

A COMPARATIVE ANALYSIS OF SHAREHOLDERS' APPRAISAL RIGHTS IN
NIGERIA AND SOUTH AFRICA

by

Abimbola Eniola

*Minor dissertation presented in partial fulfilment of the requirements for the degree of
Masters in Commercial Law at the University of Cape Town*

Supervisor: Jacqui Yeats (Department of Commercial law)

Word count: 26780

February 2019

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

COPYRIGHT

The copyright of this dissertation vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The dissertation is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

DECLARATION

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Masters in Commercial Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I, ABIMBOLA ENIOLA, hereby declare that I have read and understood the regulations governing the submission of Masters in Commercial Law dissertations including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

PLAGIARISM DECLARATION

I, Abimbola Eniola, know that plagiarism is wrong. Plagiarism is to use another's work and pretend that it is one 's own.

I have used the footnote convention for citation and referencing. Each significant contribution to, and quotation, in this project from the work(s) of other people has been duly attributed to said author(s) and has been cited and referenced accordingly. This minor dissertation is entirely my own work.

I have not allowed, and will not allow, anyone to copy my work with the intention to pass it off as his / her own work.

9 February 2019

ABSTRACT

First, this study stems from the urge to bring clarity as to whether, in Nigeria, there is a statutory framework based on which shareholders can seek appraisal in relation to their shares at any point in time. This is significant in that the corporate statutes in both South Africa and Nigeria provide for similar mechanisms for the protection of minority shareholders in almost every respect including the prejudicial and oppression remedy, derivative actions, squeeze-outs and so on, excepting the appraisal rights. Whilst there is clarity as to the existence of the appraisal remedy provision in South Africa's corporate statute, the same cannot be said of Nigeria's corporate statute. Consequently, the primary goal of this study is to identify if there is a framework for the exercise of appraisal remedy in Nigeria's corporate statute.

In carrying out this study, this dissertation examines the various components of the appraisal right provision in South Africa in detail. This helps to provide an understanding around the structure and the rationale behind a standard appraisal right provision. It is based on this understanding that certain pre-identified provisions in Nigeria's corporate statutes will be investigated with a view to identifying potential statutory framework bearing semblance to South Africa's appraisal right provision.

Contents

COPYRIGHT.....	ii
DECLARATION	iii
PLAGIARISM DECLARATION.....	iv
ABSTRACT.....	v
OVERVIEW OF THE CHAPTERS	1
CHAPTER 1	1
CHAPTER 2	1
CHAPTER 3	1
CHAPTER 4.....	2
CHAPTER 5	2
CHAPTER 1	3
1.1 INTRODUCTION	3
1.2 THEORIES OF APPRAISAL REMEDY.....	3
1.2.1 The Traditional/Historical explanation theory.....	4
1.2.2 The Group Coordination theory.....	4
1.2.3 The Coattail theory	5
1.2.4 The Inframarginal value theory.....	5
1.2.5 The Reckoning goal theory	5
1.2.6 The Discovery goal theory.....	6
1.3 Relevant appraisal statutes in this dissertation.....	6
1.3.1 The corporate statute in South Africa	7
1.3.2 The corporate statutes in Nigeria	7
1.4 Other relevant considerations.....	8
1.5 Objective of this study	10
1.6 Significance of this study	11
1.7 Research methodology.....	12
1.8 Challenges with this study	12
CHAPTER 2	14
2.1 STATUTORY FRAMEWORK FOR APPRAISAL RIGHTS IN SOUTH AFRICA	14
2.2 An Analysis of Section 164	15

2.3 The Trigger Events	16
2.3.1 Amendment of MOI.....	17
2.3.2 Fundamental transactions.....	18
2.4 Step-by-step procedure for the exercise of appraisal right under s. 164 Companies Act	20
2.5 Offer and Acceptance	21
2.6 The role of the court under section 164 appraisal exercise	23
2.7 Reinstatements and Exemptions	26
2.8 Section 164 and the theories of appraisal remedy.....	29
CHAPTER 3	31
AN INVESTIGATION INTO POTENTIAL STATUTORY FRAMEWORK FOR DISSENTING SHAREHOLDERS' APPRAISAL RIGHTS IN NIGERIA	31
The ISA.....	31
Section 129 of the ISA.....	32
Section 130 of the ISA.....	34
Section 146 of the ISA.....	34
Section 147 of the ISA.....	36
Section 147 Trigger Event	36
Offeror's Notification	37
Fair value determination	38
The Role of the Courts.....	39
Sections 146 & 147 of the ISA and the theories of appraisal remedy	40
CHAPTER 4	41
4.1 A COMPARISON OF THE COMPONENTS OF THE APPRAISAL RIGHTS PROVISIONS IN THE COMPANIES ACT AND THE ISA.....	41
4.2 A comparison of the trigger events.....	41
4.3 A comparison of the scope of the appraisal framework under the Companies Act and ISA.....	42
4.4 A comparison of the framing of the appraisal rights provisions	43
4.5 A comparison of the character of the dissenting shareholder	44
4.6 A comparison of the voting and objection pre-conditions	45
4.7 A comparison of the time stipulations	46
4.8 A comparison of the parties to appraisal exercise/proceeding.....	52
4.9 A comparison of the fair value determination process.....	53
4.11 A comparison of the role of the court in the appraisal exercise.....	54

4.12 A comparison of the time of tendering of share certificates and the implication	57
4.13 A comparison of the theories informing each appraisal statute	58
CHAPTER 5	59
5.1 FINDINGS AND RECOMMENDATIONS	59
5.2 Findings.....	59
5.3 Recommendations.....	60
BIBLIOGRAPHY	63
APPENDICES	65
APPENDIX A - Investments and Securities Act	65
APPENDIX B – Companies Act	73

OVERVIEW OF THE CHAPTERS

CHAPTER 1

This chapter sets the background for the dissertation. It introduces the appraisal remedy and the theories scholars have offered in explanation of the rationale for the inclusion of the appraisal remedy in corporate statutes. The chapter also provides an overview into the sources of law for the appraisal remedy in the jurisdictions considered in the dissertation being South Africa and Nigeria. Answers to the questions as to why engage in a subject of this nature were provided in this chapter and the rationale behind the choice of the select jurisdictions. The chapter concludes with the research methodology with which this dissertation intends to achieve its objective and the challenges of a comparative study of this nature.

CHAPTER 2

This chapter examines and analyses the appraisal rights framework in South Africa in terms of Section 164 the Companies Act No. 71 of 2008, including the salient components/ingredients of the remedy in terms of specific provisions of the Companies Act - the trigger events for the appraisal right under section 164, the step-by-step procedure laid out under the section. The analysis of the section speculates on the possible rationale/principle behind the manner adopted in the construction of section 164 and, the component procedures laid out under the section. Chapter 2 concludes with an examination of the role of the court in section 164 appraisal right process with insight into South African court cases on the remedy.

CHAPTER 3

Chapter 3 engages in the investigation of relevant provisions (of the Investment and Securities Act) under the Nigerian law with a view to identifying any appraisal remedy framework including the elements/ingredients of any such provisions as well as the trigger events. Among other things, the statutory mechanisms provided for appraisal under the Nigerian law including the determination of the value of the shares to be appraised and how disputes between the company/majority shareholders and the dissenting shareholders in relation to the determination of the fair value of the affected shares are resolved are examined

under this Chapter. The chapter concludes by identifying the role of the courts in Nigeria in the appraisal remedy procedure.

CHAPTER 4

Chapter 4 presents a logical comparison of the trigger events, procedure and the role of courts under the relevant regimes for the appraisal mechanism in South Africa and Nigeria. The chapter analyses whether the regimes in these jurisdictions serve similar or different purposes and the differences as well as the common principles shared by both regimes (if any). Finally, the chapter discusses and engages in a comparative analysis of the theories guiding each jurisdiction's appraisal rights provisions.

CHAPTER 5

The chapter will set out a summary of key findings in the dissertation and provide an answer as to whether, in terms of what obtains under the South African Companies Act, there is an appraisal right mechanism under Nigerian law and closes with suggestions.

CHAPTER 1

1.1 INTRODUCTION

The dynamism of corporate governance principles is visible in the expanding mechanisms for the protection of the rights of minority shareholders. Traditionally, majority rule was the idea by which corporate decisions are reached, leaving minority shareholders with no remedy other than to submit to majority rule.¹ This idea of the-majority-takes-all is however fast losing grounds across jurisdictions with the increasing popularity of minority shareholders protection mechanisms including the appraisal rights remedy.

Appraisal rights remedy ‘is one of the prominent protections of minority shareholders’² creating ‘the right for a shareholder, dissatisfied with proposed resolutions, to object and thereafter exit the company with receipt of fair value for his or her shares.’³ With the appraisal remedy, shareholders no longer need to submit to the whims and fancies of majority shareholders or worry about cumbersome and archaic modes of seeking redress for corporate wrongs.⁴ Appraisal remedy allows shareholders to terminate their membership of companies on account of certain objectionable proposals by the company. As it will be considered later in this dissertation, the remedy is nothing close to a one-size-fits-all remedy that can be wielded by minority shareholders against all or any kind of corporate agenda, it is usually available only in circumstances where a significant portion of a company’s assets will be involved in the proposed transaction and/or poses a risk to the assets, value or business of the company. But what informs a remedy of this nature?

1.2 THEORIES OF APPRAISAL REMEDY

Several theories have been offered in explanation of the origin or rationale behind the inclusion of the appraisal remedy in corporate statutes including the rationales which may be

¹ See the opinion of Trolip JA in *Samuel v. President Brand Gold Mining Co. Ltd* (1969) 3 (SA) 629 (A)

² *Hein Cilliers Loest v. Gendac (Pty) Ltd* 2017 (4) SA 187 (GP) 2017

³ *ibid*

⁴ Prior to the introduction and popularity of the appraisal remedy, most corporate statutes gave shareholders right to challenge the propriety of corporate decisions on an allegation of directors’ breaches of fiduciary duty owed to the company or on allegations bothering on oppressive or prejudicial conducts on the part of the directors.

responsible for the legislatures' attraction to the remedy. A few of these theories is worthy of note in this dissertation.

1.2.1 The Traditional/Historical explanation theory

The proponents of this theory of the appraisal remedy suggest that the remedy is simply an historical necessity. It was said that, in the past, corporate decisions required unanimous consent of all shareholders and that with time, there was a shift from unanimity to majority approval, which gradually gave rise to grudge-bearing on the part of some class of members of the company aggrieved. Consequently, and as a way of dealing with these members' grievances, companies had to present minority shareholders with an alternative that allowed them to exit the company under such circumstances so that the company is able to pursue its new direction on the one hand whilst providing the aggrieved shareholders the opportunity to reclaim their investments in the company on the other hand.

1.2.2 The Group Coordination theory

This theory posits that the goal of an appraisal remedy is to protect shareholders from potential value-reducing transactions. It is believed that although the body of shareholders generally lack coordination, investors are deterred from taking undue advantage of shareholders' lack of coordination where the appraisal remedy is available. This is based on the belief that the appraisal remedy is capable of eventually upsetting any undue advantage gained by an investor out of a transaction.⁵

For instance, if an investor proposes to acquire a company by first purchasing the shares of the majority shareholders at an attractive premium with the intent to, later, push out the remainder shareholders at a price lower than the market value of their shares, the investor's knowledge of the minority shareholders' rights to appraisal under such circumstance can dissuade the investor from carrying out his intentions. This possibility of recourse to the appraisal remedy by minority shareholders, in order to recoup a fair value for their shares, presents an investor with a challenge. In summary, the group coordination theory suggests that the appraisal remedy exists to deter investors from taking undue advantage of shareholders' lack of coordination.

⁵ Fischel, R. *The Appraisal Remedy in Corporate Law* American Bar Foundation Research Journal (1983) 875, 881-87.

1.2.3 The Coattail theory

The coattail theory does not directly offer an explanation as to the rationale behind the origin or the use of appraisal remedy. Rather, the theory explains why the remedy may not be available to shareholders or provided for in corporate statutes or circumstances where shareholders may not find the remedy attractive at all. The theory posits, for instance, that in the event of a merger or acquisition where shareholders hold the belief that management is hiding veritable information on the altruistic value of the company post-merger, shareholders may, in such situation, choose to be part of the new entity rather than receiving cash for their shares and be thrown out.⁶

1.2.4 The Inframarginal value theory

The proponents⁷ of the inframarginal value theory believe that shares may have some inframarginal worth. This is the difference between the market value of a shareholder's shares on the one hand and the amount a shareholder believed his shares to be worth. This proposition is premised on the assumption that there may be some consumer-surplus hidden in the value of the shares of a company which is not reflected in the offer or market price of those shares. It is this difference in value or valuation that is being referred to as an 'inframarginal value' the recoupment of which the proponent of this theory portrays as the goal of the appraisal remedy. The introduction of the appraisal remedy into corporate statutes is therefore to assist a shareholder recoup the inframarginal value of his shares.

1.2.5 The Reckoning goal theory

The reckoning theory explains that the rationale behind the existence of the appraisal remedy is the opportunity it presents to shareholders for the evaluation of the performance of the management of companies at the point of any appraisal exercise or proceeding. Since appraisal remedy is usually offered at the points where fundamental changes are being proposed to the structure of a company, any appraisal exercise at any such point reflects the financial state of the company and presents the shareholders with an opportunity to assess the

⁶ See Saul Levmore & Hideki Kanda 'The Appraisal Remedy and the Goals of Corporate Law' 32 University of California at Los Angeles Law Review 429 (1985) for a criticism of the coattail theory

⁷ Saul Levmore & Hideki Kanda *ibid*

performance of the management of the company up to that point. Such assessment serves as a benchmark for a future evaluation of the performances of the management from that initial point.⁸ Although, the reckoning goal can be thought of as a secondary goal or explanation of any particular appraisal statute, the reality of this goal is evident in the opportunity it presents to the shareholders on the efficiency or otherwise of the management of the company.

1.2.6 The Discovery goal theory

One other theory on the goal of the appraisal remedy is that the remedy exists to give shareholders the opportunity to be genuinely informed of the true state of affairs of the company. In appraisal proceedings, a company is likely to deliver to appraisers, documents in relation to the company that could be useful in the appraisal exercise or proceeding. These documents help to inform the shareholders of investment opportunities, finances and the realities of the company and any misbehaviour on the part of the management may be discovered during inspection of these documents in the appraisal exercise or proceeding.

It may however be that none of these theories can singularly explain the rationale behind the appraisal remedy or offer explanations as to what informs the approach adopted in any single appraisal statute. Typical appraisal statutes may be informed by a combination of more than one of those theories and it is the legislature that ultimately decides how appraisal statutes are framed and what goals are intended to be served or pursued by an appraisal statute. Notwithstanding, these theories provide a background into the understanding of appraisal statutes and in interpreting the intention of the legislature in framing appraisal statutes one way or the other and in identifying the purpose served by any appraisal statute.

1.3 Relevant appraisal statutes in this dissertation

This dissertation will examine in detail, the statutory frameworks for appraisal remedy in Nigeria and South Africa and engage in a comparative analysis of the relevant appraisal remedy provisions.

⁸ Saul Levmore & Hideki Kanda *ibid* at page 441

Generally, appraisal remedy flows from corporate law and as such, the typical statutory framework for appraisal remedy is found in corporate statutes. Consequently, we look briefly into the corporate statutes in South Africa and in Nigeria with a view to identifying the appraisal framework in these jurisdictions.

1.3.1 The corporate statute in South Africa

In South Africa, the corporate statute is the Companies Act No. 71 of 2008 (hereafter referred to as the ‘Companies Act’ or the ‘South African Companies Act’) and the statutory framework for appraisal remedy is expressed under section 164 of the Companies Act. The Companies Act was enacted in 2008 but was made to take effect only in April 2011. Prior to the enactment of the Companies Act, the applicable corporate statute in South Africa was the Companies Act 1973 but the 1973 had no equivalent of section 164 appraisal right which meant that there was no framework for the appraisal remedy in South Africa until the enactment of the Companies Act in 2008. It seems that the appraisal right provision under the Companies Act was meant to serve one of the objectives of the Companies Act - to achieve a balance between the rights of the shareholders and the directors⁹ of companies in South Africa. The appraisal remedy appears to be a perfect tool in pursuit of this objective of the Companies Act. This dissertation shall later examine the appraisal remedy under the Companies Act with a view to identifying the legislative intent behind the introduction of the remedy into the corporate jurisprudence of South Africa and whether it fits into any of the appraisal theories earlier highlighted.

1.3.2 The corporate statutes in Nigeria

In Nigeria, there are two main corporate statutes - the Companies and Allied Matters Act, Cap C20, laws of the Federation of Nigeria 1990 (hereafter called ‘the CAMA’ or ‘CAMA’) and the Investment and Securities Act Cap I24, Laws of the Federation of Nigeria, 2010¹⁰ (hereafter called ‘the ISA’). The CAMA is the primary source of company law providing the main framework for the registration and regulation of companies in Nigeria. The body established for the administration of CAMA is the Corporate Affairs Commission (‘the

⁹ Section 7(h) of the Companies Act

¹⁰ Laws enacted by the National Assembly in Nigeria are compiled into volumes periodically [including old and newly passed laws] and published as the Laws of the Federation of Nigeria [‘LFN’]. The ISA, although re-enacted in 2007, is published in Chapter I24 of the 2010 LFN compilation.

CAC’) and the power to register and de-register companies in Nigeria is the exclusive reserve of the CAC. CAMA also provides for the appointment of the directors, conduct of meetings, winding-up among other things. However, whilst CAMA provides for the regulation and administration of company, it does not provide a framework for corporate transactions in Nigeria. This gave rise to the need for, and enactment of the ISA.

First enacted in 1999, the ISA was re-enacted in 2007 to provide a statutory framework for mergers and acquisition, take-overs, tenders and other fundamental corporate transactions in Nigeria. The ISA provides for the establishment of the Securities and Exchange Commission (‘the SEC’) which serves as the apex regulatory authority for capital market operations. SEC’s functions, as provided for under the ISA, includes the regulation of investments and securities business in Nigeria as well as the regulation of all kinds of offers for subscription to the Nigerian public. However, although the ISA provides for fundamental transactions including mergers and takeovers, it does not contain any direct or specific provision that can be unequivocally recognised as an appraisal right provision comparable to the provision in section 164 of the Companies Act. Consequently, and to the extent that there are no specific and direct provisions on appraisal remedy under the ISA, the provisions guiding the exercise of fundamental transactions under the ISA shall be at the centre of this dissertation at the point of investigating potential statutory framework for appraisal remedy in Nigeria, noting particularly that typical appraisal remedy statutory provisions are framed around provisions on fundamental transactions.

Consequently, a careful examination of the relevant provisions on fundamental transactions under the ISA, with a view to identifying potential appraisal remedy framework, is an indispensable exercise in this dissertation and will be carried out later in Chapter 3.

1.4 Other relevant considerations

The topic of this dissertation suggests that it is a comparative study of shareholders’ appraisal rights in the broadest sense. However, the approach adopted in this study is restricted to the examination of the statutory framework for the appraisal rights remedy in Nigeria and South Africa. This study does not examine the framework for appraisal remedy outside statutory

provisions such as the possible contractual arrangement around the appraisal remedy. One ancillary issue therefore, outside the scope of this dissertation, is whether a contractual framework can be established for the exercise of the appraisal remedy outside the scope of statutes.

It is noted that shareholders' rights with respect to their membership of companies arise typically from statutes or contract, or both. Memoranda of incorporation (MOI), charters of incorporation, articles of association, shareholders' agreement are examples of the forms of contract by which the members of a company can affect their rights and obligations in relation to a company although any such contractual arrangement may not directly contradict or contravene statutory provisions. Consequently, since members generally have the capacity to affect their relationships in relation to the company by way of contract, there is no reason members of a company cannot contract the appraisal remedy outside to form part of their company's charter/memorandum of incorporation notwithstanding any extant statutory framework.

Another similar issue and by way of extension of the above issue, is whether, for instance, in a jurisdiction that has an appraisal statute, members of a company in that jurisdiction can validly limit or expand the scope of any appraisal remedy established in statute through contractual arrangement whether by providing for provisions for such expansion or limitation of the appraisal remedy in the company's charter/memorandum of incorporation or the articles of association or any other contract document. However, engaging in an enquiry of this sort, that is, a study on possible contractual arrangements in relation to the appraisal remedy, is not only a speculative task but a task with little or no research value noting that contracts are usually tailored to be client-specific and subjective in nature. It is therefore submitted that, since there is no uniform standard form of the contractual arrangement on the appraisal remedy, no meaningful evaluation or result can be achieved from a comparative study of the possible arrangement with respect to contracting the appraisal remedy. It is for this reason that the scope of this dissertation is limited to the statutory framework for the appraisal remedy and the contractual perspective of it is left out.

Notwithstanding the above, the issue as to whether shareholders' appraisal rights as provided for in statute can be altered or varied by the members of a company by contractual arrangement can be answered in the case of South Africa. Under the Companies Act, the answer is in the negative if the purport of the contract is to limit the scope of the statutory framework for the appraisal remedy. It is impossible to limit the scope of the appraisal remedy under the Companies Act because of the unalterable nature¹¹ of section 164 which establishes the remedy.

The Companies Act allows for the alterability of some of its provisions but denies alteration in other respects. However, it can be contended that expanding the scope of the appraisal remedy beyond the existing statutory coverage by means of a private contractual agreement may not necessarily give rise to a contravention of the Companies Act.¹² The inalterability of section 164 of the Companies Act does not detract from the possibility of extending the remedy to other areas of corporate proposal by private treaties. The kind of resolutions or transactions with respect to which the appraisal remedy may be available is, in terms of the Companies Act, extendable by private agreement between shareholders and the company. The fact that this is possible is evident in the way certain Johannesburg Stock Exchange ['JSE'] listed South African companies have played around the use of the condition attaching to the appraisal remedy in their transaction circulars to shareholders.¹³

1.5 Objective of this study

One of the primary objectives of this study is to investigate if there is any statutory framework for the exercise of appraisal remedy by shareholders in Nigeria in relation to what obtains under South Africa's Companies Act. On the other hand, the appraisal remedy is a good candidate for academic discourse in South Africa because of its relative newness in the nation's jurisprudence. Although, the enactment of the Companies Act was done in 2008, the appraisal right remedy in section 164 of the Companies Act is yet to receive much judicial attention that could help provide guidance, shape its use and shed light on its dynamism as a

¹¹ 'Unalterable provision' is defined in s 1 of the Companies Act No. 71 of 2008

¹²This argument can be deduced from the overall commercially progressive outlook of the Companies Act and particularly the principles expressed under s 15 (2) and (3) of the Companies Act.

¹³ The case of *Juspoint Nominees (Pty) Ltd v Sovereign Food Investments Ltd* (876/16) [2016] ZAECPEHC 15 para 66 is instructive in this regard.

subject perhaps because of the fact that disputes under the Companies Act tend to be resolved more frequently by recourse to the alternative dispute resolution mechanism provided for in the Companies Act¹⁴ rather than through the court system. It is for this reason that the appraisal remedy continues to be a subject of attraction for scholars.

Furthermore, there are many differences in appraisal statutes across jurisdictions, and one of the means by which these differences can be identified and highlighted is by way of a comparative study of this kind. Studies of the appraisal right concept in relation to what is obtainable in other jurisdictions is an avenue for a critique of the concept and would serve as a reference material for practitioners, legislature and the judiciary in appreciating the gamut of the existing practices around the appraisal remedy. This study will therefore highlight the best practices around the appraisal remedy especially between the compared jurisdictions by identifying and bringing to bear, the ideal components as well as commendable practices around the appraisal remedy in each of these jurisdictions. This captures the very essence of this dissertation in the broadest sense.

1.6 Significance of this study

The relevance of this dissertation lies in the fact that there is no apparent equivalence of the South Africa's appraisal right provision in Nigeria. On the surface however, it appears there are a few provisions in the ISA that may serve similar purposes as the South African section 164 appraisal right remedy. However, these provisions under the ISA are rarely acknowledged in Nigeria as an appraisal right remedy provisions nor is there any record of the use of these provisions as such. The outcome of this dissertation is therefore likely to provide an answer as to whether there exists an appraisal right remedy regime in Nigeria. The outcome of this comparative study will also help in providing an insight into the possibility, between South Africa and Nigeria, of sharing or exchanging adjudicatory rules, practices and precedents on the appraisal remedy including whether there is any basis for any such sharing or exchange of principles of law derived from appraisal remedy case laws in these two jurisdictions.

¹⁴ Alternative Dispute Resolution mechanism is provided for in s 166 of the Companies Act

1.7 Research methodology

This study is a comparative analysis of the appraisal rights remedy statutory framework under the South African and Nigerian laws. It compares the texts of two legislations in two different jurisdictions setting out with the assumption that one of these legislations represents the standard. The investigation will be carried out through an investigation of the laws guiding the concept in the two countries. It is admitted that there is a standard appraisal right provision under the Companies Act in terms of section 164. Consequently, this study will entail an examination of a number of provisions of the ISA with a view to determining whether these provisions or any of them is an equivalence of the appraisal remedy under South Africa's Companies Act. Any identified appraisal right provisions under the ISA will then be compared with section 164 of the Companies Act.

In identifying the relevant appraisal right statute or provision in Nigeria, this dissertation will commit to the evaluation of certain predetermined provisions in the ISA and analyse these provisions by drawing reference tools from section 164 appraisal right provision of the Companies Act.

1.8 Challenges with this study

It is acknowledged that engaging in a comparative legal research exercise covering two different jurisdictions poses certain challenges noting the fact that countries have origins of law which may be different and which difference in turn accounts for the differences in legislative approach, adjudicatory rules, experiences and consequences in these countries. However, it suffices to state here that notwithstanding this challenge, Nigeria and South Africa have common roots in the English Common Law as their origin of law albeit South Africa has other component root in Roman-Dutch law.

On a different note, because there is a dearth of case law both in Nigeria and South Africa on the appraisal remedy, this study will include less of analysis of case laws on the topic of this dissertation such that the positions and views canvassed in this dissertation and the

comparative exercise will be based largely on the interpretation of the texts of the relevant statutes as well as scholarly treatise and opinion on the subject.

CHAPTER 2

2.1 STATUTORY FRAMEWORK FOR APPRAISAL RIGHTS IN SOUTH AFRICA

What do we mean by appraisal remedy? Unfortunately, a definition of the appraisal remedy was omitted in section 1 of the Companies Act¹⁵ but the remedy can be easily understood from the perspective of the purpose it serves. Appraisal remedy has been described ‘as the right of dissenting shareholders who do not approve of certain triggering events to have their shares bought out by the company in cash, at a price reflecting the fair value of the shares, which value may in certain cases be determined judicially.’¹⁶ This purpose of the remedy was further confirmed by the court in the South African case of *Juspoint Nominees (Pty) Ltd v Sovereign Food Investments Ltd* as the right of ‘a dissenting shareholder to exit from the company on fair terms when a fundamental transaction is passed that the dissenter finds repugnant to its continued membership of the company.’¹⁷

Appraisal rights in South Africa is governed principally by the provisions of section 164 of the Companies Act, bearing in mind that there are other provisions in the Companies Act¹⁸ that impacts on the exercise of the remedy. Among other things, section 164 sets out in detail, circumstances under which a shareholder may have recourse to the remedy which circumstances, are categorically referred to as the ‘trigger events.’ Further, the section sets out a step-by-step procedure for the exercise of the remedy both on the part of the aggrieved shareholder as well as on the part of the concerned company. All of these will be examined in detail later in this chapter.

It is important, before delving into a full-scale analysis of the provision of section 164, to not take for granted one concept which may provide meaningful background to the understanding and analysis of section 164. This relates to the kind of shareholder section 164 is concerned about - a dissenting shareholder. A brief insight into the character of ‘a dissenting shareholder’ within the context of section 164, is an important exercise bearing in mind that the entire appraisal right mechanism is centred around the concept and also to reduce the risk

¹⁵ Section 1 of the Companies Act is a definition section

¹⁶ Cassim FHI, Cassim MF, Cassim R et al *Contemporary Company Law* 2 ed (2011) p 796

¹⁷ (876/16) [2016] ZAECPEHC 15 para 66

¹⁸ Ss 112, 114 and 115 of the Act

of easily equating the concept with other related concept such as the more frequently encountered concept of ‘minority shareholder’ noting the misconception that may ensue from such equation.

Although the Companies Act does not provide any direct definition of the concept, the gist of a dissenting shareholder lies in the opposition or, put in the language used in the Companies Act, the objection lodged by a shareholder against a company’s proposed action(s). This is definitely not the same as the amount of control or force that a particular shareholder is able to exert or wield in relation to such shareholder’s stocks with respect to a company’s proposed action(s) in terms of the voting power consisting in those stocks put side by side with other shareholders’ voting power which highlights the crux of being either a majority or a minority shareholder.

In essence, a dissenting shareholder, in terms of the appraisal remedy, is, as a matter of principle and consequence, a broader concept than a minority shareholder. To sum up the nature of the relationship between the two concepts, a dissenting shareholder is rather a minority shareholder who objects to a company’s [or the majority shareholders’] proposal or resolution coupled with such minority shareholder’s intention to quit and exit the membership of the company unless the proposal is altogether abandoned by the company.¹⁹ It may therefore be right to submit that the appraisal right remedy is another minority shareholders’ protection mechanism.

2.2 An Analysis of Section 164

To give a brief architecture of section 164: the section is made up of twenty (20) subsections with the section referencing nine (9) other substantive sections or provisions of the Companies Act. Subsection 2 of s 164 sets out the kinds of corporate proposals with respect to which a shareholder may indicate his objection with a view to exercising the appraisal remedy. They are known as the trigger events. Subsections 3 to 8 of section 164 set out a step-by-step procedure a dissenting shareholder must follow to ensure a valid exercise of the

¹⁹ In reality, a dissenting shareholder in terms of the appraisal remedy process would most likely be a minority shareholder since a majority shareholder is able to muster sufficient vote to defeat any proposal of the company and as such there would be no need for such majority shareholder’s recourse to the appraisal remedy.

appraisal remedy. Subsections 9 and 10 set out circumstances under which a dissenting shareholder's rights may be reinstated before completion of the exercise. Subsections 11 to 13 stipulate the offer and acceptance obligations on the part of the dissenting shareholder as well as the company. The subsection contains provisions as to the service of demand letter on the board of directors of the company, offer and terms of payment of the fair value of the affected shares as well as provisions on the manner of return of the shares certificate to the company. Subsections 14 to 17 relate to the role and the extent of involvement of the court in the exercise of the remedy although the relevance and application of subsection 16 (on the relevant date for fair value determination purposes) extends beyond the court to the board of directors at the point of considering an offer to be made to the dissenting shareholder.²⁰ Subsection 18 is a transition provision and subsections 1, 10, 19 and 20 relate to reinstatement right of the shareholder and other miscellaneous provision including exemptions.

For clarity, a detailed analysis of section 164 under this chapter shall proceed according to the design highlighted in the preceding paragraph - the trigger events, step-by-step procedure for the exercise of the remedy, offer and acceptance obligations, the role of the court in the exercise of appraisal rights and the exemptions provisions.

2.3 The Trigger Events

Appraisal right is not available to a shareholder as a matter of course or at will nor at the instance of any notice of a company's proposal. In South Africa, appraisal right remedy can be triggered only in respect of a limited number of events which are set out under section 164 (2) (a) and (b) of the Companies Act. These trigger events can be put in two broad categories namely - the amendment of a company's memorandum of incorporation (the MOI) pursuant to section 37 (8) of the Companies Act and, fundamental transactions pursuant to sections 112, 113 and 114 of the Companies Act.

²⁰ Section 164 (16) of the Companies Act

2.3.1 Amendment of MOI

The MOI is the document ‘that sets out the rights, duties and responsibilities of shareholders, directors and others within and in relation to a company, and other matters’²¹ and there is power in the shareholders and directors of a company to alter the contents of the MOI including the rights and preferences of the holder of any class of shares of the company expressed in the MOI.²² However, where the effect of any alteration of the MOI would materially and adversely alter the rights of the holder of a class of shares, section 37 (8) gives the holder of any such shares or class of shares the right of recourse to the appraisal remedy under section 164.

Although the procedure for the exercise of the appraisal remedy under section 164 are sacrosanct as will be discussed in detail later in this chapter, it is important to note that activating the appraisal remedy on the ground of an alteration of the MOI that has affected [or is likely to affect] a class of shares, is not without its peculiar inherent conditions or limitations. One of such limitations in activating the appraisal remedy in relation to an alteration of the MOI is that the alteration complained of must ‘materially and adversely alter the preferences, rights, limitations or other terms of a class of shares, any holder of those shares.’²³ However, the Companies Act does not provide an insight into the threshold of the alteration that would be considered as ‘material and adverse.’

The use of ‘materially and adversely’ phrase in the provision is an indication that recourse to the appraisal remedy right following an alteration of the MOI is not automatic. Certain alteration of the rights of the holders of a class of shares may be held as not qualified or ‘material and adverse’ enough to warrant recourse to the appraisal remedy. Some measure of effect on the concerned shareholder’s shares would therefore have to be met.

There is no doubt that this qualification leaves open the possibility of an argument that an insignificant effect on shares following an alteration of the MOI may not suffice to validly trigger a shareholder’s right to the appraisal remedy. It is however understandable that this

²¹ Section 1 of the Companies Act

²² Section 36 (2)

²³ Section 37 (8) of the Companies Act

condition serves as a deterrent from spurious resort to random and abusive recourse to the appraisal remedy. As can be deduced from the foregoing contention, the quantum of an alteration of the MOI which the courts will uphold as 'material and adverse' enough to trigger the appraisal remedy is a separate subject that would require the attention of scholars and or the court in order for the phrase to gain some clarity.

Another inherent condition a dissenting shareholder whose ground for seeking an appraisal is the amendment of MOI is that, such appraisal seeking shareholder must be a holder of shares in the class of shares which will be affected by the alteration of the MOI.²⁴ This follows from logic and basic law since such dissenting shareholder must in fact have the standing to vote on the proposal or resolution relating to the amendment which would affect the concerned class of shares and also have the standing to challenge the alteration of the MOI on the basis of being a member of that class of shares.²⁵

2.3.2 Fundamental transactions

The second set of a company's activities that trigger the exercise of appraisal right are the transactions contemplated under sections 112, 113 and 114 of the Companies Act.²⁶ Section 112 relates to the disposal of all or the greater part of the assets or undertakings of a company whilst section 113 relates to amalgamations and mergers and section 114, schemes of arrangement. A company's decision to undertake any of these activities automatically activates shareholders' rights to the appraisal remedy. With each of the referenced sections on fundamental transactions referencing section 164 appraisal right, it is mandatory for a company to advise, in the prescribed manner, every concerned shareholder of the company of her appraisal remedy each time the company intends to engage in any of these fundamental transactions.²⁷

It is pertinent to note that one common feature of all the events constituting the fundamental transactions under the Companies Act is the tendency of each of those transactions to impact on the rights of the members of the concerned company significantly similar to the situation

²⁴ Section 164 (5) (a) (ii) of the Companies Act

²⁵ Section 37 (8) of the Companies Act

²⁶ Section 164 (2) b of the Companies Act

²⁷ *ibid*

with the amendment of MOI. This points to the rationale behind the construct of the appraisal remedy in South Africa - the appraisal remedy appears to serve as protection for shareholders from proposals and resolutions that have tendencies to impact 'materially and adversely' on shareholders' rights. This study now turns to examine each of these fundamental transactions briefly.

2.3.2.1 Section 112 disposal of assets

The transaction envisaged under section 112 of the Companies Act is a disposal of all or the greater part of the assets or undertaking of a company. Whilst there is no clear indication in the Companies Act as regards the range of events that would qualify as or amount to a 'disposal', the court has defined 'disposal of assets' in a case²⁸ decided prior to the coming into effect of the present Companies Act to include 'any transaction that exposes a company's assets to the risk of attachment.'²⁹ Also, there is no doubt that a 'sale' will amount to a 'disposal' under section 112.

In addition to fulfilling the requirements in section 112, a company that intends to engage in a disposal of assets in terms of section 112 must also meet the shareholders' approval and voting requirements set out under section 115 for any approval of the resolution for disposal to be valid. The notice of meeting where the shareholders would consider whether to approve the resolution for the disposal of assets must be accompanied by a written summary of the appraisal rights in section 164.³⁰ Just as stated earlier, the availability of the appraisal remedy in the circumstance of disposal of asset of a company is very understandable bearing in mind that a sale of all or the greater part of a company's assets has the potential of impacting significantly on the value of a company and its shares.

2.3.2.2 Section 113 merger & amalgamation

A merger is regarded as one of the fundamental transactions under the Companies Act. A merger is a transaction by which two or more companies decide to merge to form one or

²⁸ The Standard Bank of South Africa Ltd v. Hunkydory Investments 188 (Pty) Ltd and others Case No. 15427/08

²⁹ *ibid*

³⁰ Section 112 (3) b of the Companies Act

more new companies. Under the Companies Act, companies that intend to engage in merger transactions must each satisfy the liquidity and solvency test³¹ and ensure to meet the other requirements set out under section 113. Section 113 like section 112 also contains a requirement that a notice of meeting be sent out to all shareholders informing them of the company's proposal to engage in a merger and inviting the shareholders to a meeting to consider whether to approve the merger resolution. The notice of meeting to be dispatched to shareholders must, among other things, be accompanied with a summary of statement explaining the provisions of section 164 of the Companies Act.³²

2.3.2.3 Section 114 scheme of arrangement

Scheme of arrangement is the broad term for the description of the range of restructuring or transactions involving the alteration of the securities of a company including the rights attaching to such securities. The range of restructuring envisaged under section 114 includes expropriation, combination, exchange or consolidation of such company's securities. A company has the obligation to inform every shareholder, who may be affected by any proposed scheme of arrangement, of his appraisal remedy right under section 164 which information must be dispatched to the affected shareholders along with the notice conveying the invitation for meeting for the consideration of the resolution for the scheme of arrangement for the necessary approval.³³

2.4 Step-by-step procedure for the exercise of appraisal right under s. 164 Companies Act

Following any proposal in terms of any of the trigger events contemplated under section 164 (2) of the Companies Act and in addition to any condition or procedure to be followed in implementing that particular proposal, a company is obligated to deliver statements advising its shareholders of the appraisal remedy under section 164³⁴ dispatched along with the notice inviting shareholders for a meeting where the resolution for any proposal of the section 164 (4) trigger events will be considered for approval by the members of the company. Any shareholder who is averse to any such transaction and intends to pursue the appraisal remedy must, consequent upon being served with a notice of meeting in relation to the proposed

³¹ Section 113 (1) of the Companies Act

³² Section 113 (5) b of the Companies Act

³³ Section 114 (3) g of the Companies Act

³⁴ Section 164 (2) *ibid*

transaction, give to the company a written notice of his objection to the transaction in advance³⁵ before the date scheduled for voting on the resolution. However, there is no obligation on a shareholder to issue a written notice of objection to the resolution on the company where the company failed to give the shareholder a notice of meeting in the first instance or where the company omitted to include in any such notice of meeting, a statement of the shareholder's appraisal right in terms of section 164.³⁶

In addition to submitting his written notice of objection to the proposal, an appraisal right seeking shareholder must vote against the proposal at the meeting convened for the consideration of the proposal and any dissenting shareholder who gave the company a notice objecting to the transaction and voted against the transaction is entitled to a notification thereupon from the company within ten (10) business days of the company's adoption of such resolution except where the shareholder has withdrawn his notice of objection.³⁷ Upon receipt of the company's notification of adoption of the resolution, the dissenting shareholder consequently issues on the company a written demand setting out the shareholder's information and requesting to be paid a fair value for all³⁸ the shares held by the shareholder in the company.³⁹ The Companies Act requires that a copy of the shareholder's demand notice be delivered on the Takeover Regulation Panel.⁴⁰

2.5 Offer and Acceptance

Under the common law of contract, a shareholder's demand notice for payment of fair value for all his shares would have qualified as an offer capable of acceptance provided the

³⁵ Section 164 (3) *ibid*

³⁶ Section 164 (6) *ibid*

³⁷ Section 164 (4) *ibid*

³⁸. At first glance, the portion of subsection (5) where it reads 'the fair value for *all of the shares* of the company held by that person' is susceptible to ambiguous interpretations. Take for instance, a shareholder who hold shares in two separate classes of shares in one company. In the event of a scheme of arrangement affecting only one class of shares with respect to which the shareholder objects and seeks to exercise the appraisal right, the dissenting shareholder may have to exercise the appraisal right with regards to '*all of the shares*' and not merely the class of shares affected by the proposal for scheme of arrangement. However, this ambiguity is doused in section 164 (8) where it requires the shareholder to state in his demand notice, the class of shares with respect to which the shareholder is exercising the appraisal right. '*All of the shares*' could therefore be taken to mean 'all of the shares' with respect to the relevant class of shares. See Farouk HI Cassim *Contemporary Company Law* (2016) 2nd edition at Pg. 803 for further reading on this contention.

³⁹ Section 164 (5) & (7).

⁴⁰ Section 164 (8)

parameters of a valid offer are met by the shareholder's demand notice.⁴¹ However, and in terms of section 164 (11) (c) of the Companies Act, only a company can validly make an offer to the shareholder for a fair value payable in respect of any shares held up for appraisal.⁴² The implication of this is that where a company decides to accept a price stated in a demand notice delivered by a shareholder, it becomes a subject of debate whether a binding contract was formed between the parties in the circumstance and in terms of the Companies Act. A mischievous shareholder issued with a company's acceptance of the terms and price set out in the shareholder's demand notice can renege by issuing a subsequent correspondence sequel to the company's acceptance contending that the conduct of parties with respect to the appraisal right is guided by statute and their interaction or contract is one of a statutory flavour. The essence of this argument is to emphasize the point that only a company can make an offer for a fair value of the shares subject of appraisal in terms of section 164 (11) (c) of the Companies Act. The company must send such offer to the dissenting shareholder within five business days after the date the approved transaction takes effect, or within five business days after the shareholder's delivery of the demand notice as prescribed,⁴³ whichever is later.

A company's offer setting out the price the company is willing to pay for the shares of a dissenting shareholder must be accompanied with a statement showing the method by which the company arrived at any such value⁴⁴ and every offer sent out to every dissenting shareholders in respect of the same class of shares and transaction must be the identical in terms⁴⁵ with each offer having a validity of thirty (30) business days.⁴⁶

Consequently, a dissenting shareholder must, within the statutory thirty (30) business days validity period of a company's offer, communicate his acceptance of the offer to the company. A shareholder who chooses to accept an offer of the company must return the relevant shares certificates to the company and if there is no certificate covering the shares,

⁴¹ This would be so in a situation where the shareholder's demand notice state the price which he is willing to trade in his shares.

⁴² Section 164 (11) (c) of the Companies Act

⁴³ See section 164 (7) of the Companies Act for the timelines

⁴⁴ Section 164 (11) (c) of the Companies Act

⁴⁵ Section 164 (12) of the Companies Act

⁴⁶ Section 164 (12) b of the Companies Act

the shareholder must take steps to transfer the shares to the company in terms of section 53 of the Companies Act.

Perhaps, the return of the shares certificate must also be carried out within the thirty (30) business days validity period of the offer otherwise acceptance may be rendered incomplete and inchoate in the circumstance. A binding contract is formed once a shareholder has accepted a company's offer and the company must, within ten (10) business days after a shareholder's acceptance, coupled with a delivery of the shares certificate to the company, pay to the shareholder the agreed sum.⁴⁷

The foregoing consideration of the offer and acceptance provisions in terms of the appraisal remedy provision under section 164 of the Companies Act raises a few contentious issues. For instance, where a shareholder although communicated his acceptance of the company's offer to the company within the validity period but could not return the shares certificate until a further date, or a case where the offer and or the share certificate was dispatched by the shareholder but was not received by the company within the offer's validity period, whether the company could refuse to pay the fair value amount and claim in such circumstances that the dissenting shareholder had forfeited his right to appraisal having failed to comply with the provision of the Companies Act. This issue bothers on whether the stipulations in section 164 require strict compliance which could otherwise vitiate the entire exercise of the remedy. This issue would be addressed later in this dissertation.

2.6 The role of the court under section 164 appraisal exercise

Generally, the Companies Act appears to assign limited roles to the court in the appraisal remedy process.⁴⁸ A court's involvement in the appraisal remedy process can be grouped into two broad categories. First is the situation where no contract was formed as between the parties⁴⁹ and second, where the company's payment to the dissenting shareholder for the

⁴⁷ Section 164 (13) (b) b of the Companies Act

⁴⁸ Farouk HI Cassim *Contemporary Company Law* at pg. 798.

⁴⁹ Section 164 (14) of the Companies Act

appraised shares would impair the company's solvency or otherwise impact on the company's ability to pay its debts as at when due.⁵⁰

The first scenario where the intervention of the court is required in the appraisal remedy procedure as envisaged under the Companies Act is where no contract had been formed between the company and the shareholder. This could arise following a company's failure in its obligation to make an offer to the shareholder under section 164 (11) (c)⁵¹ in which case the shareholder's right to a court action crystallizes. The shareholder's application to the court in the circumstance, would be seeking an order for the determination of the fair value payable by the company in respect of the dissenting shareholders' shares or an order upholding the price proposed by such shareholder in his demand notice⁵² to the company and in either case, seeking to compel the company to pay to the shareholder any sum ascribed by the court as fair value payable on the shares.

The other no-contract scenario is where although an offer was made by the company, the shareholder considers the offer made by the company to be inadequate⁵³ in which case, the shareholder must, within thirty (30) business days of validity of the offer,⁵⁴ make an application to the court for the determination of the fair value of the shares.⁵⁵ Otherwise, where the offer period lapses before the shareholder's application is filed in court, the shareholder's application becomes time-barred except where there is some inherent power in the court to extend the time within which such application may be brought.

It is pertinent to add here that the relevant date to be considered at the point of determining the fair value of any shares subject to appraisal is the date of the company's adoption of the resolution which gave rise to the shareholder's exercise of appraisal remedy.⁵⁶ This date is relevant not only to guide the court in the exercise of its powers to determine what is fair

⁵⁰ Section 164 (17) of the Companies Act

⁵¹ Section 164 (14) (a) of the Companies Act

⁵² Sections 164 (5) & (7) of the Companies Act

⁵³ Section 164 (14) (b)

⁵⁴ *ibid*

⁵⁵ Section 164 (11) & (15) (c) (ii)

⁵⁶ Section 164 (16) of the Companies Act

value as described earlier but also for the directors of the company at the point of considering the price offer to be made to a shareholder.⁵⁷

The second category of situation where the court's intervention is envisaged in the appraisal remedy process under the Companies Act is the circumstance that relates to the impact which any payment, at such time, of the fair value to a dissenting shareholder will have on the state of company's finances. These situations do not bother on dispute over the price payable as fair value for the shares. Either the price would have been resolved prior to this stage following the offer and acceptance process under section 164 (13) (b) of the Companies Act or a decision on the shareholder's application under section 164 (14) for the determination of what is payable to the shareholder in respect of the shares as fair value would have been reached by the court.

Under the second category, the company is the party lodging an application to the court. The object of the company's application is to seek some relief regarding its payment obligation to the shareholder who would have otherwise become immediately entitled to payment without more. The company wants the payment delayed to a future date on the ground that making the payment as agreed or ordered by the court will impact on the company's ability to pay its debt as 'they fall due and become payable for the ensuing 12 months'.⁵⁸ The company's application, if granted, would in real terms, vary the company's payment obligations as to date. The court's duty in the circumstance would be to strike a balance between the interest of the dissenting shareholder who is entitled to payment of fair value for his shares as soon as possible on the one hand and the majority interests or, overall public interest, in preserving the company's solvency and existence on the other hand, by making just and equitable orders noting other payment obligations the company might have within those periods.

The court's powers in relation to an application brought to it in terms of an appraisal right includes the power to join other persons or dissenting shareholders in the proceedings,⁵⁹ power to appoint an appraiser,⁶⁰ power to make award as to interest⁶¹ and costs⁶² including

⁵⁷ Section 164 (11) (c)

⁵⁸ Section 164 (17) of the Companies Act

⁵⁹ Section 164 (15) (a) & (c) (i) of the Companies Act

⁶⁰ Section 164 (15) (c) (iii) (aa) of the Companies Act

the power to compel a shareholder to deliver up a share certificate within his possession⁶³ and the power to compel the company to pay up the fair value determined to the dissenting shareholders.⁶⁴

2.7 Reinstatements and Exemptions

A shareholder's right to reinstatement in terms of an appraisal right process is stated in section 164 (10) of the Companies Act. What is meant by reinstatement of rights in terms of the appraisal remedy and section 164 is the restoration of the rights attaching to the shares held by the dissenting shareholder prior to the initiation of an appraisal process. Such right include the right to attend meeting of shareholders, right to vote on resolutions and right to participate in dividends. Reinstatement of a shareholder's rights following an initiation of appraisal process follows from an inconclusive exercise of the process for any of the reasons indicated under section 164 (9) to be highlighted later in this chapter.

At what point is a shareholder's right in relation to a company lost or deemed lost in terms of an appraisal process? Before any meaningful analysis on reinstatement of rights, it is important to identify the point at which a shareholder's rights, in terms of the appraisal rights process, are lost. The moment where a shareholder has sent a notice to the company demanding for a fair value to be paid in respect of his shares following an appraisal exercise, that is the point where such shareholder loses his rights in respect of the shares with respect to which he seek appraisal.⁶⁵ From that point onward, the shareholder's only right against the company is the right to receive a fair value for his shares. This was one of the points in issue in the case of *Juspoint Nominees (Pty) Ltd v Sovereign Food Investments Ltd*.⁶⁶

In the *Juspoint* case, the applicants had exercised their appraisal rights up to the point of making a demand on the company for payment of a fair value for their shares. However, the respondent company - Sovereign Food Investments - declined to make an offer in response to the applicants on the ground that the condition-precedent to the implementation of the

⁶¹ Section 164 (15) (c) (iii) (bb) of the Companies Act

⁶² Section 164 (15) (c) (iv) of the Companies Act

⁶³ Section 164 (15) (c) (v) (aa) of the Companies Act

⁶⁴ Section 164 (15) (c) (v) (bb) of the Companies Act

⁶⁵ Section 164 (9) of the Companies Act

⁶⁶ (876/16) [2016] ZAECPEHC 15

transaction regarding appraisal rights had not been met and as such, the company could not proceed with the transaction.

Dispute arose when the company subsequently sent out notices of meeting to shareholders leaving out the applicants and other dissenting shareholders. The company proposes to revoke the earlier resolutions objected to by the applicants and revise same at the meeting to be convened. In the contention of the applicants, the respondent's motive for calling for a fresh meeting [if allowed] was to call for a fresh vote [without the applicants in attendance] on a revised version of the original proposal, to enable the company to defeat the applicants' objection to the company's original resolution whilst also defeating the applicants' recourse to appraisal rights. The applicants premised their arguments on the fact that the company's purported revised resolution seeks practically to achieve the same ends as the original resolution objected to by the applicants.

It was on the basis of the above facts that *Juspoint* and other dissenting shareholders [the applicants] applied to the court to interdict *Sovereign* [the respondent], among others, from proceeding with the fresh meeting without the applicants in attendance, contending that the proposed meeting was a device by the company to ultimately defeat the applicants' initial objection to the same proposal and denying the applicants' appraisal rights whilst also securing approval and implementation of the transaction. The court upheld the applicants' position to the extent that *Sovereign's* earlier proposal in terms of which the applicants filed their objections had become ineffective having regards to the fact that the conditions-precedent attached to the implementation of the proposal were not met. The court further held that the applicants' rights as members in the respondent company and as holders of shares were by reason of the failure to satisfy the conditions-precedent to the transaction automatically reinstated.⁶⁷ The court held that the applicants were therefore entitled to notices of meeting and to vote at any such subsequent meeting of the company.

One important inference that must be drawn from the *Juspoint* case is that a shareholder's right is reinstated at the point where the company proposes a resolution to revoke the initial proposal giving rise to the exercise of the shareholder's appraisal rights in the first instance

⁶⁷ Ibid at Pg. 9-10, para 23 to 25

and that appraisal-seeking shareholders are entitled to the notice of meeting at which such resolution for revocation is to be considered. An appraisal-seeking dissenting shareholder will also be eligible to vote on any such resolution for revocation. Such situation is exactly captured and provided for in the Companies Act under section 164 (9) (c).

Reinstatement of shareholders' rights following an initiation of appraisal exercise may be attained pursuant to an order of court,⁶⁸ or following a company's failure to make an offer on the shareholder coupled with the dissenting shareholder's withdrawal of his demand,⁶⁹ or by the shareholder's withdrawal of his demand on the company before the company's making of an offer⁷⁰ or by a shareholder's abandonment of the appraisal right exercise by neglecting to accept an offer made by the company⁷¹ notwithstanding the shareholder's delivery of a notice of objection and voting against the resolution.

Certain exemptions are provided for in relation to the exercise of appraisal right. The appraisal right does not exist to any transaction in furtherance of a business rescue plan.⁷² The tests and the requirements set out under section 164 do not apply in pursuance of any proposed acquisition of a company's own share under the Companies Act or distribution.⁷³ Furthermore, a determination of the fair value of shares under the appraisal right procedure does not give rise to an obligation on the part of any of the parties to any offer made under section 125 of the Companies Act⁷⁴ except as the Takeover Regulation Panel otherwise directs.⁷⁵

⁶⁸ Section 164 (15) (c) (aa) of the Companies Act

⁶⁹ Section 164 (9) (b) of the Companies Act

⁷⁰ Section 164 (9) (a) of the Companies Act

⁷¹ There is an issue in this regard. According to the introductory part of section 164 (9), a shareholder's demand notice on a company marks the end of his membership rights in the company. However, s 164 (9) (a) suggests that mere 'allowing the offer to lapse' could revive a shareholder's membership. Should a shareholder not be required to do more for his rights to be reinstated than to just allow an offer to lapse? Should there not be a notification informing the company of the shareholder's intention to resume membership? It is arguable that [notwithstanding the use of the word 'or' in the subsection] the requirement that a shareholder must withdraw his demands in the first part of subsection 9 (a) must be read together with the second part of the subsection such that a shareholder must not merely allow an offer to lapse but also withdraw his demand.

⁷² Section 164 (1) of the Companies Act

⁷³ Section 164 (19) of the Companies Act

⁷⁴ Section 164 (20) of the Companies Act

⁷⁵ Section 164 (20) (b) of the Companies Act

Finally, section 164 (18) protects a dissenting shareholder in a situation where the dissenting shareholder would have been left with no company against whom an outstanding obligation in terms of any appraisal right exercise can be enforced, for instance, following a merger transaction. The situation envisaged by this provision is where, for instance, following a merger transaction between two companies, new and different entities have emerged, and these new entities would have ordinarily been entitled to avoid obligations of their predecessors-in-title by reason of not being a party to the appraisal exercise. This would, in reality, leave an appraisal seeking shareholder with no entity against whom to require or enforce payment for his shares. It is to protect dissenting shareholders against this kind of situation that the Companies Act invests new entity or entities emerging from a merger transaction with responsibility for any outstanding obligations due to an appraisal seeking shareholder from the original company or entities. As such, a shareholder can enforce any outstanding appraisal right obligations against the new emerging entity.

2.8 Section 164 and the theories of appraisal remedy

Having considered the components of section 164 of the Companies Act, this part briefly analyses the rationale of the appraisal remedy as expressed in section 164 considering the theories propounded in explanation of the remedy. In other words, this part seeks to provide an insight into South Africa's legislature's intent in adopting the construct, design and approach employed in enacting the appraisal remedy under the Companies Act.

The traditional explanation theory for the enactment of the appraisal remedy appears to be a one-size-fits-all explanation for all appraisal statutes since typically all appraisal statutes are meant for the protection of minority shareholders who are opposed to the transaction triggering the appraisal right. Consequently, the traditional theory explanation of the purpose of the appraisal remedy offers a credible explanation for the enactment of section 164 of the Companies Act.

Section 164 also answers to the 'group coordination' theory in some ways. Investors' incentive to take advantage of shareholders' lack of coordination by pitching shareholders against themselves is likely to be reduced at the appearance of section 164 appraisal remedy. However, an appraisal statute that will dis-incentivize, in the strongest manner possible,

investors from taking advantage of shareholders' lack of coordination, must be skewed in a manner as to enact the parameters for the determination of fair value of the appraised shares in a way as to extract any unfair advantage obtained by an investor. Such parameters and method for the determination of fair value must also be widely publicized to shareholders and investors alike such that wide knowledge of these parameters is within the reach of investors informing them of the potential consequence of pursuing unfair advantage. Unfortunately, section 164 appraisal right does not appear to pursue the group coordination theory this far.

The Reckoning goal explanation also fits section 164 appraisal remedy. The reckoning goal presupposes that an appraisal statute's objective is the opportunity the remedy presents to shareholder to assess, evaluate and monitor the performance of a company's management. Certainly, evaluation of the performance of the management of a company cannot be the primary goal of any appraisal statute. Yet, this evaluation can be achieved by inference from the determined value of the appraised shares. There is no doubt that this purpose can be served by section 164 appraisal right provision.

Both the inframarginal value and discovery goals of appraisal remedy can also be served by section 164 appraisal remedy since a dissenting shareholder is entitled, in any appraisal proceeding, to put in any evidence the shareholder believes would impact on the value of his shares to secure any inframarginal value on the shares. Furthermore, there is no reason a shareholder cannot request for information or subpoena documents from the company in an appraisal proceeding which might reveal information that may be of use to the shareholder. These inframarginal and discovery goals are however not the strongest explanations for section 164 appraisal right provision in that nothing in the provision appears to directly pursue or strengthen any of these objectives on behalf of the shareholder.

CHAPTER 3

AN INVESTIGATION INTO POTENTIAL STATUTORY FRAMEWORK FOR DISSENTING SHAREHOLDERS' APPRAISAL RIGHTS IN NIGERIA

As stated in chapter I of this dissertation, the CAMA,⁷⁶ although Nigeria's main corporate statute, does not provide any legal framework for fundamental transactions such as mergers and acquisitions, takeovers, schemes of arrangement or compromise. *A fortiori*, CAMA does not also provide any framework for appraisal rights. Also, as stated under Chapter 1, the statutory framework for fundamental transactions in Nigeria is the Investment and Securities Act, Cap I24, Laws of the Federation of Nigeria 2010 ('the ISA').⁷⁷

The ISA

The ISA is not merely a statutory framework for fundamental transactions in Nigeria, it is also the statutory framework for shareholders' rights⁷⁸ in relation to these fundamental transactions.

The ISA provides the framework for merger transactions from section 119 through to section 128, takeover transactions from section 131 through to section 151 and the rights of dissenting shareholders⁷⁹ in relation to these transactions are framed around some of the provisions guiding these transactions. Whilst there is no provision on appraisal rights in the ISA directly comparable what is expressed under section 164 of the Companies Act, some provisions in the ISA are conspicuous either for specifically referencing the phrase 'dissenting shareholder' or a similar term or phrase such as 'dissenter' or 'dissenting offeree' and so on or provisions providing dissenting shareholders with some reliefs in relation to the fundamental transactions under the ISA. It is these provisions that would be examined and

⁷⁶ CAMA - the Companies and Allied Matters Act CAP C20, Laws of the Federation of Nigeria 2010 - is the Nigerian equivalent of the Companies Act No. 71 of 2008 in South Africa. It is the statute regulating the process of incorporation, management and control of all kinds of corporate nomenclatures recognised in Nigeria including trusts. Although CAMA contains protections for minority shareholders in terms of prejudicial conducts and derivative actions it does not contain protection for minority shareholder in terms of fundamental transactions since it does itself not provide the framework for fundamental transactions in Nigeria. Refer to Chapter 1 for further reading on the CAMA.

⁷⁷ For further background on the ISA, see Chapter 1

⁷⁸ Although the CAMA provides for certain minority shareholders' rights in section 3

⁷⁹ Some of these rights include the right of the dissenting shareholder to compel the acquisition of his shares. For instance, sections 129 and 130 of the ISA provides a dissenting shareholder in relation to a merger transaction with the right to require or compel the acquisition of such dissenting shareholder's shares.

will form the subject of the extensive analysis under this chapter with a view to identifying potential framework for appraisal rights remedy amongst these provisions of the ISA. The provisions that would be considered are sections 129, 130 146 and 147 of the ISA.

Section 129 of the ISA

The heading of section 129 of the ISA is the ‘power to acquire shares of dissenting shareholder.’ It is the equivalent of section 124 of the Companies Act headed ‘compulsory acquisition and squeeze out’ and in practice, both provisions serve the same purpose. Section 129 of the ISA gives an offeror, or a transferee company involved in a merger transaction, who has attained a shareholding threshold in the transferor company, the right to compulsorily acquire the shares of a dissenting shareholder whose objection relates to the merger resolution. The provision of section 129 of the ISA, popularly described as a squeeze out provisions, is, however, skewed in favour of the merging entities rather than a dissenting shareholder. The provision, notwithstanding, provides a dissenting shareholder with the opportunity to have his shares acquired for value but with no guarantee of obtaining a fair value or an appraisal. With this, section 129 confronts this study with the distinction between ‘squeeze-out’ provisions and appraisal right remedy.

The gist of the difference between a ‘squeeze-out’ provision and the appraisal remedy is the right of the dissenting shareholder to insist on payment of a fair value for the affected shares which is the hallmark of the appraisal remedy.⁸⁰ On the other hand, squeeze-out provisions do not afford shareholders the right to appraisal or any mechanism that ensures fair value for the dissenting shareholders’ shares. Investing a shareholder with the right to receive a fair value for his shares or appraisal, must be supported with mechanisms which must framed into the statute creating the right. Section 129 of the ISA does not create in a dissenting shareholder the right to demand payment for fair value for shares.

Notwithstanding the foregoing, the significance of section 129 of the ISA in relation to the rest of the provisions of the ISA to be examined under this chapter is worthy of note in that

⁸⁰ Squeeze-out provisions do not guarantee a shareholder the right to demand for fair value of her shares.

section 129 of the ISA is the only section that offers a definition of a dissenting shareholder⁸¹ under the ISA.

Section 129 defines a dissenting shareholder to include ‘*a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer to the transferee company in accordance with the scheme or contract.*’ It is this definition that sets the tone for the character of a dissenting shareholder throughout the ISA. In addition, section 129 also provide a voting threshold for the approval of the transactions envisaged under section 129, a dissenting shareholder [under the ISA] is presumably a shareholder or a group of shareholders not collectively holding more than ten (10) per cent of the value of the shares or the concerned class of shares in the transferor/target company.

This is so because the threshold for shareholders’ approval of any of the fundamental transactions under the ISA is ninety [90] per cent. In effect, a fundamental transaction in terms of the ISA must receive the approval of not less than nine-tenths shareholders of the transferee company or, of the relevant class of shares for any claim to any remedy available to the dissenting shareholder to crystallise. Conversely, a shareholder must be someone, or belong to the class of shareholders, not holding more than ten per cent shares in the transferor company or in the affected class of shares before the character of such shareholder can be recognised as a dissenting shareholder in terms of the ISA. This construct of a dissenting shareholder as set under section 129 is the prevailing tone and standard adopted throughout other provisions on dissenting shareholder under the ISA.

Analysis of section 129 reflects that the provision does not afford a dissenting shareholder the right to fair value of his shares. It is rather a mechanism skewed essentially in favour of an acquirer rather than a dissenting shareholder. The object behind the provision is to enable the acquisition of the shares of a target company complete much on the acquirer’s own terms without providing the dissenting shareholder with an opportunity to have the shares appraised.

⁸¹ S 129 (6) of the ISA

Section 130 of the ISA

The section is one of the provisions in the ISA that relates to merger transactions. This provision provides a dissenting shareholder (of a target company subject of a merger) with the right to require a transferor company to purchase the dissenting shareholder's shares where the merger has been approved by holders of nine-tenths in value of the shares of the target company. The provision is simply the converse of section 129. This provision is a useful tool in the hands of a dissenting shareholder who has been left out following approval of a merger by majority shareholders and where a transferee company has neglected to purchase the dissenting shareholder's shares pursuant to the squeeze out provisions.

What is however interesting about section 130 is the possibility it creates for the dissenting shareholder to negotiate more favourable terms (as opposed to being bound by the terms agreed to and approved by the majority shareholders of the transferor company) with the transferee company in consideration for the transfer of the dissenting shareholder's shares. Section 130 creates in favour of the dissenting shareholder the right of recourse to the court for redress. Under this provision, a dissenting shareholder is entitled to bring an application to court to compel the purchase of his shares and the dissenting shareholder may, in the language of the provision, seek a more favourable term of transfer of his shares in the court proceedings.⁸² However, such right to court action does not necessarily create an appraisal right in a dissenting shareholder.

Section 146 of the ISA

Section 146 is like section 129 in that they both prescribe the right of an offeror to acquire the shares of a dissenting shareholder but whilst section 129 applies specifically to mergers, section 146 relates to take-over bids. Section 146 employs the phrase 'dissenting offeree' rather than 'dissenting shares' but the definition of a 'dissenting offeree' under section 146 (1) leaves no room for doubt that the two phrases mean the same thing.

The sections preceding section 146 -from section 131 to section 145 - provides the framework and procedure for engaging in a take-over transaction. A take-over under the ISA

⁸² Section 130(4) of the ISA

refers to the statutory right of a shareholder, who already holds not less than thirty (30) per cent of shares or voting rights in a company, to make an offer to the holders of the remaining shares for the purchase of these other shareholders' shares in the company.

The significance of section 146 to this dissertation lies in the election the section affords a dissenting shareholder under its subsection 3(b) in relation to a take-over bid. A dissenting shareholder who is affected by the provision of section 131 through to section 145 in relation to a take-over bid is faced with an election, either to transfer his shares to the offeror on the terms upon which the majority shares were acquired by the offeror, or, to demand for the payment of a fair value for his shares. It is this right of election by a dissenting shareholder under section 146 (3) to demand for payment of fair value of shares that makes the section stand out for the purpose of this study.

Section 146 (3) of the ISA references section 147. Both sections combined, lay down the procedure a dissenting shareholder must follow in making his demands for payment for fair value of his shares. It is based on the foregoing that sections 146 and 147 of the ISA [combined] will be considered as statutory framework for the exercise of appraisal right in Nigeria. This is so because these sections present the very crucial element which forms the cornerstone of appraisal right remedy – a shareholder's right to make a demand for fair value of shares. William W. Bratton wrote that:

‘the basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock ...’⁸³

Having briefly examined the provisions of sections 129, 130, 146 and 147 of the ISA as expressed in the foregoing, it is clear that, although none of those provisions particularly bear an exact semblance with section 164 of the Companies Act, sections 146 and 147 combined stands out as possessing elements which can be considered as an appraisal remedy. Section 147 is particularly more explicit in setting the step-by-step procedure by which a dissenting

⁸³ William W. Bratton ‘Corporate Finance Cases and Materials’ 7th Edition, Foundation Press (2012) at Page 8

shareholder is to pursue his demand for payment of fair value for his shares. Consequently, further analysis under this chapter and dissertation would defer to section 147 [and section 146 where necessary] of the ISA as the appraisal right mechanism and remedy in Nigeria.

This study now turns to engage in an in-depth analysis of section 147 which, in the main, provides the mechanism for the exercise of the appraisal right.

Section 147 of the ISA

Section 147 lays out the procedure applicable in the event where a dissenting shareholder has, in terms of section 146 (3) b, elected to demand for payment of a fair value of his shares rather than an election to transfer his shares to the offeror on the terms on which the offeror acquired the shares of other shareholders. Section 147 of the ISA bears some semblance with section 164 of the Companies Act in that both sections set out the procedure for the demand for payment of a fair value of the shares of a dissenting shareholder. The structure of the analysis of section 147 of the ISA under this chapter will, therefore, follow the design adopted with the analysis of section 164 of the Companies Act as far as possible under the following heading - the trigger events, offer and acceptance obligations, and the role of the Nigerian court in the appraisal right exercise.

Section 147 Trigger Event

By trigger events, what is meant are those corporate decisions which by default, entitles a dissenting shareholder to exercise the right to decide to withdraw from membership of the company following a demand for payment of a fair value for his shares in the company. Unlike section 164 Companies Act, there is only one trigger event or corporate decision that confers appraisal right on a shareholder under the ISA - Take-Over transactions. What are Take-Over transactions?

A take-over, in terms of the ISA, is a ‘take-over’ of the control of a company through purchase of the company’s shares. Section 117 of the ISA⁸⁴ defined a take-over to mean ‘the

⁸⁴ Section 117 is a definition section for Part XII of the ISA

acquisition by one company of sufficient shares in another company to give the acquiring company control over that other company.’ One distinguishing feature of a potential acquirer of shares in terms of a take-over transaction as built into the take-over provisions⁸⁵ is that such acquirer (referred to as ‘an offeror’ under the take-over provisions in the ISA) must be an existing shareholder who, individually or in acting in concert with other shareholder(s), must hold at least thirty (30) per cent shares (but not more than fifty per cent)⁸⁶ in the target company prior to the time of bidding as a statutory prerequisite or condition-precedent to engage in a take-over bid.⁸⁷ The document containing the terms and conditions upon which a shareholder [called ‘a take-over offeror’ or simply ‘an offeror’] proposes to engage in a take-over transaction is referred to as a ‘bid.’⁸⁸ The outcome of a successful take-over bid transaction is that a clear majority emerges in terms of the shareholding structure and membership of such company which in turn translates into change in control.

Offeror’s Notification

Exercising the appraisal remedy under section 147 of the ISA commences with a notice which an offeror is obliged to issue on the dissenting shareholder in terms of section 146 (2). Section 146 (2) mandates an offeror of a take-over bid to give notice⁸⁹ to dissenting shareholders, the transferor company⁹⁰ as well as the commission,⁹¹ within a specified time after the date on which acceptance by ninety per cent of the shares subject of acquisition is complete. The notice must convey fact including, the right of the dissenting shareholder to make an election⁹² either to transfer his shares on the same terms as was offered to and accepted by the consenting shareholders or otherwise make a demand on the offeror for payment of a fair value respecting the dissenting shareholder’s shares. A dissenting shareholder must sequel to the offeror’s notification, make an election and notify the offeror accordingly. Where a dissenting shareholder neglects to make an election following an offeror’s notification, the dissenting shareholder will be deemed to have elected to transfer

⁸⁵ Section 131 of the ISA

⁸⁶ The idea behind this is that a shareholder who holds more than fifty per cent in a company already constitutes majority and might not need the take-over provision to exercise control on the company.

⁸⁷ Section 131(1) of the ISA

⁸⁸ Section 132 (1) of the ISA

⁸⁹ Section 146 (2) (a) of the ISA

⁹⁰ Section 146 (7) a *ibid*

⁹¹ The Securities Exchange Commission is the statutory body established by the ISA whose responsibility includes the regulations and supervision of companies in relation to fundamental transaction. Section 146 (8)

⁹² Under section 146 (3) of the ISA

his shares on the terms on which the offeror acquired the shares of the consenting shareholders.⁹³ In addition to making an election and regardless of the election made, the dissenting shareholder shall, within twenty days of receipt of notice from the offeror, send to the company his shares certificate.

As for the offeror, he shall within twenty days of dispatch of the mandatory notice to the dissenting shareholder pay to the company the consideration which the dissenting shareholder(s) would have received if the dissenting shareholder(s) had assented to the bid on the terms accepted by the consenting shareholders.

Fair value determination

The determination of what is payable as fair value in the context of a dissenting shareholder who has elected to demand for payment of fair value of his shares in terms of section 146 (3) b of the ISA is an exercise presumably within the exclusive reserve of the court.⁹⁴ Nothing under the provision suggests that the offeror and the dissenting shareholder can between themselves agree on the fair value or reach a fair value determination through a process outside a determination by the court. Perhaps, this is to discourage or avoid a situation where the consenting shareholders would be prejudiced by the offeror's subsequent arrangement with the dissenting shareholder which may result in a value higher than what was offered and paid to the consenting shareholders for their shares.

The court process for the determination of fair value is by means of an application seeking for a determination of fair value. The application can be brought in court either by an offeror⁹⁵ of the take-over bid or a dissenting shareholder.⁹⁶ An offeror has twenty days from the date of the payment required under section 146 (6) to bring such an application for the determination of the fair value payable on a dissenting shareholder's shares to court,⁹⁷ failing which a dissenting shareholder may, within a further period of twenty days from end of the date of the

⁹³ Section 146 (4) *ibid*

⁹⁴ Section 147 (6) *ibid*. Court is defined to mean 'the Federal High Court' under section 117.

⁹⁵ Section 147 (2) of the ISA

⁹⁶ Section 147 (3) *ibid*

⁹⁷ Section 147 (2) *ibid*

offeror's period to bring the application. A dissenting shareholder who brings the application under the circumstance is not required to give securities for costs.⁹⁸

All other dissenting shareholders must be joined⁹⁹ in the appraisal proceedings. The offeror has the obligation to inform every dissenting shareholder who has elected to demand for payment of a fair value for his or her shares, of the date, place and time of the hearing of the application in court including informing them of their rights to appear and to be heard either in person or through counsel¹⁰⁰ in the proceeding.

The Role of the Courts

In carrying out share appraisal exercise under section 147, the court has the discretion to appoint one or more experts who must be independent, and whose role is to assist the court in fixing a fair value for the dissenting shareholders' shares.¹⁰¹ The ISA refers to these experts as independent 'valuers.' The court may, in addition to, or as an alternative to fixing the amount payable, make orders for awards of other kind of considerations¹⁰² other than money consideration in favour of the dissenting shareholders or held by the transferor company or other person¹⁰³ in trust for the dissenting shareholders. The court has powers to allow interests at the current bank rate on the amount payable to each dissenting shareholder from the date each shareholder sends his shares certificate to the company after receipt of the offeror's mandatory notification.¹⁰⁴ These orders must be made against the offeror in favour of all the dissenting shareholders who elected under section 146 (3) b to demand for payment of a fair value for their shares¹⁰⁵ and all the dissenting shareholders are consequently bound by the decision of the court.¹⁰⁶

⁹⁸ Section 147 (4) *ibid*

⁹⁹ Section 147 (5) (a) *ibid*

¹⁰⁰ Section 147 (5) (b) *ibid*

¹⁰¹ Section 147 (7) *ibid*

¹⁰² Section 147 (9) (a) *ibid*. The ISA does not specify the other kinds of consideration which the court is empowered to make in favour of the dissenting shareholder under the provision. It is however likely that this other consideration may include making orders for allotment of shares in the transferee company in favour of the dissenting shareholder.

¹⁰³ Section 147 (9) (b) of the ISA

¹⁰⁴ Section 147 (9) (c) *ibid*

¹⁰⁵ Section 147 (8) *ibid*

¹⁰⁶ Section 147 (5) (a) *ibid*

Sections 146 & 147 of the ISA and the theories of appraisal remedy

Apart from the traditional goal of the appraisal remedy, the only other theory that explains the approach taken by the ISA in enacting sections 146 & 147 is the inframarginal value theory. The inframarginal goal is served by the appraisal framework under the ISA having regards to the essence of such proceedings being to determine if the shares have more value than what was offered by the offeror.

The ISA therefore does not appear to do in anything in pursuit of the Reckoning and Discovery goals of the appraisal remedy. It would be recalled that the party to the appraisal proceeding in accordance with section 146 and 147 is the offeror of the take-over transaction and not the company. Therefore, there is little or no hope of the company turning in any document in the appraisal proceeding that would give a dissenting shareholder an insight into the performance of the management of the company or aid a discovery of any misconduct on the part of the directors. It is noteworthy that, under the ISA, appraisal is only available in the terms of a take-over transaction. Also, the ISA appraisal right mechanism does not appear to serve the 'group coordination goal' since there is no deterrence framed into the mechanism against investors' potential to engage in value-reducing transactions.

Overall, what has been revealed in this chapter is the existence of an appraisal remedy mechanism under the ISA. Appraisal remedy exists in Nigeria in relation to take-over transactions. It is on this basis that a comparative study of the statutory frameworks for appraisal remedy in South Africa and Nigeria will be carried out in the next chapter.

CHAPTER 4

4.1 A COMPARISON OF THE COMPONENTS OF THE APPRAISAL RIGHTS PROVISIONS IN THE COMPANIES ACT AND THE ISA

South Africa's appraisal right mechanism in terms of section 164 of the Companies Act was examined extensively under chapter 2 of this dissertation whilst sections 146 and 147 of the ISA were identified as the appraisal right regime under Nigerian law and analysed accordingly under Chapter 3. This chapter engages in a comparative analysis of the components of the jurisdictions' respective regimes highlighting their differences and similarities.

4.2 A comparison of the trigger events

The trigger events in relation to which a dissenting shareholder may exercise appraisal rights remedy under South Africa's Companies Act includes the disposal of all or the greater part of the assets or undertakings of a company in terms of section 112, a merger or amalgamation in terms of section 113, schemes of arrangement under section 114 and alteration of a company's memorandum of incorporation. However, the only trigger event revealed in the analysis of sections 146 and 147 of the ISA under Chapter III with respect to which a dissenting shareholder has the right to an appraisal remedy was in Nigeria is a 'take-over' transaction.

What is common to the appraisal right provisions in both jurisdictions is the character of transactions in terms of which a dissenting shareholder may exercise an appraisal rights and the philosophy that informs the inclusion of the remedy in the two countries' statutes. The nature of transactions such as the disposal of assets, mergers and amalgamation, schemes of arrangement, alteration of the memorandum of incorporation and take-over is such that they bring about fundamental shift in the ownership structure and control of the affected company. These transactions may also result in a change in the notion behind, and vision of the company. It therefore accords with reason and logic to afford persons who assented to the membership of such company based on certain values and ideas, which values and ideals informed their decision to join the company in the first instance, the opportunity to withdraw

from their membership of the company on fair terms, at the point where the company shifts from those values and ideals.

However, it must be admitted that mergers, disposal of assets, schemes of arrangement and alteration of the MOI on the one hand are altogether different from a take-over transaction on other hand. It is pertinent to note also that although the Companies Act itself provides for take-over transactions from sections 121 to 127, however the Companies Act does not provide for an appraisal right in respect of take-over transactions. Looking closely at the nature of transactions giving rise to an appraisal right under the Companies Act [and noting the Companies Act's failure to provide for the appraisal remedy in terms of take-over transactions], it would appear as though the protection offered by appraisal remedy under the Companies Act is against transactions with very strong tendencies to impact directly on the value of a shareholder's stocks, that is, value-reducing transactions.

On the other hand, whilst a change in control of a company, in terms of a take-over transaction, may signal a change in the direction of the company or its business [following a change in the company or directors], a change in control does not readily pose any risk or threat to the value of a company's stocks or a shareholder's interests in a company. It is therefore reasonable to assume in the circumstance that the appraisal right mechanism under the ISA was not designed primarily to offer protection to shareholders against companies' tendencies to engage in value-reducing transactions since a take-over transaction cannot necessarily be classified as a value-reducing transaction. The ISA appraisal right mechanism appears instead, to be a protection in the event of a change in the ideals which informs a shareholder's decision to invest in a company in the first instance.

4.3 A comparison of the scope of the appraisal framework under the Companies Act and ISA

There is no doubt that the Companies Act attached appraisal rights to all the fundamental transactions provided for under it such that in the event of a potential fundamental structural change in a company, a dissenting shareholder can be rest assured of some relief against majority bullying by exiting the company on fair terms. However, the ISA's appraisal rights provision only effectively affects take-over transaction. The appraisal right remedy under the

ISA is limited in scope compared to the range of transactions already discussed under the Companies Act with respect to which a dissenting shareholder may resort to the use of the remedy under the Companies Act in South Africa.

Furthermore, it is submitted that the ISA does not protect a shareholder in as much clear and broad terms as the Companies Act. A shareholder in a Nigerian company cannot exercise appraisal in terms of mergers, alteration of the memorandum of incorporation¹⁰⁷ or schemes of arrangement. Such shareholder of a Nigerian company cannot exit the company in terms of a potential mergers or disposal of assets of the company since such is not provided for in the ISA.

4.4 A comparison of the framing of the appraisal rights provisions

The difference in the design adopted in the framing of each appraisal provision is worthy of note. The Companies Act leaves no doubt as to what was offered under section 164 and how it was to be exercised. The Act presents section 164 appraisal right as a remedy for a dissenting shareholder. One would have no difficulty in understanding the section and the practice around the remedy having regards to the simplicity with which the section lays out, step-by-step, the procedure for the exercise of the right. This simplicity and clarity of purpose is further expressed in the way every provision or transaction in terms of which a shareholder is entitled to exercise an appraisal right references section 164.

Another closely related point is the fact that every company that intends to engage in any of the fundamental transaction is specifically required by the Companies Act to give to shareholders, notice of their appraisal rights under section 164 where applicable. This approach to the remedy is perhaps informed by the desire of the drafters to earnestly pursue the objectives behind the enactment of the Companies Act which in the case of the appraisal rights remedy would be to ‘balance the rights and obligations of the shareholders and directors within companies.’¹⁰⁸ It has been submitted that such an approach was informed by the appraisal remedy regimes in jurisdictions such as Canada and the United States of America where appraisal right remedy and principle had become a full-fledged jurisprudence

¹⁰⁷ In Nigeria, it is known as ‘memorandum of association’

¹⁰⁸ Section 7(i) of the Companies Act

and which jurisdictions informed the approach adopted by the drafters of the South African Act.¹⁰⁹

The situation with the ISA is different. At first glance, the ISA does not appear to include any appraisal right mechanism given especially the fact that the approach adopted by the ISA in enacting its appraisal remedy is rare. Consequently, one would therefore have to dig closely into the ISA to discover the framework.

4.5 A comparison of the character of the dissenting shareholder

The character of a dissenting shareholder under both statutes, in terms of the appraisal right remedy, is substantially the same. Both statutes present a shareholder who objects to a company's proposal or resolution and seeks to withdraw from the membership of the company by demanding payment of fair value for his shares following a majority decision to pursue the objective objected to. However, when considered as a group, each appraisal statute presents a group of dissenting shareholders different in size which difference is deducible from the voting requirement for the approval of the trigger events under each respective statute.

Fundamental transactions under the Companies Act require the approval of the holder(s) of at least seventy-five (75) per cent of the voting rights or shares in the relevant company¹¹⁰ or the relevant class of shares. Consequently, the size or number of shareholders left [after the approval], who may effectively constitute the dissenting shareholders against any such approval fundamental transaction under the Companies Act is twenty-five (25) per cent of the shareholders or class of shareholder. This size of dissenting shareholders is large compared to the ISA.

¹⁰⁹ Yeats Jacqui 'The proper and effective exercise of appraisal remedy under the South African Companies Act, 2008: Developing a strategic approach through a study of a comparable foreign law' (unpublished, University of Cape Town, 2015)

¹¹⁰ See section 65 (9) of the Companies Act

Under the ISA, the threshold for the approval of a take-over transaction is nine-tenth of the shares of the company or of the class of shares concerned¹¹¹ leaving not more than ten per cent shareholders as the largest possible size of any class of dissenting shareholders under the ISA.

4.6 A comparison of the voting and objection pre-conditions

It is more or less standard *modus operandi* in most jurisdictions of the world [as with South Africa and Nigeria] to include in their corporate statutes the requirement that companies notify their members or shareholders in the event of any proposal of a company which may affect the interests of those members and to require the companies to convene meeting of where the proposals would be considered for approval or otherwise. Such is the case with the trigger events discussed under both statutes. For these transactions to be valid, these statutes require that a meeting of members of the company be first convened at which meeting the relevant resolutions are expected to be considered for approval by the members.

Consequently, whenever a vote is called in relation to a trigger event, (whether under the Companies Act or the ISA), a shareholder is entitled to take any of the following course - vote for approval, vote against the transaction or, altogether refrain from exercising his vote on the transaction one way or the other. However, the important point here is that the way a shareholder decides to exercise his vote in terms of a trigger event affects such shareholders' ability to, or his right of recourse to the appraisal remedy.

In terms of section 164 of the Companies Act, a shareholder who intends to exercise his appraisal right in relation to a proposal of a company, must, after being served with the company's notice of meeting where the proposed transaction would be considered and before the resolution on same is voted on, write a notice of objection to the proposed resolution or transaction. In addition, the shareholder must, at the meeting when a vote is called on the approval of the proposal, vote against the transaction.¹¹² Certainly, a shareholder cannot vote in favour of a proposal with respect to which such shareholder intends to eventually exercise an appraisal right and such shareholder may also not refrain from voting altogether. The

¹¹¹ Section 129 (1) of the ISA

¹¹² Section 164 (5) (c) (i) of the Companies Act

Companies Act requires a shareholder to cast his vote against the proposal as a pre-condition to the exercise of the appraisal right.¹¹³ In essence, the opportunity to exercise appraisal right may be lost by a shareholder who refrains from voting on a proposal towards a fundamental transaction under the Companies Act or fails to serve the company with a written notice of objection to the resolution.¹¹⁴

There is however no voting conditions-precendent to the exercise of the appraisal right remedy under sections 146 and 147 of the ISA. A shareholder need not serve a written notice of objection to a take-over proposal or resolution nor is such shareholder required to specifically vote against the resolution when a vote on the resolution as a condition-precendent to the exercise of the appraisal remedy under the ISA. Nevertheless, a shareholder's vote in favour of a take-over transaction will effectively truncate the shareholder's potential to have a recourse to the appraisal mechanism under the ISA. A shareholder who votes for the approval of a take-over transaction is basically accepting the offeror's bid for his shares. This invariably means that the shareholder is bound to accept the share price or value expressed in the offeror's bid without more. It is therefore submitted that both the Companies Act and the ISA share a similar characteristic with regards to the voting pre-condition to the exercise of the appraisal right in that they require the appraisal seeking shareholder to have voted against the proposal giving rise to the decision to seek appraisal.

4.7 A comparison of the time stipulations

Another feature that is common to the appraisal right mechanism under both statutes is stipulations as to time. Both statutes indicate timelines within which the actions or procedures required to be taken in pursuit of the exercise, must be carried out and the introduction of these time stipulations into the process is quite an understandable concept in the exercise of the remedy.

Transactions that attract appraisal right are of the kind that requires exigency. They must be concluded in good time given the risk that any delay might inflict on the value of the

¹¹³ Section 164 (5) (c) (i) of the Companies Act

¹¹⁴ The only exception is where the company failed to serve the shareholder with a notice of the meeting in which case the requirement on the shareholder to serve his notice of objection to the proposal does not apply.

company, its shares and assets, especially in a case where the company involved is a publicly traded corporation. The parties would therefore, usually like to close the transaction within the shortest time possible including attending to drawbacks and dissenting shareholders' objections. It is submitted that it is this that informs the introduction of time stipulations in the exercise of appraisal right process.

The question however is whether a failure to comply with these time stipulations, either on the part of the company or an appraisal right seeking shareholder, would have any impact on the exercise of the remedy under the respective statutes or whether these time stipulations are merely advisory in nature such that there are no consequences to the failure to observe them. Before examining this issue however, it is important to highlight those time stipulations in the respective statutes.

In terms of the Companies Act, a company that has been served with a shareholder's written notice of objection to the proposed resolution must, within 10 business days after the adoption of the resolution by the company, notify the shareholder of such adoption of the resolution.¹¹⁵ The shareholder must, within twenty business days following the company's notification of the adoption of the resolution or within 20 business days after becoming aware of such adoption of resolution by the company, deliver a written demand to the company for payment of a fair value for the shares of the shareholder.¹¹⁶ The company must consequently give the shareholder a written offer within five days after any of the following - the day after which the resolution becomes effective or the last day for the delivery of a demand or from the day the company did received a demand.¹¹⁷ The offer must be accepted within 30 business days otherwise, the offer lapses¹¹⁸ and the company must pay the value stated in the offer within 10 business days after the shareholder has accepted the offer.¹¹⁹

On the part of the ISA, an offeror of a take-over bid may, within one month after his bid has been accepted by not less that ninety per cent of the shares or relevant class of shares in the

¹¹⁵ Section 164 (4) of the Companies Act

¹¹⁶ Section 164 (7) of the Companies Act

¹¹⁷ Section 164 (11) of the Companies Act

¹¹⁸ Section 164 (12) b of the Companies Act

¹¹⁹ Section 164 (13) b of the Companies Act

company, give notice in the prescribed manner to a dissenting shareholder informing the dissenting shareholder of his right of election to either transfer his shares to the offeror on the terms the offeror acquired the other ninety per cent shares or to demand for payment of fair value of his shares.¹²⁰ A dissenting shareholder must within twenty days of receipt of the offeror's notice communicate his election to offeror¹²¹ and notwithstanding his election transmit his share certificate to the company at the same time.¹²² The offeror must then within twenty days after he has sent the notice advising the shareholder of the options available to him, pay to the company, the amount which the offeror would have paid in respect of the dissenting shareholder's shares if had been the dissenting shareholder accepted the terms upon which ninety per cent of the shares acquired were transferred.¹²³ Following the payment of the money into the company [and where the dissenting shareholder elect to demand for payment of fair value for his shares], the offeror must within twenty days after payment into the company, apply to the court for the determination of the fair value of the shares of the dissenting shareholder shares¹²⁴ failing which the dissenting shareholder may within a further twenty days bring such application to the court.¹²⁵

Having highlighted the specific timelines, it is pertinent to quickly add that there is no reference to, or any provision in either statute, on the consequence of a company's failure, or an appraisal seeking shareholder's failure, to satisfy any of the time stipulations highlighted in the foregoing paragraphs. Ultimately, whether a company or an appraisal right seeking shareholder will be held bound to the time stipulation is an issue that can only receive a definite interpretation in court judgments and although there is a South African case¹²⁶ where a closely related issue was considered, there is generally no certainty around the issue noting that there is a dearth of court cases or pronouncements on the exercise of appraisal right remedy in the two jurisdictions as at date.¹²⁷

¹²⁰ Section 146 (2) of the ISA

¹²¹ Section 146 (3) of the ISA

¹²² Section 146 (5) of the ISA

¹²³ Section 146 (6) of the ISA

¹²⁴ Section 147 (2) of the ISA

¹²⁵ Section 147 (3) of the ISA

¹²⁶ *Juspoint Nominees vs. Sovereign*

¹²⁷ There is a wide-spread belief that what is responsible for the reduced litigation around the Companies Act [including the appraisal right provision] is the frequent use and effectiveness of the alternative dispute resolution mechanism under section 166 of the Companies Act.

Again, reference is made to the case of *Juspoint Nominees (Pty) Ltd v Sovereign Food Investments Limited*. Sovereign, the Respondent, a JSE listed company carrying on the business of poultry, proposed a resolution by which it intends to engage in a share repurchase transaction in terms of section 114 of the Companies Act's scheme of arrangement. *Juspoint*, the Applicant, is a registered shareholder who held shares in the range of 8 per cent in *Sovereign*. One of the conditions-precedent to the implementation of the transaction as expressed in the transaction circular issued by *Sovereign* relates to the exercise by shareholders of their appraisal right in terms of section 164 of the Companies Act.

The condition-precedent relating to the shareholders' exercise of appraisal right was drafted to the effect that *Sovereign's* proposed shares repurchase transaction may not be implemented by *Sovereign* if notices of objection was filed by the holders of more than 5 per cent shares, in aggregate or valid demands were made on the company in terms of section 164 (7) of the Companies Act by the holders of more than 5 per cent shares in aggregate, within 25 (twenty-five) business days after *Sovereign* has served notice on such shareholder(s) in line with section 164 (4). It was also stated in the circular that *Sovereign* reserved the right to waive any of the conditions-precedent to the transaction.

Juspoint duly filed a notice of objection to proposed resolution and voted against the resolution at the meeting of the shareholders where the vote on the resolution was called. Notice to dissenting shareholders [including *Juspoint*] to the effect that the resolution had been nonetheless adopted was served by *Sovereign* in line with section 164 (4) on 15 January 2016. As a result, *Juspoint* served a demand for payment of fair value of its shares on *Sovereign* in line with section 164 (7) on 22 January 2016.

Dispute arose, and a court proceeding was commenced. *Juspoint* contended that having regards to the character of the conditions-precedent and having exercised its appraisal right, the proposal could not be implemented. *Juspoint's* argument was that the condition-precedent relating to the appraisal right had not been fulfilled nor waived by *Sovereign* as at 19th February 2016, being 25 business days after the notice of adoption of resolution was served on dissenting shareholders [including *Juspoint*].

On its part, *Sovereign* contended that it reserved the right to waive any of the conditions- precedent including the exercise of appraisal right and that 25 business days after notice was served on *Juspoint* ended on 1 April 2016 adding that *Sovereign* was still within time to exercise the right reserved as to the waiver any of the conditions- precedent including the condition relating to the exercise of appraisal right.

Two issues arise from the facts of this case. First is the way the appraisal right mechanism was drafted as a condition- precedent to the implementation of the transaction as would enable a company to automatically and altogether avoid a transaction if the number of objections and appraisal seeking members in relation to the transaction reaches a threshold.

Second and more importantly, the fact that *Sovereign* required the dissenting shareholders to make a demand on the company within 25 business days as opposed to 20 business days stipulation in the Companies Act suggests that time stipulation in terms of the section 164 appraisal right provision is flexible and alterable in practice. *Sovereign* further argued in the case that it had the discretion to determine the time when any condition- precedent will be waived or fulfilled suggesting that it was not bound at all by any time stipulation.

Although, as stated, the court did not pay attention to the contention in the second issue, the issue is worthy of consideration in this dissertation. The provision of section 164 (7) of the Companies Act stipulates that a shareholder's demand on a company for payment of fair value on a dissenting shareholder's shares must be made on the company within 20 (twenty) business days following such company's notification to the dissenting shareholder to the effect that the resolution objected to has been adopted by the company. However, in *Sovereign's* circular to its shareholder, the period in which a dissenting shareholder could make such demand was extended by an extra 5 business days beyond the stipulation of the Companies Act. Such enlargement of the stipulated time suggests that a company may not *stricto sensu* be bound to observe the time stipulations under section 164 of the Companies Act. However, there is nothing in section 164 or the Companies Act to suggest that the

provision is one of the alterable provisions,¹²⁸ or, at least in relation to the time stipulations. The only exemption possible is where an approval of the Take-Over Regulation Panel¹²⁹ has been obtained with respect to the variation of strict compliance with the Companies Act in putting together the proposal.

On the contention by *Sovereign* that the company had the sole discretion to determine the time within which to exercise a waiver in relation to an appraisal right exercise, the court expressed the view that any waiver of such condition-precedent can only be exercised within the same period as the condition-precedent may be fulfilled. After other circumstantial evidence, the court invoked section 163 of the Companies Act on prejudicial conduct in barring *Sovereign* from defeating *Juspoint's* expectation after exercising the appraisal remedy. It may therefore suffice to submit that even where parties appear to be at liberty in relation to strict adherence to the time stipulations under section 164 of the Companies Act, a party to an appraisal proceeding may be entitled to remedy if prejudice would result in allowing the other party non-adherence to the time stipulation.

On the ISA side of the consequence of time stipulation attached to the appraisal exercise, parties to an appraisal proceeding may not be able to enjoy the kind of flexibility explored under the Companies Act although there is no case law whatsoever on the issue or on appraisal right in Nigeria as at date. The ISA does not indicate any consequence for non-compliance with time stipulations in the appraisal right exercise process. Generally, the courts in Nigeria are strict in holding parties to time stipulations contained in statute. Non-adherence to time stipulations is overlooked only in circumstances where there is power or discretion in the court or the other party to extend the time or grant a waiver in relation to same. Overall, the decision as to the weight to be attached to time stipulations under the appraisal regime in the ISA lies with the Nigerian courts but there is no reason Nigerian courts should not adopt the 'prejudice' approach employed by the South African court when faced with a similar scenario.

¹²⁸ Alterable Provision is defined in section 1 of the Companies Act as 'a provision of this Act in which it is expressly contemplated that its effects on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company's memorandum of incorporation.'

¹²⁹ Section 120 of the Companies Act gives the Takeover Regulation Panel the power to grant waivers in terms of compliance with the requirements for engaging in transactions.

4.8 A comparison of the parties to appraisal exercise/proceeding

One fundamental area in which the appraisal right statutory framework and provision under the Companies Act and the ISA differ significantly is with respect to the person against whom a dissenting shareholder claim to appraisal can be made. In other words, the entity who is liable on the demand made by the dissenting shareholder. The statutes are different in this regard.

In terms of the Companies Act, it is the company whose proposed resolution triggers a dissenting shareholder's appraisal right that is directly responsible for the demand for payment of fair value of the shares. The steps required to be taken under section 164 of the Companies Act has the dissenting shareholder on the one hand and the company on the other hand. The notices, demand, offer and acceptance to be exchanged in relation to the exercise of the remedy under the section is between the dissenting shareholder and the company. If the exercise extends to the court, the parties to the appraisal proceeding are the company and the dissenting shareholder(s).

The ISA's provision is however altogether different in terms of the party accountable to the dissenting shareholder on the appraisal right exercise. It must be recalled that under the ISA an appraisal right remedy exists only in respect of a take-over transaction. It is this take-over offeror who undertakes the acquisition of the shares of the target company that is accountable and liable to the dissenting shareholder throughout the appraisal right exercise including any court proceeding and in respect of the outcome of any such proceeding rather than the target company whose shares is the subject of a take-over transaction or appraisal.

This difference in the party accountable and liable to the dissenting shareholder in the appraisal exercise and proceeding certainly impacts on the character of the mechanism by which the acquisition of the dissenting shareholder will be implemented and gives rise to certain implication. Under the Companies Act, after completion of the appraisal exercise process, the legal character of the transfer of shares between a dissenting shareholder and the company can be achieved through a share buy-back arrangement or repurchase agreement

which may require the company to comply with certain other requirements of the Companies Act before undertaking such action.¹³⁰ Furthermore, the company may have to bear burden such as costs and legal fees for any court proceeding bothering on the exercise bearing in mind that shares buy-back and share repurchase arrangement also have tax implications which a company would also need to put into consideration in going through a share appraisal exercise.

With the ISA, the company whose share is the subject of an appraisal right exercise is not directly impacted by an appraisal exercise or proceeding since the party who is directly liable to the dissenting shareholder for the payment of the fair value of the shares is the take-over offeror. The appraisal exercise is strictly between the offeror and the dissenting shareholder and any eventual transfer of the share will be characterised as a transfer or an assignment such that the eventual legal relation between the parties will be one of a buyer and a seller. Consequently, all costs and tax implications in relation to the share transfer is the responsibility of either the offeror or the dissenting shareholder depending on the nature of the liability. The target company has no liability whatsoever in any appraisal exercise or proceedings under the ISA and as such, the assets of the company are not affected or at risk by reason of an appraisal exercise or an appraisal proceeding. Any legal costs and tax liability associated with an appraisal proceeding must be borne by the offeror who is the party to the proceeding save only to the extent where the company is joined in the proceeding as a nominal party. Consequently, the subject company is insulated against any risk associated with share valuation which may arise as from the appraisal exercise.

4.9 A comparison of the fair value determination process

At the centre of any appraisal exercise is the determination of what is payable as fair value on the dissenting shareholder's shares. Whilst the valuation exercise at its core may require expertise beyond the scope of pure law, the statutory construct around the initiation of determination process as adopted in the respective statutes falls within the scope of this dissertation.

¹³⁰ Section 48 of the Companies Act

The Companies Act requires that a company whose shares is subject of an appraisal exercise send a written offer to the dissenting shareholder after the shareholder's demand and where the shareholder accepts the offer, to pay the shareholder within a specified period. The company can therefore engage an appraiser internally who will advise the company on the valuation such that the company can take full charge of the valuation process and make an offer based on the valuation. Otherwise, the directors of the company may themselves decide on a value they consider appropriate. It is where the inter-parties' offer and acceptance process between a company and the dissenting shareholder has taken place and failed, that the dissenting shareholder can resort to a court action under the Companies Act.

On the other hand, the power to fix any amount as the fair value of the dissenting shareholder's share is an exclusive preserve of the court under the ISA. The offeror, the company and the dissenting shareholder have no role in the fair value determination prior to a court action. There is no provision in the ISA in terms of which an offeror or the company may send an offer setting out what the offeror considers to be 'fair value' for the dissenting shareholder's shares. The determination of the fair value of a dissenting shareholder's shares is entirely a court-driven process on the ISA side of the discourse.

4.11 A comparison of the role of the court in the appraisal exercise

Court's involvement in an appraisal exercise under the Companies Act stems either from a company's failure to make an offer to the dissenting shareholder after being served with the shareholder's demand or, where an offer was made to the shareholder, a shareholder's refusal of the offer. A dissenting shareholder's application to the court in either of the circumstances will be to seek a determination of an amount to be considered as fair value of the shares and in addition, to seek an order mandating the company to pay to the shareholder any such amount determined as fair value of the shares by the court.¹³¹

A shareholder who was sent an offer by the company must file his application in court within 30 business days after the offer was made¹³² that is, within the validity period of the offer. Whether or not the court has powers or can in fact extend the time or grant a dissenting

¹³¹ Section 164 (14) of the Companies Act

¹³² Section 164 (14) (b) of the Companies Act

shareholder indulgence in a case where a shareholder who although received an offer, considers the offer inadequate but filed his application for the determination of fair value outside the validity period of the offer is another potential issue that a court may have to contend with in an appraisal proceeding.

The ISA clearly indicates the court that has the exclusive jurisdiction in relation to the appraisal proceeding, that is, the Federal High Court. The court's involvement in the appraisal exercise, in terms of the ISA, commences with an offeror's filing of an application to the court for the determination of fair value of the dissenting shareholder's shares. Before making this application to the court, the offeror must have first paid to the company an amount of money equal to what the offeror would have paid the dissenting shareholder on those shares on the same terms and or at the same price as the offeror had acquired the shares of the consenting shareholders under the take-over transaction.¹³³

Both statutes require the joinder of all other dissenting shareholders who have not accepted the company's offer as at the date of the application filed in court¹³⁴ or who has made an election to demand for payment of fair value for their shares¹³⁵ as parties in the appraisal proceedings with both statutes indicating that any dissenting shareholder who is joined as party to the appraisal proceedings shall be bound by the decision of the court. The statutes also require that a company, (in terms of the companies Act) or, an offeror (in terms of the ISA) notify each affected dissenting shareholder of the date, place and consequence of the appraisal application filed in court and of the right of these dissenting shareholders to appear and participate in the proceedings either in person or through counsel.¹³⁶

In determining the fair value of the shares, both statutes recognise and give the court the discretion to appoint one or more 'independent valuer' (sic)¹³⁷ or appraisers.¹³⁸ Both statutes

¹³³ Section 147 (2) of the ISA

¹³⁴ Section 164 (15) a of the Companies Act

¹³⁵ Section 147 (5) a of the ISA

¹³⁶ Section 164 (15) (b) of the Companies Act; section 147 (5) (b) of the ISA

¹³⁷ The description adopted in Section 147 (7) of the ISA to refer to an appraiser.

¹³⁸ Section 164 (15) (c) (iii) (aa) of the Companies Act

also allow for interests *albeit* at a rate to be calculated on different terms¹³⁹ to be payable on any such appraised value of the shares.¹⁴⁰ The inclusion of interests provision in an appraisal statute is understandable as it offers compensation to the dissenting shareholder for certain losses. In terms of the Companies Act, interests may compensate shareholders for the loss of right to dividend and other ancillary rights for the periods between a shareholder's delivery of his demand notice on the company from which point all the shareholder's rights in the shares are deemed lost and the conclusion of the appraisal exercise or proceeding. In terms of section 146 (5) of the ISA, the interest may help to compensate a shareholder for the loss of rights accruing to the shares for the period between the time of delivery of the shares certificate and the completion of the appraisal proceeding bearing in mind that court proceedings usually take longer time.

Both statutes expressly require the court to make a determination of fair value of the shares¹⁴¹ and ultimately, to order the company or an offeror (as the case may be) to pay such determined fair value to the dissenting shareholder(s).¹⁴² However, only a court acting pursuant to the Companies Act may apportion costs in relation to an appraisal proceeding,¹⁴³ there is no such power in a Nigerian court. Parties to an ISA appraisal proceeding may have to bear their own costs. It is pertinent to add that since the appraisal proceeding in terms of the ISA is between an offeror and the dissenting shareholder(s), the final order of the court in the proceeding can only be validly made if made against an offeror¹⁴⁴ and not the company as it is the case with the Companies Act. Finally, the relevant date in an appraisal exercise or proceeding for the purpose of determining the fair value of a dissenting shareholder's shares [in terms of the Companies Act] is the date and time 'immediately before the company adopted the resolution that gave rise to the shareholder's rights'¹⁴⁵ to exercise the appraisal right. However, the ISA does not have any such provision. A credible contention under such circumstance would be that, since a shareholder is mandated to tender his share certificates

¹³⁹ The interest payable on the appraised value of shares, in terms section 147(9)(c) of the ISA, is to be calculated at the current bank rate on the appraised value from the date the dissenting shareholder delivers the company with his share certificates. Whereas, section 164 (15) (c) (iii) (b) of the Companies Act only requires that such interest be reasonable and it is to be calculated from the date the action approved by the resolution becomes effective until the date of payment to the dissenting shareholder.

¹⁴⁰ Section 164 (9) (c) of the ISA; section 164 (15) (c) (iii) (bb) of the Companies

¹⁴¹ Section 164 (15) (c) (iv) of the Companies Act; section 147 (6) of the ISA

¹⁴² Section 164 (15) (c) (v) (bb) of the Companies Act; section

¹⁴³ Section 164 (15) (c) (iv) of the Companies Act

¹⁴⁴ Section 147 (8) of the ISA

¹⁴⁵ Section 164 (16) of the Companies Act

prior to the date of initiation of an appraisal proceeding, the fair value to be determined must be the fair value of those shares as at the date the shares certificate was tendered.

4.12 A comparison of the time of tendering of share certificates and the implication

Another issue where the statutes' provisions are different is in relation to the stage at which a dissenting shareholder may tender his share certificate following an appraisal right exercise or proceeding. It is submitted that this point is important because the tendering of the share certificates marks the physical and legal divestiture of the shareholder of the property comprised in shares. The time of tendering of the certificate has two implications. First is that the company may, from the time of tendering by the shareholder onward, deal with the shares covered by the certificate as it desires.

Under the ISA, a dissenting shareholder is required to send to the company the shares certificate prior to the time of institution of an appraisal proceeding in court and within twenty days after receiving the offeror's notification of the election available to the dissenting shareholder.¹⁴⁶ However, except in the event where a dissenting shareholder accepts the company's offer there is no obligation on the Companies Act's dissenting shareholder to tender his shares certificates until a final determination of the appraisal proceeding.¹⁴⁷

The other implication of the time of tendering of shares certificate is the rule on the risks and the passing of property. It is submitted that since the tendering of share certificate indicates a physical transfer of the right in the shares, the risks associated with such shares must be deemed to have been transferred with the tendering of the certificate. Consequently, and excepting the situation with liquidation, an offeror [in terms of the ISA] may not be able to avoid or detract from the outcome of an appraisal proceeding based on any incident impacting on the company or the value of its shares or business after the date of tendering of the dissenting shareholder's shares certificate. The dissenting shareholder will be entitled to the fair value of his shares as at date of tendering.

¹⁴⁶ Section 146 (5) of the ISA

¹⁴⁷ This reasoning proceeds on the basis that the shares are certificated. In any event, the Companies Act in section 164 (9) provides that where a shareholder has made a demand on the company, such shareholder no longer has any right in respect of the shares in terms of which the appraisal rights is being exercised. However, there may be some advantage in retaining the certificate by a shareholder such as lien and then the company may not be able to do as it desires with shares whose certificates are still with an outgoing member.

4.13 A comparison of the theories informing each appraisal statute

An appraisal statute may be informed by one or more of several goals including the conventional or traditional goal, the inframarginal value goal, the group coordination goal, the discovery or the reckoning goal. The framing of any appraisal statute reflects the goals intended to be pursued by the legislature. Whilst South Africa's Companies Act serves a number of these goals, Nigeria's ISA is a far-cry from this standard. As discussed under chapter 2, s. 164 of the Companies Act appraisal right protects the dissenting shareholder to the satisfaction of the traditional explanation theory, the reckoning goal. However, the rationale behind ss 146 and 147 of the ISA appears to be a protection of the inframarginal value in the shareholder's shares.

CHAPTER 5

5.1 FINDINGS AND RECOMMENDATIONS

The chapter presents a summary of the key findings in this dissertation and recommendations.

5.2 Findings

First, it will be recalled that one of this study's primary objective is to investigate if there is a statutory framework for the exercise of appraisal remedy in Nigeria comparable to South Africa's section 164 Companies Act appraisal provision. This objective was pursued under chapter 3 where some potential appraisal provisions in the ISA were examined. The outcome of the investigation revealed sections 146 and 147 of the ISA as the appraisal rights statutory framework in Nigeria.

Second, under chapter 4, a comparative analysis of the statutory frameworks for the appraisal remedy in South Africa and Nigeria was carried out. The analysis revealed that the appraisal rights provisions in the two countries differ in significant respects. The trigger events with respect to which the appraisal remedy is available, differ and this also probably accounts for the difference in the rationale behind the enactment of the two countries' appraisal provisions. There are also differences in the procedure for the exercise of the remedy except for the court's role in the process. Both the Companies Act and the ISA gave the courts similar powers in relation to the conduct of the appraisal proceeding such as the power to appoint an expert appraiser. This leads to the questions as to whether there is basis for the sharing or exchange of adjudicatory principles, rules, experiences and precedents with respect to the appraisal remedy between the two jurisdictions.

The answer to the above question is two-folds. First, there cannot be any meaningful sharing of principles and precedents between Nigeria and South Africa in terms of the substantive areas of the exercise of the appraisal remedy provisions such as the trigger events, the voting thresholds and the preconditions. The principles of law in these parts cannot be transplanted from one jurisdiction to the other having regards to the wide divergence between the two statutes' provisions in this regard. The trigger events are different, and the conditions for the exercise are different noting also that the theories that inform the statutes are also different.

However, in the second category which bothers on the court's role, involvement and practices in the appraisal remedy process, there is room for the exchange of practices. This is because, as stated earlier, the statutes make similar provisions in relation to the conduct of the appraisal proceeding and the powers of the court thereby.

5.3 Recommendations

First, the better appraisal statute is that which serves as many goals as possible. An appraisal statute that would serve the basic objectives of an appraisal statute such as the traditional, discovery, reckoning and inframarginal goals, must, among other things, have the target company as a party to the appraisal exercise or proceeding or have both the target company as well as the transferee entity or the beneficiary of the transaction as parties. The significance of this point is better illustrated with the reverse of the case. If an appraisal exercise or proceeding is merely between the acquirer or the transferor entity and the dissenting shareholder, a dissenting shareholder's access to useful information regarding the target company becomes a challenge. The discovery and reckoning objectives of an appraisal statute also become difficult to attain in such circumstance. To this end, both Nigeria's as well as South Africa's corporate statutes require some attention to be able to attain these goals.

Second, as a matter of consistency and coherence in legislative drafting, an appraisal statute ought to provide the remedy across like-events. If structural changes were the rationale informing the inclusion of the remedy in a corporate statute, the same appraisal statute should not deny but rather make available the appraisal remedy wherever there is a potential structural change in terms of corporate transactions. It is submitted that take-overs, mergers, disposal of assets and scheme of arrangements are like-events that ought to attract appraisal remedy. Both the Companies Act and the ISA need to be considered for changes in this regard. In terms of design, it is recommended that an appraisal right provision should be designed as a distinguishable provision within the body of a corporate statute such that it may be easily identified and the referenced in the provision relating to the transaction that give rise to the use of the remedy. The Companies Act is commendable in this regard.

Third, with respect to the component of an appraisal remedy, it may be more attractive for shareholders and directors to be able to negotiate the 'fair value' before any court intervention as provided under the Companies Act noting that court actions constitute additional and enormous expense to shareholders. Shareholders may be discouraged from pursuing the appraisal remedy where it is entirely a court-driven process as with the ISA. The offer and acceptance exchange between the company and the shareholder, in terms of section 164 of the Companies Act, is a commendable ideal for an appraisal statute in that it would help to alleviate the fears and burden associated with court cases in pursuing an appraisal remedy. In addition, the adoption of the alternative dispute mechanisms in resolving appraisal disputes is another ideal in the Companies Act.

Fourth, on the court's role, the approach adopted by the South African court in the *Juspoint* case in dealing with time stipulations in appraisal dispute is highly commendable in two respects. First, mere non-adherence to time stipulations or preconditions should not be a vitiating factor in the exercise of the appraisal remedy. Second, the resolution of dispute bothering on appraisal exercise such as the consequence of a party's failure to adhere to time stipulation can be achieved by employing the 'prejudice test' adopted by the court in *Juspoint* or any other similar mechanism under corporate law where the relevant appraisal right provision does not provide for a consequence for such non-adherence.

Fifth, it is fair for an appraisal remedy framework to provide for award of interests in favour of a dissenting shareholder on the one hand and costs on either side following an appraisal proceeding depending on the determination reached by court. It is recommended that where the fair value determined by the court following an appraisal proceeding is well above what was offered to the dissenting shareholder in the first instance, award of interests and cost would be a fair compensation for the time and resources committed to the proceeding by the dissenting shareholder. If the reverse was the case, that is, where the court reached a value lower than the offer made to the shareholder, the company should be entitled to its costs of the proceedings.

Finally, an appraisal statute ought to require of companies to inform its shareholders of the availability of appraisal rights in relation to any proposal with a detailed explanation of the

mechanism for the exercise of the right. This approach adopted by the Companies Act¹⁴⁸ is highly commendable in that it is protective of shareholders' interests and an amendment of the ISA is also necessary in this regard.

¹⁴⁸ Section 164 (2) of the Companies Act

BIBLIOGRAPHY

Primary sources

Cases

Samuel v President Brand Gold Mining Co. Ltd 1969 (3) SA 629 (A).

The Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd & Others 2009 (4) SA 448 (WCC).

Hein Cilliers Loest v Gendac (Pty) Ltd 2017 (4) SA 187 (GP).

Juspoint Nominees (Pty) Ltd v Sovereign Food Investments Ltd (878/16) [2016] ZAECPHC 15.

Statutes

South African

Companies Act No. 71 2008.

Nigerian

Investments and Securities Act CAP I24, Laws of the Federation of Nigeria 2010.

Secondary sources

Books & Journals

Beukes HGJ. *An Introduction to the Appraisal Remedy as Proposed in the Companies Bill: Triggering Actions and the Differences between the Appraisal Remedy and Existing Shareholder Remedies* 2008 (20) SA Merc LJ 479–495.

Beukes HGJ. *An Introduction to the Appraisal Remedy in the Companies Act 2008: Standing and the Appraisal Procedure* (2010) 22 SA Merc LJ 176-194.

Bratton, William *Corporate Finance Cases and Materials* 7 ed, Foundation Press (2012).

Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J & Yeats J *Contemporary Company Law* 2 ed (2011) Juta, Cape Town.

Fischel, R. *The Appraisal Remedy in Corporate Law*, (Published, American Bar Foundation Research Journal 1983).

Saul, Levmore & Hideki Kanda *The Appraisal Remedy and the Goals of Corporate Law* (Published University of California at Los Angeles Law Review 1985).

Orojo, Olakunle *Company law and Practice in Nigeria* 5 ed (2008) LexisNexis, Durban.

Theses

Albertus Ebenhaezer Smit *Compulsory Acquisition of Minority Shareholding: A Critical Analysis* (unpublished, University of Cape Town, 2015)

Yeats Jacqueline. *The proper and effective exercise of appraisal rights under the South African Companies Act, 2008: Developing a strategic approach through a study of comparable foreign law* (unpublished, University of Cape Town, 2015)

APPENDICES

APPENDIX A - Investments and Securities Act

§128. Power to order the break-up of company

(1) Where the Commission determines that the business practice of a company substantially prevents or lessens competition, the Commission may in the public interest order the break-up of the company into separate entities in such a way that its operations do not cause substantial restraints of competition in its line of business or in the market.

(2) Before the break-up becomes effective, the affected company shall have been notified by the Commission and given a specified time within which to make representation to the Commission.

(3) Therefore, the Commission shall refer the order to the Court for sanctioning.

§129. Power to acquire shares of dissenting shareholders

(1) Where a scheme or contract (not being a take-over bid under this part) involving the transfer of shares or any class of shares in a company (in this section referred to as “the transferor company”) to another company, whether a company within the meaning of this act or not (in this section referred to as “the transferee company”) has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by , or by a nominee for the transferee company or its subsidiary), the transferee company may at any time within two months after the expiration of the said four months give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares.

(2) When a notice under subsection (1) of this section is given, the transferee company shall be entitled and bound to acquire those shares on the terms on which , under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company unless on an application made by the dissenting shareholders within one month from the date on which the notice was given the court thinks it fit to order otherwise.

(3) Where shares in the transferor company of the said class or classes as the shares whose transfer is involve are already held as specified in subsection (1) of this section to a value greater than one-tenth of the aggregate of their value and that of the share (other than those already held as specified in the said subsection) whose transfer is involved, the foregoing provisions of this section shall not apply unless.

(a) The transferee company offers the same terms, to all holders of the shares (other than those already held as aforesaid) whose transfer is involved, or where those shares include shares, of different classes, of each class of them, and

(b) The holders who approve the scheme or contract besides, holding not less than nine-tenth in value of the shares (other than those already held as aforesaid) whose transfer is involved shall not be less than three-quarters in number of the holders of those shares.

(4) Where a notice has been given by the transferee company under subsection (1) of this section and the court has not, on an application made by the dissenting shareholders, ordered to the contrary, the transferee company shall.

(a) On the expiration of one month from the date on which the notice has been given, or if no application to the court by the dissenting shareholders is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company together with an instrument of transfer executed on behalf of the shareholder by any person appointed by the transferee company and on its behalf by the transferee company.

(b) Pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor shall thereupon register the transferee company as the holder of those shares.

(5) Any sums received by the transferor company under the section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(6) In this section “dissenting shareholder” includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer to the transferee company in accordance with the scheme or contract.

§ 130. Right of a dissenting shareholder to compel acquisition of his shares

(1) This section shall apply where, in pursuance of any such scheme, of merger, shares in a company are transferred to another company or its nominee, and those shares together with any other shares in the first-mentioned company held by or by a nominee for the transferee company or its subsidiary at the date of the transfer comprise or include nine-tenth in value of the shares in the first mentioned company or of any class of those shares.

(2) The transferee company shall within one month from the date of the transfer (unless on a previous transfer in pursuance of the scheme or contract it has already complied with this requirement) give notice of that fact in the prescribed manner to the holder of the remaining shares or of the remaining shares of that class, as the case may be, who have not assented to the scheme or contract.

(3) Any such holder may, within three months from the giving of the notice to him, require the transferee company to acquire the shares in question.

(4) If a shareholder gives notice under subsection (3) of this section with respect to any shares, the transferee company shall be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving, shareholders were transferred to it, or on such other terms as may be agreed on as the Court hearing the application of either the transferee company or the shareholder thinks fit.

§ 131. Take-over

(1) Where any person

(a) Acquires shares, whether by a series of transactions over a period of time or not, which taken together with shares held or acquired by persons acting in concert with him) carry 30 per cent or more (or any lower or higher threshold as may be prescribed by the commission from time to time) of the voting rights of a company; of

(b) Together with persons acting in concert with him, holds not less than thirty per cent but not more than fifty per cent (or a lower or higher threshold as may be prescribed by the Commission from time to time) of the voting rights and such person or nay person acting in concert with him, acquires additional shares which increase his percentage of the voting rights, such person shall make a take-over offer to the holder of any class of equity shares capital in which such person or any person acting in concert with him holds shares.

(2) All shareholders of the same class of an offeree company shall be treated similarly by an offeror.

(3) During the course of an offer or when an offer is in contemplation, neither an offeror nor the offeree company nor any of the representation and advisers of the offeror or offeree shall furnish information to some shareholders which is not made available to all shareholders.

(132) Take-Over bid

(1) Any bid which constitutes a take-over bid shall be referred to as a bid under the take-over bids.

§ 146. Acquisition of shares of dissenting shareholders

(1) For the purposes of this section.

(a) where a take-over bid has been made in respect of all the share included in a class of shares (other than shares to which the offeror or, where two or more persons constitute the offeror, any of those persons, or any company belonging to the same group of companies as that person or any of those persons, is entitled), the shares in respect of which that take-over offer was made shall be “shares subject to acquisition”.

(b) “Outstanding shares” means shares subject to acquisition in respect of which a take-over bid was made but has not been accepted, and

(c) a’ dissenting offeree” means a person who is or, is entitled to be registered as a holder of outstanding shares.

(2) Were a take-over bid in respect of shares included in the class of shares referred to in subsection (1) (a) of this section representing not less than ninety per cent in number of share subject to acquisition has been accepted, the offeror may, within one month after the date on which acceptance of the shares representing not less than that per cent is completed, give notice as prescribed to a dissenting offeree.

(a) to the effect that the take-over bid has been accepted as mentioned in this section.

(b) that the offeror is bound to take up and pay for or has taken up and paid for, shares of the offerees who accepted the take-over bid.

(c) informing the dissenting offeree as to the election which he is required to make under subsection (3) of this section giving particulars of that election; and

(d) informing the dissenting offeree as to the effect subsection (4) of this section and as to the requirements of subsection (5) of this section, giving particulars in each case.

(3) A dissenting offeree may, within twenty days of receiving a notice under subsection (2) of the section, by notice sent to the offeror elect.

(a) to transfer his shares to the offeror on the terms on which the offeror acquired the shares of the offeree who accepted the take-over bid of.

(b) to demand payment of the fair value of his shares in accordance with section 147 of this Act.

(4) A dissenting offeree to whom a notice is given under subsection (2) of this section, who do not make any election as required by subsection (3) of this section, shall be deemed to have made an election under paragraph (a) of that subsection.

(5) A dissenting offeree shall, within twenty days after receiving a notice sent under subsection (1) of this section, send to the offeree company his share certificate of the class of shares to which the take-over bid related.

(6) An offeror shall, within twenty day after he sends a notice under subsection (2) of this section to a dissenting offeree, pay or transfer to the offeree company the amount of money or other consideration that the offeror would have to pay if the dissenting offeree made an election under subsection (3) (a) of this section, and the offeree company.

(a) shall be deemed to hold that amount of money or consideration in trust for the dissenting offeree; and

(b) shall pay the amount into a bank account established for the purpose or place the consideration in the custody of a bank.

(7) An offeror shall

(a) send to the offeree company a copy of every notice sent to a dissenting offeree under subsection (3) of this section; and

(b) Notify the offeree company of the election made by a dissenting offeree under subsection (3) of this section or deemed to have been made by him under subsection (4) of this section.

(8) An offeror shall send to the Commission a copy of every notice sent to a dissenting offeree under subsection (2) of this section not later than one month after the date on which it is so sent.

§147. Procedure where dissenting offeree makes election

(1) This section applies where a dissenting offeree makes an election under section 146 (3) (b) of this act.

(2) The offeror may within twenty days after he had paid the money or transferred the other consideration under subsection (6) of this section, apply to the Court to fix the fair value of shares of the dissenting offeree.

(3) If an offeror fails to apply to the court under subsection (2) of this section, a dissenting offeree may apply to the Court for the same purpose within a further period of twenty days.

(4) A dissenting offeree shall not be required to give securities for costs in an application made under subsection (2) or (3) of this section.

(5) Where an application is made under subsection (2) or (3) of this section

(a) all dissenting offerees who made an election under section 146 (3) (b) of this Act shall be joined as parties and bound by the decision of the Court and.

(b) the offeror shall notify each affected dissenting offeree of the date and place of the application and of his right to appear and be heard in person or by counsel.

(6) Upon an application to the Court under subsection (2) or (3) of this section, the court shall fix a fair value for the shares of all dissenting offerees who made an election under paragraph section 146 (3) (b) of this act.

(7) The Court may in its discretion, appoint one or more than one independent valuer to assist the court in fixing a fair value for the shares of a dissenting offeree who made an election under paragraph section 146 (3) (b) of this act.

(8) The final order of the Court shall be made against the offeror in favour of each dissenting offeree who made an election under section 146 (3) (b) of this Act and for the amount for his shares as fixed by the court.

(9) The Court may, in connection with proceedings under this section, make an order, if it thinks fit and, without limiting the generality of the foregoing may.

(a) by order, fix the amount of money or other consideration that is required to be held in trust under section 146 (6) of this act.

(b) order that money or other consideration be held in trust by a person other than the offeree company; or.

(c) allow interest at the current bank rate on the amount payable to each dissenting offeree from the date he sends to the offeree company his share certificates under section 146 (5) of this act until the date of payment.

10. Where the amount of money or other consideration fixed by the Court under subsection (9) (a) of this section exceeds that held on trust pursuant to any payment or transfer already made under section 146 (6) of this Act by the offeror, the offeror shall-

(a) make to the offeree company any payment or transfer necessary to comply with the order and section 146(6) of this act shall apply in relation to the amount so paid or transferred; or

(b) if the court made an order under subsection (9) (b) of this section, make that payment or transfer to the other person by whom the money or consideration is to be held in that.

11. Where the Court makes an order under subsection (9) (b) of this section-

(a) the order of the court shall operate to divest the offeree company of the money or other consideration subject to the trust and to vest it in the person named in the order on the like the and.

(b) section 146 (6) of this act shall apply to money or other consideration paid or transferred pursuant to subsection (1) (b) of this section to that person.

148. Duties of offeree company

(1) Where an offeree company is satisfied-

(a) in the case of dissenting offeree who makes an election under section 146 (3) (a) or in Act or is deemed to have made such an election, but the offeror has made the payment transfer required by section 146 (6) of this Act; and

(b) in the case of a dissenting who made an election under section 146 (3) (b) of this Act that the offeror has, in addition to making that payment or transfer, made any payment or transfer required under section 147 (1) of this act to be made by the offeror, the offeree company shall issue to the offeror a share certificate in respect of the shares that were the by the dissenting offeree.

(2) Where an offeree company is satisfied as provided in subsection (1) (a) or (b) of this section shall-

(a) in the case of a dissenting offeree who has complied with section 146 (5) of this act, give the dissenting offeree the money or other consideration to which he is entitled on application

being made by him for that purpose or, if an order is made under section 147 (9) (b) of the act, notify the person holding the money or the property in trust that the dissenting offeree has complied with section 146 (5) of this act; or

(b) in the case of a dissenting offeree who has not complied with section 146 (5) of this act send to the dissenting offeree a notice stating that-

(i) his shares have been cancelled;

(ii) a payment or transfer has been made under section 146 (6) of this Act or as the case may be, under section 147 (6) of this act and subsection (10) thereof, giving particulars; and

(iii) the offeree company shall give or, as the case may be, authorise any person holding money or property in trust pursuant to an order made under section 147 (9) (b) of this act to give to the dissenting offeree the money or other consideration, to which he is entitled, when he complies with section 146 (6) of this act.

(3) A person holding money or property in trust pursuant to an order made under section 147 (9) (b) of this act shall, when he has been notified as provided in subsection (2) (a) of this section or gives authority as provided in subsection (2) (b) (iii) of this section, give to a dissenting offeree the money or other consideration to which he is entitled on application being made by him for that purpose.

APPENDIX B – Companies Act

§ 164. Dissenting shareholders appraisal rights

(1) This section does not apply in any circumstances relating to a transaction, agreement or offer pursuant to a business rescue plan that was approved by shareholders of a company, in terms of section 152.

(2) If a company has given notice to shareholders of a meeting to consider adopting a resolution to-

(a) amend its Memorandum of Incorporation by altering the preferences, rights, limitations or other terms of any class of its shares in any manner materially adverse to the rights or interests of holders of that class of shares, as contemplated in section 37(8); or

(b) enter into a transaction contemplated in section 112, 113, or 114,

that notice must include a statement informing shareholders of their rights under this section.

(3) At any time before a resolution referred to in subsection (2) is to be voted on, a dissenting shareholder may give the company a written notice objecting to the resolution.

(4) Within 10 business days after a company has adopted a resolution contemplated in this section, the company must send a notice that the resolution has been adopted to each shareholder who-

(a) gave the company a written notice of objection in terms of subsection (3); and

(b) has neither-

(i) withdrawn that notice; or

(ii) voted in support of the resolution.

(5) A shareholder may demand that the company pay the shareholder the fair value for all of the shares of the company held by that person if-

(a) the shareholder-

(i) sent the company a notice of objection, subject to subsection (6); and

(ii) in the case of an amendment to the company's Memorandum of Incorporation, holds shares of a class that is materially and adversely affected by the amendment;

(b) the company has adopted the resolution contemplated in subsection (2); and

(c) the shareholder-

(i) voted against that resolution; and

(ii) has complied with all of the procedural requirements of this section.

(6) The requirement of subsection (5)(a)(i) does not apply if the company failed to give notice of the meeting, or failed to include in that notice a statement of the shareholders rights under this section.

(7) A shareholder who satisfies the requirements of subsection (5) may make a demand contemplated in that subsection by delivering a written notice to the company within-

(a) 20 business days after receiving a notice under subsection (4); or

(b) if the shareholder does not receive a notice under subsection (4), within 20 business days after learning that the resolution has been adopted.

(8) A demand delivered in terms of subsections (5) to (7) must also be delivered to the Panel, and must state -

[Words preceding para. (a) substituted by s. 103 of Act 3/2011]

(a) the shareholder's name and address;

(b) the number and class of shares in respect of which the shareholder seeks payment; and

(c) a demand for payment of the fair value of those shares.

(9) A shareholder who has sent a demand in terms of subsections (5) to (8) has no further rights in respect of those shares, other than to be paid their fair value, unless-

(a) the shareholder withdraws that demand before the company makes an offer under subsection (11), or allows an offer made by the company to lapse, as contemplated in subsection (12)(b);

(b) the company fails to make an offer in accordance with subsection (11) and the shareholder withdraws the demand; or

(c) the company, by a subsequent special resolution, revokes the adopted resolution that gave rise to the shareholder's rights under this section.

[Para. (c) substituted by s. 103 of Act 3/2011]

(10) If any of the events contemplated in subsection (9) occur, all of the shareholder's rights in respect of the shares are reinstated without interruption.

(11) Within five business days after the later of-

(a) the day on which the action approved by the resolution is effective;

(b) the last day for the receipt of demands in terms of subsection (7)(a); or

(c) the day the company received a demand as contemplated in subsection (7)(b), if applicable, the company must send to each shareholder who has sent such a demand a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares, subject to subsection (16), accompanied by a statement showing how that value was determined.

(12) Every offer made under subsection (11)-

(a) in respect of shares of the same class or series must be on the same terms; and

(b) lapses if it has not been accepted within 30 business days after it was made.

(13) If a shareholder accepts an offer made under subsection (12)-

(a) the shareholder must either in the case of-

(i) shares evidenced by certificates, tender the relevant share certificates to the company or the company's transfer agent; or

(ii) uncertificated shares, take the steps required in terms of section 53 to direct the transfer of those shares to the company or the company's transfer agent; and

(b) the company must pay that shareholder the agreed amount within 10 business days after the shareholder accepted the offer and-

(i) tendered the share certificates; or

(ii) directed the transfer to the company of uncertificated shares.

(14) A shareholder who has made a demand in terms of subsections (5) to (8) may apply to a court to determine a fair value in respect of the shares that were the subject of that demand, and an order requiring the company to pay the shareholder the fair value so determined, if the company has-

(a) failed to make an offer under subsection (11); or

(b) made an offer that the shareholder considers to be inadequate, and that offer has not lapsed.

(15) On an application to the court under subsection (14)-

(a) all dissenting shareholders who have not accepted an offer from the company as at the date of the application must be joined as parties and are bound by the decision of the court;

(b) the company must notify each affected dissenting shareholder of the date, place and consequences of the application and of their right to participate in the court proceedings; and

(c) the court-

(i) may determine whether any other person is a dissenting shareholder who should be joined as a party;

(ii) must determine a fair value in respect of the shares of all dissenting shareholders, subject to subsection (16);

(iii) in its discretion may-

(aa) appoint one or more appraisers to assist it in determining the fair value in respect of the shares; or

(bb) allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective, until the date of payment;

(iv) may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the court; and

(v) must make an order requiring-

(aa) the dissenting shareholders to either withdraw their respective demands or to comply with subsection (13)(a); and

(bb) the company to pay the fair value in respect of their shares to each dissenting shareholder who complies with subsection (13)(a), subject to any conditions the court considers necessary to ensure that the company fulfils its obligations under this section.

(15A) At any time before the court has made an order contemplated in subsection (15)(c)(v), a dissenting shareholder may accept the offer made by the company in terms of subsection (11), in which case -

(a) that shareholder must comply with the requirements of subsection 13(a); and

(b) the company must comply with the requirements of subsection 13(b).

[Subs. (15A) inserted by s. 103 of Act 3/2011]

(16) The fair value in respect of any shares must be determined as at the date on which, and time immediately before, the company adopted the resolution that gave rise to a shareholder's rights under this section.

(17) If there are reasonable grounds to believe that compliance by a company with subsection (13)(b), or with a court order in terms of subsection (15)(c)(v)(bb), would result in the company being unable to pay its debts as they fall due and payable for the ensuing 12 months-

(a) the company may apply to a court for an order varying the company's obligations in terms of the relevant subsection; and

(b) the court may make an order that-

(i) is just and equitable, having regard to the financial circumstances of the company; and

(ii) ensures that the person to whom the company owes money in terms of this section is paid at the earliest possible date compatible with the company satisfying its other financial obligations as they fall due and payable.

(18) If the resolution that gave rise to a shareholder's rights under this section authorised the company to amalgamate or merge with one or more other companies, such that the company whose shares are the subject of a demand in terms of this section has ceased to exist, the obligations of that company under this section are obligations of the successor to that company resulting from the amalgamation or merger.

(19) For greater certainty, the making of a demand, tendering of shares and payment by a company to a shareholder in terms of this section do not constitute a distribution by the company, or an acquisition of its shares by the company within the meaning of section 48, and therefore are not subject to-

(a) the provisions of that section; or

(b) the application by the company of the solvency and liquidity test set out in section 4.

(20) Except to the extent -

(a) expressly provided in this section; or

(b) that the Panel rules otherwise in a particular case,

a payment by a company to a shareholder in terms of this section does not obligate any person to make a comparable offer under section 125 to any other person.