PROTECTION OF THE INTERESTS OF A COMPANY THROUGH DERIVATIVE ACTION UNDER THE LESOTHO COMPANIES ACT 18 OF 2011

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Submitted in partial fulfilment of the requirments for Master of laws (LLM): Corporate Law(Coursework and Research Report)

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I, Khobotle Vincent Khoabane, 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 Witwatersrand, Johannesburg. And I further declare that the report has not been submitted before for any degree or examination in this or any other University.

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ABSTRACT

Contemporary corporate governance advocates for enhanced protection of the interests of a company against the wrongs perpetrated by both the outsiders and by those who control or manage a company. This is pivotal as it encourages investment and facilitates economic growth. Board of directors are, amongst other duties, entrusted with a duty to litigate against the wrongs committed against the company. The common law allows minority shareholders to bring derivative action on behalf of and to recover remedies for a company where wrongs are committed by the those who manage its business affairs. Lesotho, like other jurisdictions, has recently adopted a statutory derivative action. This research report identifies a number of flaws in the Lesotho statutory derivative action and draws significant lessons from similar action in South African and Australian legislation. The report makes recommendations on how the Lesotho statutory derivative action could be improved to enhance the protection of the interests of the company in the contemporary corporate setup.

ACKNOWLEDGEMENT

This research report is dedicated to my late mother, Malibeela Dinah Khoabane, who passed away on 17 July 2018. I wish that she would be around to see this final product and celebrate my graduation. I would say she should return if possible (RIP) but I know she is in a better place. *Please greet my father, Tšimoloho Egbert Khoabane, for me.*

Glory be to God the Almighty, the Provider, who was always with me through this difficult journey. Gratitude also be to Nolu Ndleleni who introduced me to Let's go To Glory (LGTG) mass. Pastor Manana taught me that I am always working from the finished work of God and that God have led me this far not to forsake me. May the Lord help me to remain forever humbled and grateful.

To my lovely wife, Maseele Florence Khoabane, thanks for letting me enrol for this highly demanding degree while I left you to look after our son, Seele and his sister Tlhonolofatso Khoabane on your own. I am humbled by the support you gave me during this difficult journey and being there to see my mother's last moments. I will forever remain indebted to you. This project is a manifestation of my commitment and dedication to my wife and children, whom I love very much. I also wish to thank my siblings for their well wishes and support.

I wish to also thank my friend, Sikeme Rabaki Raphoka, for being there for me since we were young. I am also grateful to Ntaote Lehana, Khechane Ekholo Mohlomi, Poloko Mohale, Tšepo Tumeli, Nicho Mabilane and the entire Tse Kholo FC for pushing me academically.

To my supervisor Mr Motseotsile Clement Marumoagae, I am very thankful for his guidance, patience, insight and dedications. At some point, he made me believe in my abilities when I was beginning to underestimate my own my own capabilities. *Motswana o rile, 'montsamaisa bosigo ke mo leboga bosele*.'

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I INTRODUCTION

A company is a juristic person with rights and obligations, distinct and independent from those who constituted it, thus, it can sue or be sued on its own name.[1] However, as a juristic person it is incapable of executing its functions by itself but relies on its board of directors. The board of directors is entrusted with the overall management of the company.[2] It is also the duty of the board of directors to sue or defend legal action on behalf of the company and in the name of the company.[3] However, there are times when a company is harmed by those who are controlling and managing it and they also use their power and influence to prevent the company from acting against them.

This research report discusses recourse (if any) available in the Kingdom of Lesotho (hereinafter referred to as Lesotho) to minority shareholders and/or other stakeholders where majority shareholders and/or directors of the company have wronged the company and used their influence to prevent the company from acting against them. In particular, this report evaluates the circumstances under which minority shareholders or other interested stakeholders can act in the interest of the company for the wrongs perpetuated against the company by majority shareholders or directors of the company. This will be done by evaluating the development of the derivative action in Lesotho with a view of assessing whether this remedy is capable of assisting minority shareholders and/or other relevant stakeholders to protect the interests of their company when wrongs have been committed against it.

Lesotho has introduced statutory derivative action in its current Companies Act.[4] While this Act makes the derivative action available to shareholders and directors, however, it does not set the parameters upon which derivative action can be instituted. It will be shown in this report that the procedure for launching derivative action in Lesotho is not clear and it fails to live up to the standards of the modern corporate governance. For instance, it does not provide for the pre-action demand by the minority shareholder or any stakeholder of the company which would ensure that a shareholder or stakeholder would be granted leave to

[1] *Salomon v Salomon* [1897] AC 22, *Trustees of Dartmouth v Woodward*, 17 US (4 Wheat.) 518, 639-37 (1819). See also David Million 'Theories of the corporation' (1990) *Duke Law Journal* 201-261 at 206.

[2] Maleka Femida Cassim 'When the Companies are harmed by their own directors: Defects in the statutory derivative action and the cure (Part 1)' (2013) 25 *SA Merc LJ* 168-183 at 168.

[3] Matthew Berkahm 'Derivative Action in Australia and New Zealand; Will the Statutory Provision Improve Shareholders' Enforcement Rights' (1998) 10 *Bond Law Review* 74-100 at 74.

[4] Sections 77 and 78 of the Companies Act 18 of 2011.

litigate derivatively only when the action could be shown to be justifiable in the interest of the company.[5] This research report further discusses the manner in which South Africa[6] and Australia[7] have developed the derivative action remedy in their jurisdictions with a view of drawing lessons which may assist Lesotho to improve the manner in which this remedy is applied within its jurisdiction.

The research conducted herein is desktop based. The main anticipated limitation to this research is the shortage of relevant academic and judicial literature on derivative action in Lesotho. However, this drawback would be countered by using literature from relevant foreign countries which are persuasive and can provide guidance when company law related disputes are adjudicated in Lesotho.

Part II of this research report provides the historical development of corporate actions in Lesotho. Part III, constitutes a contextual discussion of the relevant provisions that provides for derivative action as a remedy that could be used to protect the interests of companies in Lesotho. It would also identify the strengths and weaknesses of the current statutory provisions. Part IV of this report will undertake a comparative analysis of the derivative action between Lesotho, South Africa and Australia. Finally, recommendations will be made which hopefully, if implemented, will lead to the improvement in the manner in which minority shareholders and other stakeholders can effectively act to protect the interests of their companies when majority shareholders or directors are acting in a manner that is detrimental to such companies.

II. HISTORICAL DEVELOPMENT

(a) Companies Act 25 of 1967

The legal framework relating to company law in Lesotho post-independence can be traced back to the enactment of the Companies Act 25 of 1967 (the 1967 Act) which came into force on 03 July 1967. The object of the 1967 Act was 'to provide for the constitution, incorporation, registration, management, administration and winding up of companies and

[5] *Lewis Group Limited v David Farring Woollam and others* 2017 (2) SA 547 (WCC) para 8.
[6] Section 165 of the Companies Act 71 of 2008.
[7] Australia Corporations Act 50 of 2001.

other associations, and for other purposes incidental thereto.'[8] This Act ushered in the new and domesticated company law regime in Lesotho.

This Act was administered by the cabinet Minister responsible for trade and commerce.[9] It divided companies into companies limited by shares or guarantee and unlimited companies[10] and it was not applicable to other business entities such as cooperate societies,[11] building societies, trade unions or friendly societies established under Friendly Societies Act of 1882, which was promulgated by the Cape of Good Hope, which was in force in Lesotho at the time.[12] This however, led to the fragmented regulation of various entities which could easily be administered by a single legislation in Lesotho.

In relation to corporate governance, the 1967 Act placed the management of companies on directors and recognised protection of minority shareholders as being of paramount importance.[13] Section 165 of the 1967 Act was specifically dedicated to the protection of the 'minorities'. The 1967 Act did not define the word 'minorities'. However, it can be argued from the reading of the entire section that this term referred to minority members. The term 'member' had been defined as any person who subscribed to the memorandum of the company and who is, upon the registration of the company, entered into its register of members[14] and or any person who agreed to become a member and whose name is entered into the register of members.[15] It follows therefore that the Legislature was referring to minority shareholders. Section 165 of the 1967 Act stated that:

> 'any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of members (including himself), may make an application to the court for an order under this section … . If the court is of opinion that (a) the affairs of the company are being conducted as aforesaid and (b) that to wind up the company or to make an order for judicial management would unfairly prejudice that part of members, but otherwise the fact would justify the making of a winding-up order on

[8] The object to the 1967 Act.
[9] Section 3 of the 1967 Act.
[10] Section 2 read together with Section 168 of the 1967 Companies Act, which specifically deals with the contributions of both past and present shareholders on winding up of companies.
[11] Section 4 (1) of the1967 Act.
[12] Section 4 (2) of the 1967 Act.
[13] Part V of the 1967 Act.
[14] Section 27 (a) of the 1967 Act
[15] Section 27 (b) of the 1967 Act.

> the ground that it is just and equitable that the company should be wound up, or an order for judicial management on the ground that such order was desirable the court may, with the view to bring to an end the matter complained of, make such order as it thinks fit, whether for regulating the company's affairs in future, or for the purchase of the shares of any member of the company by other members of the company or by the company, and in case of a purchase by the company, for reduction accordingly of the company's capital, or otherwise'.[16]

It is submitted that this section gave minority shareholders a right to a personal action, as opposed to a derivative action, to litigate and protect a personal right or interest and not the interests of a company. The question of whether the order to be granted was to the prejudice of the minority shareholder, as opposed to the interest of the company, was also of paramount importance.

The relief sought under section 165 of the of 1967 Act at times, had the effect of altering the memorandum of the company or its articles especially where the order was made regarding the future conduct of the affairs of the company,[17] or the reduction of its capital, where the company was ordered to buy the shares of the applicant.[18] This clearly would not be in the interest of the company as a juristic person and it would be effected solely to protect the interests of the minority shareholders against the will of the majority.

Unfortunately, this was the only action dedicated for the protection of the minority shareholders. There was also no specific section in the 1967 Act that was intended for the protection of the interests of the company as a whole, such as a derivative action. It would be erroneous to assume that once the interests of the minority shareholders were protected, the entire interests of the company would themselves be protected. The derivative action was still needed to protect the interests of the company where the wrong was committed by those who control it when using their control to deprive the company of its right to redress. An example would be where a director has failed to disclose his or her interest in a contract in contravention of section 157 of the 1967 Act[19] and was using his control to deny the company

[16] Section 165 (1) and (2) the 1967 Act.
[17] Section 165 (3) of the 1967 Act.
[18] Section 165 (2) of the 1967 Act
[19] The section mandated a director who had a direct or indirect interest in the contract or proposed contract with the company to make a full disclosure of such interest in the meeting of directors of the company.

redress. The minority shareholders or directors had to resort to the common law derivative action as it was the case in *Concrete Roots (Pty) Ltd v Lebakeng Tigali,*[20] which was decided before the enactment of the Companies Act 18 of 2011 (2011 Act).

(b) Companies Act 18 of 2011

It took Lesotho almost 40 years to revisit the 1967 Act. The reforms of Lesotho's company law commenced in 2006 with the drafting of the Companies Bill,[21] which was ultimately tabled and passed in 2011[22] as the Companies Act 18 of 2011.[23] The 2011 Act has since been supplemented with the Companies Regulations of 2012.[24]

The 1967 Act was repealed because it was deemed to 'have lost touch with current developments in company law and practices' and the ever evolving social and economic demands of the society'.[25] The then minister of Trade and Industry, Cooperates and Marketing, Dr Leketekete Victor Ketso,[26] in presenting the Bill indicated that:

> 'the purpose of the Companies Bill 2011 is to make registration of company shorter and responsive to the needs of the business community. The bill has been modernised to take into account several business forms. … The bill provides for organisation of companies and impose minimum formalities yet capable of meeting diverse needs and circumstances of the business … it further clarifies relationship between companies, their management organs and shareholders as well as the rights and obligations of shareholders … *Further, the bill gives directors wide management powers without prejudicing the shareholders and creditors. Shareholders are empowered to question the directors' decision*.'[27]

It is worth noting that the 1967 Act did not have any part or provision on derivative action[28] or other corporate actions except for the remedy that protected minority shareholders against

[20] *Concert Roots v Tigali Lebakeng* [2010] LSCA 25.
[21] Companies Bill 2006.
[22] Companies Bill 2011.
[23] Companies Act 18 of 2011.
[24] Legal Notice 57 of 2012.
[25] Thamae Kuenaesele 'Changes Brought by the Companies Act 2011 to Liquidation of Companies in Lesotho' (2016) 24 *Lesotho Law Journal* 46-97 at 47.
[26] Statement of object and reasons of the Companies Act 2011.
[27] Ibid.
[28] A.O Nwafor 'A commentary on the derivative action under the Lesotho Companies Bill of 2006' (2007) 6 *Botswana Law Journal* 81-94 at 88.

the oppressive conduct that affected their interest in the company.[29] This was surprising because there are a number of corporate actions available at common law which should have been made part of Lesotho company law regime such as appraisal remedies for dissenting minorities and remedy against oppressive or unfair prejudicial conduct. However, an in-depth discussion of these other remedies falls outside the scope of this research report.

This research report is only concerned with a derivative action remedy. It is vital that derivative action is not confused with personal actions. According to Nwafor, a personal action is an assertion by a shareholder to protect his or her individual right that emanates either from the articles of incorporation or results from a breach of duty owed to that shareholder by the directors.[30] In *Lewis Group Limited v Woollam and others*[31] personal action was described as an action instituted directly by a shareholder in the advancement or defence of his or her personal right, as opposed to the rights or interest of the company.[32] In Lesotho, a personal action against directors under the 2011 Act is available to both the past and present shareholders.[33] But it is not expressly stated whether the action can be brought against a former director. The 2011 Act divides a personal action into two independent actions namely, personal action by shareholder against directors[34] and personal action by shareholders against the company.[35] A director is defined under the 2011 Act as 'a person occupying the position of a director of a company by whatever name called.'[36] This action is available where a shareholder has suffered loss due to a breach of duty owed to him in his capacity as a shareholder.[37] It is submitted that in order to succeed with this action, the applicant will need to comply with all the delictual requirements.

The 2011 Act also makes provision for a representative action where the complaining shareholders have substantially the same interests in relation to the subject matter of litigation brought against a company and or directors or other shareholders.[38] The interests protected,

[29] Section 165 of the 1967 Act.
[30] Nwafor, A.O 'Clearing the doubts on the concept of derivative action- Lesotho Court of Appeal decision in Concrete Roots (Pty) Ltd v. Lebakeng Tigali- An Opportunity Lost' (2011/12) 19 *Lesotho Law Journal* 117-146 at 124. In South Africa, a phrase 'memorandum of incorporation' is used.
[31] Supra note 5.
[32] Ibid at para 25.
[33] Section 79 (1) of the 2011Act.
[34] Section 79 of the 2011 Act
[35] Section 80 of the 2011 Act
[36] Section 2 of the 2011 Act
[37] Section 79 (1) of the 2011 Act.
[38] Section 81 of the 2011 Act.

or rights advanced by this action are personal in nature and the action is not maintained for the protection of the interests of the company.

III UNDERSTANDING THE CONCEPT OF DERIVATIVE ACTION

(a) *General overview*

The concept of derivative action should be understood in line with the fundamental principle of company law that was expressed in *Salomon v Salomon & Co,*[39] that the company should be treated as an independent juristic person with rights and obligations, distinct from those who incorporated it, and as such, can sue or be sued.[40] The ability of the company to sue or be sued on its own name is fundamental in that it limits personal liability of the shareholders and encourages the spirit of entrepreneurship.

Equally important is the proper plaintiff rule or the rule in *Foss v Harbottle*[41] which recognises the company as the only competent person to bring legal action where a wrong is perpetrated against it. Jafta JA (as he then was), in his dissenting judgement in *Letseng Diamonds v JCI Limited* [42], correctly quoted the court *a quo* and stated that,

> 'a third party cannot interfere in the terms and conditions contained in an agreement between two parties. It is between them alone and the terms of the agreement only operate between them and them alone and the terms of the agreement operate between them and no one else… in the world of company law the above principle is sometimes described as the rule in *Foss v Harbottle (1843) 2 Hare 469 (67 ER 189)* when referring to the relationship between the shareholders and a company…'.[43]

The other important leg to the rule in *Foss v Harbottle* is the majority rule. This rule entails that by becoming a shareholder a person is by necessary implication consenting to be bound by the decisions of the prescribed majority. Delport correctly argues that '… if the majority of the members by ordinary resolution can competently … wave or condone the wrong for,

[39] Supra note 1
[40] Lindi Coetzee 'A comparative analysis of the derivative litigation proceedings under Companies Act 61 of 1973 and the Companies Act 71 of 2008' (2010)) *Acta Juridica* 209-305 at 290.
[41] *Foss v Harbottle* [1843] 2 Hare 469 (67 ER 189).
[42] *Letseng Diamond v JCI Limited* 2009 (4) SA 564 (SCA) para 18.
[43] Ibid para 18.

the court to intervene at the instance of the minority would be an essay in futility.'[44] This rule recognises that it would hardly ever be possible for all the shareholders to agree or have similar views, especially in large corporations but the decisions would still need to be made on behalf of and in the interest of the company. It would rarely happen that the majority of the shareholders would come up with a wrong decision, but where this occurred, common law would provide the minority shareholders with appraisal rights or action against oppressive or unfair prejudicial conduct. If such decisions cause harm to the company and the company has been deliberately prevented from acting in order to protect its rights, the minority shareholders would be entitled to bring a derivative action.

(b) Derivative Action

The law recognises that it may happen that those who control the company, either in the meetings of the board of directors or in the general meeting of the shareholders, are the ones who may perpetrate the wrongs against the very same company they are supposed to protect.[45] In order to protect the company against the wrongs perpetrated against it by those who manage it, derivative action was developed as a remedy that can be used against such people in the interest of the company. This remedy is an exception to the proper plaintiff rule, which at common law is available to minority shareholders.[46] Derivative action has been described as:

> '… an action brought by a shareholder or director of a company in the name and on behalf of that company. Such an action is 'derivative' in the sense that the right to sue belongs not to the party actually bringing the action but is 'derived' from that of the company. Its purpose is to achieve relief in situations where a wrong has been done to the company, rather than to its shareholders personally. Normally, the decision to take action on the company's behalf lies with the directors, as they generally have the responsibility of managing the company. However, in some cases it is necessary that the shareholders be given the right to commence action on the company's behalf, usually because some or all of the

[44] Peit Delport 'Henochsberg on the Companies Act 17 of 2008' (2016) *Lexus Nexus* at 588.
[45] Cassim op cit note 2 at 170.
[46] Arad Reiberg 'Access to justice or justice not accessed: Is there a case for public funding of derivative claims?' (2012) 37 *Brooklyn Journal of Law*1021-1039 at 1025.

> board are themselves responsible for the wrong that has been committed.'[47]

The rationale behind derivative action is to enable shareholders and other stakeholders to 'enforce rights or recover compensation for the company when the board of directors refuses to do so'.[48] This remedy is derivative because the right to institute the action actually belongs to the company and not the person who is bringing the law suit. In other words, the right to sue is derived from the company.[49] This remedy also acts as 'a deterrent device to prevent management abuse and to ensure control over the board by allowing shareholders and others to litigate against directors who have breached their fiduciary duties to the company.'[50]

The common law derivative action was introduced as an exception to the proper plaintiff principle that was established in *Foss v Harbottle*.[51] The court would allow a minority shareholder to bring an action which would otherwise be competently brought by the company, where the conduct complained of was fraud committed by those who are controlling the company and they would, therefore, not allow an action to be brought against themselves.[52] Fraud in this context merely requires proof that those who control the company used their control or power intentionally or unintentionally, fraudulently or negligently, in a manner which benefits themselves at the expense of the company.[53] Theron J (as she then was) commendably asserted that the control of the company should be interpreted as 'any form of manipulation of the vote which may block an action against the wrongdoers.'[54]

The action was basically a minority shareholders' action against the majority or those who control the company. However, the court in *TWK Agriculture Ltd v NCT Forestry Corporation Ltd and others*, demonstrated that one need not necessarily be a minority shareholder to bring the derivative action.[55] In this case, the court granted leave to bring a derivative action even though the shareholders had parity of voting power as it was clear that it would not be possible for the shareholder to secure majority vote to authorize the company

[47] Berkahm op cit note 3 at 74.
[48] Cassim 'Costs orders, obstacles and barriers to the derivative action under the Companies Act 71 of 2008 (Part 1)' (2014) 26 *SA Merc LJ* 1-23 at 2.
[49] Berkahm op cite note 3 at 74.
[50] Cassim op cit note 48 at 2.
[51] *TWK Agriculture Ltd v NCT Forestry Corporation Ltd and others* 2006 (6) SA 20 (KAZHC) paras 9 and 10.
[52] *Burland v Earle 1902 AC 83 at 93* and *Concrete Roots* supra note 20 at para 9.
[53] *Daniels v Daniels* [1978] Ch 406 at 414.
[54] *TWK Agriculture Ltd* supra note 51 para 42.
[55] Ibid at para 9 and 10.

to take action in its own name.[56] The case involved a deadlock between shareholders but leave to litigate derivatively was granted.

A minority shareholder seeking to bring a derivative action would first have to apply for leave of the court. However, it was still possible, under exceptional circumstances, to bring the action without first seeking leave.[57]A minority shareholder did not need to first serve a pre-action demand on the company to bring an action before he or she could apply for leave to litigate derivatively.[58] He or she only had to demonstrate that the wrongdoer is capable of manipulating the voting so as to block a company from seeking redress.[59]

The court would grant a shareholder leave to proceed derivatively upon the determination that there is a *prima facie* case of fraud, committed by those controlling the company, and that the wrongdoers would manipulate the voting to deny the company to bring a case in its own name[60] and that the minority shareholder applying for leave is acting in good faith[61] and in the interest of the company.[62] These considerations would bar a shareholder from bringing frivolous and self-interested actions and deter him or her from over interfering in the management of the company.

Under common law, a shareholder or a director who brought a derivative action would bear the costs of the other party where the action failed, and where the case succeeded the reward would be made to the company and the shareholder would only benefit indirectly *pro rata*.[63] He or she would not be able to fully recover his costs even where the litigation was successful. This would have the effect of deterring the shareholders from bringing even some judicious derivative actions.[64] In the *Wallenstein v Moir (No2*), the court held that the company would have to indemnify the shareholder for the costs of the litigating, but this was to be done on equity basis.[65] The above discussion basically depicts the common law

[56] Ibid at para 9 and 10.
[57] Theron J in *TWK Agriculture Ltd* supra note 51 para 39-40 referred to the case of *Wallersteiner v Moir and other (No 2)* [1975] 1 All ER and stated that the courts would still allow a derivative action which was brought as a personal action, though ex facto it was clear that the action was brought for the company, even where the leave was not first obtained.
[58]Ibid at para 44.
[59] Ibid.
[60] Nwafor op cit note 28 at 86.
[61] *Nurcombe v Nurcombe* [1985] 1 ALL E.R 65.
[62] Nwafor op cit note 28 at 88.
[63] Cassim op cit note 48 at 12.
[64] Arad Reiberg op cit note 46 at 1025.
[65]*Wallersteiner v Moir and other* supra note 57 at 857.

derivative action. Currently in Lesotho, the Legislature has provided statutory derivative provisions in the 2011 Act.[66]

c. Derivative Action under Lesotho Company Law

The Highest Court in Lesotho, Lesotho Court of Appeal, had an opportunity to clarify the concept of derivative action in *Concrete Roots v Tigali*.[67] In this case, Mr. Tigali and two others were the shareholders and directors of Pile (Ltd) Pty, a company dealing in stationary and office equipment. This company held current accounts at the Maseru branch of Nedbank. The relationship between Tigali and the other two shareholders turned sour. The other shareholders resolved to buy out Mr. Tigali from the company. Before this could be completed, Mr. Tigali realised that these shareholders were also directors of another company, the Concrete Root (Pty) Ltd, which was operating in direct competition with Pile (Ltd) Pty. Concrete Root (Pty) Ltd operated its business from the same premises that Pile (Ltd) Pty conducted its business and it also held current accounts at the Maseru branch of Nedbank.

On the believe that the two other directors had transferred money from Pile (Ltd) Pty to Concrete Root (Pty) Ltd, Mr. Tigali launched an application to court wherein he sought an order declaring the two directors' dual directorship in Concrete Root (Pty) Ltd and Pile (Ltd) Pty as unlawful and in conflict with their respective fiduciary duties in Pile (Ltd) Pty, which was granted by the lower court. An appeal to Lesotho Court of Appeal was noted by Concrete Root (Pty) Ltd. The appellants contented that the court *a quo* erred in granting the relief for the alleged breach of fiduciary duty because Mr. Tigali did not have *locus standi* as the company was the only person that could sue for the breach of a fiduciary duty. The Court of Appeal held that:

> 'the submission advanced by the counsel for appellant was that Tigali lacked locus standi. He argued that because the wrong allegedly done was one to Pile the rule in *Foss v Harbottle* (1843) 2 Hare 461 (67 ER 189) at 492 applied, namely, that only Pile could sue. This submission lost sight of the well-known exception to the rule which is that a derivative action by minority directors or shareholders lies where the wrong involves conduct which is fraudulent and the

[66] Section 77 (6) of the 2011 Act.
[67] Supra note 20 para 9.

> alleged wrongdoers are the majority directors or shareholders of the company…obviously the latter will not vote for the action against themselves.'[68]

Surprisingly, this was the only paragraph in the judgement where the court dealt with the derivative action. The court failed to elaborate on and clarify this type of action in the context of Lesotho company law. However, it went on to grant relieve on derivative basis although Mr. Tigali had not applied for leave to proceed on that basis nor was he ever granted leave to do so.[69] The Court of Appeal also did not consider whether Tigali was acting in good faith and in the interest of the company, taking into account the fact that he was no longer in good terms with the other directors.[70] The fact that there was already friction between him and the other two directors would have cast a light on whether he was acting in good faith or not.

It is submitted that the Court of Appeal ought to have interrogated the concept of derivative action in the context of Lesotho further. Had it done so, it would have possibly established that the procedure for bringing this action was not followed. The importance of applying for leave to bring this action is, amongst others, to afford the court control over the action which is brought by someone who is not the 'proper plaintiff'. It helps the court to filter the wrongs that should legitimately be maintained on derivative basis.[71] Had the court considered the need to apply for leave to bring a derivative action, it would have addressed the issue of *locus stand* and established whether the case was that of the kind that can be maintained derivatively, that is whether it was brought in good faith and in the interest of the company or whether Tigali ought to had brought a personal action.

A year after *Concrete Roots v Tigali* was decided, Lesotho enacted the 2011 Act and one of the primary object of the 2011 Act was to encourage efficient and responsible management of companies and to protect the shareholders and creditors against the abuse of management power.[72]

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[68] Ibid at para 9.
[69] Nwafor, op cit note 30 at 136.
[70] Ibid at 137.
[71] *Lewis Group Limited v Woollam* supra note 5 para 47.
[72] This was also emphasized in the Government Notice 58 of 2011; Statement of object and reasons of the 2011 Act.

d. Statutory Derivative Action under the 2011 Act

Part IX of the 2011 Act provides for actions available to shareholders under Lesotho company law.[73] These actions are Personal action, representative action and derivative action. This paper is however, concerned solely with the derivative action. In terms of section 77 of the 2011 Act:

> '…a shareholder or a director of a company may apply to the court for a leave to bring proceedings in the name and on behalf of the company or related company or intervene in the proceedings to which the company or a related company is a party, for the purposes of continuing, defending or discontinuing the proceedings on behalf of the company or a related company.'[74]

The 2011 Companies Act gives standing to bring a derivative action to the directors and shareholders only.[75] This approach still considers the shareholders and directors as the only stakeholders who would be adversely affected by the mismanagement of the company. It does not consider other important company stakeholders, such as employees, creditors and those who hold the shares of a company through nominees who can also be vulnerable to the mismanagement of a company. It is submitted that these other stakeholders should have also been provided the standing to bring a derivative action. The current approach unreasonably narrows the application of this action and fails to recognise a company as a social and economic entity which does not only impact the lives of its shareholders and directors but also the livelihood of the society in which it operates.

Section 77 of the 2011 Act also makes it possible for the applicant to seek leave either to intervene or bring a derivative action for the purposes of continuing, defending or discontinuing litigation already commenced by a company. It is therefore not necessary to prove that a company is not willing to take legal action to remedy the wrong. It would in some instances suffice to show that the proceedings already commenced by the company are not being conducted with due diligence. Section 77(3) of the 2011 Act seems to suggest that the applicant would be allowed to bring this action where the company has failed to litigate as the proper plaintiff or to continue or discontinue the proceedings where the proceedings are

[73] Sections 77 and 78 of the 2011 Act.
[74] The 2011 Act.
[75] Section 77 (2) of the 2011 Act.

not diligently conducted, and it has been established that it would be in the best interest of the company to allow a derivative action by a shareholder or a director. It is commendable that the section takes cognisance of the fact that the wrongdoer would in some instance commence litigation just to bluff the minority shareholders and not seeing those proceedings through.

Section 77 (1) of the 2011 Act gives shareholders and directors standing to bring derivative action on behalf of, not only the company but also a 'related company'. Related companies have been defined under the 2011 Act as a subsidiary of another company[76] or companies which are subsidies of one company[77] or where 'the business of the companies have been carried on, that the separate business of each company, or a substantial part of it, is not readily identifiable.'[78] This section seems to give shareholders and directors a right to interfere in the management of affairs of other companies in a group setup, even if they do not hold any shares or directorship, as long as their company is related to that other company. This seems to be in direct conflict with the principle of separate legal personality. It is submitted that this would lead to abuse of a derivative action, sometimes even by people who have no interests to protect any of the companies within the group. It is further submitted that it is advisable to afford standing to bring a derivative action on behalf of a related company only when subsidiaries are being ran as façades of the holding company, as in scenario projected in section 1 (2) (b) (iii) of the 2011 Act.

Nwafor has correctly pointed out that the 2011 Companies Act has failed to give the ground upon which a shareholder or a director may bring an application for leave to bring a derivative action.[79] He further correctly asserted that an applicant should have a good cause to be granted leave to bring a derivative action. [80] The questions that beg answers are whether the applicant will have to resort to the common law ground? If so, does that help in bringing certainty and predictability into Lesotho's company law and are those common law grounds keeping pace with the developments in the modern company law? These are important questions that ought to be answered if Lesotho wishes to develop its derivative action jurisprudence. Nonetheless, we await to see what the courts will do once presented with the

[76] Section 1 (2) (b) (i) of the 2011 Act.
[77] Section 1 (2) (b) (ii) of the 2011 Act.
[78] Section 1 (2) (b) (iii) of the 2011 Act.
[79] Nwafor op cit note 28 at 89
[80] Ibid at 89.

opportunity to address these questions. Once a person with standing believes that he should take action under section 77 of the 2011 Act, he or she must follow a prescribed procedure.

The 2011 Act mandates a shareholder or a director to commence a derivative action by serving notice of application on the respondent company.[81] The notice of application is a legal document that calls upon the company to appear before the court and have audience. The notice basically kick starts a court process. The applicant does not have to first make a pre-action demand to the company to take the action before he can apply for leave to proceed derivatively. It is submitted that this approach fails to give the company control over the action before it can be brought before the court of law. The incorporation of pre-action demand would afford a company an opportunity to deal with the matter internally before the matter is taken to court. This would save costs of litigation as derivative action would reach the courts of law only where it is clear that the company is unreasonably unwilling to take action in its own name. This would also safeguard the reputation of a company because launching a derivative action may imply that there is some form of mismanagement of a company and would have impact on the share price.[82] The 2011 Act provides that once the notice of application is served, a company '*may* appear and be heard and *shall* advise the court whether it intends to bring, continue, defend, or discontinue the proceedings,'[83] This seems to suggest that the only way a company may have the application to proceed derivatively set aside is by showing that it is intending to take an action in its own name. It doesn't give a company opportunity to have applications for leave set aside on the basis that they are of no merits or are frivolous like it is the case in other jurisdictions that will be discussed later in this report.

The court will grant leave only after it has considered the action already taken by the company, if any, the costs of bringing the action, the interests of the company and the likelihood of success in the main case.[84] The court will not grant leave where the company or a related company has already taken action or has shown intention to diligently take action'[85] or it deems not to be in the interest of the company to allow a derivative action.[86]

[81] Section 77 (4) of the 2011 Act.
[82] Kenny Yang 'Evolution of Australia Derivative Action: Floodgates to Shareholders' Activism' (2013) 16 *International Trade and Business Law Review* 419-401 at 429.
[83] Section 77(4) of the 2011 Act.
[84] Section 77 (2) of the 2011 Act.
[85] Section 77 (3) (a.) of the 2011 Act.
[86] Section 77 (3) (b) of the 2011 Act.

Nwafor has argued that the application for leave is a preliminary application hence it is unrealistic or not legally proper to determine likelihood of success in the main case at this stage, he commendably believes that it would suffice to prove only the existence of a *prima facie* at this stage[87]

Section 77 (3) (b) of the 2011 Act also dictates that the court will grant leave only where it is established that it would be in the interest of the company to allow the applicant to litigate derivatively. The Act, however, does not define what constituted the interest of the company. It is submitted that this will give the court a wide discretion to determine what is in the best interest of the company and it fails to give directors latitude to determine what is in the best interest of the company under what is called business judgement rule.[88] Part IV of this paper is going to show that some jurisdictions have incorporated a rebuttable presumption that it will not be in the best interest of the company to bring a derivative action where directors have decided against the action under certain circumstances.

The 2011 Companies Act does not make good faith a requirement that should be satisfied by a director or a shareholder when applying for leave to bring a derivative action. This omission is material as it would seem like the 2011 Act does not require that the applicant should be acting in good faith or should come to court with clean hands.

Despite the flaws identified thus far in the 2011 Act, a number of commendable provisions can be identified in the statutory derivative action under the 2011 Act. Section 77 of the 2011 Act requires that an order granting leave for a derivative action should direct the company through its director to provide the person granted leave with company information and to afford him necessary assistance in relation to the proceedings and the said order should also make provision that the whole or part of the costs of the proceedings should be paid by the company.[89] The 2011 Act also does not allow for the compromise of a derivative action without leave of court.[90] This is commendable because costs of litigation have been identified as a major factor that deters derivative actions, and this would in some instances be to the

[87] Nwafor op cit note 28 at 90.
[88] Stephen Kennedy-Good 'The Business judgement rule (Part 1)' (2006) *Obiter* 62-77at 64 dictates that business judgement rule recognises that 'directors exercise a measure of judgment in their daily decision-making on behalf of a company. (and) a possibility exists that a particular decision taken may turn sour, be it due to unexpected event or merely because of the directors made an honest mistaken. The rule entails that if a decision was made in good faith, lacking fraud, the director cannot be held liable for loss suffered.'
[89] Section 77 (5) of the 2011 Act.
[90] Section 78 of 2011 Act.

detriment of the company.[91] Section 78 of 2011 Act guards against secret settlement between the person granted leave to proceed derivatively and wrongdoers by making it illegal to settle or compromise a derivative action without leave of the court. It also gives the court the power to control the conduct of a derivative action. In order to improve company law in Lesotho, there is a need to assess how countries such as South Africa and Australia are dealing with derivative actions in their respective jurisdiction in order to assess lessons (if any) that Lesotho can learn and improve its application of this action.

IV COMPARATIVE STUDY

South African law has always played an important role in the manner in which the courts in Lesotho have adjudicated legal disputes in Lesotho. Australia is also a country that has a developed culture in corporate governance and remedies that can be used to protect the interests of companies. There is both academic and judicial literature from these countries that can be useful in assisting Lesotho to develop its derivative action jurisprudence.

(a) South Africa

Derivative action in South Africa is regulated by section 165 of the South African Companies Act 71 of 2008 (hereinafter referred to as SA 2008 Act). Section 165(1) of the SA 2008 Act abolished common law derivative action and it is now the basis upon which a derivative action can be brought in South Africa.[92]

(i) Standing

The SA 2008 Act provides for an extended *locus standi* to bring a derivative action.[93] Derivative action is available to shareholders or those who are entitled to be registered as shareholders of the company or a related company,[94] officer or prescribed officers of the company or of a related company,[95] trade unions representing the employees of a company or any representatives of the employees of a company[96] and to a person who has been granted leave by the court, to serve a demand on a company to demand it to bring an action to protect

[91] Cassim op cit note 48 at 1.
[92] Maleka Femida Cassim 'Untangling the requirement of good faith in the derivative action in company law (Part 1)' (2018) *Obiter* 363-383 at 366.
[93] PA Delport op cit note 44 at 593
[94] Section 165 (2) (a) of the SA 2008 Act.
[95] Section 165 (2) (b) of the SA 2008 Act.
[96] Section 165 (2) (c) of the SA 2008 Act.

its interest, which leave 'may be granted only when the court is satisfied that it is necessary or expedient to do so in order to protect the rights of that person.'[97]

It is submitted that by affording standing to trade unions representing employees or other representatives of the employees, South African Legislature realised that the mismanagement of a company may affect the interests of other persons other than shareholders[98] and directors. Stakeholders such as employees also have a legitimate and cognisable interest in the running and protection of a company[99] Thus, a company is not only recognized as a property of the investors but also as a social and economic entity that benefits employees. The SA 2008 Act has expanded the list of persons who can bring a derivative action[100] and this increases the number of persons who can act on behalf of the company should it experience any harm as a result of those who control it.

The extended *locus standi* under the South African statutory derivative action has also been correctly commended for its ability to advance protection and realisation of some fundamental human rights. Gwanyanya submitted that the granting of a right to make a demand to a person who has been granted leave to do so by the court where the court has determined that it is necessary or expedient to grant such leave to protect a legal right of that person, under section 165 (2) (d) of the SA 2008 Act, is pivotal in the realization of fundamental human rights.[101] He made an example of a situation whereby a company is to embark on a project that would be environmentally and socially hazardous and would as a result lead to numerous litigations against the company by members of the society. He correctly submitted further that a member of the society would be entitle to apply for leave to service a demand on the company to take action that would stop that project on the basis that that project will detrimentally affect the reputation of the company and lead to excessive legal costs to the company, and this will in the same veil protect the human right to a healthy environment and or access to safe water courses.[102]

[97] Section 165 (2) (d) of the SA 2008 Act.
[98] Those who holds shares either in person or through nominees.
[99] *Lewies group Limited v Woollam supra* note 5 para 33.
[100] Helena H Stoop 'The Derivative Action Provisions in the Companies Act 71 of 2008' (2012) 129 *SA LJ* 527-553 at 537.
[101] M Gwanyanya 'South African Companies Act and the Realisation of Corporate Human Rights Responsibility' (2015) 18 *PELJ* 3102-3132 at 3111.
[102] Ibid at 3111.

(ii) Ground and Procedure for Derivative action

The preceding part of this paper has shown that in Lesotho, the 2011 Act does not set out any ground for leave to proceed derivatively. In contrast, SA 2008 Act provides that a demand should be served on the company demanding it to litigate in order to protect the legal interest of the company.[103] The applicant would be granted leave only where it has been established that there is a serious question of material consequence to the company to be adjudicated by the court.[104] The SA 2008 Act does not define 'legal interest of the company'. Coetzee correctly argues that this would make derivative action available even in regard to matters beyond 'delict, breach of trust or breach of faith by director or officers of the company.[105] Cassim correctly points out the new South African statutory derivative action can be brought even for the wrongs committed by third parties or outsiders, that is persons other than the management or controllers of the company, where the controllers or management of the company are protecting those wrongdoers.[106] It is submitted that this would logically lead to enhanced protection of company's interests.

Once a demand is served, a company would opt to take the required action or, where it does not intent to take the action, it may apply to court to have the demand set aside[107] or it would have to investigate the substance of the demand and advice the court. [108] Binn-Ward J asserted that the purpose of the demand and the investigation of the allegations made in that demand is to filter the actions that should be allowed to be derivatively brought and to help a company to decide whether to bring action in its own name.[109] The purpose of the demand is to fairly and adequately inform those who control the company of the anticipated cause of action in order to enable them to make an informed decision on whether to take the action in the best interest of the company.[110] It is submitted that the requirement of a demand recognises the pivotal principles of internal management of the company and the proper plaintiff rule. It would in effect protect the reputation of a company and reduce the litigation costs to the company.

[103] Section 165 (2) of the SA Act 2008.
[104] Section 165 (5) (b) (ii) Of the SA Act of 2008.
[105] Coetzee op cit note 40 at 298.
[106] Cassim op cit note 2 at 170.
[107] Section 165 (3) of SA 2008 Act
[108] Section 165 (4) of SA 2008 Act
[109] *Lewis Group Limited v Woollam* supra note 5 para 47.
[110] Helen op cit note 100 at 538.

A person with standing would only be entitled to make an application for leave to bring a derivative action where the company failed to comply with the demand and the company does not make an application to have the demand set aside terms of section 165 (3) of the SA 2008 Act. This can also result where the company fails to take action in its own name or there were some flaws in the investigations or in the dealings with the report of the investigation carried out in terms of section 165 (4) of the SA 2008 Act.[111] An application for leave to proceed derivatively will be granted at the discretion of the court[112] upon the applicant satisfying the court that he or she is acting in good faith and that there is a serious question of material consequence to the company that is to be trailed by the court and it is a in the best interest of the company to grant the leave to the applicant.[113]

As pointed out early, Lesotho Companies Act (2011 Act) does not make good faith one of the requirements to be established by the applicant and this opens flanks to the company and would lead to abuse of derivative action by shareholders and directors against the company. Cassim has correctly submitted that the three requirements to be proved in an application for leave to bring a derivative action under section 165 (5) (b) of the SA Act 71 of 2008, which include good faith, are meant to 'protect the company against frivolous or vexations claims or claims that are without merits.'[114] She further correctly submitted that the test for good faith should be a two legged test with the first leg being whether the applicant 'honestly believe that a good course of action exists and that it has a prospect of success'[115] while the second leg should be whether the applicant is not bring a derivative action for a collateral purpose.[116]

The lessons that Lesotho can learn from this approach is a need to adopt a pre-action demand requirement. It is submitted that this would minimize derivative actions by compelling a company to take action in its own name and this would evade reputational damage to the company. Lesotho should also learn that it is crucial to have good faith as one of the elements to be proved in an application for leave as this would discard self-interested derivative actions that would serve no interests of a company and ensure that only genuine litigations aimed at

[111] Section 165 (5) (a) of SA 2008 Act
[112] *Lazarus Mbethe v United Manganese of Kalahari* [2018] JOL 39914 (SCA) para 20
[113] Section 165 (5) (b) (i)-(iii) of SA 2008 Act
[114] Cassim op cite note 92 at 367.
[115] Ibid at 383.
[116] Ibid at 383.

protecting company's interests are allowed.[117] Discarding vexatious and frivolous actions at this very early stage would safe company costs and resources.

The SA 2008 Act also protects companies and its internal management by introducing a rebuttable presumption that a derivative action would not be in the interest of a company where the proceedings are against a third party, the company has decided not to take action, all the directors who participated in the decision had no personal financial interests in the decision and they acted in good faith and for a proper purpose.[118] This places a heavier burden of proof on the applicant to establish that a derivative action would be in the best interest of the company.[119] This approach provides experts, directors, with leeway to make business decisions on behalf of the company while at the same time guarding against abuse of that power by ensuring that those who participated in that decision-making process acted in good faith and did not have any financial interests in the decision. It ensures that the courts are not given wide discretion to interfere in the business decision reached by the boards of directors on whether to bring an action or not.

The South African statutory derivative action, in a nutshell, is capable of protecting the interest of the company against the abuse of power by those who control and or manage a company by offering a wider *locus standi* and in the same veil against the abuse of the statutory derivative action by those with *locus standi* by providing for stringent procedural requirements for demand and leave to bring an action and by introducing a rebuttable presumption under section 165(7) SA 2008 Act. The other jurisdiction from which Lesotho can draw some lessons is Australia.

(b) Australia

Section 236 (1) of the Australian Corporations Act 2001 (Corporation Act of 2001) afford standing to institute a derivative action to both former and present members of the company or of the related company[120] and both former and present officers of the company.[121] A member has been defined as the register's member of the company[122] and officers has been

[117] Ibid at 375.
[118] Section 165 (7) of South African Act 71 of 2008
[119] Cassim op cit note 2 at 171.
[120] Section 236 (1) (a) (i) of the Corporations Act 2001.
[121] Section 236 (1) (b) (ii) of the Corporations Act 50 of 2001.
[122] Section 321 of the Corporation Act 50 of 2001.

defined as a director or secretary of the corporation, both *de facto* and *de jure,*[123] irrespective of the titles the hold.[124] It is submitted that, just like in Lesotho, Australia still provide standing to shareholders and those involved in the management of the company. However, the only point of disparity is that in Australia, those people retain the standing even after leaving the company. It is submitted that it does not make sense to provide former members and officers, who no longer have any direct interest in the company, the standing to institute derivative action. It is absurd particularly when considering the fact that the Corporation Act of 2001 does not extend the standing to employees (or their representatives) or other members of the society who have interest in the administration of the company. It is recommended that Lesotho should not adopt this approach as it fails to give standing to some important stakeholders, such as employees, who are directly impacted by the mismanagement of a company but provides standing to people who used to have an interest in the company. Lesotho should rather follow the South African approach.

In Australia, the applicant has to serve the company with notice of his or her intention to apply for leave to bring a derivative action at least fourteen days before he or she applies to court for leave to proceed derivatively.[125] Failure to do so will result in the court declining to grant the application unless it determines that it is appropriate to do so in the circumstances of the case.[126] The court must grant leave where it has been established that it is probable that the company will not litigate or properly take responsibility when the applicant is acting in good faith[127] and it is in the best interest of the company to grant leave to the applicant as well as when there is a serious question to be tried by the court.[128] It is also a requirement under Lesotho 2011 Act that notice should be given to the company[129] but the Lesotho Act does not set time frame and it does not expressly demand that the applicant should be acting in good faith. Failure to set out time frame might lead to abuse of the procedure and fails to provide a clear procedure for bringing the action. It is recommended that the Legislature in

[123] De facto directors here refer to directors dully appointed into the boards of companies while de jure refers to those people who do not officially hold the office of directorship in the company but have a way of influencing the decisions of the boards such as shadow directors.
[124] Section 9 of Corporations Act of 2001.
[125] Section 237 (e) (i) of Corporations Act of 20011.
[126] Section 237 (e) (ii) of Corporations Act of 2001.
[127] *Swansson v Pratt* [2002] NSWSW 583 para 25
[128] Section 237(2) (a)-(d) of the Corporations Act of 2001. These requirements are discussed at length in Yang op cit note 82. However, their in-depth discussion falls outside the scope of this paper.
[129] Section 77 (4) of Lesotho Act 0f 2011.

Lesotho should also consider amending the law in order to set time frames that will give a company a reasonable time to respond to the notice.

Ratification of the conduct that would form subject of the purported derivative action by the board cannot be used to deny an applicant leave to take a derivative action.[130] However, the fact that the conduct complaint of have subsequently been ratified by the board will be considered by the court in determining the appropriate order to be awarded on a case to case basis. [131] The proceedings can also not be compromised without leave of court.[132] This also act as a safeguard to the interest of the company in that the wrongdoer will not easily avoid liability by manipulating other stakeholders into ratifying his conduct or by manipulating a person granted leave into a compromise. Commendably, this is also a position under Lesotho 's 2011 Act.[133]

Just like South Africa, Australia has introduced a rebuttable presumption that it would not be in the best interest of the company to grant leave to litigate derivatively in certain instances. This would be where the proceedings are between a company and a third person or where the company have decided against taking action. It should however be established that the directors who made that decision did not have any material personal interest in the decision and were acting in good faith and rationally in what they reasonably believed to be in the best interest of the company.[134] It is submitted that this rebuttable presumption would give directors leeway to make informed business judgement and ensure minimum interference of both the shareholders and courts in the running of the business affairs of the company. Lesotho does not have this rebuttable presumption. It is submitted that Lesotho should adopt this approach as it would afford companies enhanced protection.

Lastly the courts have a wide discretion, under section 242 of the Corporations Act of 2001, in awarding costs relating to derivative actions. According to Yang, during a period between the enactment of the Corporations Act 2001 and 2013 in all 19-successful leave application the courts did not order the companies to fund the applicants' litigations.[135] Lesotho' 2011 Act also provides the courts with discretion to make an order of costs of a derivative action to be borne by the company, either in whole or in part, where the court deems it to be equitable

[130] Section 239 (1) of Corporations Act of 2001.
[131] Section 239 (2) of Corporations Act of 2001
[132] Section 240 of Corporations Act of 2001.
[133] Section 165 (4) and Section 45 (4) of the 2011 Act.
[134] Section 237 (4) of Corporations Act of 2001.
[135] Yang op cite note 82 at 426-429.

and just to do so.[136] This provision is crucial for the protection of the company as it ensures that those with the standing under the Act will not refrain from taking derivative action due to the fear of having to bear the costs of litigation while at the same time ensure that the company will bear the costs only where it is deemed equitable and just to do so.

V CONCLUSION AND RECOMMENDATIONS

This report demonstrated that the rules in *Foss v Harbottle* relating to the majority rule and the rule that company is the only competent litigant where the wrong is done against its interests were promulgated to guard against the interference of shareholders in the running of the business affairs of a company, which is the duty of the board of directors. This was to maintain separation of powers between the board of directors and shareholders. Further that, it was realised that there should be some checks and balances to guard against the abuse of control by those who manage companies.

Common law derivative action was, therefore, developed as a minority shareholders action aimed at protecting the interest of the company where the wrong was committed by those who control a company and using their control to prevent a company from taking legal action to protect its interest. Minority shareholder would be granted leave by the court to bring this action where there was alleged fraud on the company by those who controlled the company and it was establish that a person bringing the action was acting in good faith and the action was in the interest of the company. Different countries such as South Africa and Australia have adopted statutory derivative actions but with some improvements to the common law action.

It was shown that South Africa now gives standing to bring a derivative action to among others, the representatives of employees of a company and to a person granted leave to the make a demand to the company where the interests of that person are to be affected.[137] SA 2008 Act mandates that a person with standing should first make a demand to a company to take action before he can apply to court for a leave to be allowed to litigate derivatively on behalf of the company.[138] This upholds the rule in *Foss v Harbottle* but at the same time guard against the abuse of power by those who control the company by ensuring that

[136] Section 77 (5) (e) of the 2011 Act.
[137] Section 165 (2) of SA Act 71 of 2008.
[138] Section 165 (2) of SA Act 71 0f 2008.

derivative action will only be allowed where it is clear that the company would not bring or defend the action in its own name.

Lesotho has on the other hand, commendably adopted a statutory derivative action in Companies Act of 2011.[139] This would bring certainty and accessibility to the rules on this action. However, the drafters retained the common law restrictive standing to bring the action. The action can only be brought by directors and shareholders. This restricted standing keeps up with the spirit of the 2011 Act as established Statement of Object to the Act.[140] Lessons learned from the study of South African approach have shown that it is not enough, under the modern corporate governance laws, to entrust the protection of the interests of a company on directors and shareholders only because modern company law recognises a company as a social and economic entity.

In its current state, the Lesotho statutory action cannot effectively protect the interest of the company both from the abuse of power by those who run its business affairs. This is due to the restricted *locus standi*. As well as from the abuse of derivative action by those given with standing, due to non-inclusion of pre-action demand to company and good faith as requirements for brining action and due to absence of business judgement rule that would minimise the interference of both shareholders and courts in business decisions of the board. In light of the lessons from South Africa and Australia, this research report makes the following recommendations:

- Section 77 (1) of the 2011 Act should be amended and the standing extended to bring a derivative action should be afforded to persons[141] such as representatives of employees and or those who would ensure that the company is managed in such a way that upholds its social and economic status.
- Section 77 should be amended to include a pre-action demand to the company in order to protect reputation of the company as it was indicated earlier that bringing derivative action implies that company's affairs are not managed properly and that

[139] Section 77 and 78 of 2011 Act.
[140] The statement basically depicts a company as a property of those who incorporated it and seeks to regulate the relation between the boards and shareholders only. Unlike the South African Companies Act 71 0f 2008, it does not see a company as a social and economic entity.
[141] Persons here refers to both natural and artificial persons.

this might have negative impact on the share prices of companies shares and its reputation.

- Good faith should be included as one of the requirements to be established in application for leave to bring an action so as to avoid self-interested actions.
- The inclusion of the ground or grounds upon which this type of action should be brought as this will also bring certainty and predictability.
- The amended sections should include time periods between processes such as serving a demand on a company and bringing an application for leave to litigate derivatively. These time frames should be made in such a way that will afford the company a reasonable time to investigate and informally decide whether to take action in its own name while at the same time guarding against unwarranted delays that might be to the detriment of the interests of a company.

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