[13] The origin of the constitutional documents of a company under English company law, from which South African law found its first breath,[14] was to ensure certainty and a level of flexibility based on the nature of the company. The 1973 Companies Act legislated that a company's constitutional documents were made up of its articles of association and memorandum of association.[15] This was similar to the English system under the Joint Stock Companies Act of 1856.[16] The articles of association and memorandum of association played different roles.[17] While the memorandum of association was superior to the articles of association,[18] they were read together.[19] The articles and memorandum of association were essentially combined in the form of the MOI for companies incorporated under the Companies Act. In terms of the 1973 Companies Act, any provision in the memorandum and articles of association that was inconsistent with the 1973 Companies Act was invalid.[20]

The 1973 Companies Act did not explicitly recognise a shareholders' agreement. Nonetheless, it was generally recognised that a unanimous shareholders' agreement could override or supersede the articles of association of that company,[21] subject always to the '*particular statutory provision*' of the 1973 Companies Act that the shareholders' agreement related to.[22] There is an argument that the articles of association would still prevail over a shareholders' agreement, despite a provision to the contrary, where there was a conflict between the two

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13 Sections 7 and 10 of the Joint Stock Companies Act of 1856.

14 Cilliers op cit note 11 at para 2.03-2.13. The Cape Joint Stock Companies Limited Liability Act 23 of 1861 was almost identical to the English Joint Stock Companies Act 7 & 8 of 1844 and the Limited Liability Act of 18 & 19 of 1855. The Companies Act 46 of 1926 was partly based on the English Companies (Consolidation) Act of 1908.

15 Section 59 of the 1973 Companies Act.

16 Section 9 of the Joint Stock Companies Act of 1856; JL Yeats (ed) *Commentary on the Companies Act of 2008* (2018) 2-33.

17 The memorandum of association described the purpose of the company per section 52 of the 1973 Companies Act whereas the articles of association provided for the internal regulation of the company per section 59 of the 1973 Companies Act.

18 *Quadrangle Investments (Pty) Ltd* v *Witind Holdings Ltd* 1975 (1) SA 572 (AD) at 579.

19 Jennifer A Kunst, Piet Delport & Quintus Vorster (eds) *Henochsberg on the Companies Act 61 of 1973* (2011) 112.

20 M Blackman, G.K. Everingham, R. Jooste et al *Commentary on the Companies Act (Blackman)* (Revision Service 9) (2012) 101. This principle originates from the case of *Rosslare (Pty) Ltd* v *Registrar of* Companies 1972 (2) SA 524 (D) at 525 which was in respect of articles of association under the Companies Act 46 of 1926.

21 *Gohlke and Schneider v Westies Minerale (Edms) Bpk* 1970 (2) SA 685 (A) and *Delfante v Delta Electrical Industries Ltd* 1992 (2) SA 221 (C). This followed the approach under English law which was addressed in *Russell v Northern Bank Development Corp Ltd* [1992] BCLC 1016. See also David Kershaw *Company Law in Context* 2 ed (2012) 94.

22 *LSA UK Ltd (formerly Curtainz Ltd) v Impala Platinum Holdings Limited* 2000 JDR 0187 (SCA) at 23.

documents relating to the '*rights flowing from'* the articles.[23] Notwithstanding this potential conflict, it was the prevailing practice under the 1973 Companies Act for the shareholders' agreement to contain the bulk of internal management regulations concerning a company and for such agreement to provide that it supersedes the articles of association in the event of a conflict.[24]

Accordingly, when considering issues around the management of a company and relationships between shareholders, the courts primarily focused on the shareholders' agreement and not the articles of association in determining the issue.

3. THE MOI AND SHAREHOLDERS' AGREEMENT UNDER THE COMPANIES ACT

The Companies Act significantly changed the position under the 1973 Companies through the enactment of section 15(7). Section 15(7) of the Companies Act, states:[25]

> '*The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with this Act and the company's Memorandum of Incorporation, and any provision of such an agreement that is inconsistent with this Act or the company's Memorandum of Incorporation is void to the extent of the inconsistency.*'

Before delving into section 15(7), there are three conceptual observations to be made regarding the MOI. First, the MOI as defined under section 1 of the Companies Act includes reference to the document of a pre-existing company structured and governed before the effective date of the Companies Act. In other words, the articles and memorandum of association of a company formed before the Companies Act are considered the MOI when referred to in the Companies Act. This is relevant as there are frequent instances where companies incorporated under the Companies Act predecessor Acts have not amended their founding documents to align with the Companies Act.[26]

Secondly, with a focus on flexibility,[27] the Companies Act provides for '*unalterable provisions*' and '*alterable provisions*'. An unalterable provision is a provision of the

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[23] Jennifer A Kunst, Piet Delport, Quintus Vorster et al (eds) *Henochsberg on the Companies Act 61 of 1973* (2011) 112; minority judgment of Marais J in *LSA UK Ltd* supra note 22 para 3.

[24] This is based on my professional experience as a corporate practitioner having reviewed many articles of association and shareholders' agreements concluded prior to the effective date of the Companies Act.

[25] Interestingly, the very first of the draft bills (B61-2008 Companies Bill), that ultimately lead to the Companies Act included the principle in this section.

[26] This is despite the transitional period afforded by the Companies Act in item 4 of Schedule 5.

[27] Michael M Katz 'Governance under the Companies Act 71 of 2008: Flexibility is the keyword' (2010) *Acta Juridica* 248.

Companies Act '*that does not expressly contemplate that its effect on any particular company may be negated, restricted, limited, qualified*'.[28] A MOI can still impose a '*higher standard, greater restriction, longer period of time, or any similarly more onerous requirement*' in respect of an unalterable provision.[29] An alterable provision is a provision of the Companies Act *'in which it is expressly contemplated that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company's Memorandum of Incorporation.'*[30] This allows a company to change the 'default' position in respect of certain matters where the Companies Act allows for such. Importantly, alterable provisions must be altered in the MOI.[31] The unalterable provisions and alterable provisions are akin to mandatory and default provisions in other corporate law jurisdictions.[32]

Thirdly, section 15(6) provides that the MOI is binding '*between the company and each shareholder; ... between or among the shareholders of the company'* and curiously, also between the company and the directors in respect of their function as such.[33] Turning to section 15(7), the Companies Act has now given shareholders' agreements explicit recognition. It is not clear what '*concerning any matter relating to the company*' means,[34] however, the section implies that the company does not need to be a party to the shareholders' agreement.[35] In a deliberate departure from the 1973 Companies Act, the MOI supersedes the shareholders' agreement and provisions that are inconsistent with the MOI are void to the extent of the inconsistency.[36] Compared with the position outlined above in section 2, it is a very different approach.

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[28] Section 1 of the Companies Act.
[29] Section 15(2)*(a)(iii)* of the Companies Act.
[30] Section 1 of the Companies Act.
[31] JL Yeats op cit note 16 at 2-53.
[32] Armour op cit note 3 at 19.
[33] Section 65(2) of the 1973 Companies Act did not include directors as being explicitly bound by the memorandum and articles of a company.
[34] Ibid.
[35] Henochsberg takes the view that section 15(7) requires that all shareholders must be a party to the agreement. He argues this on the basis that the section says '*The Shareholders*' and not just '*Shareholders*'. He says that if not all shareholders are party to the agreement, then section 15(7) would not apply. Piet Delport *Henochsberg on the Companies Act 71 of 2008* SI33 (2023) 78 (6). I respectfully do not agree that this is a purposive interpretation of the section. It forgoes the primary principles of the law of contract that parties are free to contract. This interpretation would also mean that smaller groups of shareholders could not conclude voting agreements. It also leaves open the question that if section 15(7) does not apply to these agreements, what is their status with respect to conflicts between them and the company's MOI?
[36] A shareholders' resolution is not an agreement for purposes of section 15(7). *Derby Downs Management Association v Assegaai River Properties (Pty) Ltd and Another* 2022 (2) SA 71 (KZP).

4. THE REASON FOR A SHAREHOLDERS' AGREEMENT

This research and section 15(7) would be unnecessary if shareholders chose to solely govern their relations in the constitutional documents of a company. It is thus necessary to briefly delve into the reason for, the prevalence and usefulness of shareholders' agreements in private companies.[37]

One of the primary reasons that a shareholders' agreement may be preferred is because it is not filed and open for public inspection.[38] The MOI is a public document that must be filed with the Companies and Intellectual Property Commission (CIPC).[39] There may be matters that shareholders wish to remain private.

Secondly, while a MOI is in many ways contractual in nature, it is a form of statutory contract.[40] It this thus subject to various statutory complexities, like the 'in capacity' principle,[41] which limits the subject matter of a MOI.[42] Whereas, contract law applies to shareholders' agreement.

A third reason is that a MOI binds all shareholders and can be amended by special resolution, which ordinarily requires 75 per cent approval.[43] The fact that it is common for constitutional documents, including the MOI, to be capable of amendment without unanimous consent is a product of the doctrine of the majority rules principle in corporate law.[44] This is an essential doctrine that facilitates the governing of a company with differing interest holders. It is subject to and counteracted with a myriad of statutory and common law minority protections. In contrast, a shareholders' agreement only binds those that are a party to it and will, in the ordinary course, only be capable of amendment by mutual consensus of all parties. This can be both an advantage and a disadvantage. It is an advantage to the minorities given all shareholders

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[37] FHI Cassim 'The Companies Act 2008: An overview of a few of its core provisions' (2010) *SA Merc LJ* 167.

[38] FHI Cassim, MF Cassim, R Cassim et al *Contemporary Company Law* 3 ed (2022) 180.

[39] Section 16(7) of the Companies Act.

[40] TCR Morajane 'The binding effect of the constitutive documents of the 1973 and 2008 Companies Acts of South Africa' (2010) 13 *Potchefstroom Electronic Law* 182. RH Christie & GB Bradfield *Christies Law of Contract in South Africa* 8 ed (2022) 106.

[41] In terms of this principle, a shareholder is only bound by the MOI in its capacity as a shareholder. MS Blackman 'What rights can a company's memorandum and articles of association confer on a member?' (1992) 4 *SA Merc LJ* 1. It is arguable that this principle still applies under the Companies Act. FHI Cassim et al op cit note 38 at 187.

[42] FHI Cassim et al op cit note 38 at 180.

[43] In terms of section 65(10) of the Companies Act, the special resolution percentage can be changed provided there is always at least 10 per cent between the threshold for ordinary resolutions and special resolutions.

[44] *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A); *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA); *Valencia Holdings 13 (Pty) Limited and Others v Armitage NO* 2022 JDR 0484 (GJ); Tshepo Mongalo & Tshepiso Scott *Corporate Law And Corporate Governance* 2 ed (2023) 312.

would need to agree to any changes.[45]A shareholders' agreement can thus better protect minorities. It is a disadvantage to majority shareholders as the making of certain decisions are subject to minority consent.

5. SECTION 15(7) AS INTERPRETED IN OUR COURTS

There are not many reported cases that deal specifically with an inconsistency between a shareholders' agreement and a MOI under the Companies Act. I believe that this is not only because of the embryonic stage of the Companies Act but also because the new approach of ordering the MOI above the shareholders' agreement is still relatively unfamiliar. Courts (and shareholders) do not seem to be in the required habit of referring to the MOI when it comes to determining the impact of alterable and unalterable provisions on a company.[46] I have chronologically addressed the relevant case law dealing with inconsistencies between shareholders' agreements and MOIs.[47]

(a) *De Bruyn v Conradie and others*[48]

The *De Bruyn* case is an important starting point for this discussion as the relevant events occurred shortly after the commencement of the Companies Act and the judgement demonstrates the courts disregard of the principles in section 15(7).

Flip de Bruyn ('de Bruyn') and Chris Conradie ('Conradie') were shareholders of Grandselect 101 Proprietary Limited ('Grandselect').[49] Conradie held his shares in Grandselect through a trust.[50] The relationship between Conradie and De Bruyn broke down.[51] In 2011, De Bruyn launched an application in terms of section 163(1) of the Companies Act claiming relief from oppressive or prejudicial conduct.[52] While the application was pending, in 2013 the directors

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[45] John Cadman *Shareholders' Agreements* 4 ed (2004) para 1.2.1.

[46] See for example: *Modisane v Prime Portfolio Investments A (Pty) Limited* 2015 JDR 2637 (GJ) para 28, 35 when the court considers a shareholder's rights to information without referring to the MOI of the company; *Babtista N.O and Others v Quickstep 684 (Pty) Ltd and Others* 2024 JDR 1971 (GP) para 12-15 when the court considers the validity of a notice of a shareholders meeting without referring to the MOI; and *CDH Invest NV v Petrotank South Africa (Pty) Ltd and another* [2018] 1 All SA 450 GJ para 71 where the court considers the requirements to send a notice of a board meeting without reference to the MOI.

[47] For the purposes of clarity, the focus of this report is on inconsistencies between shareholders' agreements and MOIs and not inconsistencies between MOIs and the Companies Act.

[48] *De Bruyn v Conradie and others* 2016 JDR 0387 (WCC). The matter was heard on 15 May 2014.

[49] Ibid para 2.

[50] *De Bruyn* supra note 48 para 4.

[51] *De Bruyn* supra note 48 para 8.

[52] *De Bruyn* supra note 48 para 9.

of Grand Select (De Bruyn was not a director at the time) passed a resolution commencing business rescue proceedings in terms of section 129(1).[53] De Bruyn commenced urgent proceedings to set aside the resolution to initiate business rescue proceedings.[54] In 2014, a winding up application was also launched. These two applications were consolidated into the same hearing.[55]

The shareholders had concluded a shareholders' agreement.[56] The shareholders' agreement provided that any decision by the directors or shareholders of the company relating to specific matters, require 100 per cent of the shareholders' approval.[57] These matters included winding up of the company and placing the company under judicial management.[58] De Bruyn relied on these provisions on the basis that the consent matters would also apply to business rescue proceedings.[59] De Bruyn submitted that judicial management should be read to include business rescue proceedings given the Companies Act abolished judicial management (which was applicable when the shareholders' agreement was concluded) and business rescue was the analogous remedy.[60] De Bruyn put forward that as there was no shareholder involvement in the adoption of the business rescue resolution, it should fail.[61] The judgment does not record if Conradie raised an argument that the MOI did not provide for such requirement, but it does not appear that Conradie did so.[62]

The court agreed with De Bruyn's submissions and found that unanimous consent of the shareholders would also be required for placing Grandselect in business rescue.[63]

Conradie argued that section 129 of the Companies Act explicitly vests the power to pass a resolution commencing business rescue in the board.[64] He argued that if the legislature intended that the rights under section 129 be subject to contrary provisions in the MOI, the legislature would have done so by inserting the phrase '*expected to the extent that the memorandum of*

53 *De Bruyn* supra note 48 para 10.
54 *De Bruyn* supra note 48 para 12.
55 *De Bruyn* supra note 48 para 13.
56 *De Bruyn* supra note 48 para 5.
57 *De Bruyn* supra note 48 para 17.
58 *De Bruyn* supra note 48 para 18.
59 *De Bruyn* supra note 48 para 19.
60 Ibid.
61 Ibid.
62 This is based on the fact that the judgement lists the counterarguments raised by Conradie. *De Bruyn* supra note 48 para 20.
63 *De Bruyn* supra note 48 paras 24 - 26.
64 *De Bruyn* supra note 48 para 32.

incorporation provides otherwise'.[65] It had not done so and the shareholders' agreement fell afoul of section 15(7).[66] The court disagreed with this and found that section 129 is not inconsistent with the relevant provision of the shareholders' agreement. Rather it added a layer of decision making that does not contradict section 129.[67] Judge Griesel states that '*This is in line with the provisions of s15(2)(a)(iii) of the Act, which empowers a company in its memorandum of incorporation (and, in my view, an agreement of its shareholders) to include any provision "imposing 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 Act*".'[68] The court found that the resolution to commence business rescue proceedings was invalid for failure to comply the provisions of the shareholders' agreement.[69]

With respect, the conclusion reached by the court that a shareholders' agreement can also alter alterable provisions in line with section 15(2)(a)(iii) is incorrect.[70] The definitions of alterable and unalterable provisions make it clear that these must be altered in the MOI.[71] Section 65(12) allows for the MOI to require a special resolution for any other matter not contemplated in section 65(11) of the Companies Act. Accordingly, inclusion of additional special resolution matters in a shareholders' agreement is not binding unless they are also included in the MOI. The MOI of Grandselect is not discussed in the judgment, but the court should have referred to it to assess not only if there was an inconsistency between the shareholders' agreement and with the Companies Act but also between the shareholders' agreement and the MOI. The court should have found that the business rescue resolution passed by the board was valid and not subject to the approval of the shareholders. The case illustrates that the courts' lack of familiarity with the new pecking order of the MOI and shareholders' agreement resulted in an incorrect decision.[72]

65 Ibid.
66 Ibid.
67 *De Bruyn* supra note 48 para 33.
68 Ibid.
69 *De Bruyn* supra note 48 para 37.
70 I agree with Stoop's position on this aspect as set out in Helena Stoop 'Alterable and unalterable provisions of the Companies Act 71 of 2008: recent cases expose inherent uncertainties' (2016) 2(1) *Journal of Corporate and Commercial Law and Practice* 40. It is not clear if section 129 is an alterable provision in the first place. If it is an unalterable provision, it is debatable if including shareholder approval is allowable under the guise of imposing a higher standard in this context given the duties of directors where they believe the company to be financially distressed.
71 Section 3 of this report.
72 The court did get the pecking order correct in an earlier case of *Verso Financial Services (Pty) Ltd v Burger* 2016 JDR 1340 (WCC) para 26. The judgement was handed down on 12 August 2013. This judgement is not

The relationship between De Bruyn and Conradie broke down in April 2011. This was just as the Companies Act came into effect on 1 May 2011. Even though there was a transitional period for parties to negotiate amendments to their articles of association to align them with the Companies Act and remove any inconsistencies with their shareholders' agreement,[73] this would be impossible when the shareholders' relationship had already broken down. The exclusion of De Bruyn from a decision that had such an impact on him and his future livelihood, bearing in mind he was also the manager of Grandselect's enterprise would lead to an egregious outcome. It is unsurprising that the court wanted to uphold the unanimous shareholders' agreement and De Bruyn's ability to have a role in important decisions in Grandselect. While from a technical perspective, De Bruyn should have found relief under section 163 of the Companies Act in this matter,[74] making a case out for unfair prejudice can be challenging.[75]

(b) *De Freitas v Chamdor Meat Packers (Pty) Ltd*[76]

In *De Freitas* the applicants and respondents were all shareholders of the first respondent, Chamdor Meat Packers Proprietary Limited ('Chamdor').[77] The applicants sought an order (i) declaring the shareholders' agreement to be of full force and (ii) that the new MOI adopted by the shareholders does not govern the relationship between the shareholders of Chamdor.[78]

The shareholders of Chamdor concluded a shareholders' agreement in 2002 which contained a non-variation clause in terms of which the shareholders' agreement could not be amended without the prior written consent and signature of all parties.[79] In 2012, a resolution was taken by the shareholders to adopt a new MOI and to 'cancel' the shareholders' agreement.[80] The adoption of the MOI was passed by a special resolution at a shareholders meeting and filed

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analysed in this report as the judgement mainly addresses inconsistencies between an articles of association and the Companies Act. The judge felt no need to address inconsistencies between the articles of association and the shareholders' agreement or the shareholders' agreement and the Companies Act, *Verso* para 29.

73 Item 4 of Schedule 5 of the Companies Act.

74 Stoop is of the view that section 163 was not relied on by De Bruyn, which is why the court could not grant relief under that section. This is an odd situation as it is clear from the judgment that De Bruyn had originally instituted proceedings under section 163. Why the relief he sought under those proceedings did not translate into this application as well is not clear. Helena Stoop op cit note 70 at 49.

75 See for example *Technology Corporate Management (Pty) Ltd and Others v De Sousa and Others* 2024 (5) SA 57 (SCA). Although this case does deal with section 252 of the 1973 Companies Act (the predecessor to section 163 of the Companies Act), the same principles apply.

76 *De Freitas v Chamdor Meat Packers (Pty) Ltd* 2015 JDR 1934 (GJ).

77 *De Freitas* supra note 76 para 1.

78 *De Freitas* supra note 76 para 2.

79 *De Freitas* supra note 76 para 4.

80 *De Freitas* supra note 76 para 5.

with the CIPC.[81] The resolution was not unanimously adopted but more than 75 per cent of the shareholders voted in favour of it.

It was intended that the special resolution would have the effect of cancelling the shareholders' agreement, in spite of the non-variation clause.[82] The applicants contended that the shareholders' agreement could not have been cancelled as the resolution was not signed by all parties. Further, where a shareholders' agreement contains a non-variation clause or sets out the arrangements to be complied with to vary an agreement, such provision is not inconsistent with the Companies Act. Their averment was that it is not possible for a new MOI to create an inconsistency owing to the non-variation clause in the shareholders' agreement. The shareholders' agreement cannot be cancelled contrary to the terms of the shareholders' agreement.[83] At the heart of the dispute was the effect of a MOI adopted after a shareholders' agreement and if such MOI can supersede such shareholders' agreement.[84]

The court said that it is clear that the unanimous agreement of all shareholders of a company is not required for the adoption of a new MOI.[85] Basson J stated

> '*Consequently, where a company adopts a new Memorandum of Incorporation by means of a special resolution (with at least a 75% majority vote) – which it is entitled to do in terms of the Companies Act, 2008 - it will have the effect of amending (to the extent that it is inconsistent with the new Memorandum of Incorporation) or even cancelling a pre-existing Shareholders Agreement where provision is made for such cancellation. In this regard the new Memorandum of Incorporation of the first respondent specifically provides for the cancellation of the pre-existing Shareholders Agreement (dated 13 June 2002).*'[86]

With respect to the effect of the non-variation clause, the court found that this does not prevent the adoption of a new MOI.[87] This adoption does not constitute a consensual cancellation of the shareholders' agreement in any event.[88] The court then goes on to state that '*the Shareholders Agreement (which requires unanimous consent for a cancellation) is in any event in conflict with the Companies Act, 2008 which allows for shareholders to adopt a new Memorandum of Association by means of a special resolution*.'[89]

[81] *De Freitas* supra note 76 para 7 & 10.
[82] *De Freitas* supra note 76 para 20.
[83] *De Freitas* supra note 76 para 21.
[84] *De Freitas* supra note 76 para 3.
[85] *De Freitas* supra note 76 para 26.
[86] *De Freitas* supra note 76 para 27.
[87] *De Freitas* supra note 76 para 28.
[88] Ibid.
[89] Ibid.

The court's conclusion that a non-variation clause in a shareholders' cannot prevent the adoption of a MOI, is correct and in line with section 15(7). I would even go so far as to say a shareholders' agreement that explicitly prevented the adoption of a MOI in accordance with the requirements of the Companies Act would fall within the anti-avoidance provisions of section 6(1) of the Companies Act.[90] Such limitation in an agreement would substantially defeat section 16(1)(c) of the Companies Act and the ability to amend or replace the MOI of a company by special resolution.[91] A shareholders' agreement, however, can still have a valid non-variation clause in respect of its provisions and I do not agree with the court's statement in paragraph 28 that a non-variation clause itself is in conflict with the Companies Act. The existence of a non-variation clause in a shareholders' agreement is not necessarily in conflict with section 15(7) of the Companies Act,[92] provided it does not purport to prevent the amendment of the MOI. It is the substantive provisions in the shareholders' agreement that conflict with provisions in the MOI that are relevant for purposes of section 15(7) of the Companies Act.

This case represents a good example of when section 15(7) enhances the efficient governance of a company. The mechanism that allows a company to amend its MOI by special resolution represents and gives effect to the accepted principle that shareholders are bound by the decisions of the majority.[93] All of the shareholders received notice of the proposed changes to the MOI and how this would impact on the existing shareholders' agreement.

I am of the view that the adoption of a new MOI should not be capable of being used to circumvent agreed shareholders' agreement terms which are not matters which the Companies Act addresses, for example, restraint of trade provisions. Section 15(2)(a)(i) of the Companies Act would potentially allow for this as a MOI can include matters not addressed in the Companies Act.[94] Allowing the special resolution mechanism in a MOI to circumvent matters

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[90] Section 6(1) provides '*A court, on application by the Commission, Panel or an exchange in respect of a company listed on that exchange, may declare any agreement, transaction, arrangement, resolution or provision of a company's Memorandum of Incorporation or rules-*
(a) to be primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act; and
(b) void to the extent that it defeats or reduces the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act.'

[91] I don't think this prevents a company from setting its special resolution percentage at 100 per cent which would mean that all shareholders need to consent to the adoption of a new MOI. This is allowable under section 65(10) of the Companies Act.

[92] Piet Delport op cit note 35 at 78(6A).

[93] *Sammel* supra note 44.

[94] Section 15(2)*(a)(i)* provides '*The Memorandum of Incorporation of any company may— (a) include any provision— (i) dealing with a matter that this Act does not address*'.

outside of the Companies Act may fall within the realm of section 163 of the Companies Act in that the actions of related person(s), that pass a special resolution to amend a MOI, is oppressive or unfairly prejudicial to a shareholder. However, the case demonstrates that there is a potential opening which can be used by majority shareholders to override unanimous shareholders' agreements by virtue of section 15(7). Section 15(7) is not comprehensive enough to address the realities of what is commonly agreed in a shareholders' agreement.

(c) *Gihwala and others v Grancy Property Ltd and others*[95]

Wallis' obiter in *Gihwala*, is often referred to in the context of section 15(7). Speaking to section 15(7), the court stated that the section '*deals with situations where there is a direct conflict between them, not with a qualification in the shareholders' agreement on the manner in which general powers are to be exercised, which may constrain the exercise of those powers*.'[96] I will return to examine this statement, but the context is important.

The case concerned Dinesh Gihwala ('Gihwala') and Lancelot Manala ('Manala'), who entered a business venture that turned ugly.

Spearhead Property Holdings Limited ('Spearhead') undertook a Black Economic Empowerment transaction in 2005, which entailed it making available linked units to Ngatana Property Investments Proprietary Limited ('Ngatana').[97] Ngatana was a special purpose vehicle incorporated to subscribe for shares in Spearhead at a discounted price.[98] Gihwala and Manala acquired 40 per cent of the shares in Ngatana through Seena Marena Investments Proprietary Limited ('SMI'). The Dines Gihwala Family Trust ('Trust'), which was controlled by Gihwala, and Manala held equal shares in SMI.[99]

A representative of Grancy Property Limited ('Grancy'), agreed orally in February 2005 to acquire a third of the shares in SMI and to loan part of the amount needed by Manala to participate in the investment in Spearhead.[100] A written agreement reflecting the oral agreement was not concluded, despite attempts to do so.[101] Grancy's claimed *inter alia* that Gihwala, the

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95 *Gihwala and others v Grancy Property Ltd and others* [2016] All SA 649 (SCA).
96 *Gihwala* supra note 95 para 54.
97 *Gihwala* supra note 95 para 6-7.
98 *Gihwala* supra note 95 para 7.
99 Ibid.
100 Manala did not have sufficient funds to capitalise his portion of the equity in SMI to allow SMI to subscribe for shares in Ngatana, *Gihwala* supra note 95 para 11-12.
101 *Gihwala* supra note 95 para 13.

Trust and SMI breached their February 2005 oral agreement, and Gihwala and Manala had acted fraudulently.

Part of the matter turned on Grancy proving the existence of an oral shareholders' agreement between the shareholders of SMI and the existence of tacit terms that granted Grancy rights over and above those afforded to a shareholder in the 1973 Companies Act.[102] There was an argument that the tacit terms contradicted and operated to limit the powers vested in SMI in term of its articles of association of SMI and .[103] The court thus had to consider the conflict between the articles and oral shareholders' agreement.

The court found that there was no '*conflict between the suggested tacit terms and memorandum of articles of association of SMI. They do not alter those provisions in any way*'.[104] The court goes on to state that '*A Shareholders' agreement of this type dealing with the right to be appointed as a director and operating to nullify a provision in the 1926 Companies Act that provided for the removal of directors, was enforced in Stewart v Schwab.*'[105] The type of shareholders' agreement asserted by Grancy and described below, '*does not alter or vary the company's founding documents*.' Rather the shareholders agree as to the manner in which the powers of the company will be exercised. The court found no reason why such an agreement should not be given effect.[106] In this context, the court makes the obiter in paragraph 54 quoted above.

The first issue, is that the court does not distinguish between the status of the shareholders' agreement under the Companies Act versus the 1973 Companies Act. The shareholders' agreement was concluded in 2005 and the relevant breaches occurred before the Companies Act came into effect.[107] Accordingly, regardless of the fact that the Companies Act was in effect when judgement was handed down, the position under the 1973 Companies Act was the relevant law applicable to the enforceability of the shareholders' agreement and any conflict with SMI's article of association.[108]

[102] *Gihwala* supra note 95 para 52.
[103] Ibid.
[104] *Gihwala* supra note 95 para 53.
[105] *Gihwala* supra note 95 para 54.
[106] Ibid.
[107] *Gihwala* supra note 95 para 9.
[108] See *Pasiya and others v Lithemba Mining (Pty) Ltd and others* 2024 JDR 0013 (SCA) for an example of when the court assesses which of the Companies Acts are applicable.

We nevertheless are left with the obiter concerning section 15(7)[109] that had no application to the facts of the case where the statement is made. The statement itself is not at face value problematic, but does beg the following questions: What is a direct conflict versus an indirect conflict? Does this mean that section 15(7) is only concerned with direct conflicts and not indirect conflicts? What is meant by a qualification in a shareholders' agreement that limits a director's power? Case law that has followed *Gihwala* has not really addressed these questions.[110]

It is plain that Gihwala and Manala acted fraudulently, without regard to their contractual undertakings, their fiduciary duties. The order declaring both delinquent evidences this.[111] It is my conjecture, but I suspect that the statement regarding section 15(7) comes from the inherent sense of injustice that arises when lawful and agreed terms that seek to protect a shareholder are held to be void or not enforced. This is exacerbated in a context where a co-shareholder and director of a company abuses his position to the detriment of the other shareholders. The very idea of a conflict between two documents resulting in rights being void can feel like an arbitrary deprivation of rights or an 'unbusinesslike result'.

(d) *CDH Invest NV v Petrotank South Africa (Pty) Ltd and another*[112]

In *CDH Invest*, the two shareholders of Petrotank South Africa Proprietary Limited ('Petrotank'), concluded a shareholders' agreement concerning Petrotank. The shareholders' agreement provided for 100 000 authorised shares, whereas the MOI provided for 1 000 authorised shares.[113] The parties agreed that the MOI had a typographical error and the number should have been 100 000 in the MOI.[114] Part of the dispute concerned the manner in which this would be corrected.

To amend the MOI, the shareholders' agreement required an affirmative vote of at least 75 per cent of the parties and not the votes of shareholders in a shareholders meeting.[115] The MOI did not have a provision that limited the board's power to amend the MOI under section 36(2)(b)

[109] The court stated that the section '*deals with situations where there is a direct conflict between them, not with a qualification in the shareholders' agreement on the manner in which general powers are to be exercised, which may constrain the exercise of those powers*.'

[110] For example, in *Blue Nightingale 709 (Pty) Ltd v Nkwe Platinum South Africa (Pty) Ltd* 2021 JDR 2747 (GJ) paras 27 – 39, the court finds a direct conflict, but fails to interrogate the difference between a direct and indirect conflict. This judgment is discussed further below.

[111] *Gihwala* supra note 95 para 151.

[112] *CDH Invest NV v Petrotank South Africa (Pty) Ltd and another* [2018] 1 All SA 450 GJ.

[113] *CDH Invest NV* supra note 112 para 9.

[114] Ibid.

[115] *CDH Invest NV* supra note 112 para 10.

of the Companies Act,[116] despite the provision in the shareholders' agreement requiring the affirmative vote of 75 per cent of the parties. The court identified this difference as an inconsistency for purposes of section 15(7) and found the relevant provision of the shareholders' agreement to be inconsistent with the MOI and the Companies Act. [117] The provision in the shareholders' agreement was invalid and the position in the MOI prevailed.[118] Accordingly, the board of directors was capable of amending the MOI without any approval being required of the shareholders in terms of the shareholders' agreement.

The court's finding that the provision is invalid is in line with section 15(7). The shareholders' agreement contained a provision that attempted to alter an alterable provision of the Companies Act. Section 36(2)(b) is clear that the board retains the power to make amendments contemplated in section 36(2), '*except to the extent that the Memorandum of Incorporation provides otherwise'*. The court does not reference the *Gihwala* case but it remains debatable if the inconsistency was direct or indirect.

Notwithstanding the interpretation being in line with section 15(7), it exposes again that section 15(7) does not give recognition to unanimous shareholders' agreements concluded after a MOI is effective. Petrotank only had two shareholders, both of whom were party to the shareholders' agreement and aware of this additional governance requirement. This is ignored as section 15(7) provides for the inconsistent provision to be void. In this context, where no shareholder can claim to be unaware of this additional layer of decision making, the application of section 15(7), results in a very formal application of the law and in my view gives rise to absurd or inequitable outcomes. The case exposes the potential for a majority shareholder to make commitments in a shareholders' agreement but be able to escape the commitment if a conflict arises with the MOI.

(e) *Blue Nightingale 709 (Pty) Ltd v Nkwe Platinum South Africa (Pty) Ltd*[119]

In *Blue Nightingale,* the applicant, Blue Nightingale 709 (Pty) Ltd ('Nightingale') was a minority shareholder in Nkwe Platinum South Africa (Pty) Ltd ('Nkwe SA'), the first respondent.[120] The second respondent, Nkwe Platinum Limited ('Nkwe Ltd') was the majority

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[116] Section 36(2) of the Companies Act provides *inter alia* that the number of authorised shares as set out in the MOI can only be changed by an amendment to the MOI by special resolution of the shareholders, or by the board of the company, except to the extent the MOI provides otherwise.
[117] *CDH Invest NV* supra note 112 para 12.
[118] Ibid.
[119] *Blue Nightingale* supra note 110.
[120] *Blue Nightingale* supra note 110 para 1.

shareholder.[121] Nightingale commenced urgent proceedings to have, *inter alia*, a resolution placing Nkwe SA into business rescue declared void.[122]

Nkwe SA was incorporated under the 1973 Companies Act and did not adopt a MOI under the Companies Act and its articles of association are thus considered its MOI.[123] When Nightingale acquired its shares in Nkwe SA, a shareholders' agreement was concluded.[124] Nkwe Ltd initially advanced various loans to Nkwe SA but resolved to withdraw all funding to Nkwe SA which ultimately led to Nkwe SA adopting business rescue resolutions.[125]

The shareholders' agreement of Nkwe SA provided for up to four directors nominated by Nkwe Ltd and up to two nominated by Nightingale.[126] At the time of the adoption of the business rescue resolution, there were only two directors.[127] Both were nominated by Nkwe Ltd.[128] The shareholders' agreement provided that the quorum for a meeting is one director nominated by each of the shareholders.[129] Nightingale claimed, among other things, that the meeting where the business rescue resolution was adopted was not quorate.[130] The MOI, on the other hand, provided that the quorum is two directors when there are three directors and when there are more than three directors, the quorum is three directors.[131]

Nightingale submitted that the difference in the quorum between the MOI and the shareholders' agreement was not what was contemplated in section 15(7). Rather its submission was that the provisions in the shareholders' agreement qualify the quorum of two in the MOI, such that the two should consist of one director nominated by each of the shareholders.[132] It relied on *Gihwala* in making this submission.[133]

The court found that there was an inconsistency on the basis that under the MOI, if there were more than three directors, the quorum was three. Whereas, under the shareholders' agreement, the quorum would remain a director nominated by each of the shareholders. The position in

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121 Ibid.
122 *Blue Nightingale* supra note 110 para 2.
123 *Blue Nightingale* supra note 110 para 4.
124 *Blue Nightingale* supra note 110 para 5.
125 *Blue Nightingale* supra note 110 para 7.
126 *Blue Nightingale* supra note 110 para 9.
127 Ibid.
128 Ibid.
129 *Blue Nightingale* supra note 110 para 21.
130 *Blue Nightingale* supra note 110 para 15.2.
131 *Blue Nightingale* supra note 110 para 22.
132 *Blue Nightingale* supra note 110 para 26.
133 *Blue Nightingale* supra note 110 para 27.

the MOI thus prevailed.[134] The court considered the purposes under the provision in the shareholders' agreement and the MOI when reaching its conclusion.[135]

The court correctly points out that section 73(5)(b) of the Act is an alterable provision and could only be amended in the MOI.[136] There was arguably a direct conflict between the MOI and shareholders' agreement and the court interpreted section 15(7) faithfully to its strict wording. However, if the same logic used by this court was used in *Gihwala*, I think the conclusion would be different.[137] In *Gihwala*, the articles of association would have had contradicting provisions to the oral shareholders' agreement. There appears to be an inconsistency in how courts view this provision. It is possible that the inconsistency in application arises because the court in *Gihwala* was not fully acclimatised to section 15(7). Whereas, five years later the court was more cognisant of section 15(7) in *Blue Nightingale.*

Even if one accepts that the interpretation is correct, the result appears to yield 'unbusinesslike results' and exposes section 15(7)'s simplistic regulation of the MOI and shareholders' agreement. Both shareholders were aware of the provisions of the shareholders' agreement. The quorum levels were deliberately chosen to ensure that both shareholders' nominated directors would be present at a board meeting. What third party is prejudiced by the fact that the quorum is in the private shareholders' agreement and not the MOI? The application of section 15(7) in this case highlights the potential of a majority shareholder abusing the ranking of a MOI. Despite the quorum levels agreed to in the shareholders' agreement, the majority shareholder could prevent the amendment of the MOI to ensure the agreed quorum levels are enforceable.[138]

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[134] *Blue Nightingale* supra note 110 para 33.

[135] *Blue Nightingale* supra note 110 para 43.

[136] *Blue Nightingale* supra note 110 para 41.

[137] To be clear, the position in the Companies Act was not applicable in *Gihwala* as the events concerned occurred before the effective date of the Companies Act. The obiter statements in *Gihwala* that there was no inconsistency serves as a useful reference point to how 'inconsistency' can be interpreted differently to the *Blue Nightingale* case.

[138] It is fairly standard for a well drafted shareholders' agreement to provide an obligation on the shareholders to vote in favour of amendments to the company's MOI to ensure alignment with the shareholders' agreement. I have yet to come across a case where this provision is pleaded or features in the judgment. At face value, a shareholder should have a claim for breach of contract against another shareholder should a shareholder fail to vote in favour of a resolution to amend a MOI to remove inconsistencies.

(f) *Howell v Freese*[139]

In *Howell*, the applicant, Sean Howell ('Howell') was the majority shareholder in Redshift Cyber Security Proprietary Limited ('Redshift'). The respondent, Kelvin Freese ('Freese') was a minority shareholder in Redshift. Following Freese's resignation, Howell exercised a call option to acquire Freese's shares in Redshift, in terms of a shareholders' agreement concluded between the parties.[140] The dispute concerned the valuation of Freese's shares subject to the call option.[141]

Freese argued that there was an inconsistency between the MOI and the shareholders' agreement of Redshift and the manner in which the valuation should be determined.[142] The MOI provides that in the absence of agreement of the fair valuation of the shares, fair value will be determined by an independent auditor nominated by the company's auditors.[143] The shareholders' agreement, stated that the fair value of the shares will be determined by the auditors of the company.[144]

The court determined that the valuation provisions in the MOI, had to be read within the context of the preceding clause in the MOI which dealt with involuntary sale of shares.[145] The MOI's system of valuation thus did not deal with the current circumstances when a call option was triggered. The court found there was '*no reason why the shareholders would not be permitted to regulate their affairs in a scenario not covered by clause 16 of the MOI*'.[146] There was thus no conflict.[147]

The conclusion reached by the court in *Howell* accurately corresponds with the meaning of 'inconsistent' in section 15(7). It is also valuable that the court recognises that the MOI and shareholders' agreement can deal with two different aspects of share sales. The finding also

139 *Howell v Freese* 2023 JDR 1408 (GJ).
140 *Howell* supra note 139 para 2.
141 *Howell* supra note 139 para 9.
142 Ibid.
143 *Howell* supra note 139 para 23.
144 *Howell* supra note 139 para 9.
145 This is where a shareholder is placed under curatorship or sequestrated, commits an act of insolvency, or is sequestrated, takes any steps to be deregistered or wound up, liquidated or sequestrated, enters any compromise with his creditors generally, dies, or becomes permanently incapacitated. *Howell* supra note 139 para 24.
146 *Howell* supra note 139 para 25.
147 Ibid.

highlights the importance of the context of a provision in either document in determining a consistency.

The facts demonstrate that shareholders can use section 15(7) and the two different documents to try to obtain a particular outcome.[148] Freese may have been relying on the use of section 15(7) so that he could invoke a valuation clause that would have been favourable, but that may have not been the agreed methodology agreed by the parties for the call option.

6. RECOMMENDATIONS

There are two arms to my recommendations following the above. The first are legislative reform recommendations and the second are practical suggestions to address the current issues with section 15(7).

My suggestion for future reform is that unanimous shareholders' agreements in private companies should be allowed to override a MOI adopted before the shareholders' agreement in respect of matters not dealt with in the Companies Act and in respect of specific alterable provisions in the Companies Act. There are jurisdictions that allow unanimous shareholders' agreements to alter provisions of statutory codes or constitutional documents,[149] or allow shareholders' agreement and constitutional documents to be read together in specific contexts.[150]

This should only apply to private companies. The lack of restriction on the transfer of public companies' shares requires additional publicity and the potential for harm to a third party is

[148] This use of potential conflicts to obtain a particular outcome is not unique to South Africa. In the English case of *Richard Lord v Maven Wealth Group Ltd* [2021] EWHC 2544 (Comm) shareholders disputed whether the valuation clauses in the articles of association or the shareholders' agreement applied. The court ultimately found there was no conflict between the provisions in the different documents and determined which valuation provisions were relevant to the transaction at hand.

[149] Under the Canada Business Corporations Act, 1985, a unanimous shareholders' agreement may in certain instances override various sections and amend the company's constitutional documents. See for example section 146 of the Canada Business Corporations Act, 1985 and Richard James Hay & Lucinda Ann Smith, 'The unanimous shareholders agreement: a new device for shareholders control,' (1985) *Canadian Business Law Journal* 10,4 440. In terms of section 7.32 of the Model Business Corporation Act, 1984 and §350, §351 and §354 of the Delaware General Corporation Law in the context of a 'close corporation', unanimous shareholders' agreements are given explicit recognition and can amend corporate control in a corporation. Ricardo Molano Leon *Shareholders' Agreements in Close Corporations and Their Enforcement* (unpublished LLM thesis, University of Georgia School of Law, 2006).

[150] England and Wales is an example of a jurisdiction where the shareholders' agreement exists alongside the articles of association and the shareholders' agreement is permitted to override the articles of association within limits (the shareholders' agreement cannot fetter the powers of the company to exercise its statutory powers, for example). Hollington op cit note 8 para 3-57.

exacerbated with private arrangements in this context. Moreover, it is unusual for shareholders of public companies to conclude shareholders' agreements.

An example of alterable provisions of the Companies Act that would be appropriate are those under Chapter 2 of Part F, namely the sections dealing with internal governance matters. Internal governance matters, like quorum for directors and shareholder meetings and additional reserved matters under section 65(11) of the Companies Act, are the provisions where the most customisation is typically needed based on shareholder dynamics. At the same time, a third party would not be prejudiced by not being able to access this kind of information in respect of a private company which would otherwise be in a publicly available MOI.

In maintaining the importance of majority rule for the efficient management of a company, a subsequent MOI should still be capable of prevailing over an older shareholders' agreement in respect of alterable provisions in the Companies Act. Importantly, matters not dealt with in the Companies Act, like a restraint of trade, arbitration referrals and deemed offer provisions, which are commonplace in a shareholders' agreement[151] should not be capable of being overridden in a subsequent MOI. This would allow a majority group of shareholders to vary a matter that was previously unanimously agreed upon outside of the ambit of the governance of the Companies Act. The case law demonstrates the potential for this.

I concede that this suggestion creates additional complexity in the interpretation of the shareholders' agreement and MOI that is currently not present in the Companies Act. The suggestion would result in not every inconsistency between a shareholders' agreement and a MOI being invalid. Rather, one would have to consider the type of provision which may be inconsistent and the date on which the shareholders' agreement was concluded compared to when the MOI was filed.[152] Despite the additional complexity, I think the case law evidences that this additional nuance is needed and creates greater protection for shareholders that do not have access to legal advice. The Companies Act, after all, cannot only serve the interests of institutional or sophisticated investors or those that have greater access to legal advice.

As reform is probably not realistic, to address the current issues with section 15(7), practitioners should be very circumspect in what they include in shareholders' agreements that they draft. Ideally a MOI and shareholders' agreement should be updated at the same time to

[151] John Cadman *Shareholders' Agreements* 4 ed (2004) para 1.4.7, 1.4.8 & 3.7.2

[152] Section 16(7) of the Companies Act provides for amendments to the MOI to be filed with CIPC to be effective. This timing will change when the Companies Amendment Act 16 of 2024 comes into effect as section 16 has been amended.

ensure there are no inconsistencies. Where the shareholding dynamics allow for it and there are no confidentiality concerns, practitioners should consider including all governing terms in the MOI and doing away with the shareholders' agreement. This comes with its own issues for a minority shareholder. However, in instances where there are two shareholders with equal shareholding, this may be appropriate and expedient. This suggestion does not solve for the limitations of the 'in capacity' principle.

Another protection mechanism to consider is to raise the special resolution percentage in MOIs to 100 per cent for specific matters where minority shareholders need protection. This would to an extent mimic the advantage of a shareholders' agreement insofar as it requires unanimous consent. This is not an ideal suggestion as it can afford too much power to the minority shareholders and constrain the effective democratic governance of a company.

7. CONCLUSION

The simplicity[153] and the conciseness[154] that the Companies Act affords is a welcomed change to its predecessor. Simplicity, however, should not constrain the ultimate purpose of the Companies Act which includes '*encouraging entrepreneurship and enterprise efficiency*',[155] providing '*a predictable and effective environment for the efficient regulation of companies*'.[156]

I think it is apparent that ironically the application of section 15(7) is not always consistent. The *De Bruyn* case is an example of where the court disregarded the higher ranking of the MOI and incorrectly applied section 15(7), in contrast to *Blue Nightingale* and *CDH Invest,* where inconsistency and ranking between the documents was determined differently. The inconsistent manner in which our courts have dealt with section 15(7), or failed to consider section 15(7) when relevant, creates unpredictability.

A case like the *De Freitas* highlights that section 15(7) can aid efficient governance of a company by making it easier to regulate shareholder matters where there are multiple shareholders and unanimous consent is impossible. At the same time though, section 15(7) and its application can, also defeat the purpose of the Companies Act in some ways. The judgement exposes the potential for majority shareholders to take advantage of section 15(7) to potentially

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[153] Philip Knight 'Keep it simple and set it free: The new ethos of corporate formation' (2010) *Acta Juridica* 3.
[154] FHI Cassim et al op cit note 38 at 2.
[155] Section 7*(b)(i)* of the Companies Act.
[156] Section 7*(l)* of the Companies Act.

override provisions in shareholders' agreement that do not relate to unalterable or alterable provisions.

The application of section 15(7) can also lead to absurd or unfair outcomes and even 'insensible' or 'unbusinesslike results'.[157] The prime example being the cases of *Blue Nightingale* and *CDH Invest*. In both of these instances, in spite of all shareholders consenting to and being aware of the provisions of their shareholders' agreements, they were not bound by their shareholders' agreement because of inconsistencies with the related MOIs. I think that the potential absurdities arise from a lack of nuance or over simplification of the two documents brought about by section 15(7).

In the *Howell* matter, we see that the consequences of inconsistencies between the documents can be used by a shareholder to obtain a particular outcome. A shareholder used the potential voidness to argue that a particular valuation methodology applied to a call option. The court reached a sensible conclusion and was able to read the two documents together placating any conflict between them.

Finally, I think that obiter statement regarding section 15(7) in *Gihwala* creates potential to view inconsistencies between the MOI and shareholders' agreement more narrowly. We are yet to see the courts use this as authority to only find indirect inconsistencies, so its practical effect on how the two documents are viewed together, is yet to be seen.

Ideally, there should be no battle or competition between the MOI and the shareholders' agreement and the two should be able to co-exist with minimal conflict. The contractarian roots of corporate law should still ensure that shareholders are bound by their contractual commitments, irrespective of the document in which they are found. Ultimately the governance systems that apply to companies should balance flexibility and certainty which section 15(7) does not currently achieve. While we wait for reform from the legislature or new interpretation from our courts, we will have to do our best to resolve the battle between the shareholders' agreement and MOI through practical measures.

[157] The interpretive process of legislation requires one to prefer a 'sensible meaning' as opposed to one that leads to an 'insensible' or 'unbusinesslike results'. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) 604.

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