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**MASTER OF PHILOSOPHY: COMMERCIAL LAW SPECIALIZATION**

**THE INCLUSION OF STAKEHOLDERS AND THE *LOCUS STANDI* OF THE  
OPPRESSION REMEDY: A COMPARATIVE ANALYSIS OF SOUTH AFRICA  
AND CANADA**

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**Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a program of courses.**

**I Ruvarashe Dorothy Maponga hereby declare that I have read and understood the regulations governing the submission of dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.**

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## TABLE OF CONTENTS

Abstract .....	4
Acknowledgements .....	5
<b>CHAPTER ONE: INTRODUCTION</b>	
1.1 Overview of Research .....	6
1.2 Structure of Dissertation .....	8
1.3 Limitations of Study .....	9
<b>CHAPTER TWO: EXPLORING SHAREHOLDER PRIMACY AND STAKEHOLDER INCLUSIVITY</b> .....	11
2.1 Introduction .....	11
2.2 Shareholder Primacy .....	11
2.3 Stakeholder Inclusivity .....	12
2.4 Defining the Stakeholders of a Corporation .....	13
2.5 The International Position on Stakeholder Inclusion .....	14
2.5.1 OECD Principles of Corporate Governance .....	15
2.5.2 Australian Experience .....	16
2.5.3 The United Kingdom Experience .....	17
2.5.4 South African Experience .....	19
2.5.4 (i) King I to II .....	19
2.5.4 (ii) Stakeholder Inclusivity in South Africa .....	20
2.6 Summary .....	22
<b>CHAPTER THREE: THE OPPRESSION REMEDY</b>	
3.1 Introduction .....	23
3.2 The Oppression Remedy in Canada: An Overview .....	24
3.2.1 <i>Locus Standi</i> .....	25
3.2.1 (a) (i) Group One: Security Holders .....	26
(ii) Creditors .....	27
(b) Group Two: Directors and Officers .....	28
(c) Group Three: ‘Proper Persons’ .....	29
3.3 The South African Oppression Remedy .....	30
3.3.1 <i>Locus Standi</i> in 1926 .....	30
3.3.2 <i>Locus Standi</i> in 1973 .....	32

3.2.3 <i>Locus Standi</i> in 2008.....	34
(a) Directors.....	35
(b) Shareholders.....	37
(c) Related Persons.....	38
3.4 Summary.....	41
<b>CHAPTER FOUR: APPLICATION AND INTERPRETATION OF THE</b>	
<b>OPPRESSION REMEDY IN SOUTH AFRICA</b>	
4.1 Introduction.....	42
4.2 Application and Interpretation of s 163: Selected Cases.....	43
(a) <i>Kudumane Investment Holdings Ltd. v. Northern Cape Manganese Company</i> ...	43
(b) <i>Peel v Hamon J &amp; C Engineering (Pty) Ltd</i> .....	44
(c) <i>Visser Sitrus (Pty) Ltd v. Goede Hoop Sitrus (Pty) Ltd</i> .....	45
(d) <i>Count Gotthard S.A. Pilati v. Witfontein Game Farm</i> .....	46
4.3 Analysis.....	47
4.3.1 Widened Interpretation of s 163 .....	47
(a) Court Remedies.....	48
(b) Guidance from foreign jurisdictions.....	49
(c) <i>Locus standi</i> .....	50
4.4 The influence of the principles of majority rule and non-intervention on s 163.....	52
4.5 Summary.....	54
<b>CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS</b>	
5.1 Conclusion.....	55
5.2 Recommendations.....	56
(a) Intense Judicial Involvement.....	60
(b) Watershed of alternative remedies.....	61
Bibliography.....	62

## ABSTRACT

This dissertation assesses the impact of the narrow interpretation and application of the oppression remedy in the South African Companies Act 71 of 2008, s 163 on the inclusion of stakeholders and compares it with the Canadian experience. It reviews the historical development of the oppression remedy in South Africa and focuses on how the interpretation and application of s 163 continues to exclude various stakeholders in the *locus standi* of the remedy. The comparative exposition of the interpretation and application of the South African and Canadian oppression remedy provided in this dissertation brings out fundamental differences between the two, highlights the need to extend the South African interpretation to include various stakeholders and elaborates on the benefits of a broader approach to the remedy. By outlining the impact and benefits of the inclusion of various stakeholders in the remedy as opposed to their exclusion, the study advocates for a broadened and inclusive interpretation of s 163 by the courts to create a platform for various stakeholders to seek relief through the remedy. Furthermore, to minimize ambiguity in application of the remedy, the dissertation proposes a modification of the interpretation and application of s 163 to explicitly include all stakeholders in the description of oppression remedy building on the Canadian experience through judicial transplantation.

*Keywords: company, development, stakeholder, shareholder, stakeholder inclusivity, shareholder primacy, oppression remedy, locus standi, enlightened shareholder approach, judicial transplantation*

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## **CHAPTER ONE**

### **INTRODUCTION**

#### **1.1 Overview of Research**

Company law as well as its interpretation have both evolved over time and the economic value generated for shareholders of a corporation is no longer (exclusively) used to guide and measure the performance of the business.<sup>1</sup> Instead, the structure of companies is slowly evolving from being governed by the principle of shareholder primacy to corporations implementing different practices to ensure the inclusion of a greater number of stakeholders.<sup>2</sup> Twenty-first century companies are no longer run on the premise that the shareholders being the owners of the company, should take absolute precedent over other stakeholders because they (the shareholders) run the risk of losing their investment if the company fails and their interests are not contractually protected<sup>3</sup>- the involvement and protection of stakeholder interests now plays an important role in the success and sustainability of the businesses. Thus, it has become difficult to separate the interests of shareholders and stakeholders as these interests have become interrelated. To accommodate this, South African corporate law has moved towards a more stakeholder inclusive approach in the country's corporate culture, the inclusion and protection of stakeholders' interests played a key role in the revision and amendment of the Companies Act of 1973.<sup>4</sup> The following extract from the Department of Trade and Industry's Policy report illustrates the next for this shift;

‘It is proposed that in the South African context, the company law needs to take account of stakeholders such as the community in which the company operates, its customers, its employees, its suppliers and the environment in certain situations mandated by the Constitution and related legislation. Thus, it is proposed that in the running of a modern South African company consideration has to be given not only to

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<sup>1</sup> J Schulschek Interview Summary Report (August 2012) Corporate Governance Research Program, Albert Luthuli Centre of Responsible Leadership

<sup>2</sup> King Report of Governance for South Africa (2009), Institute of Directors Southern Africa para 19-22 (Herein referred to as King III)

<sup>3</sup> A Ramalho Corporate Governance and the call to Stakeholder Inclusivity: Do Shareholders Loose Out, The Corporate Report at 19

<sup>4</sup> Companies Act 61 of 1973 (Herein referred to as Act of 1973)

economic factors but also to social and environmental ones. This is what King II refers to as a Triple Bottom Line approach.’<sup>5</sup>

This revolutionary approach to the inclusion of stakeholders resonates in different provisions within the newly adopted Companies Act 71 of 2008<sup>6</sup>- the new constitution of commerce in South Africa now includes the corporate culture, behaviour, and an exposition of the role of the company in society through corporate citizenship, sustainability, corporate investment and stakeholder inclusivity.’<sup>7</sup> In an attempt to ensure the inclusion of stakeholders within the governance of companies, the Act of 2008 includes a number of provisions that aim to deter and provide redress for the abuse of power within companies. Some of these provisions include; s 165, the statutory derivative action which gives directors, prescribed officers, shareholders and registered trade unions the right to ‘... demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company...’<sup>8</sup> Another example is s 162 which gives shareholders, the company, directors, the company secretary, prescribed officers and registered trade unions the right to ‘... apply to an court for an order declaring a person delinquent or under probation...’<sup>9</sup> By providing stakeholders such as creditors, employees and trade unions with stricter statutory protection similar to the protection set for shareholders, is an indication of the shift in South African corporate law from shareholder supremacy to the more stakeholder inclusive governance of companies. The platform provided for the increased inclusion of various stakeholders in the governance of companies has reformed and narrowed the gap that exists between the shareholders and various stakeholders within companies by ensuring the protection of various stakeholder interests.

Traditionally the oppression remedy, like ss 165 and 162, was introduced into the corporate realms to narrow the imbalance of power between minority and majority shareholders ie ‘... the interests of the various shareholders of a corporation may conflict, particularly where one shareholder or identifiable group of shareholders control the

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<sup>5</sup> South African Company Law of the 21<sup>st</sup> Century: Guidelines of Corporate Law Reform (May 2004), Department of Trade and Industry (Herein referred to as DTI Policy Report) at 25

<sup>6</sup> Companies Act 71 of 2008 (Herein referred to as Act of 2008)

<sup>7</sup> Schulschek op cit note 1 at 21

<sup>8</sup> s 165(2) of the Act of 2008

<sup>9</sup> s 162(2) of the Act of 2008

corporation and others are in a minority position.’<sup>10</sup> Through the development of corporate law, the oppression remedy in many jurisdictions has evolved beyond the protection of shareholder interests only and now extends protection to the interests of various stakeholders. The South African oppression remedy, s 163, which is similar to ss 238 and 241 of the Canada Business Corporation Act<sup>11</sup> and s 994 of the English Companies Act,<sup>12</sup> has widened its *locus standi* to extend to the protection of the rights and interests of directors. Despite the similarities between s 163 and the Canadian oppression remedy alluded to above, the Canadian remedy provides standing to a larger pool of stakeholders. It includes creditors, employees and any ‘proper person’ and this has contributed to the influence the remedy has on the inclusion and protection of diverse stakeholders interests within Canadian corporate culture. In South Africa however, the *locus standi* of s 163 is limited to directors and shareholders, which has excluded various stakeholders from seeking redress from oppressive conduct through this provision, and this may perpetuate the imbalance of power among company stakeholders. The exclusion of various stakeholders in s 163 denies the ‘powerless’ a platform to seek redress under s 163.

This dissertation aims to provide an understanding on the historical development of the South African oppression remedy and illustrate how the narrow approach to the ‘new’ oppression remedy, s 163, exposes that, to a certain extent, South African corporate culture continues to be centred on safeguarding the interests of those stakeholders, principally shareholders, that hold a direct and tangible interest within the company. It is thus argued that, in South African corporate law the inclusion of various stakeholder interests continues to lag behind in a few aspects when compared with experiences elsewhere. The dissertation will provide a comparison between the application and interpretation of s 163 in South Africa and ss 238 and 241 in the CBCA and how two very similar provisions have provided different outcomes in terms of the inclusion of stakeholders. It will analyse the South African Companies Act s 163, cases and other secondary material and compare them with the Canadian experience.

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<sup>10</sup> KP McGuinness et al (1999) *The Law and Practice of Canadian Business Corporations* at 949

<sup>11</sup> Canada Business Corporation Act RSC 1985 c C44 (Herein referred to as CBCA)

<sup>12</sup> Companies Act 2006 ch 46 (Herein referred to as the English Act)

## **1.2 Structure of Dissertation**

The dissertation is organized in five Chapters following this introduction.

Chapter 2 deals with the principles of shareholder primacy and stakeholder inclusivity and discusses the transition of corporate governance models from being built on the former principle to the latter. The chapter examines how three selected jurisdictions, Australia, the United Kingdom, and South Africa have incorporated the principle of stakeholder inclusion within their corporate frameworks.

Chapter 3 discusses the oppression remedy in detail and provides a comparative analysis of the Canadian oppression remedy and the South African oppression remedy to tease out similarities and differences and hence the attendant strengths and weaknesses of both provisions. It explores how the use, interpretation and application of the oppression remedy in Canada has mirrored the principles of stakeholder inclusion in Canadian corporate law. The discussion also explores the historical development, interpretation and application of the South African oppression remedy throughout the years and the principles and guidelines that frame the remedy.

Chapter 4 focuses on the interpretation and application of s 163 and considers the application of this newly adopted section by the South African courts. It elaborates on how the courts have contributed to limiting the remedy and how the remedy continues to be interpreted primarily in accordance to the protection of shareholder interests. Chapter 4 goes on to discuss how traditional South African corporate law principles have further limited the flexibility of the oppression remedy.

Chapter 5 presents the conclusions and recommendations of the study. The recommendations focus on how the South African courts can play a key role in ensuring that various stakeholders are provided with a platform for the protection of their rights and interests in s 163 without interfering with South African corporate culture. The chapter further interrogates the implementation of a wider *locus standi* in South African corporate law and how this relates to the principles of the so-called enlightened shareholder approach.

## **1.3 Limitations of Research**

The extensive research undertaken to achieve the objectives of this dissertation was constrained by methodological limitations related to the comparison of the two legal systems. As a methodology for comparison, comparative law is mainly functionalist in that it seeks to identify problems and the causes of legal change; to replace an existing law or search for a 'better' law and to assess which law offers the best solution to the problem.<sup>13</sup> However, the comparative analysis does not consider the cultural and legal background of both jurisdictions before arriving at comparative conclusions. The dissertation assumes that both Canada and South Africa share similar problems and that enacting similar provisions would deal with what are presumed to be shared problems, which unfortunately may not be the case.

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<sup>13</sup> P Legrad (1997), 'The Impossibility of "Legal Transplants"', 4 Maastricht J. Eur. & Comp. L. 111 at 114

## CHAPTER TWO

### EXPLORING SHAREHOLDER PRIMACY AND STAKEHOLDER INCLUSIVITY

#### 2.1 Introduction

This Chapter discusses various issues around the primacy of shareholders and the importance of inclusiveness in the protection of the rights of the stakeholders of corporations. It elaborates on the transition of corporate governance models from shareholder primacy to stakeholder inclusivity. The discussion isolates important dimensions to the issues discussed in this dissertation.

#### 2.2 Shareholder Primacy

Until the early 20<sup>th</sup> century corporations had been governed on the basic principle of the maximization of profits for shareholders. The traditional view of Milton Friedman was that, '[t]he purpose of a company is to make profits for stockholders, which means its stockholders are the one and only stakeholder group that managers should take into account when making a decision.'<sup>14</sup> This was established in the historical American case of *Dodge v Ford Motor Co*,

'[Shareholder primacy is] a business corporation that is organized and carried on primarily for the profits of the stockholders. The powers of the directors are to be employed for that end. The discretion of the directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction

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<sup>14</sup> AR Phillips *Stakeholder Theory: Impacts and Prospects* (2011) at 2

of profits or to the non-distribution of profits among stockholders in order to devote them to the other purposes.’<sup>15</sup>

Scholars in favour of shareholder primacy argue that the economic value generated by a corporation has become a useful guide to measure the performance of the business and to allay fears regarding excesses by management<sup>16</sup> and directors have been required to manage the business of the company in the interests of its shareholders and to maximize profits for the benefit of shareholders.<sup>17</sup> Although to date, a number of corporations have shifted from this traditional approach to corporate governance, principles of shareholders primacy continue to be engrained in contemporary corporate culture. However, in twenty-first century corporate culture, shareholder interests are protected differently and are included together with those of the various other stakeholders.

### **2.3 Stakeholder Inclusivity**

Stakeholder inclusivity allows for the consideration of the interests of stakeholders other than those of the primary shareholders. It relates to the idea that the governance of a company should not be centred only on the protection of the financial interests of its shareholders but should include the protection of the interests of various stakeholders. The stake holding perspective emerged in the late twentieth century, and it views the corporations as a locus, in relation to wider external stakeholder interests rather than merely shareholders’ wealth.<sup>18</sup> The OECD Principles of Corporate Governance elaborate on the importance of stakeholder inclusion and state, ‘[c]orporate governance involves a set of relationships between a company’s management, its board, its shareholders and other stakeholders’<sup>19</sup> - corporations are interdependent rather than independent social

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<sup>15</sup> *Dodge v Ford Motor Co* 170 NW 668 (Mich 1919)

<sup>16</sup> Phillips op cit note 14 at 3

<sup>17</sup> FHI Cassim The Duty and Liability of Directors in FHI Cassim (ed) *Contemporary Company Law* 1 ed 467 See also *Greenhalgh v Arderne Cinemas Ltd* [1951] CH 286 at 291 in which the court concluded that the phrase ‘company as a whole’ does not mean the commercial entity as distinct from the shareholders it means the shareholders or incorporators as a general body

<sup>18</sup> S Letza et al ‘Shareholding versus Stakeholding: A Critical Review of Corporate Governance’ in *Corporate Governance: An International Review* (2004) at 243

<sup>19</sup> Organization for Economic Co-Operation and Development *Principles of Corporate Governance* (April 2004) available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf> at 11 (Herein referred as OECD principles)

institutions that corporate boards mediate, between networks of internal and external corporate interests.<sup>20</sup> Considering the interrelated concerns of various stakeholders, ‘focusing on just one group of interests (that is shareholders) and debates about their primacy over others (that is stakeholders) misses the wider point that all of us are subject to higher level social contracts which govern our business relationships.’<sup>21</sup>

## 2.4 Defining the Stakeholders of a Corporation

To elaborate on the principle of stakeholder inclusivity, it is important to identify the various stakeholders that exist in any company. C Malin explains that the term ‘stakeholder’ can encompass a wide range of interests; basically it is any individual or group on which the activities of the company have an impact.<sup>22</sup> Other authors emphasize that;

‘[t]he fundamental idea that stakeholders have a stake in the same sense that business partners have a common stake in their venture or players on a team a common stake in the outcome of a game. Stakeholders share a common risk, a possibility of gaining benefits or experiencing losses or harms, as a result of corporate operations.’<sup>23</sup>

An Australian lawyer elaborates on this thought;

‘It may be suggested that each of these alleged stakeholders hold the following “stakes” in the company. In the case of employees it is an input of human capital particularly of long- term employees who have worked to consolidate specialist skills attributable to the company to assist with maintaining a successful business. The stake of suppliers is that they derive income from goods supplied to the company. The stake of owners is principally economic in the sense that they are relying on their shares in the company to produce a profit. The stake of the community is the need for a clean environment and boost to the economy through the provision of jobs and production of goods. Finally, the stake of creditors is that the business continues to perform well to ensure that the debts owed to the creditor are satisfied.’<sup>24</sup>

Thus, in the broadest sense the term stakeholder defines those who have a relationship with the corporation either directly or indirectly ie those who are impacted

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<sup>20</sup> M Blair et al ‘A Team Production Theory of Corporate Law’ (2001) 85 *VLR* at 265

<sup>21</sup> T Donaldson et al *Ties That Bind: A Social Contracts Approach to Business Ethics* (1999)

<sup>22</sup> C Malin *Corporate Governance* (2004) at 20

<sup>23</sup> JE Post et al *Redefining the Corporation: Stakeholder Management and Organizational Wealth* (2002) at 19

<sup>24</sup> A Corfield ‘The Stakeholder Theory and its Future in Australian Corporate Governance: A preliminary Analysis’ (1998), 5 *BLR* 10 2 2 at 2

by the conduct of business by the corporation directly or indirectly. This broad description implies that apart from shareholders, stakeholders encompass employees, suppliers, customers, banks and other creditors, the government, communities, various ‘pressure groups’- in fact anyone on whom the activities of the company may have an impact.<sup>25</sup>

## **2.5 The International Position on Stakeholder Inclusion**

Internationally, corporations have implemented the notion of stakeholder inclusivity in diverse ways within respective corporate governance models. With varying corporate regulatory structures, the notion of insider and outsider control and influence might combine with distinctions between shareholders and stakeholders in board and management representation.<sup>26</sup> Governments through corporate law and corporate governance principles have provided guidelines on how companies should manage stakeholder relationships. In almost every jurisdiction corporate governance aims to mediate three different kinds of ‘agency conflicts’<sup>27</sup>- between managers and shareholders; between majority and minority shareholders; and between the firm and third parties (that is, stakeholders).<sup>28</sup>

There continues to be a debate within corporate governance circles as to the most effective legal instrument to implement in order to manage the agency conflict and govern stakeholder relationships ie either through strict statutory regulations (eg the mandatory principles in the Sarbanes-Oxley Act in the United States) or by means of ‘soft law’ (voluntary non-binding principles). Most countries seem to have adopted the soft law approach through the principles of ‘apply or explain’<sup>29</sup> or ‘comply or explain.’<sup>30</sup>

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<sup>25</sup> JJ DuPlessis et al Principles of Contemporary Corporate Governance (2005) 1 ed at 17

<sup>26</sup> OECD principles op cit note 19 at 36

<sup>27</sup> Agency conflicts relates to disputes that arise due to imbalance of power that characterizes corporate hierarchy

<sup>28</sup> JJ DuPlessis op cit note 25 at 29

<sup>29</sup> Adopted in South African corporate law through King III (the board of directors, in its collective decision-making, could conclude that to follow a recommendation would not, in the particular circumstances, be in the best interests of the company)

<sup>30</sup> Adopted in the United Kingdom Germany and the Netherlands (The European Combined Code on Corporate Governance (July 2003)) notes that while it is expected that listed companies will comply with the Code’s provisions most of the time, it is recognized that departure from the provisions of the Code may be justified in particular circumstances)

Soft law provides companies with flexibility and rejects the idea of ‘one size fits all’ to the principles of corporate governance. As noted by A Sridhar;

‘[t]he merits of such flexibility are thought to lie in its ability to encourage companies to adopt the spirit of the Code, rather than the letter of the law, whereas a more statutory regime would lead to a “box-ticking” approach that would fail to allow for sound deviations from the rule and would not foster investors’ trust.’<sup>31</sup>

### **2.5.1 OECD Principles of Corporate Governance**

When discussing the development of stakeholder inclusivity it is inevitable not to mention the principles laid out by OECD on the inclusion of stakeholders.<sup>32</sup> These principles have influenced the development of stakeholder inclusivity worldwide by providing a platform on how corporations can govern the relationships with its shareholders and various stakeholders. The OECD establishes the importance of protecting and regulating the interests of stakeholders. Although the principles are non-binding they have assisted corporations to shift from the traditional shareholder primacy model to the more stakeholder inclusive model to corporate governance. The OECD principles governing stakeholder relationships read:

- The rights of stakeholders that are established by law or through mutual agreements are to be respected;
- Where stakeholder interests are protected by law, stakeholders should have the opportunity to obtain effective redress for violation of their rights;
- Performance-enhancing mechanisms for employee participation should be permitted to develop;
- Where stakeholders participate in the corporate governance process, they should have access to relevant, sufficient and reliable information on a timely and regular basis;
- Stakeholders, including individual employees and their representative bodies, should be able to freely communicate their concerns about illegal or unethical practices to the board and their rights should not be compromised for doing this [and]

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<sup>31</sup> A Sridhar et al ‘Corporate Governance in the UK: Is the Comply-or-Explain Approach Working?’ (December 2005) Corporate Governance at LSE Discussion Paper Series at 1

<sup>32</sup> The principles of corporate governance laid out by the OECD have become a global benchmark for governing different issues relating to corporate governance. The principles are accepted in both OECD and non-OECD countries. Website available at: <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf>

- The corporate governance framework should be complemented by an effective, efficient insolvency framework and by effective enforcement of creditor rights.<sup>33</sup>

These principles provide a comprehensive guide to how corporations can ensure that stakeholder interests are not only recognized but also protected either through corporate governance models, general corporate law rules or by both.

The following section illustrates how these principles have been implemented in Australia, the United Kingdom and South Africa in corporate law and corporate governance codes.

### **2.5.2 Australia**

The Australian Government has provided corporations with guidelines to assist in the governing of stakeholder relationships. These guidelines have facilitated the transitioning of Australian corporate culture into a more stakeholder inclusive model of corporate governance.<sup>34</sup> There is greater acceptance [by] Australian companies of the view that organizations can create value by the better managing natural, human, social and other forms of capital and it is important for companies to demonstrate their commitment to appropriate corporate practices.<sup>35</sup> The Australian Stock Exchange (ASX) principles represent an attempt to develop a regulatory framework which promotes adherence to corporate governance best practice in response to a series of corporate collapses in the earlier part of this decade.<sup>36</sup> The ASX encourages companies to '[r]ecognize the legitimate interests of stakeholders – recognize legal and other obligations to all

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<sup>33</sup> OECD principles op cit note 19 at 21

<sup>34</sup> See JH Farrar 'Corporate Governance and the Judges' (2003) *BLR* 65 on the categorization of Australian corporate governance regulation- hard law, hybrid law and soft law. The hard law is Corporations Act 2001, hybrid law are the Australian Stock Exchange(ASX) rules - (ASX Corporate Governance Principles and Recommendations, ASX Accounting standards and ASX Auditing standards) and soft law relates to the purely voluntarily ie (no formal sanctions arises from non-compliance) codes and guidelines articulating benchmarks for what is considered best practice in corporate governance as well as scholarly and trade writings (in the form of books, reports and articles) that have some role in influencing companies to shape their internal arrangements and management to achieve best practice. (See further discussion on Australian regulation through soft law in JJ DuPlessis et al *Principles of Contemporary Principles of Corporate Governance* (2011) 2 ed 170)

<sup>35</sup> DuPlessis op cit note 25 at 10

<sup>36</sup> *Ibid* at 29

legitimate stakeholders<sup>37</sup> and listed companies should have a Code of Conduct that is aimed at addressing ‘matters relevant to the company’s compliance with its legal obligations to legitimate stakeholders.’<sup>38</sup>

Australian corporate law consists of a large pool of guidelines to ensure the protection of various stakeholders’ interests in companies. These developments in Australian corporate governance have ensured a more prominent place for stakeholders in contemporary corporate governance, particularly in relation to listed companies.<sup>39</sup> Companies are committed to protecting both the interests of shareholders and stakeholders. An example of an Australian listed company that has implemented the several guidelines on governance of stakeholder relationships is Telstra Corporation Limited, a leading telecommunications company. Telstra’s Code of Conduct is useful in highlighting the expected relationships between the corporation and its employees in (one stakeholder), and what is expected by Telstra employees in engaging other stakeholders to uphold and respect their rights.<sup>40</sup>

The success of companies such as Telstra in the inclusion of stakeholders, illustrates how companies have responded to the Australian government’s positive attempt at providing guidelines for the governing of stakeholder relationships and its determination to revolutionize local corporate culture. It is important to note that, as is the case in most jurisdictions, the additional protection of stakeholder interests in Australian corporate culture extends to the wider scope of different legislation.<sup>41</sup> In addition to corporations being bound by corporate law and corporate governance principles, corporations are entitled to ensure that separate legal obligations on the protection of stakeholder interests are obliged with. The ASX guidelines acknowledge that;

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<sup>37</sup> Australian Stock Exchange (ASX) Principles of Good Corporate Governance and Best Practice Recommendations (March 2003) available at <http://www.asx.com.au/documents/asx-compliance/principles-and-recommendations-march-2003.pdf> at 11 (Herein referred to as ASX principles)

<sup>38</sup> *Ibid* at 59

<sup>39</sup> DuPlessis op cit note 25 at 36 Australian corporate governance principles have evolved greatly in the twenty-first century and modern guidelines have been afforded to both listed and non-listed companies

<sup>40</sup> See Telstra Group Code of Conduct and Business Principle available at [http://www.telstraglobal.com/attachments/article/440/934\\_Telstra\\_Group\\_Code\\_Of\\_Conduct\\_Business\\_Principles\[1\].pdf](http://www.telstraglobal.com/attachments/article/440/934_Telstra_Group_Code_Of_Conduct_Business_Principles[1].pdf)

<sup>41</sup> Environmental interests protection is provided for in the Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act) employee interests are protected through several national and provincial legislation eg the National Work 2009 and Queensland’s Health and Safety Act 2011 (QLD)

‘[m]ost companies are subject to a number of legal requirements that affect the way business is conducted. These include trade practices and fair dealing laws, consumer protection, respect for privacy, ... In several areas, directors and officers are held personally responsible for corporate behaviour inconsistent with these requirements, and penalties can be severe.’<sup>42</sup>

### 2.5.3 The UK

Unlike Australia, stakeholder relationships in the UK are governed more extensively by corporate law, the English Companies Act of 2006. Traditionally, the primary duty of the directors in the UK was to protect the interests of their shareholders and no specific duty was imposed for the recognition of stakeholder interests beyond s 309 of the English Companies Act of 1985. The provision was limited to protection of employee interests,<sup>43</sup> the only formal recognition was given to stakeholders in the 1985 Companies Act. However, the English Companies Act of 2006 through s 172 governs the protection of various stakeholder interests through enlightened shareholder value approach. It is stated that;

‘[t]he primary role of directors should be to promote the success of the company for the benefit of its shareholders as a whole, but that they should also recognize, as the circumstances require, the company's need to foster relationships with other stakeholders, its need to maintain its business reputation and its need to consider the impact of its operations on the community and the environment.’<sup>44</sup>

Under the new framework, the primary goal of directors is to promote the success of the company in the collective best interests of the shareholders - however directors must take into account, where circumstances so require, non-shareholder interests when considering, in good faith, what will best promote the success of the company.<sup>45</sup> The Act specifies on the protection of ‘... the interests of the company’s employees and [the] need

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<sup>42</sup> DuPlessis op cit note 25 at 36

<sup>43</sup> s 309(1) of Companies Act 1985 ch 6 which reads: [t]he matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its members

<sup>44</sup> Company Law Review Steering Group: Modern Company Law for a Modern Company Law for a Competitive Economy: Final Report paragraph 3.8 Available at [www.dti.gov.uk/bbf/co-act-2006/cir-review/page22794.html](http://www.dti.gov.uk/bbf/co-act-2006/cir-review/page22794.html)

<sup>45</sup> L Miles ‘Company Stakeholders: Their Position Under the New Framework’ (January/February 2003) Amicus Curiae Issue 45 at 12 Available at <http://sas-space.sas.ac.uk/3507/1/1264-1320-1-SM.pdf>

to foster the company's business relationships with suppliers, customers and others.<sup>46</sup> This however does not mean that the interests of stakeholders hold an independent value over those of a company's shareholders but rather that the Act identifies the importance of maintaining stakeholder relationships. This goes to prove that the corporate culture in the UK has evolved with the recognition of different groups of stakeholders and the governing of stakeholder relationships has become of paramount importance in the success of businesses.<sup>47</sup>

#### **2.5.4 South Africa**

In South Africa both corporate law and corporate governance principles govern various stakeholder relationships. The development of stakeholder inclusive principles can be tracked through the King Reports I, II, III up to the newly adopted Companies Act 71 of 2008. The governance of stakeholder relationships in South Africa has shifted from being governed by a single bottom line approach<sup>48</sup> to a triple bottom line approach.<sup>49</sup> The importance placed on stakeholder inclusivity in the successive King Reports emerged from the recognition that both diversity across all levels of an organization and broad consideration of all the company's relevant stakeholders is not only the businesses' responsibility to society, but an opportunity to become more attuned, informed and, ultimately successful.<sup>50</sup> The following section briefly discusses the development of stakeholder inclusivity through the King Reports and the newly adopted Companies Act and illustrates how corporations implement the inclusion of stakeholders in the South African corporate culture.

##### **2.5.4(i) King I to III**

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<sup>46</sup> s 172(1)(b) and (c) of Companies Act 2006

<sup>47</sup> See further E Lynch (2012), 'Section 172: a ground-breaking reform of director's duties, or the emperor's new clothes?' Comp. Law 33(7) 196-203 The author addresses the question as to whether the newly adopted s 172 provides an entirely stakeholder inclusive approach to the Act. Whether there is any substance to this provision, or does it merely make the law appear more inclusive when, in fact, there has been no reform at all?

<sup>48</sup> Single bottom line approach the approach of business focusing on generating profits for shareholders See Duplessis op cit note 28 at 51

<sup>49</sup> Triple bottom line or inclusive approach to governance means that the board should take into account the needs, interests and expectations of the stakeholders see King III at 2

<sup>50</sup> Schulschek op cit note 1 at 17

From the first King report in 1994, stakeholder engagement has become of utmost importance in South African corporate culture. With the increase in international commerce companies have become cautious in accounting for the interests of stakeholders. Mohamed Adam,<sup>51</sup> in his interview for the Corporate Governance Research Program acknowledged that;

‘[s]takeholder recognition was a critical driver [of] King I, it came around when there was recognition that stakeholders have a role to play in organizations and it must be one of the first sets of corporate governance principles around the world that started talking about stakeholders.’<sup>52</sup>

King I can be labelled as the game changer of corporate governance principles not only in South Africa but across the continent and around the world.<sup>53</sup>

Its [King I] principles went beyond the financial and regulatory aspects of corporate governance, advocating [for] an integrated approach to good governance in the interests of a wide range of stakeholders, having regard to the fundamental principles of good financial, social, ethical and environmental practices.<sup>54</sup>

King I has been described as a ‘revolutionary’ report as it provided a very clear and extensive explanation of how companies in South Africa should account for the interests of stakeholders, and articulating the benefits that such an ‘inclusive approach’ to governance could provide companies with.<sup>55</sup> In light of the extensive corporate failures of the early 2000s in the West, there was an immediate need to review King I to ensure that South African companies would not follow the same route. In 2002 King II was born which was built on the foundation laid out in King I. King II further ‘...

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<sup>51</sup> Mr Mohamed Adam was a member of the King Committee of 2012 and played a pivotal in the compilation of King III

<sup>52</sup> Schulschek op cit note 1 at 7

<sup>53</sup> In explaining the global influence of the King Reports, Professor King in a verbal communication with Schulschek op cit note 1 at 9 said, ‘[t]he fascinating thing was how the King Report literally went around the world. As an example, in 2001 I was asked by Kofi Anan to Chair the UN Committee on governance and the problems that had started arising out of the food for all scandal. Similarly, a Japanese professor told me: “Judge King, I have got a book for you. It is in Japanese but this is your work translated in Japanese in 1995. We have been teaching it in Japan since 1995.” I told the professor, “I am flattered, at which I am better known in Japan than I am in South Africa.” So that was quite assuming story, showing that the King Report really did go around the world. The King reports have sort of become a brand of corporate governance.’

<sup>54</sup> C Kneale *Corporate Governance in Southern Africa* (2012) at 225

<sup>55</sup> DuPlesis op cit note 25 at 38

accommodated [for] the interests of stakeholders by recognizing the importance of the relationship between an enterprise and the community in which it exists.<sup>56</sup>

#### **2.5.4(ii) Stakeholder Inclusivity in South Africa**

Currently stakeholder relationships in South African corporate law are governed by the principles of King III and the Companies Act 71 of 2008. King III adheres to the similar principles on stakeholder inclusion as those in King II ie the triple bottom line. Although King III advocates strongly for the inclusion of stakeholders, the interests of stakeholders and shareholders in South Africa corporate law are not pluralistic.<sup>57</sup> The stakeholder inclusivity defined by King III is a means to stimulate appropriate dialogue between the company and its stakeholders, which could enhance or restore stakeholder confidence, remove tensions, relieve pressure on company's reputation and align expectations, ideas and opinions on issues.<sup>58</sup> The shareholder does not have a predetermined place of precedence over the other stakeholders, but the interests of the shareholders or any other stakeholder may be afforded precedence based on what is believed to serve the best interest of the company.<sup>59</sup> The stakeholder inclusivity principles outlined in King III illustrate how South African corporate law is evolving from the traditional view of shareholder primacy, to a corporate culture that views the corporations as more of a web of relationships. The principles in King III are binding to an extent,<sup>60</sup> however generally companies have no specific obligation to adhere to the principles laid out in the Report.

Like King III, the Companies Act advocates for the inclusion and protection of various stakeholder interests. Scholars have labelled the Acts' principles on stakeholder

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<sup>56</sup> Schulschek op cit note 1 at 9

<sup>57</sup> The pluralistic approach to stakeholder inclusion holds that companies have a social responsibility to society and that shareholders are just one constituency among many and directors have a legal duty to balance the interests of shareholders and stakeholders, and must give independent value to the interests of stakeholders, whose interests are not subordinate to those of shareholders. See R Cassim 'Corporate Governance' in Cassim op cit note 17 at 449

<sup>58</sup> 'Draft Report on Governance for South Africa' (February 25<sup>th</sup> 2009) King Committee on Governance available at: <https://www.ru.ac.za/media/rhodesuniversity/content/erm/documents/xx.%20King%203%20-%20King%20Report.pdf> at 111

<sup>59</sup> King III op cite note 2 at 11

<sup>60</sup> The principles of King III are strictly binding to companies listed on the Johannesburg Stock Exchange (JSE) as they form part of the stock exchange listing requirements but remain voluntary for non-listed companies

inclusivity as an ‘enlightened shareholder value approach.’<sup>61</sup> The enlightened shareholder approach shares similar principles to those of stakeholder inclusivity laid out in King III. F Cassim defines the enlightened shareholder value approach as;

‘The interests of stakeholders, such as creditors, employees, customers, suppliers, the environment and the local community in which the company operates, are subordinate to shareholder interests. These interests may be taken into account only when it is in the best interest of the company itself. In the event of a clash between the interests of the shareholders and the interests of the stakeholder, it is the interests of the shareholders that must prevail.’<sup>62</sup>

Stakeholder inclusion is governed by a few sections within the Act of 2008; s 20(4) which establishes that trade unions have the right to institute proceedings to prevent the company from doing anything inconsistent with the Act; s 45(5) which allows trade unions to have access to financial statements for the purposes of initiating business rescue proceedings and must receive notice of any loan or financial assistance given to directors, prescribed officers or related or interrelated companies and perhaps one of the strongest messages the Act sends in support of stakeholder inclusivity is the establishment of social and ethics committees in s 72(4) and Regulation 43.<sup>63</sup> The Act acknowledges that the interests of various stakeholders are of paramount importance but on wider scale stakeholders in South African corporate law look to separate legislation, for the protection of their interests.<sup>64</sup> An example is that there is more protection for the employee- employer relationship in the Labour Relations Act<sup>65</sup>, Broad Based Black Economic Empowerment Act<sup>66</sup> and Employment Equity Act.<sup>67</sup> Of course this may well be appropriate and all stakeholder related matters could not realistically be governed by company law.

## 2.6 Summary

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<sup>61</sup> R Cassim et al ‘The Reform of Corporate Law in South Africa’ (2005) *International Company and Commercial Law Review* at 412

<sup>62</sup> FHI Cassim Introduction to the New Companies Act: General Overview of the Act ch 1 in Cassim op cit note 17 at 18

<sup>63</sup> ss 20(4), 45(5), s 72 and Reg 43 of Companies Act 71 of 2008

<sup>64</sup> Cassim op cit note 17 at 472

<sup>65</sup> Labour Relations Act No 66 of 1996 (including the amendments)

<sup>66</sup> Broad-Based Black Economic Empowerment Act No 53 of 2003

<sup>67</sup> Employment Equity Act No 55 of 1998

It is evident that corporate culture of the twenty-first century has evolved and stakeholder inclusivity now increasingly plays an important role in the success, growth and sustainability of companies. The inclusion of the interests of both shareholders and stakeholders has influenced positively the development of corporate culture nationally and internationally. However, in some jurisdictions such as South Africa and the UK, shareholders and stakeholders have not come to being regarded as equals in corporate culture but the move towards the inclusion of stakeholder interests is evident in these countries. Despite these important developments, shareholder primacy still forms the dominant part of the basis of the principles of modern corporate governance.

## CHAPTER THREE

### THE OPPRESSION REMEDY

#### 3.1 Introduction

Through the principle of stakeholder inclusivity, the interests of stakeholders are protected beyond corporate governance principles and legislation now anchors such protection. The oppression remedy is one such provision implemented in corporate legislation for the protection of various stakeholder interests and has generally altered the guiding principle in corporate decision-making ie the principle of majority rule.<sup>68</sup> The remedy was traditionally introduced into corporate law as means of ensuring that the interests of minority shareholders were not suppressed by majority shareholders ie to dilute the principle of majority rule. In Canada and South Africa the oppression remedy has extended beyond the protection of minority shareholder interests to the inclusion of other stakeholders. The new oppression remedy in South Africa, s 163 (the historical context of the section to be discussed later in this chapter), is similar in thrust to s 241 of the CBCA and s 232 of the Australian Corporations Act.<sup>69</sup> The Canadian oppression remedy however is broader and applies to various stakeholder relationships. Some Canadian scholars argue that the broadness of s 241 has resulted in the displacement of traditional remedies and are being replaced by the flexible and procedurally simple oppression action.<sup>70</sup> Section 241 of the CBCA has been labelled ‘... beyond question, the broadest, most comprehensive and most open-ended shareholder remedy in the common law world ... unprecedented in its scope.’<sup>71</sup> N Abbey notes that the Canadian oppression remedy;

‘...seeks to enforce fairness and equity, and is not limited to the enforcement of lawful conduct. The potential protection it offers corporate stakeholders is awesome.’<sup>72</sup> This was the description of the oppression remedy under s 241 of the CBCA: it is hoped

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<sup>68</sup> See traditional English case *Foss v Harbottle* [1843] 67 ER 189

<sup>69</sup> Corporation Act 2001 (Australian legislation)

<sup>70</sup> JA VanDuzer *The Law of Partnerships and Corporations* (2003) at 327 This argument is further discussed in chapter five

<sup>71</sup> SM Beck ‘Minority Shareholder Rights in the 1980’s’ in *Corporate Law in the 80s* (1982) at 312

<sup>72</sup>PH Dennis *Shareholders Remedies in Canada* (2009) at 17-1

that s 163 of the 2008 SA Companies Act is considered as awesome as s 241 of the CBCA when compared to its predecessors.<sup>73</sup>

This chapter will discuss the historical development, interpretation and application of s 163 in South African corporate law and compare it to s 241 of the CBCA. It is instructive to compare the Canadian experience described in the previous section with the South African experience to isolate important differences with implications on corporate culture. The discussion will focus on the two provisions' *locus standi*, the application of the remedy and how the remedy has played a role in the protection of various stakeholder interests in light of stakeholder inclusion.

### 3.2 The Oppression Remedy in Canada: An Overview

It is noted that in Canada the oppression remedy;

'...is not just a "shareholder remedy," the courts have exploited the broad discretion contained in the [CBCA] and the statutes modelled after it to include creditors, employees and even the corporation itself ... the oppression remedy represents an important enhancement in the position of creditors and other non-shareholder stakeholders seeking relief from corporate conduct'.<sup>74</sup>

The oppression provision in the CBCA reads;

'241. (1) A complainant may apply to a court for an order under this section;  
(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates;  
(a) any act or omission of the corporation or any of its affiliates effects a result;  
(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner; or  
(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of ....'<sup>75</sup>

Several provincial legislations have adopted an identical or similar oppression remedy to the rubric set out in the CBCA. An example is the oppression remedy set out in the Ontario Business Corporations Act. The relevant sections of the Act read;

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<sup>73</sup> NA Abbey, 'An Insightful Study of the Oppression Remedy under South African and Canadian Corporate Law' LLM (Western Ontario) (2012) at 93

<sup>74</sup> VanDuzer op cit note 70 at 330

<sup>75</sup> ss 241(1) and (2) of the CBCA

‘248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section;

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates;

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner, that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.’<sup>76</sup>

This dissertation will solely focus on the oppression remedy laid out in the federal legislation, the CBCA.

### 3.2.1 *Locus Standi*

The intention of the Dickerson Committee<sup>77</sup> in proposing the inclusion of the oppression remedy in the CBCA was the protection of minority shareholders in their capacities as shareholders, creditors, directors and officers,<sup>78</sup> but as foregoing survey cases make it clear, the categories of person who have standing as complaints to seek relief from the oppression remedy under s 238 of the CBCA, which uses the language recommended by the Dickerson committee are much broader.<sup>79</sup> The *locus standi* of s 241(1) is awarded to ‘a complainant.’ The term complainant is defined in s 238 of the CBCA as;

‘238(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates;

(b) a director or an officer or a former director or officer of a corporation or any of its affiliates;

(c) the Director; or

(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.’<sup>80</sup>

‘[Thus], the term “complainant” ... includes three [clearly defined] groups of corporate stakeholders. [The first group] includes registered holders and beneficial

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<sup>76</sup> ss248(1) and (2) of the CBCA

<sup>77</sup> The Dickerson Committee was a group of commercial lawyers scholars that advocated for the reform of Canadian corporate law in 1971 and influenced the birth of the CBCA of 1985

<sup>78</sup> RVW Dickerson et al ‘Proposals for a New Business Corporations Law for Canada’ (1971) available at [http://publications.gc.ca/collections/collection\\_2011/ic/RG35-1-1971-I-eng.pdf](http://publications.gc.ca/collections/collection_2011/ic/RG35-1-1971-I-eng.pdf) at164 (Herein referred to as the Dickerson Committee)

<sup>79</sup> B Cheffins ‘The Oppression Remedy in Corporate Law: The Canadian Experience’ 10 *JIL* 350 at 341

<sup>80</sup> s 238 of the CBCA

holders of corporate securities such as shares, bonds or debentures (“Group One”). [The second group] comprises of directors or officers of the corporation or its affiliates (“Group Two”). [The third group] is the basket clause made up of other persons whom the court finds to be “proper persons” to make an application (“Proper Persons”). Litigants falling within Group One and Two have standing in an oppression application as of right. However, those litigants falling outside those two groups must satisfy the court that standing should be afforded to them.’<sup>81</sup>

### 3.2.1(a) (i) Group One: Security Holders

Historically the oppression remedy was introduced into Canadian law in response to the recognition that the position of minority shareholders was unsatisfactory under Canadian corporate law.<sup>82</sup> The main reason for this was that the protection for minority shareholders under the common law was inadequate<sup>83</sup> and there was lack of viable judicial or statutory remedies.<sup>84</sup> The *locus standi* of the remedy has since developed beyond the protection of only majority and minority shareholder interests and grants generally all security holders’ *locus standi*, which includes certain categories of corporate creditors. As J Ziegel pointed out, ‘[i]t is obvious that the language of s 241(2) does not remotely reflect, a limited intention (for the remedy to be precisely for minority shareholders.)’<sup>85</sup> The *locus standi* of s 241 is thus widened to include the protection of the interests of a ‘beneficial owners, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates.’ The term ‘affiliate’<sup>86</sup> in s 238 has resulted in courts awarding *locus standi* to various stakeholders including; security holders that are directly or indirectly associated with a company: former shareholders<sup>87</sup> the minority shareholder of an affiliate,<sup>88</sup> shareholders who have invoked their appraisal rights in terms of s 190(11) of the CBCA,<sup>89</sup> applicants claiming a right to become security holders<sup>90</sup> and in

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<sup>81</sup> P Macdonald et al ‘Creditors’ use of the Oppression Remedy and the Mareva Injunction to Protect Corporate Assets’ at 2 Available at: [http://www.mcmillan.ca/Files/PMacdonald\\_Creditors\\_%20Use%20of%20the%20Oppression%20Remedy\\_0609.pdf](http://www.mcmillan.ca/Files/PMacdonald_Creditors_%20Use%20of%20the%20Oppression%20Remedy_0609.pdf)

<sup>82</sup> Dickerson Committee op cit note 78 at 160-62

<sup>83</sup> Cheffins op cit note 79 at 303

<sup>84</sup> *Ibid*

<sup>85</sup> JS Ziegel ‘Creditors as Corporate Stakeholders: The Quiet Revolution- An Anglo Canadian Perspective’<sup>43</sup> *UTLJ* at 527

<sup>86</sup> Affiliate is defined in s 1 of the CBCA as an affiliated body corporate within the meaning of subsection 2 See further s 1 subsection 2 of CBCA for further interpretation of company affiliate

<sup>87</sup> Cheffins op note 78 at 311

<sup>88</sup> *Moriaruty v Slater* [1989] 67 OR.(2d) 758 (HCJ)

<sup>89</sup> *Brant Investments Ltd v KeepRite Inc* [1987] 60 OR (2d) 737

some circumstance debt holders.<sup>91</sup> Although the remedy is wide and gives the courts unfettered discretion, it does not open the door to every disgruntled shareholder<sup>92</sup> or security holder eg certain debt holders.<sup>93</sup>

## (ii) Creditors

Until the introduction of the oppression remedy, a creditor was left with little recourse at common law.<sup>94</sup> The broad definition of ‘complainant’ in the CBCA now provides creditors with standing under s 241.<sup>95</sup> Section 238 awards creditors with the platform to seek relief from oppressive conduct either as security holders or as mere creditors. ‘Security’ is defined in s 2 of the CBCA as a share of any class or series of shares or a debt obligation of a corporation and includes a certificate evidencing such a share or debt obligation.<sup>96</sup> Any person, who is a holder of a security as defined in s 2 of the CBCA, is awarded *locus standi* to bring a claim of oppression under s 241. If a creditor is not a holder of any security such a bond or debentures (known as simple creditors, those who do not have access to the oppression remedy as a right),<sup>97</sup> the Act provides creditors with the platform to seek relief as ‘proper persons.’ In many creditor related cases under s 241, courts have been willing to recognise creditors, with the *locus standi* provided under the auspices of the oppression remedy.<sup>98</sup>

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<sup>90</sup> *Csak v Aumon* [1990] 69 DLR. (4<sup>th</sup>) 567 (Ont.HCJ)

<sup>91</sup> *Metropolitan Toronto Police Widows and Orphans Fund v Telus Communications Inc.* [2003] OJ No 128 (QL) (Sup Ct)

<sup>92</sup> See *Carrington Viyella v Taran* (Que SC 1983) (unreported); *Mason v Intercity Properties*, 37 BLR 6, 29 (Ont. CA 1987); *Bernard v Montgomery*, 36 BLR 257 261 (Sask. Q.B. 1987).

<sup>93</sup> Although debt holders have been awarded *locus standi* in certain instances ie in *Metropolitan Toronto Police Widows and Orphans Fund v Telus Communications Inc* [2003] OJ No 128 (QL) the court in *First Edmonton Place v. 315888 Alberta Ltd* [1988] 40 BLR 28 at 60-62 determined that an unpaid landlord was not a security holder and hence did not have standing as a ‘complainant’ under s 241 of the CBCA

<sup>94</sup> Macdonald op cit note 81 at 1

<sup>95</sup> H Sutherland et al *Company Law of Canada* (1993) 6<sup>th</sup> ed at 714

<sup>96</sup> s 2 of CBCA

<sup>97</sup> Macdonald op cit note 80 at 2

<sup>98</sup> See *Canada Opera Co v 670800 Ontario Inc* [1989] 69 OR (2D) 532 (HCJ) the court granted status to a creditor who had purchased a car, but not obtained possession, where the funds paid by the creditor had ‘gone south’ from the corporation to an associate of the controlling shareholder; *R v Sands Motor Hotel Ltd* [1984] 36 Sask R 45 (QB) the crown was given status as complainant on the basis of being a creditor under the Income Tax Act where the ability of the Crown to recover income taxes owed by a corporation was impaired by dividends the corporation had paid to shareholders as discussed in VanDuzer op cit note 70 at 338

Although the remedy has awarded the courts with a wide and unfettered discretion, the courts have limited the flexibility of the remedy in providing oppressed creditors with redress. In *Royal Trust Corp of Canada v Hordo* it was concluded that, ‘[t]he courts discretion should be used to give “complaint” status to a creditor where the creditors interests in the affairs of a corporation is too remote or where the complaints of a creditor have nothing to do with the circumstances giving rise to the debt or if the or if the creditor is not proceeding in good faith...’<sup>99</sup> It is evident that the oppression remedy may afford creditors access to an array of relief the availability of the remedy is contingent upon demonstrating to the court that the simple creditor is a ‘proper person’ to bring the claim.<sup>100</sup>

### **(b) Group Two: Directors and Officers**

Section 238 extends the *locus standi* of the remedy to include the protection of directors and officers.<sup>101</sup> This inclusion has provided a platform for directors and officers to challenge the imbalance of power within corporations and in some instances protect against unfair dismissal. R Merchant notes that;

‘[t]erminating any employee can have serious repercussions if not done correctly from a legal standpoint. Employers must recognize that terminating an employee who is also a shareholder of the corporation can be even more complex and that an oppression remedy is available to the employee/shareholder.’<sup>102</sup>

The wide scope of the remedy and decisions of Canadian courts have created precedent for employees to seek relief in instances where employment has been terminated in an oppressive manner.<sup>103</sup> By awarding protection to directors and officers

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<sup>99</sup> *Royal Trust Corp of Canada v Hordo* (1993), 10 B.L.R. (2d) 86 (Ontario General Division)

<sup>100</sup> Macdonald op cit note 81 at 18

<sup>101</sup> See s 2 of CBCA a ‘director’ is defined as ‘director’ means a person occupying the position of director by whatever name called and an officer is defined as an individual appointed as an ‘officer’ under s 121, the chairperson of the board of directors, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager, a managing director, of a corporation, or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices; This group of applicants are awarded *locus standi* under s 241 as a right.

<sup>102</sup> R Merchant ‘The Oppression Remedy: Can it be used by a terminated employee who is also a shareholder?’ (October 2014) [https://www.mcleod-law.com/sites/default/files/pdfs/McLeod%20Law%20LLP\\_Employment%20Law%20Update\\_Oppression%20Remedy\\_Oct%202014.pdf](https://www.mcleod-law.com/sites/default/files/pdfs/McLeod%20Law%20LLP_Employment%20Law%20Update_Oppression%20Remedy_Oct%202014.pdf) at 1

<sup>103</sup> The leading case in which a shareholding employee was granted standing is in *Nanef v Con-Crete Holdings Ltd* [1993] 11 BLR (2d) 218 (Ont Gen Div) in which the trial court held that although ‘[i]n

Canadian courts have set precedent for the redress in oppressive conduct that results from the breach of the employee - employer relationships. The remedy focuses, ‘... on [providing redress for] harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors.’<sup>104</sup>

### (c) Group Three: ‘Proper Persons’

The use of the words ‘proper person’ in s 238(d) further illustrates the wide and unfettered discretion given to the courts through s 241. The term ‘proper persons’ provides the remedy with flexibility to grant any other ‘complainant’ not awarded the right to redress by s 238(a) to (c) with *locus standi*. The flexibility of the term ‘proper persons’ is validated by the courts. The Canadian courts continue to grant *locus standi* to simple creditors and to other non-shareholding stakeholders. Case law illustrates that simple creditors and employees have benefitted greatly from the discretionary freedom given to the courts by ss 241 and 238. The wide discretion given to the courts by the term ‘proper person’ provides non- shareholding stakeholders the opportunity to ensure seek redress from oppressive conduct under s 241. In certain instances the courts have granted *locus standi* under s 241 to the corporation, to seek relief from oppressive conduct.<sup>105</sup> It is important to note that to date s 241 is yet to be granted to a wider audience of stakeholders such as customers, suppliers and the environment. However with ‘[t]he dominant viewpoint of Canadian judges that the oppression remedy should be interpreted broadly,’<sup>106</sup> it is only a matter of time before the remedy’s *locus standi* widens further providing redress to a wider range of stakeholders.

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normal circumstances, the wrongful dismissal of an employee would not of itself provide the basis or standing to make an oppression remedy claim, in this case the dismissal was part of an overall pattern of oppression which the dismissal formed a part, thereby bringing conduct within the scope of the oppression remedy will be different from relief normally available in cases of wrongful dismissal’ and see also *Murphy v. Phillips* (1993) 12 BLR (2d) 58 (Ont Gen Div) the complainant was a non-shareholding employee and was granted standing to pursue a wrongful dismissal

<sup>104</sup> *BCE Inc. v. 1976 Debentureholders* [2008] 3 S.C.R 560, 2008 S.C.C 69 A landmark decisions in Canadian corporate law that established that directors owe fiduciary duties to a wide range of stakeholders and directors may need to assess various interests when exercising their business judgment.

<sup>105</sup> The corporation was granted *locus standi* in two provincial decisions in which the court concluded have held that the corporation itself may be a complainant; See *Calmont Leasing Ltd. v Kredl* (1993) 142 AR 81 at 105 and *Gainers Inc. v. Pocklington* (1992) 132 AR 35 at 65-66

<sup>106</sup> This is the view of Judges in the application of the oppression remedy: *Sparling v. Javelin Int'l Ltd.*, [1986] R.J.Q. 1073, 1077-78; *Mason v. Intercity Properties*, 37 B.L.R. 6, 12, 29 (Ont. C.A. 1987); *Re*

### 3.3 The South African Oppression Remedy

#### 3.3.1 *Locus Standi* in 1926

Prior to the introduction of the oppression remedy in South African corporate law, the remedy awarded to a complaint seeking for relief from oppressive conduct was to ultimately wind up the company. The courts in *Elder v Elder & Watson Ltd* described this remedy as ‘a cure that would be worse than the disease,’<sup>107</sup> ie the remedy was rather extreme. The oppression remedy was first introduced into South African corporate culture in the Companies Act of 1926 in s 111*bis* - it was introduced as an alternative to the winding up the company. Section 111*bis* of the Act reads;

‘111*bis* (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the member (including himself), may make an application to the Court...’<sup>108</sup>

The wording of the remedy in the Act of 1926 makes it clear that the provision could only be used by members of the company if they were jeopardized in their capacity as members.<sup>109</sup> The member could not utilize the provision of the section if he was affected for example in his capacity as a director, creditor or any other capacity.<sup>110</sup> And who were the members of a corporation? According to s 24 of the 1926 Act a ‘member’ was;

‘24.(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and upon its registration shall be entered as members in its register of members;

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*Ferguson and Imax Systems Corp* 43 OR2d 128 137 (Ont CA 1983); *Chrysler Canada Ltd. v Richmond Plymouth* (BCSC 1988)(unreported); *Re Peterson v Kanata Investments Ltd* 60 DL3d 527, 542 (B.C.S.C. 1975); *Re Bury*, 12 DLR4th 451 453 (Ont HC.1985); *Re Abraham and Inter Wide Invs Ltd*. 20 DLR.4th 267 275 (Ont.HC)

<sup>107</sup> *Elder v Elder & Watson* [1952] SC 49

<sup>108</sup> s 111*bis* (1) of Companies Act 46 of 1926

<sup>109</sup> A Sibanda ‘The Statutory Remedy for Unfair Prejudice in South African Company Law’(2013) *JJS* 38(2) at 60

<sup>110</sup> *Aspeck Pipe v Mauer Berger* 1968 (1) SA 517 (C):525

(2) Every person who agrees to become a member of a company and whose name is entered in its register shall be a member of the company.’<sup>111</sup>

It is clear that s 111*bis* was introduced into South African corporate law to continue to serve and protect member interests ie the interests of shareholders. Sibanda argues that;

‘... under the Act of 1926 oppressive conduct pointed to a situation where the majority shareholders used their voting power unfairly in order to prejudice their minority counterparts or where they acted in a manner that made fair participation in the affairs of the company by minority members impossible<sup>112</sup> - the disputed conduct was supposed to involve an element of wrongfulness that prejudiced the minority.’<sup>113</sup>

Case law affirms this stance, in *Elder v Elder & Watson* the court emphasized that the oppression remedy was applied in cases where conduct involved a visible departure from the definitions of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to.<sup>114</sup> It is important to note that the Companies Act of 1926 was implemented in an era where shareholder primacy was the governing principle of corporate governance, therefore it is only to be expected that the remedy established in s 111*bis*, ‘... involved [the] balancing of different rights and conflicting interests pertaining to majority and minority members respectively namely the exercise of majority voting power as opposed to the minority members’ right to fairly participate in the affairs of the company.’<sup>115</sup>

The oppression remedy in South Africa was adopted to provide a platform for the relief of shareholders in companies, and this continues to be an underlying principle of the remedy throughout its development in the national corporate law. Section 111*bis* provided a platform for the members of a company to bring a complaint against oppressive conduct and gave the court a wide discretion in s 111*bis* (2), ‘... with a view to bringing to an end the matters complained of, [and] make such an order as it thinks fit’.<sup>116</sup> It is evident that s 111*bis* was a remedy for shareholders alone.

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<sup>111</sup> s 24(1) and (2) of Companies Act 46 of 1926

<sup>112</sup> Sibanda op cit note 109 at 62

<sup>113</sup> *Ibid* at 62

<sup>114</sup> *Supra* at 102 par 60

<sup>115</sup> Sibanda op cit note 108 at 63

<sup>116</sup> s 111*bis*(2) of Companies Act 46 of 1926

### 3.2.2 *Locus Standi* in 1973

The relevant sections of oppression remedy of 1973 read as follows;

‘252 (1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may subject to the provisions of subsection (2), make an application to the Court for an order under this section.’<sup>117</sup>

The *locus standi* of s 252 was awarded to ‘any member.’ A member was defined in section 103 of the Act as;

‘(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of a company upon its incorporation, and shall forthwith be entered as members in its register of members; and

(2) Every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company.’<sup>118</sup>

Like s 111*bis*, s 252 continued to provide *locus standi* of the oppression remedy to a ‘member.’ This illustrates that the oppression remedy in the Act of 1973 continued to be a platform for the protection of shareholder interests. The prerequisite of *locus standi* under s 252 included subscription and registration to the memorandum of the company and in order for an applicant to be awarded *locus standi* the prerequisites of membership laid out in s 103 had to be fulfilled.<sup>119</sup> Any complaint who was not a subscriber of the company’s memorandum or had not agreed to become a member or whose name was not entered in the register of members regardless of the act in question meeting the ‘unfairly prejudicial, unjust or inequitable’ test had no standing under the provision. This was discussed further in the landmark case, *Barnard v Carl Greaves Brokers (Pty) Ltd*, where the court concluded that;

‘...it is competent for a shareholder who has not obtained registration of his membership of the company because of opposition or lack of co-operation by the company or his fellow shareholders, but is entitled to such registration, to apply in the

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<sup>117</sup> s 252(1) of Companies Act 61 of 1973

<sup>118</sup> s 103(1) and (2) of Companies Act 61 of 1973

<sup>119</sup> See *Lourenco v Ferela* [1998] (3) SA 281 (T) discussion the *locus standi* of s 252 any person who is appointed as the executor, administrator, trustee, curator or guardian of a member’s estate and whose name has been entered in the register as a *nomine officii* will also be deemed to be a member of the company ... a person who is entitled to a share or in whom a share has vested in a representative capacity, but whose name is not entered in the register of members, will not have *locus standi* to bring an application under s 252 at 249

same proceedings for an order directing his enrolment on the register of members and, in anticipation of the grant of such an order, as a member for relief in terms of s 252...'<sup>120</sup>

The oppression remedy in the Act of 1973 remained a platform to protect the interests of shareholders and non-shareholding stakeholders continued to have no standing under the provision. Like the Canadian oppression remedy, the 1973 oppression provision on paper did not provide much guidance in certain instances and courts had to look to common law ie precedent set in s 111*bis*, for the further interpretation of the remedy. Section 252 provided a;

‘... wider ground [that] gives courts a greater measure of discretion than the common-law remedy, the likelihood is that discontented minority shareholders will resort to the former than the latter but that courts will continue to look to common law cases as providing some guidance as to the circumstances in which relief ought to be granted.’<sup>121</sup>

This contributed to the continuance of the oppression remedy being a shareholder remedy as case law demonstrates that the conduct under the remedy in s 252 had to constitute an exception to the rule outlined in the case of *Foss v Harbottle*, particularly the ability of majority to bind the minority,<sup>122</sup> in order to fall within the ambit of s 252. The purpose of the section remained to afford equitable relief to any members of a company who have a legitimate complaint of any act or omission by the company or of the conducting of its affairs which is prejudicial, unjust or inequitable towards them.<sup>123</sup>

The section was predominately used in cases that involved the abuse of power by majority shareholders against the interests of minority shareholders.<sup>124</sup> With the narrow approach and interpretation of the oppression remedy, s 252 did not make provision for an action by directors, employees or creditors who were not members of the company at the time of the application<sup>125</sup> - the provision could only be used by a person who was prejudiced in his capacity as a member of the company.<sup>126</sup> The application of the

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<sup>120</sup> *Barnard v Carl Greaves Brokers (Pty) Ltd* [2008] 2 All SA 272 (C); 2008 (3) SA 663 (C)

<sup>121</sup> PA Delport et al *Hahlo's South African Company Law Through Cases: A Source Book* (1999) at 539

<sup>122</sup> Sibanda op cit note 109 at 64

<sup>123</sup> The purpose of s 252 is discussed in these cases among others, *Lourenco and Others v Ferela Ltd* (No 1) 1998 (3)SA 281 (T); *Ben-Tovim v Ben: Tovim* 2001 (3) SA 1074 (C)

<sup>124</sup> See *Garden Province Investment v Aleph (Pty) Ltd* [1979] (2) SA as discussed in Sibanda op cit note 109 at 68 the remedies major advantage was that it put the conduct of majority members under the strict scrutiny of other members instead of being overshadowed by the mere fact that the will of the majority always prevailed and see also *Samuel v. President Brand Gold Mining Co Ltd* [1969] (3) SA 629 (A)

<sup>125</sup> See discussion in *Exparte Avondon Trust (Edms) Bpk* 1968 (1) SA 340 (T):342

<sup>126</sup> Sibanda op cit note 109 at 65

oppression remedy from 1926 to 1973 South African corporate law was solely built on the protection on shareholder interests in accordance with shareholder primacy as a model of corporate governance.<sup>127</sup>

### 3.2.3 *Locus Standi* in 2008

The oppression remedy in the Act of 2008 and was adopted into South African corporate law at a time when;

‘...both the domestic and global environment [had] changed dramatically. Many of the traditional company law doctrines and concepts inherited from the 19<sup>th</sup> century England have been abandoned or substantially modified. New corporate law concepts have been developed such as solvency and liquidity, new higher standards of corporate governance, new standards of accountability, disclosure and transparency ... The underpinning principle is that legislation that has outlived its usefulness and that is stifling the development of the economy must be repealed.’<sup>128</sup>

As discussed, traditionally the oppression remedy operated as a mechanism for the protection of minority shareholders<sup>129</sup>- the remedy has developed beyond this under s 163. The oppression remedy now reads as follows;

‘163. (1) A shareholder or a director of a company may apply to court for relief if

- (a) any act or omission of the company, or a related person has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant;
- (b) the business of the company, or a related person is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant or
- (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.’<sup>130</sup>

The scope of s 252(1) of the 1973 Act has been considerably widened by s 163(1), as history has proved s 252(1) to be ineffectual due to its scope being too narrow and its

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<sup>127</sup> As discussed by Sibanada op cit note 108 at 64 case law on s 111*bis*1 and s 252 although adjudicated under different legislation the courts advocated for the ‘narrow’ definition of oppression within the context of instances where majority shareholders used their voting power to unfairly prejudice their minority counterparts other conduct that unfairly disregarded the interests of shareholders was likely to be rejected as oppressive

<sup>128</sup> Cassim op cit note 17 at 3

<sup>129</sup> *Ibid* at 683

<sup>130</sup> s 163(1) of Companies Act 71 of 2008

requirements being too stringent.<sup>131</sup> Section 163 has in some way attempted to fill the gaps and weakness of the oppression provision that arose from the application of the remedy under ss 111*bis* and 252. The significant changes made to the oppression remedy are that it has widened the *locus standi*, widened its scope and provided the courts with a list of non-exhausted remedies that are available to complainants. Section 163 now provides relief for applicants other than shareholders ie the *locus standi* extends to directors and the shareholders and directors of ‘related persons.’

### **(a) Directors**

Prior to the Act of 2008 directors were not offered redress through the oppressive remedy. However, the remedy has been widened to include the protection of directors’ interests. Directors are the only stakeholders awarded *locus standi* under this provision- ‘...not creditors or employees.’<sup>132</sup> A director is defined in s 1 of the Act as, ‘a member of the board of a company as contemplated in section 66, or an alternative director of a company and includes any person occupying the position of a director or alternate director by whatever name designated.’<sup>133</sup>

Section 66 provides a further definition of what constitutes a director in the Act. The relevant portions of section 66 provides as follows;

- ‘66. (4) A company’s Memorandum of Incorporation-
- (a) may provide for-
    - (i) ...
    - (ii) a person to be an ex officio director of the company as a consequence of that person holding some other office, title, designation or similar status, subject to subsection (5)(a);or
    - (iii) ...
  - (5) A person contemplated in subsection (4)(a)(ii)-
    - (a) may not serve or continue to serve as an ex officio director of a company, despite holding the relevant office, title, designation or similar status, if that person is or becomes ineligible or disqualified in terms of section 69; and
    - (b) who holds office or acts in the capacity of an ex officio director of a company has all the-
      - (i) powers and functions of any other director of the company, except to the extent that the

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<sup>131</sup> C Stein et al *New Companies Act Unlocked: A Practical Guide* (2011) at 367

<sup>132</sup> Cassim op cit note 17 at 681

<sup>133</sup> s 1 of Companies Act 71 of 2008

company's Memorandum of Incorporation restricts the powers, functions or duties of an ex officio director; and  
(ii) duties, and is subject to all of the liabilities, of any other director of the company.  
(7) A person becomes a director of a company when that person-  
(a) has been appointed or elected in accordance with this Part, or holds an office, title, designation or similar status entitling that person to be an ex officio director of the company subject to section (5) (a) and  
(b) has delivered to the company a written consent to serve as its director.<sup>134</sup>

Section 163 grants *locus standi* to generally all directors including alternative and de facto directors. The extension of the *locus standi* in s 163, to not only protect shareholder relationships but extend to protecting the relationship that exists between directors, shareholders and the company is a significant extension of the ambit of oppression remedy. In most instances directors do not hold similar financial interest in the company like that of shareholders - the accommodation of directors in the scope of s 163 caters for a quasi-partnership where members occupy management positions and receive their investment returns in the company through remuneration.<sup>135</sup> The principle of quasi-partnership is defined as;

‘...some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up.’<sup>136</sup>

The remuneration received by directors is but one example of the fact that directors may often have similar interests to shareholders vested interested in the company which calls for protection through s 163. Section 163 provides directors with a platform to contest oppressive conduct from the breach of quasi-partnership. Traditionally in company law minority shareholders were regarded as the most vulnerable stakeholders affected by the abuse of power from majority shareholders hence the introduction of the oppression remedy. However, the development of corporate law has shown that various

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<sup>134</sup> s 66(4), (5) and (7) Companies Act 71 of 2008

<sup>135</sup> Sibanda op cit note 109 at 71

<sup>136</sup> See *Apco Africa (Pty) Ltd v Apco Worldwide Inc* 2008 (5) SA 615 (SCA)

interests are in need of protection from the abuse of power within companies. The extension of the *locus standi* to include directors is evidence of the revolution of company law and s 163 seeks to protect directors from the abuse of power. The inclusion of directors in s 163 is in accordance with the aims of the Act ie to reaffirm the concept of the company as a means of achieving economic and social benefits<sup>137</sup> and balance the rights and obligations of shareholders and directors within the companies.<sup>138</sup> Although directors have been awarded *locus standi* under s 163 the conduct complained of needs to have affected him (or her) in such capacity as a director, and not for instance as a creditor.<sup>139</sup> Case law is still to develop further on the interpretation and application of s 163 as a remedy for oppressive conduct for directors.

### **(b) Shareholders**

Like its predecessor, s 163 continues to award *locus standi* to shareholders. A shareholder is defined in s 1 as a ‘... holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register as the case may be.’<sup>140</sup> The term ‘certificated securities register’ is not defined in the definition section of the Act but one would assume it to mean the opposite of ‘uncertificated securities register.’ An uncertificated securities register is defined as, ‘... the record of uncertificated securities administered and maintained by a participant or central securities depository, as determined in accordance with the rules of a central securities depository, and which forms part of the relevant company’s securities register established and maintained....’<sup>141</sup> Thus, the *locus standi* of shareholders extends to shareholders entered in either certificated or uncertificated securities register. The registration of shareholding continues to be a pivotal pre-requisite for shareholder applicants under s 163.<sup>142</sup> The *locus standi* of shareholders under s 163 is similar to that granted by its predecessors as, ‘... courts will continue to look to common law cases as providing some guidance as to the

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<sup>137</sup> s 7(d) of Companies Act 71 of 2008

<sup>138</sup> s 7(i) of Companies Act 71 of 2008

<sup>139</sup> Cassim op cit note 17 at 684

<sup>140</sup> s 1 of Companies Act 71 of 2008

<sup>141</sup> s 1 of Companies Act 71 of 2008

<sup>142</sup> Sibanda op cit note 109 at 71

circumstances in which relief ought to be granted,<sup>143</sup> Unlike s 241 of the CBCA that awards standing to generally all security holders,<sup>144</sup> beneficial owners of securities continue to lack standing under s 163.

Cassim *et al* argues that although beneficial security owners are denied standing under s 163, the wording of the section has widened to include the protection of shareholder and director interest<sup>145</sup> - which has been used as a useful illustration of the distinction between the rights and interests of shareholders.<sup>146</sup> Despite the expansion of s 163 most of the cases dealing with the oppression remedy are focused on conduct that will be oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the shareholder applicants although s 163(1) expressly provides that directors may also use the protection in terms of the provision.<sup>147</sup> It is evident that in South African corporate law the oppression remedy continues to be a provision that is used predominantly if not exclusively by shareholders to ensure the protection of their vested interests.

### **(c) Related Persons**

Section 163 has widened the *locus standi* of the remedy by granting *locus standi* to ‘related persons.’ The inclusion of actions by related parties and or a director of those related parties is a wide extension of the remedy in comparison to s 252 of 1973.<sup>148</sup> The inclusion of related persons recognizes the development and influence of commerce in South Africa’s economic growth. The term ‘related’ is defined in s 1 and, ‘...when used in respect of two persons, means persons who are connected to another in a manner contemplated in s 2(1) (a) to (c).’<sup>149</sup> A ‘related person’ is further defined to mean;

‘ (1) For all purposes of this Act-

(a) an individual is related to another individual if they-

(i) are married, or live together in a relationship similar to a marriage; or

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<sup>143</sup> PA Delpport *Henochsberg on the Companies Act 71 of 2008* (2014) at 569

<sup>144</sup> Cassim op cit note 17 at 682

<sup>145</sup> The unfair disregard of the ‘interests’ of the applicant did not previously form part of the oppression remedy – its explicit inclusion under the Act arguably indicates that even where the conduct complained of does not affect any rights of the applicant as derived for instance from the Act or the company’s Memorandum of Incorporation the applicant will still have *locus standi* if the applicants interests are affected. MF Cassim *Shareholder Remedies and Minority Protection* ch 16 in Cassim op cit note 16 at 685

<sup>146</sup> Sibanda op cit note 109 at 71

<sup>147</sup> Cassim op cit note 17 at 682

<sup>148</sup> Delpport op cit note 143 at 569

<sup>149</sup> s 1 of Companies Act 71 of 2008

- (ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity;
- (b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2); and
- (c) a juristic person is related to another juristic person if-
  - (i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);
  - (ii) either is a subsidiary of the other; or
  - (iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2).<sup>150</sup>

Section 163 provides a platform for applicants to seek relief from oppressive conduct in instances where the conduct is an effect of an entity directly or indirectly related to the company. The expansion of the remedy to include related persons confirms that an act by an individual authorized by the board, managing directors or prescribed officers whose powers may form the subject of s 163, including persons who despite not being directors of the company enjoy some degree of authority.<sup>151</sup> ‘[The definition of ‘related persons’ in s 2 illustrates that] one could qualify as an applicant [of s 163] if one is *inter alia* a shareholder or a director either of the relevant company or of a juristic person related to the company,’<sup>152</sup> in some instances may include individuals who directly or indirectly control the company<sup>153</sup> eg through marriage.

Courts have referred to other provisions aside from s 2 of the Act in order to determine the relatedness of separate entities. The court in *Peel v Hamon J & C Engineering (Pty) Ltd* (discussed in detail in following chapter) noted that looking to separate legislation for the further interpretation of ‘related persons,’ ‘... will always play an important role in considering the relief sought in terms of s 163.’<sup>154</sup> South African courts will look beyond the Companies Act in order to fully interpret the scope of the remedy – to avoid limiting it. The expansion of the *locus standi* of s 163 to include the conduct of ‘related persons’ is a positive move in South African corporate law - expressing that oppressive conduct resulting from acts or omissions of ‘related persons’

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<sup>150</sup> s 2(1) (a), (b) and (c) of Companies Act 71 Of 2008

<sup>151</sup> Cassim op cit note 17 at 684

<sup>152</sup> *Ibid*

<sup>153</sup> *Ibid*

<sup>154</sup> *Peel v Hamon J & C Engineering (Pty) Ltd* 2013 (2) SA 331 (GSJ) para 60- the Judge noted that the definitions of ‘related persons’ in s 75(1) (b) of the Companies Act and s 1 of the Co-operative Banks Act 40 of 2007 may be helpful in determining when an entity is related to another- case to be discussed in detail further

as grounds for relief under s 163 has addressed the weaknesses arising from its predecessors.<sup>155</sup> Cassim *et al* notes that;

‘The concept of a related person, as defined in s 2 of the Act, embraces a holding company and a subsidiary relationship, as well as direct or indirect control of company or its business(or the direct or indirect control) of each of them by a third person. The extension of *locus standi* to include shareholders (and directors) of related persons constitute a distinct improvement on the 1973 Act. Section 163 extension of the *locus standi* to include shareholders and directors of related persons constitutes a distinct improvement on the 1973 Act and it takes account of pertinent judicial decisions and issues that arose from time to time whether an applicant could complain of the conduct of the affairs of a subsidiary company thereby narrowing down the possibilities of the evasion of the section.’<sup>156</sup>

The expansion of s 163 now makes it clear that in appropriate cases, and provided that the other elements of the oppression remedy are satisfied, they indeed do so, allows an applicant to complain of the conduct of the affairs of a parent company.<sup>157</sup>

### 3.4 Summary

The Canadian oppression remedy and the South African oppression remedy share several similarities ie both award directors and shareholders *locus standi*, the test for oppressive conduct- (oppressive, unfairly prejudicial or unfairly disregards interests), holding juristic persons directly or indirectly related to the company accountable for oppressive and provide a list of non-exhaustive remedies. The broadness and flexibility that characterizes the oppression remedy in the CBCA and the application of the remedy by the Courts has created a platform for the inclusion of various stakeholders both shareholding and non-shareholding to seek redress from the remedy. As alluded to earlier, the Canadian oppression remedy is not limited to shareholders and directors as s 163, but is available to a wider group of potential applicants.<sup>158</sup> The use of the term ‘proper person’ has influenced the protection of a wider group of interests beyond those of the shareholders. The Canadian courts have been willing to grant *locus standi* to various groups that would not have had any status to seek relief under corporate law before the introduction of the oppression remedy ie former shareholders, persons with contractual claims to be issued

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<sup>155</sup> Cassim op cit note 17 at 691

<sup>156</sup> Cassim op cit note 17 at 684

<sup>157</sup> *Ibid*

<sup>158</sup> Delpont op cit note 143 at 569

shares, creditors, and dismissed employees.<sup>159</sup> This discretion given to the Courts has been described as, ‘... a grant to the Court of a broad power to do justice and equity in the circumstances of a particular case where a person who otherwise would not be a complainant ought to be permitted to bring an action ... to obtain compensation.’<sup>160</sup> As corporate law continues to develop there is a possibility that the oppression remedy in Canada will be used to protect the interests of various stakeholders beyond creditors and employees.

In South Africa, the oppression remedy has undergone significant evolution since 1926 with the expansion of the oppression remedy’s *locus standi* to include directors, the widened scope ie conduct that is either oppressive, unfair prejudicial or unfairly disregards and the non-exhaustive list of remedies. Unlike s 241 of the CBCA, the wording of s 163 expressly protects only the interests of those stakeholders that hold a vested interest in the operations of the company. With the wide discretion given to the courts in s 163, common law continues to play a significant role in the interpretation and application of s 163. It is not expressly required by [the South African remedy] that the interests of the applicant should be disregarded or affected in any particular capacity e.g. interests in their capacity as shareholder or director,<sup>161</sup> the interpretation of s 163 is greatly influenced by decisions adjudicated prior to s 163 in and the courts set precedent to that accord which will continue to apply. The subsequent chapter discusses the interpretation and application of s 163 by the courts to date. This discussion will disclose whether the South African oppression remedy has evolved to ensure the protection of various stakeholder interests.

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<sup>159</sup> VanDuzer op cit note 70 at 342

<sup>160</sup> *First Edmonton Place Ltd. V. 31588 Alberta Ltd.* (1989) 40 BLR 28 at 62

<sup>161</sup> Delpont op cit note 143 at 574(2)

## CHAPTER FOUR

### APPLICATION AND INTERPRETATION OF THE OPPRESSION REMEDY IN SOUTH AFRICA

#### 4.1 Introduction

As noted in the previous Chapter, the Canadian oppression remedy in s 241 of the CBCA provides a wide scope for the *locus standi* in Canadian corporate law. Canadian courts have exercised their discretion to further widen the *locus standi* of the remedy to open the remedies applicability to various stakeholders such as creditors and employees. It is noted that;

‘[t]he key aspect of the Canadian oppression remedy is its growth from the *Ebrahimi v Westbourne Galleries Ltd*<sup>162</sup> case, to a wide remedy that seeks to enforce reasonable expectations of shareholders - the enforcement of the reasonable expectations is only possible where there is a clear statute. A statute that provides for the clear legal rights of the individuals in a corporation is required.’<sup>163</sup>

The question is as to whether the newly adopted oppression remedy in the South African Companies Act provides a similar platform for the ‘clear legal rights of the individual in a corporation,’ as described by N Abbey. Section 163 of the South African Companies Act and s 241 of the CBCA are both broad in wording, but their application differs significantly. In order to illustrate this distinct difference in the interpretation and application of similar provisions, it is instructive to discuss a few cases that have been adjudicated under s 163. This will assist in determining whether South African courts have interpreted and applied the remedy in a way that has broadened the remedy or limited it. The Chapter discusses selected cases to illustrate the interpretation of the oppression remedy in the South African courts and juxtaposes this with the experience in Canada on the remedy. The rest of the Chapter will further confer on the expansion of s 163 and the role of the courts in the narrow interpretation of the remedy.

#### 4.2 Application and Interpretation of Section 163: Selected Cases

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<sup>162</sup> *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 is an English case on the rights of minority shareholders and the traditional principle of the winding up of a company

<sup>163</sup> Abbey op cit note 73 at 123

**(a) *Kudumane Investment Holdings Ltd. v. Northern Cape Manganese Company***<sup>164</sup>

This case involves a dispute arising between the shareholders of *Northern Cape Manganese Company (NCMC)*. *Kudumane* was a minority shareholder holding 49% interest in the company and *NWC Manganese (Propriety) Limited (NWC)* being the majority shareholder, holding 51% interest in the company. There had been infighting within the company and *Kudumane* claimed that the infighting and the pending litigation hampered the ability of *NCMC* to conduct the affairs for which it was constituted thereby prejudicing the commercial rationale for its existence.<sup>165</sup> As a result of the infighting, the status of directorship in the company had become uncertain and the minority *Kudumane* had brought a complaint under s 163.

*Kudumane* sought for the removal of all directors from the board except one of the director appointed by *NWC* and had asked the court to appoint a new board of directors all together until the issues in the company had been resolved. The court ruled in favour of *Kudumane* granting a temporary decision regarding the directorship of the company while the final outcome of the pending litigation was finalized. In addressing as to whether *Kudumane* as a minority shareholder in *NCMC* could bring a claim under s 163, judge Satchwell concluded that;

‘[i]n my view *Kudumane* has discharged the onus to prove the necessary *facta probanda*. I am satisfied that *Kudumane* has the *locus standi* to approach this court for relief in terms of s 163 of the Act. *Kudumane* is a minority shareholder. The actions of *NWC* in the Kimberley litigation has had a result that the affairs of *NCMC*, and hence of *Kudumane*, are being oppressed and unfairly prejudiced and unfairly disregarded.’<sup>166</sup>

The conclusion made by the court in this decision clarifies two significant points. Firstly, that like its predecessors, the oppression remedy under s 163, continues to be a remedy for shareholders and extends to both majority and minority shareholders- Judge Satchwell makes it clear that as long as the shareholder is a shareholder as defined in s 1 of the Act, the oppression remedy awards them with *locus standi*. Secondly, the case clarifies that relief is granted in instances where the applicants’ interests have been

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<sup>164</sup> *Kudumane Investment Holdings Ltd. v. Northern Cape Manganese Company & 2 others* 2012 SA (GSJ)

<sup>165</sup> *Supra* para 2

<sup>166</sup> *Supra* para 77

oppressed, unfairly prejudiced or unfairly disregarded. The court granted the minority shareholder *locus standi* under s 163 specifically in his capacity as a minority shareholder.

**(b) *Peel v Hamon J & C Engineering (Pty) Ltd***<sup>167</sup>

The decision of the court in *Peel* confirms the expansion of the *locus standi* of s 163 with the inclusion of directors and related persons. The case involved two shareholders seeking relief from oppression through s 163 in their capacity as shareholders and directors. The shareholders and directors of the company in question, Peel Senior, Peel Junior, Pandela Duduzile and Quari Gillian sought to end the company's corporate relationship with *Hamon SA* in the joint venture, *Hamon J & C Engineering*. The applicants argued that the sale and transfer of shares to two employees, in *Hamon SA* was to improve the employment status in terms of the Black Economic Employment Act 53 of 2003 and that the transaction was 'clearly was not a genuine transaction'<sup>168</sup>

The *locus standi* of the second applicant, Peel Senior, came into question as he was neither a director nor a shareholder of *Hamon J&C Engineering* at the time the relief was sought. Although Judge Moshidi dealt in detail with the interpretation of s 163, his analysis made it clear that the *locus standi* of s 163 in application does not extend to non-shareholders or non-directors. This meant that Peel Senior did not have standing under s 163 as he was neither a director nor shareholder in *Hamon J&C Engineering* as stipulated by the Act. Relief granted under s 163 relates to the conduct complained of affecting the applicant in their capacity as a director or shareholder. The honourable judge further elaborated on the relationship that exists between the conduct of related persons as defined by s 2 and s 163. The court reiterates what is noted by Jooste that, '... a proper construction to the words, "related and inter-related persons and control", as set out in s 2, will always play an important role in considering relief sought in terms of s 163.'<sup>169</sup>Beukes et al however point out that the fact related persons are awarded *locus standi* does not mean that the oppression remedy is available to applicants in

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<sup>167</sup> *Peel v Hamon J & C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ)

<sup>168</sup> *Supra* para 58

<sup>169</sup> R Jooste *The Comparative Guide to the old and new Companies Act* (2012), 1<sup>st</sup> Edition, Juta General Law Editors at 387-388

circumstances where the requirements of s 163(1) are not satisfied.<sup>170</sup> The court's broad discussions on the legal principles that surround s 163 have shed light on the *locus standi* of the section. The *locus standi* of the remedy has been widened to include shareholders, directors and related persons but it continues to protect the vested interests of parties in the company.

**(c) *Count Gotthard S.A. Pilati v. Witfontein Game Farm***<sup>171</sup>

The case involves a dispute that arose between the two shareholders of *Witfontein Game Farm*. The minority shareholder, with a 49% interest in the company, was the applicant seeking relief from the alleged oppressive conduct from the majority shareholder. In this case the minority shareholder was not granted relief under the oppression remedy not on the basis of his shareholding capacity but rather the Judge concluded that the acts or omissions of the majority shareholder in the case did not disregard the interest of the minority shareholder which is an essential requirement under s 163 in order to be granted relief. The decision of the Judge illustrates that s 163 gives the courts wide discretion in providing a platform for the protection of shareholder and director interests and rights. Section 163 remains a platform for the protection of minority shareholder interests and as stated by the Judge; '[h]uman dignity of a minority shareholder is enshrined in s 10 of the Constitution and is part and parcel of the *pacta sunt servanda principle*.'<sup>172</sup> Minority shareholders are to be held to the same regard as majority shareholders regardless of the financial interest in a company and the *locus standi* of s 163 reiterates that point. However the courts in applying s 163 will ensure that the conduct complained of falls within the strict scope of the remedy ie 'oppressive, unfairly prejudicial or unfairly disregards interests.' The precise question is whether the harm which the applicant has suffered is something he or she is entitled to be protected from.'<sup>173</sup>

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<sup>170</sup> HGJ Beukes et al 2014, *Peel v Hamon J & C Engineering (Pty) Ltd*: Ignoring the Result-Requirement of Section 163(1)(A) of the Companies Act and Extending the Oppression Remedy Beyond its Statutorily Intended Reach, PER Volume 17 No 4 page 1691-1708 Available at: <http://www.saflii.org/za/journals/PER/2014/49.pdf> at 1697

<sup>171</sup> *Count Gotthard S.A. Pilati v. Witfontein Game Farm and Others* [2013] ZAGPPHC 12

<sup>172</sup> *Supra* para 15.3

<sup>173</sup> *Ibid* para 17.5

The Judge concludes by quoting Cassim on the application of s 163, '[i]n all likelihood a judicial construction will be given (one hopes) to extend rather than to limit the remedy (following the approach under the previous regime).'<sup>174</sup> The decision made by the Court in this case illustrates that s 163 continues to be a remedy to provide shareholders both majority and minority with relief from oppressive conduct- but like its predecessor, the courts are leery to provide relief in instances where the oppressive act or omission affects the shareholder or director beyond their shareholding capacity.

**(d) *Visser Sitrus (Pty) Ltd v. Goede Hoop Sitrus (Pty) Ltd***<sup>175</sup>

In *Visser* the court clarifies that the relief offered to directors through the oppression remedy in s 163, goes hand in hand with the common law and statutory director duties. The case involved a dispute between *Goede Hoop Sitrus (GHS)* and *Visser Sitrus (VC)* in the approval of the transfer of shares. As such, *VC* sought to compel *GHS* to register the transfer by claiming relief in terms of s 163 of the Companies Act 71 of 2008 (the Act).<sup>176</sup> The court explains that although the Act gives the Courts a wide and unfettered discretion to provide relief from an act or omission that is either oppressive, unfairly prejudicial or unfairly disregards interests of the applicant, shareholders and directors should be weary not to abuse the remedy as a means to furnish personal interests. The honourable judge noted that,

'I can see that the court might more readily intervene in the case of conduct of shareholders because they are not subject to the same fiduciary constraints as directors and minority shareholders, thus do not have the same safeguards. Despite scattered statements in case law to the effect that shareholders must vote in what they bona fide consider to be the best interests of the company, shareholders may generally consult their own interests. They are not subject to the fiduciary duties of directors.'<sup>177</sup>

The court clarifies that in most instances directors do not hold a vested financial interest in the company but are affected by any outcomes within the company; therefore the protection of their interests from oppressive conduct is of paramount importance. Section 163 provides the platform for that protection of the interests and rights of

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<sup>174</sup> Cassim op cit note 17 at 692

<sup>175</sup> *Visser Sitrus (Pty) Ltd v. Goede Hoop Sitrus (Pty) Ltd* [2014] ZAWCHC 95

<sup>176</sup> *Supra* para 1

<sup>177</sup> *Supra* para 66

directors. The statutory and common law duties of directors such as, to act ‘in good faith and for a proper purpose; in the best interests of the company; and with the degree of care, skill and diligence ...’<sup>178</sup> continue to be held to a high standard and will be considered in providing relief to directors. The expansion of the oppression remedy has created a platform for protection of directors’ interests, which in many cases are non-financial interests, from oppressive conduct.

### 4.3 Analysis

A number of cases reveal that s 163 continues to be a platform to seek redress from oppressive conduct.<sup>179</sup> In these cases the courts have yet to award *locus standi* to claims arising in creditor, employee or supplier capacity. To date, courts have established the following principles on the interpretation of s 163;

‘... the fact that the Act provides for a new ground on which an applicant can rely, namely conduct that unfairly disregards the interests of the applicant; the fact that *locus standi* is extended to the directors of the company; the fact that relief can now be sought regarding the conduct of a person related to the company; as well as the fact that section 163 now contains a wide range of relief that the Court can grant.’<sup>180</sup>

#### 4.3.1 Widened Interpretation of s 163

##### (a) Court Remedies

Section 163 and case law award courts with a very wide discretion. Section 163 has not only expanded the *locus standi* of the remedy but the remedies in the second part of the oppression remedy, s 163(2), relates to the court’s discretion or judicial powers.<sup>181</sup> The remedy has been widened to provide the court with a non-exhaustive list of remedies that may be awarded to an applicant and the courts are empowered to make an orders ‘it considers fit’.<sup>182</sup> The section provides for seventeen different remedies that are available

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<sup>178</sup> s 76(3) of the Companies Act 71 of 2008

<sup>179</sup> To date the oppression remedy under s 163 has also been instituted in the following cases: *Louw v Nel* 2011 (2) SA 172(SCA), *Bayly v Knowles* 2010 (4) SA 548 (SCA), *Grancy Property Limited v Manala* (665/12) [2013] ZASCA 57

<sup>180</sup> *Supra* 66 para 53

<sup>181</sup> *Abbey* op cit note 73 at 116

<sup>182</sup> s 163(2) of Companies Act 71 of 2008

to an applicant which include but are not limited to: an order restraining the conduct complained of, an order appointing a liquidator, if the company appears to be insolvent and an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in s 131(4) (a) are proven or exist.<sup>183</sup> The section is far-reaching<sup>184</sup> and it may arguably introduce a new dimension to contracts, which must upon conclusion, also be tested against the criteria of oppressive and unfairly prejudicial conduct.<sup>185</sup> N Abbey suggests that the discretion given to the courts by s 163 is a, ‘[t]remendous latitude, the South African Courts have an opportunity to change the face of the South African corporate law forever, through the proper use of their powers - the responsibility they also have is to ensure that the cases that are applied are carefully considered.’<sup>186</sup> The non-exhaustive remedies provided for in s 163(2) will provide applicants with a larger poll of redress options and provides the courts with great flexibility in determining suitable relief in connection with the facts.

### **(b) Guidance from foreign jurisdictions**

In addition to the wide discretion provided to the courts through s 163(2), the Companies Act generally affords the courts with the latitude to consult foreign law in instances where the Act or common law does not provide significant clarity. This is provided for in s 5(2) of the Act which states that, ‘[t]o the extent appropriate, a court interpreting or applying this Act may consider foreign company law.’<sup>187</sup> The power to consider foreign law in the interpretation of the oppression remedy in s 163s’ predecessors did not exist. In interpreting s 163, courts have exercised the power [awarded] in s 5(2) in the interpretation and application of s 163, by referring to Canadian and Australian application of oppression remedy.<sup>188</sup> The court in *Peel* stated that, a proper construction

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<sup>183</sup> s 163(2)(a)-(c) of Companies Act 71 of 2008

<sup>184</sup> *Supra* 159 para 61

<sup>185</sup> Delpont op cit note 142 at 57

<sup>186</sup> Abbey op cit note 73 at 117

<sup>187</sup> s 5(2) of Companies Act 71 of 2008

<sup>188</sup> *Supra* 63 para 48-51

and interpretation of s 163 cannot be achieved lightly without reference to similar authorities in foreign jurisdictions.<sup>189</sup> Henochsberg seconds this thought and notes that;

‘[c]ourts may look to Canadian and Australian cases for guidelines in the interpretation of certain parts of s 163. It must be kept in mind, however that Canadian oppression remedy is not limited to shareholders and directors as s 163, but available to a wider group of potential applicants, in that s 238 of the CBCA includes security holders as a complainant who may access the remedy under s 241. Security holders may include certain categories of corporate creditors.’<sup>190</sup>

It is interesting to note that the interpretation of the ‘interests of members’<sup>191</sup> under the oppression remedy of the English Companies Act of 2006, which is referenced in several s 163 cases, encompasses a different approach to that inclusion of non-shareholders to bring claims under the provision. In the English Companies Act not only interests derived from membership are protected under the oppression remedy, although they must be reasonably connected to such.<sup>192</sup> South African courts have exercised the right in s 5(2) of the Act to further interpret and apply s 163 despite the differences that may exist within the provisions. This has assisted in providing further guidance and clarity on the application of the remedy and exploring its full potential. However the narrow interpretation of s 163 has hindered the flourishing and popularity of the remedy in comparison to the jurisdictions it was borrowed from.

### (c) *Locus standi*

As noted in the previous Chapter the oppression remedies in Canada, s 238 of the CBCA and other provincial corporation Acts, are worded to create a platform for various stakeholders to seek refuge from oppressive conduct. The flexibility of the *locus standi* of the Canadian oppression remedy has been praised by several scholars. One states that; ‘[t]his is a statute that is powerful and comprehensive and does provide a means for the righting of corporate wrongs despite the lack of majority- the remedies available are very

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<sup>189</sup> *Ibid* para 48

<sup>190</sup> Delpont op cit note 143 at 570

<sup>191</sup> Section 994(1)(a) of Companies Act 2006 c. 46 (English Companies Act - An Act to reform company law and restate the greater part of the enactments relating to companies; to make other provision relating to companies and other forms of business organisation; to make provision about directors' disqualification, business names, auditors and actuaries)

<sup>192</sup> *Gamlestaden Fastigheter AB v Baltic Partnership Ltd v* [2007] UKPC 26, [2007] Bus LR 1521.

flexible and far more dynamic and varied than the usual legal remedies.’<sup>193</sup> Although South Africa has adopted s 163 almost verbatim to s 241 of the CBCA and the courts have leaned on foreign case law and legislation to further interpret and apply s 163, the provision has not veered much in application from its predecessors. A careful consideration of the interpretation given by our courts to the provisions of s 252 of the old Companies Act and the provisions in s 163 of the new Companies Act- shows a continuing intention by the legislature to broaden relief in these provisions, rather than to limit them.<sup>194</sup> It can be concluded from legislation and the developing case law on the oppression remedy that in South African corporate law the oppression remedy is not a platform for stakeholders to seek redress from oppressive conduct. It is evidenced in the above case law that the remedy continues to follow the precedents set out in early cases such as *Elder* and in *Barnard*. Under s 163 courts have been urged to, ‘...consider case law on s 252 with great caution due to the difference in wording and also the approach to be adopted in terms of the new Act.’<sup>195</sup> It can be argued that the courts’ interpretation and application of s 163 in relation the sections’ predecessors, will continue to limit the *locus standi* of the remedy despite the wide discretion it awards the courts.

Cassim comments on the influence of the precedent set by s 111*bis* of 1926 and s 252 of 1973, he notes;

[a]lthough the remedy has developed over the years, like its predecessor the oppression provision will only apply if the oppressive conduct against the director or shareholder is within his capacity as a shareholder or a director. This principle is likely to continue to apply in view of the similarity of the wording of s 163 of the new Act to its predecessors, so that a shareholder-applicant may complain of oppressive or prejudicial conduct only where this affects the shareholder qua shareholder and a director –applicant only where he or she is affected qua director as opposed to oppression or prejudice in some other capacity for instance as a creditor or a tenant.’<sup>196</sup>

As noted earlier, the oppression remedy provisions are a necessary safeguard of the rights of the minority stakeholders in a company and the remedy is one of the most powerful weapons in the arsenal of shareholders and other corporate stakeholders.<sup>197</sup> The

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<sup>193</sup> IT Dantzer, ‘The Oppression Remedy’, (20 June 2013), Commercial Litigation Lens Available at: <http://lernercommerciallitigation.ca/blog/post/the-oppression-remedy>

<sup>194</sup> *Supra* 65 para 52-53

<sup>195</sup> *Ibid*

<sup>196</sup> Cassim op cit note 17 at 684

<sup>197</sup> Dantzer op cit note 191

only corporate stakeholders that s 163 awards *locus standi* are directors and shareholders which are specified by the Act. Although the remedy has widened to include the protection of the interests of directors and related persons, it is evident through case law that the remedy continues to be a platform within company law that ensures that only those who hold a significant interest in the outcome of the business are protected from any acts or omissions that are oppressive, unfairly prejudicial or unfairly disregards their interests. Court decisions have made it clear that although the s 163 is drafted similarly to s 241 of the CBCA, in South Africa the remedy has yet to develop beyond its applicability to various stakeholders. As argued in one of the first High Court judgments dealing with the interplay between s 163 and s 165 of the Companies Act 2008, the East London High Court held that s 163 of the Companies Act is designed to deal with internal strife amongst shareholders and/or directors of a company and is not designed to deal with the company's relationship with external parties.<sup>198</sup>

#### **4.4 The influence of the principles of majority rule and non-intervention on s 163**

The principles of majority rule and non-intervention rule continue to play a significant role in the interpretation and application of s 163. As observed earlier, South Africa has adopted a wide shareholders' remedy from the Canadian oppression remedy. However, its potentially wide remedy may be limited by application of majority rule.<sup>199</sup> As already noted in the cited cases,<sup>200</sup> the oppression remedy may provide a platform to bring a claim against oppressive conduct. However the courts continue to apply the long-standing principles of majority rule and the non-intervention when relating the remedy. The doctrine of majority rule is defined in South African case law as;

‘... becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they

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<sup>198</sup> *Larrett v Coega Development Corporation* Case No. EL 1139/2013

<sup>199</sup> *Abbey* op cit note 73 at 44

<sup>200</sup> *Louw v Nel* [2011] 2 S Afr L 172 (S Afr SC); *Hickman v Oban Investments* [2010] ZAGPJHC 9; *McMillan v Pott* [2011] 1 S Afr LR 511 (WCC); *Garden Province Investment v Aleph (Pty) Ltd* [1979] 2 Sfr LR 525, (D&C Local Div); *Donaldson Investments (Pty) Ltd v Anglo Transvaal Collieries* [1979] 3 S Afr L 713 (Wit Local Div).

adversely affect his own rights as a shareholder... that principle of the supremacy of the majority is essential to the proper functioning of companies.’<sup>201</sup>

And the principle of non-intervention or internal management is explained as follows;

‘...based on the premise that within the framework of the Companies Act, companies are self-governing republics in which the majority should be allowed to govern unhindered by outside interference. From this follows two basic rules: the ‘Non-Intervention’ Rule and the ‘Proper Plaintiff’ rule, both are subject to common law and statutory exceptions.’<sup>202</sup>

The principles of majority rule and non-intervention continue to play a pivotal role in decisions made by the courts as to the power of shareholders and directors. Case law notes that despite the unfairness that may exist because it is [the act or omission] a consequence of being a shareholder the courts will often adhere to the majority rule.<sup>203</sup> This has further limited the influence of the remedy and weakened the effectiveness of s 163 in that;

‘[i]f the majority shareholders conduct themselves in a manner that may harm the company, the harm may not be seen as unfairly prejudicial to the minority shareholder-the majority may simply decide to allow the harmful conduct, the harm done to the company is harm done to the shareholders and if a minority shareholder disagrees then it is merely a consequence of being a shareholder.’<sup>204</sup>

This not only limits the scope for directors and shareholders but limits the ability to bring an oppressive act or omission for stakeholders generally. As noted by N Abbey;

‘[i]f these fundamental principles are not clarified within the South African company law, the uncertainty and confusion may be perpetuated when applying the shareholder remedy under s 163 of the 2008 SA Companies Act - now that s 163 of the 2008 SA Companies Act empowers the court to do much more, it is hoped that the interpretation of the majority rule will not be a factor inhibiting the potential for better shareholder remedies.’<sup>205</sup>

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<sup>201</sup> The principles of majority rule is often cited in the case *Sammel v President Brand Gold Mining Company*, [1969] 3 S Afr L 629 (S Afr SC) at 678 G.

<sup>202</sup> Delpont op cit note 120 at 510.

<sup>203</sup> This principle is discussed in the cases; *Investors Mutual Funds Ltd v Empisal (South Africa) Ltd* (1979) 3 S Afr LR 170 (Wit Local Div) and *Garden Province Investment v Aleph (Pty) Ltd* [1979] 2 Sfr LR 525 (D&C Local Div).

<sup>204</sup> Abbey op cit note 73 at 44

<sup>205</sup> *Ibid*

As the oppression remedy is said to, ‘... be interpreted accordance with broad standards of fairness and ethical business behaviour,’<sup>206</sup> the South African courts are not in the wrong by continuing to apply the principles of majority rule and non-intervention in the interpretation and application of s 163 however, this has further narrowed the approach by courts in application of the remedy. As the English courts note that the remedy should not be ‘... a license to do whatever the individual judge happens to think fair and that well established principles should not be abandoned in favour of some wholly indefinite notion of fairness,’<sup>207</sup> hence the influence of the doctrines of majority rule and non-intervention on s 163 is an issue that requires clarification from the courts, to truly develop the influence of the remedy in South African corporate law and provide various stakeholders with a proper remedy through s 163.<sup>208</sup> As noted, considering that majority rule is an axiomatic doctrine of company law, various jurisdictions have to consider how they can develop the oppression remedy as a means to prevent its arbitrary use<sup>209</sup>- the very wide jurisdiction and discretion of the oppression remedy confers on the court must, however, be carefully controlled in order to prevent the section from itself being used as a means of oppression.<sup>210</sup>

#### 4.5 Summary

The oppression remedy in South African corporate law has developed beyond the protection of merely those holding a shareholding interest in the company. The *locus standi* has been widened to protect the interests of directors and related persons. In *Peel* the judge noted that, ‘[t]his remedy must be interpreted having in mind, not only the contents of the preamble to the new Companies Act namely to, inter alia, “provide appropriate legal redress for investors and third parties with respect to companies.”’<sup>211</sup> Section 163 provides for the protection of the rights and interests of shareholders as *Peel* suggests, however, as the decisions in *Visser*, *Kudumane* and *Witfontein Game Farm*

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<sup>206</sup> Cheffins op cit note 79 at 313

<sup>207</sup> *O’Neill v Phillips* [1999] 2 All ER 961 (HL) at 966g-h and 968ab. This is a UK company law case that dealt with unfair prejudice under s 459 of the English Companies Act of 1985 which is now s 994 of the Companies Act of 2006

<sup>208</sup> Abbey op cit note 73 at 43

<sup>209</sup> Sibanda op cit note 109 at 76

<sup>210</sup> MS Blackman et al , *Commentary on the Companies Act* (2002) at 9- 4

<sup>211</sup> *Supra* 65 para 46

illustrate, redress for third parties ie various stakeholders, to date has not been achieved on the most part and the interpretation of its predecessor may be intrusive when interpreting some of the concepts of s 163.<sup>212</sup>The precedent set by the courts in 1926 and 1973 continue to play a pivotal role in the interpretation of s 163 regardless of the fact that the wording of the remedy has evolved. As its predecessors, s 163 permits applicants to complain of acts or omissions that affect them in their capacity as a shareholder or director. In instances where the act or omission affects the applicant beyond shareholding and directorship eg as an employee or supplier the legislation does not cater for such applicants.

Cheffins concludes the following on the success of the oppression remedy in Canada,

‘[g]iven the absence of procedural barriers, the wide scope of conduct which is covered, and the broad range of remedies which are available under the oppression remedy, it should not be surprising that this remedy has become the most important under Canadian corporation legislation<sup>213</sup>- Canadian oppression law provides useful insights into the issues which are confronting, and will continue to confront,... courts, legislators, and academics.’<sup>214</sup>

The procedural barriers that characterize s 163 ie the principles of non-intervention and majority rule, have played a role in the narrow interpretation of s 163. Despite its narrow definition, the oppression remedy in South African corporate law remains a crucial mechanism to safeguard the interest shareholders.<sup>215</sup> The remedy has evolved and relief under the remedy has become available to one other stakeholder other than shareholders. However, the 2008 Companies Act remains rather weak in the application of the oppression remedy. Case law reveals that relief for stakeholders beyond directors and shareholders continue not to fall within the scope of the oppression remedy in South African corporate law.

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<sup>212</sup> Cassim op cit note 17 at 721

<sup>213</sup> Cheffins op cit note 79 at 332

<sup>214</sup> *Ibid* at 305

<sup>215</sup> Sibanda op cit note 109 at 75

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

This Chapter presents the recommendations and conclusions from the analysis in this dissertation. The recommendations focus on widening of the interpretation of the oppression remedy in South Africa.

#### 5.1 Conclusion

With the development of corporate law, stakeholder inclusivity has become an important principle in the success of businesses. As emphasized in this dissertation, the oppression remedy as applied in Canada provides a platform for redress to various stakeholders by the wide *locus standi* in s 238. Despite the seeming similarities between s 241 of the CBCA and s 163 of the South African companies Act, s 163 continues to be applied and interpreted narrowly to safeguard the interests and rights of stakeholders that are expressly stated in the section. Although s 163 has widened its *locus standi*, widened its scope and provided non-exhaustive remedies, the narrow interpretation to s 163 provides redress to only those stakeholders who hold a vested interest within the company ie shareholders and directors. The narrow approach to the s 163 has weakened the remedy and limits its flexibility to provide redress to various stakeholders. Section 163 awards courts with a wide and unfettered discretion but the courts continue to interpret the section narrowly in line with precedent set by the sections' predecessors. As South African corporate law is no longer centred on the principle of shareholder primacy, one would expect that like s 241 of the CBCA, s 163 would award standing to a wide range of stakeholders in an attempt to protect all stakeholders from the abuse of power in the corporation.

When interpreting the broader ambit of the remedy and comparing it with other jurisdictions, it is important to bear in mind that South Africa already has a robust protection for stakeholders such as employees and consumers through the labour laws and consumer protection laws. Given the extensive protection provided to stakeholders in separate legislation an additional remedy for stakeholder protection in the Companies Act would not be suitable. As discussed, South African corporate law is not characterized by

a pluralistic approach to stakeholder inclusion but rather stakeholder interests are only taken into account when it is in the best interest of the company ie the enlightened stakeholder approach. The broader interpretation of s 163 through the judicial transplantation of Canadian jurisprudence would be line with the enlightened shareholder approach and with the aims of the Companies Act 2008. Section 7(k) provides that the Act aims to, ‘... provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders...’<sup>216</sup> The wider interpretation of s 163 will be a positive move in South African corporate law as it will allow for the flexibility of the remedy through the inclusion of stakeholders. Although the decision in *Peel* encourages courts to lean on foreign legislation to ensure the boarder interpretation of s 163, South African courts are to circumspect to ensure that the broader interpretation of the remedy works within the South African corporate law context.

## **5.2 Recommendations**

Based on the analysis presented in this dissertation, recommendations in the following two critical areas can be identified and emphasized to improve the South African oppression remedy through the judicial transplantation of s 241 of the CBCA in s 163 case law.

### **5.2.1 Judicial Transplantation of s 241 of the CBCA**

The judicial transplantation of the interpretation and application of s 241 of the CBCA to address the shortcomings of s 163 is much faster in addressing the weaknesses identified in this study than the complete amendment of the oppression remedy as a means of expanding the *locus standi* of s 163. Judicial transplantation allows transplantation through judicial decision making rather than the complete borrowing of a legal aspect. Through the judicial transplantation of legal principles judges resort to comparative law, as they enjoy a relatively greater expertise in such practice - this concentration guarantees that the borrowed concepts are not irrelevant to the domestic system since the use of comparative law bestows judges with a significant latitude regarding decisions on when

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<sup>216</sup> s 7 of the Companies Act 71 of 2008

to borrow and from which source.<sup>217</sup> As emphasized by P Legard, in comparative law it is important to keep in mind that specific rules relate to the culture in which the rule is enacted.<sup>218</sup> Shareholders and stakeholders relationships in the South African Companies Act are governed by the enlightened shareholder approach. The Act to some extent safeguards the interests of different stakeholders<sup>219</sup> - however the clear implication of this common-law and statutory principle is that the interests of stakeholders other than the shareholders of the company have received no formal, legal recognition under the Act.<sup>220</sup> Thus, the broader interpretation and application of s 163 to cater for the inclusion of various stakeholders in s 163 can be achieved if the remedy is interpreted and applied in line with Canadian case law on s 241.

The judicial transplantation of the Canadian oppression remedy would mean that rather than seeking to further amend s 163 as suggested by N Abbey,<sup>221</sup> the South African courts would use the wide discretion awarded by s 163 to interpret and apply the remedy in light of the Canadian judicial decisions. As already discussed in this dissertation, s 163 was heavily influenced by the oppression remedies in foreign jurisdictions hence when legislature has found inspiration in foreign statutes, it is only natural for judges to study the way in which these statutes have been interpreted and implemented in their country of origin.<sup>222</sup> Case law adjudicated under s 163 reveals that judges are aware that to fully take advantage of the protections offered by s 163 a wider interpretation and application of the

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<sup>217</sup> D Barak- Erez (2008), 'The Institutional Aspects of Comparative Aspects,' 537 U.S. 186 at 487

<sup>218</sup> Legrad op cit note 13 at 115. The author signifies the relationship that exists between culture ie either political, culture or social culture or economic culture and legal transplantation. That discussed that it is important to determine whether a legal aspect is consistent with the culture in the jurisdiction in which it seeks to be transplanted.

<sup>219</sup> The Companies Act affords creditors, trade unions and employees with rights. An example is trade unions right to institute proceedings to prevent the company from doing anything inconsistent with the Act (s 20(4)), have access to financial statements for the purposes of initiating business rescue proceedings (s 128) and must receive notice of any loan or financial assistance given to directors, prescribed officers or related or inter-related companies (s 45(5))

<sup>220</sup> Cassim op cit note 17 at 514

<sup>221</sup> Abbey op cit note 73 (2012), In her thesis she advocates for the amendment of s 163 in order to make the statutory provisions clearer regarding the duties and powers of individuals within the company. Her recommendations to ensure that the oppression remedy reaches its full potential in South African corporate law include the removal of the binding aspect of the Memorandum of Incorporation and the effects the principle of majority rule amongst others.

<sup>222</sup> See further discussion in MW DeLaquil (2006), Foreign Law and Opinion in State Courts, 69 Albany Law Review 697-707. The article discusses the role courts play in implementing foreign principles within the court room.

remedy is required. This is achieved by seeking further interpretation of s 163 from jurisdictions with a similar provision ie s 241 of the CBCA. The liberal approach taken by Canadian courts alluded to earlier, in the determination of questions of standing to seek relief against oppression<sup>223</sup> and the judicial transplantation of these principles would further develop s 163 into a remedy safeguards all stakeholder interests from the abuse of power in corporations to a certain extent.

The benefits of the wide interpretation of the Canadian oppression remedy by the South African courts would mean providing a platform for the flexibility of the remedy and a means to narrow the imbalance of power and inequality that exists between various stakeholders in the company. The current status where s 163 applies only to shareholders and directors disregards the interests of other stakeholders and unfairly prejudices them. The use of the wide discretion awarded by ss 238 and 241 in the CBCA, to safeguard the interests of various stakeholders within the company regardless of the interest the stakeholder holds by Canadian courts is thus instructive for South Africa. Through judicial transplantation the courts can still adopt a teleological interpretative approach that plugs any loopholes in the stakeholders' protection.<sup>224</sup> This which will open the remedy to wider interpretation and set precedent for various stakeholders to bring a claim under s 163.

The further interpretation and development of s 163 beyond the precedent set out in the ss'111*bis* of 1926 and 252 of 1973 will provide a platform for the inclusion of various stakeholders to seek redress from oppressive conduct. Canadian case law reveals that various stakeholders have been awarded *locus standi* under the oppression remedy regardless of the interest they hold in the company. On the basis of that broad legislative mandate, it has been held that standing is not to be construed narrowly<sup>225</sup>- the courts have placed more importance on determining whether the act or omission in question falls within the scope of the remedy ie 'oppressive or unfairly prejudicial or unfairly disregards the interests' of an applicant rather than focusing on who has *locus standi* under the remedy. If the South African courts widely interpreting s 163 and lean on

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<sup>223</sup>McGuinness op cit note 10 at 971

<sup>224</sup> Blackman op cit note 210 at 37

<sup>225</sup> McGuinness op cit note 11 at 970

Canadian case law for a broader interpretation and application of the remedy this will provide a starting point for s 163 to provide redress to various stakeholders not expressly protected by s 163.

Widening the interpretation of s 163 through judicial transplantation of s 241 of CBCA will improve the South African approach by widening the inclusion of various stakeholders, protecting the interests of security holders and by offering protection for anticipated oppression. As alluded to in Chapter 2, s 238 of the CBCA also provides *locus standi* to any ‘security holder’ which includes a variety of classifications of shareholders, ‘beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates.’<sup>226</sup> Transplantation would thus provide relief to all security holders which is not presently available under s 163. Under s 163 the holders of beneficial securities are not awarded *locus standi* they do not fall within the definition of a shareholder in s 1 of the Act. Yet holders of a beneficial interest in shares, although not formally yet registered with the company, should be considered under the provision, as they have legitimate corporate interests which can be harmed prior to them becoming registered members.<sup>227</sup> Thus, denying beneficial security holders’ *locus standi* under s 163 on the basis of not being a registered shareholder is rather unfair- as modern stock markets are characterized by persons who purchase shares through stock exchanges and do not bother to register themselves because of the length of time involved.<sup>228</sup> The further interpretation of s 163 through the Canadian case law will provide room for the inclusion of applicants that may hold other forms of securities but do not fall within the definition of shareholder in s 1 of the Act. The legislators’ oversight in narrowly defining the term shareholder denies various security holders excluded from the definition from benefiting from various shareholder remedies throughout the Act.

In addition, it is important to recall that security holders as per the English Companies Act, which also influenced the drafting of s 163, are awarded with *locus standi* under s 994- in which, to qualify for relief under s 994, a holder of a beneficial security must show that he has agreed with the existing member for the transfer of shares

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<sup>226</sup> s 238 (a) of CBCA

<sup>227</sup> Sibanda op cit note 109 at 75

<sup>228</sup> W Poon et al, ‘Section 16: A Companies Ordinance a Blunt Sword,’ (1980) *HKLJ* Vol 10 at 296

to bind himself, and that a proper instrument of transfer in respect of those shares has been delivered to the transferee or the company.<sup>229</sup> Section 163 denies beneficial security holders *locus standi* where in similar provisions, the CBCA and the English Companies Act, these beneficial security holders are awarded with status to bring a claim of oppression.

Finally, the wider interpretation of s 163 through the judicial transplantation would provide a platform for applicant to claim redress for anticipated oppressive conduct ie future oppression. Section 163 does not allow members to apply for relief in respect of proposed acts that may harm their interests- it follows that the court should have the power to come to the assistance of a minority member where proposed action by the majority or any other influential people in the company is clearly unfairly prejudicial, unjust or inequitable, without having to wait for its effects.<sup>230</sup> It is established in several South African cases that the section has no application where the complainant relates to something which is to be done in the future.<sup>231</sup> In Canada however, in a number of Ontario cases it was held that relief could be sought by a person who joined the company at a time when he or she knew that the affairs of the company were being conducted in the manner forming the basis of the complaint - it is sufficient if the applicant is a registered holder or beneficial owner of the security at the time he or she brings the application.<sup>232</sup> A wider interpretation of s 163 will allow disgruntled stakeholders to complain of anticipated oppression which currently has no scope. The broad interpretation of s 163 through judicial transplantation will create a platform for the inclusion of various stakeholders.

While South African courts are encouraged to interpret and apply s 163 broadly to cater for various stakeholders, the courts have to be cognizant of the issues related to

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<sup>229</sup> Joffe et al *Minority Shareholders: Law Practice and Procedure* (2011) at 240.

<sup>230</sup> Sibanda op cit note 109 at 76

<sup>231</sup> *In Porteus v Kelly* 1975 (1) SA 219 (W) 225 the court concluded that a mere calling of a meeting for the purpose of amending the articles so as to enable the director to approve of any proposed transfer of shares in a private company (the existing articles requiring the approval of all the shareholders) cannot itself be an act which is unfairly prejudicial, unjust or equitable within the meaning of the section. Discussed also in *Investors Mutual Funds Limited v Empisol (South Africa) Ltd* 1979 (3) SA 170 and *Kudumane Investment Holding Ltd v Northern Cape Manganese* [2012] ZAGPJHC 116

<sup>232</sup> See *Richardson Greenshields of Canada Limited v Hordo* (1993), 10 B.L.R. (2d)

intense judicial involvement and the watershed of alternative remedies that come about as a result of a broad interpretation of the oppression remedy.

### **(a) Intense Judicial Involvement**

The courts through the oppression remedy play a significant role in attempting to reconcile both the shareholder and various stakeholder interests. The remedy provides the courts with the power to intervene in the affairs of a corporation at the behest of a complainant where it is necessary to prevent or protect the complaint from or to stop, oppressive, unfairly prejudicial or similar conduct of the corporation.<sup>233</sup> This awards courts with intense involvement in the corporate governance of companies. This has become a leading criticism of a wide interpretation to the oppression remedy. The intense judicial involvement in corporate governance and ad hoc decision-making – certainly strikes a chord in anyone who is familiar with the operation of the oppression remedy and what its practical implications have been for the conduct of corporate affairs.<sup>234</sup> In the Canadian judiciary the remedy has been used as a method of monitoring corporate affairs but has done so in a cautious and limited way.<sup>235</sup> There is a thin line that exists between the protection of various stakeholder interests through the oppression remedy and the intense involvement of courts in corporate affairs in an attempt to settle a dispute. Therefore, in interpreting s 163, South African courts should be cautious in ensuring that judicial intervention does not intensely interfere with the governance of companies and that the concept of separate legal personality is upheld.

### **(b) Watershed of alternative remedies**

In Canada, the wide nature of the oppression remedy and its liberal interpretation by courts has given it the ability to be favoured by the bulk of disgruntled minority shareholders and stakeholders at the expense of alternative remedies such as derivative action or just and equitable liquidation. Traditional remedies such as the shareholder derivative action for injuries to the corporation have been significantly displaced by the

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<sup>233</sup> McGuinness op cit note 11 at 949

<sup>234</sup> *Ibid* at 7

<sup>235</sup> S Ben-Ishai et al *The Canadian Oppression Remedy Judicially Considered: 1995-2001* (2004) at 90

flexible and procedurally simple oppression action.<sup>236</sup> Although the broad interpretation of s 163 will expedite the flexibility of the remedy, courts need to ensure that shareholders and stakeholders are aware of alternative platforms in corporate law available to seek redress. This will avoid the misuse of the oppression remedy and evade the watershed of alternative remedies.

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<sup>236</sup> VanDuzer op cit note 70 at 327

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