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**PROTECTION AGAINST OPPRESSIVE OR UNFAIRLY PREJUDICIAL
CONDUCT UNDER THE COMPANIES ACT 71 OF 2008**

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1. **INTRODUCTION AND BACKGROUND**

The *Companies Act* 61 of 1973 (the “1973 Act”) will be repealed in its entirety when the *Companies Act* 71 of 2008 (the “2008 Act”) comes into operation on a date still to be fixed by the President of the Republic of South Africa, in proclamation.

The goal of this dissertation is to investigate what impact, if any, the 2008 Act will have on the remedies afforded to members or shareholders in companies to protect their rights in the event of so-called “oppressive or unfairly prejudicial conduct” by majority decision, or otherwise, in a company.

The wording of section 163 of the 2008 Act introduces a dramatic departure from the wording of section 252 of the 1973 Act. As such, it necessitates an anticipatory analysis of the possible implications of the wording of section 163 for members, shareholders and companies alike, but especially for minorities.

2. **RESEARCH METHODOLOGY**

The dissertation commences by considering the differences between the applicable sections in the legislation at face value. Section 252 of the 1973 Act is analysed in more depth by considering the applicable case law and the interpretations which selected authors have given to it, to the extent that it is helpful in interpreting Section 163 of the 2008 Act. Due to the obvious lack in case law regarding Section 163 of the 2008 Act, this section will be analysed by accepting the meaning of words which appear in both sections as retaining their meaning under the 1973 Act and by considering interpretations of similar legislation in other selected jurisdictions.

It will become evident that Section 163 of the 2008 Act represents a drastic departure from Section 252 of the 1973 Act. The scope of investigation in this dissertation will however be primarily aimed at investigation the locus standi of parties to institute proceedings, the grounds upon which parties may rely for protection and the power of the Courts in hearing applications instituted in terms of either section.

3. **LEGISLATION**

Section 252 of the 1973 Act provides as follows:

‘Member’s remedy in case of oppressive or unfairly prejudicial conduct.

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

(2) *Where the act complained of relates to—*

(a) *any alteration of the memorandum of the company under section 55 or 56;*

(b) *any reduction of the capital of the company under section 83;*

(c) *any variation of rights in respect of shares of a company under section 102; or*

(d) *a conversion of a private company into a public company or of a public company into a private company under section 22,*

an application to the Court under subsection (1) shall be made within six weeks after the date of the passing of the relevant special resolution required in connection with the particular act concerned.

- (3) *If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.*
- (4) *Where an order under this section makes any alteration or addition to the memorandum or articles of a company—*
- (a) *the alteration or addition shall, subject to the provisions of paragraph (b), have effect as if it had been duly made by special resolution of the company; and*
- (b) *the company shall, notwithstanding anything contained in this Act, have no power, save as otherwise provided in the order, to make any alteration in or addition to its memorandum or articles which is inconsistent with the order, except with the leave of the Court.*
- (5)
- (a) *A copy of any order made under this section which alters or adds to or grants leave to alter or add to the memorandum or articles of a company shall, within one month after the making thereof, be lodged by the company in the form prescribed with the Registrar for registration.*
- (b) *Any company which fails to comply with the provisions of paragraph (a), shall be guilty of an offence.'*

Section 163 of the 2008 Act provides as follows:

'Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company.'

- (1) *A shareholder or a director of a company may apply to a court for relief if—*
- (a) *any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial*

- to, or that unfairly disregards the interests of, the applicant;*
- (b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or*
 - (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.*
- (2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including—*
- (a) an order restraining the conduct complained of;*
 - (b) an order appointing a liquidator, if the company appears to be insolvent;*
 - (c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131(4)(a) apply;*
 - (d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;*
 - (e) an order directing an issue or exchange of shares;*
 - (f) an order—*
 - (i) appointing directors in place of or in addition to all or any of the directors then in office; or*
 - (ii) declaring any person delinquent or under probation, as contemplated in section 162;*
 - (g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;*
 - (h) an order varying or setting aside a transaction or an agreement to which the company is a party and*

- compensating the company or any other party to the transaction or agreement;*
- (i) *an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;*
 - (j) *an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;*
 - (k) *an order directing rectification of the registers or other records of a company; or*
 - (l) *an order for the trial of any issue as determined by the court.*
- (3) *If an order made under this section directs the amendment of the company's Memorandum of Incorporation—*
- (a) *the directors must promptly file a notice of amendment to give effect to that order, in accordance with section 16(4); and*
 - (b) *no further amendment altering, limiting or negating the effect of the court order may be made to the Memorandum of Incorporation, until a court orders otherwise.*
- (4) *Whenever a court, on application by an interested person, or in any proceedings in which a company is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that company constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may declare that the company is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the company, or of such member or shareholder thereof, or of such other person as specified in the declaration, and the court may give such further order or orders as it may deem fit in order to give effect to such declaration'.*

Section 95 of the Companies Amendment Bill, 2010 provides for the repeal of Section 163 of the 2008 Act. For the purpose of this dissertation however Section 163 will be analysed in its current form.

4. LOCUS STANDI OF PARTIES TO INSTITUTE LEGAL PROCEEDINGS

4.1 Parties who may institute legal action

4.1.1 Under section 252 of the 1973 Act

(1) Any member of a company... may, subject to the provisions of subsection (2), make an application to the Court for an order under this section’.

(My emphasis)

Under section 252 of the 1973 Act any member of a company who complains of the conduct described in section 252 may approach the court for an order.

Section 103 of the 1973 Act defines who the members of company are and provides as follows:

‘Who are members of a company

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

(2) Every other person who agrees to become a member of a company and whose name is entered in its register of members, shall be a member of the company.

(3) A company shall, subject to the provisions of its articles, enter in the register as a member, nomine officii, of the company, the name of any person who submits proof of his appointment as the executor, administrator, trustee, curator or guardian in respect of the estate of a deceased member of the company or of a member whose estate has been sequestrated or of a member who is otherwise under disability or as the liquidator of any body corporate in the course of being wound up which is a member of the company, and any person whose name has been so entered in the register shall for the purposes of this Act be deemed to be a member of the company.

- (4) *Subject to the provisions of section 213(1)(b), the bearer of a share warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either for all purposes or for such purposes as may be specified in the articles.'*

The members of a company are therefore the subscribers of the memorandum and every other person who agrees to become a member and whose name is recorded in the register of members. The subscribers of the memorandum will become members upon the incorporation of the company, without having to take any further steps.¹ Any other person who agrees to become a member will however only become a member when his or her name is entered in the register of members.²

In *Barnard v Carl Greaves Brokers (Pty) Ltd*³, the Court concluded that:

'...it is competent for a shareholder who has not obtained registration of his membership of the company because of opposition or lack of co-operation by the company or his fellow shareholders, but is entitled to such registration, to apply in the same proceedings for an order directing his enrolment on the register of members and, in anticipation of the grant of such an order, as a member for relief in terms of section 252...'

and that the

'...requirements of section 346(2) of the Companies Act and the considerations thereanent traversed in Rubinstein NO and Another v Langhold (Pty) Ltd 1983(2) SA 228 (C) which would prohibit such an approach in the context of an unregistered shareholder seeking the winding-up of a company in terms of section 344(h) of the Act, do not apply in the context of an application for relief in terms of section 252'.

¹*Moosa v Lalloo* 1957 (4) SA 207 (D) 210.

²*Doornkop Sugar Estates Ltd v Maxwell* 1926 WLD 127 134.

³*Barnard v Carl Greaves Brokers (Pty) Ltd* 2008 (3) SA 663 (C) 41.

Any person who is appointed as the executor, administrator, trustee, curator or guardian of a member's estate and whose name has been entered in the register as a *nomine officii* will also be deemed to be a member of the company. The phrase '*subject to the provisions of its articles*' does not mean that the name of a nominee referred to in section 103(3) will only be entered in the register if the company's articles do not contain a provision to the contrary. The nominees in section 103(3) have an absolute right to have their names entered in the register and the articles cannot prohibit it. The phrase '*subject to the provisions of its articles*' therefore means that the registration will take place in accordance with the provisions and formalities set out therefore in the company's articles, if any.⁴

Therefore, despite a provision to the contrary in a company's articles, the company's power to effect the registration is not dependant on the delivery of an instrument of transfer.⁵ Another person who is entitled to a share or in whom a share has vested in a representative capacity, but whose name is not entered in the register of members, will not have *locus standi* to bring an application under section 252.⁶

According to Henochberg the South African law in this regard presently concerns itself solely with who the registered member or shareholder is and does not afford *locus standi* to a beneficial owner of share whose identity is not recorded in the register.⁷

⁴Meskin ED: *Henochsberg: Commentary on the Companies Act* (Lexis Nexis Durban) Fifth Edition at 205 – 206 (“hereinafter referred to as Henochsberg: Commentary on the Companies Act”).

⁵Henochsberg: Commentary on the Companies Act at 206.

⁶*Lourenco v Ferela (Pty) Ltd (No. 1)* 1998 (3) SA 281 (T) 294 – 295 as disussed in Henochsberg: Commentary on the Companies at 478 .

⁷Henochsberg: Commentary on the Companies Act at 206

It is therefore clear that locus standi to institute proceedings in terms of section 252 of the 1973 Act will be subject to party seeking to institute proceedings being reflected as a member in the register of members.

4.1.2 Under section 163 of the 2008 Act

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

(my emphasis)

Section 163 of the 2008 Act appears to afford *locus standi* only to a shareholder or a director of the company.

Section 1 of the 2008 Act defines a shareholder as follows:

“‘shareholder’”, subject to section 57(1), means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be’.

Section 57 falls under Part F of Chapter 2 of the Act which regulates the governance of companies and provides that:

‘Interpretation and restricted application of Part

(1) In this Part, ‘shareholder’ means a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached.’

Section 1 of the 2008 Act defines a director as follows:

“director” means a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated’.

The relevant portions of section 66 provides as follows:

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

status entitling that person to be an ex officio director of the company, subject to subsection (5)(a); and

(b) *has delivered to the company a written consent to serve as its director.'*

4.1.3 Comparison of the two sections

In terms of the 1973 Act only a member can initiate proceedings under section 252, whereas both a shareholder and director have the necessary *locus standi* to do so in terms of section 163 of the 2008 Act.

Section 1 of the 1973 Act does not define the term 'shareholder' as is done in section 1 of the 2008 Act. The relevant case law makes it clear however that, under the 1973 Act, a person may be a shareholder without being a member. This situation would for example occur where a person paid the prescribed fee and a share certificate was issued to him but his name was not entered into the register⁸. Entry of a person's name in the members register is therefore a pre-requisite for membership, but is not a pre-requisite for becoming a shareholder. Only a member can institute an action under section 252.

The definition of shareholder as found in section 57 is of no assistance to parties seeking to institute proceedings in terms of section 163 of the 2008 Act, as section 163 does not fall within part F of chapter 2 of the Act, to which Section 57 applies.

The intention of the legislature is therefore that the definition of a shareholder as found in section 1 the 2008 should apply to section 163.

When comparing section 252 of the 1973 Act with section 163 of the 2008 Act it is worth noting that the 1973 Act provides for a register of members (therefore, different registers may be used for different securities) whereas the

⁸*Moosa v Lalloo* 1957 (4) SA 207 (D) at 210.

2008 Act provides for a singular ‘*securities register*’. All securities in issue will therefore be recorded in one register under the 2008 Act.

Under the 2008 Act the entry of a person’s name in the securities register is a pre-requisite for becoming a shareholder and therefore also for locus standi under section 163, as a shareholder. The position of a member under the 1973 Act and shareholder under the 2008 Act are therefore similar. It is furthermore my submission that the case law which applies to a shareholder or beneficial owner of shares under the 1973 Act, who are not reflected as members in the register, will similarly apply to shareholders in terms of the 2008 Act whose details are not reflected in the securities register.

Section 163 of the 2008 Act is wider as it makes provision for both shareholders and directors to institute an action where the 1973 Act only provides for a member to institute an action.

4.2 **Whose rights have to be affected for an action to be instituted**

4.2.1 Under section 252 of the 1973 Act

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

(my emphasis)

Under section 252 a member of the company may therefore apply to court where the conduct complained of is unfairly prejudicial, unjust or inequitable to himself or to some part of the members. A member can therefore institute an action on his own behalf and also where the particular member’s rights are

not prejudicially affected, but the member takes issue with a decision which has a prejudicial effect on the rights of other members.

The conduct complained of must affect the member or part of the members in their capacity as members.⁹ If the conduct complained of affects a member in, for example, his capacity as director, he will not have *locus standi* to apply to court under section 252.¹⁰

The conduct complained of does not necessarily have to affect the member's rights afforded to him under the articles of the company or in terms of the Act. A member may apply to court under section 252 where his rights or interests in his capacity as member are affected. Leon van Rooyen explained it as follows:¹¹

'Onder sekere omstandighede moet daar ook kennis geneem word van regte, pligte of verwagtinge wat nie in die Maatskappywet of konstitusie vervat is nie, maar uit 'n onderlinge verstandhouding, ooreenkoms of ander feite voortvloei. . . Optrede in stryd met die geregverdigde of redelike verwagtinge van 'n lid betreffende deelname aan die bestuur van die maatskappy kan beskou word as gedrag wat op die belange van die lid inwerk en kan die basis vorm van 'n bevel ingevolge die onderhawige statutêre remedie desondanks die feit dat die gewraakte optrede ooreenkomstig konstitusionele of statutêre voorskrifte geskied het'.

For instance, where the members of a private company agreed that a member will be a director of that company and that he would benefit from his participation in the company by way of directors remuneration rather than dividends, his right and interests as a member will be affected if he is

⁹*Ben-Tovim v Ben-Tovim* 2001 (3) SA 1074 (C) at 1093 as discussed to in Henochsberg: Commentary on the Companies Act at 481

¹⁰*Lundie Brothers Ltd* 1965 (2) All ER 692 (Ch) at 698–699; *Five Minute Car Wash Service Ltd* 1966 (1) All ER 242 at 246; *Ex parte Bates* 1955 (4) SA 81 (SR) at 84; *Re A Company* 1983 (2) All ER 36 (Ch) at 44 as discussed in Henochsberg: Commentary on the Companies Act at 481

¹¹Leon van Rooyen 1988 TSAR 268 at 275 as discussed in Henochsberg: Commentary on the Companies Act at 482

unjustifiably removed as a director and he will have *locus standi* to apply to court under section 252.¹²

4.2.2 Under section 163 of the 2008 Act

(1) *A shareholder or a director of a company may apply to a court for relief if—*

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

(my emphasis)

It is evident from the wording of section 163 that under the 2008 Act a shareholder or director may only initiate proceedings under section 163 on his own behalf and if his rights or interest have been affected. The fact that only a director or shareholder has the *locus standi* to initiate proceedings under section 163 implies that, similarly, it should be a director or shareholder's rights which are affected.

4.2.3 Comparison of the two sections

¹²Leon van Rooyen 1988 TSAR 268 at 270–277, 286–287; Re A Company (1986) BCLC 376 (Ch); Carlisle v Adcorp Holdings Ltd 2000 CLR 261 (W) at 267; and Robson v Wax Works (Pty) Ltd 2001 (3) SA 1117 (C) at 1130 as discussed in Henochsberg: Commentary on the Companies Act at 481

Under the 1973 Act a member can institute an action on behalf of himself or other members if rights as member affected. Under 2008 Act a shareholder or director can institute action only on his own behalf and if his own rights have been affected.

The primary change in the this regard is the fact that where section 252 was solely a member's remedy; section 162 is both a shareholders and directors remedy.

5 **CONDUCT WITHIN THE AMBIT OF THE ACT**

5.1 **Under section 252 of the 1973 Act**

(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable...

(My emphasis)

Although the title of section 252 refers to 'oppressive' conduct, the term 'oppressive' is not used in the section. It only provides for a member's remedy where an act or omission or the conduct of the affairs of the company is unfairly prejudicial, unjust or inequitable.

The term 'oppressive' seems to have remained because of its use in section 111bis of the *Companies Act* 46 of 1926 (the '1926 Act') which provided that:

'Alternative remedy to winding-up in cases of oppression

- (1) *Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself), may make an application to the Court by petition for an order under this section; and in a case falling within sub-section (2) of section ninety- five the Minister may make the like application.*
- (2) *If on any such petition the Court is of opinion*
- (a) *that the company's affairs are being conducted as aforesaid;*
and
- (b) *that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it is just and equitable that the company should be wound up,*
- the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.*
- (3) *Where an order under this section makes any alteration or addition to any company's memorandum or articles, then notwithstanding anything in this Act but subject to the provisions of the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; but, subject to the foregoing provisions of this sub-section, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company, and this Act shall apply to the memorandum or articles as so altered or added to accordingly.*
- (4) *A copy of any order under this section altering or adding to, or giving leave to alter or add to, a company's memorandum or articles shall, within thirty days after the making thereof, be delivered by the company to the Registrar for registration; and if a company makes default in complying with this sub-section, the company shall be guilty of an offence and liable, on conviction, to a fine of two pounds for every day that the default continues'.*

It is clear from a comparison of the wording of section 252 of the 1973 Act and 111*bis* of the 1926 Act that the test for the application of section 252 is less onerous in respect of what the dissatisfied member has to prove. Cases that were decided under section 111*bis* in respect of the nature of the onus on the member and as to what has to be shown by him before he can obtain relief under this section, will therefore apply *a fortiori* to the new section¹³. It appears as though the Legislature intended to widen the scope for intervention by the court by abandoning the word ‘oppressive.’¹⁴

5.1.1 Unfairly prejudicial, unjust or inequitable

The word ‘unfairly’ in the phrase ‘unfairly prejudicial, unjust or inequitable’ qualifies only the word prejudicial. It would be tautologous to refer to conduct as unfairly unjust or unfairly inequitable as both these terms already imply unfairness.¹⁵ ‘Unfairly’ as used in section 252 means unreasonably. In the Afrikaans version of the Act the word ‘onredelik’ is used. It was the Afrikaans version of the Act that was signed.

It is therefore clear that if an act or omission of a company or the conduct of its affairs is prejudicial to a member or a part of the members, a member will therefore only have recourse in terms of section 252 if such an act or omission or conduct of the affairs is unreasonably prejudicial, unjust or inequitable.¹⁶

¹³*Garden Province Investments and Others v Aleph (Pty) Ltd and Others* 1979 (2) SA 525 (D) at 531.

¹⁴Henochsberg: Commentary on the Companies Act at 478.

¹⁵*Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Colliers Ltd and Others* 1980 (4) SA 204 (T) at 209.

The courts have confirmed that when determining whether or not an act or omission or conduct of a company's affairs is unreasonably prejudicial, unjust or inequitable, such construction should be given to the words unfairly prejudicial, unjust and inequitable as will advance the remedy rather than limit it.¹⁷

Section 252 must however be seen in context. One must be mindful of the fact that when a person or entity becomes a shareholder in a company, that person undertakes to be bound by the decisions of the prescribed majority even if they adversely effect his own rights as a shareholder provided that those decisions were arrived at in accordance with the law.¹⁸

In *Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Colliers Ltd and Others*¹⁹ the court confirmed that:

'It is well established that, in general, minority shareholders must defer to the wishes of the majority and that the supremacy of the majority is essential to the proper functioning of companies, provided they act fairly'.

The majority shareholders of a company must however act bona fide and to the benefit of the company as a whole.²⁰ The meaning of this expression has

¹⁷*Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Colliers Ltd and Others* 1979 (3) SA 713 (W) at 719; *Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Colliers Ltd and Others* 1980 (4) SA 204 (T) at 209; *Scottish Co-operative Wholesale Society Ltd v Meyer and Another* 1958 (3) All ER 66 (HL) at 89G; *Livanos v Swartzberg and Others* 1962 (4) SA 395 (W) at 396H as referred to in Henochsberg: Commentary on the Companies Act at 478.

¹⁸*Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 679 as referred to in Henochsberg: Commentary on the Companies Act at 479.

¹⁹*Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Colliers Ltd and Others* 1980 (4) SA 204 (T) at 209.

²⁰*Gundelfinger v African Textile Manufacturers Ltd* 1939 AD 314 at 324–325; *Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 680–681; *Garden Province Investments and Others v Aleph (Pty) Ltd and Others* 1979 (2) SA 525 (D) at 531–532; *Ben-Tovim v Ben-Tovim*

been explained in a number of English decisions which have been followed and accepted by our Courts,²¹ one of the most recent of which is the case of *Clemens v Clemens Bros Ltd*²², in which the following passage from the earlier case of *Greenhalgh v Arderne Cinemas Ltd*²³ was quoted:

‘Certain things, I think, can be safely stated as emerging from those authorities. In the first place, it is now plain that ‘bona fide for the benefit of the company as a whole’ means not two things but one thing. It means that the shareholder must proceed on what, in his honest opinion, is for the benefit of a company as a whole. Secondly, the phrase, ‘the company as a whole’, does not (at any rate in such a case as the present) mean the company as a commercial entity as distinct from the incorporators. It means the incorporators as a general body. That is to say, you may take the case of an individual hypothetical member and ask whether what is proposed is, in the honest opinion of those who voted in its favour, for that person’s benefit’.

According to Henochsberg²⁴, case law has shown that the courts will intervene where:

- *“the majority shareholders are using their greater voting power unfairly in order to prejudice” a minority shareholder or “are acting in a manner which does not enable” such a shareholder “to enjoy a fair participation in the affairs of the company”;*²⁵
- or where the shareholders have entered into an association upon the understanding that each of them will participate in the management of the company, but the majority use their voting power to *‘exclude a*

2001 (3) SA 1074 (C) at 1092 as referred to in Henochsberg: Commentary on the Companies Act at 479.

²¹Garden Province Investments and Others v Aleph (Pty) Ltd and Others 1979 (2) SA 525 (D) at 531.

²²*Clemens v Clemens Bros Ltd* (1976) 2 All ER 268 at 281 as discussed in Garden Province Investments and Others v Aleph (Pty) Ltd and Others 1979 (2) SA 525 (D) at 531.

²³*Greenhalgh v Arderne Cinemas Ltd* (1951) Ch 286 as quoted in Garden Province Investments and Others v Aleph (Pty) Ltd and Others 1979 (2) SA 525 (D) at 531.

²⁴Henochsberg: Commentary on the Companies Act at 479

²⁵*Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others* 1968 (1) SA 517 (C) at 527;

*member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms;*²⁶

- or where the conduct complained of reveals ‘*a lack of probity or fair dealing, or a visible departure from the standards of fair dealing*’ or ‘*departs from the accepted standards of fair play, or which amounts to an unfair discrimination against the minority*’.²⁷

When deciding whether or not to intervene, the court must look at the conduct itself as well as the effect thereof.²⁸ Before the court may intervene a member will have to show that a particular act or omission of a company results in a state of affairs which is unfairly prejudicial, unjust or inequitable and that the particular act or omission itself was unfair or unjust or inequitable. Similarly a member will have to show that the manner in which the company’s affairs are being conducted is unfairly prejudicial, unjust or inequitable and that the result of the conduct of the affairs in that manner is unfairly prejudicial, unjust or inequitable²⁹. In *Ben-Tovim v Ben-Tovim*³⁰ the court held that:

‘...the Court must look at the conduct itself and the effect which it has on the other members of the company. The motive underlying the conduct is relevant only as an aid when deciding whether the conduct is ‘unfairly prejudicial, unjust or inequitable’ and whether the grant of relief would be “just and equitable”’.

²⁶*Barnard v Carl Greaves Brokers (Pty) Ltd* 2008 (3) SA 663 (C) at para 46, referring with approval to the opinion of Lord Hoffmann in *O’Neill and Another v Phillips and Others* 1999 (2) ALL ER 961 (HL).

²⁷*Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Colliers Ltd and Others* 1979 (3) SA 713 (W) at 722; *Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Colliers Ltd and Others* 1980 (4) SA 204 (T) at 209.

²⁸*Livanos v Swartzberg and Others* 1962 (4) SA 395 (W) at 399; Henochsberg: Commentary on the Companies Act at 479.

²⁹*Garden Province Investments and Others v Aleph (Pty) Ltd and Others* 1979 (2) SA 525 (D) at 531 as referred to in Henochsberg: Commentary on the Companies Act at 480.

³⁰*Ben-Tovim v Ben-Tovim* 2001 (3) SA 1074 (C) at 1091; Henochsberg: Commentary on the Companies Act at 479.

A member cannot rely on this section if the act or omission or conduct of the affairs relates to something that will be done in future.³¹ The calling of a meeting to amend the articles to enable the directors to act in a certain way is for example not in itself an act that can be unfairly prejudicial, unjust or inequitable for the purposes of section 252.³²

5.2 Under section 163 of the 2008 Act

'(1) A shareholder or a director of a company may apply to a court for relief if—

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

(my emphasis)

Section 163 uses certain of the terms found in section 111bis of the 1926 Act and section 252 of the 1973 Act. As the term oppressive is not used in the text of section 252 one has to look to elsewhere in the 1973 for an indication

³¹Porteus v Kelly 1975 (1) SA 219 (W) at 222; Investors Mutual Funds Ltd v Empisal (South Africa) Ltd 1979 (3) SA 170 (W) at 177 as referred to in Henochsberg: Commentary on the Companies Act at 481.

³²Porteus v Kelly 1975 (1) SA 219 (W) at 222; In re Blue Arrow plc 1987 (1) WLR 585 (Ch) as referred to in Henochsberg: Commentary on the Companies Act at 481.

of what meaning may be attached to the word “oppressive” as used in the section 163 of the 2008 Act.

5.2.1 Oppressive, unfairly prejudicial or unfairly disregards the interests of

The Concise Oxford Dictionary defines the word ‘oppressive’ as ‘*oppressing, tyrannical, difficult to endure*’.

The word ‘oppressive’ was, as already mentioned, also used in section 111*bis* of the 1926 Companies Act. It is also used in section 258 of the 1973 Act, the relevant portions of which provides as follows:

‘Investigation of company’s affairs in other cases.

(2) *The Minister may appoint one or more inspectors to investigate the affairs of a company and to report thereon in such manner as he may direct, if it appears to him that there are circumstances suggesting—*

(a) *that the business of the company is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or an unlawful purpose or in a manner oppressive or unfairly prejudicial or unjust or inequitable to any part of its members or that it was formed for any fraudulent or unlawful purpose;”*

According to Henochsberg³³ the Legislature intended that the Minister may act in terms of section 258 where the circumstances suggest that the manner in which the business of the company is being conducted is oppressive to any of the members even if they do not suggest that such manner is unfairly prejudicial, unjust or inequitable. ‘Oppression’ in the context of section 258 has the same meaning as it had for purposes of sec 111*bis* of the 1926 Act.³⁴

³³Henochsberg: Commentary on the Companies Act at 497.

³⁴Henochsberg: Commentary on the Companies Act at 497.

5.2.1.1 *Discussion of the Aspek Pipe Case*

In *Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others*³⁵ the court considered the meaning of 'oppressive conduct' in the context of section 111*bis* of the 1926 Act and section 210 of the English Act. The court confirmed that various definitions of 'oppressive' have been laid down in the decisions of our courts and those in England and Scotland. The court accordingly felt it necessary to extract from these definitions a formulation of the intention of the Legislature in affording relief to a shareholder who complains that the affairs of a company are being conducted in a manner 'oppressive' to him.

The court had regard to a range of judgments where 'oppressive' conduct was defined as follows:

- *'unjust or harsh or tyrannical'*;³⁶
- *'burdensome, harsh and wrongful'*;³⁷
- conduct which *'involves at least an element of lack of probity or fair dealing'*;³⁸
- *'a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely'*.³⁹

These definitions however represent widely divergent concepts of 'oppressive' conduct. Conduct which is 'tyrannical' is, for example, entirely different from

³⁵*Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others* 1968 (1) SA 517 (C) at 527 and also mentioned in Henochsberg: Commentary on the Companies Act at 497; The cases referred to in footnotes 36 to 48 below are taken from the judgment in the Aspek Pipe Co case.

³⁶*Marshall v Marshall (Pty) Ltd and Others* 1954 (3) SA 571 (N) at 580.

³⁷*Scottish Co-operative Wholesale Society Ltd v Meyer and Another* 1958 (3) All ER 66 (HL) at 71; *Re HR Harmer Ltd* 1958 (3) All ER 689 (CA) at 701 – 702.

³⁸*Elder v Elder & Watson Ltd* 1952 SC 49 at 60.

³⁹*Elder v Elder & Watson Ltd* 1952 SC 49 at 55.

conduct which is 'a violation of the conditions of fair play'. The definitions in themselves were also not always consistent. 'Tyrannical' conduct, for example, represents a higher degree of oppression than conduct which is 'harsh' or 'unjust' (*Marshall v Marshall (Pty) Ltd and Others*⁴⁰).

Section 111*bis* was introduced by way of an amendment to the 1926 Companies Act in 1952 and was intended as an alternative remedy to the winding-up of a company upon the just and equitable ground provided for in section 111(g) of the Act. It was however also designed to afford relief to minority shareholders who complained of oppressive conduct on the part of the majority shareholders and who did not want to avail themselves of the only remedy open to them prior to 1952, namely the winding-up of the company, as this could lead to a situation where 'the cure would be worse than the disease' as stated by Lord Cooper in *Elder v Elder & Watson Ltd.*⁴¹.

In England the House of Lords expressly stated that a liberal interpretation must be given to the section. In *Scottish Co-operative Ltd v Meyer and Another*⁴², Lord Denning said:

'True it is that in this, as in other respects, your Lordships have given a liberal interpretation to sec. 210. But it is a new section designed to suppress an acknowledged mischief. When it comes before this House for the first time it is, I believe, in accordance with long precedent - and particularly with the resolution of all the Judges in Heydon's case, ((1584) 3 Co. Rep. 7a) - that your Lordships should give such construction as shall advance the remedy.'

The same approach has been adopted in our Courts.⁴³

⁴⁰*Marshall v Marshall (Pty) Ltd and Others* 1954 (3) SA 571 (N) at 580.

⁴¹*Elder v Elder & Watson Ltd* 1952 SC 49 at 54 per Lord Cooper.

⁴²*Scottish Co-operative Wholesale Society Ltd v Meyer and Another* 1958 (3) All ER 66 (*HL Ltd v Meyer and Another* at 89).

⁴³*Marsh v Odendaalsrus Cold Storages Ltd* 1963 (2) SA 263 (W) at 268; *Livanos v Swartzberg and Others* 1962 (4) SA 395 (W) at 396 – 398.

The court therefore held that where an application complains of “oppressive” conduct it is unnecessary for an applicant to establish tyrannical conduct or a tyrannical abuse of power for relief under this section. An applicant would be entitled to relief if he establishes that the majority shareholders are using their greater voting power unfairly in order to prejudice him or are acting in a manner which does not enable him to enjoy a fair participation in the affairs of the company.

‘This view is also consistent with the more liberal definition suggested by Lord Cooper in Elder v Elder & Watson Ltd’⁴⁴, that:

“the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely”.

This definition received judicial approval in our Courts in *Marsh v Odendaalsrus Cold Storages Ltd*⁴⁵ and *Livanos v Swartzberg and Others*.⁴⁶ It has also been accepted by the Court of Appeal in England as the basis upon which the section should be approached. In *Re HR Harmer Ltd*⁴⁷, Jenkins LJ, used the words:

‘...an unfair abuse of powers and an impairment in the probity with which a company's affairs are being conducted...’

and in *Scottish Co-operative Wholesale Society Ltd v Meyer and Another*⁴⁸, Lord Keith said:

‘it suggests a lack of probity and fair dealing in the affairs of the company to the prejudice of some portion of its members’.

⁴⁴*Elder v Elder & Watson Ltd* 1952 SC 49.

⁴⁵*Marsh v Odendaalsrus Cold Storages Ltd* 1963 (2) SA 263 (W) at 268.

⁴⁶*Livanos v Swartzberg and Others* 1962 (4) SA 395 (W) at 398

⁴⁷*Re HR Harmer Ltd* 1958 (3) All ER 689 (CA) at 699

⁴⁸*Scottish Co-operative Wholesale Society Ltd v Meyer and Another* 1958 (3) All ER 66 (HL) at 86

According to Henochsberg⁴⁹, circumstances that suggest ‘oppression’ will also suggest unfair prejudice, injustice or inequity.

I agree with Henochsberg and I am further of the view that the addition of the word oppressive does little to either expand or limit the grounds upon which proceedings may be instituted in terms of section 163 of the 2008 Act.

5.2.2 Related persons

The use of the word “related” throughout section 163 of the 2008 Act requires clarification.

Section 1 of the 2008 Act defines the term ‘related’ as follows:

“related”, when used in respect of two persons, means persons who are connected to one another in any manner contemplated in section 2(1)(a) to (c);

Section 2(1)(a) to (c) in turn provides as follows:

‘Related and inter-related persons, and control

- (1) *For all purposes of this Act-*
 - (a) *an individual is related to another individual if they-*
 - (i) *are married, or live together in a relationship similar to a marriage; or*

⁴⁹Henochsberg: Commentary on the Companies Act at 497.

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

5.3 **Comparison of the two sections**

Under section 252 of the 1973 Act a member can approach the court for relief if:

- i) any act or omission of the company is; or
- ii) the affairs of the company are being conducted in a way that is
- iii) unfairly prejudicial, unjust or inequitable and that results in a state of affairs that is unfairly prejudicial, unjust or inequitable.

Under section 163 of the 2008 Act an applicant may approach the court for relief if:

- i) any act or omission of the company or a related person had had the result that; or

- ii) the business of the company or a related person is carried on or conducted in a manner that is; or
- iii) the powers of a director or prescribed officer or a related person is exercised in a manner that is;
- iv) oppressive or unfairly prejudicial or that unfairly disregards the interests of the applicant.

The addition of the word ‘related’ has therefore widened the circumstances in which section 163 would be applicable. The specific circumstances are self-evident from the wording of the above sections.

The presence of the words ‘*oppressive*’ and ‘*unfairly disregards the interests of the application*’ and the exclusion of the words ‘*unjust or inequitable*’ in section 163 does not seem to give rise to any new circumstances in which specific conduct would fall within the ambit of section 163 of the 2008 Act, which did not already fall within the ambit of section 252 of the 1973 Act.

6 SCOPE OF THE COURT’S POWER

6.1 In terms of section 252 of the 1973 Act

(3) *If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company’s affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company’s affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a*

purchase by the company, for the reduction accordingly of the company's capital, or otherwise'.

(4) *Where an order under this section makes any alteration or addition to the memorandum or articles of a company—*

(a) *the alteration or addition shall, subject to the provisions of paragraph (b), have effect as if it had been duly made by special resolution of the company; and*

(b) *the company shall, notwithstanding anything contained in this Act, have no power, save as otherwise provided in the order, to make any alteration in or addition to its memorandum or articles which is inconsistent with the order, except with the leave of the Court.*

(5)

(a) *A copy of any order made under this section which alters or adds to or grants leave to alter or add to the memorandum or articles of a company shall, within one month after the making thereof, be lodged by the company in the form prescribed with the Registrar for registration.*

(b) *Any company which fails to comply with the provisions of paragraph (a), shall be guilty of an offence.'*

(My emphasis)

6.1.1 Just and Equitable

The court may only intervene in terms of section 252 if it is just and equitable to do so. In *Donaldson Investments*⁵⁰ the court held that:

'...this is perfectly logical; for instance, an act which is unjustly prejudicial may be subsequently rectified or balanced by subsequent conduct, or else it may fall within the provision of the de minimis principle. Accordingly, an applicant must not only establish that the conduct is unjustly prejudicial, unjust or inequitable, but also that it is

⁵⁰*Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Colliers Ltd and Others* 1980 (4) SA 204 (T) at 209.

just and equitable that the Court should come to his relief, by providing for such matters as are listed in ss (3)'.

6.1.2 With a view to bring to an end

The purpose of the court's order must be to bring to an end the matters complained of i.e. the unfairly prejudicial, unjust or inequitable conduct suffered by the minority.

6.1.3 An order it thinks fit

In *Ben-Tovim v Ben-Tovim*⁵¹ the court referred to the judgment in *Bader v Weston* and stated that:

'In Bader and Another v Weston and Another 1967 (1) SA 134 (C) it was held (at 147E) that the words 'such order as it thinks fit' are of wide import and that the words 'or otherwise' are not eiusdem generis with the types of relief set out. It was accordingly held (at 147F - G) that the wording of s 111bis of the previous Companies Act, which were in this respect identical to that of s 252, indicates that

"it was intended that the Court should have a wide and unfettered discretion as to what order it should make, subject to the overriding consideration that its order should aim at bringing to an end the matters complained of. Generally, in seeking to achieve this aim the Court would make an order which would bear, either directly or indirectly, upon the author of the oppression"'.

Section 252(3) particularly provides that the court may make an order for:

- regulating the future conduct of the company's affairs;
- the purchase of the shares of any members of the company by other members thereof; or

⁵¹*Ben-Tovim v Ben-Tovim* 2001 (3) SA 1074 (C) at 1090.

- the purchase of the shares of any members of the company by the company for the reduction of the company's capital.

The court can therefore make an order that the majority must purchase the shares of the minority or that the majority must sell their shares to the minority. The wide discretion afforded to the court however implies that the court is not only limited to the types of orders mentioned in section 252(3).

If the court orders a purchase of shares it, by necessary implication of the discretion afforded to it by section 252(3), also has a similarly wide and unfettered discretion to determine the method to determine the price to be allocated to the shares and to make an order which would make its judgment properly executable.

Section 252 also appears to, at least indirectly, give the court the power to alter or add to the company's memorandum or articles.⁵²

Section 252 does not give the court the power to suspend or otherwise interfere with the rights of creditors, nor to appointing or extending the appointment of directors, nor to grant a declaratory order to "authorise" shareholders to institute action in the name of the company.⁵³

⁵²Sections 252(2)(a), (4) and (5).

⁵³Henochsberg: Commentary on the Companies Act at 483.

6.2 **Under section 163 of the 2008 Act**

- (2) *Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including—*
- (a) *an order restraining the conduct complained of;*
 - (b) *an order appointing a liquidator, if the company appears to be insolvent;*
 - (c) *an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131 (4) (a) apply;*
 - (d) *an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;*
 - (e) *an order directing an issue or exchange of shares;*
 - (f) *an order—*
 - (i) *appointing directors in place of or in addition to all or any of the directors then in office; or*
 - (ii) *declaring any person delinquent or under probation, as contemplated in section 162;*
 - (g) *an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;*
 - (h) *an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;*
 - (i) *an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;*

- (j) *an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;*
 - (k) *an order directing rectification of the registers or other records of a company; or*
 - (l) *an order for the trial of any issue as determined by the court.*
- (3) *If an order made under this section directs the amendment of the company's Memorandum of Incorporation—*
- (a) *the directors must promptly file a notice of amendment to give effect to that order, in accordance with section 16 (4); and*
 - (b) *no further amendment altering, limiting or negating the effect of the court order may be made to the Memorandum of Incorporation, until a court orders otherwise.*
- (4) *Whenever a court, on application by an interested person, or in any proceedings in which a company is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that company constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may declare that the company is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the company, or of such member or shareholder thereof, or of such other person as specified in the declaration, and the court may give such further order or orders as it may deem fit in order to give effect to such declaration.'*

6.3 **Comparison of the two sections**

Although section 163 of the 2008 Act provides a more comprehensive list of possible orders which a court may make I am of the opinion that none of the orders listed in section 163 were in fact not already within the ambit of the court's powers in terms of section 252 of the 1973 Act. The effect of the change in wording between the two sections appears to be at most to provide a further codification of the position as it was under the 1973 Act.

7 THE POSITION IN THE ENGLISH LAW

It is important to bear in mind, when considering the impact which the English Law may have on the interpretation of the 2008 Act that Section 5(2) of the 2008 Act specifically states that ‘(2) *To the extent appropriate, a court interpreting or applying this Act may consider foreign company law*’..

Part 30 of the 2006 UK Companies Act (“the UK Act”) deals with the protection of members against unfair prejudice. Section 994 provides as follows:

“Petition by company member

- (1) *A member of a company may apply to the court by petition for an order under this Part on the ground—*
- (a) *that the company’s affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or*
 - (b) *that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.*
- (2) *The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.”*

This section is almost identical to its predecessor, section 459 of the 1985 UK Companies Act.

Section 994 is drafted very widely and its provisions are open for interpretation by the court as they see fit.⁵⁴

7.1 **Locus standi**

Section 994 provides that the members of a company have the right to petition for relief under section 994. Section 994(2) however extends this right to non-members to whom shares were transferred or transmitted by operation of law.⁵⁵

The purpose of section 994 is clearly similar to that of sections 252 and 163 of the 1973 Act and 2008 Act respectively, namely to provide a mechanism to protect minority shareholders. The majority shareholders are however not expressly excluded from petitioning for relief under this section, but they can use the ordinary powers they possess due to their controlling shareholding.⁵⁶

7.2 **Affairs of the company**

By referring to the conduct of the company's affairs, section 994 includes the activities of both directors and shareholders who are exercising their powers to conduct the business of the company.⁵⁷

7.3 **Unfairly prejudicial**

⁵⁴ Davies L “*Gower and Davies’ Principles of Modern Company Law*” (Sweet & Maxwell : 2008) 8th Edition 681 - 682 and *Unfair prejudice in United Kingdom company law*: Wikipedia Encyclopedia: [ONLINE] http://en.wikipedia.org/wiki/Unfair_prejudice_in_United_Kingdom.

⁵⁵ Davies L “*Gower and Davies’ Principles of Modern Company Law*” (Sweet & Maxwell : 2008) 8th Edition 682.

⁵⁶ Davies L “*Gower and Davies’ Principles of Modern Company Law*” (Sweet & Maxwell : 2008) 8th Edition 682.

⁵⁷ Davies L “*Gower and Davies’ Principles of Modern Company Law*” (Sweet & Maxwell : 2008) 8th Edition 682.

In *Re Saul D Harrison & Sons plc*⁵⁸ the court remarked as follows:

'Unfairly prejudicial' is deliberately imprecise language which was chosen by Parliament because its earlier attempt in s. 210 of the Companies Act 1948 to provide a similar remedy had been too restrictively construed. The earlier section had used the word 'oppressive', which the House of Lords in Scottish Co-operative Wholesale Society v. Meyer (1959) AC 324 said meant 'burdensome, harsh and wrongful'. This gave rise to some uncertainty as to whether 'wrongful' required actual illegality or invasion of legal rights. The Jenkins Committee on Company Law, which reported in 1962, thought that it should not. To make this clear, it recommended the use of the term 'unfairly prejudicial', which Parliament somewhat tardily adopted in s. 75 of the Companies Act 1980. This section is reproduced (with minor amendment) in the present s. 459 of the Companies Act 1985'.

In *Re London School of Electronics Ltd*⁵⁹ the court confirmed that the honorability with which a claimant acted is highly relevant in determining whether or not the relief sought should be granted.

7.4 **Remedies**

Section 996 sets out the court power under Part 30 and provides:

'Powers of the court under this Part

- (1) *If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.*
- (2) *Without prejudice to the generality of subsection (1), the court's order may—*
 - (a) *regulate the conduct of the company's affairs in the future;*

⁵⁸Re Saul D Harrison & Sons plc (1995) BCC 475, 488 [ONLINE] as found at http://en.wikipedia.org/wiki/Unfair_prejudice_in_United_Kingdom...

⁵⁹Re London School of Electronics Ltd (1986) Ch 21 [ONLINE] as found at http://en.wikipedia.org/wiki/Unfair_prejudice_in_United_Kingdom...

- (b) *require the company—*
 - (i) *to refrain from doing or continuing an act complained of, or*
 - (ii) *to do an act that the petitioner has complained it has omitted to do;*
- (c) *authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;*
- (d) *require the company not to make any, or any specified, alterations in its articles without the leave of the court;*
- (e) *provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly'.*

Although the English courts are of the view that the word oppressive provides a more restricted form of protection to minority shareholders this is not the case in the South African context, as is apparent from the cases discussed above in which the word oppressive was examined in a South African context. The wording of the 2008 Act however, via its combination of the word “oppressive” and the words “unfairly prejudicial” clearly lends itself to an even wider and less strict interpretation. The development of the South African company law, from the 1973 Act to the 2008 Act, and the English Law, from its 1948 Act to its 1985 Act and in turn to its 2006 Act, in this regard, both tend to provide a much wider discretion to the courts when dealing with conduct affecting minority shareholders.

It is noteworthy that throughout the development of the South African and English legislation both legislatures sought throughout to give the courts a wide and unfettered discretion when dealing with these matters and to thereafter identify certain of the powers which the courts have in such

matters, without providing a closed list of instances in which the sections would apply.

8. CONCLUSION

Apart from the fact that directors may institute proceedings under section 163 of the 2008 Act there appears to be very few distinguishable aspects between section 163 of the 2008 Act and section 252 of the 1973 Act.

The main difference lies in the fact that “members” may no longer institute proceedings on behalf of other members and that directors now also have locus standi under section 163, where their rights are affected. This change is likely aimed at practical considerations rather than anything else.

Despite the vast differences between the wording of section 252 of the 1973 Act and section 163 of the 2008 Act the circumstances in which the sections will apply and the powers of the courts seem to be largely unaltered. Section 163 appears to be, at most, a more detailed codification of the legal position under Section 252 of the 1973 Act.

It may however come to bear, in time and with the development of case law relating to section 163, that the legislature’s intention to provide even wider powers to the courts in cases of conduct which affects the rights of minority shareholders, provide a departure from the interpretation which I have attached to section 163.

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